

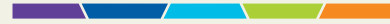
**EMPLOYMENT  
NEW ZEALAND**

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# **Using Mediation Services Effectively**



# EMPLOYMENT NEW ZEALAND



## Employment Mediation Services



Disclaimer. This document provides an overview of Leave and Holiday entitlements, as at June 2016. The Ministry of Business Innovation and Employment are not responsible for the results of any action taken on the basis of information in this document, or for any errors or omissions.

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## Introduction

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Sometimes an employee and their employer have a problem which they can't resolve by working on it together. Mediation provides expert problem-solving information and help.

Employment Mediation Services is a part of the Ministry of Business, Innovation & Employment (MBIE). Employment mediation is available to all employers and employees with an employment relations problem. It is effective, fair, and free.

This guide covers;

- › types of employment relationship problems
- › how mediation works
- › how to ask for mediation
- › possible outcomes of mediation.

This guide doesn't cover mediation in collective bargaining but you can find out more on [www.employment.govt.nz](http://www.employment.govt.nz)

# What is employment mediation?

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Mediation is where an independent and impartial third party helps employees and employers resolve their problem. The mediator encourages the employer and employee to explain what has happened, to discuss the problem, and to agree on what should happen. Everything in mediation is confidential.

## **Voluntary**

Mediation is voluntary; you don't have to go to mediation. However if the other party asks for mediation and you choose not to go, and the other party has a legal claim, they might complain to the Employment Relations Authority (ERA). The ERA can require you to attend mediation. Going to mediation to try to resolve a problem can show you are acting in good faith in the employment relationship.

## **When to get help**

Often, the longer a problem is left, the worse it gets and the more likely it is to damage your employment relationship. If you have a problem and decide to get help, it is important to do it quickly. Get help as soon as you think you can't resolve the problem by talking to the other party. You can also seek help from your union or employers' organisation.

## **Mediation services**

Mediation services can include:

- › early help by email and telephone
- › mediation meetings
- › a record of settlement agreeing to the resolution, signed by the parties and the mediator
- › a written recommendation or binding decision by the mediator if everyone wants it.

# What is an employment relationship problem



Any problem in an employment relationship, including disputes and personal grievances, can be an employment relationship problem.

## **A problem can be between:**

- › an employer and employee
- › employees
- › a union and its members
- › more than one union in the workplace
- › a union and an employer

## **Examples of problems:**

- › disagreements about the meaning of employment agreements or job requirements
- › disagreements about how much an employee should have been paid
- › where an employee thinks an action such as a warning is unjustified
- › claims of harassment, bullying or discrimination
- › where an employee has been dismissed and they think it wasn't justifiable
- › restructuring or redundancy issues.

## **Working out what the problem is**

First, think about the main facts about the problem and gather any relevant information.

Be honest with yourself. Leaving out important facts or trying to change the facts can make the problem worse.

## **Ask yourself:**

- › What is relevant in the employment agreement, job description or workplace policies?
- › What are the days and hours of work?
- › When and how did the problem arise?
- › How do you think the problem could have been avoided?
- › Does the problem involve one employee or a group of employees?
- › What actions have you taken already?
- › Have you talked to the person or people involved about the problem?

It's worth talking about the problem with a friend or colleague to see what questions they have.

**Often the underlying cause of a problem is not obvious.**

**Example:**



An employee who is not performing well may have:

- › not enough training
- › poor equipment
- › a lack of confidence in seeking help from a supervisor
- › misunderstood conditions such as sick or holiday pay
- › health and safety concerns such as long hours.

An employer concerned about performance may be influenced by factors such as:

- › absenteeism
- › poor time keeping
- › errors in the work

Spend time trying to identify the underlying cause to help you work out how to resolve the problem.

## Asking for help



Employment Mediation Services is a part of MBIE. For information about employment rights, resolving problems and mediation go to [www.employment.govt.nz](http://www.employment.govt.nz). You can email a question from the website. You can ask for mediation using the Online Mediation Request Form.

