

WHO MEDIATES EMPLOYMENT RELATIONSHIP PROBLEMS?

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Abstract

Assuming that mediation is a successful way of resolving employment rights disputes, it is interesting to establish the reasons why this is the case. Factors for mediation being a successful way of resolving disputes mentioned in the literature are numerous and can be found not only in the unique approach to resolving disputes but also in the personal qualities of the neutral third party.

This paper is based on a recently conducted study, which consists of 30 structured interviews with mediators involved in the resolution of employment relationship problems, and provides data on the person of the mediators, their training and previous work experience. It surveys not only the mediators of the Department of Labour's Mediation Services that provide most of the mediation in this field but also private employment mediators. It also reports on the findings of an online-survey on the private employment mediation market in New Zealand.

Introduction

The Legal Framework

The declared main objective of the Employment Relations Act 2000 (ERA 2000) is to build productive employment relationships through the promotion of good faith in all aspects of the employment environment. This is to be achieved, in part, by promoting mediation as the primary problem-solving mechanism and by reducing the need for judicial intervention (ERA 2000, s 3 (a) (v) and (vi)). The Act therefore provides that the parties to any proceedings must be directed by either the Employment Relations Authority (ERA) or the Employment Court to attend mediation except in a few cases where mediation is seen as inappropriate (ERA 2000, ss 159, 188). These provisions on the referral are mandatory and strictly imposed by both the ERA and the court, with the result that most employment relationship problems (ERPs)¹ will go to mediation – either on direction or voluntarily (Boule, Goldblatt and Green 2008: 246).

The chief executive has to employ or engage persons to provide mediation services to support all employment relationships (ERA 2000, s 144 (1)). At present this is done by the Department of Labour's (DoL) publicly funded Mediation Services that employs staff mediators

and provides mediation services free of charge to employers and employees.

The Act does not prevent any person seeking and using mediation services other than those provided by the DoL (ERA 2000, s 154) and therefore poses no legal barriers to the private mediation of ERPs, though some differences exist. Settlements reached in private mediation are only enforceable if a DoL mediator has signed it off (ERA 2000, ss 149, 151). Only the DoL mediators may be given the power to decide the matters in issue and therefore adjudicate the employment relationship problem (ERA 2000, s 150).

Is the New Zealand Way of Employment Mediation Successful?

Alexander (2006) pointed out that objectives of mediation schemes and projects can broadly be categorized as qualitative or quantitative and identified six main objectives: (1) the efficient resolution of disputes, (2) the promotion of the access to justice, (3) the self determination of the parties, (4) the transformation of the relationship of the parties, (5) the social transformation of the disputing culture of a community and (6) the lessening of social control resulting from the confidentiality of the mediation process.

The ERA 2000 addresses some of these objectives explicitly: the mediation services shall not only provide for a prompt and efficient resolution of ERPs (s 144 (2) (d)) but shall also support successful employment relationships and the good faith obligations that underpin them (s 143 (a)).

It is not the intention of this paper to prove the success of the New Zealand way of resolving ERPs, as success is very much a question of which objectives a dispute resolution system wants to achieve. This said, the available data of the mediation provided by the DoL very much backs up the assumption that employment mediation as practised in New Zealand is an efficient way to ERPs as opposed to more formal adjudication procedures (see also Department of Labour 2010: 5).

The DoL's Mediation Services at present employ 34 mediators in seven regional offices (Auckland, Christchurch, Dunedin, Hamilton, Napier, Palmerston North and Wellington). These mediators are involved in more than 6,000 mediations per year dealing with ERPs (see Table 1). Besides this they also mediate in matters connected to collective bargaining and perform various

other functions like signing off settlements reached out of mediation. About 77% of ERPs coming to mediation in the DoL get settled in mediation (see Table 2). This settlement rate is very much within the range of what is normally seen in this field (Pointras, J. 2009). The high settlement rate leads to only very few cases being adjudicated by the ERA, which turns out about 850 decisions per year (McAndrew 2010: 88). Even fewer cases go on to be dealt with by the Employment Court.

