

## **RESOLUTION OF INDUSTRIAL DISPUTES IN NEW ZEALAND**

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### ***Introduction***

In New Zealand, the industrial relation system is highly regulated. Before mediation was adopted to resolve workplace disputes, strikes were common which sometimes leave devastating effects on the people and the economy of the country. For example, in the early 1970s, the crew of Cook Strait ferries went on strike thus disrupting the flow of freight and passengers between the north and south islands of New Zealand. Again, in August 2006, more than 500 supermarket distribution workers in Auckland, Palmerston North and Christchurch went on strike for a nationwide pay agreement. They only returned to work after the employer promised to sign a national pay agreement, a lapse of more than four weeks. Similarly, in June 2008, more than 2,000 house surgeons and registrars at public hospitals around New Zealand went on strike for 48 hours, after their pay negotiations broke down. Thousands of patients in hospitals around the country were affected. Four months after the strike, employers agreed to an increased pay deal with the union representing junior doctors.<sup>1</sup>

The above are merely some examples of workers going on strike and its devastating effect on the company and the country. Due to the high number of strikes, the urge for speedy resolution of disputes becomes important. In the 1970s, the New Zealand Government adopted the industrial mediation services thereby reducing the need for judicial intervention. The mediation services adopted were modelled after the United States Federal Mediation and Conciliation Service. The Employment Relations Act 2000<sup>2</sup> (ERA), the current employment statute of New Zealand, emphasised *inter alia*, mediation as the primary problem-solving mechanism of labour disputes. Under the ERA, wherever an employment relationship problem arises, the parties would be encouraged to attempt to resolve their disputes voluntarily through discussions amongst themselves. Alternatively, the parties may seek mediation services provided by the Department of Labour. Meanwhile, the adjudication of the dispute falls within the jurisdiction of the Employment Relations Authority (hereinafter referred to as the Authority).<sup>3</sup> The Authority is also empowered to refer the parties to the labour disputes for mediation. Having said the above, this article examines the use of mediation as a mechanism of resolving labour disputes in New Zealand.

### **Mediation Clause in Collective Agreements**

Section 54(3)(a)(iii) of the ERA provides that every collective agreement must contain a plain language explanation of the services available for the resolution of ‘employment relationship problems’. Further, every employment agreement is required to include a procedure for the effective resolution of disputes about the interpretation, operation or application of its terms and reference to the 90-day period within which a personal grievance must be raised. Thus, it is common for the collective agreements to have a provision to refer any workplace conflicts to a private mediator.<sup>4</sup>

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<sup>1</sup> See ‘Social Impact on Labour Disputes’ at (<http://www.teara.govt.nz/en/strikes-and-labour-disputes/9>).

<sup>2</sup> The ERA is primarily intended “to build productive employment relationships through the promotion of mutual trust and confidence in all aspects of the employment environment and of the employment relationship”. This Act enacts a number of core provisions on freedom of association, recognition and operation of unions, collective bargaining, collective agreements, individual employment agreements, employment relations education leave, strikes and lockouts, personal grievances, disputes, enforcement of employment agreements, the Mediation Service, the Employment Court, the Employment Relations Authority and labour inspectors, among others.

<sup>3</sup> The Authority is an investigative body that has the role of resolving employment relationship problems by establishing the facts and making a determination according to the substantial merits of the case, without regard to technicalities: see s 157(1) of the ERA.

<sup>4</sup> If the disputes relating to interpretation, operation or application of its terms in the collective agreement could not be reconciled by the parties to negotiation, the Mediation Service at the Employment Relations Authority and Employment Court are available to resolve their disputes.

For the resolution of workplace disputes, the parties may choose to use a private mediator or arbitrator to assist them in resolving any problems. However, any settlement or decision arrived at by the parties through the use of a private mediator would have no binding effect under the ERA unless the settlement agreement was signed by the mediator of the Department of Labour. In other words, for a voluntary settlement or decision arrived at by the parties to be final and binding, the settlement agreement must be endorsed by the Department of Labour. If however, the private mediator fails to resolve the dispute, either party can seek the assistance of the mediator from the Department of Labour. Alternatively, they may refer the dispute to the Authority for adjudication.

### **New Zealand Department of Labour's mediation services**

The New Zealand Department of Labour was established in 1891 and its primary role is to improve the performance of the labour market and, through this, strengthen the economy and increase the standard of living of the New Zealanders.<sup>5</sup> The Department also aimed at avoiding any workplace disputes and to assist the parties to develop and maintain productive employment relationships.

