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ADR Bulletin

New dimensions in ADR

Employment mediation in New Zealand

Peter Franks

Mediation about employment relationship problems is one of the most important developments in ADR in NZ in recent years. Since the *Employment Relations Act 2000* (NZ) became law, mediation has been the primary means of resolving employment disputes.

This article explains how mediation works under the statute. It provides an historical context and summarises relevant sections of the *Employment Relations Act*. It discusses the different types of employment mediation and analyses the performance of the mediation services. Finally, the article identifies some issues for the future of employment mediation.

Historical context

For nearly 100 years NZ had a highly regulated system of industrial relations. This was introduced by the *Industrial Conciliation and Arbitration Act 1894* (NZ), which was similar to legislation in Australian jurisdictions. Although the arbitration system applied mainly to the private sector, employment relations in the public sector were also highly regulated. From 1908 State appointed conciliators were employed to chair negotiations between unions and employers for collective agreements. The Arbitration Court presided over the system and had the power to make binding awards setting wages and conditions.

Before 1970 employees had no legal right to challenge dismissals, other than the very limited provisions of the common law. In that year, two important changes were made. The first was the introduction of statutory personal grievance procedures for employees covered by union negotiated collective agreements. The second was the establishment of an industrial mediation service. Both initiatives were in part a response to the high number of strikes (especially the increase in strikes over dismissals).[1]

The 1970 legislation envisaged that mediators would play a proactive role in preventing disputes. In practice, however, mediators were largely involved in hearing cases involving personal grievances or disputes. They chaired grievance and disputes committees (made up of union and employer representatives). If the committee failed to reach a resolution, the mediator could make a ruling. Either party had the right to refer the case to the court.[2] In 1987 the mediation and conciliation services were merged into a new mediation service. Mediators dealt with personal grievances, disputes and collective bargaining. There were 13 mediators.

In 1991 the arbitration system was swept away by the *Employment Contracts Act 1991* (NZ) which was passed by the newly elected National Party Government. This introduced voluntary union membership and abolished awards. The word 'union' was dropped from the law. Workers could choose any bargaining agent to represent them. However, there were no requirements for employers to negotiate with workers' representatives. They only had to 'recognise' bargaining agents, who were given limited rights of access to workplaces.

The *Employment Contracts Act* provided for two types of bargaining — individual employment contracts and collective employment contracts — and gave a strong nod to the former. As the Court of Appeal later put it, the *Employment Contracts Act* allowed 'take it or leave it' negotiations.[3]

The *Employment Contracts Act* resulted in a move overnight from a highly centralised system of bargaining based on unions to a completely decentralised system designed to marginalise unions. Under the arbitration system, national collective agreements for industries or occupations were the norm, especially in the private sector. Under the *Employment Contracts Act* individual contracts were

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prevalent and enterprise bargaining was the main type of collective contract.[4]

In contrast to the radical changes it made to collective bargaining, the *Employment Contracts Act* retained employees' rights to take personal grievances. These rights were extended to all employees and not just union members. The mediation service was disbanded. The Employment Court (the successor to the Arbitration Court) continued and an Employment Tribunal (the Tribunal) was established (comprised in any particular case of one member). The Tribunal provided both mediation and adjudication services.

Under the arbitration system, unions filtered the number of cases that went through formalised personal grievance procedures. Union policy was to resolve grievances in the workplace wherever possible. The collapse of unionism in several sectors of the economy meant there was often no longer a union to turn to.

The expansion of personal grievance rights and the reduced role for unions led to an explosion in the number of cases. In its first year, the Tribunal received 2322 applications and at the end of that year 1079 applications were outstanding.[5] In 1997 the Tribunal received 5242 applications and had 3472 outstanding at the end of the year.[6] Employment law became a rapidly expanding area of work for lawyers.

Although the number of cases outstanding fell after 1997 (mainly because the number of Tribunal members was increased) the Tribunal's backlog remained very large. As the Department of Labour said in its 1999 post election briefing to the Government:

> Maintaining and improving the capacity of the Tribunal is a continuing issue. Optimal waiting times for dispute resolution are estimated at two to three months for mediation and four to six months for adjudication. In practice, however, waiting times are above these levels in almost all centres, and in the regions, waiting times may be 8 to 16 months for mediations and 11 to 22 months for adjudications.[7]

Employment Relations Act 2000 (NZ)

One of the first moves by the Labour Party led Government elected in November 1999 was to repeal the *Employment Contracts Act*. The *Employment Relations Act 2000* (NZ) became law on 2 October 2000.

