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**MEDIATION UNDER THE EMPLOYMENT RELATIONS
ACT 2000: HAS THE PROMISE BEEN FULFILLED?**

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Abstract

Mediation is a prominent method of employment dispute resolution in New Zealand. In *The Promise of Mediation*, Bush and Folger argue that mediation can bring about social transformation to create a better society for all. Validation of this argument can be found in the REDRESS employment mediation program at the US Postal Service. Inspired by Bush and Folger's argument and the success of REDRESS, this essay looks at the extent to which mediation has brought about social transformation in the New Zealand employment context.

The Employment Relations Act 2000 carries a promise to bring about social transformation through mediation. This promise is made up of two components: the provision of an effective, efficient and affordable method of dispute resolution, and the change from a litigious, competitive model to a collaborative, consensual model of dispute resolution. Although evidence shows that both components have been achieved, the true extent of social transformation remains unclear without more research on the wider impacts of mediation on individuals and society.

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I Introduction

Mediation has enormous potential to change our society for the better. Realisation of this potential at the highest level is through social transformation. This idea goes beyond change in individuals and affects communities and society as a whole. The central inquiry of this essay looks at the extent to which mediation has brought about social transformation in New Zealand's employment context. First, the concept of social transformation and its occurrence in the US employment context are explored. Second, the promise of mediation in regards to social transformation under New Zealand's Employment Relations Act 2000 (ERA) will be identified. Third, quantitative and qualitative evidence of social transformation will be evaluated. Finally, a conclusion will be made as to the extent to which the promise of mediation under the ERA has been fulfilled.

A Defining mediation

Karen Radich and Peter Franks are the authors of *Employment Mediation* (2nd edition), the leading legal text on the subject in New Zealand, and define mediation as "an informal process in which the parties to a relationship problem or dispute discuss their differences and attempt to find constructive solutions with the help of an independent mediator."¹

A range of mediation styles or models exist. The focus of this essay is on mediation provided under the Employment Relations Act (ERA), which allows for any style to be used.² Following that, this essay will not focus on any particular style and takes a broad view that encompasses all the different mediation styles.

This essay will make references to particular mediation styles or models, therefore it is important to note the different features and characteristics. Boule et al refer to four main models of mediation and explain that these models are "not so much discrete forms of mediation practice but rather ways of conceptualising the different tendencies and approaches in practice."³ These include the settlement, facilitative, transformative, and evaluative models. The main objective of each model is set out below:⁴

¹ Karen Radich and Peter Franks *Employment Mediation* (2nd ed, Brookers, Wellington, 2013) at 1.

² Employment Relations Act 2000, s 147.

³ Boule, Goldblatt, Green *Mediation: Principles, Process, Practice* (2nd ed, LexisNexis, Wellington, 2008) at 35.

⁴ At 35-36.

Settlement: To encourage incremental bargaining towards compromise.

Facilitative: To avoid positions and negotiation in terms of parties' underlying interests.

Transformative: To deal with underlying causes of the parties' problem, with a view to improving their relationship.

Evaluative: To reach a settlement according to the legal rights and entitlements of the parties.

Grant Morris identifies five mediation styles used in New Zealand's employment context. Facilitative, evaluative and settlement styles are most commonly used. Two additional styles, transformative and narrative, are less well known in New Zealand but are used in employment mediation.⁵

B Social transformation as an objective of mediation

Boulle et al outline various objectives of mediation including effectiveness in achieving settlement, efficiency and accessibility.⁶ Regarding social transformation, Boulle et al explain:⁷

[It] is a mediation objective which operates at the group, community or societal level. Here the goal is to change not merely individual relationships but also approaches to conflict and the disputing culture of the broader community in which disputes are situated. In this vision mediation occupies a place alongside other social institutions such as politics and the courts which can affect changes in attitudes and behaviour.

...

The goal is realised to the extent that mediation has demonstration and educational effects for a group, workplace, industry, or wider community and leads to more collaborative and less adversarial approaches to dispute resolution.

⁵ Grant Morris "Eclecticism versus Purity: Mediation Styles Used in New Zealand Employment Disputes" (Winter 2015) 33(2) *Conflict Resol Q* 203 at 208. Morris defines narrative mediation as where the mediator focuses on parties' stories and externalizing problems, leading to the creation of a more positive combined story. There is less emphasis on settlement.

⁶ Boulle et al, above n 3, at 52-56.

⁷ At 57.

Unsurprisingly, Boulle et al notes that social transformation “is an objective which is difficult to attain and measure.”⁸ Nevertheless, there is influential literature about the potential of mediation to bring about social transformation.

C The Promise of Mediation by Bush and Folger

Social transformation is at the forefront of the book *The Promise of Mediation* by Bush and Folger.⁹ With a specific focus on transformative mediation, *The Promise of Mediation* comprehensively explains how mediation can be used to bring about changes in the manner described by Boulle et al.

The fundamental argument presented in the book revolves around two different approaches to mediation. The first approach, a problem solving approach (settlement mediation), focuses on the capacity of mediation to find solutions and generate mutually acceptable settlements. Mediators practising this approach are more directive and influence parties toward settlements in general. Folger and Bush point out that this problem-solving approach has dominated mediation practice because emphasis was increasingly placed on reaching settlements in disputes. The second approach, a transformative approach (transformative mediation), focuses on the capacity of mediation to foster empowerment and recognition.¹⁰ Empowerment is defined as “the restoration to individuals of a sense of their own value and strength and their own capacity to handle life’s problems.”¹¹ Recognition means “the evocation in individuals of acknowledgement and empathy for the situation and problems of others.”¹²

Under the transformative approach mediators “concentrate on empowering parties to define issues and decide settlement terms for themselves and on helping parties to better understand one another’s perspectives.”¹³ Thus the directiveness associated with problem-solving mediation is avoided in transformative mediation.¹⁴

⁸ At 57.

⁹ Robert A. Baruch Bush and Joseph P. Folger *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition* (Jossey-Bass, California, 1994).

¹⁰ At 12.

¹¹ At 2.

¹² At 2.

¹³ At 12.

¹⁴ At 12.