Majority of the disputes handled by mediators of the Department of Labour are cases involving personal grievances. Apart from the above, the mediators at the Department of Labour are also involved in resolving conflicts in ongoing employment relationships, including collective bargaining disputes between unions and employers, and in promoting best practice in employment relationships. For speedy and effective resolution of workplace disputes, the Department of Labour offers the mediation services to assist the disputants to resolve their employment relations problems quickly and effectively.<sup>6</sup> Mediation services are available to both employers and employees to help them identify problems and seek appropriate courses of action to resolve their disputes.

### **Parties seeking intervention of the Department to resolve their dispute**

Where a dispute arises, the parties may seek intervention of the Department to resolve their dispute *vide* its mediation services.<sup>7</sup> Alternatively, if the parties had reached an agreement, even without the aid of a mediator of the Department, they can request the mediator to sign the agreement. Section 149(1) of the ERA provides that where a problem is resolved, whether through the provision of mediation services or otherwise, any person— (a) who is employed or engaged by the chief executive to provide the services; and (b) who holds a general authority, given by the chief executive, to sign, for the purposes of this section, agreed terms of settlement,— may, at the request of the parties to the problem, and under that general authority, sign the agreed terms of settlement.

Before signing the settlement agreement, the mediator will notify the parties the consequence of their signing the said agreement namely, the agreement shall be final and binding on the parties. It cannot be challenged. The duly executed agreement will then become enforceable in the Employment Relations Authority or the Employment Court, and further, there are penalties for the non-compliance with the duly executed agreement.<sup>8</sup>

### **Parties giving written authority to mediator to make a final and binding decision**

As noted above, if the private mediator appointed by the parties was unable to resolve the dispute, the parties may agree in writing to give authority to the mediator from the Department of Labour to make a final and binding decision. The mediator so appointed will then explain to the parties that the decision he would make in relation to the dispute shall bind the parties. The decision so made is enforceable and cannot be challenged. There are penalties for breaching the decision so made. Further, the parties cannot later seek another determination in the Employment Relations Authority or the Employment Court.

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<sup>5</sup> See 'Department of Labour (New Zealand)' at [http://en.wikipedia.org/wiki/Department\\_of\\_Labour\\_\(New\\_Zealand\)](http://en.wikipedia.org/wiki/Department_of_Labour_(New_Zealand))

<sup>6</sup> See Employment Relations Act 2000, s 145.

<sup>7</sup> *Ibid.*, s 146.

<sup>8</sup> Section 149(2) of the ERA provides 'Any person who receives a request under subsection (1) must, before signing the agreed terms of settlement,— (a) explain to the parties the effect of subsection (3); and (b) be satisfied that, knowing the effect of that subsection, the parties affirm their request. Subsection (3) of section 149 provides '(a) those terms are final and binding on, and enforceable by, the parties; and (ab) the terms may not be cancelled under section 7 of the Contractual Remedies Act 1979; and (b) except for enforcement purposes, no party may seek to bring those terms before the Authority or the court, whether by action, appeal, application for review, or otherwise'. Section 149 (4) further provides 'A person who breaches an agreed term of settlement to which subsection (3) applies is liable to a penalty imposed by the Authority'.

But, if either or both of the parties do not want the mediator to make a decision, the problem may be taken to the Employment Relations Authority which will investigate and make a determination for the parties.<sup>9</sup>

### **Enforcement of terms of settlement**

The terms of settlement agreed by the parties or a decision recorded by the mediator of the Department of Labour are enforceable by the parties in the following manner; (a) by compliance order under section 137; or (b) in the case of a monetary settlement, in one of the following ways: (i) by compliance order under section 137; (ii) by using, as if the settlement or decision were an order enforceable under section 141, the procedure applicable under section 141.<sup>10</sup> As for the enforcement of the order, section 141 provides: ‘Any order made or judgment given under this Act by the Authority or the Court (including an order imposing a fine) may be filed in any District Court, and is then enforceable in the same manner as an order made or judgment given by the District Court’.

### **Mediation services cannot be questioned as being inappropriate**

Section 152(1) of the ERA provides that ‘no mediation services may be challenged or called in question in any proceedings on the ground - (a) that the nature and content of the services was inappropriate; or (b) that the manner in which the services were provided was inappropriate’. Section 152(2) further provides that ‘Nothing in subsection (1) or in sections 149 and 150 prevents any agreed terms of settlement signed under section 149 or any decision made and signed under section 150 from being challenged or called in question on the ground that,— (a) in the case of terms signed under section 149, the provisions of subsections (2) and (3) of that section (which relate to knowledge about the effect of a settlement) were not complied with; and (b) in the case of a decision made and signed under section 150, the provisions of subsections (2) and (3) of that section (which relate to knowledge about the effect of conferring decision-making power on the person providing mediation services) were not complied with’.

