

Judicial Mediation



What is it, when it might be available, & how does it work

What is Judicial Mediation?

Judicial Mediation is a process administered by the employment tribunal service where parties to an existing claim in the employment tribunal are offered the services of an Employment Judge (trained as a mediator) usually for up to one day.

It is only available where there is already a claim in progress.

What is it for?

The purpose of Judicial Mediation is to offer an alternative to an employment tribunal claim going to a full hearing. The aim is that by the end of the mediation, the parties will have agreed the terms of a binding settlement of the claim(s) that will end the case.

The option of Judicial Mediation will usually be discussed at the first preliminary hearing in a case, as an option for case management. Judicial Mediation can only happen if all parties consent. If they do, the idea is that the Mediation will be listed far quicker than the full hearing of the claim would be, and for a shorter time period. The preparation required is much less. The hope, therefore, is that at a relatively early stage the parties can reach acceptable settlement terms.

The advantages are of course that this saves time, stress and potentially cost for both parties to the claim. The outcome is agreed, rather than being imposed on the parties by the employment tribunal and is final – it cannot be appealed or reversed.

The agreement can include outcomes that could not be awarded by the tribunal, for example the Claimant's employment continuing but in a new role or subject to agreed reasonable adjustments. Where employment has ended, the terms of a reference could be agreed, or the Respondent might agree to pay for some training or equipment the Claimant needs to help them find a new job.

Where the Claimant has raised other concerns that the employment tribunal could not deal with as part of a claim (for example in relation to data protection or personal injury not linked to discrimination) the agreement can include resolving them.

The outcome is usually recorded in a confidential ACAS COT3 document. The Judicial Mediation itself is private (unlike a full hearing, which can be attended by the public/press and where the outcome is published online and may be reported).

A Judicial Mediation which ends in a settlement also saves employment tribunal resources.



When is Judicial Mediation available?

Judicial Mediation is generally offered where the final hearing of a case is expected to last 3 days or more. Therefore, it is not usually offered in straightforward claims for unfair dismissal, wages or holiday pay.

Even if all parties agree to mediate, Judicial Mediation can only be offered by the employment tribunal. They may take the view having heard from the parties that Judicial Mediation would not in fact be effective to resolve the case in the time allowed, and would only use up more resources. If this happens, the parties are still free to mediate privately, but this will usually involve having to pay an independent mediator.

Please see our Mediation Services page for further information about private mediation.

How does Judicial Mediation work?

Preparation

Hearing arrangements

If, at a preliminary hearing, the parties express a wish to participate in Judicial Mediation, a short telephone hearing will be scheduled between them and the Regional Employment Judge. At this hearing Judicial Mediation will usually be offered if it appears likely to succeed. This is usually accepted where it's clear that both parties are genuinely willing to compromise. Arrangements will be made for the date, time and location of the Judicial Mediation (often by video).

Basis for negotiating a settlement during the mediation

Parties may be ordered to exchange and send the Judge an up to date Schedule of Loss, a Counter-Schedule of loss (which is the Respondent's own assessment of the value of the claims, should they succeed, in response to the Claimant's Schedule, which the Respondent may feel is overstated), and a limited number of documents (usually the claim and response forms, any amendments or further particulars and any case management orders especially if they include a list of issues).

Parties may also be asked (and if not formally asked it can be useful anyway) to prepare a "position statement" setting out what they would be willing to settle for any why.

Parties are NOT expected to have all the documents relevant to their case ready for presentation (although if you have them to hand it can be useful if you need to look anything up). Nor are they expected to prepare witness statements for a Judicial Mediation. When dealing with a Judicial Mediation a Judge will not hear any evidence, from anyone. You will not get to present your arguments directly to the other parties to the case.



Groundwork in case the parties agree a settlement in principle

It can be useful to know before the Judicial Mediation what the written agreement would look like if settlement terms are agreed. The Respondent (the employer) will find it useful to have a draft prepared in advance to save time on the day of the Judicial Mediation.

