

PRACTITIONER PAPER

Dispute Resolution in the Employment Tribunal

Part One: Mediation

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Dispute resolution: the processes

The Employment Contracts Act 1991 (the ECA or the Act) completes the legal evolution in New Zealand industrial relations from compulsory arbitration to direct bargaining. It also represents one of the concluding steps in the deregulation of the New Zealand economy. Under the compulsory arbitration system, the Arbitration Court was the central institution and provided arbitration as a dispute resolution process for a wide range of issues. The Arbitration Court represented an arm of administrative law where the institution, on behalf of Parliament, instituted its wishes to regulate numerous aspects of the labour market.

Under the direct bargaining system, the Tribunal provides mediation as a dispute resolution process for a wide range of issues. Whereas arbitration was appropriate to a system designed to legally regulate industry, mediation as the central dispute resolution process is appropriate to bargaining within the deregulated labour market. That is because the use of mediation is voluntary, and the result of successful mediation is that the parties assume their own responsibilities in resolving their differences. While the Tribunal offers arbitration as an alternative dispute resolution process, the ECA places a particular emphasis on mediation.

The emphasis on mediation may be found in both the sections which describe the objects of the Tribunal and in the First Schedule of the Act. Section 76 - Objects can be read as giving some, although not absolute, priority to mediation. Subsection 76 (b) states that the act "recognises that, in many cases" parties are best placed to be "assisted" to resolve their own differences, in which case mediation services are to be provided. In contrast, subsection 76 (c) states that "in some cases" mutual resolution is either inappropriate or impossible, in which case adjudication services will be provided. The first subsection emphasises that in many cases mediation will be appropriate, whereas the second section emphasises that in some cases adjudication will be appropriate. The emphasis is reinforced in the First Schedule of the Act which provides for standard personal grievance procedures. Clause 8 provides for the role of the Tribunal stating that, where "appropriate", mediation shall be provided, but only when "necessary" will the Tribunal "proceed to adjudicate on the grievance..."

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Adjudication under the ECA is synonymous with arbitration, and chosen to help emphasise the break from the previous arbitration system. Many advocates will be acquainted with the difference between mediation, and adjudication or arbitration. However, the Tribunal is finding a surprising degree of confusion over these terms when application is made for a hearing. The process of adjudication is similar to the process which takes place before the Employment Court, or for that matter, the process which takes place before the District or High Courts. In adjudication both parties put to the Tribunal the argument, and the evidence in support of that argument. The process of adjudication leads to a decision by the Employment Tribunal. The decision is legally binding on the parties unless appealed on an issue of fact or law to the Employment Court.

While the Act considers mediation to be widely appropriate, subsection 76 (b) provides that mediation shall not be a prerequisite to adjudication. A bona fide desire by both parties to either settle the issue voluntarily or to at least explore the possibilities for settlement is a prerequisite to successful mediation. In the rare circumstances where one party is unwilling to enter into at least an exploration of possibilities, then the Tribunal will proceed directly with adjudication. However, approximately 50 percent of the issues are being settled in mediation before the Tribunal.

In adjudication the Tribunal is the decision maker, but in mediation the Tribunal acts as a catalyst between the parties encouraging the voluntary settlement of the issue or issues. In mediation the parties are the decision makers, and the process is about the accommodation of their differences. The process of mediation is entirely appropriate to a deregulated labour market where employees and employers are responsible for making their own decisions. The efficiency of the labour market depends on the employer and employee assuming their own responsibilities in respect to their contracts, rather than depending on an arbitration court, adjudicator, or government, to make these decisions.

The mediation and adjudication jurisdictions

The mediation and adjudication jurisdictions share in common a number of types of disputes, however the mediation jurisdiction is broader than the adjudication jurisdiction.

Common To Both Jurisdictions

- * Section 79 (a) to (j)
- * Personal grievances
- * Disputes over the interpretation, application, and operation of employment contracts
- * Recovery of wages and other monies
- * Penalties for breaches of contract or breaches of the ECA
- * Compliance orders
- * Breach of contract actions
- * Questions on the construction of acts, including the ECA and employment contracts
- * Exercise of other powers and functions conferred on the Tribunal by the ECA and other acts

The above types of disputes are an exhaustive list of types of issues to be handled by adjudication, and which can also be handled by mediation. This overlapping jurisdiction is

founded on Section 78 (3) (a) and (b) which requires that the Tribunal shall provide mediation and adjudication in performing its general function.

