



Mediating employment and workplace disputes

This is the seventh in our series of ADR practical guides, designed to provide clients with practical guidance on various processes falling under the banner of "alternative dispute resolution" (ADR), with a particular focus on mediation.

This guide outlines how mediation can be used to resolve employment and workplace disputes and offers a number of practical tips for getting the best result. It also examines specific mediation and conciliation schemes offered by the Employment Tribunal and ACAS.

Introduction

Mediation is a confidential and flexible process whereby an independent and neutral third party is appointed to help the parties reach a negotiated settlement. It is voluntary and non-binding unless and until an agreement is reached. The mediator will adopt various techniques to facilitate discussion on how the parties can resolve the matter without recourse to the court or Employment Tribunal. For more detail on the mediation process generally, see our **ADR Practical Guide No. 2: "An introduction to mediation – what it is and how it works"** available [here](#).

A mediator can be appointed to resolve an employment dispute in exactly the same way as for a commercial dispute, but there are additional matters to consider and specific statutory requirements in relation to the settlement documentation.

Parties to employment and workplace disputes may also take advantage of:

- judicial mediation provided by the Employment Tribunal; and
- conciliation or mediation provided by the Advisory, Conciliation and Arbitration Service (ACAS) (the UK body that supports employers and employees on workplace relations).

Independent mediation

Mediation can be used to resolve all types of employment disputes including disputes arising from statutory claims (eg allegations of discrimination or harassment, unfair dismissal, detriment on grounds of whistleblowing or performance management issues) and contractual or tortious claims (eg relating to senior executive terminations and team moves).

The usual advantages of mediation apply equally in the employment context:

- It allows the parties more control over the process than is typically available through the Employment Tribunal or court system.

- It can lead to much earlier resolution of the dispute, considerable costs savings and a better overall outcome for the parties. In particular, the availability of witnesses for future litigation can often be jeopardised by natural attrition rates within a business, so mediation can provide a useful mechanism to resolve a dispute quickly before turnover of staff depletes the source of potential witnesses.
- There is scope for creative or innovative solutions, with a broader spectrum of remedies available including non-financial remedies.
- The mediation is conducted on a private and without prejudice basis in complete confidentiality. This can be particularly useful given the sensitive nature of many employment disputes and, in some circumstances, the need to preserve an on-going employment relationship.

Particular features of employment disputes

A breakdown in communication between an employee and employer can completely prevent a settlement if either party simply refuses to negotiate. Mediation can open up communication channels and facilitate a face to face meeting or dialogue between the parties.¹ This may lead to a quicker resolution than where communication is conducted through third parties.

Different considerations can apply to preserve an ongoing employment relationship. There is a greater need for a speedy resolution of the matter and for discussions to focus on how that relationship can be preserved rather than on the rights and wrongs of the dispute, as lengthy (and costly) litigation will further sour relations between the parties.

Employment disputes are often highly personal, and emotions can run high – ensure that any potential mediator has the necessary inter-personal skills to achieve a settlement in these circumstances.

The mental health of the employee may also be a factor in employment mediation.² Be ready to delay or adjust the mediation process to accommodate an employee who is too stressed or sick to sit through the mediation. It may be appropriate to seek the employee's consent for their representative to continue negotiations on their behalf, although the employee will of course have to sign any settlement agreement.

1. In particularly sensitive cases the employee/ex-employee may be reluctant to meet the employer face to face.

2. This can sometimes also apply to a fellow employee whose alleged conduct has led to them being a putative co-respondent.

There are specific statutory requirements in relation to the settlement documentation (see further below). This can make it harder to finalise a settlement agreement on the day of the mediation unless all parties are well prepared and have representatives present.

