

A Thorogood Special Briefing

Chapter 1

What is mediation?

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Chapter 1

What is mediation?

How is mediation practised in the UK?

History

Mediation has been used as a method of solving disputes since ancient times. But it was not until the 1990s that it began to be accepted by the mainstream legal community as a viable alternative to litigation.

Since the early 1990s, private sector organisations such as ADR Group, the Centre for Effective Dispute Resolution and the Academy of Experts have campaigned to have mediation accepted and recognised as ‘best practice’ in legal circles. Their work paid off, and in 1999 mediation was included in the Civil Procedure Rules (CPR) (see Appendix 6), also known as the Woolf Reforms. Judges were given the power to suggest to parties that they should mediate, rather than proceed straight to litigation. This was to avoid the potential waste of time, money and scarce public resources. With our courts overstretched, judges have begun to use this power. Now parties who refuse to mediate without good reason may have to pay some or all of the other side’s legal costs, even if they eventually win their case.

With the free mediation scheme for small claims cases, backed by the Ministry of Justice, and the National Mediation Helpline for County Court claims, mediation is now firmly fixed in our legal framework.

Attitudes to mediation

You will find that attitudes to mediation range from the full embrace of the convert to the extreme wariness of the unbeliever. Sometimes people have had bad experiences with mediation, or know those who have. You will almost certainly come across people who will tell you that mediation is a waste of time and money and that to suggest it is a sign of weakness. Believe them at your peril!

It is true that mediation is not suitable for every case and not all mediations end in settlement. However, mediation is a valuable tool that should be considered for every dispute, and understanding it is vital for anyone involved with litigation or dispute resolution.

We deal with whether or not a dispute is suitable for mediation and how to persuade unwilling parties in Chapter 3, 'Getting the other side to agree to mediation'.

Costs of mediation

The cost of a mediation will depend on who is involved and how long it takes, as well as the value of the dispute. If a party wants to be accompanied by his or her lawyer, or an independent expert, then their costs need to be considered as well as the mediator's fees. You will also need to think about where the mediation will be held and what refreshments will be provided in working out the total cost.

Mediators usually have an hourly fee and a daily fee, which vary depending on their expertise. They typically charge more for mediations which run over their standard hours (usually 9.30am to 5.00pm). An alternative method of charging that you may see is to link the mediator's fees to the amount of money at stake in the dispute. This can be combined with the daily/hourly fee model.

On average, a daylong mediation with just the parties and a mediator will cost between £600 and £3,000 plus VAT. It is usual for the parties to split any costs between them, although in some cases it is usual for one party to pay all the costs. For example, the employer usually pays in employment disputes (see Chapter 3, 'Costs').

There are also various organisations that offer free or cheap mediation, such as the scheme for small claims and various community mediation organisations.

As mediation is now seen as a normal part of the litigation process, it can also be available on legal aid or on legal expenses insurance.

Types of mediation

One of mediation's great strengths is that it is a flexible process. It can be employed for any type of dispute. It can last an hour, a day or longer. It can be concluded in one session or over several, with the parties together or in separate rooms. There may be one mediator (usual in commercial claims) or two co-mediators (usual in workplace or community mediation).

Mediation can take place in person, on the telephone or even online. Mediation by telephone/online can be particularly helpful where the parties are geographically far apart as it saves on costs and travel time.

We cover what to expect in each type of mediation in more detail in Chapter 7, ‘Mediation in different sectors’, but whatever form the mediation process takes, it will have these key features:

It is confidential

Mediation is a confidential process. The parties and the mediator usually agree to keep everything that happens in the mediation confidential.

During the mediation, you can tell as much or as little as you want to the other party. Anything you tell the mediator in confidence should be kept in confidence and he or she should check with you what can be told to the other party.

The exception to this is if the mediator thinks that there is risk of criminal action or harm to someone. These situations are extremely rare and the mediator will consider very carefully before breaking confidentiality.

Anything said at a mediation is usually considered ‘without prejudice’ and cannot be used as evidence in a court claim. There are a few, very unusual exceptions to this rule (see Chapter 6, After the mediation). Once an agreement is reached, ‘without prejudice’ usually falls away and you will need to make sure that any settlement agreement deals explicitly with confidentiality to ensure that any confidentiality obligations are legally binding.

It is voluntary

Both parties must agree to mediate. If one party is being coerced it is unlikely that the mediation will be successful. Even if an agreement is reached, it is unlikely that the parties will stick to its terms. A mediator may refuse to continue a mediation if they believe a party is not participating voluntarily. Either party may choose to leave at any time during the mediation or both must voluntarily agree any settlement.