Bush and Folger argue that the transformative approach should replace the problem-solving approach. The justification is that:¹⁵

It aims at creating “a better world”, not just in the sense of a more smoothly or fairly working version of what now exists but in the sense of a different kind of world together. The goal is a world in which people are not just better off but better: more human and humane. Achieving this goal means transforming people from dependent beings concerned only with themselves (weak and selfish people) into secure and self-reliant beings willing to be concerned with and responsive to others (strong and caring people). The occurrence of this transformation brings out the intrinsic good, the highest level, within human beings. And with changed, better human beings, society as a whole becomes a changed, better place.

This echoes the words of Boule et al that social transformation is achieved where mediation “occupies a place alongside other social institutions such as politics and the courts which can affect changes in attitudes and behaviour.”¹⁶

Bush and Folger’s argument is that transformative mediation presents opportunities for parties to achieve moral growth and become better human beings with “self-oriented skills (empowerment) and skills regarding the treatment of the other (recognition)”¹⁷. Furthermore, mediation is comparable to powerful social institutions such as politics and the courts by influencing the framework in which people relate to one another.

Bush and Folger explain that the problem-solving approach reflects the individualistic worldview where society is seen as “a mere referee between separate and sovereign individuals.”¹⁸ On the other hand, the transformative approach gives rise to the relational worldview.¹⁹ This worldview sees society:²⁰

...as a medium in which human beings can relate to one another and, in doing so, integrate the duality of human consciousness and achieve the kind of ideal human conduct that integrates strength and compassion.

¹⁵ At 29.

¹⁶ Boule et al, above n 3, at 57.

¹⁷ Neal Milner “Mediation and Political Theory: A Critique of Bush and Folger” (2005) 23 *Law Soc Inq* 737 at 747.

¹⁸ Bush and Folger, above n 9, at 244.

¹⁹ At 236.

²⁰ At 244.

Bush and Folger strongly advocate for the transformative approach and its associated relational worldview because it enables people to reach their full human potential and consequently creates a ‘better’ society for all. This argument is validated by evidence from the US in respect of a particular employment mediation program.

D The US Postal Service and REDRESS

“Resolve Employment, Reach Equitable Solutions Swiftly” or “REDRESS” is run by the US Postal Service. It is the largest employment mediation program in the world, mediating over 1,000 disputes a month across 90 different cities.²¹ The US Postal Service website explains the history of REDRESS:²²

The REDRESS program was born out of the settlement of a class action lawsuit filed by employees in the Northern District of Florida. Among their complaints was that the Equal Employment Opportunity (EEO) complaint process was too slow, remote, and ineffective in addressing workplace disputes. After reviewing the alternatives, all parties agreed that the development of a workplace mediation program might be an effective way to address these concerns. Thus, REDRESS mediation began as a pilot program in 1994 with three Florida sites. As the result of a commitment from management, employees, and their representatives, it continued to grow bigger and better. Today it is available to all Postal employees nationwide.

Using the transformative approach to mediation as defined by Bush and Folger, the social transformation envisioned for REDRESS is:²³

...to “transform” working relationships by encouraging disputing parties to openly discuss the issues of their dispute. The open discussion often helps employees recognize each other’s views and consider how the dispute might be resolved.

From inception of the pilot program in 1994 to 2006, continuous monitoring and evaluation was carried out by an independent outside entity, Indiana University. In particular, Professor Lisa Bingham worked with the Indiana Conflict Resolution Institute to undertake

²¹ Lisa Blomgren Bingham, Cynthia J. Hallberlin, Denise A. Walker, and Won-Tae Chung “Dispute system design and justice in employment dispute resolution: Mediation at the workplace” (Winter 2009) 14 *Harv Negot L Rev* 1 at 24.

²² United States Postal Service “About REDRESS” (2016) <about.usps.com>.

²³ United States Postal Service “How REDRESS Works” (2016) <about.usps.com>.

research on the effectiveness of REDRESS. In 2009 Bingham et al published a comprehensive paper in the Harvard Negotiation Law Review giving a “final, comprehensive national analysis of the exit survey and mediator tracking report databases.”²⁴

Confirming Bush and Folger’s theory, exit surveys completed by 227,196 REDRESS participants show evidence of empowerment and recognition as a result of transformative mediation.²⁵

Questions in the exit survey asked parties or disputants about whether mediators are demonstrating transformative or evaluative behaviours. The exit survey also asked disputants about their own experiences at the mediation, with a particular focus on empowerment and recognition. Regarding mediator behaviours, results from the surveys show that the majority of disputants:²⁶

... agreed or strongly agreed that the mediator helped disputants clarify their goals ...
agreed or strongly agreed that the mediator helped them understand the other person’s
point of view ... [and] agreed or strongly agreed that the mediator helped the other
person understand their point of view.

Also, it is noted that mediators are largely “avoiding directive and evaluative behaviors in the substantial majority of cases.”²⁷ These results confirm that REDRESS mediators are following the transformative approach as defined by Folger and Bush.

Regarding evidence of empowerment and recognition, Bingham et al explain:²⁸

In theory, a disputant who experiences empowerment will become more open to the other disputant and more able to hear and understand the other person’s perspective. This, in turn, will lead to recognition—that is, the ability to accept and to some degree validate the other person. The experience of empowerment and recognition may lead to settlement. This dynamic occurs to a greater or lesser degree in all forms of mediation. However, the distinctive nature of the transformative model is that it makes this dynamic of interaction, not settlement, the mediator’s goal.

²⁴ Bingham et al, above n 21, at 32.

²⁵ At 29 and 34-38.

²⁶ At 33.

²⁷ At 34.

²⁸ At 35.

Under this conceptual framework, results from the surveys suggest that “there is substantial exchange of perspectives during mediation.”²⁹ Specifically, the majority of disputants:³⁰

... agreed that the other person in the conflict listened to them during mediation ... agree or strongly agree with the statement that they learned about the other person’s viewpoint ... agreed or strongly agreed that they acknowledged as legitimate the other person’s perspective, views, or interests. While the majority of participants report that they acknowledged the other disputant, the data suggest that the other disputant does not always hear this acknowledgment. Nearly half ... report that the other person acknowledged them.

