Mediation styles used in New Zealand employment disputes

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1. Introduction

Mediation is one of the most common ways to resolve employment disputes in New Zealand. Most of this mediation is carried out by the Resolution Services branch of the Ministry of Business, Innovation and Employment (‘MBIE’). Resolution Services includes a team of employment mediators who resolve disputes using the regime established by the Employment Relations Act 2000 (‘ERA’). Some of these mediators also work in the areas of tenancy, unit titles and weather-tightness, but there remains a clearly identifiable group of mediators focusing primarily on employment disputes. This article focuses on the styles of mediation used by this team. The study asks the following questions:

- According to official government policy, what styles are claimed to be used?
- According to the actual mediators, what styles are actually used?
- What are the repercussions of these findings?

In 2012 this author published an article looking at interest-based negotiation in the Treaty of Waitangi settlement process. It was argued that the style of negotiation actually used is substantially different to that claimed by the government. This current article uses similar methodology but comes to a different conclusion. In employment mediation, the styles of mediation actually used are the same, or very similar, to that claimed by the government. This is partly due to the very broad, and somewhat vague, instructions provided by government policy in this area. The ERA effectively allows for any style of mediation, although there is an emphasis on facilitative and evaluative. Government policy documents promote a facilitative style but clearly state that an evaluative style is also appropriate. The government’s objectives in this area also suggest the encouragement of a settlement style. This approach raises the question as to whether the government should be more prescriptive in setting a particular style, thus providing the user with more information in advance. The evidence suggests that the current broad approach is actually working successfully. In fact, this article concludes that the MBIE employment team is probably the most self-aware and capable mediation unit in New Zealand.
This article utilises a number of different sources to answer the key questions including government policy documents, previous scholarly work, a survey and targeted qualitative interviews. Reference is also made to overseas experience and relevant theoretical literature on mediation styles.

2. Methodology

The methodology used in this project was based on a combination of surveys and interviews carried out in late 2013/early 2014. All 32 MBIE employment mediators were given the opportunity to complete the survey. The survey consisted of six questions relating to mediation styles used in New Zealand employment disputes. These questions consisted of ranking options and providing additional comments. Seventeen mediators completed the survey resulting in a response rate of 53%. This rate is high enough for meaningful conclusions to be made about the styles of mediation used. MBIE mediators are spread throughout New Zealand and the responses reflect this geographic diversity. Twelve of the responses (70%) were from female mediators and five from male mediators (30%). The survey process was followed by four targeted, in-depth interviews. The quantitative information gained from the survey identified issues to explore and expand upon in the qualitative interview process. The interviewees were chosen from those surveyed with a mix of age, experience, gender and geographic location. The information is anonymised for the purposes of this study.

The survey/interview process was supported by primary research findings, in particular, MBIE/Department of Labour policy documents and the Employment Relations Act 2000. This study also utilises secondary material on employment mediation in New Zealand, in particular, the work of Ian McAndrew and Martin Risak. McAndrew and Risak carried out interviews with MBIE mediators from August to October 2010.

This study effectively looks at mediator’s perceptions, that is, what styles mediators believe that they use and the way in which they believe they use them. These perceptions may differ from the reality. Given the experience and self-awareness of the MBIE mediation team it is reasonable to conclude that mediation practice reflects the perceptions to a large degree. Subsequent research could include observation of mediations and surveying of clients to test the perception against the reality. For the purposes of this study, the key focus is on the extent to which the perceptions match official government policy.
To provide background to the empirical information, research was conducted into mediation styles, New Zealand employment law and employment mediation in other jurisdictions such as the United States, Australia and the United Kingdom (with a particular emphasis on styles used). This research provides the context for the study’s findings.

3. The New Zealand employment mediation regime

Alternative dispute resolution has long played a key role in New Zealand’s legal system (Morris, 2013). The current mediation regime was established by the Employment Relations Act 2000. This legislative reform was led by Minister of Labour, Margaret Wilson. Before entering Parliament in 1999, Wilson was a Professor of Law specialising in public policy, employment law and dispute resolution. Wilson was an early proponent of teaching interest-based alternative dispute resolution in law schools, in particular, at the Universities of Auckland and Waikato. The ERA’s philosophic and legislative basis was to promote ‘good faith’ bargaining between employers and employees and facilitate consensual resolution of personal grievances. The mediation provisions in the ERA are clearly inspired by the interest-based approach popularised by Fisher and Ury and incorporated into the facilitative mediation model. During the interview process, one mediator noted that this facilitative emphasis had caused some problems in the early years of the service. Some users had become accustomed to the more evaluative, arbitration-style approach to dispute resolution under the Employment Contracts Act 1991. The ERA’s facilitative approach provided less risk assessment and greater party empowerment. There was resistance from some users but the initial scepticism was overcome.

