DEPARTMENT OF LABOUR WORKPLACE SERVICES

100 YEARS OF EMPLOYMENT MEDIATION

Contemporary Mediation Practice

CELEBRATING 100 YEARS OF EMPLOYMENT MEDIATION

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Department of Labour
TE TARI MAHI

100YEARS
OF EMPLOYMENT MEDIATION

Acknowledgement

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FOREWORD

The Department of Labour is pleased to publish this collection of papers to celebrate one hundred years of employment mediation in New Zealand.

In 1909 three conciliation commissioners were appointed by the government. They were the first independent, government-funded officials to be given the task of helping to resolve employment disputes. Their appointment came at a time when employment relations in New Zealand were in crisis. A central issue was the inability of the Arbitration Court to cope with an increasing workload. Unions and employers were frustrated and had lost confidence in the Industrial Conciliation and Arbitration Act.

For the first, but not the last time in NZ's industrial relations history, the government recognised that part of the answer was a more effective form of dispute resolution. When the conciliation commissioners took office, their focus was mainly on collective bargaining disputes between employers and unions. Today the Department of Labour's mediators continue to help parties with these disputes although most of their work is with individual employers and employees.

In 2008 Department of Labour mediators were invited to present papers at the Australian National Mediation Conference in Perth, the ADR in Employment conference at the University of Greenwich in the United Kingdom and the NZ Law Society's Employment Law Conference in Auckland. Their papers have been revised and edited for this publication.

The papers present a rich diversity of themes and perspectives on employment mediation. In the first paper Alison Cotter draws on a case study to illustrate the benefits of a narrative approach. Judy Dell and Peter Franks discuss the historical background and mediators' interventions in collective bargaining. Mike Feely provides practical hints on good practice for representatives taking part in mediations. Walter Grills uses a case study to explain how mistakes in fact and perception can sour collective negotiations.

David Hurley explores the opportunities available in mediation and how parties can take advantage of them. Leah McLay asks whether mediation is appropriate in cases of workplace bullying and considers the strategies mediators might use. Cara Takitimu and Susan Freeman-Greene explain the groundbreaking initiative between the Department of Labour and Human Rights Commission that has allowed them to co-mediate.

This collection of papers highlights the strength, diversity and creativity of contemporary mediation practice in New Zealand and demonstrates that 100 years of tradition has not diminished the vibrancy and utility of mediation as an approach to employment dispute resolution.

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BREAKING DOWN THE BARRIERS: CROSS AGENCY CO-MEDIATION

Cara Takitimu, National Mediation Practice Leader
Susan Freeman-Greene, Chief Mediator Human Rights Commission

Introduction

Two public sector agencies have joined in a ground-breaking initiative to allow them to mediate issues together.

A number of matters fall within the jurisdiction of the Employment Relations Act 2000 (ERA) and the Human Rights Act 1993 (HRA). Both laws offer mediation in the first instance as a way of resolving disputes. Mediation has traditionally been provided separately by two different public sector agencies – the Department of Labour (the Department) and the Human Rights Commission (the Commission). The development of an inter-agency co-mediation process provides an effective practical, flexible and efficient response to some of these matters.

In this paper, we track the journey of this initiative. We outline the initial resistance, explain how barriers were overcome, provide examples of the tools we have developed to protect both agencies and the parties to the process, and demonstrate the challenges and benefits of working together.

Key focus of the Employment Relations Act 2000 and the Human Rights Act 1993

The ERA is the main law that sets out the rules that govern parties in an employment relationship. If a party believes they have been treated unfairly in the employment relationship, they may raise an employment relationship problem, dispute or personal grievance under the ERA and seek redress.

The HRA protects New Zealanders from unlawful discrimination in a number of areas of life. An employee who believes they have been discriminated against in employment can choose to have the complaint resolved under either the ERA or the HRA, but not both. However, that choice is only required to be made should mediation fail to reach a resolution and there is a desire to progress the matter further through litigation.

How do the agencies work?

Under the ERA, a claim of discrimination would normally be raised as a personal grievance by an employee against their employer. Mediation is the primary problem-solving mechanism under the ERA, and therefore, one or both parties would seek mediation services provided by the Department of Labour.

Under the HRA, a complaint is made to the Human Rights Commission, which progresses it. Dispute resolution (of which mediation is a key process) is also prescribed in the first instance.

The main practical difference is that, at the Department, once a request for mediation assistance is received, a face-to-face mediation is set up within one to six weeks, depending on the parties' availability. There is limited contact between the parties and

the mediator prior to the mediation event. At the Commission, mediators are much more involved in taking the complaint and often resolve it in alternative ways to face-to-face mediation, for example, by shuttle mediation on the phone. It is not uncommon for a face-to-face mediation to come at the end of such other alternative processes and after some time has lapsed.

The genesis of the initiative

The Commission noticed that they were receiving complaints where complainants (and lawyers) had separated out components of their complaints. For example, a complainant might be unhappy with a disciplinary process and would raise a personal grievance under the ERA. However, the complainant would deliberately separate out sexual harassment issues and raise those under the HRA. There are a range of reasons why a person might separate out the claim. There is a common perception, particularly among lawyers, that the Department's mediation is best equipped to deal with employment matters and the Commission is best equipped to deal with discrimination matters, so expert assistance is sought specific to the component of the claim. Sometimes, parties will make claims in two different jurisdictions as part of a strategy to encourage the other party to settle.

The problem with this approach is that often facts and perceptions of the separate claims overlap. Because of this, the parties may not be able to resolve all or any of the matters until all matters have been mediated. This may require two separate mediations (one with the Commission and one with the Department). Having to participate in two mediations is resource-intensive and slow, and defeats the objects of both Acts to provide low-level, flexible and informal dispute resolution processes.

In other situations, it became apparent that, even if the complaint hadn't been separated out (and parties had approached both agencies), there could be value in dealing with all the issues together so that parties were fully informed through one process. The Commission approached the Department to consider whether co-mediating between the two agencies in certain matters was a viable option.

In favour of co-mediation

- Both Acts support flexible, efficient, effective dispute resolution processes. Offering the parties a single mediation process that meets their needs supports the intention of both Acts.
- Both Acts support the principle that disputes are more likely to be successfully resolved if done so by the parties themselves (which is underpinned by the subjective nature of the mediation process).
- Parties would benefit from having expert mediators from each jurisdiction; they would get more information in order to "reality check" their options. Parties should then make better informed decisions and ultimately receive a better service.
- There are experienced and capable mediators in both agencies who could easily adapt to a co-mediation approach.

Complications to consider

- Although the two different jurisdictions are reasonably complementary, there are different provisions and powers that govern mediation under the respective Acts. For example, the ERA provides for mediator sign-off and decisions, and the HRA does not.
- Neither law contemplates co-mediation with another agency so there are potential issues around jurisdiction and enforcement of any mediated agreement.
- On a practical level, both agencies take quite a different approach to mediation. There would need to be some common understanding.
- Each mediator has an individual style of mediating, and there are potential complications with co-mediation. Matching mediators with complementary styles would need to be considered for co-mediation to be successful.
- There would be administrative considerations.

What did we do?

In principle, the Department and the Commission were supportive of an inter-agency co-mediation approach. It was important to check that there were no statutory bars to co-mediation. Both Acts have provisions that refer to the choice of procedure. It seems clear from recent amendments that the choice of procedure happens at the "proceedings level", which means the Human Rights Review Tribunal or the Employment Relations Authority. The ERA makes it clear that, if an application to the Authority for resolution of the grievance is made, the applicant may not exercise or continue to exercise any rights in relation to the subject matter of the grievance under the HRA.

The provisions of each Act refer to each other and must be read together. It would therefore be inconsistent to choose a decision-making body level in one forum and at the mediation level in another. The objects of each Act, in essence, provide for flexible dispute resolution processes, early intervention and party involvement in resolution. It is conceptually inconsistent for the law to require the election of a dispute resolution forum as, by their nature, these forums enable wide ranging discussion. It would make more sense for such an election to be at a proceedings level where the issues are required to be narrowed into specific claims.

When an appropriate case presented, the agencies decided to trial co-mediation. This case involved a senior executive for a large private company. She had three outstanding and different claims. One involved sexual discrimination and was filed with the HRA. The other two were under the ERA and related to how she was treated in her employment and the subsequent end of the employment relationship. Although they were different claims, the facts, issues and perceptions clearly overlapped. All parties and their legal representatives in principle immediately saw the benefits of inter-agency co-mediation. However, preparation work was needed to make sure that everyone involved was comfortable with the approach.

To deal with any complications around the two jurisdictions, we drafted a mediation agreement that all parties reviewed and signed prior to the mediation starting. The mediation agreement covered issues such as jurisdiction, process agreements and enforcement of any settlement agreement.

It was decided that this first case would need to be handled by senior experienced mediators from both jurisdictions. It made sense that Cara Takitimu (DOL National Mediation Practice Leader) and Susan Freeman-Greene (HRC Chief Mediator) would co-mediate, as both mediators had successfully worked together before. Susan Freeman-Greene had previously worked in the ERA jurisdiction so the issues around co-mediation weren't significant, although we identified that it could be an issue for future cases.

How did it go?

Although there were some additional considerations in the setting up of the mediation, both agencies were enthusiastic to trial this new initiative, so things were fairly easy to work through. The actual logistical setting up of the mediation was facilitated by the Commission. The venue for the mediation was provided by the Department.

Most importantly, the co-mediation was a success. All three claims were resolved, the case was settled and the parties were happy with the service. In order for the parties to reach resolution, all matters had to be resolved. The parties were grateful to have a forum in which all claims could be dealt with together and they could take advantage of having expert assistance from mediators from each jurisdiction. The settlement was drawn up and signed under the ERA for ease of enforcement.

What happened after the co-mediation?

As the mediation was a success, the agencies were keen to progress the initiative. There was a need to broaden beyond the "one-off", and a case presented for a wider systematic approach. Both agencies got buy-in from their respective leaders and reported the success to their ministers who were enthusiastic.

Protocols were drafted covering:

- rationale
- purpose of protocols
- how matters for co-mediation are selected.

To avoid any doubt around potential issues in regards to dual jurisdiction, an agreement to mediate was drafted covering

- confidentiality
- ERA mediators' ability to make binding decisions
- enforcement
- recording agreements
- how mediators should prepare.

These protocols and agreement to mediate were put out for consultation within the agencies and have now been finalised by both legal teams.

Following the success of the first co-mediation, another case that fitted the criteria was co-mediated by two different mediators who had not previously worked together. They followed the protocols and the case was settled.

Next steps

- There is a need for education and promotion work with users and particularly legal representatives. There are still misconceptions about the stage at which a party must elect choice of procedure. Some believe that this is at the mediation stage. However, we are confident that it is only after mediation has failed to resolve matters that an election must be made. Some general publicity and a launch may assist in resolving misconceptions. We believe there is a lot of enthusiasm for this inter-agency co-mediation approach.
- Each potential case requires identification, negotiation and a reasonable amount of planning. This needs to be done with parties/legal representatives and mediators. However, this can be done quickly if everyone is willing.
- Approval is needed for each case.
- Co-mediation training for mediators interested in doing this work is required. Co-mediation adds its own challenges, and it is important that the mediators have complementary and inclusive styles.

Conclusion

The development of an inter-agency co-mediation process has created an effective, practical, flexible and efficient response to cases that involve matters that fall within the jurisdiction of both the Employment Relations Act 2000 and the Human Rights Act 1993. Both laws offer mediation in the first instance as a way of resolving such matters. It is traditionally provided separately by two different state sector agencies – the Department of Labour and the Human Rights Commission. However, this initiative has allowed the two agencies to work together and, in doing so, has enhanced both agencies and more importantly the service to clients.

The first co-mediation following the initiative was a success. The initiative is just the beginning of collaboration between the two agencies, and there is still more work to be done to promote the service externally. Co-mediation has the potential to transform the complaints processes in a constructive and effective way.

A NARRATIVE APPROACH TO MEDIATION

Alison Cotter, Mediator, Hamilton

Introduction

In the years since the Employment Relations Act 2000 was introduced, mediation has become the primary method through which employment disputes are resolved in New Zealand. In this paper, I shall apply principles of a narrative approach to the context of workplace and employment mediation by telling a mediation story from my practice as an employment mediator.

A narrative approach and questioning style invites participants to step outside of their positions within the conflict story. Through the mediator's use of such tools as narrative questioning and externalising conversations, participants are encouraged to comment on the conflict itself rather than focusing on a more blame-oriented construction of events. In this process, the power that the conflict has had over people's perceptions begins to shift. Participants begin to work together against the problem as collaborators rather than contestants.

The story describes the mediation of a problem in an employment relationship between a chief executive and a senior community worker in a community sector organisation. Personal details have been changed to maintain the confidentiality of the participants. The mediation story shows the use of narrative questions to address the personal, relational and community effects of the problem story. The mediator endeavours to destabilise the conflict story and create space for those affected to consider how they might reclaim their dignity and respect and be able to move on in their lives.

The paper focuses on the hallmarks or principles of narrative mediation.[1] In this story, these hallmarks are applied in an employment mediation in which the parties have a continuing relationship, as opposed to one where the relationship has ended, but the ideas are relevant to both mediation contexts.

Story of Clare and Harriet

Clare is chief executive of a large organisation in the community not-for-profit sector. Harriet was appointed to the position of senior community worker one year ago. Harriet is good at her job. She relates well to others, is energetic and is willing to take initiatives and make things happen. She is not so good at administration. Harriet organised a very successful youth project in the first week of February 2008 and was expected to write a report for the board meeting at the end of the month. Other things got in the way for Harriet so Clare extended the commitment to the March board meeting. Ten days before that meeting, Clare finds out that the report is not done and that Harriet is going on leave for a week the following day. In a frustrated outburst, Clare tells Harriet that she's absolutely hopeless at administration and will be responsible if the organisation doesn't get funding for its youth projects the following year. Harriet accuses Clare of not understanding the demands of community work and how much she's achieved, but just wanting to "tick the boxes" for the board. Clare says

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[1] J. Winslade and G. Monk, *Practicing narrative mediation: Loosening the grip of conflict*, Jossey-Bass, San Francisco, 2008.

that the late reports have become a performance matter that will be followed up when Harriet returns from leave.

This is the beginning of a downward slide in the relationship. Harriet is offended about her performance being challenged and becomes less open and responsive. Clare discovers that Harriet has fallen behind with other accountability reports as well and becomes even more frustrated. Eventually, Harriet threatens to resign. This puts Clare into panic mode as she realises how important Harriet's skills are to the organisation and how difficult and costly it would be to replace her. Clare seeks the advice of an employment lawyer who suggests they go to mediation with an independent Department of Labour mediator. Clare proposes this to Harriet, who accepts.

Hallmarks of narrative

We live our lives through stories

Taking stories seriously means treating them as having the power to shape experiences, influence mindsets and construct relationships. A narrative approach to mediation means much more than the telling of stories or the analysis of them. The mediator sees stories or narratives as constructing realities, as shaping of lives. People respond to each other with stories all the time, for example, the question, "How was your day?" is usually followed by the telling of a story. "What have you been doing lately?" produces a different response but still a story. When a lawyer in a courtroom asks, "What did you see happen?", the witness tells a story in response.[2]

The way we talk about our lives in stories helps give us a sense of continuity in life and a sense of coherence about who we are. Some stories are more coherent than others, some are more dominant, some more rehearsed. Employment mediators hear accounts of the same events retold from each person's perspective, which are utterly different from each other.

The stories within Harriet and Clare's employment experience include stories of a community organisation that has a CEO, paid workers and volunteers. There are stories of high ideals, struggles for funding and losing staff to the private sector. There are also stories of managing employment relationships well, setting up clear structures of governance and management, and dealing well with conflict.

There are personal and family stories. As well as being a manager and community worker, Harriet is a mother of 5-year-old twins, so has a story about how she juggles her family needs with her work commitments. In her first year with the organisation, she relied on an administration assistant, Maree, to help with report writing. However, this year, the organisation didn't get funding for that role, which has left a big gap for Harriet.

