



REPORT ON FINDINGS FROM FOCUS GROUPS

Inquiries into experiences in resolving
employment disputes outside the
Employment Relations Act 2000 dispute
resolution framework

In 2006 the Department of Labour was asked to address two concerns - whether 'no-win no-fee' employment advocates were encouraging personal grievance claims, and employers preferring to pay employees than go through a personal grievance process.

The challenge in addressing these themes was collecting robust data on New Zealand workplaces.

The Department initiated a short-term research project on dispute resolution. This included a series of regional focus groups to provide a more detailed and specific perspective on employers', employees' and representatives' experiences in resolving employment relationship problems – the Department does not routinely collect information about these parties' perceptions of their experiences.

The following report summarises the themes from the focus groups.

The Department requested that the Employers and Manufacturers Association, Business New Zealand and the New Zealand Council of Trade Unions provide participants for the focus groups. As a result, focus groups in Dunedin, Christchurch, Wellington, Hamilton, and Auckland were attended by 31 participants (see below for further comments on participant numbers).

Focus groups provide useful findings due to the depth of information obtained and the ability to target subgroups within a population. Also, focus groups allow participants to contribute their own information.

Focus groups do have some limitations, which we have taken into consideration. The main limitation is that the focus group method is by nature exploratory and illustrative. It does not provide a comprehensive overview of a researched group. Instead, focus groups create a picture of a topic being studied, and clearly indicate where future attention should be paid.

There is also the risk that the small numbers inherent to focus groups will limit the information provided to the researcher. For this reason, a number of focus groups were held in different locations, and themes were sought in each region's focus group. The attached report clearly indicates that particular themes are common to all regions. These themes have provided a very clear set of directions for the ongoing employment relations research being conducted by the Department.

Likewise, self-selection by participants is a partial limitation of the focus group method. The organisations approached by the Department specifically sought people willing to participate in the focus groups about dispute resolution. This had the effect of slightly skewing participant numbers towards people who have experienced 'difficult' or 'disruptive' workplace disputes; i.e. the exact types of situations the Department wanted information on, as these are the areas where the greatest benefits could come from preventing disputes.

The participants in the focus groups were a mix of employers and representatives, with no employees directly involved, although union representatives did provide views on behalf of the employees they represent. As a result the findings are more representative of employers' experiences and concerns, and further research will be necessary to fully present an employee perspective.

Recurring themes from the focus groups were:

- The majority of disputes are solved or settled privately, and not always using legal representatives
- Third parties are normally selected for the specific or specialist skills they offer, be it legal advice, mediation, or counselling
- There are concerns about some types of third parties to disputes (i.e. no-win no-fee advocates), although these third parties are not present in all regions.
- Employers appear to have clear decision-making processes for the resolution of employment disputes, including the likely cost to settle privately vs. 'formal' Department of Labour processes, and the time-frame available to settle a dispute
- The Department of Labour's mediation service is often a last resort and viewed by some as being a 'formal' route to settlement. When utilised, this service is valued.

The findings of this report should be considered alongside the other parts of the Department's research on dispute resolution – a mediation survey on personal grievances and a survey of Employment Relations Authority determinations that deal with personal grievances.

The Department is also undertaking further research of the issues raised in the focus groups, Mediation and Authority determination surveys. In particular, the further research involves gathering more comprehensive information on the impact of employment problems economically and socially, and identifying the type of resolution processes which can enhance workplace productivity.

PURPOSE

This report summarises themes that developed during a series of focus groups inquiring into people's experiences of resolving employment disputes outside the Employment Relations Act 2000 (ERA) dispute resolution framework.

This report does not reflect the Department of Labour's position on these themes.

BACKGROUND

The focus groups were carried out in response to the Department of Labour's desire to find out why and how employment relations problems are resolved outside the ERA dispute resolution framework.

These focus groups are part of wider research into various means of dispute resolution. The wider research is intended to provide initial indications of how employment problems are being resolved, rather than a comprehensive picture of various dispute resolution methods and outcomes.

Further research is planned to more thoroughly understand the underlying factors causing disputes and the costs of dispute resolution. The issues and concerns that emerge from the present research will inform the further work.

OBJECTIVES

The objectives of the focus groups were to:

1. Define motivational factors for the use of mediation and settlement outside the ERA dispute resolution framework
2. Gain understanding to inform further work about mediation and settlement outside the ERA dispute resolution framework
3. Define any difficulties in understanding or participating in ERA dispute resolution and understand people's experiences with it;
4. Identify the advantages and disadvantages of resolving an employment relationship problem with little or no recourse to the institutions provided under the ERA; and
5. Define the role and relative influence of third party representatives.