The ERA established a formalised, government mediation unit managed by the Department of Labour. Since the early 2000s, this service has featured what is arguably the leading state mediation team operating with the New Zealand legal system. The ERA openly prioritises mediation as the favoured dispute resolution approach. Most employment mediation in New Zealand occurs under this statutory regime with only a small amount occurring privately (McAndrew and Risak, 2010; Government Centre for Dispute Resolution, 2015, p.2). The most important ERA provisions relating to mediation are:

- s5 Establishing the ‘good faith’ standard to govern all employment relations;
- s 144(1) Instructing the government to provide employment mediation services;
• s147 Procedures in relation to mediation services including providing mediators with complete discretion as to style;
• s147(3)(b) Allowing mediators to express views on the substance of issues and thus authorising evaluative mediation;
• s148 Establishing the presumption the mediations will be confidential;
• s149A Allowing mediators to provide recommendations to parties (which can eventually become binding) and thus authorising evaluative mediation;
• s150 Allowing mediators to provide binding decisions and thus authorising med-arb;
• s152 Providing for mediator immunity;
• s153 Ensuring that mediators are independent and objective;
• s159 Placing a duty on the Employment Relations Authority (the regime’s administrative tribunal) to consider mediation;
• s188 Placing a duty on the Employment Court to consider mediation.

‘Personal grievance’ cases constitute the overwhelming majority of mediation cases under this regime (Radich and Franks, 2013, p.25). Lawyers are present in an advocacy role during most mediations (Walker, 2009, p.13). Due to ss 159 and 188, parties effectively need to use mediation in the first instance to be able to access the Authority and Court. If the parties have not attempted mediation then they will be instructed to do so except in exceptional circumstances. This gives mediation a quasi-compulsory status in the process. The mediation service is free, confidential, and operates on a without prejudice basis. Agreements are binding and enforceable. The mediation team is highly experienced and very successful, with settlement rates in the 76-81% range (Radich and Franks, 2013, p.25). Most of the mediators have a background in law, industrial relations and/or human relations.

4. Mediation styles

There is a huge amount of academic literature on mediation styles (for example, Golann, 2000; Stempel, 2000; Brown, 2003-4). For the purposes of this research the following definitions are used:

Facilitative: mediator focuses on underlying interests, problem-solving and allows parties maximum autonomy to determine creative outcomes.

Evaluative: mediator focuses on rights and duties and provides parties with specialist/expert information and/or advice where necessary.
Settlement: mediator focuses on parties’ positions and settling disputes through compromise and bargaining.

Transformative: mediator focuses on empowerment and allowing parties to transform their understanding of the conflict and of their relationship. Less emphasis on settlement.

Narrative: mediator focuses on parties’ stories and externalising problems, leading to the creation of a more positive combined story. Less emphasis on settlement.

These definitions were provided to participants. There are many ways to view mediation styles, for example, Leonard Riskin’s influential mediation grid (Riskin, 1996). Despite the contestable nature of mediation terms, there were no complaints from participants about the accuracy of the definitions. This article uses the term ‘style’ to cover the above approaches. Other possible terms include ‘model’ and ‘process’, although at least one MBIE mediator differentiated between ‘style’ and ‘process’.

The three most prominent styles are facilitative, evaluative and settlement. These are also the most commonly used styles under the Employment Relations Act. Transformative and narrative mediation are less well-known in New Zealand but are still used in employment mediation. The facilitative style is often referred to as the ‘classic’ mediation style and acts as a default option for many mediation regimes. Some commentators argue that evaluative mediation is not truly mediation but rather conciliation. The most influential Australasian example is the now disestablished National Alternative Dispute Resolution Advisory Council which suggested that evaluative mediation should be defined as conciliation rather than mediation (NADRAC, p.2). For the purposes of this study, the evaluative approach is defined as a mediation style.

While there is a strong overlap between transformative and narrative mediation, they are different styles. Transformative mediation is largely derived from the work of Folger and Bush and seeks to reduce the amount of mediator intervention found in other models. Narrative mediation also strives towards this goal but is primarily focused on story-telling and based on psychological theory, for example, the work of Michael White. Narrative mediation could be classified as a form of counselling but is considered mediation for the purposes of this study.

The Employment Relations Act does not specifically define styles but, as seen above, different styles are implied within the various sections. As will be seen in later sections, most employment mediators use a variety of styles within any given mediation and also from
mediation to mediation. This fluid approach is one of the strengths of this statutory regime but it does breach the theoretical foundations of some mediation styles.

Facilitative mediation is largely based on the philosophy of interest-based dispute resolution. This approach is most famously outlined in Roger Fisher and William Ury’s *Getting to Yes* (1981). While *Getting to Yes* is specifically about negotiation, its philosophy has been successfully transposed to mediation. Fisher and Ury’s principled negotiation process is supposed to be comprehensive: “Principled negotiation is an all-purpose strategy.” (Fisher and Ury, 2012, p.xvii) To be successful, each step must be carefully worked through. If only some steps are used this can undermine the entire process. Thus switching back and forth between interest-based/facilitative and other styles is not in line with Fisher and Ury’s philosophy.