Clare's story includes being deeply committed to the community sector and involved in a national organisation that is striving for more equality of wages and opportunities for workers in that sector.

[2] Winslade and Monk, 2008, p. 4.

No story can encompass all events; therefore, stories are always selective. This gives the mediator space to move between and around stories, to draw on a wider range than the problem story.

Avoid essentialist understandings

Essentialist or inside-out approaches to conflict ascribe people's behaviour to their *nature*, for example, "he's a workplace bully", "they have a personality clash". In contrast, narrative approaches build on an outside-in approach, which proposes that people's interests, their emotions, their behaviours and their interpretations are produced within a cultural or discursive world of relations and are then internalised. They are constructed rather than natural and fixed, so people are able to shift track and be part of more than one narrative at the same time.[3]

In conflict, descriptions of each other tend to narrow. Under the influence of the dispute, the experiences that *fit with the story of the dispute* often get selected for remembering. Since the late-report problem, Clare is seeing Harriet as "hopeless" at administration. She "doesn't know how to prioritise", she's "difficult to deal with" and "doesn't care about the organisation". Each of these descriptions suggests that Harriet's behaviour is due to her nature and is therefore fixed, which may downplay and make invisible her real abilities and past successes.

Likewise, Harriet is seeing Clare as just wanting to "tick the boxes" and "being unreasonable and nit-picking". Currently, Harriet's account overlooks Clare's qualities of strong leadership and demonstrated commitment to the community sector.

A mediator communicating with respect will resist essentialist descriptions and hold the door open to exceptions and contradictions to these and to the other existing stories likely to lie behind them.

Engage in "double listening"

People are always situated within multiple story lines. They are used to shifting seamlessly from one narrative to another as they go from home to school, from home to work, from the peer group to the family, from one relationship to another.[4]

A mediator engaged in double listening hears not only the pain of the conflict story but also the individual's hopes for something different. For example, by expressing what she *doesn't* like (Harriet's late reports and the way they reflect badly on her as CEO), Clare is also implicitly expressing what she likes or wants, that is, that Harriet prepare careful, timely reports for the board and funders, as well as maintain her energy and drive for the community projects she does so well. Likewise, Harriet's resistance to Clare's criticism of her report work underlies Harriet's desire for more recognition of her successful community projects.

Michael White expressed a similar idea to double listening when he wrote of the need to listen for "an absent but implicit" story.[5] This is the story that lies hidden or masked in the background of a conflict story. It is found by turning over the coin of what a person

[3] Winslade and Monk, 2008, p. 6.

[4] Winslade and Monk, 2008, p. 8.

[5] M. White, *Reflections on Narrative Practice*, Dulwich Centre Publications, Adelaide, 2000, p. 153.

objects to or is angry about. It can indicate what the speaker values and holds important. Mediators can use double listening to draw out the differences between these contrasting stories and to invite people to make choices about which story they want to embrace.

Build an externalising conversation

"The person is not the problem, the problem is the problem."[6]

Externalising is a way of naming the conflict and speaking about it as an entity in its own right. This approach helps parties separate from the conflict itself and can serve to distance blame and guilt.

The mediator asks Harriet and Clare, "So what would you call this whole cycle of events that has gone back and forth between you both? What's a name that you could agree on?"

They tentatively try some answers including "late reports", "loss of trust" and "a deteriorating working relationship". In order to understand more about these initial descriptions of the problem, the mediator asks, "What factors do you think have contributed to the problem?" In answer, Clare talks about the deadlines she faces as CEO and the challenge of her national work commitments. Harriet adds two other names to the list from her perspective – "lack of admin support" and "juggling work and home demands".

The mediator continues an externalising conversation with Harriet and Clare by asking questions that help map the effects of the problem on each of them. She asks such questions as:

- "How have late reports and loss of trust invited you to act, to feel, to respond?"
- "In what ways has the problem affected your working relationship?"
- "What is it costing you?"
- "Are there ways in which this conflict has got you acting out of character?"
- "How does it interfere with your preferences for how things could be different?"
- "Are these effects acceptable to you?"

As Clare and Harriet speak about the effects of the problem, some effects common to both of them emerge, such as stress, distraction from their real work, a sense of being unfairly criticised and losing the joy of work. Both become very clear that the effects are not acceptable and that things need to change.

View the problem story as a restraint (to a story of hope)

This hallmark is built on the idea that what people talk about and the way they talk about it helps construct their lives and their relationships. The mediator draws the participants back to the story of hope by asking, "What would be some components of a story of hope about your working relationship?" Clare responds, "That we resolve the problem." Harriet says, "That we can get on with the job." Clare adds, "That we respect

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[6] M. White, The externalising of the problem and the re-authoring of lives and relationships, *Dulwich Centre Newsletter*, Special edition, Summer 1988–1989, p. 6.

each other – and our different jobs." Harriet proposes, "That we get some more admin support."

The mediator asks with curiosity, "So how would you name the restraints to the story of hope which you've outlined?" Having taken part in the earlier externalising conversation, Harriet and Clare answer in that style, that the restraints include challenges about performance, about reports, queries from the board, loss of trust and co-operation between them, and time and energy going into the conflict rather than into the organisation's projects and goals.

The mediator follows this up by asking, "If you think about this conflict as a restraint to your getting on with the job, could you be more specific about some of the things the conflict is interfering with?" Harriet and Clare give a raft of answers about aspects of their work that are being restrained, such as celebrating the success of the youth project in February, respecting their different roles and their mutual dependence, enjoyment of work, and energy being diverted from their core work. "It's a restraint to sleeping well, too," adds Harriet, and Clare nods in agreement. The stage is set to develop an alternative story.

Listen for discursive positioning

An alternative to an essentialist position is to think in terms of discourse. Discourse and discursive positions refer to the larger cultural backdrop in which people participate, such as the body of beliefs, practices and assumptions about the law, human rights, employment relations or dispute resolution. The employment relations discourse includes employment law, evidence, protocols and the language all around these, but other discourses such as family, psychology and gender or age discourses often feature strongly in mediation as well.

The central ideas from these discourses and the assumptions within them are produced from within each cultural world. People select their opinions and ideas from these larger fields of play, then internalise and further personalise their views. The broader fields of influence give people the flexibility to move between discourses.

Within the employment relations discourse influencing Harriet and Clare's relationship is also the dimension of the not-for-profit community sector as a place to work with its strong ethic of trying to make a difference in communities, compared to the competitive market values of the private sector. There is a dependence on grants, which may vary annually. Finances are more likely to be stretched and expectations on staff can be high. Clare ignores this as she calls on a legal or rights discourse suggesting that Harriet's late reports have become a performance issue and need to be addressed more formally as such. Harriet, meanwhile, continues to experience some clash between the discourses of family and employment relations as she strives to complete her work demands before going on leave with her family. People can and do change their positions in relation to a discourse, and they change the way they call each other into a position in that discourse. Mediation can be seen as a process of negotiation of discursive positions.[7]

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[7] Winslade and Monk, 2008, p. 23.

For example, when Clare says that Harriet is "absolutely hopeless at administration" and "difficult to deal with", her statement invites Harriet into a position of agreement or disagreement with this allegation of personal deficit. Clare is calling on the ideas about deficit within the discourse of psychology.[8] If a problem is understood to emerge from a person's nature, then it becomes hard for anyone to imagine change, including the person with the problem. The mediator wants to separate the person from the problem in the way that she speaks, so rather than continue this current conflict narrative about deficit, she invites Harriet and Clare to take up different positions in a narrative that offers a position of respect for both of them. She invites them to tell her more about the successful youth projects on which they have worked together. The mediator works with positioning to open up alternative stories and alternative relational positions. The old story will still reappear, but the mediator begins to open up a new cautious mutual positioning.

Identify openings to an alternative story

The story of a conflict is always only one possible story out of a range of stories that may be told about a relationship. The mediator can develop an alternative story by paying attention to the plot elements that exist but are being left out of the conflict story. A conflict story is likely to omit elements that illustrate co-operation or mutual understanding in favour of elements that spotlight the conflict.

Winslade and Monk explain this idea: "In the shadow of a story of angry exchanges, there are moments of reflection, and remorse or quiet calmness. In the shadows of a story of despair, there are moments of hope. In the shadows of a story of obstinacy, there are moments of willingness to negotiate…. In the shadows of a story of denigration, there are instances of respect. The skill of the mediator lies in catching these moments and inquiring into them."[9]

Through questioning, the mediator elicits stories that are incompatible with the continuation of the conflict story between Harriet and Clare, for example, exceptions, contradictions, events that have been glossed over, best intentions and hopes:

- "Do you have any other thoughts or ideas from your experience of the youth project last year? You talked about the planning meeting and how you shared the big jobs. What else do you recall about how you worked together on that project?"
- "What particular strengths did you see the other bring to it?"
- "Are there elements from those projects that you'd like to revive and apply again?"
- "How did Maree the admin assistant make a difference to each of you?"
- "What would be the benefits of getting your relationship back on track? What would it mean to each of you?"

The mediator's task is to assist the participants to weave these exceptions or contradictions into a viable story by connecting them with each other and developing an alternative story of dialogue, co-operation and agreement.

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[8] K.J. Gergen, Therapeutic professions and the diffusion of deficit, *Journal of Mind and Behaviour*, 11 (3–4), 1990, pp. 353–368.
[9] Winslade and Monk, 2008, p. 27.

Re-author the relationship story

In order to build a story of co-operation, the mediator invites Harriet and Clare to take time out separately over a cup of coffee to consider the following questions:

- "How might you build on the co-operative and successful work you've done in the past?"
- "What idea or strategies might you put in place to move forward?"
- "What requests do you have of the other?"
- "What commitments are you prepared to make?"

Document progress

When they get together again 15 minutes later, she invites them to put forward their ideas alternately. Each proposal is captured on the whiteboard. When Clare and Harriet are satisfied that all their key ideas are on the board, they work through the process of discussing, refining and accepting or discarding the proposals.

The following memo of understanding is the outcome of their work together:

1. Harriet withdraws her threat of resignation and agrees to stay in her position for at least three months and then evaluate how well it's working.
2. Clare agrees to set up a performance plan in order to support Clare in gaining confidence and skills in report writing. She will:
    - work with Clare on writing the next report due
    - review the operations budget and try to expand the administration support available
    - investigate appropriate training and give Harriet the option of attending.
3. Harriet and Clare agree to meet each week to plan and co-ordinate projects and to discuss any issues of concern to either. Harriet agrees to speak up early if she encounters problems when writing reports.
4. Harriet requests that Clare notice and comment on the positive aspects of her work as well as giving critical feedback.
5. Clare and Harriet agree to keep details of this meeting confidential and to say to inquirers only, "We've had a meeting, we've got a positive plan and we're getting on with it."

In bringing the mediation to a close, the mediator shares a favourite quote from Sir Tipene O'Regan, a well-known Ngāi Tahu leader who said, "We let go of our dreams easily. It's a much harder thing to give up on our grievances".[10] She commends Harriet and Clare on the goodwill they have shown today and their willingness to let go the story of grievance and open up new stories of shared understanding, mutual commitment and a changed ongoing relationship.

[10] T. O'Regan, Personal communication, 2008.

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WORKPLACE BULLYING: TO MEDIATE OR NOT

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Introduction

In the past 18 years, there has been growing awareness across OECD nations of workplace bullying as a significant health and safety issue and "one of the most common causes of psychological injury, workplace related stress, illness and workplace related suicide".[11]

It is important to assess the suitability of mediation when workplace bullying is alleged. Is mediation appropriate at all, given concerns about power imbalance and public interest? If it is appropriate, what specific knowledge and skills does the mediator require? What strategies might the mediator employ?

Workplace bullying

There are various definitions of workplace bullying available. The common threads in the various definitions are that the bully's behaviour is repeated, unreasonable and endangers the health and safety of the person being bullied.

Workplace bullying is often regarded as a sub-category of harassment, but it has some unique features. Unlike harassment, which tends to have a particular focus – for instance gender, sexual preference, colour, race or disability – workplace bullying can focus on anything that challenges or interests the bully in some way.

While harassment is usually obvious to the victim and can be readily identified by an observer, workplace bullying can be difficult to identify and diagnose, as it tends to manifest itself as a series of small and apparently insignificant events over time. It is the pattern of these events that constitutes the psychological abuse of the target.

As with harassment, workplace bullying is often not reported due to the target's lack of confidence to speak up or because they feel embarrassed or intimidated. In order to protect their physical and psychological health, many feel the only or best strategy available to them is to leave the workplace and find a new job.

While other forms of harassment or discrimination are recognised in legislation, workplace bullying has tended to be dismissed as part of the normal culture of workplaces and/or human behaviour. However, the detrimental effects are just as significant.[12]

Writers on the topic refer to similarities between workplace bullying and domestic violence. Behaviours exhibited by both bullies and perpetrators of domestic violence include isolating the target from friends, peers and support; making unreasonable

[11] H. Olsen, "Dealing with Workplace Bullying", Address to Queensland Safety Forum 2006, accessed on Workplaces Against Violence in Employment website – www.wave.org.nz.

[12] While workplace bullying is not specifically referred to in New Zealand legislation, the Health and Safety in Employment Act 2002 has defined "hazard" to include "a situation where a person's behaviour may be an actual or potential cause or source of harm to the person or another person".

demands; and using tactics of intimidation, emotional abuse, coercion and threats. In both cases, the perpetrator intends to gain power and control over the target, and both will attempt to minimise their own behaviour and blame the target.[13]

The impact of workplace bullying extends beyond the target to other employees and the organisation as a whole. Workplace bullying contributes to poor productivity and performance, resulting from decreased morale, stress and insecurity. It also impacts negatively on absenteeism and staff turnover.

Workplace bullying mediations tend to fall into one of the following three categories:

- The target has already resigned from his or her position as a result of the bullying and is seeking redress.
- The target intends to resign due to the bullying and is wanting to negotiate an exit package.
- The target is still employed and wishes to remain so, but wants some assurance that he or she will not continue to be exposed to the bullying behaviour.

The mediation may or may not involve the workplace bully. If the alleged bully is the actual employer, then he or she would certainly be present. That may not be the case if he or she is a colleague or manager of the target.

Imbalance of power

Mediation is not universally appropriate to all disputes, and it is arguably not appropriate to workplace bullying, particularly when the alleged bully is the employer or the employer insists on them being present, due to the imbalance of power and the fact that power and its misuse is central to workplace bullying.

Mediation is designed to be an empowering process that gives the parties a direct input into the outcome of their dispute, in contrast to litigation, where the outcome is decided by a third party. However, the dynamics of workplace bullying may not be conducive to constructive problem resolution. Rather than both parties being empowered by the process, a more likely outcome is that the process will reinforce the existing power dynamic.

There is a significant imbalance of power between a workplace bully and his or her target. This power dynamic will be a strong feature of any interactions between the parties, including any mediation process they may participate in.

If we cannot change the external power relationship between the bully and his or her target, it is likely to be played out during the course of the mediation. Rather than the parties recognising the difficult position the mediator is in, they may interpret the mediator not acting to address the power imbalance as tacit approval of it.

[13] A. Needham, *Workplace Bullying: a costly business secret*, Penguin Books (NZ), 2003.

Public interest

Another key issue for consideration is the effect on the public interest of seeking to resolve workplace bullying claims at mediation.

A court decision achieves two purposes – it resolves the issue between the litigants and at the same time "espouses societal norms".[14] It is this second purpose that mediation cannot aspire to. Because of its confidential nature, mediation doesn't contribute to setting community standards of behaviour. Because mediation deals with issues at an individual level, it does not resolve societal issues.

Dealing with workplace bullying issues in mediation prevents increased public awareness about the extent of the problem. It thereby reduces the likelihood of any policy being developed in response. Mediation tends to remove issues from their societal context and deal with them as individual conflicts or issues. It could be argued that, without a larger societal response, workplace bullies will continue to cause havoc in workplaces and traumatise individual targets.

Information is not made available as to what settlements are reached in workplace bullying claims or what behaviour amounts to workplace bullying. If a significant number of workplace bullying claims are resolved at mediation, there is no way of measuring the scale and impact of both the bullying and its direct cost of resolution on workplaces and the community as a whole.

