



University of Strathclyde
LAW CLINIC

10F How to prepare for Judicial Mediation

A guide for the general public

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What is judicial mediation? (1)

Judicial mediation is a process in the Employment Tribunal where the Claimant and Respondent sit down with a judicial mediator and try reach agreement to resolve the case.

It is a voluntary and confidential process that allows parties to explore whether they can resolve the case without infringing on their rights to take the case forward or defend the case at the end of the mediation if agreement cannot be reached. This is sometimes referred to as a 'without prejudice' discussion or process. Nothing that is discussed or said in mediation can be brought up in any hearing if matters do not resolve.

What is judicial mediation? (2)



The mediation will be conducted by a judge mediator who also works as an Employment Tribunal judge. This is helpful because they are experts in employment law. However, the mediator is not there to judge each party's arguments or provide advice. Their role is to facilitate a discussion between you and the Respondent and hopefully assist you in agreeing how to resolve the case.

Who will attend the mediation?

You will attend the mediation. If you have a legal representative, then they will usually attend with you. If you are attending mediation without a representative, the mediator should answer any questions you have about the process and make sure you feel comfortable participating in mediation.

You can take someone to support you in mediation who is not a legal representative, like a friend or family member. Remember to inform everyone that you intend to do so, so there are no surprises about who turns up on the day.

A representative of the employer will usually attend along with their legal advisor if they have one. Occasionally the legal representative will attend on their own on behalf of the employer. There may be one or two people attending for the employer, including for example a relevant manager and someone from HR.

You can ask who is attending for the employer so you know in advance who you can expect to be meeting with.

What will the mediator do?

The role of the mediator is to facilitate discussion between everyone and encourage you to reach a resolution that you are both happy with. They will ask you questions so they can understand what has happened in the case so far and the type of resolution you would like.

The mediator will usually go between the room that you and your representative are in and the Respondent's room to communicate any settlement offers between you. They will also bring you all together, often at the beginning, or when it feels appropriate, if everyone is willing to do so. You will not be forced to meet with the Respondent.

What will the mediator not do?

There are a number of things the mediator will not do. For example:

- ▶ The mediator will not give legal advice to either party. The only exception to this is if you do not have legal representation then they might explain legal terms to you when necessary;
- ▶ The mediator will not judge which party has the stronger case/argument;
- ▶ The mediator will not suggest ways of resolving the case. Instead, they will encourage you and the Respondent to suggest ways to resolve the case;
- ▶ The mediator will not discuss the case with other judges at the Tribunal, so the judge who hears your case will not know what happened at the mediation.

What should I prepare before the mediation?

(1)

The purpose of mediation is to reach a resolution during the course of the mediation day, so it is essential to give serious thought to what a satisfactory outcome for you would look like well in advance of the day. Remember, this can include non-financial outcomes. The mediator and your legal representative (if you have one) are there to help you get an outcome that you feel that you can live with, weighing up all the cost/benefits of not resolving matters and risks of proceeding.

Some claimants may consider that their ideal outcome is to maximise the financial compensation received. For others it is not just about the financial compensation but about the hurt people experience when they feel they could have been treated better. It is good to approach the mediation with an open mind as it might be a combination of compensation and other things such as being able to explain how you have been made to feel that turns out to be most important.

What should I prepare before the mediation? (2)

What compensation might you feel able to accept to bring matters to a conclusion and get a resolution to put the matter behind you. Having thought about a range of figures that might be acceptable can help you weigh things up on the day.

At the outset of mediation or perhaps during there is often an opportunity to say something about how you feel about your situation and the concerns that you have had. We would recommend that you prepare some brief notes in bullet point form to be able to describe your feelings and concerns, setting the law aside. It can be easy to forget things once you're in the room and having a list should ensure that you say everything you want to say on the day.

What kind of outcome can I get from mediation?

One of the best things about mediation is that because the parties decide the outcome, there are more options available than at Tribunal. Agreements reached at mediation can be quite creative depending on the resources of the Respondent. This can be helpful if you are still employed by the Respondent as you can agree on how to navigate the employment relationship going forward, something the judge at a hearing has no power to do. This can include things like agreeing regular meetings with a relevant line manager/HR to check that things are progressing well, and/or agreeing a way to resolve any future issues. It can include how to put in place reasonable adjustments, or how to support you back to work if you have been off. You might also be able to explore outcomes such as giving managers training in how to manage employees with disabilities.

