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EMPLOYMENT DISPUTE RESOLUTION BY MEDIATION: DOES GOOD FAITH APPLY?

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CONTENTS

ABSTRACT

This paper analyses issues of mediation as a means of employment dispute resolution. It covers basic information about alternative dispute resolution in general and mediation in particular. The main problem is the question whether good faith requirements apply in mediation under current New Zealand employment law. This question is interesting concerning sections 181 and 182 of the Employment Relations Act 2000, which make it possible that the Employment Court may request a "report in relation to good faith" from the Employment Relations Authority. Interestingly, there does not exist such a rule for mediation processes. The question whether good faith requirements apply is of particular importance regarding secondary claims based on a breach of good faith requirements. Apart from that bad faith behaviour might endanger the quality of mediation in general. In order to find an answer to this question a definition of good faith behaviour in mediation is sought and the question of sanctions for bad faith behaviour is analysed. Problems arise because it is already hard to define mediation and good faith is even harder to specify. Finally, this paper argues in favour of the applicability of good faith requirements in mediation and suggests a code of conduct.

The text of this paper (excluding contents pages, footnotes and bibliography) comprises approximately 12,000 words.

I INTRODUCTION

This paper deals with some aspects of mediation in the employment law context. The main problem outlined is the question whether good faith requirements apply in mediation.

The first part of the paper gives an overview about available dispute resolution processes. This introduction also covers methods of alternative dispute resolution and leads to the classification of mediation as a method of alternative dispute resolution. Thereafter mediation is defined in detail. Defining mediation is a problem. That starts with finding an appropriate approach. Another issue is where to put the emphasis. Some definitions, for example, focus rather on the achievable outcome. This chapter also names some official definitions of mediation and names objectives of mediation. There are a variety of mediation types. The problems in defining mediation also occur because of the differences between those types. The most important types are described briefly. Finally the first chapter outlines which outcomes can be achieved by mediation. In the end, parties make their decision about the appropriate dispute resolution process last but not least in regard of the outcome they might achieve with the process.

The second part of the paper outlines the basic procedures of employment dispute resolution under the Employment Relations Act 2000 in New Zealand. It describes the possibility of using the mediation service and the availability of private mediation under the Act. Furthermore this chapter names the kinds of employment disputes that seem suitable to be resolved by mediation.

An important part of the employment dispute resolution system in New Zealand is the Employment Relations Authority. Before I come to the main problem discussed in the paper I will give a brief overview about the Authority because I will come back to

function of the Employment Relations Authority during the discussion of the problem.

In the third part I will analyse the main problem of the paper. The question is whether good faith requirements apply to mediation in general and more specifically whether the good faith requirement of the New Zealand Employment Relations Act 2000 applies to mediation of employment disputes. Issues arise regarding sections 181 and 182 of the Employment Relations Act 2000. These provisions deal with good faith behaviour and apply to the process before the Employment Relations Authority. The question is whether the absence of similar rules for mediation means that the Act's good faith requirements do not apply to mediation. The discussion of the problems starts again with the outlining of definition problems. It is hard to determine which factors establish good or bad faith behaviour in mediation. Therefore some possible approaches and examples are outlined. After one has described bad faith behaviour in mediation one can question the next problematic issue. This is whether bad faith behaviour in mediation is subject to sanction. This is a controversially discussed question. There are strong proponents of both the pro sanction and the contra sanction side. Their conflicting arguments are outlined. After that I present a compromise approach. Considering the major adverse impact that bad faith behaviour can have on the mediation process and its participants one can argue that the less bad faith behaviour occurs during a mediation the more satisfied will the parties be with the result. Finally it is to argue whether there is a need for good faith requirements in mediation. To bring more clarity into the problem it will be shown that it is sensible to draw a distinction between objective and subjective factors. After that, the most important problems with punishing subjective bad faith behaviour will be outlined. Problems occur regarding confidentiality, litigation, open expression and voluntariness. A proposed code of good faith for mediation is briefly outlined at the end of this chapter

Finally, I will come to the conclusion that it is generally possible that good faith standards apply in mediation. Furthermore, it will be shown that the current New Zealand employment law does not exclude good faith standards from mediation.

II DISPUTE RESOLUTION PROCESSES

The traditional process of dispute resolution is adjudication. Its characteristics are as follows: Adjudication is an involuntary process, decisions are binding and subject to appeal and third party participation is imposed. This third party is a neutral decision-maker and has generally no specialised expertise in the dispute subject. Adjudication is a formalised process and highly structured by predetermined, rigid rules. Each party gets the opportunity to present proofs and arguments. The process leads to a principled decision that is supported by a reasoned opinion as outcome. The process of adjudication is public[1].

In contrast to adjudication alternative dispute resolution is voluntary and usually private. Alternative dispute resolution may serve as a means to avoid costly litigation. It consists of at least three elements: negotiation, mediation and arbitration.

A Negotiation

Negotiation is the most informal, least expensive method of resolving disputes. It is a not-binding process. However, if an agreement is achieved, the result of a negotiation process is enforceable as a contract. Negotiation does not include the facilitation of a third party. It is usually an informal and unstructured process. The

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[1] Stephen B Goldberg, Eric D Green, Frank E A Sander *Dispute Resolution* (Little Brown and Company, Boston Toronto, 1985) 8.

proceeding is characterised by an unbounded presentation of evidence, arguments and interests. The sought outcome of a negotiation process is a mutually acceptable agreement[2].

B Mediation

Mediation is a private and voluntary process of alternative dispute resolution. It is a more formal yet non-binding process. It uses a party selected outside facilitator - the neutral mediator - to help negotiate a dispute settlement. The mediator usually has specialised subject expertise. During the mediation process the parties have the possibility to present evidence, arguments and interests. As in the negotiation process the presentation of evidence is unbounded. Once an agreement is reached through consent of the parties, it is generally binding on the participants and the sought outcome of the process is a mutually acceptable agreement. The process of mediation will be outlined in detail later[3] in this paper.

C Arbitration

Arbitration is also a voluntary process. Arbitration is binding and can be subject to review on limited grounds. In contrast to the other processes of alternative dispute resolution arbitration is not stringently private. If a judicial review is sought, the process is no longer private. Arbitration involves a party selected third party decision-maker. He or she has usually specialised subject expertise. Arbitration is in comparison to adjudication procedurally less formal. The parties may set the procedural rules and substantive law. Each party has the opportunity to present proofs and arguments. The

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[2] Stephen B Goldberg, Eric D Green, Frank E A Sander *Dispute Resolution* (Little Brown and Company, Boston Toronto, 1985) 8.

[3] Refer to page 7.

outcome of a arbitration process may sometimes be a principled decision supported by reasoned opinion. However, in other cases the outcome is a compromise without a reasoned opinion[4]. A special case is court-annexed arbitration. This is an involuntary process. Court-annexed arbitration is non-binding and public. In general, one can say that arbitration is a means of reaching a final, binding resolution of disputes that cannot be solved through more informal techniques. It is viewed as less costly and more effective than litigation. Sometimes non-binding arbitration is imposed by court procedures. The use of pre-dispute arbitration clauses is gaining increased acceptance. Such clauses are generally recognised as a legitimate means to avoiding the litigation of employment related disputes. However, in the special case of employment disputes the employer has to follow certain guidelines to achieve this goal. Careful drafting of arbitration clauses is a key to a successful arbitration process.

Arbitration has long held a place in New Zealand employment dispute resolution. That place has in part been retained in section 155 of the Employment Relations Act 2000. Problems arise because the Arbitration Act 1996 does not apply although section 155(1) allows parties of an employment agreement to submit employment relationship problems to arbitration. The parties then must determine their own procedure for the arbitration. Furthermore, there is no means of enforcing the award. An award is a determination, not a settlement, so the provisions of section 149 cannot apply. Section 150, concerned with the mediator becoming the determiner, can have no application, for that provision only applies to persons employed or engaged by the chief executive of a department to provide mediation services. The arbitrator, on the other hand, will have been appointed expressly to arbitrate, not to mediate. A solution may be found in section 155(3)(b) which provides that the submission of an employment relationship problem to arbitration does not otherwise affect the application of the

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[4] Stephen B Goldberg, Eric D Green, Frank E A Sander *Dispute Resolution* (Little Brown and Company, Boston Toronto, 1985) 8.

Act. Assuming that the parties have seriously attempted mediation, which proved to be unsuccessful before entering the arbitration, then the arbitral award may be enforceable by either party applying to the Employment Relations Authority to confirm it and adopt it as a determination order and/ or direction of the Authority.[5] Once the Authority has adopted the award then it can be subject to the compliance provisions of the Act.[6] As this procedure is less than ideal, arbitration is not of great importance for employment dispute resolution in New Zealand anymore.

D Other Processes

The presented processes of dispute resolution are the so-called "primary" dispute resolution processes. Each of the primary processes can be used in its own right without adaptation.[7] Apart from these, there are other processes, which are called "hybrid" dispute resolution processes. Hybrid processes are combinations of usage of the primary processes. They were developed by drawing elements from the primary processes and making them suitable for a particular case. The advantage is that an alternative dispute resolution practitioner can devise a permutation of procedures and approaches, which fit all the nuances of the parties' needs and circumstances without being constrained by prescribed rules.[8] Among hybrid processes are the following: private judging, neutral expert fact-finding and mini trial.[9] Furthermore there is an ombudsman procedure, whereas one may not mistake this alternative dispute resolution process for the process involving a statutory ombudsman. Mainly in the United States of

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[5] Employment Relations Act 2000 section 161(1)(r).
[6] Employment Relations Act 2000 sections 137-138 and Phillip D Green *Employment Dispute Resolution* (LexisNexis Butterworths, Wellington, 2002) 78.
[7] Henry Brown, Arthur Marriot *ADR Principles and Practise* (Sweet & Maxwell, London, 1993) 19.
[8] Henry Brown, Arthur Marriot *ADR Principles and Practise* (Sweet & Maxwell, London, 1993) 20.
[9] Stephen B Goldberg, Eric D Green, Frank E A Sander *Dispute Resolution* (Little Brown and Company, Boston Toronto, 1985) 9.

America one also knows a summary jury trial as hybrid alternative dispute resolution process and early neutral evaluation[10].

