

## **Barriers to participation: a mediator's perspective**

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### **Introduction**

Employment relations law has been a political football for as long as I can remember. The dispute resolution system is an exception. There have only been three major changes in the last 45 years and the present system has been in place since 2000. A discussion about the dispute resolution system is well overdue and it is a good approach to look at it in terms of barriers to participation.

This paper is my personal view. It discusses the following issues:

- An overview of the employment dispute resolution system.
- Barriers to participation in mediation.
- What happens at mediation.
- Barriers to going to litigation.
- What can be done to address barriers to participation.

### **Overview of the employment dispute resolution system**

I started working in employment relations in 1979. The right to take personal grievances was established in law in 1970 and a standard personal grievance procedure was introduced by the Industrial Relations Act 1973.<sup>1</sup>

The procedure was pretty simple. A worker with a grievance had to raise it with the employer. If it wasn't fixed, they raised the grievance with their union who tried to resolve it with the employer. If that wasn't successful, the grievance was referred to a personal grievance committee consisting of an equal number of representatives of each party usually chaired by a mediator. If the parties couldn't agree on a resolution, they could ask the chairperson to make a decision or refer the grievance to the Arbitration Court (now the Employment Court).

Lawyers were hardly ever involved. In 1987 there were 13 mediators and five judges of the Court.

Mediators spent much of their time dealing with collective bargaining and industrial action. The employment institutions dealt with a fairly small number of individual cases. For example, in the year to 31 March 1985, grievance committees dealt with 658 cases. 46 per cent were settled by agreement of the parties. A further 30 per cent were settled by a decision by the chairperson. 4 per cent were withdrawn and 20 per cent were unsettled. 14 per cent were referred to the Employment Court for a decision. Disputes committees (dealing with disputes over the interpretation and application of awards) dealt with a further 305 cases. The Court dealt with just under 300 cases.<sup>2</sup>

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<sup>1</sup> Gordon Anderson, 'The origins and development of the personal grievance jurisdiction in New Zealand', *New Zealand Journal of Industrial Relations*, 1988, 13, 257-275.

<sup>2</sup> Department of Labour, *Industrial Relations, A Framework for Review*, Volume 2, 1986, pp. 166-169.

'Med/arb' was a feature of this system, i.e. binding decisions by mediators who chaired grievance committees. Their decisions often incorporated partial or full agreements by the parties.<sup>3</sup> The system was effective in resolving grievances without litigation and settling them quickly. In practice, it took between two-three days and a month between invoking the formal procedure and a grievance committee meeting.

In retrospect, this system looks pretty attractive. However it had one big flaw. The personal grievance procedure only applied to unionised workers who were covered by awards and agreements. At the time, union density was just over 50 per cent of wage and salary earners.<sup>4</sup> Half the workforce was excluded.

#### *The Employment Contracts Act*

The Employment Contracts Act 1991 extended the coverage and protection of employment law to all employees. It replaced the mediation service with the Employment Tribunal which provided both mediation and adjudication.

This was followed by an explosion in employment cases. In 1997, the Employment Tribunal received 5,242 applications and had 3,472 outstanding at the end of the year.<sup>5</sup> It took a long time to get a hearing. Outside the main cities, waiting times were eight to 16 months for mediation and 11-22 months for adjudication.<sup>6</sup>

There was also a big change in representation. Under the ECA, union membership plummeted and the number of employment lawyers multiplied. Payment of legal costs became a new factor in employment cases.

#### *Mediation under the Employment Relations Act*

The Employment Relations Act 2000 made important changes in the employment dispute resolution system. It replaced the Employment Tribunal with Employment Mediation Services and the Employment Relations Authority. In 2018 there are 39 mediators (23 employees and 16 service providers). There are 18 authority members and five judges.

In an often-quoted phrase, the Hon. Margaret Wilson, the author of the Employment Relations Act, said mediation would be 'free, fast and fair'.<sup>7</sup> Mediation became the first step in the formal legal process of resolving disputes and 'the primary problem-solving mechanism.' The exception is enforcing employment standards where labour inspectors can take cases directly to the Employment Relations Authority.<sup>8</sup>

Mediation is almost mandatory; the law prevents parties from bypassing it and going directly to arbitration. Mediation is not limited to legal disputes. While personal grievances are the main type

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<sup>3</sup> R. Miller, *The Resolution of Disputes and Grievances in New Zealand*, Industrial Relations Research Monography No. 8, Industrial Relations Centre, Victoria University of Wellington, 1983, pp. 32-33.

