

## **GUIDANCE NOTES ON ALTERNATIVE DISPUTE RESOLUTION**

The Tribunal has a statutory obligation to encourage the use of alternative dispute resolution (“ADR”).<sup>1</sup> ADR is a voluntary process that enables the parties to avoid costly, time consuming and stressful proceedings. It also keeps the dispute private.

### **JACS and CAJ**

Employment cases are referred to the Jersey Advice and Conciliation Service (“JACS”) for conciliation once the Response Form has been filed by the employer. The case is stayed for 3 weeks to allow conciliation to take place although the stay can be extended if the parties are actively trying to conciliate.

Non-work-related discrimination claims are referred to Citizens Advice Jersey for mediation.

If the case does not settle after referral to JACS/CAJ it will usually be listed for a 1.5-hour Case Management Hearing at which the Tribunal will make procedural directions to take the case to a final hearing.

### **Case Management Hearing**

At the end of the Case Management Hearing the judge will discuss with the parties ADR. If the parties have not attempted conciliation or mediation at JACS/CAJ the judge will usually recommend this course to the parties. If conciliation or mediation at JACS/CAJ has failed, the judge may suggest that the parties have another attempt.

In a simple case and with the permission of the parties the judge may switch off the recording of the hearing and have a confidential and without prejudice discussion with the parties about settlement. Confidential means that the parties cannot communicate details of the discussion to anyone other than their representative. Without prejudice means that nothing discussed can be used by the parties at any future hearing. This is important because it allows the parties and the judge to have an open discussion about the merits of case.

It will usually be too early for the judge to give any definitive assessment of the merits of the case, but the judge will be able to reality test the claims being made and the responses. For example, a claimant seeking maximum compensation for a failure to provide a contract could be referred to the Tribunal Guidelines on Compensation which set out the factors that will be considered in calculating compensation and an indication given that the claim appears to lie at the bottom/top end of the scale of compensation.

If the parties agree a settlement of an employment case, they will be asked to make an appointment at JACS/CAJ to document their agreement.

In a more complex case, the judge may discuss with the parties the options of Judicial Mediation and Judicial Assessment. Whether the judge offers these options depends on the nature and complexity of the case and the attitude of the parties to settlement.

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<sup>1</sup> Article 47(1) of the Employment and Discrimination Tribunal (Procedure) (Order) 2016.

Due to the limited number of Tribunal judges the parties will normally only be offered either mediation or assessment.

The Case Management judge may also suggest external mediation with a third-party provider. This will be appropriate where there is no judge available to deal with mediation or the Tribunal is unable to arrange a mediation in the timescale requested by the parties.

### **Judicial Mediation**

Judicial Mediation is a free service offered by the Tribunal that enables parties to agree a private settlement of their dispute. It allows the parties to remain in control of their agreement rather than having an outcome imposed on them. It also allows the parties to include solutions that are outside the scope of the Tribunal e.g., references and agreements on future conduct.

Mediation is confidential and without prejudice. Confidential means that the parties cannot communicate details of the discussion to anyone other than their representative. Without prejudice means that nothing discussed can be used by the parties at any future hearing.

Judicial mediation is a facilitative process where the judge will assist the parties to reach an agreement by managing the process in a fair and constructive manner. The judge will help the parties focus on areas of agreement and common interest.

The mediation can take place at any stage of the proceedings. Early successful mediation saves the time and effort that is required in preparing for the final hearing. In some cases it may be beneficial to hold the mediation at a later stage if a party would be more comfortable with mediation after exchange of documents or witness statements.

The judge will not make decisions or impose solutions on the parties. The judge will not normally offer an assessment of the merits of the case especially where the mediation is taking place early in the proceedings.

The mediation will last no more than one day. It is a condition of mediation being offered that the decision makers with authority to make decisions on both sides attend the mediation. Parties can bring with them legal or other representatives or family members for support.

Prior to the mediation the judge may contact the parties via the Registrar to request copies of certain documents e.g., the employment contract. The judge will have access to the Claim Form, Response Form, Case Management Orders and all other documents and correspondence on the Tribunal file. Unless the case is very complex the judge will not normally request position papers or speak to the parties before the mediation.

On the day of the mediation the parties will meet at the Tribunal offices. Each side will have their own room and there will be a common meeting room.

The mediation will normally start with an all-party meeting at which the mediator will emphasise the confidential and without prejudice nature of the mediation and check that each side has present a person with authority to settle the case. The judge will explain the process to be followed and the parties will have the opportunity to ask questions. Each party will have an uninterrupted opportunity to set out their concerns and say what they want to achieve from the mediation. The judge may facilitate this by asking questions or seeking clarification.

Once each party has spoken the judge will facilitate a discussion aimed at settlement. At times a party may wish to withdraw to their own room or talk to the judge privately. If there are private discussions the judge will agree with that party which part of the discussion can be shared with the other party.

The mediation process is entirely voluntary and the parties can withdraw from it at any time.

If the case does not settle the mediation judge will take no further part in the proceedings and the final hearing will be held before a different judge.

### **Judicial Assessment**

Judicial Assessment is a free process that involves a private meeting with a judge. The judge will give the parties a provisional assessment of the strengths and weaknesses of each aspect of the case. The judge will use their experience and expertise to express an opinion while remaining wholly impartial. The assessment may identify possible ranges of compensation or damages if liability is established. The judge will also inform the parties of any maximum limits on compensation/damages.

The meeting will last no more than half a day.

Anything said by the judge is confidential and cannot be used in any subsequent hearing. The comments of the judge are also non-attributable which means they cannot be shared with anyone other than a party's representative.

Unlike mediation the judge will not attempt to facilitate a settlement between the parties. The purpose of the assessment is to clarify the issues and give the parties an idea of the possible outcome of the case both as to liability and quantum. The parties can use this information when considering how to proceed with their claim or response and to assist with any future settlement discussions between the parties.

The extent to which the judge can assess the case depends on the stage the proceedings have reached. A Judicial Assessment early in the proceedings prior to disclosure and/or witness statements will be more speculative. A Judicial Assessment later in the proceedings can be firmer but will take place after considerable time, effort and costs have been incurred by the parties.

A Judicial Assessment will take place at the Tribunal in a meeting room. All parties must be present in the room throughout the assessment. The judge will not meet with the parties separately.

At the start of the assessment the judge will emphasise the confidential nature of the assessment and explain that the eventual outcome at a hearing may be different from

the assessment. During the assessment the parties may seek clarification on any points made by the judge.

After the assessment the parties may (subject to availability) use the Tribunal premises to meet and discuss settlement. The parties can also arrange an appointment with JACS/CAJ to try and reach agreement.

The assessment process is entirely voluntary and the parties can withdraw from it at any time.

If the case does not settle the assessment judge will take no further part in the proceedings and the final hearing will be held before a different judge.

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