The mediator will be neutral and non-judgmental

The mediator will be impartial. They will not take sides or make judgments about who is right or who should win, though they may question each party about their position and attitudes. The role of the mediator is to help the parties come to their own agreement.

The parties will reach their own agreement

Mediators have no authority to decide disputes or to impose an agreement on the parties. The parties will decide the outcome of the mediation. Because the parties create and agree to any settlement, they are more likely to be happy with it and to stick to its terms.

Advantages and disadvantages of mediation

Advantages

FLEXIBLE PROCESS, FLEXIBLE OUTCOME

Mediation is a flexible process and gives parties access to a wide range of outcomes not available in litigation. Usually, all a court will do is order one party to pay money to the other. In mediation, because the parties come to their own agreement other things can be taken into account to address the parties' unique needs. For an example, see the case study below.

Resolution prevented dissolution

A partnership had two partners, and they had fallen out. The partners were at very different stages in their lives; one was 60 and looking forward to retirement and the other was 40 and looking forward to growing the business to reap rewards in the future.

They had received an offer to buy the business. The 60-year-old wanted to accept but the 40-year-old did not. They were in deadlock as neither could act without the other's agreement. The 40-year-old had offered to buy out the 60-year-old, but not for a price the 60-year-old found acceptable. They thought they might have to dissolve the partnership, which would mean they both lost something into which they had put a lot of work and which was really valuable to them.

They agreed to attend a mediation. Despite knowing each other very well and discussing the situation in detail they had been unable to find a way forward. At the mediation, they found a resolution which took into consideration more than the law and the legal interpretation of their partnership deed.



The 60-year-old agreed to take less money for his share of the business, but on condition that he stayed on as a partner for 18 months and paid no rental for the premises, trading out the difference between the price he wanted and what his partner was prepared to pay. The 40-year-old got to pay less up front, and got continuing support and handover for when he took over the business. They also preserved their personal and professional relationship, which was of great value to both of them.

CONFIDENTIAL AND PRIVATE

Mediation is confidential. Unlike court proceedings, which are public, mediation is a private process. Parties can avoid publicity and reputational damage.

QUICK

Court proceedings can take months or even years to reach a conclusion. Mediation can be over in hours or a day and can be arranged at short notice. It also requires less time from parties than litigation, meaning that parties can be freed up to concentrate on their day to day concerns.

ECONOMIC

Mediation fees will nearly always be far lower than the costs of litigation. Of course, if the mediation does not result in a settlement then the mediation fees will be in addition to any litigation costs. However, the mediation process usually increases the parties' understanding of each other and the claims. This can be very helpful in the litigation or in promoting settlement later.

CERTAINTY WITHIN THE PARTIES' CONTROL

In court, the decision is up to a judge, a tribunal or a jury. The outcome of any litigation is uncertain up to the point where a judgment is given and even then that judgment may be appealed by the losing side. And that is before arguments about costs. A mediation in which an agreement is reached gives parties certainty on the day, in an outcome that they control.

SUITED TO ASSESSING COMPLEX ISSUES

Mediation can be conducted with significant input from experts, a specialist mediator (e.g. someone who is an expert and a mediator) or the parties themselves. This makes the process ideal for examining and allowing the parties to assess complex issues together in a way that is not possible in litigation.

PRESERVES RELATIONSHIPS

Mediation preserves relationships and can even make them stronger. Unlike more adversarial processes, because mediation encourages parties to look for mutual solutions they are more likely to discover mutual interests. They are also more likely to achieve an understanding of each other's needs and businesses. This can lead to very beneficial and long-lasting relationships emerging from a dispute.

Examples of this include business relationships, e.g. where colleagues or partners have left a business after a dispute, but on resolution of the dispute continue to help each other via referrals and with ongoing cases; and personal relationships, e.g. neighbours or spouses who, after resolution of the dispute, help each other with child care and community issues.

CAN ADDRESS ALL ISSUES

Mediation can address all the issues that concern the parties, not just the legal points or the financial issues. This can be very effective in disputes where people's emotions are involved, due to the cathartic nature of the process. Acknowledgement and apology (both unlikely in litigation!) can go a long way to resolving a dispute. We find this is true for commercial/business disputes as well as for disputes that are traditionally considered 'emotional', such as divorces or discrimination claims.

For an example of how expressing emotion can clear the air even in a business dispute, see the case study below.

Case Study

A company had wanted a new factory to be built in order to expand their production. They had new orders to fill, and the contractor had promised that the factory would be up and running in good time. Owing to many issues, some allegedly with the factory owner, some allegedly with the contractor and some allegedly with the smaller sub-contractors the contractor had hired, the factory was not ready.