METHODOLOGY

In November 2006 five facilitator-led focus groups were held in Dunedin, Christchurch, Wellington, Hamilton and Auckland. The questions posed in the focus groups were based on the objectives listed above.

Participants were sought by approaching the New Zealand Human Resources Institute, EMA Northern, EMA Central, Otago Southland Employers Association, Canterbury Employers Chamber of Commerce, New Zealand Council of Trade Unions, the New Zealand Law Society and the Small Business Advisory Group. These organisations recommended people who would be interested in participating in the focus groups.

The focus groups were facilitated by an independent facilitator. A staff member from the Department attended to take notes. Participants signed a consent form that included a confidentiality clause.

Composition of focus groups

A total of 31 people attended the five focus groups:

- 20 represented employers: 4 small businesses, 3 medium businesses and 13 large businesses, and
- 11 representatives: 5 from unions, 2 from employers' associations, 2 lawyers and 2 private employment dispute resolution specialists.¹

The numbers of participants in the Auckland and Hamilton groups was disappointing. No employers were represented in Hamilton and although interest was initially high in Auckland (more than 15 people expressed an interest in attending), only three participants attended the meeting.

No employees participated in the focus groups. Some representatives, in particular union representatives, expressed views on behalf of the employees they represent. In the further research into dispute resolution it will be important to capture the views of employees. The research and evaluation team are currently considering the best means of accessing employees.

Because of the low numbers of participants in two of the groups, a written survey was sent to everyone who had expressed an interest in the focus groups but was unable to attend. A total of 6 surveys were returned. This survey asked the same set of questions covered in the focus group sessions. The responses received were very similar to the views expressed during the focus groups.

¹ At the focus group sessions, participants were not directly asked about the size of the business they worked in or represented. The definition of size is based on the general impression given in the session and organised according to the Ministry of Economic Development definitions of business or enterprise size. These are: small 1-5 employees; medium 6-19 employees; large 20 employees or more.

OVERVIEW

There were recurring themes motivating employers and representatives to resolve disputes privately:

- perceptions that it may be cheaper to 'pay out now' rather than go through a lengthy formal process that drives up costs
- the need to resolve a problem quickly with as little tension as possible between the parties and in the workplace
- whether the employment relationship has ended or the parties want it to continue, and
- if incorrect processes were followed but the dismissal was substantively justified. Some employers thought they would be worse off in the ERA system under these circumstances.

The general consensus from all groups was that at least 90% of disputes are resolved outside the formal institutions. Many are resolved internally, particularly for larger organisations with human resources departments.

The reasons that independent third parties were used to resolve disputes outside the ERA institutions were to:

- reduce any negative impact on the workplace and achieve a speedy resolution
- find and resolve the cause of the problem and often to maintain the employment relationship, and
- reduce costs.

Participants considered that independent third parties tend to be flexible, focused on problem solving and provide industry-specific skills. They can also provide specialist knowledge and confidentiality.

Concerns were expressed, however, about the role and influence of some third parties in resolving disputes, such as:

- no win-no fee advocates who emphasise monetary settlement;
- certain advocates' lack of credibility; and
- third party representatives can have a negative impact in mediation.

Participants expressed concerns about using the Department of Labour's mediation service:

- the expense associated with process and settlement
- mediation types, processes and styles can vary
- there is variation in the skill level of mediators, and
- there is a tendency for the mediation to focus on settlement rather than problem resolution.

It was clear however, that participants valued the mediation service for:

- reaching a settlement once an employment relationship is over
- ensuring fairness
- testing the merits of a potential personal grievance case, and

- ensuring that settlements reached can be enforced.

This report sets out the findings of the focus groups. These findings are presented under five headings:

6. motivational factors characterising the use of mediation and settlement outside the ERA dispute resolution framework
7. themes characterising the use of mediation and settlement outside the ERA dispute resolution framework
8. issues raised about dispute resolution within the ERA framework
9. experiences and perceptions, and
10. issues raised with respect to the role and relevance of third party representatives.

FINDINGS

Motivational factors for the use of mediation and settlement outside the ERA dispute resolution framework

The following factors were considered by participants when deciding whether to resolve a dispute outside the ERA dispute resolution framework.