The key aim of the preceding Act was 'to promote an efficient labour market'. In contrast, the main object of the *Employment Relations Act* is 'to build productive employment relationships through the promotion of mutual trust and confidence in all aspects of the employment environment and of the employment relationship'.[8] The objectives of the *Employment Relations Act* include developing good faith behaviour in employment relationships, addressing the 'inherent inequality of bargaining power in employment relationships', promoting collective bargaining, protecting the integrity of individual choice, promoting mediation 'as the primary problem solving mechanism' and reducing the need for judicial intervention.

The *Employment Relations Act* abolished the Employment Tribunal. It established a new mediation service and an Employment Relations Authority (the Authority) and continued the Employment Court. The Authority's role is to adjudicate on grievances and disputes. Both the Authority and the Employment Court have a duty to consider sending parties to mediation before determining a case before them.

The provisions of the *Employment Relations Act* dealing with mediation 'recognise that employment relationships are more likely to be successful if problems in those relationships are resolved promptly by the parties themselves' (s 143). Therefore, 'expert problem solving support, information and assistance needs to be available at short notice to the parties to those relationships'.

Under earlier legislation, mediation invariably meant a formal meeting convened by a mediator or Tribunal member. The *Employment Relations Act* says mediation services also include the provision of information about employment rights and obligations and about the services that are available to assist people with problems. Mediation services can be provided by telephone, fax, internet or email and by publications, as well as by mediators.

Before 2000, mediators and Tribunal members were statutory appointees. Mediators are now employees of the Employment Relations Service, a division of the Department of Labour. The *Employment Relations Act* protects their independence in dealing with any particular problem. It gives them considerable flexibility by providing that a mediator may 'follow such procedures, whether structured or unstructured, or do such things as he or she considers appropriate to resolve the problem or dispute promptly and effectively'.

The *Employment Relations Act* provides that mediation services are confidential (apart from mediations concerning collective bargaining). What happens in mediation cannot be revealed or used in subsequent legal proceedings. Mediators cannot be called to give evidence in litigation. If a problem is resolved and a mediator is asked to sign agreed terms of settlement, once the mediator has signed the settlement its terms are 'final and binding on, and enforceable by, the parties'. No further legal action can be taken (except to enforce the settlement). In contrast, a party who is dissatisfied with the outcome of an authority hearing can take their case de novo to the Employment Court. Employment Court decisions can be appealed to the Court of Appeal, with leave, on points of law. By agreement between the parties, mediators can also make final and binding decisions.

Mediators must explain what final and binding means before signing a settlement or making a decision. They can be challenged if they fail to do so. However, with this exception, mediation services cannot be questioned in legal proceedings as being inappropriate.

Mediation services under the Employment Relations Act

The changes to dispute resolution introduced by the *Employment Relations Act* were a response to widespread concern about the old system. In its report on submissions on the Employment Relations Bill 2000 (NZ), the Department of Labour said that '[a] large number of submissions supported mediation as a means of providing effective low level dispute resolution, as it will be less legalistic and more accessible'.[9]

The emphasis of the *Employment Relations Act* on mediation also reflected the determination of the new Minister of Labour, Margaret Wilson, to put in place an effective system of ADR. In an often repeated phrase, she has said that mediation services are 'free, fast and fair'.

One of the Employment Tribunal's problems was that it was unable to cope with demand. At its peak the Tribunal had 28 members. Under the *Employment Relations Act* there are 38 mediators and 15 authority members — nearly double the number of personnel.

In the past, people had to follow formal procedures before they could go to mediation. A fee had to be paid to file a case with the Tribunal. Under the current statute, mediation services can be accessed simply by contacting an office of the Department of Labour. There is no charge.

The aim of the *Employment Relations Act* and the Minister's commitment are underlined by the Department of Labour's performance standards. One says that 80 per cent of mediations undertaken will be resolved within three months. Another says that external client surveys will demonstrate 90 per cent satisfaction with the mediation service. A third standard says that in 95 per cent of requests for assistance, mediation services will be offered within 10 working days.[10] Before 2000 the employment institutions were based solely in NZ's main cities. Mediators are now based in Auckland, Hamilton, Napier, Palmerston North, Wellington, Christchurch and Dunedin. Under the arbitration system and the *Employment Contracts Act*, mediators and Tribunal members tended to be middle aged, male and grey haired. Mediators now come from diverse backgrounds in terms of age, gender, ethnicity and experience.

