The Work Couch

Navigating today's tricky people challenges to create tomorrow's sustainable workplaces

RPC

Season 3

Episode 13 – Judicial mediation with Charlotte Reid and Brodie Walker

Ellie: Hi and welcome to the Work Couch Podcast, your fortnightly deep dive into all things employment. Brought to you by the award-winning employment team at law firm RPC, we discuss the whole spectrum of employment law with the emphasis firmly on people. Every other week we unpack those thorny HR issues that people teams and in-house counsel face today and we discuss the practical ways to tackle them. My name is Ellie Gelder, I'm a Senior Editor in the Employment, Engagement and Equality team here at RPC and I'll be your host as we explore the constantly evolving and consistently challenging world of employment law and all the curveballs that it brings to businesses today. We hope by the end of the podcast that you'll feel better placed to respond to these people challenges in a practical, commercial and inclusive way.

Ellie: Now the summer break has come to an end, we are going back to school on the Work Couch this week by learning all about judicial mediation, which is a form of alternative dispute resolution commonly referred to as ADR. We'll be exploring exactly what judicial mediation is, what employers can expect from it, as well as its potential cost saving benefits. And with us to guide us through this topic, we are delighted to welcome two members of our employment team at RPC. Firstly, Senior Associate Charlotte Reid, and secondly, Brodie Walker, a current trainee. Charlotte and Brodie are going to be sharing their key insights into judicial mediation or JM as we will refer to it and when it might be a viable option for employers. So hi Charlotte and Brodie, it's wonderful to have you both on the Work Couch. Thank you for being here.

Brodie: Thanks Ellie and thank you for having me.

Charlotte: Good morning Ellie and welcome back to school.

Ellie: Absolutely. So let's start off our lesson then. Charlotte, can you begin by just explaining to us what ADR is and the different forms of ADR that might apply to employment disputes?

Charlotte: Yes, so alternative dispute resolution or ADR, as we often refer to it, is essentially a set of ways to resolve a dispute without involving court proceedings. It is a very broad term. There are lots of forms of ADR, including things like arbitration, dispute resolution appointments, and of course mediation. Most ADR involves third party interventions, such as from a mediator or an official expert or in the case of judicial mediation a judge. This third party helps both sides ideally reach an agreement which can be legally binding and if an agreement is reached during the dispute resolution proceedings between parties then this can save the parties the time, cost and general hassle of going all the way through the court or tribunal process through to judgment.

Ellie: So let's look at judicial mediation or JM specifically now. So what are the key features of that?

Charlotte: To quote the guidance on ADR as issued by the President of Employment Tribunals in England and Wales in 2023, judicial mediation or JM is consensual, confidential and also facilitative unless parties have agreed that it can be evaluative and that's in contrast to it being facilitative. I think one thing to point out is that when we refer to JM for the purposes of this podcast, we're talking about JM in the context of employment tribunal proceedings, hence my mention of the guidance from the president of employment tribunals in England and Wales. Moving on to what those terms actually mean. Firstly, and this is really important, judicial mediation is consensual. That means both parties have to agree to it. And also importantly, either party may withdraw from judicial mediation at any time without explanation or sanction.

Secondly, JM is confidential. This is in contrast to tribunal hearings and judgments, which are often held in open court and can be accessed online by anyone. Discussions during JM would not be placed on the public record. They're conducted on a without prejudice, i.e. sort of legally off the record basis. This means that anything discussed during a mediation, for example, settlement offers, can't be referred to at a later date in open court, i.e. a court hearing. This offers protection and comfort to the parties because they may not want to be bound by something that they previously offered during the mediation. And thirdly, mediation is facilitative. I hate saying that word. According to the presidential guidance that I