If you want to speak to someone you can contact us on [0800 20 90 20](tel:0800209020). The contact centre can give you information about legal minimum rights, facts and common sense suggestions to help you deal with the problem yourself. It cannot however provide legal advice to you. The contact centre can also refer the matter to an Employment Mediation Services' case coordinator.

If it is more appropriate we may refer you to other parts of MBIE or services such as the Human Rights Commission, WorkSafe NZ.

### **Before going to mediation**

Before you ask for mediation, you should try to raise your concerns directly with the other party to try to fix the problem.

If you're not comfortable talking to your employer first (or anyone else in your organisation) because of behaviour such as bullying, discrimination or harassment, you can ask for mediation. You don't need to make a formal complaint to the other party. Contacting us about mediation does not mean you have to take any further action.

### **The mediators**

Mediators are not on the side of either party. They are independent people trying to help both parties to resolve the problem. Mediators work with people to find solutions to the problem they can agree to.

Mediators come from a range of backgrounds and:

- › have extensive training in dispute resolution
- › come from employer and/or employee backgrounds
- › have a clear understanding of employment law
- › know current workplace trends.

**The mediator's role is to:**

- › encourage parties to identify the real issues
- › help the parties explain the issues to each other
- › help identify the things the parties agree on
- › help the parties find solutions to their problem even if these are not obvious
- › work with parties to find good faith and common sense solutions
- › assess the risks of the problem escalating to the Employment Relations Authority
- › help the parties reach a resolution which allows them both to put the problem behind them.

**Ways mediators work:**

Each employment problem is different. The process for mediation will depend on the parties and the type of problem. Employment Mediation Services provide a confidential process where problems can be discussed, clarified, and a resolution reached which both parties can agree to.

Mediators can:

- › provide early assistance to parties
- › help the parties with or without a representative
- › make a written recommendation or decision if the parties agree
- › record settlements (including settlements reached outside mediation) so they become full and final and binding under the Employment Relations Act 2000
- › provide information to community groups, unions, advisors, employer organisations or employment law seminars.



## Overview of a mediation process

Here is an overview of a mediation process. More detail follows.

Stage	What happens
1.	An employee, employer or union asks for mediation.
2.	Employment Mediation Services contacts the other party.
3.	If a mediation meeting is the best option, a meeting date will be arranged. Both parties will be told in writing of the time and place.
4.	You can keep trying to: <ul style="list-style-type: none"><li>• seek a resolution with the other party</li><li>• get more information to help you reach an acceptable outcome.</li></ul>
5.	Decide if you need support or representation and if you do, choose who it will be.
6.	Prepare for your mediation meeting.
7.	The meeting takes place
8.	If you agree to a settlement, the mediator records the details and you sign the agreement. If you don't reach agreement then the mediator will ensure you are clear about your options.

## Mediation outside Employment Mediation Services

There are costs if you employ a private mediator. Part of any agreement to use private mediation should be agreeing on how much each party pays.

Only Employment Mediation Services mediators can sign final and binding settlements under the Employment Relations Act 2000. If a private mediator is used, an Employment Mediation Services mediator can still be asked to sign the settlement.

Contact us on [0800 20 90 20](tel:0800209020) for advice.

# Requesting mediation

## Deciding on mediation

If you are an employer, employee or union and think you can't make any more progress with the other party, there are some questions to ask yourself:

- › Have I made my problem clear to the other person?
- › How important is the issue to me?
- › What would make me feel the matter is resolved?
- › Is keeping on trying to sort out the issue worth it to me, or is it using up too much of my energy when I could be doing other things?
- › Have I really looked at this from the other person's point of view
- › Have I really tried to reach an agreement?

It's a good idea to talk the matter over with someone outside the issue to check your view of the situation.

Unions and employer organisations may have seen similar issues before and know of solutions or approaches you haven't thought of.

## Making the request

If you decide to seek mediation you can contact Employment Mediation Services by:

- › Making a request at <https://www.employment.govt.nz> using the *Online Mediation Request Form*. The form is to get as much information as possible to help us work out the best course of action and next steps. Please include any supporting document as scanned attachments (e.g. the employment agreement, time and wage records, any letters emails and text messages). If you need help with the form, please contact us
- › Contact us on **0800 20 90 20**. We will listen, and discuss appropriate action and may refer you to mediation.

