

## Mediation

### Frequently Asked Questions

#### What is Mediation?

1. Mediation is a creative way to resolve disputes. It may be considered as guided negotiation in which the parties are assisted to negotiate a settlement for themselves.
2. *This is done by an impartial third party, the mediator, listening to everyone's point of view, talking to the parties privately and together, and guiding their dialogue towards a settlement.*
3. *By assisting communication between the parties and exploring the issues which are of real importance to them, the parties are encouraged to find ways to address their present and future needs, rather than dwelling upon who may have been right or wrong in the past.*

#### Who is in Control?

4. *Mediation is voluntary and any party may withdraw from the process at any time.*
5. *The outcome is always within the control of the parties. With the help of the mediator the parties decide for themselves upon a settlement they can live with.*
6. *The mediator does not impose a decision, nor make any kind of judgment - unlike court, tribunals, arbitration or ombuds; the mediator helps the parties to find their own, acceptable, solution.*
7. *Parties in mediation avoid the uncertainty and dissatisfaction often experienced in judicial systems where they have little choice but to accept the judgment made, which none of them may be happy with.*

#### What is the position of the Mediator?

8. *As an impartial third party the mediator's role is to chair the mediation and determine the procedure for the mediation in order to guide the parties to a settlement. The mediator will carry out this responsibility under the auspices of Eskhill & Co which will provide administrative support including liaison with the parties in order to find a suitable date and venue or remote medium for the mediation, exchange any relevant papers and deal with questions that arise about the process.*
9. *Eskhill mediators are experienced professional people on the Scottish Mediation Register who are trained in mediation techniques and achieved accreditation approved by Scottish Mediation.*

#### Will my rights be protected?

10. *Mediation seeks to achieve a settlement that is in the best interests of the parties in the circumstances of the dispute. Unlike the justice system, the mediation process is not intended to find fault, assign blame, or punish anyone.*
11. *The mediation process is 'without prejudice', so that on the rare occasion that a settlement is not reached litigation may be pursued without the parties needing to worry about having 'given away' anything that the other could use in other formal or judicial proceedings.*
12. *And, since mediation is voluntary; any party may withdraw at any time and pursue their rights through litigation or other formal proceedings.*

### Can I trust it to be Confidential?

13. Unlike the potential publicity of court proceedings, the parties to mediation are required to keep the proceedings and the outcome of the mediation confidential.
14. Before a mediation takes place both parties and the mediator, and any other person who is involved in the mediation, will enter into an agreement to mediate which includes a confidentiality clause.
15. The agreement to mediate requires all persons involved to observe the confidentiality of the whole process of the mediation including the written papers and oral communications.
16. This confidentiality can only be set aside with the specific agreement of the parties; if required at law; or, if non-disclosure may lead to significant harm to a person's life or safety.
17. Within the mediation itself the Mediator will keep confidential any information given by one party unless express permission is granted for some or all of that information to be disclosed to another party.

### Where is the mediation held?

18. There are two location possibilities: Face-to-Face Mediation and Remote Mediation.
19. **Face-to-Face Mediation** - It is arranged at a venue convenient to the parties. The venue is normally a neutral place such as a hotel or other meeting facility. Each party will have their own room and there will be a separate room for joint meetings.
20. **Remote Mediation** – It may be by telephone or video conference. We generally prefer that it takes place by video conference and recommend the use of Zoom which has features which enable us to simulate the physical rooms in a face-to-face mediation. Please refer to our information note: An Introduction to Remote Mediation.

### Who attends the mediation?

21. If the parties in the dispute are individuals they are likely to represent themselves at the mediation. If the parties are companies they should be represented by senior individuals who have full authority to reach a settlement.
22. The parties may be supported at the mediation by others who are there to support them or advise them. These people may be friends, or professional advisors such as their solicitor. The decision about who is to attend a mediation should be planned in advance with the mediator. The accompanying persons should sign the agreement to mediate and are bound by the whole mediation proceedings.

### Is mediation time consuming or expensive?

23. Mediation resolves disputes fast, usually within a day. More than 80% of cases that go to mediation are resolved within the first mediation day and many more achieve a settlement within a few days of the mediation meeting.
24. Mediation can be set up quickly, within a matter of weeks or months. The parties' agreement to mediation will need to be obtained, a mediator appointed and a suitable date, time and location found which is suitable to all.
25. Mediation is significantly less expensive than litigation - because months or years of litigation are avoided, as are the consequent fees of lawyers and experts in lengthy proceedings. Parties may of course have legal or other advisors present during the mediation if they wish.
26. The Mediation can take place at any time - it is not limited to ordinary working days or hours. If it suits the parties to negotiate over a weekend, then that's when it happens.

### Is Mediation Binding?

27. Nothing is binding upon any party until an agreed settlement is reached and a Settlement Agreement has been drawn up and signed as an enforceable contract between the parties.

## What happens in a Mediation?

Once the parties have decided in principle that they wish to resolve their dispute by mediation they will select a mediator and agree the terms of the mediator's appointment.

There will usually be a need for a preliminary meeting (which may be conducted by telephone, online or in person) involving the parties and/or their advisors. The meeting(s) may consider a number of procedural matters including:

- the timetable and venue;
- a draft of the agreement to mediate
- representation at the mediation day
- the preparation of case summary documents
- the procedure on the mediation day
- the appointment of an assistant or co- mediator.

The mediator will organise the exchange of case documents that summarise the matter and the issues at dispute as seen by each party, if required. The Mediator will seek to agree a format and style for these documents with the two parties. These documents will then be prepared by the parties and their advisors and be sent to the Mediator in order that they can be circulated to the parties in good time for the Mediation Day.

The Mediation Day will normally be scheduled for a full day and will be chaired by the Mediator who determines the procedure. For remote mediations the 'mediation day' may be split across two days to reduce screen time in a single day.

There may be initial meetings between the Mediator and each party in their private rooms (and in the case of remote mediations this will be in private virtual rooms where confidential discussion can take place). These private meetings will normally be followed by a joint meeting at which the Mediator will clarify the process and each party will make a presentation of their case to the other party and the Mediator followed by dialogue.

After joint dialogue, and at the request of either party or the Mediator, there may be private meetings between the mediator and each party to explore the issues and identify options for moving forward. The Mediator will not discuss anything from a private party meeting with the other party unless authorised to do so by first party.

As the mediation progresses private meetings may be followed by joint meetings. The mediator may hold meetings with any combination of the parties and their advisors as he/she considers may assist the negotiation.

The parties will be free to withdraw from the Mediation at any time after informing the Mediator and if this happens the Mediation will terminate.

The Mediation may be adjourned by agreement between the parties to be resumed at another time and place.

Other than by reaching a settlement or by a party withdrawing, the Mediation may be terminated by the Mediator if he/she considers the Mediation is unlikely to reach a settlement or another substantive matter is discovered such as a conflict of interest becomes known.

If a settlement is reached a Settlement Agreement will need to be drawn up and executed by the parties. This records the parties' agreement in their terms and the mediator may be involved in assisting them in drafting the document. Where the parties have legal advisers involved in the mediation, the Settlement Agreement will normally be drafted by the legal advisers.

If a settlement is not reached on the mediation day the mediator may continue to liaise with the parties if they wish and it is quite common for mediations that do not reach settlement on the day to settle within a few days