

## What is mediation?

Mediation is a voluntary, confidential and flexible process in which an impartial mediator assists the parties to work towards settling their dispute by agreement.

**Voluntary** once started, the parties are free to leave at any time. The mediator doesn't act as a judge and can't impose an outcome. Rather, the parties retain control of the decision on whether or not to settle and on what terms.

**Confidential** the parties are required to treat all discussions as confidential. What is said at mediation cannot be used in later proceedings if a settlement is not agreed. What is said to a mediator in a private session will not be passed on to the other party without express permission. The confidential nature of the process frees the parties up to say things, and explore options, safe in the knowledge that this will not undermine their substantive legal position.

**Flexible** one of the big benefits of mediation is its flexibility, both in terms of the process and the outcome. Although there is a basic framework that most mediations follow, the process can be adapted for each case, and the mediator can use different techniques to engage people and encourage them to consider settlement options. Importantly, the parties can explore and agree outcomes that would just not be possible in court or tribunal proceedings, arbitration or expert determination.

Whilst most mediations result in a settlement on the day, one often understated advantage of mediation is that, where that does not happen, the parties should at least come away from the process with a better understanding of each other's positions. This increases the chance of an agreement being reached later on and may go a long way to explaining why many cases that don't settle on the day will go on to be resolved within days or weeks of the mediation.

## What happens at mediation?

The broad framework for the mediation process is set out below, but this will be varied to suit each case including during the course of the day itself:

- ***Before the mediation:*** in addition to dealing with the logistics and administrative aspects, the mediator will contact the lawyers (and sometimes the parties themselves) to introduce themselves, discuss the process and ensure that the attendees will have authority to settle.

Brief written summaries will be provided about the case, either confidentially to the mediator or to be exchanged between the parties. These are sometimes in the form of "position statements", but we prefer that parties fill out our own Confidential Mediation Questionnaire.

- ***Start of the mediation:*** the mediator will greet the parties and help them settle in to their private rooms. Each party will be asked to provide a signed Mediation Agreement if they have not done so already.
- ***Joint session:*** it will not always be appropriate, but we generally encourage the parties to meet with each other in an initial joint meeting. In this meeting, the mediator will set the scene, explain the process and emphasise the ground rules. Each party will also be invited to make an opening statement. The mediator may use information from those statements to start identifying the key issues to be resolved.
- ***Private sessions:*** the mediator will meet with each party's team separately in turn, to start discussing the issues, and to better understand their underlying interests, aims and needs.

Through a series of such private sessions, a general path to settlement, and the shape of a possible agreement, will usually emerge. The mediator will then encourage the parties to turn broader principles and ideas into more detailed proposals and figures that can then be negotiated.

- ***Tailored sessions:*** the mediator might, during the course of the day, suggest chairing a further joint session or a meeting just between certain combinations of attendees. This can be helpful, for example, where it might assist for one party to explain their position to the other in their own words to clear up a misunderstanding, or where it might save time for the principal decision makers to negotiate directly with each other.
- ***Settlement agreement:*** when the parties have agreed on the main terms of a settlement, these will be recorded in a formal settlement agreement that will need to be signed in order to become fully binding. The parties' legal representatives will prepare the agreement. The mediator will remain on hand to help resolve any further issues that crop up during the drafting stage.

- **Conclusion:** after a settlement agreement is signed, the mediator may wish to meet with the parties, either separately or in a joint meeting, to ensure that everyone is clear on any follow up actions that may need to be taken, before the parties say goodbye to each other.

Where an agreement is not reached, the mediator may encourage the parties to meet with each other in a final joint meeting, which can be used to set out any progress that has been made, reiterate any offers that remain open for acceptance and identify any further steps that could be taken to keep the negotiations going in the following days.

- **After the mediation:** the mediator will usually contact each party's lawyers a few days after the mediation whether or not a settlement has been reached.