QUEEN SQUARE
CHAMBERS

# Mediation in Employment Law Settings

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1. The general rule of the Employment Tribunal being a costs neutral venue means that, for either party, a victory can often be Pyrrhic if they have instructed lawyers and incurred legal fees. For the reporting period of 2021-22, the average award for an unfair dismissal claim was £13,541, whilst for disability discrimination it was £26,172[1]. As a realistic estimate, Solicitors and Counsel's fees for a 3 day final hearing can be in the region of £15,000 inclusive of VAT.

2. With statistics like these, it is small wonder that any but the most exceptional cases (the highest sex discrimination award last year was £184,941) are litigated through to completion. However, there are many bars to effective settlement – the belligerent or unrealistic Litigant in Person, a party that simply *"wants their day in Tribunal"*, or a Government Body who might be prevented from settling even on a commercial basis due to Treasury issues. How can we best protect our client's position (either Claimant or Respondent) whilst achieving a positive outcome at an early stage?

3. Whilst the ACAS Early Conciliation scheme, and ACAS more generally are there to provide an avenue of dialogue, they seem at the moment to be nothing more than a message delivery service. Likewise, a well-structured and robust WIP save as to costs letter can often provoke a negative response from an under-pressure litigant in person.

**What is Judicial Mediation?**

4. Judicial Mediation is a form of Alternative Dispute Resolution that has been running since an initial pilot scheme in 2006 and is now available throughout England and Wales. In 2014, official statistics gave this form of ADR a 65% success rate with settlement reached on the day of mediation. However, anecdotally, it seems that this figure might be lower in the current environment, which we will look at shortly.

5. Whilst the 2013 ET Rules contain references to Judicial Mediation, there is no specific rule governing the availability or format of the mediation. Rule 3 states:

   *A Tribunal shall wherever practicable and appropriate encourage the use by the parties of the services of ACAS, judicial or other mediation, or other means of resolving their disputes by agreement*

[1] Source – Employment Tribunal Tables 2021-22 - https://www.gov.uk/government/statistics/tribunal-statistics-quarterly-july-to-september-2022

6. Instead, much of the guidance comes from Appendix 3 of the Employment Tribunals (England and Wales) Presidential Guidance to Rule 3 issued on 22nd January 2018. Ultimately, the decision whether or not to offer judicial mediation is made by the Regional Employment Judge of the region where the claim is being dealt with.

7. Because of this gap in the ET Rules, different Regions have slightly different approaches to JM. However, as a general rule of thumb, the following are relevant considerations and principles:

    a. Judicial Mediation will be discussed at the first Preliminary Hearing. The PH Agenda, sent to both parties along with the notice of hearing, contains a section to indicate if you are interesting in JM.
    b. JM will usually be available to 'open track' cases – discrimination and whistleblowing, which are listed for 4 or more days. Some unfair dismissal cases might be eligible, but will likely depend on length of hearing. Any case where the Claimant remains employed by the Respondent will also be suitable.
    c. Even if one party is not willing to enter JM at the PH, if the position changes then the parties are able to write to the ET at a later date indicating they wish to be considered.
    d. If both parties are open to JM, then the case will be referred to the REJ. A further telephone PH might occur at this stage to set directions for the JM.
    e. The JM should occur within 4-8 weeks of the referral to the REJ.

8. The REJ might also require further information from the parties before confirming a JM listing. For example, one REJ usually requires both parties to indicate their starting positions for a mediation. This information isn't seen by the other party, but helps gauge whether settlement is a possibility, or if the parties are too far apart.

**Considerations before the first Preliminary Hearing**

9. It is not uncommon for one party at the PH to say that they are *"without instructions"* regarding JM. Whilst there is no requirement to confirm either way, this is often frustrating for the other party and can cause delay. The same is true for an unrepresented party, who may not be aware of JM, or confuse it with other methods of settlement, such as via ACAS.