<sup>4</sup> B. Ellem and P. Franks, 'Trade Union Structure and Politics in Australia and New Zealand', *Labour History*, 95, 2008, pp. 43-67.

<sup>5</sup> *Report of the Department of Labour for the year ended 30 June 1997*, AJHR G.1.

<sup>6</sup> Department of Labour, *1999 Briefing to Ministers*, Department of Labour, Wellington.

<sup>7</sup> Hon. Margaret Wilson, 'Free, fast and fair – a new Mediation Service for New Zealand businesses and employees', media release, 13 July 2000.

<sup>8</sup> Employment Relations Act 2000, s.159AA and s.188A.

of matter handled by mediators, there are a wide range of other matters including ongoing employment relationships, co-worker conflict, disputes over the interpretation of employment agreements, large group conflicts and collective bargaining (including strikes and lockouts).

With the exception of collective bargaining disputes, mediation is confidential. What happens cannot be revealed or used in subsequent litigation. Nor can mediators be called to give evidence. Once a mediator has signed a settlement agreement its terms are final and binding. Settlements can be enforced but cannot be appealed. While parties can use private mediators, only MBIE mediators have the power to sign final and binding settlements.<sup>9</sup>

Since 2000, a lot of work has been done to provide information about employment rights and employment dispute resolution. Our website – [www.employment.govt.nz](http://www.employment.govt.nz) – includes a wealth of information. MBIE’s contact centre – 0800 20 90 20 – deals with over 90,000 phone enquiries a year. People access mediation services by applying online through our website.

In the year to 31<sup>st</sup> July 2018, the mediation service dealt with 7274 applications (including 142 about collective bargaining and strikes) and signed off 8967 settlements that were negotiated outside mediation. During the same period, the Employment Relations Authority issued over 750 determinations while the Employment Court disposed of 180 cases.

### **Barriers to participation**

While we do not have any figures, my guess is that people who are marginalised in the labour market are the same as those who don’t know about and don’t use the employment dispute resolution system. For employees, they are low-paid and are disproportionately likely to be young people, women, people without formal qualifications and Māori or Pacific peoples. They are more likely to work in the hospitality and retail industries. For employers, they are likely to be small businesses which operate on low margins and employ few staff.

Self-employed workers (who number around 289,000) are excluded from the dispute resolution system.<sup>10</sup> Since 2004, mediators have been able to provide dispute resolution services to parties in work-related relationships that are not employment relationships.<sup>11</sup> However this is a small portion of our work.

Once people get to mediation, there are further barriers to participation. It is usually helpful if parties have someone to advise them and advocate for them. Representation helps deal with power imbalances between parties but comes at a cost. I will discuss this issue later in the paper. Union members are greatly advantaged compared to those who aren’t in a union. They get free, and usually competent, representation. However unions only represent one-fifth of the workforce and cover only a small part of the marginalised work force

Information is another barrier to participation. Some people have no understanding of how the legal system works. Employment law is complex. Most of the key principles are to be found in case law

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<sup>9</sup> Grant Morris and Annabel Shaw, *Mediation in New Zealand*, Thomson Reuters, Wellington, 2018, pp. 189-209.

<sup>10</sup> Ministry of Business, Innovation and Employment, *Briefing for the Incoming Minister for Workplace Relations and Safety*, 26 October 2017, p. 4. Ingr

<sup>11</sup> Employment Relations Act 2000, s.144A.

and those included in the Employment Relations Act are very general or incomplete. For example, when the test of justification was changed in 2010, the amendment outlined four factors that must be considered. It then added unhelpfully that the Authority or the Court could consider 'any other factors it thinks appropriate.'<sup>12</sup>

## **What happens at mediation**

Mediation is confidential and settlements negotiated in mediation are legally final, binding and enforceable. Most cases settle. In 2017-2018 the settlement rate was 76 per cent and this has been consistent – give or take one or two percentage points – over many years. The mediation service's disposal rate (i.e. settlements plus unresolved matters that never go to the Authority) has been estimated at as high as 96 per cent.<sup>13</sup>

In my experience, parties can achieve much better outcomes through negotiations – inside or outside mediation – than they can achieve through litigation. Unlike the Authority or the Court, they are not constrained by decisions of the higher courts. While there can be large legal costs at mediation, they are usually lower than costs at the Authority or the Court.

