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Relatively Informal Guide to Workplace Mediation (UK)

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1. Relatively Informal Introduction

Many many years ago I was encouraged to submit a high-profile equal pay claim to mediation. We had already won in the Employment Tribunal, but an appeal was threatened and there were going to be extended arguments about quantum even at best. To say that I was sceptical would be an understatement – after all, we had spent the thick end of two years getting to that point and were over £1 million apart from the employer. And yet, after just eight hours in mediation, it was all done – settled in less than a day.

Shortly before the time ran out, but while we were still hundreds of thousands apart, the mediator took both parties away from their lawyers into a room together. When they came out, it was all agreed. And for years afterwards, I wondered – what did he do to them in there? Did it hurt? And by what sort of dark arts had he taken a seemingly unbridgeable gap, years in the making, and, in less than a day, bridged it?

Since that day, mediation in the employment field has become more common, driven in part by the increasing cost and complexity of legal proceedings and in part by mediation's inherent advantages of speed, economy and discretion. That is true whether you are well down the path of a tribunal claim or (perhaps more positively) just in the first twitchings of some internal spat between valued members of your staff. So often, such disputes are based on crossed wires, inadvertence or moments of stress or fatigue. While any decent lawyer worth their salt could swiftly turn this kernel into entrenched positions, terminal acrimony and whopping legal bills, why would you let that happen if you could avoid it? Despite that, mediation is still not as widespread in the workplace as its potential merits should suggest, perhaps because few employers are yet willing to trust a process that they do not fully understand.

So, this guide contains a series of relatively informal insights into the mediator's art, what to expect if you go to mediation on an employment relations matter, and how to make the best out of it. We will let you know how to tell your BATNA from your WATNA, the role of the precipice and why going into the Insult Zone is less fun than it sounds. The ability to use mediation principles is actually a handy life skill generally, in fact, though I can exclusively reveal that its nonconfrontational, pragmatic and reasoned approach is not remotely effective (indeed, is actively provocative) when applied to teenage children.

This Relatively Informal guide is based on a series of my posts concerning mediation matters on this firm's www.employmentlawworldview.com blog. It represents my personal views and experiences of workplace mediation in action, nothing official. Mediation is as flexible as the parties to it, and while there are some quite definite wrong turns you can take, there is no exclusively or categorically right approach to it. If you have markedly different opinions as to the use and practice of mediation in the workplace, or you would like us to expand on any of these thoughts, we would be delighted to hear from you.

David Whincup

2. What Are We Talking About Here?

The definition of mediation most commonly used by the Centre for Effective Dispute Resolution (CEDR) is "a flexible process conducted confidentially in which a neutral person actively assists parties in working towards a negotiated agreement of a dispute or difference, with the parties in ultimate control of the decision to settle and the terms of resolution".

In this guide we will look at what that means in practice and hopefully shed some light on the mediation process as it may be applied to workplace and employment disputes.

Before getting into the nuts and bolts of a mediation, some basic rules. These basic rules are more or less sacrosanct, and they inform almost the whole of the procedure from start to finish.

First, mediation is in principle (see Section 3 for the practical position) generally **voluntary**. Some contracts in the commercial world make mediation a part of the formal dispute resolution mechanism but this is much less common in UK employment contracts. This means that a party can refuse to participate or can walk out of a mediation at any time, usually quite without sanction in costs or otherwise. However, though mediations do sometimes contain some posturing and threats to walk, it actually happens very much less than you would think.

Second, **confidentiality**. There are two layers of confidentiality required to make a mediation work. Each party must first be confident that what they say to the mediator about their position will stay secret unless and until they agree otherwise. Without that safeguard, they may feel constrained in voicing ideas or opinions that might help move the matter towards a settlement. Nothing should "leave the room" until the mediator has that party's clear consent to take it to the other side. And second, the parties must also jointly feel that they can make suggestions or offers, or even just "vent" at the outset, without this being held against them later should the mediation fail. The intention is to provide a "safe environment", and this will be fatally threatened by any suggestion that the confidentiality "bubble" around the whole process is not robust.

Third, **neutrality**. The moment the mediator is perceived (whether correctly or not) to favour one party over the other, the mediation is effectively doomed. This is sometimes hard to avoid, especially where one party or their representative is behaving unreasonably in the terms sought, or, in the heat of the moment, rudely or aggressively. The maintenance of strict impartiality, both in fact and in perception, is key. That means the mediator consciously behaving equally to both parties when in joint session, and maintaining an almost infinite patience in their dealings with each separately, despite the sometimes almost irresistible temptation to the contrary.

Last, **ownership of the solution by the parties**. This is what gives the mediation process its power. The mediator is not making a ruling on the case, nor finding a solution in their own head and then pushing the parties towards it. The outcome is theirs to agree. Even though the mediator might often think that some other outcome might have been "fairer", that is not for them to decide, and they must not express that view at any stage in the process. While the mediator would encourage the parties to look at all the options, it is the prerogative of each to make a "bad" bargain if they are happy with it, and it is not within the mediator's remit (for fear not least of prejudicing neutrality) to steer them away from it. After all, who is the mediator to say it is bad for that party at that time.

3. How Voluntary Is Voluntary?

Proponents of workplace mediation often stress its confidential and voluntary nature, as in What Are We Talking About Here? above, and the ability to fail to agree without there necessarily being any adverse consequences. It is all about listening and rapport and trust, say those commentaries, making the whole process sound as cuddly and unthreatening as your favourite puppy. In fact, there are a number of situations in which mediation can have real teeth, requiring it to be treated with a proper degree of respect by invitees and parties to it. In particular, is the process truly voluntary?