### **Independence of mediation personnel**

The independence of mediation personnel is regulated by section 153. The above section provides: ‘(1) The chief executive must ensure that any person employed or engaged to provide mediation services under section 144— (a) is, in deciding how to handle or deal with any particular problem or aspect of it, able to act independently; and (b) is independent of any of the parties to whom mediation services are being provided in a particular case. (2) The chief executive, in managing the overall provision of mediation services, is not prevented by subsection (1) from giving general instructions about the manner in which, and the times and places at which, mediation services are to be provided. (3) Any such general instructions may include general instructions about the manner in which mediation services are to be provided in relation to particular types of matters or particular types of situations or both. (4) Where a Labour Inspector is a party to any matter in respect of which a person employed or engaged by the chief executive is providing mediation services, the fact that the Labour Inspector and that person are employed by the same employer is not a ground for challenging the independence of that person. (5) Where the chief executive is a party to any matter in respect of which a person employed or engaged by the chief executive is providing mediation services, that fact is not a ground for challenging the independence of that person. (6) No person who is employed or engaged by the chief executive to provide mediation services may— (a) hold office, at the same time, as a member of the Authority; or (b) be employed, at the same time, to staff or support— (i) the Authority under section 185; or (ii) the court under section 198.’

### **Confidentiality**

Confidentiality is a critical element of successful mediation.

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<sup>9</sup> Section 150(1) of the ERA provides: “The parties to a problem may agree in writing to confer on a person employed or engaged by the chief executive to provide mediation services, the power to decide the matters in issue. (2) The person on whom the power is conferred must, before making and signing a decision under that power,— (a) explain to the parties the effect of subsection (3); and (b) be satisfied that, knowing the effect of that subsection, the parties affirm their agreement. (3) Where, following the affirmation referred to in subsection (2) of an agreement made under subsection (1), a decision on how to resolve a problem is made and signed by the person empowered to do so,— (a) that decision is final and binding on, and enforceable by, the parties; and (b) except for enforcement purposes, no party may seek to bring that decision before the Authority or the court, whether by action, appeal, application for review, or otherwise. (4) A person who breaches a term of a decision to which subsection (3) applies is liable to a penalty imposed by the Authority”.

<sup>10</sup> See s 151 of the ERA.

The participants to the mediation session must be assured that the discussions cannot and will not be disclosed to others. In other words, the confidential communications at the mediation session are accorded privilege and thus, are not admissible in court. This assurance is important so that the parties would be prepared to talk over the dispute openly. Section 148(1) of the ERA deals with the non-disclosure of confidential information or documents that transpired or disclosed during the mediation sessions. The above section enumerated the list of person or persons who is/are expected to keep confidential any statement, admission, or document created or made for the purposes of the mediation and any information that, for the purposes of the mediation, is disclosed orally in the course of the mediation. They are as follows: (i) a person who provides mediation services; (ii) a person to whom mediation services are provided; (iii) a person employed or engaged by the department; (iv) a person who assists either a person who provides mediation services or a person to whom mediation services are provided. The confidentiality of the information or documents may however, be waived by the consent of the parties or the relevant party.

Further, section 148(2) provides that: ‘No person who provides mediation services may give evidence in any proceedings, whether under this Act or any other Act, about - (a) the provision of the services; or (b) anything, related to the provision of the services, that comes to his or her knowledge in the course of the provision of the services’. While section 148(3) provides that: ‘No evidence is admissible in any court, or before any person acting judicially, of any statement, admission, document, or information that, by subsection (1), is required to be kept confidential’. Section 148(4) provides that the Official Information Act 1982<sup>11</sup> does not apply to any statement, admission, document, or information disclosed or made in the course of the provision of mediation services to the person providing those services.

While section 148(5) provides that where mediation services are provided for the purpose of assisting persons to resolve any problem in determining or agreeing on new collective terms and conditions of employment, subsections (1) and (3) above do not apply to any statement, admission, document, or information disclosed or made in the course of the provision of any such mediation services.

Lastly, section 148(6) provides that ‘Nothing in this section - (a) prevents the discovery or affects the admissibility of any evidence (being evidence which is otherwise discoverable or admissible and which existed independently of the mediation process) merely because the evidence was presented in the course of the provision of mediation services; or (b) prevents the gathering of information by the department for research or educational purposes so long as the parties and the specific matters in issue between them are not identifiable; or (c) prevents the disclosure by any person employed or engaged by the department to any other person employed or engaged by the department of matters that need to be disclosed for the purposes of giving effect to this Act; or (d) applies in relation to the functions performed, or powers exercised, by any person under section 149(2) or section 150(2)’.

