



When to mediate and when not to mediate

- A Checklist

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'making the workplace a better place to be'

In determining whether or not mediation would be a good option for a conflict or workplace matter, please consult the following checklist. The items listed serve as a guideline; however, consider the specific needs of the parties and the situation and consult with others for advice if necessary.

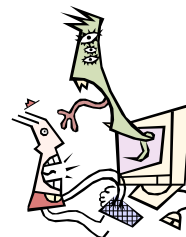
When to mediate:

- When no fundamental legal principle is at stake.**
- Where misunderstandings, miscommunication or lack of communication are responsible for the problem.
- When confidentiality is important.
- When a speedy outcome is desired.
- Where there is no power imbalance.
- When the issues are not of concern to the wider organisation or society (precedent setting).
- When parties are in a fit condition to participate.
- Where there are no difficult questions of fact.
- When there is trust in, and agreement to, the mediator.
- Where there is sufficient goodwill.
- Where the mediator is qualified, suitable and accountable.



When not to mediate:

- When the law has been broken.**
- Where behaviour has violated laws, award, conditions or organisational policy.
- Where parties other than those mediating are liable for the consequences of a breach of any agreements that are outcomes of the mediation process. (eg, duty of care or vicarious liability)
- Where one party has formal authority over the contract of employment of the other and can subject that party to an employment detriment.
- When parties hold deeply entrenched positions (deep seated values, preferences and prejudices that keep them entrenched in 'argument' mode -v- 'exploration' mode.)
- When there is a track record of dispute.
- When there is an avoidance of performance management responsibilities by management.
- When a power balance exists that cannot be redressed.
- When it is not the organisation's responsibility to manage the conflict (ie, the matter is not work-related in any way).
- When blame is the likely outcome of a failed mediation.



What Is Mediation?

Mediation is a problem solving approach where a neutral person meets with the parties and assists them to reach an outcome to which they can both agree and which will resolve the issue.

If the complaint manager believes that mediation is a suitable option, the parties should be asked if they want the matter to be mediated. Mediation is a voluntary process based on the commitment of parties to participate with goodwill.

The outcome of mediation is determined by the parties to the dispute.

Since agreements made at mediation are not binding, there is a risk that the parties may 'reneg' at a later stage.

As well, since mediation depends to some extent on the skills and self-discipline of those involved, resolution may not be achieved and the matter may escalate.

Mediation is appropriate for minor concerns and interpersonal differences. It may also be used in conjunction with appropriate behaviour management to resolve complaints.

It is important to note that where complaints involve possible breaches of codes or policies then conciliation may be a more suitable option.



What Is Conciliation

Whilst conciliation is similar to mediation in many ways, the conciliator is not neutral on matters of company policies, procedures or standards. Their role is to ensure the outcome agreed to by the participants is acceptable to the organisation.

The conciliator assists the parties in dispute to identify issues, develop options, consider alternatives and try to reach agreement.

A conciliator may provide advice on the content of the issues in dispute and options to be considered, prior to agreement.

Parties have a significant amount of control over the outcome, however, the outcome agreed to must be in line with organisational policies and expectations.

In the absence of an agreement between the parties the conciliator may be asked by the employer to make recommendations about the matters in dispute.

Risks of conciliation include token participation, refusal to participate and failure to agree a way forward.

Conciliated agreements are binding on the parties and breaches may be managed through line management or the disciplinary process.

General Applications

Mediation is appropriate for minor concerns that are interpersonal in nature. Conciliation is appropriate for most types of complaint.

However, neither mediation nor conciliation are appropriate if there has been an avoidance of performance management responsibilities by line management, where a power balance exists and cannot be redressed and where blame is the likely outcome of a failed process.

Neither is appropriate for matters involving allegations of harassment, unlawful conduct or matters involving significant formal or personal power difference between parties.

Privacy, Confidentiality and Reporting

Our job is to provide conflict and dispute resolution processes so that issues can be aired and resolved in a safe environment.

What is said in mediation is confidential, ie, we do not report what participants say.

However, if the comments or actions of a participant indicate threat, endangerment or criminality, then we are ethically and legally bound to report.

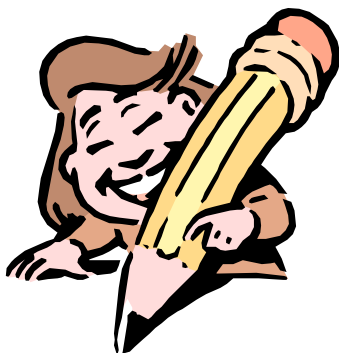
Where clients require a written report from the mediator we will report on the process, the outcomes and our general impressions as to the likelihood of resolution or the likelihood of the outcomes being maintained.

You should discuss your client's expectations in regard to reporting, confidentiality and the outcomes they wish to achieve from the process at the initial briefing.

How does the process commence?

If a conflict or dispute is found to be appropriate for mediation/conciliation, the employees will be asked if they want to resolve the matter. If they agree then the process will commence.

The facilitator will meet with the parties separately and discuss the issues at the heart of the conflict, the format, and any ground-rules that will be observed during the meeting.



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Setting up the process

A typical process will most likely include the following steps:

- The facilitator will meet with the first party to hear their concerns.
- The facilitator will meet with the other party to hear their concerns.
- An agenda will be agreed to in consultation with the parties.
- The facilitator will meet together with the parties together and ask them to present their concerns as per agreed agenda.
- The mediator facilitates the search for solutions.
- Additional separate meetings may take place.
- After a set period of time the parties either find an agreement or end the process.

How does mediation conclude?

The process concludes when:

- Either a written agreement drawn up by the parties involved in the mediation is signed by both parties, or a verbal agreement sealed with a gesture (eg handshake).
- The outcome is confidential to the parties and the mediator.
- The mediator assesses that there is insufficient common ground for a mediated outcome to be achieved.
- Either party feels that a solution cannot be found and it is useless to continue the mediation; or
- Either party wishes to end during the process and return to a formal process.

How does conciliation conclude?

The process concludes when:

- A written agreement is drawn up by the parties involved in the process.
- The line manager may be involved to ensure that:
 - outcomes agreed to are acceptable
 - agreements are maintained.
- The outcome is confidential to the parties, the conciliator and the appropriate manager.
- The conciliator assesses that there is insufficient common ground for a negotiated outcome to be achieved.
- Either party feels that a solution cannot be found and it is useless to continue the process; or
- Either party wishes to end during the process and return to a formal process.