

Employment Relationship Problem Resolution: A gap between objectives and implementation

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Abstract

This paper identifies a disjuncture between the policy objectives of the Employment Relations Act 2000 (ERA) and the Employment Relations Problem Resolution system. One objective of the ERA was the early resolution of employment relationship problems close to the workplace. The framing of workplace conflict as Employment Relationship Problems (ERP) heralded a paradigm shift from adversarial escalation of disputes to collaborative problem solving by early negotiation and mediation. Our research suggests that in practice there is a propensity to bypass the intentions of the ERA by confidential settlement negotiation or escalation to a personal grievance; thus, the aim of strengthening employment relationships through processes of early, low-cost, fast and fair conflict resolution by state sponsored institutions appears yet to be fully realised in the education sector.

Our research of ERP in the New Zealand education sector indicates the shortfall in meeting the original intentions of the ERA is related to three factors: 1) the complexity of contemporary employment relationships in education; 2) the state provision of processes for early resolution does not include conflict in complex stakeholder relationships; 3) a culture of complaint has a negative impact on trust in school employment relationships. Given that background, this paper sets the scene for the forthcoming publication of a model for collaborative conflict management that provides process guidelines for organisations under the current legislative framework.

Key words

Employment Relations Act 2000, employment relationships, workplace conflict management, dispute resolution, education complaints, conflict resolution, good faith, education law.

Introduction

In New Zealand, there is growing interest in workplace conflict management in the education sector, highlighted by media reports about how principals and boards of trustees are dealing with escalated conflict between stakeholders. This paper presents findings from

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PhD research¹ about the management of Employment Relationship Problems (ERP) in New Zealand primary schools. The paper begins by outlining the methodological approach taken in the research.² The second section presents international and New Zealand literature on workplace conflict management. The third section presents research findings and discussion of the following three emergent propositions:

- 1) School ERP are more complex than the Employment Relations Act 2000 (ERA) prescribes between an employer and employee. ERP involve relationships between stakeholders in the wider school community; parents are influential.
- 2) There is a gap in the institutional provision of processes for early resolution of education ERP involving complex stakeholder relationships other than the employer and employee (for example, teacher/parent).
- 3) A culture of complaint has a negative impact on trust in school employment relationships.

Methodology

The goal of the research³ was to build empirical insights into the nature and the management of workplace conflict. While the study was located in New Zealand primary schools, our research interest is wider as we wished to find out: 1) what types of workplace conflict and ERP had been experienced; 2) what organisational conflict and dispute resolution policies, processes and practices were implemented in the workplace; 3) how participants understood ongoing ERP; 4) how conflict and ERP had been resolved; and 5) why problems had been avoided, managed, escalated, resolved or settled.

This interpretive research was inductive and iterative with data collection, analysis, literature review and application of extant literature occurring simultaneously. There were 38 qualitative narrative face-to-face interviews conducted. Participants⁴ were asked to recount recent stories of ERP they had experienced. The interviews were transcribed; memos of observational data about settings, processes, communication and relationships within schools were recorded. In excess of 260 ERP episodes surfaced. Drawing on grounded theory method (GTM),⁵ the data analysis involved coding ERP and comparing the numbered ERP by participant (illustrated in Table I), substance process and outcome.

¹ Gaye Greenwood "Transforming Employment Relationships? Making sense of conflict management in the workplace" (PhD Thesis, Auckland University of Technology, 2016).

² Greenwood, above n 1.

³ Greenwood, above n 1.

⁴ The participants were 9 principals, 6 deputy, assistant or associate principals, 6 past or present members of boards of trustees, 4 employment relations investigators, 6 mediators, 6 experts in education and/or employment relations including a representative of the New Zealand Education Institute primary teachers' union (NZEI) and The Board of Trustees Association (NZSTA) and one significant case of a teacher who requested participation toward the end of the study.

⁵ Kathy Charmaz *Constructing grounded theory: A practical guide through qualitative analysis* (Sage Publications, London, 2006); Juliet Corbin and Anselm Strauss *Basics of qualitative research: Techniques and procedures for developing grounded theory* (Sage Publications, Los Angeles, 2008); Cathy Urquhart *Grounded theory for qualitative research: a practical guide* (Sage Publications, Singapore, 2013).

Table I

n ERP/ Participant <i>in vivo</i> open codes	Chronology of episode/actions/ events/	Relationships/ identities/parties	Process of conflict management	Outcomes
1. Martin <i>Respecting children</i> <i>High-performance</i> <i>school</i> <i>Parental</i> <i>complaints</i> <i>Racism</i> <i>Parental</i> <i>expectations</i> <i>Low trust</i> <i>Teacher</i> <i>commitment</i>	Parental complaints about teacher's performance & absences, <i>claimed</i> <i>teacher was</i> <i>abrasive towards</i> <i>children.</i> <i>Ours is a high</i> <i>performance school</i> The teacher resigned.	Principal–parents– team leader– teacher. <i>Pākehā people</i> <i>complaining about</i> <i>a Māori teacher.</i> <i>Parents concerned</i> <i>about teacher's</i> <i>level of</i> <i>commitment.</i>	Conversation to support teacher at parent–teacher meeting, <i>but trust</i> <i>was low</i> Team leader led an open process of support for the teacher & meeting with parents.	<i>Parents sent racist</i> <i>emails complaining to</i> <i>the principal & team</i> <i>leader about the</i> <i>teacher.</i> Teacher left without saying goodbye or giving notice.