III MEDIATION IN DETAIL

A Definition

Some characteristics of mediation were already outlined above[11]. Nevertheless mediation is not easy to define. The difficulties in defining mediation arise because it does not provide a single analytical model, which can be neatly described and distinguished from other decision-making processes. This difficulty is caused by a variety of factors. The first one is that in defining mediation there are often very vague terms used, as for example voluntary or neutrality. These terms can never provide certainty because they are subject to change and various interpretations themselves. Another reason for the difficulties in defining mediation is that it has yet to develop a coherent theoretical base and an accepted set of core features which enable it to be differentiated from other processes of alternative dispute resolution. Another reason that may not be underestimated is that different users use the term mediation in different senses. Mediation is used in a variety of areas and so factors such as economics, politics and self-interest exert their influence on the definition. People define and describe mediation for their own purposes. Another aspect, which is tightly linked with the last reason, is the fact that there is a wide diversity in the practise of mediation. Mediation is – as already mentioned – used for different purposes. It operates in different legal and social contexts. The mediators in all

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[10] Henry Brown, Arthur Marriot *ADR Principles and Practise* (Sweet & Maxwell, London, 1993) 20.
[11] Refer to page 4.

these different areas have great differences in their background, training, level of skill and operational style.[12]

Considering this one can approach mediation as a process – a "infinitely variable process, yet with common strands".[13] Mediation is an extension of the negotiation process. The mediator helps the parties by facilitating continued negotiation in a managed way.[14] This makes the enormous influence of the mediator's personal skills can have on the prospect of a good outcome clear.

Other definitions are more dispute resolution focused with emphasis on achieving outcomes that are accepted by the parties, but which not necessarily resolve the dispute.[15]

Furthermore, it is possible to define mediation in either a descriptive or a conceptual way. Conceptualist definitions have a high normative content. The process is defined in ideal terms that emphasise certain values, principles and objectives. In this manner, mediation was defined as "the bringing together of parties in conflict with a neutral person or persons whose function is to assist the parties to resolve the dispute through the systematic isolation of issues and development of settlement options to achieve a consensual accommodation of needs".[16] This definition was criticised as being simplistic because even when the dispute cannot be settled there is till a role to be played by the mediator. This role will include seeking to reduce the matters in issue and encouraging the parties towards an

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[12] Laurence Boulle, Judi Jones, Virginia Goldblatt *Mediation: Principles, Process, Practise* (Butterworths, Wellington, 1998) 3.
[13] Phillip D Green *Employment Dispute Resolution* (LexisNexis Butterworths, Wellington, 2002) 1.
[14] Phillip D Green *Employment Dispute Resolution* (LexisNexis Butterworths, Wellington, 2002) 1.
[15] National Working Party on Mediation *Guidelines for Family Mediation: Developing Services for Aotearoa/ New Zealand* (Butterworths, Wellington, 1996).
[16] J Folberg, A Taylor *Mediation: A Comprehensive Guide to Resolving Conflict without Litigation* (Jossey Bass, San Francisco, 1988) 7.

understanding of the opposing points of view.[17] Other conceptualist definitions assert that mediation "is empowering for the parties", that it "reflects an alternative philosophy of conflict management", or that it strives to "improve relationships between the parties".[18] These definitions can also be criticised because although these goals are aspired to and achieved in some mediations – however, in other mediations they are neither in evidence nor are they contemplated by those involved. Therefore the critic is that it be misleading to include without qualification such factors in the definition of mediation.[19] The conceptualist approach has the advantage that it highlights for users and practitioners the higher goals and values of mediation. These goals and values differentiate mediation from other process of dispute resolution and decision making. However, the main disadvantage is that the conceptualist approach is an ideological and not an empirical approach to the definition of mediation. That means, it tends to pass off the prescriptive elements of mediation because it regards them as descriptive.[20]

A descriptive approach has the advantage that it provides an explanation of the process. The descriptive approach defines mediation not in terms of an idealised concept or theory, but in terms of what actually happens in practise. Descriptive definitions have a low normative content. They accept that within the wide diversity of mediation practice, the values, principles and objectives of the conceptualists are often overlooked and overridden.[21] The strength of this approach is that it is based on practise and therefore reflects reality. Using the descriptive approach, mediation was defined for

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[17] Phillip D Green *Employment Dispute Resolution* (LexisNexis Butterworths, Wellington, 2002) 2.
[18] Laurence Boulle, Judi Jones, Virginia Goldblatt *Mediation: Principles, Process, Practise* (Butterworths, Wellington, 1998) 5.
[19] Laurence Boulle, Judi Jones, Virginia Goldblatt *Mediation: Principles, Process, Practise* (Butterworths, Wellington, 1998) 5.
[20] Laurence Boulle, Judi Jones, Virginia Goldblatt *Mediation: Principles, Process, Practise* (Butterworths, Wellington, 1998) 5.
[21] Laurence Boulle, Judi Jones, Virginia Goldblatt *Mediation: Principles, Process, Practise* (Butterworths, Wellington, 1998) 5.

example, as "a process of dispute resolution in which the disputants meet with the mediator to talk over and then attempt to settle their differences."[22] The main disadvantage of this approach is that it provides a very superficial and unhelpful definition. The definition is free of values. That is dangerous in so far as it overlooks the underlying philosophy of mediation.[23]

There are some official definitions of mediations. They are outlined in statues, rules of court and codes of conduct for mediators. Though the practical use of these definitions is often doubtful. As an example the Australian Federal Court Rules define the term as "mediation means mediation conducted under a mediation order".[24] However, there are also more helpful definitions of mediation. The Australian Family Law rules, for example, provide that a mediation conference must be conducted "as a decision making process in which the approved mediator assists the parties by facilitating discussions between them so that they may: communicate with each other regarding the matters in dispute; and find satisfactory solutions which are fair to each of the parties and (if relevant) the children; and reach agreement on matters in dispute."[25]

As a principle one can summarise under consideration of this wide variety of definitions of and approaches to mediation that there are some basic features of mediation. One could summarise mediation as "a decision making process in which the parties are assisted by a third party, the mediator. The mediator attempts to improve the process of decision making and to assist the parties reach an outcome to which each of them can assent."[26] Furthermore, mediation has also secondary objectives apart from the principal objective of making a

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[22] M Roberts "System or Selves? Some Ethical Issues in Family Mediation" (1992) 10 MQ 11.
[23] Laurence Boulle, Judi Jones, Virginia Goldblatt *Mediation: Principles, Process, Practise* (Butterworths, Wellington, 1998) 5.
[24] Australian Federal Court Rules O 2 r 4.
[25] Australian Family Law Rules r 10(1)(a).

decision. Inter alia these secondary objectives characterise mediation and distinguish it from other decision-making processes. Boule, Jones and Goldblatt provide substantial list[27] of secondary objectives of mediation. It will be to examine whether mediation in employment law as it is practised in New Zealand is able to achieve these objectives:

Mediation shall bring clarity to the situation by identifying and defining which matters do or do not require decisions to be made.

Mediation shall overcome or reduce communication problems between the parties so that they can more clearly perceive and understand what each other means and feels.

Mediation shall identify and acknowledge the various parties' needs and interests, whether they are substantive, procedural or psychological.

Mediation shall promote constructive and efficient negotiations, which focus predominantly on the parties' needs and interests, and which broaden the search for options and settlement alternatives.

Mediation shall reduce anxiety and other negative effects of the problem situation and to be empowering for the parties so that informed and rational decision-making can take place.

Mediation shall encourage the parties to take charge of their own decisions and to accept responsibility for the consequences of those decisions.

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[26] Laurence Boulle, Judi Jones, Virginia Goldblatt *Mediation: Principles, Process, Practise* (Butterworths, Wellington, 1998) 3.

Mediation shall reduce tension and improve, or at least not lead to deterioration, in relationships between the parties.

Mediation shall provide the parties with a model and some skills and techniques, for future decision-making without third party assistance.

B Types of Mediation

An important aspect is that some of the problems of definition are a result of the contrast between private mediation and the different forms of institutionalised mediation. Definitions and descriptions of mediation tend to have only private mediation in mind.

Private mediations are often well resourced. They have few time limitations. Generally they are conducted by well-qualified mediators, who can exploit the potential of the mediation system in full.[28]

Institutionalised mediation is mediation, which is connected to the courts or are required by statute. Some forms of institutionalised mediation do not have any of the named typical features of private mediation. The process can even be "poor, nasty, brutish and short"[29] – as to cite one of the early critics of institutionalised mediation.

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[27] Laurence Boulle, Judi Jones, Virginia Goldblatt *Mediation: Principles, Process, Practise* (Butterworths, Wellington, 1998) 8-9.
[28] Laurence Boulle, Judi Jones, Virginia Goldblatt *Mediation: Principles, Process, Practise* (Butterworths, Wellington, 1998) 4.
[29] T Hobbes *Leviathan* (Everyman Edition, J M Dent and Sons, London, 1962) 65.

C Purpose of Mediation

Mediation can be used for a variety of purposes, which are described in the following. It will be interesting to find out which of these possible fields of mediation use may be useful in employment disputes.

1 Defining problems

Sometimes it is necessary to determine which issues are in dispute and which are not. This process is also called "scoping", therefore this kind of mediation is called "scoping mediation". Mediation can be used to define the problem before it will be referred to other methods of dispute resolution. Those can be litigation or a public inquiry. Scoping is used environmental disputes in New Zealand for example. The advantage of involving mediation into the dispute resolution process is that it allows the parties to define the problem without the pressure to compromise their interests.[30]

2 Dispute settlement

Dispute settlement mediation takes place in the context of a dispute between two or more parties and is used in an attempt to settle the dispute. The special advantage of mediation is that even where the dispute is not settled by the mediation itself, the process may contribute to the management of the dispute in other ways. However, the main objective of dispute settlement mediation remains to bring the dispute to an end through a joint decision making by the parties[31].

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[30] Laurence Boulle, Judi Jones, Virginia Goldblatt *Mediation: Principles, Process, Practise* (Butterworths, Wellington, 1998) 12.

3 Conflict management

Mediation can also be used to manage conflict, as conflict containment mediation. One speaks of a conflict if there has been an ongoing series of disputes of severe intensity and if this has been going on over an extended period of time.[32] Mediation can even be helpful in cases where it is known that the conflict will continue. It can help establishing appropriate rules, structures and processes for communication and interaction. Mediation is able to regulate the conduct of the parties in the short term. That serves the long term objective of dealing with the dispute, although the long-term objective will finally be achieved by another means of dispute resolution.[33]

4 Negotiation of contracts

Mediation can already be used before a dispute occurs. Transactional mediation is used to manage procedures during the negotiations and to provide ways of dealing with disputes should they arise during the future contractual relationship between the parties. The mediator can help for example in establishing a positive climate, identifying interests and priorities, improving communications, managing destructive emotions, formulating proposals, narrowing options and noting and recording agreements.[34]

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[31] Laurence Boulle, Judi Jones, Virginia Goldblatt *Mediation: Principles, Process, Practise* (Butterworths, Wellington, 1998) 12.
[32] Laurence Boulle, Judi Jones, Virginia Goldblatt *Mediation: Principles, Process, Practise* (Butterworths, Wellington, 1998) 12.
[33] W Faulkes "The Dispute Resolution Industry – Defining the Industry and Establishing Competencies" (1994) 5 ADRJ 285, 287.
[34] Laurence Boulle, Judi Jones, Virginia Goldblatt *Mediation: Principles, Process, Practise* (Butterworths, Wellington, 1998) 13.

