DEPARTMENT OF LABOUR EMPLOYMENT RELATIONS

Using mediation services effectively

DOL 11666 APR 12

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Department of Labour
TE TARI MAHI

About the Department of Labour

The Department of Labour provides information and investigates problems to do with employment and workplace health and safety. We can help employers and employees with:

- employment conditions
- minimum legal requirements
- problem resolution
- health and safety
- ways to work better
- labour market information.

More information

www.dol.govt.nz

0800 20 90 20

Information, examples and answers to your questions about the topics covered here can be found on our website www.dol.govt.nz or by calling us free on 0800 20 90 20.

Disclaimer

This document is a guide only. It should not be used as a substitute for legislation or legal advice. The Department of Labour is not responsible for the results of any actions taken on the basis of information in this document, or for any errors or omissions.

ISBN 978-0-478-33334-3

April 2012

Introduction

Mediation and the requirement to act in good faith, are cornerstones of the Employment Relations Act.

The objective is to build productive employment relationships through the promotion of good faith in all aspects of the employment environment. This includes promoting mediation as the primary problem solving mechanism. Further, the Act recognises that, if problems in employment relationships are to be resolved promptly, expert problem-solving support, information, and assistance needs to be available at short notice to the parties to those relationships.

Mediation services under the Employment Relations Act 2000 are provided by the Department of Labour. Mediation services are available to any employer or employee with an employment relations problem. Mediation is simple, effective, free and fair.

This booklet starts at the point where you believe you have a problem and decide to seek help. It is important to get help as soon as a problem emerges. Don't wait until it has become significant and your employment relationship is damaged.

Also in this series are booklets on:

- Minimum employment rights
- Employment relationships
- Solving problems at work
- Holidays and leave
- Pay and the minimum wage
- Unions and collective bargaining
- How to hire – guide for employers

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What is mediation?

Mediation is a process whereby parties are assisted to resolve a problem between them by an independent, impartial third party in a confidential forum. The mediator has the role of encouraging those with a problem to explain what has occurred, to discuss the pros and cons of the difference that has arisen, and to come to a resolution that is satisfactory to both parties.

A range of activities can be described as mediation services. These include:

- email and telephone exchanges
- workplace discussions
- education activities
- mediation meetings.

The following pages discuss:

- issues referred to mediation
- the role and duties of the mediator
- typical mediation activities
- ways to make mediation work effectively for you.

What is an employment relationship problem?

An employment relationship problem includes personal grievances, disputes, and any other problem which may arise in an employment relationship.

It can include disputes between:

- employer and employee
- employees
- a union and its members
- unions in the workplace
- a union and an employer
- an employer and other employers involved in multi-employer bargaining.

Examples of problems include situations where a party believes there to be:

- an unjustified dismissal
- a situation where actions such as warnings or demotions maybe unjustified
- claims of harassment and discrimination
- differences over the meaning of employment agreements
- restructuring and redundancy issues.

The Employment Relations Act requires that:

- every employment agreement includes a process for dealing with problems
- the employment agreement is in writing.

A sample process for dealing with problems is in Appendix B.

How do I identify the problem?

First, think through the key facts about the problem, and gather any relevant information. Often the act of collecting the information is the first step towards resolving the issue. Be honest with yourself. Omitting important facts or amending the facts can make the problem worse.

The kinds of questions you might need to ask yourself are:

- What are the details of the employment agreement?
- What are the days and hours of work?
- What is the job description?
- What type of business is involved?
- When and how did the problem arise?
- 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?

Sometimes it's worth running through the problem with a friend or colleague to see what questions they have about your story. Often the underlying cause of a problem is not obvious.

For example, an employee who is performing poorly may have:

- inadequate training
- poor equipment
- lack of confidence in seeking assistance from a supervisor

- misunderstandings about entitlements such as sick or holiday pay
- health and safety issues, such as concern about long hours.

Equally, an employer concerned about performance may be influenced by factors such as:

- absenteeism
- poor time keeping.

Whether you are an employer or employee, it is worth spending some time at this stage trying to identify the underlying cause in order to see how the problem might be resolved.