The episodes were then re-tabulated into emergent sub-categories. Coded constructs (for example, parental complaints) were compared. ERP that resolved were compared with problems that escalated and/or the employment relationship ended. From the analysis of the coded, categorised and tabulated data, four themes emerged. The participants' metaphors provided the titles of the themes in four findings chapters presented as: 1) building the emotional bank account: relational trust; 2) percolating problems: negotiating power and influence; 3) blurred boundaries: governing, leading and managing ERP; 4) learning and transforming ERP. The propositions that emerged from these four themes were compared and contrasted with extant literature. The next section of this paper reviews conflict management literature relevant to three significant propositions and then presents empirical evidence of a disjuncture between objectives and implementation of ERP resolution under the ERA.

International literature

Internationally, policies, processes and systems of workplace conflict management have been difficult to evaluate, however, there have been repeated calls for research that provides empirical evidence of effective workplace conflict management processes.⁶ Lipsky had found growth in alternative dispute resolution (ADR) practices at the level of the organisation in the United States,⁷ but there is a lack of research about phases of emergence,

⁶ David Ewing *Justice on the job: Resolving grievances in the Non Union Workplace* (Harvard Business School Press, Boston, 1989); David Lewin "Dispute Resolution in the non-union firm: a theoretical and empirical analysis" (1987) 31(3) *J Conflict Resolut* 465; Douglas McCabe *Corporate Nonunion Complaint Procedures and Systems: A Strategic Human Resources Management Analysis* (Praeger, New York, 1988); E Patrick McDermott "Survey of 92 Key Companies: Using ADR to settle Employment Disputes" (1995) 50(1) *Dispute Resolut J* 8; Jessica Jameson "Employee perceptions of the availability and use of interest based, rights based and power based conflict management strategies" (2001) 19(2) *CRQ* 163; Lisa Bingham and Denise Chachere "Dispute Resolution in Employment: The need for research" in Adrienne Eaton and Jeffrey Keefe (eds) *Industrial Relations Research Association Research Volume: Employment Dispute Resolution and Worker Rights in the Changing Workplace* (Industrial Relations Research Association, Champaign (Ill), 1999) 95; John Budd and Alexander Colvin "Improved Metrics for Workplace Dispute Resolution Procedures: Efficiency, Equity, and Voice" (2008) 47(3) *Ind Relat* 460; Bernie Mayer *Beyond Neutrality: Confronting the crisis in conflict resolution* (Jossey-Bass, San Francisco, 2004); Lisa Bingham "Employment dispute resolution: the case for mediation" (2004) 22(1-2) *CRQ* 145.

⁷ David Lipsky and Ronald Seeber "The Social Contract and Dispute Management: the transformation of the social contract and dispute management in the US workplace and the emergence of new strategies of dispute management" (2003) 9 *IERA* 87.

transformation, resolution, settlement, escalation from problems to conflict/grievance, and escalation to dispute.⁸ In-depth understanding of effective processes and practices for managing workplace conflict is important because ongoing unresolved relational problems manifest in increased stress, labour turnover, sickness, absenteeism, and escalation for individuals, teams and the organisation.⁹ There has been debate about whether workplace conflict management processes such as mediation should be provided internally or externally.

Comparative international research about processes and outcomes of ERP has been hindered by differences between internal and external dispute resolution systems and those delivered through the private and public sectors across federal or nation states and different legal and policy contexts.¹⁰ International literature on mediation is dominated by North American field research on internal systems design in large organisations. Jameson argued there was a lack of workplace conflict management training in interest based mediation processes.¹¹ Building on the work of Lind and Tyler,¹² Bingham and Pitts reported mediation was successful when there was procedural justice (process fairness) and where parties in mediation “felt they had control over the process” and were “able to participate meaningfully in it”.¹³ From comparative research of individuals’ experiences of internal and external mediation, they demonstrated that external models were satisfactory if there was “an absence of an integrated internal conflict management system”.¹⁴ However, external processes were considered a last resort, and early internal processes were preferable. Colvin also identified a positive relationship between commitment-oriented human resource management, and employee satisfaction and empowerment when employee participation, information sharing, training and development, and decision making were practised.¹⁵ Colvin emphasised the need to investigate how employee involvement in self-managing teams had developed new and informal processes for conflict resolution.¹⁶ Overall, there was acknowledgement of the positive value of internal systems for workplace conflict management.

The role of training in conflict management has become a site of empirical research. In Ireland, Teague and Roche found a lack of training in workplace conflict management by

⁸ James Antes, Joseph Folger and Dorothy Della Noce “Transforming conflict interactions in the workplace: Documented effects of the USPS Redress Program” (2001) 18(2) *Hofstra Lab & Emp LJ* 429; Bingham, above n 6; Bingham and Chachere, above n 6; Robert Bush and Joseph Folger *The promise of mediation: Responding to conflict through empowerment and recognition* (2nd ed, Jossey-Bass, San Francisco, 2005); William Felstiner, Richard Abel and Austin Sarat “Emergence and transformation of disputes, naming, blaming, claiming” (1981) 15(3-4) *Law Soc Rev* 631; Mayer, above n 6; William Roche and Paul Teague “Firms and Innovative Conflict Management Systems in Ireland” (2011) 49(3) *BJIR* 436.