These responses clearly show that disputants experience empowerment and recognition as a result of transformative mediation. They have become “more open to the other disputant and more able to hear and understand the other person’s perspective.”³¹ Furthermore, “participants in mediation may be learning conflict management skills to take back to the workroom.”³² There is research suggesting that supervisors change how they manage conflict as a result of REDRESS training and mediation sessions.³³ As summarised by Bingham et al, the research shows that “supervisors listen more, are more open to expressing emotion, and take less of a top-down hierarchical approach to managing conflict.”³⁴

REDRESS has succeeded in bringing about social transformation and fulfilled its promise to improve the workplace climate. Good communication and conflict management skills are developed by employees and supervisors as a result of transformative mediation. Employees and supervisors also report a positive effect on their relationship with the other party as a result of the mediation program. Crucially, there has been a significant reduction in formal complaints.³⁵ This is significant because REDRESS was primarily a response to an alarming increase in equal employment opportunity complaints during the early 1990s.³⁶

²⁹ At 36.

³⁰ At 35-36.

³¹ At 35.

³² At 38.

³³ Lisa-Marie Napoli “USPS Supervisors and Conflict Management Techniques: Evaluating Training and Mediation Interventions” (unpublished dissertation, Indiana University, 2004) at 61-62.

³⁴ Bingham et al, above n 21, at 43.

³⁵ At 45-48.

³⁶ At 24.

The transformed workplace at the US Postal Service is truly a changed, better place as envisioned by Bush and Folger that enables people to reach their full human potential.

REDRESS is testimony to the idea that mediation can bring about fundamental social transformation in the employment context. The inquiry now turns to the New Zealand context to determine the extent to which social transformation has been achieved as a result of mediation under the ERA.

E Background to and the promise of mediation under the ERA

Mediation is well established in New Zealand's employment law history. The Industrial Conciliation and Arbitration Amendment Act 1970 (NZ) saw the first formal incorporation of mediation in the employment legal framework. However, the previous informal existence of mediation was acknowledged by law-makers when the Bill was introduced into Parliament in 1970. Successive employment legislation prioritised mediation, making it "the dominant statutory form of [alternative dispute resolution or ADR] in industrial relations."³⁷ The ERA continues this trend with a purpose:³⁸

To build productive employment relationships through the promotion of good faith in all aspects of the employment environment and the employment relationship, *by promoting mediation as the primary problem-solving mechanism.*

The overall goal of the ERA was to improve labour productivity.³⁹ Economic policies before the introduction of the ERA had resulted in "a low wage, low skill and low labour productivity workforce."⁴⁰ The government's argument underlying the ERA is that it is possible to increase labour productivity only through "a cultural shift from an adversarial approach to a co-operative approach to conducting the employment relationship."⁴¹ One of the key mechanisms that the ERA put in place to achieve this goal was a mediation regime for the resolution of employment disputes. Also, the importance attached to mediation in

³⁷ Grant Morris "Towards a history of mediation in New Zealand's legal system" (2013) 24 *ADRJ* 86 at 89-90.

³⁸ Employment Relations Act 2000, s 3 (emphasis added).

³⁹ Margaret Wilson "The Employment Relations Act: A framework for a fairer way" in Erling Rasmussen (ed) *Employment Relationships: Workers, Unions and Employers in New Zealand* (Auckland University Press, Auckland, 2004) 9 at 9.

⁴⁰ Wilson, above n 39, at 9.

⁴¹ Wilson, above n 39, at 10.

the ERA showed the government's determination to establish an effective system of alternative dispute resolution.⁴²

Therefore, the promise of mediation under the ERA has two components: mediation would provide an effective system of dispute resolution and it would bring about a change “from an adversarial approach to a co-operative approach to conducting the employment relationship.”⁴³ These two components and their wider implications will be considered in order to evaluate the extent to which the ERA has socially transformed the New Zealand employment context. Quantitative and qualitative evidence will provide the basis for this evaluation and any gaps will be highlighted.

II The promise of an effective, efficient and affordable system of dispute resolution

The reform under the ERA was driven by then Minister of Labour Margaret Wilson. Wilson described the structural and institutional objectives of the ERA in relation to mediation:⁴⁴

The innovation of the Employment Relations Act was not to rely on the formal legal remedies in the first instance, which are costly, adversarial and often leave the parties, even the winning party, with a feeling of grievance. A re-examination of the traditional methods of dispute resolution that had served New Zealand well before the Employment Contracts Act led to a decision not to return to conciliation and arbitration. They were not appropriate dispute resolution mechanisms in the current labour market. *Instead it was decided to update those notions and establish a free mediation service that would provide the parties with the opportunity to resolve their differences quickly and at minimum cost.*

Wilson often repeated that mediation services would be “free, fast and fair”.⁴⁵ Therefore, the promise of mediation under the ERA includes the delivery of an effective, efficient and affordable service. The following discussion will evaluate whether this promise has been fulfilled by looking at institutional and economic changes as a result of mediation.

⁴² Radich and Franks, above n 1, at 8.

⁴³ Wilson, above n 39, at 10.

⁴⁴ Wilson, above n 39, at 18 (emphasis added).

⁴⁵ Margaret Wilson “Free, fast and fair – a new Mediation Service for New Zealand businesses and employees” (press release, 13 July 2000).

A A hierarchy of dispute resolution mechanisms

In general, disputing parties attempt self-resolution without the involvement of an outside agency at the first instance. In fact, over half of all employment relationship problems are resolved in this way.⁴⁶ If that is unsuccessful, parties turn to external intervention through the employment institutions. These institutions consist of mediation services, the Employment Relations Authority, and the Employment Court.

As intended by its proponents, the ERA effectively established a hierarchy of employment dispute resolution mechanisms with mediation as the primary problem-solving mechanism. This was achieved by the operation of certain provisions under the ERA. Firstly, s 144(1) requires the government to provide employment mediation services. Secondly, s 159 places a duty on the Employment Relations Authority to consider mediation while s 188 places a corresponding duty on the Employment Court. This means that if parties wish to access the Employment Relations Authority and the Employment Court they need to go through mediation first. As a result, mediation has a “quasi-compulsory status”⁴⁷ and has been described as a pro-active or “fence at the top of the cliff” service rather than the ambulance at the bottom.⁴⁸ This structural change is significant in helping to achieve cost reductions which are covered in a separate section.

