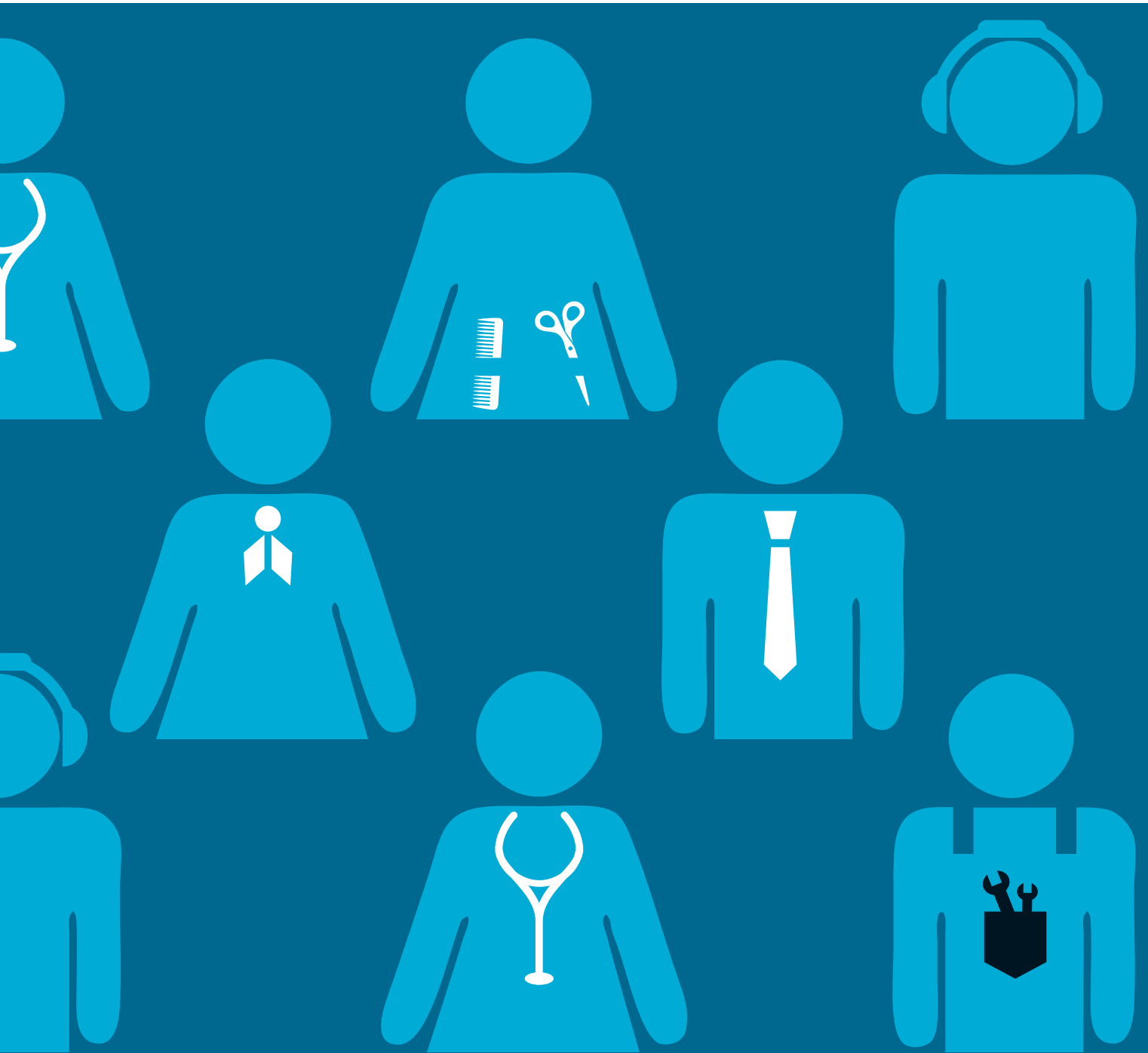


Mediation: A guide for trade union representatives



Mediation:

A guide for trade union representatives

Mediation is increasingly being used to resolve disputes in many areas of life including family law, neighbourhood conflict and employment. Indeed, there is a long history of third party assistance, often referred to as conciliation, being used in employment and workplace disputes when domestic procedures have been exhausted. It is not, however, a replacement for trade union representation, and nor should it undermine the valuable role of trade union representatives. It is, rather, a complementary process.

Representation and mediation have many things in common, in particular the skills involved in addressing conflict. However there are also important differences. A mediator must act as an impartial third party, and mediation itself is an informal, voluntary process, and what happens in a mediation and its outcome are confidential.