⁹ Roche and Teague, above n 8, at 436–437.

¹⁰ Bingham, above n 6; Bingham and Chachere, above n 6; Blaine Donais *Workplaces that work: A guide to conflict management in union and non-union work environments* (Canada Law Book, Ontario, 2006); Peter Feuille, Denise Chachere and John Delaney “The individual pursuit of organisational justice: grievance procedures in non-union workplaces” (1992) 10 *Res Pers Hum Res Man* 187; Bernard Walker “For Better or For Worse: Employment Relations Problems under the Employment Relations Act 2000” (PhD Thesis, Canterbury University, 2009).

¹¹ Jameson, above n 6.

¹² E Allan Lind and Tom Tyler *The Social Psychology of Procedural Justice* (Plenum Press, New York, 1988).

¹³ Lisa Bingham and David W Pitts “Highlights of Mediation at Work: Studies of the National REDRESS Evaluation Project” (2002) 18(2) *Negotiation J* 135 at 135.

¹⁴ At 138.

¹⁵ Alexander Colvin “The dual transformation of workplace dispute resolution” (2003) 42(4) *Ind Relat* 712.

¹⁶ Alexander Colvin “Adoption and use of dispute management practices in the non-union workplace” (2004) 13 *Adv Ind Labour Relat* 69.

line managers.¹⁷ They found empirical support for Lipsky and Avgar's¹⁸ claim of a positive association between line and supervisory engagement in conflict management and labour productivity. Longitudinal research undertaken by Amsler encompassed 15 years of training and development in systems and processes of conflict management, including the evaluation of transformative mediation.¹⁹ Over time, after training and implementation of several approaches to workplace conflict management in the United States Postal Service, Amsler found transformative mediation to be the most satisfactory early intervention process compared with in-house facilitative mediation.²⁰ Roche, Teague and Colvin reported "innovative ADR practices across a number of countries and a growing interest in measures to prevent conflict".²¹ However, they noted a lack of empirical evidence for "portentous claims about how outcomes for stakeholders affected organisations, employees and trade unions".²² There is international consensus of a growing trend for conflict management at the level of the workplace, but empirical research has been slow because there are ethical, privacy, safety and commercially sensitive barriers to access for studying real time workplace conflict. Scepticism about conflict management literature and debate about effectiveness of in-house conflict and dispute resolution will continue until creative in-depth research design is implemented. The ground breaking longitudinal studies conducted in the United States Postal Service²³ could be replicated in other jurisdictions if organisations permitted academic researchers access.

New Zealand Workplace Conflict Management

Over the last decade, New Zealand research about the ERP resolution system focussed on external provision of dispute resolution services by state sponsored employment institutions, processes for collective bargaining, rates of grievance handling, the relationship between unions and employers, union density, strikes and lockouts. Academic literature²⁴ and state commissioned research²⁵ identified a lack of understanding about resolution of ERP, which are widely defined as:²⁶

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

¹⁷ Roche and Teague, above n 8.

¹⁸ David Lipsky and Ariel Avgar "Toward a strategic theory of workplace conflict" (2008) 24(1) *Ohio State Journal on Dispute Resolution* 143 at 176–177.

¹⁹ Lisa Amsler "Using mediation to manage conflict in the United States Postal Service" in William Roche and others (eds) *The Oxford Handbook of Conflict Management in Organisations* (Oxford University Press, Oxford, 2014) 279; formerly Lisa Bingham "Transformative mediation at the United States Postal Service" (2012) 5(4) *International Association for Conflict Management and Wiley Periodicals Inc* 354; Bingham, above n 6; Bingham and Pitts, above n 13; Bingham and Chachere, above n 6.

²⁰ Amsler, above n 19.

²¹ William Roche and others (eds) *The Oxford Handbook of Conflict Management in Organisations* (Oxford University Press, Oxford, 2014) 1.

²² At 1.

²³ Amsler, above n 19.

²⁴ Ian McAndrew "The Employment Institutions" in Erling Rasmussen (ed) *Employment Relations in New Zealand* (2nd ed, Auckland University Press, Auckland, 2010) 74; Bernard Walker and Robert Hamilton "Grievance process: research rhetoric and directions for New Zealand" (2010) 34(3) *NZJER* 43.

²⁵ McDermott Miller Ltd *Social & Economic Costs and Benefits of Employment Relationship Problems: Technical Report* (Department of Labour, 2007); Bernard Woodhams *Employment Relationship Problems: Costs, Benefits and Choices* (Department of Labour, August 2007).

²⁶ ERA, pt 2, s 5(c).

One objective of the ERA was to enable a “free, fast and fair” state sponsored mediation service to provide “a problem-solving” approach to ERP and “reduce the need for judicial intervention”.²⁷

State provision of mediation services has been a feature of the highly regulated industrial relations landscape for over 100 years,²⁸ yet a significant gap in research about conflict management at the level of the workplace remains. We do not know what types of conflict and ERP emerge within the workplace, nor do we understand how employers and employees manage processes that help resolve, trigger escalation or settle ERP. An evaluation of the New Zealand Department of Labour’s mediation service asserted the service had been perceived as a “formal route to settlement” and “often a last resort”,²⁹ rather than an early step in the process of ERP resolution. Walker’s study of employer-employee grievances noted that little was known about conflict and dispute emergence at the level of the workplace.³⁰ However, the day-to-day requirement for good faith negotiation behaviour replicates the principles of interest based negotiation and the facilitative problem solving approach to mediation.