Usually mediations concerning grievances connected with the termination of the employment relationship (unjustified dismissals, constructive dismissals, redundancy) are scheduled for a half day (4 hours); disputes involving ongoing employment relationships are scheduled for a full day. The settlement rate, both for grievances and overall, indicates that the way mediation is provided by the DoL is – as it regards costs and easing the ERA's caseload – an efficient way to resolve ERPs (see also McDermott Miller 2007). This may very much be based on the way mediations are conducted within this framework but will also be influenced by the persons who deliver these services, the mediators.

Table 1: Volume of Completed Contractual and Minimum Code Requests Mediation with the DoL

Financial Year (July to June)	Northern Region	Waikato-Eastern Region	Central Region	Southern Region	Grand Total
2006/07	1837	1179	1312	1178	5506
2007/08	2097	1088	1737	1223	6145
2008/09	1955	1065	1642	1425	6087
2009/10	1800	1250	1586	1486	6122
Grand Total	7689	4582	6277	5312	23860

Source: Department of Labour

Table 2: Settlement Rate of Mediations conducted by the DoL

Financial Year	Settlement Rate
2006/07	76%
2007/08	76%
2008/09	77%
2009/10	78%
Grand Total	77%

Source: Department of Labour

Note: The "Settlement Rate" shows the percentage of cases that settled for each year. This is calculated by dividing the number settled by the total settled and not settled. Those that are classified as settled include cases where mediation was requested and settled in mediation or outside mediation.

As a final preliminary note, two other objectives against which the success of mediation can be measured should

also be briefly touched upon. It also seems that the availability of a publically funded service ensures access to justice in that every employee and employer can access

the Mediation Services, should they require it regardless of financial circumstance. Further it is able to encourage parties (especially employees) to voice their ERPs at an early stage and not only after their employment is terminated. Martin and Woodhams (2007: 9) report that in about one third of the mediations the ERPs are raised during an ongoing employment relationship.

The Department of Labour conducted an unpublished customer satisfaction study in 2009 for the 2008/09 Annual Report. The mediation result was 83% satisfaction (and therefore met the 80% target). No figure was available for 2009/2010 because the process for designing and undertaking the survey is being revised.

The Mediators as a Factor in Success

Mediation in a broad and general sense can be defined as a form of decision-making in which parties are assisted by someone external to the conflict, the mediator, who cannot make binding decisions for them, but assists their decision making in various ways (Boule and Nesic 2010: 1). However one defines the success of mediation, the mediator who conducts it plays an important part in it – he/she is the one who aids the parties with their decision making and is therefore a crucial element for the outcome. It is therefore interesting to examine who actually mediates ERPs.

This paper explores this by distinguishing two different kinds of frameworks within which mediation of ERPs occurs. On the one hand there is the framework of the DoL's Mediation Services which provide a free service where the parties have little influence on the person of the mediator and the date of the mediation. On the other hand mediation is conducted by private mediators who have to be paid by the parties (usually one of them – the employer) but where the parties can choose the mediator freely and have more influence on the date and the venue of the mediation.

The study establishes some personal characteristics (gender, age, education, previous work experience) of 30 mediators engaged in the resolution of ERPs to get a first glimpse not only within which framework employment mediators operate but also who they are.

Methodology

The research consists of two different surveys. In one survey **structured interviews** were conducted which explored personal characteristics of the mediators, especially their educational and professional backgrounds. The interviews also explored the mediators' approach to mediation and the standard processes they followed, but these topics are beyond the scope of this paper. The interviews lasted 30 – 60 minutes, and were conducted during the months August to October 2010 in Auckland, Hamilton, Wellington, Christchurch and Dunedin.

The participants who were employed by the Department of Labour were selected by the DoL's chief advisor and the mediation practise leaders to enable the interviewing of a representative sample of the mediators. Of the 34 mediators presently employed by the Department of Labour, 21 were interviewed.

The private employment mediators to be interviewed were selected after an invitation to participate had been sent out by the two professional organizations of mediators in New Zealand, AMINZ and LEADR (NZ). As only nine private mediators have been interviewed, the sample is very small. Also its representativeness could not be established as there was no data available on the private employment mediation market in New Zealand. If one considers though that interview partners were those who came forward after having been contacted via the two professional organisations AMINZ and LEADR, and that every effort has been made to interview all those mediators who are seen as employment mediators by their peers, especially by the mediators of the DoL's Employment Mediation Service², the data collected sheds an interesting light on the actors in the private employment mediation market.

