EMPLOYMENT NEW ZEALAND

Employment Mediation Services

Barriers to participation: a mediator's perspective

"Barriers to participation: A Symposium", 13 September 2018

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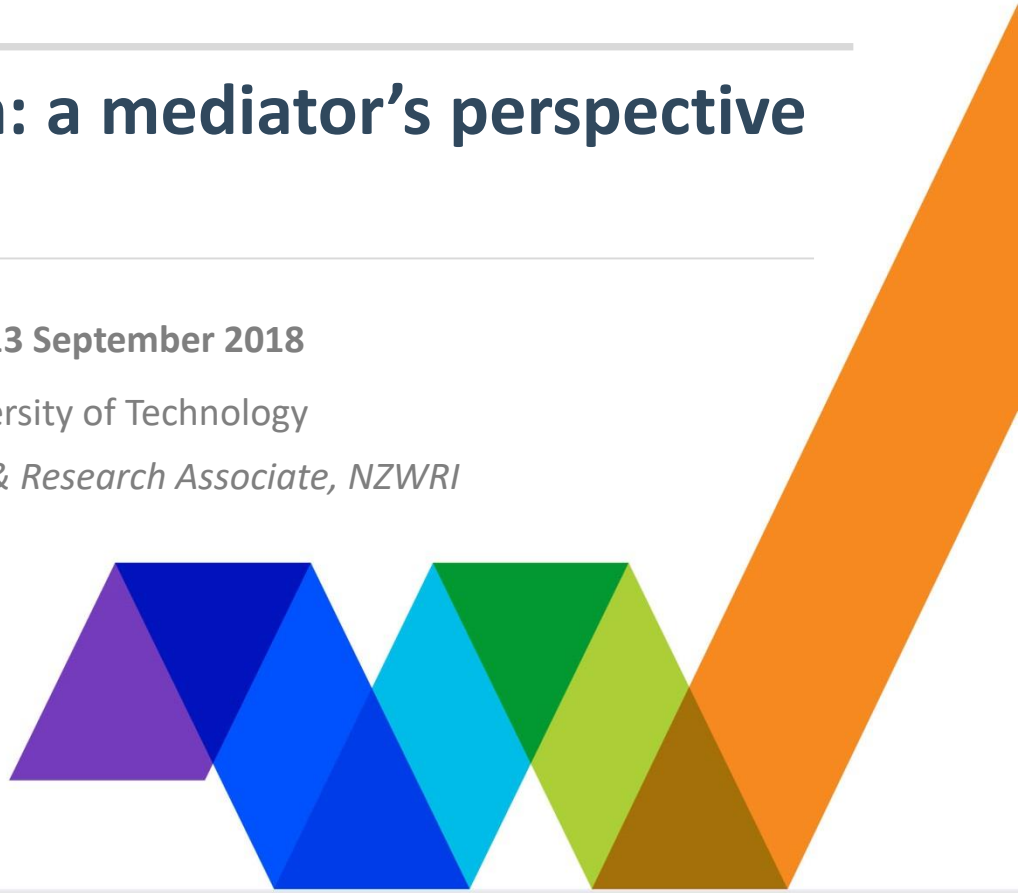

Introduction

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

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

Overview of the dispute resolution system (1)

In the 1980s

- A worker with a personal grievance raised it with their employer. If not fixed, the union talked to the employer.
- If unresolved, the matter was referred to a grievance committee of an equal number of representatives of the union and employer, usually chaired by a mediator.
- If not settled, the parties could ask the chairperson to make a decision or refer the grievance to the Court.
- Few employment lawyers, 13 mediators & 5 judges.
- In 1985, grievance committees dealt with 658 cases. 46% settled by agreement, 30% by the chair's decision & 20% unsettled. The Court dealt with around 300 cases.

Overview of the dispute resolution system (2)

- “Med/arb” (binding decisions by mediators) was a feature of the system.
- Mediator decisions often incorporated partial or full agreements by the parties.
- The system resolved grievances quickly and without litigation. It took between 2-3 days and a month before a grievance committee meeting.
- In hindsight this looks attractive. The big flaw of the system was that it only applied to unionised workers who made up 50% of the workforce.

Overview of the dispute resolution system (3)

The Employment Contracts Act 1991

- Extended protection of employment law to all employees.
- Replaced the mediation service with the Employment Tribunal which provided mediation and adjudication.
- Explosion of cases. In 1997, the tribunal received 5242 applications and had 3472 outstanding at the end of the year.
- There were long delays. Outside the main cities, waiting times were 8-16 months for mediation and 11-22 months for adjudication.
- Union membership plummeted, employment lawyers multiplied & legal costs became a new factor.

Overview of the dispute resolution system (4)

The Employment Relations Act 2000

- Employment Tribunal replaced by Employment Mediation Services and the Employment Relations Authority.
- In 2018, 39 mediators (23 employees & 16 service providers), 18 Authority members and five Employment Court judges.
- Margaret Wilson: Mediation would be 'free, fast & fair.'
- Mediation is the first step in the formal legal process of resolving disputes and the 'primary problem-solving mechanism.' It is almost mandatory.
- The exception is enforcing employment standards. Labour inspectors can take cases directly to the Authority.

