Policy, Operations and Outcomes
in the New Zealand Employment Jurisdiction
1990-2008

Susan Robson, PhD Candidate, Faculty of Law, University of Otago
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Abstract

This analysis of the policy for, and the operations of, the dispute resolution institutions established successively by the Employment Contracts Act 1991 and the Employment Relations Act 2000, examined the relationship between dispute resolution system design and success in meeting government employment policy objectives.

The grounded theory research method was utilised to first gather archived material from the Department of Labour (now the Ministry of Business, Innovation and Employment) about policy for, and the operations of, the institutions of each period under review. This material was organised for each period under review by commencing with a narrative of the policy that established the institutions, and following with a description of the operations of those institutions, policy changes, and the outcomes (in terms of policy objectives) that resulted. Each institution created by statute is described separately.

From these narratives common themes emerged as subjects of further analysis and this formed a concluding part of each operational chapter. The final chapter draws from this theme analysis.

The dominant themes concerned the transition from collectivised to individualised approaches to dispute resolution, the arrival of lawyers to a jurisdiction that had historically excluded or restricted them, the speed with which individual disputes (personal grievances) dominated the work of the institutions, and the emergence of two distinct and different advocacy and resolution cultures: a collectivist culture of union and employer association advocates and mediators; and an individualist culture of lawyers, employment advocates and adjudicators. The individualist culture imposed the norms, practices, costs and outcomes of the civil courts on the employment institutions, notwithstanding specific policy prescription (in both statutes) against that form of resolution.

This study concludes that the relationship of advocacy culture to institutional structure is key to predicting effects on policy objectives. It is furthermore possible that success in meeting those objectives may be more dependent on advocacy culture than institutional structure.
Preface

The initial inspiration for what was intended to be a study of institutional dispute resolution process came from the endowment of the Centre for Legal Issues at the University of Otago Law Faculty (my alma mater) by Grant and Marilyn Nelson. Mark Henaghan’s enthusiasm, Kim Economides’ helpful guidance on research method and Paul Roth’s superior understanding of the employment jurisdiction, generous sharing of resources and readiness to read and comment on successive drafts established an early and consistent support for this endeavour. Stuart Anderson, Struan Scott and Jessica Palmer turned the discipline of regular reviews into a positive experience and Kyle Matthews’ instructions on the finer aspects of word-processing software and formatting solved a number of mysteries. Clare Ramsay smoothed the administrative path whenever necessary.

Jessie Neilson helped me to understand how the Library worked for distance students and the Department of Labour helpfully allocated me a desk beside Erin O’Brien, who facilitated the search for the primary sources, with patience and good humour over the three years that this search took.

Ross Wilson, Walter Grills and Paul Stapp talked to me about their experiences of some of the issues raised by the primary sources. Phil de Wattignar went further, providing me with useful material about employment mediation.

John Robson, who is more familiar with the employment jurisdiction than I, proved to be a handy sounding board and proof reader.

Completion of this thesis was dependent on the support and encouragement of all these people, to whom I remain profoundly grateful.
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Chapter 1

Introduction

Thesis

This grounded-theory study of the specialist dispute resolution institutions of the New Zealand employment jurisdiction in the period 1990-2008 argues that the connection between dispute resolution system design\(^1\) and success in meeting government employment policy objectives may be more dependent on advocacy culture than institutional structure. Whether or not that is so, the interdependence of culture and structure in facilitating policy outcomes is key to predicting their effects.

The impetus behind the study was my interest in process issues arising from advocacy in low-level statutory bodies created to provide specialist forums as a means of relieving congestion in the civil court system. Of the specialist jurisdictions with which I am familiar (including membership of the Employment Relations Authority 2000-02) the employment jurisdiction offered bases for policy comparison not available from others.

The institutions created by the Employment Contracts Act 1991 (ECA) and the Employment Relations Act 2000 (ERA) were each based on policy goals for low-level, quick, effective and inexpensive institutional approaches to dispute resolution as a means of achieving broader social policy outcomes, greater labour market flexibility in the case of the ECA period and more pluralist\(^2\) approaches to employment in the ERA period.

For comparative purposes the two periods represented policy from the competing interests of this jurisdiction (i.e capital and labour) that, until 1991, relied on collectivist approaches to the management of individual disputes via employer

\(^1\) The phrase ‘dispute system design’ appears to have a specific meaning that is not intended here. In United States of America academia it refers to workplace management systems: Todd Dickey, *Integrating Unions in Integrated Conflict Management Systems* (2015) 33(S1) Conflict Resolution Quarterly, 45.

associations and unions. This changed with the enactment of the ECA, a policy recognition that labour market flexibility would depend on a transition from collectivist to individualist approaches to industrial relations, and the introduction of lawyers (en masse) to a jurisdiction that had previously limited their involvement. This meant there were two advocacy cultures (collectivist and individualist) in both periods under review. This study charts the dominance of lawyers as advocates in both periods and their role in facilitating ECA and undermining ERA policy goals for labour relations.

A major focus is the personal grievance jurisdiction introduced in 1973 as a means of averting collective action arising from disputes confined to individuals. It assumed a particular significance after 1991 because it dominated the work of the institutions and became the means by which the transition from collectivist/pluralist to individualist/unitarist approaches to dispute resolution was established. Description of this transition (and both eras) is based on the perception, position and experience of the government department charged with both policy and operational responsibility for labour/employment issues. The study contains analyses of the Department of Labour’s positions and responses to Cabinet policy about dispute resolution and the operational issues that resulted, with the obvious caveat that, while institutional and organisational factors may play an important role in shaping policy outcomes, they are not the only thing that matter. The flexibility outcome sought by the National Government in 1991 had both been met prior to 2000 and remained undisturbed by the era that followed. The rapidity with which the transition to individualist/unitarist labour relations was effected in the 1990s and the absence of a return to pluralism in the 2000s established a basis for the inquiry about what it was about the way that the institutions operated in each era that influenced this result.

For these reasons this study contains detailed descriptions of the two policy processes that resulted in the legislation at issue and similarly detailed accounts of the way the two sets of institutions operated in each era. These are descriptions from (or of) the Department’s perspective, for the purpose of making the observations and drawing the conclusions in each chapter, but also for revealing what appeared not to be considered during policy processes. These are the omissions that form the basis of the theory about advocacy culture.

**Research Method**

**Grounded Theory**

This research method relies on the development of theory as research proceeds, rather than testing hypotheses posited in advance. It is regarded as providing a framework

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3 The term individualist, throughout this paper, refers to non-unionised employees. The transition applies, therefore, to de-collectivised employees. Employers, particularly those composed of groups of shareholders, or reliant on other collective forms of capital, under which many employees in New Zealand are employed, have not been required, incentivised or cajoled into de-collectivising.


for the whole research process – data collection, mode of analysis and theory generation. In its classification and explication of succeeding levels of the analytical thinking required of such research – coding, axial coding and theory development - it provides a useful structure for ordering and connecting apparently disparate data.

Use of the grounded theory method relies on the researcher having ideas or experience of their own:

[T]he theories that we carry within our heads inform our research in multiple ways, even if we use them quite unselfconsciously...to analyse data, we need to use accumulated knowledge, not dispense with it. The issue is not whether to use existing knowledge but how.\(^7\)

Primary source material from the Department of Labour was first gathered and selected for its relevance to policy for and operation of the institutions, not for its connection to any hypothesis because it had not been determined at that stage. However, my interest in and experience of institutional process and advocacy cultures may well have influenced the selection of material regarded as relevant. The selection process constituted the first stage of the grounded theory approach (memoing/tagging phenomena that appear to be significant).

Committing the material gathered to narrative form (chapters 2-8) constituted the second, open coding, stage. It formed the basis for determining what themes emerged that were common to each narrative. Once those themes were established and the connections between them across both eras emerged, the observations and conclusions that form the second half of each chapter were formulated. These were the issues relevant to institutional process (labelled quality of process).\(^8\) The penultimate step required the assessments labelled quality of outcome, in large part dependent on secondary source material. The theory concerning the role of advocacy culture in facilitating policy objectives did not emerge until after several iterations of this process.

Sources

The Department of Labour files recorded correspondence to and from the Department – from members of the public, Government Ministers, other Government departments, Members of Parliament, Parliamentary Select Committees, Judges, Tribunal members, lawyers, unions, employer organisations, litigants. Press releases, newspaper, magazine, journal and academic articles, theses, and reported research were also collected and archived, as were records of policy advice tendered to Ministers, from preliminary drafts to instructions to the Parliamentary Draftsmen, advice tendered to and by other Departments, policy, statistical and qualitative research sought from both inside and outside the Department. Additionally the files contained information about the operation of the institutions administered by the Department: the Mediation Service (prior to 1991 and post 2000), the Employment Tribunal, the Employment Relations Authority, the Labour and Employment Courts;

\(^7\) Anselm Strauss and Juliet Corbin, *Basics of Qualitative Research, Techniques and Procedures for Developing Grounded Theory*, (2nd ed, Sage, Los Angeles, 1998) at 47; My particular theories, prejudices and perspectives can be found in the Case Comment sections of post 2005 editions of the *Employment Law Bulletin*, Lexis Nexis Wellington and in its online Employment Law Service.

\(^8\) The terms ‘quality of process’ and ‘quality of outcome’ categorise content in chapters 2-7: ‘outcome’ refers to the result of policy goals and ‘process’ refers to institutional processes of the dispute resolution institutions established in both eras.
personnel appointments; employment terms and conditions of judicial and other dispute resolution personnel; statistical data about case processing; reports (weekly, monthly, quarterly, annual) about institutional performance.

These files proved to be the rich source of data suggested by May as the

...sedimentations of social practices, [which] have the potential to inform and structure the decisions which people make on a daily and longer-term basis; they also constitute particular readings of social events. They tell us about the aspirations and intentions of the period to which they refer and describe places and social relationships at a time when we may not have been born, or were simply not present.  

However, as the list above reveals, the documents contained within the files were a mix of primary and secondary sources.

Primary source documents on the policy construction exercise for both statutes were relied on for their descriptions of the advice proffered to the Government. Comparison of those documents over time (from initial policy explorations to what was finally expressed in legislation) revealed what changes of position and advice by the Department occurred and (sometimes) why. Documents emanating from other Government departments in 1991 fulfilled three functions: they formed the basis for elucidating competing policy approaches to the issue of de-regulation; they revealed the means by which opposing political constituencies were served by public officials at that time; and they articulated the competing policy positions – quality of outcome versus quality of process - that formed the basis for comparative analysis of their operational efficacy in the institutions that emerged from the two policy processes under review.

Other primary source documents were the reports generated by the Department on the operation of the institutions. They included statistics on applications or claims and their disposition. This numerical data formed the basis of analysis of the operation of the institutions. By the process of comparing sets or classes of data, or the interrogation of connections within those sets or classes, the first stage phenomena on which the grounded theory method relies were revealed.

The search for explanation of phenomena was dependent, in large part, on secondary source documents – correspondence, submissions, press releases, newspaper articles, research and conference papers. They were the source of complaints, opinions, and comment about issues concerning the operation of the institutions and thus assisted in the identification of concepts or theoretical categories necessary for open and axial coding analysis. The content of these documents was relied on for the fact of the complaint or opinion expressed, rather than the truth of the matters canvassed, within them. Reliance on this type of material was not envisaged when this research began, but complaint, opinion and comment is, as the Department’s files reveal, both a function or outcome of a policy process (during and afterwards) and a component of the measurement of operational impact. Since the labour jurisdiction depends for its existence on the fundamental policy conflict between the interests of labour and capital the function of criticism and complaint has a particular significance.

A third category of file documents, qualitative research (including research about public perceptions of the institutions commissioned by the Department after 1999) fulfilled the functions of both primary and secondary source material, in that the research revealed both the existence of first level phenomena, and the means of classification and explanation.

As will become apparent from the narratives of both eras the process of policy-making about the institutions changed significantly after 2000. In 1991 policy advice was informed by the perspective and experience of public servants with long histories within the Department of Labour. After 2000 (and the retirement of the official with the greatest involvement in policy advice over the previous decades) the emphasis shifted to the collection of research and data by specialists contracted specifically for each research project. Departmental policy analysts came and went. Lost was any sense of history or continuity.

**Literature Review**

The need to stimulate thinking about the properties or dimensions of the research data depends upon multiple views of the phenomena thus revealed. This was the purpose of the literature review. It offered bases for comparison, explanations of the data and theories for testing. Strauss and Corbin recommend use of the literature review to access a variety of meanings and interpretations of events, interactions and objects so that variations can be incorporated into the theory that is the consequence of third stage selective coding.

Thus the literature review for this research did not begin until much of the primary resource material had been gathered and narrativised because it was only at that point that its potential themes emerged. This type of literature review forms the basis for the formulation of theoretical categories once other data gathering processes have occurred, rather than beforehand as a basis for hypothesising.

**Theoretical perspective**

The following broad theoretical issues form the basis of the perspective adopted for both the narratives and the analysis contained in this study.

The term *juridification* describes the process by which the state uses the law to steer its social and economic conditions in particular directions to suit prevailing political objectives. Labour law has become a larger more juridified subject with the decline in trade union density across developed economies, and the parallel expansion of

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10 Meenakshi Sankar and Roberta Hill, *Connecting Policy, Research and Practice: What does it mean in practice?* Labour, Employment and Work in New Zealand Conference, Industrial Relations Centre, Victoria University of Wellington, (2002): This discussion of the challenges of case-study based methodology for evaluation and policy development in the Department of Labour illustrates the limitations of such research for research based policy approaches.

11 Strauss and Corbin, note 6.


employment protection legislation dealing with individual rights (in some of them).\textsuperscript{14} This study proceeds on the basis that the policies that underpinned each statute, the desire to abandon the “\textit{enforced collectivism}” of an over-regulated labour market,\textsuperscript{15} and the wish to replace the unitary system that resulted with a more pluralist statutory framework,\textsuperscript{16} each aspects of juridification, were particularly dependent on the institutions created to facilitate the social and economic changes sought. The policies called for radically different institutions, so that the broad similarity in the ERA of the dispute resolution institutions that facilitated the policies of the ECA, contributed to the means by which the policy goals of the ERA were frustrated.

These institutions substituted stakeholder involvement in grievance resolution for reliance on the judiciary and the judicial formulation of social policy in the labour law sphere,\textsuperscript{17} best suited to a unitarist than a pluralist model of labour regulation.\textsuperscript{18} The focus on common law contractual rights, and restrictive interpretations of statutory protections limited the scope of any protective role that the courts might have adopted for employees but expanded protections for employer property rights in labour resources.\textsuperscript{19}

The shared policy view (underlying both statutes), that institutional informality could overcome the problems of more formal dispute resolution institutions, failed to take account of 1980s theories about the lure of informality, the replication by such institutions of the courts they were designed to replace, and the centrality of the role of institutions for the legal profession.\textsuperscript{20}

The international context in which these changes occurred, the growth of individualisation in employment relations during a period of rapid global economic restructuring and “\textit{a more aggressive assertion of managerial rights}” has been attributed to a number of interrelated factors: more competitive product markets, less buoyant labour market conditions; a “\textit{more facilitative political climate}” (for the adoption of free-market deregulatory approaches to policy-making in industrialised states arising from perceived needs to provide for greater business investment and economic growth); and the dominance of human resource management cultures that demand unitarist approaches to labour relations.\textsuperscript{21}

\textit{Thesis Scheme}

\textsuperscript{14} Susan Corby and Pete Burgess, \textit{Adjudicating Employment Rights: A Cross-National Approach}, (Palgrave Macmillan, Basingstoke, 2014): They argue that as a result of these trends, another is necessary: analysis of the institutions that adjudicate individual employment rights.
\textsuperscript{16} Margaret Wilson, note 2.
\textsuperscript{19} Gordon Anderson, notes 17, and 2.
Adoption of the narrative approach to describe policy and institutional operations mandated a chronological organisation of the data relied on to generate the theory about the influence of advocacy culture in this jurisdiction. Thus chapter 2 describes the policy debates that resulted in the ECA. They contain the arguments for the then existing collectivist model of dispute resolution and the points of difference between its advocates and those for ‘justice’, the unitarist model favoured by the proponents of change. The explication of these points of difference begins the argument about the effects of advocacy culture on dispute resolution system design and employment policy objectives.

The two advocacy cultures that operated in the jurisdiction are introduced in the Chapter 3 description of the operation of the Employment Tribunal. The dominant theme of this chapter, the means by which the intention for informality of dispute process for the Employment Tribunal was subverted whilst desired policy outcomes were advanced, represents an attempt to demonstrate the connection between choice of system design, policy outcomes, and advocacy culture. Its focus on the role of the legal profession in the success of the transition from collectivised to individualised dispute resolution advances the argument about the influence of advocacy culture on system design and policy objectives.

Chapter 4 concerns the Employment Court in the ECA era, its resort to common law ideas of process as a means of establishing a central role in dispute resolution in this jurisdiction, and the political reaction. This is intended to reveal the breadth of legal advocacy culture, and the means by which that culture was asserted.

Chapter 5 mirrors Chapter 2, in that it describes ERA policy debates. The descriptions of policy advice from the Department of Labour reveal a significantly changed focus from that delivered 9 years earlier. Its advice favoured improving the operation of the individualist model. The corresponding absence of advice about collectivist resolution models suggest the success of the policy approach that the Department earlier opposed. A second contrast concerns the involvement of the legal profession in the policy formation process. Its opposition to proposed institutional and procedural changes set the scene for the descriptions in chapters 6 and 7 of the means by which that opposition frustrated those changes and the policies that prompted them. Those chapters about the Mediation Service and the Employment Relations Authority, the ERA equivalent of chapter 3, establish the connection between advocacy culture, resolution system design and policy outcomes.

Chapter 8, like Chapter 4, reveals another perspective on advocacy culture and institutional process by moving the focus from representatives to decision-makers. Its focus is the Employment Court’s reaction to ERA restrictions on its powers to supervise inferior institutions.

The data in these chapters is categorised according to whether it addresses quality of process in the institutions described or quality of policy outcome. The observations and conclusions about the data of each chapter form the basis of the themes relevant to the central theory about the influence of advocacy culture on institutional dispute resolution system design and policy outcomes addressed in the concluding chapter 9.
Chapter 2
Employment Contracts Act Institutions
Policy Origins

Introduction
National Party policy for the 1990 General Election emphasised the need for a more flexible labour market by reducing collective and increasing individualist negotiation of terms and conditions of employment and the representation of employee interests. However after the election the process of legislating the promises concerning dispute resolution provoked a hard fought policy dispute about the reach of labour market deregulation. The dispute aligned some public servants and their departments with Cabinet policy moderates and others with policy radicals. The resulting Part VI, Employment Contracts Act (ECA) reflected a series of political compromises: a new statutory regime instead of amendment of the existing one; retention of a specialist employment jurisdiction over resort to the civil courts; abolition of the Mediation Service in favour of an Employment Tribunal; retention of the Labour Court as the Employment Court; extension of statutory minima for grievance processes to the entire workforce over none at all.

This chapter describes the policy process (concerning issues of access, legal and lay assistance, formal and informal procedures, dual and single function institutions, timing of institutional change) that resulted in the dispute resolution system and institutions of the ECA. The aim is to establish a basis for demonstrating how the individualist outcome sought by both radicals and moderates was facilitated by the extension of grievance rights to the whole workforce and dispute resolution system design. The radical lobby opposed both.

Interrogation of this conflict requires a description of the detail of the respective policy positions of advisers, policy makers and stakeholders and their strategies and tactics.

The chapter concludes with a list of structural and process issues relevant to the subsequent operations of the dispute resolution institutions and system selected.

Labour policy context
Legislation governing the relationship between employer and employee has been a feature of New Zealand industrial relations since the Industrial Conciliation and Arbitration Act 1894. By 1991 this relationship was based on what was known as the

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national award system – a series of formally recognised awards that set legal minimum conditions of employment that were binding on the employers and (most) employees in the industries or occupations on which they were based. Their terms and conditions were the subject of bargaining between unions and employer groups with state provided conciliation and arbitration when agreement could not be reached. By 1984 it was clear that the statutory regime needed to better reflect changes of bargaining practice. The incoming Labour Government therefore sought to reform aspects of the system. It began by abolishing compulsory arbitration for pay claims (disputes of interest). It went on to reform the structure and powers of unions, clarify rights to strike and make some changes to the dispute resolution institutions, but it retained the essential character of the award system (including the representation of employees through a system of collective bargaining) notwithstanding some intense philosophical differences within the governing party about the place of regulation and collective (over individual) interests in industrial relations.2

This debate presaged the industrial reforms of the incoming National Government in 1990. Against what has been described (of the Labour Relations Act 1987) as either a centralist-collectivist response to inequalities of bargaining power and consequent conflict3 or a failure to provide for a controlled transition to greater enterprise bargaining, the argument for greater bargaining flexibility triumphed. It privileged individual over collective bargaining of terms and conditions of employment, couching what has been described as an agenda to strip employees of bargaining power and workplace voice,4 as the promotion of freedom, choice and labour market efficiency.5

The debate about deregulation of the labour market forced policy makers back to basics in respect of the nature of dispute resolution, the need for state involvement, the structure of the resolution institutions and whether a specialist jurisdiction should be maintained. Much of the thinking on these issues had never been subject to the challenge that the deregulation debate required. The policy struggle that resulted in the new statute covered the full range of issues that arise for public dispute resolution.

The reforms brought specialist dispute resolution facilities for the first time to all employers and employees – regardless of whether they were covered by a collective arrangement – and changed the nature of representation in this jurisdiction. This, in

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4 Gordon Anderson and Moira Thompson, Mazengarb’s Employment Law, Vol 1, General Introduction, (loose-leaf ed, Butterworths, Wellington); Gordon Anderson, The Employment Contracts Act 1991: an employers’ charter? (1991) 16(2) New Zealand Journal of Industrial Relations, 127, argues that the consensus between the two major representatives of employers (New Zealand Employers Federation) and employees (Federation of Labour) 20 years previously was no longer existent by mid 1980s – the employers adopted a position that unions were anachronistic and marginal to good industrial relations.

5 Gordon Anderson, note 2 at 80.

turn, affected processes or styles of resolution. Prior to 1991 the dominant resolution style of individual disputes was heavily influenced by the bargaining styles of parties to collective bargaining. Impasses were resolved in large part by assisted negotiation. After 1991 the influx of lawyers as representatives introduced the requirements of legal method to dispute resolution. Impasses were regarded as requiring arbitration. The implications of this for the public provision of dispute resolution facilities will be considered in later chapters.

**National Party Policy for 1990 General Election**

This policy, released to the public on 8 May 1990, proposed to deregulate the labour market (by abolishing the award system in favour of individual employment contracts) and make changes to the dispute resolution system by ending the union monopoly over the representation of workers with personal grievances, reviewing the Labour Court and the Arbitration Commission and revamping mediation and conciliation procedures. It signalled the opening up of personal grievance procedures to non-union member employees by asserting that no group or individual would be denied access to dispute resolution procedures.

At issue was the means by which the personal grievance jurisdiction would be extended to all employees: whether the current system would be made available to all or via a dual system (one for union and the other for non-union employees). The latter option (lobbied for by employment-at-will advocates\(^7\)) was regarded as having the disadvantage of reinforcing the benefits of union membership (based on a view that one of the main attractions of union membership was the right to take personal grievances) and the former option as preferable only if the Labour Court was not retained.\(^8\)

**National Government Policy Divisions**

Work by the Department of Labour (via its Industrial Relations Service) on the implementation of labour market policy commenced immediately after the election.\(^9\) The Minister of Labour, Hon W F Birch, wished to introduce the reform legislation in two parts, the first of which would be in the first week of December 1990. He wanted a working group set up before Christmas to review the dispute resolution institutions, the results of which would form part of the second stage of the reform programme in the New Year.

By early November 1990, however, a clear division in the new Cabinet about this strategy became evident. The Minister of Labour regarded reform of bargaining for collective agreements as the legislative priority with reform of the industrial relations institutions to be dealt with later. His initial plan was to amend the Labour Relations

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\(^8\) Paul Bell for Minister of Labour, Minute, 16 November 1990; David Peetz *Individual contracts, bargaining and union membership* (2002) 28 Australian Bulletin of Labour, 1.

\(^9\) Department of Labour to Minister of Labour, Minute (of meeting between Minister of Labour, Secretary of Labour and General Manager Industrial Relations Service) 2 November 1990. At this meeting the Minister presented his officials with a document known as *legal drafting instructions*, compiled by Paul Bell in the months leading up to the election, which became the basis of development of the Employment Contracts Act.
Act 1987. The Minister of Finance, Hon Ruth Richardson, was opposed to incremental reform, preferring a "clean slate" approach through a completely new labour statute based on voluntary contracting and the common law of contract. Labour contracts would be enforced through the civil courts (District and High Courts) as non-union individual contracts were, ameliorative contracts legislation (e.g. Contractual Mistakes Act 1977, Contractual Remedies Act 1979, Contracts (Privity) Act 1982) would not apply and the "Minimum Wages Act" would be repealed, for the reasons that the ordinary courts should be the forum for disputes resolution:

I believe this is essential in view of the string of poor decisions by Labour Court Judges; [the labour market needed to be protected] from some of the worst features of the various contractual Acts referred to – features that would probably open the way for harmful judicial activism.

Officials reflected this division of view, with those in the Departments of Labour, Justice and the State Services Commission (SSC) coming in behind the Minister of Labour and Treasury officials supporting the Minister of Finance. The Treasury position was met by a policy assessment from Labour officials that warned that a labour relations policy that rests entirely on individualised contracts secured through the civil justice system runs the risk of relatively high bargaining and disputes resolution costs both for many employers and workers. An industrial relations regime that permits individualised contracting only, takes no account of the economies of scale available through collective arrangements, nor of the moderating disciplines (e.g. against wildcat industrial action) that are available through collective bargaining.

There was also the practical problem of resourcing the radical agenda. Labour officials warned that the extension of the dispute resolution regime from 40% of the workforce (that was then unionised) to all employees had considerable resourcing implications for the existing institutions, the Mediation Service and the Labour Court. For the radical agenda this warning was welcomed. It wanted to abolish those institutions.

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10 Minister of Labour, Memorandum For Cabinet, 9 November 1990.
11 The Treasury, Paper, Labour Contracts (undated) faxed by A. Sundakov to Department of Labour on 16 November 1990.
12 The Minister’s term for the Minimum Wage Act 1983.
13 Minister of Finance, Memorandum to Cabinet, 12 November 1990.
14 Ibid, Draft Labour Bill, Annex 1, Explanatory note about clause 5. This position has been described as reflecting the criticism of the Business Roundtable that specialised institutions pay too much attention to the content of contracts, implying terms into them, and that civil courts would produce significantly different judgments about contracts: Nick Wailes, (citing Gordon Anderson) The Case Against Specialist Jurisdiction for Labour Law: The Philosophical Assumptions of a Common Law for Labour Relations (1994) 19(1) New Zealand Journal of Industrial Relations, 1.
15 The concern about continued use of the Labour Court judiciary was that they “had proved particularly adept at innovative interpretations of dismissal and redundancy law”: Penelope Brook, note 3 at 9.
16 General Manager Industrial Relations Service and the Assistant Commissioner of State Services to Minister of Labour and State Services, Paper: Labour Relations Amendment Act No 2 1990: Public Policy Issues, 12 November 1990, at [8].
17 Ibid.
18 David Smyth, The Treasury, Paper: Note of Positions of Labour Department and Treasury on Labour Market Reform as at 18 Nov, 18 November 1990: “… if Treasury’s views are adopted there
arrangements and a return to the position prior to 1970 where modified at-will terms and conditions applied to much of the workforce.\textsuperscript{20} It was thus horrified by the proposal to extend personal grievances (characterised as a tax on employment) to the whole workforce. Retention of a separate jurisdiction would perpetuate a lack of respect for contract law principles and “a pattern of third-party interference” in employment. Failure to abolish statutory minima for wages, holidays and health and safety would compromise the purity of the freedom of contract approach they sought for the new legislation.\textsuperscript{21}

The battle to prevail that followed this opening skirmish continued through the following year until the final form of the legislation was approved in April 1991. The tactics engaged by the protagonists echoed their positions on the content of the struggle. Their officials were directed by Cabinet to work together to produce the necessary policy papers (the Officials Working Party on the Employment Contracts Bill) but whilst the (Labour, Justice and SSC) officials in the Birch camp were able to do so, the Treasury members of the group chose not to. The Treasury strategy was to undermine the power of any challenge to its preferred positions. This was achieved by the simple expedient of failing to table essential policy positions until the last minute, failing to contribute to the debate until after other participants considered it concluded, and the issue of its own policy papers after (and in response to) the papers contributed by the others.\textsuperscript{22} This caused the Labour Minister to record his desire to deal with dispute resolution mechanisms “in a more consultative fashion”\textsuperscript{23}.

The Minister of Finance was successful in the struggle over whether to reform existing legislation or start anew but in the quarrel over sequencing legislative change the Minister of Labour prevailed,\textsuperscript{24} although not without the casualty sustained by his officials who had pressed for an assessment of institutional dispute resolution requirements once the new deregulated labour market environment had been established. This would have seen the retention of existing institutions – the Labour Court and the Mediation Service for the initial phase of the Employment Contracts

\begin{itemize}
\item would be no formal need for a state mediation service (although Government could take a separate decision to provide one), or a separate Labour Court.” at 4.
\item Addis v Gramophone Co Ltd [1909] AC 488.
\item Ibid.
\item Minister of Labour to Prime Minister, letter and Cabinet Strategy Committee paper: Industrial Relations, 20 November 1990: “We talked earlier today about the difficulties caused by the lack of agreement between Treasury, the Labour Department (Ralph Stockdill’s group) and Ruth Richardson and myself on procedure, let alone for the content of the required paper. Ross Tanner has prepared a potted summary of events over the weekend, which you may find illuminating.”
\item Minister of Labour, Memorandum For Cabinet, 9 November 1990 at [5] p 2.
\item Minister of Labour, Media Statement, 19 December 1990; Minister of Labour for Cabinet Strategy Committee, Cabinet Committee paper: Development of the Government’s Industrial Reform Package, 20 November 1990; Minister of Finance for Cabinet Strategy Committee, Cabinet Committee paper: Economic Policy and Comprehensive Labour Market Reform, 20 November 1990; Cabinet Strategy Meeting Minutes, 21 November 90: CSC(90) M 2/2: The Committee agreed to adopt the operational guidelines set out in the Minister of Labour’s paper, directed that drafting of the legislation commence immediately and noted that a second Bill to integrate institutional arrangements would be introduced in the New Year.
\end{itemize}
Act. Instead, the officials were locked into a policy debate about whether any institutions at all would feature in the reforms.

**Labour Market Policy: Regulation**

The Department of Labour was forced back to policy basics by this debate, in particular on the place of regulation in the labour market. Its view was that a labour relations regulatory framework should serve the following purposes: lowering the costs on employers and employees by providing procedural certainty in bargaining and disputes resolution; lowering external costs to the community (that arise, for instance, from industrial disruption); and providing cost-effective protections for employees otherwise exposed to unreasonable commercial or safety risks. Its rationale for continuing state involvement in the proposed reforms included a critique of the Treasury policy as overly reliant on outcomes. An assessment of the case for an institutional complement to that policy rests on the case for defined processes to ensure the harmonious and equitable achievement of those outcomes. If they are to be fully effective, these processes should be robust enough to cope with the pressures placed upon them, both in depressed and buoyant labour market conditions.

This required an acceptance that the costs of industrial conflict are invariably imposed on others not involved in the issues at stake, meaning that there is a benefit of state involvement in industrial dispute resolution in lowering those costs.

On the choice of forum for dispute resolution Labour officials noted that whilst it was theoretically possible to rely on the civil courts, the costs – financial and social – of doing so were likely to be considerably higher than were then current.

Acknowledging that the argument for retaining specialist institutions was dependent on assessments of their long-term benefits and the net resource costs of alternatives, they emphasised the public signalling function of specialist institutions:

To provide no specialist industrial relations institutions runs the risk that the State has no capacity, (short of some form of one-off legislative intervention) to influence bargaining behaviour, and particularly disruptive bargaining behaviour. On the other hand, the establishment of some institutional presence signals publicly that the State has some interest in constraining excessive bargaining behaviours and promoting industrial harmony. This can be seen by contrasting the need for the Whangarei Refinery Expansion Project Disputes Act 1984 to prevent work stoppages on site as opposed to the action of the Labour Court in sequestering the assets of the seamen’s union when they ignored an order of the Labour Court to return to work.

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28 Department of Labour for Minister of Labour, note 26 at [6] p 3; cf Brook, note 7, who derided legislating for outcomes when government regulated unions and described labour market regulation based on the freedoms of contract and association as targeted at “processes rather than outcomes” at 130. This in turn is met by John Deeks who argues that labour market deregulation is not argued in relation to outcomes but in relation to beliefs or ideology: the market as “a priori good rather than good as a consequence of what it could and did deliver.” John Deeks cited by Ellen Dannin, *The Origins and Impact of New Zealand’s Employment Contracts Act*, (Auckland University Press, Auckland, 1997) at 91.
29 Department of Labour, note 26.
over a rail ferries dispute. These potential benefits should be measured alongside the cost of state provision. Any institutional structures should be considered on the basis of resource cost-effectiveness relative to the Government’s wider policy objectives.30

An additional analysis of the role of institutions sought to identify those functions under the proposed bargaining system that might require third-party involvement, the institutions providing those functions (Mediation Service and Labour Court) and what would happen in their absence: no access to state provided facilitation for the negotiation of employment contracts (collective or individual); no access to disputes resolution for those covered by collectives, except on an individual basis; and no access to institutional means to enforce contractual obligations, as the result of the deficiencies of the common law of master and servant. At that time remedies for common law actions were limited to damages, dismissals were effective upon receipt of the required period of notice and damages were limited to income covered by the notice period:

Thus the inherent inadequacy or inappropriateness of the remedies available to the individual under common law combined with the difficulty and costs of taking actions in the civil courts means it is not often realistic for individuals to pursue breaches of their contracts of employment, even if they were informed enough to do so.31

Labour officials concluded this advice by asserting that disputes about negotiations, grievances and enforcement are an inherent part of the negotiating process, but the absence of specialised industrial relations institutions to assist with difficulties or impasses would significantly increase the potential for industrial unrest. As would any failure to address issues of inequity. The problem of the barriers to access that the civil courts represented was repeated along with a warning that their effectiveness in resolving industrial disputes would be constrained by jurisdictional factors. Additionally they would require a significant increase in resources – potentially more than that devoted to specialist industrial institutions, given the amount of work processed by the Mediation Service and the Labour Court:

The substantive issue is therefore not one of whether the State should be involved in assisting in the resolution of disputes or in the enforcement of employment contracts, as it inevitably does have that function. The issues are essentially the extent to which it is involved in setting parameters beyond those that apply in the civil courts; the institutional framework it wishes to provide to underpin that involvement; and the most cost effective way in which that may be achieved. It is therefore proposed that the institutional implications of the proposed labour market reform be addressed in the context of the role of the State providing: an institutional framework for mediation; the institutional and jurisdictional framework for dealing with disputes over the application and enforcement of contracts of employment; the institutional and jurisdictional framework for dealing with disputes of the nature of a personal grievance.32

Provision of information (e.g. model contracts, dispute procedures, minimum codes) was another issue considered relevant to state involvement in the labour market. This was described as state involvement for the purpose of assisting parties to employment contracts because decisions to engage are dependent on adequate information. If the workforce were to be converted to employment by individual contract there would be a need for clear guideline information (for both employers and employees). The

31 Ibid, at [15], p 5.
32 Ibid, at [16], [17], p 6.
Department doubted that a universally acceptable commercial supplier of such information could adequately meet this need. The issue was not so much supply, as whether the information was accepted as authoritative. State provided information was more likely to meet this condition, thus lowering transaction costs between bargaining parties and facilitating the monitoring of bargaining outcomes for policy assessment purposes.\textsuperscript{33}

The mechanisms for dispute resolution to be included in legislation continued to be the subject of debate between Treasury and the Department of Labour after Cabinet accepted the need for a two-stage legislative process. A draft memorandum (prepared by Labour officials)\textsuperscript{34} containing an outline of what the Employment Contracts Bill would contain drew an immediate response from Treasury that it omitted mention of the system by which employers and workers would choose whether their employment contracts would be

governed by general law or by the special statutory scheme that would replace the Labour Relations Act. Both individual and collective contracts were to be possible under general law, while the special statute was to apply only to collective arrangements. Workers and employers were expected to opt explicitly into either the general or the special regime…\textsuperscript{35}

This triggered a Cabinet direction to the officials to resolve the issue. The result was the inclusion in the Bill of specific rights to sue on employment contracts in the civil courts.\textsuperscript{36} Four days later Cabinet approved the Bill for introduction to the House of Representatives.\textsuperscript{37} The Ministerial war over acceptable dispute resolution mechanisms continued to rage, with the Minister of Finance asserting that the legislation brought employment contracts under the jurisdiction of the law of contract\textsuperscript{38} and the Minister of Labour forewarning potential changes to the institutional framework (from those contained in the Bill), decisions about which would be left to the Select Committee.\textsuperscript{39}

**Introduction of the Employment Contracts Bill**

The initial drafts of the Employment Contracts Bill\textsuperscript{40} provided for a Mediation Service (a continuation of the existing service) and a Labour Court (without lay members). They also provided for a continuation of the practice under the Labour Relations Act 1987 of having grievance committees consider personal grievances whereby the employee submitted their grievance to the committee (composed of an equal number of representatives for each party and a Chair), the employer submitted a
response, and in the absence of a negotiated resolution, the decision of the committee was binding.\textsuperscript{41} There were similar provisions for the settlement of disputes about collective contracts\textsuperscript{42} and procedures for the conciliation and arbitration (by the Mediation Service) of disputes arising during the negotiation of collective contracts.\textsuperscript{43}

Introducing the Bill the Minister of Labour described a number of changes to streamline the processes of these institutions and enlarge access to them. Grievance committees would be responsible for resolving grievances with no rights of appeal to the Labour Court, except on points of law. All employees whose employment contracts (collective or individual) provided for personal grievance procedures would have access to grievance committees and they would not need to do so through a union.\textsuperscript{44} He went on, however, to foreshadow potential changes by announcing that the Select Committee would be further considering institutional structure and calling for submissions from interested parties.\textsuperscript{45}

The ECA that was given the Governor General’s assent on 7 May 1991 contained radically different provisions. Those providing for the establishment and operation of an Employment Tribunal replaced the provisions concerning the Mediation Service. Provisions establishing and providing for the operation of the Employment Court replaced those concerning the Labour Court.

The process by which this occurred was a mix of stakeholder input (via specific consultation), public consideration (via submissions to the Select Committee considering the Bill) and a continuation of the policy battle both between officials and members of the Executive described above.

\section*{Institutional dispute resolution: the policy process}

\textit{Stakeholder Consultation}

The Minister of Labour invited submissions on personal grievances and the employment institutions from the Employers Federation, the Council of Trade Unions and the Business Roundtable in January 1991.

The Business Roundtable submission argued strongly for the abolition of all institutions, for the common law of contract to prevail and for the civil courts to be the only available dispute resolution institutions:

\begin{quote}
any institutional arrangements that preserve a special labour jurisdiction will result in judicial behaviour that does not reflect the government’s intentions of treating employment contracting according to the same principles as standard contract law.\textsuperscript{46}
\end{quote}

\textsuperscript{41} Employment Contracts Bill 1990: (134/P, 134/1-4) \textit{First Schedule: Standard Clauses in relation to procedure for settlement of personal grievances}, December 1990.


\textsuperscript{44} Minister of Labour, note 39.

\textsuperscript{45} Ibid.

\textsuperscript{46} Business Roundtable to Minister of Labour, letter, 22 January 1991.
It was particularly concerned about the retention of the Labour Court, asserting that there would be no need for additional resources if its jurisdiction (but not its judges) was simply absorbed into the civil court system – so long as no special labour division of those courts was thereby created. Interestingly the paper accompanying this submission referred to the efficiency of the Labour Court in organising fixtures [as] an important factor [in any step to remove it]. The small size of the Court, the limited business and the (relatively) few advocates and counsel make communications easier. Lack of formality and procedural niceties contribute to this efficiency. The civil Courts are cumbersome by contrast, a fact which is only slowly being redressed.47

This contribution, by a lawyer reliant on work in the Labour Court, served to highlight the contradictions of the agenda of the radical section of the business lobby. It could succeed only by significantly limiting employee powers to challenge employer decisions, which in turn depended on the erection of barriers of access to authoritative dispute resolution. The inefficiencies of the civil court system were perceived by the economists of this section of the lobby to provide those barriers. For the lawyers, however, the interests of clients and the business opportunity that arose from that relied on low barriers of access to courts.

Abolition of the Mediation Service was recommended on the grounds that mediation was currently in use only because it was free, was not provided by the state for other commercial contracts, and private mediation could fill any gaps (on the basis that a market for mediation services would rapidly develop and competition between providers would ensure their quality).48

The Council of Trade Unions (CTU) asserted the need for institutions like the Labour Court and the Mediation Service and personal grievance procedures regardless of the labour relations environment created by the reforms.49 It argued that a principles based approach to the institutions required the Labour Court to retain its equity and good conscience jurisdiction and informality of process, and the Mediation Service to retain its facilitative functions.

These institutions and procedures should be swift, efficient, and unencumbered by unnecessary procedural purity. They should be accessible i.e., practical and affordable; in the interests of achieving workability, equity and stability.50

This submission echoed the position of Labour officials about the need for policy on the institutions to be formulated after implementation of the reforms – reasoning that this would provide an opportunity to assess the practical impact of the new legislation before the institutions were changed.

In common with the CTU submission the Employers Federation argued for accessibility and affordability of new structures and the importance of mediation services. But that was the extent of any common view. For employers there were serious difficulties with the existing institutions – delays in achieving final results, the combination of mediation and arbitration functions in grievance committees, the

48 Business Roundtable, note 46, at 3.
50 Ibid.
repetition of proceedings at committee and court hearings as the result of de novo
hearings in the Labour Court, and the focus on issues of process at grievance
committee hearings by the Labour Court.51

The submission advanced four options for the delivery of mediation services –
disbanding the Mediation Service (leaving mediation services to be provided by the
private sector), restructuring it into a State Owned Enterprise (to compete with private
sector providers) or retaining it either as is or with its monopoly rights (for the
provision of services) and arbitration function removed. The theme of the pros and
cons of these options was choice, the cost of private sector provision, and the need for
arbitration to be separately provided.

Arbitration would be provided by a tribunal (located between the Mediation Service
and the Labour Court) which would be informal and accessible, administered by the
Justice Department, Government funded, using the services of private sector
arbitrators (selected in each case by the parties to a dispute) whose decisions could be
appealed only on a point of law.

The Labour Court would be retained but with a limited jurisdiction to hear appeals
and referrals of points of law from the tribunal, compliance and strikes/lockouts. It
would be administered by the Justice Department and would lose its equity and good
conscience jurisdiction. The alternatives, of either disbanding the Labour Court or
establishing a labour division of the High Court, were also considered. The practical
difficulties of disbanding a court, and the barriers to access, increasing cost, the
requirements of rules of evidence, and the exclusive representation rights of lawyers
in the High Court meant neither option was feasible.

In the articulation of policies that best served the interests of their respective
constituencies (big business, labour and small/medium business) these submissions
reveal the importance of process in the construction, removal or alleviation of access
barriers to effective and authoritative dispute resolution. Barriers could be
constructed by limiting resolution to the civil courts, removed by retention of
facilitation with arbitration as an option for facilitation failure, or alleviated by a
preference for arbitration over facilitation.

**Officials’ positions: The Department of Labour position**

The Department of Labour continued to argue for the status quo. The need for it to
look for confirmation from others for the success of the institutions it administered
had by then become apparent:

> The report of the Law Commission (1989) on the courts notes that the volume of work handled
> by the Labour Court is beyond the present capacity of the civil courts.52

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51 NZ Employers Federation to Minister of Labour, letter, 30 January 1991; Peter Boxall, *Management
Zealand Experiences*, (Victoria University Press, Wellington, 1993) 146, argues that this reflected the
reform agenda of New Zealand managers: “management can no longer be considered the reactive
party in the ideological debate over the nature of the employment relationship and in the practical
regulation of its terms.” at 148.

The proposal to extend the personal grievance jurisdiction had implications for the workloads of the current institutions but this resort to the Law Commission underlined the point that the civil courts were never in the position to assume this workload.

The case for specialist institutions in the labour market was mounted on the basis of their special expertise, flexibility, avoidance of legalism, encouragement of informality and preservation of Parliament’s intentions, and for labour institutions in the settlement of disputes for compromise and adjustment, the accommodation of long-term interests, improved relationships, avoidance of further disputes, incentivising long-term stability and balance in the labour market, and the conclusion of acceptable contractual outcomes.

Lay representation in the whole dispute resolution process was regarded as critical to effectiveness of stable industrial relations:

By contrast, the average occupants of the judicial bench are more used to dealing with ‘one-off’ settlements, derived from the application of abstract principles embodied in precedents, and have little knowledge of the realities of the workplace and the ongoing nature of the employment relationship.

The ready availability of solutions or remedies personal to the parties, the use of informal procedures and a less adversarial, more investigative atmosphere in the labour jurisdiction was contrasted with the imposition of inflexible legal precedent, the need for legal rulings, automatic reliance on lawyers and the costs of legal representation. Specialist institutions best reflected Parliament’s intentions for the labour market because the common law was regarded as failing to reflect the realities of that market. It assumed equality of bargaining power, relied on limited remedies (wage loss only) and was problematic for social needs for stability and balance in employment relationships.

This preference for facilitative over arbitrative approaches to dispute resolution can best be understood by reference to the Department’s view of their consequences. Facilitation was regarded as forward-focused, long term, relationship-based, emphasising the importance of compromise. Arbitration was perceived as short term, dichotomous (right/wrong), backwards oriented (via dependence on precedent) with a focus on contractual terms rather than the needs of relationships.

The Labour Court avoided these traps because it had a wide-ranging jurisdiction, was the latest in a series of specialist institutions established for the labour jurisdiction since 1894, was acknowledged as having specialist expertise by the civil courts, and noted for the consistency of its judgments, had had many of its (controversial) decisions upheld, allowed lay advocates, lawyers, parties themselves to be heard thus providing enhanced access to all comers, and relied on relatively informal procedures which resulted in a more expedient and efficient disposal rate of cases.

54 Ibid.
56 Ibid.
57 Ibid.
Similarly the Mediation Service was noted as having a dual role – facilitation and arbitration – whilst offering a low cost service, information and advice to empower parties to reach their own decisions, informality in hearings where a ruling was required, and the use of employer and employee representatives in such hearings to allow the reality of the workplace to be taken into account and incorporated into workable decisions.\textsuperscript{58}

Data for the 3-year period to 30 September 1990 on the use of the institutions revealed that personal grievance claims averaged 770 annually, 51\% of which were resolved by agreement/facilitation, 44\% by mediator decision (9\% of which were appealed) and 5\% by referral to the Labour Court. Thus, of the 2304 grievances over this period, 197 (8.5\%) required Labour Court input, indicating that the:

\begin{quote}
high rate of disposal of cases at the committee stage, where the parties have access to third party advice and information, suggests that this facilitative function has a significant role to play in lowering external costs through achieving workable outcomes as well as enabling such disputes to be settled as near as possible to the point of origin. The relatively low number of appeals of decisions made by mediators also support the notion of a lower order resolution body having the power to determine settlements without the need for incurring the comparatively higher cost to the State of a court ruling.\textsuperscript{59}
\end{quote}

The Department did concede, however, the potential for conflict to arise between the facilitative and arbitrative functions of the Mediation Service as the result of the introduction in the (December 1990 version of the) Employment Contracts Bill of provisions to summon witnesses and hear evidence. This was characterised (somewhat disapprovingly) as introducing a more formal element into arbitration.

The resource implications for specialist institutions in the new environment involved issues of access and demand arising from increased access to grievance procedures, and responses to the new industrial environment. The Department was unable to translate those changes into estimates of demand.

The Department’s second position was that the status quo had to be retained as an option because the existing institutions had been established to meet the objectives specified above (special expertise, flexibility, avoidance of legalism, encouragement of informality and preservation of Parliament’s intentions) and they would serve as a measure of the strengths and weaknesses of the other options.

The use of the civil court system as an option was discounted on the basis that it would face the legal difficulty of adjudicating two separate strands of employment law (the common law of master and servant and the statutory jurisdiction), it was unable to operate flexibly, informally and expeditiously (compared to the Mediation Service and Labour Court) and its use would incur added costs by both parties and the State.

A mix of specialist lower order and civil court higher order institutions was similarly dismissed in favour of a specialist jurisdiction serviced exclusively by specialist institutions to fully cover the range of actions provided by the legislation. This led to

\textsuperscript{58} Ibid.
an option that the Department was prepared to countenance: a specialist lower order disputes resolution body in terms of either the retention of the Mediation Service or the establishment of a new body, a ‘low-level’ tribunal with a facilitative function over a range of matters for which court adjudication was unnecessary and with potential to consider personal grievances if that jurisdiction was to be enlarged to include all employees.

This option required the Department to confront the problem of conflict between the facilitative and arbitral functions of this body by suggesting they be separated. An industrial tribunal (presumably a slightly higher order one) would assume the arbitral role. It would comprise a legally qualified chair and two lay members representing management and labour. Its consensus decisions would be brief and free of legal jargon. The emphasis would be on common-sense based on experience in industrial relations rather than strict application of legal principles, less formality than a court and representation by the parties themselves.\(^{60}\)

This was not, however, an option favoured by the Department. It questioned the need for lay representation on a tribunal as an unnecessary duplication of representation (and added costs to the State) if employers and employees had direct access to it and the ability to fully represent workplace realities. At this point it was also noted that no apparent added advantage had resulted when specialist courts comprised a lay membership.

From this emerged the option for a single ‘lower order body’ with direct rights of access and representation by parties, separate but complementary facilitative and adjudicative functions and a wider jurisdiction that encompassed some of the functions then performed by the Labour Court.

Recommended was the establishment of specialist institutions at both low and higher levels and deferral of their structure and resource requirements.\(^{61}\) The Government’s position (as put by the Minister of Labour) required institutions that were accessible to individuals, able to resolve disputes as near as possible to their point of origin, and take account of the uniqueness of the labour market and the realities of the workplace.\(^{62}\) This required the establishment of a facilitative body, a specialist lower order tribunal (with jurisdiction to determine personal grievances, disputes, and enforcement and compliance matters) and a specialist court to act as an appellate body and with jurisdiction for actions such as torts, injunctions and review.\(^{63}\)

**Officials’ positions: The Treasury position**

The reaction from The Treasury was immediate. The proposals conflicted with provisions in the Bill that empowered parties to use the civil courts and to negotiate

\(^{60}\) Ibid.
\(^{61}\) Ibid.
\(^{62}\) Minister of Labour for the Cabinet Committee on Enterprise, Growth and Employment, Memorandum, 31 January 1991, CEG (91) 11 [submitted to the committee on 4 February 1991, supported by State Services Commission and with the Prime Minister’s approval for consideration on 5 February 1991 even though it contained no Treasury input].
\(^{63}\) Ibid, at 3.
contracts outside its purview. It suggested commissioning a background paper from the Department of Justice and the Law Commission about the principles underlying formation and operation of judicial institutions, but that the Government could take a lead in developing policy on labour market institutions:

The design of legal institutions has tremendous consequences for the operation of the labour market. For example, rules about unfair dismissal developed by the Labour Court in the last few years came about partly because the specialist nature of the Court encouraged it to operate outside the mainstream of legal opinion.

This reaction also, however, signified some movement in the Treasury view about the place of institutions in the reforms:

We agree that the general court system may not always deliver quick, credible and low cost dispute resolution, and that access to clear provisions for dealing with grievances is important…we support the idea of a low-level tribunal…it would be appropriate to explore the possibility of allowing Small Claims Tribunals to deal with employment issues.

**Officials’ positions: The Options paper on Institutions**

Both positions were referred to Cabinet, and officials directed to develop in more detail the Labour proposals. The result was an Options paper for Institutional Arrangements, drafted by the Department of Labour, containing four options.

Option 1 proposed the retention of the Labour Court and the Mediation Service but with some changed functions. It was noted in its final form as the option supported by the Council of Trade Unions and the institutions were described in terms of their specialist knowledge, ready accessibility and current functions. Included in the description of the Mediation Service was its dual facilitative and arbitrative functions and a summary of criticism of that duality.

Option 2 proposed a specialist lower level tribunal, the abolition of the Mediation Service and the retention of the Labour Court. The Employers Federation supported this option in its final form. Option 3 proposed a specialist lower court and the High Court, with no provision at all for any specialist institutions as the 4th Option.

Whilst SSC and Justice officials agreed with the thrust of the draft, Treasury complained about it as biased in favour of specialist institutions and significant legislative interventions. It regarded the options relying on the civil courts as “straw...
men” characterising the paper as suffused with a fundamental distrust of the general legal system.\textsuperscript{70}

The content of these objections is of interest not only for what it reveals about Treasury’s limited understanding of the way courts operated, but also for its refusal to accord any weight to the experience or the statistical evidence other officials produced about court functioning. Its focus was fixed on the type or content of the judicial decisions that would result. The objection, for instance, to retention of the current institutions (Option 1) was that they:

may lose sight of the general business environment within which labour markets have to function, and may make decisions damaging to economic development. The availability of lay representation may reduce the quality of legal argument. This could encourage appeals to higher courts, and consequently cause uncertainty. Low cost to individuals may encourage excessive litigation.\textsuperscript{71}

Its objections to the retention of a specialist court (in Options 1 and 2) concerned the problem of having an appellate court removed from the “mainstream of legal development”.\textsuperscript{72} To this end it preferred reliance on the High Court over the Labour Court, on the basis that the High Court had a “more mainstream” approach to torts, injunctions and review, was more familiar with commercial environments and developments in the law of contract.\textsuperscript{73} Its response to reservations about barriers to access was a review of High Court procedure, on the basis that problems of access affected all contracts, not just employment ones.\textsuperscript{74}

The Options paper was approved for distribution to the Select Committee and by early March had been circulated to those who had already made submissions on the Bill.\textsuperscript{75}

\textit{Officials’ positions: the Interdepartmental Working Party}

In the meantime the officials from Labour, Justice, SSC, Treasury and the Prime Minister’s Department continued to meet for the purpose of ironing out policy issues that remained outstanding. The differences between Treasury and the other departments on institutional issues remained.

The SSC’s contribution to the debate noted that the policy choices were essentially polar: retention or modification of existing institutions within a framework of specialist labour law and practice or no provision for any specialised institutions and a reliance instead on the ordinary courts and the general law of contract for outcomes.\textsuperscript{76}

\begin{thebibliography}{99}
\bibitem{70} The Treasury to Minister of Finance, letter, 15 February 1991.
\bibitem{71} Ibid.
\bibitem{72} Ibid.
\bibitem{73} Ibid.
\bibitem{74} Ibid.
\bibitem{75} Cabinet, Minutes, (18 February 1991) CAB (91) M 6/3; Chair Labour Committee to submitters, Draft letter, 25 February 1991; Draft press release, 25 February 1991; Inter-departmental Officials Committee Minutes, 26 February 1991; Chair Labour Committee to submitters, letter, 1 March 1991 (enclosing Options Papers).
\end{thebibliography}
Asserting that the key criteria for institutional structures included an effective and equitable means of dispute resolution and the provision of certainty and stability in practice, it specified its preference for retention of specialist arrangements tailored to suit the new industrial environment and for Option 2. This was the option that it believed would minimise the costs associated with restricted access, the ‘bidding up’ of disputes that would be encouraged by excessive formalism, legalism and excessive and costly litigation (both directly and via the possible demands on legal aid).

This SSC position on institutional structure shared with the Employers Federation an assumption that formality, legalism or adversarialism were tropes of the civil courts. The Department of Labour, by contrast, regarded them as behaviours associated with lawyers (as advocates and judges). The importance of the distinction is that the SSC position was based on a belief that in order to minimise the risk of those tropes dominating dispute resolution an institutional arbiter could be called low-level and informal and its litigants and their representatives would behave accordingly. The Department saw provision of arbitration per se as the invitation to resort to formalist or legalist behaviours. The absence, in these discussions, of focus on tropes of representation was highlighted by the need for amendment to the Bill’s provisions on representation when the spectre of motorcycle gangs as bargaining agents was raised.

This was not an issue, however, on which Labour dwelt at that time. It identified the source of policy differences as contrasting views of the labour market. It did not accept the “commercial libertarian view of labour relations”, preferring to see them as involving a balancing of “individual and corporate values”, and commercial, economic and social values – both long and short term. It identified the weaker of disputant parties as vulnerable should the common law option favoured by Treasury predominate. It characterised a dispute resolution system that is costly, inaccessible or reflects imbalances of power as encouraging the aggrieved to other or indirect means of expressing frustration and as creating an advantage for the well-endowed over the poorly-endowed because legal and other transactional costs are typically regressive so that the more litigious a process the more it costs.

Asserting that the best results for dispute resolution institutions occur where the rules succeed in facilitating, rather than suppressing or diverting an orderly and sustainable bargaining process, Labour favoured quick accessible recourse to resolution, describing the alternative as requiring disputant parties to conform to standard legal procedures that do not necessarily facilitate smooth and equitable adjustment.

Echoing the sentiments of the SSC and Labour papers the Department of Justice cited Fair Trading and Credit Contracts legislation (statutes that the Minister of Finance asserted should not apply to the labour jurisdiction) as accepting that the law does not

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77 Ibid.
78 Employment Contracts Act 1991, s 11(1) contains the right to object to a representative convicted of an imprisonable offence, an amendment to the Employment Contracts Bill that occurred after the Mongrel Mob announced its intention to offer its services as bargaining agent.
treat all commercial contracts alike, recognising that different subject matters require different treatment, particularly where there are imbalances of bargaining power.\textsuperscript{81}

Justice identified the principles relevant to choice of institutions for particular jurisdictions as the degree of formality required, representation type (participant or lawyer), speed, cost, mode of resolution (facilitation or arbitration), and claim numbers. The availability of resources (the cost of decision makers, their administrative support and the transaction costs of the proceedings to parties and the State) and practicalities (rules, forms, appointment of decision makers, consultation processes) had also to be considered. Access to justice was regarded as an important principle, with recent experience indicating that specialist institutions like the Disputes Tribunal designed for particular jurisdictions provided the most effective access to all-comers.\textsuperscript{82}

Justice officials were critical of proposed changes to existing institutions, warning that the value of the status quo arose from the difficulty of estimating dispute volumes in new environments. They preferred assessments of existing systems for their capacity to cope with additional or enlarged jurisdictions:

> there appears to be a reasonable degree of user satisfaction with the existing institutions. They could provide a stable and familiar landmark to guide the transition. The bill does change their roles but not so fundamentally that they too must be replaced. There may be advantages in retaining them at least in the short term. The existing expertise and experience of decision makers could play an important part in ensuring a smooth transition at a time when there is likely to be a lot of uncertainty and possibly, proceedings. Few additional resource implications or issues of practicality would arise...because the bodies and support structure already exist.\textsuperscript{83}

The potential for delays (and barriers to access) in newly created systems was noted, as was the superiority of consistency and certainty of decision making by specialist bodies in those jurisdictions requiring greater attention to legislative policy in their outcomes than courts. The development of case law, termed slow and ad hoc, was also more dependent on particular issues as they arose and the ability of parties to litigate, restriction of appeals to the Labour Court on points of law would raise issues of definition requiring clarification that could only occur case by case over time, introduction of legal rules to the Mediation Service raised the potential for increasing formality, which in turn would result in increased legal representation, requirements for transcripts and recording of evidence. A concurrent jurisdiction with the civil courts had the potential to result in the development of divergent streams of labour law – a recipe for confusion and uncertainty.\textsuperscript{84}

The creation of new institutions in Option 2 (specialist tribunal and court) would be more expensive than retaining the existing ones, suitably qualified decision makers had to be found and trained, their administrative requirements identified and met and new procedural rules drafted.