Yes and no. If I am an employer faced with a dispute between two employees, either peers or manager and subordinate, then I have a legitimate interest in seeking to resolve it. Any reasonable instruction I issue to that end is therefore likely also to be a legitimate exercise of my rights as employer. Consequently, any refusal to comply with my reasonable management instruction could technically count as misconduct.

That does of course assume that my instruction to an employee to enter a facilitated discussion with the other party is reasonable in the first place. However, there will be few circumstances where an instruction to two adults to behave like adults and at least try to resolve matters between them where it is to their mutual benefit (and mine as employer) to do so is not a reasonable one.

If we assume that your asking an employee and his manager to try to mediate a falling-out between them is a reasonable management request, what rights do you have as employer if one of them refuses? This is a good question. It highlights the possible tension between the employer's right to require its employees to act in line with its reasonable instructions (and ultimately to dismiss if they do not) on the one hand, and the notionally voluntary nature of mediation on the other.

We do not suggest that a simple refusal to mediate without more is grounds for dismissal. It is a more complicated question than the "average" disobedience issue. For one thing, the objector (whether manager or employee) may have good grounds to decline. This would make the refusal reasonable and so not culpable. Additionally, we must remember that entering a mediation does not fix the problem. It merely begins a process that may well produce a settlement (approximately 80% of employment mediations do), but in no sense definitely will. There is little ability on the part of the employer to control what a party will or will not agree to within the confidential "bubble" of the mediation, and so no real way of its compelling a reasonable or pragmatic approach. You may not even know how things went within the mediation or why no agreement was reached, and the mediator ought not to tell you. That means that there is no necessary connection between whether the employee agrees to mediate and whether a satisfactory resolution is reached.

But that does not mean that the offer of mediation is without teeth if it is unreasonably refused. Take a typical conflict issue that is damaging the necessary working relationships between manager A and subordinate B. Assuming B is the complainant, ask them what they want – what would their ideal outcome be? Secretly, they may want A warned or dismissed, but they are more likely to say that they want A to behave differently in some respect and for that necessary relationship to be restored. As employer, you might consider that the problem is a handbags-at-dawn spat that has got out of control or that there is genuinely some work to be done by one or both parties. In the end, however, the corporate imperative for you is the restoration of the relationship. You know that a formal grievance process will probably hole that relationship below the waterline and that if ultimately A and B can't work with each other, one will have to go.

On the face of it, a request to mediate here is clearly a reasonable management request, in particular for A, who, as manager, is under an even stronger duty to subjugate their own feelings to the best interests of the business. If there is a mediation but it fails, neither party can be blamed because what happens in that "bubble" is confidential. That leaves you having to resolve the grievance on ordinary principles. However, if A or B unreasonably refuses to mediate at all, they take a clear and nonconfidential step directly inimical to the restoration of the relationship that you need as employer. All else being equal, it would not be hard for you then to blame them for its not being retrievable and to pick them as the one who has to leave as a result. This is not dismissal for refusing to mediate (i.e. for disobedience), but it could be dismissal for the contribution that a persistent refusal to mediate makes to the irretrievable breakdown of an important workplace relationship (i.e. for "some other substantial reason").

Of course, all else rarely is equal. The employer will need to look also at the parties' respective importance to the business, other evidence for or against, and the scope for moving one rather than dismissing them. In the end, however, it must be the case at its very lowest that the refusal to mediate of a party to a dispute like this puts them at a pronounced disadvantage when it comes to how the employer chooses to break the deadlock.

Exceptions? Perhaps repeated previous failures to reach agreement, serious harassment, evidence that the other party has no actual interest in resolution by agreement, for example, but not much else. If you try to reach agreement and fail, then so be it, but if you will not even make the effort in the first place (whether as manager or subordinate), that is something you must be prepared to find levelled against you by your employer.

4. How Confidential Is Confidential?

Up to a point. What is confidential in the process is the course of the discussions with the mediator and between the parties. If expressly decided by both parties, then the terms of the resolution may also be confidential. Therefore, if the mediation breaks down, neither party may later rely on the conduct of those discussions to blame the other. For this reason, many mediation agreements expressly prohibit the parties from calling for the mediator or their notes as part of any later litigation.

However, the fact that a mediation took place is not usually confidential, and nor normally is either the fact of failure (as opposed to the reasons for it) or the terms of any agreement arising from it. There is no automatic confidentiality obligation in relation to a request to a party to mediate or their response to that.

Even in relation to those discussions conducted within mediation's confidentiality "bubble", there are limits. The mediation process allows for (indeed encourages to some extent) a degree of venting. If, in the course of that, something were to be said or done that would be improper outside the mediation context, it will be little less so within it. A good mediator will tell the parties at the outset that in the mutual pursuit of settlement they may hear things they find hard or do not agree with, but that process still does not legitimise behaviour that is personally insulting, overtly discriminatory or physically threatening. Any such conduct in a mediation could later be disclosed and relied upon by the victim, whether employer or employee.

The parties can agree that the terms of the resolution they reach are confidential, but there are again limits, in that the employer may need to know how two employees resolve matters between them if either it or they need to enforce those terms. If the agreement details that the parties will behave differently towards each other going forwards and one defaults on that obligation, then this becomes an issue of poor performance or misconduct just as if that obligation had been incorporated into their contract of employment with all the other behavioural rules. The fact that it was put there via a mediation is irrelevant.