Facilitative scholarship extends far beyond *Getting to Yes* and the Harvard Negotiation Project. As in the negotiation-based work of Fisher and Ury, facilitative mediation scholars can lean towards exclusivism. Jeffrey Stempel argues that “[a] segment of the ADR community at times appears to view facilitation as something of an orthodox ideology if not an orthodox theology. For these mediators, facilitation is the ‘one true way’ of mediation because mediation draws its legitimacy from its purported nonevaluative character.” (Stempel, 2000, p.249) One influential article from 1996 was entitled “Evaluative Mediation is an Oxymoron” (Kovach and Love, 1996).

In 1994 Joseph Folger and Robert Baruch Bush published *The Promise of Mediation* arguing that only transformative mediation could fulfil mediation’s potential. Folger and Bush see transformative mediation as a comprehensive process that consciously avoids the facilitative, evaluative and settlement approaches (Folger and Bush, 1994, pp.11-12). Instead of focusing on problem-solving, their approach “emphasizes mediation’s capacity for fostering empowerment and recognition.” (Folger and Bush, 1994, p.12) Folger and Bush unashamedly see mediation styles as ‘either/or’ rather than the MBIE ‘toolbox’ approach: “We believe that the transformative approach should become the primary approach to practice in all the contexts in which mediation is used, reversing the direction in which the mediation movement has been heading. Our goal is to explain why this shift in practice should occur, showing both the limitations of the problem-solving approach and the strengths of the transformative approach. We delineate the transformative approach to mediation, contrasting it with other approaches.” (Folger and Bush, 1994, p.12)
maintained a consistent position since 1994, only last year calling for mediators to: “End once and for all the fiction that evaluative case settlement is mediation.”(Folger and Bush, 2014, p.3)

Narrative mediation shares many similarities with Folger and Bush’ transformative model but should be seen as a distinct model with fundamentally different origins. This model was developed in the work of John Winslade and Gerald Monk (2000). Based on the psychological work of family therapists, Michael White and David Epston, the approach is overtly postmodern and challenges other forms of mediation. For example, it disagrees with the largely positivist facilitative emphasis on underlying interests and replaces this with the discourses that parties create from conflict. Like Folger and Bush, Winslade and Monk are not seeking to add another process to the ‘toolbox’, instead they are seeking to replace the toolbox. Somewhat ironically, this is a very prescriptive approach for a post-modern theory.

The teaching of narrative mediation in New Zealand was pioneered at Waikato Law School by Richard Cohen in the mid-1990s when this author was a student at this institution. Cohen argued that “The narrative questioning style that we try to adopt differs in purpose from that used in other approaches to mediation and counselling.”(Winslade and Cohen, 1995, p.95) One Department of Labour mediator, Alison Cotter, has published on this topic (Cotter, 2009) and was also involved with Winslade, Monk and Cohen in the establishment of Waikato Mediation Services (Hansen, 2004, p.297). Narrative mediation is present in MBIE employment mediation, as evidenced by the survey results. However, the approach to narrative mediation largely ignores American mediator Alison Taylor’s advice, “it is not a model that can be ransacked for techniques without damaging the intent and purposes it requires…because the foundational view is vastly different [from other approaches].”(Taylor, 2002, p.137)

Most ADR scholars such as Fisher, Ury, Folger and Bush are writing in an American context but the debate over styles has also occurred in New Zealand. For example, narrative mediation has a direct New Zealand connection and was the model used in Waikato Mediation Services. Top commercial mediator, Robert Fisher QC, has noted the tension between facilitative and settlement mediation in New Zealand. In his description of the development of mediation it is clear that many mediators are committed to a particular style rather than using a variety of styles: “Some mediators were quick to see the writing on the wall. In the field of litigated money claims, mediators who could energetically reason with,
persuade, cajole, badger, and wear down the parties flourished….The age of the settlement mediator had arrived. Mediators who persisted in passive, facilitative, therapeutic, or non-interventionist styles were equally successful in their fields. But their fields were increasingly seen to be at the personal, family, relationship, and community end of the spectrum.” (Fisher, 2010, p.21) Fisher notes the importance of being able to use different styles but his argument shows that the eclectic MBIE approach is not necessarily the default approach.

One of the theoretical problems with an eclectic approach to styles is it fails to engage with important ongoing issues such as whether evaluative mediation can actually be defined as mediation, and whether mediators should be able to prioritise settlement regardless of parties’ wishes. The eclectic approach argues that all styles are essentially equally valid and therefore it just depends on the context as to which approach is used. So instead of providing a clear, principled, answer to the questions above, the eclectic approach argues that ‘it all depends on the context’. There is a reluctance to pass judgment or provide a qualitative opinion on contentious issues. To provide a practical example, suppose a MBIE mediator stated that “evaluative mediation is not mediation and therefore should not be labelled as such by the mediation service”, or perhaps “I will not direct parties to settle in any way, a lower settlement rate can sometimes be a better indication of true mediation occurring than a higher one”. These are both common and valid positions in mediation practice and scholarship but it is difficult to see how they could be accommodated under MBIE’s mediation model which of course flows from the legislation. The reality is that MBIE’s model allows for all styles and does not rank them in terms of value.