However, both trade union representation and mediation seek to:

- promote good management and organisational culture based on openness and trust
- respect the rights of individuals
- understand how relationships break down and impact on people and business
- work to maintain working relationships.

Mediation is not offered as a panacea, and there are some types of conflict where it will not be suitable. However, when used appropriately, it can offer a way to avoid the potentially destructive effects of drawn-out conflict.

Brendan Barber
TUC General Secretary

Ed Sweeney
Acas Chair

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What is mediation?

Mediation, like conciliation, is where an impartial third party, the mediator, helps two or more people in dispute to attempt to reach an agreement. Any agreement comes from those in dispute, not from the mediator. The mediator is not there to judge, to say one person is right and the other wrong, or to tell those involved in the mediation what they should do. The mediator is in charge of the process of seeking to resolve the problem but not the outcome.

Although it differs from other ways of resolving disputes, mediation also shares features with good grievance procedures where the parties are able to use the procedure to discuss and resolve issues at an early stage through informal discussion; and with direct negotiation where, like mediation, the process is about parties reaching a voluntary agreement.

Mediators may be employees who act as internal mediators in addition to their day jobs, or they may be from an external mediation provider. They can work individually or in pairs as co-mediators.

Mediation distinguishes itself from other approaches to conflict resolution in a number of ways.

Mediation is:

- **Informal:** Although it can be used during formal procedures to provide a breathing space in a less formal setting.
- **Flexible:** It can be used to address a range of situations, and to address conflict involving colleagues with a similar job or grade, or between a line manager and their staff. It can be used where there is conflict between teams, or between a trade union or groups of employees and management. It can be used at any stage in the conflict including after formal resolution of a dispute to rebuild working relations.
- **Voluntary:** Both parties must agree to participate.
- **Morally binding but has no legal status (unless the parties so desire).**
- **Confidential:** Anything said during the mediation is confidential to the parties. They may choose to reveal some or all of what has occurred during the mediation to colleagues, their trade union representative or their managers, but only if all parties agree. The only exceptions are where, for example, a potentially serious unlawful act has been committed or there is a serious risk to health and safety.
- **(Generally) unrepresented:** The focus of mediation is the resolution of the dispute by participants themselves and to maintain as much informality for the process as possible. (See also page 11 Supporting members during mediation when requested.)

Mediation, individual conciliation and pre-claim conciliation

The principles of individual conciliation and pre-claim conciliation* (PCC) in actual and potential employment tribunal claims are identical to those of mediation. However, the mediation:

- does not take place against a backdrop of an actual or potential tribunal claim
- typically deals with relationship issues between individuals or groups, or individuals and their managers
- like collective conciliation, it is generally carried out with the parties face to face.

*Where potential tribunal cases are identified the parties can be offered the services of an Acas conciliator, at no cost, to resolve the dispute. Agreements reached in PCC have the same legal standing as a settlement brokered by Acas after a claim has been lodged.

What does mediation seek to achieve?

Mediation seeks to provide an informal and speedy solution to workplace conflict, and it can be used at any point in the conflict cycle. What the process offers is a safe and confidential space for participants to find their own answers. It does this in a number of ways, by:

- exploring the issues, feelings and concerns of all participants, and rebuilding relationships using joint problem-solving
- allowing those involved to understand and empathise with the feelings of those they are in conflict with
- giving participants insights into their own behaviour and that of others and opening up opportunities for change
- helping participants develop the skills to resolve workplace difficulties for themselves in future
- encouraging communication and helping the people involved to find a solution that both sides feel is fair and offers a solution that favours them
- using energy generated by conflict in a positive way to move things on.



When can mediation be used?

Mediation is particularly well suited to situations where there is:

- ✓ Relationship breakdown
- ✓ Personality clashes
- ✓ Bullying and harassment and perceived discrimination issues (although each situation needs to be judged on a case by case basis as cases of bullying and harassment, and discrimination, may need to be dealt with by more formal procedures)
- ✓ When managers are not well placed to deal with an issue because they may be perceived as biased
- ✓ Where negotiations between unions and management have broken down and both parties agree that mediation could provide a way forward.

There are situations where mediation may not be suitable if:

- ✗ Used as a first resort or to bypass or undermine agreed procedures for dealing with disputes in the workplace
- ✗ It is used by a manager to avoid their managerial responsibilities
- ✗ A decision about right or wrong is needed eg where there is possible serious criminal activity
- ✗ The individual bringing a discrimination or harassment case wants it investigated
- ✗ The parties do not have the power to settle the issue
- ✗ One side is completely intransigent and using mediation will only raise unrealistic expectations of a positive outcome.