There have always been concerns that mediation is a place where bad deals are made under the cloak of confidentiality. Mediators have ethical obligations to parties under the MBIE mediators' code of ethics and the code of ethics of their professional organisations. The service's quality assurance includes regular training, assessments of mediators by the principal employment mediator and other experienced mediators and one-on-one coaching. Complaints about mediations and mediators are investigated and dealt with by dispute resolution managers.

Grant Morris, one of the leading academic researchers about mediation, did a study in 2015 which gave an upbeat assessment of employment mediation and concluded that 'the MBIE employment team is the top mediation unit in New Zealand.'<sup>14</sup> MBIE's surveys show 89 per cent customer satisfaction with mediation.

The confidentiality of mediation came under the scrutiny of a full bench of the Employment Court in the *Just Hotel* case in 2006 when it was alleged that the employee was dismissed at mediation. The court's decision to put limits on confidentiality was overturned by the Court of Appeal. It said that confidentiality applied to all documents, statements or submissions at mediation unless they had come into existence independently. The court said this conclusion 'reflects the desirability of encouraging the parties to a mediation to speak freely and frankly, safe in the knowledge that their words cannot be used against them in subsequent litigation if the dispute does not prove capable of resolution at mediation.'<sup>15</sup>

If a 'bad deal' is defined as less than one might reasonably expect to get at litigation, then there are certainly times when this happens at mediation. Lots of people prefer to settle rather than waiting some months for an Employment Relations Authority hearing which will be expensive and stressful.

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<sup>12</sup> Employment Relations Act 2000, s.103A(3) and (4).

<sup>13</sup> Department of Labour, *Report of the Department of Labour for the year ended 30 June 2011*, AJHR, G.1. 2011.

<sup>14</sup> Grant Morris, 'Eclecticism versus Purity: Mediation Styles Used in New Zealand Employment Disputes', *Conflict Resolution Quarterly*, 33(2), Winter 2015, p. 224.

<sup>15</sup> *Just Hotel Ltd v Jesudhass* [2007] NZCA 582.

Usually they will have the benefit of an analysis of the strengths and weaknesses of their case by their representative and/or a mediator. Legal costs often loom large in this discussion. If someone has a weak legal case, a modest settlement is better than the alternative of nothing. When parties decide, at mediation, to negotiate an exit from employment, the consequences of not agreeing can become a very strong incentive to reach a settlement.

Some people say mediation and the Authority are not the right forums for resolving complaints of bullying or harassment.<sup>16</sup> It has also been argued that it is wrong to use non-disclosure agreements which are similar to confidential settlements under the Employment Relations Act to 'hush up' sexual harassment cases.<sup>17</sup> The difficulty with these arguments is that, while it is possible to delineate cases about breaches of employment standards, bullying and harassment cases are rarely black and white.

### **Barriers to litigation**

There are a number of barriers that can prevent employees and employers from going to the Authority and the Court. Some are the same as the barriers to mediation: lack of understanding of the legal system and of employment law.

Another barrier is the potential risk to future employment. Employment Relations Authority cases are a great source of free copy for the media and it is an uncomfortable but necessary duty for mediators to explain to employees that going to litigation may attract unwanted publicity. Susan Hornsby-Geluk wrote in a recent column:

'The reality is that an employee who pursues a personal grievance can essentially be "blacklisted" by prospective employers regardless of whether they won or lost their case. Unfortunately, this can lead to employee parties accepting settlements that are substantially less than they might get if they went to court, because the stigma of being seen as litigious or a trouble-maker is too great.'<sup>18</sup>

Litigation is expensive and legal costs are the greatest barrier to people going to litigation. Karen Radich and I analysed 613 costs determinations by the Employment Relations Authority between 2011 and 2016. Our study showed that the actual costs of taking a case are much higher than the Authority's notional daily tariff. Median costs levels awarded by the Authority were less than half the actual costs for both employees (37 per cent) and employers (29 per cent).

