LincsLaw
EMPLOYMENT SOLICITORS

GUIDE TO
Mediation

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INTRODUCTION – WHAT IS MEDIATION?

Mediation is an important form of alternative dispute resolution (ADR). In other words, it is one of the mechanisms used by parties in a dispute to avoid or conclude litigation (Court or Tribunal proceedings).

The use of alternative forms of resolving disputes is formally recognised and indeed encouraged by the Courts and the legislature. Mediation can help parties and the Court to meet their duties under the "the overriding objective". The "overriding objective" means the just resolution of the case in a way that is proportionate to any sums at stake, the importance and complexity of the issues and the financial position of each party. A Court can stay or suspend legal proceedings in order to facilitate Mediation.

Mediation can usefully be defined as *"a confidential, non-binding process that involves the intervention of an acceptable third party (the Mediator) who has no authoritative or decision-making power but who assists the parties in a dispute to reach a mutually acceptable settlement"*.

Mediation is therefore:

(a) confidential;
(b) binding upon the dispute being mediated only;
(c) not derived or based on legislation;
(d) voluntary;
(e) a process where the decision-making authority always rests with the parties themselves

WHY USE MEDIATION

Mediation has a number of advantages over litigation or even other forms of alternative dispute resolution such as conciliation, adjudication or arbitration as it is:

- Quicker
- Cheaper
- Less formal
- Less stressful

Mediation also has a high success rate. Even in those Mediations that are not immediately successful, a settlement is often reached a lot quicker afterwards than would have been the case without the Mediation. The parties usually benefit from the opportunity to air their grievances or concerns and to raise the issues that matter to them.

In addition, more formal processes such as litigation allow the parties less control over what takes place and what they want to agree as a settlement. Mediation allows the parties significant control over how they wish to reach any final agreement. Being a completely confidential process, Mediation allows the parties to avoid the unwelcome publicity that can surround Court cases. If necessary, the parties can also stop a Mediation at any stage without any adverse consequences in terms of costs or their chances of success at Court or another forum.

Mediation as a means of resolving disputes has grown significantly over the last twenty five years. It is increasingly being seen by Courts and Tribunals as a key mechanism in dispute resolution. In addition, Mediation is recognised and used by individuals and

businesses as a cost-effective, quick and constructive mechanism for settling varying types of conflicts.

WHEN TO USE MEDIATION

Mediation can be used at any stage in a dispute, not simply before legal or any other proceedings are underway. As it is cheaper and quicker than going to a Court or Tribunal, Mediation can profitably be used in cases involving a few hundred pounds all the way up to multi-million pound disputes.

Matters that have been in endless and protracted dispute, or have stagnated for months or even years, have been known to settle remarkably quickly when the parties have taken advantage of the Mediation process. Mediation is also particularly valuable when the parties want some form of future ongoing relationship (eg: as employee and employer). The kind of resolution or outcome sought by the parties can often be a better guide as to whether or not Mediation is suitable than the nature of the dispute itself.

There are certain features in a dispute that could make it particularly suitable for Mediation, namely:

1. All parties have evidenced their willingness to participate – *a vital feature!*
2. There have been no discussions between the parties about settlement for several weeks or even several months – *Mediation could help to get discussions going again;*
3. One or more of the advisers/representatives for the parties are having difficulties with their clients- the Mediator can help a party take a realistic view of its case and chances of success or failure in any formal proceedings;
4. A legal claim is about to be issued – *agreeing to mediate early on should save expense and stress;*
5. The dispute involves a number of parties and it is proving difficult to put together a comprehensive settlement – *a Mediator can work objectively and impartially with all the parties to facilitate such a settlement;*

6. The dispute involves co-defendants or co-claimants who are unable to agree a settlement position amongst themselves – *Mediation can work for disagreements amongst parties on the same side as well as for opposing parties and the process is essentially the same in both scenarios;*

7. The parties in dispute have an on-going relationship that should be preserved if possible – *Mediation is historically much better at achieving this than litigation;*

8. One or more of the parties does not want bad or adverse publicity – *as Mediation is a confidential process, what happens in a Mediation should never be made public;*

9. The settlement value of the dispute is less than it would cost a party to take the case to Court – *Mediation is designed to reach a fair settlement as quickly as possible thereby saving litigation costs;*

