



Employment Mediation

What is it?

Overview

Employment mediation differs from [Workplace Mediation](#) in that the employment relationship has already broken down irretrievably, so the process is not about improving the future working relationship of two or more colleagues. Instead, the employer may be on the brink of dismissing the employee, or the employee is threatening to bring, or has brought Employment Tribunal or Court proceedings, but the parties conclude they do not want to be fighting a protracted battle for months to come. **Often both parties have "unfinished business" which a simple negotiated settlement or a full hearing will probably not address satisfactorily at an emotional level.** If both parties want to resolve the dispute speedily and effectively, employment mediation is really worth trying, especially as it can often be done in one day.

Protected Conversations or ACAS Early Conciliation result in a financial compromise, often leaving both parties feeling cheated in some way by the other. Whereas, employment mediation invariably achieves an outcome which both parties see as successful, because they can express their needs face to face, explore how these can be met, and reach the solution themselves. Also, the mediated agreement does not have to be limited to financial matters and can include, for example, an apology, reference, change to working practices, provision of training, creation of a new role or re-deployment. The outcome is a win/win, which the parties find reasonable and in their best interests. However, the parties should approach the mediation with a degree of realism: Both parties may have to make some compromises. In other words, a partial win – partial win outcome.

The Mediator offers a fresh approach to resolve the issues in dispute, and facilitates the process. Whilst the Mediator does not judge the legal issues, she can give a non-binding neutral view of the relative merits, especially during the private sessions with each party. Therefore, the parties can "test" their positions in a confidential, without prejudice setting which, even if a mediated agreement is not reached, is a very valuable experience. Also, the emotional heat is likely to have lessened, increasing the chance of a negotiated settlement in the future.

At all times, the Mediator acts impartially, and has no authority to make decisions regarding the parties' issues. In this way, mediation is not the same as arbitration, which is another form of alternative dispute resolution with which you may be familiar.

The success rate for employment mediations is very high, because usually both parties are highly committed to the process.

Making a referral

The party, or their advisor, who contacts the Mediator is regarded as the Referrer. Generally, the Mediator will discuss with the Referrer the basic terms of the referral. The Mediator may ask for a joint discussion, or email communication, with both parties' advisors in order to agree terms.

We cannot provide our mediation service if gunnercooke acts, or has previously acted, for either of the parties; there will be a potential conflict of interest. In these circumstances, the Mediator will decline the referral unless both parties still wish the Mediator to mediate in relation to the particular dispute.

Once the Mediator has agreed in principle the terms of the referral with the Referrer, she will produce a Mediation Agreement for the parties' review and approval. The Mediation Agreement is the terms and conditions of business the parties will have with gunnercooke in relation to the mediation. It includes, among other things:

- The fees and disbursements being charged by the Mediator, and who will pay, or if jointly, in what proportions the parties will pay.
- Confidentiality obligations.
- Circumstances in which the mediation will end.
- Confirmation that at least one attendee has full and unlimited authority to negotiate, compromise and settle the dispute (or will have access on the Mediation Day to such person).
- Where and when the mediation will take place.

Preparation before the mediation day

The parties will be asked by the Mediator to prepare **Position Statements**, and provide her with any key documents they wish her to review before the Mediation Day.

Position Statements are not pleadings and their purpose is not to rehearse the legal arguments in support of a party's position. Instead, they should **briefly** set out:

- A concise summary of the background to the dispute, the issues (identifying any which are agreed) and the party's position.
- The stage reached in any legal proceedings.
- Whether there have been any previous settlement negotiations and, if so, details of any offers made.
- The issues to which the party attaches the most importance.
- What the party hopes to achieve from the mediation (financial and non-financial).
- Any concessions the party is willing to make in the interests of achieving a settlement (not essential).

If either of the parties wishes to provide the Mediator with **key documents**, these should accompany the party's Position Statement. These may include:

- The outcome of any grievance or disciplinary process and/or the pleadings (if proceedings have been issued already).
- The former employee's schedule of loss (and any counter schedule).
- The employee's contract of employment and any other relevant contractual documents.

The Mediator will generally have no interest in seeing evidential documents. This is because **the aim of a mediation is not to establish who is right or wrong, but to see whether each of the parties can compromise sufficiently to achieve a settlement.**

Whilst the Mediator's role (see below) is not to "hear" the case, as an Employment Tribunal or Court would do, if a party believes that it would assist the Mediator's understanding of the issues in dispute, they can show the Mediator additional documents on the Mediation Day during the Private Sessions (see below).

On the mediation day

The Logistics

- Each party will be provided with a room in which they can discuss matters in private, and where the Private Sessions with the Mediator will take place.
- The Mediator will base herself in a third room, which will also be used for the Joint Session(s).