B Accessibility of the mediation service

Mediation is provided by the Ministry of Business, Innovation and Employment’s (MBIE’s) Employment Mediation Services. In comparison to formal, adversarial dispute resolution mechanisms, mediation is more easily and directly accessible. Any employer or employee with an employment relationship problem can access these services.⁴⁹ An employment relationship problem is broadly defined under the ERA to include:⁵⁰

⁴⁶ McDermott Miller Ltd *Employment Relationship Problems: Costs, Benefits and Choices* (Department of Labour, August 2007) at 13.

⁴⁷ Morris, above n 5, at 207.

⁴⁸ Karen Spackman and Charles Chauvel “Why mediate?” *Employment Today* (Auckland, Dec 2005/Jan 2006) at 43.

⁴⁹ Radich and Franks, above n 1, at 19.

⁵⁰ Employment Relations Act 2000, s 5.

... a personal grievance, a dispute, and any other problem relating to or arising out of an employment relationship, but does not include any problem with the fixing of new terms and conditions of employment.

The application process for mediation is simpler than the complex procedures and onerous preparation associated with formal, adversarial systems of dispute resolution.

Mediation services can be accessed by making a phone call to MBIE's national contact centre or the local MBIE Employment Mediation Services office. These offices are located in the main centres of Auckland, Hamilton, Wellington, Christchurch, Dunedin, Napier and Palmerston North. Minimal paperwork in the form of a Request for Mediation and supporting documentation is required before a staff member arranges a suitable time and place for a mediation meeting to take place.⁵¹

Mediation is far less time-consuming compared to litigation. Where litigation can take months and sometimes even years, mediation meetings "usually last around 3 or 4 hours".⁵² The mediator might arrange an adjournment if it appears that that more time could lead to a settlement. In that situation the mediator will continue to work with both parties and possibly arrange a further mediation meeting.⁵³

There are approximately 35 mediators employed by MBIE across the country with the responsibility of helping parties reach a satisfactory solution.⁵⁴ This team is highly capable and helps to resolve a large number of cases every year as discussed in the next two sections.

C Usage of the mediation service

Throughout its years of operation, the mediation service has consistently completed a large number of mediation requests. Table 1 shows the number of completed requests over selected years where the data was available.⁵⁵

⁵¹ Employment New Zealand "Requesting Mediation" <www.employment.govt.nz>.

⁵² Employment New Zealand "Preparing for Mediation" <www.employment.govt.nz>.

⁵³ Employment New Zealand, above n 52.

⁵⁴ Radich and Franks, above n 1, at 19.

⁵⁵ Department of Labour "Annual Report" (June 2003, 2011 and 2012), Ministry of Business, Innovation and Employment "Annual Report" (June 2013 and 2014).

Table 1: Number of completed mediation requests

Year	Completed mediation requests
2003	9,278
2011	9,861
2012	10,059
2013	10,857
2014	10,584

In order to promote fast and effective resolutions, the ERA allows for mediation services to be provided in a variety of ways that do not necessarily involve a meeting where parties discuss their issues face to face with the assistance of a mediator. Accordingly, s 145 gives authority for mediation services to be provided through other methods such as by telephone, facsimile, internet or email, or by publishing pamphlets, brochures, booklets or codes.⁵⁶

It is important to note that the completed mediation requests in Table 1 are inclusive of all the different ways that mediation services can be provided. Therefore, only a proportion of the completed mediation requests in Table 1 involve face to face meetings. The frequency of face to face meetings is around 4000 per year.⁵⁷ In comparison, the Employment Court disposes less than 250 cases per year.⁵⁸ The relatively large number of mediation meetings per year shows that it is a prominent method of employment dispute resolution.

Additional information about the relative workload of the Employment Relations Authority and the Employment Court before and after the introduction of the mediation service would be helpful. This information can show the success of mediation as a “fence at the top of the cliff” service that diverts parties away from the more formal employment institutions.⁵⁹ However, available data focuses on the settlement rate achieved by mediation as the primary measure of its effectiveness in resolving disputes.

⁵⁶ Employment Relations Act 2000, s 145.

⁵⁷ Maria Dew “Employment Mediation in the new MBIE Resolution Services Team” (10 October 2014) ADLSI <www.adls.org.nz>.

⁵⁸ Courts of New Zealand “Annual Statistics” <www.courtsofnz.govt.nz>.

⁵⁹ Spackman and Chauvel, above n 48, at 43.

D Effectiveness as measured by settlement rate

The mediation service is effective in resolving employment disputes. Table 2 shows the percentage of mediation requests that were settled before or at mediation in recent years.⁶⁰

Table 2: Mediation settlement rates, 2008-2014

Year to 30 June	Settlement rate (%)
2008	76
2009	78
2010	78
2011	80
2012	81
2013	82
2014	84

A settlement rate in the range of 76 to 84 per cent is very high, indicating that approximately four in five disputes result in a settlement. Table 2 also shows a clear positive trend therefore settlement rates may continue to increase year after year. This is clear evidence of the effectiveness of mediation in resolving employment disputes.

However, settlement rate is a superficial measure that only focuses on the fact of agreement. Other factors such as the durability of the agreement over time, and the quality of the agreement itself can also be used to measure the effectiveness of mediation in resolving employment disputes. Furthermore, some mediation styles look beyond the agreement between the parties to determine the success of the mediation. For example, Bush and Folger argue that transformative mediation is successful if the parties experienced empowerment and recognition as a result, and facilitative mediation can look at extent to which mediation helps parties identify and understand their needs and interests.

Therefore, a wide range of factors can be taken into account when measuring the success or effectiveness of mediation to give a multi-dimensional view. These additional factors

⁶⁰ Department of Labour “Annual Report” (June 2008, 2009, 2010, 2011 and 2012), Ministry of Business, Innovation and Employment “Annual Report” (June 2013 and 2014).

are difficult to measure and it is unsurprising that there has been little published research in this area.