10. If your client is willing to enter into JM, then good practice indicates that you should indicate this to the other side ahead of the PH to allow them to take instructions. If you are representing the Claimant, then setting out an early schedule of loss can assist the Respondent. Vice-versa, if you are the Respondent, there is no harm in requesting

that the Claimant values their claim (if it is not readily identifiable from the ET1) so your client can evaluate if settlement is realistic.

**At the Preliminary Hearing**

11. Some ET Regions are now setting directions for open track cases upon receipt of the ET1, including a provisional final hearing, with the PH serving as a "catch-up" to confirm compliance and review the time estimate for the merits hearing. This can impact on JM if significant unrecoverable costs have been incurred through the disclosure process, although conversely, parties may have a better understanding of the litigation risk at this stage.

12. The important thing at this stage is to ensure that any further directions are put off until after the anticipated mediation. For Respondents, any further costs incurred are likely to eat into the amount they are willing to settle for. Certain aspects of the litigation process, such as exchanging witness statements, can often harden respective positions and act as a block to settlement.

13. If one party is still unsure or *"without instruction"* then you should also seek early directions to provide a schedule or counter-schedule, with the parties to confirm their position within 7 days upon receipt.

14. Your client might not be willing to entertain JM until after a preliminary issue has resolved, such as disability status or an amendment application. Once this issue is resolved, the ET will likely make further directions through to final hearing, so the same principle applies – try to avoid preparation for the JM running parallel to the mediation.

**Preparation for JM**

15. Once the REJ has green-lit the JM, you will also need to consider directions to maximise your chance of success. These usually include:

    a. Schedule of Loss
    b. Counter-Schedule
    c. Any disclosure going to remedy/mitigation
    d. Bundle for the mediation
    e. Position statements
    f. Agreeing wording of the settlement agreement

16. Since nothing that is discussed at the JM is able to be referred to at the final hearing, you can afford to be more realistic in your respective schedule of loss. Remember,

whilst you are trying to get the best result for your client, you should also be looking to build consensus with the other side where possible. For example, the basic award, notice pay, and even *Vento* banding are often non-contentious – even if you want to argue where it falls within the band!

17. The mediation bundle should be kept as short as possible – the pleadings, the schedules, and any evidence relevant to quantifying loss, such as pension statements, payslips or the contract of employment. The Mediation Judge is not going to hear or consider evidence, so save your time and paper.

18. In the current climate, position statements should be provided since it is unlikely there will be a joint session at the outset. A position statement must tread the fine line between being receptive to settlement and highlighting the other side's weaknesses. Try to keep it keep it factual and avoid inflammatory statements or threats of costs. If not readily obvious from the schedule of loss, set out your justification for the valuation of each head of loss. If one party is seeking a resolution outside of pure financial compensation (such as a written apology, the termination of the Claimant's employment, etc), then this should be clearly signposted in both the schedule and position statement.

19. Just as important is trying to have agreed wording prior to the mediation. Mediations can often go down to the wire (they will normally not go beyond 3pm) so this can maximise time for substantive negotiations rather than haggling over wording. If one side is unrepresented, you may need to involve ACAS as well (so you should contact your mediator to make sure they are on standby), although not all settlements reached at JM will be suitable for a COT3. The Mediator Judge also cannot get involved in the wording, so a litigant in person will need time before the mediation to consider the contents of the agreement.

20. Agreed wording is vital if as part of any settlement the Claimant's employment will be terminated. You will need to agree on the mechanics of the termination, the return of any Company devices or confidential information, references and outstanding payments owed, such as notice or holiday pay (which might be separate to the settlement figure).

21. You might also want to consider making a late offer of settlement, representing your starting offer for the mediation, around 48 hours beforehand. Hopefully this will result in no response from the opposition (or they will indicate it can be discussed at the mediation). Tactically it allows you to put pressure on the other side at the mediation by indicating there is an existing offer on the table and you propose to adopt that as your starting point, meaning that they will have to make the opening offer on the day.