The company took legal action against all the contractors and sub-contractors, who then all counter claimed against the company and each other. It was a complex piece of multi-party litigation. All the parties, from the large company to the smallest sub-contractor agreed to a mediation to try and sort it out as the litigation was going to be risky and expensive.



The owner of the company was furious, and when all the parties were together for the first meeting of the day, before they split up into their separate rooms, he really let rip. He went round all the other parties, banging his fist on the table in front of them and telling them what he had lost because the factory was not completed in time. Most sat there stony faced, but a small contractor burst into tears. When asked why, he explained that if the case went to court, he would be ruined whether he won or lost because of the legal fees he would need to find and the effect on his insurance premiums. He was terrified of losing his business and the support for his family.

The mediation was successful and the small contractor got to keep his business. The company manager had been able to express how angry he was and to make the other parties understand how he had been affected. Most importantly, he was able to see that they were affected as well, and that it was not only him who had suffered because of what had happened. This enabled him to deal with his anger and to seek a sensible commercial resolution.

LOW RISK

Mediation does not affect your legal rights unless you sign a legally binding agreement at the end of the process. Taking part in the mediation process poses little or no risk to any legal claims you might have. However, you will need to think carefully about what information you want to give the other side during mediation in case they can use it later to your disadvantage. (See Chapter 1, 'Fishing expeditions and Part 36 offers', below, for more information).

VOLUNTARY SO USUALLY EFFECTIVE

The parties should take part in the process voluntarily, in good faith and with a desire to resolve the conflict. This makes settlement more likely. The parties design and agree their own settlement, so are much more likely to concur and to keep to the agreement terms.

Disadvantages

ADDITIONAL COST IF UNSUCCESSFUL

If the mediation does not result in a settlement then the costs will be in addition to any litigation costs. However, the mediation process usually increases the parties' understanding of each other and the claims, and this can be very helpful in the litigation process or in promoting settlement later.

VOLUNTARY AND NON-BINDING PROCESS

Mediation is a non-binding process, though many mediations end with a legally binding settlement agreement. It is a voluntary process, which requires both parties to want to mediate. A party cannot be forced to take part in a mediation like a defendant is forced to take part in litigation. There is nothing (other than common sense!) to prevent a party withdrawing part way through a mediation if they wish to do so.

FISHING EXPEDITIONS

Occasionally, someone will come to a mediation to attempt to extract useful information from the other party, rather than with the desire to reach an agreement. An experienced mediator can usually spot this and may call a halt to the mediation. Mediations are usually confidential and without prejudice, but will involve giving some information about your position to the other party. Of course, this works both ways, so if you are on a fishing expedition beware! We have seen the fisher caught, and those who intended a fishing expedition ending up with a settlement because of what they discovered.

FISHING EXPEDITIONS AND PART 36 OFFERS

One particular trick we have seen is a party attending a mediation and then using the information they get about the value of the claim to make a Part 36 offer. A Part 36 offer is a formal offer that can affect how much of the other side's (and your own) legal costs you have to pay, depending on the outcome of the litigation. Where this tactic is used, it is usually to put pressure on the other side to accept a low settlement offer.

However, the planned exploitation of information learned at a mediation to make a Part 36 offer is unusual, and, like any fishing expedition tactic, can backfire!

For more details on how the courts treat information disclosed at mediation, see Chapter 6.

DOES NOT STOP LEGAL DEADLINES

Mediation does not halt the litigation process. It will not affect your legal deadlines. If you need more time to try mediation before a deadline (such as a hearing) you need to apply to the court or tribunal and ask them to grant you an extension of time or to stay the proceedings. It is important that all litigation deadlines are met, unless you have permission from the court to extend them.

MEDIATION IS NOT AN EASY OPTION

Mediation is not an easy option. While it can be easier than a court hearing, it can also be very intense. It is important that you do not underestimate the pressure of the process.

MEDIATION WILL NOT PROVIDE A PRECEDENT

A mediation settlement will not provide a precedent like a legal ruling. If you have a series of claims on similar issues, a legal ruling which sets a precedent might be valuable to you. Providing, of course, that the precedent is in your favour!

NO JUDGMENT, NO DAY IN COURT

Sometimes people want a decision by a judge about their claim. Sometimes they want their day in court, or publicity for their claim. Mediation will not give a judgment on who was right and who was wrong and its purpose is to avoid the day in court!

SEEN AS WEAKNESS

Some people (mistakenly) see an offer to mediate as a sign of weakness. Thankfully, this attitude is becoming less common and can usually be dealt with by explaining the benefits of mediation and emphasising the strengths of your legal case.

Why is mediation successful?

