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PRACTITIONER PAPER

Personal Grievance Mediation in the Employment Tribunal

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This article presents some personal views I have concerning the mediation of personal grievances in the Employment Tribunal, but I suggest that what I have to say has equal relevance to mediation conducted by independent mediators in terms of alternative procedures contemplated by the Employment Contracts Act.

I have endeavoured to approach the subject in a practical and pragmatic, "in the real world", manner. I shall also refer throughout to "workers" and "employers" because, with due respect to Judges and Tribunal members and lawyers and bargaining agents, it is workers and employers who really matter in all of this and the more we talk about "applicants" and "respondents" the easier it becomes for us to lose sight of that.

To set the scene, a few facts and figures about the Employment Tribunal and its workload.

There are 17 permanent Tribunal members and in the middle of 1993 a further eight temporary members came on board. The national complement therefore is 25. The temporaries are all part-time, two of the permanent members are part-time. All members are Mediator Members, 20 are both Mediator and Adjudicator Members.

Nationally, the workload looks like this:

Auckland	50%
Wellington (which includes Nelson)	28%
Christchurch (i.e., rest of South Island)	22%

In the year ended October 1993 3,326 applications were received by the Tribunal. During the same period 3,060 applications were disposed of. With the advent of the temporary members, the Tribunal backlog is progressively reducing. Presently the delay from filing to hearing is between one and two months for mediation. Hauling back the adjudication wait period will take a little while yet. It is currently between six and eight months. The advantage of seeking mediation is obvious and for the avoidance of doubt, in the event that a matter is not resolved by mediation, parties do not lose their place in the queue, they do not go back to square one.

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Mediation is the primary method of disposal in the Tribunal. The split is 60 percent mediation/40 percent adjudication. The settlement "hit rate" in mediation is around 85 percent and it is not the case that the "failed" 15 percent all subsequently reappear in adjudication. Approximately half of those cases do not return to the Tribunal.

As the following information illustrates, Tribunal mediations mainly involve personal grievances. Taking the workload of the Tribunal as a whole, i.e. mediations and adjudications, the mix is:

75%	personal grievances
15%	wage recoveries
10%	the rest, i.e., compliance, disputes, penalties, etc.

The mediation workload in isolation is:

82%	personal grievances
15%	wage recoveries
3%	the rest

Thus, we are saturated with personal grievances, 95 percent of which are alleged unjustifiable dismissal cases. We receive relatively few disadvantage applications and very few applications alleging discrimination, duress or sexual harassment.

What I am saying is that our mediations mostly involve workers and employers who have become "divorced" through dismissal and who in the main are not seeking to re-establish their relationship. Readers will readily appreciate that the scope and techniques for mediation where there is an ongoing employment relationship (as is usually the case in disadvantage grievances) are different from the divorce situation where the position of the applicant in most cases tends to be, "You did me wrong brother, and now you must pay."

There is something else that needs to be understood about the nature of Tribunal mediation and that is that in the main our mediations are conducted in the shadow of the law. By that, I mean that for the parties there is always available a place (adjudication) at which who is right and who is wrong, and what (if anything) should be done about it, can be established. Thus, at all times, parties in our mediations are negotiating with their eyes on the adjudication alternative. On the one hand they hope to avoid going there, but on the other hand they are endeavouring to predict as best they can how well or otherwise they might do at such a forum.

The reality is that possible outcomes for a personal grievance in adjudication narrow down to:

The worker wins.
The worker wins but with remedies reduced for contribution.
The worker loses. (Is it really possible to say that an employer wins?)

And despite the often bizarre levels of claim which are frequently put forward, I believe most representatives know what the more likely level of award will be in the event of a finding for the worker in adjudication.

In mediation involving other forms of dispute as diverse (say) as trade, politics or the jigsaw jungle that once was Yugoslavia, predicting the form of the final outcome in the event that compromise is not achieved, is far more difficult, often impossible. Thus parties, their representatives and mediators who are involved in trying to resolve disputes where there is no access to an ultimate decision maker operate somewhat differently to parties, their representatives and mediators trying to resolve a personal grievance. Or, to say it another way, the great thing about playing poker is that you do not know what is in the other fellow's hand.