What are the benefits of mediation?

Dealing with ill defined problems and perceived unfairness

Mediation can address perceived unfairness and ill-defined problems even if they are not unlawful.

“Mediation is an ideal way of dealing with ill-defined problems, where there is no clear evidence and a positive outcome from normal grievance procedures is unlikely. It also allows people to be listened to. And it will be useful for problems between peers, which the unions find more difficult to deal with than problems between a manager and an employee.”

Trade union representative, University of Central Lancashire* *

Dealing with disputes involving two union members from the same union

Mediation can be used to avoid a potential clash of interests faced by trade union representatives.

“Where this is deemed appropriate, it can prevent the union and its representatives being placed in a position where there is internal conflict of interest. Reaching a mediated settlement allows the parties to retain control over the outcome and allows the union to empower its members rather than represent them.”

Trade union representative, Unison, East Lancashire Primary Care Trust

Preventing unnecessary grievances and tribunal claims

There is also evidence that the use of mediation can avoid unnecessary tribunal claims and reduce the level of formal grievances because early intervention means that disputes are addressed before they escalate. Using mediation to address disputes rooted in relationship breakdown can also free up time that trade union representatives would have spent dealing with this type of issue through the grievance system. And it can provide a relatively fast response to dealing with conflict and so prevent parties from becoming entrenched.

It can also be particularly useful in cases where one party has taken out a grievance against another individual and that person then takes out a counter grievance. This inevitably leads to the employers having to make a decision about who is right and who is wrong, with the outcome being an aggrieved employee who feels they have been treated unfairly and who may then take out a further grievance against the employer. Mediation can help to deal with the disagreement before it escalates.

“Where there is a simple disagreement which has escalated, mediation may return the working relationship to a point where it was stable and productive. In our experience, it is rare for working relationships to start badly and get worse. There was usually a point at which the relationship worked and this can be returned to when the parties put the conflict into perspective and remember how they used to work well. Mediation creates an environment in which this can happen. In our experience, this works best where a thoughtless comment has gone unchallenged but led to bad feeling or where a professional disagreement has become personal.”

Trade union representative, Unison, East Lancashire Primary Care Trust

Maintaining the employment relationship

In a tribunal claim there is always a winner and a loser. If an individual takes a case to tribunal the outcomes, if they win, are limited to reinstatement or financial compensation. In most cases the employee will have ceased to work for the employer and in reality few return to the same place of work. Mediation is more likely to result in the employee remaining in employment.

Flexible outcomes

In mediation outcomes are flexible. The solution to a mediated dispute is laid down by those involved. It might include:

- an apology
- a commitment to change behaviour
- an agreement to distribute work more fairly and provide greater levels of responsibility
- an agreement to review policies and procedures
- a commitment to periodically review the agreement reached.

How does mediation work in practice?

There is no one size fits all with mediation but it usually involves the following stages:

Separate meeting

First contact with the parties

The mediator will meet parties separately. The aim of this first meeting is to allow each individual involved to tell their story and find out what they want out of the process.

Joint meeting

Hearing the issues

The mediator generally brings the participants together and invites them to put their side of the story during a period of uninterrupted time. At this stage the mediator will begin to summarise the main areas of agreement and disagreement and draw up an agenda with the parties for the rest of the mediation.

Exploring the issues

Having identified the issues to explore, the mediation is now about encouraging communication between the parties, promoting understanding and empathy and changing perceptions. The aim of this part of the meeting is to begin to shift the focus from the past to the future and begin to look for constructive solutions. Although this is usually done with all parties together in the same room the mediator may, as with collective conciliation, separate them for a time if necessary.

Building and writing an agreement

As the process develops the mediator will encourage and support joint problem-solving by the parties, ensure the solution and agreements are workable and record any agreement reached.

Closing the mediation

Once an agreement has been reached, the mediator will bring the meeting to a close, provide a copy of the agreed statement to those involved and explain their responsibilities for its implementation. In some cases no agreement is reached and other procedures may later be used to resolve the conflict. However, nothing that has been said during the mediation can be used in future proceedings. The mediator will agree with the parties what information can be shared outside the mediation and with whom.

The link to discipline and grievance procedures

In some organisations mediation is written into formal discipline and grievance procedures as an optional stage. Where this is not the case, it may be necessary to reach an agreement to put the discipline and/or grievance procedure into abeyance before mediation can be attempted.