A mediator may contact you and the other party to see if there is a way of resolving the problem without a mediation meeting.

## Special needs

If you have any special needs such as an interpreter, or wanting mediation to occur on a marae, let us know when the mediation is being arranged. We will do our best to arrange this.

## Receiving notice of a mediation meeting

If it is agreed a mediation meeting is the best option and a meeting date has been arranged, both parties will be told in writing of the time and place. Possible places can be the workplace, a marae, a local community venue, or our office. It should be a place where both parties feel comfortable and can speak confidentially.

# Preparing for mediation

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## Why prepare

There are no legal requirements for preparation for mediation. Any preparation you do is for your own benefit.

## Mediation workbook

Preparation is about working out what the facts are so you can explain to others what happened, what your views are and what you want.

It is a good idea to use the *Preparing for Employment Mediation Workbook* to make notes on:

- › what happened and what the problem is
- › the cause(s) of the difference between yourself and the other party
- › what your employment relationship was like before the problem developed
- › evidence to support what you are saying
- › what is most important for you and the other party
- › ways to solve the problem
- › what will happen if you can't resolve the problem.

## New information

If new information becomes available before mediation, you can send it to the mediator (e.g. the employment agreement, time and wage records, any letters, emails and text messages).

## Keep trying to resolve your problem

While you're waiting for mediation, you should keep trying to resolve the problem.

If you reach agreement before the meeting, let Mediation Services know. You can record the agreement yourself. If the parties and an Employment Mediation Services mediator sign it, this agreement has the same effect as a settlement reached in a mediation meeting.

See: <https://www.employment.govt.nz/records-of-settlement>.

## If mediation is no longer required

If a mediation meeting has been arranged but you can't make it, or don't need it, let Employment Mediation Services know as soon as you can.

# Representation and support

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## Representing yourself

A mediation meeting is not a court hearing. People often attend mediation on their own. If you are going to go to mediation without a support person or representative, you don't need any expert knowledge, but you do need to be able to listen, respond and be open-minded about the options for resolving the problem.

If you don't feel confident going on your own, you can take a support person or representative. This can be a union or employers' association representative, friend, whanau member, community leader, or a legal advisor.

The mediator will give both parties the opportunity to find an acceptable outcome. If you are speaking on your own behalf, the mediator will make sure you are not disadvantaged in the mediation process. The mediator may:

- › suggest breaks to help you gather your thoughts
- › explain legal concepts in plain English
- › suggest you seek help if you are out of your depth
- › help you focus on the issues.

You can change your decision about having or not having a representative at any stage in the process.

## Bringing a support person

You can bring a support person to a mediation meeting, even if you're already bringing an advisor or representative. A support person doesn't usually participate in the mediation; their role is to support you emotionally. This person could be a friend, whanau member etc.

## Employing an advisor or representative

If you feel unsure about representing yourself you can ask a friend or family member or employ an advisor. If you employ an advisor you will need to pay them.

Employing an advisor does not always mean they will need to represent you before or during mediation. You may need help at two stages:

1. Preparing for the mediation meeting and/or
2. Attending the meeting.

## Choosing a representative

If you hire a professional representative, it will cost you. Think about cost in advance because who pays could become a major issue in the mediation. The issue can get in the way of fixing the relationship and getting back to working together, if that is what you want. You do not have to bring a representative to mediation.

If you are a member of a union or an employers' organisation, they will have experienced people who can help you.

If you employ an employment advisor or a lawyer you should very clearly tell them:

- › the work you want them to do
- › what you are trying to achieve
- › how much you are prepared to pay. You can ask for a cost estimate before you agree to hire them.

### **Keeping involved**

Even if you have representation, you need to stay involved in the mediation. This is your chance to tell the other party your concerns and have them genuinely heard and considered. This can be one of the most important parts of mediation.

