

# Why LITIGATE when you can MEDIATE?

Could mediation be a solution for councils and other public bodies to resolve disputes?

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**M**ediation is a form of alternative dispute resolution that has been around for a long time; in fact it dates back to Roman times. A mediator is neither a judge nor an arbitrator, nor even a chairperson. A mediator acts as an independent facilitator of discussions between parties, with a view to resolution.

## Why mediation works in a better way than other forms of dispute resolution:

■ A claim had been brought arising out of the care of an elderly resident at a care home. The man, in his 90s, had suffered a hip fracture, which had gone undiagnosed for some time and his admission to hospital had been delayed. In hospital he contracted an infection, from which he died. The Claimant was his daughter, a retired ITU nurse. In discussions during mediation the daughter's real concerns related to the failure to recognise that the standards of care had been unacceptable, along with the impersonal way her complaints and subsequent litigation had been handled. It was apparent the Claimant had high standards as a nurse and was distressed by the way her elderly father had spent the last weeks of his life. At the mediation there was direct discussion with the managers of the care home and appropriate apologies were given. The



managers of the care home acknowledged deficiencies in the care and indicated they would take steps to avoid repetition of such incidents. The claim settled for a modest amount.

■ The foster parents of a child from a challenging background were concerned about a breach of data protection that had involved disclosure of their identity to inappropriate people. Again, their concerns were more about repetition of mistakes than financial compensation. After detailed discussions directly with the responsible council officers, the couple were reassured that processes had been changed to positive effect. The claim itself settled for a nominal amount.

■ A property developer was in sustained conflict with the local planning department. Every decision made by them seemed to go on appeal. At mediation it was



revealed that his relationship with the local planning department had been soured by a particular individual who took a rigid attitude. This officer was no longer employed by the council. In confidential discussions at the mediation it was accepted there had been difficulties with his approach. The mediation resulted in resolution of a planning appeal on agreed conditions and a more constructive working relationship.

**Some positive features of mediation:**

■ **Confidentiality** - in each case, the confidentiality of the mediation enabled the parties

## Alternative dispute resolution

The two most common types of ADR are mediation and arbitration.

**Mediation** is where an independent third party helps individuals and the organisation/company they are in dispute with to reach a mutually acceptable outcome. The mediator adds formal structure to the communication and the aim is to help both reach a voluntary agreement. The mediator cannot impose a solution.

**Arbitration** is where an independent third party considers the facts and takes a decision that's legally binding on the individual, the organisation/company, or both.

to discuss matters in an open and candid way, which facilitated the resolution of the issues between them. Mediations are, unless the parties agree otherwise, wholly confidential. Parties can also discuss with the mediator specific information they would not necessarily wish to share with the other party; certainly, at that stage. This enables the mediator to understand the true nature of the dispute and guide the parties into constructive discussions.

■ **Identifying the parties' real concerns** - often in a dispute what the parties are really concerned about is not necessarily reflected in the legal agenda. It follows that legal process can result in an outcome that does not resolve the essential reasons for the dispute. Identifying the parties' real concerns enables each of them to get a perspective on the respective viewpoints which enables them to move towards settlement.

■ **Range of outcomes** - a mediation does not have any restriction on how the dispute can be resolved. Litigation is essentially binary in nature, with most disputes being resolved by reference to whether

compensation is payable or not. However, in mediation a whole range of outcomes are possible. These outcomes may well satisfy the parties much more than a simple award of compensation.

■ **Informality and flexibility** - cutting across this is the essentially informal and flexible ➤

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nature of the mediation. The skill and experience of the mediator enables them to judge how best the parties should communicate at any stage in the mediation. There can be long face-to-face meetings (if possible) but communication can also be through the mediator. The position can change during the course of the mediation. It is quite common for a full and at least relatively amicable discussion to take place on a face-to-face basis during the course of the mediation, which might have been thought impossible at the start.

Mediation has a high success rate, usually quoted at 80% or above. It has also a much higher degree of satisfaction from participants than is seen in other forms of dispute resolution. Mediation is particularly appropriate for councils and other public bodies whose interests in dispute resolution go beyond the financial.

There is advantage in terms of stakeholder engagement and in the perception that the council or other body listens to those who are not satisfied with their service. This has been the experience of NHS Resolution who have had a major initiative on mediation, and on which they reported in February 2020.

“Mediation is proven to be an effective forum for claims resolution by providing injured patients and their families with the opportunity to receive face-to-face explanations and apologies. Time can be spent listening and responding to the particular concerns of a patient and their family. The process provides a platform to claimants, patients and their families to articulate concerns that would not ordinarily be addressed in other forms of alternative dispute resolution (ADR).”

Mediation can take place at an early stage, before there has been expense on legal process and before the parties’ attitudes have hardened. The process is undertaken by the mediation provider. A party provides a short position statement and copies of relevant documents. Representation at the mediation is not necessary, but it is important that if at all possible, responsible officers with direct knowledge of the issue attend the mediation. Apologies and assurances are best given by those involved who have personal knowledge.

There is really no type of issue or dispute that cannot be referred to mediation. Mediation can be used in employment disputes within the workplace, and in

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tribunal proceedings, as well as a complaint or dispute that would ordinarily lead to litigation.

Mediation can be conducted by telephone or online. Online mediation took off in the lockdown and has had the advantage of parties remaining in familiar environments. Given the backlog of unresolved disputes, it is likely to remain popular as a cost-efficient and easy to arrange solution.

In addition to facilitated mediation, mediation providers offer other forms of dispute resolution; in particular, early neutral evaluation. This is a form of arbitration conducted in a low-cost way. It could be useful for council disputes in relation to funding, where court proceedings have been met with disapproval.

The cost of mediation is based on an hourly rate, which includes preparation time. The hourly rate and the amount of time is dependent on the complexity of the issues and the amount of money involved. For

example, a two-hour telephone mediation could cost from £200. At the other end of the scale, a whole day mediation in a complex dispute involving considerable preparation time, may run into four figures.

These costs could be seen as an additional cost, given the involvement of the third-party, but this view would represent a false economy. The reality is that using mediation, in particular early mediation, can result in a substantial reduction in resource cost and legal expenses. ●

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Complete Mediation was formed out of a desire to offer a cost-effective alternative to the normal legal process.

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