When should I seek assistance?

Usually, the longer a problem is left, the larger it gets!

For this reason, the Employment Relations Act provides ready access to assistance at any stage in the employment relationship and requires people to work together in good faith. Get help as soon as you feel out of your depth. You may wish to seek assistance from your union or employers' organisation.

Alternatively, the Department of Labour can often assist by giving you basic legal information and helping you consider how this applies to your situation. You can ask questions anonymously if you wish. (See Appendix A).

How do I contact the Department of Labour?

To contact the Department of Labour Contact Centre for workplace enquiries call **0800 20 90 20** or go to the Department's website at **www.dol.govt.nz**

Information officers at the Department's Contact Centre are experienced in helping with day-to-day problems in workplaces. They can also help interpret the minimum legal employment conditions. In most cases, information officers can give you information to help you deal with your problem yourself by providing facts and commonsense suggestions.

If your question requires more assistance, information officers can help you to decide which process will help you deal with the problem. They may refer you to other services established under the Employment Relations Act, or may provide information on other government agencies such as the Human Rights Commission or other parts of the Department of Labour.

The service is free, and your call is always confidential.

When should a mediator get involved?

Many of the employment matters referred to the Department revolve around preserving or improving workplace relationships.

If you still need help after calling the Contact Centre to discuss your case, the matter can be referred to an area office for mediation assistance.

Contacting the Department to talk about mediation does not commit you to taking any further action. You don't need to make a formal complaint to the other party before speaking to the Department but a problem should be raised and discussed by the parties, with a view to resolving it, prior to any third party intervention occurring.

The Department's mediation services can help you to:

- obtain information on problem solving
- identify the skills you need to deal with the problem yourself
- be the trigger for you and the other party to recognise a problem exists
- resolve problems and improve workplace relations.

Help from a Department of Labour mediator is free and confidential.

What is the mediator's role?

Mediators are not advocates for either party. They are independent people committed to the process of problem resolution. Mediators work with people to find solutions to the problem that will work for both parties.

Mediators come from a range of backgrounds. Among those employed by the Department of Labour are individuals:

- with extensive training in dispute resolution
- from both employer and employee backgrounds
- with an in-depth understanding of employment law
- with a clear picture of current trends in workplaces.

The mediator's role is to:

- help people find the best way to resolve their problems
- encourage parties to identify the real issues
- help the parties explain those issues to each other
- identify points of agreement between the two parties
- help people find a way through their problem that may not seem immediately apparent
- work with people to find answers that reflect good faith and common sense
- provide an assessment of the risks of the problem escalating to the Employment Relations Authority
- seek a resolution that allows both parties to put the issues behind them.

Each employment relations problem is different. The process for each mediation will depend on the needs of the parties and the nature of the problem. Mediation services provide confidential processes where problems can be discussed, issues clarified and a conclusion reached that all those involved can accept.

Mediators can also:

- provide early assistance to parties with or without representatives being present
- make a written recommendation or decision with the agreement of the parties
- record settlements (including signing-off settlements reached outside mediation) so they become full and final and binding under the Employment Relations Act
- perform a range of legislative duties under the Employment Relations Act
- provide information to unions, to community groups and advisors, to employer organisations or employment law seminars.

When should I consider a mediation meeting?

Often by the time people contact Department of Labour mediation services they are distressed, angry, no longer listening to each other, and unable to see any resolution beyond a continuing dispute or permanent breakdown in the relationship.

The most common trigger for considering a mediation meeting is the feeling by an employer, employee or union that they have made all the progress they can by dealing directly with the other party.

If you are in that position, there are some questions worth asking yourself:

- Have I made my problem clear to the other person?
- How important is the outstanding disagreement to me?
- What would make me feel that the matter is resolved?
- Is resolution worth pursuing, or is it diverting my energies from other important activities?
- Have I really looked at this from the other person's perspective and tried to reach an agreement?