Introduction Meetings

- The Mediator will meet each party separately to introduce herself, and check that they are ready to proceed.
- Whilst it is normal for the current or former employee to make his opening statement first in the Joint Opening Session (see below), the Mediator will ascertain whether this is how both parties wish to proceed. In the event of a dispute, the Mediator will ask the parties to draw straws.

Joint Opening Session

- Both parties and their advisors will be invited into the Mediator's room at the same time. A party may choose not to join the session.
- Each party, or their advisor, will be given uninterrupted time to make an opening statement. This gives everyone the chance to hear each other's case.
- The Mediator will then encourage the parties to engage in an open discussion, to identify the issues in dispute (and their relative importance to each party) and common ground. This will help form an agenda for the mediation.

Private sessions & shuttle mediation

- After the Joint Opening Session, the parties will return to their separate rooms.
- The Mediator will move between the parties' rooms to explore further the issues identified in the Joint Opening Session.
- The Mediator will only share information, and make settlement proposals, with the relevant party's permission.

Further joint sessions

- These will take place if the Mediator thinks that further joint sessions would be useful as the Mediation Day progresses, and the parties agree to this approach.

Drafting the Settlement Agreement

- When it becomes clear that the parties have agreed terms in principle, the Mediator will work with the parties, and their advisors, to draft the settlement agreement.

- The Mediator will have access to her laptop for this purpose in her meeting room.
- The Mediator will not accept any legal responsibility for the content of the settlement agreement. The parties must seek legal advice from their respective advisors.
- If there is insufficient time to complete a binding agreement on the Mediation Day, the parties may choose to capture in writing, in a non-binding agreement, those matters which they have managed to resolve during the mediation. The parties might then choose to continue the negotiation after the Mediation Day, or book another Mediation Day with the Mediator.
- All communications (whether written or oral) between the parties and the Mediator before, during and after the Employment Mediation are confidential and without prejudice (until any mediated settlement agreement becomes legally binding).

The mediator's role

- To be impartial and neutral at all times.
- To manage the mediation process, but not the outcome.
- To help the parties resolve their differences and find a way to work collaboratively towards a settlement that is mutually acceptable.
- To express her opinion on the relative merits of the parties' positions, so as to help the parties take a realistic view of their respective positions.
- To suggest financial and non-financial solutions which might help the parties reach settlement.
- Is **not** to give legal advice or impose a decision if an agreement is not reached.
- To end the mediation in any of the circumstances set out in the Mediation Agreement.

The advisor's role

It is not essential for each party to have an advisor present at the Mediation Day. This is something which will be discussed at the Making a Referral Stage. In order to ensure there is an even playing field, the Mediator will usually consider it appropriate for either both the parties to be represented or neither to be. Alternatively, the parties may arrange to have telephone access to their advisor during the Mediation Day.

The advisor's role is:

- To advise his/her client on the legal arguments, and relative strengths and weaknesses of the potential employment claim(s).
- To encourage his/her client to be realistic as to prospects of success if the matter is not mediated and proceeds to an Employment Tribunal or Court hearing.
- To remind his/her client that everything related to the mediation process must be kept confidential, and be regarded as without prejudice except in those circumstances set out in the Mediation Agreement.
- If the advisor is present, to use the time when the Mediator is with the other party to continue discussions with his/her client and prepare for next Private Session.

The Party's Role

- To be prepared to be realistic, and remain open and flexible.
- To be full and frank with the Mediator during Private Sessions.
- To remain focussed on finding a solution rather than apportioning blame.
- To behave professionally and courteously at all times with the Mediator and other party.
- To ensure that he/she has authority to reach a mediated settlement, or access on the Mediation Day to the person from whom he/she will need to get authority in order to reach a binding settlement agreement.



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Rebecca is a highly experienced employment lawyer, as well as a qualified workplace and employment mediator. Therefore, she has extensive technical and commercial expertise, having handled many complex and sensitive matters regarding all aspects of employment law. In the most recent edition of Chambers and Partners 2021, clients highlight Rebecca's "very pragmatic approach, supporting the needs of the business. She is a reliable source of advice and guidance."

Rebecca acts primarily for employers, across a diverse range of business sectors. However, she also advises senior executives and directors, which gives her the advantage of handling issues from both perspectives. She provides clients with practical solutions, which satisfy the legal requirements and commercial drivers. She is also mindful of the emotional impact on the employment relationship when conflict arises. She works closely with her employer clients on an ongoing basis, allowing her to understand their businesses, proactively advise on the impact of new laws and deliver appropriate training and coaching to the Human Resources team. Rebecca is commended for her user-friendly, down to earth, approach.

In Chambers & Partners 2020, Rebecca was commended by clients for being "excellent technically, very practical, down to earth and good with clients." – [Chambers 2020](#)