5 Policy formulating

Policy-making mediation can be used where a public authority is required to determine policy, standards or procedures in rules and regulations. This process allows a participation of the affected parties and interested members of the public and is in some countries used to develop environmental and health and safety standards.[35]

6 Prevention of conflicts

Preventative mediation can be used to assist parties to anticipate problems, grievances and difficulties and to plan processes for dealing with them when they arise.[36] Partly both transactional and policy-making mediation involve elements of conflict prevention.

7 Subsidiary purposes

Apart from the named achievements mediation can also serve other purposes, for example as an educational tool in decision-making, as a managerial tool[37], as filtering mechanism in the litigation process and to negotiate the facts – that means the parties develop a common version of the facts of the case.[38]

For determining the appropriate dispute resolution process a variety of factors are to consider. Among these are: the relationship

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[35] L Susskind and G McMahon "The Theory and Practise of Negotiated Rulemaking" (1985) 3 Yale Journal of Regulation 133.
[36] Laurence Boulle, Judi Jones, Virginia Goldblatt *Mediation: Principles, Process, Practise* (Butterworths, Wellington, 1998) 14.
[37] A Acland *A Sudden Outbreak of Common Sense: Managing Conflict through Mediation* (Hutchinson, London, 1990) 15.
[38] Laurence Boulle, Judi Jones, Virginia Goldblatt *Mediation: Principles, Process, Practise* (Butterworths, Wellington, 1998) 14.

between the disputants, the nature of the dispute, the amount at stake, speed and cost and the power relationship between the parties.

IV MEDIATION UNDER NEW ZEALAND EMPLOYMENT LAW

A common complaint about the employment law institutions under the Employment Contracts Act 1991 was the legalistic - and therefore expensive and time-consuming - nature of the dispute resolution process. One of the aims of the Employment Relations Act 2000 was to increase the speed with which problems are resolved and to reduce the cost of resolving them by reducing the litigious nature of employment relations. Moreover, it was thought that such "de-legalisation" of employment relations would have the effect of assisting unions to function more effectively.[39]

The Employment Relations Act 2000 has changed a lot in the process of employment dispute resolution in New Zealand. Mediation was also available before the introduction of the Act, for example for disputes of interest under the Industrial Conciliation and Arbitration Act 1894. Also subsequent legislation has provided for a range of mediation mechanisms. Under these mechanisms were, for example Dispute Committees under Industrial Conciliation and Arbitration Act 1954 (sections 176 and 177), the Industrial Mediation Service in section 64 of the Industrial Relations Act 1973, the Mediation service under the Labour Relations Act 1987 (section 25), and Employment Tribunal mediation under the Employment Contracts Act (section 80). Up until the passage of the Employment Contracts Act 1991, there had essentially been a dual system for the resolution of disputes over the terms and conditions of employment. Employees who were covered by collective contracts – that is, awards or collective agreements – had

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[39] Paul Roth "Review: Employment Law" (2001) 4 NZ Law Rev 475, 476.

access to statutory dispute procedures. These were procedures gave a primary emphasis to the resolution of the dispute wherever possible by mediation or conciliation. Those employees covered by individual contracts, in contrast, generally had to resort to private litigation to resolve disputes over the terms and conditions of their employment. This procedure usually included and early involvement of lawyers in the dispute resolution process and an emphasis on adjudication by the courts.[40] Under the Employment Contracts Act 1991 the same dispute resolution procedures applied to all employment contracts, whether individual or collective. One of the issues that arose when the Employment Contracts Act 1991 was passed was whether the greater emphasis on employment contracts – as opposed to employment relations – would lead to a greater involvement of lawyers in both the construction and the interpretation of employment contracts and, in turn, a greater emphasis on adjudication rather than mediation in resolving disputes and personal grievances.[41] A comparative study between the Employment Contracts Act 1991 and the Labour Relations Act 1987 found that under the Employment Contracts Act there was "an increased reliance on adjudication as a dispute and personal grievance process"[42] and that there was "a greater degree of formality in the new procedures"[43]. However, the members of the Employment Tribunal thought that the separation of the mediation function from the adjudication function had given them a greater freedom to mediate effectively.

Finally, mediation has been given a huge legislative emphasis by the introduction of the Employment Relations Act 2000. Typically,

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[40] John Deeks, Jane Parker, Rose Ryan *Labour And Employment Relations In New Zealand* (2 ed, Longman Paul Limited, Auckland 1994) 382.
[41] John Deeks, Jane Parker, Rose Ryan *Labour And Employment Relations In New Zealand* (2 ed, Longman Paul Limited, Auckland 1994) 384.
[42] Margaret Robbie *Representation, Procedure and Process in Mediation and Adjudication since The Employment Contracts Act* (mimeo, Business Studies Department, The Waikato Polytechnic, Hamilton 1992) 46.
[43] Margaret Robbie *Representation, Procedure and Process in Mediation and Adjudication since The Employment Contracts Act* (mimeo, Business Studies Department, The Waikato Polytechnic, Hamilton 1992) 47.

in mediations prior to the Employment Relations Act 2000 coming into force, the parties would not agree to mediation unless each committed to confidentiality.[44] Under the Act, mediation is, with few exceptions, mandatory. Therefore, the Act imposes confidentiality unless the parties or the relevant party consents to its waiver.[45] Another interesting aspect is that the so-called inquisitorial approach has been introduced to dispute resolution where mediation has failed. Inquisitorial processes were not new in New Zealand. However, they have never been given such a heavy emphasis before and it is the fact that this approach is now linked with the specific powers given to those who are conducting the investigation - that creates the difference.

The Act established the institutions dealing with employment disputes and provides the rules where these institutions are in charge. These institutions, which are established under Part 10 of the Employment Relations Act 2000, are the Mediation Service, the Employment Relations Authority and the Employment Court.

In section 5 of the Employment Relations Act 2000 is defined that mediation in the meaning of the Act covers both mediation provided by the mediation service and private mediation.

A Advantages of Employment Dispute Mediation

The advantages which mediation represents to parties of employment disputes include according to Ralph Gardiner, a member of the former Employment Tribunal[46]:

(1) "Mediation is user friendly. In mediation, parties are truly in a low level informal tribunal.

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[44] *Crummer v Benchmark Building Supplies Ltd* [2000] 2 ERNZ 22.
[45] Employment Relations Act 2000, Section 148(1).

(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 disputes has been taken over by a machine.

(3) A mediation hearing [...] is 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, [...] parties do not need to be represented at mediation hearings."

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[46] Ralph Gardiner "Mediation of Employment Disputes" (Arbitrators Institute of New Zealand Seminar, Auckland 14 October 1993).

If one compares the listed advantages with the objectives of mediation in general, listed earlier in this paper[47], one can see that mediation of employment disputes as practised in New Zealand is likely to achieve those objectives. However, I am critical concerning the last point. The hypothesis that it establishes an advantage for the parties that they do not need representation requires a closer examination. At a first sight, the idea of no party representation during mediation fits well into the picture of mediation of an informal and uncomplicated process of dispute resolution. On the other hand is an employment relationship often characterised by a power inequality between the parties. Representation can help to reduce this inequality during the process. A further aspect regarding inequality during the process is that most employers – in contrast to employees - inevitably have professional representation, even if this is only by their in-house human resource staff. Representatives can also assist their parties in viewing the issue in dispute in a legal context. It might be helpful if the parties actually recognise what the relevant case law and statutory law provides. That way the parties have the chance to reflect their expectations, which are of course driven by a lot of emotional factors as well, with the realistically and possibly achievable under legal aspects. The contra argument might be that representation is an additional cost factor for the parties. Furthermore mediation does not deal only with the legal aspects of a case. It also considers the emotional and psychological needs and expectations of the parties. For example in a personal grievance case, apart from a monetary compensation an apology can be the aimed outcome of the process and make parties even more satisfied with the outcome than the monetary compensation. However, under employee protection aspects one cannot argue that no representation is solely an advantage. I can only agree with Gardiner's statement if one reads the advantage not in the fact that there is no representation but in the fact that there is no representation necessary, which means the parties have the choice

[47] Refer to page 13.

whether they want representation. This opportunity is clearly an advantage.

B The Mediation Service

According to section 144(2) of the Act mediation services may include:

(a) "the provision of general information about employment rights and obligations:
(b) the provision of information about what services are available for persons (including unions and other bodies corporate) who have employment relationship problems:
(c) other services that assist the smooth conduct of employment relationship problems:
(d) other services (of a type that can address a variety of circumstances) that assist persons to resolve, promptly and effectively, their employment relationship problems:
(e) services that assist persons to resolve any problem with the fixing of new terms and conditions of employment."

This definition is very broad and leads to the consequence that the Employment Relations Authority would immediately refer any dispute concerned with existing terms and conditions to mediation if mediation has not already been tried.

C The Relationship between the Mediation Service and Private Mediation

It is up to the parties' choice whether they take their employment relationship problem to the statutorily provided

mediation service or to a private mediator. The Employment Relations Act 2000 expressly states that in section 154:

> "Nothing in this part prevents any person seeking and using mediation services other than those provided by the chief executive under section 144."

This distinction can cause problems in terms of the question whether private mediation shall be afforded the same benefits relating to confidentiality and settlements as the statutory mediation service. Some commentators take the view that the confidentiality provisions of the Employment Relations Act 2000 protect only mediation services pursuant to section 144 of the Act[48]. Green however, takes the view that the Act distinguishes between mediation services provided under section 144 by the mediation service from mediation services generally which can include both statutorily provided and private mediation.[49] As an example one can present section 153, which expressly refers to the mediation services provided under section 144 to be compared with section 148(1)(a) which refers to "mediation services" without any reference to section 144. If one considers that the Act treats both private and statutory mediation services in the same way and if one further considers that there is a need to uphold and protect the integrity of the mediation process which the Act offers one has to agree with Green[50] that there appears to be no reason why private mediation will not be afforded the same benefits in terms of confidentiality and settlement as that achieved thought the statutorily mediation services.

The Employment Relations Act 2000 identifies employment topics that are so-called "dispute generators" and provides a process

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[48] Jason Bull (ed) *Brookers Employment Law* (looseleaf, Brookers, Wellington 2000, para ER148-04 (2/10/00) 1-2169, last updated October 2003).
[49] Phillip D Green *Employment Dispute Resolution* (LexisNexis Butterworths, Wellington, 2002) 53.

for their resolution. The following list contains areas of potential dispute where a mediator might have a positive influence on resolving the dispute and nurture the achievement of an acceptable resolution in the order of their appearance in the Act:

- Freedom of association disputes, sections 7 to 11;
- Access to workplace disputes, sections 19 to 25;
- Independent review of information disputes, section 35;
- Collective employment contract bargaining, sections 40 to 59;
- Individual employment contract bargaining, sections 60 to 69;
- Strikes and lockouts, sections 80 to 100;
- Personal grievances, sections 101 to 128;
- Contract interpretation disputes, section 129.