However, the mediation jurisdiction extends beyond the types of disputes shared between the jurisdictions. Section 78 (1) provides for the general responsibility to assist employees and their representatives and employers and their representatives with the maintenance of effective employment relationships. In contrast with the formal application procedure for mediation and adjudication which will arise out of Section 78 (3) (a) and (b), Section 78 (2) provides that the Tribunal may offer, at its own instigation, mediation assistance in respect to "any matter" in order to facilitate the settlement of differences. This subsection is broad, and allows the Tribunal to be proactive in the resolution of disputes. Section 78 (4) (a) and (b) compliments the proactive designs of subsection 78 (2) insofar as the parties may agree to invite mediation assistance of the Tribunal over matters which are beyond the formal jurisdiction of the Tribunal, and where no formal application has been made to the Tribunal for mediation assistance.

Separation of mediation and adjudication processes

There is a critical change under the ECA in respect to the terms upon which mediation and adjudication are offered by the new Tribunal. Under the previous Labour Relations Act 1987 (LRA), the mediator was chairperson of personal grievances and disputes committees. As chairperson of the committee his or her first role was to mediate between the parties in order to facilitate a voluntary settlement. Failing agreement, the chairperson then arbitrated on outstanding issues. The chairperson had a dual role combining mediation and arbitration.

In the United States, this disputes resolution model is known as med/arb; however there are grounds for objecting to the procedures of med/arb. The basic objection is that the chairperson may be perceived as biased in his or her endeavour to influence the accommodation of the parties. Such a perception of bias appears because the mediator actively endeavours to encourage the parties to change their positions. In mediation, the mediator often separates the parties and carries out private discussions on the merits of the case during the adjournment of proceedings. Dealing separately with the parties raises the possibility that the mediator may be unfairly influenced by one party or the other and that one party may raise argument in private to which the other party is not given an opportunity to respond. The mediator's analysis of case law may not favour a particular party. If the mediator is successful, then the party, losing confidence in their legal position, will change position in order to achieve settlement. If the approach is unsuccessful, the party may perceive the mediator as biased, or arguing the case for the other side. The perception is reinforced where the mediator decides against the party.

A critical feature of the ECA is to separate the mediation and adjudication functions. Section 81 (c) provides that when the Tribunal is called upon to provide both mediation and adjudication in a single dispute, the same member of the Tribunal shall not perform both functions. The new arrangement we have termed as the arb/med contingency model - arbitration is contingent on a breakdown in mediation.

Critics of this change point out that this will require double handling of numbers of disputes. Where one Tribunal member fails to resolve a dispute in mediation, a second Tribunal member will be required to hear the matter in adjudication. Hearing times could be at least doubled, and time and cost to the parties increased. However, the separation of the

mediation and adjudication functions has meant that a mediator is no longer constrained because of their potential change of roles from mediator to arbitrator, and the parties don't wait for the mediator to assume in arbitration what were the responsibilities in mediation. While mediation style is a personal matter, Tribunal members are able to take a direct, and in many cases more active role, in encouraging the parties to settle. The fact that mediation may be more effective under the ECA must be weighed against the double handling of disputes.

Between mediation and arbitration: the halfway houses

The inflexibility of separating the mediation/arbitration process is in a sense, more apparent than real. A matter may commence in adjudication under section 78(3)(b). However, the adjudicator may decide that the dispute could better be handled by mediation, and either refer the matter for mediation by another Tribunal member, or commence mediation within the adjudication hearing. The adjudicator may develop a confidence that the matter can be resolved voluntarily during the adjudication, or decide that the issues need to be clarified and agreed before adjudication is appropriate. The risk that the adjudicator takes is that the parties may fail to reach an agreement, and the matter may have to be referred, yet again, to another adjudicator. The point is that the Act is not so inflexible as to prohibit the mixture of adjudication and mediation, but simply prevents formal adjudication by a member of the Tribunal who has been involved in mediation of the same dispute.