It's worth talking the matter over with someone outside the issue to check your view of the situation. This does not have to be an employment relations advisor, although unions and employer organisations are likely to have seen similar issues before and can give assistance. Talking the matter over with a mediator can also help you identify the various ways other people have successfully dealt with similar circumstances.

If you do decide to seek mediation you can contact the Department by calling the Contact Centre, 0800 20 90 20. An Information officer will listen to your request and discuss an appropriate action. The Information officer will refer the matter to an area office so mediation can be arranged.

A mediator may contact you and the other party to discuss the problem and see if there is a way of resolving it without attending a mediation meeting. If it is agreed that a mediation meeting is the best way forward and a meeting date has been arranged, both parties will be advised in writing of the time and venue. Examples of possible venues include the workplace, a marae, a local community venue or the Department of Labour office. It is important that it is a venue where both parties feel comfortable and confidentiality can be maintained.

You are not required to prepare a written submission for the meeting, but you should think through the facts of your case and make some notes for your own use.

If you have any special needs at the mediation, such as a translator, it is important that you raise these issues when the mediation is being arranged.

➜ How do I receive notice of a mediation meeting?

When a problem occurs, the two parties should discuss and, if possible, resolve matters themselves before attending a mediation meeting. A mediator may provide the parties with early assistance to help them in this. If both parties still request a mediation meeting the Department's area office closest to where the employment relationship occurred will contact you to arrange a meeting.

Attendance at mediation meetings is voluntary but participation in mediation can be seen as part of the good-faith duties of the employment relationship under the Employment Relations Act. If you refuse to participate, the other party can take their complaint to the Employment Relations Authority, which can then require you to attend mediation.

While you are waiting for the meeting you can still seek a resolution with the other party, seek early assistance from a mediator, or obtain information from the Department of Labour that might help you reach an acceptable outcome.

If you continue to work on the problem and reach an agreement before the scheduled meeting, you can ask a mediator to record that agreement. The mediator will check that the agreement complies with the law before signing it. When it is signed the agreement has the same status as an agreement reached in a mediation meeting and becomes a full and final settlement.

If a mediation meeting has been arranged but you no longer require mediation you should let the Department's area office know.

➜ Should I represent myself?

A mediation meeting is not a court. People often represent themselves, so, if you feel confident, you can prepare for the meeting yourself to explain the facts.

You don't need any technical knowledge, but you do need to be able to listen, respond and be open-minded about the options for resolving the problem. An external advisor is often useful in that role. This can be a union or employers' association representative, friend, whanau member, experienced community leader, or a professional advisor.

The mediator's role is to ensure that both parties are given the opportunity to pursue an acceptable outcome. If you represent yourself, the mediator will make sure you are not disadvantaged in the mediation process.

The mediator may:

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

You can change your decision about having a representative at any stage in the process.

Do I need to employ an advisor or representative?

If you feel unsure about representing yourself, you can employ an advisor, or ask a friend or family member for assistance and support. You need to remember that if you employ an adviser you will need to pay them – this may form part of your decision about who to seek assistance from.

Engaging an advisor does not necessarily mean they will, or need to, represent you before or during mediation.

You may need assistance at two stages:

1. preparing for the mediation meeting and
2. attending the meeting.

How do I choose a representative?

The complexity of the problem will influence the level of assistance you need.

If you employ a professional advisor, cost may become an issue. It's important that you consider this in advance because recouping costs may become a major feature of a mediation and impede your ability to repair the relationship and get back to working together, should you seek this result. 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 staff who can assist you.

If you employ an employment advisor or a lawyer you should be very clear on your brief to them, including:

- the work you want them to do
- the objective you are trying to achieve
- how much you are prepared to pay.

How should I prepare for the mediation meeting?

When you enter into mediation you are starting down a road that should have a conclusion. Mediation gives the parties opportunities to understand each others' perspectives, and to take that into account when attempting to reach agreement. It is a process that allows the parties to move on, whether in the same employment relationship or not.

In the mediation meeting you are participating in a structured discussion where you must be able to discuss the problem and respond to facts or comments made by the other party or the mediator.