It is also appropriate that I should briefly mention that form of employment dispute mediation which might adequately be called mediation in the shadow of the sword. By that I mean, when parties are faced with a strike. In these (industrially) law abiding or more restricted times, we do not see much of that, and most party representatives who have entered the business since the advent of the Employment Contracts Act have not experienced that exciting dimension at all. Let me assure the uninitiated that when your time comes, the shadow which will most exercise your mind will be that cast by the cold steel.

Much of my time as an advocate and subsequently as a mediator was served under the Industrial Relations Act and the Labour Relations Act (different times, different manners) when strikes were more commonplace and disputes, personal grievances and other matters were often negotiated and mediated against the background of a strike (actual or threatened). That sort of thing puts more bargaining chips on the table, makes for far more challenging advocacy and mediation, and demands (particularly of representatives) raw courage. Times may change again, and for me and those of my colleagues who once served in the trenches, old ways and means are not forgotten.

The advantages which mediation represents to parties (meaning workers and employers) can never be stated too frequently. They include:

1. It is extremely user friendly. In mediation, parties are truly in a low level informal Tribunal.

2. The parties control the outcome. Nothing can be imposed. Settlements, when achieved, are by mutual agreement of the parties. Adjudication, as with the Court, is a place in which a dispute has been taken over by a machine.

3. A mediation hearing in the Tribunal is now available with little delay. I am sure everyone recognises that disputes are best resolved quickly before attitudes become hardened and memories go soft.

4. A mediated settlement represents finality. Adjudication on the other hand may well be the entrepot for judicial odyssey.

5. Mediation hearings and settlements are private. Parties do not subsequently read about themselves in the newspaper.

6. Mediation is a cheap process.

7. Parties are not limited to those remedies provided by the Act.

8. Mediation is a far less time consuming process than is adjudication.

9. Mediation is a process which, more so than adjudication, enables parties to understand what is being done and said.

10. Finally, and some readers may have mixed feelings about this, parties do not need to be represented at mediation hearings.

I imagine most readers are familiar with the process but I will briefly paint the picture (please bear in mind that all mediators have different styles).

When the parties arrive the mediator will generally meet briefly with them in separate rooms, subsequently bringing the parties together in one room. The parties sit around a table. The mediator will introduce him/herself. Inevitably some people present will know each other but usually there will be people present who are strangers to others. Thus it is important to get each person to introduce him/herself and identify what they represent in terms of the hearing (lawyer, bargaining agent, the worker whose grievance this is, employer, witness to events, husband, etc.)

The mediator will then talk to the parties about how it is that they have all come to be so assembled, identify the processes (mediation/adjudication) by which matters are resolved in the Tribunal and emphasise to the parties the benefits represented by mediation. The mediator will then explain how the mediation itself will proceed. Ordinarily the parties are happy to follow the process outlined by the mediator but occasionally there will be requests for variations which will be discussed with the parties and agreement achieved.

The worker's story is outlined first. That story may be put forward by the worker's representative or there may be a mixed presentation, part by the representative, part by the worker. In many cases a witness to certain events will also be called upon to make a contribution. Whatever the employer may think about what is being said, it is best that the worker's story is put forward without interruption from the employer party. When the worker's story is on the table, it is appropriate that the employer party has the opportunity to ask any questions in clarification but it is not satisfactory in a mediation for a cross-examination process to then take place.

The reverse process then occurs with the employer's story being put forward without interruption. It may be that the employer party will seek a brief adjournment before replying. This obviously makes sense if something different, unknown or unexpected has emerged during the worker's presentation.

Mediations are always conducted with two rooms available so that at various times parties are able to confer separately. Sometimes adjournments will be sought by one or other of the parties, or they will be suggested (sometimes urged) by the mediator.

The basic pattern, however, is that the worker has his/her say, the employer has his/her say and there will then be at least one session during which parties can talk to each other about "what has gone down". In this third session, care needs to be taken by the mediator to ensure that each side gets a fair go, that one side does not dominate and that the process doesn't become derailed through emotion, anger or the like.

An important part of the process is that the individuals whose dispute this is (dismissed worker/former boss) are able to have a say, but ultimately the process is essentially about achieving finality. It is nice if along the way healing occurs as well, but the focus for mediators is to encourage settlement or, as the Employment Contracts Act puts it, "to facilitate mutual resolution of differences to parties to employment contracts."