The principle of *good faith* is a requirement of the ERA. Good faith is expected to influence behaviour during day to day negotiation and bargaining of the ongoing relationship, especially during proposed changes, restructuring, and any matters that arise under or in relation to an employment agreement while it is in force.³¹ Parties are expected to “be active and constructive in establishing and maintaining a productive relationship” where both parties are “responsive and communicative”.³² The requirement for good faith negotiation was an attempt to reframe negotiation behaviour from a positional rights based competitive process to an integrative interest based process of open communication.

The direction to *mediation as a primary problem solving mechanism* suggests a facilitative approach to mediation where a neutral third party assists parties to collaboratively negotiate agreement, mirroring integrative negotiation³³ on common interests, a problem solving approach rather than zero-sum positional bargaining. Reflecting principled negotiation,³⁴ where the mediator surfaces interests and frames communication in terms of common or mutual goals, the approach has been critiqued for its focus on settlement³⁵ and for its lack of attention to communication in relationships.³⁶ While subjectivity and emotion are acceptable, the aim is for the parties to negotiate in a structured, objective manner to move away from personalising a problem. However, in employment grievance mediation ‘the person’ may be perceived as ‘the problem’ and taking action for a ‘grievance’ attributes

²⁷ Margaret Wilson “Free, fast and fair – a new Mediation Service for New Zealand businesses and employees” (media release, 13 July 2000) at 1.

²⁸ Judy Dell and Peter Franks “Mediation in the statutory context: Employment mediation in New Zealand” (paper presented to LEADR 9th International Alternative Dispute Conference, Wellington, 21 September 2007).

²⁹ Department of Labour *2006–2007 Annual Report* (2007) at 3.

³⁰ Walker, above n 10.

³¹ ERA, s 4(4).

³² ERA, s 4(1A)(b).

³³ Richard Walton and Robert McKersie *A Behavioural Theory of Labour Negotiations* (McGraw-Hill, New York, 1965).

³⁴ Roger Fisher and William Ury *Getting to Yes: Negotiating an Agreement Without Giving In* (Houghton Mifflin Co, Boston/New York, 1981).

³⁵ Bush and Folger, above n 8.

³⁶ Peter Carnevale and Dean Pruitt “Negotiation and Mediation” (1992) 43(1) *Annu Rev Psychol* 531.

blame for disadvantage or injustice. Walker's observation of 14 personal grievance mediation cases suggested that the imbalance of power negatively impacted outcomes.³⁷ Ministry of Business, Innovation and Employment mediation was effective for employers to negotiate exit packages, but not for employees. Godard critiqued the assumption that conflict management processes provide 'individuals' with a voice as equals.³⁸ He asserted the imbalance of power was hidden during confidential dispute resolution processes such as mediation. Confidential negotiation and mediation were utilised to exit staff from schools in some of the cases reported in this research.

Workplace conflict management in the New Zealand education sector

Conflict management in the education sector is in the spotlight. Workplace conflict and ERP are vulnerable to escalation. In *Lewis v Howick Board of Trustees*, Colgan J, the Chief Employment Court Judge, claimed the management of ERP required caution in regard to procedural legalism. Colgan J associated formal legal processes by the Board of Trustees with the escalation of conflict involving the whole school community. The commentary of the Judge in *Lewis* reflected earlier research across industry sectors where there had been resistance to informal resolution by some lawyers. Parties and advocates had favoured more adversarial processes to settle ERP.³⁹

The education sector operates in a highly unionised environment with a wide range of legislative requirements, regulations and processes in the interests of children. There are tensions related to the special interdependent relationship between governance by boards of trustees and their management of staff and the principal. The governance structure emerged from reforms in the education sector in 1989, where boards of trustees were established by the Tomorrow's Schools policy under the Education Act 1989. Boards became the employer responsible for recruitment, discipline and dismissal, with the principal both a member of the board of trustees and an employee of the board. Each board of trustees is a democratically elected group of community representatives, the majority of whom are usually parents. This research identified the potential for escalation before engagement in early problem solving processes. The propositions reported in this paper are concerned with ERP that emerged from complex employment relationships between boards, principals, teachers and parents and identify how a culture of complaint can fuel escalation of conflict.

Research Findings: discussion of three emergent propositions

In this section we report findings and three propositions.

Proposition 1: School ERP are more complex than the ERA prescribes between an employer and employee. ERP involve relationships between stakeholders in the wider school community; parents are influential.

³⁷ Walker, above n 24.

³⁸ John Godard "Labor-Management Conflict: Where it comes from, why it varies, and what it means for conflict management systems" in William Roche and others (eds) *The Oxford Handbook of Conflict Management in Organisations* (Oxford University Press, Oxford, 2014) 48 at 48.

³⁹ Tony Waldegrave, Diane Anderson and Karen Wong *Evaluation of the Short Term Impacts of the Employment Relations Act 2000* (Department of Labour, 2003); K Wyse "The Employment Relations Act 2000: A failed attempt?" (dissertation, University of Auckland, 2003).