There are no technical requirements for presenting your story. Preparation is essentially drawing the facts together so you can explain to others what happened, what your views are and what you want.

The facts you should be prepared to cover at the mediation are:

- the key cause of the difference between yourself and the other party
- any secondary matters that contribute to that difference
- what your employment relationship was like before the problem developed
- any evidence to support what you are saying
- what you are seeking (be specific if you can).

The mediator will give assistance and support you in your decision-making. The aim is to end with a resolution that is within the law and that both parties feel comfortable with.

What happens at a mediation meeting?

When you arrive the mediator will brief you on the process, and you are able to ask any questions or comment if any part of that process makes you uncomfortable.

The mediator will:

- introduce all the people involved
- ask each party to outline their understanding of the problem
- invite them to describe the outcome they wish to see from the meeting.

You will each be given a chance to explain your view and make any supporting documents or information available to the mediator and each other.

Be truthful about the outcome you really want. For example, if an employee believes the working relationship is beyond repair, they might ask for a good reference and compensation for their upset and costs. If an employer is considering reinstatement, it's best to say so at the start. Clearly stating your goals will not disadvantage you.

The mediator may:

- seek additional information
- question either side further
- ask whether particular responses to the problem have been considered
- help interpret a document or legal issue
- discuss the potential risks to each party (costs, injury to reputation, reduced employee productivity, further legal action, and so on).

The mediator's role includes:

- providing a fair process that allows parties to participate fully
- managing the group's expectations and emotions
- focusing their attention on reaching a successful outcome.

This is not a court of law. You are not under oath and you will not be cross-examined, but you will need to explain your point of view. Information and comment exchanged during the meeting are "without prejudice" and cannot be used later in discussions about this or any other problem.

If proceedings become tense, it's the mediator's job to make sure things keep going smoothly.

It's common to take a break to:

- consider how things are going
- confirm things that have been said
- consider your responses
- gather further information.

The mediator will be available to both parties to talk issues through or explain the process. Mediators are experienced in showing differences in a new light and identifying possible solutions.

The mediator will ensure that momentum is not lost, and will encourage both parties to take a new look at their situation.

Decisions remain in your hands but the mediator will support you by:

- recording areas of basic agreement
- identifying and working through areas of disagreement
- proposing ways to resolve the issues.

You may ask the mediator to make a recommendation or a decision. Giving the mediator power to make a written recommendation or to decide is discussed further on pages 14 and 15.

Mediation meetings vary in duration, depending on the issues and the attitudes of the parties, with an average mediation meeting taking about four hours. Where the issues are complex, more time may be needed so that all the facts and potential solutions can be canvassed.

➜ What happens when agreement is reached?

If you come to an agreement, the mediator generally records your decision and obtains your signature. The mediator will record when and how agreements such as reinstatement of an employee, payment of a settlement or a formal apology, are to take place. Once you 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 permitted to sign a settlement in which a party agrees to forgo minimum entitlements provided in employment law. The mediator will advise you of your options should this possibility arise.

If you reach an agreement before your mediation meeting, you can ask a mediator to record that agreement. In this case the agreement has the same status as an agreement reached in a mediation and becomes a full and final settlement

once it is signed by the mediator. Before signing the mediator will check that the agreement complies with the law and that the parties understand that the settlement will become final once signed.

Parties to the mediation are responsible for ensuring that the agreement is followed through. If you believe that the agreement has not been implemented as agreed or has been breached, you can ask the mediator to follow up. If necessary you can seek enforcement through the Employment Relations Authority or the Employment Court.

What happens if an agreement can't be reached?

Sometimes you will end up just not agreeing on an answer to the problem. At this point the mediator will help you to work through other available options. Some of these options are identified in this section.

If it looks like more information or assistance could lead to a settlement, the mediator can arrange an adjournment. You can agree on a time to meet again with the mediator, or make a commitment to work things through yourselves and contact the mediator for assistance or to record an agreement.

Parties can agree in writing to allow the mediator make a written recommendation or to make a final and binding decision that decides the outcome (see sections below for further information).