\textsuperscript{82} This was also the conclusion of research conducted a couple of decades later: see Laing, Righarts, Henaghan, \textit{A preliminary study on civil case progression times in New Zealand}, (University of Otago, Legal Issues Centre, 2011)
\textsuperscript{83} Department of Justice, note 81, at [b] p 5
\textsuperscript{84} Ibid at [4] p 3.
All institutional options faced the potential for increased numbers as the result of extending the personal grievance jurisdiction and this had implications for the legal aid budget.

Of option 3 (appellate High Court) Justice noted that the High Court Rules would apply (requiring Judges, not Parliament, to amend those which did not work in the labour jurisdiction), the absence of the equity and good conscience jurisdiction would result in the overturn of more decisions and a lack of consistency between tribunal and court would arise; practical problems of an increased workload would result (the Courts Amendment Bill 1990 then before a select committee was designed to offload a significant proportion of its work because the High Court was not coping with it); appointment of additional judges and consultation with existing ones would be required; and accessibility would reduce because delays already existed. 85

The option of using the Disputes Tribunals was discounted because they had a limited jurisdiction, hearings of only an hour, their referees were not trained in labour law matters, and they would need to be restructured. This would affect both their ethos and effectiveness, thus negatively affecting the public interest. If District Courts were required to absorb this jurisdiction they would be swamped and other reforms planned for the court system would be undermined. 86

Treasury referred to the quality of decision-making from the civil courts as a cost or trade-off that had to be recognised in the design of labour market institutions. It was therefore inappropriate to try to force decision-making into low-cost options for cost saving reasons. Creating low cost institutions was furthermore not the only way to ensure access to all.

Most disputes that occur in society are resolved privately, often informally, by the participants. In many ways, the Government-run court and tribunal system provides machinery of last resort. People rely on formal and drawn out public processes only when they are unable to find voluntary solutions. The role of courts is complicated by the fact that judges do not just resolve private conflicts, they also make public policy in the process. This is why the quality of judicial decision-making is so important, and why expensive procedural constraints are inevitably imposed on judges. I think it is important that we design labour market institutions in a way that would not discourage people from resolving their disputes privately. For example, if the costs of the court system are subsidised, as is the case at present with the Labour Court, the incentive to find private solutions is reduced. 87

In a replay of the skirmishes between officials in November and December before the Bill was introduced, the meeting between them that followed the circulation of these papers revealed SSC, Justice and Labour in one corner (supporting Options 1 or 2) and Treasury in the other, asserting it had not had time to complete its analysis. It was agreed that a paper combining the majority views would be prepared and referred to Treasury so that its views could be incorporated in the report for the Cabinet Strategy

85 Ibid at 7.
86 Secretary of Justice for Minister of Justice, Memorandum, 15 March 1991.
87 The Treasury, Paper, Labour Market Institutions Officials Group, 14 March 1991 at 2: An informal reaction by Labour officials to this paper in a handwritten fax dated 15 March 1991 (Bob Hill to Joanne Silberstein) warned of its covert messages, unchanged perceptions and philosophy, naivety about institutional dispute resolution and attempted re-litigation of issues previously resolved.
Committee.\textsuperscript{88} Again Treasury’s input could not be included in the resulting report.\textsuperscript{89} Its position was contained in a separate paper.\textsuperscript{90} It proposed a new option: replacement of the existing institutions with a low-order Employment Tribunal (a hybrid between the Disputes Tribunals and the Mediation Service with a limited jurisdiction under $10,000) leaving appeals and major cases with public policy implications to the general court system.\textsuperscript{91}

**Select Committee: Mediator and Judicial submissions**

The Select Committee invited the Judges of the Labour Court to make submissions on the options papers and the Chief Judge accepted this invitation.\textsuperscript{92} The mediators of the Mediation Service made two sets of submissions to the committee.\textsuperscript{93} The divergent views of these players in the institutions about mediation functions and the role of legal procedure in the resolution process reveal the essence of a debate that is ongoing. This is the debate about the characterisation of the issues in a dispute: behavioural, legal or a mixture of the two? Legal training emphasises the importance of the legal issue. Non-lawyers believe that this approach ignores the influence of behavioural issues. The mechanism by which any dispute is resolved is generally dependent on which side of that debate the facilitator of its resolution lies. It can be argued that this difference is fundamental to the measurement of effectiveness of dispute resolution procedures and institutions, particularly in relationship disputes and

\textsuperscript{88} Inter-Departmental Officials Committee, Minutes, Employment Contracts Bill Outstanding Issues, 15 March 1991.

\textsuperscript{89} Department of Labour for Minister of Labour, Report for Cabinet Committee on Enterprise, Growth and Employment on Employment Contracts Bill, Outstanding Policy Issues, 22 March 1991: The Executive Summary described the competing philosophical alternatives (statutory or contractual resolution procedures) as “no justifiable case for specialist labour relations procedures or institutions” (the free market position supported by Treasury) versus “appropriate procedural and institutional arrangements to promote free, fair and efficient bargaining” (the protective position supported by SSC, Justice, Labour).

\textsuperscript{90} The Treasury for Minister of Finance, Employment Contracts Bill – Outstanding Policy Issues, 22 March 1991.

\textsuperscript{91} Assistant State Services Commissioner Doug Martin to Minister of State Services, letter, ECB: Outstanding Policy Issues, 25 March 1991; Department of Labour to Minister of Labour, ECB – Outstanding Policy Issues: Treasury report T91/1088 of 22 March 1991, 25 March 1991: This letter also complained about the Treasury participation on the Inter-Departmental Officials Committee by referring to the meeting of 15.3.91 (at which all departments had agreed they would submit papers they had each prepared but Treasury circulated a very brief paper that it said did not contain its full analysis) and then the agreement at that meeting that a report containing the views of the 3 departments who had prepared substantive papers would be prepared, sent to Treasury and then its report would be incorporated. But the Treasury position was not available and therefore could not be incorporated. Treasury recommendations were never discussed by the other officials because they didn’t know about them. There was also no time to comment on them before the Cabinet Committee meeting: at [4-6] p 3. On the substance of the Treasury paper the letter stated that its acknowledgement of a need to balance employee protections with freedom of contract “represents a shift from what we had previously understood to be the Treasury position”, at [3(a)]. The letter complained further about Treasury’s selective use of submissions to the Select Committee: it quoted the Russell McVeagh position but ignored “comment about the ...clear majority of submissions from both employer and employee groups] favouring the retention of the Mediation Service and Labour Court”. at [3(d)].

\textsuperscript{92} Chairman Labour Committee to the Chief Judge Labour Court, letter 12 March 1991; Chief Judge Labour Court, Submission to the Labour Committee (undated).

in their use of time, and the following description of positions illustrates why this may be so.

The Chief Judge recommended that grievance committees unable to facilitate a resolution have the power to arbitrate taken from them.94 This view reflected a well-understood position by lawyers that those involved in attempts to settle a dispute should not then become its arbitrator:

Until 1987 persons chairing grievance committees had no right to determine grievances without the consent of the parties which was rarely given. Instead the decision had to be referred…to the Arbitration Court. It is a long step from that situation to one where chairpersons, possibly without legal qualifications, have the right to decide finely disputed issues of fact…95

His additional position was that de novo grievance appeals to the Labour Court could be discontinued, but only if:

there is first a full judicial inquiry with the parties having due prior notice of the nature of the case they have to meet and having, at the hearing, right of cross examination and, in advance of it, the right to summon witnesses and to have documents produced…96

The mediators did not accept that mediation and arbitration functions are incompatible. Their experience of splitting these functions (prior to 1987) whereby the Mediation Service mediated and the Conciliation Service arbitrated was that the ensuing double handling of disputes became a major source of complaint (including by parties).97 Additionally they worried about issues of efficiency and the added costs of ensuring separate personnel were available to deal with both functions required of the same dispute.98 They characterised the objection as founded on theory and ignorant of the effectiveness of actual practice.99 The objection was undermined by the paucity of complaints about dual powers – a single judicial review from over

94 Chief Judge Labour Court, Submission to the Labour Committee on the Employment Contracts Bill 1990 (undated): “This duality of roles is to a purist – and all Judges and most lawyers are purists – an unsatisfactory way of dispensing justice. Apart from rare statutory exceptions, any Judge who operated in that way would at once have his judgment set aside on appeal or review because he or she will have acquired information other than that which is presented to them by way of evidence in the case. A lot of this information is of a highly prejudicial but otherwise irrelevant nature bearing only upon other experiences of the employer with the same worker or… the union with the same employer… To avoid such a duality of roles means defining and separating the various functions of statutory mediators… it is unsatisfactory for the same mediator to fill both roles.” at 15
95 Ibid, at [2(d)] p 8
96 Ibid, at [2(b)] p 8
97 Mediators, note 93.
98 Ibid: “Changes in institutional arrangements…may generate… a system that is impossible to manage under present budgetary constraints… [More officers would be required] if grievances and disputes are to be processed with the same efficiency as presently experienced… In many disputes mediators in NZ both mediate and arbitrate within a single dispute in an efficient and fair manner satisfactory to both parties…there is little to suggest that combining mediation and arbitration provides for a less efficient or equitable way of resolving disputes.” at 12.
99 Ibid; Mediation Service, note 93. The dual functions of Dispute and Grievance Committees first obliged them to facilitate settlement and to arbitrate only when mediation failed. Committee procedures involved parties in the decision-making process: “This involvement allows the Chairperson to increase the parties understanding of the legal issues, improve personal relationships, and to plan to avoid future disputes. These results of the disputes and personal grievance procedures are important because of the on-going relationship of the disputants, and are not part of the outcomes generally associated with Tribunal or Court proceedings.” at 2
3,000 disputes in the previous four years and a low number of successful appeals of arbitrated decisions.¹⁰⁰ Some disputes (e.g. interpretation of contractual provisions) not amenable to mediation ensure the mediator was arbitrator from the outset. Others, particularly grievances, concern:

problems in personal relations between the employer and employee, or the employer’s representative and the employee or…to relations between the grievant and other employees. Often these types of grievance are better handled by mediation. The mediator is basically concerned about altering relationships, and may be involved in encouraging inter-personal bargaining over issues of a personal rather than a financial nature…On the other hand, the issue may be a fundamental point of principle related to the management of the enterprise, or a fundamental principle concerning human rights. These fundamental principles are not subject to bargaining and, in this type of grievance, arbitration is the appropriate dispute resolution process. The appropriate dispute resolution process therefore may vary according to the subject matter of the grievance.¹⁰¹

Interestingly the Chief Judge made a similar point, although not in respect of this particular issue, in making the case for a specialist employment jurisdiction by distinguishing between issues of morality/justice/fairness as they are considered in the civil courts and in employment law:

in employment law there is no one community of right-thinking persons whose standards can be applied. Instead there are two or three or even more disparate communities of right-thinking persons whose differing ideologies and employment cultures are entitled to consideration when it comes to determining the justice of a particular case. It is not so often a question of deciding between conflicting accounts of the facts as of deciding between competing interpretations and perceptions of undisputed facts.¹⁰²

The solutions proposed by each on this issue of the potential for function conflict are also revealing. The mediators believed the problem could be overcome by providing disputants with a choice: a med/arb option or straight arbitration.¹⁰³ The Chief Judge proposed two separate institutions with shared personnel, one of which would provide a chair for the (mediating) committee and the other a tribunal or hearing officer who would formally receive evidence and adjudicate upon it.¹⁰⁴ The mediators’ reaction to that was to point out that institutions of first instance in any dispute resolution system should emphasise voluntary settlement. If that failed then there was, in the Labour Court, an arbitration body and no need to replicate its functions in an additional tribunal.¹⁰⁵

Moving from the general to the specific the mediators were concerned that adoption of Option 2 and the replacement of the Mediation Service with an employment tribunal would transform the resolution process of the disputes/grievances they dealt with to something more formal and legalistic. This would increase the time required to dispose of a matter (they compared the day usually taken by a grievance committee with the two-plus days required by the Labour Court in its de novo hearing of an appeal) in a jurisdiction with a growing workload. In what can now be accepted as a

¹⁰⁰ Mediation Service, note 93: 1 judicial review in 3000 disputes, 50% of disputes settled voluntarily, less than 10% of Chairmen’s arbitrations appealed and of those less than 50% successful.
¹⁰¹ Mediators, note 93, at 16.
¹⁰² Chief Judge, note 94, at 14.
¹⁰³ Mediators, note 93.
¹⁰⁴ Chief Judge, note 94.
¹⁰⁵ Mediation Service, note 93.
prescient statement of things to come, the mediators asserted that the alternative would be to accept the slower processing of disputes and grievances or to increase the number of statutory officers substantially:

The arrangement would neither improve the cost effectiveness nor the administration of the procedures set down in the legislation. Not only is the Mediation Service cost effective from the point of view of state funding, but [it] is inexpensive from the perspective of the parties. There is no requirement that the parties be represented by legal counsel, although lawyers can, and do represent clients within the procedures. The issue is not one of lawyer versus lay representation, but the continued use of affordable, and cost and time effective procedures…

Select Committee: Public Submissions

Of the general submissions that addressed institutional issues before the Options papers were circulated, 83 supported retention of a separate employment jurisdiction in some form and 18 saw no need for one. Thirty-seven of those in support came from unions, 20 from employers and 26 from others:

The union submissions have largely urged the retention of the main features of the current Labour Court, particularly its specialist Judges, equity and good conscience jurisdiction, and lay representation. Three of the submissions have suggested extending the Court’s jurisdiction to all employment contract matters. Similarly the submissions from other…sources have mostly argued the case for retention of a separate Court. The submissions of employers span a wider range of possibilities, including a separate Court with no equity and good conscience jurisdiction (NZEF) and a separate division of the HC. However 13 of the 20 support retention of a separate Court with equitable jurisdiction, …

Submitters to the earlier Select Committee were sent the Options papers and invited to make further submissions. Analysis of the responses revealed that 47 supported Option 1, 23 Option 2, and 3 each Options 3 and 4.

Of those who supported Option 1 almost half were unions and 6 were employers. Ease of access and lay representation were regarded as key to the success of the institutions in minimising resolution costs and disruptions to workplaces. Employer submissions supporting this option came from those who were familiar with and approved of the workings of the existing institutions and procedures. They wished to retain these perceived advantages. Other non-union submissions warned of the
potential increase in dispute numbers and dismissed the concern about the Mediation Service’s dual role for the reason that the same dual function operated successfully in the Disputes Tribunal.\(^{113}\)

In its comment on the support for Option 1 the Department used the opportunity to argue, again, for retention of the institutional status quo to ensure a smooth transition to the new industrial environment. But it conceded that the status quo failed to address the perceived difficulty of dual resolution roles in a single process.\(^{114}\)

The reasons for supporting Option 2 (over half of which came from employers) focussed on minimising cost and delay and the need to separate mediation and arbitration functions. Also, however, was:

an element of concern that the replacement of mediators with a tribunal could detrimentally affect the positive features of the current system such as speed and informality. A number of the submissions which favoured the option noted that current levels of accessibility, informality and lay participation needed to be retained. Two submissions stressed the need for the service to be readily accessible in the regions as well as major metropolitan areas…\(^{115}\)

A number of those who chose this option laboured under some misapprehensions about how it would work.\(^{116}\) Some submitters had no idea how the existing system operated because they saw in this option advantages that were already cited by others as reason for retaining the status quo.\(^{117}\) For the Department this was the option that

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\(^{113}\) National Council of Women Submission to the Labour Committee on the Employment Contracts Bill 1990 (undated): “…there is the potential for a sharp increase in the number, scale and range of disputes between employer and employees with the replacement of the national awards with a host of individual and collective agreements… [Something similar to the Disputes Tribunal – regarded as] readily accessible can provide a non-threatening form of justice appropriate to matters which can be resolved by common sense…We would like more thought to be given to ensuring that the advantages of both mediation services and lower order disputes resolution body are available”;

\(^{114}\) The Report of the Department of Labour, note 110.

\(^{115}\) Ibid, at 148.

\(^{116}\) Alexander Szakats, formerly of Victoria University of Wellington School of Law, Submission to the Labour Committee on the Employment Contracts Bill 1990 (undated): proposed a model that replicated Grievance Committee membership and procedure.

\(^{117}\) Peter Boxall, Research Fellow Monash University, Melbourne. Submission to the Labour Committee on the Employment Contracts Bill 1990: “I prefer option 2 since it offers the possibility, I assume, of speedier and less formal process and thereby holds the potential to ‘increase the equity’ in the system. … Reforms which make the process less rather than more formal, quicker rather than longer, simpler rather than more technical are to be welcomed. Such a process is manifestly more equitable given the well-known differential ability of individuals to pursue enforcement of their rights…it must be recognised that the building of an industrial culture in which disputes … and grievances are resolved without direct action has been one of the critical success stories of NZ labour
addressed the problem of dual function, offered the advantage of continuity at the appellate stage and the opportunity to design a low-level informal tribunal that could replicate the flexibility and low cost of existing institutions.  

Cabinet’s choice

The Minister of Labour and his Department therefore recommended adoption of Option 2 with the amendment of the Bill to provide for the abolition of the Mediation Service and the establishment of an Employment Tribunal to adjudicate on disputes and grievances and other matters then dealt with by the Labour Court that could more conveniently be dealt with at an entry level, to provide a separate mediation service for those matters able to be resolved without the need for adjudication, and to provide facilitation services outside its jurisdiction as an adjudicating body, if invited by the parties. The mediation function would be provided on request or offered when a date of hearing was sought by the parties but would not include adjudication. Adjudicators of the Tribunal would hear evidence on oath, summon witnesses, record evidence, prohibit publication of evidence, call and receive evidence otherwise inadmissible, award costs, refer a matter to the Employment Court on point of law.

Cabinet chose Option 2.

Enacting the Employment Contracts Act

The select committee acknowledged support for the existing institutions but summarised its position on them as requiring some change whilst retaining their essential character and accessibility. On 23 April 1991 the Chairman reported back to the House its changes to the Bill. Replacement of the Mediation Service by an Employment Tribunal was described in terms of the retention of the former’s low cost, easy access, mediation and arbitration functions (but with a clear split between

relations reform in the last 20 years. The Labour Court (and its predecessors) has been a key player in this. I would hate to see this good work undone.”

118 The Report of the Department of Labour, note 110.

119 Ibid; Department of Labour Chief Legal Advisor to Chief Parliamentary Draftsman, Drafting Instructions, 12 April 1991: The new Employment Tribunal would have 2 distinct functions – mediation and adjudication: “It can only adjudicate within its jurisdiction. But it can mediate both outside its jurisdiction (informally) and inside its jurisdiction (formally). For the informal side, only brief mention in the Bill is needed. The intention was to empower the administrators of the Tribunal to assess first whether a proceeding could be mediated: Even if a matter is immediately set down for adjudication without mediation the Tribunal may still order mediation once the adjudication hearing gets under way...No one member can provide both mediation and adjudication services in the same case.” at 1

120 Cabinet Minutes, (2 April 1991) CAB (91) M 12/13.

121 Report of the Labour Committee on the Employment Contracts Bill, April 1991: “Retaining the shape of the existing industrial relations institutions received a great deal of support. However, the Committee was concerned that, in the move to a contract-based system, the roles of these institutions will need to change to some degree, although their essential character and accessibility can be retained. Accordingly the committee favoured the establishment of a lower level tribunal to be called the Employment Tribunal to meet the dispute resolution needs of the parties to employment contracts. Its jurisdiction would cover both functions of adjudication and mediation. A Court of Record called the Employment Court, replacing the existing Labour Court, is recommended by the committee. This court would have the same administrative and appointment arrangements as those provided for in the bill in relations to the Labour Court. The Employment Court would have both Court of first instance and appeal responsibilities.” at 9

them), and expanded jurisdiction. Its decisions could be appealed to the new Employment Court, which would have exclusive jurisdiction to hear and determine actions for the recovery of penalties, in tort, for injunctive relief and judicial review and concurrent jurisdiction (with the District and High Courts) to determine proceedings founded on or relating to an employment contract.  

The Minister of Labour, in his report back speech, also emphasised speed of access – but for all, describing the new institutions as much more democratic and a vast improvement on the slow, selective and cumbersome procedures which they replaced.  

Retained, for the purpose of grievance resolution, was the Labour Relations Act requirement to include in employment contracts procedures for settling grievances before recourse to outside assistance. The ECA version emulated the procedural steps previously required of unions and employers, with the added imposition of a 90 day time limit for initial submission, but with no requirement that the parties’ written statements form the basis of any subsequent hearing.  

Later, at the second reading of the Bill, the purely facilitative and non-exclusive nature of the mediation services on offer (private mediation was a choice disputants could make) were included as features of the new Tribunal.  

However, the constituency for which these changes were made, the employers, were not fully satisfied. The complaint was not with the new institutions but with the statutory provisions governing their functions and powers, in particular the power of the tribunal to order parties to mediation whether or not the parties chose that approach. In a warning that now seems prescient the employers worried that the retention of that power combined with universal rights of access would result in a more unwieldy and bureaucratic system than then current. These fears were fuelled some weeks later by the suggestion that the tribunal’s regulations (then being formulated) should include some rules for discovery. This brought protests from both the Council of Trade Unions and the Employers Federation, both of whom made the same point that the tribunal was intended to be low level and informal and that discovery processes immediately formalised or legalised its procedures. These

124 Minister of Labour, Speech Notes, 22 April 1991; cf John Hughes, The Employment Tribunal and the Employment Court (1991) 16(2) New Zealand Journal of Industrial Relations, 175, who predicted that the rules requiring all evidence to be put to the Tribunal would lengthen the hearings of grievances: “the Tribunal stage may come to resemble the 2 to 3 day hearings which were once the usual province of the Labour Court when hearing grievances de novo.” at 176.  
125 Labour Relations Act 1987, s 215, 7th Schedule.  
126 Employment Contracts Act 1991, Sch 1, s 32; The LRA requirements in Sch 7 (8),(9) to have the union and employer written statements put before the grievance committee and to form the basis of its consideration of the grievance were not included in the later Act.  
127 Minister of Labour, Speech Notes: Second Reading of Employment Contracts Bill (undated).  
128 NZ Employers Federation to Minister of Labour, letter 29 April 1991 at 3.  
129 Department of Labour to Minister of Labour, Memorandum 15 August 1991. The suggestion was made in early August by the Chief Judge of the Employment Court and apparently referred to the NZ Council of Trade Unions and the NZ Employers Federation for comment.  
130 NZ Council of Trade Unions to Department of Labour, Submission, 15 August 1991; NZ Employers Federation to Department of Labour, Submission, 27 August 1991.
views were referred to the Minister of Labour and no rules for discovery were included in the Employment Tribunal Regulations.  

The Bill to which assent was given in May 1991 provided for the establishment of an Employment Tribunal and Employment Court. It came into force on 19 August 1991. The objects of Part VI, (in s 76) provided for the establishment of:

- (a) Specialist institutions with exclusive jurisdiction to deal with the rights of parties to employment contracts
- (b) Appropriate services that will facilitate the mutual resolution by parties to employment contracts of differences that arise between them, it being recognised that, in many cases, such parties are the persons best placed to resolve such differences and should be assisted to do so themselves
- (c) A low level, informal, specialist Employment Tribunal to provide speedy, fair, and just resolution of differences between parties to employment contracts, it being recognised that in some cases mutual resolution is either inappropriate or impossible
- (d) A specialist Employment Court to oversee the role of the Employment Tribunal and to deal with particular legal issues, it being recognised that the nature of employment contracts is such that the parties to employment contracts from time to time require the assistance and certainty that can be provided by a specialist court.

The ink was hardly dry on the new legislation when the Law Society petitioned the Ministers of Labour and Justice for urgent amendment to its jurisdictional provisions. It foresaw problems arising from the concurrent jurisdiction of the civil courts and the employment institutions from different appeal rights, rules of evidence, limitation rules, remedies, the place of equity and good conscience, the use of non-legal qualified decision makers. It also expressed concerns about the absence of any monetary or complexity limits on the tribunal’s jurisdiction. No amendments to the Employment Contracts Act resulted from this petition.

Conclusions

The vigour with which the policy conflicts described above were argued had at least two results. The first arises from the variable victories and losses experienced by the protagonist factions: the result was a theoretically inconsistent statute, in that the neoclassical contractual based theories of the radicals (drafted under tight secrecy and little consultation) are reflected in Parts I and II but Parts III and VI (victories of the moderates) are more consistent with previous labour relations

131 Department of Labour to Minister of Labour, Memorandum, 15 August 1991; NZEF to Department of Labour, and to Minister of Labour, Letters 27 August 1991.
133 Department of Labour to Minister of Labour, Memorandum, 15 August 1991.
134 Walsh & Ryan, note 1, compare the absence of consultation on these provisions (to which they attribute clear manifesto commitments and a shared understanding of policy direction) to the extensive consultation concerning the institutions (which they argue were the result of pre-election uncertainty about policy direction).
135 Freedom of Association
136 Bargaining
137 Personal Grievances
138 Institutions
Second, it meant that a range of issues concerning the provision of dispute resolution services was covered, but others were omitted. Assumptions about the institutional status quo and its replacement, some articulated above, others not, are notable for their focus on structure. This came at the expense of considering the evidence about the effects of cultural tropes (representatives requirements of structure and modes of operating in high frequency resolution institutions) presented by Justice whose contributions (with Labour’s) were all but ignored. As should become clear in the following chapter this omission is crucial to understanding why the statutory objective for low-level, speedy and informal dispute resolution was subverted.

This is not to mean, however, that the ideas that were subject to intensive debate were irrelevant (even if lightweight) rather that they resulted in outcomes that were different from those argued for them. Thus, the issues concerning a specialist jurisdiction (over reliance on civil courts) and a statutory (over common law) basis of the principles for claim resolution are relevant to the outcome sought by the Minister of Finance. They are discussed at the end of the next chapter, but given the success of that outcome, do not reappear. Access to justice (specifically the barriers to) is the subject of anxious consideration in policy for the Employment Relations Act (both before and after its enactment), but it suffered, too, from a focus on institutional structure (and outlier representation) rather than cultures of representation. Availability of arbitration at entry level undermined the effectiveness of the Employment Tribunal thus ensuring it became an issue in need of redress for the Employment Relations Act, as was the issue of separating modes of resolution, the latter creating a fresh set of problems in practice. The warnings of the mediators and their employer detailed above may appear to have laboured the point of their differences with judicial notions of best practice but they serve to introduce the idea of different approaches and practices (and distinct resolution cultures) to conflict resolution in the employment jurisdiction.

Never articulated in the policy process described above were the implications of the transition of representation from collective (union and employer association advocates) to individualist (lawyers and self-employed employment advocates). The consequences of this omission form the basis of the following chapter. Representation and its effects on institutional structure became the one issue common to the policy and operations of both statutes. As such representation was never considered in the terms within which it operates – radically differently depending on form (individualist or collectivist).

Thus the issues that dominated primary source material about policy and operations for the employment jurisdiction after the ECA was enacted concerned the means by

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140 Ellen Dannin, *Working Free, The Origins and Impact of New Zealand’s Employment Contracts Act*, (Auckland University Press, Auckland NZ, 1997) described them thus: “...it is striking how lightweight their arguments are and how poor their research was. This campaign was conducted by the most powerful, moneyed and well-connected groups in New Zealand, so lack of resources cannot explain the poor quality of what they advanced.” at 40.
which this transition occurred and its effects on the statutory objectives for the institutional resolution system.
Chapter 3
Employment Contracts Act Institutions

Operations and Policy: The Employment Tribunal

Introduction

Although the dispute resolution institutions established by the ECA appeared to result from a series of compromises between the political and bureaucratic disciples of free market libertarianism, National Party moderates and civil servants with experience of the employment jurisdiction, it is also possible that they were selected by the moderates as a mechanism to ensure an orderly transition from collectivist to individualist approaches to labour relations. Co-option of incentives to collectivise – rights of grievance and informal claim processes – were key to undermining unions and shaping acceptance by potential union members of individual employment contracts. By this means both outcome and process goals could be achieved.

The purpose of this chapter is to assess whether and how these policy goals were met by the operation of the entry-level institution, the Employment Tribunal. The bulk of the material about it concerns the quality of its processes for individual (as distinct from collective) employment disputes. Description and analysis of the process goal takes the statutory objective for process as a basis of categorisation. Discussion of the outcome goal concludes this chapter.

Quality of Process

Although a number of employers familiar with the Labour Relations Act dispute resolution regime were keen to retain that system and structure, the provision of arbitration at entry level in the ECA reflected the desire of the Employers Federation to achieve finality for employers at first instance. But it preferred the relative informality of grievance committee processes over those of the Labour Court. For these reasons much of the Labour Court’s original jurisdiction was transferred to the Employment Tribunal, the policy prescription for which was to be low level, speedy and informal. It would offer arbitration and mediation as alternative modes of resolution of choice for all disputes and grievances.

The analysis that follows will first examine the requirement for the Tribunal to operate in a low level and informal way by assessing whether the claims filed, the means by which they were processed and the ways in which they were resolved fulfilled this policy requirement. It will then assess whether the requirement to operate in a speedy fashion was met.

The method of analysis of the low level and informal policy requirement relies on a separation of each of the constituent parts and personnel of the claims and resolution process, and a consideration of the statistical data, literature and archived information relevant to each part. The first part concerns the way claims or applications were made. The second part concerns the way that claims were processed and resolved and

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1 See chapter 2: Select Committee, Public Submissions, p 31.
it is further classified into sections which consider choice of mode of resolution, the effects of choice of the adjudication mode, claim withdrawals, the effects of representation, member (decision-maker) work rates (output) and the costs of the respective modes of resolution (main centre and regional).

The method of analysis of the policy requirement for the Tribunal to operate in a speedy fashion relies on similar material but is organised in a slightly different way. This is for two reasons: the material relevant to the low level and informal mandate applies also to the issue of speed; and much of the archived material concerned the issue of delay at the Tribunal. First considered is the way delay was measured and second a description of the complaints of delay. This is followed by accounts of the measures for redress (which include the appointment of additional members and registries, administrative responses and incentives to influence choice of mode) and policy responses.

Conclusions about these separate aspects of process will focus on the ways they interacted, and the consequences of those interactions for the policy mandate in s 76 ECA. This will contribute to the assessment of the effectiveness of competing policy positions about choice of institutional structure and mode of resolution on institutional functioning identified in the Conclusion of Chapter 2.

**Low level and informal**

Making claims

Applications to the Employment Tribunal were categorised by the Department of Labour according to whether they were claims for arrears of, or recovery of wages, compliance with statutory or contractual obligations, complaints concerning parental leave arrangements, penalty actions (arising from breaches of statutory obligations), disputes (generally arising from interpretations of awards or collective contracts) and personal grievances (arising from claims of unjustified dismissal, discrimination, sexual harassment, duress or disadvantage).

The Department collected statistics about application numbers in two main ways: by counting the numbers of applications filed, and by counting the number of claims filed. Some applications contained more than one claim. In terms of categorising claims by type, counting and categorising the claims in each application, rather than categorising an application according to the main claim within it results in more accurate statistics. However all of the claims in any one application were considered together (in the same way as multiple causes of action in a statement of claim in the civil jurisdiction are treated), because they arose from a problem of the employment relationship, regardless of the ways they were described. For this reason multiple claims in an application were more relevant to remedy - and the number of potential remedies available to an applicant – than to the way an application was managed.

The use of both of these ways of presenting information about applications to the Tribunal enabled the Department to choose between the use of application or claim numbers and types, depending on the conclusions it wished the intended reader to draw. Explanations of the differences between applications and claims were generally absent from the information so presented, as were explanations about changes that occurred in the types of statistics collected about the operation of the employment institutions over the period under consideration (1991 – 2000). Where
relevant, these changes will be noted in any description or analysis that invokes the data affected.\(^2\)

Although the Tribunal did not formally begin to conduct hearings until mid August 1991, all proceedings under the new legislation were required to be filed at the Tribunal from 15 May 1991. For the year ended 30 June 1992 2332 applications (containing 2547 claims) were filed. This marked the beginning of a 6-year period in which application numbers exceeded the previous year’s filings, although at inconsistent rates of increase. In the 92/93-year 880 more applications were filed than in the 91/92-year, an increase of 37%, but in the 93/94 year the increase (382) was 11%. This was followed by annual increases of 18%, 20% and 5% before successive falls in application numbers (1.6%, 16% and 3.5%) were recorded for the final 3 years of the ECA regime.\(^3\)

The significance of both the successive rises and the erratic rates of rise of applications lay in implications for managing the Tribunal workflow. As discussed below in respect of the issues of choice of mode of resolution and of delay that dogged the Tribunal from as early as 1992, the Department experienced difficulty in accurately predicting future resourcing needs, particularly in respect of the membership of the Tribunal. It had little experience of rapid or sharply variable rises in the use of the institutions it administered.\(^4\)

Increases in application numbers were accompanied by increases in numbers of claims, but the differences between the two were subject to rises in both number and proportion. For instance, in the 91/92 year there was a difference between application and claim numbers of 215. This amounted to 8.44% of total claims, but in the following year the difference was 13.11%.\(^5\) In the 93/94 year it was 16.26%. By the 97/98-year the difference was 20.68%.

The significance of this data lies in what it suggests about the formality of the process of claiming. A forum that relies on the technicalities of claiming as a basis of resolution or appeal of the matters before it incentivises multiple claiming as the means by which a remedy (any remedy) can be obtained. The steady rise of multiple

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\(^2\) Data cited in this and following chapters was derived from Department of Labour Monitoring Reports. These were issued monthly and also quarterly. Much of the data relied on has been collected from a series of such reports. It forms the basis of calculations about trends over time. Accordingly it is not possible to attribute to data selected any particular Monitoring Report. Data that is not footnoted is therefore derived from a number of these reports.

\(^3\) Application numbers subsequently rose annually for the 5 years following June 1992 thus: by 880 to 3212 in 1992/93; by 382 to 3594 in 1993/94; by 658 to 4252 in 1994/95; by 892 to 5144 in 1995/96; by 285 to 5429 in 1996/97. The fall in application numbers for the following 3 years by 92 to 5337 in 1997/98, by 868 to 4469 in 1998/99 and by 157 to 4312 in 1999/00: Department of Labour Monitoring Reports; Dianne Donald and Joanna Cullinane *An Analysis of Personal Grievance Statistics in New Zealand from 1984 to 1998*, (1998) Labour, Employment and Work in New Zealand Conference, Industrial Relations Centre, Victoria University of Wellington, 184.


\(^5\) The percentage differences for subsequent years were: 1994/95 = 15.53%, 1995/96 = 17.04%, 1996/97 = 18.5%, 1997/98 = 20.68%, 1998/99 = 19.31%.
claims in applications to the Tribunal suggests that applicants (or their representatives) perceived this as increasingly necessary for the success of their proceedings with the passing of time. This suggests a rise of formality in the process of claiming, the reasons for which will be discussed below in use of representatives and the Employment Court’s review role.

Personal grievances alleging unjustifiable dismissal constituted the bulk of the applications made to the Tribunal. For the 91/92-year they comprised 63% of the applications (and 58% of the claims) filed. This rose the following year to 72% of applications, (62% claims). For the 7 remaining years of the ECA regime 77-79% of applications (63% of claims) were dismissal grievances. Although grievances claiming disadvantage rose more than four fold from 102 in 1992 to 452 in 1999 they remained at 3-4% of total claims until 1999 when they rose to 8%.

Aside from grievances the most common applications to the Tribunal were for arrears of wages and recovery of holiday pay. Although wage arrears claims rose from 420 in 91/92 to a peak of 1000 in 96/97 they fell steadily in proportion to other claims from 16.4% in the first year to 12.4% in the 98/99-year. Applications for recovery of holiday pay tell a different story: they rose steadily in number and proportion from 46 (1.8% of claims) in the first year to a peak of 415 (6%) in the 1997/98-year.

Compliance actions dropped steadily from 206 (8% of claims, 8.8% of applications) in 91/92 to 157 (2.8% of claims, 3.5% of applications) in 98/99 and disputes from 112 (4%) to 101 (2%) over the same period. The Department’s calculation of the main application types and percentages for the period May 1991 to February 1993 (70.6% grievances, 16.9% wage arrears, 7.7% compliance and 3.3% disputes) may well have accurately described the work of the Tribunal at that time but it proved to be an inaccurate predictor of incoming work. These figures represent the lowest proportion of grievances and the highest proportions of the 3 other categories for the period of the ECA.

This dominance of personal grievances can also be explained in another way. In the 89/90-year 811 personal grievance claims were filed. In September 1989 union density statistics\(^6\) indicate that there were 648,825 union members in the workforce, revealing a personal grievance claim rate of 125 per 100,000 union members.

For the first full year of the Tribunal’s operation (91/92) 1609 grievances were filed. The working population was 1,452,895, indicating a claim rate of 110 per 100,000. The following year 2505 grievances were filed from a working population of 1,486,666 meaning a claim rate of 169 per 100,000. For the 93/94-year the claim rate was 192 and 215 for the following year. In 95/96 it climbed to 240. By June 1997 the rate was 268.

This data indicates that the number of personal grievances increased significantly out of proportion to previous rates of claim and other workplace problems. The steep climb in claim rate suggests, in terms of Rau’s dispute pyramid model,\(^7\) that something clearly changed in the relationship between the third, fourth and fifth steps

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(establishing a dispute, seeking advice and filing a claim) when personal grievances were made available to the whole working population.

Cullinane and Donald postulate motivational and structural explanations, attributing, in respect of motivation, the economic, social and political environment created by the ECA to the dismissals of increased numbers of employees, as the result of employer perceptions of more flexibility to ‘fire at will’, white collar and professional employee perceptions of the economic advantages of challenging dismissals, and the widespread publication of this means of deriving financial gain. These are what Rau describes as the forces that dictate the internal configuration of specific disputes pyramids and shape the context in which the kind and number of problems are perceived and conflicts generated. They could also be described as structural explanations because they are consistent with the explanations advanced by Roth, Hughes and Wilson: removal of the union monopoly on filing grievances undermined the vetting role undertaken by unions (they only took cases they knew had a basis for a remedy) and left no mechanism for screening out unmeritorious cases; and the deregulated and decentralised industrial environment led to a growth in its levels of contractualism, and litigious behaviour as the result of the replacement of a collectivist by an individualist approach to problem resolution in the labour jurisdiction.

Processing and resolving claims

Choice of Mode of Resolution

In contention during the policy debates about institutional structure was the simultaneous exercise of Mediation Service powers to mediate and arbitrate. Conventional legal wisdom dictated they had to be exercised separately, notwithstanding the views of users of the Service, its mediators and Labour officials that the evidence of both separate (prior to 1987) and simultaneous use suggested that the latter was more satisfactory. Med-arb, as practised between 1987 and 1991 was a two-step process sequentially involving mediation and, contingently, arbitration presided over by a single neutral who filled both roles, if required. The final outcome typically combined any agreements reached in the mediation phase with the neutral’s decisions on any unresolved matters that proceeded to the arbitration phase.

From an administrative perspective the use of the decision function when a mediated settlement could not be achieved left significantly fewer grievances unresolved. By September 1989 the Department was able to confirm the effect. Of the 191 grievances processed by the Mediation Service in that quarter, 89 (47%) were resolved by agreement in committee, 88 (46%) were decided by the Chair, consistent

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8 Cullinane and Donald, note 4.
with those of the previous two quarters in 1989. This meant that over 90% of grievances were either settled or decided (in roughly equal proportions) as the result of one meeting or hearing, although the decision making function increased the number of applications to the Labour Court as the result of appeals from mediator decisions (from 240 in the September 1988 quarter to 256 in the same 1989 quarter).

The ‘problem’ of accommodating both functions was resolved by empowering the Tribunal to mediate and arbitrate in separate proceedings, unless both parties sought mediator arbitration. Claimants could thus choose the mode of resolution of their applications.

Between May 1991 and 31 March 1992 the Tribunal received 1623 applications for adjudication and 42 for mediation. It quickly became apparent that its membership of 14 was unable to offer adjudication services in these proportions because of the member time taken up by this option. Hearings were rarely completed in less than a day, and then a written decision had to be produced. By contrast mediations were generally completed in half a day with no additional work required of a member once a settlement was reached and recorded or after it became clear that settlement was not possible.

Adjudication continued to be the mode of first choice of almost two-thirds of applicants (at least until June 1994 when the Department stopped recording modes of choice) notwithstanding that this was not the dominant mode of resolution: around a third of dispositions by the Tribunal in these early years were adjudicated; two thirds were mediated.

By September 1992 the Department was able to report that times to outcome (i.e. between application and disposition) differed between the two modes: peak mediation settlements occurred between 61-120 days from application whilst most adjudicated claims took at least 2 months longer: the Tribunal was dealing with “mediated matters within an appreciably shorter timeframe than adjudications.”

The administrative response to this problem was to offer mediation to those who chose adjudication, as a first attempt at resolution and available significantly earlier

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13 Employment Contracts Act 1991, s 88; John Hughes, The Employment Tribunal and the Employment Court, (1991) 16(2) New Zealand Journal of Industrial Relations, 175, argued that this provision reinforced the New Zealand stereotype of the mediator as arbitrator and that the opportunity to separate mediation and adjudication functions was lost.
14 The time required to complete written decisions varied between members. This affected the rate at which the Tribunal could deal with other matters requiring hearings: Alistair Dumbleton The Employment Tribunal – Four Years On, (1996) 21(1) New Zealand Journal of Industrial Relations, 21.
16 In the 92/93 year 56% of applicants sought adjudication. In the 93/94 year 62% sought adjudication.
17 In the 92/93 year 35% of Tribunal dispositions were adjudicated and 64% mediated. In the 93/94 year 32% were adjudicated and 68% mediated.
than a hearing. Of the 683 applications that were actively resolved by 31 March 1992 only 6% required adjudication following mediation. Half of the remaining 94% of dispositions were solely mediated, and the other half solely adjudicated.  

Double use of the Tribunal (mediation then adjudication) was the consequence of withdrawing the power of mediators to make a decision (without parties’ consent) once it became clear during mediation that settlement was unlikely. However it formed the basis of a view that the effectiveness of the Tribunal’s mediation function was strengthened by its separation from decision-making.  

The high rates of settlement (an 85% resolution rate) and the low take up rate of subsequent adjudication (only half of matters that failed to settle at mediation proceeded to adjudication) were cited in support of this proposition. The issue remained live, however, particularly for those with experience of both systems, who remained concerned about the cost and the formality that separation of modes of resolution signified. They continued, through the 1990s, to argue for greater use of the power to ask the mediator to make a decision because this was the system that worked informally under the Industrial Relations Act (parties sought a decision when they couldn’t agree because they sought finality and wanted to avoid the cost of litigation) and by operation of the law under the Labour Relations Act:

the history of the Mediation Service over some 20 years points to the viability of the med/arb mix as a successful vehicle by which to bring about early satisfactory informal and cheap resolution of industrial disputes.

This power to ask a Tribunal mediator to make a decision was contained in s 88(2) ECA. Reliance on it was effectively scotched in 1993 when the Employment Court held that mediators had no power to make decisions, even if the parties had consented. This position was overturned by the Court of Appeal in 1995 but med/arb was a choice rarely made until the end of the decade: the first such decision was recorded in the 97/98 year. The following year 33 such decisions were issued, 5% of the total decisions made that year.

By 1997 the offers of mediation had successfully changed the proportions of those who sought adjudication at the outset. An explanation of the Tribunal’s workflow

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19 Unfortunately the data about double use ceased to be provided after the first quarter in 1992. It was replaced by simple percentages of applications mediated, adjudicated or withdrawn. Donald and Cullinane, note 3, observed in 1991 that the Department had collected statistics about personal grievances since 1981 but the manner of recording them was inconsistent over time.

20 McAndrew, Morton, Geare, note 11.


23 Majestic Horse Floats v Goninon [1993] 1 ERNZ 323; Gisborne Boys High School v Employment Tribunal [1993] 1 ERNZ 462, adopted a different approach to that in Wilson v SERCo Group (New Zealand) Ltd (unrep) Employment Court, 15 April 1992, AEC 24/92, by holding that no right of appeal lay because the Tribunal member was not operating within the adjudication jurisdiction. Dumbleton, note 14, notes that parties in mediation saw the power of decision in s 88(2) as a useful option, until the later decisions.

24 Shaffer v Gisborne High School Board of Trustees [1995] 1 ERNZ 94.

25 Department of Labour for Minister of Labour, Employment Institutions Workflow, 30 April 1997.
showed that over a typical 2-3 month period of 1000 applications there would be 750 applications for mediation and 250 for adjudication. Eighty of the mediation applications would be withdrawn and of the 670 remaining 570 would result in settlement and of the 100 unsettled half would be withdrawn. Of the adjudication claims 110 would be withdrawn and of the remaining 190, 150 would result in an accepted decision and 40 would be appealed or referred to the Employment Court. This model reveals a change of proportion of outcomes requiring Tribunal input between settlements and decisions (rising proportion of settlements and decreasing proportion of decisions) and confirms a consistent 5-6% rate of double intervention (mediation + adjudication). However another model on which the Department relied in 1997 to support an application for increased funding for the Tribunal suggested a higher rate of double intervention of close to 12%. In the absence of definitive calculations, but by reference to the number of decisions issued annually it is probable that the rate lay between these figures, suggesting, in turn, a slight rise of rate between 1992 and 1997.

The trend for high preference but falling rates of dispositions for adjudication is confirmed by comparing the 91/92-year (36% of total dispositions were mediated settlements, 26% adjudicated and 37% were withdrawn) to the 96/97-year (mediated settlements rose to 63% of all dispositions whilst adjudications fell to 12% and withdrawals to 24%). If withdrawal and mediation rates are considered together (as party determined dispositions) in contrast to adjudication rates over the period of the ECA regime it becomes clear that party/assisted negotiation of the employment problem/s at issue was increasingly preferred (74% rising to 86%) over adjudication (26% reducing to 12%).

This trend, rising application and settlement rates against declining trial rates, necessitated by court system architecture which has capacity to fully respond to only a minority of the matters put before it, is associated with the development of a complementary relationship between litigation and negotiation (litigation is a strategic move in the process of negotiation, rather than the other way round), or litigotiation – the single process of disputing in the vicinity of official tribunals.

Although low trial and high settlement rates were a feature of the Labour Court’s operations, high application rates were not, so the Department had no experience of a trend more familiar to administrators of the civil court system.

**Effects of choice of adjudication**

Aside from the higher time requirement for hearings that choice of the adjudication option demanded (25% of hearings required more than a day) as time passed the Tribunal recorded more written decisions per application. In the 91/92-year it recorded 349 decisions on 312 adjudicated applications. In other words substantive decisions made up 89% and ancillary (interlocutory and costs) decisions 11% of the

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26 Department of Labour to Treasury, Memo: *Cost of mode of resolution*, 6 March 1997.
29 Ralph Gardiner, note 15.
total. The following year 680 decisions were made on 585 applications (86/14%). This trend of rising proportions of ancillary decisions continued, so that by the 98/99 year the proportion of substantive decisions had reduced to 71% and ancillary decisions had risen to 29% of recorded decisions.

This may be why the Department allowed 3-4 days per member for an adjudication and half a day for a mediation in the calculations it was required to make to address backlogs and the appointment of additional members to the Tribunal.

The need for ancillary written decisions suggests that the parties to an application who require them are unable or unwilling to settle these matters themselves (e.g costs for the successful party) or they became an administrative requirement. Whatever the reason for them written decisions on ancillary matters are a measure of formality of the institution that issues them. Rising proportions of written ancillary decisions suggest a rising degree of formality of process at the Tribunal.

Withdrawals

Withdrawals of applications represent either an acceptance by an applicant that their case has insufficient merit to proceed, or a settlement between the parties of the dispute, generally before it is heard.

In its collation of data about the work of the Mediation Service and the Labour Court under the Labour Relations Act regime the Department did not routinely record withdrawals from grievance committee hearings. However withdrawals were the dominant mode of disposition at the Labour Court. In the period April 1989 to September 1990 they ranged from 61% - 81% of quarterly recorded dispositions. At this time the Labour Court had exclusive jurisdiction to consider applications for compliance and wage arrears claims. The Department was aware that withdrawal rates vary according to application type, noting in early 1992 that compliance matters had the highest rates of withdrawal (64%) and personal grievances the lowest (32%).

Given the dominance of grievance over other claims under the ECA this explanation for withdrawal rates requires further explication. In the 91/92-year 37% of the Tribunal’s completed matters were withdrawals. Thereafter they fell from 31% in the 92/93 year to a steady average of 25% from the 94/95 year to the 97/98 year. These figures could be regarded as corroborating the Department’s view that withdrawals were related to application type (the highest withdrawal rate was associated with the lowest proportion of claim type) but they also suggest a connection to mode of resolution. There is a correlation between adjudication and withdrawal rates, in that the higher the adjudication rate, the higher the withdrawal rate. A rising rate of mediated settlements was accompanied by a falling rate of both adjudicated decisions and withdrawals. A potential link between the process of adjudication and the withdrawal rate was the subject of comment by the Department in mid 1992:

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30 Department of Labour for Minister of Labour, Monitoring the Employment Contracts Act, 10 April 1992, at 29; Theodore Eisenberg and Charlotte Lanvers, What is the Settlement Rate and Why Should We Care? (2009) 6(1) Journal of Empirical Legal Studies, 111: Settlement rates vary according to dispute type.
Of all outcomes...36% were withdrawals. Approximately 70% of these occurred prior to a hearing. 59% of all withdrawn applications were assigned to the adjudication process rather than the mediation process when the withdrawal occurred.31

The link was further clarified 5 years later in the workflow model described above32 which showed that the withdrawal rate for applications for mediation (before held) was 11% but for adjudication was 42%. These figures each excluded the withdrawal rate that followed an unsuccessful mediation.

The significance of the difference in withdrawal rates between applications for mediation and adjudication (and of the rise in mediation withdrawal rate following mediation) suggests that withdrawals may be an incident of the adjudication process, rather than an incident of institutional dispute resolution assistance. It can furthermore be argued that the dominance of withdrawals in disposition rates for the Labour Court (a purely adjudicative body) and their relative absence in grievance committee statistics underlines this point.

Additionally, the low rate of mediation withdrawals pre-hearing may be an incident of the level of risk of proceeding. Withdrawals are most likely to occur when the parties prepare for their proceeding to be heard or dealt with (i.e. immediately beforehand). This represents the one time when both are focused on the upcoming process, and the risks and benefits of proceeding. Since no or little risk/benefit analysis is required for the mediation process because of the absence of consequence that attends upon failure to settle, there are few or no incentives for self-resolution beforehand in the mediation process.

However disposition statistics for the last couple of years of the Tribunal’s operations indicate a rising rate of withdrawal (a return to the rates of the early years of over 29%), a steady adjudication rate (13%) and a falling mediated settlement rate (39% in the 98/99 year). Additionally the Department began to record the numbers of private settlements registered with the Tribunal for enforcement purposes. In the 97/98-year 109 such settlements (3.5% of total settlements) were recorded. This rose to 873 the following year (48% of total settlements). They represented private settlements reached within “the vicinity of official tribunals.”33 As such, if they are considered with mediated settlement and withdrawal rates they confirm the theory of the relationship between litigation and negotiation – that litigation is a tactic of negotiation because it is the means by which parties are forced to deal with each other.34 The higher rate of self resolution indicated by combining withdrawal and private settlement rates for this last period of the Tribunal’s operations suggest a reducing dependence on its mediation function.

In other words the provision of the mediation function operated, in the middle years of the Tribunal’s operations, as some kind of brake or limit on withdrawal rates, presumably because it offered risk-free official intervention to litigants. As the likelihood of what the Tribunal would order became more familiar to representatives

33 Evans and Parker note 28.
34 Galanter, note 27.
the rates of self-resolution (but within the vicinity of the Tribunal)\textsuperscript{35} rose, thus triggering the higher withdrawal rate earlier associated with the adjudication option. Withdrawals therefore appear more likely to be an incident of institutional dispute resolution than mode of resolution. If the analysis of the effects of representation on formality of dispute disposition (below), is taken into account it can further be argued that withdrawal rates are an incident of the type of representation that litigants engage.

\textbf{Effect of representation}

The ECA provided for a range of representation for parties to proceedings.\textsuperscript{36} The three major types, lawyers, self-employed advocates (with and without formal legal training) and union/employer association advocates differed in their training and qualifications for the advocacy role and in their approaches to issues of process. A difference between lawyers/self employed advocates and union/employer association advocates was the business opportunity that representation offered.

Union and employer association advocates were salaried employees of organisations whose major focus of attention in the 1990s was on the collective interests of their members. Advocacy of individual problems was regarded as an incident of servicing the collective interests of their memberships but not an end in itself.\textsuperscript{37} Individual casework was regarded as time consuming and, for union organisers, included consideration of the effects of the workplace problem on other members and the business enterprise itself. The interests of individual members could not compromise collective interests, particularly given that reinstatement was the primary remedy.\textsuperscript{38} Individual advocacy was free of charge because it was an incident of membership fees.

Until 1991 personal grievances were available only to union members and the grievance had to be taken in the name of the grievant’s union so the filtering or vetting function described above meant that only grievances with prospects of success were taken on. Grievances were first considered by grievance committees that consisted of employer and employee representatives chaired by a mediator from the Mediation Service. At that level advocacy was routinely the domain of union and employer association advocates, although some employers relied on lawyers. Lawyers as representatives were more likely to appear in the Labour Court, particularly in respect of actions other than grievances that were not restricted to union members.

Historically, part of the tension between union and employer interests in the labour jurisdiction concerned the means by which disputes were resolved, in particular the professionalisation of the institutions created for this purpose and the limits on direct action that were traded for formal rights of dispute resolution. Employers saw

\begin{thebibliography}{99}
\bibitem{munro} Justine Munro, Monograph, \textit{Settling Treaty Claims: Litigation’s contribution to adversarialism in Crown-Maori Negotiation}, (New Zealand Centre for Conflict Resolution, Faculty of Law, Victoria University of Wellington, 1997).
\bibitem{ecact} Employment Contracts Act 1991, ss 59, 90.
\bibitem{labour} Ibid; Labour Relations Act 1987, s 209(f).
\end{thebibliography}
advantages for their interests in recourse to legal process but unions regarded legal process as the means by which consideration of substantive issues was either ignored or subsumed. From the 1970’s onwards the focus of union suspicion of the processes of the jurisdiction’s institutions concerned growing backlogs of work, greater legalism and concentration on technical detail at the expense of substantive issues.  

To address these concerns the Labour Government enacted the Labour Relations Act 1987. It provided for an Arbitration Commission (to deal with disputes of interest) and a Labour Court, which dealt with disputes of rights: the interpretation of awards, grievances, and other actions regarded as ‘legal matters’. The effect of these changes of institution was regarded as continuing and accelerating the trend of legalising labour issues. The Labour Court, unlike its predecessors, was not a court of conciliation and arbitration. It was purely a court of record, with appeal, review and first instance functions. It was also regarded as presiding over the waning use of employer and employee representatives in the resolution or disposition of labour disputes, generally operating on a Judge alone basis except for demarcation disputes and personal grievance referrals or appeals.

This trend accelerated under the ECA. Under the LRA an average of 60% of parties were represented by union or employer association advocates and 36% by lawyers in the Labour Court. Under the ECA this ratio “switched dramatically” to 70% lawyers and 28% advocates in the Employment Court and 60% lawyers and 35% advocates in the Employment Tribunal, becoming cause for complaint: the Tribunal was accused of “operating too slowly, often as a result of the involvement of lawyers”; employers’ use of lawyers at its hearings were obliging others to do so; this led to legalistic processes that extended hearing times and delays from scheduling difficulties caused by lawyer unavailability. They were accused of ignoring the Tribunal’s mediation option in favour of arbitration rendering it slow and legalistic.

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40 Disputes of interest concerned the registration of awards and the arbitration of disputes arising from bargaining for them.

41 Department of Labour, Memo, Issues Raised by Unions and Employers in Recent Discussions, (undated, c 1989): a record of discussions by the Department with unions and employers in the hotel, car assembly, meat and building industries in mid 1989, a major theme of which concerned the "increased formality or legalism [defined as sacrificing accepted practice to the letter rather than the spirit of the law] of the institutions under the new Act" although it was acknowledged that there were differences of perception about their effects. An employer representative viewed the change positively: "it assisted sanctity of agreement because there were more sanctions available for the employer." Union representatives reported that many more unions were hiring their own lawyers or using outside legal services much more frequently than they had in the past. at 2.

42 Ryan and Walsh, note 39.

43 Margaret Robbie, Paper for Diploma Industrial Relations, Representation, Procedure and Process in Mediation and Adjudication since the Employment Contracts Act, Victoria University of Wellington, (c1993); This study did not include reference to grievance committees, the representatives before which were restricted to union or employer association officials: Labour Relations Act 1987, Sch 7.

44 Department of Labour, Notes of meeting between Minister of Labour and Rob Campbell (Wheeler Campbell Labour Markets Ltd), 11 June 1992.

and for that reason a call was made for their involvement to be restricted, as it is for the Disputes Tribunal. 46

The business lobby belief that lawyers undermined the ability of the Tribunal to reach “common sense decisions on dismissals and compensation” 47 highlighted a basic distinction between union and lawyer/business approaches to remedy. Union organisers regarded conciliation of employer and employee interests as the fundamental requirement of their task when confronted by conflict. 48 They regarded retention of the job for the employee as a major goal. Much of their effort, therefore, lay in repair of damaged work relationships. This involved a heavy emphasis on negotiation, education and “keeping lines of communication open”. 49 Unwinding a dismissal or a warning was therefore of greater importance to union representatives than pursing compensation.

Lawyers, as representatives, had a different focus. In part this arose from the imperative in legal training to identify the source of breach before determining remedy, generally associated with monetary compensation. The result was that the first task of the lawyer was allocation of responsibility for breach, which, in terms of the client relationship (“a lawyer should advance their client’s partisan interests with the maximum zeal permitted by law”), 50 generally involved a search for fault by the other party. Of itself, this imperative lends itself more easily to position taking and confrontationalism, so that the search for breach rendered restoration of relationships much more difficult than assertion of remedy (compensation), even if restoration of the working relationship was the more desirable option for the client. 51

A distinction, therefore, between collectivist and individualist advocacy for grievants lay in the pursuit of different outcomes, which in turn affected the means by which those outcomes were pursued. These differences can be considered in terms of timing, use of and effect on mode of resolution, grievant assumption of risk, and choice of representative.