Apart from this list mediation could assist in cases of reduction of issues and where the employment relationship is to preserve.

D The Role of the Employment Relations Authority

The de-legalisation process, as described above, came to be focused on the operation of the Employment Relations Authority. The Authority was intended to function as an informal but efficient forum for determining factual and legal issues at first instance. A number of procedural features serve to assist in the de-legalisation of the process at this level:

- the informality of Authority procedure (sections 160 and 173);
- the minimalist approach to recording its determinations (section 174);
- the de novo handling of issues in the Court (sections 179 and 183);

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[50] Phillip D Green *Employment Dispute Resolution* (LexisNexis Butterworths, Wellington, 2002) 53.

- restrictions on judicial review of the Authority (section 184);
- the Court no longer has the function of advising or directing the Authority as to how it does its work (section 188(4)).

If initial attempts at mediation are unsuccessful, issues proceed to the Authority. The Employment Relations Authority is supposed to be an inquisitorial body as opposed to one that adjudicates within a conventional adversarial framework. The explanatory note to the Employment Relations Bill stated: "It is intended that the Authority will make practical decisions quickly, with a minimum of detail, focusing on key issues and how to resolve them." In its report to the Employment and Accident Insurance Select Committee, the Department of Labour described the proposed operation of the Authority as:

> " [...] not constrained by the formalities of a judicial hearing. The Authority has been given powers to operate flexibly given that it has a wide jurisdiction, and to act quickly and pragmatically. The wider powers of the Employment Relations Authority will allow it to take greater control of the proceedings, where that is appropriate given the nature of the employment problem or dispute, to get to the nub of a problem. Accordingly, section 157(1) describes the Authority as "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".[51]

If a party is dissatisfied with the Authority's determination, it can elect to have the matter heard again in the Employment Court, this time within a conventional adversarial framework.[52] The Employment

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[51] Department of Labour "Report to the Employment and Accident Insurance Select Committee" (June 2000) 150.
[52] Paul Roth "Review: Employment Law" (2001) 4 NZ Law Rev 475, 477-478.

Court oversees the role of the Employment Relations Authority and deals with specific legal issues. There is a stated emphasis on "equity and good conscience" and it is to uphold the emphasis of the Employment Relations Act 2000 on good faith bargaining.[53]

E Success of Employment Dispute Mediation

Statistics show the mediation of employment disputes, as practised in New Zealand, is a success story. Most cases are being settled in mediation, as was the intention of the legislation.[54] For example from 1 July 2002 to 30 June 2003 from 9,256 received applications only 1,155 have not been settled in the Mediation Service of the Department of Labour.[55] The question is where this success comes from. The major advantages of mediation have already been described above.[56] They certainly build the basis for the success of mediation in employment disputes. It is also the special character of an employment relationship as an ongoing human relationship, which makes mediation especially suitable to solve disputes in that relationship. Mediation does not only solve monetary issues of a dispute but also personal and emotional issues. Furthermore, in mediation parties take responsibility for the outcome. That makes a settlement more likely. Another aspect regarding the Authority is that the determinations are reasonable predictable, at least regarding the remedies and that this might have an influence on the success rate of dispute settlement by mediation.[57] Mediation may help assess strength of cases. It brings clarity about the factual situation. That helps parties

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[53] John Deeks, Erling Rasmussen *Employment Relations in New Zealand* (3 ed, Pearson Education New Zealand Limited, Auckland, 2002) 136.
[54] Paul Roth "Review: Employment Law" (2002) NZ Law Rev 557.
[55] Department of Labour "Annual Report of the Department of Labour – Te Tari Mahi – for the year ended 30 June 2003" 189.
[56] Refer to page 18.
[57] See for example statistics in Ian McAndrew, Kathryn Beck "Decisions and Damages: An Analysis of Adjudication Outcomes in the Employment Tribunal and the Employment Relations Authority" (New Zealand Law Society, Employment Law Conference, November 2002).

to evaluate their prospects realistically and may increase their willingness to settle in mediation.

V GOOD FAITH IN MEDIATION

Section 4 of the Employment Relations Act 2000 outlines the fundamental approach associated with good faith employment relations. The Act's promotion of productive employment relationships based on mutual trust places good faith at the centre of employment relations. There are a number of broadly defined matters where the duty of good faith applies: collective and individual agreement negotiations, employer and employee consultations, redundancy situations, and union access to workplaces.

The question of the applicability of good faith requirements in mediation arises under different aspects.

Firstly, I am of the opinion that the certainty that all participants are required to act in good faith improves the quality of the whole process and can help make mediation more successful.

Secondly, the question arises if the parties can actually compel each other to act in good faith. Consequently the question arises what happens to claims of the participants because of bad faith behaviour. Firstly, it is to find out whether there are any claims and whether or under which circumstances they are enforceable. This may vary from case to case. However, one always has to consider possible tort claims or other secondary claims such as negligence in the course of contracting, *culpa in contrahendo*. This context shows that it actually is important whether the parties acted in good faith, although one can not enforce acting in good faith of the parties itself.

Under New Zealand employment law another interesting aspect has to be taken into consideration: According to section 181(2) of the Employment Relations Act 2000 the Employment Court may, in certain situations, request a "report in relation to good faith" from the Employment Relations Authority where a party has sought a hearing de novo. This report will give the Authority's assessment of the extent to which parties involved in the investigation have[58]

(a) facilitated rather than obstructed the Authority's investigation; and

(b) acted in good faith towards each other during the investigation.

If the Employment Court is satisfied that the person making the election "did not participate in the Authority's investigation of the matter in a manner that was designed to resolve the issues involved" the court may direct that the hearing not be a hearing de novo.[59] These reports in relation to good faith under section 181 of the Employment Relations Act 2000 are a new initiative, which was introduced by the Employment Relations Act 2000 and have only been considered in a few cases.[60] Still, what constitutes behaviour which will be held to have "facilitated rather then obstructed" an Employment Relations Authority investigation, or result in a finding that a party had not acted in good faith during an investigation meeting, will require assessment of the particular characteristics of each case. The cited cases[61] also show the consequences for a party that treats the Employment

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[58] Employment Relations Act 2000 Section 181(1).
[59] Employment Relations Act 2000 Section 182(2).
[60] See recently: *North Harbour Windows and Doors (1999) Limited t/a Nu Look (North Shore) v Henman* (5 May 2003) Employment Court Auckland AC 35/03 Colgan J; *Western v Warwick Henderson Gallery Limited* (19 August 2003) Employment Court Auckland AC 45A/03 Colgan J; *Leybourne v Eftpos Specialists (Auckland) Limited* (27 August 2003) AC 48/03 Colgan J.
[61] *North Harbour Windows and Doors (1999) Limited t/a Nu Look (North Shore) v Henman* (5 May 2003) Employment Court Auckland AC 35/03 Colgan J; *Western v Warwick Henderson Gallery Limited* (19 August 2003) Employment Court Auckland AC 45A/03 Colgan J; *Leybourne v Eftpos Specialists (Auckland) Limited* (27 August 2003) AC 48/03 Colgan J.

Relations Authority investigation as an opportunity to determine the strength of the other party's case, or acts other than "in a genuine attempt to resolve the case on its merits."[62] These consequences will be more than just a sizeable costs award in favour of the other party. It may result in a party, who wants to have a hearing de novo, having the extent of their hearing restricted.

However, there does not exist a similar rule for mediation processes. One can see this as an indication that good faith does not apply in mediation. In favour of this opinion one can use a systematic argument. If there is a rule for the Employment Relations Authority one could reason that the legislator intentionally did not invent such a rule for mediation. It might have been the legislator's intention that good faith requirements shall not apply during mediation. On the other hand, a closer look is necessary. One has to consider the unique characteristics of mediation. Actually the parties' behaviour during mediation cannot be investigated afterwards because of the absolute confidentiality of mediation. Confidentiality is a major characteristic of mediation and a key factor for the success of mediation. If one further asks for the intention of the legislator it seems unlikely that this intention was to exclude good faith standards from mediation. Good faith requirements were invented to the benefit of all parties. Everyone should be able to rely on the assumption that the other party is acting in good faith and that, if the other party fails to observe this code of conduct the party has to expect consequences. However, this argumentation only works under the assumption that it is generally possible that good faith requirements apply in mediation. I will analyse this question subsequently. Heretofore I set the hypothesis that if it is generally possible that good faith requirements apply in mediation there is no reason why they should not apply in employment dispute mediation under current New Zealand employment law.

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[62] *North Harbour Windows and Doors (1999) Limited t/a Nu Look (North Shore) v Henman* (5 May 2003) Employment Court Auckland AC 35/03 Colgan J, 15.

A Defining Good Faith in the Mediation Context

The first problems arise if one tries to define good faith in the context of mediation.

In the New Zealand Employment Relations Act 2000 does not deliver a useful definition. According to section 4(1)(a) just provides that the parties of an employment relationship must deal with each other in good faith. Section 32 of the Act provides extensive examples about good faith bargaining for collective agreements. However, this provision does not deliver a clear definition either.

In the mediation further difficulties occur. As it is a vague and pretty unspecific term mediation itself is hard to define.[63] Consequently it is not surprising that authors have difficulties in defining good faith in the context of mediation. Kovach delivered a very extensive description. According to her a definition should include the following aspects:

> "Compliance with the terms and provisions of [... a state statute or other rule ...];
>
> Compliance with any specific court order referring the matter to mediation;
>
> Compliance with the terms and provisions of all standing orders of the court and any local rules of the court;

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[63] Refer to page ...

Personal attendance at the mediation by all parties who are fully authorised to settle the dispute, which shall not be construed to include anyone present by telephone;

Preparation for the mediation by the parties and their representatives, which includes the exchange of any documents requested or as set forth in a rule, order, or request of the mediator;

Participation in meaningful discussions with the mediator and all other participants during the mediation;

Compliance with all contractual terms regarding mediation which the parties may have previously agreed to;

Following the rules set out by the mediator during the introductory phase of the process;

Remaining at the mediation until the mediator determines that the process is at an end or excuses the parties;

Engaging in direct communication and discussion between the parties to the dispute, as facilitated by the mediator;

Making no affirmative misrepresentations or misleading statements to the other parties or the mediator during the mediation; and

In pending lawsuits, refraining from filing any new motions until the conclusion of the mediation."[64]

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[64] Kimberlee K Kovach "Good Faith in Mediation – Requested, Recommended, or Required? A New Ethic" (1997) S Tex L Rev 575, 622-623.