If these options are not acceptable, the mediation ceases. In this case, you may choose to live with your differences and take no further action. Alternatively, you may pursue the matter with the Employment Relations Authority or the Employment Court. These institutions can direct you to try mediation again if they believe you should be able to reach agreement.

Can the mediator make a recommendation?

At any stage you can agree to the Department's mediator making a recommendation on how to resolve the employment relationship problem. Both parties must agree in writing to a mediator's recommendation and that recommendation will be full, final and enforceable *unless* you or the other party notify the mediator that you reject the recommendation within a specified timeframe.

You will have time to consider whether or not to accept the recommendation. The onus, therefore, will be on you to say whether you accept or reject the recommendation. If you or the other party do not accept it, the mediation may continue with another mediator, if requested, or an affected party may refer the matter to the Employment Relations Authority.

Is the mediator allowed to decide the outcome?

At any stage of mediation the parties can together agree to give the mediator the authority to make a decision on 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 feel unable to make a move.

The parties must give written consent in order for a mediator to make a decision.

If you give written consent to the mediator, then the mediator's decision is binding. You cannot appeal the outcome if you don't like it.

When should I decide to settle?

When deciding to settle it is important to remain realistic. A settlement should reflect the effect of the disputed event on the parties. A settlement will not necessarily involve money.

When guiding you to a reasonable settlement the mediator encourages you to look at:

- the investment in the employment relationship
- the nature of the problem
- the circumstances
- how the behaviour of both parties may have contributed to the problem
- how relevant law may affect the outcome.

Mediators will help you consider things such as:

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

If you change your mind about what you want from the mediation, you should tell the mediator or the other party. Consider your advisor's opinion but ensure your concerns are clear as well. It is also valuable to recognise the other party's needs if you want a lasting and satisfactory settlement to the problem.

Many satisfactory solutions do not involve money. 'Holding out' for money may prove an obstacle to resolution. There are many creative solutions to problems and the mediator can assist you to explore ideas that will result in a settlement that resolves the dispute, that everyone can live with, and allows parties to get on with their lives.

Settle when you feel the offer before you is satisfactory. There is no guarantee that the offer will be available a week or even an hour later. If you feel that you would like more time to think about the settlement offer you should discuss this with the mediator to see if the offer can be 'left on the table' for a while.

Once you have settled and signed an agreement you cannot change your mind because this is full, final and binding in law.

Is mediation confidential?

Information exchanged during mediation is confidential and cannot be disclosed to outside parties or to other employment institutions like the Employment Relations Authority or Employment Court, unless agreed by the parties or the mediation was in the course of bargaining for a collective agreement.

Mediation in collective bargaining

Mediators can become involved at any stage of the collective bargaining process. If the parties are having difficulty reaching agreement and think that mediation might help, either party can seek early assistance from a mediator or a mediation meeting. Often both parties will agree that mediation is necessary; however, it is always best to first discuss with the other party what they would like to achieve in mediation.

The Employment Relations Act requires that the parties who are entering into a collective bargaining process first reach an agreement about the process they will use for conducting the bargaining in an effective and efficient manner. This is called a bargaining process agreement. For guidance on what a bargaining process agreement should contain see the Code of Good Faith on the Department of Labour website.

If at any point in the bargaining process the parties reach impasse they can seek the assistance of a mediator. The mediator will assist them to overcome the impasse and then will leave the parties to continue bargaining.

The confidentiality obligations that normally apply to mediation do not apply to collective bargaining. This is because in collective bargaining the parties have to report on progress and consider options with those they represent, such as union members or company board members. How this information is to be shared and how information is given to the

media is something that the parties should agree as part of the Bargaining Process Agreement. There are times when the parties will want to agree that the progress of the discussions is to be kept confidential. Reaching an agreement on what will be reported publicly or on maintaining confidentiality sometimes helps things along, particularly if a range of options is being discussed.

Mediators may record agreements reached but the parties remain responsible for keeping track of changes to the collective agreement as they would throughout the bargaining process.