What if a confidentiality promise made in the initial mediation agreement or the closing settlement agreement is breached? Much will depend on the facts, but since the commitment essentially becomes part of the employment contract, you could expect the usual contractual consequences to flow from that breach – a misconduct allegation by the employer, a grievance and/or constructive dismissal threat by the employee or in principle an application for an injunction by either.

Despite the superficial fluffiness of the process, therefore, a decision not to participate in mediation may already have costs consequences in some UK courts, and, in my view, it is only a matter of time before this will apply in the Employment Tribunal too. Abusing the process through breach of confidentiality can come back and bite you, as can defaulting on any other term agreed.

None of this should take away from the merits of mediation as a swift, discreet, effective and economical way of resolving many workplace disputes of otherwise significant destructive potential, but do just remember that one day your puppy's bark might not be worse than its bite.

5. Preliminary Communications With the Parties

Time in any mediation is often both limited and precious. Once it is underway, there is little time for sorting out the preliminaries. As a result, it is customary for there to be contact between each of the parties (and/or their representatives) and the mediator prior to kick-off. For a judicial mediation arranged through the Employment Tribunal, this will normally be a joint case management discussion, but for commercial workplace mediations the mediator will usually seek to speak to each protagonist separately first.

This serves a number of purposes. It can deal with any outstanding administrative matters, especially to check that the mediation agreement (see Commercial Mediation Agreements below) has been signed and that the mediator's record of the parties' names, contact details and intended attendees is correct. In addition, the mediator will want to be sure that both parties will have full authority to settle on the day if terms can be agreed – while there is nothing wrong with that authority being subject to a phone call to someone more senior, it is essential to ensure that that someone will be available if and when the need arises.

That prior contact is also very useful in clarifying the parties' respective experience of mediation. Do they understand the ground rules about confidentiality, process, the mediator's neutrality and the outcome being in their hands, not the mediator's? Even where lawyers are instructed, some mediators would sooner have this call with the parties themselves, since it is they and not their lawyers who must ultimately be happy with the process. However, this direct contact is not always feasible or indeed necessary if experienced representatives are acting.

If the mediator has received all the mediation papers beforehand then they will often use this prior contact to raise any remaining questions about the arguments or current state of the case. If they have not, then they may seek a brief synopsis of what the issues are and where each party stands (and thinks the other stands) in relation to settlement. Last, since much of the power of the mediation process is borne of the trust the parties must have in the mediator's discretion and understanding of their position, the mediator will also use this call to try to establish the beginnings of a rapport with them, to make some small-talk to create a little bond or to find some point of common interest with the party. This is particularly true with individual claimants as they are generally the least familiar with or convinced about the process, and building that rapport helps turn the mediator from an external stranger into someone to whom they can open up and feel secure that their trust will not be betrayed.

6. Commercial (Non-Judicial) Mediation Agreements

Earlier in this guide, we referred to some of the basic principles underlying a successful mediation. But why should the parties consider themselves bound by them? This is where the formal mediation agreement comes in.

Mediators will tend to start with something like the CEDR model agreement. The parties have the right to vary that document but only by agreement, and, in our experience, alterations of substance are relatively rare. So, what can you expect to be asked to sign up to?

First, a commitment that the mediation process represents a good faith attempt by each party to settle. Though this is just words and in that sense no more legally enforceable than an oral statement to the same effect, it is a representation that the mediator can more easily refer a party back to by virtue of its being in writing. It may also be of some reassurance to a party otherwise sceptical of the other's intentions. The model agreement refers to just three parties, usually employee and employer, plus the mediator. In disputes with more moving parts – for example, two employees at odds plus an employer that will need to be involved in the resolution between them, the cast list may grow.

To avoid arguments at a late point, a promise that the attendees for each party have full authority to bind it by the terms of any settlement.

Next, an express reiteration of the confidential and without-prejudice "bubble" around the process. It requires the parties to agree that they will not call the mediator as a witness in any proceedings, nor make any application for disclosure of their notes. The agreement also prohibits the mediator from giving evidence or producing case notes voluntarily at the request of either party.

The CEDR model agreement provides that no settlement reached at the mediation will be legally binding until set out in writing and signed by the parties. This is not always adhered to, especially where the mediation moves into facilitation territory and a mutual clarification or clearing of the air may make the necessary difference without anything more formal than a handshake. Pushing the parties to put something in writing in these cases can force them into defensive positions and so be counterproductive. However, if the mediation is to resolve a live dispute where the employee has brought proceedings or is still in time to do so, then a settlement in the form of a statutory settlement agreement is most usual.

Last, the mediator's fees. The default position under the model agreement is that these are split equally between the parties. Sometimes, just to get the thing underway, the employer will agree to pay the whole cost, but be aware that who pays the fee is a matter of no interest to the mediator and you get no "brownie points" as employer in such a case.

Next, if you are asked to provide a position paper in advance of the mediation, what should it say to be most helpful to the process?

7. Written Position Papers

Sometimes, the parties to a mediation are asked to provide the mediator in advance with a "position paper". This is a document of a few pages (as a rough rule of thumb, the equivalent of five minutes' talking). It sets out in broad terms how the parties have got to where they are, how they feel about that and where they want to get to. Often the phrase used here is what they "want tomorrow to look like".

A position paper is not generally a compulsory part of a mediation (it is rarely requested in judicial employment mediations), but it can be helpful to both the mediator and the parties themselves. Sometimes, they are for the mediator's eyes only, and sometimes they are written expressly with a view to being exchanged between the parties. It does not matter much which, as obviously there is never any exchange unless the mediator has the agreement of all concerned.