As a Claimant you can ask the Respondent to provide you with a draft (minus figures and other specific settlement terms) of any agreement it is likely to want you to sign if settlement is reached, such as any confidentiality agreement or whether a reference will be offered.

You should let the ACAS officer assigned to your case know that a Judicial Mediation is happening, and ideally ensure that they or a colleague will be on hand to confirm a binding legal agreement if settlement can be reached.

On The Day

Judicial Mediations are often listed for one day. They can be tiring and intense. At present they are very often listed to take place online. It is far easier to manage a Judicial Mediation than a full hearing online, because there is very little direct interaction between Claimant and Respondent. If it is online, you need to make sure you attend from somewhere where there is reliable internet access, that you can hear what is going on, and you are not going to be disturbed. You need to be available all day, although there will usually be a lunch break.

Whether you are online or attending a Judicial Mediation in person, it is a good idea to ensure you have plenty to drink and snacks readily available.

You must attend the Judicial Mediation ready to make decisions. If you are attending for an employer, then you must have authority to settle the case on the day. Parties can attend with professional or lay representatives (e.g. friends or family) or on their own.

The first step is usually for the Judge to meet with all parties together, either in a virtual room or in person. The Judge will introduce themselves, explain the format for the day, and remind everyone of the strict rules about confidentiality. They will also confirm that Judicial Mediation is voluntary, so it is open for any party to withdraw from the Judicial Mediation at any time.

The parties will then split off into individual rooms. Where the Judicial Mediation is online, in practice this often means that the Judge will open and close meeting rooms for you to join, so no one else can inadvertently hear what is said in your room. The Judge will usually either set a time to return to the "room," or will call or email you to invite you back in.



The Judge will meet with each of the parties in turn (usually starting with the Claimant) to find out what their desired outcome is. You are not expected to make legal arguments to justify your position. The Judge's role is not to give advice. They are not allowed to advise the parties, although they may give an indication of their view of the strength or weakness of particular points and the risk of pursuing them. Nor will the Judge try to impose solutions. They will want to focus on areas of agreement and manage expectations, whilst ensuring that both parties understand the implications of terms they might be considering.

Having heard your view the Judge will confirm what you are happy for them to relay to the other party. They will then go and meet with the other party, relay what you have asked them to, and establish the other party's view in return. The Judge might encourage both parties to consider the risk, cost, uncertainty, and potential reputational damage of litigation, as well as broader outcomes to the dispute beyond financial compensation.

The Judge will go between the parties as many times as necessary to reach agreement, or until it becomes obvious that agreement will not be reached, or at least not in the time allowed.

If agreement can be reached the usual next step is to agree it in writing and then send the written agreement to ACAS for them to confirm that a binding agreement has been reached. ACAS would then formally let the employment tribunal know and the case will be withdrawn from the hearing list.

It is important to understand that the position statement and anything said in the Judicial Mediation are confidential. If the Judicial Mediation is not successful, the Judge dealing with it will have no further involvement in the case, and the parties may not refer to anything that happened at the Judicial Mediation to support or defend their case going forward.

After the Mediation

If the parties reach agreement at a Judicial Mediation, the employment tribunal claim is over, and cannot be re-started under any circumstances. Neither party can revisit the terms of the written agreement.

If you are unsure or need more time to consider, the end of the Judicial Mediation day is not necessarily the end of settlement discussions. If the Respondent makes an offer for the first time at Judicial Mediation and you decide you need to get some legal advice on it or think about it some more, you can ask them to leave the offer "on the table" for a week or two while you do so.

If the resolution of the claim involves a payment of money, then it is important to ensure the paying party has the correct bank details for the receiving party, and that a date for payment is included in the agreement.

If the agreement is not honoured then, as long as it was finalised through an ACAS COT3 process the Claimant can follow the enforcement procedures set out [here](#):

If the agreement was finalised through a settlement agreement, the Claimant would only be able to sue the Respondent(s) for breach of contract.