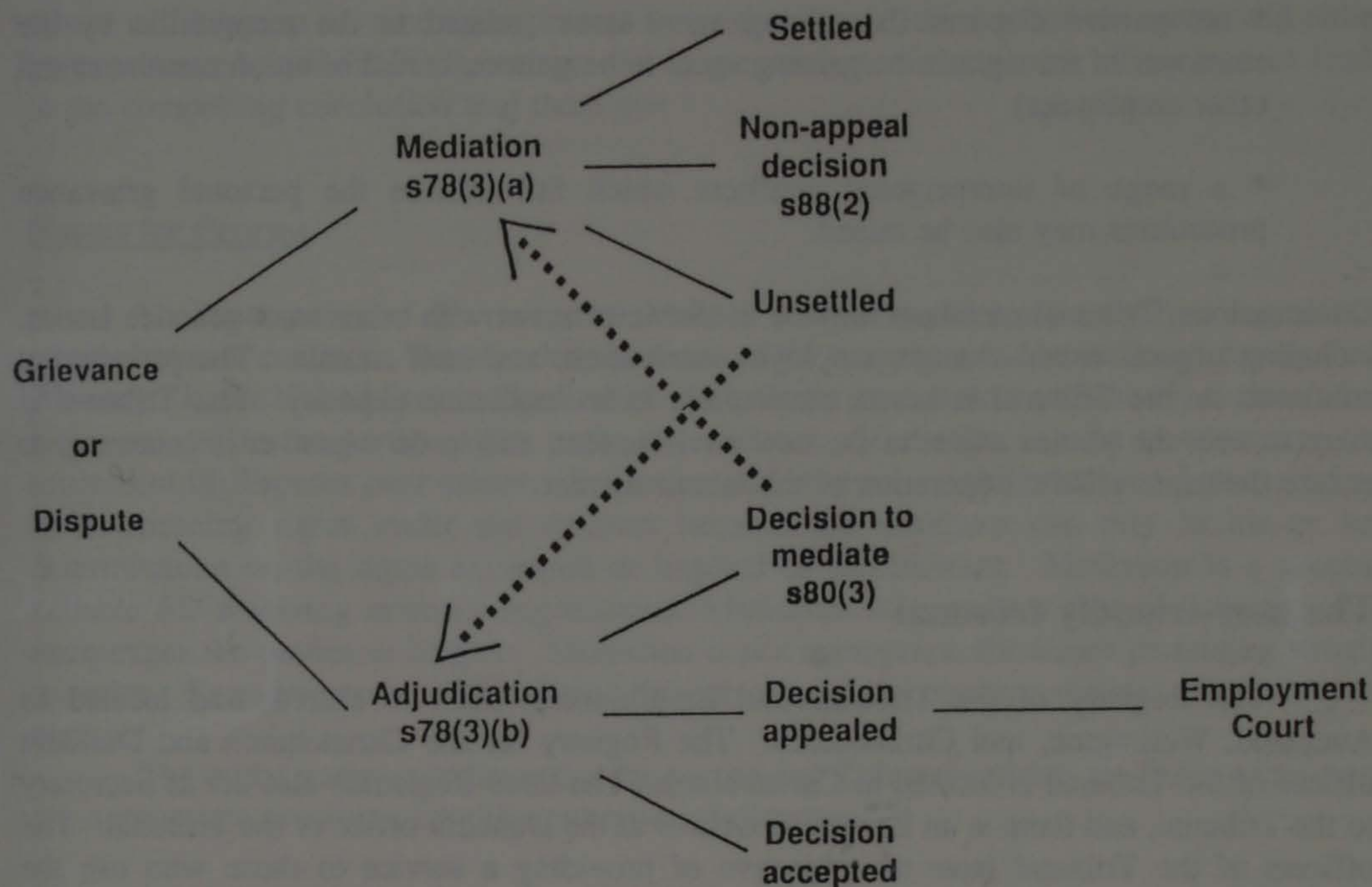
The distinction between informal and formal adjudication is important. Under formal adjudication, the decision of the adjudicator is appealable to the Employment Court. However, a matter may be informally adjudicated upon in mediation pursuant to section 88(2). Where a matter commences in mediation, the parties may agree to the mediator deciding the matter. The mediator may make a determination. But the determination cannot be appealed to the Court, and is binding upon the parties. This provision has been used for the purposes of consensus arbitration where the parties essentially agree, but wish the Tribunal member to make a formal legally binding decision settling all details of the conflict.

This section, however, has a potential usefulness which is likely to be realised in the near future. For example, the parties may reach an agreement on the parameter within which they would like arbitration. The parties may agree that a settlement should fall between \$1000 and \$3000, and leave the decision to the Tribunal as to where, within these parameters, the settlement should fall. Or for example, the parties might institute final offer arbitration under section 88(2), where the Tribunal is asked to decide either entirely for the last offer made by a union in respect to several issues or the last offer of the employer. The genuine flexibility of the Act in respect to disputes resolution procedures is represented in Figure 1.

Informal and formal mediation

In the informal mode of mediation no application is made pursuant to the referral forms in the Employment Tribunal Regulations. The Tribunal may be proactive, simply contacting the parties at the mediator's initiative. The parties may approach the mediator directly on the phone, and make arrangements to speak to the mediator privately. Either party may seek informal advice about any of the processes or procedures under the Act, or even

FIGURE 1 - FORMAL APPROACH TO TRIBUNAL



on the application of the law. The mediator will pick up the dispute and run with it, but there is one critical factor which must be remembered. A Tribunal member may be contacted directly to initiate informal mediation on a particular issue. The mediator may be asked advice on the law, procedure, and strategies to resolve the issue. But having become involved with mediation, that Tribunal member will not subsequently act as a formal adjudicator in respect to the particular issue raised.