It is grievances that most obviously lend themselves to the possibility of mediation. Managers may not always see it as appropriate to surrender their discretion in relation to disciplinary issues, such as misconduct or poor performance, where they believe a point of principle is at stake. However the line between disciplinary and grievance issues may in specific instances become blurred, in which case the employer may prefer to tackle the underlying relationship issues by means of mediation rather than impose a disciplinary sanction.

Although mediation is often perceived as a form of early intervention in disputes, it can also be used to rebuild relationships after a member of staff has been through a disciplinary or grievance process. It is also important that it is seen as a complement to and not an alternative to agreed procedures. It should only be used where agreed procedures have been exhausted or the parties agree to put them in abeyance.



The role of representatives in mediation

The role of trade union representatives in mediation includes:

- ensuring that employers inform and consult trade unions on the way in which mediation policy affects collective agreements or other methods of dispute resolution when they are considering, setting up, or implementing, mediation schemes
- supporting members during a mediation when requested.

Ensuring that employers inform and consult with trade unions

Key areas that employers should consult on with their trade unions when introducing and using mediation are:

- [How mediation fits with discipline and grievance procedures \(see page 8\)](#)
- [Selection of mediation providers and mediators](#)

Trade union representatives should ensure that they are informed and consulted on issues that impact on their members who may participate in mediation to resolve a dispute, but also those members who are mediators themselves.

If it is proposed to use mediators external to the organisation, trade union representatives might wish to ensure:

- the mediation provider is registered with the Civil Mediation Council (CMC) or the Scottish Mediation Register
- mediators have been properly trained
- the employer has run checks on mediation providers to ensure the quality of the service.

If mediators are chosen from employees within the organisation it will be important to ensure they represent a range of people in regard to:

- Seniority
- Race
- Gender
- Age
- Offices and departments
- Roles (including TU roles).

This is important to ensure impartiality and to avoid a potential clash of interests.

Training for internal mediators and other staff

For mediation to be effective, mediators need to be trained in the techniques of mediation and hold a qualification such as the Acas Certificate in Internal Workplace Mediation (CIWM). They also need to understand their role and how it fits within the organisation's dispute resolution procedures, and other policies and procedures such as bullying and harassment and diversity policies.

Awareness training for other employees and line managers on how and when to use mediation is also important.

- Is there awareness training for:
 - o employees as potential participants in mediation?
 - o line managers on how and when to use mediation?
 - o trade union representatives about how mediation fits with other policies and procedures, and how management intend to work with trade unions on using mediation in the workplace?

Time off and support for internal mediators

Where employees are acting as mediators, trade union representatives might wish to establish:

- What time off arrangements are available to them?
- What support is provided for what can be a stressful role? Is there a dedicated person responsible for overseeing the mediation arrangements?
- Are their mediation responsibilities reflected in their job descriptions and role profiles?
- Is there an arrangement for cover when they are involved in a mediation?

Case study

At Customer Service Direct, mediators are released from their day jobs to fulfil their mediation duties. Mediators aim to keep alternate Thursdays free for this activity, although there is flexibility around the timing of their mediation activity. Good administration and coordination is considered crucial to the smooth running of the mediation service. This has been facilitated by the appointment of a mediation coordinator, a service that is greatly valued by the mediators. **

Reporting

Does the employer report annually to staff and trade unions on take up and effectiveness of mediation?

Collective consultative arrangements

If there are collective consultative arrangements within the organisation how does mediation fit with these?

Supporting members during mediation when requested

The central tenet of mediation is to provide an opportunity for those in conflict to find their own solution to the situation they find themselves in, and for the parties to remain central to the process.

Mediation is most successful where no representatives are present. Experience has shown that it is the individuals involved who are best able to explain how they feel. An open and frank discussion of the issues, which is controlled by the mediator to ensure fairness and appropriate behaviour, can be the key to sorting out the conflict.

There are situations where representation may well be necessary however:

- ✓ A disabled employee may need to be accompanied by a carer or in the case of a deaf employee, for example, by a sign language interpreter.
- ✓ A non English speaker, or someone who does not have sufficient command of the language to express complex feelings and emotions, will need an interpreter.

In these cases representatives need to clearly understand their role and, like the mediator, must have established practice standards that guarantee their independence, impartiality and commitment to confidentiality.

There are also situations where representatives, whether they be lawyers, trade union representatives, other employee representatives or a friend, do sometimes attend mediations and can play an important role in providing moral support. This may involve being on hand to talk or offer advice in break out sessions, or occasionally to accompany their member in the meeting itself because for example:

- ✓ An employee feels particularly fragile because the mediation deals with issues such as harassment or bullying and they would prefer to have their trade union representative present.