Information about customer satisfaction with the mediation service can be an indicator of the effectiveness of mediation. Recent statistics published in MBIE's Annual Reports show the percentage of customers who were satisfied with the overall quality of labour mediation services to be in the range of 80 to 82 per cent.⁶¹ Also, the percentage of employment matters completed through a mediation process within expected timeframes is in the range of 92 to 97 per cent.⁶² These are very high figures and shows that mediation is delivery an effective, efficient and satisfactory service to users.

The various costs of employment relationship problems will be covered in the next section along with how mediation helps reduce these costs for disputing parties and the economy as a whole.

E Costs of employment relationship problems

In 2007, McDermott Miller Ltd carried out research commissioned by the Department of Labour on the cost of employment relationship problems (ERPs).⁶³ The research was based on a survey of businesses and public sector employers, with a total of 982 respondents. The research found that the cost of ERPs was \$214 million, which equated to 0.6 per cent of private sector wages and salaries for the year.⁶⁴

In 2013, MBIE referred to this research and adjusted the calculation of cost which came to \$242 million (in 2013 dollars).⁶⁵ This equates to 0.4 per cent of private sector wages and salaries for the year. MBIE also noted:⁶⁶

This calculation is the present day [2013] value of the 2007 estimate. An estimate of the cost of more recent ERPs, also incorporating indirect costs such loss of

⁶¹ Ministry of Business, Innovation and Employment "Annual Report" (June 2013, 2014 and 2015).

⁶² Ministry of Business, Innovation and Employment "Annual Report" (June 2013 and 2014).

⁶³ McDermott Miller Ltd, above n 46.

⁶⁴ At 3.

⁶⁵ Ministry of Business, Innovation and Employment "Dispute Resolution: Best Practice Report 2 of 2 to Joint Ministers" (2014) at 22.

⁶⁶ At 22.

productivity, morale and personal relationship issues resulting from the dispute, would provide a truer picture of the current cost of ERPs to the New Zealand economy.

It follows that the true cost of ERPs is likely to be greater than what is shown by this research. The idea that ERPs result in loss of productivity and thus greater costs for the economy is supported by a study completed by FairWay Resolution Ltd in 2014.⁶⁷ The study was based on interviews carried out with a sample of 740 salary or wage earners. It was revealed that one in four employees experienced a workplace conflict in the last 12 months. Most conflicts lasted less than one week but over a third of carried on for more than one month.⁶⁸ This shows that workplace conflict is prevalent and can sometimes be drawn-out. The study emphasised the loss of productivity as a consequence of workplace conflict:⁶⁹

[The] impacts of conflict were missing deadlines, loss of confidence and mistakes being made. Respondents reported taking time off as a response to conflict, of leaving the employment by choice or dismissal. Clearly a quarter of the workforce producing poorer quality of work, higher absenteeism and loss of focus due to poorly managed conflict adds up to significant loss of productivity to the New Zealand economy.

Evidently, there are heavy costs associated with ERPs and workplace conflict. As discussed below, mediation under the ERA significantly reduces these costs for employers, employees and the economy as a whole.

1 Savings in legal fees

Parties using the mediation service make significant savings as to legal costs in comparison to using more formal employment institutions such as the Employment Relations Authority (the Authority) and the Employment Court.

When mediation is unsuccessful and the parties turn to the Authority, they “will face additional and often substantial costs.”⁷⁰ Radich and Franks together with Andrew Horn

⁶⁷ FairWay Resolution Ltd *Conflict in New Zealand Workplaces Study* (August 2014).

⁶⁸ At 2.

⁶⁹ At 3.

⁷⁰ Radich and Franks, above n 1, at 125.

presented a paper to the 2015 Resolution Institute *'kon gres'*.⁷¹ This paper was based on analysis of 531 Authority costs determinations in the four years between 2011 and 2014. Comparisons were made between the Authority's costs awards and the actual costs of the successful party.

The results show that taking a case to the Authority is expensive: 28 per cent of employers' actual costs were over \$20,000 and 15 per cent of employees' actual costs were over \$20,000. These costs cover, inter alia, filing fees, hearing fees, representation costs, witness expenses and service fees. The median costs award to employees was \$3071.56. Median actual costs for employees was \$8129.50. This means that employees were awarded 40 per cent of their actual costs. The median costs award to employers was \$3000. Median actual costs for employers was \$11500. This means that employers awarded 29 per cent of their actual costs. Given the great disparity between the actual costs and the awards received, it is uneconomical for parties to take a case to the Authority.

The Employers and Manufacturers Association (EMA) published similar figures on the average cost of disputes for employers and employees. The most recent published figures are from 2012.⁷² The EMA found that the average legal cost to take a personal grievance to the Authority was \$7,843. The average legal costs to defend a personal grievance claim was \$12,445. Taking a case to the Employment Court involves even greater legal costs given the preparation and time required.

In contrast to the Employment Relations Authority and the Employment Court, the mediation service at MBIE is provided without cost. Although, most parties have legal representation at mediation and consequently incur fees. Nevertheless, mediation is by far the most cost-efficient method of employment dispute resolution.

Mediation can also help reduce legal costs for parties by “inject[ing] a degree of realism into claims.”⁷³ This is because the mediation process allows parties to get a sense of the relative strength of their position and the merits of their case. In turn, parties can avoid the costs of proceeding further up the hierarchy if they do not have an arguable case.

⁷¹ Peter Franks, Andrew Horne and Karen Radich “What about the costs? The impact of litigation costs on mediation” (paper presented to Resolution Institute *'kon gres'*, Auckland, September 2015).

⁷² David Lowe “Performance problems are the most difficult to get right; legal fees falling” *Business Plus* (New Zealand, June 2013) at 8-9.

⁷³ McDermott Miller Ltd, above n 46, at 7.

2 *Savings for the wider economy*

There are significant institutional savings to be made where employment disputes are resolved through mediation rather than more formal dispute resolution processes like the Employment Court. MBIE notes:⁷⁴

The MoJ [Ministry of Justice] has calculated that the total cost of running the Employment Court in 2010 was \$3.3 million. This equates to an average of \$13,070 per case. The average application fee paid was \$155 (GST exclusive). The total revenue collected by the Employment Court in 2010/11 was \$49,052, representing just 1.5% of the Court's total running cost. Therefore, the lion's share of the cost of not resolving employment disputes early and so proceeding to formal court litigation is currently borne by the taxpayer.