22. Finally, with most mediations now taking place remotely (or even, commonly, by telephone), you should consider how you will be able to communicate with your client on the day. If it is possible to have the client, and Counsel (if instructed) to be in the same location then this will speed things up at mediation. If you are acting for the Respondent, then the Tribunal will expect you to have a decision-maker in attendance with authority to settle up to your maximum offer.

**At the Mediation**

23. In accordance with September 2020 Presidential Guidance on Remote and In-Person Hearings, which is still in force, JM can take place remotely via either video or telephone hearing. Anecdotally, it seems that telephone mediations are less effective – it can be difficult to build a rapport, and delays are frequent since the hearing is conducted using the same system as a telephone PH and the parties are told to dial in at a certain time, which can lead to waste.

24. After the opening joint session (which some mediators will not hold), the mediator will go back and forth between the parties. Whilst the mediator is neutral and will not express a view as to prospect of success, there is no harm in getting them to communicate your assessment of prospects to the opposition, especially if a litigant in person.

25. For Claimants, you should try to focus on your best two or three points. In discrimination or whistleblowing claims, you often only need to win one or two parts of the claim to attract a decent compensatory award. There is little point in getting bogged down in arguing over all 7 of your pleaded protected disclosures – pick your best one, and one or two examples of detriments, to show the strength of your claim.

26. For Respondents, your client needs to be realistic and open to a mutual settlement. Simply strong-arming the Claimant, making "commercial" offers of settlement or refusing to move from your opening offer are all likely to exasperate the mediator and make the Claimant walk away. Instead, it is often helpful to make offers based on what you have assessed as the Claimant's probable outcome, reduced to reflect your view on prospects of success and/or litigation risk. This should give you plenty of room to manoeuvre, avoiding *"horse-trading"* and allow you to make justified and reasoned counter-offers.

27. You can be fully open and transparent with the mediator, and indicate to them what information you are willing to have communicated with the other side. For example, there may be reasons dictating your approach, such as an unavailable witness, that

you wish to tell the mediator about as context, but don't want the Claimant to know about.

28. Don't be afraid to be prepared to walk away – or threaten to walk away by tabling a "final offer" if you think the other side are being unreasonable. The mediator may be able to indicate if there is still the prospect of improvement, but if you have based your negotiations on rational offers representing appropriate risk, and are getting nowhere, then you are unfortunately wasting your time. A well-timed final offer, going into the lunch break, can often break the deadlock.

29. Once settlement is reached, the mediator will take a step back and at this stage both representatives will come together to discuss any final terms. The mediator cannot convert the JM back into a PH for the Claimant to withdraw the claim, so if the Respondent is insisting on an immediate withdrawal, this will have to be done in writing.

**After the mediation**

30. If mediation has not been successful, that does not mean that settlement is off the table. Often mediations can bring the parties closer together, and you may be able to achieve settlement in the coming weeks before costs start being incurred again with preparation for the final hearing.
31. Whilst JM is entirely voluntary, and refusal of such cannot amount to unreasonable conduct within the meaning of r76(1)(a) of the ET Rules for costs, the position is less clear as to when a party has acted unreasonably within a mediation (for example, not being prepared to move from their initial offer, walking away at an early stage when there was still room for negotiation). There is no decided authority on this point, so to better protect your client's position as to costs, you should reiterate any offer made in the mediation through WIP correspondence, summarising any points that were made to support your offer during JM, but specifically not referring to the mediation at all. This way you will be able to refer to the contents of the letter (and presumably, the refusal of the offer as unreasonable conduct) in any subsequent costs' application, without falling foul of disclosing what happened at the JM.

32. The Judge who acted as mediator will not be involved in any further hearings and apart from the REJ's case management order, no documentation or notes from the JM will be on the Tribunal's file.

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**17th April 2023**