A position paper can help the mediator make prior sense of a dispute where either there is very little documentation (for example, a falling-out between colleagues) or the paperwork is voluminous or badly organised. It can certainly be helpful during the preparatory work to have their attention drawn to particular key documents. After all, the less time needed to set out these basics at the mediation itself, the greater the time the parties can apply to the process. A position paper can also help the mediator assess in advance the intended approach of each party to the mediation. While the tone and demeanour that each adopts is ultimately a matter entirely for them, ignorance or anxiety can sometimes lead position papers to come across as particularly unrealistic, insulting or uncompromising.

In those circumstances, a good mediator would tend to have an "Are you sure?" conversation with the party, just on the basis that its continuing that approach in the mediation itself might increase the risk that the other would walk away.

The preparation of a position paper can also help the parties themselves. The mere process of reducing to paper their thoughts and aspirations by way of resolution can help bring order and a strengthened degree of realism to their thinking. In addition, when it comes to their opening statements, the position paper can often act as a script (or the basis of one) for what can be a daunting moment (see next section).

So, the position paper is mostly good news. But all that said, most mediators would not insist on one if they thought that the mere process of writing it would be off-putting to a party. They might have limited writing skills or fear (quite unjustifiably) that their paper will somehow be "trumped" in the mediator's eyes by a more polished product from a professional representative. They may just feel happier talking than writing, and that could make any requirement for such a paper an obstacle in their mind to the mediation itself. Under those circumstances, while not preventing the other party doing such a paper for its own use, the mediator would not necessarily ask either to produce one.

Next, there you are in the mediation room with the other side, the process just kicked off. The mediator turns to you and asks you if you have anything to say. What should be in your opening statement?

8. Opening Statements

At the start of mediation, the mediator will almost always take a quick run through the ground rules already covered above – that the parties are responsible for the outcome, that the mediator is neutral and the whole process is covered by confidentiality. That done, the mediator will then sometimes ask the parties to make opening statements. This should not come as a surprise – if they think that it could help in any given case, then the mediator will tell the parties in advance that this is their intention.

Even though the statement should last less than five minutes, it is an extremely important part of the mediation process. It provides in particular a chance for both parties (usually the employee) to vent some of the emotion associated with the treatment they perceive as having led to the dispute. Where the mediating parties are both employees, this can be very liberating and allows a clearing of the air in a way that a structured grievance meeting could never achieve. This may be the first time that the employee has had the chance to say directly to his colleague or employer exactly how he feels about things, without fear of instant contradiction or retaliation. I recall one mediation where the ex-employee was clearly very agitated and jumpy, so the mediator invited him to speak first. Was there anything he wanted to say to his former bosses? "Yes," he said, leaping to his feet and crashing his fist onto the table, "I am f…ing furious about this." Not an immediately promising start, you might think, and not an opening I would usually advocate, but you could practically see the steam escaping from him as he sat down again, and the matter was settled within a few hours. Neither party should underestimate the power of being properly heard by the other.

I always encourage my client in a mediation to speak directly to the other party, and not to address their remarks to me or the mediator. Eye contact with the other side can be very powerful, so I would ask them to be sufficiently familiar with their statements that they do not need to read them line by line.

Mediators will generally encourage the use of "I" statements, not "you". "I have felt bullied by you" is more personal and so less challengeable or provocative than "you have bullied me," for example. That may make it easier for the other party to acknowledge or even express regret that the complainant feels that way, without having to accept that there had in fact been any bullying. Last, it is a golden rule that the other's opening statement must not be interrupted by word or gesture (tutting, eye-rolling, derisive smirking, etc.), almost however aggressive or offensive the listener perceives it to be.

So, what should the employer say? In dismissal cases, I have found to be very effective an early acknowledgement by the employer that there is an imbalance of emotion in play – it can rarely hurt so much to dismiss as to be dismissed. The employee's sense of grievance can be deflated to some extent by seeing that fact recognised up front. While the employer can state its belief that it has less to lose than the employee if no settlement is reached, it will be much more helpful to focus on its own acceptance that it is in both parties' interests to talk constructively about a resolution. In addition, reference to some point in the past when the relationship between the parties was much better can be very positive – it reminds the employee of happier times and that helps them see the employer as a former colleague with shared memories, and not solely as an enemy in litigation.

Who should make the statement – the lawyers or the clients themselves? I always encourage the parties to speak direct. It can be inimical to any impression of openness and willingness to talk if they hide behind their legal representatives.

The tone of the statements can inform the next steps in the mediation. If one or both come across as hostile and uncompromising, then the mediator will generally recommend a move straight into private sessions. However, sometimes the statement reveals that the parties are closer than they thought. In those cases, the mediator might potentially suggest that they continue talking in joint session to see where it goes.

9. The Exploration Phase

At the end of the joint session, the mediator will move the parties on to the exploration phase, talking separately to each party. They will normally visit first the one who showed the greater emotion in the opening session (generally the employee), because it is there that they can immediately be reassuring to best effect.

It is tempting to try to herd the protagonists straight into the bargaining stage, but this will almost always be a mistake. Whether they consciously know it or not, the parties will generally need some reinforcement of the underlying framework of the mediation (neutrality, confidentiality, etc.) before they will genuinely begin to open up to the mediator, their advisers and indeed sometimes to themselves also as to their needs from any resolution. It would be naïve to expect a party to bare their soul in the first private meeting.