In the first few years after the ERA it does appear that there was some tension amongst mediators as to which style should prevail: facilitative or evaluative. In outlining the history of the mediation service since 2000, McAndrew notes that while some mediators came from the former Employment Tribunal, armed with specialist employment knowledge, “others of the initial intake were engaged for ‘process knowledge’, for the most part orientated to the more passive ‘facilitative’ style of mediation, and in many cases without substantial employment relations or employment law subject knowledge.” (McAndrew, 2010, p.87) Along with tension within the mediation team there was also a backlash from users: “parties, and particularly lawyers, were often less than happy with a non-directive approach from mediators, preferring the traditional litigation risk analysis style.” (Walker, 2009, p.13) This ‘facilitative versus evaluative’ tension appears to have largely dissipated with the result
that both are equally valid and regularly used. In the words of Anglicanism, the MBIE mediation team is now a ‘broad church’. Although McAndrew notes as recently as 2010 that “issues of diversity of skills, effectiveness, and acceptability to disputing parties remain a concern.”(McAndrew, 2010, p.87)

The eclectic approach is neither new nor surprising. In a 2000 article, Golann made the following argument: “professional legal mediators in fact use a variety of styles, and that they change their approach constantly during a single mediation, even within a single meeting with a disputant….these stylistic changes are the norm rather than the exception.”(Golann, 2000, p.42) Although the argument is made in specific reference of legal mediators it can easily be applied to the MBIE mediation unit. Golann’s thesis was influenced by the prominent ADR scholar, Leonard Riskin. As long ago as 1996, Riskin argued that the ideal mediator is “sufficiently flexible to employ the most appropriate orientation, strategies and techniques as the participants’ needs present themselves.”(Riskin, 1996, pp.40-1) Some commentators credit Riskin with coining the terms ‘facilitative’ and ‘evaluative’ in relation to mediation (Lande, 2000, p.322). Thus the MBIE approach must be seen in the context of a long-standing scholarly debate between the purists and the eclectics. As will be argued in this article, ‘purist’ does not necessarily equate with ‘theorist’ and ‘eclectic’ does not necessarily equate with ‘practitioner’.

The tension between evaluative and facilitative mediators under the ERA occurred against the backdrop of an international debate focused on this very issue. John Lande (2000) set out the main areas of dispute in a debate that reached its height in the late 1990s. Lande uses the term ‘eclectic’ to mean swapping between distinct processes rather than having ‘one’ eclectic process (Lande, 2000, p.322; Kovach and Love, 2000, pp.296-7). The theory underpinning the modern mediation movement’s early phase (1970s to early 1990s) was dominated by facilitative mediation (Lande, 2000, p.330). The facilitative/evaluative debate transformed this situation and gave evaluative mediation scholarly recognition and a pervasive place in practice (Bush, 2003). This can be clearly seen in a number of influential and conflicting articles published in the Journal of Dispute Resolution from the mid-1990s to the early 2000s, several of which are mentioned in this paper.

All of the mediation styles discussed in this article are underpinned by strong theoretical frameworks which can be located in academic literature. New Zealand has contributed very little to this literature. One MBIE mediator noted, “one of the things that really disappoints
me is the academic research into dispute resolution….We have very few people in New Zealand who are doing research.” This article seeks to combine the theory and the practice to reach conclusions.

5. What styles are claimed to be used?

Facilitative, evaluative and settlement styles can be found in the ERA provisions. In addition to this, MBIE’s *Code of Ethics for mediators employed by the Department of Labour* defines the mediator’s role as follows (Department of Labour, 2012):

Mediation is a process in which an impartial third party – a mediator – facilitates the resolution of a dispute. A mediator facilitates communication, promotes understanding, assists in identifying needs and interests, and uses creative problem solving techniques to help the parties in a dispute reach their own resolution. The mediator’s role is active. Mediators make interventions and suggestions to help parties consider options for resolution.

The definition uses the terms ‘facilitates’ (twice), ‘interests’ and ‘problem solving’. This strongly implies a facilitative model. The final sentence implies an evaluative model. The repeated use of ‘resolution’ (three times) could also imply a settlement model. It is highly likely that this definition is based on the ERA. That said, it clearly emphasises the facilitative approach over other styles. Yet a 2007 Department of Labour report noted that “Employers (and representatives) considered there was variation in the skill level of mediators, and in processes and styles used, and a tendency for the mediation to focus on settlement rather than problem resolution.”(Department of Labour, 2010, p.12)