Things to think about before mediation

It is worth carefully considering the following questions well in advance of the mediation:

- ▶ What has happened that led you to raise a claim at the Employment Tribunal?
- ▶ What kind of outcome would help resolve the case for you?
- ▶ How would that outcome stand up considering the value of your claim but also the risk of not succeeding and receiving nothing?
- ▶ If you are still employed by the Respondent, what do you need to happen to allow your employment to continue without any conflict?
- ▶ How likely is your case to succeed at Tribunal?
- ▶ What sum are you likely to be awarded if your case is successful?

What will happen on the day?

Try to arrive a little early to the Tribunal building so that you are relaxed. You should check in at the Tribunal's reception and the receptionist will then direct you to the waiting room. A Tribunal clerk will let you know when the mediator is ready to begin and they will take you from the waiting room to another room. This is usually a Tribunal room but the furniture will be rearranged so that it does not look like a Tribunal room. The Respondent will be in a separate room.

The mediator will then come into your room and introduce themselves to you and your legal representative/supporter. They will explain how the mediation will work and answer any questions you might have. There is no set structure to how the rest of the day will go. Mediators try to be as flexible as possible and they will conduct the rest of the day in whichever way they think is most likely to help you reach agreement.

How can the mediator help you?

Remember the mediator is there to help you. They cannot take sides in the dispute so you should feel comfortable being open and honest with them. When you are speaking to the mediator what you are saying is confidential and should not be shared without your consent. So you can do some 'thinking' with the mediator that will be kept private. The more open you are with them, the more they can help you throughout the day. If you are worried about something, tell them. They can change their approach to mediation throughout the day if it helps you and the other side communicate better.

Can mediation be done online?

This material was prepared during the COVID-19 pandemic in 2020. Prior to this, mediation was always carried out in person. The Tribunal has now developed technology to enable mediation to take place online for the duration of the pandemic. Online mediation may continue to be an option after the crisis is over.

If you do participate in online mediation, you might want to discuss with the Tribunal in advance how this will work. The Tribunal can arrange a case management discussion at which the judge will talk you through how the online platform works. This will also give you an opportunity to ask the judge any questions.

What impact will mediation have on my claim?

If the mediation does not result in an agreement, it will have no effect on your claim at Tribunal. The claim will proceed to a final hearing as if the mediation had never happened. The mediator will not be involved in any future hearings. Everything that is discussed in mediation is confidential.

This means that neither party can tell the judge or witnesses at Tribunal what was said during the mediation.

Reaching agreement at mediation

If you do reach agreement with the other party, you will both want to sign a contract to make that agreement legally binding. If they are legally represented, the Respondent might have a contract ready for you to sign on the day. This contract is called a 'COT3'.

For this reason, it is important to be aware of the strengths and weaknesses of your case in advance and to have received some legal advice if possible before going to mediation. This is because you will have to make important decisions about whether to reach a settlement of your case on the mediation day.

Finalising the agreement in a contract/COT3

You should not feel rushed into signing the contract. Make sure you take time to read through and understand the agreement.

The Respondent's representative may want matters concluded on the day if everyone is clear there is agreement in principle and may suggest contacting ACAS to finalise a COT3/contract. Remember verbally agreeing the terms through ACAS is a binding agreement. ACAS may be able to talk you through what the agreement means although they cannot advise you.

If you are close to reaching agreement but need some time to confirm this, you can suggest that you are allowed time overnight to finalise your decision. The Respondent may or may not be willing to agree to this.

Can I tell my friends/family what happened in mediation?

Mediation is often referred to as a 'bubble' in which the parties can talk openly and honestly about the case. This is because what is discussed in the mediation should not be shared with anyone who is not present. This means you cannot share what was discussed at the mediation with work colleagues, friends, the press/media or on social media. The same rules apply to the Respondent.

There are some exceptions to this. For example, the Respondent might have to contact a senior member of staff to get permission to agree a financial settlement with you during the mediation. It might be agreed that certain parts of what are being agreed need to be shared with a colleague of consent.

You might wish to bring a family member or close friend to the mediation to support you. Since this person will be present during the mediation, you can discuss what happened with them after. However they are also bound by the confidentiality after the mediation.