Mediators therefore tend to begin the first private session with an open question – some variation on how did they feel about the other party's opening? – and will be patient and silent while they vocalise their thoughts. Even where someone has come armed with lawyers, mediators tend to park themselves physically closer to the individual in order to help build the necessary rapport. The lawyers can of course be involved but we would generally discourage a party from relying on them to the point where they dominate the meeting. As if.

This first private session will be very much more about feelings and very rarely about either numbers or the legal merits of the dispute either way. Pushing into bargaining too quickly compels a retreat into previous legal positions and so will be counterproductive. However, building trust takes time, and time is an odd thing in a mediation because it runs at different speeds in the different rooms. Time while the mediator is with one party runs very quickly for them, but the same period will feel much longer in the other's room. That party may begin to feel abandoned or that the mediator is somehow favouring the other, which is prospectively the death of the mediation altogether. Therefore, in order to keep both parties engaged, a good mediator will continually inform each party roughly how long they will be with the other, and tell them straight away if there is a need to extend this. Keeping an eye on the clock and appearing at the same time to be focused entirely on the party is one of a mediator's key skills.

Even where no figures have been discussed or concessions made at the first private session, the mediator will reinforce the confidential nature of the proceedings in that room by asking specifically what they can take from that private session back to the other side. It may be no more than an emotional reaction to the opening, positive or negative, but it will still help the early hesitant steps towards a meeting of minds. After two or three such meetings for each side, none probably lasting more than about 15 or 20 minutes as a rule, we will have prepared the ground to move on to the bargaining phase.

10. A Look Into the Insult Zone

At some point, the parties will have got as far as they are going by exploration of common emotional ground and objectives and will want, in fact need, to begin to move into the harder bargaining phase.

Even in the protective cocoon of a mediation, there is often a reluctance to be the one to make the first move. Employers fear that it may look weak or that the proposal put forward is so ambitious as to provoke an immediate waltzing-out by the other party. This is not a necessary concern, and I always encourage employer clients in particular not to take that stance. Not being willing to make a first move at all is far more likely to persuade the employee that you are not taking the process seriously than making one that may well be unacceptable but at least has some rationale attached to it.

You should remember also that the mediator may already have gained from the exploration phase an outline idea of what the other party wants or its likely negotiation style. Sometimes, this may lead them to park a particularly thorny issue (usually the money) then to approach the settlement question initially via some softer avenues. These might include references, outplacement or some acknowledgement/apology designed to reduce the emotional head of steam carried by the employee. Signs that the employer is willing to make such concessions are valuable to the progress of the mediation even if the reality is that these are points of much greater worth and significance to the employee than they are to the employer.

Nonetheless, the positioning of the opening offer can set the tone, good or bad, for the rest of the mediation. For that reason, the mediator would generally seek to "reality test" the opening proposal before taking it to the other side. That means effectively holding up a mirror to a party's suggestion, perhaps in the light of the other's previous position in negotiations or in its opening statement, and asking how genuinely realistic it is. Often, it is effective to ask one party how, if they were the other, they would receive that offer. Would they see it as a constructive approach, even if well short of acceptable, or as so far adrift of what they know the other wants that it represents no more than an insult?

Tough negotiation is one thing, but once the parties stray into the Insult Zone, the mediation is already on its last legs. After all, if all a party wanted to do was insult the other side, it could have done it in correspondence before we all got there. Once at the mediation, however, the mediator will make a point of reiterating what you are there for – to try to reach a deal, and not to maintain the same entrenched postures that had failed to lead to settlement before you started. This is particularly important where the lawyers are doing most of the talking. They may have advised on the action or dismissal or claim giving rise to the mediation, and they may fear that their client will round on them if, having been paid for that advice, they now advocate too "weak" a settlement. A good lawyer will however be able to separate the legal merits of the position from the best interests of the client – you can have a cast-iron case at law but that does not mean that you want the cost, distraction, risk or PR associated with fighting it.

Next, carrying on with the bargaining phase and telling your BATNA from your WATNA.

11. BATNA, WATNA and Other Tools

Earlier in this guide, we discussed the transition from exploration to bargaining in an employment or workplace mediation – the move from the preliminary skirmishing to the full-blown negotiation process. But surely, the parties could do the horse-trading between themselves? True, and they sometimes do, but the growth in mediation as a dispute resolution tool in the employment arena is evidence that sometimes it just takes three to tango. In this section we will look at some of the techniques that the mediator uses to push the parties towards each other.

Reality Testing

This is a catch-all description of the process of encouraging a party to take a hard look at its own position to see if its assumptions about facts or risks or costs are correct. This is a delicate process – too much playing devil's advocate risks the perception of loss of neutrality, that the mediator is advancing their own thoughts on the merits, or surreptitiously pushing the other party's confidential position.

Posing some external challenges is a necessary part of the mediator's role, however, and a party may be willing to have that debate with the mediator where the same points raised by the other side would be dismissed just because they are raised by the other side.

BATNA and WATNA

These may sound like Japanese manga cartoon characters, but in fact they stand for Best (and Worst) Alternative to a Negotiated Agreement. Put shortly, these concepts are compared with any given settlement proposal to assess whether that proposal can realistically be beaten by other means. Taking an ordinary unfair dismissal claim as an example, the employee's BATNA is obviously winning the claim. But though that might bring them some money, the quantum may be up for debate, they will probably incur irrecoverable legal costs, and they will definitely face considerable stress, delay and potentially adverse PR also – and that is if they win. So, even the best alternative is not necessarily all that great. Turned on the employer, the WATNA will be to spend all those costs, put up with months of internal flak from managers who do not want to take the witness stand and will not necessarily be a safe pair of hands when they get there, and then to lose a possibly significant sum in compensation in the glare of a public forum. Even its BATNA (to win) carries all the same downsides except the compensation award. Against that is a reasonable cash offer to a leaver or some other accommodation for a continuing employee (even if the employer feels it to be totally unmerited or the employee thinks it short of their aspirations) necessarily such a hard step?