In an August 2013 position description for ‘Mediator’ the following phrases are used: “Neither Mediators nor the party/parties will be constrained by prescribed processes in accessing or delivery of mediation service”; “The Mediator will be required to…operate in a manner that accommodates the parties’ wishes in terms of procedures”; The Mediator will be required to…research especially on matters of employment law, legal services, information technology”; “The ideal appointee will have the following experience and demonstrated capabilities…negotiating or facilitating interaction between parties in conflict….advise about the risks and benefits of positions taken and solutions proposed.”(MBIE, 2013) The employment advertisement notes that Association of Dispute Resolvers (LEADR) or other similar training is preferred, that is, facilitative training.
McAndrew and Risak concluded that the mediation style under the ERA featured “an effort at least at proactive, remedial mediation, despite a continuing preponderant demand for evaluative, ‘divorce’ orientated mediation.”(McAndrew and Risak, 2013, p.8) McAndrew and Risak also concluded that “mediators differentiate between terminated and ongoing employment relationships” in terms of style choice (McAndrew and Risak, 2011, slide 14). This assertion was also made by a mediator in the present survey and seems to imply that ongoing relationships will include a more facilitative, even transformative, approach. It could be argued that evaluative mediation is as relevant to ongoing relationships as terminated ones, that is, parties will still want risk assessment and guidance. Ultimately McAndrew and Risak referred to the MBIE model as ‘hybrid’. This article is a more detailed and comprehensive look at styles and one which goes beyond McAndrew and Risak’s work and seeks to assess the validity of the MBIE approach in the context of mediation theory.

The MBIE Mediator Competency Framework (2015) is the most recent indication of mediator guidelines. It should be noted that this framework applies to all MBIE mediators, not just the employment team. The framework clearly sets out core and extended competencies and provides a structured approach to career progression. The framework notes that mediators “generally specialise in a mediation area that requires in depth knowledge.”(MBIE, 2015, p.4) In this statement, “area” refers to substantive legal area, for example, employment. This clearly implies that evaluative mediation will occur to some extent. A facilitative mediator should be well equipped to mediate any dispute regardless of substantive subject knowledge. The framework confirms that “mediators will remain in the current jurisdictions [employment, tenancy, weathertight homes, unit titles] to which they have been appointed and extended competencies will be assessed in that context.” Movement into another jurisdiction/area will require “technical knowledge training”.(MBIE, 2015, p.5) An alternative model would have seen mediators work over all jurisdictions, that is, the employee would be primarily seen as a ‘mediator’ rather than an ‘employment mediator’. However, throughout the framework both facilitative and evaluative approaches are mentioned and ultimately the policy allows mediators to determine “an appropriate mediation style for the parties.”(MBIE, 2015, p.8)

Radich and Franks (2013) refer to the styles used by MBIE employment mediators. Peter Franks is a very experienced member of the MBIE team. In relation to facilitative mediation, the authors state that: “Mediators from MBIE and most private mediators have been trained to use at least elements of a facilitative process.”(Radich and Franks, 2013, p.73)
In describing the stages of mediation, the authors specifically use LEADR’s facilitative model. (Radich and Franks, 2013, p.70) In the first edition of this text, Chauvel and Spackman argued that: “[Facilitative] is the style of mediation that will most commonly be used to resolve employment relationship problems.” (Chauvel and Spackman, 2005, p.37) In relation to evaluative mediation the authors state that: “…MBIE mediators are empowered by s147(3) to express their views on the substance of the issues in dispute.” (Radich and Franks, 2013, p.74)

In conclusion, the authors note (Radich and Franks, 2013, p.74):

In practice, few mediators use a “pure” style. Some mediators may practice a combination of more than one of the styles mentioned above. Most will have a preference for one style or another – many facilitative mediators, for example, will refuse to give an evaluation of a particular problem. However, most mediators are willing to be flexible and adapt the processes they use to meet the parties’ needs in a particular case.

This summary reflects the ERA, MBIE policy and the survey results. It also reflects overseas research which notes a discrepancy between the clear styles described in theory and the more ad hoc approach applied in practice (Golann, 2000). Flexibility and adaptability should be celebrated but the various sources provide a vague description for those who might use MBIE’s services. It could also be argued that if any style is emphasised in law and policy, it is the facilitative style with the evaluative approach taking second place. This possibly does not accurately reflect the importance of evaluative mediation in the ERA regime. It seems that the settlement model plays an important role in MBIE mediation but this is not stressed in the relevant policy documents. Some users have been surprised by the emphasis on settlement rather than problem-solving. Users who have studied the relevant literature will be largely prepared for a facilitative-evaluative approach rather than a strong settlement model.

Some commentators actually equate ‘good’ employment mediation with the evaluative model. In relation to the 2010 ERA amendments barrister Sue Robson noted: “Good mediators should already provide assessments of a party’s chances of success of taking the matter further” (italics added). (Robson, 2010, p.98) Where does this comment leave the committed facilitative or transformative mediator, who is perfectly entitled under the ERA to choose their own mediation style? In analysing the history of the Department of Labour/MBIE team, academic Bill Hodge has argued that: “There remained some pockets of
dissatisfaction, sometimes relating to the unwillingness of departmental mediators to do reality checks and risk analysis. Sometimes a legal adviser needs and seeks a third person, whom the client trusts, to reduce a client’s unrealistic expectations of recovery.” (Hodge, 2005, p.422) Yet in any mediation the mediator is there for the parties, not for the lawyers and not for what the lawyers think their clients need.