Cost

- many employers considered independent mediation/settlement processes less costly than using the Department's mediation service
- some participants considered that it is more efficient to spend a small amount straight away (by using non-formal processes) than to go to the Department's mediation service and end up spending twice as much later if unsuccessful, and
- the possibility of legal action and associated costs.

The likely consequences of using the ERA institutions

- if poor procedure has been followed, the employer may expect that they won't be successful in the ERA institutions. However, they still want to resolve substantive issues.

Type of result the parties want

- wanting the problem to go away quickly without publicity
- whether the parties want or need a confidential settlement
- whether the employment relationship has ended or the parties want it to continue. Employers often don't want to lose a skilled person but, not knowing how to deal with the situation, they involve an independent third party.

Early intervention and speedy resolution

- by keeping the process informal, escalation of the problem is prevented and the potential for confrontation or entrenched positions is reduced
- some employers consider that resolving the problem outside the formal institutions is quicker, fairer and yields a clearer outcome that satisfies both parties, and
- wanting to avoid tension in the workplace. Following a formal disciplinary dismissal process can create tension between the parties.

Other factors

- a 'managed exit' can be organised by an independent third party when Human Resources don't want to do the firing
- whether an employee wants recognition that they are being forced out of their job, and
- avoiding the parties having to re-live the situation, which tends to happen in the more formal processes.

Themes characterising the use of mediation and settlement processes outside the ERA dispute resolution framework

Participants emphasised that the size of workplace and access to resources affects the ability of an employer to provide dispute resolution processes. Those choosing to resolve employment problems outside the ERA dispute resolution framework often used an independent third party. A range of internal and external, formal and informal third parties are used, including unions, employers' associations, churches, lawyers, psychologists, industry specialists and professional associations.

It was noted that although the Department's mediation service is confidential, many participants considered that resolving a dispute 'behind the scenes' was often more private. Although not legally enforceable, the confidentiality of resolving a dispute privately was an attraction in many cases.

Participants emphasised the following advantages of private dispute resolution.

Flexibility

- an independent third party can go to the actual workplace
- an independent third party has time to work through the issues, there is no set time limit for resolving the problem or coming to a decision
- the parties to the dispute have more control over the process than in the formal processes, enabling them to use, for example, cultural resolution processes
- it is less formal than the Department's mediation service, and
- it provides an extra step before more formal legal procedures are initiated.

Private processes focus on problem solving

- problem solving is based on repairing and maintaining the relationship rather than legal concerns
- where the dispute is minor and relatively easily resolved, private processes often encourage the parties to resolve it so there is no need to unnecessarily escalate it to mediation
- private resolution provides a process for working through the short and long term issues, and
- independent third parties can:
 - identify what went wrong and propose solutions
 - manage unrealistic expectations and clarify consequences
 - provide unique solutions
 - provide access to resources.

Access to skills and knowledge

- employers can purchase the specific skills or specialist industry knowledge required to resolve a particular dispute, and
- employers can get information about employment relations law.

Issues raised in respect to dispute resolution under the ERA

Three issues were raised repeatedly by focus group participants in respect of problem resolution under the ERA. These were cost, imbalance in the law and the Department's mediation service.

Expense

The following sentiments were expressed:

Employers seem to have to pay for everything

I couldn't afford to follow procedures so I paid out

I don't need someone to tell me how to write a cheque

Whether you are right or wrong you always have to bring your cheque book out

I want to be principled but I can't afford to be

Even if I win, I am \$10,000 out of pocket

- about \$5,000 was mentioned as the cost of paying out an unwanted employee privately, and
- participants considered that there are huge compliance costs for employers, and that these are especially difficult for small employers.

Imbalance in the law

Participants considered that the law has become focused on protecting employees and there is little regard for the effect of dispute resolution on business. In particular, frustration was expressed that:

- there is no cost to an employee to take a personal grievance and this means employers bear the cost of employment disputes
- an employee can leave at any time while the employer has to justify dismissal and follow a rigid process. This is especially problematical where the employer is sure the employee will not prove a good 'fit' for the role (despite having performed well at interview) although there is no clear reason for dismissal
- in some centres, participants considered that the process can make it impossible for them to dismiss an employee.

The Department's mediation service

Many participants stated that they only go to the mediation service once they have tried other options and these have failed. Many would only go to the mediation service once the employment relationship has ended.