**Timing**

The point in conflict at which assistance is sought differs for collectivised and individual employees. Unionised employees were better equipped to recognise problems in need of resolution than their non-unionised counterparts, 52 thus ensuring that attempts at de-escalation of conflict occurred before the need for disciplinary action arose. 53 This in turn was dependent upon the establishment of working relationships between union officials and management, which facilitated the dialogue necessary to negotiate problems in the workplace as they arose. Where no such

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47 Ibid.
48 Donald, note 37.
49 Ibid.
50 Parker and Evans, note 28.
53 Donald, note 37.
relationships existed it was the role of union officials to determine with whom to negotiate problems in workplaces and to establish a working or negotiating dialogue likely to result in early or acceptable resolution.\textsuperscript{54} By contrast lawyers were less likely to be consulted until matters were seriously awry.\textsuperscript{55} At this point the lawyer is less likely to have other sources of information about the dispute than the union advocate, who, in turn, is not required to advance a grievant’s interests above those of others.\textsuperscript{56}

Lawyers, on the other hand, have an obligation to a client to do the best they can for them, the tools available being the filing, or defending, of proceedings. Codes of ethics underline these obligations by endorsing zealous advocacy of clients’ causes.\textsuperscript{57}

This in turn affected the point at which assessment of a grievant’s prospects of success of achieving a remedy occurred. A union member with low prospects of success was unlikely to attract representative effort beyond the workplace.\textsuperscript{58} Other grievants were less likely to obtain this assessment until they were at the Tribunal:

more often than we would wish applicants arrive at our hearings so pumped up with expectation that little short of a howitzer will reach them as they float about somewhere above cloud nine. Similarly we still meet employers who clearly have made a botch of a dismissal and who believe that payment of another week’s notice should bring the ship home.\textsuperscript{59}

This difference of timing (with increased use of lawyers) reduced the number of disputes resolved ‘closer to the workplace’ and increased the number of those requiring Tribunal involvement.\textsuperscript{60}

\textit{Mode of Resolution}

Whilst unions and employer associations expended much of their effort on avoiding the need for outside intervention,\textsuperscript{61} lawyers were trained to regard courts and tribunals as their first port of call.\textsuperscript{62} Negotiating skills were to collective advocates what litigation skills were to lawyers. This had the following effect on the Tribunal:

At first, mediation was a bit of a mystery to some lawyers who argued their case across the table comfortably enough but then didn’t seem to know how to negotiate and cut a deal. That, of course, had long been the very bread and butter of the union officials and their Employer Association counterparts... Some representatives (c 1991 onwards) may as yet not fully appreciate a reality which those advocates and union officials with extensive service in the

\textsuperscript{54} Ibid.
\textsuperscript{56} Ibid.
\textsuperscript{58} Donald, note 37.
\textsuperscript{59} Gardiner, note 15.
\textsuperscript{60} Department of Labour for Minister of Labour, paper, \textit{The Employment Contracts Act – Institutions and Personal Grievances}, 26 November 1993.
\textsuperscript{61} Donald, note 37.
\textsuperscript{62} Parker and Evans, note 28.
industrial trenches had long before identified – the job of the representative is to resolve a matter and the mediator is a tool of their trade.\(^63\)

These observations reflected the concerns of the Tribunal membership about the conduct of legal representatives at hearings, the quality of their advocacy, and their behaviour during the mediation process. They sought training for lawyers in Tribunal advocacy.\(^64\) Some Tribunal members new to adjudication were sufficiently intimidated by the demands of counsel in the procedural point scoring underpinning trial advocacy to request training for themselves in procedural issues.\(^65\) This had implications for both modes of resolution, although it was the presence of legal counsel inexperience in the mediation process that was regarded as frustrating the perceived advantages of an informal low-level specialist Tribunal, the use of lay advocates and the equity and good conscience jurisdiction.\(^66\)

Lawyer reliance on adversarial posturing in non-judicial processes, arising from a tendency to view such processes through the optic of litigation, has been long understood:\(^67\)

These processes may be approached as if they were merely variants or extensions of the judicial, adversarial model which to so many lawyers is the paradigm of disputing.\(^68\)

The dominance of lawyers as representatives also affected the style of mediation as the result of its function as the forum that preceded adjudication. Likely adjudicated outcome, as predicted by the mediator, became the basis for settlement by parties who were legally represented. This in turn required mediators to sacrifice a facilitation role for assessment of litigation risk, turning them into ‘deal makers’, engineering agreements on ‘exit packages’ for often long-dead employment relationships.\(^69\)

Lawyer effects on the Tribunal’s adjudicative function were seen to be adversarial and controlling, and over time ‘they became more inventive with their arguments and challenges.’\(^70\) That the Tribunal should operate for the convenience of legal representatives was underlined shortly after it began when it was asked to depart from its practice of starting at 9 a.m in favour of traditional Court hearing times.\(^71\)

Requests such as this, the reluctance to adapt to the requirements of the mediation function and a continuing insistence on choice of adjudication as first option suggests

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63 Gardiner, note 15; A study of 100,000 civil cases terminated in Taiwan from 2000-2006 showed settlement least likely when both parties legally represented: Kuo-Chang Huang How Legal Representation Affects Case Outcomes: An Empirical Perspective from Taiwan, (2008) 5(2) Journal of Empirical Legal Studies, 309.
66 Department of Labour, note 60.
67 Menkel-Meadow, note 51; Munro, note 35: Munro argues that the Maori Fisheries negotiations were thwarted by the approach of the parties who locked themselves into litigation positions, maintained them as a point of principle and found as a result no basis for compromise.
69 McAndrew, Morton, Geare, note 11.
70 Ibid.
a connection between business opportunity and the reluctance of lawyers to acknowledge the validity of non-judicial processes:

some lack of enthusiasm can often be explained by simple self-interest [which is] at least partly a matter of economics: Lawyers, especially those paid by the hour, are able to extract substantial fees from prolonged conflict, and may have an incentive to shape disputes in such a way as to maximise their benefits from them. Economic changes such as intensified business conflict – and above all heightened competition in an increasingly entrepreneurial legal profession – may also play a role in dampening interest in non-adversarial settlement. And self interest can have other, less tangible aspects: Alternative processes often function in such a way as to transfer greater power and control over disputing to the parties themselves, or to other professionals...72

Risk

The cost of representation by counsel, particularly for adjudication, was payable regardless of outcome.73 Analysis of adjudicated outcomes revealed that almost half of the grievances litigated yielded no remedy for the grievant. Of those who did obtain a remedy over half were awarded less than $5,000 in compensation. Ninety-three per cent of successful grievants were awarded less than $12,000. Costs awards never met the full cost of representation.74

By contrast the cost of union membership was seen as akin to an insurance premium that offered representation for individual problems at no extra charge. If advocacy was required, it carried with it exemption from indemnification of the other party if unsuccessful, the full benefit of any compensation award, and vigorous attempts to resolve the problem in the workplace (i.e. before matters escalated to dismissal).75

The consequences for grievants of choice of representative therefore differed in terms of risk. Union/employer association members took the risk, when litigating, that their organisation would refuse to represent them if their prospects of success were too low. Those relying on lawyers or self-employed advocates had little or no risk of a refusal to assist but they undertook all the risk associated with their prospects of success. They risked paying a costs award to the other party if they were unsuccessful and even if successful they took the risk that the cost of representation would match or exceed any compensation awarded.

Choice

The analysis above fails to account for the persistent dominance of lawyers as

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72 Rau, et al note 7; Support for the importance of time to lawyers in resolution processes comes from a more recent study in the USA that found an increased likelihood of settlement from Court referrals of appeals to ADR programmes but no change to disposition times: Michael Heise Why ADR Programs Aren’t More Appealing: An Empirical Perspective, (2010) 7(1) Journal of Empirical Legal Studies, 64.
73 No-win-no-fee advocates began to appear in the mid 1990s as the subjects of complaint by the Employers Federation. Dumbleton, note 14, noted that because advocacy at the Tribunal was unregulated clients and advocates were free to contract amongst themselves about how a reward for services should be paid, relying on the NZEFs arguments about the free market to observe that in such a market, contingency fee advocacy is a choice available to parties. Contingency advocate effects on the Mediation Service are discussed in chapter 6.
74 Gardiner, note 15.
75 Ibid.
representatives in this jurisdiction. One explanation is that lawyers are more likely to be associated with getting ‘the best deal’ at the other party’s expense, notwithstanding that this assumption is not generally supported by research. A related, but opposing idea, “that negotiation on financial matters through lawyers will do little to increase independent communication between the parties” does appear to have some validity.

**Tribunal Member Output**

In its first year of operation Tribunal members (14 were appointed amounting to 12 full time equivalents [FTEs]) settled 437 and decided 312 applications. This averages 36 mediations and 26 adjudications per member annually, or 3.6 and 2.6 per member per month (calculated on the basis that 10 months of 22 working days per month is a working year because it accounts for annual leave, sick and other leave entitlements). If the 4 days per adjudication that the Department allowed for this mode and the half day that most mediations took are totalled (12 days) it is clear that these figures indicate a low disposition rate per working month.

The following year (16 FTE members) the average monthly disposition rate was 6.4 for mediations and 3.6 for adjudications (18 days). The peak year for disposition by adjudication, the 93/94-year (22 FTEs) saw 822 substantive decisions issued taking an average of 16 working days per member per month. The 8.3 mediations required just over 4 days.

The peak year for dispositions was the 96/97-year (24 FTEs) when 13 mediations and 2.5 adjudications per member per month occurred. By this time the average number of annual adjudications had settled into 26 per member per year, requiring 10 or 11 days per month, leaving the same number of days available for mediations. At no time, however, did the number of settlements reached require this amount of time (even by taking into account the approximately 15-20% of mediations that were not settled). In the 97/98 year the disposition rate for mediations dropped to 12 per member per month, reducing the following year to less than 8.

Output rates, highest from the 93/94 to the 97/98 years, coincide with falling withdrawal rates, rising mediation settlement rates and the issue of the highest numbers of substantive decisions (notwithstanding their falling proportion of all dispositions). Withdrawal rates are most closely associated with periods of lowered output rate. Output was lowest for the first two and the last two years of the Tribunal’s operations. For the first two years the proportion of adjudications to total dispositions was high, as was the proportion of withdrawals. For the last two years the proportion of withdrawals rose with that of private settlements and the numbers and proportions of mediated settlements fell.

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78 Ibid.
The connection can be explained by the practice of late notification of withdrawals, when it became difficult or impossible for Tribunal staff to substitute waiting proceedings. Inability to reschedule proceedings at short notice “due to the unavailability of clients’ lawyers” was noted by the Report of the Labour Select Committee in 1993, but there is no evidence that this resulted in any significant changes to the Tribunal’s setting down and other administrative practices. Unavailability of representation as the result of withdrawals close to hearing dates was advanced by the Department in 1999 as one of three reasons why average waiting times for matters to be resolved at the Tribunal continued to increase.

By 1999 application rates were declining, as were disposition rates. But the numbers of applications awaiting disposition continued to rise. The Department collected two sets of backlog statistics: applications awaiting a hearing and applications outstanding. The second set was a combination of applications that hadn’t been dealt with and those that had, but were awaiting a decision following adjudication. This latter set included those who sought adjudication following an unsuccessful mediation and those who were awaiting a decision on a hearing already conducted.

The differences between these sets of data reveal that although the numbers awaiting attention grew steadily (but unevenly) from 691 at the end of 1991 to 3022 at the end of 1999, the numbers awaiting a decision grew at a different rate. If the average withdrawal rate is deducted from both sets of data (to determine more accurately the applications requiring Tribunal intervention and to account for those requiring both mediation and adjudication) then the number of decisions awaited from hearings already held can be calculated. There was nothing to count until the end of 1993 when (approximately) 270 applications were awaiting a decision. At that time an average of 58 applications were decided per month, so this figure represents 4.5 months of decisions. Five years later about 830 decisions were awaited. The average number of applications decided had fallen to 53 per month, so this represents 15 months of decisions.

This means that, over time, as the number of decisions per application grew, the rate at which substantive decisions were issued slowed. If considered alongside the output rates calculated above, the 2.6 adjudications per month that Tribunal members averaged required more than 4 working days per application to complete. This appears to have affected the numbers of mediations that were conducted after the high point in the 96/97-year of 13 per member per month. The effect on the backlog at this point was to slow its rise, but this ended with the reduction over the following two years of settlements to 12 and then 8 per member per month.

Additions to Tribunal membership had no permanent effect on backlogs. For the 3 years over which most of the additional appointments were made, in the early 1990s, the backlog hovered around 1500 but, thereafter, rising application numbers ensured a rising backlog. Output rate per member had some effect on the backlog but the backlog had no measurable effect on output rate.

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80 Department of Labour to Minister for Enterprise and Commerce, Memorandum, Employment Tribunal Waiting Times, 4 May 1999.
Operational Costs

In the course of the annual Budget funding round in early 1997 the Department was required to establish for the Treasury why it wished to increase its mediation settlement rate, rather than offer more adjudication. It prepared the following table\(^{81}\) of the cost to the Department of each mode of resolution. It includes the cost of disposition at the 5 Tribunal city bases and the regions, the costs per day of adjudication and the cost of those applications that required both modes of resolution. These costs were calculated by reference to the time required of Tribunal members and support staff and the costs associated with travel and use of venues.

<table>
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<th>Projected no’s</th>
<th>type</th>
<th>cost per app</th>
<th>total cost</th>
</tr>
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<tr>
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<td>68,151</td>
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<tr>
<td>1144</td>
<td>mediation @ base</td>
<td>415.93</td>
<td>885,094</td>
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<td>2128</td>
<td>mediation circuit</td>
<td>587.60</td>
<td>613,452</td>
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<tr>
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<td>adjud (1 day) @ base</td>
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<td>152</td>
<td>adjud (1 day) circuit</td>
<td>2985.68</td>
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<td>73</td>
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<td>adjud (long) circuit</td>
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<tr>
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<td>med + adj (long) circuit</td>
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</table>

This table reveals the significance of the difference in the cost of mediation and adjudication. Of greater significance however is the cost of adjudication relative to the size of the remedies at stake. If 56% of remedies were $5,000 or lower, then it is quickly apparent that, for many successful claims, the cost of the professionals – Tribunal and representatives – was higher than the remedy at stake.

Speedy

Measuring delay

Although the theme of administrative and public attention for the nine years that the ECA was in force was overwhelmingly about the delays in having proceedings heard at the Tribunal, once they became apparent and then endemic, the immediate response, in terms of applications filed after May 1991, suggested to officials that early fears of a rapid increase in the number of claims as the result of the extension of

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\(^{81}\) Department of Labour, note 26.
the personal grievance jurisdiction to all employees were unfounded. This confidence dissipated soon thereafter.

The two major ways that the Department calculated and described delay were by time and number: the average times that applications waited to be heard and determined (or mediated) and the size of the backlog.

The Department’s assessment of waiting times was initially counted in days, as it had been for the institutions that operated in the jurisdiction before 1991. The major time categories were: 90, 120, 180 days and more than a year. The measures of delay were applications on which nothing happened for more than 90 days from filing. Thus, when, by mid 1992 the proportion of hearings held within 90 days of application dropped from 63% in the previous quarter to 51%, the Department described this as sharp, indicating that a higher Tribunal output rate was not coping with the increase in application numbers. Comparisons of applications awaiting hearing in August 1992 and March 1993 indicated that the 28% waiting for 3-6 months in August grew to 35% in March and the 7% waiting longer grew to 23%. Put another way, of the applications heard in the first year, 47 waited more than 6 months. This grew to 686 in the second year.

These figures also reveal that the language of delay had transformed periods described in days to months by 1993. The use of time period descriptors varied from this point on. The Department’s descriptors are those adopted for the data that follows. It is not clear why they varied.

The data was also categorised by registry. Auckland was the bellwether for delay, which is unsurprising since roughly half of applications were filed there. In the first year of operation the Auckland registry disposed of 32% of its completed applications within 90 days, Wellington 73% and Christchurch 76%. This reduced the following year to 16% in Auckland, 15% in Wellington, and 58% in Christchurch. The trend suggested here, that the Christchurch registry had lower waiting times than the other two registries, persisted for the entire period of the Tribunal’s operations.

The backlog consisted of applications awaiting hearing, regardless of time of filing. It became a measure of delay once it exceeded the number of applications made for the previous 3 months (this being the optimum period identified by the Department within which proceedings should be heard). Thus when, at the end of 1992, the 1441 applications awaiting hearing represented about 6 months of applications (the

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83 End of the second quarter for 1992, but the end of the public service reporting year: 1 July-30 June.
86 Minister of Labour for Deputy Leader of the Opposition, Response to Question for Written Answer, No 2397, 18 May 1993.
87 Deputy Leader of the Opposition for Minister of Labour, Questions for Written Answer, No’s 2395 – 2402, 18 May 1993.
88 Department of Labour for Minister of Labour, Memorandum: *Employment Tribunal Regional Waiting Times*, 11 February 1998.
average for 1992 was 235 per month) the Department had another measure of delay. Interestingly, and notwithstanding a rising application rate, this measure of delay (6 months of applications) represented a high point that was exceeded next in 1998. For the 5 years between these periods, when application rates rose from an average of 284 to 467 per month, the backlog hovered between 4.6 and 5.5 months of applications. By this measure the backlog was at its highest in 1999 when it represented 9 months of applications made that year.  

The third measure of delay was an historical comparison with earlier backlogs. The backlog at the end of 1992 had more than doubled from the 691 awaiting hearing at the end of 1991. Thereafter, apart from small dips in 1994 and 1998, the trend was a rise in numbers awaiting hearing to a peak of 3022 at the end of 1999.

By the end of 1994 average waiting times were 2 months for mediations and 7 months for adjudication. Waiting times increased over the following two years to 4 and 8.5 months respectively. An additional registry in Hamilton in early 1996 to cope with the upper North Island workload slowed the rate of increase in waiting times in the Auckland registry between the 92/93 and 98/99 years from 18 to 20 weeks for mediation and 26 to 57 weeks for adjudication, but had no effect on Wellington where the increase for mediation was from 20 to 32 weeks and for adjudication from 24 to 67 weeks. Christchurch maintained its superiority over the others, but sustained increases of 12 to 16 weeks for mediation and 16 to 44 for adjudication over this period.

The regions, outside the main centres, generally suffered longer waiting times, ostensibly as the result of the circuit system by which applications in a particular region would be accumulated until there were sufficient to occupy a Tribunal member for a number of days. Establishing a registry in Hamilton was to the immediate advantage of the cities closest to it because they experienced the shortest average waiting times for mediation (4 months). For other regions it is not clear whether waiting times were a function of numbers, distance from or ease of access by the city servicing them, or administrative differences between the three Tribunal centres. It is also unclear how the circuit system affected waiting times for adjudications. The shortest waits (7-9 months) were in South Island regions serviced by the Christchurch Tribunal. City applicants waited 10-15 months. The regions that waited the longest

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93 Department of Labour for Minister of Labour, *Response to Question for Written Answer, 4 May 1999* (re increase in average waiting times in the Employment Tribunal).
94 Department of Labour to Minister of Labour, Memorandum: *Delays in the Employment Tribunal, 31 January 1997*.
96 Mediation waiting times were 5 months in Whangarei, Hamilton, Gisborne, Palmerston North, Timaru, Ashburton, West Coast, and Dunedin, 6 months in Blenheim, Nelson, New Plymouth, Wanganui, and Queenstown, 7 months in Hawkes Bay, and 8 months in Invercargill.
times (18-22 months) were all serviced by the Wellington Tribunal, the members of which did their own calculations asserting that average waiting times for mediation for the 7 centres in the Wellington region was 7.99 not 10 months as calculated by the Department and 15.14 months for adjudication, not the 19 months reported. It is not clear whether similar differences existed also for data from other centres.

**Complaints of delay**

Concerns about the potential for delays at the Tribunal were expressed at the outset when the implications of creating a specialist jurisdiction were first realised. Non-union employees under the previous regime accessed their local Disputes Tribunal or District Court for resolution of their disputes with employers but these avenues of relief were no longer available after May 1991. Members of Parliament for two South Island electorates (representing both sides of the House) petitioned the Minister of Labour to allow minor matters such as wage arrears claims to be dealt with as before, but to no avail.

Within a year of commencing its resolution function in mid August 1991 the Tribunal was subject to criticism that it was operating too slowly, presaging a series of complaints about delays in obtaining fixtures and hearings. By year’s end the complaints of delay in the press forced a response that emphasised the increase in jurisdiction to universal rights of access, a recent steep increase in application numbers and the appointment of additional members to the Tribunal. By early 1993 the Council of Trade Unions was seeking monthly reviews of Tribunal delays.

Although early complaints were diffuse about cause it was not long before the Tribunal’s approach to adjudication was identified as the culprit. The Employers Federation was amongst the first to note that the Tribunal was processing matters in a “more formalised, legalistic and lengthy manner.” By then the Tribunal had been

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98 Nick Smith, MP Tasman, to Minister of Labour, letter, 28 August 1991, concerned that the 14 members of the Employment Tribunal would be insufficient to cope with the workload; Pete Hodgson, MP Dunedin North to Minister of Labour, letter 20 November 1991, raising concerns about wage arrears matters that were formerly dealt with by the Disputes Tribunal. Requested Disputes Tribunal be given jurisdiction over minor wages arrears. Response, Minister of Labour to Hodgson, 13 December 1991: Request refused.
99 Department of Labour, note 44.
102 New Zealand Council of Trade Unions to Department of Labour, letter, 12 March 1993; Response, Department of Labour to NZCTU, 15 March 1993.
103 NZ Employers Federation to Secretary of Labour, letter, 2 April 1993, at 3; Dumbleton, note 14, accepted adjudication by the Tribunal did not live up to the speedy objective for it, but attributed blame for its legalism to the Employment Court and the Court of Appeal, both generators of long complicated decisions expanding or qualifying generally simple concepts: “What I thought was intended was something in the character more like the grievance and disputes committees which had operated under the Labour Relations Act and not something like the Labour Court under that Act. It remains my view that the essence of adjudication in the Tribunal was intended by the Employment Contracts Act to be
operating for 2 years during which nearly half of adjudicated outcomes took more than 6 months (over a year in some cases) from filing to hearing whilst less than 20% of their mediated counterparts took this time to resolve.\textsuperscript{104}

Employers were also keen to eliminate what they perceived to be the sources of increased claim numbers. Amongst these was the provision of legal aid under the new Legal Services Act 1991. Their concern was that the provision of legal aid would work against the objective of resolving labour market disputes expeditiously and at the lowest level possible.\textsuperscript{105}

The Chief Judge of the Employment Court entered the fray in mid 1993 when he was reported as noting that the delay in obtaining hearings at the Tribunal was sufficiently serious to warrant urgent attention.\textsuperscript{106} This coincided with the Labour Select Committee inquiry into the effects of the Employment Contracts Act on the labour market. Tribunal members who gave evidence to the Committee were concerned that the low level, informal objectives for the Tribunal were not being met. Agreeing that the expansion of the grievance jurisdiction to all employees was significant, they pointed out that this had resulted in a change of grievant, which in turn affected hearing times. Middle management employees excluded from the previous grievance jurisdiction were perceived by Tribunal members as over-represented in adjudications. Their claims were described as more complex than those of wage earners, demanding more time to hear and decide.\textsuperscript{107} Evidence recording (in adjudicated hearings) for appeal purposes, and the existence of Regulations for the Tribunal contributed to perceptions that its processes were overly formal and legalistic.\textsuperscript{108} These views were relied on by the Committee in the two reports that were produced, which reflected majority and minority views of the issues raised by the Inquiry.\textsuperscript{109}

Waiting times continued to be the subject of complaint (including from the legal profession) through to the 1999 general election.\textsuperscript{110} Other complaints concerned the high number of personal grievances lodged at the Tribunal, the use of contingency advocates, the availability of legal aid for grievances, the “rumours of advice from Social Welfare staff to dismissed persons to file personal grievances to avoid the

\textsuperscript{104} Deputy Leader of the Opposition to the Minister of Labour: Question for Written Answer No 2399, 18 May 1993.

\textsuperscript{105} New Zealand Employers Federation to Secretary for Justice, letter (undated, early 1992).

\textsuperscript{106} Helen Clark, MP to Minister of Labour Question for Oral Answer No 5 (Due 4.5.93) \textit{What action, if any, does he intend to take in the light of the reported comment by Chief Judge Tom Goddard that the delay in Employment Tribunal hearings ‘is a serious situation which does need attention and needs it now. There is a tremendous backlog’? Answer: A temporary panel of 7 part time members of the Employment Tribunal for the purpose of focusing on the backlog is to be appointed.}

\textsuperscript{107} The Report of the Labour Committee, note 45.

\textsuperscript{108} Limits on the scope of appeals also required all potential issues and arguments to be raised and dealt with at first instance, which also contributed to perceptions of legalism.

\textsuperscript{109} The Report of the Labour Committee, note 45.

\textsuperscript{110} Waikato District Law Society to Minister of Labour, letter, 7 March 1997; NZ Law Society to Minister of Labour, March 1999; response, Minister of Labour to NZ Law Society, 16 March 1999.
“week stand down period” and the focus by the institutions (as perceived by employer associations) on process at the expense of substance in personal grievances. They were acknowledged as a reason for increased funding for the Tribunal and a review of its processes.

Perhaps because that review never materialised, complaints about waiting times continued to dog the Minister of Labour in Parliament. There was little new in his responses. The Department took the opportunity offered by his request for reasons for continued increases in average waiting times at the Tribunal in mid 1999 to attribute limited resources to the problem, whilst acknowledging that increased resource and a drop in applications had failed to address the backlog. Accumulated caseload as the result of constrained resources from inception was now said to be the problem, particularly for the regions that experienced the longest waiting times. It suggested that an increase in number and efficiency of the Tribunal membership and more resources for the regions were the measures most likely to address the problem.

The Department adopted a wider view of the problem, however, for others, attributing the Tribunal’s increased caseload to statutory changes to the labour jurisdiction. The resulting emphasis on individual rights and obligations in employment contracting meant greater (individual) requirements for the dispute resolution and enforcement services of the State. This was seen to be a direct result of the extension of rights of access to grievance and disputes procedures to all employees, changes to the nature and structure of bargaining, specifically the demise of the national award system, the decline of unions as information and enforcement agents, the transfer of minimum employment conditions from awards to statutory minima. Increases in the resourcing and accessibility of state provision of information and enforcement, at little or no direct cost to individuals, encouraged an increasing reliance on them. The precedent effects of key judgments enhanced public awareness of these services that in turn affected subsequent demands for enforcement action. Changes in the economy and in the circumstances of individual employees were also regarded as affecting their propensity to utilise the services offered by the State.

Measures to redress delays

Membership of the Tribunal

The initial complement of 14 Tribunal members was also the number of mediators employed by the Mediation Service immediately prior to May 1991. It was clear to the Department by mid 1992 that this was insufficient to cope with claim numbers. Three additional Tribunal members were appointed by the end of that year to meet the increased demand, followed by the appointment of eight temporary members in

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112 Minister of Labour to NZ Employers Federation Conference, Speech Notes, 12 May 1998.
113 Minister of Labour, Response to Question for Written Answer 4 May 1999; Department of Labour to Minister of Labour: Report on the reasons for continued increases in average waiting times in the Employment Tribunal (undated but prepared as part of the response for written answer).
114 Department of Labour to Kate Hamilton, Centre for Labour and Trade Union Studies, University of Waikato, 12 March 1999.
115 Department of Labour, note 101.
May 1993,\textsuperscript{116} at the time the Labour Select Committee began its inquiry. By August 1993 it accepted that the additional temporary members were insufficient. It recommended the appointment of additional adjudicators and mediators if waiting lists and times could not be substantially reduced.\textsuperscript{117} Notwithstanding the Department’s belief that the backlog had begun to reduce and application numbers were falling, three more temporary members for the Auckland Tribunal were appointed in mid 1994.\textsuperscript{118} This effectively doubled the complement of members of the Tribunal from 14 to 28 in less than 3 years of operation.

By mid 1999 it had become clear to the Department that the part-time members needed to be converted to full time.\textsuperscript{119}

\textit{Additional registries}

The Hamilton registry was established in January 1996 to cope with the upper North Island workload, and a Dunedin registry in July 1998 to service the lower half of the South Island.\textsuperscript{120}

\textit{Funding}

Funding for the Tribunal was $5.694m for the 1993/94 financial year ($5.798m spent), $6.318m annually for the years 1994-96 rising to $6.896m for the years 1996-98. The initial basis on which this rise in funding was secured was that it would reduce to $6.718m for the 98/99 year.\textsuperscript{121} For the 96/97 budget round the Department argued for retention of the $2.11m (approved in May 1994 for the following two budget rounds for the temporary panel of 8 Tribunal members) in addition to extra resourcing for increasing demand and the growing backlog. It argued that it had relied on a number of administrative and regulatory options to strengthen the incentives for more cost effective and efficient dispute resolution in the Tribunal (e.g encouraging applicants to accept mediation) but that there were:

\begin{quote}
limits to the extent to which reallocating work priorities and switching resources internally can contribute to an overall reduction in total workload and case backlogs. Current levels of demand and resourcing mean that such strategies are likely to be limited in their effect in the absence of a sufficient resource raise. Despite the productivity gains made to date, projected future demand levels will put increased pressure on waiting times and backlogs, without corresponding increases in resource.\textsuperscript{122}
\end{quote}

Treasury agreed to support this bid only when it became clear that the advice it sought about increasing application fees, the effect of the 26 week stand down for entitlement to welfare benefits, incentives and disincentives on frivolous claims would have no effect on the problem then confronting the Department, that the terms of the panel of

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120 Minister of Labour to Pete Hodgson, MP, letter, 28 February 1997.

121 Department of Labour: \textit{Funding and Workload of the Employment Tribunal}, (undated c 1996).

\end{flushleft}
eight temporary Tribunal members were due to expire mid year at a time when application numbers were still rising.\textsuperscript{123} Funding of $1.875m was approved for the following 3 budget rounds to maintain current demand only. No funding was approved for the management of future demands.\textsuperscript{124} This forced the Department to look for savings in other areas of its expenditure for transfer to the Tribunal.\textsuperscript{125}

For the 1997/98 budget round the Department sought an additional $650,000 to reduce waiting times at the Tribunal.\textsuperscript{126} As part of the exercise to garner Treasury support for this bid the Department prepared the table of costs set out above which costed all Tribunal resolution functions, revealing the relatively high costs of adjudication over mediation functions. This triggered a different response from Treasury than previously. It wanted to know how additional funds would reduce waiting times, but also wanted to target adjudication waiting times. It was concerned that reductions to mediation waiting times would result in greater use of this function, but it also wanted fee increases to be considered to encourage lower cost mediation and discourage use of higher cost adjudication.\textsuperscript{127}

The Department’s reply noted that its target times for mediation were 2-3 months because it was within that period that effective settlement occurs:

\begin{quote}

The professional opinions and experience of the tribunal members themselves is that mediations will settle in those timeframes. In their, and our, experience, where hearing times for mediation are delayed outside the target ranges, the parties will fail to settle in that manner, and will then proceed to adjudication – an altogether more lengthy, expensive and resource intensive process for all concerned.\textsuperscript{128}

\end{quote}

It went on to note that current waiting times were 6-7 months, meaning that its priority was to improve capacity to deal with the mediation workload. It therefore disagreed that funding should be directed at adjudication and took the opportunity to lobby for an increase in the Tribunal membership (a minimum of three additional members) to establish regional coverage where waiting times were longest – Hamilton, Dunedin, and Wellington.\textsuperscript{129} It got an increase - $4m with the difference to be funded by rises in Tribunal fees.\textsuperscript{130} This allowed for the appointment of two additional members for the Hamilton registry.

\textsuperscript{123} The Treasury to Department of Labour, letters 10 and 30 January 1996.

\textsuperscript{124} Minister of Finance to Minister of Labour, letter (undated) advised that Gatekeeping Ministers considered bids on 13 March 1996. They agreed to support an increase of $1.875 for 96/97; 97/98; 98/99 to maintain current demand. But no funding to manage future demands to 99: Cabinet Minutes, 15 April 1996, CAB(96)M13/5(24).

\textsuperscript{125} Department of Labour to Secretary of Labour, letter, 25 March 1996; Secretary of Labour to Minister of Employment, letter, 25 March 1996; Department of Labour to Secretary of Labour, letter, 2 April 1996, – transfer of savings to fund 1 additional member of Tribunal at annual cost of $200,000.

\textsuperscript{126} Department of Labour (internal) memo, 17 January 1997; Department of Labour to Minister of Labour, memo, 21 January 1997.

\textsuperscript{127} The Treasury to Department of Labour, letter, 25 March 1997.

\textsuperscript{128} Department of Labour to The Treasury, letter, 26 March 1997.

\textsuperscript{129} Ibid.

\textsuperscript{130} Minister of Finance, Minute, 5 May 1997; Cabinet Minute, (26 May 1997) CAB (97)M 19/10 (29): Cabinet agreed to an increase in Vote Labour of $4.50 to reduce backlogs and waiting times to be met by increases in Revenue Crown of $400; agreed $250 of Crown Revenue by increase in fees and if this amount not generated then amount to Industrial Relations institutions would decrease by the amount of the deficit.
Additional funding of $3m was secured for the Tribunal in 1998\textsuperscript{131} to tackle the backlog of waiting applications, particularly in the regions, and to account for the disappearance of the previous increase in funding swallowed up by Higher Salary Commission increases to Tribunal member remuneration.\textsuperscript{132} This was followed by an increase of $1.77m to increase the capacity of the Tribunal in the 1999 budget round.\textsuperscript{133}

\textit{Administration}

Conspicuous by its absence from the data archived by the Department are the files of Tribunal administrators. There is, consequently, little information about administrative responses to the problems of delay. In the detailed counting of applications, waiting times, disposition rates and the explanations for them, this absence is of interest. Of the information that is available about the Department’s administrative practices, a passive approach to the problem of delay is apparent. Since organisational culture (the extent to which court administrators are prepared to take the lead in organising court business) has been identified as the key determinant of performance (in terms of delay, convenience to parties and use of court resources) evidence of administrative passivity is likely to suggest poor performance.\textsuperscript{134} Apart from an early recognition that applicants had to be incentivised to choose mediation as a resolution option there is no evidence of any other changes to administration to increase disposition rates.

There is, however, evidence of the means by which the backlog data could be differently categorised to reduce the numbers apparently awaiting hearing. This involved the use of a float of applications capable of being set down for the following 2 months. Since mediations took only half a day on average but adjudications 3-4 days, more potential mediations and fewer adjudications increased the float, which, as the result of its exclusion from the waiting list, reduced the numbers awaiting hearing. However this was something of an illusion because there were no guarantees that the applications in the float would be dealt with in the float period. It was also clear, at the time this idea was mooted, that disposing of mediations at the expense of adjudications was already the practice in the Auckland registry and that the result was a ballooning backlog of cases awaiting adjudication.\textsuperscript{135}

The suggestions of efficiencies that accompanied this analysis of the backlog in late 1993 were furthermore more dependent on the membership of the Tribunal than its administration. Recommendations included the intensive use of mediator only members to work on switching adjudications to mediations, dual warranting (new appointees with mediation and arbitration skills), transferring lengthy adjudications to the Employment Court, reductions of circuiting, restricting the Wellington

\textsuperscript{131} Minister of Labour to NZ Law Society, letter, 16 March 1999.
\textsuperscript{132} Department of Labour to Minister of Labour, letter, 1998 Budget – Proposals for additional resourcing to maintain current IRS operation, 19 December 1997; memo, 26 January 1998; Aide Memoir: 1998 Budget – Vote Labour Industrial Relations Proposals (undated); Minister of Labour to NZ Employers Federation Conference, Speech Notes, 12 May 1998; Department of Labour to Minister for Enterprise and Commerce, Memorandum, Employment Tribunal Waiting Times, 4 May 1999.
\textsuperscript{133} Cabinet minute, (12 April 1999) CAB(99) M 10/5(27).
\textsuperscript{135} Department of Labour, Internal Memo, Backlog, 20 October 1993.
membership from deferring adjudications at setting down times, using the reserve bench for adjudications characterised by high fallout and/or very short hearing times and/or considering the value of a modified call-over system. 136 This last recommendation, along with a warning that withdrawal rates of 40% for adjudications could not be ignored were the only signs that there was any role for administrators in the problem of delay.

It is clear from this list that the adjudicative function was perceived to be the major reason for the backlog. This was the function that the Department opposed having to administer at entry-level. It could be argued, therefore, that its passivity of approach to administration was a function of the need to demonstrate to the Executive the problem of the option chosen for the employment institutions.

The Department also lacked experience of this function at entry level. The Labour Court had a smaller first instance jurisdiction than the Tribunal, significantly fewer claims, a small, highly specialised bar, high withdrawal rates, and, as noted above, no experience of the phenomenon of adversarialised or litigation dependent modes of resolution.

Asked in 1999 why average waiting times at the Tribunal continued to increase, the Department identified three reasons: the lag between identification of demand or capacity gaps and increased funding; the variation in the regions of waiting times (which affected the averages for a region as a whole) as the result of the circuit system; availability of representation (paucity of short-notice availability as the result of withdrawals close to hearing dates). 137 This question was posed when application numbers had fallen for over a year, the Tribunal had a complement of 29 members, and self and mediated settlement rates were relatively high.

Another hint of what lay behind this passivity of administrative approach comes from an incident that occurred when budget constraints were particularly tight in late 1997. The Tribunal’s manager announced a freeze on circuit adjudications as a temporary means of enabling it to operate within budget until the beginning of the new financial year, only to be confronted by the fact that he lacked the power to make that decision: the choice of when and where the Tribunal’s dispute resolution services would be delivered was statutorily reserved for the Tribunal membership. 138 The announcement provoked complaints from provincial MPs, law firms, the NZ Law Society and the Employers Federation, and an internal legal opinion confirming that the manager lacked the power he sought to exercise. 139 The freeze had to be substituted for a limited suspension of circuit work in favour of main centre work. 140

136 Ibid.
137 Department of Labour to Minister for Enterprise and Commerce, Memorandum, Employment Tribunal Waiting Times, 4 May 1999.
138 Employment Contracts Act, s 88(4).
139 The announcement on 22 December 1997 was followed by letters to Minister of Labour from MPs for Marlborough (24.12.97), Nelson (19.12.97), Palmerston North (23.12.97), law firm in Richmond (7.1.98), the Employment Law Centre in Napier (7.1.98), NZ Employers Federation (16.1.98) and the NZ Law Society (28.1.98) complaining about this decision. The same response was provided to complainants blaming the HSC Determination and promising that individual requests for hearings in the provinces would be considered on their merits.
140 CEO Institutions to Employment Tribunal members and staff, Memo, 22 December 1997, advising that adjudication hearings would be limited to the main centres from 1 April 1998; Chief Adjudicator
The recasting of the entry-level resolution functions of the labour jurisdiction into a Tribunal meant that the membership was appointed by warrant from the Governor-General. This had implications for administration at that time because warrants conferred a different status on the membership than mere employment. Members answered to the Chief Adjudicator, not Department officials. More importantly, disposition of the matters before them was solely their preserve. The Department had no powers to assess and improve the individual performance of members, nor to replace them during the term of the warrant. So whilst its administrative staff could receive and process applications, and schedule hearings, they had no powers over rates of disposition once a hearing had commenced.

This was not much of a problem for mediated applications because they rarely required further input from the mediating member once concluded: the usual practice was to set out terms of settlement at the conclusion of a successful mediation thus ensuring no difference in the time required of a mediator between resolved and unresolved matters.

It was, however, a problem for the adjudicative function. Competence and confidence of decision maker affects the time a hearing takes and the time in which decisions are issued. The former was clearly less of a problem than the latter given that 75% of hearings took a day or less. Since disposition rates were affected by delays in issuing decisions and those delays increased over the decade, overall output rates were affected. The Department had no power to intervene, except in its scheduling decisions, with the result that there were few incentives on the membership to complete matters. This helps to explain the tripling of the backlog over five years noted above.  

Status and power relationships thus appear to have influenced Tribunal operations, particularly in respect of the adjudicative function and in the search for reasons why the problems of delay were not perceived to be the responsibility of Tribunal administrators.

Allied to this issue were the contradictions inherent in the statutory scheme for the Tribunal and the sources of its funding. The problem of providing for a low level, informal and speedy institution with an arbitrative function, was compounded, for its administration, by the incorporation of superior court shibboleths about judicial independence into legislation. As the narrative above illustrates, court systems are susceptible to the tensions between funding decisions made by the Government of the day, user expectations and judicial views of independence. They are particularly vulnerable if the latter have the imprimatur of statute. The transformation of a constitutional convention to ensure the impartiality of judicial decision making into a power to decide when and where Tribunal hearings could be held (usually the preserve of administrators) all but guaranteed that, in the face of funding constraints, effective administration of the Tribunal was undermined.

Employment Tribunal to CEO Institutions, letter, 22 December 1997; CEO Institutions to Chief Employment Tribunal, letter, 23 December 1997; Industrial Relations Service to Department of Labour Legal Section, letter, 13 January 1998; Legal Section, Department of Labour, Legal Opinion, 16 January 1998, noting that the directive concerning provincial hearings was of no legal effect because of the discretion in s 88(4) ECA; CEO Institutions to Employment Tribunal members and staff, Memo, 28 January 1998, changing directive in memo of 22 December 1997 to suspension of circuit work.  

141 From the equivalent of 4.5 months of decisions in 1993 to 15 months of decisions in 1998.
Policy Responses

The early period of the ECA regime is notable for complaints about the Tribunal and the absence of any Cabinet interest in policy responses to those complaints. This created a policy gap that was quickly filled by the Parliamentary opposition, particularly in the 1993 election year with the select committee inquiry. It produced two reports, reflecting majority (Government) and minority (Opposition) positions. The majority report made a number of recommendations, including a review of the Tribunal Regulations, but no review occurred and none of its recommendations were implemented, except for the appointment of more Tribunal members.142

The major focus of Departmental effort, incentivising greater use of the Tribunal’s mediation function, saw it resort, mid way through the decade, to its judicial officers for ideas about how this could be achieved. Its discussions with the Chief Judge of the Employment Court143 and the Chief Adjudicator of the Tribunal144 resulted in their agreement that the Tribunal was ill equipped for its adjudication role, litigation was an inefficient use of its resources, and the low-level and informal aims for its operation were incompatible with its statutory and practical functions and its personnel:

Contributors to legalism are statutory function, de facto Labour Court function, role of lawyers (and their advocacy of legal arguments and defences) the need and requirement from the Employment Court to provide reasoning for their decisions so appeals can be determined and the increased body of employment law since 1991.145

Also discussed was the place of Calderbank letters in promoting out of court settlements, increasing costs charged by the Tribunal, adjournment of hearings for a mediator to take over, and the need for legislative change to enable the Tribunal to impose mediation on parties at the outset.146

These views were replicated a year later in response to the Department’s invitation to Tribunal members to comment on the industrial relations policies contained in the Coalition Agreement of 11 December 1996 (codification of personal grievances; minimisation of judicial activism; addressing delays at the Tribunal). The contribution of one member, memorable for the vernacular in which it is expressed, neatly, if robustly, represents the views of those with long experience of the jurisdiction:

The adjudication system is long-winded, excessively pedantic and above all horrendously expensive. The system cannot be ‘speedy and informal’ with the current legislation and regulations in place. The objects clause of part IV of the Act is in conflict with the provisions of ss 92(2) and 96…These clearly define adjudication proceedings as ‘judicial proceedings’. In the real world judicial proceedings are not, and cannot be, ‘speedy and informal’. Someone has to decide whether they want judicial or they want speedy and informal – you cannot have both. Having worked under the Industrial Relations Act…the Labour Relations Act and the Employment Contracts Act my view is that the mediation-arbitration provisions of the LRA were

142 Department of Labour, note 118.
143 Department of Labour, record of discussion with Chief Judge Employment Court, 14 December 1995.
144 Department of Labour, record of discussion with Chief Adjudicator, Employment Tribunal, 15 December 1995.
145 Ibid.
146 Ibid.
the most efficient and workable. They did not have the theoretical purity of the current mediation-arbitration split but in practice worked well. Basically the system has become ridiculously expensive. We can’t take the crap out of the lawyers but the crap could be taken out of the system. The current regime simply won’t allow speedy and informal and you can’t have proceedings at a reasonable cost unless they are speedy and informal so we either cop what we’ve got or change the system. Tinkering around the edge won’t do it if you want ‘speedy and informal’. You need to completely revisit both the Regulations and those parts of the Act that have turned adjudication into judicial proceedings. It’s been good for tribunal members salary claims and the legal profession and bad for everyone else and needs to be sorted out to do the job that I think was originally intended by Parliament. That is, to give people access to low level mediation and arbitration in employment matters.\footnote{147}

By contrast the Law Society response to this invitation criticised the use of non legally qualified Tribunal members as adjudicators, the failure of the precedent function of the employment institutions to provide sufficient certainty for representatives, the absence of appeal rights on facts for wrongful dismissal claims (able only to be commenced in the Employment Court), overlapping High and Employment Court jurisdictions, incentives for unjustifiable dismissal claims as the result of the 26 week stand down from entitlement to welfare benefits and contingency fee advocates, and delays at the Tribunal. It sought improved speed of Tribunal processes, better case management and training for Tribunal members in mediation and adjudication skills, the appointment of more members and Judges, the use of teleconferencing for mediations, direct rights of access to the Employment Court, wider appeal rights to the Court of Appeal.\footnote{148}

This marked the beginning of Ministerial interest in policy issues associated with delay. It also coincided with a Cabinet desire to limit the influence of the Employment Court.\footnote{149} By then applications requiring adjudication by the Tribunal were waiting 8-9 months. Delay of this type was attributed to the transformation of what was intended to be low-level informal dispute resolution in the Tribunal to an increasingly legalistic approach to adjudication.\footnote{150} This was said to result from process requirements imposed by the Employment Court in the exercise of its supervisory or review function, and the use of legal representation that had “introduced a level of formality and a more adversarial approach to claims.”\footnote{151}

These conclusions were derived from an external legal opinion\footnote{152} that questioned the Court’s practice of its powers of supervision.\footnote{153} Court judgments that contained lists

\begin{footnotesize}
\footnote{147} Maurice Teen to Department of Labour, letter, 30 October 1997.
\footnote{149} A full description of this interest in the Employment Court is contained in chapter 4, following.
\footnote{150} Employment Contracts Act 1991, s 76.
\footnote{151} Department of Labour for Cabinet Committee on Strategy and Priorities, \textit{Issues Paper on Personal Grievance} (undated but in response to a Cabinet request of 22 September 1997 and issued prior to 12 November 1997) at \[54\] p 12.
\footnote{152} The opinion, from Peter Chemis of Buddle Findlay consisted of three reports that were delivered to the Department on 6 June 1997: \textit{The Nature, Limits and Effects of the Supervisory relationship between the Employment Court and the Employment Tribunal; Appeals from the Employment Tribunal to the Employment Court; Appeals from the Employment Court to the Court of Appeal}. They were commissioned following the Coalition Agreement, 1996, between the National and New Zealand First Parties described in chapter 4 following.
\footnote{153} Peter Chemis for Department of Labour, Report: \textit{The Nature, Limits and Effects of the Supervisory Relationship between the Employment Court and the Employment Tribunal}, 6 June 1997; Department
\end{footnotesize}
of questions the Tribunal should ask in respect of particular issues were cited as influencing the Tribunal to apply a rules-based (over a principles based) approach to adjudication. This was said to sacrifice speed and informality for consistency.

The Court’s wide variety of directions to the Tribunal included specific issues and findings of fact necessary to resolve a matter, the powers it could and should use, priorities it should accord to particular cases, the principles it should rely on and the documents it required to determine a matter.

A major reason for the range and depth of these interventions was attributed to the absence of any express limits on the Court’s supervisory function (despite the apparent constraints in ss 88 and 140 ECA of the Tribunal’s power to regulate its own procedure and its jurisdiction to hear disputes at first instance). This highlighted a clear conflict in the Act’s objects (as expressed in s 76) because the supervisory role (as interpreted by the Court) operated to inhibit the low-level informal approach mandated for the Tribunal:

This last factor does not always operate as a limit on the Court’s supervisory role. Sometimes the Tribunal’s low-level status has been used by the Court to justify intervention.

Internally, the Department noted that although the Tribunal had the power to regulate its own procedure, and was not bound to follow the Court’s directions, it had never adopted an independent course. It regarded the Court’s requirement that the Tribunal fully state its reasons for decision as most likely to be responsible for increases to its workload.

These conclusions featured in a later policy paper about industrial relations reforms prepared in May 1998 – shortly after Cabinet had approved (in principle) a transfer of the Employment Court to the District Court – in a discussion about the Court’s appellate and supervisory roles. Of the appellate role, the paper asserted the need to balance the low-level informal nature of the Tribunal’s role against the need for consistency and justice. Maintenance of this balance required that the appeal structure be restricted to some extent, particularly appeals on factual

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155 Peter Chemis, note 153.

156 Ibid.


158 Department of Labour, note 153.

determinations.\textsuperscript{160} To that end it noted a Cabinet direction to develop options for more informal adjudication and appeals.\textsuperscript{161}

None of these options for change appear to have been the subject of analysis by the Department. Cabinet’s intention to subsume the Employment Court in the District Court did not survive consultation with the judiciary.

**Conclusions**

Conclusions about this quality of process material are classified in terms of their significance to the policy debates described in the previous chapter.

*Statutory (over common law) basis of the principles for claim resolution*

The absence of statutory guidance about resolution of dismissal grievances,\textsuperscript{162} the claim that dominated the employment jurisdiction after 1991, and the disappearance of stakeholder involvement in their consideration shifted their focus away from the workplace into the courtroom. This meant that whilst the right to claim a grievance was based in statute the resolution of such claims became more obviously rooted in the common law than prior to the ECA. This was a function of individual claiming unmediated by context that resulted from the transfer of responsibility for claiming from collective to individual interests.

The result was an unsequenced or haphazard judicial development of the principles associated with justification for dismissal, a phenomenon associated with the development of social policy by the courts rather than the legislature.\textsuperscript{163} Because this process demanded an exclusive focus on the circumstances of the individuals engaged by the grievance it invited further (similar but apparently different) claims and more refinement, but was the means by which practices that affected collective interests could be ignored, thus establishing judicial consideration of the principles of justification as an element in the shift from collectivist to individualist approaches to labour disputes.

This policy debate can thus be characterised as a struggle over differing forms of what is described as juridification, the means by which state intervention is regarded as necessary for limiting and controlling social conflict in the labour jurisdiction. The classic way of achieving this was via legislative and administrative regulation of the parties to collective employment arrangements. This was the position adopted by Labour, Justice and SSC policy advisers, the proponents of a quality of process approach to the jurisdiction.\textsuperscript{164}

The advocates of deregulation advanced the argument that is regarded as the fundamental, but flawed critique of this theory:

\begin{flushright}
\textsuperscript{160} Ibid.
\textsuperscript{161} Ibid.
\textsuperscript{162} The Employment Contracts Act 1991, Part III Personal Grievances (ss 26-42) defines unjustifiable dismissal as one of 5 types of personal grievance in s 27(1)(a) but is thereafter silent about the basis for such a claim. By contrast grievances based on discrimination (s 28), sexual harassment (ss 29, 35, 36) and duress (s 30) attract detailed statutory grounds for claims.
\textsuperscript{164} Chapter 2: Official’s positions: the Interdepartmental Working Party, p 25
\end{flushright}
Simitis argues that this is not simply a demand for a return to the ‘pre-interventionist’ period, simply that the role, the responsibility, and the priorities of the state should change. Rather than give priority in state policy to individual employment protection, the overall objective of the state should be to give priority to the revitalisation of the market economy and to divest employers of responsibilities which may prevent them from responding effectively to changes in market forces.  

The method of steering the changes sought by this lobby was via the courts, not by legislation. It believed that traditional court (arbitrative) processes were more likely to advance its particular interests but the evidence of Tribunal functioning suggests that the outcome sought by this lobby was available regardless of court forum.

Specialist jurisdiction (over reliance on civil courts)

Radical lobby fears that a specialist jurisdiction would obstruct the outcome it sought, return to employment-at-will, appeared to be vindicated by the influx of non-union white-collar grievants at the Tribunal when it was first established. This class of grievant, regarded as a dominant influence on the grievance jurisdiction, had the financial resources to pursue appeals to the Employment Court, whose approach to the procedure of dismissal (“third-party interference in employment relations”) became a consistent source of complaint from the radical lobby throughout the term of the ECA.

However this grievant class was associated with reliance on lawyers and adjudication and thus locked into the outcome of exchanging jobs for compensation, thereby establishing a norm capable of application to other classes of grievant, a phenomenon described as “courts must act when litigants call.” Notwithstanding the radical lobby’s view that dismissal compensation amounted to a tax on employment, the outcome that resulted from exchanging jobs for money (over reinstatement) was sufficiently close to employment-at-will to ensure that the

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167 Ibid.


170 This exchange essentially altered pre-1991 goals of grievance resolution, the retention of the job from which a grievant was dismissed.

171 Horowitz, note 163, at 38: This phrase refers to the absence of control or organisation over social policy issues that arise in the courts when individuals litigate. The ensuing decisions have precedent value for litigants who follow. The result is the unsequenced or haphazard development of policy matters (like justification for dismissal) arising, not from the worst or most extreme examples of the behaviour at issue, but from litigants with the inclination and resources to litigate and the ability to provide a more favourable (to them), but incomplete view of the practices of which they complain.

universal and mandatory nature of the just cause requirement of dismissal remained.\textsuperscript{173}

This suggests that specialisation of jurisdiction failed to undermine this policy goal as the radical lobby feared.\textsuperscript{174} Nor did it disrupt the goal of the moderates for an orderly transition from collectivist to individualist approaches to labour disputes.

Policy officials sought retention of the specialist jurisdiction to facilitate quality of dispute resolution process. The potential for the adjudicative mode of resolution to undermine that goal was mitigated by retention of the mediative mode that became the means by which rising but unpredictable claim numbers could be accommodated and (eventually) processed. Thus an incident of the specialist jurisdiction was availability of the administrative resource and co-ordination required for this response to the problem. This connects the moderates’ quality of outcome need for an orderly transition to the officials’ desire for quality of dispute resolution process, suggesting that an incident of the specialty of jurisdiction facilitated a quality of outcome goal.

\textit{Representation (individualist vs collectivist)}

Extension of representation rights, whereby collective advocates were replaced by lawyers as the dominant representative type, led to a heavy bias towards adjudication as the choice of mode of resolution, a surging but haphazard application rate, the predominance of dismissal grievances, problems of administration, and increasing amounts of Tribunal member time and effort required for proportionally fewer adjudicated outcomes.

The influx of lawyers also transformed the point at which institutional intervention in this jurisdiction occurred. For collective advocates it was available when discussion and negotiation failed to produce a settlement but for lawyers it was the means by which negotiations began. Thus institutional intervention became the first rather than the last step in the resolution process.

Lawyers were, however, available to all-comers, took their fees from remedies, were associated with the vindication of individual rights and redress, won (and publicised) lottery-like compensation awards, and so ensured that rights of grievance were perceived to be superior to or an adequate substitute for membership of unions and employer associations.\textsuperscript{175}

The result, higher proportions of employees who could be dismissed, effectively at will so long as there remained the promise of money as the means of exchange, was

\textsuperscript{173} Despite a provision of the Coalition Agreement 1996 (between the National and New Zealand First parties) to codify the personal grievance jurisdiction no legislative change resulted.

\textsuperscript{174} Roger Kerr’s description of a major weakness of the ECA as a failure to “give the task of administering a regime based on contract law to the general courts” in a 2005 review of the lessons of labour market reform in NZ was unmatched by any analysis of how this affected the results, the first noted as “the virtual disappearance of multi-employer contracts...in a freer environment [where] most employers want to deal directly with their own workforces and vice versa”: Roger Kerr, paper, \textit{Lessons from Labour Market Reform in New Zealand}, H R Nicholls Society’s XXVI Conference Melbourne, 18 March 2005, at 9.

\textsuperscript{175} Kagan, note 57, argues that the basic causes of adversarial legalism – popular demands for fair treatment, recompense, and protection combined with mistrust of government and fragmentation of political and economic power – remain unchanged and unchangeable in the United States.
crucial to widespread employee acceptance of this particular bargain. That lawyers remained the dominant representative type was thus an important contributor to realisation of the quality of outcome goal, increased flexibility of the labour market.

*Separate modes of resolution*

This policy debate, about whether assisted negotiation or the provision of evidence according to the demands of legal method should precede first-instance adjudication, also concerned fundamental differences about the significance of time and place in conflict resolution. The need to resolve grievances quickly, preferably in the workplace and if not by use of whatever strategies were necessary, formed the basis of collectivist views of institutional structure. For the disciples of legal method speed of resolution was less important than the pursuit of justice in specifically designated institutions.

The representation of these two perspectives in the Tribunal membership\(^\text{176}\) as well as in representatives had consequences for concepts of control/ownership and time in claim processing.

Separation of resolution function\(^\text{177}\) meant that Tribunal members and representatives more familiar with arbitration as a contest largely of process assumed *ownership* or control of that function, whilst those more familiar with mediation controlled the use of that function. The lack of familiarity of legal representatives in the 1990s with state provided mediation services ensured that Tribunal members had greater powers of control over that function than the adjudication function. The passivity required of adjudicators by legal method was the means by which control of that function could be asserted by the lawyers.\(^\text{178}\) This explains both the perspective and the descriptions of Tribunal functioning by the members cited above.

The effects of these differences of *ownership* of function can be measured in terms of time. The effect on adjudication was to lengthen the time and increase the detail (more claiming, more ancillary decision making) required to achieve finality. By contrast mediations retained their form and function: they routinely took half a day over the whole of the ECA regime.

Ownership and control of resolution function may also account for low apparent use of the power to arbitrate in mediation.\(^\text{179}\) Although the Employment Court was responsible for suspending its use, restoration of the power made little difference, a consequence attributed to mediation success rates that mediators were unwilling to

\(^{176}\) The initial complement of 14 was made up of 5 lawyers and 9 mediators from the Labour Relations Act 1987 Mediation Service.

\(^{177}\) Employment Contracts Act 1991, s 78(3).


\(^{179}\) Employment Contracts Act 1991, s 88(2): the use of this function was not separately counted by the Department of Labour until 1997/8. Its availability and use in the early part of the decade was the subject of anecdote and recall but not statistics presumably because it was exercised within mediation and the outcome contained in terms of settlement that signified resolution by mediation. No appeal was available where parties agreed to a mediator decision because all terms of settlement were final and binding on the parties.
compromise by offering powers of decision. Membership output rates, mediator wariness of lawyer representatives, the requirement to obtain consent for the exercise of the power, suggest that retention of purity of mode of resolution became a preferred option because it required less effort.

