

## Workplace and Employment Mediation –

### What to expect if you are the **worker**

#### What is mediation?

Mediation is a process in which parties in conflict are empowered to resolve their dispute themselves, with the assistance of an independent, unbiased mediator skilled in the art of dispute resolution.

#### What is mediation not?

Mediation is not a judicial process. It is not about blame or culpability. A mediator does not arbitrate a dispute, or decide who is right or wrong. Whereas court and tribunal processes are about looking backwards, mediation is about looking forwards. That is not to say that important events that that have occurred in the past are ignored – far from it – but the focus is on reaching a practical, workable resolution.

#### What is the difference between workplace and employment mediation?

Generally speaking, workplace mediation involves two or more workers who cannot get along or who are otherwise in conflict with each other. It may involve whole teams of people, or just two individuals. It may be a Board room dispute.

Employment mediation generally involves a worker, or group of workers, (or former worker or workers) who are in conflict with their employer.

#### Is an employer involved in a workplace mediation, or is it left to the individual workers?

The employer is usually involved. However, the level of involvement of the employer may differ depending on the nature and extent of the dispute. Generally, we encourage workplace mediations to be tripartite: involving the two workers, or teams of workers, and the employer.

#### Can I bring somebody with me to the mediation?

Mediation can be a long and sometimes stressful situation. You should absolutely bring somebody with you, but the question of who is down to the employer, because it's their business. We encourage employers to permit workers to bring a work colleague or trade union representative to a mediation and, in certain situations, a lawyer is not unusual. In rarer circumstances, the employer may allow you to bring somebody other than a formal representative from outside the organisation, such as a family member. This is especially the case if the employer is required to make reasonable adjustments for a disabled worker under the Equality Act 2010

#### Do I have to agree to try mediation?

No, not unless your contract of employment requires it, and indeed our experience is that parties who are dragged to a mediation table tend not to reach agreement. A mediation process is entirely voluntary.

## Can I leave part way through?

Absolutely – mediation is voluntary. All that we ask is that, if you are thinking of terminating the mediation, or walking away, you discuss with the mediation first and hear their thoughts on the matter before making a decision.

## Is the process confidential?

Confidentiality is a key aspect of mediation. The parties have to be free to speak to each other candidly without fear of reprisal and the employer must also be confident that the personal data it controls under the GDPR, and its legitimate business information, is protected.

A mediation is confidential in two important respects: firstly, what is said by everyone in the mediation is confidential and 'without prejudice'. Essentially this means that the content of the mediation, and what is or is not agreed, is privileged, and may not be disclosed to a court or tribunal in the event of subsequent legal proceedings. This includes any offers and concessions made.

Secondly, what you say privately to the mediator is confidential and will not be relayed to other parties, including the employer, unless you agree.

## How long will the mediation last?

Mediations can last for as long as necessary, but often a full day is set aside. This is because the road to reaching a resolution is often a bumpy one. A large part of the process involves the mediator establishing a rapport with the parties. Mediators that have established trust are far more likely to facilitate a resolution, but this takes time.

## We've tried mediation internally before and it didn't achieve much – it is worth it?

We are often familiar with parties starting by saying that mediation has been tried before without success. Digging deeper, we tend to find that this means that someone has tried to facilitate a round table meeting between two parties in dispute. This is not mediation. The mediator will be trained and accredited to conduct a carefully planned and creative process.

## What happens before the mediation?

The mediator will spend time with both the employer and the parties to the mediation, or the principle parties where there are teams involved, in order to begin to establish a rapport and explain the process. We appreciate that workers are sometimes reluctant to engage in mediation; they can have anxieties and uncertainty about the process. That can take time to break down. It isn't unusual for a mediator to spend several hours with the worker, either on the phone, face-to-face or via Zoom/Teams, before the mediation even takes place. This is an important part of the process of managing expectations and getting the parties into the right mindset.

## What happens on the day?

Again, the mediator will spend time with the parties separately to re-emphasise the process, go over the principle of confidentiality and establish a calm and practical environment conducive of resolution. The mediator will then start to explore the issues with the parties – this background exploration is about

establishing common ground, building trust and identifying issues that need to be resolved before parties can move to a bargaining stage – the stage in the process where they are encouraged to put forward and consider proposals for resolution, facilitated and marshalled by the mediator.

### Do I have to meet face-to-face with the other party?

We always encourage it, but you do not have to. Sometimes, animosity has built to such a level that parties are unwilling to sit in the same room as each other. Nobody will be forced to deal directly with another party, but your IHL mediator will always explore the reasons for this and consider possible alternatives.

### What is it gets out of hand?

The mediator will control the process and carefully manage and moderate the dialogue. The mediator will absolutely not allow any bullying, aggressive behaviour, mud-slinging, shouting or other unprofessional conduct during the mediation. In the worst case scenario, you have the right to end the mediation early.

### Is resolution guaranteed?

No, and nor should it be. The mediator will be conscious that reaching no agreement is probably better than reaching an agreement that is impractical or unworkable or likely to be breached before the ink is dry.

### I just can't see what resolution looks like – is there a point?

Absolutely. All disputes are capable of resolution. A mediation may not reach an agreement on the day, but may lead to further discussions that may, given time, lead to an ultimate solution. The mediator is experienced in dispute resolution and employment relations and will be creative. Often, parties struggle to see a clear resolution through the fog of a preconceived notion of what a resolution might look like. The point is that a totally different resolution, even a radical one, might present itself during the process.

### What do I need to do to prepare?

Remember: you are not preparing a case to present. This is not a judicial process, and the mediator is not going to decide on a winner and loser. You just need to be open-minded, professional and clear. Focus less on what you *want*, and more on what you *need* from the process. You may want someone to be sacked, or for you to be promoted, but is that realistic? Perhaps, in the first instance, think about what you *need*? Perhaps you *need* to be listened to? To be acknowledged? This is far more likely to be a realistic starting point to move forward on.

### Will I be cross-examined or questioned?

The mediator will not permit cross examination in workplace mediation, or aggressive questioning of any sort from a party. The mediator will undoubtedly have questions for you, but these will be focussed on establishing the background, not challenging your version of events. The mediator's role is not

challenge, but they may gently stress-test your ideas and thoughts to make sure they are realistic but remember: ultimately, it is your dispute to resolve and you will be in control of what resolution looks like.