Although this list seems to be quite substantial, one has to confess that it merely just itemises behaviours, which are included in good faith. It rather seems to be a list of examples of good faith behaviour. This enumeration is not a universally valid. However, universal validity is characteristic for a definition, whereas it is supposed to apply to a variety of different cases. Some statutes and rules contain requirements of good faith in mediation.[65] However, the same difficulties arise. For example, in the United States only one statute, dealing with agricultural lending mediations, contains a list of cases when the parties are not acting in good faith in the meaning of the statute:

> "[…] not participating in good faith debtor/creditor mediation includes: failure on a regular or continuing basis to attend and participate in mediation sessions without cause; failure to provide relevant financial information; failure to designate a mediation representative with authority to make binding commitments, settle, compromise or mediate the matter; failure to provide written statements regarding alternatives; and participation in "other similar behaviour which evidences lack of good faith."[66]

Remarkable is that this so-called definition again approaches the term by defining what bad faith behaviour is. Basically one can reduce the definition to a statement that "good faith is anything that is not bad faith"[67]. That might sound trivial. However, this approach finds its advocates since "it is bad faith that we seek to quash and since bad faith is presumably the rarer form of conduct"[68]. Therefore it

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[65] See for the US list in: John Lande "Using Dispute System Methods to Promote Good Faith Participation in Court-Connected Mediation Programs" (2002) 50 UCLA L Rev 69, 78-80.

[66] Minn Stat Ann § 583.21(1)(a) (West 2001).

[67] Robert S Summers "The General Duty of Good Faith – Its Recognition and Conceptualization" (1982) 67 Cornell L Rev 810, 818.

[68] Roger L Carter "Oh, Ye Little of Good Faith: Questions, Concerns and Commentary on Efforts to Regulate Participant Conduct in Mediations" (2002) J Disp Resolution 367, 372.

might be legitimate to focus on defining what is inappropriate behaviour by mediation participants.

As already described, mediation aims to assist disputants in better understanding one another and in reaching a well-informed and mutually acceptable resolution of their conflict. Ideally this can be achieved through an open sharing of interests and parties learn more about each other. By that they can increase their ability to work collaboratively. These legitimate purposes of mediation are defeated when a participant acts contrary to this goal.

Keeping that purpose in mind one can develop a list of examples of bad faith behaviour in the context of mediation. Such a list[69] will include for example the following three situations:

A party uses the mediation process primarily to gain strategic advantage in the litigation process;

A party uses mediation to impose hardship rather than to promote understanding and conflict resolution; or

A party neglects an affirmative material obligation owed to another participant, the mediator, or the court.

B Sanctions for Bad Faith Behaviour

If one has found out that a party to mediation was acting in bad faith as a next step the question occurs whether this behaviour is to sanction. This question is contested. Some authors promote sanction, others are opposed to it.

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[69] Roger L Carter "Oh, Ye Little of Good Faith: Questions, Concerns and Commentary on Efforts to Regulate Participant Conduct in Mediations" (2002) J Disp Resolution 367, 372.

1 Pro sanctions

Proponents of enforceable good faith requirements contend that mediation just will not work absent the threat of sanctions for misconduct. They argue that litigants and attorneys accustomed to an adversarial "no holds barred" adjudicatory environment will not comport with mediation's ideals of openness, disclosure and fair play without the coercive threat of sanctions.[70] The proponents of sanctions for bad faith summarise the problems as follows:

> "If good faith is not present, all we will be left with is a pro forma mediation, one more procedural task to be checked off of the long list of items to be covered in order to get to the trial. In fact, now, the term "pro forma mediation" is one that is heard when the parties, or more often their lawyers, arrive at mediation only because the court mandated them to do so. They unequivocally state that they have no intention of resolving the matter and really do not participate. These mediations are usually a waste of time for the mediator, a waste of time for the attorneys, unless it is used for free discovery or as trial preparation, and a waste of expense for the parties."[71]

Another author argues that parties to a private mediation who feel aggrieved by an opponent's lack of good faith possess a common law cause of action in contract and possibly tort. According to this

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[70] Kathleen A Devine "Alternative Dispute Resolution: Policies, Participation, and Proposals" (1991) 11 Rev Litig 83, 108-109; Alan Kirtley "The Mediation Privilege's Transition from Theory to Implementation: Designing a Mediation Privilege Standard to Protect Mediation Participants, the Process and the Public Interest" (1995) 1995 J Dis Res 1, 49, 50; Kimberlee K Kovach "Lawyer Ethics in Mediation: Time for a Requirement of Good Faith" (1997) Dispute Resolution Magazine 9

[71] Kimberlee K Kovach "Good Faith in Mediation – Requested, Recommended, or Required? A New Ethic" (1997) S Tex L Rev 575, 595.

opinion, every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement. The author reasons that every voluntary mediation involves a contract, either oral or written. In essence, the parties say to one another, "In consideration of you agreeing to meet and mediate this dispute, I agree to meet and mediate it as well." The implied covenant of good faith would, according to this opinion, attach to such a contract. This author theorises that victims of particularly egregious bad faith may even be entitled to recover punitive damages and believes that sanctions will compensate parties injured by bad faith conduct for their time and inconvenience. [72]

This opinion seems to be reasonable. However, one has to admit that they present the same problems as traditional good faith analysis does, as for example defining good faith.

As good faith issues also arise in other areas of law, for example in employment law, some authors suggest that case law from those fields can be instructive in the mediation context.[73] Those analogies seem plausible. However, one may not be too uncritical in accepting them without further analysis. One has to analyse the case under mediation aspects, although there might be a legal requirement for good faith behaviour in litigation, as for example in the New Zealand Employment Relations Act 2000.

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[72] Maureen A Weston "Checks on Participant Conduct in Compulsory ADR: Reconciling the Tension in the Need for Good Faith Participation, Autonomy, and Confidentiality" (2001) 76 Ind L J 591, 644.

[73] Kimberlee K Kovach "Good Faith in Mediation – Requested, Recommended, or Required? A New Ethic" (1997) S Tex L Rev 575, 586-587; John Lande "Using Dispute System Design Methods to Promote Good Faith Participation in Court-Connected Mediation Programs" (2002) 50 UCLA L Rev 69, 90-91; Edward F Sherman "Court Mandated Alternative Dispute Resolution: What Form of Participation Should Be Required?" (1993) 46 SMU L Rev 2079, 2102.

2 Contra sanctions

Commentators opposed to sanctions recognise the problem of bad faith conduct, but believe that "the cure is worse than the disease". They see mediation's unique appeal as being its open and safe environment where disputants can freely and comfortably discuss their interests and views. Rules requiring good faith and threatening the imposition of sanctions, they contend, will hang over the parties "like the sword of Damocles", inhibiting the process rather than abetting it.[74] In conformance with that perception one can follow the statement that the imposition of a requirement to participate in good faith may also adversely affect the way the parties interact with each other and with the mediator. Parties may react cautiously and be "less likely to let down their litigation hair." This potential inhibition strikes at the core of mediation's attributes, the process's ability to offer participants an open and accepting environment in which to settle disputes. If parties are worried about the mediator's evaluation of their participation, the flow of information may be stemmed.[75] Opponents of sanctions also contend that such rules could be abused just as proponents claim mediation is abused.[76] Bullock and Gallagher, for example, stated that: "It is not worth the risk posed to the mediation process to impose a legally enforceable good faith requirement in order to achieve a highly uncertain benefit. A much more accessible alternative – and one which may be equally effective in practice – is for the mediator to request from the parties a voluntary commitment that they will use their best efforts to settle the case and that they will engage in good faith negotiations toward that end at the beginning of

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[74] See for example: Ellen S Pryor and Will Pryor "Concurrent Mediation of Liability and Insurance Coverage Disputes" (1997) 4 Conn Ins L J 485, 499.

[75] James J Alfini and Catherine G McCabe "Mediating in the Shadow of the Courts: A Survey of the Emerging Case Law" (2001) 54 Ark L Rev 171, 180.

[76] See for example James J Alfini and Catherine G McCabe "Mediating in the Shadow of the Courts: A Survey of the Emerging Case Law" (2001) 54 Ark L Rev 171, 205-206; Wayne D Brazil "Continuing the Conversation About the Current Status and the Future of ADR: A View From the Courts" (2000) J Dis Res 11, 30-33; David Hricik "Reflections of a Trial Lawyer on the Symposium: Dialogue with the Devil in Me" (1997) 38 S Tex L Rev 745, 748-749.

the mediation session. Such an approach is much more in keeping with the realities of what brings parties to settlement and with mediation's role as a facilitator of the parties' self-determination."[77] Opponents of sanctions believe that sanctions will cause mediation to become one more adversarial proceeding.[78] This concern might even be exacerbated by the vagueness of the good faith standards that have been proposed. Another author proposes in this context, for example:

> "Because a list of prohibited conduct cannot usually anticipate all violations, a test of good-faith participation should include an alternative totality-of-the-circumstances standard evidencing process abuse. Violations of the good-faith requirement can be measured objectively by a course of conduct abusive of the process, such as using the alternative dispute resolution process for the sole purpose of discovery or to outspend or harass the other side, and other coercion or pressure tactics."[79]

Critics of sanctions fret further that such vagueness will lead to "satellite" litigation in which parties would fight endlessly over whether a violation has occurred. Rather than being an alternative to litigation, mediation could become a catalyst for litigation.[80]

The threat of hearings on whether a party acted in bad faith raises a possibility abhorrent to most mediation supporters: the

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[77] Stephen G Bullock and Linda Rose Gallagher "Surveying the State of the Mediative Art: A Guide to Institutionalising Mediation in Louisiana" (1997) La L Rev 885, 970.

[78] David Hricik "Reflections of a Trial Lawyer on the Symposium: Dialogue with the Devil in Me" (1997) 38 S Tex L Rev 745, 753; Edward F Sherman "Court Mandated Alternative Dispute Resolution: What Form of Participation Should Be Required?" (1993) 46 SMU L Rev 2079, 2094.

[79] Maureen A Weston "Checks on Participant Conduct in Compulsory ADR: Reconciling the Tension in the Need for Good Faith Participation, Autonomy, and Confidentiality" (2001) 76 Ind L J 591, 630.

[80] See for example: David Hricik "Reflections of a Trial Lawyer on the Symposium: Dialogue with the Devil in Me" (1997) 38 S Tex L Rev 745, 748-752; Alexandria Zylstra "The Road from Voluntary Mediation to Mandatory Good Faith

mediator would likely be called to testify as to what happened. This threatens a fundamental premise of mediation-confidentiality.[81] Indeed, advocates of good faith standards acknowledge the inevitable erosion in standards of mediator confidentiality that their proposals would cause. Weston contends concerning this problem that "confidentiality in alternative dispute resolution is popularly viewed as crucial to the effectiveness of alternative dispute resolution and to participants' willingness to use such procedures. The confidentiality accorded to alternative dispute resolution proceedings is designed to promote the party candour, disclosures, and compromise discussions needed to resolve disputes. After the fact allegations of alternative dispute resolution bad faith conduct can undermine participants' trust in the confidentiality of alternative dispute resolution, create uncertainty, and potentially impair full use of the process. Yet the good-faith-participation requirements applied to party conduct in alternative dispute resolution proceedings are also designed to ensure process integrity and procedural fairness. The requirement is essentially meaningless if confidentiality privileges restrict the ability to report violations".[82]

3 Compromise and own perspective

The major problem with evaluating whether an act or omission is the result of bad faith depends ultimately on the actor's subjective motivation. The term "faith" already implies something inchoate, intangible and not measurable. Judgements about this will therefore inevitably entail guesswork. A few commentators have tried to overcome the distance between opponents and advocates of good faith

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Requirements: A Road Best Left Untraveled" (2001) 17 J Am Acad Maritim Law 69, 70.