When parties have reached agreement in the negotiations, the whole new agreement must go to the union members for ratification. A ratification process may also be required for the employer, for instance, where a board must sign off an agreement. After ratification a copy of the agreement must be sent to the Chief Executive at the Department of Labour.

The Department of Labour has prepared an online resource which can be found at **www.dol.govt.nz/infozone/collectivebargaining/index.asp**. This is a tool with information and guidance to assist both parties work through all collective bargaining processes.

➔ Mediation in essential industries

More than 100,000 New Zealanders work in essential industries. These are defined under the Employment Relations Act as areas where industrial action over collective bargaining can cause major social or economic disruption to the community.

Notice of industrial action in essential industries must be given to the other party and the Chief Executive of the Department of Labour must be advised. The length of notice depends on the nature of the industry. The services of a mediator will then be offered to the parties and treated with urgency.

The mediator provides the same services as those normally offered to parties during other negotiations, but will focus particularly on how a strike or lockout can be avoided.

➔ Mediation outside the Department of Labour mediation services

There are costs involved in employing a private mediator. Part of any agreement to use this form of mediation should be agreeing on how much and who pays.

Only Department of Labour mediators have the authority to sign settlements so that they are legally final and binding under the Employment Relations Act. If a private mediator is used, a Department of Labour mediator can be asked to sign the settlement. Contact the Department on 0800 20 90 20 or your local Department of Labour office for advice on this process.

➔ The Employment Relations Authority

The Employment Relations Authority was established under the Employment Relations Act to determine the law and facts in employment relations disputes. It has powers to determine the outcomes of disputes.

The Authority can use a variety of ways to sort through issues. For example, it can:

- call for evidence from the parties or anyone else
- hold investigative meetings
- interview the parties or anyone else
- make a recommendation to the parties.

The Authority must also consider whether mediation will still be helpful, and can refer parties back to mediation.

Appendix A: Service and support available

If you require further information and guidance about any matter covered in this publication or about any other employment relations matter:

› Call Department of Labour Contact Centre free on 0800 20 90 20; or
› Visit our website at www.dol.govt.nz – where you can also find easy-to-read information, publications, and fact sheets on specific employment issues to assist you to create and manage better workplace relationships.

Ask a Labour Inspector

Labour inspectors monitor, investigate and enforce minimum employment conditions set out in various Acts of Parliament. The functions of the inspector involve providing employees and employers with information and education to enable them to become compliant with the law. They also have a role to assist employers implement systems and practices in the workplace that comply with the minimum standards.

If it appears that any of these laws has been breached in a workplace, an inspector may intervene in the workplace to ensure there is compliance with minimum employment standards.

Go to Mediation

Our mediators can, if invited, assist you to deal with workplace problems that arise. They operate informally and formally, can provide you information, visit your workplace, and meet both parties separately or together for one meeting or a series of meetings.

Mediators are based at offices around New Zealand.

Apply to the Employment Relations Authority

If you have not resolved a problem through the options available in mediation services, the Employment Relations Authority is available to formally investigate issues, determine whether mediation could assist, and rule accordingly.

The Authority is based at Auckland, Hamilton, Wellington and Christchurch and will travel 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 for more information.

Other legal obligations

This booklet focuses on matters mostly under the Employment Relations Act, the Holidays Act, the Minimum Wage Act, the Parental Leave and Employment Protection Act and the Wages Protection Act. You should also be aware that other legislation impacts on employment relationships. For example, the antidiscrimination provisions of the Human Rights Act and the Equal Pay Act apply to all employment relationships. Also, the Privacy Act and the Accident Compensation Act may well also have an impact.

The Department of Labour's Contact Centre for workplace enquiries on 0800 20 90 20 will put you in touch with the appropriate source of advice on these matters.

You can get assistance from other Department of Labour services

1. Health and safety in the workplace is another area where employers and employees need to be able to work effectively together. Often unsatisfactory management of safety issues can eventually result in employment relations problems, as well as unsafe working environments. Information about Health and Safety in Employment (HSE) is available on www.dol.govt.nz. There are offices throughout New Zealand.