## **What happens at a mediation meeting**



### **When you arrive**

The mediator will:

- › introduce all the people involved
- › tell you about the process. You can ask any questions or comment if anything makes you uncomfortable
- › ask each party about their understanding of the problem
- › ask them what outcome they want from the meeting.

### **Each person explains their view**

You each explain your view and give any documents or information to the mediator and the other party.

You should be honest about the outcome you really want.

For example, if an employee has been unjustifiably dismissed and believes the working relationship is beyond repair, they might ask for a good reference, compensation and legal costs. If the employer thinks the relationship can be fixed and is considering reinstatement, it's best to say so at the start. Clearly stating your goals will not disadvantage you. You can change your mind as you become more aware of the other parties' views.

### **The mediator can:**

- › ask for more information
- › ask questions
- › ask whether particular responses to the problem have been considered
- › help interpret a document or legal issue
- › discuss the risks to each party (costs, injury to reputation, employee productivity, legal action, and so on).

The mediator:

- › provides a fair process
- › manages both parties' expectations and emotions
- › focuses on reaching a successful outcome for both parties
- › keeps things going smoothly.

Mediation is not a court and the mediator is not a judge. You will not be cross-examined, but you will need to explain your point of view. Information and comment during the meeting are 'without prejudice'. This means they can't be used later in discussions or in legal proceedings about this or any other problem.

Breaks are often taken to:

- › consider how things are going
- › confirm what has been said
- › consider your responses
- › gather further information.

Mediators are experienced in showing the parties a different view and possible solutions. The mediator will keep things moving and encourage both parties to take a new look at their situation.

## **Decisions**

Generally only the parties can make a decision, but the mediator will support you by:

- › identifying areas of agreement
- › identifying and working through areas of disagreement
- › suggesting ways to resolve the issues.

## **Asking the mediator to make a recommendation or decision**

Giving the mediator power to make a written recommendation or to decide is covered in the next section.

## **How long does it take?**

The length of a mediation meeting varies depending on the issues and the parties. Most are finished within four hours. Sometimes more time is needed.

# Reaching an outcome

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## Reaching an agreement

It is important to be realistic about deciding to agree on the solution. Recognise the other party's needs if you want a satisfactory and lasting settlement. If you change your mind about what you want from the mediation, you should tell the mediator or the other party. Settlements don't always involve money.

Mediators will help you think about:

- › the circumstances and nature of the problem
- › the effect on the reputation of an injured party
- › the length of the employment relationship
- › previous expectations about income and career
- › harm or loss to the business
- › efforts both parties have made to deal with the problem
- › the legal costs of further action.

There are many ways to solve problems and the mediator can help you with ideas.

The parties need to try to find a solution everyone can live with and get on with their lives.

If you feel the offer is reasonable you should settle. The offer might not be available a week or even an hour later. If you need more time to think about the settlement offer you should ask the mediator to see if the offer can be 'left on the table' for a while.

## What happens if an agreement is reached

If you reach agreement, the mediator records your settlement decision and gets your signature. The mediator records when and how actions (such as reinstatement of an employee, payment or a formal apology), will happen. When the parties and the mediator have signed the record of settlement, the agreement becomes a full and final settlement and cannot be reopened by either party.

The mediator is not allowed to sign a settlement which contains less than minimum employment law entitlements.

If you reach an agreement before your mediation meeting, you can send it online to Employment Mediation Services to record the agreement. It becomes a full and final settlement once it is signed by the mediator.

Before signing it, the mediator will check:

- › the agreement complies with the law
- › the parties understand the settlement and that it is final.

Once you have settled and signed an agreement you cannot change your mind.

The agreement is full, final and binding in law.

## **Keeping to the agreement**

Parties to the mediation are responsible for sticking to the agreement. If you believe the agreement has been broken, you can ask the mediator to follow up. If necessary you can seek enforcement through the Employment Relations Authority or the Employment Court.

## **When agreement can't be reached**

If you can't reach agreement at mediation then the mediator will help you to work through the options:

- › If it looks like more information or help could lead to a settlement, the mediator can arrange a time to meet again with them, or
- › you can decide to work things out yourselves and to contact the mediator if you need help, or to record an agreement
- › parties can agree in writing to ask the mediator to make a written recommendation, or
- › ask the mediator to make a final and binding decision.