We find that most mediations reach an agreement. In our experience, 80-85% of mediations result in settlement at the mediation or shortly afterwards. Here are some of the reasons why the mediation process works:

Time and exploration

‘Nothing concentrates a man’s mind like knowing he is to be hanged in the morning’ is a popular misquote used by lawyers to explain why cases so often settle just before (sometimes seconds before) the hearing. By then, the majority of the legal costs have been spent. While it is sometimes worth waiting to settle for tactical reasons, in most cases the lack of earlier settlement is simply because the parties did not have the time, the information and the mindset to give the dispute sufficient attention.

Litigation is a slow, drawn out process. The full arguments and evidence in a dispute are sometimes not clear until full disclosure and witness statements have been exchanged. Mediation allows parties some time away from the pressures of their normal day-to-day to explore the issues and really think about what they want to achieve and whether legal action will help them.

Pressure cooker effect

Mediations are usually scheduled to run for a fixed time. The process has its own momentum, which a good mediator will encourage. Most people, having spent some dedicated time trying to reach agreement, will be reluctant to walk away without one. It is amazing how many mediations settle in the last half hour!

Can address all the issues in open dialogue

Any adversarial process, such as litigation, encourages parties to take specific positions and to stick to them. It also encourages making all points of a claim important, without differentiating between what is key for a party and what is simply a negotiation or litigation point. For more detail on how this works, see Chapter 5, ‘PIN analysis’.

A skilled mediator will encourage the parties to move away from their entrenched positions and to really examine the issues of the claim and what is important to them. This includes issues that a court (and the litigation process) may not address, such as workplace morale, future relationships and reputational damage.

Power to decide on the day

Each party attending the mediation should have the authority to agree a settlement, or the ability to reach someone who does quickly. In the usual litigation scenario, decisions about settlement often have to go up through the ranks of an organisation or are delayed for other reasons. When this happens, the impetus to settle is lost and negotiations can simply take too long to be effective.

Some mediation providers in the UK

Training and accreditation of mediators

There is no overall body that regulates mediators. The Civil Mediation Council (CMC) is an unincorporated association of members established by some of the United Kingdom's mediation providers, independent mediators, academic institutions, legal professional bodies and government departments. The Scottish Mediation Register is a similar organisation in Scotland. In order to become a member of the CMC or the Scottish Mediation Register, you have to fulfil criteria relating to training and practice development, conduct (including complaints handling) and indemnity insurance.

Unlike bodies such as the Law Society or the General Medical Council, neither the CMC nor any other association of mediators has any official legal recognition or powers.

Most of the private sector mediation providers offer mediation training. This can be a general mediation course (usually aimed at those who wish to become commercial mediators) or may be aimed at a specific sector, e.g. workplace or family mediation.

The voluntary sector organisations also offer training, usually in the areas of community and family mediation, and some employers have workplace schemes that train employees.

A foundation mediation skills course will usually last one to three days plus private home study. To become a qualified mediator usually involves six to ten days of training including assessment, plus private home study. Participants usually have to produce a portfolio of work. Some courses require new mediators to undertake supervised mediations and/or produce evidence of practical work. Any reputable course will include a great deal of practical content to give participants time to practice their skills. It will also normally include a formal assessment.

Some courses are accredited by UK education bodies, such as the Open College Network or are run in conjunction with universities, sometimes as part of a recognised course such as the Bar Vocational Course. Before undertaking any mediation course, or engaging any mediator, you should check their pedigree carefully.

In 2008, the European Parliament passed Directive 2008/52/EC (the Mediation Directive), which is aimed at promoting mediation as an efficient, cost effective way of resolving cross-border disputes. While the Directive only has to apply to cross-border disputes, it leaves the way open for member states to extend it to disputes at a national level. The encouragement given by the Directive has enabled many member states to introduce codes and legislation to facilitate mediation within their jurisdictions. The Directive should be fully in force before 21 May 2011. Among other provisions, it encourages member states to ensure that training is available for mediators and to promote the drafting of ethical codes of conduct and the implementation of quality control measures.

Mediation providers

You do not have to go through a mediation provider, but can go directly to a known mediator. Many mediations are arranged this way and some excellent mediators work for themselves, rather than under the banner of any particular provider.

We have listed a few (very few) of the mediation providers available in the UK. While we have worked with some of them, we have not worked with all of them and we do not give any guarantee as to their suitability to handle your – or your client's – specific issues. It is important that you find a mediator with whom you and your client are comfortable.

- ADR Group
- Bevans Solicitors
- In Place of Strife
- LawWorks
- Littleton Chambers
- The Academy of Experts
- The Centre for Effective Dispute Resolution
- The Clerksroom
- The TCM Group