A broad spectrum of remedies is available including:

- an apology
- a reference
- outsourcing assistance or training to help the claimant find new employment
- an undertaking to review company policies (eg equal opportunities)
- an agreement to ensure management undergo training (eg where there is evidence of institutional sexism or racism)
- a decision to take disciplinary action where appropriate
- a decision to annul a disciplinary decision
- a decision to review a particular process

These can be particularly valuable in the employment context or where there is an ongoing employment relationship. Mediation may enable the parties to save face: the employer may achieve a satisfactory commercial outcome, and the individual may achieve sufficient recognition of their grievance without either appearing to have capitulated during negotiations.

What is the difference between employment mediation and workplace mediation?

A mediation to resolve a dispute between the employer and a former employee is usually referred to as "employment mediation". Where there is a desire to preserve an ongoing relationship between the employer and the employee, it is usually referred to as "workplace mediation".

Workplace mediation can help resolve a dispute between two (or more) employees or between an employee and the employer, or between an employee, another employee and the employer. It should not be used as a substitute for proper line management – managers should be trained in having difficult conversations and how to manage employees' performance properly. But it can be very effective to bring in an external independent person to rebuild a working relationship that has deteriorated or broken down. That person should be someone with wide experience of conducting workplace mediations as the dynamics can be different from that in employment mediations.

How does the Employment Tribunal or court process impact on the mediation process?

- The Employment Tribunal Rules require a Tribunal "wherever practicable and appropriate" to encourage the use of ADR, including through ACAS, judicial or other mediation. But while the rules encourage parties to consider alternative dispute resolution,³ there is no penalty for failing to do so, which limits the impact of the rule.
- By contrast, when dealing with claims in the High Court or County Court there are potentially substantial costs penalties if a party unreasonably refuses to mediate.
- ACAS offer a pre-claim conciliation service in relation to statutory claims although it requires the agreement of all parties and so is of limited practical use.

3. See rule 4. See also [The Presidential Guidance on ADR 2023](#).

Mediation with an independent mediator

Mediations involving employment disputes typically involve the following stages, which are broadly the same as for mediations of commercial disputes. For more detail on each step in the mediation process, see our **ADR Practical Guide No. 2: "An introduction to mediation – what it is and how it works"** available [here](#).

- The parties decide where the mediation will take place (usually the offices of one of the parties' solicitors), how long it will last (usually one day) and how the mediator's costs will be apportioned.
- They will appoint a mediator.
- Parties usually make their own decisions as to who attends, although the mediator will want a representative from the respondent with full decision-making authority to be present.
- The mediator and the parties enter into a mediation agreement which sets out the agreed process and includes provisions as to confidentiality and the without prejudice nature of the mediation.
- The parties prepare a bundle of documents for use at the mediation. Sometimes the contents will be agreed between the parties. The bundle may include pleadings in the case, details of any previous settlement discussions and a chronology. The bundle is usually exchanged between the parties and supplied to the mediator before the mediation.
- The mediator will usually request that each party sets out their case in a position statement. This will be a short case summary or submission from each side and a set of key supporting documents. The content will depend on the nature of the dispute and the type of mediation but will usually include the party's explanation of the key issues and their position. Sometimes these position statements will only be provided to the mediator. When they are exchanged, the parties may also prepare a separate confidential briefing for the mediator on matters they consider private but significant.
- The mediation has a structure similar to that used in relation to commercial disputes, with the mediator employing "shuttle diplomacy" between the parties' and their representatives.
- Where an agreement is reached, this will be documented in a settlement agreement which will be signed by both parties and by the legal representative of the employee. Sometimes where no agreement is reached on the day, discussions involving the mediator continue and result in a settlement at a later date.
- If the mediation does not result in a settlement, the matter may continue through the Employment Tribunal or court system. Matters discussed during the mediation will not be referred to in any subsequent court or tribunal process.