10. When there is posturing in negotiations as to any financial settlement – *in Mediation, settlement figures can be raised and discussed confidentially and realistically.*

THE MEDIATION PROCESS

There are a number of stages involved in the Mediation process. This section deals with them as follows:

(a) Before the Mediation Hearing
(b) The Mediation Hearing itself
(c) The Role of the Mediator
(d) The End of the Mediation & Next Steps

The underlying **aim** of the process is to allow a conflict to be managed constructively resulting in an agreed way forward. The key **principles** are that whilst the Mediator controls the process and facilitates an agreement, the parties themselves suggest and discuss options and determine the outcomes.

(a) Before the Mediation Hearing

The Mediator will **not** normally meet the parties prior to the Mediation but will:

- ask the parties for some information about the dispute in order to identify the key causes behind it and the issues involved;
- determine if the case is a suitable one for Mediation;
- check who else is involved, confirm that they are aware Mediation is being proposed and explain the basic process if they do not know how Mediation works;

- send the parties a guide to Mediation and how it works;
- draft an Agreement to Mediate and send it out to all the parties.
- send the initial (deposit) invoice out- each party has to pay the appropriate proportion before the Mediation can commence;
- contact the parties direct to request preparatory written material from each party (usually this will be in the form of summaries);
- discuss the date, time and location of the Mediation. The venue will be neutral and acceptable to all parties.

(b) The Mediation Hearing itself

Although there is always scope for flexibility, the classic Mediation process has some key steps, namely:

Opening Joint Session > Private Sessions > Closing Joint Session

The Mediator will make an introductory statement at the Opening Joint Session. A number of matters will be covered by this statement, including introductions; the stages in the process; applicable ground rules; time-frames and objectives for the day. In addition, during this session, each party makes their opening statements in the presence of the other party/parties.

The Mediator also has to:

1. Establish the nature of the dispute;
2. Clarify the relevant issues;
3. Explore those issues;
4. Develop options for resolving the dispute;
5. Encourage the parties to reach an agreement if possible

All these matters will be achieved through discussions between the Mediator and the parties in the private sessions. These sessions are a series of informal meetings which are totally confidential. The aim is to identify what has happened, what the issues are, how the parties feel about the issues, how they can move forward and what outcomes they want from the Mediation itself. The number of such sessions will of course vary depending on the nature and complexity of the dispute and the willingness and determination of the parties to reach a settlement.

(c) The Role of the Mediator

The Mediator will act as a facilitator guiding the parties through the process and will try to encourage communication and dialogue between the parties in an attempt to find common ground on which an agreement can be built. The Mediator will also try to de-personalise the dispute as much as possible.

The Mediator will remain impartial, objective and neutral at all times throughout the process and will not express any views about the respective merits or otherwise of each party's case nor dictate what, if any, agreement could or should be reached between the parties.

On occasion, the Mediator may need to challenge assumptions or opinions voiced by the parties and also act as "devil's advocate". However, this does not mean that the Mediator is taking sides or looking for weaknesses in a particular party's case or argument. These are simply mechanisms and strategies open to the Mediator in order to assist the parties to think more creatively, remain solution-focused and and hopefully to reach a satisfactory agreement on their own terms.

(d) The End of the Mediation and Next Steps

The Mediator will bring the parties together for a final joint session.

If a settlement has been reached then a written binding agreement can be drawn up. This can be done by legal or other representatives for the parties if necessary. Otherwise, the Mediator can assist the parties in setting out the main heads of agreement and these can be expanded on later. Both the parties and the Mediator will retain a copy of the written agreement. A Mediation agreement is a binding document and legally enforceable.

If no settlement is reached, then the parties are free to take legal or other formal action. However, all discussions and proposals during Mediation are non-binding and without prejudice - in other words, anything said during the process cannot be used or relied on in any later proceedings. In effect, the situation is as if the Mediation had never happened and the parties are back in the position they were immediately before the Mediation process began.

CAN WE HELP YOU?

Lincoln based LincsLaw Solicitors have qualified Mediators who can conduct Mediations between parties in dispute. Alternatively, we can act as representatives for parties undergoing a Mediation Process. If you are contemplating using Mediation to resolve your dispute, contact us for a free, no obligation discussion.

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