If these options are not acceptable, the mediation ceases. You can then choose to live with your differences and take no further action. Or in some circumstances you may be able to go to the Employment Relations Authority or the Employment Court. They can direct you to try mediation again if they believe you should be able to reach agreement.

## **Mediator recommendations**

At any stage you can agree to the employment mediator making a recommendation on how to resolve the employment relationship problem. A mediator recommendation is one way to get a quick resolution of the problem and may reduce costs.

- › You can ask or the mediator might offer to give a written recommendation before, during or after mediation.
- › A mediator's recommendation is confidential to you and the other party unless you both agree otherwise.
- › Both parties must agree in writing to accept a mediator's recommendation for it to become full, final and enforceable.
- › You will have time to consider whether or not to accept.
- › If you don't accept the recommendation, you or the other party must let the mediator know by the time deadline. If you don't let the mediator know in time, the decision will become final and binding and enforceable by you both.

If you or the other party do not accept it, you can;

- › try to reach agreement between you, or
- › ask to continue with another mediator, or
- › one party can refer the matter to the Employment Relations Authority if they have a legal claim.

There are two important dates:

- › the date you must notify the mediator if you don't accept the recommendation
- › the date of settlement – the day when the recommendation becomes final (usually the day after you must notify the mediator).



### **When the mediator can decide the outcome**

At any stage of mediation the parties can agree that the mediator will decide the outcome. This can help where everyone agrees on the facts but not on the best way to resolve the problem, or where agreement is close but the parties can't quite get there. The mediator will explain what is involved and both parties need to sign a consent form.

The mediator's decision will be binding. You can't change your mind or appeal the outcome if you don't like it.

## **Mediation confidentiality**

Information given and discussions during mediation are confidential. It cannot be given or disclosed to outside parties or the Employment Relations Authority or Employment Court unless both parties agree.

The mediator is unable to give evidence about the mediation including any information made known during the mediation.



# Appendix: Services and support available

If you need more information about mediation and employment relations:

- › Visit [www.employment.govt.nz](http://www.employment.govt.nz) or
- › Contact us free on [0800 20 90 20](tel:0800209020).

## Mediation

Our mediators can help you to deal with workplace problems. They can give you information, visit your workplace, and meet parties separately or together for one meeting or a series of meetings.

Our mediators are located around New Zealand.

## The Employment Relations Authority

If you have not resolved a problem through mediation, the Employment Relations Authority can formally investigate issues, determine whether mediation could help, and rule accordingly. The Authority is based at Auckland, Hamilton, Wellington and Christchurch and travels to other main centres.

If a party is not happy with the decision of the Employment Relations Authority the Employment Court is available to all parties. Visit [www.era.govt.nz](http://www.era.govt.nz) for more information.

## A Labour Inspector

Labour inspectors monitor, investigate and enforce legal minimum employment conditions.

You can contact us free on [0800 20 90 20](tel:0800209020).

## Other government services

1. Safety issues can eventually result in employment relations problems as well as unsafe working environments. Information about safety at work is available at [www.worksafe.govt.nz](http://www.worksafe.govt.nz). You can call WorkSafe NZ free on [0800 030 040](tel:0800030040) to:
  - get advice on workplace safety and health
  - report a workplace accident, injury or illness
  - find out how to identify and manage risks or prevent injuries in your workplace.
2. Visit [www.immigration.govt.nz](http://www.immigration.govt.nz) or by calling [0508 55 88 55](tel:0508558855) to:
  - find out about immigration, and visas to work or study in New Zealand
  - get resettlement information for new migrants
  - get information on employing migrants or seasonal workers

## Unions and employer organisations

You can seek help from your union or employers' organisation. A phone call could help to resolve your problem or avoid costly mistakes.

You can get union contact details at [www.union.org.nz](http://www.union.org.nz) or employer organisation contact details at [www.businessnz.org.nz](http://www.businessnz.org.nz).