6. What styles are actually used?

According to the MBIE mediators, the styles actually used in practice largely correspond with the styles which are claimed to be used. This is a positive outcome as it shows consistency and accuracy but is not surprising given the flexibility allowed under the ERA. Legislation and policy relating to styles is being acknowledged and followed. This is not the case with every ADR regime in New Zealand’s legal system. For example, in my recent study on interest-based negotiation in the Treaty of Waitangi settlement process, it became clear that the style used in practice was quite different to that set out by the government in policy guidelines.

The following section draws on the survey and interviews with MBIE mediators. The results are set out and then discussed. Many of the questions asked for participants to rank answers on a scale of 1 to 5. Overall results are provided in accordance with this scale ie a 1.5 result would show most participants choosing 1 or 2 whereas a 4.5 would show most participants choosing 4 or 5. The survey and interviews were confidential to promote open feedback in a sensitive employment context. Therefore the quotations that follow are not referenced to specific individuals.

Every mediator was aware of the five mediation styles included in this research. Question 2 asked about the extent to which mediators used each style in employment mediation. This question goes to the heart of this research project and produced the following results (1 = all the time, 5 = never):

- Facilitative = 1.94
- Evaluative = 2.53
- Settlement = 2.59
- Transformative = 2.94
- Narrative = 3.53
Given the strong preference for mediators to use a range of styles, these results were not particularly surprising. Based on the claims described in section 5, facilitative should be first with evaluative and settlement coming next. There is a more obvious emphasis on facilitative mediation in policy than in practice. From studying the policy guidelines I expected a larger gap between facilitative and other styles.

These results need to be considered in the context of the written comments. A distinction was made between mediations involving ongoing relationships and where the relationship was ending. One mediator commented: “Generally ongoing relationships will be more facilitative/narrative in nature.” Another mediator noted that they use evaluative mediation when caucusing. Many mediators stressed that different styles will be used in different circumstances and that mediators should be familiar with the full range. However, the question specifically asked for the ‘extent to which’ these styles are used. This was to ascertain the dominant styles.

Throughout the survey and interview processes mediators, with one exception, appeared reluctant to emphasize the settlement style, despite it receiving 2.59 in this question. One mediator strongly believed that there is a settlement focus: “We do have a settlement focus...there is no question about that and that is certainly true for personal grievances”. However, this settlement focus does not trump mediator autonomy. No mediator mentioned adverse pressure to settle. One mediator stated:

I haven’t ever felt pressured to settle a mediation. In fact I wouldn’t be working here if I was because I think that’s absolutely wrong, because as a mediator, that whole idea of independence, I can’t have a vested interest in the outcome, so if I’m incentivised to make something settle, that compromises my independence and my impartiality.

The survey findings were reflected in the interviews. One mediator noted that transformative mediation can be appropriate in ongoing employment relationships while another thought that transformative and narrative were of limited use due to time constraints and clients’ interests in a clear outcome: “I don’t think they are appropriate to our work really. To put it another way, I think that other styles are more appropriate for our work.” MBIE mediators seemed to have a much greater theoretical understanding of facilitative and evaluative mediation compared with transformative and narrative.

There is possibly a geographic element to the use of different styles. Several mediators mentioned that the Auckland team may take a more evaluative, even med-arb,
approach with other teams such as Wellington being more facilitative. This is partly reflected in the greater use of s149A in Auckland. The section 150 med-arb process is not particularly common but seems more prevalent in Auckland than elsewhere. One mediator thought the Auckland difference could be due to the large amount of small business users looking for mediator guidance, as opposed to large organisations in which the in-house human resources team had already played a role. Another mediator thought that it could be due to different ‘style cultures’ developing, that is, Auckland developing a more interventionist culture versus a more traditional mediation approach in Wellington. If using s150 became the norm then the mediation philosophy which underpins the process could be undermined and the overall process could gradually morph into arbitration. One mediator mentioned that parties avoid s150 due to the lack of a right of appeal. An experienced mediator who was strongly supportive of the facilitative model had only made one decision under s150 and had not been asked to make a recommendation under s149A.

It is important to note that the majority of mediations concern personal grievance cases without ongoing relationships (Radich and Franks, 2013, p.38). This will affect the mediation style chosen. Most parties have legal representation and this can increase the demand for a more legalistic, evaluative approach. A small amount of the mediation team’s work occurs in collective bargaining. This takes the form of ‘assisted negotiation’ and strongly resembles the Fisher and Ury principled negotiation process.

Question 3 asked about the extent to which each style reflects the mediation expected under the ERA (1 = a very large extent, 5 = not at all). This was a question about perception rather than practice. As previously noted, the Act allows a range of styles but does emphasise particular approaches, explicitly and implicitly.

- Facilitative = 1.94
- Settlement = 2.00
- Evaluative = 2.12
- Transformative = 3.18
- Narrative = 3.53

These results were predictable for facilitative and evaluative mediation which are both explicitly encouraged in the ERA. The settlement approach is included in a more subtle way but most mediators believe it is expected under law. In fact, mediators believe that it is
expected to a slightly larger extent than evaluative mediation. Despite ranking fourth and fifth in questions 2 and 3, the relatively high scores for transformative and narrative were surprising. Mediators are aware of these more ‘niche’ styles and use them where appropriate but overall the understanding seems weaker than for other styles.