Mayer uses as an example the cumulative result of private settlement of sexual harassment complaints with minor reprimands, apology and "otherwise business as usual". The questions he then poses can equally be asked when the majority of workplace bullying cases are settled in mediation: "Does this in the long run result in the protection of workers [from bullying], or in changing organisational culture? Or does this end up instead in contributing to a climate that allows exploitative relationships to continue…?"[15]

Irvine is of the view that sexual harassment claims are better suited for fact-finding forums because "ultimately we need to draw bright lines delineating acceptable behaviour in the workplace".[16] This view also has some merit in respect of workplace bullying. There ought to be socially accepted, objective standards of behaviour that workplace bullying breaches. If that is the case, then both parties' perceptions of the facts can not be valid, and one or both of the parties may need a determination as to who is "right" and who is "wrong".

It has been suggested that the notion of mediators as neutral or impartial facilitators "no longer holds" when there is domestic violence and abuse and that mediators must take a stand that violence in a relationship is not acceptable.[17] Like domestic violence,

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[14] L. Boulle, *Mediation Principles Process Practice*, Butterworths 1996, p. 60.

[15] B. Mayer, *Beyond Neutrality: Confronting the Crisis in Conflict Resolution*, Jossey-Boss, 2004, p. 161.

[16] M. Irvine, Mediation: Is it Appropriate for Sexual Harassment Grievances?, *Ohio State Journal on Dispute Resolution*, 1993, 9, p. 28, cited in Baylis, fn 37, p 603.

[17] L. Fisher and M. Brandon, *Mediating with Families: Making the Difference*, Prentice Hall, 2002, Appendix 2, p. 229.

workplace bullying destroys the ability of both parties to negotiate equally and fairly. How does a mediator take a stand that workplace bullying is not acceptable without compromising their impartiality?

Is there potential for mediation to reinforce the bullying?

There are some values and assumptions underlying mediation that are worth examining in the context of workplace bullying mediations.

By its nature, mediation requires the parties to engage constructively in an attempt to reach joint decisions. There should ideally be a desire to settle the dispute, some capacity to compromise and a level of honesty. Mediation is most successful where there is value congruence, that is, where the values of mediation are shared by the parties. It is less likely to be successful where those values are not shared by the participants.

A workplace bully may associate the values of mediation with individual weakness, and this could render the process open to manipulation by the bully. While the target may persist with his or her attempts to resolve the issue and find some common ground during the mediation, the bully may see it as "a game to be won – not issues to be discussed, compromised and action jointly agreed".[18]

The informality and "user-friendliness" of mediation is often promoted; however, it could be said that mediation requires more extensive and direct participation from parties than litigation.[19] The direct participation required by mediation is likely to be difficult for a person who has been the target of workplace bullying, as the target's confidence and self-esteem have already been significantly undermined.

Often where there are allegations of workplace bullying, one or both parties need the facts of the past addressed and resolved. The target may require his or her version of what has happened to be recognised and validated in order to move on. While this is not particular to workplace bullying, the nature of workplace bullying may increase the need for it. The target may not have been believed by people that he or she has previously disclosed the bullying to, or the person to whom they've complained may not have recognised the significance and pattern of the "small" incidents. Conversely, the person against whom the bullying allegations have been made may require some determination or recognition that their actions did not amount to bullying or that they were appropriate and justified.

The reality is that mediation is "not well equipped for resolving disputes of fact or arriving at a version of historic reality, unless the parties collaborate to provide it jointly",[20] something that is extremely unlikely with workplace bullying allegations.

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[18] Needham, p. 36.

[19] Boulle, p. 37.

[20] Boulle, p. 37.

Mediation techniques

When we consider some of the techniques used by mediators in order to assist parties to resolve their differences and engage in joint decision-making, a number of issues are highlighted for workplace bullying mediations.

Throughout the mediation, the mediator will "reframe" where appropriate and will endeavour to use language that is neutral and mutual. A mediator may therefore listen to an emotive opening statement where a target describes and names the bullying that they have been subjected to. Obviously, "bullying" would not be a neutral and mutual agenda item. The mediator may therefore be tempted to capture that issue and suggest "relationship" or "communication" as an item for discussion.

From that, the parties are likely to conclude either that the mediator doesn't believe that the bullying has taken place or that the mediator does not believe it is a serious issue. From the target's point of view, the bullying behaviour has been minimised. On the other hand, the bully has been reinforced and further empowered by the mediator's choice of language.

In order for parties to resolve their issues at mediation, they may be encouraged by the mediator to consider the relationship issues and to reflect on their own behaviour and its impact on the other party, particularly if the mediator does not understand the dynamics of workplace bullying. By the time a target reaches mediation, they may have already encountered this approach. One of the major mistakes employers make is to imply that the target is in some way responsible for the situation. They can do this by asking the target whether he or she did anything to provoke the bullying or what they might do to resolve the situation. Any questions of a similar nature from the mediator, no matter how carefully they are framed, may very well have the same effect. Workplace bullying is not a relationship issue or a conflict that both parties have contributed to in some way. It is entirely an issue of inappropriate workplace behaviour by the bully.

A suggested approach

It is important to note that workplace bullying may be falsely or wrongly alleged. It is not within the capability or role of a mediator to determine whether or not workplace bullying has occurred. This means that mediators have to be responsive to the needs of a party who may have been bullied, as well as those of a party who may have been falsely or wrongly accused.

Without a thorough knowledge and understanding of workplace bullying dynamics and behaviours and without thorough preparation in advance of the mediation, there is every chance that the mediator may make things worse for one or both of the parties in what is a highly charged and complex situation.

It would be considered unacceptable for a mediator with nothing other than a scant knowledge and understanding of domestic violence to mediate with parties where there has been a history of violence and abuse. Likewise, a mediator who does not have a thorough understanding of workplace bullying ought not to be mediating where those allegations have been made.

Given that there are specific concerns and issues associated with workplace bullying mediations, it is important to begin from the premise that not all relationships are suitable for mediation and that just because it can be mediated doesn't mean that it should. The first task, as always, is to determine whether or not mediation is a suitable process.

Diagnosis of the conflict and consideration as to whether or not mediation is appropriate is particularly important when there are allegations of workplace bullying. In order to engage in a proper conflict diagnosis, there needs to be a formal intake process or pre-mediation assessment. The main purpose of the assessment is to establish whether or not mediation is appropriate having regard to the particular parties and the particular issues.

Given the nature of workplace bullying, the mediator must also turn his or her mind to the physical and psychological safety of the target. If a mediator cannot ensure the physical and psychological safety of one of the parties, then he or she ought to question the appropriateness of mediation.

It is again important to draw a distinction between mediations where the alleged bully is not present and mediations where the employer is either the alleged bully or insists on them being present. Mediation is less likely to be suitable where the bully is present. Keep in mind that the workplace bullying may be taking place because the organisation either endorses it or turns a blind eye to it. That being the case, the process still presents some risk for the target.

Fisher and Brandon list some indicators to be aware of when making a decision in a family mediation context. They include "the intention of one party to harass another… parties who have major non-negotiable values differences [and the parties'] capacity to negotiate safely on their own behalf".[21] These indicators would appear to hold some relevance to workplace bullying mediations and ought to be considered by a mediator as part of the pre-mediation process. The mediator should also consider the ability of the target to "deal in mediation context" with the bully, having assessed his or her resilience and ability to make decisions.[22]

Mediation is often regarded as being better able to deal with disputes involving ongoing relationships than other more adversarial forms of dispute resolution. While there are some issues and particular considerations regarding mediation of workplace bullying claims, mediation may be more suitable than the alternatives when the target is still employed and wishes to remain so. Provided the bully is not the employer, through mediation, the parties may be able to reach agreements designed to address the bullying, protect the target and provide other forms of redress for the target.

With respect to domestic violence mediations, there are some widely accepted principles that can be applied to workplace bullying mediations as well. If mediation is to be a viable option, it has to be voluntary, and alternative options ought to be available to the

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[21] Fisher and Brandon, p. 60.

[22] Fisher and Brandon, p. 160. This was proposed in respect of domestic violence mediations but it is equally applicable to workplace bullying mediations given the similar dynamic.

parties. Parties ought to be able to consider the process, its constraints and its risks for themselves before consenting.

If a decision has been made to proceed with mediation and the parties are fully informed and consenting, the diagnosis can then focus on what interventions and approaches might be appropriate.

If the alleged bully is going to be present and both parties wish to proceed, the mediator should consider whether the process needs to be varied, given the nature of workplace bullying.

Whilst shuttle mediation is regarded by many as potentially counterproductive, it is sometimes used to protect parties where there is the potential for violence. It may therefore provide an option for proceeding with a workplace bullying mediation where there is a risk that the bullying will continue or be reinforced if the bully and target were to participate in joint sessions.

Mediation for workplace bullying may be rendered more appropriate if the parties are represented by advocates. Advocates ought to be able to assist with the imbalance of power, and they allow the parties to reduce the intensity of their own participation. Advocates can also provide a further check on whether or not mediation is continuing to be appropriate.

For domestic violence mediations, Fisher and Brandon suggest that, if the mediation is to proceed, the mediator ought to stress to the parties that the first session will be exploratory and that the mediator and parties will continue to assess the appropriateness throughout the course of the mediation.[23] This approach should also be considered for workplace bullying mediations. As with domestic violence, in a workplace bullying mediation, that monitoring must include a continual assessment of the power imbalance and the impact it's having on the parties and the process.

This continual monitoring and assessment also allows mediators to consider, develop and implement the most appropriate interventions. That should also extend to the possibility that the mediation will be terminated where it no longer appears to be in the best interests of one or both of the parties to continue.

For a mediator to continue the process of assessment and diagnosis during the mediation, he or she must be able to take note of the "paralanguage", being "those additions to the spoken word which add to meaning of words themselves e.g. tone, inflection, volume, pitch, emphasis, sighs and yawns".[24] While it is expected that mediators are sufficiently skilled and aware to consider this in all mediation contexts, there will be some subtleties associated with workplace bullying that will require a mediator to apply their understanding of the particular dynamics and behaviours. It is also important in a workplace bullying mediation for the mediator to able to read non-verbal communication that indicates anxiety or that may be threatening or intimidating to the other party.

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[23] Fisher and Brandon, p. 233.

[24] Boulle, p. 170.

Provided the mediator has a good understanding of workplace bullying, and he or she has had an opportunity to assess the parties and diagnose the conflict prior to the mediation, they ought to have pulled together a "toolbox" of suitable interventions and approaches. Having prepared in this way, the mediator should feel more able to deal with behaviours that might manifest during the course of the mediation.

It would be concerning if a mediator approached a workplace bullying mediation with a view that the bully can be "transformed" through the process and the relationship can be repaired. Mediation is not counselling. "The focus in mediation is not on personal change."[25] For the bully, any change in behaviour is only likely to come about after a lengthy process of rehabilitation and a breakdown of the denial that often characterises the bully's behaviour.

Conclusion

The issues in respect of mediation and workplace bullying are numerous and complex. It would be a mistake for a mediator to assume that workplace bullying mediations are capable of being approached in the same way as any other employment relationship mediation.

In terms of its dynamic and pathology, workplace bullying has more in common with domestic violence than, for instance, a personal grievance for unjustified dismissal. It is widely accepted that, where there is a history of domestic violence, mediation should only be attempted after careful consideration and after putting in place appropriate safeguards. Likewise, where there are workplace bullying allegations, we must start from the premise that mediation may not be a suitable process for dispute resolution.

If mediation is embarked upon, it should only be after a thorough conflict diagnosis by a mediator with sufficient knowledge, understanding and competency to be able to manage the process. The parties must participate in the mediation voluntarily, having been fully briefed about the process and its constraints, and throughout the course of the mediation, the mediator must remain vigilant to the possibility that the process could be doing more harm than good and be prepared to terminate the mediation if that is the case.

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HANDLING AN EMPLOYMENT RELATIONSHIP GRIEVANCE – ADVICE FOR ADVOCATES

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Introduction

Mediation has been legislatively prescribed as the primary dispute resolution process and is well recognised and accepted by participants and players in the wider employment relations system.[26] As a mediator who has taken a part in mediations now numbering well in to the four figures, I do not claim any particular insight above others into the efficacy of this provision as a whole, but I would be doing myself a disservice if I didn't reflect that I had learned something along the way. The purpose of this paper is to offer advocates some comment, perhaps even advice, on what works well in mediation.

In doing so, my emphasis is on the practical rather than the theoretical. I come from a perspective where I have an advantage over lawyers and advocates in that I see the process unfolding – I see and talk to each party, both in a plenary and caucus environment.

Prior to mediation

The obvious place to start is to focus on what happens before the parties even arrive at mediation. Often, the temperament or climate is set well before the parties actually meet. Ian Gordon has commented on the need for an open mind, getting the facts (even the ones your client doesn't want to reveal!) and the need to get a thorough understanding of your client's needs and interests.[27] Quality work at the front end pays dividends in the mediation process. We are all painfully aware of the advocate who meets his/her client for the first time just prior to the mediation meeting, then miscues and bombs the process, leaving a trail of tears. Smart advocates recognise that, in the end, mediation is essentially a process of sophisticated negotiation. To that end, preparation is essential.

Arriving on the day with a well thought out mediation strategy pays dividends. Such a strategy involves:

- having your client tell the story – they need to be heard, especially on the effects of any dispute on them, and their voice is often more authentic than the best advocate's submissions
- understanding what the other party is likely to raise
- having a good appreciation on how the law informs the matter for both sides
- knowing what your client's needs and interests are (apart from financial) – also having regard to differences between short-term needs and long-term interests

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[26] Section 3(a)(v) Employment Relations Act 2000.

[27] D. Asher, M. Feely and I. Gordon, Handling an employment relationship grievance and coming up trumps, New Zealand Law Society, *Employment Law Conference 30–31 October 2008*, pp. 93–107.

- having a common understanding with your client on the best alternatives to a negotiated agreement (BATNAs), worst alternatives to a negotiated agreement (WATNAs) and the most likely alternatives to a negotiated agreement (MLATNAs)[28]
- having a sound appreciation of costs and benefits
- having an open mind, without losing the plot
- making sure the client understands what to expect from mediation and from the mediator.

On the day

Sophisticated advocates have a number of common features. First, and perhaps most importantly, they treat the other party with respect. The old adage of being tough on the problem and soft on the people is a smart tactic. I will say more about that later. Countless times I've heard lawyers and advocates seemingly showing off in front of their clients only to have their position mortally wounded when they actually hear the other side. Alternatively, even if they have "right" on their side, the mediator goes into caucus with the other party to be met with a comment along the lines of: "I'd rather pay my lawyer thousands than give them a dollar." Treating the other party with disrespect is not a smart move, especially for the less experienced advocates.

Second, having your client tell the story can be a powerful move. Often a mediation would be incomplete, in a process sense, without such an opportunity. Most mediators will ask anyway, but in my opinion, clients should always be encouraged to speak.

Third, be realistic in what is being sought. Within reason, practitioners all know the tariff so it is pointless asking for remedies that are over the odds. Advocates who do so run the risk of disengaging the other party and making it rather difficult for the mediator to repair the process.

Fourth, the Romans had it right – *audi alteram partem* – listen to the other side. Many a mediation comes to grief simply because of a total factual disconnect between the parties. While agreement isn't needed, the sophisticated advocate knows when to acknowledge a point or two made by the other party. If they've done their homework, they may be able to turn it into a positive. If valid points are not acknowledged, advocates run the risk that the other party will feel they are not being listened to and will see little point in continuing. Advocates should be patient, allow time for discussion and not rush to solutions.

At some stage of the process, direct or indirect bargaining takes place. My purpose is not to set out a complete "how to" guide but to offer some tips on what, in my opinion, works well. As I have said, asking for the stars is a sure way to annoy the other side, as is completely rejecting, out-of-hand, any reasonable commencement point. For the purposes of this discussion, I am referring to cases where there is some mutual risk.