Different types of mediation services

Providing information is the first type of mediation service. This is mainly done by the Employment Relations Infoline, a national call centre based in Auckland. Infoline staff deal with a wide range of inquiries about employment issues. They provide information and assistance to both employees and employers. Infoline staff, labour inspectors[11] and mediators also give talks or seminars to various audiences. Information is also provided by the Employment Relations Service's website.[12]

As well as providing information by telephone, email and the internet, the Department of Labour has published a number of pamphlets and booklets on employment rights. This is not new. What is new is the publication of a series of booklets outlining best practice and providing detailed advice. These publications cover good faith in collective bargaining, how to prevent and fix employment relationship problems, hiring new employees and using mediation services effectively.

Under the previous legislation, employees or employers had to invoke formal grievance or dispute procedures, file papers, follow statutory timetables, pay a fee and get in the waiting line before they could access mediation. The informality and accessibility of mediation under the *Employment Relations Act* mean that parties can get help even if there is no legal 'grievance'.

The second type of mediation service is assisting employees and employers with workplace employment relationship problems. One example is an employer asking for help to deal with conflict between employees. Another example is a performance issue that is brought to mediation before there is either formal disciplinary action or a formal grievance has been submitted. In almost all cases the aim is to resolve a difficulty in an ongoing relationship.

The third and largest type of mediation service involves personal grievances taken by employees against employers. These cases usually involve a formal meeting, facilitated by a mediator. In most cases parties are represented by lawyers, advocates, unions or employer organisations. The meetings are confidential and without prejudice. Both parties are given uninterrupted time to present their views. Where appropriate, mediators encourage discussion between parties to promote better understanding of different perspectives. Parties invariably caucus with the mediator. Caucus sessions often include an analysis by the mediator of the legal issues of the case and the costs and risks of litigation. Most mediations over grievances (and over employment relationship problems)

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take either half a day or a day.

The fourth type of mediation service is assisting employers and unions with collective issues. These can include disputes over the interpretation of collective agreements (which can go to litigation) and negotiations for a collective agreement. While parties can take legal action about the good faith obligations of the *Employment Relations Act*, there is no statutory provision for arbitration over collective bargaining.

Mediations over collective bargaining usually take more time than grievance cases. In a small number of cases (for example, major industrial disputes) a mediator can work on a case for several weeks. Interventions in collective bargaining are often selective; that is, the mediator becomes involved to help the parties resolve an impasse and then withdraws. Unions and employers usually come to mediation with most issues settled. Mediation assistance is often requested when industrial action is on the horizon. The Department of Labour has a statutory duty to offer mediation services before there can be strikes or lockouts in essential industries.

Mediation services two years on

A Department of Labour report on the first two years of the *Employment Relations Act* provides a statistical overview of the performance of the mediation services.[13]

Infoline staff, labour inspectors and mediators participated in talks and seminars attended by around 23,000 people. The Department answered 435,458 enquiries on employment related matters. The Employment Relations Service website received an average of 91,853 page requests per month.

A variety of methods were used in resolving employment relationship problems, not just formal mediated meetings. Fifty-six per cent of the actions used to resolve problems were phone calls, 30 per cent were mediated meetings, 6 per cent were letters, 4 per cent were faxes and 4 per cent were emails.

Over two years the Department received 15,336 requests for mediation services. Table 1 below illustrates the main types of applications.

Table 1 Mediation services applications

Personal grievance	61.7%
Recovery of wages	6.4%
Redundancy	5.8%
Collective bargaining	4.7%
Individual agreements	4.3%
Good faith	2.5%
Disciplinary problems	2.2%
Disputes[14]	2.2%
Minimum code	1.6%
Other	8.6%

Mediators completed 14,357 applications during the period — 68.2 per cent were settled (including a handful where mediators made decisions) and only 12.8 per cent were not settled. In 19 per cent of cases parties decided not to proceed or their applications were withdrawn. Three quarters of applications were completed within six weeks and 92 per cent within 12 weeks.

The Employment Relations Authority has also been successful in dealing with applications speedily. In the first two years it received 3634 applications and completed 2716. As many as 75 per cent were completed within five months. Only 3 per cent of the Authority's determinations have had a judgment issued by the Employment Court for a de novo challenge.

The demand for mediation assistance is growing. In the September 2002 quarter there were 2524 applications compared with 2078 in the September 2001 quarter. The growing workload meant that only 84 per cent of applicants were offered mediation within ten working days, compared to the Department's performance standard that 95 per cent would be offered mediation within this period.[15]

The Department regularly surveys users of mediation services. In the September 2002 quarter 86 per cent of respondents were either 'very satisfied' or 'satisfied' with the overall handling of their issues.