Maintaining purity of mode had time and costs implications if it resulted in double use of the Tribunal: at least four and a half days of member time and a seven-fold increase in cost (from $415 to $2865) on a single application. The price for the state was $2450 per double-use resolution, but significantly higher for litigants. Substantial savings were available from the institutionalisation of med-arb: 3,437 projected single use claims were costed at $2.39 million and 619 double use claims at $2.36 million, but only if it operated as described by the mediators that pined for its return i.e. as it had done before the ECA, within the times prescribed for mediation, and in the absence of the requirements of process imposed on the Tribunal’s adjudicative function.

The implications for time of resolution of maintaining the purity of the mediation function arise from its use as triage by administrators, as the basis for resolution by collective advocates and as a preliminary process of adjudication for individual representatives. Effective pre-claim litigation risk analysis in the labour jurisdiction (on which administrators had previously relied for management, budgeting and planning purposes) atrophied with the transfer of representative function from collective advocates to lawyers and self-employed advocates. For those represented by the latter groups mediation became the first occasion on which their positions on the grievance were subject to the litigation risk analyses conducted by collective advocates before claims were made. The mediation function that was utilised by collective representatives to achieve finality performed a different function for their lawyer colleagues.

It was the Department’s recognition of this effect that drove its decision to persuade those choosing adjudication to first attempt mediation. By promoting mediation as earlier available and settlement as more desirable for litigants it was able to significantly reduce the proportions of those awaiting an adjudication function over which it had much less influence or control. Greater reliance on mediation arising from the consistency of time required for this function promised efficiencies in management, budgeting and planning. The time required to achieve finality in each adjudication was incapable of accurate prediction. Whilst it was possible to assume approximate hearing times it was not possible to make similar assumptions about scheduling hearings, withdrawals, interlocutory and costs applications, and decision writing times. The uncertainties that arose from these incidents of the adjudicative function dominated the problem of time management for the Department, such that it never overcame them. Its success in reducing the proportions of applications that

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180 Ian McAndrew, Adjudication outcomes in the Employment Tribunal: Some early comparisons with the Employment Relations Authority (2001) 26(3) New Zealand Journal of Industrial Relations, cf Gardiner, note 21, who lamented the attrition of the med/arb power, attributing it to policy considerations concerning institutions and appeal mechanisms. at 350.

181 McAndrew, note 180, notes that costs orders of $5,000 were typical following one day adjudications and that this affected settlements at mediation by the need to incorporate representative costs in monetary settlements. Given that costs awards rarely reflect the level of costs incurred and that over 90% of compensation awards were below $12,000, litigants who underwent unsuccessful mediation were thus liable to incur costs of representation that exceeded any compensation awarded.
required adjudication never translated into the efficiencies of administration (reducing delays) that it anticipated with each increase of resource.

This suggests that the policy requirement for low level, informal and speedy dispute resolution institutions is significantly dependent on certainty of time requirements of the resolution functions selected.

It can therefore be argued that separate resolution modes, key to the imposition of legal method on grievance disposition, formed the basis of a slower, more formalised, legalistic and expensive resolution culture as the result of the demands of the arbitrative function, notwithstanding that mediation resolved significantly more claims.

Mediation’s value to the Tribunal was primarily ameliorative. It was the means by which claim processing efficiencies could be achieved and it became a forum for litigation risk analysis, settlement operating as an incident of risk analysis, not the reason for its use. Mediation was thus essential to adjudication for the way it facilitated the survival of the arbitrative function. Adjudication had the opposite effect on mediation by obstructing early access and limiting (via reliance on adjudication’s remedies) the range of potential resolution options.

These conclusions suggest that the requirement for mediative and arbitrative modes of resolution to be offered separately was incompatible with the statutory objective for the Tribunal of informality, low level, speed, justice and fairness. Since separation of function is a requirement of the pursuit of justice value that underpins legal method and informality, low-level and speed are values associated with collectivist approaches to dispute resolution these conclusions highlight the difficulty of incorporating both value sets in one institution.

Quality of Outcome

The dominant policy rationale for the ECA, increased labour market flexibility via institutionalisation of enterprise bargaining (preferably between employer and individual employee), had a number of dimensions.

[W]age flexibility meant speeding up adjustments to changes in demand, particularly downwards; employment flexibility meant easy and costless ability of firms to change employment levels, particularly downwards, implying a reduction in employment security and protection; job flexibility meant being able to move employees round inside the firm and to change job structures with minimal opposition or cost; skill flexibility meant being able to adjust workers’ skills easily.

These are the effects of what Brian Easton describes as short-term flexibility, to which he adds its capacity to undermine long-term flexibility (how a labour force increases its skills and ability to perform a multitude of tasks) and to erect barriers to

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182 Employment Contracts Act 1991, s 76(c).
the development of loyalty to the employer and worker acquisition of specific skills.\(^\text{184}\)

By the mid 1990s there was sufficient evidence of decentralised collective bargaining, increased use of individual employment contracts, wide variations in wage settlements (with some groups – low income, female, private sector - experiencing substantial decreases in basic rates\(^\text{185}\) and others – Standings’ salariat and proficians and Boxall’s managers\(^\text{186}\) - large increases) to establish wage flexibility as a major outcome of the ECA. This came at the expense of traditional relativities and notions of comparative wage justice.\(^\text{187}\)

Also apparent were changes to conditions of work that extended ordinary hours (beyond eight per day and forty per week) and days of work before penalty rates applied (if they applied at all – over a third of employees had no penalty rate provision by 1995).\(^\text{188}\)

Flexibility of employment levels (the ability of employers to vary employee numbers) also increased:

This is suggested by the rapid recorded increases in the level of part-time, casual and temporary forms of employment, as well as in the growing incidence of self-employment since the legislation reviewed have been put in place. It is also indicated in the increased ability of employers to vary the amount of labour used through changes in the number of hours worked and the range of tasks employees are expected to perform. There has also been a substantial reduction in constraints placed on the establishment of work contracts and on the ability of managers to dismiss employees.\(^\text{189}\)

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\(^\text{184}\) Brian Easton, *The Economic Impact of the Employment Contracts Act* (1997) 28(1) California Western International Law Journal, 209: “the primary gains to employers from the Employment Contracts Act have been lower pay and greater freedom to manage, not higher output per worker” at 215.


\(^\text{186}\) Standing, note 183, describes class relations in the global market system of the 21st century as consisting of 7 groups, the second and third of which in descending levels of income are: the salariat (still in full time employment, in large corporations and government agencies/public administration) most of whom have their pensions, paid holidays and benefits paid by the state; and proficians with highly marketable skills who earn high incomes on contract and move around willingly; Peter Boxall *Management Strategy and the Employment Contracts Act 1991* in Harbridge (ed) *Employment Contracts: New Zealand Experiences*, (Victoria University Press, Wellington, 1993) 231 argues that it was the management class that sought the changes enacted in the ECA.


These outcomes were the result of “the virtual disappearance of multi-employer contracts,” the rise of enterprise bargaining and the diminished importance of collective bargaining, rapid falls in union membership. In September 1989 union density statistics (measured by comparing union membership with membership of the total workforce) showed that 44.7% of the working population belonged to a union (up from 43.5% in December 1985). In May 1991 union density was 41.5% of the total workforce, dropping to 35.4% seven months later. For the period 1992-96 it continued to slide from 28.8% at the rate of about 2 percentage points a year to 19.1. The speed of this decline following the passage of the ECA suggests a causal relationship.

[T]he combination of growing fiscal constraints, uncertain economic growth, perpetually high inflation and unemployment rates, and changes in the structure and sources of employment since the early 1980s, have all contributed to the diminution of trade union power and membership. This development, in turn, is also widely acknowledged as having provided New Zealand employers with increasing scope to set bargaining agendas, control bargaining outcomes and determine at what level with the organisation negotiations with workers and their representative will take place.

This shift in the balance of power in the workplace between workers and management (conferring on the latter increased autonomy in setting terms and conditions of employment) and the reduction of union influence was attributed by commentators as resulting in a greater role for the Tribunal and the Court in matters concerning discipline and employment security, whilst simultaneously feeding the perception amongst the business community that these institutions prioritised the interests of employees.

This was not, however, the reality. Analysis of grievances for the 4-year period prior to 1992 (under the LRA), in 1994 and 1998-9 revealed different outcomes for grievants under the LRA and the ECA. The LRA (dismissal) grievances fell into 3 groups: those resolved at first instance by a grievance committee in 1990 (159), all of which were found to be unjustifiable; those (151) decided by the committee chair in 1990 (when consensus unforthcoming) found 57% of the dismissals unjustifiable; those heard by the Labour Court between 1987 and 1991 (287) had two different outcomes – for those heard between 1987-1990, 73% of the grievances were held to be unjustifiable reducing to 54% for those in 1991.

For those decided under the ECA there were reasonably consistent outcomes for employers and employees. In 1994 54% of employers were ordered to remedy the problem raised by the grievance meaning 46% of grievants failed to obtain any

190 Roger Kerr, note 174.
193 Keith Abbott, note 187, New Zealand, at [1]: The result, two thirds of the workforce on informal or individual employment contracts, many of whom under standard-form, roll-over contracts on a take-it-or-leave-it basis, used primarily by employers for cost-cutting, concession-bargaining and de-unionisation; Sarah Oxenbridge, The Individualisation of Employment Relations in New Zealand: Trends and Outcomes in Deery & Mitchell (eds) Employment Relations Individualisation and Union Exclusion An International Study, (The Federation Press, Leichhardt, NSW, 1999).
194 Rasmussen and Deeks, note 187.
195 Bronwyn Boon, note 4.
remedy. The later analysis focused on outcomes rather than remedy but grievant success rates were fixed at 52%. This mirrored the results from the Employment Relations Authority for a similar period.

These outcomes indicate that the common complaint of employer representatives that the ECA institutions had made it “impossible to dismiss employees” was truer of the LRA institutions. The complaint, however, had a corollary. It, along with media reports of large compensation payments (and the lower prominence accorded unsuccessful claims) suggested a dispute resolution system accessible to individual employees.

Thus, if an orderly transition from collectivist to individualist bargaining was regarded as dependent on a dispute resolution system acceptable to individuals (who would otherwise be either collectivised with expectation of remedies or not, with no expectation of redress) then a quality of outcome policy goal could be posited as achieving acceptable outcomes for employers in greater flexibility of wage and conditions on offer whilst offering employees the reassurance of a responsive system of grievance redress.

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196 Ralph Gardiner, note 15.
197 McAndrew, Morton, Geare, note 11.
198 Erling Rasmussen and Felicity Lamm, Paper, From collectivism to individualism in New Zealand employment relations, AIRAANZ Conference, Auckland, October 2005.
199 Roger Kerr, The New Zealand Employment Contracts Act: Its Enactment, Performance and Implications (1997) 28(1) California Western International Law Journal, 89, argued that changes to the Court, the law of personal grievances, including opting-out were necessary as redress.
200 Ibid.
Chapter 4
Employment Contracts Act Institutions

Operations and Policy: The Employment Court

Introduction

The last chapter argued that the policy goals for the Employment Tribunal as a low level, informal and speedy entry-level dispute resolution institution were frustrated by the inclusion of a separate arbitration function. However it was this function that helped facilitate the quality of outcome goal sought by the moderate policy lobby – greater flexibility of the labour market via an orderly transition from collectivist to individualist approaches to employment disputes.

The Tribunal’s arbitrating function was subject to the Employment Court’s (EC) powers of review. Its exercise of those powers was seen to dominate the way that adjudication operated at the Tribunal, suggesting that the review function was incompatible with the low level, speedy and informal policy prescription for the Tribunal.

Unlike the Tribunal, the EC functioned as a court of record (as had the Labour Court prior to the ECA). Much of its jurisdiction was, however, affected by the ECA. It retained first-instance powers over actions in equity and tort (mainly strikes and lock-outs) and appellate powers over grievances but lost first-instance powers for a number of statutory actions (compliance, wages protection, holidays and minimum wage issues).

Whilst the major theme of the attention paid to the Tribunal concerned its processes and delay, that paid to the EC concerned its judgments. The critics were also different. The Tribunal attracted complaints from employees, unions and small-medium employers but the EC’s critics were large employers. They were less interested in issues of process than in the implications of its decisions. They believed the EC was actively undermining the employment-at-will policy outcome goal.

This chapter begins with a short analysis of the ECs functioning in terms of the data about its processes. The bulk of the chapter concerns the policy reaction to its approach to dismissal grievances. It is categorised as a quality of outcome issue because the concern about compromising outcome goals was the theme of the relevant data.

Quality of process

The EC retained its Labour Court complement of 6 judges until November 1997 when numbers were reduced to 4, notwithstanding the reduction of work that resulted from the changes of jurisdiction in 1991. However this had no impact on disposition rates.

1 Employment Contracts Act 1991, s 104. The power to hear and determine any action founded on an employment contract in s 104(1)(g) came to be used by those wishing to bypass the Tribunal’s exclusive first-instance jurisdiction over grievances by reliance on the common law action, wrongful dismissal. First instance matters within the Tribunal’s jurisdiction could be removed to the Court by leave (s 104(1)(c)-(e)).
The Department began to note in 1992 that lowered application numbers had no effect on times to final outcome.\(^2\)

Applications awaiting hearing increased from 131 at the end of 1992 to 294 at the end of 1998, notwithstanding high withdrawal rates (averaging 50%) and low annual application numbers (301 in 1992, peaking at 452 in 1995 and reverting to 303 in 2000). Put another way, applications awaiting hearing at the end of 1992 constituted 44% of the total application numbers for that year, rising to over 65% in 1997. Judgments delivered provide some guide to disposition rates, although interlocutory and costs applications mean that more than one judgment per proceeding may occur. The data reveals that 206 judgments were delivered in the 91/92 year or an average of 34 per judge (3.4 per month), 170 in 92/93 (28 per judge), 163 (27) in 93/94, 228 (38) in 94/95, 181 (30) in 95/96, 216 in 96/97 (36), 209 (52) in 97/98 and 197 (49) in 98/99.

Over this period the EC never received more than 11% of the applications made to the Tribunal (the range was 6.3% – 11%), it had higher withdrawal rates and after mid 1992 it never determined much more than a third of the decisions issued by the Tribunal (the range was 19% - 35%). Given that decisions constituted a decreasing percentage of total Tribunal dispositions (26% in 92 reducing to 12% in 99) it becomes immediately apparent that there were significant differences in disposition rates between the two institutions. This suggests that the EC was able to devote much more time to each proceeding than the Tribunal, notwithstanding differences between them in the way that evidence was gathered for those matters that they had in common: appeals from Tribunal decisions (which accounted for between a third and a half of the EC workload). The Tribunal heard the evidence in person and the EC worked off transcripts of this evidence. Since it is much quicker to read than to hear evidence the time differences can only be accounted for in the submission and decision making process.

The appreciably slower rate of disposition of an arguably light workload had fewer public consequences for the EC. It did not attract the complaints of delay that the Tribunal did. The Department, recording problems of delay (e.g 12-month waiting time for hearings in 1999) justified them in terms of dispositions (more than applications received for the two prior operating years), reduced personnel, type of work (there were a number of ‘long’ cases - up to 10 weeks hearing time) and judicial sabbatical leave commitments. It still had 263 applications in 1999 awaiting a hearing date.\(^3\)


\(^3\) Department of Labour for Minister of Labour, Report, *Delays in the Employment Court*, 18 February 1999; cf, Judge T G Goddard, *Curial Institutions under the Employment Contracts Act: 1991-1997* (1997) 28(1) California Western International Law Journal, 103, who called for the replacement of two retired Judges as part of a warning about reduced judicial resource, the inevitability of delay and the effect on the civil jurisdiction of transferring “another four or five thousand cases a year” from the employment jurisdiction.
Quality of Outcome

Complaints

Recorded criticism of the EC focused on signs of partiality, reiterating the concerns of the Minister of Finance about the Labour Court noted in chapter 2. When the Chief Judge spoke at the swearing in of Tribunal members in 1991 his use of the phrase ‘People’s Tribunal’ was misreported as ‘the People’s Court’ provoking a complaint to the Minister of Labour of a “clearly discernible anti-employer bias”:

the Chief Judge views the Court as an instrument intended to favour ‘the worker’…[Can] NZ afford an institution, pivotal in the evolution of employment relationships, whose activities are so likely to be guided by anti-employer bias?

The business lobby that argued for the abolition of the specialist jurisdiction and the use of the High Court in place of the Labour Court in early 1991 renewed its calls for these reforms in late 1992, via complaints about the EC’s judicial activism and assertions of the need to limit grievance compensation for procedural unfairness and notice dismissals lacking reasons. The complaints couldn’t be taken seriously, in the Department’s view, in light of the problems of methodology that plagued the paper in which they were contained. However the paper’s criticism of long and wordy judgments was regarded as a valid point:

it should be noted, however, that with the increasing use of legal representatives rather than lay advocates, proceedings of the Employment Court and Employment Tribunal are in general becoming more legalistic and involve legal arguments and precedents to a greater extent.

The administrative consequences of the EC’s exercise of its review function over the Tribunal was of more concern for the Department:

the nature of the direction provided to the Tribunal by the Court is being monitored. One area on which particular attention is being focussed in this monitoring is the requirements put on the Tribunal by the Court in relation to the range of matters that should be addressed in Tribunal

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5 NZ Business Roundtable and NZ Employers Federation, Report on the Labour/Employment Court, An Analysis of the Labour/Employment Court’s approach to the interpretation and application of employment legislation, December 1992; cf Gordon Anderson, Interpreting the Employment Contracts Act: Are the Courts Undermining the Act? (1997) 28(1) California Western International Law Journal, 117, who argued that the criticisms of the Court were not about legal issues so much as its failure to reflect the political and economic perspective of this lobby. Its criticism of the EC consideration of procedural fairness reflected the lobby’s failure to preserve, in the EC Bill, cl 17(3) that, had it survived the Bill’s second reading, would have outlawed reliance on procedural fairness as a basis for dismissal grievances: Bronwyn Boon, Procedural Fairness and the Unjustified Dismissal Decision, (1992) 17 (3) NZ Journal of Industrial Relations, 301.

6 Department of Labour for Minister of Labour, Comments on the NZ Business Roundtable and NZEF report on the Labour/Employment Court, An Analysis of the Labour/Employment Court’s approach to the interpretation and application of employment legislation, 4 February 1993: the court and tribunal decisions cited included English, Labour Relations Act, Court of Appeal and Tribunal decisions. Of the 58 decisions cited as evidence of the Employment Court’s judicial activism, only 11 were Employment Court decisions and the EC, in a number of those decisions, had adopted the contractual approach that the Report urged for interpretation.

7 Ibid.
decisions. These requirements have the potential to affect the ability of the Tribunal to function effectively.  

The pressure on the EC to mitigate its approach to procedural fairness in grievances and on the Government to disband it was maintained via the business and city print media through 1993. It culminated in a series of Parliamentary questions seeking confirmation of the lobbying for its abolition and assurances that this was not on the Government’s policy agenda. The response described the most recent attacks on the EC as criticisms of the decisions of its Chief Judge and the number of appeals they apparently attracted (9 from 200 judgments, 5 of which were upheld). This appeal rate was lower than that of the High Court. The Chief Judge’s appeal rate (higher than other EC judges) was the result of his practice of presiding over the more controversial cases (more likely to be appealed, regardless of judicial identity).

**Policy debates**

Whilst the Government saw no need for any policy changes in the employment jurisdiction mid decade the Business Roundtable did. Election year and the prospect of the first MMP Parliament in 1996 saw it reprising its attacks on the specialist nature of the employment jurisdiction in general and the EC in particular.

By then the Minister of Labour was different from the person who oversaw the enactment of the ECA. He took the issues raised by the Business Roundtable

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9 Roger Kerr, *The Independent*, *A court for employment or unemployment*, 7 May 1993; Evening Post, *Employment Court’s future ‘under review’* 17 September 1993; Evening Post, *Court in the line of fire*, 21 September 1993; the latter two articles contain criticism of the EC Chief Judge by Max Bradford (Chair Labour Select Committee) who is quoted as saying “the jury is still out on the future of the Employment Court” and Alan Jones (Fletcher Challenge): “the Labour Court (sic) should be disbanded” and all employment contract cases should go to the District and High courts. He was also critical of the Tribunal, arguing that its judges (sic) were too cloistered. The Council of Trade Unions was cited as arguing for the specialist jurisdiction to be maintained; see also other news media stories described as “a media campaign that was probably unique in New Zealand for its vitriolic and sustained and highly personalised attack in the Employment Court and its judges”: Gordon Anderson *Employment Law: The Richardson years*, (2002) 33 Victoria University of Wellington Law Review, 887 at 889.

10 Helen Clark to Minister of Labour, Questions for Written Answer No 5186-7, 16 September 1993, and Answers, 28 September 1993.

11 Supplementary Information to Question 5187.

12 Minister of Labour to NZ Employers Federation, letter 30 November 1993 (in response to letter NZEF to Minister dated 20 October 1993).

13 Gordon Anderson, *The Specialist Institutions: the Employment Court and the Employment Tribunal* (1996) 21(1) New Zealand Journal of Industrial Relations, 1; Bernard Robertson, *The Arguments for a Specialist Employment Court in New Zealand* (1996) 21(1) New Zealand Journal of Industrial Relations, 34; Professor Charles W Baird, Speech to the Karori Rotary Club (undated c May 1996) at 6-7: “The Employment Contracts Act...gives the main responsibility for interpretation and enforcement to a specialist court, the Employment Court?... Under s 188...the personnel of the Labour Court became the initial personnel of the Employment Court. With one exception, they still are. This was a huge mistake, for those judges were already dedicated to treating labour relations in a unique way. They were perhaps the least well qualified to launch a new era of legal equality for labour relations.”

14 Hon Max Bradford was the Minister of Labour in 1996. He had chaired the Labour Select Committee that considered the Employment Contracts Bill in 1991 when the Hon W Birch was the Minister of Labour.
sufficiently seriously to seek advice about whether the Human Rights or Bill of Rights legislation precluded the possibility of amending the ECA to provide for union-free and union-only employment based on voluntary bargaining (the Minister of Labour in 1990 scotched the same suggestion made by the then Minister of Finance). The Department pointed out that the EC was overseen by the Court of Appeal that had:

issued a number of significant decisions, for example in relation to bargaining behaviour, which consider the overall philosophy of the Employment Contracts Act and provide guidance to the Employment Court on how the new framework should be interpreted.\footnote{Ibid, at [19].}

A sturdier response to the call to abandon the specialist jurisdiction (or at least the EC) came immediately before the election from employment lawyer and National Party activist Peter Kiely who argued that the equity and good conscience jurisdiction (anathema to opponents of the specialist employment jurisdiction) had been a part of labour law for some time. He noted that it was the Court of Appeal\footnote{Ibid, at [19].} and not the courts in the specialist jurisdiction that established, in 1985, that contracts of employment had to contain implied terms of fairness.\footnote{Marlborough Harbour Board v Goulden [1985] 2 NZLR 378; that procedural fairness was a creature of the common law was a point also argued by John Hughes, \textit{Personal Grievances} in Harbridge (ed) \textit{Employment Contracts: New Zealand Experiences}, (Victoria University Press, Wellington, 1993), 89.} He confirmed that changes to the present structure of the jurisdiction were unlikely to occur after the election and that as it then operated it offered significant advantages for legal practitioners. Asserting that debates in a \textit{“new and developing jurisdiction”} were normal and healthy he cautioned against confusing controversial decisions with the need to abolish the structure created to provide their resolution.\footnote{Peter Kiely, Paper, \textit{Employment Law under MMP}, NZ Law Society Employment Law Conference, 1996.}

Noting the essentially political nature of differing or opposing views of the ECA he also observed that few:

\begin{quote}
issues demarcate the National Government from its opposition parties as clearly as the Employment Contracts Act. National views the legislation as central to its claims of economic success. Opposition parties such as Labour and the Alliance maintain that the implementation of it has eroded basic work conditions for employees since its inception in 1991.\footnote{Ibid.}
\end{quote}

These approaches to the policy issues raised by the reforms reiterated the competing policy positions of the radicals and the moderates described in Chapter 2. Both sought a more flexible labour market but they differed about the strategy necessary to achieve this outcome. The radicals sought removal of legal redress for complaints by employees whilst the moderates perceived that a functioning dispute resolution system would be the means by which the goal of labour flexibility was publicly accepted. This explains why they shared the view that the traditional arbitration model of dispute resolution in the civil court system could not process large numbers of complaints.

\footnote{Department of Labour to Minister of Labour, Advice, 20 June 1996.}

\footnote{\textit{Ibid}, at [19].}

\footnote{\textit{Marlborough Harbour Board v Goulden} [1985] 2 NZLR 378; that procedural fairness was a creature of the common law was a point also argued by John Hughes, \textit{Personal Grievances} in Harbridge (ed) \textit{Employment Contracts: New Zealand Experiences}, (Victoria University Press, Wellington, 1993), 89.}

\footnote{Peter Kiely, Paper, \textit{Employment Law under MMP}, NZ Law Society Employment Law Conference, 1996.}

\footnote{\textit{Ibid}.}

\footnote{\textit{Ibid}; cf Peter Kiely \textit{MMP: Aligning the Judicial and Parliamentary Functions}, (1996) 21(2) New Zealand Journal of Industrial Relations, 178, where he argued that the EC and the CA judiciary were continuing to apply Labour Relations Act principles \textit{“in spite of the sharp change in statutory policy”} wrought by the ECA.}
claims. For the radical lobby the civil system was a necessary barrier to access for complaints and for the moderate lobby the reason to retain specialist institutions, the need to guarantee public acceptability of the new system and as a means of securing the employment jurisdiction as a business opportunity for lawyers (the only way to interpret the description of a jurisdiction then over 100 years old as new and developing).

**Policy Initiatives**

**Coalition Agreement to Review the Personal Grievance Jurisdiction**

Following the General Election in late 1996 the coalition parties (National and NZ First) agreed to review EC decisions to determine whether Parliament’s intentions were sufficiently clearly expressed to minimise judicial activism in the employment area.\(^{21}\)

Pressed for the reasons for this in Parliament the Minister replied that:

> Some legislative provisions set out within the Employment Contracts Act may not have fully explained Parliament’s intentions when passing the Act. There is particular concern that some Court decisions are beginning to affect flexibility in the labour market, and impact on the level of employment. In some areas it may be that the Court’s decisions have moved away from the central principles of the Act as intended by Parliament. There has been debate, for example, about the obligations of employers in relation to procedural fairness, concerns about the Court’s willingness to set aside dismissals which are otherwise substantively justified. At present, many of the obligations of employers and employees are unclear, scattered through a range of legal decisions, and subject to continuing legal challenge. No one’s interests are served by such a situation. It is important to have clear law, and fair and efficient procedures which are understood by all parties to resolve this kind of dispute. It is important that all such concerns are fully explored and carefully considered in the review.\(^{22}\)

The terms of reference for this review were agreed in August 1997, when it was also agreed that reports assessing the EC approach to the principles concerning unjustified dismissal would be commissioned from two sources, law firms Chapman Tripp and Bartlett Partners. The terms of reference included the following:

- What could the courts reasonably have concluded was the intent of ‘unjustifiable dismissal’ in the context of the Employment Contracts Act
- Were the decisions of the courts, and the Employment Court in particular, consistent with that intent; and

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\(^{21}\) Coalition Agreement between National and New Zealand First parties (1996), *Industrial Relations Key Policy Initiative, 5*; John Hughes, *The Employment Court, Judicial Activism and the Coalition Agreement*, (1997) 28(1) California Western International Law Journal, 167; Laila Harre to Minister of Labour Question of the Day, 19 March 1997: ”Is the intention of the Government to review the existence of the Employment Court as well as to conduct a formal study of the Court’s decisions?”

\(^{22}\) Minister of Labour to Laila Harre, Supplementary Reply to Supplementary Question, 19 March 1997: *What kind of issues does the Minister expect to arise as a result of the review?* Hughes, note 21, believes that reasons for hardening attitudes to the EC between the 1993 and 1996 elections included increased pressure from employer groups following unpopular decisions about bargaining communication and fixed term contracts, increased rate of appeals to the CA, Tribunal delays, increased legalism and formality, and a differently composed Labour Market Policy Group in the Department of Labour that reflected support for ECA principles.
If not, why were they not consistent (i.e., did the courts not follow the intent, was the intent unclear to the extent that there were many possible options, was the result driven by other factors like the nature of court processes)?

Adopting different routes, the opinions reached the same conclusion that the principles established prior to the ECA continued to be applicable and applied.

The reason for commissioning this advice arose in part from a concern that issues of procedural fairness were dominating assessments of justification. It is not clear whether other concerns included the explosion of personal grievance claims to the institutions after 1991, but this issue was covered by both opinions.

The Chapman Tripp opinion linked this focus on procedural fairness to the increase in personal grievance claims directly by postulating that the former arose from the latter. Noting increasing numbers of claims, it suggested that the application of personal grievance procedures to all employees (from restricted availability to union member employees) and in particular senior management and professional employees had resulted in higher awards which in turn became a focus for the media and other commentators.

Galanter describes this phenomenon as media reports of legal cases that provide a skewed view of “Davids besting Goliaths” when it is the reverse that is true: Goliath corporate litigants are more often successful in court proceedings than their David adversaries.

This explanation of cause and effect echoes the point made by Rau et al. that rights based conflicts are shaped by the economic, social and political context in which problems are perceived and disputes develop. Particular risk factors for claiming and disputing are the status, relationships, educational levels and legal contacts of disputants. In the absence of an institutionalised remedy system claiming and disputing, particularly in the courts, is incentivised. This is because the development of remedies almost inevitably lags substantially behind the recognition of rights. Thus a freshly created jurisdiction for a group of high status, well-paid and educated employees who had been previously denied remedies now apparently available to

23 Department of Labour to Minister of Labour, letter, Terms of reference for an independent review of court decisions in respect of personal grievances, 1 August 1997.
24 Jack Hodder, Joanna Holden, S. Coleman, Opinion for Department of Labour, Review of the institutions and the Employment Contracts Act 1991 – the meaning of ‘unjustifiable dismissal’, November 1997; this view was echoed in Hughes, note 21.
25 Ibid.: “Since the enactment of the Employment Contracts Act, the debate over the meaning of unjustifiable dismissal has heated up. The Employers Federation, the Business Roundtable and the Independent Newspaper have taken the lead against the specialist Employment Court and the decisions reached by that Court and the Court of Appeal, particularly on procedural fairness issues and redundancy. The Employment Court and the Court of Appeal decisions in Brighouse (1994) in particular have come under severe criticism as have a number of decisions in which reinstatement has been ordered.” at [119].
26 Ibid.
29 Ibid.
them became the vehicle by which a focus on the (pre-existing tenet of fairness in employment contracts) procedural fairness of dismissals arose.

This point is underlined by the motivations for claiming provided by the ECA identified by Cullinane and Donald as: the policy requirement for greater flexibility in the labour market, more movement between jobs, employer beliefs that dismissals would be easier, and the rising use of business restructures as the means of shedding and replacing staff.\(^{30}\)

Another reason for the increase in grievances was identified by the Chapman Tripp opinion as the “removal of representation and bargaining issues as a source of conflict” and the shift from ‘collectivism’ to ‘individualised’ disputes.\(^{31}\)

What this has meant is that the body of case law developed with respect to a unionised workforce is now being applied to professionals, management and other higher level employees. The development of the implied term of trust and confidence at common law was starting to impact on those employees prior to the Employment Contracts Act but, nevertheless, the appearance of those employees before the employment institutions, and the application of the earlier case law to them appears to have come as a shock, at least in certain quarters.\(^ {32}\)

This identified the problem of procedural fairness for the business lobby as a failure to adequately consider its application to the whole working population in the policy development of the ECA. The use to which the relevant legal principles would be put was an unanticipated consequence of the labour market reforms that imposed (procedural) conditions on the means by which grievances could be raised but left substantive principles untouched. It raises some wider issues, however, about the consequences of replacing a regulated with a deregulated labour jurisdiction.

For Kagan the public policy and dispute resolution functions of the new institutional structure created the perfect conditions for ‘adversarial legalism’ to flourish.\(^{33}\) By replacing a regulated system of awards, collective arrangements and dispute resolution dominated by stakeholders (employer groups and unions) of approximately equal bargaining strength with an unregulated bargaining environment, decision making authority moved from hierarchical (dominated by official decision makers applying authoritative norms or standards) to participatory (influenced by disputing parties, and lawyers, normative arguments, evidence). Decision making style (the extent to which parties/interests/officials insist on conformity to legal procedures, rights and duties) moved from informal (discretionary judgment, bargaining and informal processes) to formal (controlled by legal rules and procedures). The result, adversarial legalism,

is a method of policymaking and dispute resolution with two salient characteristics. The first is formal legal contestation – competing interests and disputants readily invoke legal rights, duties and procedural requirements, backed by recourse to formal law enforcement, strong penalties, litigation and/or judicial review. The second is litigant activism – a style of legal contestation in which the assertion of claims, the search for controlling legal arguments, and the gathering and submission of evidence are dominated not by judges or government officials but by disputing parties or interests, acting primarily through lawyers. Organisationally, adversarial legalism

\(^{30}\) Joanna Cullinane and Dianne Donald, Personal Grievances in NZ, University of Waikato (2000).


\(^{32}\) Ibid, at [191].

typically is associated with and is embedded in decision-making institutions in which authority is fragmented and in which hierarchical control is relatively weak. 34

Applied to the policy and process of employment dismissals this analysis suggests that a focus on procedural fairness was an inevitable outcome (rather than an unanticipated consequence) of the labour market reform encapsulated in the ECA.

The Bartlett opinion anticipated this analysis by noting that, historically the industrial courts approached issues in a less legalistic way than the civil courts, mainly as a result of legislative prescription. 35 Cited as illustrative of this approach were: the prohibition on lawyers (from 1973 to 1987) from having a right of audience in the Industrial/Labour Courts; the inclusion of non-legally qualified panel members in the Labour Court; the freedom to admit evidence that is ‘not strictly legal’ and the:

relatively brief and uncomplicated procedural regulations, at least as compared with the highly complex and developed rules of court which determine the procedure of general jurisdiction. 36

Thus the fuss about the way the employment institutions were operating arose from a business preference for the strict rules and principles of the courts of general jurisdiction and a corresponding ignorance of the history of the industrial jurisdiction. In addition,

a further thread which runs through the approach of the courts to the interpretation both of industrial legislation and of employment contracts is the view that the employment relationship cannot be equated to a conventional business relationship although that view has become less pronounced in recent decisions. 37

The opinion concluded that legislative changes superficially peripheral to the issue of dismissal were part of the problem of the increase in grievances: their extension to the entire workforce; the introduction of the 90 day limit for their submission; the elimination of reinstatement as a primary remedy; abolition of the union role in initiating (and filtering) claims; substitution of grievance committees by the Employment Tribunal; introduction of contributory fault as relevant to remedy rather than justification for dismissal.

The observation that the transfer of power to initiate grievances from unions to individuals resulted in unmeritorious claims no longer subject to the filtering process that unions undertook seems to have triggered a request (the sole recorded reaction to both opinions) from the Minister of Labour for advice from the Department about institutional powers to dismiss frivolous and trivial cases. The response, that the power had been exercised rarely notwithstanding numbers of attempts to strike out vexatious proceedings, took the matter no further but met the Department’s objective of closing down subsequent inquiries. 38

Part of the point of Kagan’s model of adversarial legalism, its fragmentation and lack of coordination of authority and decision making, is that it characterises systems,

34 Ibid, at 9.
36 Ibid, at [A4(e)].
37 Ibid, at 12.
38 Department of Labour for Minister of Labour, Paper, Employment Tribunal’s power to dismiss frivolous and trivial cases, 24 March 1998.
rather than their disparate parts. The Minister’s request reveals the futility of a focus on the particular in the absence of analysis of the system of which it was part.

Specialist Jurisdiction

Of the policy issues that appear to have dominated the Minister of Labour’s thinking in 1997 and 98, none received more attention than the idea that the EC should become part of the District Court.

Officials championed the status quo for its access to greater judicial expertise about the realities of the workplace and its flexibility in the provision of resolution services by the use of mediators. They believed that the existing structure had the potential to limit the rigidity of precedent on which the civil courts were required to rely and that it would better preserve Parliament’s intention to establish an employment dispute resolution system that took account of equity issues and imbalances of power between contracting parties.39

Support for the view that the Executive should impose limits on the EC came from another legal opinion on the Court’s supervisory powers over the Tribunal.40 Although it concerned matters of little interest to the radical lobby (because it focused on the internal operations of the employment institutions, rather than on labour market issues) it did what the other two opinions (commissioned later in the same year) failed to do by providing a basis for concern about the ECs exercise of its powers. Its rationale for action against the Court attributed to it responsibility for the problems of delay at the Tribunal. By contrast the common view of the other opinions was that the EC was behaving no differently from any court faced with the same issues.

The Treasury contributed by commissioning some economic research (as part of its Court Performance project) a focus of which was analysis of the effects of judicial decision making on “efficient employment outcomes” and the means by which specialist courts “affect such outcomes”.41 Apparent from the Department of Labour’s report of the research was that it had not been consulted about it, nor was it convinced about the quality of the data or methodology. The purpose of the research was said to be the identification of characteristics that influence litigation outcomes (posited as those of the litigant, the environment, the law and the institutions) but it can be inferred that there was a strong suspicion on the part of Labour officials who attended the seminar at which the research was described that it was concerned primarily with institutional characteristics. The difficulty already apparent to the researchers was that whilst there was a wealth of data about the functioning of the employment

39 Department of Labour, Why we should keep the Employment Court: Occasional papers on Employment Law, No 3, September 1997; cf Department of Labour Election Brief 38 (October 1996) cited by Hughes, note 21, as noting concerns about the Court, inconsistencies between judicial decisions and statutory intent leading to uncertainty and confusion and its suggestions for redress – widening the pool of judicial talent, rotating judges, transferring the EC to the general jurisdiction, widening the scope of appeals.
41 Department of Labour for Minister of Labour, Report on Seminar by Dr George Barker and Dr Stuart Schwab on an Economic and Empirical Analysis of Litigation in NZ Courts, 3 December 1997, at 1. This was a report of a seminar presented to members of the Law and Economics Society that outlined the proposed research methodology and presented some preliminary data on research then being undertaken by Dr Barker and Dr Schwab for the Treasury.
institutions, there was correspondingly very little about the general court system.\textsuperscript{42} Labour officials had other concerns. Data about decision-making was derived from both EC and Tribunal decisions but no distinction was made between sources, meaning that appellate decisions were likely to have different characteristics from first instance ones, but they were all lumped together. In addition decisions were categorised on the basis of win or loss with no account of the subtleties involved in ‘wins’ that attract no or a low remedy, or remedies lower than an employer expected to pay.\textsuperscript{43}

The paucity of comparative data from the civil courts meant that the data from the employment institutions could not be meaningfully assessed. Nothing further appeared to come of it,\textsuperscript{44} although its value lies as another illustration of the persisting differences of approach between the Department of Labour and Treasury to issues of institutional design in the labour jurisdiction. Institutional structure, therefore, remained a function of the major policy difference between them about appropriate policy goals for this jurisdiction, Treasury’s quality of outcome position representing the interests of big business, or capital, and the Department’s quality of process position representing the interests of small business and labour.

Notwithstanding the opposition from Labour officials to the idea of transferring the EC to the District Court it nonetheless took hold. The objective of the proposal was:

- to integrate the Employment Court into the perceived ‘mainstream’ of judicial decision-making, thus increasing judicial independence and enhancing the quality of judicial decision-making.\textsuperscript{45}

To that end the Cabinet Economic Committee agreed in principle, in late April 1998, to transfer the exclusive jurisdiction for employment matters from the EC to a specialist division of the District Court, with the removal of some matters to the High Court, pending consultation with the judiciary. It also agreed to ask officials:

- to investigate ways of making the Employment Tribunal more informal and less legalistic, and to enhance the Tribunal functions in accordance with its objective of informality, and facilitating solutions to disputes between employers and employees.\textsuperscript{46}

This was the result of a concerted attempt, by Department officials, to divert the policy focus from the EC to the Tribunal, its major administrative headache at that time. Its policy papers on the proposed move to the District Court were peppered with suggestions for changes to the ECs supervisory role over the Tribunal, to

\textsuperscript{42} As part of my research for this thesis I was advised by officials at the Ministry of Justice that there was no systematic collection of statistics about the functioning of the courts (e.g. numbers of proceedings, waiting times, withdrawal rates etc.) until 2004.

\textsuperscript{43} Department of Labour, note 41.

\textsuperscript{44} No report of the research project could be found in the Department of Labour’s archives, apart from an early very incomplete draft about the intentions of the researchers, obtained after the Law and Economics seminar and containing very little of the information presented at that seminar.

\textsuperscript{45} Department of Labour for Cabinet Economic Committee, Paper: Future Administration of the Employment Court, 21 April 1998, 98/002150, at 1.

\textsuperscript{46} Cabinet Minutes: Strengthening the Role and Operation of the Employment Tribunal, (28 April 1998) CAB (98) M 14/5B: noted that work on amending the Employment Contracts Act to improve the ability for the Employment Tribunal to operate in a low level and informal manner more consistent with the policy intent behind its establishment, will be incorporated into separate work on the future role, structure and functioning of the Employment Court. at [f].
Tribunal adjudication processes (reducing legalism and increasing informality), to rights to appeal and to the ways evidence was heard and considered.\(^47\)

The statistics that the Department had earlier gathered about appeal rates and outcomes for the EC and the High Court (which showed a lower rate of appeals from EC decisions and the same percentage of decisions overturned by the Court of Appeal)\(^48\) appeared not to be relevant to the decision to disestablish the EC.

However, notwithstanding Cabinet’s adoption of its Economic Committee’s recommendation, the proposal foundered. It had always been accepted that consultation with the judiciary was necessary before the transfer proceeded but it seems that the result of that consultation was not anticipated. By mid-July 1998 that consultation with the Chief Justice, Chief District Court Judge, Chief Judge of the Employment Court and the Solicitor-General had occurred. The Minister of Justice wished to consider further the policy issues they raised.\(^49\) Contemporaneously the Attorney-General and Minister of Justice had been developing proposals for changes to the structure and processes of other specialist courts, as well as the processes of judicial appointments, complaints about judges, and the nature of judicial immunities. These proposals were to be reported back at the end of August 1998.\(^50\) Some technical amendments to the ECA concerning the Tribunal’s powers to make orders about contracts, to enforce mediated settlements and to issue suppression orders were approved.\(^51\)

No transfer of the EC to the District Court occurred. By then the radical lobby had located a more reliable forum for the advancement of its policy agenda, the Court of Appeal (CA). As Anderson notes, prior to the enactment of the ECA the CA had been largely content to adopt a pragmatic approach to labour law matters generally and in particular to common views of fairness and the necessity for employee protections in grievance resolution.\(^52\) This changed after 1991. The CA’s earlier deference to the specialist expertise of the Labour Court was replaced by what Anderson argues was a negation of that expertise held by the EC.

The CA enhanced ‘rights to manage’ at the expense of employee protections in three main ways: statutory protections in holiday and minimum wage legislation could be avoided by CA endorsement of the incorporation of holiday pay in weekly pay\(^53\) and

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\(^{48}\) Department of Labour to Minister of Labour, Memo, *Appeals from decisions of the High Court and Employment Court*, 20 August 1997, was in response to a request from the Social Services Select Committee for statistics on the percentage of EC decisions appealed to the CA and overturned: 8% of EC decisions since its establishment were appealed, 46% of those decisions were upheld, and 4% overturned. For the year 96/97, 16% of High Court civil decisions were appealed, of which 26% were upheld, and 4% overturned.


\(^{50}\) Ibid.

\(^{51}\) Ibid.


\(^{53}\) *Gladstone Milk Bar Ltd v Henning* [1998] 3 NZLR 183 (CA).
prioritising the apparent intention of parties to enter into contracts for services;\textsuperscript{54} protections against dismissal could be avoided by the use of fixed-term contracts\textsuperscript{55} and redundancy;\textsuperscript{56} and objectivity in establishing justification for dismissal was abandoned.\textsuperscript{57} The common law principle, trust and confidence, offered the appearance of a degree of mutuality in the employment relationship but a case analysis revealed otherwise:

Decisions of the Court of Appeal in particular have minimised the impact of the term on employers and largely limited its use to the personal grievance jurisdiction, where it may provide assistance in arguing that a grievance has occurred but cannot be said to impose any substantive new obligations on employers. … From an employee perspective, however, the term may not have imposed new substantive obligations in addition to the obligation of fidelity, but it does seem to have been used as a useful justification for extending the scope of that obligation.\textsuperscript{58}

Aside from revealing why reliance on the civil court/common law nexus was so important to the radical lobby, Anderson’s analysis articulates how this alignment of position on employer rights between the radical lobby and the CA during the ECA era advanced the proprietary interests of employers at the expense of employee protections.

Thus the radical lobby’s focus on the EC’s approach to procedural fairness masked the source of the fundamental changes to the jurisdiction’s approach to employee protections that were necessary for the transition to employment-at-will.

Conclusions

The period of the EC under the ECA was marked by a key change of Minister. The Minister for its first years, the Cabinet moderate who shepherded the ECA through the legislation process, remained relatively impervious to the attempts of the radical lobby to re-litigate the issues they failed to have incorporated into legislation in 1991. This changed with the appointment of Hon Max Bradford, who sought to introduce a fresh vigour to the role.\textsuperscript{59} Amongst the reasons for a failure to implement the radical lobby’s desire to be rid of the Court was an opaque focus on data related to institutional and economic issues arising from the ECA and their interrelationship:

\begin{itemize}
  \item \textsuperscript{54} \textit{TNT Worldwide Express (NZ) Ltd v Cunningham} [1993] 3 NZLR 681 (CA).
  \item \textsuperscript{55} \textit{Principal Auckland College of Education v Hagg} [1997] 2 NZLR 537 (CA).
  \item \textsuperscript{56} \textit{GN Hale & Son Ltd v Wellington Caretakers etc IUW} [1991] 1 NZLR 151 (CA); \textit{Aoraki Corporation ltd v McGavin} [1998] 3 NZLR 276 (CA).
  \item \textsuperscript{57} \textit{Northern Distribution Union v BP Oil NZ Ltd} [1992] 3 ERNZ 483 (CA); \textit{W & H Newspapers Ltd v Oram} [2001] 3 NZLR 29 (CA).
  \item \textsuperscript{58} Anderson, note 52, at 129.
  \item \textsuperscript{59} Erling Rasmussen, John Deeks, \textit{Assessing the Impacts of the Employment Contracts Act} (1997) 28 (1) California Western International Law Journal, 275, cite an unpublished paper, Max Bradford, \textit{What Happens Now?} Institute of International Research, 11\textsuperscript{th} Annual Industrial Relations Conference, 1997, as describing anticipated amendments to the ECA to include incorporation of Holidays and Wages Protections legislation, and EC decisions on dismissal and fixed-term grievances.
\end{itemize}
much of the advocacy for further reform of the Act rests on the presumption that additional institutional changes, particularly with respect to the roles of the Employment Court and the Employment Tribunal, provide the key to improved economic performance. By then it was becoming clear that the economic benefits claimed for deregulation and de-collectivisation of the labour force, particularly productivity gains, had failed to materialise.

The Minister may have thought he was on safer ground when he sought externally commissioned legal advice about the means of achieving desired policy outcomes. The Department probably understood the difficulty (for the radical lobby) of commissioning legal advice for outcomes more likely to reduce than enlarge a burgeoning new market for legal services, so the advice had the effect of supporting its positions – about the ECs powers of review and the need to assess fairness of dismissal process (its objection to legalising the assessment did not alter its view that the assessment was necessary). From a quality of process perspective, the Department’s chief concern during the legislative process, the EC performed as expected.

The complaints about the EC, assessed against Kagan’s connection between the political status of business and business institutions with adversarial legalism (the more decentralised and deregulated an economy the more likely it resorts to lawyers and litigation to resolve conflict), the fragmentation of business-labour relations and the vulnerability of labour-management relations in the United States, to adversarial legalism, suggest that the business lobby’s dependence on North American views of New Zealand’s specialist employment jurisdiction became the means by which it avoided confronting the source of its problems with procedural fairness. Its complaint, in other words, was about the use of principles concerning process against it, accustomed as it was to issues of process in the courts advancing, rather than inhibiting, its interests.

From a quality of outcome perspective procedural fairness marked the reality of the transition from collectivist to individualist approaches to conflict resolution. It served to confirm that increased numbers of individualised employees were subject to dismissals they could not accept, thus suggesting that employment-at-will was operating in all but name. Resort to complaints about unfairness and demands for recompense were the exchange for workforce acceptance of (effective) employment-at-will as an aspect of increased labour market flexibility.

This is the point made by Hince and Harbridge who argue that the real agenda of the reforms:

...ideology and power were fundamental motivators of the key proponents of the Employment Contracts Act. From such a perspective even substantial economic and social costs would be a price worth paying to create a fundamental shift in employment relationships and labour market power that undoubtedly resulted.62

60 Ibid; for a British perspective on use of employment tribunal procedural change as a tool for economic stimulation see David Mangan Employment Tribunal Reforms to Boost the Economy (2013) 42 (4) Industrial Law Journal, 409.
This resulted in outcomes associated with Thatcher era Britain\textsuperscript{63} - the emergence of a non-union sector based on the principle of cost-minimisation that experienced higher levels of turn-over and injury rates, greater use of casualised labour and compulsory redundancy and a dismissal rate twice that of the unionised sector:

NZ has been through a period of social Darwinism wherein the strong have got stronger, the weak, weaker, the rich richer and the poor poorer, the advantaged have become more so and so have the disadvantaged. Almost any schism in society that existed has widened and become more overt.\textsuperscript{64}

Indicated, therefore, from the conclusions of chapter 3, (the measures opposed by the radical lobby did not obstruct its agenda) is that so long as institutions of dispute resolution are subject to the tropes of legal method, it mattered not how they were constituted for a successful transition from pluralist to unitarist approaches to employment relations.

Common law and legal method were thus vital elements of the power transition required of the ECA.


\textsuperscript{64} Hince and Harbridge note 62.
Chapter 5

Employment Relations Act Institutions

Policy Origins

Introduction

In the period 1991 to 2008 there was a major difference to the way the National and Labour led Governments relied on policy to shape the operations of the employment institutions. No significant policy activity occurred following the Employment Contracts Act (notwithstanding pressure from the radical business lobby) until the coalition agreement of 1996 raised the issue of personal grievances. This provoked renewed consideration of the Employment Court’s (EC) role. But the status quo was maintained. No changes, either to the EC or to the law concerning grievances, were made.

This suggests that the labour market outcome sought by the policy makers of 1990 was perceived as in the process of being achieved. The radical lobby certainly thought so, notwithstanding a continuing complaint about the strategy deployed to reach that goal.¹ That strategy difference – whether an accessible dispute resolution system was necessary for the transition from collectivised to individualised approaches to labour issues – centred on the role of the employment institutions. Juridification theory suggests the institutions were critical to the transition from legislative and stakeholder to judicial regulation of those issues. In terms of the strategic instincts of National moderates the institutions formed a basis for public acceptance of this change.² Since this was the strategy with which the radical lobby took issue, it led the charge to destabilise the EC, to which it attributed responsibility for a disruptive focus on procedural fairness. This was perceived as undermining the outcome goal of widespread employment-at-will, a marker of increased labour market flexibility.

This period of policy (as distinct from lobbying) inactivity can be contrasted with what occurred between 2000 and 2008. It began with an apparent intention, via policy activity and legislation, to move away from formal, legalist approaches to labour relations and dispute resolution towards policy based on academic and consumer research.

The aim of this chapter is to describe the policy process for the employment institutions that resulted in Part 10 Employment Relations Act (ERA) for the following purposes: to establish a similar basis of comparison between policy and operations as is contained in previous chapters about the ECA; and as a basis for comparison of policy, process and outcome (for the institutions) between the ECA and the ERA eras.

Since policy about the structure and processes of the institutions dominated policy formulation, quality of process issues will precede description of desired outcome.

**Quality of Process**

**Post-election Policy Issues for Employment Institutions**

Following the 1999 election the Minister of Labour met with what were described as Labour Party Interest groups for the purpose of eliciting their views about their preferred approaches to changes to industrial relations and the employment jurisdiction. The recorded consensus was that personal grievances and disputes should be routed through the mediation process, with mediators given the power to make binding decisions. Appeals would be heard de novo by the EC. Those using the institutions could appear personally, be represented by an agent, or with the consent of all parties, a lawyer. These positions represented a desire to revert to the Labour Relations Act regime of the late 1980s and were included in consideration of the role of the institutions. Eliminating rights to be legally represented and the prescription of non-legalistic procedures for evidence were also mooted. The Department and Labour activists shared the view (at this point in the process) that formal procedures and legal representation were inextricably connected, hence generation of the option of regulating pre-institutional processes to incentivise effective dispute resolution by ensuring all avenues of redress were explored before resort to the institutions. Also connected was the issue of combining med/arb procedures in one process. This raised the question whether the Tribunal was the appropriate body for this process and what appeal rights would be available.

The options concerning the EC focused on their effects on the Tribunal’s autonomy: whether its supervisory role and the current appellate structure and role (points of law only or the power to reconsider facts) should be retained.

**Policy development of Employment Relations Bill 2000**

By early January 2000 officials had formulated three options for the institutions: improving the existing system; splitting mediation and adjudication functions into separate institutions; establishing a new mediation/arbitration function (in the absence of a mediated settlement the mediator would arbitrate). Assessment of each option relied exclusively on the problems created by the ECA: the increased availability of the personal grievance procedure to the whole workforce and the reduced role of unions in the resolution of disputes within the workplace and as filters for the institutions. Reasons for criticism that the Tribunal had failed to deliver the “low

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3 Department of Labour description: see Record of meeting: Minister of Labour with Labour Party Interest groups, 22 December 1999.
4 Record of meeting: Minister of Labour with Labour Party Interest groups, 22 December 1999.
5 Department of Labour to Minister of Labour, Employment Relations Bill – Policy Issues, 23 December 1999.
6 Ibid.
7 Ibid.
8 Department of Labour, Role of Specialist Employment Institutions, 11 January 2000.
9 Ibid.
level, non-legalistic and speedy mechanism” prescribed for it were summarised as delays caused by representation by lawyers and advocates, too few Tribunal members and Court judges; the necessity for the Tribunal to record its reasons in lengthy decisions for the purpose of enabling the Court to consider facts on appeal and to exercise its supervisory function, over-detailed procedures and high representation costs arising from “increased legalism and...extensive preparation”.

The central theme of the Department’s position was that legalism inhibited effective dispute resolution:

The Employment Contracts Act introduced a framework based around individual rights and obligations based on employment contracts, which had inherent tendencies toward legalism. Individuals are increasingly aware of their rights, and more prepared to pursue their claims legally when their incomes and livelihoods are at stake. The individual nature of the claims, and the diversity of employment relationships has also increased the complexity of legal arguments that are pursued. The increase in legalism may increase individuals’ ability to exercise their rights to justice, however, it also has the effect of being adversarial, time-consuming, and costly.

Suggestions for the first option, improvement of the existing institutional framework, replicated options canvassed with the Labour Party Interest Group: reduced formality of process and decision making by the Tribunal, removal of the Employment Court’s oversight function, limited appeal rights, screened entry-level claims via evidence of prior attempts at resolution and reduced rights of representation. By then it was clear that splitting the Tribunal’s mediative and adjudicative functions was in contemplation, requiring consideration of where adjudicated hearings would commence.

The second option, establishing separate entry-level mediation and adjudication institutions was seen as potentially increasing the number of mediated settlements. This raised the issue whether mediation should be compulsory before adjudication could be sought and the risk that the benefits of compulsory mediation would be minimal and expensive.

The third option, an institution with a combined mediation/arbitration function would offer mediation first, an outcome (if settled) that was final and binding or a decision by the mediator with a right of review of that decision. The risks were that each function would be undermined by failures to disclose information that could be the basis for a decision. Mediators could be restricted by pressure to maintain a neutral decision-making process and parties could withhold information in anticipation of a court hearing. There was potential for them to treat the mediation as adjudication and adopt more formal approaches, so that if mediators had high levels of autonomy they would be perceived as not providing a fair system of justice. A lengthier process and a focus on its rules were also feared.

Recommended was an institutional structure consisting of a specialist mediation function and two specialist adjudication bodies (entry level and appellate) supported

10 Ibid, Appendix at 12
11 Ibid.
12 Ibid.
13 Ibid.
14 Ibid.
by proactive provision of information and advice about the options available to disputants (the second option). The policy objectives perceived to be fundamental to the efficient operation of these institutions were the need to support the employment relationship as a whole in place of the existing focus on defining or resolving contractual issues; and the facilitation of speedy (close to the event), accessible (informal) and fair dispute resolution by avoiding legalism.\(^\text{15}\)

**Mediation function**

Mediation assistance would be available in a different form from that offered by the Employment Tribunal. Whilst its style of mediation was accepted as the means by which a high proportion of the disputes before it were resolved, it was also noted that this function was not advertised (as the result of resource constraints), was reactive (invoked only once the employment relationship had already broken down), relied on formal application and was often required to traverse all legal issues arising from the problem – whether or not they were relevant to ultimate settlement. The suggested solution was a wider focus on supporting existing employment relationships, rather than on the narrower negotiation of terms of exit from a practically defunct contract.