The former Attorney General responsible for the drafting of the ERA provided a reminder that the intention of the legislators was a focus on relationships and processes for early informal resolution of ERP. As an expert participant in this study, the Hon Margaret Wilson, Professor of Public Policy at the University of Waikato, stressed the emphasis on relationships rather than formal contractual legalism:

To use the language of relationship was to try and get people to recognise that it isn't entirely legal, that we're not just talking about a legal relationship, but we're talking about a human relationship that is, by and large, hopefully ongoing. So therefore, it requires a different approach, I suppose, than the strict adversarial legal approach to everything (Margaret Wilson, named interviewee).

In this study, the 'employment relationship' was widely constructed by research participants. Figure I compares the legal definition with parties to ERP reported by participants. A mediator reflected on gaps between the legislative definition of the employment relationship and common understandings of parties to an ERP mediation. She treated problems between employees as ERP even though they were not officially in an employment relationship under the Act:

It's becoming common to receive written complaints about performance and competence between staff members—teachers. The Act does not formally cover many of the conflicts and disputes we have in schools. Usually it's been between the principal and the staff member or between two equal complainers. Well, strictly speaking under the ERA, two employees don't have an employment relationship. How I think of it is that it's the employer who wants these two to get on, so there is an employment relationship between each of them (Sarah, mediator, ERP n156).

The important words to note from Sarah's observations above are "two equal complainers". The emergence of employee–employee ERP was associated with problems that affected employment relationships but did not always emerge from interactions between parties strictly in an employment relationship. Nevertheless, the conflicts, problems and disputes were interpreted as ERP. Hence the legal definition did not capture the experience of the research participants.

Figure I

Definition v reported ERP

Employment relationships defined

4(2) ERA 2000, includes those between:

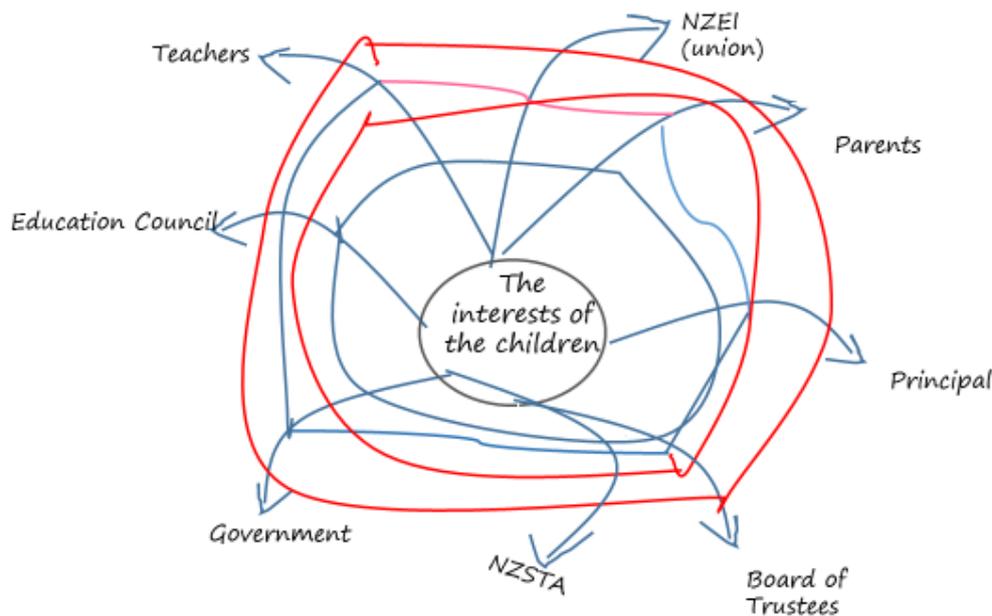
- (a) an employer and an employee employed by the employer,
- (b) a union and an employer,
- (c) a union and a member of the union,
- (d) a union and another union that are parties bargaining for the same collective agreement, or
- (e) a union and another union that are parties to the same collective agreement.

ERP reported from interviews

Relationship	
Principal–senior/team leader (s)	Principal–parent(s)
Senior leader(s)–teacher(s)	Principal–teacher(s)
Teacher–parent(s)	Principal–BoT–Teacher(s)
Teacher–teacher	Principal–BoT
Principal–union–teacher(s)–Government	Principal–BoT Chair

The ERP involved complex relationships between stakeholders. At the centre of ERP were the interests of children. However, ERP were dynamic and adult alliances shifted over the life cycle of conflicts. The complex web of employment relationships reported during the research is represented in the diagram below (Figure II).

Figure II



The propensity for ERP to escalate was a disadvantageous outcome of the dynamic complexity of relationships. ERP were reported to involve stakeholder relationships between board of trustee members, teachers and principals. The involvement of lawyers and insurance companies influenced escalation of ERP. The participants reported a range of stakeholder involvement in ERP, beyond the employer-employee relationship (see Figure I). Relationships between parents and board of trustee members, employee and employee were common sites of ERP. The findings reinforced Patten’s assertions that the school employment relationship is emotional and complex.⁴⁰ Decision making required effective

⁴⁰ David Patten “An Examination of an Investigative Model of Dispute Resolution for Boards of Trustees Involved in Staff Disciplinary Disputes” (LLM Dissertation, Victoria University of Wellington, 2002).

leadership, strong trust⁴¹ and collaborative governance.⁴² Government representatives, the teachers’ registration board, agents of the Ministry of Education, individual teachers, unions, principals, parents and boards of governors were involved in ERP. ERP were successfully resolved when there was early collaborative problem solving, but where there was escalation or an employment relationship ended, neither the voice of collective nor legal advocacy protected the teachers or principals. When groups of parents complained, problems escalated. Teacher-parent or parent-principal problems did not resolve without early intervention, exemplified by the episodes below.