Where a party wishes to have the support of their trade union representative this must be agreed by all the parties in the mediation. This can result in the other side also deciding to bring a representative. Where it is agreed, the role of the representative is as an advisor and supporter and not as a formal representative speaking on behalf of their member. Like the mediator and the parties involved, they must also make a commitment to the confidentiality of the process.

“Some members who are vulnerable will feel vulnerable...[and] may benefit from just having somebody in there they can trust... Maybe just for the initial stage. There for moral support but not to take any part in the proceedings, but just to go in and sort of handhold them through the first steps and then say, right you know you are all right to carry on. There may be occasions where that would help.”

Trade union representative – Public sector

However, even in situations where the support of a representative has been agreed, a representative may not need to be present throughout the whole mediation. The initial one to one meetings can be an opportunity for the individual to build up a rapport with the mediator, with their representative present, and feel more secure about continuing with the mediation on their own.

“Only one out of 32 mediations that we have done so far had representation but we don’t recommend it beyond the first stage. I tell them it’s about the two people in the dispute dealing with the issues. It’s not about the law. Most of the cases involve bullying and even where they are dealt with by a formal grievance they don’t tend to go anywhere. The idea of accompaniment to the initial meeting with the mediators is acceptable, allowing rapport to be established and the rep to withdraw for the main session. Perceptions of turning up with a rep can escalate the conflict rather than support the mediation process. We find, in NHS East Lancashire, that having staff side mediators helps to diffuse concerns and reassure the parties.”

Trade union representative, Unison, East Lancashire Primary Care Trust

Should the union be informed whenever their member is involved in a mediation?

Trade union representatives will not be directly involved in all mediations that take place in their workplace. Because of the confidential nature of the process, trade union representatives will not be informed as a matter of course about a potential mediation, details of the mediation or that it has taken place, without the express agreement of the parties.

At East Lancashire PCT the initial referral may come from an employee or a manager. However, for the most part, either HR staff or union representatives will identify whether a matter may be appropriate and then suggest mediation to both the staff involved in the conflict and the relevant line manager(s).

Can trade union representatives be mediators?

The process of mediation and representation may differ but many of the skills involved are very similar. It is useful for mediators to have experience of dispute resolution, understanding of equality and diversity issues, understanding of HR policies and practices, knowledge of power and minority issues, experience of facilitating informal groups. A good mediator needs to be approachable, empathetic, a good listener, able to analyse and summarise information and have good oral, written and non-verbal communication.

Case study

At West Midlands Police, mediators are assigned to cases outside of their own departments or units. Police Federation representatives trained as mediators do not mediate in cases involving police officers, whom they may later represent in a formal process.**

The cross-over with many of the skills/knowledge and experience that trade union representatives possess means that they can be a potential resource for employers who are looking to recruit internal mediators. Where representatives do act as mediators, however, they should avoid mediating for individuals who they also represent.

“In NHS East Lancashire, staff side mediators can be involved in any case where there is no other conflict of interest. However, they would not go on to represent the member if the mediation was unsuccessful. This is because you can’t forget or easily put aside knowledge gained from the mediation. So, best practice means that we keep the two roles very clearly separate.”

Trade union representative, Unison, East Lancashire Primary Care Trust

Trade union mediation checklist

- Is your employer consulting with the trade union at an early stage when planning to introduce mediation?
- How does the policy or use of mediation impact on existing collective agreements?
- How does mediation tie in with discipline and grievance and other existing workplace procedures?
- Are external mediation providers properly trained?
- Has the employer run checks on external providers to ensure the quality of the service?
- What training is in place for internal mediators?
- How is confidentiality ensured where internal mediators are used?
- Is there mediation awareness training available for trade union representatives?
- What are time off and support arrangements for internal mediators?
- What reporting procedures exist on the effectiveness and take up of mediation?



References

**Mediation. An employer's guide.

Acas/CIPD www.acas.org.uk/index.aspx?articleid=1680

How can I find out more?

Acas provide mediators and mediation training including the Certificate in Internal Workplace Mediation (CIWM). Contact Acas Customer Services Team on 08457 38 37 36 or go online at www.acas.org.uk/ciwm

Acas leaflet, Mediation explained, can be downloaded from www.acas.org.uk.

Acas/CIPD, Mediation: An employer's guide. Provides detailed guidance on mediation, including case study examples from a range of organisations.

www.acas.org.uk/index.aspx?articleid=1680

Civil Mediation Council www.civilmediation.org/index.php

Scottish Mediation Network www.scottishmediation.org.uk/

Scottish Mediation Register www.scottishmediation.org.uk/mediationregister/index.asp

Notes



www.acas.org.uk
www.tuc.org.uk