Every negotiator wants to win, but in employment mediations, a distinction has to be drawn between the advocate's desire for success and the client's short-term and long-term needs and interests. Mediations are meetings, not trials. Personally, I don't mind questions of clarification being asked of the other party but only on the explicit

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[28] R. Fisher and W. Ury, *Getting to* Yes, Arrow Books, 1988.

understanding that it's not cross-examination and no-one has to answer if they (or their lawyer) would prefer otherwise. Sharing more of the background often helps connect the dots and can lay the groundwork for the following negotiation process. If a party is treating the other with respect, then this phase is likely to be a lot more profitable.

Astute advocates use the plenary sessions as both an opportunity to put their view and understand the other party's perspective. There are often a range of mutual and separate interests, and it is only through this phase of the mediation that they become explicit. In traditional interest-based negotiation, interest is defined as a party's concern or need behind an issue. It expresses why participants care. Interests can be mutual, and the astute advocate is aware of this and can explore them to the best mutual advantage. Perhaps this is more relevant in collective bargaining, but even in personal grievance mediations, there are inevitably mutual interests.

An example may be an under-performing employee, perhaps with health concerns, who is nearing retirement and is the subject of a disciplinary process. The interests of the employee may include:

- reputation – avoiding being dismissed
- confidentiality
- protecting superannuation
- dignity and pride – ending a career with dignity
- getting certainty for the future.

For the other party, the interests may include:

- protecting other employees
- business profit/viability
- reputation – being seen as a good and fair employer
- getting closure.

This example shows there are a number of shared or mutual interests. Experienced practitioners in a mediation setting can quickly isolate and use the shared interests to practical advantage while keeping the overall goal or strategy in mind. I have seen many occasions where the problem cries out for a solution in mediation only to have the whole process thwarted by advocates who simply wreck the process through lack of planning or ability to spot the obvious. Sometimes, ego triumphs over process or the advocate/client have set up a *folie à deux* where credulous client meets convincing advocate to mutual disadvantage.

On these occasions, a disappointed employer leaves the mediation process along with a disappointed employee. In other words, the representatives have bombed the process. Such an outcome would very rarely be the preserve of a sophisticated negotiator who is able to balance interests and outcomes while never letting go of the overall planned strategy.

There will be occasions where direct speaking is called for, and the mediation process is robust enough to accommodate this. Sophisticated advocates have a way of telling people where to go in such a way that they look forward to the trip. Unfortunately, others do not. Advocates should remember that, even if they have something that

needs to be said in a direct manner, the proverbial boot may be on the other foot next time. What goes around comes around. Mediations are not places for show-offs or ego-trippers. Those who think and act otherwise run the risk or the reality that, next time, they may be seeking a favour that simply isn't there. Represent your client by all means – but do business to do business again.

I mentioned earlier about separating people from the problem. In my experience, not doing this is probably the most common error made in mediation, even by experienced advocates. Put simply, sometimes good people do bad things. The astute advocate knows this and can get the point across in a non-attacking manner. Sometimes, this is best done by acknowledging some of the good things the person has done then putting the behaviour or action in the context of the problem. Remember, the mediator is not the jury, the other party is. As one former mediator put it: "The best way to an employer's wallet is not through their nose."

Getting to maybe – dealing with blockages

Finally. I would like to offer some comments on dealing with blockages. Anyone can bluff, bluster or threaten, and that may be a legitimate tactic if you are convinced you're right, but smart negotiators don't give up easily. That's why they succeed. Here are some tips for trying to get through when you know the strategy but obstacles or challenges present themselves.

My first tip is to use the mediator. They have the real advantage of being in each room and being taken into various confidences. Obviously, the mediator will respect the confidentiality of the process, but experienced mediators can give some great advice for moving through or dealing with blockages.

Personally, I like to have parties refocus on their objectives for the day. Often this has the effect of pushing aside the short-term difficulties in the pursuit of a better outcome. Other tactics can include:

- helping the other party find resolution
- running a mile (but not a marathon) in their shoes
- exploring blockages – ask "why?"
- making concessions – give to get
- trying to avoid any loss of face for the other party
- not all solutions are in dollars – what else can go in the mix?
- reconsidering the BATNAs, WATNAs and MLATNAs
- having an exit strategy.

Finally, advocates should remember that history shows the more bitter your enemy, the greater the resistance. In other words, your earlier actions have helped frame this stage of the process so the astute advocate has sown the seeds.

Differences between public and private sectors

In dealing with employment relationship problems in mediation, it is useful to understand some of the differences between the public and private sectors. In the public sector, advocates need to understand the role of central agencies (for example, the Auditor General) and their influence on potential outcomes. All risks are political, and this can drive behaviour. It is often useful to think of more creative solutions, for example, assistance with academic studies. Name, blame and shame tactics don't

normally work past a pretty low threshold, and the public sector's overall risk analysis is different from the private sector. Often in public sector mediations, departments are represented by people who have recommendatory powers only. My advice is to understand the differences and seek to work positively with the representatives although, in my view, it is appropriate to ask what positions they hold and get an understanding of their authorities.

Conclusion

Mediation has been defined 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 to assist the parties to reach an outcome to which each of them can assent".[29] A key point is that it is a decision-making process that produces an outcome the parties can live with – often not the perfect outcome but an outcome nevertheless. Astute advocates get the best out of the process through having an effective strategy, a realistic appraisal of mutual risk, an approach that optimises the chances of success in a personal sense, including using the mediator effectively, and balancing needs and interests of all participants.

Perhaps Kenny Rogers was singing, in *The Gambler*, about mediation when he suggested that:

> You got to know when to hold 'em, know when to fold 'em,
> Know when to walk away and know when to run.
> You never count your money when you're sittin' at the table.
> There'll be time enough for countin' when the dealin's done.

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EMPLOYMENT MEDIATION: OPPORTUNITIES AND OUTCOMES

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Introduction

"So it's just about the money!" I imagine we have all heard this sentiment from advocates, lawyers and employers. This paper explores the basis of this view and whether a wider focus can be more useful to the parties in industrial conflict. Additionally, a new framework for understanding the mediation process based on a philosophy of the Ancient Greeks is introduced.

This paper links practical experience and research in exploring the range of opportunities available to parties in employment mediation and the ways in which they might be empowered to take advantage of them to create optimal outcomes.

Whilst, as mediators, we operate within a statutory framework with specified outcomes, there are still great opportunities to explore unique and creative solutions for the benefit of the parties. Ongoing relationships, collective bargaining, high conflict situations, emotional tensions, multi-party involvement, presence of advocates and support people, breakdown of relationships, special areas of interest (such as voluntary agencies and churches), intra- and cross-cultural conflict – all have multi-skills requirements. This paper's focus is on the mediator/party interaction in identifying individuals' needs and interests and how these may be meshed.

Being able to put names to what we do and why is always helpful in understanding best practice. An early Greek philosophy[30] is useful in this regard. Its steps are:

- **Ethos** – character, trustworthiness, credibility
- **Pathos** – empathy, emotions, relationships
- **Logos** – the logical rational outcome.

I find these elements and their natural sequence make sense when:

- reflecting on practice and preparation for mediation
- applied in mediation
- explaining the stages in the process to parties (for example, why I am taking the time to focus on emotions rather than "cutting to the chase")
- a philosophy the parties may find useful in their work and lives.

Ethos: application in practice

There are many papers and articles on what it takes to be a mediator. I have heard it described as "… one doesn't have to be a *good* person [i.e. saintly] but one has to be *good enough*". Given that the primary role of a mediator is to make the process safe, it follows that the mediator has to be a safe person. This, to me, includes aspirations such as humility (to be guided by principles and ethics and to understand the extent of one's own competencies), to suspend judgement and to accept that the parties need to take their own time to find their own unique solution, to conduct a process that meets the

[30] From a tear-off calendar 'The 7 Habits of Highly Effective People' for 22 May 2008.

parties' needs (as "pure" as possible but not necessarily adhering to a particular form), to be constantly looking for self-improvement and to be willing to accept new ideas from any source.

Back to basics

Some years ago, I asked a senior experienced lawyer what, in her view, made the difference in mediator skills in intractable cases. Her reply: "It is the amount of positive energy that the mediator brings into the room."

A more recent comment based on the views of experienced mediators shows that the basics of listening, humility, trustworthiness, patience and hope[31] remain the essentials for best practice.

What do parties want from mediation?

Case study: It's not necessarily just about the money

A man had been injured in a work-related accident. At the time, he had been working night shifts, which attracted a penal rate of pay. On his recovery, he returned to work but on day shifts. The employer got him back on nights fairly quickly, but at the time of mediation, there was a claim for back pay of about $400 for wages he might have earned had he returned straight to night shifts. The worker wanted the cash. The employer could not compromise on the principle that it was his right to allocate workers to different shifts and a pay-out would have major precedent impact, but he also didn't like the idea of a valued employee remaining bitter and disgruntled.

In discussion at mediation, the worker talked of the pain he had suffered and how difficult it had been to be at home unable to do much more than sit on the couch for some weeks while his wife was in the last stages of pregnancy. How many children? They had three under the age of five. What was life like for the two of them during this time? He went very quiet for a while and then acknowledged that life had been, and still was, tough. Would an EAP[32] counselling programme help? In the end, the employer was glad to pay for counselling sessions for the couple (up to the value of about $1,000). The worker could go home to his wife having achieved a real benefit that addressed his real needs, and the employer came out smelling of roses.

In a 1996 paper, Virginia Phillips discussed what "justice" means from the disputant's point of view. Reviewing the literature to that date, she found that justice means both satisfaction and fairness. Each element is composed of three related components: a procedural component relating to the process, a distributive component relating to the outcome, and an evaluation of the neutrality of the mediator (or judge) by the parties.[33]

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[31] For a full development of these concepts, see Julian Portilla, What Exists is Possible: Stories from Conflict Resolution Professionals, *Conflict Resolution Quarterly*, Vol.24, No 2, Winter 2006, pp. 241–248.

[32] Employee Assistance Programme – a confidential resource paid for by the employer to help employees through various life crises.

[33] V. Phillips, Mediation: The influence of style and gender on disputants' perceptions of justice, *New Zealand Journal of Industrial Relations*, Vol. 21, No. 3, 1996, pp. 297–311. See also Bernadine Van Gramberg, ADR and workplace justice: Just settlement?, *Australasian Journal of. Dispute Resolution,* Vol. 14, No. 3, 2003, p. 233.

My own experience in discussing with disputants what they mean by "wanting justice" is that they express the desire for an outcome that is satisfactory to them. "Satisfaction", however, is a feeling.

What is satisfactory will vary with individuals, some of whom may not be able to articulate their needs. Discerning these needs and helping achieve unique outcomes that may or may not involve money is one of the aims of mediation.

Case study: Creative solutions

An employee left a pig farm for redundancy reasons but claimed the process was unfair. One of her senses of loss was being unable to work with the animals. The agreement achieved through mediation included the provision to her of "one healthy weaner piglet".

Note also the increasing scale of satisfaction from results: settlement – usually where an answer is virtually imposed if only by external imperatives; agreement – where the parties agree to disagree and get a "fix"; and resolution – where the relationship is restored and all outstanding issues are laid to rest.

What do lawyers and advocates want from mediation?

As long ago as the 1980s, Riskin and Westbrook[34] were writing about the "map references" that lawyers have for dispute resolution: to identify a relevant rule of law, find provable facts that apply, and winning and losing measured in money. These, they pointed out, had little in common with mediation whereby the law is relevant only to the extent that the parties agree (subject to lawfulness and ethical considerations) – winning or losing can be damaging to each side in achieving dignity for both, and the intent is to find solutions that mesh mutual needs and interests.

There are many lawyers and lay advocates who display great skill and common sense in helping their clients through conflict but also some who do not understand or pay attention to their client's psychological needs. Some do not necessarily distinguish their own needs (i.e. to feel they have got the best deal possible for their client) from the needs of their client (which may be to get a reasonable deal with dignity for both sides and to move on). Unfortunately, much third-party negotiation, including in mediation, can be conducted in a manner calculated to be anything but open-hearted.[35]

There are positive aspects to the role of advocates in mediation. Certainly, lawyers helping parties achieve results they could not get on their own is valuable indeed. However, some make mistakes until they fully understand the process that requires basically respect – for the process and respect for the other party. The best advocates have sensitivity to the process that can be of enormous help to the process, the mediator and their client.

[34] See Leonard L. Riskin and James E. Westbrook, *Dispute Resolution and Lawyers*, West Group, 1988 (part of the American Casebook Series).

[35] See for example Elizabeth Ellen Gordon, Attorneys' Negotiation Strategies in Mediation: Business as Usual?, *Mediation Quarterly*, Vol. 17, No. 4, Summer 2000; and John Wade, Mapping the Deceptive Dance of Hard Bargainers: What are the possible roles of mediators when supervising the dances of deception, delusion, and decision-making? *Bond Dispute Resolution* News, Vol. 19, May 2005.

Pathos: what emotional needs do parties want to resolve at mediation?

Asking parties, "What do you want to achieve?" gives the opportunity for expression of needs and feelings – the relevance and importance of pathos (relating to empathy, emotions and relationships) in mediation. Responses to this question will typically include altruistic as well as self-serving motives: "I want my good name restored", "I want to make sure what happened to me doesn't happen to anyone else", "I don't want to be blamed for the pain I am feeling", "I want it to be over" and "I just want what I am entitled to". Money may well be important, but in context, it is not always the first thing on top.

Money may also be a substitute for a variety of needs and be used as a metaphor for pain. Such needs are subjective. They may bear little relationship to a cost and risk analysis of litigation outcomes, which may be the focus of the other party. One technique is therefore to "unpack" the underlying emotional and other needs of the parties and find ways to address them more directly.[36]

In attempting to categorise the emotional needs parties want resolved at mediation, I am indebted to Professor Mitchell Hammer of American University for his acronym "SAFE":

- S – substance
- A – affiliation or attunement
- F – face
- E – emotions.

ASPIRE

In discussion with Ian Macduff,[37] we preferred "ASPIRE" as an acronym for parties' needs and motivations at mediation:

- **A stands for altruism:** This refers to those people who want to make sure that what happened to them does not happen to anyone else. They may also not want any innocent bystander to suffer from their recovery action (such as former workmates who would lose their jobs if the business went under as a result), or their altruism may simply be an expression of generosity of spirit.
- **S stands for spiritual values:** Those who wish to start with prayer (generally tangata whenua or first peoples) or those concerned for their relationship with God as a result of the way they interact with this fellow human being. Apologies and forgiveness arguably have their spiritual place in human concerns.
- **P stands for personal factors:** Be it saving face, mana[38] or simple human dignity.
- **I stands for instrumentality:** The costs and risks of litigation.
- **R stands for relationships:** Restoration of relationships is especially important in small communities.

[36] For a more systematic approach see J. Wade, Crossing the Last Gap: Why it is Important, *Australasian Dispute Resolution Journal*, Vol. 6, No. 2, 1994, pp. 92–112.

[37] Practice Associate Professor of Law, Singapore Management University.

[38] The status and respect that a Māori is given by the tribe, which, in employment, can be damaged by, for example, an unfair dismissal.

- **E stands for emotions:** Where a relationship has been or remains important, people who believe they have been the subject of traumatic events often seek an apology. A meaningless apology can do more harm than good, so unpacking the elements of a sincere apology is essential.

The following is based on the work I have heard described of Reverend Marie Fortune of the United States who practises mainly in the area of sexual abuse by priests of all denominations. I also acknowledge the work of Rhonda Pritchard and Gordon Hewitt, both of Wellington, New Zealand.

These writers observe that, in many cases, the person feeling the most emotion will be the survivor. The perpetrator may have forgotten the matter, be in denial or have minimised the event in their memory. I suggest the greatest gift that a perpetrator can give a survivor is to be worthy of forgiveness. An apology can go a long way to that end.

On apologies

- Regret is only saying you are sorry that they are feeling bad.
- Remorse is merely "I am sorry I was caught".
- Repentance takes responsibility and makes no excuses.
- Restitution to the position previously held.
- Supererogation or "going the second mile" to demonstrate the lesson is learned and that behaviour will change.
- Revenge or retribution can lead to inverting the abuser/survivor dynamic.
- The apology must be offered without conditions (such as a requirement for acceptance) and be genuinely felt. It needs to be from the heart. This is hard to fake in the intimacy of mediation.
- Freely given acceptance can lead to reconciliation and redemption.