Table II: Complex ERP escalated

Relationship	Descriptor or type of ERP	ERP that escalated
Principal–teacher–insurance companies–BoT	Early adversarial investigation, notification of insurance company <i>Negotiated exit settlement</i>	In a situation where it gets too adversarial too quickly, it may be a lawyer trying to score points...A lawyer said, “ <i>Oh you’d better get your insurance company on deck because it’s going to be potentially a personal grievance</i> ”. But on the other hand, she’d also flagged a possible mediation, so she was keeping open both things & threatening you with the most expensive legal process...I’d hold out the olive branch of mediation. But unfortunately, by the time it gets to an investigation, there’s a polarisation. Unfortunately, a majority of investigations lead to an agreed-upon exit (Adam, mediator, academic, ERP n197).
BoT–principal–teacher	Competency <i>Exit settlement mediation, legalism, insurance-ism</i>	There were professional competency issues. A principal, and then board, began to have competency concerns with a teacher. The union was brought in, insurance companies were notified, lawyers were called; there was a mediation. But the relationship was beyond repair by then and it wouldn’t have mattered who mediated...no one was going to fix it. Exit settlement at state-sponsored mediation was the outcome (Eron, lawyer, mediator, board of trustees chair, ERP n135).

There was evidence of a risk of double jeopardy for teachers and principals to lose their job and career when problems escalated. Where ERPs have not emerged from actions of the parties to the formal legal employment relationship, for example, where conflict emerged between a parent and a teacher, then the board of trustees was responsible, and this research confirmed Colgan J’s warning in *Lewis* of the risk of escalation when a board engaged early in formal legal processes. However, board of trustees’ recourse to formal legalism may be related to gaps in conflict management training and a gap in the provision of processes for early problem resolution in the institutional system.

Proposition II: There is a gap in the institutional provision of processes for early resolution of education ERP involving complex stakeholder relationships other than the employer and employee, for example, teacher-parent.

The episodes in Table II (above) highlight the risk of conflict between board of trustees, principals, parents and teachers escalating. An Employment Court Judge interviewed during the study suggested that schools need a specialised, education-focussed problem resolution system because teachers face a very real risk of losing their career if an ERP goes badly. The

⁴¹ Viviane Robinson, Margie Hohepa and Claire Lloyd *School Leadership and Student Outcomes: Identifying What Works and Why: Best evidence synthesis iteration* (Ministry of Education, 2009).

⁴² Cathy Wylie *School governance in New Zealand – how is it working?* (New Zealand Council for Educational Research, 2007); Chris Ansell and Alison Gash “Collaborative Governance in Theory and Practice” (2007) 18(4) *J Public Adm* 534.

Judge's comment below highlights the need to move to a more specialised dispute resolution service for education than the current state provision of mediation services for employees in the education sector:

The Mediation Service can take a while and they're not particularly focussed on education. Mediators are focussed on getting a resolution of the problem and they may handle an engineering works problem, [then] a shop assistant the next. They try to get a resolution quickly because there's a lot of pressure on them, they do two or three of these a day; they're not going to be able to take the time to get outside educational input. If you have early mediation, it needs to be expert mediation and people in the education sector probably need to think about their own problem resolution mechanisms (Employment Court Judge, ERP n225).

In practice, the government mediation service informally addressed some ERPs involving interpersonal employee-employee problems at the discretion of the mediators, but there was no process provision for ERPs beyond assistance and negotiation advice. The employer-employee relationship was the focus of the mediation service. The parent-teacher relationship has in the past been conceptualised as co-parenting or *loco parentis*. This responsibility for safety and achievement of the children is shared, but the relationship of *loco parentis* is complex. Coleman and Fergusson claimed they found mixed messages in schools.⁴³ There was a dissonance between school goals to be child centred and defensive actions from teachers. The outcome was struggle and resistance which made it difficult to negotiate "shared power".⁴⁴ In our research, we identified an association between positional negotiation and escalation of problems when there were complaints from parents.

Participants reported that a lack of attention to problems resulted in ongoing festering, escalation and/or diminished trust in some school communities. Conflict contagion⁴⁵ involving the spread of emotional involvement and mistrust between stakeholders in the school community provoked increased complaint. Just as conflict contagion occurs over time in teams from "dyadic conflict" to "when conflict perceptions are broadcast to other[s]",⁴⁶ conflict contagion involved alignment with perspective taking and emotional contagion spreading over time.⁴⁷ Conflict contagion was a risk associated with ERP in schools, especially where there was a lack of confidence in processes for the management of conflict that emerged from complex stakeholder relationships.

Once lost, trust was difficult to rebuild and where parents were dissatisfied by unresolved problems, complaints bubbled above and below the surface of everyday interactions within and outside the school community. The legislative intentions of the ERA of a paradigm shift to collaborative interest based problem solving from adversarial fault finding may not have been fully realised in education or the government mediation service. We identified a culture of exit settlement negotiations following complaints by parents and boards of trustees. Explicit communication of the principles of good faith behaviour in the school setting is a double edged sword, as parents requested open communication in the interests of their

⁴³ Peter Coleman and Robert Fergusson *Making Conflict Work: Harnessing the power of disagreement* (Houghton Mifflin Harcourt, Boston/New York, 2014).