This change of focus was regarded as key to changing the style of mediation to an approach that would be “less formal and legalistic”.\(^\text{16}\) To this end mediator skills that were specifically interpersonal and problem solving (and thus capable of engaging the trust and cooperation of the disputants) would be privileged over legal knowledge. Vesting mediators with a broad discretion, empowering them to adopt a horses-for-courses approach to the type of mediation assistance required, and ensuring there were no limits on subject matter were also intended to emphasise the policy desire for greater informality and responsiveness. The wish for a move away from legalism was expressed in terms of “practical solutions” and a recommendation that there should be no rules about initiating mediation\(^\text{17}\) or the point at which it was offered.\(^\text{18}\) Averting relationship breakdown was regarded as particularly important:

> given the legislative objectives of reinforcing the employment relationship (rather than enforcing a contractual relationship or remedying a breach of same) and the emphasis on reinstatement as the primary remedy. This has important implications for the style of mediation adopted – arguing for a higher degree of informality of process, ease of access … as well as for the levels of resourcing required to sustain such practices, particularly as irreconcilable breakdowns in the employment relationship will continue to occur and the current style of post hoc grievance mediation will remain part of the system, even if a shift in priorities is experienced.\(^\text{19}\)

Limits on the desire for a break with legalism are apparent in the evaluation of options for arbitration in mediation. In terms of the debate about the Labour Relations Act med/arb provisions (described in chapter 2) the Department’s recommendation of the ‘pure’ option, (whereby no arbitration services would be offered) adopted the legalist view that modes of resolution must be offered separately. The status quo option (on

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16 Ibid, at 3.
17 Ibid, initiation on request was recommended. Reliance on formal application was rejected as a barrier to access because it required specialist knowledge of the application process.
18 Ibid, at [18]. The options were: at the workplace (before employment relationship breakdown); via requests for information; on request after workplace differences became apparent; or as an alternative to litigation.
19 Ibid, at [16].
request or by consent) was said to solve the problem of impasse but create the problem of addressing (any and all) legal issues raised by the parties. The med/arb option (arbitration in the absence of settlement) raised the problem of appeal rights and had the potential to undermine both mediative and adjudicative functions. ‘Pure’ mediation offered a conducive environment for parties to reach their own decisions.\textsuperscript{20}

Three institutional options for the provision of mediation were canvassed: status quo (i.e. provision by Tribunal), the establishment of a separate state funded mediation service or contracting out the mediation function to private providers. The advantages of a separate state funded service were noted as encouraging the establishment of a specialist body of mediators, tighter focus in recruitment on the social skills of problem solving and communication, the ability to employ more personnel at a lower cost (because legal qualifications would not be required) and wider accessibility.\textsuperscript{21}

This led to a recommendation to change the employment status of mediators:

> Tribunal members are currently independent statutory officers. As such, a concerted change of approach to how they perform their duties cannot be directed (other than in terms of statutory objectives), compared to employees, who would be more able to be ‘managed’ and given clear administrative direction.\textsuperscript{22}

Also recommended was retention of existing certifying functions over private settlements for enforcement purposes.\textsuperscript{23}

**Adjudication function**

The Department recognised that:

> Some form of adjudication is a necessary component of a dispute resolution structure, as there are situations where parties are unable to resolve their differences themselves, however, it is necessary to determine the appropriate level of formality, considering the need to balance accessibility with providing a fair process.\textsuperscript{24}

Appeal rights, original jurisdiction, informality, filtering and representation were the initial policy issues by which this balance between accessibility and fair process was considered. By contrast with the policy process of 1991 this one adopted the access to justice position upon which legal method is based, particularly in its consideration of structural options.

**Appeals and originating jurisdiction**

The alternative structures were adjudication by a low-level body with appeals on fact and law to a higher level specialist body and final appeal to the Court of Appeal or an informal med/arb hearing with a de novo right of appeal. The first was recommended because it had three levels, two rights of appeal, conformed to the standard court system structure and confined originating jurisdiction to the lower level body. It risked delays from the formalism that accompanied the claims made of this function but this was seen to be preferable to the potential for the med/arb option to relegate

\textsuperscript{20} Ibid, at [21].
\textsuperscript{21} Ibid, at [22].
\textsuperscript{22} Ibid, at footnote to [13].
\textsuperscript{23} Ibid, at [20].
\textsuperscript{24} Ibid, at 9.
mediation to a secondary function, generate high levels of dissatisfaction from its informality of process and incentivise appeals. Retention of the status quo for appeals to the Court of Appeal (law only) was recommended for the reason that this had worked well under the ECA.  

Informality

Having adopted the access to justice position on these options policy makers were then confronted with the problem of formality. It was obvious that the new originating institution should have the power to regulate its own procedures, but this was what the Tribunal had and its adjudication processes were conceded to be relatively formal. Regulatory prescription mandating simpler procedures and administration and shorter, less detailed decisions was one solution, but it did not address the formality of hearing processes that plagued the Tribunal. Resolving this problem would require a departure from the detail of legal and factual issues that were regarded as having dominated the form and content of Tribunal decisions. The demands of precedent had led to the development of a significant body of case law, perceived as an end in itself, but no longer tolerable. Allied to this issue was the Employment Court’s supervisory power. Restricting it was required:

The effect of this change would be a clear indication to the Employment Court that its supervision role is limited to providing guidance on substantive issues through its appellate function. The Employment Tribunal would have the opportunity to develop its own procedures, without having to demonstrate that those procedures are in accordance with the direction of the Court.  

Filtering

The requirement for prior attempts at dispute resolution before adjudication was sought, an attempt to address the problems of delay at the Tribunal, was the subject of a recommendation to incentivise such efforts: to ensure a higher proportion of disputes could be resolved extra-judicially; and to increase institutional capacity to process claims more quickly. Prior attempts could be taken into account in decisions and the institutions could have the power to order parties to mediation before proceeding, where this was seen to be appropriate.

Representation

Rights of representation at the originating institution were considered by reference to the problem of legalism that lawyers had brought to the jurisdiction following the ECA. One solution was to remove rights of legal representation, but this raised access to justice issues:

Restricting legal representation in the mediation process may be less risky, as the matters are likely to be resolved by seeking a mutual resolution, rather than based around complex legal arguments, and adherence to legal procedures and rules is not required. However, representation can provide a useful purpose in mediation by providing an objective person who can guide the disputant, which can be a tense and stressful time for individuals. Restricting legal

25 Ibid, at [29]
26 Ibid, at [35]
representation also limits the options for suitable representation for parties that are not union members.\textsuperscript{27}

Alternatives posed included permitting agents for any party and lawyers with consent of all parties, or full rights of representation. The choice of status quo (full rights) was tempered by a suggestion for solving the problem of undesirable representative behaviour via administrative processes aimed at encouraging informality.\textsuperscript{28}

\textit{Inquisitorial model}

For this reason inquisitorial models (N.Z and overseas) were investigated. Officials who consulted other low-level tribunals\textsuperscript{29} about their hearing processes as part of this inquiry found some common themes in communication and control. Sophisticated communication skills (on the part of both administrative and decision making personnel), proactive administrative assistance for users, an emphasis on accessibility and active engagement with claimants were the qualities consistently highly valued by those consulted. Natural justice – the measure of fairness of process that the Department was conscious would be the source of criticism of its choice of informal procedures\textsuperscript{30} – was accommodated (by each of the tribunals consulted) by reference to behavioural, rather than prescriptivist process requirements. Good communication and reflective listening skills, according to one participant, meant that parties were more likely to accept an adverse result if they could see that they had been heard and their dignity respected.\textsuperscript{31} Another addressed the natural justice issue more directly: the traditional adversarial model was not the only way to guarantee it, just as cross-examination was not the only way to accommodate the right to be heard.\textsuperscript{32}

These insights were regarded as sufficiently compelling to justify recommendation of an investigative model for the originating institution:

The inquisitorial approach on the other hand, is derived from the French legal system. It involves a lot more control on the part of the adjudicator in order to establish what really happened...

Parties are given the opportunity to present their case, and challenge the other side’s case, however they are not given the opportunity to question witnesses directly as in the Common Law model. Less emphasis is given to the need to test witness’ credibility and the impressions gained during cross-examination. In French civil cases, there is a strong emphasis on written evidence, as opposed to oral, and judges are given all documents prior to the case which they examine carefully to allow for a closer examination of the issues involved during the hearing.

\begin{itemize}
\item \textsuperscript{27} Ibid, at [41]; cf Kuo-Chang Huang, \textit{How Legal Representation Affects Case Outcomes: An Empirical Perspective from Taiwan} (2008) 5(2) Journal of Empirical Legal Studies, 309, a study of 100,000 civil cases in an inquisitorial jurisdiction found that legal representation had no significant bearing on case outcomes when parties go to trial.
\item \textsuperscript{28} Department of Labour, note 15, at [41].
\item \textsuperscript{29} Tribunals consulted were the Principal Disputes Tribunal Referee, the Complaints Review Tribunal Chairperson and the Chairman of the recently concluded TranzRail Inquiry.
\item \textsuperscript{30} Department of Labour: note 15, at [41].
\item \textsuperscript{31} Department of Labour, \textit{Notes of Interview with Chairperson Complaints Review Tribunal}, 12 April 2000. This position was supported by social research of specialised administrative tribunals that found claimants were more likely to accept governmental decision making when they perceived the decision maker was not biased against them, and when they felt that the decision maker listened carefully, treating them and their arguments with respect: Robert A Kagan, \textit{Adversarial Legalism: The American Way of Law}, (Harvard University Press, Cambridge, Mass., 2001).
\item \textsuperscript{32} Department of Labour, \textit{Notes of Interview with Chairperson TranzRail Inquiry}, 23 August 2000.
\end{itemize}
Arguments in favour of an inquisitorial or investigative approach are that it assists parties that are not represented, and that it may be a better way of obtaining the facts without a hearing being dominated by technical arguments that may be presented by counsel. Where a party fails to provide enough evidence, even though evidence may be available, it allows the adjudicator to intervene, and ensure that all relevant evidence is properly presented and tested.33

Addressing the technical requirements of an investigative approach, officials emphasised the need for decision-makers to have well developed social and communication skills and for decisions to be in a clear and concise format and restricted to content necessary to establish the reasons for a decision. They also noted the value of case management strategies that ensure party awareness of rights and obligations, and specify issues for resolution prior to hearings, in reducing hearing times.34

Following adoption of this model, officials had the benefit of differing legal views of the procedures proposed for the Authority. They encapsulate competing approaches to informality. The Crown Law office could only see risk because with the:

lack of formal procedures or full decisions, parties may not perceive that they have been heard or have had a full opportunity, or are adequately informed of the procedure adopted. This may also prejudice parties’ rights to apply for a judicial hearing; the determination may not fully record the procedure, evidence and basis for findings. It is not clear how the natural justice provisions will sit with the express procedural provisions.35

The Chair of the recently concluded TranzRail Inquiry, a Queens Counsel, supported adoption of the investigative model for its ability to empower decision makers to tightly control proceedings thus reducing their length and complexity.36

Cabinet Consideration

By mid-February 2000 the proposed changes to the status quo could be summarised as the dis-establishment of the Employment Tribunal, the establishment of a Mediation Service and a separate lower level adjudication service, the Employment Relations Authority, with full first-instance jurisdiction to hear and determine all types of employment dispute, the retention of the EC for appeals on matters of law only and appeals to the Court of Appeal with leave only, retention of rights of representation and mediation to be undertaken before adjudication could be sought.37

On referral back from Cabinet, splitting originating jurisdiction for individual and collective disputes between the Authority and the EC, further modified these changes. The Authority would determine individuals’ claims and the EC collective disputes

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33 Department of Labour, Overview of other judicial, or quasi-judicial, or administrative decision models and the application of principles, processes or approaches in those models to the Employment Relations Authority (undated, c mid 2000) at [3] – [5].
34 Ibid.
36 Department of Labour, note 32.
37 Cabinet minute, Employment Relations Bill – Confirmation of Government Reform Package for the ad hoc Committee on Employment Relations Bill, (9 February 2000) CAB(00) M4/6(1), AER(00).
(strikes/lockouts, freedom of association). Appeal rights to the EC were also significantly enlarged by the inclusion of rights to full de novo hearings.\footnote{Office of Minister of Labour, Cabinet Submission, Employment Relations Bill – Finalisation of Outstanding Elements 17 February 2000, Options for Dispute Resolution and Enforcement, 17 February 2000.}

Further refinements from the Minister, that were among matters later agreed by the Cabinet, included the power for the Authority to set its own procedures and rules of evidence.\footnote{Cabinet Minute, Employment Relations Bill - Dispute Resolution and Enforcement, (16 February 2000) CAB(00) 63; AER (00) M 3.} The Authority would also be required to formulate its written decisions to meet the needs of the parties rather than the requirements of a higher court. The Minister’s primary concern lay in balancing the need to preserve existing rights of claimants to seek specific redress against the need for a lower level decision-making body to act in a “pragmatic and realistic way” without “excessive legalism or formality”.\footnote{Cabinet Submission, note 38 at [21].}

The ensuing Cabinet discussion about an objective of the Employment Relations Bill, that it “recognise that legal rules tend to be divisive rather than constructive” resulted in an invitation to the Minister to reword it. Her response was to agree to delete it, but not before the following justification of that particular wording:

> The intent of this provision, or sub-objective, needs to be seen in the specific context of the proposals for dispute resolution and grievance resolution under the Bill. In short, that the emphasis here should be on processes and institutions that are directed at ensuring practical effective dispute resolution in a way that satisfies the principles of natural justice yet does not become trapped in excessive legalism and formalism. In addition, that dispute resolution processes are aimed at settling differences and enhancing the ongoing employment relationship. That is, the promotion of co-operative and consensual, rather than adversarial and potentially divisive problem-solving techniques.\footnote{Ibid, at [5].}

**Stakeholder views**

Contemporaneous with the policy development process by officials was consultation by the Minister with the employment jurisdiction lawyers and judiciary, the former because they had become “major players” under the ECA and were perceived as having a major stake in the continuation of that regime, although they proved to be difficult to engage in a substantive way in the policy process.\footnote{Margaret Wilson, The Employment Relations Act: A framework for a fairer way, in Rasmussen (ed) Employment Relationships, New Zealand’s Employment Relations Act (Auckland University Press, Auckland, 2004), 9.}

Judicial views on a range of issues under consideration were sought, including concerns about the role of lawyers in mediation. The judges were unable to accept that the shortcomings of the current system could be attributed to the legal profession:

> It seems to be generally considered that, on balance, the legal profession is helpful in achieving the resolution of disputes by way of mediation as much in the employment context as in commercial ADR. Many, if not most litigants would feel uneasy about going into the process
without the benefit of legal advice on call as the negotiation develops and possibly takes surprising turns.\textsuperscript{43}

They indicated that the minimum number of judges for the EC might have to increase, that the criteria for removals of proceedings and appeals to the EC should be widened and that the position of Head Registrar (to whom the other two would report) should be created.

The view that the EC would require more judges was echoed in a number of lawyer submissions to the Select Committee that considered the Employment Relations Bill mid year. The Auckland District Law Society position was based on a view that parties to employment relationships had “the absolute right to have their dispute heard by a judicial body”\textsuperscript{44} and that the proposed structure of the institutions compromised access to justice from the power to appoint non-legally-qualified members to the Authority, and the absence of an express requirement of them to act judicially, record evidence, summarise submissions, give reasons for credibility findings, or record hearings. It was particularly exercised by the proposal to confer on the Authority powers that only the High Court had, in respect of the statutes to which it could look for remedies, the absence of any review function by the EC over the Authority and the absence of an exclusive jurisdiction for the EC to hear penalty and injunction claims. Its major concerns about the Mediation Service were that it would be administered by the Department of Labour and its mediators would be employees, rather than warranted judicial figures. The absence of statutory initiation procedures, powers to withhold information from mediators, sanctions for doing so and powers to review mediation proceedings were additional concerns.\textsuperscript{45}

Submissions from specialist employment lawyers were based on similar beliefs about the impracticality of informal procedures in this jurisdiction and of adversarial processes as the only way of managing proceedings characterised by “antagonism” or “strongly divergent views”.\textsuperscript{46} Expressing the same concerns as those of the Auckland District Law Society, one submission unwittingly undercut its plea to maintain the status quo by asserting both that delays at the Tribunal were attributable to the ECs exercise of its review function, and that the EC should retain this power.\textsuperscript{47} Pouring scorn on the idea that any employment relationship problem could form a basis for redress it urged the Committee to confine the Authority’s jurisdiction to identifiable causes of action. Both predicted that the EC would be overburdened by dissatisfied customers seeking a full judicial hearing of their dispute, as the result of the Authority’s exercise of its draconian powers, with one going further to assert that the superior courts would impose upon the Authority the obligation to act judicially:

\textsuperscript{43} Chief Judge, Employment Court to Minister of Labour, letter, 15 February 2000.
\textsuperscript{44} Auckland District Law Society, Submission to Employment and Accident Insurance Select Committee, \textit{Employment Relations Bill}, (undated c mid 2000), at [1.1].
\textsuperscript{45} Ibid.
\textsuperscript{46} Christopher Toogood, QC, Submission to the Employment and Accident Insurance Select Committee, \textit{Employment Relations Bill}, (undated) and Associate Professor William C Hodge Submission to the Employment and Accident Insurance Select Committee, \textit{Employment Relations Bill} (1 May 2000).
\textsuperscript{47} Christopher Toogood, QC, note 46.
The ERA cannot be permitted, and will not be permitted in practice, to make ‘practical decisions quickly, with a minimum of detail, focussing on key issues and how to resolve them’ with an emphasis on informality. 48

The other advanced the view that investigative procedures were slower than adversarial ones, citing Human Rights Commission investigations as evidence:

The notion that an Authoritarian/ Investigator can touch down in a workplace, ask a few questions and emerge immediately with a determination is fabulous. In addition, an investigator who is also a decision-maker will always be on the precipice of a breach of natural justice. In the Human Rights Commission the investigative role is separate from the determinative decision making role: the Authority will both investigate and determine, will be both police officer and judge…. A review of the Authority’s determination will be a common outcome. 49

Support for these views came from at least two unions whose submissions were prepared by their legal officers. One opposed the establishment of the Authority because a lack of clarity about its processes compromised members’ demands for certainty from adjudication, if required to resort to this method of problem resolution. 50 The other doubted that the investigative procedure was capable of delivering on the promise of speedy, informal and practical justice because of what it perceived as its dual investigative and judicial role. It too feared increased recourse to the EC. 51

The inability of a party to call their own witnesses, the risk that informality would result in further bullying or victimisation of workers by aggressive employers or advocates, absence of rights to cross-examine, the length of time investigations would take, the extended jurisdiction for the Authority over bargaining, good faith and injunctions, uncertainty about the need for members to be legally trained, and no necessity for reasons for credibility findings were the reasons advanced by one union for regarding tribunal adjudication as more likely to deliver “more just and certain outcomes” than investigative meetings. 52

The opposing view, from a lawyer with recent experience of the investigative model, emphasised the need to have the new processes clear from the start. To ensure that the Authority would operate in an entirely new way he warned against recruiting Tribunal members to the Authority with “set ideas about process”. 53 Supportive of the format documents the Department proposed to adopt for proceedings, the proposed use of support staff to assist parties and telephone directions conferences he issued some advice about dealing with lawyers. 54

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48 Ibid, at 8.
49 Associate Professor William C Hodge, note 46, at [7.4].
50 Service and Food Workers IUW, Submission to the Employment and Accident Insurance Select Committee, Employment Relations Bill, (undated) at [12.14].
51 Post Primary Teachers Association, Submission to the Employment and Accident Insurance Select Committee, Employment Relations Bill, (undated).
52 SFWU Submission, note 50, at 73-79.
53 Department of Labour, note 32.
54 Ibid: the advice included the need to clarify procedure at outset, use of a long table with parties seated either side (to facilitate constructive discussion), keeping lawyers seated, not accepting written submissions nor using the word ‘submission’.
The Chief Tribunal Adjudicator and some Tribunal members, who opposed mediators becoming employees instead of holding warrants, repeated concerns in these submissions about the administration of the Mediation Service by the Department.

Related concerns about the lack of clarity about mediator qualifications and the potential use of mediators with generic, rather than specialist employment expertise, were raised after the select committee process by reference to research that suggested that employment conciliators in Britain were less effective than their New Zealand counterparts because they offered conciliation only and were civil servants who were not required to be experienced in employment relations or law. Mediation at the Employment Tribunal was described in this research as more proactive. Its reliance on the evaluative model was attributed to higher settlement rates in New Zealand:

This study identified the difference between the conciliator’s role and the mediator’s role as being a significant reason behind the different rates of settlement. 55

Select Committee Consideration

The Employment and Accident Insurance Select Committee considered the Employment Relations Bill. It was advised by the Department of Labour. In its June 2000 report to the select committee, after canvassing the submissions made, the Department formally reported on the policy reasons for the proposed changes to the employment institutions. The first of the proposed changes underlined an intention to de-formalise the process by which grievances were resolved:

Schedule 1 of the Employment Contracts Act provided a relatively formal ‘one size fits all’ process for the resolution of grievances including the exchange of documents between the parties setting out their respective positions. This type of process is inconsistent with the policy approach in the Bill, which emphasises the desire of the parties to resolve their employment problems in the way best suited to their situation through informal means. 56

Allied to this emphasis on encouraging parties to resolve their own problems was the creation of a separate mediation function:

The Employment Relations Bill establishes institutions which are intended to improve on the delivery of problem resolution services through the separation of the distinctly different functions of decision-making and mediation. The Bill also places emphasis on mediation, as a more appropriate process for the resolution of employment problems, as it focuses on empowering individuals to resolve their problems themselves. The Bill also emphasises a wider approach to mediation which includes a spectrum of assistance from information provision and face-to-face communication between the parties at the workplace. 57

The policy hope was that there would be less need for disputants to obtain legal assistance for mediation. This hope was bolstered by the view that legal aid would not be available for representatives to attend mediation because it was restricted to

57 Ibid, at 150.
representation at court or tribunal proceedings.\textsuperscript{58} That, however, was the only plan to limit legal representation at mediation. In conceding the advantages of representation at mediation by the presence of an objective person from whom a disputant could obtain suitable guidance, the Department essentially scuttled the recommendation of the Labour Party Interest group that legal representation occur only by consent of all parties to a claim.\textsuperscript{59}

A large number of submissions were noted as supporting mediation so long as mediators had the requisite skills and training, but some, noted as coming mainly from employers, opposed compulsory or state provided mediation (on the grounds that there were plenty of private mediators about, or the Department was insufficiently independent as the provider). The Department’s response emphasised its ability to adopt a strategic approach to the range of services required and to most efficiently allocate resources by targeting them where appropriate. Additionally the Mediation Service was regarded as having an important role in the dissemination of information about employment rights and obligations – information provision being regarded as a major way of de-escalating employment problems and reducing the need for judicial intervention.\textsuperscript{60}

Submissions about procedural and confidentiality issues at mediation were addressed by underlining the policy goal of focusing on the problem at issue, rather than on how it had been processed.

On the issue whether mediation should be compulsory before adjudication the Department was concerned about the risks of litigants simply going through the motions in order to qualify for adjudication assistance.\textsuperscript{61} However it also envisaged a much less formal and more flexible adjudication service, available on request, with “no barriers to access for parties in terms of specialist knowledge of how to apply” and with work priorities responsive to need, effect and workload.\textsuperscript{62}

The Department’s response to those who opposed the establishment of the Authority referred to the broad powers conferred on the Tribunal to regulate its own procedures as failing to achieve the policy goal of low-level speedy dispute resolution. The new institutional framework was designed to remedy that problem by separating adjudicative and facilitative functions. The concerns about its extensive investigative powers, potential for delays, wide and potentially complex jurisdiction, denial of judicial hearing, mixed role (investigation and decision making), informal procedures, lack of transparency in those procedures, lack of requirement for legal training were confronted by the assertion that the Authority was established to operate in a way that would not be constrained by the formalities of a judicial hearing. It had powers that would enable it to take greater control of the matters before it and to operate flexibly, quickly and pragmatically. But the use of these powers did not preclude robust advocacy or argument about the merits of a case or the relevant legal principles,

\textsuperscript{58} Ibid: it also reflected a subsequent finding that parties are most likely to settle a case when neither is represented: Kuo-Chang Huang, note 27.
\textsuperscript{59} Department of Labour, note 8.
\textsuperscript{60} Ibid, at 153.
\textsuperscript{61} Department of Labour, note 15.
\textsuperscript{62} Ibid, at 7.
because parties would retain the role of preparing and presenting their cases. However
the need to incorporate the principles of natural justice was conceded:

The Authority’s approach to decision-making is relatively unprecedented in NZ. This does not
mean that the principles of fairness will be compromised. While the Bill in its current form does
not make this explicit, it is intended that the Authority will be required to act in accordance with
the principles of natural justice, and this needs to be clarified in the Bill. This will include giving
the parties the opportunity to be heard, and to respond to allegations against them. 63

Also conceded was the need to ameliorate the Bill’s provisions about the requirement
to submit a good faith report to the EC on a challenge. Noting that the provision was
intended to provide an incentive to take the Authority seriously the Department
recommended an amendment to ensure that good faith reports would only be required
if sought by the Court. 64

The need for adequate resourcing of the institutions was conceded by the
announcement that the number of personnel available to deal with problem resolution
would double. 65

In summary the changes to the adjudicating institutions were designed to ensure:

• they were the exclusive providers of court based adjudication services (by
excluding the Arbitration Act from applying to employment problems – to
avoid involvement in the employment jurisdiction by the ordinary courts),
although parties could still use their own alternative dispute resolution
processes; 66

• there would be no need for them to focus on the way that an issue was dealt
with by the forum below; 67

• the establishment of a “new body with new powers” the Employment
Relations Authority (to avoid confusion with the Employment Tribunal) with
specific powers unconstrained by the formalities of a judicial hearing, to
operate flexibly, quickly and pragmatically in a wide jurisdiction, and to take
greater control of proceedings to get to the nub of a problem; 68

• that included in the Authority’s new powers were investigative powers,
limited decision-recording obligations and minimal administrative processes; 69

• full rights of appeal in the challenge of an Authority determination to the
Employment Court, the ability to seek full de novo hearings or to limit an
appeal to a particular question of law or fact; 70

63 Report of the Department of Labour, note 56 at 150.
64 Ibid, at 174.
65 Ibid.
66 Ibid.
67 Ibid.
68 Ibid, at 150.
69 Ibid: “It is not intended that the Authority will carry out lengthy investigations, as a significant role
in preparing and presenting arguments will still be carried out by the parties themselves...A significant
amount of the Employment Tribunal’s time is currently used in writing decisions, which often include
unnecessary detail, and which causes an unnecessary strain on resources and creates delay.” at 161.
• that the Authority’s processes would be taken seriously by the parties to an investigation by the provision of good faith reports to the Court, if sought, on any challenge to an Authority determination;\textsuperscript{71}

• that the Employment Court focus would be on the employment relationship problem at issue, and not on the way the issue was dealt with by the other institutions;\textsuperscript{72}

• further limitation of appeals to the Court of Appeal by:
  
  o requiring leave which could only be granted if there was a public interest in the outcome:\textsuperscript{73}

  o requiring, in the determination of appeals, regard to the objects of the legislation generally and as expressed in each of its parts.

The reason for this limit on Court of Appeal powers was noted as follows:

The express exhortation strengthens the normal presumption and discourages judicial activism. Combined with the legislative overruling of several Court of Appeal decisions in the ER Bill, this provision indicates that the Government does not intend to have the spirit of its legislation frustrated by a Court of Appeal that has already nailed its ideological colours to the mast.\textsuperscript{74}

Explaining the policy reasons behind these proposed changes to a Public Law Conference the Minister of Labour focussed on the need to reduce legalism in the employment relations dispute resolution system as an important policy aim.\textsuperscript{75} This, she said, was best achieved by designing processes that could resolve issues “as close as possible to their point of origin” (in the hope that working relationships could be supported and maintained), reduce the need for “legal and technical” arguments and representation and lower compliance costs for small employers by ensuring a “straightforward, common-sense and more user-friendly process.” Notwithstanding their location in principles of fairness or reasonableness, the institutions, she argued, would still play an important role in interpreting the law:

many employment relationship problems arise as a consequence of interpersonal difficulties [but] others involve substantive points of law, and the Courts are the proper place for these to be resolved.\textsuperscript{76}

\textsuperscript{70} Report of the Employment and Accident Insurance Legislation Committee (majority), undated: “In the case of a de novo hearing, the Court will hear the matter as if it had not been heard by the Authority and as if no decision had been made by the Authority,” at 38.

\textsuperscript{71} Ibid.

\textsuperscript{72} Report of the Department of Labour, note 56.

\textsuperscript{73} Report of the Select Committee, note 70: “The role of the Court of Appeal is to provide guidance on difficult matters of law, not to determine factual matters which are more appropriately dealt with by the specialist employment institutions.” at 40.

\textsuperscript{74} Paul Roth, The New Institutional Framework, [2000] ELB, 64 at 68.

\textsuperscript{75} Minister of Labour, Address to Public Law Conference in Wellington: The Employment Relations Bill – a Case Study in Turning Policy into Legislation, 19 June 2000.

\textsuperscript{76} Ibid.
Employment Relations Act 2000

When the Minister of Labour moved that the Employment Relations Bill be read in the House a second time on 8 August 2000 she noted that the Select Committee spent five months (169 hours) hearing and considering 2305 substantive and 391 oral submissions, but that apart from some technical changes to Part 10 (Institutions) no substantive changes to those particular provisions were recommended. On moving that the Bill be read for a third time a week later she said:

I wish to ensure that this House clearly understands the broadness of the notion of mediation services under this Bill, and how the institutional arrangements generally are designed to focus on the problem between the parties.

The mediation services being established are about flexible and innovative problem solving. They are not confined to the limited formal mediation constructs that our employment lawyers are used to. They instead occupy a continuum from the provision of information through to formal or ‘pure’ mediation, the mix being chosen to suit the features and needs of the case in hand.

If a problem does go beyond mediation to the Authority and the Court, those institutions are charged with focussing on that problem and resolving it. They will not waste their own time, and that of the parties, by looking at how their fellow institutions have previously dealt with the same problem.

To these ends the objects for the institutions linked the ideas of: ‘successful employment relationships’ with reliance on the duty of good faith; their success with the prompt resolution of problems by the parties themselves; prompt resolution with ready access to ‘problem-solving support’ and information; problem solving procedures with flexibility; the inevitability of requirements for ‘judicial intervention’ with the need for triage by arbitration uninhibited ‘by strict procedural requirements’; ‘difficult’ legal issues with ‘higher courts’.

If these objectives are compared to those for the institutions in the ECA it is immediately apparent that recognition of the need to encourage self-resolution is

77 Hon Margaret Wilson, NZ Government Press Release, Employment Relations Bill Second reading, 8 August 2000.
78 Ibid.
79 Employment Relations Act 2000, s 143.
common to both, as is the desire for informality of process at entry level, and the necessity to resort to more formal court processes for complex legal issues.

The differences between the ECA and the ERA included the timing of institutional involvement, the formal recognition of the role of information provision in dispute resolution, and the supervisory role of the EC. The timing issue concerned the point at which outside assistance should be made available to disputing parties. The focus in the ERA, on supporting successful employment relationships, the availability of expert problem-solving support at short notice and on flexibility of problem solving procedures suggest a policy desire for disputing parties to resolve their differences before rights were affected or breaches of obligation crystallised. It can be contrasted with the objective of providing specialist institutions to deal with the rights of parties to employment contracts in the ECA wherein that assistance was available once rights, obligations and their breach in contract had crystallised.

In policy terms the ready availability of information and assistance in s 143(c) ERA formed part of the strategy for early intervention in dispute resolution. Similarly the supervisory role of the Court over the Tribunal (s 76(d) ECA) reinforced the importance of correct legal process in dispute resolution. This point of difference was underlined by the means by which the objectives were expressed.

The policy desire of the Labour Government to emphasise the relational over the contractual nature of employment was echoed in a perceived need to de-couple dispute resolution (problem-solving) from formal legal process. This required some attention to be paid to the use of language. Thus ‘parties to employment contracts’ in the ECA became ‘employment relationships’; ‘differences’ became ‘problems’; ‘speedy, fair and just resolution of differences’ became ‘problem-solving support’. De-legalising the language may have served other functions: the need, for instance, to signal a move away from the concept of dispute as the assertion of individual rights (s 76(a) ECA) to a greater focus on resolution, regardless of source of dispute.

A related difference concerned the connection between process and institutions. Section 76 ECA introduced the Tribunal and the Court and defined their respective roles. The institutions are not named in s 143 ERA, underlining the intention to

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80 Employment Contracts Act, s 76(b): Appropriate services that will facilitate the mutual resolution by parties to employment contracts of differences that arise between them, it being recognised that, in many cases, such parties are the persons best placed to resolve such differences and should be assisted to do so themselves;

Employment Relations Act, s 143(b): recognise that employment relationships are more likely to be successful if problems in those relationships are resolved promptly by the parties themselves;

81 Employment Contracts Act, s 76(c): A low level, informal, specialist Employment Tribunal to provide speedy, fair and just resolution of differences between parties to employment contracts, it being recognised that in some cases mutual resolution is either inappropriate or impossible;

Employment Relations Act, s 143(f): recognise that judicial intervention at the lowest level needs to be that of a specialist decision-making body that is not inhibited by strict procedural requirements;

82 Employment Contracts Act, s 76(d): a specialist Employment Court to...deal with particular legal issues, it being recognised that the nature of employment contracts is such that the parties to employment contracts from time to time require the assistance and certainty that can be provided by a specialist court.

Employment Relations Act, s 143(e) recognise that there will always be some cases that require judicial intervention; (g): recognise that difficult issues of law will need to be determined by higher courts.
privilege procedural flexibility over the institutional means by which dispute resolution services would be delivered.

Notwithstanding this difference of focus about issues of process, statutory definitions of the dominant claim of the jurisdiction, dismissal grievances, remained the same.  

Conclusions

Institutional Structure

Apparent from the earliest policy advice about institutional structure was a desire to address what were perceived to be the defects of the existing structure. However it became the sole driver of institutional reform, crowding out alternatives, thus ensuring domination of the policy process by the problems of the (immediate) past.

This explains the use of the term legalism to embody all that was regarded as problematic: the effects of requirements of legal process on the operations of the Tribunal; the way the ECs review function was exercised; the width of rights of appeal; the preference for adjudication as a first choice of mode of resolution and the corresponding absence of formal filter or triage mechanisms for reducing pressure on the Tribunal. Just as legalism was regarded as the source of all problems, so would informalism operate as a universal panacea. This required detailed consideration of cause and effect for remedial options, mainly by reference to the means by which representatives could subvert policy intentions.

Thus, removal of the ECs review function would only have the desired effect if the appeal structure was altered. Its mere existence was regarded as having the capacity to impose an undesirable formality of process on the lower order institution. However, less formal procedures in that body raised concerns that review and appeal rights would be adversely affected. Conferring a de novo jurisdiction on the ECs appellate function addressed these concerns because it reduced incentives to rely on defects of Tribunal process as the basis of appeal, provided a traditional adversarial forum for those who equated informality with unfairness, and eliminated the problem of confining the appellate function to the evidence adduced in the lower body. The problem of surface compliance (going through the motions of resolution attempts by lower order bodies in order to save evidence for the appellate one) raised by this appellate function was solved by transferring control for the provision of evidence from the parties to the Authority.

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83 Employment Relations Act 2000, s103 contained a sixth ground for a grievance, racial harassment, but otherwise is almost identical to Employment Contracts Act 1991, s 27, which in turn was the same provision as the Labour Relations Act 1987, s 210 (except that the word worker was replaced by the word employee) which was based on the Industrial Relations Act 1973, s 117, the statute that introduced the claim.


85 Department of Labour, note 8.
Separation of modes of resolution also served to address more than a single issue. The intention for the Mediation Service was that it would reduce pressure on the adjudication functions of the other two institutions by operating as a filter for proceedings for which settlement was likely. This undermined the prerogative of representatives to select mode of resolution. It also diverted them from focussing on process by requiring them to address issues of substance (the essence of the Department’s campaign against legalism).

Process disputes about whether mediation was appropriate were avoided by the decision to refrain from statutorily requiring it to be compulsory. Imposing on the Authority a duty to ensure that, where appropriate, matters were subject to mediation achieved compulsion by indirect means but the discretion to waive the requirement ensured that its ability to act quickly was not compromised.86

Structuring the route of dispute resolution in this way addressed the problem of classifying disputes according to the mode of resolution regarded as most appropriate for them. As some of the lawyer submissions to the select committee revealed, a characteristic of lawyer representative culture is a confidence about identifying what matters are or not capable of negotiated settlement.87 Their assertion of this confidence ignored the important fact about litigation in this jurisdiction that settlement occurred during the litigation process in more claims than were heard and decided but it serves to underline the difference of (representative) cultural view described in chapter 3 about timing of negotiation. Union/employer association representatives relied on early negotiations for early settlements and had adapted their behaviour towards each other accordingly, whereas lawyer representatives were more likely to see negotiation as a function of the litigation process.88

Separation of resolution functions created a problem for the preferred resolution mode of the Government’s political supporters, med/arb. This mode addressed the problem of dependence on multiple institutions or hearings for the resolution of low-level problems, an issue overridden in the policy development process by fears that a med/arb mode would be swamped by the demands of process.89 The concern about multiple hearings appears also to have been subsumed by an optimism that mediation as the dominant mode of resolution would solve this problem for most claimants. The inclusion of med/arb as an option offered by the Mediation Service (for parties who consented) avoided problems of appeal or review by the expedient of conferring the same status on mediator decisions as settlements.90

The major lesson of institutional functioning from the Department’s experience of the Tribunal, adequate resourcing for the new structure from the outset, resulted in the promise to double personnel at the lower levels.91

86 Employment Relations Act, s 159: Duty to consider mediation.
87 See, for example, the submissions in note 46.
89 Department of Labour, note 15.
90 Employment Relations Act, s 150 Decision by authority of parties.
91 Report of the Department of Labour, note 56.
Apart from the creation of the Mediation Service the institutional structure imposed on the jurisdiction by the ECA, designed to privilege individual over collective interests, remained intact.\(^\text{92}\) Never explored, for instance, were options that returned responsibility for grievance resolution back to employees and employers, or a committee system at which the interests of both parties were represented in the facilitation/decision function, or to any structure dominated by the collective interests of parties to employment disputes. It can thus be argued that retention of a structure that represented the preferences of legal representatives over collective ones entrenched, rather than challenged, their domination of dispute resolution in this jurisdiction. The addition of another tier to the structure served only to consolidate an already dominant position. This is a point Richard Abel makes in respect of what he calls the movement from formalism to informalism which he argues solidifies shifts in power from the less to the more privileged, but is nonetheless characterised in the language of process. Process values appear neutral: informalism does not obviously favour any group or category but because the outcome of informal processes is described as compromise and that produces unbiased results only when the opponents are equal then compromise between unequals “inevitably reproduces inequality”.\(^\text{93}\) This is also the position of Owen Fiss who argues that settlements reflect wealth and power inequalities and adjudication aspires to autonomy from distributional inequalities.\(^\text{94}\)

However Abel also argues that informal institutions have the capacity to advance the liberation of the less privileged, a more humane process (if they “express some of the aspirations of the disputants”), greater participation by parties and less dependence on professionals.\(^\text{95}\)

This in turn suggests a quality of outcome measure for the new structure, particularly if the view is correct that change in process, substance or institutional access alters outcomes:

> Because the vast majority of disputes are resolved by the disputants themselves anticipating the behaviour of legal institutions (formal or informal), the consequences of any change in that behaviour is greatly amplified in extra institutional social life. All processes are outcome influential, if not outcome determinative.\(^\text{96}\)

In providing for reinstatement as the primary remedy for individual grievances, a measure of its success would be the shift in remedies from damages for dismissal to reinstatements, or from ended to mended employment relationships. This was certainly the prediction of one commentator at the time this remedy was foreshadowed:

> In the individual context of personal grievance claims, the remedy of reinstatement will probably stage a comeback. This is likely to result in a significant change to the way personal grievances are resolved in the future. Where it is claimed, reinstatement is likely to become a more commonly awarded substantive remedy and this, in turn, will likely result in increased numbers

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\(^{92}\) Roth, note 74.


\(^{95}\) Abel, note 93 at 263.

\(^{96}\) Abel, note 84 at 301.
of cases where interim reinstatement is sought and granted, pending the substantive resolution of grievances.\(^{97}\)

The differences between the policy hope and Abel’s prescription for successful informal institutions also suggest a quality of process measure: the extent to which this structure advances or inhibits resort to the primary remedy. Abel is pessimistic. Characterising the privacy in which informal institutions operate as isolating grievants and inhibiting collective perceptions of common grievances, he argues that their remedies are limited to what their more powerful adversaries are prepared to offer:

As a consequence the grievant is receptive to the only remedy the informal institution can offer – exit from the relationship. Informalism thus offers a result, as well as a process, that is individualistic: it fosters labour mobility...This simply provides normative sanction for the dominant response to grievance and incipient conflict – namely avoidance.\(^{98}\)

Focusing on policy goals of maintenance and restoration of community relationships he observes that:

It is ironic that institutions publicly justified by the ideal of community and targeted at disputes arising in ongoing relationships serve instead to dissolve community and to terminate relationships by facilitating exit. Just as compromise preserves the material status quo, so exit reproduces the social status quo. The mediation technique chosen by most programs – communication by the disputants only indirectly, through the mediator, a form of shuttle diplomacy – increases the probability that the relationship will be severed, just as it does in labour disputes. Informal justice can be seen as adapting the middle class response to conflict – exit – to the circumstances of the dominated by surrounding that option with greater physical security and endowing it with authoritative normative approval.\(^{99}\)

This suggests that the challenge for the new structure, in both quality of outcome and process terms, concerned its ability to influence and effect changes to the results of employment relationship problems. If it continued to preside over the terms of ending those relationships, then it could safely be concluded that the changes to process were for nought. If, however, it became the means by which problem resolution contributed to greater stability of existing relationships then some success could be claimed for it.

**Mediation function**

The Department attributed the problem of legalism in mediation to perceptions of it as a function of the Tribunal’s adjudicative jurisdiction, meaning that it suffered from a formalised application or initiation process which required claims to be couched in terms of contractual legal issues and was restricted, in the remedies available, to those mandated by the adjudicative function. It thus conformed to lawyer requirements of the settlement process (formal claiming, appearance at a neutral forum, settlement of legal issues by a third party) by mimicking the way that lawyers settle litigation at the court door.

Disrupting this model was regarded as dependent on changing the object and style of the mediation services on offer, so that policy effort was devoted to the characteristics of the institution, in the hope that the shuttle style of Tribunal mediation (on which

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\(^{98}\) Abel, note 84, at 290.

\(^{99}\) Ibid, at 294.
legal representatives relied) would be overtaken by other approaches.\textsuperscript{100} The extent to which changes to initiation procedures and the style of mediation would alter these expectations was not considered. This may well have been the result of an optimism that since representation at mediation was unnecessary it would dissipate. In turn, this suggests a reduction in levels of representation at the Mediation Service resulting in the availability and use of a range of mediation styles as a quality of process measure of success.

Another measure of policy success concerned the point at which mediation services would be sought. Early intervention, for the purpose of strengthening, or maintaining rather than facilitating termination of employment relationships was the major policy goal for the Mediation Service. The emphasis, during the policy development process, on its information provision function suggested that it would operate proactively, to ensure that employers and employees were both aware of the assistance it could provide and incentivised to use it. However the means by which this would occur was not spelt out. This policy goal is also one that can be measured by reference to the status of employment relationships at the point at which the Mediation Service became involved.

The need for the information function highlights a fundamental problem for the evolution of mediation from its original use in the 19\textsuperscript{th} and 20\textsuperscript{th} centuries (as the means by which the collective interests of well-organised and experienced adversaries in industrial disputes were conciled) to its use in the 21\textsuperscript{st} century for individuals with widely differing levels of understanding and power.\textsuperscript{101} Joint facilitation of individual grievances by representatives of both capital and labour in the 1970s and 80s mitigated this effect by ensuring a rough kind of equality of arms in the availability of information and advice to disputants. This effect was lost with the transfer of the mediation function to the Tribunal whose guarantees of confidentiality had the effect not only of isolating disputants (from those with similar issues) but also of restricting flows of information about the resolution of those issues by others.\textsuperscript{102}

This suggests a similar quality of outcome measure for the information function as for reinstatement: the extent to which mediation contributed to the mending rather than the ending of employment relationships.

The employment status of mediators was a subject dear to the Department’s heart, perhaps as a result of its experience of administering solely warranted officers at the Employment Tribunal. Their refusal to accept administrative direction about circuit work in 1998 (when temporary reductions were proposed as the means to remain within budget allocations) became the subject of press attention and complaints to the Minister and revealed the existence of simmering tensions between warranted and administrative personnel.\textsuperscript{103} Employee status was likely to have been perceived as delivering staff who would be more co-operative and/or more easily directed, in the

\textsuperscript{102} Abel, note 84, at 290.
\textsuperscript{103} See Chapter 3: \textit{Administration}, note 140.
event of fluctuations of demand, thus providing the Service with the flexibility that the Tribunal lacked.

It is, however, more likely that its inability to impose performance accountability standards on warranted officers and to influence their rates of pay (set independently by the Higher Salaries Commission) were the reasons for its advocacy of this status. It was easier for the Department to collect and act upon information about individual mediator rates of settlement if they were employees, and to manage its budget. Part of the problem of resourcing for the Tribunal was created by HSC determined salary increases that were required to be met from existing budgets, unlike those for the judiciary which were outside the Department’s budgetary responsibilities. The Department was, furthermore, forced to go cap in hand to its Minister whenever increases in Tribunal member numbers were required to address delays. This must have operated as an incentive to change because control over mediator salaries suggested they would be cheaper to employ so that more of them could be engaged, thus conferring on the Department more power to directly address resourcing issues than it had for the previous decade.

This stance on employment status suggests the measure of success for this policy position as concerning timeliness of response to requests for mediation services.

The Department’s recommendation opposing the inclusion of a med/arb function represented a significant departure from its views of its utility to grievance committees in 1991. At that time it was regarded as a policy success because it provided for the final resolution of a greater number of grievances at entry level thereby reducing the need for the Labour Court to be involved. This change of heart underlined the dominance of its fears of further formalising mediation: any decision-making power carried that risk in its view. There may also have been a worry about the time that would be taken up by the decision-making function. A ‘pure’ mediation process had a greater chance of occurring within pre-set or acceptable time limits (e.g. half a day). These concerns were addressed by introducing requirements of consent for med/arb. There were, however, no obligations on the Service to advertise this function so take-up was likely to be affected by how well understood the existence of this power was to potential users. Its measure of success, given the Department’s opposition to it, can therefore be connected to its visibility.

**Adjudication function**

An explanation for resort to the inquisitorial or investigative model for the Authority, beyond the need for a local response, comes from an historical analysis of delegalisation movements in the United States, where cost (to parties and the state) was accepted as the major driver of reforms designed to address the problem of legal formality. The common response (at each end of the 20th century) was to channel and absorb minor conflict into specialised forums. This response was itself an aspect of broader social reforms which:

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104 Department of Labour, note 15.
105 Employment Relations Act, 2000 s 150.
attempted to expand the judicial capacity of courts and court-related institutions to manage minor disputes through the use of informal procedures, mediation and arbitration. The objectives of the contemporary [late 20th century] delegalisation movement are efficient dispute processing and expansion of access to justice in minor criminal and civil disputes. Both goals have antecedents in the progressive [early 20th century] reforms. Critics of both sets of reforms have argued that these two objectives are in conflict. But this historical overview has suggested that by examining these objectives in light of the organisational context from which delegalisation programmes develop, we find these objectives are collateral policies of an administrative-technocratic rationale for judicial intervention in order maintenance. It is apparent that dispute processes premised upon hostility to formality play a significant role in the judicial management strategies of the 20th century. The expansion of administrative access to justice and the expansion of participatory access to justice under such reforms were facilitated by the rise of judicial management and extended through the contemporary decentralisation of judicial management. Both objectives were structured by the politics of judicial management – the concentration of judicial power under an ideology of expanding participation.  

This description of the means by which order maintenance has come to be dominated by the legal paradigm helps to explain why the policy development process was confined to improvements to an institutional structure in place for barely a decade. The characterisation of the desire for change to institutional dispute processing as ‘hostility to formality’ neatly encapsulates the nature of the struggle between administrative and lawyer interests over the Authority’s adjudicative function. Lawyer concerns confirmed policy and administrative views about legalism (or formalism) because they relied on arguments that, decoded, equated quality (of decision, decision maker and process) with status. Accordingly ‘justice’ was only possible via judges (or at a pinch, the legally qualified) and adversarial process. These views can be contrasted with those of Fiss, who characterises adjudication as the pursuit of ‘justice’, not in terms of status or process, but in terms of its reinforcement of public, communitarian values. In its use of public resources and reliance on public law, adjudication explicates and underlines public values – those embodied by statute – so that litigation of them is the (public) mechanism by which they are enforced. Perceived in those terms, it could be argued that adjudication need not be tied to any particular mode, or set of rules, so long as process and decision are publicly defensible.

However Kagan’s description of Western European inquisitorial systems as offering efficiency advantages over their common law adversarial counterparts in claim resolution emphasises their multi-dimensional characteristics as a key aspect of their success. In addition to the greater control that judges have over case progress in inquisitorial systems, and their higher ratio to representatives (2-4 representatives per judge, cf 18 per judge in the United States) their recruitment, training, socialisation and supervision are directed at maximising adjudicative predictability, a social value accorded less status in common law jurisdictions. Efficiency in case progression could be regarded as an incident of this goal, rather than as an aim in its own right. This raises the issue whether it is possible to pluck from a system a mode of adjudication reliant for its success on a culture and a host of other characteristics not included in the transfer.

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107 Ibid, at 63.
108 Fiss, note 94.
110 Ibid.
These competing ideas about the arbitration function suggest that the measure of success for the investigative model lay in timeliness, rates of appeal and choice of mode of appeal. The time between claim and resolution would reveal whether investigations were quicker (and cheaper) than traditional adversarial processes, a high de novo challenge rate would confirm lawyer concerns about the problems of process in the ERA\textsuperscript{111} but a low rate could be scored as a win for the policy makers.\textsuperscript{112}

Adjudicative predictability, a potential measure of success of the investigative model, had particular relevance for the employment jurisdiction as the result of the preponderance of dismissal grievances. However the intention for the Authority to resolve problems (not legal issues) informally and immediately via “\textit{succinct determinations (rather than long legal decisions)}”,\textsuperscript{113} militated against this measure, as did the Authority’s power to resolve problems regardless of the way they were presented or classified. Precedent, an incident of legal method, was implicitly disavowed as a basis of problem resolution for the Authority because the higher courts could address difficult issues of law.\textsuperscript{114} Predictability, the stated aim of the Chief Judge in 1991,\textsuperscript{115} was therefore dependent on an adversarial rather than an inquisitorial institution.

The most significant changes to appellate functions were intended to disrupt formalism’s connection of ‘justice’ to status. Thus, limiting EC review functions to Judicature Act judicial review powers and further deferring their exercise by requiring rights of appeal to be exercised first\textsuperscript{116} was intended to deter reliance on process as the means of obtaining rights of audience at the Court of Appeal. This intention to reduce incentives to rely on superior resources in the search for the institutionalisation of ideological positions\textsuperscript{117} was reinforced by the addition of obligations on the Court of

\begin{footnotesize}
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\item[111] Kenneth Johnston, \textit{King John, Runnymede, the Magna Carta, and Other Stuff} [2000] ELB 158: “The simple fact of the matter is that process rights have been hard won over a long time (in fact, since the 15th of June 1215), and they remain vitally important. In the writer’s view there is every prospect that the procedure which the Employment Relations Authority seems likely to adopt in exercising its adjudicative role may be the subject of challenge.”
\item[112] Phillip Green, \textit{Vive La Difference? Dispute resolution under the Employment Relations Act 2000} [2000] ELB, 137: “Unless there is transparency within the process (and natural justice is concerned with ensuring a high degree of visibility through the process), then the Employment Relations Authority will be bereft of integrity before it starts work. This may require of the Authority that in practical terms it tempers the application of s 174(b). A strict reliance by the Authority on s 174(b) is likely to create mistrust. The party who “loses” will have that mistrust confirmed, because the process does not allow the opportunity for a losing party to understand how it was that the decision came to be made. The adage that “for justice to be done it must be seen to be done” is drawn from the well of human experience which says that such an approach will find a large measure of acceptability. The ER Act may offer speedy resolution, but will it provide for a just resolution?”
\item[114] Ibid.
\item[115] T G Goddard, Chief Judge, Employment Court \textit{The Only Constant is Change …The Changed Role of the Employment Court under the Employment Relations Act 2000} [2000] ELB 115: “My vision for the Court in 1991 was to achieve certainty in an environment that was novel and therefore obscure. I saw certainty as a high form of justice in this ambiguous atmosphere. Was this achieved? History will be the judge. An indicator may be that cases have latterly been settling at the Court door in increasing numbers.”
\item[116] Employment Relations Act, 2000 ss 188(4), 194.
\item[117] Roth, note 74.
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Appeal to apply a public interest test to the questions of law before it and to have regard to the objects of the statutory provisions at issue.¹¹⁸

The measure of success of this policy goal is likely to be in the extent to which the affected courts acknowledged and applied these restrictions. This would be reflected in the number of challenges and appeals. Compliance would reduce and non-compliance increase them.

**Representation and institutional personnel**

Explicit in the policy process was the intention to reduce the presence of lawyers in the dispute resolution institutions, particularly at the lower levels.¹¹⁹ Not only were parties free “to choose any other person to represent” them¹²⁰ but statutory provisions about the roles of mediator and Authority member remained pointedly free of individual qualification requirements. Although lawyers were associated with the formalist response to the ECA, to which increases in the time and cost of enforcing rights (particularly individual rights) were attributed, they have long operated as a focus for fears about their capacity to undermine intentions to confront formality. Abel’s characterisation of informalism as “expressing a strong, if implicit animus against lawyers”¹²¹ does not prevent him from also noting the paradoxical effect of reforms that seek to eliminate lawyers but which generate more legal business for them as the result of the way that “informalism interacts with formal legal institutions along complex boundaries”.¹²² It operates to both simplify disputes and increase their number, “making them more amenable to mass processing and permitting lawyers to increase their profits”.¹²³ This is an accurate description of the reaction of the legal profession to the creation of the Employment Tribunal and the appearance of no-win-no-fee advocates. It may also explain the predictions of a rise in appeals to the EC that its de novo function and the Authority’s investigative function would yield.

It is in the description of the means by which informal institutions exchange institutional dependence on lawyers for that of paraprofessionals (“notwithstanding the rhetoric of disputant participation and self-reliance”)¹²⁴ that Abel’s analysis can be put to use. He argues that informal institutions possess distinctive advantages for some participants and disadvantages for others. This raises the issue whether the change of role for mediators from the Tribunal to the Mediation Service had the potential to affect their status and authority as the result of the influence on the Department of academic perceptions of the role as non-directive and facilitative.¹²⁵ These ideas conflicted with lawyer requirements for the evaluative, directive style of Tribunal mediation. The facilitative/evaluative dichotomy was the subject of much debate between mediators in the United States in the 1990s when lawyers and former

¹¹⁹ Hon Laila Harré, Associate Minister of Labour, Speech notes “The Future of New Zealand’s Industrial Relations Framework”, address to the 14th Annual Industrial Relations Conference, Auckland, 7 March 2000: “The aim of these institutions is to keep costs down and make it unnecessary to involve a lawyer every time an employer or employee has a problem”.
¹²⁰ Employment Relations Act, 2000 s 236.
¹²¹ Abel, note 84, at 303.
¹²² Ibid.
¹²³ Ibid.
¹²⁴ Ibid.
judges came to dominate their ranks. Their more directive evaluative style challenged the existing facilitative style:

Some lawyers, and particularly former judges, did not easily take to the traditional non-directive style of mediation, relying instead on their legal knowledge and experience to ‘reality test’ with the parties about the strength of their cases and to ‘evaluate’ the issues and predict court outcomes. [The Judicial Arbitration and Mediation Service relied heavily on ex-judges as neutrals] in the conviction that the parties often wanted some sort of evaluation of their cases by a person who could speak with experience and authority about how a court might resolve a dispute.¹²⁶

This suggests a quality of process measure of success of the facilitative style favoured by policy for the Mediation Service as the extent to which it survived representative requirements for the evaluative model.

A related feature of Abel’s informal institutions is that officials within them with legal qualifications tend to dominate the shape of such institutions. They attract judicial support because of their value as repositories for economically, politically and socially insignificant or repetitive cases that don’t fully engage judicial legal skills (and may resist legal resolution) and because the existence of subordinates (particularly in high numbers) is status enhancing. Such institutions come, eventually, to resemble the courts they were designed to replace.¹²⁷

This suggests a measure of policy success for the Authority as the degree to which the Authority developed and maintained the inquisitorial culture prescribed for it. This was likely to depend on who dominated in the struggle for control over evidence availability, Authority member or representatives. As Roth noted, the change of representative culture required by this change to adjudicative function would only occur if industrial practitioners perceived that their clients’ interests were best advanced by shedding old adversarial habits for a mutual problem-solving approach that incorporated good faith obligations.¹²⁸

There is also a quality of outcome measure suggested by the policy desire to reduce the influence of lawyers on claiming and disputing in this jurisdiction: the extent to which their influence diminished, or altered in line with policy goals for problem solving approaches that supported, rather than ended employment relationships.

The following three chapters will describe and assess the operations of the institutions in terms of these policy goals and suggested measures of their achievement.

**Quality of Outcome**

We are endeavouring to rebuild an economy that recognises the reality of the global economy for a small economy such as ours. We must trade. We must compete. We must develop our skills. We must create environments that support and encourage innovation and creativity.¹²⁹

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¹²⁶ Rau, Sherman, Peppet, note 101, at 386.
¹²⁷ Abel, note 84.
¹²⁸ Roth, note 74.
¹²⁹ Hon Margaret Wilson, Minister of Labour, *New Zealand’s Path Forward* [2001] ELB 1.
This policy position for the ERA could well have explained policy for the ECA were it not for a prefacing disavowal of the latter’s construction of the employment relationship as a purely economic contract. This may explain why the new Government’s desire to promote collectivism in the labour market was expressly not to be at the expense of individualism, nor a return to the traditional instruments of compulsory unionism, national awards, monopoly unions, and compulsory arbitration.

Ultimately, the aim is to encourage individualism and collectivism to flourish side by side. Balancing the rights of individuals and promoting collectives presented quite a challenge to ensure that the legislation catered for both diversity and flexibility while addressing the fundamental issue of inequality in the workplace.

Both collective and individual rights would be enforced by the employment institutions, only more quickly and at less cost than under the ECA, by substituting its legalism for good faith, mutual trust and confidence and an emphasis on the human relational nature of employment. The ERA would focus on behaviours rather than contracts, on rebuilding cooperative workplace relationships for improved levels of productivity, buttressed by a new brand of mediation as the primary problem-solving process designed to be “fair, flexible and free”, neither institutionalised not restricted to formal intervention, supported by a specialist decision-making body uninhibited by strict procedural requirements and reinforced by reinstatement as the primary remedy.

This policy ambition for institutional process – that it would influence the day-to-day behaviours and negotiations on which employment relationships depend, in the hope that increased productivity, innovation and skill development would result – can be contrasted with the approach to the institutions under the ECA. In 1991 expectations of the institutions was limited to their role in order maintenance (in the transition from collectivism to individualism).

Analysis of outcomes will focus on the consequences of the ECA that the ERA was designed to overcome:

- a reduction in the level of unionisation from around 60 per cent to about 20 per cent of the workforce; increased flexibility in the use of labour through an increase in casualisation of work; stagnant gains to productivity to around 0.5 per cent a year; increasing levels of income inequality, especially in the middle income groups; increased compliance costs, especially in the area of personal grievances where the advent of lawyers increased the costs of the process of dispute resolution; and a decline in the skill base through a combination of emigration and failure to resource skill training and retraining.