A suggestion for a compromise between "I'm sorry you are feeling bad" and "*Mea maxima culpa*" is along the lines of: "The employer acknowledges with hindsight that some of the circumstances leading up to the [event causing the personal grievance] could have been handled differently, and that this caused unnecessary distress that was not intended, and expresses its apologies that this occurred." It is interesting how often some focus on emotional outcomes will enable financial outcomes to fall into realistic ranges without having to carry unnecessary baggage.

Case study: Saying and meaning sorry

A young man came to mediation the day before a criminal court appearance for theft as a servant to which he planned to plead guilty. His union represented him and wanted his employer to acknowledge that it had not followed proper procedure in its internal investigation, in order that the same issues wouldn't arise for other union member employees in the future. About a thousand dollars would cover the point. The company wasn't prepared to reward someone for stealing from them, although it was ready to apologise for its investigation. It also didn't want to have to go through litigation. When asked what he wanted to achieve, the young man asked for the opportunity to apologise to his workmates who had helped him in the past and who he felt he had betrayed.

Outcomes in co-worker conflict

I focus on this aspect of employment mediation because this is some of the most challenging and exciting work we do, despite – or because of – the fact many such cases traditionally result in exit packages. Mediation will normally not occur until a point of crisis in a co-worker conflict. That is understandable; it is human for people to either not notice or avoid "raising the issue" in the hope that the problem will sort itself out. The conflict will often be based on issues such as miscommunication or psychological factors, and unique creative outcomes will be required.

In my experience, factors to consider in co-worker conflict cases include the following:

- In a harassment case, should the alleged perpetrator be present at all? If so, should they be in the same room as the complainant? How will the room be set up? What prior discussions around safety should be held? Should it be co-mediated with both a man and a woman mediator?
  Should the employer be present if not a direct party? (They can note the case and be prepared if repetition occurs. They also control the purse strings if counselling, training or even structural steps need to be taken.) Role boundaries and confidentiality issues need to be clarified at commencement.
  Room set-up featuring chairs in a circle rather than formal tables can helpfully facilitate more "heart to heart" communication.
  Teaching the parties basic communication skills can be very helpful, such as clarifying understanding and using "I" statements rather then "you" statements. The process of "encode, transmit and decode"[39] together with attribution error (explored later) are common causes of dysfunctional relationships. Reflecting these problems back to the parties can be a very effective strategy to finding long-term and positive outcomes.
- More sophisticated skills can include having the parties view their own behaviour from the third-party point of view. Having them physically swap places can be significant in that even the play of light on another's face can bring new insights (see the case study below).
- One successful opportunity used in a number of cases is to refer both parties on for Myers Briggs or TMI analysis. This can lead to self-insight as to one's own behaviours that can be modified and also a readiness to cut the other some slack if the parties can recognise that the behaviours they are experiencing are not malicious.

Mediations involving co-worker conflict may require several sessions or at least a follow-up mediation session booked as a review date.

Case study: Co-worker conflict

A new school principal was experiencing co-worker conflict with the full-time secretary. The principal was an enthusiast – she wanted things done differently and would intervene if the counter was (allegedly) unattended. The secretary became very glum, wouldn't speak to the principal in the mornings and raised a personal grievance with her employer, the board of trustees (comprised of voluntary elected parents.) The board

[39] J. Edelman and M.B. Crain, *The Tao of Negotiation: How you can prevent, resolve and transcend conflict in work and everyday life*, Harper Business, New York, 1993, pp 62–63.

valued both women, but also wanted the conflict resolved as it was affecting the whole school community.

The opening statements of the mediation highlighted the practical issues. The secretary had not been enabled to understand the advantages the principal had introduced to the staff and school generally. The board came to understand that the physical office set-up meant that the secretary had her back to the counter and couldn't attend it easily. The board undertook to hire an architect and get that structural change underway.

Impasse remained between the staff, however. The mediator asked them to swap places and then, from their new viewpoint, to write a list of things they could do to make life easier for the other. On returning to their original seats, they were asked to write another list – this time of what they might need from the other. When the lists were compared, they were almost the same. They included undertakings such as "I could smile" from the secretary and "I can spend more time explaining the big picture" from the principal.

Communication and linguistics

Whilst the theory and practice of communication is not new, its importance in being both the source of much conflict and the logical means of resolving the same are becoming more recognised.

The basic concepts of "encode" (formulating words that you think will be understood by the recipient), "transmit" (the means of communication) and "decode" (what the recipient makes of the message) are clear enough. The same is true for "attribution error", in which a person assumes a meaning based on their own life experience, which varies from that intended by the speaker, resulting in miscommunication.

Recognition of the importance of metaphor is another issue. Metaphor is a useful strategy to enable communication through shared experiences, but it is also one in which it is easy to make mistakes. For example, men often use metaphors that draw on war, sport and sex, all of which may be of little relevance, or even high offence, to some women. The conscious use of universal metaphors related to journeying, geographical features, mazes and prisms of light have a greater chance of successful comprehension.[40]

For example, if a mediator uses the term "ground rules" in opening, then they have to play the role of monitor and school teacher in enforcement. If the phrase used is "basic agreements", then the parties take that responsibility themselves. In the event of breach, the mediator can take the moral high ground: "You agreed previously to [not interrupt in opening statements] – do we need to revisit that agreement?" Ultimately, we have no enforcement authority save to stop the mediation.

[40] Dale Bagshaw, Language, power and mediation. *Australasian Dispute Resolution Journal*, Vol. 14, No. 2, May 2003, p. 130.

Logos: logic and rationality

Logos to the Ancient Greeks related to the sphere of logic and rationality. This is one element that lawyers, accountants and human resources advisors are skilled at – the logical, rational costs and risks analysis of potential court proceedings as an intervention technique – though I suggest the concept of logos has a more holistic dimension.

Case study: Addressing emotions

Two men had come to mediation over the allegation that one had been unfairly fired. The response was that the employee had hit the boss. The matter had gone to the criminal courts on a charge of assault but had been dismissed for lack of corroboration. All this had lasted over a year.

Meanwhile, the two men's sons had played in the same football team, and the fathers had had to stand on opposite sides of the playing field for the whole season. After the lawyers had talked for the parties for some time, it was clear that there was impasse. It was also clear that the parties' body language was of pain and of reaching out to each other. It was agreed that they would speak to the mediator alone.

As soon as they sat down, the employee leaned across the table and said, "I know my lawyer is claiming $7,000 but, you know, I would accept $1,000." The boss stood and spoke for several minutes in a manner that was inarticulate, but from the heart. His message was that: "I'm hurting here, too, and $1,000 is still too much." He then sat down. What to do?

What about treating the end of the employment as one where you both agreed to end it without allocation of fault? The employee looked up. "You know," he said, "I would have accepted two weeks' notice – what about that?" He was a part-timer, so this represented about $400. The employer got up, walked around the table and held out his hand. Then, as one, the two men put their arms around each other and wept on each other's shoulders. As they left, they were heard promising to share a meal together.

The textbooks contain considerable lists of interventions appropriate for different cases. These include the obvious skills of clarifying, reframing, unpacking underlying issues, keeping the parties focused and so on. Professor John Wade of Bond University lists a repertoire of some 44 interventions,[41] but highlights the absence of research on their effectiveness.

Associate Professor Lim Lan Yuam of the National University of Singapore offers some nine useful interventions.[42] He emphasises the importance of power-balancing and empowerment of the parties so that responsibility for the solution does not move to the mediator, i.e. away from the parties who have to live with the consequences.

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[41] J. Wade, Strategic interventions used by mediators, facilitators and conciliators, *Australasian Dispute Resolution Journal*, November Vol. 6, No. 4, 1994, pp. 292–304.

[42] Lim Lan Yuam, An analysis of intervention techniques in mediation, *Australasian Dispute Resolution Journal*, Vol. 9, No. 3, August 1998, pp. 196–205.

As discussed above in relation to pathos, there is a developing interest in addressing emotions as a major factor in helping people both overcome barriers and achieve lasting resolution. See, for example, Erin Ryan[43] and the books she reviews for an interesting typology of the ways in which emotions impact in mediation. Particular skills for mediators are therefore in empathy, discernment of emotional messages and self-awareness of one's own emotional reaction to issues as they arise.

"Pure" and "evaluative" mediation

Much of the criticism of mediators, especially by lawyers, is that some mediators, in following a "pure" mediation process, appear to sit back and do little to advance a solution. This leads to the tension between such mediators who avoid any comment on the substance of the case and those who offer an "evaluative" view on what might happen. The debate has been around for at least 20 years, and those who follow the mediate.com e-newsletter will know it still attracts hot discussion.

This leads to the variety of impasse-breaking techniques. If all other interventions do not work, then should one discuss the substantive issues? I suggest there is a subtle role boundary to be drawn. I myself will not evaluate. Advice is the advocate's responsibility.

I will analyse a case, however – if asked for a comment – on the basis that this is valuable information the parties need to enable them to make a wise decision. For example: "The onus of proof in constructive dismissal is on the employee, and the threshold to justify a departure is quite high; these are the sort of issues you and your advocate will need to discuss. If s/he thinks you have a 40 or 80 percent chance on the particular point, then it is only sensible to factor that into your bargaining position."

I also make a point of discussing litigation costs compared with likely outcome. Equally, if people are stuck and have no way of moving forward, I will ask them if they would like a smorgasbord of ideas from which they might choose based on my knowledge of what has worked for others in the past.

Use of humour

Laughter is often the best ice-breaker, but used inappropriately, it can backfire. At its best, it will help carry parties past impasse, and at its worst, they will feel they and their issues are demeaned. The ethics of the extent to which mediators should go to help people past stuck places – because manipulation would be an abuse of the process – are important in this context.

On a related point, and for a useful and challenging discussion, see Robert D. Benjamin's 'The Mediator as Trickster'.[44] Benjamin argues that the traditional professional models of law, medicine and mental health are not well suited to the purposes and practice of mediation because they are "… fundamentally anchored in a technical-rational conceptual orientation that encourages the professional to be an expert". He further asserts that: "The [folkloric] trickster figure, like the mediator,

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[43] Erin Ryan, Building the Emotionally Learned Negotiator, *Negotiation Journal*, April 2006, p. 209.

[44] Robert D. Benjamin, The Mediator as Trickster: The Folkloric Figure as Professional Role Model, *Mediation Quarterly*, Vol.13, No. 2, 1996, pp. 131–149.

demonstrates the effective integration of both the analytical skill and the intuitive sensibilities necessary to be effective in the management of conflict."

Benjamin argues for treating people and their problems holistically rather than mechanically. Note that he draws a clear distinction between mediator expertise and the mediator as expert (in the particular field). The latter may well lead to advice-giving, which he argues is the prerogative of a lawyer or advocate and, if conducted by the mediator, is a form of arbitration.

The stories we tell

Little anecdotes or one-liners can be useful impasse breakers – these quotations are either well known, from well known authors or New Zealand colleagues or invented:

- May you be involved in litigation in which you know you are right. (Old Arabian curse)
- You can't eat principles. (Tauilili Paul Stowers quoting his Samoan grandmother)
- All conflict is but different perspectives illuminating the same truth. (Ghandi, whose words were directed to war but apply equally to conflict)
- If you look at an egg end on it is clearly round; and from the side it is oval. For a chicken, it is at least the start of life if not the meaning to it, and for the judge, it is what he/she had for breakfast – scrambled.
- What is truer than the truth? The story of the truth. (Isabelle Allende)
- The game at litigation is not what is the truth, but what can you prove to be the truth.
- You can't catch flies with vinegar. (Honourable Michael Moohan, MP for Petone, 1946–1967)
- When there is a straight conflict of credibility with no supporting evidence either way, then the decision-maker has only six options – you are lying, the other side is lying or you are both lying. Those are unlikely findings. The other three options are that you are mistaken, the other is mistaken or you are both mistaken. The decision-maker is left with knowledge of how selective memory can affect perceptions or a "gut feeling" on which to make a decision. You have the option of having a fallible human being making that choice for you, or finding a solution here today you can both live with.
- All conflict settles eventually – it normally doesn't take more than seven generations.
- Every collective settles in time. The longest I have had took 12 years, and I certainly don't expect this one to take that long. (Walter Grills)
- There is no use spinning the wheel if the hamster's dead. (When the trust in the relationship is gone)
- He who seeks revenge should dig two graves. (Old Chinese proverb)
- Always forgive your enemies. Nothing annoys them more. (Oscar Wilde)
- Apologies are priceless but principles are costly. (Pat Weeks)

Conclusion

It is quite common in complex cases for a settlement to cover 14 or 15 points of which only one or two deal with money. Each issue could justify a paragraph. For instance, it may be useful to ask the employee to write their own reference. They usually are conservative about their performance and will remember career highlights that the employer may have forgotten. Usually a reference is backed up with an undertaking to speak in reply to any enquiries only in terms consistent with the reference. This addresses the fear that the employee will be bad-mouthed behind their back. Note how wording will overlap with emotions – often an employee will want to feel valued for their contribution.

21 summary points for mediators

1. The first rule of mediation is to trust the process.
2. The process is your business, not the substance.
3. Keep the process and the parties safe.
4. If the parties can talk from the heart, they will get the most satisfaction.
5. The purpose of mediation is not to get a solution – it is to focus on the issues so the parties can come to an agreement if they wish.
6. Help them look for the best – not just the first – solution.
7. Be open to the possibilities.
8. The art of mediation is compromise.
9. It's all about empowerment – for the parties.
10. The idea is to mesh mutual needs and interests, not "win/win".
11. Information giving is not advising – analyse but don't evaluate.
12. Role boundaries are important.
13. The moment when people change their minds and make a breakthrough is magic.
14. Ethos, pathos and logos.
15. ASPIRE.
16. It's as much about psychology as it is the law.
17. Humour can make a positive difference.
18. Outcomes are often about pragmatics in preference to principles.
19. Communication theory is worth study.
20. Careful use of words makes a difference.
21. It's a privilege to be invited to help people solve problems.

Whakatauki

It is traditional in Māori society to finish with a proverb to "add relish to the meat":

> Nā tō rourou, nā taku rourou
> ka ora ai te iwi.
> With your food basket and my food basket
> the people will thrive.

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MEDIATION AND COLLECTIVE BARGAINING IN NEW ZEALAND

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Introduction

Collective bargaining disputes present special challenges for mediators. There are a number of parties at the table – union and employer advocates, employees and management – and other parties who aren't present, such as the employees affected by the bargaining, chief executives and boards of management and sometimes government ministers. Mediators have to deal with a web of different needs and interests. Parties usually come to mediation after they have reached an impasse. Invariably, the issues between the parties are very difficult. There are big stakes in some disputes, for example, where a national strike is looming in public hospitals. Tensions are often high and relationships fraught. Thought must be given to repairing relationships after disputes have been settled.

Although there are a number of process requirements under New Zealand's employment law, collective bargaining is essentially voluntary. Disputes can only be resolved by negotiation. Mediation is the main form of assistance provided by the state. Collective bargaining mediation has a long history in New Zealand. In 1909, the first conciliation commissioners took office. Although titles and functions have changed, the state has employed people to mediate in collective bargaining since then.

Drawing on our experience in the field, our paper covers three main areas:

- The historical context and its relevance today.
- The special challenges of collective bargaining mediation in comparison with other forms of workplace mediation.
- The key attributes and interventions that mediators bring to collective bargaining disputes.

Historical context

For nearly 100 years, New Zealand had a highly regulated system of industrial relations. This was introduced by the Industrial Conciliation and Arbitration (IC&A) Act 1894. Although the arbitration system applied mainly to the private sector, employment relations in the public sector were also highly regulated. The Arbitration Court presided over the system and had the power to make binding awards setting wages and conditions.