This shows that mediation reduces costs not only for the parties to the dispute but also the courts and ultimately the taxpayer.

3 *Reduction in work stoppages*

MBIE mediators can assist during collective bargaining.⁷⁵ This is a process by which employers and trade unions negotiate wages and conditions for union members. The Department of Labour has reported that mediation can contribute to a decrease in yearly work stoppages by helping to prevent the escalation or continuance of collective bargaining problems.⁷⁶ Table 3 shows annual work stoppages from 2005 to 2014.⁷⁷

Table 3: Annual work stoppages, 2005-2014

(Note: C means confidential)

⁷⁴ Ministry of Business, Innovation and Employment "Dispute Resolution: Best Practice Report 2 of 2 to Joint Ministers" (2014) at 22.

⁷⁵ Radich and Franks, above n 1, at 37.

⁷⁶ Department of Labour "Annual Report" (June 2011) at 22.

⁷⁷ Ministry of Business, Innovation and Employment "Annual Work Stoppage Statistics: 2014 Calendar Year" (2014) at 2.

Calendar year	Number of stoppages	Number of employees involved	Person-days of work lost	Estimated loss in wages and salaries \$(million)
2005	60	17,752	30,028	4.8
2006	42	10,079	27,983	5.2
2007	31	4,090	11,439	1.9
2008	23	C	C	C
2009	31	8,951	14,088	2.4
2010	18	C	C	C
2011	12	2,098	4,850	1.0
2012	10	5,179	78,589	13.6
2013	6	270	483	0.12
2014	13	1,564	1448	0.3

With the exception of the calendar years 2009 and 2014, there has been a decreasing trend in the number of work stoppages per year. There has been a corresponding decline in estimated wages and salaries lost. This is another example of how mediation has helped reduce costs for the wider economy.

Also, a reduction in work stoppages is in the wider public interest. The industrial distribution of work stoppages includes public administrations and safety, transport, postal and fuel delivery, healthcare and social assistance, and education and training.⁷⁸ Less disruptions in these essential industries benefits all New Zealanders.

4 Reduction in social and personal costs

The study by McDermott Miller Ltd looked at social and personal costs of ERPs as well as economic costs. Interviews with parties that experienced ERPs show:⁷⁹

The largest and most commonly mentioned costs were psychological. Both employees and employers found ERPs to be stressful, unpleasant and even distressing. Employees spoke of depression, anxiety and low self-esteem. Others commented on the amount

⁷⁸ Ministry of Business, Innovation and Employment, above n 77, at 3.

⁷⁹ McDermott Miller Ltd, above n 46, at 26.

of time and energy that fighting the ERPs cost them. Some said that they had reduced social contacts and energy for their families.

...

ERPs affected the stress levels, health, financial situation and productivity of both, employers and employees, and led to consequences for the families of both. All the interviewees indicated that the process had been unpleasant to be involved in, even extremely distressing. Most of them wanted the ERP to be resolved so they could put it behind them and carry on with their lives.

Similar accounts of social and personal costs can also be found in the study by FairWay Resolution Ltd. The study showed that employees involved in workplace conflict most commonly experience “feelings of anger, stress and anxiety, followed by losing focus in the workplace, avoiding communicating with the other party and reduced motivation.”⁸⁰ Other personal costs of workplace conflict are loss of self-esteem, sleeping difficulties, sickness and drinking more alcohol.⁸¹

Mediation, as an effective, accessible and affordable method of dispute resolution, helps reduce social and personal costs associated with ERPs. At a basic level, mediation helps parties resolve their dispute relatively quicker than formal, adversarial methods, thus reducing social and personal costs. Formal, adversarial systems are also more resource intensive thus exacerbating the negative social and personal impacts on parties. Ultimately, mediation is less stressful and better for parties’ mental and physical health.

F Preliminary conclusion

At this stage, evidence shows that mediation has brought about social transformation in the form of providing an effective, efficient and affordable system of dispute resolution. Statistics, figures and studies show that mediation has led to reductions in a wide range of costs for the disputing parties and the economy as a whole. The focus now turns to the second component of the promise of mediation and whether social transformation has been achieved to a greater extent than what has been revealed so far.

⁸⁰ FairWay Resolution Ltd, above n 67, at 2.

⁸¹ At 8.

III The promise of a cooperative and consensual model of dispute resolution

The main driver of the ERA, Margaret Wilson, was a professor of law at the University of Auckland and later the founding Dean at the University of Waikato before entering Parliament in 1999. Grant Morris, an alumnus of the University of Waikato, explains:⁸²

[Margaret Wilson] was an early proponent of teaching interest-based alternative dispute resolution in law schools, in particular, at the Universities of Auckland and Waikato. The ERA's philosophic and legislative basis was to promote good-faith bargaining between employers and employees and facilitate consensual resolution of personal grievances. *The legislation was clearly aimed at social change, in particular, transforming employment dispute resolution from a litigious, competitive model to a collaborative, consensual model.* Mediation was, and is, the most important element in achieving this ambitious aim. The mediation provisions in the ERA are clearly inspired by the interest-based approach popularized by Roger Fisher and William Ury and incorporated into the facilitative mediation model.

Therefore, the promise of mediation under the ERA includes a fundamental change in the nature of employment dispute resolution. Specifically, a “litigious, competitive model” will be replaced by a “collaborative, consensual model” of dispute resolution.⁸³ The incorporation of interest-based negotiation is important in bringing about this change and will be discussed in more depth in a later section. Furthermore, the ERA's focus on good-faith bargaining and consensual dispute resolution encourages parties to deal with each other openly, honestly and constructively. The following discussion will evaluate whether this promise has been fulfilled. Implications for parties' behaviour and relationships will also be covered.

A The nature of mediation under the ERA

The primacy of mediation under the ERA means that a “litigious, competitive model” has been overtaken by a “collaborative and consensual model” of dispute resolution.⁸⁴ Mediation is a stark contrast to the adversarial litigation process. Boule et al notes that the

⁸² Morris, above n 5, at 206 (emphasis added).

⁸³ Morris, above n 5, at 206.

