Blind Justice

Settle or Be Struck Out

How compulsory mediation rewards the parties who game it, hides the game behind confidentiality, and falls on the unrepresented

Research briefing | Blind Justice UK | June 2026

This document is a research briefing prepared by Blind Justice UK (Registered Charity No. 1217562). The analysis is based on publicly available data and on accounts given to Blind Justice by litigants in person. It does not constitute legal advice.

Executive summary

In under two years, and with very little public attention, England and Wales have made mediation compulsory in the parts of the justice system used most by people without lawyers. Since the Court of Appeal's decision in Churchill v Merthyr Tydfil County Borough Council in 2023 the courts can order parties to mediate; since 1 October 2024 the Civil Procedure Rules require them to promote it; and since 22 May 2024 every defended small money claim worth up to ten thousand pounds is automatically routed into a compulsory one-hour mediation, on pain of strike-out or costs, before it can reach a judge.

This briefing is not an argument against mediation. It is an argument about how this particular scheme has been built, and who it serves. Its central finding is that the scheme contains a structural flaw that hands a sophisticated, represented party a tactical weapon and gives the unrepresented party no defence against it. The flaw is simple. The rules compel everyone to attend a mediation. They do not compel anyone to engage with it. And what happens inside the mediation is confidential and cannot be shown to the court.

Put those three features together and a clear strategy emerges, one that Blind Justice has heard described, again and again, by litigants in person. A represented company or a repeat-player defendant attends the mediation, as required, and then declines to move. It makes no offer, or a derisory one. It treats the appointment as a box to be ticked. In doing so it buys the automatic twenty-eight day stay that comes with the referral, delay that costs a well-resourced defendant nothing and costs an unrepresented claimant, who needs the money and the resolution, a great deal. And because the law that is supposed to punish a party for not engaging in mediation, the costs sanction, cannot see inside a confidential process, the party that gamed the mediation walks away untouched. The one rule designed to keep mediation honest is structurally blind to the most common way of abusing it.

The consequence is an asymmetry that runs the wrong way. A litigant in person who refuses to attend, or who holds out for the hearing they are legally entitled to, is exposed to a costs penalty. A represented opponent who attends and stonewalls is not, because the stonewalling is privileged and the court will never be told it happened. Minimal compliance is rewarded; honest refusal is punished. And because every mediation is sealed, no claimant can ever show the pattern, and no one can prove the game is being played at scale. The system manufactures the conduct and then hides the evidence of it.

This briefing sets out the law that created this position, the structural incentives it produces, the accounts Blind Justice has received from unrepresented litigants, and the one official figure that should give the policy's architects pause: that the average mediated settlement is for about half the sum claimed. It does not allege wrongdoing by any named party. It argues that a compulsory process should not reward bad faith, shield it from the court, and fall hardest on the people least able to see it coming, and that the scheme should not be made permanent until that is fixed.

What this briefing reveals

The scheme compels everyone to attend a mediation but no one to engage with it, and it then makes what happened confidential. For a represented company or a repeat-player defendant that is not a burden, it is a tactic: attend, concede nothing, bank the automatic twenty-eight day delay, and wear down an unrepresented opponent who needs resolution. The costs penalty meant to punish a party for not engaging in mediation cannot reach them, because what they did in the room is without prejudice and the court will never be told. A party who openly refuses ADR is exposed to that penalty. A party who turns up and stonewalls is not. The scheme rewards bad faith dressed as compliance.

It falls on the unrepresented, who are coerced to attend on pain of strike-out, exposed to costs if they hold out for a hearing, and unable to prove the other side gamed the process because confidentiality seals it. Blind Justice hears the same account repeatedly from litigants in person: the other side attended, offered nothing or next to nothing, used the stay to delay, and nothing could be done. Because every mediation is sealed, the pattern can never be shown. The most important question about this policy is the one it is built so that no one can answer.

Five findings

1 Compulsion is now the rule. Halsey (2004) held that forcing unwilling parties to mediate was an unacceptable obstruction of access to the court. Churchill (2023) reversed that, and from 1 October 2024 the Civil Procedure Rules require courts to promote alternative dispute

resolution and empower them to order it. Since 22 May 2024 small money claims up to ten thousand pounds are automatically referred to a compulsory mediation.

2 You must attend, but you need not engage. The scheme's own safeguard, that it is compulsory to attend but not to settle, is also its loophole: a party complies fully by turning up and conceding nothing. There is no enforceable duty to negotiate in good faith.

3 The twenty-eight day stay is a free delay for the side that benefits from delay. Automatic referral stays the claim for twenty-eight days. For a well-resourced defendant that is time bought at the unrepresented claimant's expense.

4 Confidentiality shields the gaming. What a party does inside a mediation is without prejudice and generally cannot be put before the court. So the costs sanction for not engaging cannot reach a party who attended and stonewalled, and no claimant can ever show a pattern across cases.