Towards the end of the 1900s, the arbitration system faced mounting criticism from employers and unions. There was a rash of strikes, and militant unionists formed the radical "Red" Federation of Labour. One of the problems was that conciliation had become ineffectual in resolving collective bargaining disputes. Unions and employers took disputes straight to the Arbitration Court, which was swamped with work. The long delays in getting to the court exacerbated the problem.

In 1908, the Liberal government passed a major amendment to the IC&A Act that, among other things, established conciliation councils (made up of union and employer representatives) as a forum for collective bargaining. The councils were chaired by conciliation commissioners. These independent government-appointed officials were the forerunners of today's employment mediators.

Three conciliation commissioners were appointed in early 1909 at a salary of £500 a year. The appointments of Patrick Hally (the chief Labour Department inspector in Dunedin and a former unionist) and James Triggs (the chair of the Canterbury conciliation board and a former businessman) were welcomed by employers and unions. The appointment of the third commissioner, Thomas Harle Giles (the principal of a commercial college), was met with suspicion and some hostility as he had no background in employment relations but was secretary of the Auckland Branch of the Liberal and Labour Federation. Auckland unions initially tried to bypass him, but once he started work, their hostility evaporated.[45]

In the short term, the 1908 changes were successful in encouraging parties to resolve disputes by agreement and in relieving the delays in getting to the court. In the long term, the changes established conciliation as the main form of dispute resolution in collective bargaining. While the Arbitration Court issued general wage orders and set wage relativities, most settlements were reached in conciliation. Writing in 1960, Sir Arthur Tyndall, the longest-serving judge of the Arbitration Court, emphasised the importance of conciliation in the New Zealand system: "An analysis of the total of 2,000 awards made during the last 13 years shows that 75 per cent represent complete settlements by the parties. In addition, during the same period, 1,005 industrial agreements were made; so that out of 3,005 enforceable documents, only in 486 did the court have a direct hand in settling some of the terms."[46]

New Zealand's industrial conciliation and arbitration system lasted from 1894 to 1991. There were major changes to the system during that time. For example, a conservative government undermined it by introducing voluntary arbitration at the height of the Great Depression. In contrast, the first Labour government (1935–1949) created a highly centralised wage-fixing system based on compulsory unionism and general wage orders issued by the court. By the mid-1960s, large cracks appeared in the system as a result of union frustration with the conservatism of the court and the growth of enterprise bargaining. The 1970s and 1980s were a see-saw of wage controls, confrontations and compromises between unions, employers and governments against a backdrop of growing economic instability with rising inflation and unemployment. Voluntary arbitration was reintroduced in 1984, and the court became increasingly irrelevant in wage fixing.

Conciliation councils were one part of the system that did not change greatly. They continued to operate successfully, and as a 1981 thesis noted, "…the principles underlying the 1908 Act still form the basis for the present system of settling industrial

[45] *The New Zealand Gazette*, January 28 1909, p. 203; *Evening* Post, 14 January 1909; *Otago Witness*, 20 January 1909; *NZ Free Lance*, 13 March 1909; James Holt, *Compulsory Arbitration in New Zealand, The First Forty Years*, Auckland University Press, Auckland, 1986, p. 86 and p. 95.

[46] Sir Arthur Tyndall, The New Zealand System of Industrial Conciliation and Arbitration, reprinted from the *International Labour Review*, August 1960, Government Printer, Wellington, 1960, p. 9.

disputes".[47] Conciliation commissioners – or conciliators as they were later known – played a central role in a highly institutionalised system. To initiate collective bargaining, a union had to create a dispute of interest with employers. The dispute was heard by a conciliation council made up of representatives of the union and employers and chaired by the conciliator. Collective bargaining took place within the council. The conciliator worked with the parties to encourage a settlement, kept the formal record of the negotiations and wrote up the terms of settlement. Conciliators were therefore involved throughout the bargaining. Their diaries were arranged so that they chaired a succession of conciliation councils for different industries and occupations throughout the year. The trend-setting negotiations at the start of a wage round might take several days or weeks, but most conciliation councils reached agreement in one to three days.

In 1970, an industrial mediation service was introduced, modelled on the United States Federal Mediation and Conciliation Service, in part in response to the high number of strikes. This was separate from the conciliation service, and mediators were meant to focus on rights disputes and personal grievances, not collective bargaining. In practice, there was a lot of overlap, and the two services were merged into a new mediation service in 1987. A distinct feature of the New Zealand system was that mediators often arbitrated. As one study put it: "When conciliators and mediators mediate, when the Conciliation and Mediation Services and the Arbitration Court arbitrate, even the matter of nomenclature can be a semantic nightmare. In theory, the distinction between mediation and arbitration is obvious. In practice, one form of intervention shades imperceptibly into the next."[48]

In 1991, the arbitration system was swept away by the Employment Contracts Act (ECA), which was passed by the newly elected National Government. It resulted in a move overnight from a highly centralised system of bargaining based on unions to a completely decentralised system designed to reduce the effectiveness of unions. Under the arbitration system, national collective agreements for industries or occupations were the norm, especially in the private sector. Under the ECA, individual contracts were prevalent and enterprise agreements were the main type of collective contract. In contrast to the radical changes it made to collective bargaining, the ECA continued employees' rights to take personal grievances. These rights were extended to all employees and not just union members.

There was also a major change in the dispute resolution institutions. While the Employment Court (the successor to the Arbitration Court) continued, an Employment Tribunal (comprised in any particular case of one member) replaced the mediation service. The tribunal provided both mediation and arbitration, although there was a much clearer distinction between the two. The "med/arb" of the former system became infrequent. Occasionally, tribunal members mediated in collective bargaining disputes, but most of their work was on personal grievances and rights disputes. The expansion of personal grievance rights and the reduced role for unions led to an explosion in the number of cases. A large backlog developed. By 1999, waiting times were around three

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[47] Grant Watson, *Something more than a civil offence: Illegal strikes in New Zealand, 1906-08*, MA Thesis, University of Auckland, 1981, p. 177.

[48] John M. Howells and Susan H. Cathro, *Mediation in New Zealand: The attitudes of the mediated*, The Dunmore Press, Palmerston North, 1986, p. 24.

months for mediation and six months for arbitration in the main centres and 8–16 months for mediation and 11–22 months for arbitration in the regions.[49]

One of the first moves by the Labour Government elected in November 1999 was to repeal the ECA and replace it with the Employment Relations Act (ERA). The key aim of the ECA was "to promote an efficient labour market". In contrast, the main object of the ERA is "to build productive employment relationships through the promotion of mutual trust and confidence in all aspects of the employment environment and of the employment relationship". Good faith principles are the main thread that runs through the Act.

The court continued, but the Employment Tribunal was replaced by a new mediation service, run by the Department of Labour, and an Employment Relations Authority to arbitrate on personal grievances and rights disputes. This separation strengthened the distinction between the functions of mediation and arbitration. One of the Act's objects is to promote mediation "as the primary problem-solving mechanism" and reduce the need for judicial intervention. In an often repeated phrase, Margaret Wilson, the Minister of Labour who introduced the ERA, said that mediation services would be "free, fast and fair".[50]

There have been radical changes in New Zealand's economy, employment relations and legislative framework over the last 20 years. However, this short historical overview shows continuity in important areas. First, mediation under different names has been the predominant form of state intervention in collective bargaining disputes for almost 100 years. Second, at times of industrial strife (1970) and too much legalism (1909 and 1999), governments have recognised that mediation is a much more effective dispute resolution mechanism than arbitration. Third, mediation has been supported by unions and employers, if not always by the lawyers.[51] Fourth, state-employed mediators have the benefit of a long institutional memory of collective bargaining mediation.

Collective bargaining mediation in comparison with other forms of workplace mediation

Personal grievances are the majority of disputes handled by Department of Labour mediators. They are also involved in helping to resolve conflicts in ongoing employment relationships, including collective bargaining disputes between unions and employers, and in promoting best practice in employment relationships.

There are several important differences between collective bargaining mediation and other forms of workplace mediation. These present special challenges for mediators.

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[49] *1999 Briefing to Ministers*, Department of Labour, Wellington 1999, p. 154.

[50] Hon. Margaret Wilson, 'Free, fast and fair – a new Mediation Service for New Zealand businesses and employees', media release, 13 July 2000.

[51] In its report on submissions on the Employment Relations Bill in 2000, the Department of Labour said: "A large number of submissions supported mediation as a means of providing effective low level dispute resolution, as it will be less legalistic and more accessible." *Employment Relations Bill, Report of the Department of Labour to the Employment and Accident Insurance Legislation Select Committee*, Department of Labour, Wellington, June 2000, p. 146.

Future focus

Personal grievance mediations usually focus on the past, the end of employment relationships and the legal rights of the parties.

Collective bargaining mediation is not just about the negotiation of wages and conditions for union members. It is also about ongoing relationships. These usually include the relationship between the employer and its staff, the relationship between the employer and the union, the relationship between the union and its members and personal relationships between the individuals concerned – the advocates and the bargaining teams.

Confidentiality

The general rule under the ERA is that mediations are confidential and without prejudice.

Collective bargaining mediations are not confidential as such. Private sessions between the mediator and individual parties are confidential, and the parties may agree to hold without prejudice discussions during the mediation. The parties may also have to agree on how to deal with sensitive commercial or personal information.

Time commitment

Personal grievance mediations often take half a day and usually take no more than a day.

Mediations about collective bargaining can take weeks and, in extreme cases, months before the parties reach a settlement. Negotiations affecting large numbers of workers and high profile disputes require a big time commitment on the part of the mediator.

Parties

There are usually only two parties to grievance and rights mediations, and a small number of individuals take part.

There are a number of parties in collective bargaining mediations, particularly those concerning multi-employer agreements. A large number of individuals can be involved. Mediators have to deal with a web of different needs and interests.

On the union side, those in the room include paid officials (an advocate and sometimes others) and workplace delegates. Outside the room are the union members covered by the agreement, who must ratify a settlement before the agreement takes effect, and the union leadership. The advocate, delegates, members and union can have different needs and interests. Sometimes more than one union is involved in the negotiations.

On the employer side, those in the room include an advocate (usually an HR manager or an external consultant, for example, from an employers' organisation) and management representatives from different parts of the business (for example, finance, operations and HR). Outside the room are the chief executive and senior management team, the board of directors and sometimes foreign owners.

Public sector

In public sector negotiations, the State Services Commission may have to be consulted. In significant public sector negotiations, government ministers will be consulted. In multi-employer negotiations, there can be a number of employer parties with different needs and interests. For example, most collective agreements in the public health sector cover all 21 district health boards.

The law

Employment law is a crucial part of mediations about grievances and rights disputes, and the issues are usually straight-forward.

The law is largely irrelevant in collective bargaining mediations. There is no provision in law for arbitration in collective bargaining disputes, and the law on collective bargaining is focused largely on process issues. Agreement can only be reached by negotiation between the parties.

Litigation and industrial action are no substitute for negotiation. As Chief Judge G. L. Colgan put it during a major dispute: "During the course of the hearing I described … the intended strike action … as a sideshow to the fundamental issue that both [the parties] must come to grips with – the negotiation and settlement of a collective employment agreement … these are important issues that I am now determining but they are tactical issues … irrespective of the outcome of them, these parties are still going to need to sit down, bargain, settle, and have ratified, a collective agreement …"[52]

Collective bargaining mediations can involve complex issues involving the claims at the bargaining table and the underlying needs and interests of the parties (including the parties outside the room). The stakes can be very high, for example, where a national strike is looming in public hospitals. In multi-employer negotiations and collectives covering thousands of workers, settlements can cost millions of dollars.

Outcomes

Mediations about grievances and rights disputes don't always settle.

Collective bargaining mediations always end in agreement, even though the dispute may last many weeks and involve industrial action by the parties.

Important attributes of mediators in collective bargaining

In all workplace mediations, mediators must be impartial and be seen as such. They have to be good communicators who are able to empathise with the parties. They must be able to use appropriate techniques and strategies in each mediation.

In collective bargaining, the following attributes are also important:

- **Patience and persistence.** Collective negotiations can take a long time. The mediator must be able to last the distance and keep going when it seems there is no

[52] *Director-General of the Ministry of Agriculture and Forestry v. NZ Public Service Association Incorporated*, unreported Employment Court judgement, No. WC 25/05, 29 November 2005.

prospect of a resolution. They must be able to promote dialogue between the parties on the issues and discourage them from rushing to solutions too quickly.

- **Energy, flexibility, humour and confidence.** Parties often come to mediation when they are at an impasse and when relations between them are frayed. The involvement of the mediator can change the dynamic of the negotiations. Mediators should be energetic in encouraging the parties to work for a settlement and give the parties confidence that they will eventually do so. They must also be comfortable in dealing with large groups of people ranging from workplace delegates to senior managers. A good sense of humour can help break the tension during difficult periods in negotiations.
- **Judgement and intuition.** Mediators must know when to get involved in collective negotiations and when to stay out. They also need a good sense of timing so they can sense when to make a suggestion or encourage parties to move towards resolution. There is an old saying in collective bargaining that "no agreement should be reached before its time".
- **The ability to establish credible relationships quickly.** Mediators must not only be seen as impartial. They must establish a relationship of trust with parties, particularly in long-running negotiations. This helps build up a store of goodwill so that the parties keep the mediator informed about what is going on, so they can help prevent relationships deteriorate and so the mediator's interventions will be accepted later in the mediation.
- **Knowledge of power relationships.** An underlying issue in many collective negotiations is the relative power of the employer and the union. Mediators might encourage parties to take an interest-based approach to negotiations but they must also understand power relationships, which can be based on a long history of distrust between parties.
- **Knowledge of negotiation strategies, industrial relations, business and workplace dynamics.** Mediators must understand the theory and practice of collective bargaining, relevant employment law and have a practical knowledge of industrial relations. They should also understand different types of businesses (for example, a small family-owned enterprise and a large government-owned agency) and how workplaces operate.

Some people believe that mediators must have industrial relations experience and/or in-depth knowledge of specific industries. We disagree. However, mediators must be able to absorb large amounts of information quickly and become familiar with particular businesses and industries. This can include understanding budgets and financial reports, performance appraisal systems, salary structures, roster systems and specific terminology and technical issues relating to particular industries.

Key interventions in collective bargaining mediations

Collective bargaining mediations are about ongoing employment relationships. Mediators should encourage parties to improve their relationships so they can resolve their disputes without third party intervention. In general, we should do as little as is necessary to help parties to get through an impasse in their bargaining.

In most cases mediators' interventions in collective bargaining should be selective. They can take place at different stages of the bargaining process. For example, a mediator

can be involved in training for negotiating teams in interest-based bargaining and can assist parties in working out a pre-bargaining process agreement (a requirement under the ERA). Mediators can also be involved in debriefings with the negotiating teams after bargaining has finished.

The most common interventions take place during bargaining. These include the following:

- **Taking control of the process.** By giving a structure and direction to the bargaining process, the mediator allows the parties to concentrate on the issues in the negotiations. The mediator needs to have a sense of where the process is going and should regularly analyse the progress of the negotiations.
- **Modelling good behaviour.** By behaving in a courteous and respectful manner towards the parties, the mediator can model good behaviour and encourage better personal relationships between negotiators. Mediators should aim at establishing good relationships with all the members of the negotiating teams, not only the advocates.
- **Keeping lines of communication open and monitoring the bargaining.** In protracted negotiations in particular, the mediator should keep regular contact with the advocates to monitor the state of the bargaining. This is essential not just in keeping the mediator informed about each party's thinking, but it also enables the mediator to keep lines of communication open, particularly at times of industrial action when there are no direct talks.
- **Promoting direct communication between the parties.** This can be done on a number of levels. The mediator can chair face-to-face meetings between the negotiating teams. These can encourage members of negotiating teams to take a direct part in discussions and contribute their particular areas of expertise. The mediator's techniques of summarising and reframing, using open questions and detoxifying language can help encourage discussion on the issues. The mediator might also call "short lineouts" (meetings of a few negotiators from each party) or discussions between the advocates. These could be without prejudice meetings. Discussions involving a smaller group can avoid the theatrics of discussion at the bargaining table and get to the heart of an issue. Mediators must always be conscious that prolonged "short lineouts" can leave those not involved feeling excluded and suspicious.
- **Calling bad behaviour when appropriate.** Mediators should not be afraid of robust debate. The opportunity to vent frustrations and emotions, if carefully managed, can often lead to a more measured approach in the future. At the same time, mediation should be a safe environment for both parties. The mediator should call bad behaviour when appropriate.
- **Coaching the parties.** The mediator has a very important role in working with the parties separately to encourage greater understanding between them and to help them move towards a settlement. In caucus, the mediator can "translate" the other party's positions or interests and encourage negotiators to look at issues from the other party's perspective. The mediator can help each party to generate options. This can include walking the negotiators through some negotiating steps, for example, how to frame and present an offer. The mediator can also float ideas and options, and they can talk with each party about the alternatives to a settlement and about the risks of industrial action and, occasionally, litigation.