⁸⁴ Morris, above n 5, at 206.

term adversarial has a number of meanings in the context of litigation and the legal system:⁸⁵

The dependence on the parties to develop their own cases, the passive role of judges in their adjudicative role, the competitive culture required to convince the judge of the merits of one's case, the technical rules of evidence and procedure and their propensity to exacerbate conflict, and the win-lose nature of court outcomes.

Following that, parties' attitudes and behaviours in the adversarial litigation process can be characterised as positional, competitive and confrontational. On the other hand, at the heart of mediation is its cooperative and consensual nature. The parties reach a solution themselves instead of being told what to do by a third party.

Unlike judges, the mediator cannot impose an outcome unless both parties give him or her the binding power to do so. This is facilitated under s 150 of the ERA that allows mediators to make binding decisions with the authority of the disputing parties. In this way, med-arb (a hybrid of mediation and arbitration) is incorporated into the dispute resolution process. Mediators can also make recommendations with the authority of the parties under section 149A, thereby allowing evaluative mediation. Generally, the mediator assists the parties to discuss issues between them and attempt to reach an agreement to resolve those issues.

The following discussion looks at the possible ways in which mediation can help individuals develop better communication and negotiation skills. In addition, the potential for relationship preservation or improvement will be covered.

B Communication

The mediation process provides a framework for communication that allows the parties to explore and understand the causes of the dispute. In turn, parties can identify and consider a wide range of resolution options and potentially reach a mutually acceptable agreement.

In *Employment Mediation*, Radich and Franks describe different skills that promote constructive communication between parties in mediation. These include questioning and listening skills that are vital in keeping the lines of communication open.⁸⁶

⁸⁵ Boule et al, above n 3, at 48.

⁸⁶ Radich and Franks, above n 1, at 87-97.

Parties can ask different types of questions to achieve different aims during mediation. Some examples given in the *Employment Mediation* are:⁸⁷

Practical questions: to establish the facts;

Clarification questions: to clarify a party's intentions or dig deeper into an issue;

Reflective questions: repeating what a party has said to check understanding;

Hypothetical questions: to suggest a situation or solution, without making a commitment;

Rhetorical questions: to make a point or to produce an effect.

Parties can also practise active listening during mediation which is explained in detail in *Employment Mediation*. Briefly, the four key components are:⁸⁸

Stop – doing other activities, including planning your response, when the other party is talking;

Look – make eye contact and pay attention to the other party. This creates an atmosphere of trust and communication and makes the other party feel that their contribution is valued;

Listen – for any underlying issues that need to be addressed to allow eventual resolution;

Respond – use simple cues that encourage further communication such as, “I see” or “go on”, or paraphrase what has just been said.

A level of caution must be exercised when interpreting the sections on questioning and listening skills in *Employment Mediation* as evidence of skills development in parties. The book is primarily a guide to best practice in employment mediation thus is not direct evidence of skills development in parties. However, Radich and Franks would have drawn upon their practical experience as mediators in writing *Employment Mediation*. Therefore, the sections on questioning and listening skills would, to a degree, be based on what is actually happening at mediations. Thus, the sections suggest that parties are developing better communication skills a result of mediation.

Good communication skills are necessary for the negotiation stage of mediation, which is focus of the next section of this essay.

⁸⁷ Radich and Franks, above n 1, at 89.

⁸⁸ Karen Spackman “Mediation: prepared and ready for interaction” *Employment Today* (Auckland, Feb 2006) at 45.

C Negotiation

Given that “mediation is above all a facilitated negotiation process,”⁸⁹ there is great potential for parties to develop better negotiation skills as a result of mediation.

Parties each have their own approach to negotiation coloured by their individual experiences and perspectives. A common form of negotiation is positional bargaining where “the parties take fixed positions and become competitive, reducing the chance of resolution.”⁹⁰ However, mediation under the ERA is “clearly inspired” by interest-based or principled negotiation.⁹¹ This is reflected in MBIE’s Mediator Code of Ethics which explains that “a mediator promotes communication and understanding, assists in identifying *needs and interests* and uses problem solving techniques to help parties in a dispute reach their own resolution.”⁹² Interest-based negotiation is in line with facilitative mediation which is the style most commonly used by MBIE mediators.⁹³

Similar to the previous section on questioning and listening skills, there is no direct evidence that parties are adopting interest-based negotiation as a result of mediation. The extent of knowledge is that government policy promotes the use of facilitative mediation by MBIE mediators which is followed through in practice. This can influence parties to follow interest-based negotiation. Therefore, it is possible that parties are developing better negotiation skills as a result of mediation.

Fisher, Ury and Patton in their book *Getting to Yes* explain how interest-based negotiation is superior to positional bargaining.⁹⁴

... in contrast to positional bargaining, the principled negotiation method of focusing on basic interests, mutually satisfying options, and fair standards typically results in a *wise* agreement. The method permits you to reach a gradual consensus on a joint decision *efficiently* without all the transactional costs of digging in to positions only to have to dig yourself out of them. And separating the people from the problem allows

⁸⁹ Radich and Franks, above n 1, at 81.

⁹⁰ Radich and Franks, above n 1, at 76.

⁹¹ Morris, above n 5, at 206.

⁹² Ministry of Business, Innovation and Employment “Mediator Code of Ethics” (May 2016) (emphasis added).

⁹³ Morris, above n 5, at 217.

⁹⁴ R Fisher, W Ury and B Patton (eds) *Getting to Yes: Negotiating Agreement Without Giving In* (2nd ed, Houghton Mifflin, New York, 1991) at 14.

you to deal directly and empathetically with the other negotiator as a human being, thus making possible an *amicable* agreement.

The ability to negotiate a wise agreement in an efficient and amicable way is a very useful skill that enables parties to resolve disputes and conflicts more successfully if they occur again in the future. The idea that interest-based negotiation enables parties to deal with each other amicably is tied to the concept of relationship preservation which is covered in the next section.

D Relationship preservation

Relationships can be preserved or even improved as a result of mediation. This is a core objective of transformative mediation but can occur in other mediation styles because of the shared characteristics of cooperation and consensual decision-making. All mediation styles allow parties to have their perspectives appreciated, their interests properly understood, and fully consider and respond to issues raised during the mediation.