⁴⁴ At xviii.

⁴⁵ Karen Jehn and others "Conflict contagion: a temporal perspective on the development of conflict within teams" (2013) 24(4) *Int J Confl Manage* 352.

⁴⁶ At 353 and 355.

⁴⁷ At 368.

children and teachers negotiated reasonable expectations to protect themselves from complaint. The next proposition is focussed on what appears to be an ongoing everyday phenomena in schools that undermines trust. We have categorised this as *a culture of complaint*.

Proposition III: A culture of complaint has a negative impact on trust in school employment relationships.

In the cases reported below in Table III, the culture of complaint was based on parental dissatisfaction with teacher performance and alleged disrespectful treatment of children by teachers. However, this culture of complaint was associated with high socio-economic areas rather than schools in lower socio-economic zones. Principals in fast-growing urban schools claimed parental complaints were influenced by demographic factors such as parents' professional status and other high socio-economic indicators. Lisa, a principal in a high decile 10 school, said:

If I compare complaints and problems to when I worked in a low-decile school, parents are scared stiff of the teachers in a really big way; they think we are godly things, you know, that aren't to be taken on. Decile 10 is the whole other end of the spectrum. You'll get taken on over every little wee thing. I have teachers putting up signs on their doors saying they are not available before 8.45am otherwise complaint and problem conversations take up class preparation time before school (Lisa, principal, ERP n21).

Lisa's assertions that complaint was a product of unreasonable expectations of parents for teacher availability and that parents from high socio-economic decile 10 schools were likely to be more demanding with teachers more likely to experience complaint, were reinforced by leaders from other schools. The following episodes provide examples of complaints, outcomes of ERP and problem resolution processes, as reported by participants.

Table III: Complaints > ERP

Relationship	Descriptor or type of ERP	ERP where trust was damaged by complaint
Parents–teacher–team leader–principal	Parental complaints - disrespectful treatment of a child	
<i>Racist rhetoric from parental emails—principal avoided problem, team leader supportive but teacher resigned</i>		I had a lot of issues with a staff member and parents who had some legitimate concerns about a teacher...I didn't have any issues with her competence but the complaints were about performance, timeliness, as well as her abrasive relationship with children. She had lots of time off; but the racism, disgusting rhetoric [and] emails from parents to the principal escalated the problem. There are high parental expectations...and she put in [the] bare minimum of effort; it was really hard. A school like ours is a high-performance school, you have to be fully committed to your job, otherwise you don't last. The teacher left [with] no notice to go to another job...She didn't even say goodbye, she just left, boom, two days after parent meetings where she had asked me to come support her cause (Martin, team leader, ERP n1).

Relationship Descriptor or type of ERP <i>Problem Resolution Process</i>	ERP where trust was damaged by complaint
Teacher–parents–principal Complaint about disrespectful treatment of a child <i>Avoidance of managing the dispute</i>	I find the stand-off between “he said/she said” (between parents and teachers) quite hard...Well, I don’t know what it is that makes me kind of hesitant to say...this but, I mean, I can think of one example maybe more...if I kind of dig deeper about that teacher’s behaviour, one example...[pause] I did see [the teacher] move the head of the child. The Board has had two complaints in writing but there are also some other issues around parents’ perceptions of her teaching and her leadership (Anita, principal, ERP n50).
Parents–teacher–principal Complaint -disrespectful speaking to children <i>Difficult conversation, loss of confidence, teacher exit</i>	I had a staff member with a hearing impairment who appeared to yell constantly at the children and parents were concerned they complained...He lost confidence and left the profession. We talked - it was a difficult conversation. He decided he was not suited to the classroom...Parents take you on, complain about anything, in a decile 10 school (Lisa, principal, ERP n10).
Parent–teacher Complaint -disrespecting a child, poor performance or misconduct <i>Investigation, teacher exit</i>	A child stepped on a piece of equipment and the teacher abused the child saying he/she is “hopeless and useless”. An investigation found that’s a poor way to teach. I think that’s poor performance, but abusing the kid for stepping on the equipment could also be misconduct. We did not agree on whichever it was. I can’t give you a clear, bright line between a concept of poor performance resulting in a bad outcome, and misconduct resulting a very bad outcome; it was the same thing (Adam, mediator, academic, investigator, ERP n146).
New principal–parents Complaint -children’s placement in classes <i>Unsuccessful negotiation, family exited</i>	We hadn’t put a child with their friend in a classroom. I said, “but there will be kids in there that you know.” So friendship is not driver of school, and...every time we talked about that kid’s behaviour it was always blamed back at us because previously in this school they said we used to put children with their friends first. So that caused a whole lot of grief for a year till they finally left the school. We now have a complaints policy and [the] only thing they can complain about is my process, not my decision (Peter, principal, ERP n41).
Teacher–parents–BoT–principal Parental complaint about ill-treatment of a child <i>Escalated/negotiated teacher exit</i>	There was a complaint against a teacher’s perceived ill-treatment of a student. Through the maelstrom of conflict relationships and [the] complicated raft of legal and social obligations, they rushed for lawyers and an external investigator; and none of it saved it from escalating. They had no education input. It would have been better to have sought dispute resolution advice, problem-solving advice, [or] interest-based advice rather than simply looking to lawyers to get rights-based processes (Adele, mediator, ERP n174).
Ministry of Education A culture of complaint <i>Ministerial appointments of commissioners or statutory managers</i>	Basically, it’s a culture of complaint. The problem is that the Ministry of Education responds to complaints [and] puts in statutory intervention when a sufficient number of complaints go directly to them, or a year report, which itself will be usually dealing with a barrage of complaints when the ERO team turned up in the school. Now, I think that results in the Ministry getting a comment from the board and from the principal about what sort of intervention is required, but the appointment of a statutory manager or whatever to achieve outcomes is sometimes just the ministerial predetermined direction of the intervention (Carl, investigator, lawyer, ERP n210).