Reframing

This is the putting of a different spin on something said by a party with the intention of altering the message in it. A 75% chance of success can equally be described by the mediator as a one-in-four chance of losing. If a letter of apology is too much for the employer to swallow, perhaps an "acknowledgement of regret" would be more palatable, even though in practical terms it means the same thing.

Walking to the Balcony

Also "to the abyss", "precipice", etc., this is a similar technique to the WATNA but a little more "visual". It involves encouraging the party to look out as if over a sheer drop and to contemplate the future, starting the very next day, if settlement is not reached. Are they really ready to take that leap? How different would that future look if today were the last time they had to live with this dispute? How happy would they be to wake up tomorrow morning with all this behind them?

In the end, these are all just tools in the good mediator's armoury, each one aimed at helping the parties distinguish between what they would like to achieve out of the mediation on the one hand from what they might just be willing to live with on the other.

12. Effective Negotiation Styles

Clients often ask, sometimes in the mediation itself, what negotiating stance they should adopt in order to get the best deal out of the process.

This is dangerous territory for a mediator. It goes without saying that they cannot disclose anything of the other side's negotiating position, e.g. that although they have said they will do a deal at £x, they would really go for £y. Similarly, they cannot advise either party as to the offer they should make themselves, with the possible exception of some gentle shot across the bows of any offers that they fear will fall into the Insult Zone and so jeopardise the whole process.

The reality is that there are as many negotiating styles as there are disputes, and their effectiveness or otherwise is entirely a function of their opponent. Some parties will crumble quickly if an employer makes a low offer and steadfastly refuses to increase it. On the other hand, others will regard that as a sign that it is not taking the mediation seriously and they abandon ship early on. It is consequently totally impossible to provide a definitive guide to negotiation tactics that will work every time.

Our top tips for employers:

- Do not be tempted to say your offer is "final" unless it is, meaning that you will reject even the tiniest increment over that position. While this sometimes works, if it does not, then to move your offer materially after playing the "final offer" card will cost you dearly in credibility terms for the rest of the mediation.
- Your negotiation movements should ideally decrease in size (or percentage) each time. To change your position in same-size steps does not give the other party any reason to sense the narrowing of the opportunity to settle. CEDR adopts the rule of thumb that you should aim to be somewhere close to settlement in no more than three offers and counteroffers each.
- Focus initially on things you can agree on – a reference if the person is leaving, a low-cost but cosmetically important accommodation of some sort if they are not. Sometimes leaving the money until later allows the parties to recognise that there is less between them than they thought.
- Adopting too hard a line too soon will risk alienating the other party. Later in the day, this will probably be much more effective.
- Keep positive – the mediation day can be long and hard, and the great majority of breakthroughs come only at its end when the parties are otherwise facing the prospect of a day's time and costs wasted. A positive and reasonable approach conveyed to the other side also denies them to some extent the ability to blame you if the mediation fails. Instead, they must face the unattractive possibility that the failure was down to them. This is a powerful spur to make that extra small concession that will put the thing back on track.
- Try to depersonalise the issue – sometimes described as "working hard on the problem and soft on the people". Emotions can block negotiation progress but, instead of dismissing them (easy for the employer but wildly provocative to the employee), try to recognise them up front and to make it clear that you do understand the other's position. This overt awareness of what the other party is feeling will also help you understand how any given offer is likely to be received. An early attempt to put yourself in the employee's shoes may well assist movement towards settlement.
- Remember that your objective is not to come out with a deal you are happy with, but just one you can live with. The mark of a good settlement, I have heard it said, is that it makes both parties equally unhappy. Be prepared to abandon points you would have preferred to maintain, in the knowledge that your opponent is doing the same. If you are too wedded to your position, then you should just get on and litigate it instead. On the other hand, if you want the dispute resolved now without that cost, delay and uncertainty, then you will have to be willing to pay (in some form or other) for the privilege.

13. Mental Health and Mediation

We are sometimes asked if resolving workplace disputes by mediation is still viable if one of the parties is suffering from mental health issues. The quick answer is that it usually makes use of that process even more desirable, but let us take a closer look at that proposition.

The first point to make is that absolutely everyone who turns up as a party to a mediation does so in some degree of heightened mental state or disturbance: uncertainty, fear, aggression, desperation or simply a childlike faith that if they sit in their room long enough the mediator will bring them on a plate a deal they are happy with. The point at which any of those emotional states trip over into something clinically recognisable as a mental health condition and/or a disability is neither clear nor relevant to the mediator. The existence or suspicion of a metal health issue is just something else that they must take into account in the conduct of the process, just as for a physical condition or impediment.