To get a fuller picture of the private employment mediation market an **online-survey** using the tool "surveymonkey" was conducted about the amount of private employment mediation being performed and possible reasons for using private mediators instead of the publicly funded DoL's Mediation Services. All mediators accredited with the two professional membership organisations AMINZ and LEADR were invited to participate in the survey either by the researcher himself (and followed up by an encouragement to participate in the AMINZ newsletter) or directly by the organization (LEADR). 13 out of the invited 64 AMINZ-accredited mediators completed the questionnaire (response rate of 20%) and 16 of the 232 LEADR-accredited mediators completed the questionnaire (response rate of 6.9%). The data compiled from 29 questionnaires (overall response rate of 10%) is not statistically viable but – especially in combination with the interviews – may offer a spotlight on the private employment mediation market as well as its participants.

Results of the Interview Study

Department of Labour Mediation Services

Gender: The Department of Labour Mediation Services at present employ 34 mediators, of whom 20 are female (59%) and 14 are male (41%). Of interviewed mediators 12 were female (57%) and 9 male (43%).³

Age: The ages of the mediators are not recorded by the Department of Labour, so data on the overall age structure was not available. However, age was asked in the interviews. Only one of the interviewed mediators employed by the Department of Labour is below 40 years of age (34 years), four are between 40 and 49, nine are between 50 and 59 and seven are between 60 and 69.

Educational background: 16 of the mediators interviewed have a university degree, four have finished education that would enable them to enter university and only one has not finished education up to this level.

Of those 16 mediators with university degrees six have a law degree; three hold a degree in industrial relations and another three in teaching. The other mediators have various degree majors (politics and history, dispute resolution, psychology, commerce).

Professional background: During the interviews the mediators have been asked about their professional background before they started working with the DoL's Mediation Services. Two of the interviewed mediators had already been mediators and adjudicators with the Employment Tribunal under the Employment Contracts Act (EC Act) 1991.

As table 3 shows, nine mediators have a background of working for one of the social partners at some stage in their careers. Six come from a union background and three have worked for an employer organisation. Six mediators had worked with the Department of Labour prior before becoming mediators. Three had been Labour

Inspectors and another three had worked in other roles (work and income advisor, back-office at the mediation services and in policy making). Three mediators had worked in mediation in other fields before joining DoL (community mediation, restorative justice, race relations office). Two mediators have a background as lawyers and one was an HR Manager.

Time with the Mediation Services: The Mediation Services are part of the comprehensive institutional setup to deal with ERPs established in the DoL under the ERA 2000. Initially 40 mediators were hired; 18 of those are still with the DoL, making up more than half of their present staff of 34. Thirteen of the 21 interviewed mediators were part of the original staff.

Some of the mediators, 5 of the absolute number (and 4 of the interviewees), previously served as members of Employment Tribunal under the EC Act 1991. This institution consisted of 'mediator' members, who provided mediation, and 'adjudicator' members, who adjudicated employment disputes. In fact, virtually all members were 'mediator/adjudicator' members and could provide both services (Geare and Edgar 2007: 335).

Table 3: Background of DoL-Mediators

Union	6
Labour inspector	3
DoL employee (other)	3
Employer organization	3
Mediation (other)	3
Lawyer	2
HR-Manager	1
Total	21

Table 4: Mediators' time of employment with the Employment Mediation Services and the Employment Tribunal



Source: Department of Labour

Private Mediators

Gender: Out of the nine private mediators five were men and four were women.

Age: None of the mediators interviewed was below 40 years of age and only two were below 50, 3 were below 60 and four were older than 60 with one mediator being in his seventies.

Educational background: All but the oldest of the interviewed mediators hold university degrees.

Of those eight mediators with university degrees, four have law degrees and two hold degrees in dispute resolution. The other mediators have degrees in arts and teaching.

Professional background: Four of the interviewed mediators have a background in law, either as practising lawyers or teaching law at a university. Two mediators have a background as HR-Managers and another two working worked in the field related to crime (as a police or a probation officer). One mediator has a union background and another one worked for an employer organisation before becoming a HR-Manager. One of the interviewed mediators was employed by the DoL before practising privately – anecdotal evidence holds that there are a few others working in the private market who have a history with the DoL or even the Employment Tribunal.