5 The State will not let anyone test the harm. It does not publish settlement outcomes by representation status. Its own evaluation shows the average mediated settlement is for about half the sum claimed. The absence of the data that would expose the asymmetry is itself the finding.

1. The right that quietly changed

For nearly twenty years the position was settled. In Halsey v Milton Keynes General NHS Trust in 2004, the Court of Appeal said that to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to the court. That changed in November 2023. In Churchill v Merthyr Tydfil County Borough Council, the Court of Appeal held that a court may lawfully stay proceedings to require, or order, the parties to engage in a non-court dispute resolution process, provided the order does not impair the very essence of the claimant's right to proceed to a judicial hearing, pursues a legitimate aim, and is proportionate. The courts went from cannot compel to can compel.

The rules followed within a year. From 1 October 2024 the Civil Procedure Rules were amended so that the overriding objective expressly includes promoting or using alternative dispute resolution, the court's duty to manage cases includes ordering or encouraging it, and the court's general powers include the power to order parties to engage in it. Alongside the general power, a specific scheme was built for the small claims track. From 22 May 2024, defended money claims up to ten thousand pounds are automatically referred, once the directions questionnaire is filed, to a free one-hour mediation provided by the Court Service, and the claim is stayed for twenty-eight days while it is arranged. The appointment is conducted by telephone, with the mediator moving between the parties. It is, the Government says, compulsory to attend but not to settle. Failure to attend can result in the claim or defence being struck out, or in a costs order. That single design choice, compel attendance, leave engagement voluntary, and seal the room, is where the trouble begins.

2. Compulsory to attend, not to engage

The Government's reassurance, that it is only compulsory to attend and not to settle, is meant to answer the obvious objection that no one should be forced to give up their case. It does answer that objection. But it creates a different and larger one. If the only legal obligation is to turn up, then a party discharges that obligation completely by turning up and doing nothing else. There is no duty to make an offer. There is no duty to respond to one. There is no duty to negotiate in good faith, and no definition anywhere in the scheme of what meaningful engagement would even look like. Attendance is the whole of the requirement, and attendance is cheap.

For an unrepresented claimant who genuinely wants their dispute resolved, this is merely frustrating. For a represented and experienced opponent, it is an opportunity. The rational move for a defendant who would rather not pay, or would rather delay paying, is to attend the mediation, decline to improve their position, and let the clock run. They have complied with the rule. They have risked nothing. And they have learned, in a confidential setting, exactly how the unrepresented claimant intends to put their case, while giving nothing away in return. A process designed to encourage settlement has handed the party with the least interest in settling a free reconnaissance exercise and a lever for delay.

3. The twenty-eight day weapon

Delay is not neutral. In almost every small claim it helps one side and hurts the other, and which side it helps is predictable. The claimant is usually the one who is owed money, or who has been left without a service they paid for, or whose credit file or housing or livelihood is affected by the dispute. They want it over. The defendant is often a business, a creditor, an insurer, a landlord or a large repeat-player for whom the disputed sum is small and for whom delay carries no cost and sometimes a benefit. The automatic twenty-eight day stay that comes with mandatory referral is therefore not an even-handed pause. It is time handed, for free, to the party most likely to want it, at the expense of the party least able to absorb it.

A sophisticated defendant does not need to refuse mediation to obtain that delay. Refusing would expose them to a costs sanction. They need only accept it, attend, and run it down. The scheme has converted a step that was meant to speed resolution into a sanctioned mechanism for postponing it, and it has done so in a way that is invisible to the court, because nothing about how the defendant behaved in the mediation can later be shown to a judge. The claimant experiences the delay. They cannot prove it was engineered.

4. Tick the box, then stonewall

The pattern that follows from these incentives is one Blind Justice has heard described repeatedly by unrepresented litigants, and it is the same pattern in case after case. The represented party attends the mediation because it must. It then makes no offer, or an offer so low it is plainly not a serious attempt to settle. It declines to explain its position. It treats the hour as a formality to be endured. The mediator, who has no power to compel either side to move and whose role is to facilitate rather than to adjudicate, reports only that no agreement was reached. The claim then proceeds, weeks later, no closer to resolution than before, and the unrepresented claimant, who came to the appointment hoping it would end their ordeal, has instead been delayed, drained, and taught that the system's idea of a fair process is one in which the other side need do nothing at all.

None of this requires the represented party to break a single rule. That is the point. The conduct is not a breach of the scheme; it is the scheme working exactly as its design permits. A process that asks only for attendance will reliably attract parties who give only attendance, and the parties best placed to exploit that are the experienced and the advised. The repeat-player learns the move once and uses it every time. The litigant in person meets it once, does not recognise it, and has no way to respond.