	quoted earlier, that term is used in contrast to evaluative which means that unless the parties have agreed to such a course, the employment judge conducting the JM will not give any party in the case an indication of their prospects of success. So that's in contrast to, for example, a judicial assessment, which is a process involving a judge evaluating the strengths and weaknesses of a case and providing an indication of potential outcomes. That's not the purpose of judicial mediation. Essentially, judicial mediation offers the parties the chance to consider options or solutions that would not typically be available as a remedy following a standard tribunal hearing. For example, agreements other than just payment of damages from one party to the other. And as a final point, I will just emphasise I've only mentioned the key principles there. There's an awful lot more to judicial mediation and many more considerations so it's just bearing in mind these are key principles.
Ellie:	Thank you. Important to stress that. So Brodie, I think many people listening to this may be thinking, "OK, judicial mediation could be quite an appealing option for my particular employment dispute". But it's not the only type of mediation, is it?
Brodie:	That's right, Ellie. Essentially, there are two types of mediation, judicial mediation and then private mediation. Private mediation generally consists of the parties together instructing and funding an independent third party to act as a mediator in the dispute. For example, this could be an expert. In contrast, judicial mediation, which we'll be talking about today, is a free service, which typically starts once an employment claim reaches the preliminary stage in the employment tribunal. At the preliminary hearing, a judge will discuss whether the parties are interested in judicial mediation and whether the judge considers that mediation could be suitable. If both parties are interested, the matter will generally be referred for further consideration of its suitability for mediation. And then typically a 30 minute hearing will be held for the parties and the judge to discuss and agree a date for the mediation.
Ellie:	So once a judge has recommended judicial mediation and assuming the parties agree to it, what happens next in the process?
Brodie:	So once the judge and parties decide that judicial mediation is suitable, a mediation will be listed for a certain date. Typically, a mediation lasts one day and can be held either in person or remotely. On the day itself, the mediation typically starts by both parties appearing before the judge to discuss the approach for the day and the agenda. Parties may be represented or unrepresented. And if a party is represented, they can send the representative on their behalf. There's no need for them to actually attend themselves. Once the parties have then appeared before the judge, they'll usually go into separate breakout rooms and these can be physical or virtual.
Ellie:	Okay, so Charlotte, let's look a bit more then at the judge's role in JM. Can you expand on that a bit for us?
Charlotte:	The judge's role is to identify key issues between the parties and facilitate discussions, usually with the ultimate aim of settlement. The judge may go between the rooms, whether virtual or in person, to speak to each party individually, or they can, during the mediation at any time, join both parties to a main room. The judge, as I mentioned before, won't share their opinion or judgment on the case as they would in a tribunal judgment. Their aim is to help the parties find common ground. If either party is unrepresented, the judge may provide additional support to the unrepresented party by explaining, for example, relevant legal issues or explaining the merits of any settlement offers. They generally also help each party to understand the other party's position on certain issues. But that judge is not acting as a legal advisor. Their role is purely explanatory and facilitative.
Ellie:	And so, Brodie, the aim then of JM is that the parties will agree to settle. So what happens in practice if the parties agree to settle or not settle?
Brodie:	Whether the mediation results in a settlement is entirely up to the parties and will largely depend on what happens on the day. However, if a settlement is reached, once the agreement has been drafted and the parties have signed it, and the claim has been withdrawn, the claim is concluded altogether. So it will no longer take place in the tribunal process. If a binding agreement is not reached, the parties can return to litigation and they can be confident in the fact that all discussions that took place in the judicial mediation were on a without prejudice basis. It's also worth pointing out that the judge who conducted the judicial mediation won't be involved in any future management of the case.
Ellie:	So Charlotte, I think another key question people will be thinking about is, okay, when in the life cycle of an employment dispute or a claim, is it going to be best to actually have the JM?
Charlotte:	It's a very good question and there's not really a one size fits all answer. It's generally a question which employers or individuals will require legal assistance on at some point. On the one hand, if the parties are willing to engage in JM, you