Character of mediation practice: Seven of the nine interviewed mediators are self employed working under different headings (mediator, commercial mediator, barrister); two of them are employed and practise as staff mediators.

Of those mediators interviewed, seven work exclusively (full-time) as mediators and two of them work part-time as a side-work to another profession or to receiving a pension.

Anecdotal evidence holds that there is only one mediator in New Zealand (not available to be interviewed for this study) who practises employment mediation full-time. All the interviewed mediators combined their employment mediation work either with other professions (tertiary teaching, practise as a barrister or employment advocacy) or – if mediation is their main source of income - with mediation of non-work related conflicts (commercial, family, student, restorative justice, Leaky Homes).

Results of the Online-Survey on Private Employment Mediation

There is little known about the private practice of employment mediation in New Zealand. The online-survey conducted unfortunately does not really shed much light on this segment of the NZ mediation market as the overall response was poor. Still, it may be able to offer a first glimpse on it.

Out of the 27 valid answers for the first question how many ERPs the mediators have resolved in the last five years (06/2005 – 06/2010) four answered that they have a **mediation volume** of more than 100 mediations in this time period (three of them reporting a number above 400). Only six of the respondents answered that they have not mediated any ERPs, 11 between 1 and 10 employment mediations and 6 between 11 and 100 employment mediations. All of the mediators with an experience of more than 10 employment mediations have

mediated one or more ERPs in 2010, indicating that all of the respondents most active over the past five years are still active.

While these respondents may not be representative of the broader population of LEADR and AMINZ accredited mediators (approximately 300 in number)⁴, it is probably safe to say that they are somewhat representative of New Zealand's private employment mediators. The numbers indicate that there are only a few "big" players in the field of employment mediation outside the DoL's Mediation Services. On the other hand, they also make clear that after a decade of publicly funded employment mediation under the ERA 2000 there is – to some extent – a certain field of activity for private employment mediators.

Asked which **kinds of cases** these mediators are involved in, they reported "dysfunctional workplaces" as the major issue (18 of the 24 completed questionnaires). Six of these cases also involved the termination of an employment relationship, meaning that in half of the cases the surveyed mediators deal with, there are ongoing employment relationships. As the DoL's Mediation Services deal with ongoing employment relationships to a lesser extent (one third of their caseload as reported on above), this indicates that parties are more likely to call on private employment mediators for problems in ongoing employment relationships than they are for more 'routine' dismissals.

As far as **mediator's fees** are concerned, nearly all of the mediators reported that they were paid by the employer as a general rule (21 of the 23 validly completed questionnaires). All the high volume employment mediators (more than 100 mediations in the last five years) were within this group. Only two mediators reported that employers and employees shared their fees; these were mediators with 20 and 50 ERPs mediated in the last five years.

The **selection of the mediators** was either done by the employer alone or by the employer together with the employee with about a 50% share for each selection method. It is interesting though that three of the four high volume employment mediators are selected by the employer and only one of them by the employee and the employer together. In the interviews it became obvious that in many cases it was actually not the employer itself but their lawyer suggesting the use of a certain mediator they had a good experience with.

The interviews with private mediators also touched on the topic of neutrality and impartiality in light of the selection and payment of the mediator so often being in the hands of the employer. All interviewed mediators reported that they are able to assure the employees of their neutrality and impartiality despite these circumstances.

The private mediators were also asked what they see as the **reasons for the use of private employment mediation** instead of the DoL's Mediation Services. The most common answers were the expertise of private mediators (12 of the 20 responding mediators, i.e. 60%),

the free choice of the mediator (as opposed being assigned a mediator with the DoL's Mediation Services), timeliness, and privacy (all 9 responses, i.e. 45% of the answers).

The mediators were also asked **why** disputing employers and employees **do not use** private employment **mediation** more often. Not too surprisingly, the vast majority mentioned the costs as the reason (15 of 18 mediators responding to this question). Other reasons mentioned were satisfaction with the DoL's Mediation Services (7 answers), the lack of experienced employment mediators, and the parties unawareness of alternatives and how to access them (each mentioned 7 times).

