



Mediation Practice Note	Date of issue:	November 2008
Topic: Recorded Settlements	Date of Review:	November 2009
Distribution: Chief advisor, regional managers, mediators, team leaders.	Authors: Team:	Practice Leadership (Colleen Hicks)

This practice note deals with-

The Role of the Mediator where recorded settlements contain;

- (a) Potentially unenforceable terms
- (b) Potentially unlawful terms
- (c) Possible tax avoidance is suspected
- (d) An Ethical issue is raised by a party
- (e) Payments to advocates under 149(3).

The role of the Mediator

It is the role of the mediator to facilitate resolution and with recorded settlements this requires that the Mediator respect the agreement as the settlement of the parties and thus the Mediator will not wish to unnecessarily undermine that agreement.

When Mediators consider Recorded Settlements they have to fulfil their obligations under section 149 of the Employment Relations Act 2000 to:

- explain that once signed by a Mediator the Recorded Settlement:
 - a. will become final, binding and enforceable;
 - b. will not be able to be cancelled by the Contractual Remedies Act; and
 - c. can only be presented in a higher authority for enforcement purposes.
- satisfy themselves that
 - a. the parties understand the effects of signing; and
 - b. that the parties have affirmed their request for signing

In practical terms, this legal obligation involves a telephone call or interview with the parties.

The Use of a File Note

A "File Note," must be used whenever a questionable term arises (except for tax issues see below) to explain why, under the circumstances, it was appropriate to sign the Recorded Settlement. The file note is to be made in Workbench.

In practice, the note would simply reflect that the parties fully appreciated the intent and any likely implications of the term. The note would also contain any other facts or considerations that reassured the Mediator about the reasonableness of the term in its context.

The File Note would include:

- A specific reference to the term in question
- A note that the Mediator had been concerned
- A note that the Mediator had drawn the parties attention to his or her concern and any possible implications caused by the term
- A note of the parties explanation and if appropriate that they had reconsidered the term
- A note that the parties fully understood the intention of the term
- Any background notes the Mediator may want to include; especially notes which indicate why the term was reasonable

Standard Practice (for Tax Cases)

A File Note will not be required for Recorded Settlements that potentially generate tax concerns. Instead the Department will rely on its standard practice i.e. That the Department does not offer tax advice and where necessary the Department ensures that the parties have received tax advice. For further details please see *(c) Tax avoidance is suspected* (below).

(a) Potentially unenforceable terms

Classic examples of unenforceable terms are:

- penalty / liquidated damages terms
- restraint of trade terms

Penalty / Liquidated Damages

Where the term imposes a reprisal cost for breaching the settlement, which has no relationship to the damage the breach actually caused to the party.

For example, in *Ozturk*¹, a settlement provided for a \$2,500 penalty to be payable on each monthly payment that was overdue by more than a week. The Court found that the principal owing would ordinarily attract between \$125 and \$250 in interest charges. The Court determined that the term was not designed as a mechanism to reimburse a party for any potential losses;

¹ *Ozturk v Gultekin (t/a Halikarnas Restaurant)* [2004] 1 ERNZ 572

instead the term's intent was to compel performance by creating an entirely disproportionate threat.

Restraint of Trade

There is a legal presumption that such provisions are unlawful, but they may be enforceable if they are reasonable in the circumstances and not contrary to the public interest.

Reasonableness involves consideration of the circumstances of the parties at the time of entering into an employment relationship including relative bargaining power.²

Ascertaining reasonableness may also require consultation with colleagues and requesting background information from the parties.

Approach

The Mediator must use a File Note when the enforceability of a term remains uncertain and the parties still wish to have a Recorded Settlement.

(b) Potentially Unlawful Terms

Examples of potentially unlawful terms are:

- withdrawal of an official complaint, where it may be outside the party's control whether that complaint is pursued³ e.g. a complaint to Police
- a term in breach of immigration law

Mediators' role

Clearly a Mediator may not be party to (and must not sign) anything unlawful. As with unenforceable terms, however, obvious cases are likely to be rare.