### **Submitting employment relationship problem to arbitration**

The parties may instead of mediating the dispute agree to submit their employment relationship problem to arbitration.<sup>12</sup> Section 155(2) of the ERA provides that if the parties to an employment agreement purport to submit an employment relationship problem to arbitration, - (a) nothing in the Arbitration Act 1996 applies in respect of that submission; and (b) the parties must determine the procedure for the arbitration’. Section 155(3) further provides that the submission of an employment relationship problem to arbitration does not - (a) prevent any of the parties from using mediation services or applying to the Authority or the court in accordance with this Part; or (b) otherwise affect the application of this Act.

### **Employment Relations Authority may direct parties to mediate**

Section 159 deals with the duty of the Employment Relations Authority to direct the parties to consider mediation. Where any matter comes before the Authority for determination, section 159(1) requires the Authority to first consider whether an attempt has been made to resolve the matter by the use of mediation.

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<sup>11</sup> The Official Information Act 1982 was enacted with a view to ‘make official information more freely available, to provide for proper access by each person to official information relating to that person, to protect official information to the extent consistent with the public interest and the preservation of personal privacy, to establish procedures for the achievement of those purposes’.

<sup>12</sup> See section 155(1) of the ERA.

Before the Authority investigates the matter, it may direct the disputants to mediate or to further mediate, as the case may require. However, the Authority will not consider the use of mediation or further mediation in the following circumstances, namely; (i) when use of mediation will not contribute constructively to resolving the matter; or (ii) when mediation will not, in all the circumstances, be in the public interest; or (iii) use of mediation will undermine the urgent or interim nature of the proceedings. In the course of investigating any matter, the Authority may from time to time as thinks fit, consider whether to direct the parties to use mediation. Section 159(2) further provides that where the Authority gives a direction to the parties to mediate or further mediate, the parties must comply with the direction and attempt in good faith to reach an agreed settlement of their differences. When such direction has been given the proceedings in relation to the request before the Authority will be suspended until the parties have done so or the Authority otherwise directs (whichever first occurs).

### **Conclusion**

Workplaces dispute should ideally be resolved through collaborative and less confrontational means. Mediation is the best dispute resolution process. Apart from providing fast, creative and mutually satisfactory resolutions, mediation has the potential of preserving the relationship between the parties. Mediation can mend and preserve frayed working relationships, even when the parties are extremely angry. Moreover, mediation fosters mutual respect through improved communication. As noted in this article, mediation of labour disputes in New Zealand has been legislatively prescribed as the primary dispute resolution process.

The ERA introduced *inter alia*, mediation as a mode of amicable resolution of labour disputes. Wherever an employment relationship problem arises the parties are encouraged to resolve the dispute through discussions amongst themselves with the aid of a private mediator. When a private mediator fails to resolve the dispute, the parties can approach the Department of Labour for mediation services. The Department provides mediation services to both employers and employees to help them identify problems and seek appropriate courses of action to resolve them. The parties can also agree to ask the mediator of the Department to make a final and binding decision over any issue they cannot agree upon.

Before extending the mediation services, the mediator will request the parties to sign an agreement which provides *inter alia*, that the decision of the mediator shall be final and binding on the parties and cannot be challenged. Such an agreement is enforceable in the Employment Relations Authority or the Employment Court, and there are penalties for breaching it. Any settlement agreement reached between the parties is then enforceable by the Employment Relations Authority and the Employment Court. Where mediation failed to resolve the dispute, either party can ask for a determination (a decision) from the Employment Relations Authority. The Authority may, before determining the merits of a particular problem, direct the disputing parties to mediate over the dispute.

Having said the above, it is worthwhile to note that the employment mediation had benefited both the employers and the employees. It has been a big saver for the employer in terms of management time and the employees, in terms of avoiding losses of earnings. The success rate of the amicable settlement *vide* mediation service provided by the Department of Labour has been very encouraging. For example, in 2008 almost 6,000 cases were referred to mediation, of which 80% were settled. This resolution rate has been maintained despite the number of requests for mediation rising by 26% between 2006 and 2008.<sup>13</sup>

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<sup>13</sup> See speech by Hon Kate Wilkinson, Minister of Labour, to commemorate 100 years of employment mediation, Parliament House, 30 June 2009 at ([http://www.aminz.org.nz/Story?Action=View&Story\\_id=11172](http://www.aminz.org.nz/Story?Action=View&Story_id=11172)).