5. The confidentiality shield

If the story ended with bad-faith conduct, there would at least be a remedy, because the law does in principle penalise a party who behaves unreasonably in relation to mediation. Following Halsey and hardened by later decisions such as PGF II SA v OMFS Company in 2013 and by the amended rules after Churchill, a party who unreasonably refuses or fails to engage with ADR can be ordered to pay costs even if they win. On paper, the party that ticks the box and stonewalls should be exactly the party that rule was made for.

It is not, and the reason is confidentiality. Mediation is conducted on a without prejudice basis. What is said and done inside it is privileged and, with only narrow exceptions, cannot be put before the court. A judge deciding costs can be told whether a party attended. The judge cannot, in practice, be told what the party did once inside, whether it made a realistic offer, whether it engaged at all, or whether it simply sat in silence for an hour to run down the clock. The fact of attendance is visible. The quality of engagement is sealed. So the costs sanction that is meant to punish bad-faith mediation can reach the party who honestly refuses to attend, but not the party who cynically attends and does nothing. The rule is precise where it should be blunt and blind where it most needs to see.

There are narrow exceptions, where the conduct amounts to unambiguous impropriety, but the threshold is high and the burden of invoking it would fall on the very litigant least equipped to do so. For all practical purposes the shield holds. And it has a second effect that is just as serious. Because every mediation is sealed, no one can aggregate across cases. A claimant who suspects they were gamed cannot point to the hundred other claimants gamed the same way, because each of those mediations is confidential too. The design that hides the conduct in the individual case also makes the pattern unprovable in the system. That is why a briefing like this must rely on the accounts of those who lived it. The State has built the process so that there is nothing else to rely on.

6. The asymmetry, and who carries it

Strip the scheme to its mechanics and the asymmetry is stark. A represented party can attend, concede nothing, gain delay, gather intelligence, and face no consequence, because the confidentiality of the process protects them from the only sanction available. An unrepresented party is compelled to attend, exposed to a costs penalty if they decline or if they hold out for the hearing the law entitles them to, given no benchmark of what their claim is worth, and left unable to prove that the other side did not engage. Every advantage the scheme confers runs to the sophisticated, and every burden it imposes runs to the unrepresented. That is the precise inversion of what a process built in the name of access to justice should produce.

7. What Blind Justice hears

Blind Justice supports litigants in person across England and Wales, and the accounts that reach it about compulsory mediation are strikingly consistent. The following are not quotations from any single case; they are a fair summary of the pattern described to Blind Justice by many unrepresented people, offered here as qualitative evidence of how the scheme is experienced from the side that has no lawyer.

> *They turned up, said almost nothing, made no real offer, and the whole thing was over in twenty minutes. Then I had to wait weeks for a hearing date anyway.*
>
> *I felt I had to settle for far less than I was owed, because I was warned I could be penalised on costs if I did not take part properly, and I did not understand what that meant.*
>
> *Their solicitor knew exactly what they were doing. I had never done this before. It did not feel like a negotiation. It felt like being managed.*

These accounts cannot, by the nature of the process, be corroborated with the mediation records, because those records are confidential. But they are exactly what the structure of the scheme predicts. When you compel attendance, leave engagement optional, reward delay, and seal the room, you should expect the represented to game it and the unrepresented to be ground down by it. The accounts and the architecture point the same way, and the only reason they cannot be tested against hard data is that the State does not collect it.

8. Settling short, and the data the State will not publish

There is one official number that fits the picture. In the Government's own evaluation of the scheme, the average monetary settlement reached is for a little over half of the sum claimed, about 55 per cent before the scheme's recent changes and 54 per cent after, and more than half of mediated cases settle on terms of this kind. A settlement at half the claim is not by itself proof that anyone was wronged; claims are sometimes pitched high and a compromise around the middle is ordinary between parties who have each weighed their risks. The concern is what surrounds the number: that one side usually has no lawyer and no idea what the claim is worth in law, that attendance is compelled and refusal carries a costs risk, that there is no test of the merits anywhere in the process, and that the other side may have engaged in bad faith without it ever being seen.

All of this could be tested if the State published the right data. It does not. The Court Service records how many claims are referred, how many settle, and the broad value of settlements. It does not publish those outcomes broken down by whether the parties were represented. It does not compare mediated settlements with what comparable claims recover at a hearing. It records nothing, publicly, about whether the unrepresented systematically do worse. The one metric that would reveal whether compulsory mediation harms the people it most affects is simply not collected, and a reform whose effect on the unrepresented cannot be measured should not be made permanent until it has been.