- **Helping resolve divisions within teams.** Divisions within negotiating teams can slow down progress in the negotiations and, at times, undermine them. Mediators must be sensitive to the different needs and interests of members of a negotiating team, for example, the union organiser's concern to follow union policy and promote standard union claims and the delegates' interest in particular workplace issues. Mediators should work with negotiating teams to encourage a realistic approach to the bargaining and to resolve internal differences.
- **Acting as a go-between.** While direct dialogue should be promoted wherever possible, relationships between parties can deteriorate during collective bargaining and during mediation. At these times, the mediator can protect the parties from each other and keep communication lines open by shuttling between them. In discussions with each party, the mediator can test proposals by floating them as the mediator's idea.
- **Summarising agreements between the parties and making sure agreement is reached on all issues.** Mediators can help maintain progress by summarising agreements during the mediation and encouraging the parties to keep an accurate record of the negotiations. At the conclusion of the negotiations, the mediator should check that agreement has been reached on all issues. They should also check that the parties are clear on what will happen next. The union can brief the employer on its ratification process and discuss the timing of union meetings. The employer can brief the union on the process for getting sign-off from the chief executive or the board. The parties can discuss the information that will go to workers and how any media interest might be managed.

Conclusion

Mediating collective bargaining disputes can be challenging but it is also professionally rewarding and enjoyable. There is a certain mystique about collective bargaining, but it is more apparent than real. Collective bargaining is another type of ongoing employment relationship that can be handled by employment mediators with generic skills. With appropriate specialist training, mentoring and co-mediation, experienced employment mediators are able to adapt to the special demands of collective negotiations.

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RELATIONSHIPS AND ARITHMETIC

Walter Grills, Mediator, Dunedin

Bring in the lawyers

Historically, lawyers were prohibited from participating in conciliation councils where collective agreements were negotiated. The prohibition no longer exists, and today, more lawyers are involved in collective bargaining. However, the original fear that lawyers would make negotiations too legalistic has only partly abated. The role is often limited to providing an opinion by phone or letter or to acting as a distant advisor to HR managers or a union advocate. While the parties have confidence in the lawyer's advice, only a limited number of lawyers sit at the collective bargaining table and conduct negotiations on behalf of the employer or union.

My own hypothesis is that the approach taken in collective bargaining correlates more highly with personality types than with vocations and/or qualifications. Success is directly related to previous upfront experience with collective bargaining and ability to handle the practical problems that are unique to the interaction of groups of people joined for the purpose of negotiating collective agreements. The following brief observations may assist lawyers to understand and carry out certain practical aspects of collective bargaining.

Laws and outlaws

In collective bargaining, a client's expectations extend to your giving more than legal advice. The lawyers' views will be sought on matters not pertaining to the law. Increasingly, lawyers are being engaged as advocates who sit at the bargaining table, formulate bargaining strategies and take leadership roles as spokespeople for the bargaining team. As advocates, their functions are in part "legal" in the sense of requiring knowledge and giving advice on labour law. There are also a number of extra legal functions that are performed. The lawyer leaves her office on Queen Street, drives to the outback, and arrives at Possum Patch District Council's chambers. The lawyer loses both geographical and psycho-social space. The lawyer joins the human process. You not only lead a team, but you are part of a bargaining team. You have a say in what constitutes the client's opening position, and they have say in what and when you have breakfast. You become part of a band of "outlaws" in the sense of camaraderie and become an integral part of a process that, for the most part, has little or nothing to do with the law.

This paper deals with relationships and arithmetic, and hopefully provides some practical advice on some of the extra legal functions that are essential to a lawyer's contribution to collective bargaining.

Let's begin with arithmetic

We begin with arithmetic – in particular, percentages. Wage movements in collective bargaining are most often expressed as percentages, and advocates must understand how to calculate and communicate the results of these calculations to the bargaining parties.

I have, from long experience, reached the view that there are a number of highly educated, qualified and competent lawyers who do not know how to use percentages. I need to get the parties to look at complex problems of communication arising over percentage wage increases, but key players on the bargaining team can't calculate percentages. More aptly put, they can all – with great confidence – calculate percentages, but they all get different answers. How do I talk about this problem without talking down to those who know and without embarrassing those who don't?

Clearly communicating a proposal about wage increases is far more difficult than learning the maths required to calculate the proposal. Both calculations and communications are improved if we share the same calculator and use the same formula for calculating percentage increases.

You and everyone else will understand that increasing 100 by 1 percent will equal 101. One is, by definition, 1 percent of 100. Increasing 100 by 4 percent will equal 104. Increasing 100 by 8 percent will equal 108. Increasing 100 by 6 percent will equal 106. While renegotiating the Possum Patch District Collective Agreement, the parties propose increases to wages and allowances by 4 percent, then 8 percent, and finally 6 percent is agreed on as a compromise.

There is a $100 per year possum allowance paid to possum exterminators. The salary paid to possum exterminators is $66,666.

One hundred is like any other number. A formula for increasing 100 by 4 percent will be the same formula for increasing 1,000 by 4 percent, or $66,666 by 4 percent. If you can apply the formula to 100, you can apply the formula to any number you want. Dividing and multiplying are opposite operations. Divide the answer by the same number you have just multiplied by and you get the original number. Divide 104 by 100, and you get 1.04. Multiply 100 by 1.04, and you get 104. Multiply 1.04 by any number and the number is increased by 4 percent.

Arithmetic World Wonder No. 1: Multiply by 1.0? to increase any number by ? percent.

Let's deal with relationships

Dorothy Doolan, union delegate and mother of six, is known as Dorothy "Sign on the Dotted Line" Doolan, shortened to the nickname Dottie. Her husband, her children and the union members love her. Those emotions are not shared by those who struggle to manage the Possum Patch District Council.

In other local authorities, negotiations are sometimes dominated by concerns about the employer's operating revenue and expenses, balancing budgets, restraining rate increases, and profit and loss of the local body's subsidiary companies. That is not the case at Possum Patch. Dottie requires equal attention to be given to the Consumer Price Index (CPI), which is the profit and loss statement for her family. If she does not get at least the movement in the cost of living, then she is running at a loss.

The collective bargaining table and the family dinner table provide a common focus on both her shopping list and the employer's operating costs and revenue accounts. The "basket" of goods and services measured by the CPI is, in an important sense, her family's shopping basket.

A labour lawyer needs to know about the CPI and how movements in the CPI are calculated. The lawyer also needs to know how to operate her pocket calculator and to know the difference between Weetbix, and Vogel's Select Café-Style Luxury Muesli. If the lawyer doesn't understand and empathise, then Dottie will read your mind, and you won't have to read her lips. She has the fastest calculator and sharpest tongue in the West (West Coast of New Zealand). As a point of deeply held principle, she does not like Queen Street lawyers, and she is about to look you up and down.

Pull out your pocket calculator. Type in 1.04, push x twice and, ah, the secret of life. You now have 1.04 as a constant. Type any number and =, and you directly get an increase in the number by 4 percent. Try this:

Type 1.04, type xx, type 40,000=, type 50,000=, and so on.

Arithmetic World Wonder No. 2: Type x twice and the preceding number 1.0? becomes a constant for increasing numbers by ? percent.

If you don't follow this tip, then you have to multiply each wage rate by .04, and then add the answer to the wage rate, and then do the same operation for the second number, and so on. That takes you longer, but more importantly, you appear dopey to those in the know, to the critical observer, Dottie. She knows you are a three-stepper rather than a one-stepper.

As a lawyer in collective bargaining, you will be under scrutiny. If you calculate wage percentages in three steps and without the use of a constant, then it is unlikely that you have any experience in wage bargaining, because you will not have had experience in increasing series of wage rates by a percent, a necessary task in collective bargaining. That undermines the perception of your overall competence and your ability to exert leadership during collective negotiations.

If you can't do these calculations quickly and efficiently on Friday night, how do you add up the cost of groceries on your shopping list while shopping at PAK'n SAVE? Maybe you don't shop at PAK'n SAVE and/or maybe you don't have to have a shopping list at all – a point that will cross Dottie's mind during the debate on the CPI. Remember that the analogy between the council's operating revenue and expenditure and the CPI is powerful and that Dottie's arguments are upfront and personal.

Negotiating style

As a lawyer, you may be engaged to provide an aggressive edge to negotiations with a view to dominating the proceedings – the lawyer as the muscle. Alternatively, the lawyer may be asked to provide balance or protection against an opposing advocate or bargaining team that is perceived to be destructive or dominant in their approach. You may be hired to block rather than punch. The question of aggression and passivity is, however, complicated. Unbridled aggression and roll-over passivity are at the opposite ends of a continuum, and a good advocate knows how to do both Taekwondo and Tai Chi – on occasion, both at the same time. Good negotiating style is a question of timing, degree and change of pace. Aggression as a controlled, purposeful and symbolic strike does, from time to time, establish a necessary balance in the exchange of argument

across the bargaining table. Against this, passive aggression is a devastating response to an insulting and/or disordered presentation by the other bargaining team.

At the bargaining table, what is **not** said is generally more important than what is said, and the fact that you don't say it is more important than its simple absence from the dialogue. Silence is a heavy blow.

Sparring not fighting

In the dramaturgical context of collective bargaining, experienced advocates do not fight but "spar". There is a delicate blend of aggression, mutual protection and concession. Aggression is temporarily cathartic in the first act, but both parties will desire a happy ending in the third act. How they get there will depend in part on the parties' substantive differences (i.e. 4 percent versus 8 percent). The other major factor will be your relationship with the other advocate. Both sets of clients will, in the third and final act, remember they are paying you to find a solution and expect you to find that solution. You will need assistance. Negotiations involve a sparring partner rather than a boxing opponent.

Collective bargaining is dramaturgical not only because it involves ritual, but also because collective bargaining requires influencing, persuading and entertaining audiences. Certainly, many lawyers are used to and practised at the "cut and thrust" that arises out of an adversarial system, but there is a key difference between the adversarial system and collective bargaining. In collective bargaining, there is no judge to keep order; to the contrary, negotiations are often disorderly. You may be dealing with bargaining teams with not much more order than an angry crowd. Your long-term responsibility is to sell a deal to the other bargaining team. Your short-term responsibility may be to persuade a crowd as to the sensibility of orderly procedures. Most importantly in collective bargaining, the lawyer is not making submissions to a judge who will decide, but persuading a group – literally an "audience" to accept a proposition. The lawyer's language and tone should suit that purpose, and often the most successful approach is like leading a discussion amongst your peers. The court may be the lawyer's own territory, but collective bargaining is the union's own natural habitat.

Shreds of paper shrapnel

Let's again focus on what is superficially a mundane exchange but has powerful effect. I have been involved in some highly informal and ineffective negotiations where an offer has been made on a scrap of paper shoved over the table from one advocate to another advocate. If not set out carefully, the other advocate can read the proposal in a number of ways. On adjourning for private deliberations, the advocate then explains the offer verbally to his seven-member team who then write down their version of the proposal, which has already been misunderstood by the advocate. The advocate then endeavours to get a unanimous approach to the opposing side's proposal, which he does not understand and has inaccurately conveyed to his bargaining team. A misinterpreted proposal is then reinterpreted in seven different ways.

In a mature bargaining relationship, the advocates will have agreed on a format for conveying proposals and counter proposals. Communication chaos can be avoided by a carefully designed proposal written so as to be unambiguous. Don't change the format unnecessarily; this requires the group to recalibrate with each change of format.

Change 1.04 to 1.06, not the rows into columns and the columns into rows. Eight copies are prepared and distributed to the advocate and seven members of the opposing bargaining team. They all get the same copy, with the same rows, the same columns, the same percentages. This removes misunderstandings related to handwriting defects, effects of percentage movements described differently and perceptual distortions created by the multi-directional passing-on of information.

Bargaining historian

I often observe that an accountant or wages administrator will join the bargaining team. They carefully record each offer and counter offer and will calculate the cost effect on an Excel spreadsheet. The accountant or wage administrator becomes, in effect, the "bargaining historian" and has at hand the facts of negotiations. While on the surface, these appear to be low-level clerical tasks, when carried out competently and exclusively by the "bargaining historian", the tasks attach significant power to the accountant or administrator.

If you wish to take control of the conduct of negotiations, as distinguished from the outcome, which is over to your client, my advice is to take charge of the record-keeping and basic costing of proposals and counter proposals. Prior to negotiations, arrange with your client to either prepare or help you prepare a spreadsheet to cost proposals and counter proposals. Ideally, there will be an assistant to help record offers and counter offers, but you need to have a close relationship with that assistant. You need to be directly involved in input and output and to be on top and ahead of the issues.

In addition, proposals and counter proposals need to follow an agreed and understandable format. Ideally, there should be a shared format and a formula for calculating, communicating and identifying the differences in the parties' positions. This is a question that should be raised in reaching the pre-bargaining process agreement or as a practice agreed between advocates. The confusion that is subsequently discussed can be avoided by combining in the offer the following principles: percentages and steps; the calculations pertaining to key wage classifications; the present wage rates: and the new wage rates. A written proposal should also make clear the extent to which the proposal replaces all previous offers or undertakings, written and verbal, and represents in full the employer's or union's position. The proposal needs to make clear whether it is made contingent on the acceptance of all elements of the proposal and, if so, emphasise that the proposal is a "package" deal (see offer set out below).

Prepare a copy for the other advocate and each of the members of their bargaining team. Keep the layout on a template, and make that template available to go on the other bargaining team's laptop. The bargaining team then uses the template to prepare a counter proposal. At the very least, the other bargaining team should design a written counter proposal that can be read against the template. In some of the more successful negotiations, the parties have agreed on a single person adept at word-processing and Excel to prepare proposals and counter proposals that can be understood, and understood against one another. In one negotiation, certain offers were committed with agreement by both parties to PowerPoint and presented to a stop-work meeting for debate and ratification. These arrangements depend on your establishing a genuine relationship with the other advocate.

Here is an example of how it shouldn't be done, the negotiations between the Possum Patch District Council and the Union of Possum Patch District Workers (UPPDW).

Opening positions

The union claims an 8 percent increase for one year. The increase is to be on all wages and allowances. There are to be other changes in the collective agreement. The wage increase operative date will be 1 July 2008. The term of the agreement is to commence on 1 July 2008 and expire on 30 June 2010. The previous agreement expired on 30 June 2008. Management comes to the bargaining table and agrees with the proposal, with one exception. Wages and allowances are to be increased by 4 percent.

	Council	**Union**
Wage increase	4%	8%
Term	12 months	12 months
Commencing date	1 July 2008	1 July 2008
Wages operative date	1 July 2008	1 July 2008
Expiry date	30 June 2009	30 June 2009
Term	12 months	12 months

The parties are negotiating in June, prior to the expiry of the old agreement. Backdating is not an issue at this stage. From the onset, management says they do not want to horse trade and have a prolonged bargaining session. Their proposal is their top figure. They explain that they are constrained by the Local Government Act to pay no more than 4 percent as budgeted. That is their first counter proposal and also their last offer. The annual plan has already been adopted by council. The budget has been incorporated in the annual plan. The annual plan and its budget have been formally adopted by a unanimous vote of council and therefore are set in legal concrete.