   You can:

   – find out about workplace health and safety law, visiting www.dol.govt.nz or call the Department of Labour Contact Centre free on 0800 20 90 20
   – get advice on workplace safety and health
   – report a workplace accident, injury or illness
   – find out how to identify and manage hazards in the workplace or prevent injuries in your workplace.

2. Immigration New Zealand is available on www.immigration.govt.nz or by calling 0508 55 88 55

   You can:

   – find out about immigration in New Zealand
   – get information for new migrants to settle in New Zealand
   – get information on how to apply for a visa to work or study in New Zealand.

Assistance from unions and employers' organisations

You may wish to seek assistance 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 or employers' organisation contact details at www.businessnz.org.nz.

Appendix B: Sample problem-solving procedure in an employment agreement

The written employment agreement between an employer and an employee must include a problem-solving procedure. Such a procedure might be:

If our employment relationship is to be as successful as possible, it is important that we deal effectively with any problems that may arise.

This procedure sets out information on how problems can be raised and worked through.

1. What is an employment relationship problem?

It can be anything that harms or may harm our employment relationship, other than problems with the fixing of new terms and conditions of employment.

2. Clarify the problem

If either of us feels that there may be a problem in our employment relationship, the first step is to check the facts and make sure there really is a problem, and not simply a misunderstanding.

You may want to discuss a situation with someone else to clarify whether a problem exists, but in doing so you should take care to respect the privacy of other employees and managers, and to protect confidential information belonging to the employer.

For example, you could seek information from:

› friends and family
› the Department of Labour Contact Centre free on 0800 20 90 20
› pamphlets/fact sheets from the Department of Labour
› your union, a lawyer, a community law centre or an employment relations consultant.

3. Discuss the problem

If either of us believes there is a problem, it should be raised as soon as possible.

This can be done in writing or orally. Provided you feel comfortable doing so, you should ordinarily raise the problem with your direct manager. Otherwise, the problem can be raised with another appropriate manager. A meeting will usually then be arranged where the problem can be discussed. You should feel free to bring a support person with you to the meeting if you wish. We will then try to establish the facts of the problem and discuss the possible solutions.

4. The next steps

If we are not able to resolve the problem by talking to each other, we each have a number of options:

- We can contact the Department of Labour Contact Centre free on 0800 20 90 20, which can provide information and/or refer us to mediation.
- We can use the mediation services provided by the Department of Labour (or we can agree to get our own mediator). Mediation will normally be confidential.
- If we reach agreement, a mediator provided by the Department of Labour can sign the agreed settlement, which will be binding on us.
- We can both agree to have a mediator provided by the Department of Labour make a written recommendation to resolve our problem. Should we accept that recommendation, it will become binding on us both.
- We can both agree to have the mediator provided by the Department of Labour decide our problem for us, in which case that decision will be binding on us.
- If mediation does not resolve the problem, either of us can refer the problem to the Employment Relations Authority for investigation.
- The Authority can direct us to mediation, or can investigate the problem and issue a determination. The Authority can also make a recommendation which, if we accept, will be treated as the Authority's determination of the matter.
- If either of us is not happy with the Authority's determination, we can refer the problem to the Employment Court. (The Court may also tell us to go back and have more mediation.)
- In limited cases, there is a right to appeal the decision of the Employment Court to the Court of Appeal.

5. Personal grievances

If the problem is a personal grievance, then you must raise it within 90 days of when the incidents that gave rise to the grievance occurred or came to your attention.

A personal grievance can only be raised outside this time frame with the agreement of the employer, or in exceptional circumstances.

If you are given notice of dismissal before the end of an agreed 90 day trial period you cannot raise a personal grievance on the grounds of unjustified dismissal. You may, however, raise a personal grievance on other grounds, such as discrimination or harassment or an unjustified action by the employer that disadvantaged you.

More information

www.dol.govt.nz

0800 20 90 20

Information, examples and answers to your questions about the topics covered here can be found on our website www.dol.govt.nz or by calling us free on 0800 20 90 20.

newzealand.govt.nz

Department of Labour
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