[81] Kevin Gibson " Confidentiality in Mediation: A Moral Reassessment" (1992) J Dis Res 25, 29.

[82] Maureen A Weston "Checks on Participant Conduct in Compulsory ADR: Reconciling the Tension in the Need for Good Faith Participation, Autonomy, and Confidentiality" (2001) 76 Ind L J 591, 633.

standards. Some have suggested a distinction between "objective" and "subjective" good faith.[83] Objective good faith involves matters such as compliance with procedural rules and orders, completion and exchange of pre-mediation forms, and physical presence at the mediation. Subjective good faith entails matters more closely linked to a party's intent. It might include bargaining in good faith or bringing representatives with adequate settlement authority. Sherman stated:

> "I have no trouble with requirements imposed by rules or court orders as to reasonably objective conduct. These would include providing the other party and mediator with a short statement of
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> (1) the issues in dispute,
> (2) the party's position as to them,
> (3) the relief sought (including particularized itemization of all damages claimed), and
> (4) any offers or counter-offers already made."[84]

He speaks in terms of "the minimal meaningful participation necessary to ensure the process is not futile."[85] Kovach also discussed this minimal meaningful participation standard and acknowledges that "it is certainly worth additional deliberation and reflection".[86] Another suggestion is that there might exist a more useful dichotomy between good faith in procedural matters and good faith in substantive

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[83] Edward Sherman "Good Faith Participation in Mediation: Aspirational, Not Mandatory" (1997) Disp Resol Mag Winter 1997, 16; David S Winston "Participation Standards in Mandatory Mediation Statutes: You Can Leed a Horse to Water…" (1996) Ohio St J on Disp Res 187, 201.

[84] Edward Sherman "Good Faith Participation in Mediation: Aspirational, Not Mandatory" (1997) Disp Resol Mag Winter 1997, 16.

[85] Edward Sherman "Good Faith Participation in Mediation: Aspirational, Not Mandatory" (1997) Disp Resol Mag Winter 1997, 16.

[86] Kimberlee K Kovach "New Wine Requires New Wineskins: Transforming Lawyer Ethics for Effective Representation in a Non-Adversarial Approach to Problem Solving: Mediation" (2001) 28 Fordham Urb L J 935, 966.

participation in the mediation.[87] Good faith in procedural matters includes such matters as physical presence at the mediation and completion of pre-mediation paperwork. Whereas good faith in substantive participation in the mediation can include, for example, bargaining strategy, making or refraining from making offers and selection of representatives.

From a New Zealand Perspective a further argument for this distinction can be found in the rules for good faith behaviour in collective bargaining in the Employment Relations Act 2000. Part 5 of the Act is designed for the purpose of promoting collective bargaining. It sets out the requirements involved in good faith bargaining and it prescribes the ratification and application of collective agreements. Good faith collective bargaining requires according to the Act at least the following things[88]:

The parties have to agree on a bargaining process.

The parties must meet each other.

The parties have to consider and respond to bargaining proposals.

The parties must recognise and respect the bargaining authority of the other side and avoid undermining this authority.

The parties will provide the necessary information to substantiate claims.

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[87] Roger L Carter "Oh, Ye Little of Good Faith: Questions, Concerns and Commentary on Efforts to Regulate Participant Conduct in Mediations" (2002) J Disp Resolution 367, 379.

[88] Refer to Employment Relations Act 2000 Section 35.

> The parties must take into account relevant good faith codes, the proportion of employees who are union members, and the circumstances of employer and union (including the resources available to the employer).

These requirements have a rather objective character. This behaviour can be controlled and analysed from an outside perspective. It will be shown subsequently where the advantages of this are and why evaluation of subjective good faith behaviour always involves special difficulties.

The question of good faith in mediation turns on balancing two reasonable postulates. Sincere collaborative dispute resolution requires co-operation from all participants. Opponents of sanctions respond that mediation will never be an effective tool if parties' behaviour is coerced or second-guessed.

It is to find out whether one can regulate some of the behaviour of mediation participants without impinging their autonomy. Therefore, one has firstly to examine the consequences of bad faith conduct. Afterwards one may not neglect and therefore has to consider the dangers of employing coercive sanctions to regulate behaviour beyond the merely procedural.

C The Need for Good Faith in Mediation

Bad faith can have a major impact on mediation participants. This threat is not hypothetical. US American studies of party satisfaction with mediation indicate either slightly more[89] or slightly

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[89] See for example the following studies: Jeanne M Brett et al "The Effectiveness of Mediation: An Independent Analysis of Cases Handled by Four Major Service Providers" (1996) 12 Negot J 259; John Lande "Failing in Litigation? A Survey of Business Lawyers' and Executives' Opinions" (1998) 3 Harv Negot L Rev 1.

less[90] satisfaction than exists with adjudication. If one considers the advantages of mediation, one has to scrutinise these results. It seems surprising that the percentage of satisfied parties is not higher. One possible speculation among others may be that many of the disappointed mediation participants experienced bad faith conduct. Under this aspect one can hypothesise that decreasing bad faith behaviour during mediation will result in increasing party satisfaction with mediation.

1 Objective good faith

Courts employing their inherent power to enforce orders can regulate most forms of bad faith related to procedural matters. In the case of voluntary mediation, acts of objective bad faith might violate the covenant of good faith and fair dealing implied in the contract to mediate. The fact that remedies already exist does not, however, vitiate the need to clearly identify what bad faith behaviour is proscribed. Mediation participants should know in advance for what conduct they have to expect sanctions. Certainty is an important aspect for parties in all kinds of dispute resolution processes. Furthermore, for mediation to gain widespread acceptance, participants who invest emotionally and financially in the process should be rewarded with fair and honest treatment from all others involved. A clear statement of the type of objectively measurable behaviour expected in mediations would further these ends.

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[90] See for example the following studies: Deborah R Hensler "ADR Research at the Crossroads" (2000) J Disp Resol 71 and Deborah R Hensler "A Glass Half Full, a Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation" (1995) 73 Tex L Rev 1587.

2 *Subjective good faith*

However, it is questionable whether efforts to regulate bargaining strategies and other substantive decision-making behaviours of participants will do the same, because there are some major drawbacks to this attempt. The potential collateral damage that results from attempts to punish bad faith behaviour includes loss of confidentiality, satellite litigation over whether bad faith has occurred, inhibition of free expression, and loss of party autonomy. All these results are contradictory to the goals of alternative dispute resolution, which were already outlined in the fist part of this paper. Mediation shall permit the disputants to come together without fear of reprisal. The disputants shall share their interests and concerns and they ideally explore ways in which a mutually satisfying resolution can be found. Mediation is a kinder and gentler form of dispute resolution. It empowers the parties to control their destinies rather than surrendering dominion to the courts. Co-operation, collaboration, confidentiality, trust, and voluntariness are aspirations of mediation.[91] It is very doubtful whether these ideals can be achieved if there is too much control over the parties' behaviour during mediation. One can even think about the question whether excessive judicial intrusion into the mediation process threatens fundamental rights of the parties.[92] In the following I will outline the most important problems with punishing subjective bad faith behaviour.

(a) Confidentiality issues

Confidentiality is of enormous importance to the success of mediation. This is generally accepted - even advocates of far-reaching

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[91] Roger L Carter "Oh, Ye Little of Good Faith: Questions, Concerns and Commentary on Efforts to Regulate Participant Conduct in Mediations" (2002) J Disp Resolution 367, 391-392.

[92] Roger L Carter "Oh, Ye Little of Good Faith: Questions, Concerns and Commentary on Efforts to Regulate Participant Conduct in Mediations" (2002) J Disp Resolution 367, 395.

good faith standards acknowledge this importance.[93] A mediator must have the trust of all participants to be effective. Particularly in private mediations, mediators encourage parties to discuss the strengths and weaknesses of their case openly. Disputants need to be sure that facts occurring during mediation will not be used against them in a court. The confidence established by that can be very helpful to set the stage for collaborative conflict resolution. A strict enforcement of good faith standards in substantive areas of mediation imperils the confidentiality of the process.

The problem with "good faith" statutes and court rules is that they require mediators to report whether parties participated in good faith. This causes problems for the parties, but also for the mediators: "Mediators who know that the law requires the parties to participate in good faith are more likely to worry about whether they have a duty to report, on their own initiative, perceived violations of that duty. They also are more likely to fear that they will be pressed by a court or a party to divulge their private views on these matters, or to give testimony in a proceeding to determine whether sanctions should be imposed. Apprehension about such duties or pressures could create counterproductive distractions for mediators who are trying to build relationships and to help the parties during a mediation, and even could discourage some good mediators from agreeing to serve."[94] For the parties it is more important that a negative report from the mediator will presumably cause a party to face the wrath of, if not sanctions from, the court. In the event of a hearing on bad faith sanctions, the mediator will likely be required to testify. Even if it were somehow possible to confine the mediator's testimony to a factual recitation of the behaviours underlying the claim of bad faith,

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[93] Ellen E Deason "Enforcing Mediated Settlement Agreements: Contract Law Collides with Confidentiality" (2001) 35 U Cal Davis L Rev 33; Kevin Gibson "Confidentiality in Mediation: A Moral Reassessment" (1992) J Dis Res 25, 29; Philip J Harter "Neither Cop nor Collection Agent: Encouraging Administrative Settlements by Ensuring Mediator Confidentiality" (1989) 41 Admin L Rev 315, 324.

the parties' trust in the confidentiality of mediation would be shattered.[95]

(b) Causing additional litigation

If mediation is used widely and properly, it should result in a less litigious culture of conflict. In a well-intentioned but naive effort to make mediation more effective, overly broad proposals for good faith requirements threaten exactly the opposite result. Rather than resolving pending litigation, a mediation that results in charges of bad faith may lead to additional legal proceedings-hearings on imposition of sanctions. Courts neither achieve judicial economy nor make the process less adversary when they condone bad faith conflicts. Although the mission of mediation is to promote an amicable settlement, placing good faith requirements on bargaining strategies may provide a disincentive to settle. It does not seem unlikely that if a contentious party or attorney senses an opportunity to gain strategic advantage from another party's mistake, he or she may re-direct attention away from negotiation to pursuit of a bad faith claim. By the same token, the other party may react with defensiveness. Fending off bad faith charges, rather than working collaboratively, may even become that party's primary focus. While rules that require a party to comply with reasonable mediation procedures should not have a chilling effect on the process, a court's scrutiny of bargaining decisions might.[96] This should represent a significant concern for mediation policymakers.