The flexibility of mediation in regard to settlement options also helps to preserve and even improve relationships. This stems from the fact that mediation is not bound by “judicial precedent, or the remedies which can be obtained in court proceedings”.⁹⁵ Boulle et al explain the advantages of this process:⁹⁶

Mediation ... allows the parties to agree on outcomes which would never be available as a court remedy. Apologies, for example, are one of a range of non-justiciable remedies that assume importance in an interest-based framework. They may agree on one party performing a personal service for another, on a dismissed employee being re-employed in another section of the firm, on one party providing an employment reference to the other, or on similar creative arrangements.

This flexible approach can be contrasted with the rigid application of legal rules and precedent in the courts that seeks to retrospectively vindicate rights. Mediation allows parties to explore a wide range of solutions that focus on the future relationship, rather than the rights and wrongs of the past that is inherent in the adjudicative process.

⁹⁵ Boulle et al, above n 3, at 48.

⁹⁶ At 49.

It is important to note that the majority of the mediation services' workload involves mediating personal grievances arising when the employment relationship has in fact ended through dismissal.⁹⁷ Accordingly, relationship preservation may not be a realistic outcome for many parties. Research commissioned by MBIE explains why this might be the case.

E ThinkPlace research

In 2013, ThinkPlace carried out research commissioned by MBIE looking at user experiences of mediation services.⁹⁸ The research found that an "intention mismatch" between parties can lead to "decreased employment relations".⁹⁹ An "intention mismatch" is "when one party comes to mediation for settlement (ending the relationship) and one party comes for resolution (continue the relationship)."¹⁰⁰ In this situation, the parties have divergent experiences and the relationship is put under a lot of pressure:¹⁰¹

In our interviews, employees were the most negatively impacted by intention mismatches, whereas employers did not express this as an issue. We uncovered situations where employees believed they were engaged in mediation to mend a broken relationship, but the employer (usually unbeknownst to them) had an intention to end the relationship. In our interviews with employees, they were unaware of their employer's intentions to terminate until they were actually in the mediation hearing room. This caused a sense of shock, stress, anxiety, anger and disappointment for the employees of this study.

Due to the small sample size used to collect information (four employment mediators, seven employers and seven employees),¹⁰² these findings only suggest possible experiences and outcomes of employment mediation. Nevertheless, the research lends some support to the idea that relationship preservation as an outcome of social transformation may occur to a limited extent. As mentioned earlier, personal grievances and dismissal claims make up the largest proportion of employment mediations. It may be common for intention mismatches to arise in these cases and result in strained relationships.

⁹⁷ Radich and Franks, above n 1, at 25.

⁹⁸ ThinkPlace *Resolution Services: Qualitative Research on Customer and Stakeholder experiences* (MBIE, December 2013).

⁹⁹ At 24.

¹⁰⁰ At 27.

¹⁰¹ At 27.

¹⁰² At 5.

Regrettably, the research by ThinkPlace is a missed opportunity to test numerous hypotheses in the wider literature about the ways in which mediation can bring about social transformation. The research methodology that “focused on gaining deep user understanding and providing a truly outside-in perspective”¹⁰³ using a small sample size was inadequate to give meaningful conclusions about user experiences in general. What is needed is an evaluative methodology based on directive questioning and a large sample size.

REDRESS is an excellent example of how evaluative methodology can produce meaningful findings. The research methodology involved exit surveys and mediator tracking reports that assessed specific aspects such as mediator behaviours and parties’ experiences of empowerment and recognition. Information was collected from a total of 227,196 participants for over a decade. This approach allowed for meaningful conclusions to be made about the success of REDRESS in achieving its objective of improving workplace climate at the US Postal Service. If a similar approach can be taken to evaluate employment mediation provided by MBIE it would contribute greatly to the knowledge and understanding of the service and its impacts.

IV Has the promise been fulfilled?

Bush and Folger gave a compelling argument in *The Promise of Mediation* that mediation can create a better society for all. Inspired by this argument and the success of REDRESS, this essay looks at the extent to which mediation has socially transformed the New Zealand employment context. The premise of this essay is that the promise of mediation under the ERA is made up of two components. Firstly, the ERA seeks provide an effective, efficient and affordable system of alternative dispute resolution. Secondly, the ERA aims to transform employment dispute resolution from a litigious, competitive model to a collaborative, consensual model. These two components each carry wider economic and social implications. This essay has found that the promise of mediation to bring about social transformation has been achieved to a moderate extent. However, it is uncertain whether the full potential of mediation for social transformation is realised.

In regard to the first component of the promise, statistics, figures and reports show that mediation is an effective, efficient and affordable method of employment dispute

¹⁰³ At 4.

resolution. Annual government reports show that MBIE's mediation service deals with a large number of requests and has a consistently high settlement rate in the range of 76 to 84 per cent. This leads to significant reductions in costs for the disputing parties and the economy as a whole, as illustrated by publications from the government, academics, lawyers and other sources. Therefore, a conclusion can be drawn that mediation has brought about social transformation in the form of cost reductions.

The second component of the promise has also been achieved but its wider implications are uncertain. With a focus on cooperation and consensual decision-making, mediation enables parties to discuss issues between them and attempt to reach an agreement to resolve those issues. This is a fundamental shift away from a litigious, competitive model of dispute resolution. The wider implications of this change include the development of better communication and negotiation skills, and preservation of employment relationships. The authoritative text *Employment Mediation* and government policy suggest that these changes are possible but do not provide any direct evidence. In respect of relationship preservation, research by ThinkPlace lends support to the idea that it occurs to a limited extent only. Ultimately, the lack of research about the qualitative impacts of mediation precludes any conclusions about the extent to which social transformation has been achieved in respect of behaviour and relationships.

It is unfortunate that employment mediation and its impacts on individuals and society is an underdeveloped research area. There are significant benefits to be gained, particularly from research about the qualitative impacts of mediation. It can be used to evaluate whether the service is achieving its objectives and fulfilling its wider potential for social transformation. Only through targeted and rigorous research will more insights be gained into employment mediation. Only then can a clearer picture be revealed as to the true extent to which mediation is socially transforming New Zealand's employment context.

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