The parties may seek informal mediation in respect to any matter which falls under the formal adjudication jurisdiction. But more important, informal mediation is the avenue for obtaining mediation assistance on issues which fall outside of the formal adjudication jurisdiction. The types of issues which are likely to be raised under the sub-sections allowing informal mediation are:

Exclusive to Mediation Jurisdiction

- * contract formation and renewal disputes
- * demarcation disputes (issues arising over conflicting rights of unions and/or other employees to perform certain types of work)
- * recognition disputes (bargaining agent issues related to the recognition by the employer of the rights a bargaining agent to bargain on behalf of union members, and other employees)
- * a range of interpersonal conflicts which fall outside the personal grievance procedures may also be raised.

On occasions, Tribunal members may be available to assist with other work practice issues, including organisational change, employee motivation, and staff morale. The jurisdiction conferred on the Tribunal is broad, particularly in its mediation capacity. The Tribunal is there to help the parties adjust to the new environment, and to do whatever is necessary to ensure the more efficient operation of the labour market.

The user-friendly tribunal

The Registry of the Tribunal and Employment Court is shared, and located in Auckland, Wellington, and Christchurch. The Registry for the Christchurch and Dunedin offices of the Tribunal is located in Christchurch. The three Registrars also act as Secretary to the Tribunal, and there is an Executive Officer at the Dunedin office of the Tribunal. The officers of the Tribunal have the objective of providing a service to those who use the Tribunal, and making the operation of the Tribunal easy for the client, and efficient for the Tribunal members. In their approach to the Tribunal, advocates will be guided by the Employment Tribunal Regulations 1991. Filing Fees are set out in the Third Schedule, and are \$35 for an application for general mediation assistance, as well as for referrals of personal grievances and disputes to the Tribunal. Application forms for the various types of actions taken before the Tribunal are set out in the Second Schedule.

Pamphlets are available from the Tribunal describing how to take a case to the Tribunal, the various dispute resolution options available, and how to use them. Amongst other things, these pamphlets remove the usual initial necessity of labouring through regulations.

Tribunal officers are happy to discuss the regulations, the pamphlets, and how to process a case. Applicants and respondents have a choice as to which services the Tribunal is to provide. An applicant can either apply for mediation or adjudication. Tribunal officers will assist the parties in deciding which disputes resolution process they take up. Section 80 - Mediation Assistance (2) provides that the Tribunal officer shall determine whether mediation assistance is provided prior to adjudication. The Tribunal officer will consult with both parties. Mediation will be recommended in most cases, however the general policy is that agreement by both parties will be sought for mediation. Mediation seeks the voluntary resolution of the issue, or issues, and the Tribunal has no powers under mediation to impose

settlements. Either both parties agree to pursue a common solution, or they agree to explore the various possibilities for such a solution. Failing such agreement, the matter is likely to be put down for adjudication where a binding determination, subject to appeal to the Employment Court, will be made.

For those parties who are wary of mediation, and of foregoing the right to obtain traditional justice in adjudication, the right remains to insist on adjudication. There will be some advocates, perhaps particularly lawyers, who insist on this traditional right, but many others will adapt to the mediation process by preference. A third set of advocates will either be experienced with the TAB, or have the innate instinct of the punter. That instinct leads to the compelling conclusion that there are:

Horses for Courses

The functioning of the deregulated labour market requires not only free negotiation of employment contracts, but also that the terms of the contracts can be enforced during their currency. In the United States, adjudication is a process used almost exclusively to determine issues related to the parties rights under the contract. Mediation is used to encourage the settlement of disputes over contract formation and renewal. Arbitration is a process suited to determining rights under the contract because the arbitrator can rely in his or her determination on the terms expressed or implied of the contract. Mediation is a process suitable for resolving contract negotiations. Mediation is a process that is voluntary and encourages the parties to bargain. Mediation is not appropriate for issues pertaining strictly to rights. Bargaining over rights during the currency of the contract violates the sanctity of contract.