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<sup>16</sup> Leah McLay, 'Workplace Bullying: to mediate or not' in Craig Smith and Peter Franks (eds), *Contemporary Mediation Practice, Celebrating 100 years of Employment Mediation*, Department of Labour, Wellington, 2009, pp. 18-26. 'Anti-bullying company fined \$30,000 for breaching ERA order', *New Zealand Herald*, 1 June 2018, [https://www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=12051144](https://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=12051144), accessed 4 September 2018.

<sup>17</sup> Catriona MacLennan, 'Time's Up for non-disclosure agreements', *Newsroom*, 9 August 2008, <https://www.newsroom.co.nz/2018/08/08/184043/times-up-for-non-disclosure-agreements>, accessed 4 September 2018.

<sup>18</sup> Susan Hornsby-Geluk, 'Workers who take employers to court fear hurting future job prospects', *Stuff*, 8 August 2018, <https://www.stuff.co.nz/business/opinion-analysis/106066962/workers-who-take-employers-to-court-fear-hurting-future-job-prospects>, accessed 4 September 2018.

The Authority's daily tariff is \$4500. The median legal costs incurred by employees was \$8209.56 but the median costs award made to them was \$3071.56. The median legal costs incurred by employers was \$11,755.13 but the median costs award made to them was \$3431.88.<sup>19</sup>

People can "win" at the Authority and the Court but end up out of pocket. Our study gave examples of cases where employees were out of pocket by between \$9000 and \$25,000 because their actual legal costs were greater than they were awarded for remedies and costs. Although advocates generally charge less than lawyers, their clients can also end up out of pocket.<sup>20</sup>

If people take a case and lose, they will usually have to make a contribution, based on the daily tariff, to the successful party's costs. If they have rejected a *Calderbank* offer that is better than what they win at litigation, they may have to pay a higher amount in costs than the daily tariff.<sup>21</sup>

### **What is to be done?**

It is tempting to think that we could go back to the "good old days" when most disputes were resolved quickly, few cases went to litigation and the number of specialist employment lawyers could be counted on the fingers of one hand. In my opinion, it would be wrong to try to close the stable door by restricting or excluding lawyers. That horse bolted 27 years ago with the Employment Contracts Act. It would also be wrong to restrict or exclude contingency fee advocates. They provide representation to employees who would otherwise be unrepresented. From time to time, these advocates annoy those of us who work in the employment institutions. Some lawyers annoy us as well.

It would be better, in my view, to expand the number of competent representatives who do not charge fees. In some places, community law centres represent or assist parties at mediation for no charge. I think there should be increased funding to community law centres so this service is available across the country for mediation and for litigation of cases which have a reasonable prospect of success. It would also need to be accessible to those who are marginalised in the work force.

The Employment Relations Act provides some options for resolution which are under-utilised and could help reduce barriers to participation. These include:

- Early assistance mediation for co-worker conflict and ongoing relationships.<sup>22</sup>
- "Med/arb" for straight-forward issues such as wage recoveries, maybe with a right of appeal on grounds of law.<sup>23</sup>
- Mediation provided in different ways than face-to-face mediations, e.g. by phone, video conference or Skype, and in workplaces.<sup>24</sup>

There is also a need for more accessible information about the employment dispute resolution system and employment law. For example, I think it would be helpful if there was an accessible and

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<sup>19</sup> Karen Radich and Peter Franks, 'Counting the costs', *Employment Today*, October 2016.

<sup>20</sup> In *Reid v Andrews* [2018] NZERA 3, 5<sup>th</sup> January 2018, the employee ended up nearly \$2500 out of pocket.

<sup>21</sup> *Calderbank v Calderbank* [1976] Fam 93 (CA)

<sup>22</sup> Employment Relations Act 2000 s.147(2)(ac).

<sup>23</sup> Employment Relations Act 2000 s.149A and s.150.

<sup>24</sup> Employment Relations Act 2000 s.145(2).

authoritative guide to all the steps that employers should follow in conducting a disciplinary process. Information needs to be provided through medium such as videos and apps as well as websites.

Finally, a lot of the debate about the employment dispute resolution system is based on anecdote and opinion rather than evidence. I echo the call that was made some years ago for there to be more empirical research on our employment dispute resolution system.<sup>25</sup>

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<sup>25</sup> Bernard Walker and R.T. Hamilton, 'The 2010 review of the New Zealand personal grievance system: Commentary', *New Zealand Journal of Employment Relations* 34(3):83-91.