The opening positions are apart by 4 percent over the first 12 months. Opening positions are often derived from political tensions within the bargaining teams, rather than derived from economic argument or bargaining power realities. Had the union asked for 20 percent, or the employers proposed a wage pause, more would have been revealed about the state of mind of the bargaining team than the validity of any arguments about wage increases. At the very least, Possum Patch advocates are being influenced by a realist (Dottie) and know the power realities mean that the parties are going to settle somewhere between 4 and 6 percent. The advocates will not have colluded prior to negotiations, but discussed what is possible and realistic.

The experienced lawyer will foster realistic expectations both in the opposing and in their own bargaining team. Support for unreasonable and unobtainable bargaining objectives always receives an early and favourable response from your bargaining team, but is the plank from which the unsuspecting lawyer will fall off. Set your bargaining team's expectations unreasonably low. Expect the worst, achieve the best you can. You will receive the unwarranted perception as being an over-achiever. If the team achieves more than they have been conditioned to expect, then the lawyer may be re-engaged for the next renewal of the agreement.

Penelope and Dorothy

After an adjournment, the union insists that the council is not bargaining in good faith. Dottie talks over and interrupts her own lawyer. "The council has made their first offer, their final offer, but this is their first final offer." The lawyer for the council looks uncomfortable. As she speaks, Dottie holds out the palm of her left hand, and the gesture holds the lawyer off balance. "That is not good faith bargaining. A vote of council does not determine our wage increase. The employer is not the arbitrator in this dispute with the union." The lawyer nods. Paid by the council, but deep in her most private mind, she is no longer sure whose side she is on.

Dottie follows with a short, sharp convincing lecture on deficit financing under the Local Government Act. The lecture has been well practised. The collective agreement has, for years, expired in June, following two months on from public consultation, bitter budget debate and adoption. The council has never had, but always found, enough money to pay for wage increases that exceed the budget. The union threatens to withdraw from the negotiations and refer the issue of good faith to a stop-work meeting. Under pressure, the council representatives ask for an adjournment. Representatives straggle off to separate adjournment rooms. Later, the lawyer and Dottie bump in to each other in the corridor In the breath of a quiet introduction, the Queen Street lawyer and Dottie become Penelope and Dorothy, and the dispute moves inexorably toward resolution.

Impasse 1

The council representatives return to the table and make a counter proposal. Their new proposal is tabled in writing. Putting the proposal in writing is a means to clarify the offer, but the assumption that the written word automatically clarifies the issue is often faulty. How the offer is written, its simplicity and persuasiveness, what words are used and how the numbers are placed are critical, minor matters that precipitate major misunderstandings. Here is what the council put in writing:

Council 2nd offer	4% 12 months	4% 12 months

The lawyer for the council has done the maths correctly, but not the communications. Does the written proposal mean that the council is offering 4 percent for 24 months? Does the second 4 percent following from the first 4 percent mean that wages are held to the initial 4 percent?

The proposal had been explained and put in writing after lunch at 1:15 pm. The prevailing perception of the union's bargaining team was that the 4 percent, and 4 percent, meant that the council had offered 4 percent for 24 months. Feelings were hostile. The council had not only refused to budge on its first 4 percent offer, but had such a "stick it to the union attitude" that the first unacceptable offer was extended for a further year. "Here's 4 percent for this year. If you don't like it this year, we won't bother to increase your wages next year," said Jack Daniels, the possum exterminators' representative on the bargaining team.

By 2:15 pm, negotiations had almost broken down in disarray when an adjournment was sought by the council representatives in order to clarify their position. The council's intent was that the offer was for 4 percent for 12 months, and an additional 4 percent

for the next 12 months. The point needed clarification, and the council rewrote the proposition, which was put under the closed door of the union's adjournment room. The confrontation had been more dramatic than in past negotiations and the thickness of the heavy rimu door gave Penelope, the lawyer for the council, some comfort.

Council 2nd offer	4% 12 months	8% 12 months

Jack treated the offer not with relief, but joy. He would gladly wait 12 months on 4 percent for a full 12 percent. His perception was that the council's communications firmly established that they were offering 4 percent for the first 12 months and 12 percent (4 + 8 = 12) for the second 12 months. Jack then left the rest of his bargaining team to tidy up. Dottie Doolan was not so sanguine and sighed under her breath, "Unlikely the council would ever be that generous." However, Dottie knew to let the balloon of expectation expand. Ultimately, the council would not want it to burst. The disappointment would provide the energy, and the anger, to propel the negotiations forward.

Problems compounded

If the offer was put so as to identify how the additional increase in the second step was calculated, then the misunderstanding might have been avoided. In order to quell a riot, Penelope rewrites the council's proposal and asks that the union's bargaining team reconsider.

Council 2nd offer	4% 12 months	8% (4 + 4 = 8%) 12 months

But this proposal created a further misunderstanding. The error is not in communication, but mathematics. The precise calculation is not 4 percent **plus** 4 percent – 4 percent and 4 percent are not added but compounded. Compounding provides an amount slightly more than 8 percent. The rate is increased by 4 percent in the first year, and then in second year the original rate is again increased by 4 percent. But the amount of the first 4 percent increase (difference between 104 and 100) is also increased by 4 percent.

100 + 4% = 100*1.04 = 104
104 + 4% = 104*1.04 = 1.0816

The difference is $96 a year, which is mathematically insignificant (you can't even buy eight packets of cigarettes per year) but an irregularity that has caused two hours of intense debate and suspicion right at the point where the parties should be nudging the nexus of a settlement. Just when the group focus should be on splitting the difference between 4 percent and 8 percent, and 12 and 24 months, certain union members are arguing about why the management is short-changing them in the second year of the proposal. The reason that they know they have been short changed is Dottie Doolan's calculations and her profound understanding of percentages. She has an even more profound understanding of human nature.

Late night mind slippage

The bargaining team members have had no dinner and are locked in this hot debate at 10:45 pm. They have now come to understand that the council has offered them not another 4 percent for the second year, but $96 per month. This incorrect and illogical conclusion is described as a group mind slippage. The figure has slipped in their tired minds from $96 a year to $96 a month. The exact terms of the increase became confounded in a argument about not smoking in the council's adjournment room, which became confounded in an argument about cutting down on the number of packets of cigarettes smoked per week, which in turn came down to a discussion about the cost of smoking a packet of cigarettes a week. A pack of Holiday cigarettes costs $12.50 but you won't die of cancer – the pack says "Cigarettes cause heart attacks". Tired laughter accompanies the mind slippage. Four packets a month costs $100 – $1,200 a year. That is the amount that the council has tried to pick from the pockets of Possum Patch union members. If you are finding the argument and my writing difficult to follow, then I have achieved my intention. That feeling of tired confusion characterises the thinking of union members late at night on 30 June 2008 – the night before their collective agreement expires.

The matter would have been perhaps easily cleared up if it hadn't been for Jack's return with several mates from the Possum Patch Pub with a bottle of Jack Daniels, several jars and a crate of Lindauer. The invitation to the council representatives to join in the celebration of their 12 percent increase was well received, and the party went well for the first 10 minutes… when the mood changed. There was something about the atmosphere of these celebrations that suggested that they might need a mediator more than another drink. It is now just after midnight. A strike seems a restful alternative to the possum exterminators.

Breakdown

And so, as mediator, I paid a visit to Possum Patch, and this is my view of the dispute. The employer's proposal had a number of attractive aspects, which have not been perceived by the union bargaining team. The reason that the positives have not been grasped is that the mind of the bargaining team was confused, hostile and unreceptive. The third effort to clarify was made at 10:45 pm, when the team was tired and hungry and in no state to objectively consider a proposal. My suggestion to the parties was that the proposal be rewritten and presented in the format suggested below.

In deference to the proposal, I made the following points to the union bargaining team. The 4 percent offer in respect to the first year is not an increase on their previous position, but the increase in the term from one year to two years puts forward another aspect of the negotiations with a potential for compromise. The union argued that the 4 percent in the first counter proposal was not good enough for the first year. This is a repeat of the offer for the first year, but not an extension of the offer into the second year. There is a second wage increase in the second year. Beyond the fact that the union has misread the offer in respect to the second year, there is a reason to study the proposal more closely.

The offer has been shaped in a way that suggests that the offer means something other than its mathematics. The shape of the offer sends a signal. Eight percent is the number shared in both the union and council's proposals. The council has not included the

number 8 by accident in its counter proposal. The council's 8 percent for the second year is a year too late, which says that they will not concede the union's claim of 8 percent in the first year, but the fact that they have proposed the union's number 8 is a signal that they will **genuinely** listen to the union's argument for a further increase in wages beyond their proposed 4 percent. This is a double-edged signal. The council will offer significantly more if the union will look at a two-year agreement.

PRINCIPLES

The following is the employer's offer:

- 2-year term – 1 July 2008 to 30 June 2010
- All wages and allowances increased in two steps:
  4% – 1 July 2008 to 30 June 2009
  4 + 4 = 8% – 1 July 2009 to 30 June 2010
  4%/8% are compounded – 1.04 x 1.04 = 1.0816 (4% + 4% = 8%)

SALARIES

Council	Present rates per annum	Multiply by 1.04	4% 12 mths per annum	Multiply by 1.0816	8% 12 mths per annum
Possum exterminators	120,000	1.04	124,800	1.0816	129,793
Labour	100,000	1.04	104,000	1.0816	108,160
Gardener	80,000	1.04	83,200	1.0816	86,529
Tractor driver	79,933	1.04	83,130	1.0816	86,456
Economic modeller	33,338	1.04	34,671	1.0816	36,059
CEO	25,000	1.04	26,000	1.0816	27,040

ALLOWANCES

Possum handling allowance	$100 per annum	1.04	$104 per annum	1.0816	$108.16 per annum

This offer is made on the contingency that the union accepts that there be no other alterations to the present collective agreement with the exceptions of being (1) wages (2) allowances and (3) the term. The union accepts that these changes comprise the complete package offered in full and final settlement of all matters in the dispute.

SIGNED

Penelope Paine
LLB/Lawyer/Advocate
10:30 am, 1 July 2008
Possum Patch District Council

Breakthrough

On return to the bargaining table, the council then offers its third counter proposal. The counter proposal is 6 percent for a two-year term, the single increase coming into effect 1 July 2008. The collective agreement is to expire on 30 June 2010.

Council position	6% 12 months	6% 12 months
Council's previous position	4% 12 months	8% 12 months

Again, a brief digression. The amount of money over 24 months is the same (4 + 8 = 6 + 6). The 6 percent means that you pay 2 percent more in the first 12 months and 2 percent less in the second 12 months. Because there is an even number of months in each step, the conclusion is intuitive – 4 + 8 = 12/2 = 6, the same as 6 + 6 = 12/2.

After receiving the proposal, the union seeks an adjournment, and the negotiators lock into a hot debate as to what the next move is. They vote 4 to 3 against recommending a strike and 4 to 3 to make a counter proposal. Dottie understands that they have not increased the overall expenditure on wages but sees a way forward. Unanimous agreement is reached to accept the 6 percent, but for a period of 18 months rather than two years. The union returns to the table and says that they will put a compromise to the membership – 6 percent for 18 months. The team has reservations, and some doubt that it will be acceptable.

The council negotiators are divided but finally agree to 6 percent for 18 months provided that the union bargaining team recommends the settlement. The union bargaining team withdraws the reservations about the offer. The union organises a stop-work meeting, and management negotiators meet with the councillors to explain why they conceded the 18 months. The union members and the councillors hear the pros and cons of the settlement at two separate meetings – one in the council chambers and the other in the Town Hall.

Selling the deal

The course of the above negotiations has travelled from the opening positions through the two impasses, and arriving at the compromise settlement. Discussions have been impeded by the mathematics, and despite their simplicity, communication difficulties have surrounded the mathematical calculation and shared understanding of percentage increases and movements. These difficulties are a recurrent cause of losses of time and trust and are a main source of hostility in collective bargaining. The difficulties will be magnified at ratification meetings where the hopeful compromise is on sale. Lawyers need to discuss the design of the presentation made to their respective clients. There will be a mutual interest in selling the deal to both parties.

The 6 percent is easier to sell to the union ratification meeting. The union will say that the council had offered 4 percent for 12 months. "We got 6 percent for 18 months instead of 4 percent for 12 months. We got 2 percent extra for the 12 months (6 – 4 = 2). For the extra 6 months, we continued to get 6 percent. This is to be compared to what we might have got if we had been renegotiating after 12 months. The "powers to be believed" tell us that a major recession will be in full force within 12 months. After 12

months, we will be faced with a claim for a pay pause, which will have force of logic. It means that the 4 percent for 12 months is likely to be frozen, rather than be increased. That means the comparison is simply 18 months at 6 percent as opposed to 18 months at 4 percent." Easily ratified!

Management will have a more difficult sales job. Council representatives endeavoured to keep the increase in wages over the period from 1 July 2008 to 30 June 2009 to 6 percent or less.

Council	6% – 24 months	
Agreed compromise	6% – 18 months	What ifs

Management sought a 24-month agreement, but settled on a compromise 18-month agreement. The "what if" period is the 6 months that fall between the 18-month term and the 24-month term. What if the parties negotiate a short-term pay pause between 18 months and 24 months? Wages stay at 6 percent as in the 18-month agreement. Council cost objectives are achieved. What if they negotiate a 2 percent increase wage increase for the short-term six-month agreement or, for that matter, any length of subsequent agreement that provides 2 percent over this six-month period?

Percentage	Months	Weighted average increase*
6%	18	108
8% = 6 + 2 (or 4, 6, ?)	6	48
	24	156

*A weighted increase is the percent multiplied by the number of months that the percent applies; the average increase is equal to the sum of the weighted increases, divided by the total number of months – 156/24 = 6.5%

Management failed in its objective to keep wages to 6 percent or less. Council representatives did, however, gain an extra six months over a long pattern of having to renew the agreements every 12 months. The elected councillors will ratify the agreement with an additional six months with some relief.

Dottie signs on the dotted line and thinks about advantages in negotiating the next agreement in November 2009 rather than in June 2010. Wage increases won't be stuck in a council-adopted annual plan until February 2010. Union claims will be a public issue before the adoption of the budget. She thinks she just might attend the public consultation over the 2009/2010 annual plan and budget and remind the ratepayers that union members have children to feed and, ah yes, rates to pay.

The TAO of collective bargaining

To return to martial arts, the martial arts analogy applies not only to the giving and receiving of blows in collective bargaining, but there are both art and philosophy in Kung Fu and Bruce Lee, and collective bargaining and Dottie Doolan. The Kata in Karate is a choreographic sequence of moves, kicks, strikes and blocks joined together in a dance of war. They are performed among and against imaginary opponents. But they are more than a "Clayton's" fight – Kata are spiritual enactments that make it

unnecessary to fight; connections between power and peace, strength and silence, threat and grace. I am waxing lyrical for a purpose.

The opening proposal and counter proposal in collective bargaining are truly ritualistic. The aggression of the union advocate is symbolic, representative of the possibility of war, and the counter proposal of the employer is a signal that the homeland will be defended. Nevertheless, the ritual with its aggressive gestures, when fully appreciated and acted out, most often replaces the need to strike or to take action.

The strike or lockout is warfare, an unthinkable outcome in civilised society, leaving relationships within industry permanently damaged. Major strikes stop production, but they also result in managers being moved on and special general meetings to remove elected union officials! Career paths take unexpected directions. Lawyers are the easiest to blame and the most expendable. The effects of strikes do not end when the workers come back to work.

The uninitiated often underestimate the strength and primacy of feelings and the importance of their ritualistic expression in substitution for striking or locking out. The dramaturgical nature of collective bargaining therefore does not make it unreal or phony. The playing out of emotions, the sacrificial injury to feelings, and even reputation, replaces the unthinkable affects of a strike or a lockout on the financial viability of businesses and families and the long-term relationship between employers and employees. I can find no other explanation for the power of evocations in collective bargaining and their transformation into peaceful and co-operative solutions and agreements.

Peace will prevail at Possum Patch.

FOR FURTHER INFORMATION ON MEDIATION SERVICES
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PLA 10998 JUN 09

Department of Labour
TE TARI MAHI

newzealand.govt.nz