What I am highlighting is that the purpose of mediation is to bring about settlement; mediation is not a purpose in itself. It is part of the task of the mediator to encourage parties to settle and to explore with them avenues for settlement. Mediation is in large part a negotiation at which a third party, knowledgeable in negotiation procedures, is present, acting as a "go between". Following the phases of the process already described, the mediator will talk with the parties separately and frequently performs the shuttle role conveying offers and counter offers and additional comment. The parties in caucus will frequently seek input from the mediator concerning the merits or otherwise of their case. The mediator's role is not to bully anybody but sometimes straight talk is called for and is forthcoming.

Where settlement is achieved I reconvene the parties and spell out in full the settlement which has been reached so that the details of a settlement are acknowledged by all concerned at one joint meeting. This, among other things, is to avoid the possibility of subsequent misunderstanding. I then record the settlement in writing for the parties. I often have a closing meeting with the parties at the end of a mediation at which settlement has not been achieved, but frankly, there are times when with feelings running hot, this is inappropriate and indeed, unwise.

In the event that settlement is not reached at a mediation conference, it does not follow that lines of communication close off. If a mediator senses that after the parties have had a day or so to think things over progress can yet be made, then the mediator will pick up the phone. If parties subsequent to the hearing want to reinvolve the mediator, they should do the same.

I intend now to touch briefly on a variety of mediation "straws in the wind".

Acknowledging that different mediators have different styles and preferences, I have to say that I do not like to see parties at mediation hearings reading prepared briefs of evidence at each other. Nor do I believe that mediations are much assisted by representatives firing Court cases at each other. Nor do I think that representatives should do all the talking, or worse, deliberately discourage the worker/the employer they represent from saying anything,

Mediation is a living process which needs to be kept alive and flowing. There will be periods when parties are in separate rooms considering their positions or waiting on an initiative from the other room, but mediations are not generally assisted by lunch breaks or

(worse still) by adjournments part way through because someone has thoughtlessly scheduled another appointment or because some people around 5pm think it is time to go home. These things are best kept going to a conclusion and some individuals take longer than others to reconcile themselves to situations.

Parties often bring the wrong people (or do not bring the right people) to mediation hearings. Whether parties are represented or not, it is important (focusing on dismissal PG's) that at the very least the grievant is present for one side and that present for the employer is the person who dismissed the worker and a person who can make decisions on behalf of the employer.

As far as the employer is concerned, those two persons may well be one and the same but it may be they take the separate forms of (say) a foreman and a general manager. What is needed in the combined teams is information relevant to the case (hence the sacker and the sackee) and people who can make decisions when it comes (as it usually does) to negotiation time. Or if none of that is clear enough, let me say it this way - mediations are not assisted if one party has to keep getting on the phone to seek information or authority from absent people. Absent people are in no good position to offer opinions or make decisions when they have not enjoyed the flavour of what has been said, felt and observed at the hearing itself.

Representatives of parties are present both as advocate and as negotiator, and the jobs are not the same.

If you want to buy or sell a house you have an idea of its market value. Prospective buyer and seller can both form a view of its condition. Each party separately knows of particular pressures they are individually under to buy or to sell. These and other factors are ingredients in negotiation in mediation hearings.

Both sides should be able to see advantage in avoiding cost of representation and the cost represented by the time consumed in preparing for and appearing at adjudication.

No worker can sensibly expect to achieve in negotiation all that they might hope to achieve on a good day if they were to win at adjudication. The certainty represented by settlement is worth something.

Parties have to be aware that what they would like to get and what they are prepared to settle for are different things.

The fundamental of negotiation is that parties have something of value they wish to exchange. "I will give you this if you will give me that." In personal grievance negotiations the employer will wish to obtain release from the worker's application. The worker will wish to gain in exchange one or more things such as - reinstatement, money, a reference, an expression of apology or an agreement to rewrite history (i.e., change the apparent circumstances of departure.) What is the value that the parties place on the matter at the heart of the negotiation - the application? What is it truly worth to the seller, what is it truly worth to the prospective buyer? Sometimes buyer and seller are both comfortable with a price that is ultimately agreed. Sometimes a seller feels constrained to accept a lower price

and departs disgruntled. Sometimes the purchaser pays more than hoped or anticipated and considers himself to be ripped off. But a deal is a deal, that is the way of the world.

