

As a Neurodivergent employee do I have the right to mediate?

Employee rights under the Equality Act 2010 – definition of a disabled person under section 6 of the Equality Act 2010

- The definition of a disability under the Equality Act 2010:
A physical or mental impairment that has a substantial and long-term adverse effect on their ability to perform normal day-to-day activities.
- Where an individual is covered by this definition then certain duties kick in under the Equality Act 2010, i.e. the duty to make reasonable adjustments.
- The Employment Tribunal is concerned with whether the “impairment” affects the person’s day-to-day activities, rather than a medical diagnosis.
- If a person thinks that they meet the definition but for whatever reason haven’t seen a medical expert, it is often safest for an employer to treat them as if they are disabled in terms of the Equality Act 2010.
- Where the definition doesn’t apply, then that is not to say that we should not make adjustments. Labels are not always helpful and often the mediator will be making adjustments for an individual who has particular requirements without a need to formally identify whether someone meets the legal definition of a disabled person.
- It is good to be mindful of the definition, as where it is met, there are extra-legal duties incumbent on the mediator and the workplace and where such duty arises, liability may follow. The “without prejudice” nature of mediation may not cover the mediator if something discriminatory occurred during a mediation. Given the focus on empathy and respect during the process this is of course unlikely.

Rights of disabled persons under the Equality Act 2010

- The purpose of the duty to make reasonable adjustments is to avoid the disadvantage an individual may experience. The questions to ask are: is the adjustment reasonable and would it alleviate the disadvantage?
- If the adjustment can assist to level out the playing field or ease the process for that person and it is reasonable to make, then we have a duty to make that adjustment.
- The preparatory stage of the mediation will likely be more involved in order to identify the individual’s challenges and what can be implemented to help them in the process.

Do you have the right to mediate as a neurodivergent employee?

- The short answer is yes. There is no exclusion.
- However, there is no right to compel mediation as a neurodivergent person, but it can be requested by way of a reasonable adjustment.
- There is no obligation on employers to provide mediation to a neurodivergent person, and it is for the employer to consider whether mediation would be reasonable. Ultimately, all parties will have to agree to mediate as it is a voluntary process.
- There may be contractual duties on an employer to explore mediation, by way of a collectively agreed workplace policy or agreement with a union, but a person cannot be compelled to participate in the process.

Experiences of adjustments made to mediation process

Preparatory phase

- Spending more time understanding the individual, helping them understand the process and identifying practical arrangements to be implemented.
- The preparatory phase is key to finding out what will reduce the impact of the process on that particular person. There is no one size fits all.
- Taking the time to talk through the process of mediation with the individual and having discussions of what it will look like.
- The use of an agenda may help the individual prepare. A list of things to think about beforehand is useful too. Keep it simple though and use direct and clear language.
- Often more time is spent in the preparatory meetings before bringing parties together. Sometimes allowing weeks between the meetings can allow stew time for them to think. When you then come together again, you can ask them “what have you been thinking?”

Mediation phase

- Asking more direct and clearer questions. Reality testing may not benefit from hypothetical questions.
- Ensuring there are plenty of breaks throughout.
- Not passing judgment. The issue between two people may seem very trivial to an outsider, but to them it can be very important. It does not matter the spectrum or label but rather what is key is recognising that to those individuals the issue is really important.
- Mediators must demonstrate neutrality – what may seem simplistic and bizarre, can often be the most challenging mediations.
- Flip charts may be used to get the person to draw where they are now, where they want to be and what the route to that place looks like. The participant can then be asked to describe the other person’s route and draw this on the flip chart. Carry out this exercise with both parties separately and then bring them together and invite them to describe the other’s routes. This can enable the parties to shift into different futures.
- The use of closed questions will help manage the flow of information and non-verbal prompts can be helpful.
- The use of “ask, suggest, tell” – asking open questions to start with but if getting nowhere then can suggest something relevant to be discussed, but still pose it as a question to enable the person to feel in control of the conversation.

Concluding phase

- Allowing reflection time before signing the agreement can help the ultimate agreement stick better.
- It can be tempting to try and tie down an agreement on the day if possible, but in the case of neurodivergent individuals, one may be more inclined to give heads of terms and allow a period of reflection. Giving a short amount of time is useful and whilst it may mean it unravels, it may also mean it sticks better.
- Confirm the wording of an agreement with the party by reading it aloud.

- Ask the party to give the mediator the words for the agreement, write it on a flip chart and allow them time to look at it. If they don't want to sign, then ask them "what is missing?" This gives them the opportunity to address something they may be holding back. The key is building trust, and the real stuff is often held back.
- Always maintain cynicism until agreement is signed off. Carry out the final reality check before they sign by asking "are you sure?" or "is it really there?" Often this enables the hidden thing to suddenly come out. It can be frustrating for employers if they are not able to conclude after a full day but sometimes the positive outcome of the day is the understanding of what the issue is really about.
- Another final question to reality check when someone is not sure if they want to sign, is asking them "do we want to adjourn then?" This may bring into focus the reality that if the matter is not concluded that day, then the process or the issue would continue. This may be enough for someone to realise that they do want to conclude and move on.