The initial statistics indicate that the parties and Tribunal officers are finding that there are appropriate processes for different types of disputes:

- * Mediation is the choice in about 60% of personal grievances
- * Adjudication is the choice in about 75% of arrears of wages
- * Adjudication is the choice in about 90% of compliance orders

This appears to reflect the choice of adjudication for disputes which are more specifically related to rights issues - disputes which are determined according to the wording of contracts. Personal grievances generally arise out of issues which do not specifically relate to the wording of the contract, and have to do with the financial or personal relations between employers and employees. These issues appear to be more amenable to resolution via mediation. Contract formation and renewal disputes do not fall under the adjudication jurisdiction of the Tribunal and, because of their nature, they are likely to be processed through mediation. Occasionally, this type of dispute goes to voluntary arbitration. On rare occasions, the Tribunal may arbitrate on this type of dispute, but only with agreement of the parties.

The general pattern is that about 47 percent of all issues are resolved by mediation and about 47 percent are resolved by adjudication. Only about six percent of the issues are double handled, that is resolved by adjudication after mediation fails. The general trends suggest that mediation is increasing in popularity and effectiveness, and in the Wellington

Registry the resolution of arrears of wages cases appears amenable to mediation. Over 50 percent of these cases have been resolved in mediation, which suggests the possibility that mediation may be more effective in the resolution of rights issues than would be theoretically predicted.

The effectiveness of the mediation preference is apparent from the emerging statistics. Over 90 percent of the issues taken up in mediation are resolved within four months, whereas only 50 percent of the issues taken up in adjudication are disposed of within the four month period. These statistics are likely to improve now that the glut of cases under the LRA is disposed of, and the Tribunal's object as set down in section 76(c) is clearly within reach. That section provides that the Employment Tribunal is to provide for the "speedy, fair, and just resolution of differences between parties to employment contracts..."

However, the friendliness of the Tribunal may depend on whether the parties have fulfilled a number of preliminary responsibilities before arriving at the offices of the Tribunal for a mediation conference or adjudication hearing.

Preliminary responsibilities of the parties

The single step mediation/arbitration model has not only been replaced by a two step contingency model, but the contingency model has been placed within a direct bargaining system, the emphasis of which is on the parties attending to their own affairs. Third party intervention at the mediation or arbitration is an avenue of last resort. The Act not only emphasises voluntary settlement in mediation, but there are a number of preliminary requirements placed on the parties prior to appealing before the Tribunal. These requirements are to encourage the parties own settlement prior to appearing before the Tribunal.

Section 26 of the Act sets out the objectives of the personal grievance provisions, and subsection (a) states that all employment contracts must contain an effective procedure for the settlement of personal grievances. Parallel provisions in respect to contractual interpretation disputes are set out in Section 44. Subsection (b) states that all employment contracts must contain an effective procedure for the settlement of disputes about their interpretation, application, or operation. Where no effective procedure is agreed between the parties for the settlement of personal grievances or interpretation disputes, then the procedures specified in the First and Second Schedules of the Act are deemed to have been incorporated into the contract of employment. All employment contracts therefore, will have either the standard clauses of the First and Second Schedule or, in their substitution, effective procedures for settling grievances or disputes.

What constitutes an "effective" grievance or disputes procedure has yet to be decided by the Tribunal or Employment Court. Section 32 stipulates that an agreed personal grievance procedure need not be consistent with the procedures in the First Schedule. Similarly, Section 44 (2) (b) stipulates that the agreed disputes procedure need not be consistent with the procedures in the Second Schedule. While this means that the agreed procedure need not follow step by step the procedures set out in the Schedules, nevertheless those Schedules provide a guide as to what is an effective procedure for resolving grievances and disputes. The procedures in both the First and Second Schedules require the parties to make a bona fide effort to resolve their differences prior to appearing before the Tribunal.

Clause 3 within the First Schedule requires that a grievance be submitted to the employer within a period of 90 days from the date on which the alleged grievance took place,

or 90 days from the date on which the employee became aware of the alleged grievance. The purpose of the 90 day limitation is to enable the employer to remedy the grievance rapidly and as near as possible to the point of origin. The emphasis here is on requiring the contact between the employee and the employer, and their mutual endeavours to resolve the matter "rapidly" and at the "point of origin", and therefore at a time before the matter would be heard by the Tribunal, and at a location closer to the place of employment, than to the Tribunal's conference rooms.

Clause 4 refers to the requirement in Section 26 (c) that "the application of a personal grievance procedure is not able to be frustrated by a deliberate lack of cooperation on the part of any person". Similarly, but with less vivid language, Clause 4 of the Second Schedule requires that the parties meet to discuss a dispute prior to the matter arriving at the Tribunal. Therefore, the Act and Regulations, read together, require the parties to carry out negotiations, and endeavour to resolve both grievances and contractual interpretation disputes prior to attending a hearing at the Tribunal. The Tribunal is likely to insist that this requirement be met.