Workers need to identify what it is they really want to achieve at a mediation because that knowledge will influence the way they behave. We all know where the onus lies in grievance matters in adjudication but the reality of mediation is that the worker is seeking to persuade someone else (the former employer) to volunteer something. It may well be that the worker feels he/she got a raw deal at dismissal. The worker may be angry about what went on. It may seem attractive to the worker to seize the opportunity at the mediation to "slag" away at the former employer. There may well be satisfaction for the worker in doing so, but it is generally not going to set a tone which opens hearts and wallets and encourages settlement proposals. I have spoken here for particular reasons about conduct of workers, but it is a two way street. If both parties want to achieve resolution (as is usually the case when they come to mediation), the conduct of parties and their representatives should be measured. Viewpoints can be advanced without participants needing to bully, shout, swear, call each other liars or throw dirt about unrelated matters.

When I was an advocate, advocates who reported to me would from time to time complain about the methods or characteristics of the mediators of the day. I appreciate that mediators will not be universally loved and we, like everybody else, will have good days and bad days. But I say to practitioners what I said to my advocates then. These are the people you have to deal with. Their personality and methods vary but they are all in their different ways trying to bring about resolution to arguments. That is also what you are employed to do. Part of your job is to learn the characteristics of these mediators and be able to adapt your game plan accordingly. There is no more formidable industrial team than a mediator and two representatives who are all working toward a resolution which each is able to see is possible and appropriate.

I have spoken about negotiation and the reality is that the "facilitating of mutual resolution of differences between the parties to employment contracts" done by mediators is frequently fluxed by an exchange of the folding stuff. Now and down the years this has often led to employers describing mediation as "a place at which I have to pay up money".

I can understand that and it is not a perfect world. But employers are business people who every day have to make practical business decisions, many of which may seem unappealing. If an employer's case looks somewhat fraught (or worse), it makes sense to accept that errors may have been made and to cut a deal. I am also aware that sometimes employers feel their case to be strong but for the purely pragmatic reasons of putting an end to the matter and avoiding the cost and distraction of adjudication (or worse) they choose to direct money at the problem to make it go away.

It is simply a reality that if an employer wants to know that a matter is at an end, the comfort of that knowledge will have a price. Accepting that to be the reality, mediation nevertheless does not always have to be, "a place at which I have to pay up money."

If an employer (having taken good advice) seems to have a genuinely strong, case, there is nothing wrong with coming to mediation with the intention of laying that case out calmly and carefully in the hope that the worker will get the message and fold his/her tent. It is

rare that a worker will hold up a white flag at the mediation hearing itself and surrender, but not infrequently, in light of what they have learned, they get the message and do not take the matter any further.

Sometimes parties (more regularly grievants than employers) choose to bring to the hearing supporters (Mum, Dad, a partner). These folk have had no involvement in the dismissal and are there to give emotional or other support to a particular party rather than contribute directly to the hearing. I can understand why they come, and power balancing and comfort level for participants are matters which concern mediators. Sometimes the presence of supporting "loved ones" is beneficial but on balance I counsel against it. Frequently they are unable to be sufficiently detached. In the event of a negotiation, they become an additional opinion in an already tricky exercise. Also, I have on occasion seen wives, husbands, etc., become aware during a mediation hearing of events and details which a worker has kept from them, the knowledge of which was certainly going to make their ongoing relationship interesting!

If parties come to mediation with unreasonable expectations, bringing them down to earth will be difficult and often impossible. We regularly see claims filed seeking hurt and humiliation payments in excess of $50,000. In many cases, no doubt, that is done for tactical purposes. However, more often than we would wish, workers arrive so pumped up with expectation that little short of a howitzer will reach them as they float about somewhere above cloud nine. Similarly, we still meet employers who clearly have made a botch of a dismissal and who believe that payment of another week's notice should bring the ship home.

Often mediators are involved in a face saving exercise. Perhaps the employer already knows, or discerns at the hearing, that he (or his Manager/Foreman/Leading Hand/whatever) has made a hash of a dismissal but is reluctant to admit it or appear to be admitting it. This can lead to a log-jam, with the employer wanting to make settlement steps but cast because of how he believes that will be viewed by others.