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130 Roth, note 74.
131 Hon Margaret Wilson, note 129.
132 Lorraine Skiffington, note 113.
133 Ibid.
134 David Mangan, *Employment Tribunal Reforms to Boost the Economy*, (2013) 42 (4) Industrial Law Journal, 409 argues that recent reforms to employment tribunal procedures in Britain emphasise the use of law as a tool for economic stimulation rather than a source of rights protection, an apt description of this intention.
135 Hon Margaret Wilson, note 129.
Chapter 6
Employment Relations Act Institutions
Operations and Policy: The Mediation Service

Introduction
The aim of this chapter is two-fold: to describe the operations of and the policy development process for the Mediation Service (MS); and to assess both in terms of the measures (quality of outcome and quality of process) suggested in chapter 5 and those contained in the Department of Labour’s Evaluation and Monitoring Strategy for the employment institutions. This 3-phase strategy to ascertain the effects of the legislative changes to the labour environment was intended to focus on the new mediation and adjudication structures and the means by which they met the objectives of speedy, informal dispute resolution closer to the workplace, fewer formal disputes and better, fairer, ongoing employment relationships. Phase 1 of the strategy proposed research on how well prepared employers were to respond to the changes. Phase 2 proposed monitoring and tracking of the institutions, for the purpose of determining what effect the MS had on the resolution of disputes, by the collection and analysis of data about claims (types, numbers, timeliness, resolution, institutional capacity). Phase 3 proposed an assessment of the effect of the changes on employment relationships two or three years after the Act came into force by looking at whether there was any change in the number and type of disputes handled by the institutions.

The following analysis describes the MS’s operations and policy development for the period between 2000 and 2008 in terms of the Department’s Evaluation and Monitoring Strategy. Discussion of that material is contained in the section entitled Conclusions that considers, first, quality of process measures and, second, quality of outcome measures.

Operations: 2000-2005

Claim and Use Statistics
As occurred in the Employment Contracts Act era, the Department changed its means of collecting and describing the data concerning the employment institutions from time to time after the Employment Relations Act was enacted. Immediately apparent was a significant increase in reliance on institutional dispute resolution provided by the MS. In its first 9 months of operation (1 October 2000 – 30 June 2001) the MS received over 450 more requests for assistance than the highest of the annual filings at the Employment Tribunal. As with the Tribunal, requests for MS assistance initially
increased annually, but unlike the Tribunal they stabilised within 3 years, so that by 2005 the MS could expect to receive between 4,400 and 4,800 requests for assistance each 6 months (as it had between December 2002 and December 2005).

Personal grievances dominated the subject matter of mediations. By 2002 they constituted 65% of the workload.

Timeliness of resolution rates differed significantly from the Tribunal. Most requests were completed within 3 months of receipt (94% in the December 2002 quarter, compared with 91% in the same 2001 quarter).

Of outcomes derived from requests for assistance in the period 1 July 2001-30 June 2005 (average = 7000 annually) withdrawal/not proceeding rates stabilised at around 21%, settlements following mediation at 57% and not settled rates at 17%. However once private settlements are added to these outcomes it becomes clear that settlements rose in both number and percentage (of all outcomes) from 1291 (14%) to 2634 (27%). Private settlements are those concluded outside the Service, but registered with it for enforcement purposes.

Satisfaction rates

User satisfaction with the MS was high at the end of its first nine months of operation with a client satisfaction rate of 86%. Its services were regarded as an improvement on those offered previously, particularly for speed of scheduling mediations and flexibility with arrangements. A subsequent survey of satisfaction rates appeared to confirm the early one:

The emphasis on mediation has been a success. The June 2002 EMA (Central) survey concluded that 70% of surveyed employers who have attended mediation have been satisfied with the process and outcome, which suggests that the Act is working well…. Client satisfaction surveys confirm this view, with 88% of surveyed mediation users indicating they were either satisfied or very satisfied with mediation.

By 2004 the Service’s “culture of prompt and effective organisation” was described as one of its “undisputed triumphs”:

Almost without exception, the support officers at the Mediation Service are well organised and supportive in attempts to arrange prompt mediations. Further, the Mediation Service has shown a willingness to indulge parties by arranging mediations to fit particular circumstances which, among other things, might include:
• a willingness to mediate after working hours (to accommodate the needs of the parties);
• a willingness to mediate on weekends;
• an ability to take account of cultural considerations (by involving appropriate people in the mediation process — often in addition to the mediator); and

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3 In 2001 7,480 requests were received, rising to 8,920 in 2002 and 9,400 in 2003. Since then annual requests hover around 9,000.
4 Department of Labour for Minister of Labour, Use of Contact call centre (Infoline) and Mediation Service, (undated c early 2006).
5 Department of Labour for Minister of Labour, Issues Paper, Review of the Employment Relations Act (undated, c February 2003).
6 Department of Labour, Key Messages: Employment Relations The ERA is working (undated, c 2006).
7 Department of Labour to Minister of Labour, The First 9 Months under the ERA: Report for the period 2.10.00-30.6.01, 25 July 2001.
8 Department of Labour to Minister of Labour, Report (undated c late 2002).
• a practical ability to take account of parties’ concerns (such as security issues in the case of workplace violence or sexual harassment problems).

In short, from the practitioner’s perspective, the Government has provided a well-oiled machine, with an admirable ability to provide mediation services in a prompt fashion and taking into account the particular circumstances of the parties to mediation.9

Mediation style

The policy goal of ensuring the style of a mediation process was appropriate to the problem at issue was for the purposes of equipping the MS for an early intervention role in employment problems,10 providing for flexibility of service provision, and reducing the perceived formality of the Tribunal’s evaluative style of mediation. This appears also to be the reason for the employment of mediators for the MS from a variety of backgrounds. Some came from the Tribunal, union or employer associations, and others from different dispute resolution institutions and backgrounds. From the perspective of representatives, they fell into two groups: those with or without employment dispute experience. The former were identified with the evaluative, shuttle style that dominated Tribunal mediation and the latter with a facilitative style that was less dependent on knowledge or experience of the employment jurisdiction.11

Facilitation was regarded as well suited to repair and maintenance of on-going employment relationships, but these were not the problems presented to the MS in high numbers. Both union and lawyer representatives were recorded as critical of the facilitative style (associated with lack of industrial experience) although those from unions lacked the intensity and frequency of lawyer complaints. At the heart of complaints lay the role of the neutral in explicating the boundaries for resolution: “they want someone to tell them what might happen”.12

Neutral assessments of the strengths and weaknesses of party positions were regarded as promoting settlement. Their absence triggered some representative insistence on choice of mediator, which in turn resulted in widely disparate mediator workloads and settlement rates.13 Mediators with larger workloads and higher settlement rates were

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10 Paul Roth, The New Institutional Framework [2000] ELB 64: “Mediation services deal with ‘employment problems’ as defined in cl 157(3), which includes any problem arising from or related to an employment relationship and, in particular, any problem with existing terms and conditions of employment, and any problem with the determination of new terms and conditions of employment”.
11 Julie Morton, M.Com Thesis, Reducing Legalism: The impact of the Employment Relations Act 2000, University of Otago, August 2003; This difference may have been the motivation for training sessions in employment law for mediators lacking employment dispute experience: Paul Roth and John Hughes conducted at least one block of these sessions in 2002 (recollection of Paul Roth, written record unavailable).
12 Ibid, p 75; Steven Hooper (Chief Mediator) Report on the use of preventative pro-active mediation techniques as an alternative to event-based processes (2002) noted increased volume but consistent and dominant profile of dismissal grievance demands to broker exit packages were inhibiting the Service from adopting an early intervention role.
13 Morton, note 11, cites disparities of settlement rates of between 50% and 97%; p 79; disparities between mediation styles is a well-researched issue: Grant Morris Eclecticism versus Purity: Mediation Styles Used in New Zealand Employment Disputes, (2015) 33(2) Conflict Resolution Quarterly, 203; James Wall, Timothy Dunne and Suzanne Chan-Serafin, The Effects of neutral, evaluative and pressing mediator strategies, (2011) 29(2) Conflict Resolution Quarterly, 127; Daniel Klerman and
identified as those with industrial and/or Tribunal experience. The initial practice of allowing representatives to choose the mediator had ended by 2004, prompting one to observe that the practice was “neither appropriate nor practically achievable in a large number of circumstances”.14

Mediators regarded the requirement to mediate, the separation of modes of resolution, the speed of scheduling and the absence of the need for initiating documents as evidence of a reduction of formality and legalism at the MS (compared to the Tribunal). Lawyers took the view that nothing had changed, but there was a spectrum of views from unions about mediation formality. They regarded separation of resolution modes as significant, but saw the behaviour of lawyer representatives (who were perceived as engaging too often in surface negotiation as a response to requirements to mediate) as contributing to an increase in formality and legalism.15

The numbers of mediations concluded by mediator decision were less than 1%, notwithstanding the Department’s hope in 2004 that the planned amendments to s 150 of the Act would increase their number and the rate at which low-level matters were resolved. It was forced to admit that the MS was limited in its use of case management techniques to manage its workload, that there was not much attention paid to triage or prioritisation of requests but that this was about to change. It intended to accord priority to collective negotiations, ongoing work relationships and urgent matters.16

Mediator Quality

The Department was criticised for the lack of attention it paid to quality assurance issues affecting its mediators,17 and the absence of feedback or complaint mechanisms concerning them.18 Tensions between mediators and representatives centred on their respective roles: mediators believed that lawyers regarded mediation as preparation for adjudication,19 and lawyers believed that mediators too often slid into advocacy for the unrepresented.20 Commonly acknowledged were tensions arising from the legal positions of the parties: legal assessments of party positions were regarded by mediators as sometimes helpful but other times obstructive of settlement21 but any expression of a view about the legal merits of a position by a mediator was described as “always unhelpful”.22 The articulation of these concerns suggests that a more

15 Morton, note 11.
16 Department of Labour to The Treasury: Budget bid for (inter alia) 8 additional mediators, 8 additional support staff for Mediation Service (undated but early 2004)
17 Morton, note 11.
18 Scott-Howman, note 9, noted the absence of a formal process of feedback about mediators, and practitioner fears of complaints about mediators affecting subsequent mediation.
19 Colleen Hicks, Mediator: Employment Mediation – Getting the Best Results from Mediation [2005] ELB 44, noted that evidence testing by advocates in mediation potentially mitigated against settlement.
21 Hicks, note 19.
neutral way of assessing mediator competence would have been useful.

The absence of best practice standards or objective measures to evaluate mediator practice was complicated by the range of industry qualifications in dispute resolution, and organisations to which practitioners could belong, and the absence of any requirement to do so. The result was that initiatives to improve the provision of mediation tended to be dependent on individuals, or regional offices. Some, for instance, concerned about the quality of representatives, offered process and advocacy seminars for new advocates that were well received by district law societies, unions and employer associations, but this appears not to have been considered as part of any national strategy. When the upcoming effect of the 2004 amendments to the Act on mediator practice was raised the absence of a mediator handbook or guidelines was the subject of communication between mediators. There was no unanimity of view – some mediators believed the absence of guidelines was appropriate because it underlined their power to adapt mediation procedure to the circumstances of particular problems.

Guidelines were issued for use in early April 2005. They described the policy intention behind the amendments (the need for early attention to a problem) and the triaging process necessary to determine which matters would be transferred to the fast track process (single issue problems, remedies sought below $5,000, or only non-monetary, no ongoing relationship to preserve). Mediators were first required to determine whether a problem was suitable for fast track, then to obtain party agreement to limited timeframe resolution (by linking failure to mediator decision) and consent to use of the s 150 process.

These Guidelines were followed two years later by the Strengthening Mediation Practice Project. It sought to establish a best practice framework to ensure consistency through all mediation centres and to identify opportunities for practice innovation and specialisation.

23 Phillip de Wattignar to Department of Labour: Response to Green Paper on the Improvements to the Employment relationship Problem Resolution System, (undated, c 2008) p 4; see also training seminars for mediators in employment law, note 11.

24 Email communication between mediators employed by the Department, December 2004; the paucity of empirical literature on what constitutes competent mediation practice was not confined to New Zealand, see Dorothy J. Della Noce Evaluative mediation: in search of practice competencies, (2010) 27(2) Conflict Resolution Quarterly, 193.

25 Department of Labour, Chief Executive’s Instructions to Mediators also called General Instructions to Mediators (undated, c April 2005)

26 Department of Labour to Minister of Labour, Briefing Paper, Strengthening Mediation Practice, 12 April 2007.
Policy Development 2000-2005

Research projects

Dispute incidence

The first Phase 1 research the Department commissioned (a quantitative survey) sought data about the incidence of disputing (requiring third party assistance) in workplace environments.27

The range of sources of information sought by employer and employee respondents, their limited reliance on that provided by the Department,28 and the significant differences between employer and employee samples (2000 in each) in their reports of dispute incidence and outcomes suggested an absence of uniformity about, or common understanding of, remedy systems in workplaces. Clear, however, were differences between unionised and non-unionised employees: 61% of all employees who had experienced a problem were aware of written guidelines in the workplace for their resolution; 79% of union members were aware. This was regarded as consistent with other data available to the Department indicating that written procedures were more likely to be available in more unionised sectors, and unionised employees were more likely to be aware of them.30

Resolution processes

This survey was followed a year later by a qualitative study of employer/employee experiences of disputes and their resolution processes, factors relevant to success or failure and the new industrial environment.31 The absence of congruity between employer and employee views revealed by the earlier survey was confirmed in this research (and a third survey a year later) by reference to a range of issues: employees had a low, and employers (by the act of having to produce or revise employment agreements) a high awareness of the new Act, the Employment Relations Service and changed employer obligations; employees found it difficult to visualise dispute resolution as a process but larger employers maintained a process driven approach influenced by the Employment Contracts Act; employers viewed these

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27 AC Nielsen Ltd for Department of Labour, Survey of Employment Disputes and Disputes Resolution, November 2000: a quantitative survey of employer and employee experiences of disputes and their resolution for the purpose of measuring the incidence of disputes in the workforce, procedures for resolution, dispute outcomes, perceptions of the role of the Department of Labour, and establishing benchmarks for future research about the impact of the new Act on the incidence and process of dispute resolution.

28 The Department of Labour Infoline was used by 10% of employees as a source of information about a particular dispute and as a source of information about dispute procedures by 7% of employers; the Department’s other institutions – the Labour Inspectorate and the Tribunal were a source of information for less than 3% of each group: ibid.

29 For example, the employee survey reported 273 disputes per 1000 employees and 20% remaining in their jobs following resolution of a dispute but the employers reported a dispute rate of 22 per 1000 and 44% remaining in the job: ibid.


processes as fair to both parties with a few perceiving it as biased in favour of employees, whilst high levels of frustration were articulated by employees about the lack of clear resolution of disputes, delaying tactics and the difficulty of remaining in employment after raising a dispute. 33 This may explain why employees were dissatisfied generally with dispute outcomes and employers believed the majority of disputes were settled amicably.

For employees, third parties in disputes had support or advisory roles but for employers they had a very specific role of providing expertise on the new legislation. Introducing them to resolve a dispute was regarded as escalating the problem. Thus whilst most employers wanted to avoid formal mediation, most unions chose it as their first port of call.34

Choice of problem-solving process was dependent on its desired outcome. If employers wanted a workplace relationship to continue, private interventions (e.g private mediation) were preferred, but if they sought to end it a confidential settlement or resort to the Mediation Service were the accepted options.35

The differences identified within employer and employee groups are also instructive. Unionised employees had higher levels of satisfaction with dispute resolution processes than their non-union peers and employers of unionised employees (large employers) had a more positive view of union involvement in disputes than non-unionised business employers. There were clear differences in formality of process between large (80+ employees) and small employers. The latter were more reluctant to air a dispute outside the workplace and more suspicious of the MS (“as a pseudo court process with the employer on ‘trial’ for alleged breaches”).36 Employers with experience of the MS were more positive about it than those with none, which, if considered with other reported effects of experience on opinions in this jurisdiction, highlights a reliance on and repetition of myths and their transformation into “employment folklore.”37

A consistently reported view (across both groups) was that nothing had changed from the ECA regime (perceived by employers as ushering in the era of the personal grievance). The limited impact of the new statutory environment was confirmed in another evaluation of its short-term effects, with 68% of employees, 64% of employers and 66% of unions surveyed reporting no change.38

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33 Comparison of employee satisfaction rates between the UMR 2002 survey and the Waldegrave (ERS) 2003 survey: UMR 57% dissatisfied with process and 49% dissatisfied with outcome; ERS 65% dissatisfied with actions taken by employer to resolve dispute.

34 UMR Research Ltd, note 31.

35 Ibid; Employer preferences for private mediation were higher in the early years of the Mediation Service than later years. They reported that their early reservations about the quality of Mediation Service mediators was subsequently addressed: Martin Risak and Ian McAndrew, Who Mediates Employment Relationship Problems, (2010) Labour, Employment and Work in New Zealand Conference, Industrial Relations Centre, Victoria University of Wellington.

36 Ibid, at 77.


38 Waldegrave, et al note 30; this was also the view of Andrew Caisley, The law moves in mysterious ways, and Ian McAndrew, Julie Morton and Alan Geare, The Employment Institutions, both in
Although there were no common views about the outcomes of disciplinary disputes (except that reinstatement following dismissal was rare) there was a consistent acceptance that the outcome of an employee complaint was that it was either withdrawn or the employee resigned.

Follow-up research focussed on early intervention, the relationship between information provision and mediation, via a series of simulated role-plays of a variety of interventions (e.g. information + mediation, no information +mediation).\(^{39}\) The researcher found that, notwithstanding that mediation was most likely to lead to the result attracting the highest satisfaction rates, the provision of information, alone, about the subject of a dispute was perceived by managers and employees to be at least as desirable as the outcomes from mediation and information combined. However provision of information *simpliciter* was more likely than mediation to result in a request for third party intervention, suggesting to the researcher that there are benefits to both parties by early resort to mediation, particularly if it is preceded by the provision of information.\(^{40}\)

*Views about the Mediation Service*

The above conclusions were later tested in a qualitative survey of employer and employee users of the MS:\(^{41}\) their willingness to be involved in earlier mediation was a focus of the research. Previously recorded low awareness of the MS was confirmed, with common agreement that this changed when a dispute requiring outside intervention arose. Also common to both groups was the status of the employment relationship when mediation was sought, it had ended, or was about to end. Neither group believed that mediation could occur earlier in the resolution process.\(^{42}\)

An earlier survey of union experience of the MS revealed that about half reported that it had improved their ability to resolve problems (collective and individual) effectively, some saw it as a useful source of advice (for employers) and momentum, and welcomed its less formal and faster approach (confirming earlier employer views).\(^{43}\) Concerns focussed on variations of mediator expertise and rising legalism.\(^{44}\) Use of mediation increased with the size of the worksite and levels of unionisation, although the largest sites or those with the highest levels of unionisation did not have the highest levels of use (attributed by the report writer to the likelihood of better internal problem resolution systems).\(^{45}\)

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\(^{40}\) Ibid, at 2.


\(^{42}\) Ibid, at 10; cf analyses of the use of private mediation by employers in: Stephen Hooper, *The Use of Private Mediation in Organisational Disputes and Personal Grievances – The Experiences of Waikato Mediation Services*, (1996) Labour, Employment and Work in New Zealand Conference, Industrial Relations Centre, Victoria University of Wellington, 220; Risak and McAndrew note 35; both studies showed that private mediations tended to be early workplace interventions.

\(^{43}\) UMR Research, note 41.

\(^{44}\) Waldegrave, et al, note 30.

\(^{45}\) Ibid.
Lawyers who regarded mediation positively believed it worked best where access was prompt, the mediator operated as a facilitator rather than a legal advisor or judge, the mediation focused on the parties and their interests, a focus on legal issues was avoided and the employer expected to write a cheque:

…mediation often works best where the parties reconcile themselves to the fact that mediation is a forum which exists to allow them to strike a deal, rather than as a forum which exists to allow determinations to be made about such things as justice and fairness. … Mediation is a forum which encourages commercial common-sense, rather than emotional or moral justice.46

Policy implications

There are at least two policy issues suggested by this research. Firstly, if it is accepted that (non contract) disputes arise either from employer or employee complaint, that employers were generally satisfied, but employees not, with the means by which their complaints were resolved, then workplace remedy systems were perceived as a basis for entrenching employer advantage in the employment relationship. Demands for redress by employees were discouraged by guaranteeing either certainty of outcome (withdrawal or termination) or a refusal to engage, whilst similar demands by employers could be satisfied by a simple adherence to obligations of process.47 Recognition of this result would have underlined the importance of the s 3(ii) objective for the new legislation of ‘acknowledging and addressing the inherent inequality of power in employment relationships’, given data that indicated that 82% of employers and 58% of employees believed bargaining power to be equal in their workplaces, 86% of employers and 69% of employees perceived no change to their bargaining power in the new regime and 66% of unions considered that the new Act had made no difference to their bargaining power.48

The second policy issue raised by this study concerns the effect of information provision. Whilst the earlier survey revealed that the most common source of information for employees about problem resolution in the workplace came from their employer (with significant reductions in confidence about its veracity arising from involvement in a dispute), this study confirmed that for those whose source of information and support was their union, satisfaction rates about workplace remedy systems were significantly higher.49 Considered with data about the characteristic of employees most likely to experience workplace disputes, trade union membership,50 and that in chapter 3 which traced a declining presence at the Tribunal by unionised employees, this suggests a more complex relationship between provision of information and satisfaction with workplace remedy systems. Mere provision is

47 It can be argued that this ensured that employers could avoid confronting the implications of mid-1990s analysis of patterns of pre-grievance disputes that certain forms of business structure and management practices increase the likelihood of disputes within the workplace: Hooper, note 42.
49 Ibid.
50 AC Nielsen, note 27, at 7: Disputes per 1000 employees (Significant differences only) union members: (591 per 1000; non members: 156 per 1000) covered by a site collective contract (480/1000) in a large enterprise (+500 employees: 420/1000) in the public sector (394/1000), in the job for at least 10 years (390/1000) on the median personal income (379/1000); Keith Macky and Peter Boxall, Employee Well-Being and Union Membership, (2009) 34(3) New Zealand Journal of Employment Relations, 14, found differences in perception between the unionised and non-unionised of work overload and pressure, stress and unsatisfactory work/life balance (unionised report higher incidence).
clearly insufficient to establish confidence in them. The Department’s view (noted above) of the connection between union membership, higher levels of confidence in employer remedy systems, written procedures and increased awareness of them was also a subject on which its mediators had views. One of them (likening small employers who don’t belong to employer or trade associations to non-unionised employees) identified the following factors as important to successful workplace remedy systems: acceptance of conflict as a normal part of human interaction, access to early intervention processes to stop problems from escalating, and the provision of professional, accurate and partial information to parties which reflects and advocates their particular interests. Their influence on building trust and confidence helped parties to take their share of responsibility for the state of the employment relationship.

If the above views about the MS are considered alongside concerns about the emphasis within mediation on risk management (risk of escalation of dispute) rather than genuine settlement, the pressure to settle via compromise over money, and the lack of authority vested in the mediator, a public perception of the Service as an unlikely early intervener (particularly for non-unionised workplaces) is established. Respondents’ ideas for its improvement included more information about its process and outcomes, settlement guidelines (dollar amounts equated to type of dispute), banning of legal representatives, and policies for repeat offenders (frequent users), thus suggesting that they saw the Service as having a regulatory or judicial, rather than an ameliorative or facilitative, function.

Given the policy emphasis on privileging early facilitation for the purpose of supporting employment relationships (in preference to presiding over their end) this gap between public and policy perspectives of the Service’s functions called for further analysis. The policy issues overlooked then in the search for the connection between information provision and dispute resolution, but apparent now, include the role that the provision of partial (as distinct from neutral) information plays, and from whom and when. If it is accepted, for instance, that disputants require support and advice that is partial, not neutral, in the early stages of a dispute then their failure to look to the MS for help may also arise from its need to proffer its independence as evidence of its authority. Thus, status could be regarded as undermining the desired function of early intervention.

This was not necessarily the case, however, for union members. Their higher levels of awareness of, access to and satisfaction with workplace remedy systems appears to be replicated in their resort to the MS. The difference was described in the following terms:

In the case studies, all parties expressed the view that the involvement of lawyers in a dispute tended to draw out the process and raised the expense much more than was the case if the employer worked with the relevant union. Employers generally reported unions as moving to

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53 de Wattignar, note 23.
54 Scott-Howman, note 9, characterises as commercial prudence the employer practice of settling claims regarded as baseless by money payments that cost less than the price of a hearing.
55 UMR Research, note 41.
resolve disputes more quickly and pragmatically than their lawyers did. Their presumption was that unions did so in order to use their resources efficiently.\footnote{Waldegrave, et al note 30, at 117.}

This was also the view of the Department and may account for its opposition to a Legal Services Agency proposal to approve legal aid for mediation on the grounds that it would undermine the policy goal of a low-level, informal, “non-legalistic” problem-solving function for the Service. It made the further point that representation there was unnecessary:

The purpose of mediation is to assist these two parties to resolve the problem themselves, with the aid of an expert facilitator who can also make a decision if the parties so ask. These are not legal proceedings, they are fully confidential, and no matter raised in them can subsequently be used in any other litigation relating to the employment relationship problem. In fact the intrusion of legal argumentation can act to deflect the parties from reaching a solution to a problem in mediation that best suits their own situation.\footnote{Department of Labour to Legal Services Agency, letter, 16 February 2001. This view is supported by a Taiwanese study of 100,000 civil cases that concluded parties are most likely to settle when neither is represented: Kuo-Chang Huang, \textit{How Legal Representation Affects Case Outcomes: An Empirical Perspective from Taiwan} (2008) 5(2) Journal of Empirical Legal Studies, 309; Another study across seven jurisdictions (including NZ) of decisions to obtain legal assistance found that income had a low relationship to the decision. Those who could afford a lawyer forwent that assistance at similar rates to those on low incomes: Herbert Kritzer \textit{To Lawyer or Not to Lawyer: Is that the Question?} (2008) 5(4) Journal of Empirical Legal Studies, 309.}

This hope was realised to a limited extent in the MS’s early days, where levels of representation were significantly lower there than at the Authority, (49% for employees vs 68%; 27% for employers vs 60%)\footnote{These figures were collected in the quarter ending March 2002.} or at the Tribunal (84% employees, 60% employers 1.10.99-30.9.00).\footnote{Department of Labour (Employment Relations Service), Submission to the Law Commission on Preliminary Paper 51: \textit{Striking the balance}, 9 August 2002.} Five years later 88.8% of employees and 60% of employers were recorded as represented at mediation.\footnote{Department of Labour (Workplace Policy Research and Evaluation: Martin & Woodhams), \textit{Personal Grievance Mediations Conducted at the Department of Labour – a snapshot}, June 2007.}

This suggests that a difference worthy of analysis emerged both in the research commissioned by the Department and its own experience, between collectivist and individualist views of the MS’s functions (ameliorative/facilitative vs regulatory/judicial) and use (early vs late).\footnote{Paul Roth, note 10, anticipated the problem at the outset by noting that although the new legislation sought to promote collectivism, individual rights had not been rolled back.}

Focused as the research and evaluation effort at the Department was on disputing and its incidence or characteristics and on the performance of the MS, this issue of the differences of individualist and collectivist views (and approaches to dispute resolution) and their effects was never taken up. Clues as to why emerge from the Department’s attempts to draw together the results of the surveys and studies described above.\footnote{Department of Labour, \textit{Stock Take of Employment Relations Monitoring Systems}, 2005.} It did so by a focus on statistics of prevalence – of types of dispute, of employee and employer characteristics, existence of written procedures, satisfaction with and barriers to effective mediation, dispute outcomes. Significance was also attached to departures from other statistical norms, so that Maori, for
instance, were recorded as having higher incidences of disputing and union membership, than their numbers in the general population. Thus emerged a profile of the disputant in the workplace (male, Maori, unionised, full-time, in job for +10 years, large employer, public sector, earning <$30,000) that bore little resemblance to the profile of the grievant seeking mediation (NZ European, gender neutral, aged over 25, full time in job for 1-4 years, non-unionised). This focus on statistical data may have obscured evidence of trends or phenomena relevant to the policy issues regarded as important by the Department – an early intervention role for the Service, for instance – so that the sorts of connection suggested by a comparison of the data available appear not to have been made. The result was that it gathered a data rich resource about disputing in this jurisdiction that appeared not to be utilised, substantively, for policy development.

**Statutory review**

A Phase 3, formal review of statutory problem resolution mechanisms began in early 2003, at a time when pressures on the MS were said to be growing. It was coping with a higher than anticipated workload, two thirds of which concerned personal grievances (the majority being dismissals). These required mediators to preside over negotiations of relatively small claims (in terms of money and issues) that took as long to resolve as higher value or more substantive problems, thus generating a perception:

that mediation is simply a means of distributing money from employers to employees, as opposed to a forum where parties to an employment relationship problem come to solve problems.

This was regarded as potentially jeopardising the MS’s response rates and capacity for early intervention in subsisting relationships. The behaviour of representatives was regarded as the root of the problem:

Although the use of a representative in mediation is optional, it is estimated that representatives are present for 80% of mediations for individual problems.

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63 AC Nielsen, note 27.

64 This profile comparison is based on the AC Neilson Survey, note 27, and the Martin & Woodhams study, note 60. A more time-congruent comparison is not possible because the profiling of mediation users did not occur until 2007; Bernard Walker and R T Hamilton, *Grievance Processes: Research, Rhetoric and Directions for New Zealand* (2009) 34(3), New Zealand Journal of Employment Relations, 43, argue that an understanding of decision-making from the employee perspective may be a central element in greater knowledge of grievance dynamics. They call for more research to explain why employee behaviours occur, instead of simply observing overall grievance numbers and making generalisations based on anecdotal evidence.

65 Given that annual request and outcome numbers were stabilising during this period, it is possible that the parties, problem type and representation at mediation were imposing demands on the Mediation Service that had not been anticipated. An alternative explanation can be derived from the demands of the Department’s advice function: the description of problems tended to be dependent on Departmental agendas (vis a vis the Minister) that may have been obvious at the time but which, subsequently, are opaque.


While many representatives contribute positively to the mediation process, some representatives inject a legalistic, structured and adversarial element into mediation, which focuses on producing winners and losers, without regard to reaching a mutually beneficial resolution. Negative behaviour also includes representatives limiting their clients’ opportunity to deal directly and reach an agreement with the other party. Further, representatives at times frustrate the process and negatively affect outcomes through having no real understanding of mediation processes or through not understanding the law. The end result is that problems that might otherwise be solved at mediation are not, and advance unnecessarily to the Employment Relations Authority.  

For these reasons, amongst the issues notified to the Minister as relevant to the statutory review was whether the participation of lawyers was having an adverse impact on access to and the cost of mediation, its processes and outcomes.  

Amongst the solutions proposed, but ultimately rejected, was a fast-track one-hour process requiring agreement to a mediator decision if settlement could not be reached. Use of representatives would be discouraged, to streamline its effectiveness, encourage direct dealing between disputants, limit unrealistically high claims (to cover the cost of representation) and provide for settlements appropriate to the circumstances. Related, but additional proposals that were also rejected, included promoting self-representation, setting maximum fees for representation, limiting representation to particular types of problem (excluding it for grievances, similar to the ban on representation in the Disputes Tribunal), requiring pre-mediation self-resolution attempts, and promoting desirable representative behaviour via training programmes through professional guilds, e.g. the Law Society.

Perhaps because the Department’s perspective on representatives was not new these proposals could be dismissed as an attempt to secure a position previously rejected. Additionally, there was no unanimity of view amongst academics and commentators about whether the role of representatives had changed in the new institutions. Nor did the judges of this jurisdiction agree about the role of lawyers: whilst one was prepared to pass on lawyer views about the rising costs of process and the effect that the promotion of mediation was having on deteriorating levels of expertise in litigation, another was advancing the view that their costs of representation at mediation and the Authority were a significant barrier to access to justice available only at the Court:

...cases are not decided on their merits but simply don’t reach the courts...I think we have a very substantial segment of people involved in employment relationships who are practically unable to engage in litigation.

An academic study of the new institutions and their processes to assess whether the policy goal of reducing legalism had been achieved confirmed Department commissioned research that the anticipated changes to both the style and the subject

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70 Department of Labour, note 66.  
71 Morton, note 11.  
72 Chief Judge Employment Court to Department of Labour, letter, 24 October 2002.  
73 Colgan, J Speech notes for Industrial Relations Conference, (Department of Labour files), 2002.
of mediation had yet to occur. Contrasting their effects on adjudication with those on mediation, the researcher attributed the introduction of the inquisitorial role to perceptions that legalism had reduced in the Authority, indicating, perhaps, that signalling of policy goals, by means additional to their mention in legislation, may be a necessary precursor to their achievement.

The policy proposals that were accepted in the Phase 3 review were aimed at empowering the MS to work around the problems of representation, by clarifying and enhancing its ability to direct and control individual mediations. Amongst criticisms of its style was that mediators tended to ‘sit on the fence’ and take the middle ground regardless of (what employers saw as) the obvious merits or weaknesses of the case.

Thus, s 147 of the Act was amended to address lawyer objections to mediator powers by confirming mediator rights to talk to disputants in the absence of their representatives about the substance and progress of a mediation, when the problems of a party’s position became apparent.

Also included was a fast-track time-limited process that allowed for mediator decisions in the absence of settlement. It was intended to apply to claims for non-monetary remedies and those below the $3,000-$5000 range (60% of compensation settlements were for amounts under $5,000). The trade-off for a shortened process was availability of mediation at short notice:

Parties would enter the process in a clear expectation that, if they did not reach an agreement during a specified time, they would agree to a mediator-made decision by agreement under s 150. Parties who did not agree to this, or who did not agree to a concluded settlement at the end of the process, would be faced with the prospect of restarting their applications via the ‘normal’ more time-intensive process.

While such a process could be largely implemented administratively, it is desirable that some provision is made legislatively in order to clearly signal the place and objectives of the process within the current range of mediation services. A principles-based approach will ensure that mediation itself would not be overly regulated in terms of prescribing process.

This process required the prior agreement of the parties, however. Or, more accurately, their representatives. It was consistently not forthcoming.

The full range of amendments to mediator powers enacted in 2004 were the:

- recognition that mediators can manage any mediation process actively;
- extension of mediation services to contractors and others in work-related relationships that are not employment relationships.

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74 Morton, note 11.
75 Department of Labour, note 67.
76 UMR Research, note 41.
77 Employment Relations Act 2000, s 147(3).
78 Employment Relations Act 2000, s 147(2)(ab).
79 Department of Labour, note 67, at [54], [55].
80 Employment Relations Act 2000, s 143(da).
81 Employment Relations Act 2000, s 144A.
• reinforcement of the ‘horses for courses’ power to determine the kind of mediation on offer for fast track mediation; 82
• introduction (by prior consent) of time limited services with mediator decision in the absence of agreement; 83
• reinforcement of mediator powers to discuss issues with parties directly and in the absence of their representatives; 84
• prohibition on resort to cancellations of terms of settlement under the Contractual Remedies Act 1979; 85
• introduction of penalties for breaching terms of settlement or mediator decision; 86
• introduction of the requirement for payments agreed or decided at mediation to be made to be made direct to the party and not their representative, unless they were legally aided, or representative costs included. 87

Operations: post 2005

Claim and Use Statistics

By 2008 private settlements outnumbered those concluded with mediation assistance. In that year 5,970 mediations were conducted, of which 58% (3,474) resulted in settlement. However 3,857 private settlements were registered, meaning that of total outcomes (mediations and private settlements) private settlements constituted 39% and mediated ones 35%. These percentages and proportions were maintained at 41% (private) and 37% (mediated) for the following 3 years with settlements consistently constituting 62% of mediations for that period. Also stable were the percentages of mediations that were not settled (18%) and those for which no results were recorded (19%). 88

Additional data for this period, although outside the parameters of this analysis, suggests a trend about the type of employment relationships subject to mediation between 2005-8. Mediations held within 3 months and between 3 and 6 months of request were accorded priority or non-priority, dependent on whether the workplace relationship was ongoing or had ended. Ongoing relationships had priority status. The data suggests, from the proportions and relationship between priority and early

82 Employment Relations Act 2000, s 145(1).
83 Employment Relations Act 2000, s 147(2)(ab).
84 Employment Relations Act 2000, s 147(3).
85 Employment Relations Act 2000, s 149(3)(ab).
86 Employment Relations Act 2000, ss 149(4), 150(4).
87 Employment Relations Act 2000, s 150A.
88 Department of Labour, Mediation Service Completed Applications 1.1.08 – 31.12.11, (undated).
mediation and non-priority and later mediation, a declining use of mediation for ongoing relationships.\textsuperscript{89}

If private settlements (their need to be registered with the MS for enforcement purposes indicated termination of the employment relationship) are added to non-priority mediations, and if it is accepted that a proportion of priority mediations were settled by termination (given that terminated relationships constitute 75\% of mediations) then it is clear that a dominant role of the Service was to settle the terms of already ended employment relationships.

\textit{Cost and benefits of Mediation Service}

The comparative costs of running the Department’s various dispute resolution institutions were calculated at the end of 2004 to reveal that its Infoline (call centre information provision) cost $3.11 per enquiry,\textsuperscript{90} the MS $134 per settlement (or partial settlement), the Authority $493 per determination and the EC $2,579 per judgment. However these calculations were based on costs to the Department, so the cost of the mediation workforce was included but Authority member and judicial salaries excluded. Their inclusion would have significantly increased the gap between the cost of mediation and adjudication, (for the 2007/08 year the combined operational and member costs of the Authority were $9,221 per determination)\textsuperscript{91} thus further underlining the conclusion that there were advantages to shifting costs to procedures \textit{“that are less formal and focused more on providing information”}.\textsuperscript{92}

Comparing the major outputs across each of the activities is difficult, because they vary in their impact, cost and nature. However, analysis of settlement sizes in the mediation, authority and court services show that most cases are settled with payments of less than $10,000. This indicates that the severity of cases that all 3 services deal with is comparable. Although the size of potential settlements is higher in the authority and the court rather than mediation, they do not increase markedly.\textsuperscript{93}

A utility analysis, whereby expenditure and economic benefit of the institution at issue were calculated, indicated benefits of $59.4m and $58.9m from the Infoline and the MS but $3.2m from the Authority and a negative result from the EC of - $527,107.\textsuperscript{94}

\textit{Costs of resolution to others}

For employers the direct cash cost of disputes arose from legal and advisory fees (31\% of total cash costs), the payment of compensation (40\%) and the cost of

\textsuperscript{89} In 2008 mediations in both time categories were 43\% and roughly equivalent by type (52\% priority, 48\% non-priority); in 2009 37\% of mediations were held within 3 months and 54\% between 3 and 6 months, 43\% were accorded priority and 57\% not. The following year 33\% of mediations were early, 39\% accorded priority; 56\% later and 61\% non-priority. Similarly 39\% of early mediations in 2011 were matched by 46\% accorded priority and later mediations (50\%) matched the 54\% accorded non-priority status.
\textsuperscript{90} Contact centre (Infoline) received 223,317 calls in 2002/03 year; 250,062 in 03/04 and 251,102 O4/05.
\textsuperscript{91} Department of Labour, Paper, \textit{Average cost per Authority case 2007/08 year} (undated c 2009).
\textsuperscript{92} Dr Geoff Plimmer and Chris Cassels for Department of Labour, Report, \textit{Greater strategic positioning of service delivery to achieve outcomes} (undated, c November 2004).
\textsuperscript{93} Ibid, at 12.
\textsuperscript{94} Ibid.
temporary or replacement staff (29%). In-house resolution took the least amount of time (1-2 months) and incurred the lowest direct cash cost, followed (in ascending order of duration and cost) by use of external parties (representatives), the MS, private mediation, the Authority and the EC.\textsuperscript{95}

Duration and cash cost by resolution method

<table>
<thead>
<tr>
<th>Type</th>
<th>median duration</th>
<th>mean</th>
<th>median cash costs</th>
<th>mean</th>
</tr>
</thead>
<tbody>
<tr>
<td>In-house</td>
<td>1 month</td>
<td>2.3</td>
<td>300</td>
<td>3000</td>
</tr>
<tr>
<td>External parties</td>
<td>2</td>
<td>3.5</td>
<td>5,800</td>
<td>13,100</td>
</tr>
<tr>
<td>Med Service</td>
<td>5</td>
<td>6.2</td>
<td>7,275</td>
<td>13,600</td>
</tr>
<tr>
<td>Other mediation</td>
<td>2</td>
<td>9.6</td>
<td>3,200</td>
<td>6,800</td>
</tr>
<tr>
<td>Authority</td>
<td>9</td>
<td>9.8</td>
<td>14,000</td>
<td>13,300</td>
</tr>
<tr>
<td>Court</td>
<td>16</td>
<td>15.5</td>
<td>75,000</td>
<td>75,000</td>
</tr>
</tbody>
</table>

Satisfaction rates were highest for in-house processes (79%) and lowest for reliance on third parties (40%). Large employers (+100 employees) are the most satisfied with resolution systems and medium employers (10-19 employees) the least satisfied.\textsuperscript{96}

**Policy Development post 2005**

*Research Projects*

*Dispute incidence rate*

A survey of over 800 employers in 2007\textsuperscript{97} revealed that 13% had experienced a dispute (unresolved by an immediate manager) in the previous 12 months, yielding an incidence rate of 1.5 per 100 employees, which rose the smaller the employer. Employers of fewer than 10 employees had an incidence rate of 2.5-2.9 and employers of more than 100 a rate of 1.1.

Employees aged 25 years or younger experienced 13% of disputes, but for each older age group the rate was 28% per decade (until 55, after which the rate was 4%).

The majority of workplace disputes involved salaried employees. Hourly rate employee disputes cost their employers significantly less. The absolute correlation was between payment basis and cost rather than level of remuneration and cost. The greatest incidence of individual disputes occurred with those earning between $21-39,000 and employed between 1 and 5 years (62%), followed by those employed less than a year (23%). Long serving employees had the lowest incidence of disputes, but

\textsuperscript{95} Department of Labour, Workplace Strategic Policy Research and Evaluation (McDermott Miller), *Social and Economic Costs and Benefits of Employment Disputes*, 12 July 2007.

\textsuperscript{96} Department of Labour for Cabinet Economic Development Committee, *Review of the Employment Problem Resolution System*, (9 October 2007) (EDC (07) 185), Appendix 1.

\textsuperscript{97} Department of Labour (McDermott Miller), note 95.
the cost and duration of disputes rose as employment lengthened. Duration of dispute also increased for younger, mid salary, shorter-term employees.  

Grievance party characteristics

Of the types of grievance mediated over a 5-week period in mid 2006, over 75% concerned the termination of the employment relationship. Forty-three per cent of applicants were in the 40-65 year age group (49% of the workforce) and 37% aged between 25 and 40 (32% in workforce) with an almost equal gender balance. The majority were NZ European (62%, cf 79% of workforce), followed by Maori (16%, cf 9% of workforce) other European (10%) and Pacifica (3% cf 4% of workforce).

Small (1-5 employees) and medium (6-19) employers were overrepresented in these grievance claims in comparison to their presence in the workforce (14% involved small employers who employ 11% of the workforce and 26% involved medium employers who employ 19% of workforce). Employers of 20-100 employees matched their grievance and workforce presence (23%) and large employers of +100 staff were underrepresented (31% cf 47% of workforce).

The status and length of the employment relationship yielded the most significant data: 83% concerned permanent full time jobs and 76% concerned relationships of less than 4 years duration: 38.7% of grievants were employed for a year or less, and 37.4% had been employed between 1-4 years.

Small and medium employers had a higher proportion of grievances taken against them in the first 6 months of employment and were more likely to face unjustifiable dismissal claims:

Small businesses had a markedly more negative view of the impact of ERP provisions than large ones. It is likely that small businesses will generally have fewer HR resources and expertise than larger businesses (who can afford to employ specialists). Small businesses are also unlikely to be experienced in dealing with ERPs as they may have one only every four or five years. As a result, their information about ERPs is more likely to come from media reports, or through business networks, which may amplify “horror stories”. Consequently, small businesses may expect the costs of resolution to be high and fear that their processes would be found to be inadequate.

Employers of +100 employees (where the employment relationship at issue was generally longer than a year) were more likely to attract claims of unjustifiable action (where the relationship continues):

Consistent with this finding, claims of unjustifiable action were significantly more likely to be made by employees employed for five years or more, and personal grievances of unjustified dismissal were more likely to be made by employees employed for nine months or less.

Mediation Outcomes

Representatives were relied on by 88.8% of applicants and 60.7% of respondents, the most common for both being lawyers (43.5% applicants; 40.3% respondents). Union

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98 Ibid.
99 Department of Labour (Martin, Woodhams), note 60, at 6.
101 Department of Labour (Martin, Woodhams), note 60, at [3.11].
representatives appeared for 22.4% of applicants and employment advocates for 20% of applicants and 16% of respondents. The research found no relationship between representation and the probability of settlement, but a significant relationship between the type of representation and the amounts of monetary compensation agreed.

Full settlements were achieved in 62% of the mediations and partial settlements in 5%. There was a financial component of settlement in 51% of all mediations, with the most common amount in the $2,000-5,000 range (25% of all mediations):

Under multi regressive analysis the following factors had the greatest amount of influence on the levels of compensation agreed at mediation:

- Applicants who had a lawyer had higher amounts of compensation agreed at mediation;
- Respondents who had representation (particularly by an association or union) paid out lower amounts of compensation; and
- Personal grievances related to redundancies resulted in higher amounts of compensation.

However even combining all of these factors explains less than a fifth of the variation in compensation.

About a third of the applicants represented by lawyers had included in their terms of settlement payments termed legal costs. The most common amount was between $1-2,000, but almost as many secured amounts in the $2-5,000 range. The research did not identify whether the differences in compensation agreed between those represented by lawyers and those represented by others were also reflected in the net amounts retained after the payment of the costs of obtaining it, because the data was collected from mediators, not parties.

Complaints

Small employer business association complaints formed the basis of a study in 2007 about the high costs of resolution, rising numbers of meritless grievances incentivised by no-win-no-fee advocates or benefit stand-down requirements, allegations of systemic biases in the employment institutions favouring employees and the more onerous impact of resolution requirements on them. Research data failed to corroborate these concerns: there was a steady number (9,200) of annual applications over the previous 7 years, no-win-no-fee advocates were found to be limited in number and effect but regarded as offering access to justice to low-paid non unionised employees unable to afford legal advice, and statistics from Work and Income revealed fewer than 5 benefits per month for the 3 years to 2007 were granted in lieu of a stand-down period. The allegation of systemic bias in favour of employees was countered by data that revealed that each group believed the other to be advantaged by the resolution system.

102 Ibid, at 6.
103 Ibid, at [3.13]; cf Kuo-Chang Huang, note 57.
104 The data on which the research relied was compiled from questionnaires completed by mediators, not the parties; A study of Labour Courts in Mexico found that on average workers recovered higher percentages of their claims in settlements, but that they also recovered on average less than 30% of what they sought: David Kaplan, Joyce Sadka, Jorge Silva-Mendez, Litigation and Settlement: New Evidence from Labor Courts in Mexico (2008) 5(2) Journal of Empirical Legal Studies, 309.
105 Department of Labour (Woodhams), note 100.
The researcher ventured some insights into why some problems escalate. Noting that problems arising from employee misconduct followed a more predictable path than performance and inter-personal relationship issues, he identified the search for “more objective reasons” to terminate an employment relationship as:

likely to be destructive of trust and be regarded by employees as showing a lack of good faith. Consequently, anything resembling a ‘fishing expedition’ is likely to escalate the issue into a major dispute. Where the employees had not already brought in legal representation, such tactics led to their bringing representatives in and representatives took a harder line on experiencing such tactics. It is therefore likely that fishing will extend the process, and therefore the costs.106

This result was described as dependent on what was at stake. For employees this concerned alternative job prospects, the social, psychological and familial impacts of the dispute and the desire to clear their name. The stakes for employers included their assessment of the costs of the resolution pathway, the effect of publicity on their reputation, and whether a precedent within the workplace was created.107

Costs of representation

By early 2006 it was apparent to the Department that those of the 2004 amendments aimed at resolving the cost of representation at mediation had failed to stem complaints from employers about the high costs of participation in the employment resolution system.108 Lawyer costs demands within mediation were also a source of complaint.109 Interestingly the briefing material on the issue avoided any mention of an earlier Cabinet Committee direction to the Department to develop a best practice guide for representation fees, work on which could not be found.110

Amongst the suggestions for policy work (which also included dispensing with representation at mediation or the imposition of fee maxima) was gathering evidence from the Disputes and Tenancy Tribunals. That work was not commissioned, but the suggestion echoed representations to the Minister three years earlier by a Community Law Centre concerned that employees were not well served by the current model:

This community law centre sees mediation as an effective component of any dispute resolution process and strongly supports its inclusion in the current model. As discussed in previous correspondence, the Disputes Tribunal process incorporates mediation as an integral part of the hearing and referees are specifically trained in mediation techniques. It is a particularly effective and efficient way of dealing with low level proceedings and it is difficult to see how collapsing the current employment process for low level claims and removing solicitors and advocates from the process in these cases ‘could result in resourcing and cost issues’…

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106 Department of Labour (Workplace Strategic Policy Research and Evaluation, Woodhams and Howard), Economic and Social Costs and Benefits of Employment Relationship Problems and how they vary according to mechanisms used for resolution, July 2007, at [6.3].
107 Ibid, at [4].
108 Department of Labour for Minister of Labour, Briefing Paper, Cost of Representation under the Employment Relations Act, 3 February 2006.
109 Kenneth Johnston, Some Random Observations Concerning Mediation in the Employment Area, [2002] ELB 117: deplores the practice of settling advocacy costs during mediation, noting that negotiations about the reasonableness of costs sought can take up a significant proportion of the mediation.
You highlight that ‘if parties engaged in mediation wish the mediator to make a binding decision about the problem, they may agree so in writing’. I was unaware of this option as it is not well publicised by the Mediation Service. 111

The writer noted that the Disputes Tribunal handled 20,000 cases annually at a direct cost of $125 per case. Its average waiting times were 10 weeks which compared favourably for those claims requiring determination with the then existing waiting times of 6 weeks for mediation and 5 months for investigation by the Authority. The response emphasised the delays that a single mediation/adjudication system under the Employment Contracts Act had engendered, admitting also the absence of research supporting the assertion:

that separate mediation services are resource-efficient and to collapse the mediation and Authority continuum into one step could result in resourcing and cost issues. 112

**Discipline and Dismissal Project**

When this policy issue was first mooted in 2006 the Department was asked to address two concerns: whether no-win-no-fee advocates were incentivising grievance claiming; and whether employers were avoiding the grievance claims process by paying out employees in private settlements. 113

The research plan included (another round of) obtaining information from stakeholders about the extent of problem resolution outside the institutional framework, its characteristics in “highly productive workplaces” and the extent to which they replicated or differed from statutory procedures. 114 It also sought insights into the effects of representatives on settlements in mediation, and the reasons why the MS’s imprimatur on ‘recorded settlements’ were sought, by commissioning a snapshot study of MS mediations. 115 A law firm had earlier been commissioned to assist with research into the effect of Authority and EC decisions on employer processes via a report on case law about disciplinary and dismissal disputes. 116

**The Employment Problem Resolution System Project**

By mid 2007 the representation and discipline projects begun in 2006 were incorporated into the Employment Problem Resolution System Project, which was initially intended to cover grievance resolution, the cost of representatives and the development of a code of employment practice. Its brief was to propose options for change and recommend to Cabinet those that it preferred. 117

111 Whitireia Community Law Centre to Minister of Labour, letter, 29 January 2003.
112 Minister of Labour to Whitireia Community Law Centre, letter, 3 March 2003.
113 Department of Labour, Report on findings from focus groups inquiring into experiences in resolving employment disputes outside the Employment Relations Act 2000 dispute resolution framework, 2007.
114 Department of Labour for Minister of Labour, Briefing Paper, Employment Relations Research – Dispute Resolution, 13 July 2006.
115 Department of Labour (Martin & Woodhams) note 60.
116 The Department commissioned law firm Buddle Findlay to prepare a report on case law about disciplinary and dismissal disputes in May 2006.
Understood by then was that most (up to 90%) disputes were solved privately, use of third parties was dependent on the specific or specialist skills on offer (legal advice, mediation, counselling), many employers knew the likely times and costs of settling privately or publicly, the MS was perceived to be the formal, less desirable route to settlement (but valued when utilised), private processes were associated with repairing and maintaining the relationship and the institutions with legal concerns.\textsuperscript{118}

The Department was also aware that: small employers were more concerned than large employers about problem resolution; the resolution process incurred social and emotional costs for both employers and employees who each believed the formal resolution system favoured the other, but who both sought timely resolution; employers preferred in-house resolution but employees a process that enabled them to be heard; small employers were more likely to pay higher amounts to settle privately than larger ones as the result of their inexperience of problem resolution, ignorance of settlement options and lower probability of having formal resolution systems in place.\textsuperscript{119}

Union membership was acknowledged as an effective means of internal problem resolution where union representatives acted as informal mediators in the workplace. They supported employers (in respect of dismissals considered to be justified, where for instance, breaches of health and safety policies affected other employees) but had a reduced presence in small workplaces most at risk of dispute escalation.\textsuperscript{120}

The MS was valued for assisting with the settlement process once an employment relationship had ended, for ensuring fairness, testing the merits of potential grievances and ensuring settlements could be enforced but was also criticised for the variation of mediator styles and skill levels, separation of parties at the expense of problem solving and for its vulnerability to lawyer requirements for a quasi-courtroom and their inhibiting effect on the provision of mediator risk assessments.

Unions were described as proceeding directly to the MS. Lawyers were regarded as dominating proceedings, refusing to allow parties to speak for themselves, focused on win/loss and monetary outcomes, and responsible for inappropriately formalising the mediation process. Other (individualised) employee advocates were also regarded as guilty of dominating settlement processes, and escalating disputes.\textsuperscript{121}

From these studies and surveys, its own service delivery experience, and consultation with employer and union national associations the Department concluded that the problem resolution system was meeting its objectives but could improve its functioning. The criteria it suggested against which options for improved functioning would be measured concerned whether the system’s credibility would be enhanced, its participants better informed, imbalances of power addressed and rights to access to justice preserved. Its preferred options required more work (scoping, problem

\textsuperscript{118} Department of Labour, Comment on: Report on findings from focus groups inquiring into experiences in resolving employment disputes outside the Employment Relations Act 2000 dispute resolution framework, 2 July 2007.

\textsuperscript{119} Minister of Labour for Cabinet Economic Development Committee. Review of the Employment Problem Resolution System. (9 October 2007) (EDC (07) 185), Appendix 1.

\textsuperscript{120} Ibid.

\textsuperscript{121} Department of Labour, note 118.
definition, cost benefit analyses, delivery vehicles, budget bidding).\textsuperscript{122} The exception, development of a code of employment practice,\textsuperscript{123} began immediately. This work triggered consideration of codes of practice for disciplinary processes. However it soon became clear that the Council of Trade Unions opposed the idea. It was quietly dropped.\textsuperscript{124}

The work that Cabinet agreed should proceed included the means by which use of the mediator decision provisions of s 150 could be increased, mediation services improved, and the quality of paid representation better assured.\textsuperscript{125} Within the Department this work project was known as the Green Paper.\textsuperscript{126}

*Use of s 150 powers by mediators*

This was the subject of two surveys conducted in May 2008, an internal one of mediators and an externally commissioned survey of employers, employees and representatives.

Analysis of the data from mediators concluded that use of the decision power was most often the result of individual mediator choice.\textsuperscript{127} The policy intention for s 150 - that the Service should provide for resolution (whether by agreement or decision) for low-value disputes for which a two-stage process in the absence of agreement could not be justified – was not fulfilled by the mediator approach, described as more carrot and stick. The survey concluded that there was a significant inconsistency of

\textsuperscript{122} Minister of Labour, note 119.

\textsuperscript{123} Provision for Codes of Employment Practice was established by Employment Relations Act, 2000 Part 8A, in December 2004.

\textsuperscript{124} Minister of Labour to Department of Labour, Memo, *Code of Employment Practice*, 1 April 2008, directing the Department to cease work on the Code of Employment Practice following a meeting between the Minister, Department officials and the Council of Trade Unions.