may think the earlier the mediation, the better to avoid the parties incurring more and more costs by complying with case management directions and also potentially the costs of attending preliminary hearings and the like. However, on the other hand, it could be said that it's in the parties' interest to allow matters to play out a little bit further. By that, I mean assessing the merits of the other side's case via, for example, the disclosure process and having spoken to potential witnesses. That's really key to informing a mediation strategy, also strengths and weaknesses of the case and the approach to potential settlement negotiations. Additionally, there are still costs to be incurred in preparing for a JM. A list of issues in a bundle will most likely need to be agreed and prepared prior to any JM. So that can also inform the mediation and settlement negotiations and just the general approach to the process. It would generally be the position that once the list of issues and schedules of loss and disclosure bundles have been agreed that would be the stage where parties look to have mediation, but that's not always the case. There are cases where it's far more beneficial to try and hold the JM process sooner. And as we've said before, even if a JM does take place, there's no requirement for the parties to reach an agreement and the claim could still progress through the tribunal through to judgment afterwards if an agreement's not reached. The parties will need to balance the costs of finding out or understanding the case against them by allowing the matter to play out a bit further against not incurring costs in doing so, so that the mediation becomes less cost effective and less beneficial than it could be. When mediation will be held is very much on a case by case basis, but having the support of legal advisors who have experience in prepping for and attending JMs will likely be essential.

Ellie: So Brodie, can you just outline for us then the benefits of choosing judicial mediation?

Brodie: Well, as we've discussed, the aim of JM is generally to reach a settlement or another agreement which avoids the claim going through the proceedings of the employment tribunal. To help put it in perspective, a few years ago, the president of employment tribunals in England and Wales reported that between 2009 when JM began and July 2023, employment judges in England and Wales have conducted around 8,000 mediations with a success rate of about 65 to 70%, which resulted in a net saving of nearly 22,000 sitting days. And even if the mediation does not result in a settlement, it doesn't mean that the mediation was a failure. Mediation can be a useful tool in helping the parties to narrow down the issues between them with the assistance of a neutral third party. This means that if the claim does proceed through the tribunal procedure, if the list of issues has been narrowed down or agreed beforehand, there'll be much less back and forth correspondence between the parties and potentially less involvement from the tribunal, which can result in delays as well as substantial costs. Mediation can also help to align parties' expectations on damages or awards if both have extremely different expectations. During the mediation, the judge can advise on realistic expectations and the parties can both put forward their representations. This allows for a much more nuanced discussion than what typically takes place via online correspondence, so email. Again, this means that time and cost is saved throughout the tribunal process because there'll be less back and forth correspondence or time spent finalising the agreed list of issues at hearings.

Ellie: Thanks for explaining that. So Brodie, just drawing on what we see from clients and drawing on those experiences, why might people choose judicial mediation over going to tribunal?

Brodie: So there are many reasons why parties might use judicial mediation. For example, it can be significantly faster in resolving a dispute than going through the tribunal. One of the major benefits of mediation is that it can be listed at relatively short notice, which is an important advantage in light of the current and ever-growing backlog of tribunal cases.

The latest figures indicate that at the end of 2024, there had been a 23% increase in the backlog of open cases compared to the previous year. And when the Employment Rights Bill becomes law, we are expecting that this backlog will grow even further. Judicial mediation also allows the parties slightly more control over a dispute than in litigation as it's open to both parties to voluntarily agree to the mediation and they can choose when it takes place. There is also the added benefit of the fact that judicial mediation allows for flexibility of remedies and solutions, which the court's not able to offer. Whereas an employment judge can broadly only make orders for reinstatement, re-engagement and/or compensation. A JM settlement can be an opportunity to agree something outside of those. For example, this could be an apology or delivery of training or a reference or some other action of value to either of the parties. These are not open to a judge to award, but can be secured as settlement terms through a judicial mediation. Finally, and very importantly, mediation can be a really great way of saving costs.

Ellie: Yeah, so on that topic, of costs, Charlotte, I'm assuming that's going to be a key factor when employers are weighing up whether or not to go for the JM option.

