

## What is Mediation?

Mediation is a method of resolving disputes in which a third party, the Mediator, facilitates a process designed to assist the parties in reaching their own voluntary solution and agreement.

Mediation differs from litigation, Arbitration or Adjudication as each of these leads to a third party imposing a binding decision on the parties.

Although Mediation is a flexible process which can be adapted to suit particular circumstances or needs, typically the stages might include:

- In advance of the Mediation
  - Brief written summaries of the dispute submitted to the Mediator.
- At the Mediation
  - Signing of the Mediation Agreement in which the parties confirm their participation in the process and their understanding that information given in the Mediation will be on a without prejudice basis and is to be kept confidential unless otherwise agreed.
  - An initial joint meeting between the parties and the Mediator with presentations setting out the respective positions
  - Private sessions (sometimes referred to as caucus sessions) in which the Mediator meets privately with each party in turn. The Mediator shuttles between the parties gaining a better understanding of the issues and endeavouring to identify potential settlement options.
  - Further joint meetings are held as appropriate during which face to face negotiations can take place and agreements can be reached.
  - Where an agreement is reached it can be written-up as a legally enforceable contract if this is what the parties require.

Mediation is a confidential process to the extent that the parties wish it to be. This includes confidentiality inside the Mediation and also in respect of any agreement reached. The Mediator will keep any information given by a party in private session confidential unless the party agrees that the information can be shared.

The advantages of Mediation are its speed, flexibility and relative cost. It also allows for non-legal interests to be taken into account in any agreement reached between the parties. For example a compromise might include a

promise of future work. This non-adversarial approach often allows relationships to be maintained or re-built in a way which would be unlikely to happen with more adversarial methods of dispute resolution. Mediators encourage parties to consider their interests and not merely to concentrate on their legal rights.

The use of Mediation is growing partly as a result of parties seeking simpler and cheaper means of resolving disputes and partly as a result of encouragement from the courts who now require parties to make every effort to resolve their dispute before it ends up in court.

The success rate for Mediation is high (around 80%) and the reasons for this include:

- It encourages the parties to communicate
- It gets the right people around the table (authority to settle is important)
- It allows the parties to have their say (to a much greater extent than would be possible in other more formal and controlled dispute forums)
- It concentrates on interest based solutions
- It focuses attention on costs and risks

Mediation is conducted on a '*without prejudice*' basis and therefore the parties are encouraged to be proactive in putting forward ideas and seeking solutions which are not binding unless they are incorporated into the final agreement.

Mediation should not be seen as a '*soft option*'. The parties need to prepare thoroughly and should be prepared for a long and demanding day (typically a Mediation is scheduled for one day but can be longer). The Mediator is a skilled neutral third party. It is not his job to impose a settlement on the parties, rather he should facilitate the parties in working through the process and arriving at their own solution and agreement.

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