Overview of the dispute resolution system (5)

- Not limited to legal disputes. Wide range of matters other than personal grievances: ongoing employment relationships, co-worker conflict, disputes over interpretation, collective bargaining, strikes & lockouts.
- Mediation is confidential (except for collective bargaining). What happens cannot be revealed or used in litigation.
- Settlements signed by mediators are legally final, binding and enforceable.
- In 2018, the MBIE contact centre dealt with 90,000 phone enquiries, there were 7274 mediation applications & 8967 recorded settlements. The Authority issued 750 determinations and the Court disposed of 180 cases.

Barriers to participation at mediation

- Those who don't use the system are those marginalised in the labour market: young, women, those without formal qualifications, Māori & Pasifika and small businesses with low margins and few staff.
- Self-employed workers (around 289,000) are excluded. Mediators can provide dispute resolution but few cases.
- Once people get to mediation there are further barriers.
- Representation helps deal with power imbalances however it comes at a cost.
- Union members greatly advantaged; only 20% unionised.
- Lack of information is a barrier. Employment law is complex & largely in case law. Ss. 103(A) amendment in 2010.

What happens at mediation (1)

- Mediation is confidential. Settlements are final & binding.
- Most cases settle. 76% settlement rate in 2017/2018. Disposal rate as high as 96%.
- People can achieve much better outcomes through negotiations – inside or outside mediation – than through litigation. Not constrained by decisions of the higher courts and legal costs are lower.
- There have always been concerns about bad deals at mediation.
- Mediators have ethical obligations to parties. The service's quality assurance includes training, regular assessments & coaching.

What happens at mediation (2)

- Complaints are investigated & dealt with by managers.
- Grant Morris 2015 study concluded that 'the MBIE employment team is the top mediation unit in New Zealand.' MBIE surveys show 89% customer satisfaction.
- Confidentiality of mediation scrutinised by a fully bench of the Employment Court in the 2006 *Just Hotel* case. The court's decision to put limits on confidentiality was overturned by the Court of Appeal.
- If a 'bad deal' is less than one might reasonably expect to get at litigation, there are certainly times when that happens at mediation.

What happens at mediation (3)

- Lots of people prefer to settle rather than waiting months for a hearing which will be expensive & stressful.
- Legal costs loom large in discussions about the strengths & weaknesses of any case.
- When someone has a weak legal case, a modest settlement is better than the alternative of getting nothing.
- Some say mediation and the Authority are not the right forums to resolve bullying complaints. Critics say non-disclosure agreements 'hush up' harassment cases.
- While cases about breaches of employment standards can be delineated, bullying and harassment cases are rarely black and white.

Barriers to litigation (1)

- Lack of knowledge of the legal system & employment law.
- Potential risk to future employment because of publicity. Susan Hornsby-Geluk: 'An employee who pursues a personal grievance can be black-listed by employers.'
- Legal costs are the greatest barrier to going to litigation.
- Radich & Franks study of 613 costs decisions by the Authority (2011 & 2016) showed that actual legal costs are much higher than the Authority's daily tariff ($4500 a day).
- Median costs awarded by the Authority were less than half actual costs for employees (37%) and employers (29%).
- Median actual costs for employees were $8209 & awards $3071, for employers $11,755 & $3431.

Barriers to litigation (2)

- People can “win” at litigation but end up out of pocket.
- Franks/Radich study gave examples of cases where employees were out of pocket by between $9000 & $25,000 because their actual legal costs were greater than they were awarded for remedies and costs.
- This can also happen when people are represented by advocates although they charge less than lawyers.
- If people lose at the Authority, they usually have to make a contribution, based on the daily tariff, to the successful party’s costs.
- If they reject a Calderbank offer that is better than what they win, they may have to pay a higher amount in costs.

What is to be done? (1)

- We can't go back to the "good old days" when disputes were resolved quickly, few cases went to litigation & the number of employment lawyers could be counted on the fingers of one hand.
- We can't close the stable door to exclude lawyers and contingency fee advocates. Those horses bolted years ago.
- A better option would be to expand the number of competent representatives who do not charge fees.
- This could be done through increased funding to community law centres for representation at mediation and litigation of cases which have a reasonable prospect of success.

What is to be done? (2)

- There are dispute resolution options under the ER Act that are under-utilised: early assistance mediation, “med/arb” for straight-forward issues and mediation by phone, video conference or Skype and in workplaces.
- There is a need for better information about the dispute resolution system and employment law e.g. an accessible and authoritative guide to all the steps employers should follow in conducting a disciplinary process.
- Information provided by video & apps as well as online.
- A lot of debate is based on anecdote & opinion rather than evidence. More empirical research is needed on the employment dispute resolution system.