Charlotte: It's definitely an important consideration for anyone involved in litigation because as we know costs very quickly and easily spiral. As we mentioned before the judicial mediation service offered by the employment tribunal is free and generally costs involve mainly preparation fees in terms of attending a preliminary hearing to list the JM and also preparing the JM bundle, correspondence and of course the cost of attending the JM itself. These costs are generally minimal compared to the significant costs of defending a claim all the way through to judgment following a final hearing.

	It's difficult to be specific about what the cost saving is likely to be or could be because really it depends on the complexity of the case, the amount of evidence and the witnesses involved, etc. Although I came across an article recently that mentioned three quarters of cases which involved successful JM reported cost savings of £25,000. So it's definitely fair to say that we're looking at potentially significant savings. Whilst we know that not every case will end in settlement and parties may ultimately still have to go to a final hearing, broadly speaking, JM represents a cost saving benefit, especially given the high success rate that we mentioned earlier.
Ellie:	And Brodie then, looking on the other side of the coin, what are the potential downsides for employers who choose JM?
Brodie:	As with all litigation or ADR, there are always risks and there's never a guarantee of the mediation being successful. I guess the main downside for employers is the risk that the mediation does not lead to any form of resolution or narrowing down of the issues in dispute. However, this risk generally is mitigated by the fact that a judge is present and should help to keep the parties on track on the day. Another potential downside, as we said previously, is that there is no obligation on the parties to reach an agreement on the day. And since the process is voluntary, either party can fail to attend with little to no consequences. That being said, you would hope, given the potential advantages and that the mediation would only be listed with the agreement of both parties, that failures to attend would be relatively rare. Another risk could be that one party chooses or doesn't engage with the mediation on the day itself, which would lead to wasted costs incurred in preparing for the mediation. Albeit these costs would be much less significant than preparing for a hearing.
Ellie:	Thank you. Now, Charlotte, I know that the incoming Employment Rights Bill, which Brodie briefly mentioned earlier, is set to really shake things up for employment disputes. Please, can you talk us through what effect we might see on judicial mediation?
Charlotte:	That's right Ellie, the Employment Rights Bill is proposing to change many areas of employment law, far too many to mention on this podcast. We're anticipating some of the proposed changes coming into being around the end of 2026. One of the key changes proposed by the Bill is the removal of the two-year qualifying period required for an employee to bring an unfair dismissal claim. Now, we don't know whether this is happening or whether it's not happening. The position is in somewhat of a state of flux, but it's worth mentioning because this could have repercussions on the relevance of judicial mediation. Currently, to bring an ordinary unfair dismissal claim against their employer, an employee must have worked for the employer for a minimum of two years. Now, this may change with the Employment Rights Bill proposing that there be no qualifying period of employment and that the right to bring an unfair dismissal claim be a day one right. It's possible with the removal of that exclusion, we may see more unfair dismissal claims reaching the tribunals. This itself may create a further backlog in the already busy tribunal process and cause a delay when claims can be heard. If that's the case, then JM or indeed other forms of ADR may become increasingly important because they offer a faster and more cost effective route for parties willing to engage in them. But as I said, and as with all other proposals in the ERB, the position is yet to be finalised. So we are still waiting to see what happens.
Ellie:	Yeah, thanks Charlotte. It will be interesting to see how this all plays out with the introduction of the new Bill and of course we will update our Work Couch Listeners once we hear any further updates on the Bill. But for now, thank you so much Brodie and Charlotte for sharing such valuable insights into judicial mediation today.
Brodie:	Thank you for having us, Ellie.
Charlotte:	Thank you very much, Ellie.
Ellie:	Well, that brings us to the end of this episode. If you'd like to revisit anything we discussed today, you can access transcripts of every episode of the Work Couch podcast by going to our website, www.rpclegal.com/ theworkcouch. Or if you have questions for me, Charlotte or Brodie, or perhaps suggestions of topics you'd like us to cover in future please get in touch, you can email us at theworkcouch@rpclegal.com. We'd love to hear from you. Thank you all for listening and we hope you'll join us again in two weeks for our next episode.

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