Conclusions

The **typical employment mediator** is not very young (usually above 50), has tertiary education (quite often a law degree) and pursues the practise of mediation as a second (or third) career. If the mediator works for the DoL he/she usually has a background in employment relations (quite often looking after employees' interests). Half of them have been mediating in this environment for more than ten years and have therefore mediated more than 1,000 ERPs.

The **largest share** of ERPs in New Zealand are mediated by the publicly funded **DoL's Mediation Services**. This system is by many measures very efficient and mediates more than 6,000 cases per year with a settlement rate of about 75%.

Private mediators commented that it is very hard to compete with the Mediation Services as they have to charge the parties for their work and therefore have to establish the added value in using them. They see their value in their expertise and the fact that parties are sure which mediator they will have dealing with their case. Other issues are the timeliness of the service as well as the added privacy.

In the interviews with private mediators it was voiced that in the first years after the establishment of the DoL's Mediation Services private employment mediation was sought after as some employers (and they are the ones who pay for private mediation) considered the quality of mediation delivered by the DoL not sufficient. This has changed and **private employment mediation** now seems to **exist only in some niches**. Some employers, especially in the tertiary educational sector, offer mediation to their employees as part of their corporate culture and a means of early intervention to resolve ERP. These mediators are involved in a large number of mediations and may explain the prevalence of the mediation of ongoing employment relationships in the questionnaire study. These mediators seem not to work in competition with the DoL's Mediation Services but rather complement them.

Only to a small extent employers and employees make use of private mediators in the core practice of the DoL's

Mediation Services, i.e. the intervention in disputes which have reached a certain level of escalation. Only very few employers prefer to use private mediators (and pay for them). This may be the case where senior managers are involved as parties are able to choose a mediator as opposed to get one assigned with the DoL's Mediation Services. Private mediators reported that employers see the way services are delivered by private mediators to be more confidential (they prefer not to be seen in the offices of DoL's Mediation Services) and that they are considered to be able to deliver a more timely and customized service. In the interviews the added value mentioned by the mediators were quite varied stressing the niches they are occupying: one mediator mentioned his/her legal expertise and the rather legalistic process he/she was running which put an emphasis on the representatives whereas another mediator very strictly followed a facilitative model not giving advice on the substance or evaluating the legal position of the parties.

Again, though there are some private mediators mediating ERPs in New Zealand, the main engine of employment mediation in this country is the pretty effective public Mediation Services resolving thousands of cases each year. As outlined above this is by many standards a successful operation (see also McAndrew 2010: 91). A comprehensive evaluation of public employment mediation in New Zealand against a range of criteria of success, derived from the purposes of the policy and the process is beyond the scope of this paper. Anyway, a recently undertaken public consultation came to the conclusion that the grievance procedure (including the public mediation scheme) has met its objectives as set out by the ERA 2000 (Department of Labour 2010). The report also states the DoL's intention to conduct further research on this topic and to provide more empirical evidence on the operation of the personal grievance system.

Future research implications: Though this paper and the underlying research is able to shed some light still very little is known about the private employment mediation market and its actors. Therefore further research into this field is very much encouraged; it would be especially valuable to explore the reasons parties are making use of private employment mediators instead of the publicly funded DoL's Mediation Services. This could not only explore the reasons for these services existing next to the free public mediation scheme but also shed a light on possible shortcomings of the public service.

The data on the mediators which not only established a prevalence of older, well educated persons from a range of different backgrounds but also that DoL-employed mediators often have extensive employment relation experience may also be the basis for further research. It might not only relate to the service provider's approach to mediation (facilitative and transformative vs. settlement and evaluative mediation) but also to cultural factors as well as to policy decisions and their changes laid down in the ERA 2000.

Notes

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1. The ERA 2000 uses the term “employment relationship problems” as an umbrella term covering personal grievances and disputes. It is the language of employment relations these are individual employment rights disputes.
2. One mediator frequently named was not available but will be interviewed at a later stage.
3. As the need or appropriateness of adding percentages with any sample of less than 100 people may well be questioned we have added percentages only where they may shed light on the issue of the representativeness of the interviewed sample.
4. Some mediators are accredited with both LEADR and AMINZ – the completed questionnaires were cross checked and the data suggests that they have not been completed by a mediator twice resulting from his dual-membership.

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