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[94] Wayne D Brazil "Continuing the Conversation About the Current Status and the Future of ADR: A View From the Courts" (2000) 2000 J Dis Res 11, 32.
[95] Roger L Carter "Oh, Ye Little of Good Faith: Questions, Concerns and Commentary on Efforts to Regulate Participant Conduct in Mediations" (2002) J Disp Resolution 367, 392.
[96] Roger L Carter "Oh, Ye Little of Good Faith: Questions, Concerns and Commentary on Efforts to Regulate Participant Conduct in Mediations" (2002) J Disp Resolution 367, 393.

(c) Concerns regarding open expression

Parties should take part in mediations openly and honestly. The threat of sanctions inhibits both openness and honesty. If bad faith behaviour is sanctioned in the case of party representation, this representative might be sanctioned because the court believed that he or she was inadequately prepared for the mediation. Fear of being charged with bad faith for not knowing every detail of the case might then inhibit lawyers from asking questions of other parties that could lead to greater understanding for everyone.[97] A corporate representative might avoid disclosing that his or her company has decided that it has no liability and intends to defend the case. Instead, he or she might make insignificant offers to avoid bad faith charges. A pointless mediation might occur simply because the defendant fears revealing its true position. Too broad good faith requirements imperil the highest aspirations of mediation. In a genuinely collaborative mediation, advocates work together even though their interests and those of their clients differ. Cooperation of this sort requires a certain mindset, one that seeks a good solution for all parties rather than individual triumph. Potential sanctions make such a mindset much more difficult to achieve. As parties contemplate statements of interest or settlement offers, their attention will inevitably be drawn to ways to avoid sanctions. Advocates will circle one another warily, looking for opportunities, and looking out for vulnerability.[98] Problem solving necessarily will play a secondary role.

(d) Concerns regarding voluntariness

Predominantly the voluntary nature of the process is seen as the most important advantage of alternative dispute resolution

[97] Roger L Carter "Oh, Ye Little of Good Faith: Questions, Concerns and Commentary on Efforts to Regulate Participant Conduct in Mediations" (2002) J Disp Resolution 367, 393.

processes in general and mediation in particular. Alternative dispute resolution permits parties to wrest control of the case outcome from the court. Requiring parties to behave in a particular way may erode that voluntariness. In a frequently-cited article, Kovach and Love claimed that, "evaluative mediation is an oxymoron."[99]. An "evaluative" mediator assesses the strengths and weaknesses of legal claims, develops and proposes a settlement, encourages the parties to accept a settlement, and predicts court outcomes and/or impact of not settling. Kovach and Love argue that an evaluative mediator, by implicitly pressuring parties to adopt a particular view of the dispute, removes an element of voluntariness from the process. In this context another interesting questions arises: in how far is mandatory mediation compatible with the idea of voluntariness as a basic characteristic of mediation? Only a few commentators have argued that parties should not be compelled to mediate their disputes because it seems paradox to compel someone to participate in a "voluntary" process.[100] Nevertheless, court-ordered mediation is practised in many jurisdictions. For example, every United States District Court participates in some form of alternative dispute resolution.[101] Judges and court personnel have embraced mediation, in no small part, because they believe that it clears dockets.[102] Problems arise if the court involves itself in how the parties must act during the mediation. Then the process has morphed into something that is hardly to call "voluntary" anymore. Especially if a party is not free to make a small offer or no offer at all, in mediation, that party has lost, rather than gained, autonomy.

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[98] Roger L Carter "Oh, Ye Little of Good Faith: Questions, Concerns and Commentary on Efforts to Regulate Participant Conduct in Mediations" (2002) J Disp Resolution 367, 394.

[99] Kimberlee K Kovach and Lela P Love, "Evaluative" Mediation Is An Oxymoron" Alternatives to High Costs of Litigation (1996) CPR Institute for Dispute Resolution, Vol 14, No. 3, 31.

[100] William F Coyne Jr "The Case For Settlement Counsel" (1999)14 Ohio St J on Dis Res 367, 391; Tina Grillo "The Mediation Alternative: Process Dangers for Women" (1991) 100 Yale L J 1545, 1581.

[101] "The Alternative Dispute Resolution Act of 1998" 28 USC §§ 651-658 (2000).

[102] Steven H Goldberg "Wait a Minute. This Is Where I Came In. A Trial Lawyer's Search for Alternative Dispute Resolution" (1997) BYU L Rev 653, 665.

A further aspect one might have to consider is that disputants may have many reasons to not settle. Some institutional defendants believe that paying any amount on a disputed claim will encourage others to initiate similar litigation. Litigants may want an issue adjudicated for its precedential value. Both plaintiffs and defendants at times feel that vindication of their position outweighs any economic efficiency associated with settlement. If, for any reason, a party does not want to make an offer to settle even a token offer they should have that right. Access to the courts does not exist absent the right to refuse to settle. Even in bad faith cases, courts still have to respect the principle that parties cannot be compelled to settle. The underlying principle one may not neglect is that the parties and not the court own the dispute.[103]

Furthermore, an aspect to consider is that one may not see docket clearing as a primary goal of any form of alternative dispute resolution. Mediation processes should be designed to improve the quality of settlements. Any attendant increase in the quantity of settlements ought to be seen as a secondary benefit.[104]

The most strident advocates of good faith requirements seem to believe that the force of the state is needed to protect good faith participants and the courts from the questionable tactics of litigators. They reason that courts can compel parties to behave properly through the coercive use of sanctions. However, if parties behave, mediation will work and if mediation works, people will participate willingly in good faith.[105]

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[103] Roger L Carter "Oh, Ye Little of Good Faith: Questions, Concerns and Commentary on Efforts to Regulate Participant Conduct in Mediations" (2002) J Disp Resolution 367, 395.
[104] Roger L Carter "Oh, Ye Little of Good Faith: Questions, Concerns and Commentary on Efforts to Regulate Participant Conduct in Mediations" (2002) J Disp Resolution 367, 395.
[105] Roger L Carter "Oh, Ye Little of Good Faith: Questions, Concerns and Commentary on Efforts to Regulate Participant Conduct in Mediations" (2002) J Disp Resolution 367, 396.

Many people further mediation, as well as other forms of alternative dispute resolution, because they believe it will offer people more freedom to steer the course of their dispute.[106] By taking control away from the courts and placing it in the hands of the parties, "better" dispute resolution should occur. Empowerment and alternative dispute resolution work together as well as autonomy and alternative dispute resolution.[107] There is the danger that mediation could become the instrumentality by which party autonomy is threatened.

D Problem Solving

There is no general rule that can be applied and would solve the problems. Because we have many forms of mediation, rules of participant conduct must be implemented in many different contexts. In the case of private mediation, the parties can incorporate the standards into the mediation agreement.[108] In court-ordered mediations, the rules could be included in individual referral orders, or made a part of the local rules of court. No set of standards will serve as a prescription for good conduct in all circumstances. Adjustments for the nuances of local legal cultures must be made. Nonetheless, one can advocate the adoption of general guidelines for participant behaviour on a more global and authoritative level. Supporters of mediation as a form of dispute resolution need to communicate to the uninitiated what is expected of participants. This can be accomplished through widespread promulgation of standards of conduct.[109]

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[106] See for example: Edward Brunet "Replacing Folklore Arbitration with a Contract Model of Arbitration" (1999) 74 Tul L Rev 39, 65.
[107] See for example: Robert Baruch Bush and Joseph Folger *The Promise of Mediation* (1ed, Jossey-Bass, San Francisco, 1994) 108-111.
[108] Kimberlee K Kovach "Good Faith in Mediation – Requested, Recommended, or Required? A New Ethic" (1997) 38 S Tex L Rev 575, 617.
[109] Roger L Carter "Oh, Ye Little of Good Faith: Questions, Concerns and Commentary on Efforts to Regulate Participant Conduct in Mediations" (2002) J Disp Resolution 367, 405.

E Proposed Code of Good Faith

According to the results found above a code of good faith in mediation could look as follows.[110] Comments regarding single rules will be made subsequently.

(1) All parties have to attend the mediation. Personal attendance should be the regular case.

(2) If a party wants to attend the mediation telephonically this party should advise all participants of the mediation a reasonable time in advance. Permission to a participation by telephone shall only be granted if there exists a good cause.

(3) All parties are required to cooperate in preparing all necessary documents.

(4) No party is under any obligation to make any offer at the mediation.

(5) If a party does not intend to make an offer at the mediation, this party shall advise the other party of such intent.

(6) Representatives of institutional parties shall participate only with authority to settle the dispute.

Personal attendance should be the rule and other participation should only be allowed in exceptional cases. Mediation is a process of developing a solution – naturally this process requires the parties to

[110] Roger L Carter "Oh, Ye Little of Good Faith: Questions, Concerns and Commentary on Efforts to Regulate Participant Conduct in Mediations" (2002) J Disp Resolution 367, 398-402.

meet each other. Body language and facial expression are very important. The missing of these non-verbal communication means can lead to misunderstandings and endanger the settlement. Another aspect is that parties who do not participate in person might be distracted because they are not in the quiet environment where mediation usually takes place.

Failure to prepare documents for mediation is a classic form of objective bad faith conduct. An exchange of documents before the mediation can be very helpful. Parties get to know more about each other's interests and views. This will aid them in preparing for the mediation. The same is valid for the mediator. A good preparation by the parties will make it easier for the mediator to lead the parties to a satisfying settlement.

The rule that no party is required to make an offer may be controvertible. However, it ensures that no subjective good faith standards are enforced. Decisions about bargaining strategies are the province of the parties and their representatives.

A notice of intention not to make an offer makes it possible for the other party to get prepared for that and think about alternatives. An alternative could be, for example, if the other party gets the right to cancel the mediation.

A representative acting without the necessary authority to settle the disputes endangers the whole process. It is very frustrating for the other party if an institution delays a settlement or makes it even impossible by sending a representative with limited authority. This comes close to the situation when a party does not appear to the mediation. The other party may expect a representative who is able to settle the dispute because reaching a settlement is the purpose of mediation.

F Result Regarding Good Faith in Mediation

The tension between the need for good faith in mediation and the desire to preserve party autonomy creates a dilemma. Permitting one party to use mediation to abuse the other seems unacceptable. Conversely, courts should not impinge upon party autonomy. A partial solution to this problem can lie in identifying behaviours that are undeniably inappropriate. This would include failure to comply with reasonable and clearly defined procedural rules. Beyond this point, however, it is dangerous to enhance the mediation process through use of coercive sanctions. One must reconcile oneself to the fact that many forms of bad faith behaviour cannot be avoided by the use of subsequent sanctions. Opposing sanctions for certain types of bad faith does not mean to suggest that the problem should not be addressed. Rather, one can say that the solution lies in preventing, not in punishing, such bad faith. Two useful suggestions for alternative means to achieve good faith conduct may be the following: First, educating future mediation participants with respect to mediation's potential will likely result in more attorneys and parties buying into the process. This, in turn, will result in less abuse of mediation.[111] Second, it has been suggested that effective systems design will decrease bad faith behaviour.[112] If participants understand the process and if the process is well designed, mediation should offer cheaper, faster, and more creative resolution of disputes. This should result in widespread acceptance of the mediation process as an alternative to adjudication or negotiation. Self-interest of the parties will do what the coercive force of sanctions will not.[113] Considering this it should

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[111] Roger L Carter "Oh, Ye Little of Good Faith: Questions, Concerns and Commentary on Efforts to Regulate Participant Conduct in Mediations" (2002) J Disp Resolution 367, 397.