Carl (above) articulated the complexity of interests when the state is a stakeholder in complaints, however, conflicts of interest also exist for teachers who need access to an early dispute resolution process when the problem is between the principal and a teacher:

What do I do if I am a teacher and I want to make a complaint? I’m unhappy, I don’t like the way the principal talks with me, I have to interact with him every

day and he/she just makes me feel like crap. Now what do I do about this, who do I complain to? I go and complain to the principal, that's hard, I don't know how to do that but the principal says, "Don't go to the board. You have to come to me; if you've got a complaint, you have to come to me". All right, I go to the principal and I make a complaint and he just says, "Well, you are just challenging my authority". So now where do I go? (Carl, investigator, lawyer, ERP n215).

The conflict of interests in the situation of discord between a principal and a teacher highlights an important tension; the teacher's attempt to seek support from colleagues can be viewed as strategic alliance building and acting in bad faith, undermining the principal. The exemplars above highlight the need for systems and processes across the school community where problems could be dealt with fairly and quickly to retain and build trust in relationships as parties work through inevitable workplace conflicts.

The Government is currently encouraging parents to request robust information from teachers and schools. However, this is not always simple. Parents and students recently gained access to nationwide complaint processes beyond the school, which could add to teachers' anxieties about how much autonomy and authority they have in the classroom. The Education Council's online complaint form, uploaded in July 2015, allows for written complaint about a teacher. There is one caveat: "the first point of contact of any contact for any complaint will be the teacher's employer" and the complainant is warned, "the complaints assessment committee (CAC) is unlikely to consider a complaint that is frivolous or vexatious".⁴⁸ However, the complainant may report the conduct of the teacher, quality of the teaching and/or the character of the teacher. The potential impact of the new complaints procedure suggests that a culture of complaint is a significant institutional phenomenon for the education workplace.

Principals may become more defensive of their teachers because scrutiny may increase the fear of complaints, in parallel with the expectations of the administration of National Standards. There may be increased workplace stress about how to negotiate problems. Classical negotiation theory recognises defence as a feature of competitive positional bargaining.⁴⁹ A collaborative interest based approach is less likely to involve defensive reasoning. If parents and principals or teachers engage in dualistic, right-and-wrong thinking, attributing blame before making sense of the situation or assumption checking, complaints are likely to escalate. Internal systems for complaint handling have required the recording of investigative processes, but now parents and students can electronically lodge complaints centrally with the Education Council and this is a powerful lever, forcing schools to predict, prevent and resolve issues as early and as close to problems as possible. However, a defensive mindset cues ongoing conflict.⁵⁰ The new process of complaint to the Education Council will require a shift in mindset from a defensive and positional rights based, adversarial negotiation to an early collaborative learning approach at the level of the school. The concept of *loco parentis* could be explicitly constructed as a good faith relationship of

⁴⁸ Education Council *Complaint Form* (1 July 2015) at 1, available at <www.educationcouncil.org.nz>.

⁴⁹ Walton and McKersie, above n 33; Fisher and Ury, above n 34; Roy Lewicki and others *Negotiation* (3rd ed, McGraw-Hill, Boston, 2010).

⁵⁰ Bernie Mayer *The dynamics of conflict resolution: A practitioner's guide* (Jossey-Bass, San Francisco, 2000); Bernie Mayer *Staying with conflict: A strategic approach to ongoing disputes* (Jossey-Bass, San Francisco, 2004); Mayer, above n 6; Kenneth Cloke *Mediating dangerously: The frontiers of conflict resolution* (Jossey-Bass, San Francisco, 2001); Walton and McKersie, above n 33; Fisher and Ury, above n 34; Lewicki and others, above n 49.

open, transparent communication, thereby, building trust in individuals and processes for workplace conflict resolution in schools.

Conclusion

Our research identifies a policy and practice gap between intentions and outcome of the ERA for the resolution of complex ERP in the primary education sector. The paper has identified policy and practice contradictions where the language of the ERA encourages early collaborative informal problem solving, while the current Government education policy focusses on complaint. The language of complaint infers rights based grievance, criticism and blame, which may provoke early formal processes of investigation, associated with formal legalism and evidence gathering rather than informal processes for collaborative conflict management. The goal was to resolve conflict early, by problem solving before escalation to legal causes of action. Our research suggests there is a need to embed early workplace ERP resolution processes that include complex relationships in education where parties in conflict are not strictly party to the employment relationship. A forthcoming paper will present findings that demonstrate how explicit sensemaking processes can enable early collaborative conflict management at the level of the workplace.