In the main, the things that make mediation work for the great majority of parties to it are the very same things that should increase its attractiveness and efficacy for those suffering with a mental health condition. For example:

- The process is **non-judgmental**. The mediator is not there to allocate blame or to criticise. While they will have to pass on responses from the other side that may be hard to hear, the employee still has a safe space within which to receive and digest those messages in their own time.
- The parties are **in control** of the process. If the employee needs a break, they can have one. If they want to walk out, they can. If they want to say things to the other side that are important to them, then, within limits, they can do that. If they do not want to see the other side, then they probably do not have to. That is not to say that any of these things are necessarily helpful to the progress of the mediation, and the mediator may well seek to persuade them otherwise, but that is still better than its collapsing there and then through the employee's inability or unwillingness to continue.
- Mediation takes place in a **strictly confidential** environment, allowing the employee to be less concerned that the pressure of the process may lead them to do or say something they fear could be used against them later. Less concern equals less stress equals less chance of their doing so anyway.
- It is possible that they may even hear messages that are **more positive** than they expected. The employer may express an active wish to work things out with them so that they can come back to work as soon as possible, or it may expressly recognise past successes or efforts that their condition may have led them to think had been ignored or overlooked.
- They may be accompanied and guided throughout by a friend, family member or lawyer for moral and psychological support.
- No one will impose anything on them. If they are not content with the best that the other side can offer, they do not have to take it. In addition, it should be borne in mind that mediation solutions can be about much more than cash – if the mental health issue is caused or exacerbated by work, for example, solutions could include accommodations to address this. Maybe an agreement for different hours or duties, a change to reporting lines, a transfer, some time off, some form of apology or explanation, and a whole range of other options that an Employment Tribunal simply cannot provide.
- Obviously, this is a world away from being trapped alone on the witness stand facing relentless cross-examination in the glare of a public tribunal. Though there is clearly no need to have any form of mental health condition to appreciate that distinction, it will be more than usually valuable for an employee who does.

Two final points for the employer:

- It is of course unnecessary to say that there is a world of difference between having a mental health condition on the one hand and being mentally incapable of contracting on the other. An agreement reached at mediation with an employee who has a mental health condition is usually every bit as enforceable as one with someone does not.
- Because the mediator must be particularly careful to ensure that the employee understands what is happening and the ground rules applicable, they may appear superficially to favour the employee and hence potentially prejudice the appearance of neutrality. The sensible employer will appreciate the difference between empathy and sympathy, however, and will not take any such message from the mediators going out of their way for an employee who is known to be unwell.

14. Drawing the Line at Drawing a Line

If you try to mediate a workplace clash, then the hardest part is often to get the parties to focus on the future of that relationship, not the recent past leading to its breakdown. For so long as one or both find themselves unable to let go of that past, there will be obvious difficulties in establishing a new and untainted platform from which to move forward. For that reason, you sometimes see in mediated agreements an express term that the parties will "draw a line under the past", or some similar phrase. Sometimes it is not stated expressly, but is nonetheless an implicit part of the agreed arrangement working successfully in practice. Either way, what does "drawing a line" actually mean? What level of obligation does it impose on the signatories to the agreement? Should you seek to include it expressly in your settlement terms, or to leave it unsaid?

First, a couple of things that "drawing a line under the past" in a workplace mediation agreement does not mean. It does not mean that the individual is being asked to agree that what they say happened in the past did not happen, or that they had no basis to be unhappy about it, or that they have to forget it all. It does not mean that they are waiving their right to refer back to those events if the mediation agreement comes unravelled in practice. It does not mean that, internally at least, they cannot continue to bear resentment towards the other party.

What it does mean, however, is that if the future working arrangements agreed at the mediation are complied with by the other side, and if that helps the working relationship stagger back onto its feet again, then neither party will shatter that fragile progress by bringing that past back onto the table. That might be via some formal complaint or grievance, or even just by bringing it up in conversation with the other side, as either will necessarily force them to defend themselves and then off we go again.

In other words, it should boil down to a relatively simple question: if the other party to the mediation does as they have agreed, can you trust yourself and the process enough to swallow (outwardly at least and conditionally only) your perhaps entirely justified unhappiness about events past? Or do you feel so strongly about the situation that you are absolutely compelled to seek a formal resolution regardless of the damage it will do to the working relationship? If that is genuinely your position, some might say that you should not mediate, that you are just wasting everyone's time and instead that it might be best all round to get on with the grievance or disciplinary process and take your chances there. Before you go that way, however, think on these two points: first, you can't really be sure what your position is until you have heard what the other party has to say in the mediation. Second, if all that stands between the employer and a functioning resolution of a workplace dispute is your refusal to look forwards rather than backwards, then you may find that whatever your personal perception of the rights and wrongs of the matter, it is actually you who have become the problem.

So, if the employer can contain itself long enough to give the arrangements agreed a chance to work, and you can adopt a professional exterior while doing so, then do not be concerned by committing yourself to drawing that line. You are agreeing to do something essential to the mediation's success, but not at any cost to your own position should the wheels come off later.

This takes us to whether that obligation should be express or left implicit. Ultimately, this is obviously a matter for the parties themselves, but in my view, express is the way to go. First, it is a silent reminder to yourself, when your resolve begins to wobble, that that is what you agreed to. Second, it is a visible sign to the other party of your willingness to do what is necessary, however hard, to put the past behind you.

15. Concluding the Process

Not all mediations settle. The Employment Tribunal mediation system boasts a success rate of over 70%, while about 85% of commercial employment mediations result in an agreement. Those who do not settle can go off to fight another day, and best of luck to them with that, but for those who do reach an agreement, what are the rules about wrapping up the process?

That depends very much on what the mediation is about. If it is a matter that is or could be the subject of Employment Tribunal proceedings, then the employer is still safest requiring the completion of a statutory compromise agreement. The fact that the agreement is reached via a mediation does not vary the usual rule that an ordinary letter of agreement is not effective to waive statutory claims.