[112] John Lande "Using Dipute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs" (2002) 50 UCLA L Rev 69, 113.

[113] Roger L Carter "Oh, Ye Little of Good Faith: Questions, Concerns and Commentary on Efforts to Regulate Participant Conduct in Mediations" (2002) J Disp Resolution 367, 397.

be possible that mediation works as a useful and successful means of alternative dispute resolution for all parties.

VI CONCLUSION

For New Zealand Employment Law this perception means the following: If one accepts that good faith requirements generally apply in mediation one can draw the conclusion that the good faith requirements of the Employment Relations Act 2000 also apply to mediation of employment disputes in New Zealand.

Mediation is generally well suited for the resolution of employment disputes. An employment relationship is an ongoing human relationship. Therefore special issues arise. Often it is very important for the parties not only to get compensation in money for the violation of employment rights. Especially in personal grievance cases it might be even more important to get a true apology as outcome of the process. Mediation makes it possible that the parties talk more to each other. The procedure in litigation is rather characterised by the parties talking to the Court. If the parties have this possibility to really talk to each other in a less formal environment than in a court it is more likely that the real issues of the dispute come into consideration. This point is of enormous importance if one actually tries to obtain an ongoing employment relationship. An apology or the possibility to discuss the real issues of the employment relationship problem makes it also easier for the party to go on with his or her career without a burden.

On the other hand, the other arguments usually named as advantages of mediation are less strong. Cost and time efficiency can also be achieved by litigation. Especially in the employment law field a specialised employment law court system can work very effectively. One can think about approaches like free employment law courts or a

first conciliation hearing. That can be arranged in a short time and gives the parties the possibility to reconsider their claims. A special problem is institutionalised mediation, as commonly practised. Alternative dispute resolution promotes such democratic values as self-determination and freedom from interference by the state. As alternative dispute resolution has become less alternative and more institutionalised, disturbing trends have emerged. Mediation, once a purely voluntary process, has become mandatory. This raises new problems.

On the other hand, one should not stick too much to technicalities and definitions. It is far more important that the practised process is working effectively and satisfactorily for the parties. In so far, I consider institutionalised mediation as a kind of hybrid dispute resolution process, still mediation but already with characteristics of litigation. This kind of process can have its own advantages. As experienced with the Mediation Service provided by the New Zealand Department of Labour, institutionalised mediation can work very successfully. I see the advantages in such a system in the combination of the advantages of two systems: institutionalised mediation has still all the positive effects of mediation as described above. However, especially in the employment law context I see an advantage in the more of control that is established by the institution. Employment relationships are characterised by a power inequality between the parties. That can be dangerous in such an informal and confidential process like mediation. Institutionalised mediation ensures, in my opinion, rather that employees' rights will be observed during the process. The application of good faith standards in mediation is also under this aspect just a logical consequence.

VII BIBLIOGRAPHY

Texts

A Acland *A Sudden Outbreak of Common Sense: Managing Conflict through Mediation* (Hutchinson, London, 1990).

Robert Baruch Bush and Joseph Folger *The Promise of Mediation* (Jossey-Bass, San Francisco, 1994).

Laurence Boulle, Judi Jones, Virginia *Goldblatt Mediation: Principles, Process, Practise* (Butterworths, Wellington, 1998).

Henry Brown, Arthur Marriot *ADR Principles and Practise* (Sweet & Maxwell, London, 1993).

Jason Bull (ed) *Brookers Employment Law* (looseleaf, Brookers, Wellington 2000, last updated October 2003).

John Deeks, Jane Parker, Rose Ryan *Labour And Employment Relations In New Zealand* (2 ed, Longman Paul Limited, Auckland 1994)

John Deeks, Erling Rasmussen *Employment Relations in New Zealand* (3 ed, Pearson Education New Zealand Limited, Auckland, 2002).

Phillip D Green *Employment Dispute Resolution* (LexisNexis Butterworths, Wellington, 2002).

Stephen B Goldberg, Eric D Green, Frank E A Sander *Dispute Resolution* (Little Brown and Company, Boston Toronto, 1985).

T Hobbes *Leviathan* (Everyman Edition, J M Dent and Sons, London, 1962).

National Working Party on Mediation *Guidelines for Family Mediation: Developing Services for Aotearoa/ New Zealand* (Butterworths, Wellington, 1996).

Journals

James J Alfini, Catherine G McCabe "Mediating in the Shadow of the Courts: A Survey of the Emerging Case Law" (2001) 54 Ark L Rev 171.

Wayne D Brazil "Continuing the Conversation About the Current Status and the Future of ADR: A View From the Courts" (2000) J Dis Res 11.

Jeanne M Brett et al "The Effectiveness of Mediation: An Independent Analysis of Cases Handled by Four Major Service Providers" (1996) 12 Negot J 259.

Edward Brunet "Replacing Folklore Arbitration with a Contract Model of Arbitration" (1999) 74 Tul L Rev 39.

Stephen G Bullock and Linda Rose Gallagher "Surveying the State of the Mediative Art: A Guide to Institutionalising Mediation in Louisiana" (1997) La L Rev 885

Roger L Carter "Oh, Ye Little of Good Faith: Questions, Concerns and Commentary on Efforts to Regulate Participant Conduct in Mediations" (2002) J Disp Resolution 367.

William F Coyne Jr "The Case For Settlement Counsel" (1999)14 Ohio St J on Dis Res 367.

Ellen E Deason "Enforcing Mediated Settlement Agreements: Contract Law Collides with Confidentiality" (2001) 35 U Cal Davis L Rev 33.

Kathleen A Devine "Alternative Dispute Resolution: Policies, Participation, and Proposals" (1991) 11 Rev Litig 83

W Faulkes "The Dispute Resolution Industry – Defining the Industry and Establishing Competencies" (1994) 5 ADRJ 285.

Kevin Gibson " Confidentiality in Mediation: A Moral Reassessment" (1992) J Dis Res 25.

Steven H Goldberg "Wait a Minute. This Is Where I Came In. A Trial Lawyer's Search for Alternative Dispute Resolution" (1997) BYU L Rev 653.

Tina Grillo "The Mediation Alternative: Process Dangers for Women" (1991) 100 Yale L J 1545.

Philip J Harter "Neither Cop nor Collection Agent: Encouraging Administrative Settlements by Ensuring Mediator Confidentiality" (1989) 41 Admin L Rev 315.

Deborah R Hensler "A Glass Half Full, a Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation" (1995) 73 Tex L Rev 1587.

Deborah R Hensler "ADR Research at the Crossroads" (2000) J Disp Resol 71.

David Hricik "Reflections of a Trial Lawyer on the Symposium: Dialogue with the Devil in Me" (1997) 38 S Tex L Rev 745.

Alan Kirtley "The Mediation Privilege's Transition from Theory to Implementation: Designing a Mediation Privilege Standard to Protect Mediation Participants, the Process and the Public Interest" (1995) 1995 J Dis Res 1, 49

Kimberlee K Kovach "Good Faith in Mediation – Requested, Recommended, or Required? A New Ethic" (1997) S Tex L Rev 575.

Kimberlee K Kovach "Lawyer Ethics in Mediation: Time for a Requirement of Good Faith" (1997) Dispute Resolution Magazine 9.

Kimberlee K Kovach "New Wine Requires New Wineskins: Transforming Lawyer Ethics for Effective Representation in a Non-Adversarial Approach to Problem Solving: Mediation" (2001) 28 Fordham Urb L J 935.

Kimberlee K Kovach and Lela P Love, "Evaluative" Mediation Is An Oxymoron" Alternatives to High Costs of Litigation (1996) CPR Institute for Dispute Resolution, Vol 14, No. 3, 31.

John Lande "Failing in Litigation? A Survey of Business Lawyers' and Executives' Opinions" (1998) 3 Harv Negot L Rev 1.

John Lande "Using Dipute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs" (2002) 50 UCLA L Rev 69.

Ellen S Pryor and Will Pryor "Concurrent Mediation of Liability and Insurance Coverage Disputes" (1997) 4 Conn Ins L J 485

M Roberts "System or Selves? Some Ethical Issues in Family Mediation" (1992) 10 MQ 11.

Paul Roth "Review: Employment Law" (2001) 4 NZ Law Rev 475.

Paul Roth "Review: Employment Law" (2002) NZ Law Rev 557.

Edward F Sherman "Court Mandated Alternative Dispute Resolution: What Form of Participation Should Be Required?" (1993) 46 SMU L Rev 2079.

Edward Sherman "Good Faith Participation in Mediation: Aspirational, Not Mandatory" (1997) Disp Resol Mag Winter 1997, 16.

Robert S Summers "The General Duty of Good Faith – Its Recognition and Conceptualization" (1982) 67 Cornell L Rev 810

L Susskind and G McMahon "The Theory and Practise of Negotiated Rulemaking" (1985) 3 Yale Journal of Regulation 133.

Maureen A Weston "Checks on Participant Conduct in Compulsory ADR: Reconciling the Tension in the Need for Good Faith Participation, Autonomy, and Confidentiality" (2001) 76 Ind L J 591.

David S Winston "Participation Standards in Mandatory Mediation Statutes: You Can Leed a Horse to Water…" (1996) Ohio St J on Disp Res 187

Alexandria Zylstra "The Road from Voluntary Mediation to Mandatory Good Faith Requirements: A Road Best Left Untraveled" (2001) 17 J Am Acad Maritim Law 69

Conference Papers

Ian McAndrew, Kathryn Beck "Decisions and Damages: An Analysis of Adjudication Outcomes in the Employment Tribunal and the Employment Relations Authority" (New Zealand Law Society, Employment Law Conference, November 2002).

Other Sources

Department of Labour "Annual Report of the Department of Labour – Te Tari Mahi – for the year ended 30 June 2003" (Wellington, October 2003).

Department of Labour "Report to the Employment and Accident Insurance Select Committee" (Wellington, June 2000).

Ralph Gardiner "Mediation of Employment Disputes" (Arbitrators Institute of New Zealand Seminar, Auckland 14 October 1993).

Margaret Robbie "Representation, Procedure and Process in Mediation and Adjudication since The Employment Contracts Act" (mimeo, Business Studies Department, The Waikato Polytechnic, Hamilton 1992).