Concerns

1. The mediation service was not used very frequently by participants for early, low level problem resolution because:
 - the commonly understood mediation model is not always used
 - mediation service is too formal and more like a court room – *for example one lawyer gave a 40 minute opening statement in the mediation service*

- the three hour time limit can be too short – afternoon sessions mean insufficient time and there's pressure to settle in one session
 - the facts don't get heard – it is mostly about procedural issues
 - key matters to be resolved are not recorded
 - parties are not in the same room for most of the day
2. Not enough focus on problem solving:
- You just have to settle, there's no problem solving*
- You don't get the resolution that is needed, maybe the parties want an apology and the settlement is all about money*
- It's not good for building the employment relationship*
- Department of Labour mediation doesn't work, it just brings closure not understanding*
- The Department's mediators appear to have an attitude of 'take out your cheque book and we'll go home'.*
3. Access in remote regions was sometimes difficult, although an example was given of positive use of teleconferencing
4. Inconsistent standard of mediation skills
- mediation can be an undirected and uncontrolled environment
 - people are not always given the right of reply
 - the mediator may hear the dispute and do nothing
 - mediators don't explain the risks of taking a certain approach enough
5. Style of mediators
- there may be personal pressure from the mediator to settle
 - mediation is not balanced, too much focus on the employee, not interested in employer or the truth
 - inappropriate feedback, for example to a party about what his chances were.

Some representative participants (in particular lawyers) considered that a mediator shouldn't give legal assessments. However, some employers wanted mediators to provide more input on substantive issues and give risk assessments.

Positive aspects

Participants were asked when they would choose to use the mediation service. Some organisations (particularly unions) use the mediation service as much as possible. Participants stated that they use the service for the following reasons.

1. To get a settlement

Many participants thought that in 95% of cases that go to the mediation service the parties would like to reach a settlement as they want to move on from the past. The service is useful for achieving a settlement because:

 - a confidential settlement with legal closure is reached and deals can be signed off
 - people like to hear "this is a full and final settlement"
 - the risk of being challenged is minimised
 - when the relationship has broken down impasses can be broken down
 - complicated situations can be resolved

2. To ensure that the resolution is fair
 - o the mediation service is useful when someone has not followed any process
 - o where mediator will allow conversation between parties
 - o to get neutrality from the mediator
 - o when one party doesn't have an advocate and they don't recognise they need one
 - o if both parties want to sort out a problem, both parties agree they want to use this process and will work together to resolve the situation
3. To test the robustness of a case
 - o used to test out how it will go at the Employment Relations Authority
 - o to clarify consequences
 - o to provide a reality check
4. To gain a third party perspective
 - o when the employer doesn't have the capacity to deal with a dispute
 - o in relationship disputes if employer doesn't want to deal with employees who are fighting
 - o to get an issue out of the workplace
 - o when third party mediation hasn't been successful
5. When a client has been dismissed and the employee is unhappy with the disciplinary process or resolution of a workplace dispute
6. When parties want to be heard at a formal Government sponsored process, and
7. If a dispute has become stale.

Additional comments

- it is usually an employee who takes the employer to mediation and many employers only use it if they have to
- some employers considered the mediation service is used by employees to 'get one over' the employer
- the mediation service is a necessary step in order to go to the Employment Relations Authority
- unions often go straight to the mediation service
- WINZ's reduced stand down period where a personal grievance claim has been made provides an incentive for a dismissed employee to make such a claim²
- the case of *Jesudhass v Just Hotels Ltd* brings into question whether mediation is confidential or not
- it was great when the Department's mediation service used go come to workplaces and talk about situations to help people decide what to do.

² If an employee is dismissed with cause or resigns voluntarily a 13 week stand down period applies before eligibility for the unemployment benefit. If the employee challenges a dismissal or loss of employment by taking a personal grievance, the stand down period does not apply. If the dismissal is later found to be justified, the employee must repay the benefit received during the 13 week period

Experiences and perceptions

Experiences

- most participants aim to keep problem resolution low key and informal and reach a genuine resolution
- some businesses have decided against increasing the size of a business to avoid having to cope with increasing numbers of staff
- employees often don't understand the disciplinary process and this causes stress when the process is enacted
- some employers were not sure what to do if they made an error and employed the 'wrong' employee
- some participants resisted 'paying out' an employee:
"I don't pay the good ones to leave so why should I pay the bad ones," while others were in favour: "I never fire an employee because it is quicker and cheaper to pay them out"
- even if successful, the formal process is demoralising and affects both an employer's work and private lives.