However, many mediations are about resolving tensions between colleagues that will otherwise explode, the shrapnel causing who knows what damage to those individuals, the colleagues around them and the employer's business. The terms of settlement in those cases (also called "facilitations") can often be little more than an increased mutual understanding of the other's position or sensitivities, or perhaps an apology (more likely when reframed as an "acknowledgement") or some express commitment to deal differently next time with any issues arising. CEDR recommends that all settlements should be in writing, but I have found in some cases like this that the process of reducing this mutual understanding to paper can do more harm than good. This is because the parties then inevitably focus on the precise words used and not on the behavioural changes that they have agreed. If the protagonists are genuinely content to resolve the matter on a handshake, then it is not for the mediator to require otherwise.

Even where there is to be a written agreement, the mediator cannot advise on its detailed terms for fear of being perceived to have lost their neutrality. The most they can do is to remind the parties of the different components of the settlement at the close of the bargaining stage, but it is up to them to determine what goes into the final agreement. For this reason at least, it can make sense for the employer to have its advisers available in person or on the phone towards the back end of the mediation day.

Going home after a failed workplace mediation is a deeply depressing business for all parties. Sometimes they are just miles apart from the start, and failure is always on the cards, but equally, mediations occasionally founder on a last-minute moment of fatigue, temper or intransigence when they had seemed just about to do a deal. In those circumstances, a good mediator will let the parties reflect overnight on the wasted cost and lost opportunity to put it all behind them, and will contact both again the next day to see if something can be snatched from the jaws of defeat. A meaningful proportion of mediations that do not succeed on the day are resolved soon afterwards in this way.

16. What if Mediation Fails?

Sometimes employers are reluctant to sponsor mediation of workplace disputes on the grounds that if there is no agreement, that is just time and money wasted. In some cases, that is true, but as a general principle, it is not. Even a failed mediation can bring significant benefits to the employer, such that even (in fact, especially) when the prospect of resolving some deep-rooted and bitterly held complaints seems slim, it is often still worth trying.

First, you never know. Feedback for mediators often begins "I never thought a resolution was possible, but thanks to you …".

Second, even if it does not succeed on the day, mediation plants seeds in the minds of those involved. Is a formal process really going to get me what I want? Will there be an outcome for me from that process that is worth the grief, stress, cost and delay that I will suffer in pursuing it? How is this process affecting my family, my friends or my relationships with other colleagues? Will my employer ever truly be able to get past my not resolving the matter now? And so on. A good mediator will therefore tend to contact both parties in the few days afterwards to see whether a night's sleep and some further reflection has led to any movement in their thoughts. Whether immediately subsequently or at a later date, those seeds can often lead to a resolution that was not quite within reach on the day.

Last, a mediation that is refused or fails tells the employer something very useful about the relationship that has broken down, whether that is between colleagues or between the employee and the business. It provides essentially incontrovertible evidence that that relationship is dead. That means that if the employer proposes the dismissal or transfer of one or both parties because of that breakdown, it can do so on the basis of hard fact, not mere assumption or suspicion that the position is irretrievable. That will put it in a much stronger position if that dismissal or transfer is challenged in the Employment Tribunal. There will be very few circumstances indeed where the mere fact of suggesting a mediation will fall outside the range of reasonable responses open to the employer.

17. Fancy Some DIY?

Much of this guide relates to how a professional external mediator might be expected to address a workplace dispute. However, once you have your head around it, mediation is a process anyone can apply. It is less a question of formal accreditation as mediator and more a state of mind, a willingness to look beyond the traditional questions of right and wrong to the much more important issue of how we fix it all. This is not always easy for representatives, employees, managers and HR all brought up in the shadow of what they think the Acas Code of Practice says about grievance procedures plus umpteen years of decided case law around what makes a fair dismissal. That said, the sense of liberation all round that follows the realisation that it is the future that matters far more than the past is considerable, and it does not take any specialist expertise to get there.

Therefore, if you want to do this in-house, you are absolutely free to try. Fundamental to this will be how far the mediator (internally often better referred to as "facilitator", though the process is essentially the same) is seen to be impartial and without their own agenda or views on the merits of the dispute. This takes a relentless pursuit of the holy grail of resolution, the only objective an employee can reasonably have when they start a complaint. Keep in mind at all times that the formal "Acas" process is not an end in itself, only a means to an end – the end being that resolution. If the parties can get there through your reiteration of those principles and highlighting the sheer level of self-interest for them in doing this right, you are far more likely to end up with a real resolution, not just a legal one.

Sometimes, however, there are good reasons for going externally even if you think that you do have the mindset to do this yourself. First, using an external mediator immediately pulls the rug on any argument that either of the parties might try about bias or favouritism, perhaps on the basis that you are seen as particularly employer-leaning or more personally friendly with one protagonist than the other. Second, the employer's spending a little money on seeking a resolution is very clear evidence both to the parties and any later Employment Tribunal of the value that it attaches to the preservation of the relevant relationship. Third, while it may not be easy to equate the £4,000 to £6,000 that a top-end mediator will cost you with the phrase "a little money", this is of course buttons relative to the financial and non-financial costs associated with a full-blown grievance going sideways. Last, with no disrespect, unless you do it all the time, then an external mediator is likely to be better at it, so giving your mediation proposal much greater credibility. The best possible advertisement for mediation in your workplace is that it works.

Contacts

Alison Treliving
Partner, Manchester
T +44 161 830 5327
E alison.treliving@squirepb.com

David Whincup
Partner, London
T +44 207 655 1132
E david.whincup@squirepb.com

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