\textsuperscript{125} Cabinet Economic Development Committee, Minutes, *Review of the Employment Problem Resolution System*, (24 October 2007) EDC Min (07) 24/6: Cabinet agreed that further work on the following 6 options for improving the functioning of the employment relations problem resolution system should proceed:

- increasing educational resources and support for employers, employees and their representatives, including improving Department of Labour guidance for employers/ees on employment relations problem resolution and termination of employment
- exploring the extent to which the quality of paid representation from employment advocates (except lawyers and union/employer association advocates) could be improved
- assessing whether statutory provisions (s 124) for the reduction of compensation for contributory conduct are effective
- assessing how greater use could be made of s 150 powers
- increasing mediator and Mediation Service capacity and capability
- exploring options to reduce time taken by Authority members in investigation and determination of cases, including consideration of changes to Authority process

\textsuperscript{126} *Green Paper on the improvements to the Employment Problem Resolution System.*

\textsuperscript{127} Department of Labour, Internal paper, *Section 150 Employment Relations Act*, 26 May 2008: Mediators (85% of the Department’s mediators responded) were asked about their 5 most recent cases. Of 128 mediations, of which 28% generated the offer to have the mediator decide, only 1 resulted in use of the power of decision. The reasons for not offering this option were that it was unnecessary because the parties were able to resolve the problem (34%), the problem was too complicated (19%), the employment relationship needed to be preserved and the power to make a decision was perceived as damaging that prospect (13%), the representatives would have rejected the offer (4%).
mediator practice in the use of the power. This resulted in a recommendation for additional training of mediators if use of s 150 powers were to increase.128

The external research revealed high awareness of the power but few offers by mediators or requests by parties to exercise it. Offers tended to be made in the middle or near the end of the time allotted for the mediation, and when a party sought use of the power it was accepted only when both parties wanted the problem resolved. The low rates of offer or request for use of the power were said to be because it was unnecessary, parties lacked confidence in the mediator, the employment relationship needed to continue, there was no evidence available on which decisions could be made. This last response came from a representative who confirmed that use of the power would never be sought or accepted.129

The policy response to this data was a proposal to present three options to parties to an unsettled mediation: mediator decision, mediation termination or mediator recommendation (conditional upon there being either one party clearly at fault or faults on both sides with a clear compromise solution available and/or low proposed remedies).130

Consideration of this proposal revived the old arguments about the need for purity of resolution mode against the expense of a two-stage process. The Department’s mediators opposed the proposal:

I think the hopes that some put in s150 are illusory. Mediators are not arbitrators and there does not appear to be a safe, principled and consistent approach to how and when s150 would be made available to the parties. Best practice requires both that there be an agreement to mediate and there is a clear mediation induction process entered into with the parties prior to the s150 process. DoL could consult with AMINZ, LEADR and NZLS on what is currently recognised and recommended and used as best practice. The recommended approach could then be publicised.131

It was agreed that the Mediation Practice Manager would prepare and circulate to mediators a practice note promoting greater use of s 150 and describing the circumstances in which mediators should recommend its use to parties.132

128 Ibid.
129 UMR Research for Department of Labour, Mediation Survey, May 2008: This study on the use of s 150 relied on 155 respondents (26 employers, 55 employer representatives, 15 employees, 59 employee representatives). All were aware that the mediator could make a decision if both parties consented but few received offers from mediators to make decisions. Of those who did, both parties accepted the offer. Offers tended to be made in middle or near end of a hearing. Where a party requested a decision the other party accepted the intervention in a majority of cases because both wanted resolution. Among the 81 employers and their representatives 8 had received a mediator offer, 11 had sought a mediator decision and 62 had received no offer nor made a request. Among the 74 employees and their representatives 8 had received a mediator offer, 9 had sought a decision and 52 had received no offer nor made a request; Of the 19 employers to whom a decision was offered or requested 4 resulted in a mediator made decision and 15 did not result in a decision. Of 13 employees to whom a decision was offered or requested, 6 resulted in a decision and 7 did not.
130 Department of Labour, Internal paper (Policy to Mediation Service) Section 150: a possible approach, 29 July 2008.
131 de Wattignar, note 23, at 4.
Improving the capacity and capability of the Mediation Service

In mid 2008, when this issue was the subject of consultation with the Department’s stakeholders, the MS employed 39 mediators in 7 regional offices. Its problems were defined as capacity in collective bargaining mediation (noted as restricted to a small pool of highly experienced older mediators and no succession planning for their replacement), access by Maori, restricted use of modern technology (almost all mediations required the presence of all parties in the Department’s premises), and use of mediation in workplaces. Better training (in other models, in partnership with other institutions), use of online and videoconferencing and establishing a mediator-in-workplace programme were recommended.133

At that time there was no formal programme of independent evaluation of mediator capability, nor were there any published best practice standards. This meant that mediators were vulnerable to assessment via the views and expectations of participants and their representatives. Key to acceptability (for these parties) was an understanding of the culture and practices of industrial relations, but this was not necessarily the basis on which new mediator appointments were made.134 Political support for the view that industrial relations practices should form the basis of the mediation services on offer came from the Government’s objectives for the Department in its Statement of Intent for the 2007/08 year (which emphasised the need for interventions to focus on the underlying causes of poor workplace practice, rather than on symptoms) but the policy effort remained firmly fixed on the range of techniques of alternative dispute resolution for individual disputes.135

Regulating Employment Advocates

The Department was directed to explore the extent to which the quality of paid representation by employment advocates could be better assured.136 This was the Government’s response to employer complaints of meritless claims against them, reliance on no-win-no-fee arrangements and the use of mediation to extort financial settlements for these claims on the basis that they were cheaper than the costs of proceeding to the Authority.137 The legal profession was specifically excluded from the enquiry, notwithstanding the view that their litigation and adversarial focus posed greater and more frequent obstacles to progress at mediation than the subjects of these complaints.138

The policy options agreed by Cabinet in 2007 (requirement for advocates to belong to a professional association or promotion of those who belonged to one that had a code of professional ethics) were joined by two more: development of an online tool ‘rate my advocate’ or limiting free mediation by imposing costs on those that were unnecessarily lengthened. Promotion of the use of advocates in professional organisations was the recommended option because it did not require legislative intervention, avoided the problem of breaching NZ Bill of Rights Act protections of

133 Department of Labour, (Smith to Workplace Leadership Team), internal paper, 15 May 2008.
135 Department of Labour, note 133.
136 Minister of Labour note 122.
137 Department of Labour, (Workplace Leadership Team), internal paper, 12 May 2008.
138 de Wattignar, note 23.
freedom of association, and the benefits of raising professional standards and simplicity of implementation carried fewer risks than the other options.¹³⁹

Green Paper consultation

By mid August 2008 it was clear to the Department that Green Paper consultation with stakeholders had failed to engage them in any substantive way with its issues and proposals. The comment that the consultation document elicited was contradictory and confirmed that larger employers and those who belonged to employer associations were generally well catered for and that those least served by the problem resolution system, non unionised employees and those employers who did not belong to employer associations, were unlikely to benefit from any of the proposals under consideration.¹⁴⁰ The ensuing briefing to the Minister recommended (inter alia) the issue of practice notes to mediators promoting the use of s 150 powers of decision, no further action on the proposal to require employment advocates to belong to professional associations and greater financial investment in the MS.¹⁴¹ The Minister accepted the first two and rejected the third of these recommendations.¹⁴²

Following the 2008 General Election the incoming Minister was briefed about the Employment Relations Problem Resolution System work programme. She was advised that recent research suggested a high level of satisfaction with the MS. At that time the MS employed 35 mediators.¹⁴³

Conclusions

Quality of Process

Informality and flexibility of process, the major policy goals for the MS, were perceived as key to the quality of outcome goal of supporting and maintaining successful employment relationships.¹⁴⁴ Additional measures of quality of process were timeliness of expert problem-solving support, information provision and assistance.¹⁴⁵ Assessment of the extent to which these goals were achieved follows (below) by reference to ease of access to the MS (claiming), the timeliness of its response, and the range of mediation styles on offer. It is accompanied by analysis of other measures adopted to ensure informality and flexibility – institutional separation of mediation from adjudication, and the employment status of mediators. The effect

¹³⁹ Department of Labour, note 137.
¹⁴⁰ Department of Labour, (Aitken to Strang, Armitage) internal paper, Initial thoughts on the Green paper issues/proposals re educational resources/support re Employment Relations problem resolution system, 7 August 2008.
¹⁴³ Minister of Labour to Department of Labour, Briefing Paper Overview of the Employment Relationship Problem Resolution System Work Programme, 23 December 2008.
¹⁴⁴ Employment Relations Act, 2000, s 143(a), (d).
¹⁴⁵ Employment Relations Act, 2000, s 143(b), (c).
of maintaining rights of representation for those seeking mediation - the policy issue that attracted most contention – concludes this analysis.

**Claiming**

Access to MS assistance required a phone call or email, either to the Department’s Infoline or directly to the MS. The information required of an applicant, obtained by prompts from the MS, enabled it to take responsibility for contacting and persuading the other party to agree to mediation, and for scheduling.

Provision of mediation by the MS was at no charge. For parties reliant on representation, costs differed according to choice of representative, from no cost of representation for union members to subsidised costs for members of some employer associations to success or contingency fees for those using no-win-no-fee advocates to full costs, regardless of result for parties reliant on lawyers or employment advocates. Thus, the difference in costs to employers of reliance on the MS over private mediation (in the costs table above) must be attributable to higher related costs (representation, remedies, replacement staff) rather than the cost of the resolution process, given the need to pay the cost of a private resolution process.

By comparison to mediation conducted by the Employment Tribunal the MS:

- collected no charge or filing fee for provision of mediation services;
- required no initiating application by claimants;
- annually received significantly higher numbers of claims;
- achieved a stability of number of requests within a short time of commencement.

On these measures, cost, application process, use and administration the MS can be regarded as achieving the quality of process goal of informality and flexibility of access to its mediation services.

**Timeliness**

Whilst the scheduling process appeared to users of the MS to remain consistent over the period under review, providing parties with almost immediate certainty of a date for potential resolution (and the incentive for self-resolution, consistently by a fifth of total requests),\(^{146}\) there was a major difference in timeliness of response between the MS’s first five years and the following 3-year period in the point at which mediation occurred. Over 90% of mediations were held within 3 months of request in the early period, but that dropped to 43% in 2008. In the later period over 90% of mediations were held within 6 months of request. The result was that the Department’s measure of timeliness increased from three months to six months. It followed the decision (c 2007)\(^{147}\) to prioritise the provision of mediation assistance to ongoing employment relationships. The proportional similarity between the priority status of requests and

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\(^{146}\) This figure is calculated from Mediation Service use statistics compiled by the Department of Labour.

\(^{147}\) The decision to administratively categorise requests for assistance appears to have resulted from the Green Paper policy process. Documentation of the decision has not been located.
time categories suggests a connection between the administrative classification of a request and the time in which it is addressed. The extent of the connection remains unclear. It is, however, possible to speculate that the classification system introduced a measure of administrative formality that affected the time efficiencies that were a feature of the earlier unclassified reception and scheduling system.

It is also possible that timeliness rates declined at the MS because a 3-6 month measure was as acceptable to users as a 0-3 month measure, particularly if the scheduling process consistently delivered a mediation date close in time to the request for assistance. Specificity of date close in time to request can be contrasted with the practice of the Tribunal that often required parties to wait for several months before acquiring a date.

Another explanation for declining timeliness of service provision may lie with an issue discussed in greater detail below, namely the types of problem requiring resolution. When the MS commenced it was anticipated that it would deal with a wide range of employment relationship problems. It is likely that its mediators believed they would be assisting parties to resolve problems in continuing work relationships, that the MS would operate more like it had in the 1980s than the Tribunal of the 1990s. By 2005 it must have become clear that the work that was anticipated constituted a very small minority of that which was presented. As at the Tribunal, mediators were required to preside over negotiation of the terms of terminated relationships, which constituted over three-quarters of the problems requiring mediation assistance. And it was not just the problem that was familiar. The nature of the parties was too. They were likely to have been in the employment relationship for less than a year, and certainly not for more than 4 years, the employer was likely to have less than 20 employees, and the employee to be permanent, full time and salaried. Neither party belonged to a union or employer association and each was dependent on advice from lawyers or employment advocates for whom fees were derived from ending, rather than maintaining the employment relationship, but who were unable or unwilling to negotiate the terms of its dissolution with each other directly.148

These factors suggest that timeliness of mediation provision was influenced by:

- scheduling on receipt of claim/request;
- control over scheduling vested in the MS, rather than parties or their representatives;
- the informality of the process by which scheduling occurs (absence of initiating documents and applications for hearing), the flexibility to immediately accommodate the needs of both parties, and the ability to provide a date shortly following request;
- singleness or clarity of resolution function.

Timeliness may have been affected by:

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148 This composite description is drawn from the following sources: Department of Labour, notes 95 and 99; de Wattignar, note 23.
• the introduction of administrative procedures that seek to classify and/or prioritise specified types of request or problem;
• the passage of time on institutional functioning;
• service provider disillusion.

It can thus be concluded that timeliness of response to requests for assistance is a quality of process goal that can be accepted as met for the scheduling of mediation.

Timeliness of mediation provision was also a quality of process goal that was met for the first 5 years of the MS’s existence. The doubling of the period within which most mediations were conducted for the following 5 years represented a departure from the standard set for meeting this quality of process goal. The reduced standard of timeliness compared favourably, however, with standards of timeliness at the Tribunal.

Range of mediation styles

In its recognition that the style of mediation on offer had to change (from that offered by the Tribunal) if the policy goal of early intervention was to be met, the Department proceeded on the basis that separating resolution functions and conferring on mediators the power to decide the style and process of individual mediations would be sufficient to ensure that its desired change of style occurred.

Two distinct styles of mediation, facilitative and evaluative, were on offer with med/arb available by consent. It is possible that the expressed policy preference for a range of styles, a horses-for-courses approach dictated by mediator assessment of the style most suitable for individual parties and problems and the Department’s determination to ensure there were no rules of process by which representatives could disrupt mediation meant there was no need to discuss the issue of mediation style in any depth. This position would have been confirmed by the Department’s experience of mediation as the mode of problem resolution that had consistently yielded the best results over the preceding decades. Its intentions for informality of adjudication at the Authority would also have led it to believe that there was a low-cost readily accessible adjudicative option for disputes that were incapable of settlement.

It may be for these reasons that the Department did not consider that any additional signalling of the policy desire to change the style of mediation was necessary. But its reliance on some Tribunal members as the first of the MS’s mediators and their continued use of the shuttle-style evaluative model may well have signalled that nothing much had changed. This style was initially that of the Mediation Service of the 1980s when the parties were union and employer groups who settled grievances similarly to collective issues, by way of bargaining. For the individual representatives who came to dominate use of the Tribunal the evaluative model was a function of both its status as the precursor to Tribunal adjudication (rather than as a dispute resolution mechanism in its own right) and their demands for the risk assessment model that this status engendered.\textsuperscript{149} Thus, the Tribunal mediation function came to

\textsuperscript{149} Ian McAndrew, Julie Morton, Alan Geare, \textit{The Employment Institutions} in Rasmussen (ed) \textit{Employment Relationships, New Zealand’s Employment Relations Act}, (Auckland University Press, Auckland, 2004) 99; Johnston, note 109, describes, from a mediator’s perspective, the differences in counsel approaches to mediation, between those who saw it as a dry-run for adjudication and those
serve two purposes and constituencies: as the basis of litigation risk analysis, with settlement as an incident, but not necessarily a goal, for legal representatives (in much the same way as pre-trial or interlocutory processes preceded settlement in other jurisdictions) and as assisted negotiation with the aim of resolution for collective advocates.

The reason for the failure to consider the implications of differing or competing styles of mediation is less important than its consequences. The facilitative style was not acceptable to representatives and mediators and lawyers decried the med-arb style, so these models never gained the traction that was envisaged for them. Additionally, the dominant problem presented for mediation, the negotiation of the terms of a dissolved relationship, favoured use of the evaluative style because participants sought assurances about the strengths and weaknesses of the positions they had adopted. But these were also positions from which a failure to achieve settlement could form the basis of an arbitrated outcome. The parameters of resolution of this type of problem were well understood and were, in most cases, insufficient to justify the cost of separate adjudication by the Authority. They did, however, require that mediators had experience and knowledge of the employment jurisdiction.

By 2003, when the review of the Act began, it was clear that the policy hopes for the use of a range of resolution styles had been thwarted. As the statutory amendments concerning it reveal, this was perceived by the Department to be the result of (individualised) representative insistence that the process requirements for adjudication applied to mediation (e.g. formal opening and closing statements, absence of contact between parties and referee). However there is no evidence (apart from some regional mediator initiatives to offer representative training) that the Department considered measures additional to the amendments necessary to modify representative behaviours and expectations. Lawyers continued to be allowed to read aloud lengthy opening submissions, for instance.

The high proportion of dismissal problems, reliance on the evaluative style and a continuing failure to consistently and regularly offer arbitration as the means of guaranteeing an outcome, particularly for low-value claims, affected incentives to settle. The cost (of representation) of proceeding to the Authority for adjudication became the measuring stick (or, dependent on perspective, threat) by which settlement options were assessed. A tariff approach to costs orders at the Authority meant that a successful party would be reimbursed only for a small proportion of the costs of representation actually incurred. This was a source of complaint, particularly from small and medium employers, once representatives recognised its value as the basis of securing settlements unachievable by adjudication. The problem affected both employers and employees: small employers were more likely (than large employers) to agree to monetary settlements as the cost of avoiding further action (regardless of a claim’s merit); non-unionised employees of larger employers, for similar reasons, were more likely to settle for significantly less than their entitlement, or not at all. Thus, inequality of bargaining power for these groups of individuals was likely to determine their outcomes.

who gathered information for the purpose of deciding whether to settle.
This suggests that dominant use of one style of mediation became a component of entrrenching bargaining advantage or disadvantage. Use of the evaluative style as a means to achieve *fairness* in the face of obvious inequalities of bargaining power was dependent either on mediator expertise or exercise of the arbitrative power. However the latter was restricted to parties who consented to its use. Those with superior bargaining power had no reason to do so. Availability of the power was neither advertised, nor the subject of any formal guidance about its use. It is possible to argue that the Department’s opposition to its inclusion as a mode of resolution affected both its availability and use.

It can therefore be concluded that

- the policy desire for use of a range of mediation styles was not achieved by the MS;
- for some participants the evaluative style of mediation in use by the MS had the effect of underlining their lack of bargaining power in the employment relationship at issue;
- for these participants, exercise of the s 150 power was a means of addressing that problem but this redress was denied them;
- the Department’s fears about the formalising effects of the exercise of the s 150 power ensured it was rarely and inconsistently available.

*Separation of modes of resolution*

There was a major administrative benefit for the Department in separating modes of resolution. The semi-compulsory requirement to have a problem mediated before the Authority could investigate removed choice of resolution mode from representatives, regarded by the Department as part of the problem of Tribunal functioning. It thus conferred a triage function on the MS that transformed institutional planning and resourcing. Although the ready availability of mediation effectively doubled requests for assistance, those numbers stabilised relatively early in the MS’s history (in a way that applications to the Tribunal never did), thus achieving for the Service an operational stability that was denied the Tribunal.

In addition administrative processes could be devoted solely to scheduling and conducting mediations. This simplicity of function may account for the efficiencies of claiming and timeliness discussed above.

The rising numbers of privately settled claims registered for enforcement purposes (and their eventual replacement of mediation as the dominant mode of settlement, similarly to the trend apparent in the Tribunal’s final year) suggests also that, in terms of Galanter’s theory about lawyers and “*litigotiation*” (private resolution by lawyers occurring primarily in the shadow of the court), the *court* embraces any official dispute resolution institution to which claimants are obliged to look for assistance. In other words, mode of resolution of institution may be less important than institutional status as an initiating venue for claims. Speed of scheduling, and the absence of opportunity to prevaricate by resort to process or interlocutory issues are also likely to have influenced rising rates of private settlement requiring no institutional intervention. Since mediation affects what representatives can achieve without
assistance it follows that ready access to the Service became the prompt by which private resolution could be achieved.

Administrative efficiency was not, however, the policy goal publicly advanced for the institutional separation of resolution function. Rather, separation was promoted as the means to achieve an early assistance role for the MS, a sort of marriage guidance bureau for employment relationships. Freed from the need to preside over ended relationships, the MS would function as a first port of call for those who sought to mend their relationships. This accounts for the need to offer a range of mediation styles and to maintain an informality of process via direct contact between mediator and (unrepresented) parties. The failure to achieve this policy goal appears to arise from an inability to consider the implications of servicing two separate and distinct constituencies of the employment jurisdiction - collectivised and non-collectivised employer and employee parties to disputes.

The early assistance role sought to replicate for non-collectivised workplaces what occurred in their unionised counterparts. But, in recognising the importance of an information function for this role, policy makers proceeded on the basis of an assumption about information source that the evidence suggests was wrong. The Department’s Infoline was a source of neutral and factual information relevant to the workplace. But provision of this information failed to transform Infoline or the MS to trusted assistant, intervener, or adviser because that was not their role. As Department research revealed, preferred sources of information in the early stages of a dispute are partial, not neutral, regardless of the constituency to which the disputants belong. It is in the advocacy of a position that results differ according to constituency: unionised employees are more likely than the non-unionised to achieve early satisfactory resolution that maintains the employment relationship. Advocacy was never a role available to the Department’s institutions, so the policy failure to recognise that information without advocacy could not form the basis of an early intervention role may be key to understanding why it was unachievable.

This failure to incorporate an understanding of the differences of advocacy style in policy for the institutions had another effect. It rendered the institutional separation of resolution modes a component of the high costs of resolving disputes in this jurisdiction. Since the parameters for settlement (at both the MS and the Authority) were, for the majority of disputes, below the threshold for civil claims to be resolved by the Disputes Tribunal, it soon became apparent to those familiar with both jurisdictions that civil claimants were significantly better served. They enjoyed a one-stop-shop, certainty of schedule, time limited resolution, no costs of representation and a guaranteed outcome.

The separate provision of adjudication following failure to achieve mediated settlement had two additional effects. It diminished resort to the s 150 power and it institutionalised the evaluative style into the dominant process by which mediation services were offered, for the reasons specified above in the discussion of mediation style. This meant that the tropes of Tribunal modes of resolution were confirmed, consolidated and maintained.

Use of the s 150 power was always dependent on an acceptance that certainty of outcome was more important than the maintenance of purity of resolution style. Resolution rates of 65% suggest that purity of resolution style was maintained at the
expense of certainty of outcome. Once the rate of Authority determinations are factored in (10-15% of total mediations) it becomes clear that about 20% of those in receipt of mediation services may not have achieved an outcome (the extent to which private settlements are reached following a failed mediation is unclear).

It is possible to argue from this that the overall effect of maintaining the purity of resolution styles was either to deny an outcome to a potentially significant proportion of those who engaged in mediation, force acceptance of an unfair outcome, or significantly raise the costs of obtaining a fairer outcome.

Separation of modes of resolution, therefore:

- achieved administrative efficiencies by conferring a triage function on the MS and transferring control of use and scheduling from representatives to the institutions;
- increased the recorded incidence and earlier timing of private settlements (those requiring no institutional input for the settlement process);
- was accompanied by significantly increased requests for assistance;
- failed to result in an early assistance role for the MS in employment relationship problem solving;
- rendered certainty of outcome more costly for participants;
- affected the use to which the s 150 power was put;
- institutionalised the evaluative style as the dominant means of providing mediation services;
- incentivised postponement of fairness of outcome assessments.

Mediators as employees

In addition to obtaining more control over claiming and scheduling the Department was empowered to exercise greater control over mediators as the result of the change of their employment status from independent statutory officers (warrant holders) to employees of the Service.

As is now becoming clear, administrative measures of the MS’s effectiveness produce different results than those of other policy outcomes. Its ability to recruit mediators in numbers that satisfied demand ensured that the measure of success suggested in the previous chapter, timeliness of response to requests for assistance, can be accepted as met.

The paucity of practice and performance standards or manuals, formal guidelines, or accountability measures suggests, however, that the clear administrative direction that the Department sought (from this change of status) to implement policy for the MS never occurred.\textsuperscript{150} It was, furthermore, slow to act on evidence (in the form of widely

\textsuperscript{150} Department of Labour: Employment Institutions – Options Paper, 28 January 2000.
differing settlement rates between mediators) that its enthusiasm for generic mediation skills over employment experience was misplaced. Users and their representatives (both individual and organisational) rated knowledge and experience of the employment jurisdiction as significantly more important for mediator effectiveness than the facilitation skills of those who lacked this experience. Settlement rates confirmed the divide.\textsuperscript{151} The Department, however, appeared to associate experience of the jurisdiction with \textit{legal knowledge} so the practice of preferring those with generic skills persisted. This may help to explain differences in annual outcome rates of mediation between the Tribunal (around 80\%) and the MS (around 65\%), although other differences (e.g. ease of access and usage) are also relevant.

If mediators with generic skills had a greater commitment to maintaining the ‘purity’ of the mediation function than those with experience of the jurisdiction, it is possible to argue that this view was aligned more closely with the Department’s fears about use of the arbitrative power. If greater use of the arbitrative power raised the outcome rate then it can be argued that commitment to purity of mediation function was a component in both entrenching inequalities of bargaining power and postponing resort to \textit{fairness} as a basis of achieving outcomes.

The change of employee status for mediators thus:

- contributed significantly to the policy goal of offering more timely provision of mediation services;
- presented an opportunity for managing a close alignment between policy goals and mediation practice that was under-utilised by the Department;
- may be associated with lowered settlement rates by the MS (in comparison with the Tribunal);
- may be a component in a greater commitment to the style than the outcome of the provision of mediation services.

\textit{Effect of representation}

Research evidence gathered after 2000 about the influence of representation on grievance resolution confirmed what the Department already knew from its experience of the Tribunal: significant differences between collective and individual representative cultures were reflected in workplace resolution rates and institutional functioning. Unionised grievants and their employers had higher rates of disputing and resolving in-house (than their non-unionised counterparts) and employers accepted that union advocacy was a component of this effect. This meant there was less need for recourse to institutional dispute resolution. The opposite was established for those reliant on individual representatives. They experienced lower rates of in-house disputing and resolving, longer duration and more costly disputes and greater need for institutional intervention.

\textsuperscript{151} Morton, note 11.
From this can be noted a paradox: policy for the MS’s functions was based on a collectivist approach but its constituency relied on the individualist approach to problem resolution. This helps to explain the policy effort that went into ameliorating the influence of individualised representatives on the MS’s functioning. The success of that effort can be assessed by reference to claiming and scheduling, mediation style and separation of resolution functions.

The transfer of control over claim initiation and scheduling from representatives to the MS establishes its major point of difference from the Tribunal. Its informality of process and active administrative control of these preliminaries limited the influence that representatives had on timeliness of institutional response at the Tribunal. Interestingly these were the changes that both mediators and union advocates cited but lawyers ignored when asked if the MS’s processes were less formal than those of the Tribunal.\(^{152}\)

The attempt to introduce a different, less formal mediation style foundered in large part on opposition by lawyers to the incidents of facilitation. These included facilitation’s need to elicit from disputants, directly, non-legalised cues about the dispute that are regarded as relevant to the means by which resolution occurs. Lawyers reacted to these attempts by denying mediators direct access to their clients, hence the need to clarify and enhance mediator powers to direct and control mediations in the 2004 statutory amendments.\(^{153}\) Lawyers also reacted negatively to the absence of any evaluation of the positions they had adopted in particular disputes. They sought to avoid facilitation by seeking mediators who relied on the evaluative model.\(^{154}\)

Mediators were aware that reversion to litigation risk analysis was incompatible with the statutory focus on relationship problem solving. They were also critical of lawyer requirements of them to evaluate legal positions, noting that provision and evaluation of legal advice was a representative function, not a mediator one.\(^{155}\) But there was no unanimity of response to the resulting lawyer insistence on choice of mediator. Some offices condoned the practice and others resisted it, but disparity of mediator workloads was the consequence, with ex-Tribunal mediators shouldering considerably heavier workloads than recent appointees.\(^{156}\) Thus was imposed on the MS the mediation style that met the requirements of lawyer representatives.

Lawyer reaction to use of the s 150 arbitrative power formed the basis of the Department’s fears that it would undermine the policy desire for informality and

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\(^{152}\) Ibid: a higher number of lawyers than union advocates believed there had been no change to formality of mediation. All mediators believed there was less formality at the Mediation Service than the Tribunal.

\(^{153}\) This raises the issue of control - who controls a mediation – identified as a problem for commercial mediation: Tony Willis Overlawyering of ADR a major issue, 853 Law Talk, 23 October 2014, 27; “As the gatekeepers [lawyers] don’t just want control but they have control at a very early stage. And once they get involved in the process, they are very reluctant to let go...”.

\(^{154}\) Morton, note 11.

\(^{155}\) Ibid, citing a mediator interviewee: In reality the person responsible for providing employment law advice to party isn’t really us, it’s them. It’s actually a failing on the lawyers, because they arrive here saying they really want you to reality check this person. The answer is why haven’t you done it? I’m not their adviser, they should be doing this. at 78.

\(^{156}\) Morton, note 11.
flexibility of mediation style by incentivising resort to legalist or formalist demands for rules of process. The Department took the view that arbitrative modes of problem resolution attracted those demands. It now appears that resolution style is irrelevant. The demand for rules of process (or the use of a resolution model that can be defined in terms of rules of process) appears to be an incident of the provision of institutional problem resolution to which lawyers have rights of representation.

This proposition is supported by reference to the consequence of separating institutional provision of modes of problem resolution. It explains the effort that went into the well-signalled statutory change to the rules of process for the Authority, and may also account for the effects of the less well-signalled policy desire for change of mediation style. Lawyers accepted that change was intended for the adjudicative mode, but not for the mediative mode.\(^{157}\)

Complaints about the reliance on the costs of proceeding to a separate institution to extract settlements for otherwise meritless claims focused on no-win-no-fee representatives, despite their low numbers and the fact that their activities were largely confined to the Auckland region. In essence they took advantage of the high costs of representation that complainant employers incurred to force settlements that were lower than the potential cost of proceeding to the Authority. This practice was made possible by separating the modes of resolution by which problems were resolved. But it was not a practice either confined to or begun by no-win-no-fee representatives. They followed individualised representatives to the Tribunal and adopted practices that were perceived to offer fees for negotiation services provided at the MS. The only cost of providing this service was a telephone and the time spent at the mediation. They differed from other individualised representatives at mediation only in matters of presentation and fee structure. Few of them adopted the dress and appearance of lawyer representatives and they were less able to speak the language of the law. It was thus easier to attribute to them responsibility for barely ethical practices that were much more widespread.

These effects of representation on the MS suggest that confronting and mitigating the effects of legalism was less a matter of style, process or structure of the institution at issue than of the behaviours and expectations of those who operated in accordance with its dictates. It can therefore be concluded that:

- the transfer of control over administrative procedures from representatives to the MS had a positive effect on their informality, flexibility and timeliness;

- the differences of representative culture (between collective and individualised representatives) first apparent at the Tribunal were confirmed by research about the MS;

- policy for the MS’s operations was more closely aligned to the practices of collective than individualised representatives but the latter group dominated use of the MS;

\(^{157}\) Ibid.
• institutional provision of dispute resolution services (providing for rights of representation) is more likely to be an incident of individualised than collective representation;

• resolution models dependent on flexibility or informality of process that do not meet lawyer requirements of process are more likely to change to meet lawyer expectations, than lawyer expectations alter to accommodate informality;

• formalist/legalist requirements of process apply to adjudicative, mediative or facilitative modes of problem resolution, where rights of representation exist, regardless of institutional form, function or style;

• separation of modes of resolution incentivised reliance on the costs of representation as the means of achieving or denying mediated outcomes.

Quality of Outcome

The quality of outcome measure of success for the MS was a greater use of mediation to support and sustain existing employment relationships. This required the Service to show that a significantly higher proportion of its outcomes resulted in the mending, rather than the ending of employment relationships.

Administrative measures to address the problems (attributed by the Department to legalism) of claim receipt and scheduling were in large part successful. The MS coped with higher claim numbers, its service provision was significantly quicker and it attracted fewer complaints than did the Tribunal. However these efficiencies failed to influence the policy goals of early intervention, greater informality and flexibility of mediation style and reduced involvement in assisting the negotiation of the terms of ended employment relationships. A common conclusion, mid-decade, of commentators was that the resolution institutions of the ERA had yet to result in any fundamental changes to employment relations’ practice or dispute resolution.158

The dominant form of employment in New Zealand, and overwhelmingly in the private sector, is the individualised contract. The legal nature of the contract of employment is heavily balanced in favour of the employer, and the employer’s power to dictate its express terms tips that balance even further. Employee voice in the process of contract formation is typically limited to accepting or declining an offer of employment on an employer’s standard terms. Those terms are likely to maximise employer discretions and control, and to maintain maximum employer flexibility to dispense with the employee’s services. The standardisation of employer-dominated contracts is further enhanced by the standardised legal and human resource advice received by employers.159

This description of the power dynamic supports Morton’s theory about the reluctance to engage mediation assistance early within a current employment relationship. Morton regards this reluctance as consistent with theories of the connection between social distance and resort to the law.160 She argues that the policy failed to take

158 McAndrew et al and Caisley, note 38;
160 Morton, note 11.
sufficient account of the effect the ECA had on individualised contractual relationships and increases in short term and casualised jobs.

This analysis fails, however, to account for differences in claiming, disputing and resolving between unionised and non-unionised work environments. The policy goal of early intervention in workplace disputes sought for the MS adoption of the role of advocates in unionised workplaces without recognising that their early intervention in workplace problems was an incident of collectivisation. Non-unionised workplaces, suspicious or hostile towards collective forms of problem-solving, and as unlikely to allow an institution into the workplace as union organisers, left themselves with the alternatives of either managing disputes in ways that avoided the need for outside assistance, retaining their membership of employer associations (thereby retaining the benefit of collective approaches to disputes) or relying on legalised dispute resolution procedures and legal advice about employment matters (which in large part replaced resort to employer associations for many employers). 161 Adoption of this last alternative increased their chances of requiring institutional intervention and thereby the costs (and duration) of dispute resolution.

These choices had similar consequences for employees. Those in unionised environments with the benefits of higher awareness of problem solving mechanisms and earlier access to them were less likely to require institutional assistance to obtain a dispute outcome. Union members who did were saved the cost of representation. Annual union membership fees were generally less than the cost of an hour or two of a lawyer’s time. The other consequence of union membership was early access to advice about the prospects of success of a dispute position. Unions and employer associations were less likely to utilise resources on the advocacy of untenable positions. In terms of the Rau Sherman model of remedy systems, 162 that high or low use is dependent on certainty of outcome, this suggests a reason for differential reliance on the MS: an incident of collective advocacy is the provision of early and clear advice about outcomes; advice about outcome had to compete with the business opportunity offered by the existence of the dispute for individual advocates.

Employees in non-unionised workplaces, particularly those operated by small or medium sized employers, faced greater risks of disputes requiring outside assistance. They were required to pay for that assistance and it was more likely to result in an outcome that included the end of the employment relationship. They were also at higher risk of discovering untenability of dispute position after, not before, they incurred costs of representation.

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161 The AC Neilson, UMR and Waldegrave research reports read together reveal employer associations as less likely sources of information and advice for employers than lawyers or human resources practitioners; Margaret Wilson, The Employment Relations Act: A framework for a fairer way in Rasmussen (ed) Employment Relationships, New Zealand’s Employment Relations Act, (Auckland University Press, Auckland, 2004), 9: “Prior to the Employment Contracts Act, employers had sought advice from the Employer Associations. [Afterwards] the Employer Associations had transformed themselves from primarily service organisations into lobby groups. The legal profession became a major stakeholder in the continuation of the Employment Contracts Act regime.” at 15.

It can thus be concluded that the employment dispute resolution system of the ERA was ill suited to the needs of small to medium sized employers and their employees. The greatest number of complaints about it came from this group, as did the often expressed desire for easier termination procedures. Their individualised, fragmented position in the business environment, and fewer resources, rendered them more vulnerable than large employers and union members to the costs and other disadvantages of an individualised problem solving system.

These factors in combination indicate that adoption of an early intervention role for the MS in working environments run by those dominated by legalised ways of thinking about dispute resolution was likely to prove extremely difficult, if not impossible. The result was a higher quality of process for the quality of outcome goals of the ECA (great labour market flexibility).
Chapter 7

Employment Relations Act Institutions

Operations and Policy: The Employment Relations Authority

Introduction

The major quality of process goal for the Employment Relations Authority, variously described as the promotion of cooperative and consensual over adversarial and divisive or pragmatic and realistic over legalist and formalist techniques of problem resolution, was not much different from the low-level, speedy and informal prescription for the Employment Tribunal. Their one point of difference lay in the extent to which the problem of legalism and formalism was considered a barrier to those goals. As is clear from chapter 2, little - if any - policy thought was devoted to the means by which low-level speedy informality would be enforced by the Tribunal. This can be contrasted with the months of detailed consideration of the policies described in chapter 5 and the resulting belief that quality of process would be better guaranteed by separating modes of resolution, transferring control over the adjudication process from the litigants to the adjudicator, replacing the adversarial mode of adjudication with the investigative, abolishing the Employment Court’s powers of review, altering the language of dispute resolution, re-focusing the basis of (first instance adjudicative) claims from causes of action to problems of the employment relationship and reducing the requirements of decision making in written determinations.

The way that the Authority operated for the first eight years of the ERA will be considered in terms of these changes to the rules of institutional functioning. This will be followed by an analysis of policy concerns about the Authority’s functioning.

The quality of outcome goal, the extent to which employment relationships were mended rather than ended as a result of involvement by the Authority, and the extent to which quality of process goals were met, will form the basis of the Conclusions section.

Operations

Separation of resolution modes

The debate about how the variety of techniques available to public dispute resolution institutions should be offered (separately or together), canvassed in chapter 2, revealed sharp differences of opinion between the participants and practitioners of the

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1 Office of Minister of Labour, Cabinet Submission, Employment Relations Bill – Finalisation of Outstanding Elements, Options for Dispute Resolution and Enforcement, 17 February 2000.

2 Paul Roth, The New Institutional Framework [2000] ELB 64: “In its basic aims, therefore, Part 10 of the Employment Relations Bill (“Institutions”) does not depart far at all from the aims of the Employment Contracts Act, but the new framework will require both greater resourcing by Government, and a shift in practice and approach by industrial practitioners.”
jurisdiction on the one hand and the judiciary, ECA policymakers and large employers on the other. The Department’s view was that the Labour Relations Act reforms that empowered grievance committees to rely on more than one mode of resolution had produced efficiencies (reducing to one the hearings required) and were approved by participants. The mediators of the then existing Mediation Service advocated powerfully for that status quo to be retained. In 1999 Labour Party interest groups who were canvassed about industrial dispute resolution sought a return to that position. It was never seriously considered, in large part as the result of the Department’s determination to avoid engaging with the debates about process that a suggested return would have engendered.

The structure that resulted institutionalised and emphasised technique differences by providing for mediation to be offered by the Mediation Service, investigative adjudication by the Authority and adversarial adjudication by the EC. This had the (unintended) effect of formalising those techniques, which raises the issue whether it is possible to institutionalise informality of problem solving by way of a highly formalised institutional structure. The conclusions of chapter 6 about the functioning of the Mediation Service suggest it may not.

It is possible to argue that the requirements to first mediate and then investigate a problem, before it can be accepted as requiring an adversarial approach, model the resolution stages of a dispute such that it should result in changes to the expectations of parties and their representatives. Preferences for adjudication as the first resolution response (the problem of Tribunal functioning) could be modified by repeated experiences of the advantages of mediating first. Separation could also be described as an attempt to disrupt the lawyer need to negotiate in the shadow of the court by emphasising the need to negotiate before seeking the assistance of arbitration. Alternatively, a first resort to the Authority could suggest an absence of agreement to mediate, refusals to engage suggestive of power imbalances confirmed by an insistence on formality (via directions, rather than agreements to mediate).

These theories can be tested by reference to Authority referrals to the Mediation Service. A well-understood model would result in declining numbers of referrals because the need to first look to the Service (or attempt private settlement) would become industry practice. In its first full year of operation the Authority referred 34% of its applications to mediation. The following year it referred 54%. In 2008 it referred 40%. By then the Department was able to show that of those referred to mediation 22% returned to the Authority for adjudication, 45% appeared to disappear without trace (no resolution at mediation was recorded, but neither did they return to

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3 Department of Labour, Industrial Relations Service – Monthly Monitoring Reports for 2001
4 Department of Labour, Industrial Relations Service – Monthly Monitoring Reports for 2002
5 Department of Labour to Minister of Labour, briefing to incoming Minister (undated, c early 2009). Two other Department of Labour sources of statistics for 2008 and 2009 form the basis of different conclusions: an internal paper, note 6, about referrals to the Mediation Service by the Employment Relations Authority, July 2008 – February 2009 reveals that 483 referrals were made from 1391 Statements of Problem, (yielding a 34% referral rate) and another (Revell to Petrie, 11 May 2009) states a 25% rate, but on the basis of application numbers that are different and higher than other sources of statistics about applications.
the Authority), 4% were withdrawn before mediation, 8% remained unresolved by mediation but did not return to the Authority, 20% were settled at mediation.  

It was also clear by 2009 that early indications of the distribution of the Authority workload in 2001 and 2002 remained stable through the intervening period: annual applications were reduced by about a third via referral to mediation, a third were subject to determination and another third were withdrawn between referral for investigation and issue of a determination.  

The trend suggested by these statistics, in particular the proportion of applications directed to mediation (on the basis that mediation had not been first attempted) undermine the theories about institutional structure as a model or a basis for modifying negotiating behaviour, but tend to confirm continuing first resort to adjudicative procedures for over a third of claimants. It remains unclear whether the high numbers of unresolved referrals were the subject of private settlements or non-notified withdrawals so that it is difficult to determine why the characteristics of this group appear to differ so markedly (particularly in mediated resolution rates) from those who first seek mediation.  

The combination of referrals and requests to the Mediation Service confirm the efficacy of institutional separation as a filter of claims capable of mediated settlement, regardless of the assessment of the parties and their representatives of the mode of resolution required. Since referrals tended to precede any significant administrative or investigative activity on applications, (by the requirement to specify in a Statement of Problem whether mediation had occurred) those claims that could be mediated avoided the Tribunal problem of delay (by jettisoning the administrative requirements of adjudication for claims capable of settlement).  

Separation of institutions was accompanied by a reduction of the proportion of claims requiring adjudication. In 1992 26% of Tribunal outcomes were adjudicated. This reduced to 12% within 5 years. A mid-decade review of outcomes of the ERA institutions revealed that the proportion of Authority determinations to Mediation Service settlements was 7.6%. A comparison of completion statistics for both institutions for the period 1 July 2001 to 30 June 2005 indicated that 5.5% of total outcomes (including withdrawals) were Authority determinations.  

This reduced requirement for litigation services did not pass unnoticed by the legal profession. Their complaints focused on the cost of mediation and litigation at the Authority (sufficiently high to deter clients from wanting to proceed further), the time and expense required by Authority litigation, and the promotion of mediation at the expense of litigation, which was causing a deterioration of expertise of lawyers at the employment bar. The complaints prompted a response from the Minister of Labour.
that emphasised employer and employee rights to quick and low cost problem resolution and the resultant policy focus on “decreased legalism” in the Authority.\textsuperscript{11}

The Chief Judge repeated these concerns some years later. His focus was on quality of justice issues:

\begin{quote}
[T]he legislation now requires in effect all employment related disputes to be dealt with completely by the Employment Relations Authority before any party has access to a court of justice. Increasingly stringent privative provisions enacted by Parliament have sought to prohibit access to the Court in all circumstances and irrespective of the seriousness of the consequences of doing so, until an Authority investigation and determination have been completed. Such a restrictive regime runs the risk of employment litigants having a 2\textsuperscript{nd} class of justice available to them. This process illustrates what I have regretfully concluded is a legislative mistrust of courts and court processes in the employment field because of what is perceived to be emphasis on technicality and legalism, and of form over substance. That is not a correct analysis of the judicial role but it has become dogma for some.\textsuperscript{12}
\end{quote}

Change of language

Central to addressing formalism or legalism in adjudication at the Authority was a change to the language of this resolution mode. Adoption (for the Tribunal) of the terminology of the civil courts to describe initiation, interlocutory, hearing and decision procedures was a means by which the legal profession asserted its dominance in representation and was the basis of union complaints of legalism. Use of this terminology also operated to exclude certain claims from resolution processes, and was regarded as divisive.\textsuperscript{13} Substituting relationship for contract, statement of problem for cause of action, statement in reply for notice of defence, investigation meeting for hearing, determination for decision, challenge for appeal, represented an attempt to establish, by the signals of language, a change of policy and attitude towards dispute resolution in this jurisdiction.

These changes of language were accompanied by other departures from Tribunal practice designed to underline the primacy of the goal of informality of process: namely, the use of standard forms for initiating and defending claims (statements of problem and reply) capable of completion by all comers; telephone conferences for administrative arrangements; and no recording requirements for hearings.

There was, however, an omission in the statutory regime for the investigation process. When Departmental officials sought the views of the chairpersons of tribunals with similar powers to those mandated for the Authority in August 2000, they recorded advice about reliance on submissions from representatives. It was to refuse to accept written submissions and, furthermore, to refrain from even using the word submission for the purposes of having the new adjudicative processes clear from the outset and to emphasise that the Authority would operate in an entirely new way.\textsuperscript{14} This advice was not incorporated into the Act or its Regulations, but appeared to inform the wording of a Practice Note about the Authority’s procedure. Indicating that formal

\textsuperscript{11} Minister of Labour to Chief Judge, Employment Court, letter, 9 December 2002.
\textsuperscript{12} Chief Judge Graeme Colgan, Address to 6\textsuperscript{th} Biennial NZLS Employment Law Conference, 12 October 2006.
\textsuperscript{13} Office of Minister of Labour, (on the subject that legal rules tend to be divisive) note 1.
\textsuperscript{14} Department of Labour, \textit{Notes of Interview with Chairperson TranzRail Inquiry}, 23 August 2000.
openings by parties to investigation meetings were not required it also included the following reference to closing submissions:

At the end of an investigation meeting parties or their representatives may sum-up by making points about the information gathered by the Authority and may refer to applicable legal principles. A citation of any case law should be given where a copy of the decision is not being provided.\(^{15}\)

Early attempts by some Authority members to conform to this prescription and dispense with closing submissions following investigation meetings (necessitating timetabling orders about the dates by which they were to be filed) were unsuccessful.\(^{16}\) Lawyer representatives insisted on their rights to do so. Self represented parties and those represented by organisational advocates were less likely to regard them as necessary.\(^{17}\)

The result amounted to a repetition of one of the problems of delay that beset the Tribunal – the time that elapsed between receipt of evidence and issue of the written conclusions of the adjudicator. Complaints about this drew responses from the Authority attributing the delay to the necessity for Members to await submissions before reaching their determinations.\(^{18}\) It is possible that, for this reason, Authority Members agreed to a proposal for oral determinations,\(^{19}\) because (at the same meeting) they also supported a review of the role of legal representatives and sought adoption of the Disputes Tribunal approach to representation for small matters.\(^{20}\) Additionally Members would have been conscious of the power to issue oral decisions (capable of transformation into determinations by transcript) at the end of investigations because that option was included in the Practice Note about procedure issued in November 2000. The statutory amendments enjoining them to deliver oral determinations at the conclusion of investigation meetings were not, however, formulated until 2013.\(^{21}\)

The point of raising the issue of submissions is that they are markers of the formalist or adversarial approaches to dispute resolution that policy for the Authority sought to discard. Representative insistence on the provision of submissions can therefore be

\(^{15}\) Chief of Employment Relations Authority, Practice Note: Employment Relations Authority Steps to be taken in proceedings, 6 November 2000, at [5].

\(^{16}\) Susan Robson, recollection of discussions with other Authority members about accepting submissions October 2000 – July 2001.

\(^{17}\) Susan Robson, recollection of attempts to dispense with written submissions following Authority investigation meetings, October 2000 – January 2002.

\(^{18}\) Department of Labour, internal paper, Review of the Employment Relations Problem Resolution System: exploring options to reduce the time taken in the investigation and determination of cases in the Employment Relations Authority, including by considering changes to process, February 2008.

\(^{19}\) Members were recorded as supporting a proposal for oral determinations in the minutes of a meeting between them and officials on 29 February 2008 (note 20) but as opposing this proposal in a similar meeting on 30 July 2008. It is possible that the difference in view applies to timing or context, so that oral determinations on substantive issues at the conclusion of investigations were less acceptable than those for ancillary (e.g on preliminary jurisdictional or costs) issues.

\(^{20}\) Department of Labour, Record of discussion of internal paper, Review of the Employment Relations Problem Resolution System with Authority Members, 29 February 2008.

\(^{21}\) Employment Relations Amendment Bill 2013 (105-1), cl 61; Employment Relations Act 2000, ss174A-E contain the amendments that took effect in March 2015. They impose 3-month time limits on the issue of written determinations that follow oral determinations.
regarded as another element that distinguishes dispute focus from resolution orientation of representatives described in chapter 3.

Similarly the collective decision by Authority members in October 2000 to seek briefs of evidence prior to investigation meetings as a means of establishing the basic facts of a matter (and to reduce the time required to elicit them at the investigation meeting) may have constituted another (unintended) marker of formalism, perhaps as the result of the use of the litigation label *brief of evidence* to describe the information sought. The use of the language of litigation was a signal, particularly to representatives familiar with the Employment Tribunal, that the changes to the adjudicative function for the Authority could be regarded as merely cosmetic. An alternative view is that the need to file briefs of evidence itself established a legalistic process because these are the documents of adversarial court processes.

**Statement of Problem**

The provision of application and defence templates, (the statement of problem and the statement in reply) to ensure that the basic facts of the problem were before the Authority and couched in everyday language, was also a means by which the conversion of workplace problems into legal causes of action could be avoided. A measure of the success of this strategy would be the extent to which filed statements conformed to this ideal. This appears to depend on who drafted them. Within a short time of the Authority’s commencement it was apparent that the self represented were able to complete these forms in the way intended but that representatives were less likely to do so.

Authority members identified legal representatives as more likely to draft statements in terms of traditional causes of action. They attributed to this style of drafting parties who became entrenched into perceiving their problems in terms of the legal issues identified in the statements, rather than the workplace problem under review.

The provision of templates did not operate to alter the type of problem brought to the Authority. Personal grievances (mostly arising from dismissals) remained the dominant employment relationship problem, as they were at the Tribunal and at the Mediation Service. They formed 62% of the requests for assistance at the Service, 79% of the applications to the Authority, and 42% of Authority determinations. This last statistic mirrored the proportion of grievances subject to Tribunal decisions. Its failure to reflect application percentages arises from the proportion of decisions and determinations (for both institutions) required to be devoted to ancillary matters (costs and interlocutories): between 33% (Authority) and 38% (Tribunal) in a 2002 analysis, but, as noted below, subject to subsequent increases.

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22 Susan Robson, recollection of the initial training session of Authority members in October 2000.
24 Ibid.
25 Department of Labour, note 20.
The second most common claim was of wage arrears, estimated as totalling 25% of annual claims.\textsuperscript{28} As for the Tribunal the Department counted both application numbers and the separate claims within each application. Wage arrears claims often accompany grievances, particularly if issues arise about notice periods or holiday pay. This explains why the combination of grievances and wage arrears claims exceeded 100%. This category of claim accounted for 7% of Authority determinations in its early days,\textsuperscript{29} which tends to confirm its status as a consequence more than a cause of workplace problems.

\textbf{Transfer of control}

Administrative control over the whole process of receiving and adjudicating claims was regarded by officials as crucial to avoiding the problems of delay occasioned by the behaviour of representatives at the Tribunal. For this reason Authority staff had responsibility for checking and serving documents once they were filed:

\begin{quote}
Authority Support Officers will check to see that the wording and contents of the statement of problem and statement in reply are such as to fully, fairly and clearly inform all parties and the Authority. If not, either by telephone or other convenient method, a Support Officer will seek clarification or any necessary additional information from the author of the statement.\textsuperscript{30}
\end{quote}

Support officers were also responsible for arranging telephone directions conferences, the purposes of which were the:

\begin{itemize}
\item[(a)] identification of factual and/or legal issues central to the employment relationship problem and its determination, and disposal by agreement of non-contentious matters;
\item[(b)] settling with the parties particular details as to the conduct of the investigation meeting, such as persons who are to give information and the supply of documentary information;
\item[(c)] considerations of directions to be issued, either at the request of any party or by the Authority of its own initiative;
\item[(d)] setting a timetable for necessary steps to be taken by the parties or anyone required to attend before the Authority;
\item[(e)] fixing the date, place and time for a meeting to start the investigation (to be confirmed by written notice).\textsuperscript{31}
\end{itemize}

These controls over the initiation and processing of claims shared some similarities with those instituted by the Mediation Service. There was, however, one difference in what occurred administratively between the three regional Authority offices that subsequently assumed some significance to the means by which control of the investigation process affects output. The four original Members at the Wellington office agreed that, upon filing, statements of problem would be immediately allocated to Members, each of whom assumed responsibility for a particular region (Manawatu, Taranaki, Hawkes Bay, Wairarapa) and all of whom received, in strict rotation, statements of problem from the Wellington metropolitan area. The Auckland and Christchurch offices allocated files differently – at some time after statements of reply

\textsuperscript{28} Department of Labour to Minister of Labour, Briefing Note, \textit{Meeting with the Chief Authority Member}, 31 October 2005.
\textsuperscript{29} Beck and McAndrew, note 27.
\textsuperscript{30} Chief of Employment Relations Authority, note 15, at [2].
\textsuperscript{31} Chief of Employment Relations Authority, note 15, at [3]
were filed. The choice of to whom the files were allocated remained with administrators. The Wellington system required Members to actively manage files from the outset. This retention of control of the whole process had workflow consequences. Within two years it was clear that Wellington was the only office consistently matching applications and disposals. The other two offices failed to do so and experienced significant rises of uncompleted applications, of itself an indicator of delay. During this period Wellington members were additionally allocated files from the Auckland office.

The other difference of significance between the regional offices concerned the issuing of determinations, an indicator of work rate. The Wellington office consistently issued higher numbers of determinations per member than the other two offices. The rate of variation of determination numbers between members was also lowest in this office.

The significance of these regional differences of work rate and workflow lies in the means by which they were affected by the timing and determinant of file allocation. Immediate and automatic file allocation produced efficiencies over the use of administrators, so the order from the Chief of the Authority in 2011 to the Wellington office to desist from using this procedure resulted in a noticeable reduction of case processing efficiency.

Use of investigative mode

Cross-examination

Conferral of the inquisitorial function was the clearest signal of the policy desire for change to entry-level adjudicative resolution. It formed the basis of perceptions that legalism had reduced more significantly at the Authority than at the Mediation

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33 This meant that they could schedule directions conferences for investigations upon the expiry of the date for filing replies, rather than waiting for these documents to be filed.

34 Department of Labour, Industrial Relations Service – Monthly Monitoring Reports for August 2002: Between June 2001 and August 2002 outstanding matters at the Authority rose from 367 to 630. The Wellington office maintained a constant difference between claim receipts and disposals of 92. Outstanding matters rose from 250 to 400 in the Auckland office and from 70 to 143 in the Christchurch office.


36 Department of Labour, *Annual Determinations per member 2003-2007* (undated); *Annual Determinations per member 2006-2008* (undated). For the 6 years between the beginning of 2003 and the end of 2008 three members of the Wellington office issued 22% of the annual number of determinations (or just over 7% each). Member numbers at the Christchurch office rose from 2 to 4 and their annual output rate varied between 17 and 23% but their average annual rate per member varied from 4.8% to 5.9%. The Auckland membership issued 54-59% and their numbers rose from 9 to 12 but their average annual rate hovered between 4.5% and 5.8%.

37 Ibid; For the 5 years between 2004 and 2008 the variations were between .6 and 2.8% in Wellington, 2.3 and 4.3% in Christchurch and 3.9 and 6% in Auckland of the total annual determinations issued by the Authority.

38 Paul Stapp, Wellington Authority member, Notes of interview with Susan Robson, 27 April 2012. No reason for the instruction was provided, but it was issued by the same Chief Member who lobbied the Minister of Labour for more members for the Authority by letter dated 2 May 2001 when Wellington members had insufficient work to occupy them fully.
However, as became clear during the select committee consideration of the Employment Relations Bill, lawyers regarded this function as negatively affecting the Authority’s capacity to act judicially. Their objections were framed in terms of the principles of natural justice, and they failed to subside when the ERA was passed. This became apparent to the Wellington members of the Authority who agreed to describe the new hearing processes to members of the Wellington District Law Society in October 2000. The meeting became very heated when the issue of cross-examination arose and it grew clear that representatives would no longer have unfettered rights to this form of questioning.

On 6 November 2000 the Practice Note cited above about Authority process was issued. It was prefaced by a reference to the statutory requirement for resolution on substantial merits and without regard to technicalities. Investigation meetings would commence with a description of the procedure to be adopted, no formal openings were required, and evidence in chief would be proffered in written briefs but capable of supplementation orally at the investigation meeting. The Note went on to state, about evidence, that the Authority would question witnesses and there would be no cross-examination, although parties would be invited to propose additional matters for the Authority to inquie into.

The Practice Note summarised the collective views of the Authority membership about the way the investigative function should operate. They believed this function would offer them a more active role in the resolution process and control over the pace and the time required for gathering and testing evidence. For these reasons they were keen to ensure its success.

Less than six months later the cross-examination issue came before the Employment Court, following the circulation of directions by the Authority that the parties to a grievance in which credibility was in issue exchange briefs of evidence and lists of questions for witnesses prior to an investigation meeting. The Authority declined an application to remove the proceedings to the Court (about whether the grievant was an employee or the beneficiary of a Government run work experience scheme) on the basis (inter alia) that Parliament intended the Authority to set its own procedures, these had been set and they were consistent with the statutory obligations on the Authority. It considered that the relevant principle of natural justice, the right to be

39 Morton, note 23.
42 Johnston, note 41: “However, Authority members speaking publicly have announced that they reserve the right to examine witnesses themselves and will not allow any form of cross-examination of witnesses by parties or their representatives.” at 158; Susan Robson, Recollection of the meeting between Wellington members of the Employment Relations Authority and employment lawyers at the Wellington District Law Society rooms in October 2000.
43 Employment Relations Act 2000, s 157.
44 Susan Robson, note 22.
45 Neville Taylor, Member of the Employment Relations Authority, The Employment Relations Authority Investigation Process [2001] ELB 19.
heard, was accommodated by these procedures and was not synonymous with any right to cross-examine.

The Court was first required to determine whether it should order removal of the proceeding. It considered that it should, for the following reason:

The Act contains new and quite novel provisions for the handling of judicial business. Those who are used to more traditional methods are opposed to the Authority’s interpretation of what the Authority may do in the conduct of investigations. While it is true that the Court may not tell the Authority how to conduct investigations it is also true that the Authority is obliged to adhere to the principles of natural justice. Any failure to do so is an unlawful act and unlawful acts have an impact on jurisdiction. The Court must be free to take cognisance of any illegality.47

The issue was more fully argued four weeks later. By then the Attorney General and the New Zealand Law Society were joined as interveners.48 The Court confirmed its earlier expressed view that the right to cross-examine, as a principle of natural justice, was binding on the Authority.49 It also made the point that if Parliament intended to exclude the right to cross-examine at the Authority it could easily have said so. Parliament50 took up this invitation on 14 November 2001 and ss157 and 173 of the Act were amended to provide that compliance with the principles of natural justice did not require the Authority to allow the cross-examination of a party or person.51 It retained discretion to do so.52

In turn, this raised the fear that absence of a fetter on the discretion of Authority members would result in more frequent recourse to superior courts for guidance about the manner of exercising the discretion, ensuring that statutory provisions to informalise and streamline matters might well have the reverse effect.53 This fear proved to be groundless, and by means that were unlikely to have been anticipated: it seems that trust – the trust that participants have in the Authority membership – is linked most closely with lawyer perceptions of a proper balance between practical and natural justice.54

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47 Ibid, at [20].
50 Minister of Labour, Media Statement, Law Change Corrects Technicalities, 3 October 2001: The Government will also move to clarify the law that the Employment Relations Authority is not required to allow cross-examination, but may do so in appropriate cases. This is consistent with the policy intent behind the Employment Relations Act which recognises that decision-making at first instance should be as informal as possible and not constrained by the legal procedures. Parties will not be prevented from pursuing their case in the Employment Court on the basis of a full hearing. The Authority’s ability to decide the procedure of an investigation meeting is an important way in which flexibility can be maintained and undue length and technicalities avoided. The Authority will continue to be required to meet the principles of natural justice.
51 Amendment inserted by Employment Relations (Validation of Union Registration and Other Matters) Amendment Act 2001, s 10, 14 November 2001.
54 Suzanne Innes-Kent, A review of the Employment Relations Authority: Balancing the requirements of practical justice and natural justice in an informal, inquisitorial process [2007] ELB 120.
When Authority members, unions and lawyers were asked about the utility of cross
examination (after the amendment), their differences of view concerned its bullying
potential and veracity testing powers. Authority members familiar with its tropes
were keen to dispense with “power games and trying to belittle people, or intimidate
them and going over the same ground already covered in the hope of a different
answer”\(^{55}\) whilst lawyers were concerned about discharging obligations to clients
when the test of veracity of the other party’s witnesses was left to the Authority
member.\(^{56}\) However there was no unanimity of view amongst representatives about
the effect of the amendment: 43% believed their questioning of witnesses remained
the same, whilst 54% said it had reduced. Union advocates were equally divided on
the issue but more lawyers (65%) asserted reduction.\(^{57}\)

As time passed, and the transfer of control of proceedings from representatives to
Authority members became more accepted, lawyers (in response to questions about
natural justice and cross-examination) were recorded as generally happy with the
Member-controlled approach, accepting the need for relevance and control of
repetition as the price for efficiency and cost control.\(^{58}\) Their concerns, individual
differences between Authority members, boiled down to issues of social skill or
presentation, if the encomium in the study’s summarised conclusions are a guide:

Authority Members should be free to assess risk, disclose early thoughts and look for openings
to invite settlement, but not in such a way that parties feel coerced or feel that the Member has
pre-determined the outcome before they have told their story.\(^{59}\)

During the election campaign of 2008 the National Party signalled its desire to require
the Authority to act judicially.\(^{60}\) After the election the Minister of Labour explained
that this included restoring the right of representatives to cross-examine. Initial
advice to the Minister suggested that this would limit the ability of Authority
members to control investigations by transferring more power over the course of a
proceeding to representatives.\(^{61}\) Informality would be compromised and costs to
parties increased. These consequences were described as “at odds” with the original
policy intention for the Authority - to ensure fair resolution processes that privilege
substantive issues over legal technicalities.\(^{62}\) Officials also invoked the problems
experienced by the Tribunal (delay and legalism) and research by the Ministry of
Justice (as part of its Tribunals project) that revealed that users of the Authority were

\(^{55}\) Morton, note 23, at 113.
\(^{56}\) Ibid.
\(^{57}\) Ibid.
\(^{58}\) Innes-Kent, note 54.
\(^{59}\) Ibid, at 121.
\(^{60}\) Department of Labour for Minister of Labour, Briefing Note, Minister’s meeting with Department of Labour officials (undated c December 2008).
\(^{61}\) Ibid. See also Gordon Anderson, David v Employment Relations Authority, Attorney-General and
New Zealand Law Society. [2001] ELB 99: “Whatever the views of the Court on the decision, it seems
that there is a probability of removing the control over the Authority’s procedures from the members of
the Authority, and placing it in the hands of the party’s lawyers — the situation lawyers would feel
more comfortable with. Among other things, the decision alludes to, although does not really comment
on, the lawyer’s dislike of the adjudicator taking any active part in proceedings.”
\(^{62}\) Department of Labour, internal paper: Employment Relations Authority – Minister’s Comments, 13 February 2009.
significantly more likely to say they thought that one of the best features of investigation meetings was that they were less formal than court hearings.  