During the interviews mediators spoke of their freedom to choose appropriate styles. Under section 147 of the ERA there is something akin to ‘academic freedom’ in that mediators are given wide ranging powers to determine how they work and this freedom is protected by law. This presents an interesting scenario given that the mediation team exists in a government department. Ministries and departments are well-known for hierarchical structure and restricted worker autonomy. One interviewee described mediator autonomy as “complete”.

Question 4 asked about the extent to which mediators had received government training in the different styles. The current employment mediation service dates from 2000 (despite various name changes). MBIE uses the LEADR (facilitative) model as its principal training model. Facilitative training was the most common, followed by evaluative and settlement (1 = a very large extent, 5 = not at all).

- Facilitative = 2.44
- Evaluative = 2.88
- Settlement = 3.00
- Transformative = 3.81
- Narrative = 4.13

The issue of training was discussed in more depth during the targeted interviews. The most common form of specific, foundational, training is the LEADR 5-day course. Soon after the ERA mediation service was established, Collaborative Decision Resources (CDR) Associates from Colorado conducted training. All interviewees mentioned the organisation and its influential role in training. As with most large mediation training programmes, CDR adopts a facilitative model. The Department of Labour, now MBIE, has provided ongoing in-house training as well. In fact, this training is probably more comprehensive than that provided by external organisations. It is run by internal practice leaders and includes an observation programme. Most of this training is not obviously style-specific but does include
risk assessment and case law analysis reflecting an evaluative focus. However looking holistically at mediator training, the most common style reflected is facilitative.

Question 5 asked about the acceptability of changing styles during a particular employment mediation. Every mediator supported being able to change styles. This overwhelming response is supported by the ERA and MBIE policy which provides a large degree of autonomy to employment mediators. This might seem a predictable and common-sense outcome. However, it can be seen as somewhat controversial in the context of mediation theory. As argued in section 4, some theorists advocate consistently using a particular style as opposed to other styles. The MBIE eclectic approach tends to treat all styles as being equal. It effectively takes a post-modern perspective of style, refraining from attempting to objectively judge the value of any given style. This perspective is encapsulated in the following quotes from mediators:

To be successful mediation needs to be a dynamic process that is responsive to the parties’ needs and interests….Not being prepared to change styles limits opportunities for parties to engage fully.

You need to be intelligently adaptive as you become more informed about the conflict.

Models form part of a mediator’s toolbox and flexibility of use of tools forms the artistry of the mediator rather than a reliance on the science only.

We’re trying to resolve disputes and if one approach doesn’t suit, we try another.

During the interviews, it was apparent that experienced mediators were well aware that some theorists advocate using a ‘pure’, consistent style. However, no mediator agreed with this approach in relation to the ERA.

Question 6 focused on the use of hybrid styles. For the purposes of this research, ‘hybrid’ means the concurrent use of two or more styles. This is contrasted with ‘changing styles’, which is the alternating between different styles, for example, moving from facilitative to evaluative. It could be argued that there is no such thing as a ‘hybrid’ style for as soon as key elements from another style are introduced, then a style change has occurred. This question seemed to cause some confusion and, in retrospect, ‘hybrid’ should have been more clearly explained. That said, mediators overwhelmingly supported the use of hybrid styles and provided some pertinent comments:
Give the parties the best mediation experience to assist in the resolution of their problems or to help them manage their problems more appropriately. If this means changing styles/providing hybrid styles then that is what we should do.

As an example, during facilitative mediation, it may also be necessary to reality check parties by using an evaluative style.

One mediator acknowledged the benefits of flexibility while noting: “Although I don’t like my parties to be confused.” For the purposes of any given MBIE employment mediation, the best definition of ‘hybrid’, and the one implied by McAndrew and Risak, is when mediators use more than one style of mediation in that particular mediation. This could be seen as changing styles within the mediation or, alternatively, having more than one style running together in a specific mediation. A better term, and one used in this paper, is ‘eclectic’. Either way, a clear distinction can be made between the hybrid/eclectic approach and a pure approach.

The survey results reflect a mediation team that is proud of its eclecticism, responsiveness and adaptability. This can be contrasted with the use of Folger and Bush’s transformative model in the United States Postal Service. Folger and Bush celebrated the postal service for choosing a specific mediation style and attempting to follow it closely and exclusively (Folger and Bush, 2005, p.52). There is an element of proselytizing in the work of scholars such as Fisher and Ury and Folger and Bush. This does not usually include the promotion of other rival approaches. In fact, Folger and Bush use US Postal Services examples in their work to show why transformative should be used in place of other styles: “The workplace mediation just described was intended to illustrate concretely why this view makes sense. At a more general level, it makes sense to see conflict transformation as the most important benefit of mediation both because of the character of the benefit itself and because of mediation’s special capacity to achieve it.”(Folger and Bush, 2005, p.35)

Folger and Bush are unlikely to be impressed by MBIE’s use of transformative mediation only as one approach amongst many, and even then, used less than facilitative, evaluative and settlement. In fact they categorically state: “Mediators sometimes assume that it is possible to combine transformative practices with elements and objectives of other models of practice that are more focused on problem solving and reaching agreement. At issue is whether it is possible for mediators to ‘do both’ at the same time, or to shift strategically from one framework to another in the course of a mediation. Our experience is
that combining models is not possible, because of the incompatible objectives of different models and the conflicting practices that flow from these diverse objectives.” (Folger and Bush, 2005, p.228) According to the MBIE survey and interview results, all of the MBIE mediators disagree with this statement. Folger and Bush warn that “shifting between [models of mediation] leads to confusing and inconsistent practices.” (Folger and Bush, 2005, p.228) Yet all the MBIE mediators surveyed strongly support shifting between models.