Clause 4 of the First Schedule and Clause 5 of the Second Schedule require the party initiating the procedure to set out in writing the nature of the grievance or dispute, the facts relied on, and the remedy or solution sought. Clause 5 of the First Schedule and Clause 6 of the Second Schedule require a written response setting out the respondent's view of the facts, and the reasons why the remedy or solution sought have not been granted. The respondent has 14 days in which to provide the written response, and where the time limit is not adhered to, the applicant party can refer the matter directly to the Tribunal. Where the 14 day limitation is complied with, Clause 7 of the First Schedule and Clause 8 of the Second Schedule provide for the reference of the personal grievance or dispute to the Tribunal. Reference requires the use of forms four and five, Referral of Personal Grievance and Statement of Claim, of the Employment Tribunal Regulations 1991. These referral applications require that the preliminary written statement and response are attached to the application. These documents record important facts as to the parties initial endeavours to resolve the dispute.

The Tribunal may enquire, and under certain circumstances is likely to enquire, into whether these preliminary procedures have been adhered to. The Tribunal may adjourn proceedings where these procedures have not been adhered to, and direct that the parties make a bona fide effort to resolve the issue prior to any return to a hearing. This is likely to arise where there is no agreement as to the nature of the issue before the Tribunal, no agreement as to obvious facts, no agreement as to which facts are in dispute, and no prior agreement to meet before attending the Tribunal hearing in order to resolve these matters. Failure of the parties to avail themselves of these procedures will mean increased costs and significant delay where a hearing is abandoned. The evidence that one party, but not the other party, has frustrated the use of these preliminary procedures can influence the Tribunal's attitude towards the awarding of costs when and if the matter is finally adjudicated upon.

Strategy in mediation

The principle objective of a mediator is to promote the voluntary settlement of an issue or issues. In adjudication, the objective of the adjudicator is to deliver a reasoned determination of an issue. Mediation procedures encourage the parties to move together from

diverging positions, to accommodate conflicting interests, and to reach a mutually agreeable settlement. Adjudication procedures encourage the parties to clarify their positions, and to fortify these positions by the presentation of supportive argument and evidence. Mediation encourages the reduction in the divergence. Because adjudication and mediation involve different processes, the general strategy taken by an advocate in mediation involves different considerations.

In adjudication, the advocate must convince the neutral - the adjudicator. In mediation, the advocate must convince the opposing party. While the case is presented and discussed in mediation, the process in mediation is about negotiations which are only in part concerned with the merits of the case. For those who have not been involved in a mediation conference, the atmosphere falls somewhere between a formal legal hearing and negotiations leading to the closure of the sale of property, which is a polite way of saying that there have been horses traded within such conferences. In adjudication, bargaining power is largely irrelevant, whereas in mediation bargaining power is critical. Mediation facilitates bargaining, and properly prepared, the advocate will have developed a bargaining strategy prior to the commencement of mediation which takes into account not only the objective legal conflict between the parties, but the psychology of bargaining, itself. Therefore, the fully prepared advocate will have prepared both a brief on the legal points and merits of the case, and a bargaining strategy and agenda.

Bargaining power

The first step in preparation for mediation is reconnaissance. This involves approaching the other advocate as to his or her client's position and problems, and researching the background of the conflict from other sources which might not normally be tapped in the preparation of a case for court. That means questioning your client, and witnesses who support the client, as well as drawing conclusions from public information, or information which may be obtained from any other reliable source. This reconnaissance differs in its focus from an endeavour to establish the facts relevant to the legal issues. The information so obtained may be entirely irrelevant to the legal case, but critical to the bargaining position. Knowledge that a grievant has a new job, a high salary, and a commitment to start work in three days in Las Vegas, gives the employer a decided advantage in negotiations. The employer knows that it is unlikely that the matter will proceed to adjudication, and that the grievant is likely to accept a more modest settlement in mediation.

The bargaining strength of the opposition, and the determination to exercise that strength, are factors which form part of the reality of bargaining within a mediation conference. If the issue concerns the renegotiation of a collective contract, it helps to know whether the opposing employer has a full warehouse, and an empty order book, or an empty warehouse and a full order book. The information is critical in advising the employer or employee as to a strategy to take in the face of a potential strike or lockout. A full warehouse means that the employer may welcome the strike. A full order book is to the union's advantage. In this type of mediation the Tribunal has no jurisdiction to adjudicate. The parties must assess outcomes which they may affect, or bring down upon themselves. However, the assessment of outcomes where mediation fails also plays a significant part in the mediation of grievances and disputes which fall within the adjudication jurisdiction.