Statutory requirements for settlement of employment disputes

Sometimes a simple settlement agreement may be sufficient. However if the settlement includes resolution of any potential statutory claims (such as unfair dismissal or discrimination), a statutory settlement agreement or a "COT3" form (negotiated with the assistance of ACAS) will be needed. Certain conditions must be satisfied for a binding statutory settlement agreement. The agreement must be in writing and relate to a "particular complaint" or "particular proceedings", the nature of which must be set out, the employee must obtain independent advice on the terms and effect of the agreement, the independent adviser must be insured and identified in the agreement, and it must state that the conditions regulating settlement agreements are satisfied.

Judicial mediation

When can it assist?

Judicial mediation involves the appointment of a specially trained employment judge to mediate a dispute involving claims in the Employment Tribunal. Where a claim has been submitted to an Employment Tribunal, the employment judge may raise the possibility of judicial mediation at a case management preliminary hearing. If the parties consent, the regional employment judge will decide whether the case is suitable for mediation and consider the resources available. No fee is payable.

Cases are usually considered suitable for judicial mediation if a full hearing of at least three days has been fixed, the case involves discrimination or some other complex issue and involves one claimant and one respondent (although occasionally judicial mediation can incorporate two or three claimants). Judicial mediation can be particularly useful where there is an ongoing employment relationship.

What is the process?

If judicial mediation is offered, there will be a preliminary hearing to make arrangements for the conduct of the judicial mediation.

Both parties should then attend the mediation. The respondent's representative will need to have full decision-making authority to agree settlement terms. Legal representatives can be present. Initially both parties usually appear jointly before the mediating employment judge and then go to separate tribunal rooms.⁴ The employment judge will develop the settlement negotiations adopting a facilitative technique, eg by taking views from each party separately and then relaying the information to the other side. The mediating employment judge will assess the evidence and identify the key issues.

If a settlement is achieved, the terms are agreed in writing and ACAS will usually be involved in incorporating the terms into a legally binding COT3 form. The parties should obtain the name and contact details of the ACAS conciliation officer who will be available on the day of the mediation. The employment judge may telephone ACAS to achieve a conciliated settlement. Alternatively, the parties may finalise the settlement terms by entering into a statutory settlement agreement.⁵

Practical tips for mediating employment disputes

- Ensure all participants are ready to engage in the process.
- Be willing to agree some form of compromise; if the respondent simply wants the claimant to withdraw their claim or is only prepared to make the claimant a nuisance payment then mediation may well be unsuccessful. A mediation provides the opportunity to explore whether non-monetary solutions will assist as well as, or instead of, a payment.
- Consider in advance what the key matters of importance are and where there is scope for concession.
- Agree tactics – decide what approach is likely to be most successful.

4. Judicial mediations can also be held remotely if appropriate.
5. Other forms of ADR are offered by the Employment Tribunal Service and set out in The Presidential Guidance referred to in footnote 3 above.
6. But note the extensive legislative restrictions on the application of these in the context of statutory employment claims.

- Choose a mediator with the appropriate skills for the particular case. The mediator will have a big impact on the success of the mediation meeting, particularly a workplace mediation.
- The claimant should bring their legal adviser to the mediation to enable a statutory settlement agreement to be executed if an agreement is reached.
- Identify a person from the respondent removed from the immediate incident to be objective in relation to the dispute.
- Ensure those attending on behalf of the employer have sufficient seniority to apologise (if required) and are authorised to settle the matter.
- Bring a checklist of potential terms to be included in any settlement agreement or COT3 form, or a draft statutory settlement agreement. Try to agree as much of this in advance to save protracted negotiations late at night.
- Consider in advance broader issues that may need to be addressed in a settlement agreement, such as potential tax treatment of any settlement sum, confidentiality provisions,⁶ whether additional restrictive covenants are necessary and if it is prudent to include a clawback of settlement monies in the event that there is a breach of a covenant/confidentiality clause.
- If it is impossible to conclude a comprehensive agreement on the day of the mediation (eg if the claimant has a disability), set out in a signed heads of agreement what has been agreed and the steps to be taken to conclude the final agreement in a tight time-frame.

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