A 2006 study into tenancy mediation in New Zealand concluded that a transformative approach was being used successfully under the Residential Tenancies Act 1986. The authors concluded that “there is no sharp distinction identified between transformative and other mediation practices.” (Gill, Phillips and Farnsworth, 2006, p.334) The authors engage with the Folger/Bush thesis but ultimately see it as too restrictive. This is an interesting example of practical adaptation of theory but can also be seen as a distortion of Folger and Bush’s philosophy. The employment mediation study ultimately supports practical adaptation but argues that practitioners need to be more self-aware of how this adaptation may differ from the original model and the possible repercussions.

7. What are the repercussions of these findings?

This project has focused primarily on mediation styles. It also provides insights into other areas of employment mediation in New Zealand. Overall, the MBIE mediation team has a clear idea of what styles are promoted in the ERA and how and when to use these styles. Facilitative mediation is at the heart of this statutory regime. However, the emphasis on this model comes through more strongly in policy documents and training than in mediator’s practice.

Based on these research findings, there are some recommendations that could be considered in ERA mediation.

- Provide users with more information about specific styles so they better know what to expect. ADR ‘jargon’ could be avoided by using terms such as ‘problem-solving’, ‘risk assessment’ and ‘reaching outcomes’.
- Match the training to the reality. For example, if evaluative and settlement mediation continues to play a major role in practice, this should be better reflected in training.
- Work towards a more accurate understanding of transformative and narrative mediation. Most mediators referred to these two approaches in a generalised way.
The theoretical background is specific and these approaches are supposed to be a way of avoiding evaluative, settlement and facilitative mediation rather than complementing them.

- A strongly practical approach to mediation makes sense in the ERA environment but there is more potential to actively engage with scholarly work. A distinction can be made between academic work supported by quality research and more superficial work based on anecdote.

Should the MBIE employment team be considered a model for other mediation units, whether public or private? The answer partly depends on one’s view of whether one mediation style is clearly superior to the others and should be prioritised, or whether all styles are roughly equal and there to be used when appropriate. The latter approach is possibly more convincing in a practical context, especially given that the MBIE mediators are well-educated in mediation theory and have purposely chosen the more flexible, eclectic approach. This paper has argued that the MBIE employment team is the top mediation unit in New Zealand. The strongest challenge to this position probably comes from a small group of private mediators specialising in commercial matters. It is difficult to categorise this group as a ‘unit’ but they are identifiable. According to one of the leading members of the group, Robert Fisher: “Although mediation techniques can be classified in various ways…the differences tend to be matters of emphasis only. In practice, the responses required of a mediator will be as infinitely variable as human behaviour itself. It follows that no single mediation technique will ever be a complete answer.”(Fisher, 2010, p.23) Fisher proceeds to argue that settlement and evaluative styles will be more prominent in commercial mediation compared with more personal/relationship-based matters.

It is very difficult to find a New Zealand mediator who argues for a purist approach, that is, using one style at the expense of the others. Therefore there is an obvious difference of opinion between certain theorists and those in practice. The dichotomy becomes less clear when one considers that most, if not all, of the theorists have practical experience as well. The ‘pure’ approach cannot be dismissed by labelling it as ‘theory’ and thereby distinguishing it from ‘practice’. Fisher, Ury, Folger and Bush are all leading dispute resolution professionals as well as prominent academics and developed their ‘pure’ theories from practice.
In terms of scholarship, MBIE mediators should acknowledge that the eclectic approach actually runs counter to fundamental philosophies underpinning many of the styles. More time could be spent thinking about ‘why’ some of the styles are supposed to be exclusive. This does not imply that mediators should abandon the eclectic approach. This paper concludes that it is largely proved successful and effective. However, since the passing of the ERA in 2000, Department of Labour and MBIE mediators have, to paraphrase Alison Taylor, ‘ransacked’ different models for techniques despite foundational views being fundamentally different (Taylor, 2002, p.137). The question then becomes ‘has this damaged the intent and purposes of particular models?’

Overall, MBIE’s eclectic approach to mediation styles is both consciously practiced and very effective. A key issue posed by the approach is that parties have little idea which style to expect. Another issue is that mediators are mixing and matching styles which, according to the style ‘creators’, are not supposed to be mixed and matched. Despite these issues, in a domestic context, the MBIE employment team most successfully embodies the ideal of practical mediators actively using scholarship and theory to support practice.

References