Recorded Settlements are usually received without any prior involvement by the Mediator. Under these circumstances the Mediator's understanding of the parties' backgrounds, intent and reasoning is therefore limited.

Approach

Usually, the Mediator's role would be to raise any concern directly with the parties.

The Mediator must use the File Note where the lawfulness of a term remains uncertain and the parties still wish to have a Recorded Settlement.

(c) Tax avoidance is suspected

Examples of potentially tax avoiding terms are:

² *Laws of New Zealand, Employment, paragraph 19*

³ For example a Police complaint or complaint to a professional body

- terms that are framed as non-taxable compensation settlements that may relate to lost wages or redundancy

Mediators should look for the following triggers:

- A precise settlement amount, which suggests the amount was calculated on wages (e.g. \$7,647.25)
- where a reference in the document or the compensatory figure itself suggests the entire payment (or an overly significant proportion of the settlement) is non-taxable and the document appears to be settling a problem involving redundancy or lost wages.
- where the non-taxable payment is in the higher realm of tax-free awards made by the Employment Relations Authority and the courts.

Although there is no set amount of non-taxable compensation that is “too high”, as each case turns on its own merits, the Courts have given some general guidelines for cases that go to the Employment Relations Authority or Employment Court.

This guidance, and the settlements tables issued periodically by the Employment Institutions Information Centre, may be of general assistance, but it may not always be directly applicable to mediated or recorded settlements. If further researched advice is required the EIIC is available at <http://www.ers.dol.govt.nz/law/case/>.

Mediators' role

Mediators must not give tax advice. Tax is the obligation of the parties. However, this needs to be balanced against a Mediator's wider duty to support the law.

Approach

In reality this will mean, where any of the triggers above are crossed the Mediator is required to contact the parties, raise their concern and ask if they have received tax advice, if they reply in the affirmative the Mediator may sign the settlement if they have not received advice the Mediator must not sign the settlement.

(d) Ethical Issue raised by a Party when contacted

A Mediator may receive some information that indicates a party is not fully aware of the settlement's details or effect. This information would usually come to light when the Mediator contacts the parties to receive their affirmation.

Common examples include:

- a party says they do not know about the settlement
- a party says they have changed their mind
- a party claims to have been forced into the settlement by duress

Mediators can only sign a recorded settlement if the parties affirm their request for the Mediator to sign once the Mediator has explained that the settlement is final, binding and enforceable.

If an ethical issue is raised, the best option is for Mediators to give the party raising a concern time to consider and seek further advice.

If the party subsequently affirms the settlement, the Mediator will sign, and make a file note that a concern was raised. For the sake of clarity, if the party does not affirm the mediator will not sign the recorded settlement document and will make a file note to that effect.

The parties may be assisted to reach settlement by being offered mediation.

Payments to advocates under s. 150 A

Payments to Advocates under s150A

Payments made in breach of s150A (i.e. directly to advocates) are, under the Act, to be treated as if they had not been made. The party making the payment is required to ensure the payment is legal.

Section 150A provides :

(1) Any payment by one party to another, required by any agreed terms of settlement under section 149(3) or decision under 150(3), must be paid directly to the other party and not to a representative of that party, and the party receiving the payment may not receive or agree to receive, payment in any other manner.

Legal Services has provided advice on when a 'payment' comes under s150A and when it is excluded. They have advised that, payment includes any monetary settlement (e.g. \$5,000), but excludes any goods or services e.g. outplacement services and arguably legal or advocacy services where such service is a separate term of the settlement and a GST invoice for a defined sum is provided to the other party.

Therefore where a respondent agrees to pay a contribution to the costs of the applicant's representation on receipt of a GST invoice for those costs such payment would be excluded from s150A.

(This approach cures the mischief that the section was designed to remedy (i.e. preventing any less than ethical representatives taking a cut out of the settlement to ensure payment for their services), and places more power in the hands of the applicant.