Actually there is nothing wrong and everything to be gained by admitting that you might have made the odd mistake. I've seen some really good advocacy from some employer representatives who, instead of taking the usual position of maintaining that the dismissal was all according to Hoyle, immediately seized the initiative by saying straight up - *"Look, for the purpose of this mediation I'm prepared to admit that we got this and this wrong and that it might go against us in adjudication. However, you did this and this so you have to take some share of the blame. Now....."*

However, if faces have to be saved, then they have to be saved by confidentiality agreements or by settlements made stating there is no admittance of liability or by arranging to proceed with smaller teams (i.e. exclude some ears) or by encouraging some concession or gesture or form of words from the other side which will make progress possible. Can I say to practitioners that there is nothing wrong with a party's representative quietly having a word to the mediator on the side to identify face saving needs which may not be immediately apparent to the mediator.

Finally, I want to take a moment to express some personal thoughts on an issue which continues to be controversial. This is the question of the mediation model verses the combined mediation/arbitration model. Under the mediation model, the mediator assists the parties in their endeavours to achieve settlement, but in the event that settlement is not achieved, the mediator has no alternative arbitration function. The matter must proceed to another forum. Under the mediation/arbitration model, the mediator assists the parties in their endeavours to achieve settlement as under the "pure" mediation model. However, if there is no resolution achieved by the parties, the mediator is converted into an arbitrator who then determines the matter for them. On the face of it, the Industrial Relations Act 1973 provided for the mediation model, but experience showed that the parties generally opted to convert the process to mediation/arbitration. The Labour Relations Act 1987 provided for the mediation/arbitration model, while the Employment Contracts Act 1991, as we know, provides for the mediation model.

There are mixed views among practitioners concerning the merits of the two models. Personally, I am comfortable with either model and am not much impressed with theoretical or philosophical arguments against the mediation/arbitration mix. The reality is that both methods work and the choice of one rather than the other is probably dictated, not so much by theoretical considerations relating to the processes but by policy considerations concerning institutions and appeal mechanisms.

Under the Industrial Relations Act, parties to personal grievances were required to form a committee and attempt resolution. Most grievance committees were chaired by mediators. The standard personal grievance procedure of the time envisaged that either the committee would resolve the matter or if the matter remained unresolved, it would be referred to the Court for hearing and determination. On the face of it, the mediation model obtained, but in practice the mediation/arbitration model was applied because the parties consistently asked the mediator to determine unresolved grievances for them "final and binding".

They did this because:

1. They sought finality and were prepared to set aside other procedures and appeal rights to achieve that end.

2. The matter could be determined without the further delay occasioned by referral to and hearing in the Court.

3. The cost of further litigation was avoided.

The Labour Relations Act 1987 clearly provided for the mediation/arbitration model in that personal grievances, if not resolved by the committee (i.e. the parties) passed into the hands of the committee chairperson by law and not by choice. The chairperson (almost invariably a statutory Mediator) was then obliged to do one of two things - make a decision or refer the grievance to the Labour Court. While a number of cases were referred to the Labour Court by chairpersons, by far the majority of unresolved grievances were decided by the chairperson and while those decisions could be appealed, most were accepted by the parties.

By 1991, statutory Mediators in New Zealand had applied the mediation/arbitration model in personal grievance hearings for some 20 years and in doing so resolved a great many personal grievances.

Under the present Act it initially seemed that s88(2) provided a stand alone, voluntary exception to the Act's general prohibition on Tribunal members performing both mediation and adjudication services involving the same matter. Parties from time to time, at the conclusion of mediation hearings at which settlement had not been achieved, requested the Mediator Member of the Tribunal to decide the matter for them and members did so. *Gisborne Boys High School Board of Trustees v The Employment Tribunal and Camile Shaffer* ([1993] ERNZ 1 462) held otherwise.

I cannot argue with the Court's finding but the result nevertheless is unfortunate. It seems to me that the ability for parties at mediation to be able to voluntarily opt for an arbitrated outcome, which gives finality and obviates the need for further litigation and cost, is a desirable feature which should be available to workers and employers as part of the smorgasbord of alternative dispute resolution options.