Perceptions

- many participants considered that 90-95% of problem resolution "deals" are done prior to mediation service intervention
- some employers feel there is a significant imbalance in the employment relationship in that employees can leave at any time whereas an employer has to give justification for dismissal
- employees have increasingly high expectations of settlements from the Department's mediation service and the Employment Relations Authority
- using the formal institutions is considered an obstacle to dismissal. Employers considered they needed to go to the mediation service and the Authority although they knew the relationship wasn't working.

The following sentiments were expressed:

The ERA process treats employers as a cash cow

Using the Department's mediation service means that we have failed

It is really hard to go through the legal procedures

It's frustrating that employers can follow all the procedures but still end up at the Employment Court

Why is justifiable dismissal so impossible? [This question was asked by an employer who had experienced problems when trying to dismiss an employee for alleged theft].

Issues raised with respect to the role and relevance of third party representatives

Although third parties can be a valuable tool in the resolution of employment disputes, two key concerns key issues were raised: the influence of no win, no fee representatives, and the role of representatives in mediation.

No win, no fee representatives

There were regional differences in participants' responses. Christchurch participants were not aware of any problems and were not aware of any 'no win no fee' providers in Christchurch. Problems and concerns were raised in the North Island where it appears that there are more providers.

Advantages of using 'no win no fee' advocates were that they are fine for a case that has merit and is worthy on a point of law.

Disadvantages were considered to be that:

- some 'no win no fee' providers tend to focus on settlement rather than problem resolution. As a result they:
 - tend to settle early as their focus is on turnover
 - create an expectation of a high monetary settlement and have no interest in pursuing other remedies
 - can be "ambulance chasers" in that some pursue cases that are likely to involve a monetary settlement
- credibility
 - some have little support, for example no support staff, and can be slow to provide documents or organise meetings
 - there is no controlling body and there are some 'cowboys' in the market. Examples of unprofessional practices included:
 - client wanting to talk with advocate had to do so while the advocate was doing his other job of pumping petrol
 - an advocate asked for bus fare to be paid to get to Hamilton from Whangarei, then required that the mediation finished early so he could catch the bus back again
 - some no win, no fee advocates incorrectly describe personal grievances and have little knowledge of employment law
 - some have a confrontational style, and don't focus on resolving the issues
 - it is hard to get an 0800 advocate to set date for mediation because they have high numbers of clients and little support – in one case there was a wait of two months by which time the employment relationship had completely broken down
 - they may misconstrue what the client has to pay (fair trading issues)
 - they tend to target the vulnerable, and
 - they can escalate problem unnecessarily.
 - vulnerable employees may not be aware that they can access support through Legal Aid and 0800 services such as the Department's 0800 20 90 20 information line

The role of third parties in mediation

Lawyers:

- can be dangerous in mediation – they are professionals who can take over the proceedings
- can make the process harsher, emphasising money rather than resolution
- don't allow parties to speak for themselves, and
- can't see past win/lose.

Advocates:

- want to take over and have their own agenda
- add fuel to the fire, and
- need to know their limitations.

Suggestions for improvements from participants and additional feedback

- There should be more education available, particularly:
 - business information seminars for small businesses
 - about Legal Aid
 - about dispute resolution, including on-site.
- increased funding for development of a service between the Contact Centre and the mediation service, to provide help about to how get to mediation
- feedback sessions between mediation service and service users/evaluation of mediation service would be helpful.
- The issue of compensatory payments was raised. IRD makes judgements about whether settlements have been made under Section 123(1) c of ERA. They consider the payment taxable if the compensatory payment does not meet the definition of compensation. Participants considered it inappropriate that IRD judges Employment Relations Authority members' decisions
- The model would work better if one could use the mediation service to solve problems and the Employment Relations Authority to settle.
- Participants generally liked the 90 day rule (whereby an employee must raise a potential personal grievance within 90 days of the dispute occurring) and consider that it works well in most cases.
- Participants thanked the Department for taking proactive action.

SUMMARY

The findings of this work will inform wider research into dispute resolution. One of the key drivers for resolving disputes outside the Employment Relations Act institutions was cost. The on-going research will explore this issue more deeply and attempt to quantify the economic and social costs of dispute resolution.

The Workplace Services team will use the information gathered in the focus groups about the mediation service as part of work to be completed in 2007 to effect improvements to service delivery. The Department's Communications team will also use some of the findings of the focus groups to assist them with their communications strategy.