

Employment Tribunals (Scotland) **Judicial Mediation**

When a person makes an Employment Tribunal claim normally the process which is followed involves a Hearing taking place before an Employment Tribunal at which evidence is heard and legal arguments are made with a decision (judicial determination) then being made on the case. The process is a formal one involving evidence being led from witnesses and cross examination, which is very similar to what happens in an ordinary court. Mediation provides an alternative way to resolve a dispute which does not involve going through the normal tribunal hearing process. It is a form of what is commonly referred to as ADR - Alternative Dispute Resolution.

Mediation is a process in which parties who are in a dispute seek to build an agreement with the assistance of a trained mediator acting as an impartial third party whose aim is to help the parties reach a solution to their problem. Mediation is voluntary and aims to offer parties the opportunity to be heard, to hear each other's perspective and to decide how to resolve their dispute themselves. In a mediation process the mediator does not take sides or make judgments. Instead, his or her focus will be on developing effective communication between parties and building consensus in relation to a solution to the dispute which exists. Employment Tribunals (Scotland) offers judicial mediation in certain types of cases. However, while judicial mediation is an alternative to a tribunal hearing it is not an alternative to ACAS conciliation which will continue to be available in the normal way. Although ACAS and the tribunal judiciary collaborate in relation to judicial mediation, the statutory duty placed on ACAS is not compromised by the process and ACAS maintains its independence.

In the judicial mediation process the mediator is an Employment Judge who has been trained as a mediator. The Judicial Mediator will not express a view on the prospects of success of parties if the case was to be judicially determined and will not offer legal advice to parties. However, using his or her experience and knowledge, the Judicial Mediator will assist parties who wish to find a way of resolving their dispute which is mutually acceptable.

Suitable cases are identified, as part of the normal tribunal process, by an Employment Judge usually at a Case Management Discussion. To be considered for the judicial mediation scheme a case

- must include a discrimination complaint or a complaint of unfair dismissal.
- must normally be predicted to last at least three days if it was to proceed to an ET Hearing.

However, not every case that meets these criteria will be suitable for mediation nor is it possible to offer judicial mediation in every case where parties think it might be of benefit. It is ultimately for the Vice-President of Employment Tribunals (Scotland) to make a decision as to which cases will be put forward for judicial mediation, bearing in mind resource constraints. An important factor which will be taken into account in prioritising the cases which will go forward for mediation is whether the claimant is still in the employment of the respondent (employer) or wishes to return to that employment. This is because the type of approach used in mediation (as opposed to a judicial determination process) is particularly helpful if the parties are going to need or want to work together in the future. If, at the initial CMD which takes place, the Employment Judge considers the case may be suitable for judicial mediation s/he will raise this with parties who can indicate at that time, or in writing within 7 days of the CMD, if they are interested in pursuing this option. An information sheet will be made available to assist parties in coming to a decision. Occasionally an Employment Judge may identify a suitable case other than at a CMD, in which case s/he will direct that the parties are written to and asked if they would be interested in pursuing this option. If both parties do wish to try to achieve a mediated resolution the case file will be sent to the Vice President who will make a decision about whether mediation is to be offered. Parties will then be informed of that decision in writing. If judicial mediation is going to take place the Vice President will appoint an Employment Judge who has been trained as a Judicial Mediator to deal with the case. The Judicial Mediator will be given the Claim and Response Forms, the CMD note from the first CMD and any other information in the file that is deemed relevant by the Vice President.

A telephone mediation arrangement CMD will be arranged quickly thereafter so that the Judicial Mediator can introduce him/herself to the parties, explain the process which will be followed in more detail and confirm the matters which will be the subject of the mediation process. It is very important that parties (or their representatives, as the case may be) make themselves available quickly for this mediation arrangement CMD. During the course of this call the date for the mediation meeting itself (which will take place under the rules governing CMD s) will be fixed. Again, it is important that parties/representatives make themselves available as quickly as possible for the judicial mediation meeting. The fact that mediation is taking place will not delay the case being listed in the normal way for its full Employment Tribunal Hearing nor will mediation delay the date which will be fixed for that Hearing. Generally a mediation meeting will be scheduled to last one day (or occasionally two).

Representatives can attend the mediation meeting with their clients but their role will be rather different to the one which they perform at an Employment Tribunal Hearing, given the nature of the mediation process is different from that of a judicial determination. The Judicial Mediator will discuss this at the mediation arrangement CMD

The Judicial Mediation is confidential and held in private. If the mediation process is successful parties will be able to finalise any agreement which emerges with the assistance of Acas. Acas has indicated its willingness to be involved in this process. It is also open to parties to finalise the process by means of a compromise agreement. It is therefore essential that an appropriate decision maker from the respondent is available on the day of the Judicial Mediation to finalise any agreement.

Nothing which is said or which occurs at the Judicial Mediation may be referred to at any subsequent hearing. If the mediation process is not successful and the case has to proceed to a Hearing the Judicial Mediator will have no further involvement with the case and will not disclose to any other Employment Judge what happened during the Judicial Mediation process. As noted above, parties and their representatives will not be able to make reference to what happened during the mediation process if the case needs to progress thereafter to a hearing of any type.