As stated earlier, a large number of submissions on the Employment Relations Bill supported the new emphasis on mediation. However, there were also critics. Many employers were unhappy that the *Employment Contracts Act* was scrapped. Some employment lawyers were uncomfortable with the new system and one or two looked down their patrician noses at the newly employed mediators. One critic bemoaned 'the loss of an independent mediation service' and suggested that the new mediators might not be impartial.[16]

One year after the *Employment Relations Act* became law, there was praise from many of the former critics. The Employers and Manufacturers Association said the mediation service and the Authority were 'a major success story'. In a feature about the two new institutions, a business newspaper said:

> They're fast, efficient and pragmatic. They're accessible, informal and don't get bogged down in legal technicalities. And they crunch out solutions to seemingly intractable employment problems in a matter of weeks, if not days.[17]

A panel of business leaders brought together to advise the Government on ways of reducing business compliance costs said:

> … the mediation service appears to be working very well. The indications from business are that it is well resourced and manages to deal with disputes within a short period of time — just what employers and employees need.[18]

After the Department's report on the first two years of the *Employment Relations Act* was released, *The Capital Letter*, an authoritative legal bulletin, wrote:

> The Minister [of Labour] can take considerable satisfaction from the report's details, perhaps not the least the apparent success of the promptly available (and all but mandatory) mediation services, and the near redundancy of the Employment Court under the new Act.[19]

After quoting some of the figures in the report, it continued:

> These statistics must inevitably raise the question of whether the Act might be a model for the civil justice system generally. Would public sector mediators provide a cost efficient answer to the longstanding complaints about lack of access to justice for the great majority of our population?

Some issues for the future

The first two years of the *Employment Relations Act* have seen widespread acceptance of mediation. A legalistic system where people had to wait months for mediation has been replaced by an accessible service which encourages parties to resolve their problems themselves.

One of the main problems faced by the Employment Tribunal was that it was never able to get on top of its burgeoning workload. An important issue for the future is that governments continue to provide adequate resources to allow speedy access to mediation services. The increasing number of applications for assistance will place growing pressure on resources.

However, adequate resources is not the only answer. The largest part of the mediators' work is reactive and deals with individual grievances. By giving employers and employees the information, guidance and tools to support problem resolution in workplaces, mediators and the Department of Labour can help reduce the number of grievances and improve the quality of employment relationships. Similarly, promoting best practice in collective bargaining should reduce the need for intervention in negotiations between unions and employers.

The immediate challenge is to find the right balance between responding quickly to requests for help and promoting best practice effectively. Underlying this is the need for the State — through the Department of Labour — to continue to play a pro-active role in the field of employment relations. ●

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Endnotes

1. Department of Labour *Industrial Relations: A Framework for Review Vol 2* (1985) 144 and 146.
2. Above note 1 at 236–42.
3. *Tucker Wool Processors Ltd v Harrison* [1999] 1 ERNZ 894 at [53].
4. Harbridge R 'Bargaining and the Employment Contracts Act: an overview' in Harbridge R (ed) *Employment Contracts: New Zealand Experiences* Victoria University Press Wellington 1993 pp 31–52.
5. Department of Labour 'Report of the Department of Labour for the year ended 30 June 1992' *Appendices to the Journals of the House of Representatives of the NZ Government* (AJHR) G1 (1992) 71.
6. Department of Labour 'Report of the Department of Labour for the year ended 30 June 1997' AJHR G1 (1997) 118.
7. Department of Labour *1999 Briefing to Ministers* (1999) 154.
8. Section 3; the *Employment Relations Act* is available at <www.legislation.govt.nz>.
9. Department of Labour *Employment Relations Bill — Report of the Department of Labour to the Employment and Accident Insurance Legislation Select Committee* (2000) 146.
10. Department of Labour 'Report of the Department of Labour for the year ended 30 June 2002' AJHR G1 (2002) 64.
11. Labour inspectors are Department of Labour employees who enforce the minimum employment code (for example, the *Holidays Act 1981* (NZ) and the *Minimum Wage Act 1983* (NZ)).
12. At <www.ers.dol.govt.nz>.
13. Department of Labour *The Employment Relations Act: A Summary of the First Two Years (2 October 2000 to 30 September 2002)* (2002).
14. Disputes over the interpretation of an agreement.
15. Above note 10.
16. New Zealand Law Society *Employment Law Conference 23–24 November 2000* pp 131–38.
17. *The Independent* 14 November 2001.
18. Ministerial Panel on Business Compliance Costs *Finding the Balance — Maximising Compliance and Minimising Cost* (2002) 86.
19. 25 TCL 44 (1180).

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