9. A system-wide pattern

The small claims scheme is the sharpest example, but the same model is spreading across the parts of the justice system used most by people without lawyers. In family law, since 2014 a person must attend a Mediation Information and Assessment Meeting before most applications about children or finances, under section 10 of the Children and Families Act 2014. In employment, a claimant must go through early conciliation before bringing most Employment Tribunal claims, under section 18A of the Employment Tribunals Act 1996. In special educational needs, a parent must contact a mediation adviser before appealing to the tribunal, under section 55 of the same 2014 Act, the subject of Blind Justice's earlier briefing on SEND mediation. In each, the unrepresented are routed through a mandatory resolution step before they may reach a judge, and in each the State publishes little or nothing about whether that step delivers fair outcomes for the people compelled into it. The direction is unmistakable, and it is being set without the evidence that would show whether it serves the public or simply processes them.

10. Recommendations

Blind Justice does not oppose mediation. It opposes a compulsory scheme that rewards bad faith, hides it from the court, and falls on the unrepresented. The following would close the gap.

1. Replace the duty to attend with a duty to participate in good faith. The scheme should define minimum meaningful engagement, such as the exchange of a reasoned position or a genuine response to an offer, so that turning up and conceding nothing is no longer full compliance.
2. Give the court a limited, defined window into engagement. A mediator should be able to certify to the court, in neutral terms, whether each party engaged, without disclosing the content of the negotiations, so that the costs sanction for non-engagement can reach the party who attends and stonewalls, not only the party who openly refuses.
3. Stop penalising the unrepresented for the failures of the represented. A litigant in person should not face a costs penalty for declining to settle in a process the other side has not engaged with in good faith and should not be exposed to costs simply for insisting on the hearing the law entitles them to.
4. Publish outcome data by representation status, settlement value against claim value, and, where possible, against comparable adjudicated outcomes, so that the effect of the scheme on litigants in person can be measured rather than assumed.
5. Do not make the small claims scheme permanent, or extend compulsory mediation to higher-value claims, until the engagement loophole and the confidentiality blind spot have been fixed and the scheme has been independently evaluated for its effect on the unrepresented.
6. Treat mandatory dispute resolution as a single system-wide question across civil, family, employment and special educational needs cases, with a common standard of good-faith participation and outcome transparency, rather than introducing it area by area without scrutiny of its cumulative effect on access to justice.

Methodology and sources

This briefing relies on public sources, the Court of Appeal's judgment in Churchill v Merthyr Tydfil County Borough Council, the amended Civil Procedure Rules in force from 1 October 2024, the Government's small claims mediation scheme and its published evaluation, the Civil Justice Council's report on compulsory alternative dispute resolution, the relevant primary legislation in family, employment and special educational needs law, and the established law on without prejudice privilege and on costs sanctions for conduct in relation to ADR, together with qualitative accounts given to Blind Justice by litigants in person, which are summarised as a pattern and not attributed to any identifiable case. The briefing does not allege wrongdoing by any individual mediator, judge, official or party. Its argument is about the design of the scheme and the data that is, and is not, collected about it.

1. Churchill v Merthyr Tydfil County Borough Council [2023] EWCA Civ 1416 (29 November 2023). https://www.bailii.org/ew/cases/EWCA/Civ/2023/1416.html
2. Halsey v Milton Keynes General NHS Trust [2004] EWCA Civ 576. https://www.bailii.org/ew/cases/EWCA/Civ/2004/576.html
3. PGF II SA v OMFS Company 1 Ltd [2013] EWCA Civ 1288 (costs and failure to engage with ADR). https://www.bailii.org/ew/cases/EWCA/Civ/2013/1288.html
4. Ministry of Justice, CPR amendments giving courts power to order alternative dispute resolution, in force 1 October 2024. https://www.gov.uk/guidance/civil-procedure-rules-amendments
5. HMCTS, Inside HMCTS: Preparing for the requirement to mediate in small claims (11 April 2024). https://insidehmcts.blog.gov.uk/2024/04/11/preparing-for-the-requirement-to-mediate-in-small-claims-what-you-need-to-know/
6. GOV.UK, Faster resolution for small claims as mediation baked into courts process. https://www.gov.uk/government/news/faster-resolution-for-small-claims-as-mediation-baked-into-courts-process
7. HMCTS, opt out mediation evaluation report (settlement values; throughput). https://www.gov.uk/government/publications/hmcts-opt-out-mediation-evaluation/hmcts-opt-out-mediation-evaluation-report
8. Civil Justice Council, Compulsory ADR report (June 2021). https://www.judiciary.uk/wp-content/uploads/2021/07/Compulsory-ADR-report.pdf
9. Children and Families Act 2014, section 10 (family MIAM) and section 55 (SEND mediation). https://www.legislation.gov.uk/ukpga/2014/6/contents
10. Employment Tribunals Act 1996, section 18A (ACAS early conciliation). https://www.legislation.gov.uk/ukpga/1996/17/section/18A