The Bird in the Hand

During the process of encouraging clarification, and of understanding the facts and issues, many mediators will raise the question of "trial" risk. While I have recommended the preparation of a formal bargaining strategy prior to mediation, I also recommend the prior preparation of a legal brief. Mediation gives an opportunity to test your legal argument against the opposing party, to assess the strength of their argument, and to view face to face those who will be giving evidence in adjudication. Both the strength of opposing arguments and the quality of evidence can be measured in mediation. Bargaining power in mediation, as a preliminary to adjudication, relates to the perceived strength of opposing arguments and evidence. Where both the strength of your clients arguments and evidence is confirmed, then your client may wish to proceed to adjudication. Or the client may seek a more handsome settlement in mediation.

On the other hand, where mediation makes no such confirmation, then bargaining will be in the best interest of your client. Your client may "get out light" in mediation. The third possibility is that the strength of the legal argument and evidence is difficult to assess. The issue may be controversial, and as yet to be determined by the Tribunal or Employment Court. Where such uncertainty exists, wisdom often lies in reaching a settlement that avoids loss in adjudication, or the uncertainty of the outcome of adjudication. The mediator may be so trite as to suggest "a bird in the hand is worth two in the bush", but trite as the suggestion may be, the history of grievance and dispute resolution is littered with regret that such trite, but sage advice, was not accepted.

Preparing the client for mediation

There is a two fold advantage in carefully assessing the position and strength of the opposing party prior to carrying out an empathetic analysis of the merits of your client's case. At this early stage the advocate is not suffering from mind set. Psychologically, the advocate is better suited to carry out an objective assessment prior to preparation of the detailed argument of the client. The second advantage is that the client should be encouraged early in the relationship to come to terms with the realities of bargaining in mediation, and with the uncertainties of adjudication. This point is of greater significance if the outcome of the second step, adjudication, is doubtful. Settlement in mediation in order to avoid adjudication may be preferable, but impossible if the client carries unrealistic expectations, and an inflexible attitude. If the client is unrealistic from the start, then it becomes impossible for the advocate to candidly advise the client during mediation as to best options without the client perceiving the advocate to have turned against the client's cause.

While, as a matter of course, advocates assist clients with sorting out their personal objectives before taking an issue to adjudication, the success of this intrapersonal process is not so severely tested as in mediation. Once the decision is made to go to adjudication, the client becomes the observer. The advocate's terms of references are narrow: win the case. The client's success is measured in terms of win/loss.

In mediation, by contrast, the client is not an observer of a legal process, but a participant. The outcome is not determined by a judge, or third party, but by the client, and the balance of bargaining power. The outcome for the parties in mediation is designed by the parties themselves, and may fall within a spectrum ranging from win/win to lose/lose. The

client will be asked to make decisions about changing legal and psychological positions, and the psychological position is often more important, and more difficult to change than the legal position. Prior to mediation the client needs to be prepared for what will happen in mediation, and for the type of decisions required in mediation. The type of decisions made in mediation often involve delicate issues.

Dismissal is for many employees more difficult to endure than divorce. The employee's reaction to dismissal has been described by psychologists as one of grief, and the process of recovering similar to the process of grieving over the loss of a member of the family. Experience with only a small number of grievance cases will reveal that this is not an overstatement. The client should be assisted by the advocate to reach a more than superficial understanding of what the client really wants from the negotiation and what the client can realistically expect. The client may simply want revenge. Compensation is important only in so far as it measures that revenge, and "a day in court" may be required, regardless of the magnitude of compensation offered in mediation. In contrast, other grievants on rare occasions are offended at the suggestion that the grievance be resolved by the exchange of money.

These grievants have an ethic which does not accept money for services not rendered. They may seek simply the clearance of their name. On the other hand, many grievants are in mediation solely for financial regard, and can be paid to go away. For some the mediation conference is cathartic. Emotions are vented, and the employment relationship is re-established. Whether or not an employee is entitled to reinstatement is often a simple, legal issue. Whether an employee really wants to go back and work for an employer who does not want that employee is not a legal issue, and never a simple question. However, that is the type of question which can be anticipated prior to mediation, and which should be the subject of preliminary consultation between advocate and client.

How to use the mediator

A key feature of mediation is that its use is entirely voluntary. The parties must agree to mediation, and once in mediation, the parties are not bound to accept any particular set of mediation procedures. How mediation is carried out depends on the personal style of the mediator. There is no single formal mediation format, and the parties are entitled to discuss, and to influence the mediator as to what form mediation should take. Mediators, however, are not bound to provide a mediation service. Mediators can place conditions upon their involvement, and some mediators are insistent in this regard. Nevertheless, prior to the commencement of the mediation conference, the order of the day is for the advocates to discuss in private the mediation procedures. The range of mediation formats will alter between mediators and between particular grievances and disputes. The mediator will be open to suggestion.

In the most informal format the mediator will merely chair discussions. The parties will choose what they wish to discuss, and how they wish to proceed. The mediator brings into the informal setting a number of qualities which the parties will wish to make use of. The mediator will have had a great deal of experience in bringing parties to settlement. The mediator will be fresh and without biases as to how the grievance or dispute might be resolved. The parties personal involvement may have blinded them to aspects of the issues in dispute, and to avenues for moving the dispute towards resolution. In addition, the mediator will be a Tribunal member, and fully aware of the decisions of the Employment

Court and of Tribunal adjudicators. As pointed out above, the mediator is likely to assist in a trial or adjudication risk analysis.

The mediator's private involvement with the parties when they are physically separated is one distinguishing feature between the process of mediation and adjudication. The adjudicator conducts a hearing in front of both parties, and both parties are aware of all that is said before the adjudicator. The only exception to this is when the adjudicator meets privately with both advocates. During adjournments in mediation, the parties sit in separate rooms, and the mediator carries out discussions in confidence with each party. This is useful when there is a great deal of animosity between the parties. Sometimes an advocate will ask the mediator to talk in private with his or her client. This is a useful procedure when the issue is of a personal or embarrassing nature, or where the advocate has been unable to convince the client to take a reasonable approach to resolving the dispute.

However, the general purpose of separating the parties is to discuss what the bottom line of each party might be. The mediator is used as a tool to explore the possibilities for settlement. Such an exploration without the assistance of the mediator holds the potential to undermine the parties bargaining positions. The parties are rightfully hesitant of withholding information concerning their bottom line. Such information suggests that the bottom line is up for negotiations. Keeping your bottom line confidential is like playing the cards close to your chest in poker.

Fundamental to the mediator's integrity is the rule that he or she will not reveal the contents of private discussions with the other party unless authorised to do so by the first party. However, entering into a confidential relationship with both parties allows the mediator to examine both bottom lines simultaneously, and to construct proposals which are attractive to both parties. Bargaining is thereby prompted without weakening either parties bargaining position. Neither party is required to reveal their bottom line. The mediator can discuss in private the potential usefulness of his or her proposals, and obtain private agreement by both parties before the mediator's proposals are made public. The mediator is able to go beyond the immediate legal issues, and unearth the full range of issues, which will include legal, financial and interpersonal issues, and to ascertain the priority assigned to these issues.

In some cases the parties' priorities will be held in inverse importance. The employee may hold in order of priority a good work reference, compensation, and reinstatement. The employer's resistance may be in reverse order: a good work reference, compensation, and a continued severance of the employment relationship. Where the issues are held in inverse order, the mediator may propel the parties towards settlement. The point which the employer is most likely to concede is the point which the employee most desperately desires. The point which the employer is least likely to concede is the point which the employee is least likely to pursue. In other disputes the priority assigned issues may be correlated. The employee may value reinstatement as a top priority, and the employer may resist reinstatement as a top priority. In this case, the mediator may probe the reason for the importance of the issue to each party and look to alternative ways to satisfy these underlying needs.

Designer Settlements

For example, an alcoholic employee may require compensation because he or she cannot obtain employment. The reason why the employee cannot obtain employment will relate to the alcoholism. The employer cannot concede that the dismissal was unjustified because of the importance of sobriety to the workplace. However, the employer can afford

to fund the employee's rehabilitation programme, and to give the employee first option in filling future employment vacancies upon the successful completion of the programme. The remedies sought, as stipulated by the Act, are only one way of resolving the needs and problems which have prompted the claim for the remedy. The mediation process promotes the flexibility necessary to creatively resolve issues in ways unanticipated by the Act, but to the mutual satisfaction of the parties.

Section 88 - Procedure (2) provides that where the parties conclude a settlement they may request the Tribunal member to sign that settlement. In any such case the terms of the settlement will be final and binding. If a grievance goes to adjudication, the adjudicator is bound to make an award in terms of a remedy stipulated in the Act. Those remedies include reimbursement of wages, reinstatement, and compensation for humiliation, loss of dignity, and injury to the feelings of the employee, as well as for compensation in respect to the loss of a benefit. Those remedies are also available to the parties in mediation, but the parties in mediation are also entitled to create their own terms of settlement involving arrangements which extend beyond the remedies of the Act. Importantly, those remedies are no less enforceable than if they had been awarded on on adjudication.