On 1 April 2011 ss 157(2A) and 173(1A) were repealed. Section 160 was amended to provide that the Authority must allow cross-examination to the extent consistent with its equity and good conscience jurisdiction.

Other aspects of the investigative mode adopted by the Authority that were the subject of analysis for their effects on the perceived formality of its procedures included information provided by Authority members (particularly to unrepresented parties), the effect of representation on outcomes and of party understanding of the reasons for the dispute, the cost of representation, and resourcing.

**Information Provision**

Information provision, a key objective for the employment institutions as a component of the expert problem solving support and assistance considered to be necessary for prompt dispute resolution, appears to be a concept open to different interpretations. Authority members took the obligation seriously, reporting that they conducted their investigations differently depending on the amount of information about the problem they considered that parties had. Unrepresented parties, or those with representatives that members believed had not fully explained matters, were more likely to receive more information from members than those with representation that members trusted. Whilst all representatives agreed that their clients/members should understand the reasons for the dispute only 60% of them were confident that this was frequently the case. The result for the other 40% was described as the “bystander effect” that occurs when the extent to which representatives take over responsibility for running a dispute relegates parties to bystander status. Authority members regarded parties with legal representation as more vulnerable to this phenomenon when their lawyers resorted to the language of the law by framing facts and behaviours in legal terms ('legal labels') as a substitute for ordinary description.

Perceptions of the validity of the Authority position on information provision differed amongst union advocates and lawyers asked whether they thought unrepresented parties were offered legal advice or more assistance as the result of their lack of

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63 Department of Labour, note 60.
64 Employment Relations Act 2000, s 157(2A) repealed on 1 April 2011 by Employment Relations Amendment Act 2010, s 26; Employment Relations Act 2000 s 173: substituted, on 1 April 2011, by Employment Relations Amendment Act 2010, s 33.
65 Employment Relations Act 2000, s 160(2A): inserted, on 1 April 2011, by Employment Relations Amendment Act 2010, s 29(1).
66 Morton, note 23.
67 Employment Relations Act 2000, s 143(c).
68 Morton, note 23.
69 Morton, note 23. A Taiwanese study of 100,000 civil cases that found legal representation had no significant bearing on case outcomes at trial reasoned that the continental (inquisitorial) judge’s active role in the adjudication process helped to explain why pro se litigants fare reasonably well in formal litigation: Kuo-Chang Huang, *How Legal Representation Affects Case Outcomes: An Empirical Perspective from Taiwan* (2008) 5(2) Journal of Empirical Legal Studies, 309; cf Beck and McAndrew, note 27, whose connection of success rates with representation is described overleaf.
70 Morton, note 23, at 33.
71 Ibid, at 128.
representation. Fifty-three per cent of union advocates and 32% of lawyers thought legal advice was rarely or never proffered to the unrepresented and 34% and 61% thought it was occasionally. Members denied offering legal advice. In response to the question whether members assist the unrepresented purely because they lack representation 53% of union advocates and 19% of lawyers thought not (rarely or never), 45% of unionists and 80% of lawyers believed this occurred occasionally or frequently.

The researcher who posed these questions attributed the differences of response to the “fine line” between providing information and offering advice. Additional explanations lie in conflicts of view about the function of information provision and the role of the investigative arbiter. Given that information provision in adversarial arbitration attracts a plethora of formal exclusionary rules (and interlocutory processes) but is regarded as a core (negotiable) resource in the negotiation of collective agreements it is not difficult to accept that it is also subject to conflicting professional positions between litigators and negotiators.

This conflict is also apparent in perceptions about the role of the investigative arbiter. For lawyers the arbiter, as the decision-making neutral, is required to refrain from providing information or advice to parties to avoid compromising neutrality and/or suggesting predetermination. For institutional advocates, for whom information is a basis for accurate assessments of negotiating positions, and information exchange the means by which disputants work towards resolution, the arbiter performs a facilitative function. Thus exists an apparent replication of conflicting role expectations experienced by Mediation Service mediators (who could be either facilitators or evaluators, but not both).

The practice, for instance, of Members proffering a preliminary view of a dispute for the purposes of encouraging parties to resolve their differences before an investigation concluded was reported as attracting “a fair amount of discussion” amongst practitioners:

On the one hand, many parties may appreciate the preliminary view and the opportunity to agree to an outcome without the remaining uncertainty of a determination being imposed on them. On the other hand many parties may feel that their “day in Court” has been unfairly influenced and perhaps predetermined. In particular, where the parties have unsuccessfully attempted mediation and subsequently incurred legal costs in preparing for the proceedings, many find it frustrating to then be back, effectively, in mediation.

In many situations, this approach may be suitable and indeed successful in resolving the problem in an appropriate manner. At the same time it may be that it unnecessarily overlaps the roles of the Mediation Service and the Authority to a degree that is not appreciated by some parties. This practice (and the fact that it is adopted more in some Registries than others) has, of course, attracted a fair amount of discussion from practitioners.

For Authority members role conflict concerned the extent to which the investigative function required them to facilitate and engage in information provision and exchange, but only in certain circumstances: in the coincidence of self-representation

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72 Ibid, at 115.
73 Ibid.
74 Ibid, at 117.
and legal representation. The anxiety (of attracting allegations of predetermination and inviting challenge) reported by Members in those circumstances centred on issues or evidence that unrepresented parties were unaware of the need to establish.\(^\text{76}\) Since obtaining that information is the essence of the investigative role this is an anxiety attributable to the tropes of adversarial litigation. It suggests that, as for mediators, role conflict was an incident of adversarial expectations, rather than of the role itself. The outcome, however, affected unrepresented parties as a class: unrepresented employers were more likely to lose grievance claims;\(^\text{77}\) awards of compensation to unrepresented grievants were significantly lower than the results achieved by their represented counterparts. Apparently counter intuitively, unrepresented grievants at the Authority (but not the Tribunal) were more likely than those who are represented to win their claims.\(^\text{78}\) This appears to indicate that the Authority was more accessible than the Tribunal to unrepresented grievants. It furthermore suggests that unrepresented grievants were less likely than those with representation to seek remedies for meritless claims.

**Representation**

Related to the role-conflict issue is the perceived effect of representation at the Authority (67% of grievance parties were represented by lawyers, 21% of employees and 16% of employers by advocates)\(^\text{79}\). Union and lawyer representatives were almost unanimous (92%) about the disadvantages of lack of representation (12% of grievants and 7% of employers were self-represented).\(^\text{80}\) Authority members were unanimous in the belief that the unrepresented suffered no disadvantage. However their interlocutor noted that their anecdotal summaries of investigations involving the unrepresented established the opposite. The gap was attributed to a social desirability bias arising from the policy expectation for the Authority that the unrepresented should not be disadvantaged.\(^\text{81}\)

Absent from this analysis was the effect of representation cost on outcomes. So whilst the views of Authority members about the very high costs of representation by individual (as distinct from institutional) advocates were recorded there is an absence of data about the degree of financial disadvantage resulting from lack of representation. The $3,000 difference in average compensation awards between the represented and the unrepresented failed to account for the cost of obtaining the higher awards.\(^\text{82}\) Since costs awards are accepted as accounting for a small proportion only of the total costs of individual representation the issue of disadvantage is more complex than the data generated by this research suggests. Authority members reported that hourly rates of lawyer representatives of $300-400 resulted in costs

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\(^{76}\) Morton, note 23.

\(^{77}\) Grievant success rates at the Authority were 83% where the respondent employer was self-represented and 73% at the Tribunal: Beck and McAndrew, note 27 (Table 8).

\(^{78}\) Grievant success rates at the Authority were 64% for the self-represented, 57% for those represented by lawyers and 55% for those represented by advocates (cf 40% for the unrepresented at the Tribunal and 59% for the represented, regardless of type of representative): Beck and McAndrew, note 27 (Table 8).

\(^{79}\) Beck and McAndrew, note 27, Table 4: *Proportion of grievance cases by party representation*.

\(^{80}\) Ibid.

\(^{81}\) Morton, note 23.

\(^{82}\) Beck and McAndrew, note 27.
applications of up to $40,000 for a single investigation. At that time (2003), of the 124 costs awards recorded 99 (79%) were for awards of $3,000 or less. Of the awards to employers 72% were in this range and of those in favour of employees 87% were in this range. In that year 149 awards of compensation for distress and humiliation were made, 130 (87%) of which were for less than $9,000 and 96 (64%) of which were for less than $6,000.

This raises the issue whether cost of representation deterred parties from proceeding to the Authority. A Legal Services Agency survey in 2006 suggested a rate of 22%. Asked about this by Morton, union representative responses covered, reasonably equally, the full range of responses but 58% of lawyers agreed that this was a frequent and 37% an occasional occurrence. These differences of response were attributed to role differences between union and lawyer representatives. Unions decide whether to fund proceedings (and do so on the basis of strength of case) but that decision reposes with the clients of lawyers. Comparing the costs of preparing for and attending investigation meetings with Tribunal hearings the majority (71%) of all representatives questioned believed they remained the same, notwithstanding that, at the time this question was posed, investigation meetings were slightly shorter than Tribunal hearings.

Member output

The average length of investigation meetings increased, however, from 1.09 days in 2006 to 1.24 in 2008, although the significance of this figure is difficult to establish, given regional differences for much of the data gathered about the Authority’s functioning (e.g. the times between filing and investigation meeting varied regionally, mirroring the variations arising from case allocation strategies). If determinations issued are a guide to the number of investigations completed (absent the effect of ancillary decisions discussed below) an interesting conclusion about individual work rates can be drawn. In the 2003 and the 2007 years the same number (854) determinations were recorded as issued. The 2003 figure was achieved by 15 members but by 2007 the membership numbered 18, thus reducing the 2003 average of 56 to 47. A closer examination of individual rates for this period reveals that 6 of 8 members of the Auckland office, and 2 of 3 members in each of the other 2 offices issued fewer determinations in 2007 than 2003.

83 Ministry of Business Innovation and Employment website: Costs and Compensation Tables, 2003
85 Morton, note 23: union responses were: 34% frequently, 21% occasionally, 24% rarely, 20% never: at 126
86 77% of investigations took no more than a day in the first 18 months of the Authority’s operations, cf 68% of Tribunal hearings took this time in its last 18 months of operation, 95% of investigations took no more than 2 days and 86% of Tribunal hearings took this time: Beck and McAndrew, note 27; see also Paul Latreille, J.A Latreille, K. G Knight Making a Difference? Legal Representation in Employment Tribunal Cases: Evidence from a Survey of Representatives, (2005) 34(4) Industrial Law Journal, 308, who argue that lawyers may both shorten and lengthen case resolution in British employment tribunals by encouraging early withdrawal and late tribunal resolution of cases respectively.
87 Department of Labour for Minister of Labour, Statistics for officials’ meeting with Minister of Labour: Average hearing length and time between hearing and determination, 13 March 2009.
88 In 2003, they averaged 167 days in Auckland, 154 in Wellington and 228 in Christchurch: Department of Labour, Monthly Monitoring Reports for 2003.
Given the absence of change in the nature of problems put before it, stability in application, withdrawal, and referral rates, these statistics suggest that the Authority experienced a reduced ability to operate at its original rate or had a reduced workload.\(^9^9\) At the outset there was insufficient work for the 13 members initially appointed. However, whilst Wellington members were offering to share the workload of the Auckland members,\(^9^0\) the Chief Member was campaigning for the appointment of more members.\(^9^1\) He continued to do so, attributing inadequate resourcing of the Authority to limitations on its investigative and educative functions, by citing an establishment projection of 70 cases per month and application numbers of 200 per month.\(^9^2\) This description of the Authority as inundated by claims for which its membership was inadequate failed to acknowledge that the establishment target had yet to be met or that it was becoming apparent that over two thirds of the applications would not require investigation.\(^9^3\)

Reducing output rates and the demands for more members replicate what occurred at the Tribunal. Delay was attributed to scarce adjudicator resource, even after it became apparent that increases to the Tribunal membership had no permanent effect on the number of unresolved applications, or the size of the delay.

Richard Abel is alive to this phenomenon, describing the specialised functionaries (“to whom law is their occupation”) within informal institutions like the Authority as possessing distinctive advantages, including the power to demand and obtain status enhancing measures like increasing the numbers of their subordinates.\(^9^4\)

**Determinations**

Notwithstanding the Department’s reliance on determination numbers as establishing that a third of applications required determination, it is unclear whether as many as this were fully investigated and determined. This is because all determinations issued by the Authority were counted as if they each originated from a different Statement of Problem. However the problem (noted in Chapter 2) with the Tribunal’s functioning, that as time passed the Tribunal recorded more written decisions per application (11% ancillary decisions in the 91/92 year, but 29% in the 98/99 year), was replicated by the Authority. In the 18 months prior to October 2000 38% of Tribunal decisions were ancillary and in the 18 months after that time 33% of the Authority’s determinations concerned costs and process.\(^9^5\) By 2007 this proportion had risen to

\(^{89}\) In 2002 2,267 applications were received and 2,300 applications were completed: Department of Labour, Monthly Monitoring Reports for 2002.

\(^{90}\) Susan Robson, recollection of repeated offers to the Chief Member to assist and of receipt of Auckland files January – August 2001.

\(^{91}\) Chief Member to Secretary of Labour, letter, (seeking more members to be appointed to the Auckland and Christchurch offices) 2 May 2001; Chief Member to General Manager, Employment Relations Service, letter, (complaining about overload of work for Authority members and seeking more members for the Auckland and Christchurch offices) 7 January 2003; Chief Member to Secretary of Labour, letter, (seeking more resources) 19 August 2003.

\(^{92}\) Morton, note 23.

\(^{93}\) The claims were made in late 2002/early 2003: the number of determinations issued in 2002 (738), if adjusted for ancillary decisions included in that total (33%) suggest that approximately 500 cases were dealt with, significantly fewer than the 800 projected.


\(^{95}\) Beck and McAndrew, note 27.
over 45%, whilst the proportion of grievance determinations reduced from 42% of the total issued in 2001 to 34%. Compensation and costs awards (on the basis that compensation awards are the consequence of substantive determinations and costs of ancillary determinations) illustrate this phenomenon. In the 2002 and 2011 years application numbers (2269 and 2297 respectively) were similar, as were the numbers of awards of compensation for distress (164 and 173). In 2002 126 costs awards were issued. In 2011 207 such orders were made. If, as suggested in chapter 3, rising proportions of ancillary decisions indicate a rising degree of formality of process then this had implications for the goal of informality of process. It raises the issue of who benefitted from this phenomenon. The compensation tables for 2002 and 2011 reveal that 92% and 86% respectively of awards of compensation for non-financial loss were for less than $9,001 (with similar distribution curves: 34% and 26% below $3,000, 40% for each between $3-6,000 and 16%/18% between $6-9,000). The costs awards tell a different story. They are categorised according to whether the employer or the employee won the award. In 2002 68 awards were made to employers, 10% of which were for more than $4,000. Of the 58 awards to employees 8% exceeded $4,000. In 2011 32% of the 102 awards to employers were above $4,000 and 19% of the 105 awards to employees exceeded this amount. This indicates a significantly lower rise in compensation than costs awards and a rising difference of costs awards between those made in favour of employers and those for employees.

Rising numbers of ancillary determinations on stable application, referral, and withdrawal rates also suggest a reduced workload for the membership but the appearance of an increased one. The time required for investigation meetings and (substantive) determination drafting is generally significantly more than that for ancillary matters so that if the issues arising from a claim are the subject of separate determinations the fiction is maintained that more than one claim has been resolved, and that each required the two or more days that substantive determinations involve.

96 Department of Labour, Employment Authority Cases 2007-8 (undated c late 2008).
98 A downward trend in compensation awards under the Employment Relations Act (in comparison to those made under the Employment Contracts Act) was already apparent by 2003: Michael Leggat, Compensatory Payments: Some Observations and Thoughts for Change [2003] ELB 41: “A few conclusions can be drawn from these figures. First, after an initially more parsimonious approach, there was a significant increase in the level of awards made by the Tribunal from the mid–1990s. Three of the four highest annual Tribunal averages are for the years 1995 to 1997. Secondly, while there is, as yet, insufficient data to conclude that there is a concerted decrease in dollar terms in the level of awards in subsequent years, it is unarguable that there is not a decrease once considerations of current value are applied. According to Reserve Bank current value equations, the 1995 average Tribunal award of $4,800 made in March of that year would have been $5,559 in March of 2003. Thirdly, in considering likely future trends, the eighteen months for which both Authority and Tribunal awards are available, the average awards made by the Tribunal were some ten percent higher than the corresponding average for the Authority. Before leaving the statistics, it is interesting to note a far more discernible tending downwards of average awards in decisions of the Employment Court over the same period. Applying the same methodology, in 1996 and 1997 the average awards were $9,400 and $10,600 respectively. Averages since then have been $5,600 in 1998, $4,000 in 1999, $8,800 in 2000, $9,300 in 2001.”
99 Ministry of Business et al, note 97.
If it is accepted that member time was intended by policymakers to privilege substantive over ancillary dispute resolution (signalled by the proscription on strict procedural requirements in s 143(f)) then it becomes apparent that progressively less member time was devoted to that primary function.

It can also be argued that procedural and costs disputes are markers of the inability, or unwillingness, of representatives to negotiate and resolve ancillary issues. They also increase the time spent on a problem by representatives. For time-based charging regimes the incentives to privilege adjudication over negotiation of such issues are obvious. Where the number of substantive issues subject to adjudication remained stable, as the compensation awards of 2002 and 2011 indicate, then it is difficult to attribute rising numbers of ancillary determinations to the type of problem the Authority was mandated to resolve. This suggests they may be an incident of representation.

McAndrew and Beck’s analysis of grievance outcomes in 2002 indicated that in terms of success rates for grievants there was no difference between the Tribunal and the Authority: grievants won 58% and lost 42% of the claims filed. Further analysis revealed differences of outcome dependent on the coincidence of representation and adjudicator experience: employers who were represented before Authority members who were former Tribunal adjudicators were significantly more likely to win (grievant success rate 38%) than those before newly appointed members (grievant success rate 66%). This was a difference also apparent at the Tribunal where adjudicators were divided into 4 sub groups, the first of which had a grievant success rate of 53%, the second 35%, the third 65% and the fourth 77%. All of which suggests that individual differences amongst decision-making neutrals underline the essentially subjective nature of the assessment of fairness implicit in the adjudication of grievances, but averaged out those differences had little effect on overall outcomes.

Cost Benefit

When the institutions involved in employment dispute resolution were subject to the cost benefit or utility analysis in 2005 (described in chapter 6) the researchers were aiming to assess expenditure on the institutions against productivity gains to obtain a measure of the economic benefit of each institution. Their calculations were based on the similarity of settlement/compensation awards (less than $10,000) in all three institutions, as the only quantifiable indicator of the overall severity of a case or degree of injustice at issue.100 The Authority’s benefit was assessed at $3.2 million, but its exclusion of Member salary costs transformed that benefit to a negative on the basis of figures available a couple of years later: in the 2007/08 year operational costs for the Authority were $2.23 million (cf $1.75 million – the amount on which the above calculations were based) and member costs were $3.8 million.101 This amounted to between $6,000 and $7,000 per determination (dependent on whether the divisor is the 2007 or 2008 total). If the same calculation was restricted to substantive determinations then the cost per case rose to $11,000 - $13,700.

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100 Plimmer and Cassels, note 8.
Policy Development

The review of the Act in 2003-4 that ushered in changes to the powers of the Mediation Service also resulted in amendments that were intended to strengthen those statutory provisions concerned with the Employment Court’s powers of review. There were few direct changes to Authority powers concerning grievances, apart from an added power to make recommendations to employers for the purpose of minimising the future effects of problematic work practices, and the clarification of Member powers in respect of parties or witnesses absent from investigation meetings.

Employment Code of Practice

The change to which was attributed increased complexity of investigation arose from the insertion of the test of justification for grievances, s 103A. It imposed an objective test (the fair and reasonable employer) for application to the circumstances of the grievance at issue. This formed the basis of a Cabinet decision to develop a code of employment practice for disciplinary and dismissal procedures, consideration of which would assist in the determination whether an employer’s action or an employee’s dismissal was justified. It was aimed at mitigating complaints about the difficulties for small employers posed by the issue of procedural fairness. It is not clear what, if any, policy work was devoted to the Code. The Department’s reasons for seeking a deferral in exchange for a project about providing guidance only on those procedures was based on feedback from the Mediation Service that indicated that notwithstanding the wide range of information and guidance already available there was widespread ignorance of these resources by mediation users. It suggested that the project could focus on whether existing material was sufficiently accurate, appropriate and accessible and the reasons why employers were not accessing it. The lack of support for a Code became apparent when the employer groups that were consulted opposed it for conflicting reasons. Business NZ took the view that it would interfere with employer discretion and the Small Business Advisory Group wanted less discretion and more certainty.

The Department commissioned a Wellington law firm to compile the Employment Code of Practice, renamed as Guidelines for Employers, and it was completed in

102 Discussed in chapter 8: The Employment Court.
103 Employment Relations Act, ss 123(1)(ca), 173(2A-C) inserted on 1 December 2004 by the Employment Relations Amendment Act (no 2) 2004.
104 Rising complexity and length of investigations following the 2004 amendments was described as anecdotal: Department of Labour to Minister of Labour, Paper, Employment Relations Authority, 13 February 2009.
105 Employment Relations Act, s103A inserted on 1 December 2004 by the Employment Relations Amendment Act (no 2) 2004.
106 Cabinet Minutes, CAB Min (04) 23/6.
107 Department of Labour to Minister of Labour, paper Code of employment practice for disciplinary and dismissal procedures, 22 December 2004.
108 Department of Labour to Minister of Labour, paper, Project for providing guidance on disciplinary and dismissal procedures, 24 June 2005.
109 Department of Labour to Minister of Labour, paper Disciplinary and Dismissal procedures – Addressing uncertainty and complexity through improved guidance and the use of the right communication channels, 11 November 2005.
2008, but unavailable as a public resource (on the Department’s website) until some time in 2009.\textsuperscript{110}

The amendment to s 103A in 2011 can be regarded as an attempt to incorporate the major procedural steps necessary for disciplinary actions or dismissals covered by the code or the guidelines into the Act.\textsuperscript{111}

\textbf{Cost and Quality of Representation}

The second of the policy projects, the costs of representation, (described in Chapter 6) devoted policy effort to concerns about employment consultants and no-win-no-fee representatives, when the policy issue was encouraging self-representation:

\begin{quote}
It is unclear whether the costs employers and employees incur for representation are value for money. There are perceptions that an emerging ‘employment consultants industry’ can create incentives for providers to generate fees and the employer and employee may not actually need the services offered. A representative can be engaged to reduce perceived risks when in fact the case is simple, the parties capable and a representative not necessary. Likewise, if one party has a high profile representative, the other may feel compelled to engage a similar representative. This type of ‘lawyering-up’ results in increased costs for both parties.\textsuperscript{112}
\end{quote}

There is no evidence that work on a Cabinet direction to develop a best practice guide for representative fees occurred.\textsuperscript{113} However potential justifications for this failure can be discerned in the paper’s acknowledgment that costs concerns were based largely on anecdotal evidence and problem perception, non-lawyer employment consultants were engaged in only a small number of disputes, and in suggestions for research subjects – substantive data on costs of representation, more analysis on types of representative, analysis of other Tribunals (Disputes and Tenancy were mentioned), consideration of fee maxima or tariffs for representatives.\textsuperscript{114}

None of these suggestions were taken up. Issues concerning representation moved from fees to the quality of services provided. There were also increasing references to the need to balance the benefits that representatives brought to the dispute resolution process against concerns about cost and quality.\textsuperscript{115}

The result was a Ministerial direction to explore the extent to which the quality of paid representation by employment advocates (excluding lawyers) could be better assured.\textsuperscript{116} This involved consideration of whether they should be required to belong to professional associations but nothing substantive arose from whatever work was done as the result of this direction.

\textsuperscript{110} Department of Labour, internal email communications between policy and communication officials in February 2009, confirming that the Guidelines had been completed (by Peter Chemis of Buddle Findlay) and delivered but not posted on the Department’s website.

\textsuperscript{111} Employment Relations Act, s103A(3) substituted, on 1 April 2011, by Employment Relations Amendment Act 2010, s 15.

\textsuperscript{112} Department of Labour to Minister of Labour, briefing note, Cost of Representation under the Employment Relations Act, 3 February 2006.

\textsuperscript{113} Ibid.

\textsuperscript{114} Ibid.

\textsuperscript{115} Ibid.

\textsuperscript{116} Minister of Labour to Cabinet Economic Development Committee, Review of the Employment Relationship Problem Resolution System, 4 November 2007.
The representation cost project became subsumed by a wider review of the employment relationship problem system, which reported in 2007 that the system was generally meeting its objectives, but could improve to better reduce its vulnerability to negative criticism, and more effectively preserve its integrity. Of the 14 options proposed by officials and the Government’s Small Business Advisory Group there were 6 on which the Department was directed to undertake further work, three of which concerned the Authority: representation (discussed above), the effectiveness of the statutory provisions for reducing remedies for substantive justification and contributory conduct and reducing the time taken in the investigation and determination of problems.117

Authority application of s124 (contribution)

Much of the employment relations research commissioned by the Department from 2000 onwards (described in Chapter 6) suggested that employment relationship problems negatively affected small and medium sized employers to a greater extent than larger employers. This was perceived by the Department to influence their assertions that problems of process were privileged over those of substance. Officials regarded the statutory power to reduce remedies for contribution and the discretion to take the size of the employer into account in determining remedies as the answer to this problem. To substantiate this view they informally reviewed 33 determinations issued over a 5-week period to find that there were two dismissals resulting from problematic process for which no remedies were awarded because of the contributory behaviour of the employees. In another 8 determinations remedies were reduced for this reason.118 This was followed by a research project that analysed 300 determinations. Of the 196 that found for the employee 74 (37%) included s 124 orders.119 This appeared to underline concerns expressed by the Small Business Advisory Group that the power in s 124 was insufficiently exercised. It recommended an amendment to the provision to require Authority members to specifically refer to it when awards of compensation were made. The Department took the view that the issue of a Practice Note requiring members to consider contributory conduct could achieve the same result.120 This was the subject of discussion with Authority members who flatly rejected the suggestion that they were not applying s 124 appropriately.121 The issue does not appear to have been taken any further.

Reducing investigation times

Exploration of the third issue occurred against the background of the Law Commission’s review of New Zealand’s tribunal system.122 The Law Commission’s criteria for tribunal reform utilised by the Department as a basis for policy to reduce

117 Ibid.
118 Ibid.
119 Department of Labour, internal paper, Section 124, Employment Relations Act, 8 May 2008.
120 Ibid.
121 Department of Labour, Minutes, Meeting between the Department of Labour and members of the Employment Relations Authority; 30 July 2008.
122 Law Commission to Department of Labour, Advice of planned project, Unified Tribunal Framework, 12 October 2006; The Authority was ultimately excluded from the scope of this project because of its integration with other employment institutions: Law Commission, Tribal Reform, (NZLC SP 20), October 2008.
investigation and determination times included fairness and credibility (specialisation, quality decision making, transparency, consistency, independence, rule of law) accessibility (availability of information about the Authority, ease of entry, cost to users – including the cost of representation, geographic coverage), administrative efficiency (minimal delay, best use of resources, innovation) and proportionality (relevant to complexity and seriousness of issue).123

Officials working on this project proceeded on the basis that determinations were issued between 2 weeks and some months after investigation meetings. Those that took months were regarded as having cost implications for parties, in lost wages, legal fees and social costs.124

The resulting proposals included a standardised process and procedure for better establishing fairness and credibility. Suggested were improved induction and training programmes for members and staff, a professional development programme, generic procedures for member appointments, practice notes and guidelines from the Chief Member and better access to reasons for decisions.125

Recommendations to increase speed and efficiency included: the introduction of oral and/or same day decisions (the practice in the District Court); dedicated legal research support; a review of the balance of full and part time members; better case management and compulsory mediation.126

Also proposed, to improve accessibility, was the introduction of new technologies: electronic document filing and video/tele conferencing. Transparency was regarded as dependent on a memorandum of understanding between the Authority and the Department containing key expectations and a systematic collection of data on performance so that the Authority could be measured accurately against expectations and required to improve efficiency. Research on user experience and requirements of representation, cost, process, outcome and on the effectiveness of informal and inquisitorial over adversarial processes was also proposed.127

Authority members consulted about these proposals supported those that sought to enhance the role of support staff (from clerical to case management duties), require mediation to be compulsory, improve flexibility of process, provide more staff and member training, ensure their determinations were available on the Department’s website, introduce dedicated legal research support and increase the Authority’s membership. They suggested that the role of legal representatives could be reviewed, noting that these were the representatives that tended to entrench parties to issues by their methods of drafting statements of problem. They further suggested adopting the

123 Department of Labour, internal paper, Review of the Employment Relationship Problem Resolution System exploring options to reduce the time taken in the investigation and determination of cases in the ERA, including by considering changes to process, February 2008
124 Ibid.
125 Ibid.
126 Ibid.
127 Ibid.
Disputes Tribunal position on banning representation for small matters and wanted mediators to be more assertive in their use of s 150 powers of decision.\textsuperscript{128}

Later, in a similar consultation, the members asserted that their investigations and determinations should not be compromised by an emphasis on handling matters more quickly, resisted improving case management systems for the reason they were already well standardised, opposed the idea of using information technology for investigations on the grounds that face to face contact was important, preferred the use of independent investigators over technology, resisted the idea of oral decisions, but supported research that would show that the investigative or inquisitorial model was more efficient than the adversarial model of dispute resolution.\textsuperscript{129}

The ensuing recommendations focussed on: collection of case statistics; a Practice Note about compliance with timetabling directions; the obligations of support staff (to refer unmediated problems to mediation or require applications for waiver); further consideration of a case management model; greater use of distance technology; and compilation of a DVD on the workings of the Authority for parties to investigation meetings.\textsuperscript{130}

The General Election a few weeks later relieved the need to further develop or implement the proposals and recommendations. By December 2008 the new Minister of Labour had agreed to defer the report back to Cabinet on the analysis of the six preferred options to enhance the employment relations problem resolution system\textsuperscript{131} and six months later the report was no longer required.\textsuperscript{132}

\section*{Conclusions}

\subsection*{Quality of Process}

The quality of process measures for the Authority suggested in chapter 5 (balancing accessibility and fair process, satisfying the rules of natural justice whilst avoiding the traps of excessive legalism and formalism, privileging co-operative and consensual over adversarial and divisive problem-solving) raised the issue whether it was possible to rely on an inquisitorial function controlled by personnel rooted in adversarial traditions to achieve these goals. The measure therein posed, the degree to which the Authority developed and maintained the quick, low-level, informal adjudicative culture its policy makers desired, is assessed by reference to ease of claiming, timeliness of Authority response, predictability of its outcomes, management of the tension between informality and acting judicially and the cost of providing a separate adjudicative function.

\begin{flushleft}
\textsuperscript{128} Department of Labour, note 20.  \\
\textsuperscript{129} Department of Labour, note 121.  \\
\textsuperscript{130} Department of Labour, internal paper, \textit{Draft recommendations}, 29 August 2008.  \\
\textsuperscript{131} Department of Labour to Minister of Labour, \textit{Overview of the Employment Relationship Problem Resolution System Work Programme}, 23 December 2008.  \\
\textsuperscript{132} Minister of Labour to Minister of Finance as Chair Cabinet Committee for Economic Growth and Infrastructure, letter, 15 May 2009.
\end{flushleft}
Claiming

The regulatory provision of templates for seeking and responding to requests for Authority assistance underlined the policy desire (also signalled by changes of statutory language) for informality of claiming. Members accepted that the self-represented and those represented by organisational advocates drafted their claims and responses in the language and manner signalled by the templates. Members were critical of lawyer insistence on the use of the language of the law as a substitute for the everyday language that the templates signalled as appropriate for original content. They believed that use of legal language constrained the way that parties (on whose behalf it was deployed) perceived and engaged with the problem at issue and its resolution. This suggests that the signals intended by the change of language and provision of templates were received differently, dependent on the type of representation that parties engaged.

Three conclusions are therefore apparent:

- choice of statutory language and use of prompts or guides to claiming may influence the expectations and behaviour of disputants during any subsequent resolution process;
- the means by which claims are drafted may either facilitate or hinder policy intentions for the resolution process;
- these effects on the process of claiming at the Authority did not attract post-statute policy attention.

The policy decision to refrain from requiring resort to mediation as a compulsory first step in the dispute resolution process imposed obligations on claimants and the Authority. Claimants had to pay a filing fee to the Authority to obtain a direction to mediation and the Authority had to supply administrative services and Member time to make those directions. This imposed complexity and cost on the process of claiming.

It can therefore be concluded that:

- the (practical) compulsion to attend mediation imposed additional costs on claimants who were either unaware of this requirement or unable to secure the attendance of the other party at mediation;
- this resulted in the existence of two classes of claimant: those who were or were not required to pay a filing fee for mediation (i.e claimants who opted to commence at mediation paid no filing fee but those who commenced at the Authority and were directed to mediation had to pay the Authority filing fee);
- the need for mediation to be a compulsory first step in the dispute resolution process was well understood by the Department but not the subject of legislative change.

On the basis of Law Commission criteria for measuring tribunal effectiveness:
the Authority was accessible in terms of ease of claiming (provision of templates) and availability of information about the workings of the Authority;

the Authority’s accessibility diminished in terms of cost to users who relied on individualised representatives.

Timeliness

Measures of timeliness concern the periods that elapsed between application and investigation meeting and between meeting and determination. They are derived from data about applications awaiting hearing and written determination, annual determinations issued, rates of determination per member. For the period under review this data confirmed the existence of regional variations in waiting times and determination rates, with the most significant and consistent variations being those between the Wellington regional office and the other two offices in Auckland and Christchurch. The Wellington office consistently had lower numbers and percentages of applications awaiting investigation and/or determination and it issued more determinations (on annual and individual measures). The Wellington office operated, during this period, a different method of file allocation than the other two offices.

Membership of the Authority varied during this period from 13 to 18 but the data reveals that variations in the numbers of determinations issued annually bore no relationship to the size of the Authority membership. Furthermore, whilst the membership was increased for the Auckland and Christchurch offices it decreased in Wellington.

It can thus be concluded that:

- timeliness of investigation is more closely connected to file allocation systems than to the number of adjudicators available to determine applications;

- automatic file allocation systems appear to offer more timely adjudicator interventions to disputants than those which are discretionary or reliant on administrators;\(^\text{133}\)

- file allocation systems that transfer responsibility for the management of proceedings to adjudicators from the date of application offer more timely adjudicator interventions to disputants than those subject to administrator management;

- timeliness is more likely to be an incident of adjudicator work-rate than adjudicator numbers;

\(^{133}\) Automatic file allocation systems impose more work obligations on adjudicators by the timing of the allocation (when applications are first filed), but potentially save adjudicator time by oversights and interventions that undermine representative failures to observe time limit requirements. Representatives are less keen to engage with adjudicators than with administrators about delay (perhaps because the power/status relationships are different).
• notwithstanding that the data about regional variation in timeliness measures was available to the Department from the outset, it attracted no policy attention.

The timeliness issue with which the 2007 review grappled concerned the period between investigation meeting and determination. This time period appeared to attract the most complaints. This is likely to result from an absence of certainty about when determinations would appear. By contrast the period between application and investigation became certain once dates were set for investigation meetings.

It can be concluded that:

• waiting times that trigger complaints were more likely to be associated with Authority obligations that were not time-limited (or on which no dates were set)

On the basis of Law Commission criteria for measuring tribunal effectiveness:

• the Authority was less efficient, administratively, than the Mediation Service in terms of waiting times

_Predictability_

The question posed in chapter 5, whether the investigative mode of adjudication was sufficient on its own to guarantee the efficiencies in case progression associated with inquisitorial systems can be assessed by reference to predictability of claim outcome. That the jurisdiction was dominated by one cause of dispute, dismissal, and guaranteed similarity of remedy (regardless of institution) might indicate that the issue of predictability of outcome was straightforward. Kagan’s distinction between inquisitorial and adversarial systems, that the maximisation of adjudicative predictability is required of inquisitorial but not adversarial systems, suggests the issue is more complex than a simple incorporation of the inquisitorial mode into a jurisdiction offering other modes of resolution.

Since predictability of outcome is the means by which disputes are resolved without the need for institutional intervention the stability in numbers of requests for institutional assistance suggests that it was either absent or exerted a limited influence on the process of claiming in respect of dismissal grievances.

The high resolution, private settlement and withdrawal rates associated with these institutions suggest that adjudicative predictability influenced settlement and remedies, rather than the process of claiming. If this is the case then its purpose of reducing the need for institutional intervention was defeated, but Galanter’s theory about the necessity for settlement by lawyers to occur within, rather than absent institutions, can be applied.

Research showing that the overall average success rate for grievants remained unchanged from the Tribunal to the Authority indicates that a changed mode of adjudication had no effect on success rates. The finding that adjudicator identity correlated with variations of success rate clarifies why predictability influences resolution but not claim rates in this jurisdiction. Predictability is dependent on perceptions of uniformity of outcome. It was likely to be disrupted in this jurisdiction by the potential for variation of outcome offered by a range of views about what is
fair in dismissal. Thus the perceived width of discretion arising from the subjectivity of dismissal fairness assessments formed a basis for reposing trust in differences between individual adjudicators. This, rather than other assessments of disputant position, may also have facilitated resort to the institutions.

Policy for the ERA assumed rather than debated the issue of adjudicative predictability, perhaps as the result of its perceived connection to outcomes (particularly from the Court of Appeal) regarded as disadvantageous to the new Government’s employee constituency. It preferred to rely on the provision of information (institutional and extra-institutional) for predictability of outcome, and on access to justice over adjudicative predictability as a core policy value.

It is possible that the policy failure to consider the point at which these principles intersect explains higher rates of access to the ERA institutions than to the Tribunal, and little measurable change to the predictability of institutional outcomes. Their intersection point concerned availability of information, but it was information of a specific type. The policy effort concerned information about employment relationships. This explains the focus on employment rights and dismissal and disciplinary procedures. Information about dispute outcomes - data about claim and success rates, remedies sought and awarded, the time and costs of claiming, winning and losing – was collected by the Department but was not, or inadequately, publicly available. The data which was available – annual compensation and costs award sizes and numbers – was meaningless without the comparator detail of the number of problems determined for which such orders were claimed. Anonymised data about settlements concluded at the Mediation Service was similarly unavailable.

This is the information that is as relevant to decisions to make or defend claims as is that concerning the reasons and processes for disputing. The absence of publicly available hard data did not, however, prevent the jurisdiction’s practitioners from access to or comprehension of the messages that the data provides, because experience of its operations delivers the same messages about what positions are likely to succeed and what are not.

Thus its absence from the public domain transformed it into a resource that either had to be purchased or regarded as an incident of union membership. Its influence on filtering access to institutions was identified in chapter 3 as contributing to the comparatively low use of the grievance committee process when compared to resort to the Tribunal.

It can therefore be concluded that:

- inclusion of an inquisitorial mode of dispute resolution had no effect on the predictability of outcomes for dismissal grievances;

- predictability of outcome:
  - is a quality of process measure relevant to use of institutional dispute resolution services;
  - is of value to disputants in the decision whether to rely on the assistance of institutional dispute resolution services;
appears not to influence use of institutional dispute resolution services in the employment jurisdiction;

may be dependent on the public availability of information collected by the Department but not publicly disclosed.

Informality

The major theme that emerges from analysis of the quest for informality concerns the struggle for control over the resolution process between lawyers and Authority members. Members embraced the investigative function for the width of powers it conferred on them to utilise a range of resolution strategies and control the pace and time required for investigations. As a result investigation meetings took up less time (overall) than Tribunal hearings.134

The struggle for control of the resolution process was not characterised in those terms. Lawyers preferred to describe it in terms of their requirements for the Authority to act judicially. If the conclusions of the Employment Court about the natural justice implications of refusing representatives ‘rights’ to cross-examine are indicative then acting judicially appeared to be regarded as synonymous with adversarial modes of adjudication.135 The Court’s decisions in David v Tilley136 and David v Employment Relations Authority137 represented an attempt to impose upon the Authority the adversarial mode of adjudication legislatively discarded in favour of the investigative mode. The Law Society, granted intervener status for the Full Court hearing of David v Employment Relations Authority, supported the Court’s position. It remains unclear whether the Court of Appeal would have upheld this position because the legislative amendments confirming cross-examination’s discretionary status were passed before it could hear and determine the Crown appeal.

This was the first major confrontation about the exercise of the Authority’s investigative powers. The second (again arising from the assertion of representative rights to cross-examine) concerned an Authority direction requiring parties to file, in advance, statements or questions for investigative testing. The absence of a requirement to disclose these communications to the other party resulted in a finding that the Authority had breached natural justice.138 The direction was thus outside the Authority’s jurisdiction. It too prompted amendments to the Act excluding the Court from jurisdiction over challenges to Authority procedures.139

It is possible that the speed (or predictability) of the legislative reaction deterred other attempts to have the Authority revert to the adversarial status quo via the Employment Court. Resistance to informality took other forms and was, as a result, more successful. Thus in the drafting of statements of problem and reply and in the briefs of evidence required for investigations lawyers felt able to revert to the language of litigation. This caused Authority members to associate it with negatively influenced

134 Beck and McAndrew, note 27.
138 Metargem v Employment Relations Authority [2003] 2 ERNZ, 186
139 Employment Relations Act s 179(5) was inserted on 1 December 2004 by Employment Relations Amendment Act (No2) 2004, s 60.
party expectations of and participation in the problem resolution process. If this association could be established it would confirm that the means by which disputes are described or framed influences the means by which they can be resolved. Informality of language in the presentation of problems may well form the basis for informality of resolution process.

The incidents of the struggle over informality appeared to be time and categorisation (the process of defining and separating issues raised by a problem), the latter arguably a constituent of the former. If, for instance, the battles over cross-examination were reframed as struggles over the time required for the hearing or investigation process it becomes clearer what might actually have been at stake for the representatives who pursued that issue.\textsuperscript{140} The advice that eliminating cross-examination reduced the length of hearings, the complaint that it simply repeated issues already covered and the high proportion of lawyers who asserted a reduced capacity to veracity test witnesses suggest a connection between the passage of time and unrestricted rights to cross-examine. The measurably higher proportion of lawyers over union advocates who noticed the difference (in its absence) might also be explained in terms of time. For lawyers time was the basis of the business opportunity offered by hearing or investigative processes because time formed the basis of their fees regimes. Concepts of time raised different issues for union advocates engaged with grievances: the more time spent on individual matters meant less time available for the collective interests of their memberships.

Similarly, increased proportions of ancillary determinations suggest an increasing Authority tendency to submit to lawyer requirements to separate (and separately determine) the issues raised by a problem. Preliminary and post-investigative issues requiring separate determination increased the time required for problem resolution. Thus is established a connection between formalist drafting (dependent on categorisation of facts into separate causes of action) and the passage of time.

Additionally lawyer insistence on the provision of written submissions following the conclusion of investigations increased the time devoted to individual problems and deferred the formulation and dissemination of determinations – the time period that attracted complaints of delay.

Increased proportions of ancillary over substantive but relatively stable numbers of determinations issued annually suggest that fewer problems required adjudicative resolution as time passed but greater institutional input.

Passive resistance thus proved to be more successful for lawyer representatives than direct action in the struggle over informality of process. Their failure to adopt the language mandated for this jurisdiction and their requirements for issues raised by claims to be split and separately considered met no effective resistance. These tactics were neither the subject of policy consideration nor of direct Authority reaction (apart from complaint). The increases to costs awards, unmatched by substantive increases to compensation awards, tend to confirm lawyer success in imposing a formality of process on the Authority that undermined the statutory policy intentions for it.

\textsuperscript{140} It should be conceded that few lawyers are likely to accept that cross-examination is a means of extending the time taken by a hearing. They are more likely to characterise it as a means of asserting the power of the advocate to test the veracity of the witness.
Lawyer success in evading policy scrutiny can be measured by the policy effort that was devoted to the obstacles that representation posed for informality and the diversion of this effort to analyses of non-legally qualified advocates, notwithstanding this group’s low incidence as representatives at the Authority. Missed by the policy attention devoted to this group was the essentially parasitical nature of the representation they offered. Aligned to dispute oriented (as distinct from resolution focused) representation they offered representation services at a lower price, thus exposing the business opportunity that offering this service provided, but they were not involved in advancing the adversarialist agenda. Their strategy (reliance on the higher cost of resisting claims requiring adjudication to extract mediated or negotiated settlements) was not original, but their failures (no-win-no-fee representatives in particular) to camouflage the tactic by resort to the style, culture, dress and language of the law, both exposed it and protected from scrutiny the representatives who originated the strategy.

This raises the role of institutional separation in advancing the informality of process goal. It can be argued that separation of institutions inhibited informality at the outset because it conceded the adversarialist position of the necessity for separating (thereby formalising) the variety of ways by which dispute resolution occurs. This operated to inhibit resort to the horses for courses approach (the use of mediative or adjudicatory powers, dependent on the individual circumstances of the dispute and the parties) favoured by informality’s advocates: it resulted in mediator and lawyer resistance to the Service’s use of the adjudicative power in s 150; and it provided a basis for lawyer resistance to Authority reliance on a mix of mediative and adjudicative investigative powers. Ancillary determinations that record consent orders suggest that Authority members who assert powers to facilitate negotiated settlements are both willing and able to rely on a mix of resolution techniques. The absence of consistent data on this form of resolution means its extent was unclear. Consent determinations do not record whether settlements are privately negotiated or reached with the assistance of the Authority. However, their existence in higher numbers than decisions by the Service suggests that the investigative power resulted in a greater reliance on a variety of resolution modes than the mediative power. The types of ancillary determinations issued (consent orders, preliminary and post-investigative orders) suggest that use of a range of powers depended on the expectations of representatives and parties and the extent to which it was apparent that facilitation of settlement was possible.

Although it remains unclear to what extent institutional separation raised expectations about purity of resolution mode, it can be concluded that it undermined policy initiatives to institutionalise informality. Lawyer expectations that a separate adjudicative body would operate adversarially influenced their resistance to the prompts that changes of language, provision of Problem and Reply templates, transfer of control over the progress of proceedings and use of the investigative mode signified. They felt able to ignore the statutory requirements of informality of process for the Authority because they had been able to do so with similar goals for the Tribunal.

Although it can be concluded that separating adjudicative from mediative functions and the investigative mode from the adversarial failed to advance the goal of informality of process, separation did underline the extent to which disputes capable of mediated or negotiated resolution can be filtered from those requiring adjudication.
Thus the policy goal of informality for Authority process was:

- both actively and passively resisted by lawyer representatives;
- undermined by lawyer representatives required to maintain or justify the time required for Authority proceedings;
- also undermined by institutional separation of modes of resolution;
- further undermined by a failure of policy effort to collect data about the workings of the Authority that identified whether and why the processes prescribed for it operated as intended.

It can also be concluded that:

- reliance on informality of language to reinforce requirements for informality of process influenced some disputants but not others;
- disputants least likely to be influenced by messages about informality tended to be represented by lawyers;
- provision of template originating documents for proceedings can reinforce messages about informality of process;
- use of informal language in the description or presentation of problems can influence the informality of the resolution process.

**Cost**

Institutional separation of the mediative and adjudicative functions had the effect of throwing into sharp relief the differences of cost to the public purse resulting from their separate administration and use. The major cost incurred by each institution was in salaries. The Remuneration Commission set the salaries of Authority members and the Department set mediator salaries. Authority members received higher salaries than mediators, thus institutionalising differences of status between the two groups. It is possible that this effect was unintended but differential pay rate/status is another means by which adversarial expectations of the adjudicative institution in a separated system are raised and the goal of informality undermined.

But for their use of different resolution functions (and the need for written determinations) there was no difference in the types of problem the Service and the Authority were required to resolve, or in the remedies that resulted, the most common of which involved payments of compensation and costs. The remedy of reinstatement was insufficiently agreed or awarded to warrant publication of its incidence. Greater certainty of result (predictability) was available from the Authority, given that its determinations were public, mediated settlements were not and there were proportionally fewer adjudicated outcomes than at the Tribunal, but this had no effect on applications to the Authority, the basis on which its membership requirements were measured.

There was a major difference in the number of outcomes each institution produced. The Authority’s membership constituted 40-50% of the number of mediators but it
investigated between 9 and 15% of the annual number of problems mediated by the Service.\textsuperscript{141}

The cost per case of problems investigated by the Authority was higher than the majority of its awards of compensation. This calculation excludes the cost of the mediation to which almost all Authority cases were referred, and is further complicated by those cases that require more than one determination. Cost of obtaining aggregate results can be calculated by reference to the Authority’s costs and compensation tables. In 2007, 182 compensation orders were made (from 861 determinations, 14 of which concerned collective issues). On the basis that individual awards were made at the upper limit of their individual categories the maximum total amount awarded was $1.383m. Similarly 148 costs orders amounted to $453,000. The cost to the public purse of achieving these money transfers totalled $6.03m.

It can be concluded, on the basis of Law Commission criteria for measuring tribunal effectiveness, that:

- the administrative efficiency of the Authority (in terms of best use of public resources) was undermined by
  - increases to Authority membership on the basis of application numbers rather than workload;
  - reliance on the less efficient of the two file allocation systems in operation for its first decade;
  - the problem of proportionality exposed by Authority costs of $6 for each $1.80 distributed in compensation and costs awards (the most common remedies);
  - the payment of higher salaries (to members than mediators) for resolving significantly fewer problems and taking longer to do so.

**Quality of Outcome**

The policy desire to replace the ideological basis of the ECA, economic rationalism, with a new ideology of increasing productivity through cooperation, collectivism, and the re-building of constructive workplace relationships,\textsuperscript{142} was premised on the idea that a contractual approach to labour (where it was treated like any other commodity) had reduced the New Zealand workforce to a low-waged, low-skilled labour market, with only small groups of highly paid and highly skilled employees. One way of redressing the perceived imbalance would be a return to collectivism, but not at the expense of individualism (termed *freedom of association*). They would co-exist:

\textsuperscript{141} Department of Labour, *Key Messages: Employment Relations, The Employment Relations Act is working* (undated, c late 2005): These figures are based on number of applications resolved, rather than on number of determinations issued.

Balancing the rights of individuals and promoting collectives presented quite a challenge to ensure that the legislation catered for both diversity and flexibility while addressing the fundamental issue of inequality in the workplace.\textsuperscript{143}

The balance struck relegated collective rights to bargaining for wages and conditions whilst individual rights would be enforced by a dispute resolution regime that was significantly more accessible. Disputes about collective rights continued (in this era as in its predecessor) to be dwarfed, both in number and effect, by the myriad ways that individual grievances, particularly dismissal grievances, could be mediated, investigated and litigated.

The material in this and the preceding chapter thus establishes that the effect of the belief that collectivism and individualism could co-exist was to ensure that the rights guaranteed by individualism undermined any benefits that collectivism could offer dispute resolution.

The dominant quality of outcome measure for the Authority, the extent to which employment relationships were mended rather than ended, was dependent on the extent to which lawyers maintained the influence established over the Tribunal on claiming and disputing in this jurisdiction. The policy intention was that lawyer reliance on adversarial tropes of disputing would diminish or alter to conform to the goals of supporting employment relationships.

The major measure of the primary goal, reinstatement, was not publicly recorded, in the way that compensation and costs awards were, because the Authority rarely ordered it.\textsuperscript{144} By contrast awards of compensation were published. Their numbers remained relatively stable at 160-190 per annum, confirming that the precedent set by the Tribunal – exit from the relationship accompanied by money transfers where fairness was in issue – was maintained by the Authority.

Also stable was the incidence of representation. Lawyers represented two thirds of parties to Authority investigations. The Authority in large part conceded their requirements of process. The result was a quasi-adversarial resolution process for parties with lawyers which combined member control over the pace and timing of investigations with lawyer control over the presentation of evidence. For unrepresented parties, or those represented by institutional advocates, the Authority was less encumbered by adversarial requirements of process.

The extent to which lawyers inhibited the development of an inquisitorial culture for the Authority remains unclear. Passivity, or inadequacy of Authority reaction to lawyer requirements of process contributed, as did resistance to policy ideas for new or innovative ways of improving the resolution process – typified by Member reactions to suggestions to reduce determination waiting times.

\textsuperscript{143} Ibid.

\textsuperscript{144} Beck and McAndrew, note 27: Of 624 determinations in its first 18 months of operating the Authority ordered 13 reinstatements; Andrew Caisley, The law moves in mysterious ways in Rasmussen (ed) Employment Relationships, New Zealand’s Employment Relations Act, (Auckland University Press, Auckland, 2004), 60: “Ironically this would suggest that reinstatement is now being ordered less often than in the early years of the Employment Contracts Act when the Chief Judge was complaining that it had become endangered as a remedy. It appears that the legislative cure has completely failed to address the perceived problem.” at 66.
Thus, the conclusion of chapter 6, that the Mediation Service offered a higher quality of process for the quality of outcome goal of the ECA, labour market flexibility, applied also to the Authority. The effect, according to one commentator, has been to preserve the imbalance of employer and employee interests in the personal grievance procedure that followed the ECA, a gradual shift in the test of “unjustifiable” behaviour to a standard that essentially reflects the perspective of the employer, not that of an impartial observer balancing the interests of both employer and employee.\textsuperscript{145}

The effects on the wider outcome goal, greater labour productivity, followed this failure to disrupt flexibility:

\ldots since the introduction of the Employment Contracts Act there has not been a dramatic increase in labour productivity in New Zealand. Indeed, some have argued that there has been a decline in the growth of labour productivity in New Zealand since the early 1990s. At the same time during the course of the 1990s Australia’s labour productivity performance has been far superior to that of NZ despite the continued role played by arbitration. These findings suggest either that labour market regulation is not the only factor which determines labour productivity or that neo-liberal arguments about the relationship between individual contracting and productivity are flawed.\ldots

Thus, despite their recourse to extra-arbitration protection, most NZ employees suffered badly from exposure to the forces of market liberalization during the ECA period. While the Labour government has re-regulated the employment relationship, the ERA has not led to the reconstruction of the multi-employer bargaining structure that prevailed during the arbitration era. Neither have substantial renewal and organizing efforts, backed by new statutory support mechanisms, served to substantially re-invigorate a union movement demoralized following the abolition of the NZ arbitration system.\textsuperscript{146}


\textsuperscript{146} Michael Barry and Nick Wailes: \textit{Contrasting Systems? 100 years of Arbitration in Australia and New Zealand}, (2004) 46(4) Journal of Industrial Relations, 430 at 441, 443
Chapter 8
Employment Relations Act Institutions
Operations and Policy: The Employment Court

Introduction

The policy desire to incentivise negotiated over adversarialist approaches to dispute resolution was reinforced in the ERA by the goal of reducing the need for judicial intervention. It was hoped that this would facilitate increased rates of maintained (over terminated) employment relationships. The focus of this chapter is on how the goal of diminishing the need for judicial intervention influenced the Employment Court (EC).

Predictions during the policy formation process of increased work for the EC proved to be mistaken. A major theme of the material about its throughput after 2000 was the reduction of work either available to or performed by its judges:

The Employment Relations Act … has altered the character of the Court’s work. At one end, that work was extended by the removal of previous restrictions upon the Court’s reconsideration of cases decided by the tribunal below it. At the other end, the Act reduced the scope for the Court’s work by requiring all disputes to go to mediation at least once. In this way, many cases do not reach the Employment Relations Authority at all and, of those that do, reportedly half are settled by further mediation or otherwise by consent. The Court has the capacity, as a result, to take on additional work but none has so far been supplied. The nature of the Court’s work has altered as well. However, personal grievances and disputes about the interpretation or operation of employment agreements still form the main diet.

Nonetheless the EC preserved, throughout much of the period under review, its usual complement of 5 judges – some under temporary warrants – even as it became clear that the work available did not justify that number.

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1 Employment Relations Act 2000, s 3(a)(vi).
2 Chief Judge, Employment Court to Minister of Labour, letter, 15 February 2000; Auckland District Law Society, Submission to Employment and Accident Insurance Select Committee, Employment Relations Bill, (undated), Christopher Toogood, QC, Submission to Employment and Accident Insurance Select Committee, Employment Relations Bill (undated), W C Hodge, Submission to Employment and Accident Insurance Select Committee, Employment Relations Bill, 1 May 2000.
4 When Judge Palmer retired in 2003 the Department took no immediate steps to replace him. A request to the Minister of Labour from the MP for Christchurch Central about a replacement appointment resulted in advice to the Minister that a replacement was not warranted because the workload of the court in Christchurch could be managed by circuit judges, given that in the year to May 2002 a total of 138 applications were filed in the court, nationwide, and in the year to May 2003 163 applications were filed, 15% of which emanated from Christchurch. It went on to note that the workload of the court under the new legislation was 40% of that under the Employment Contracts Act: Department of Labour to Minister of Labour, Memorandum, Replacement of Employment Court Judge in Christchurch, 19 June 2003.
Analysis of the EC’s operations will first consider its dispositions – the means by which proceedings before it were dealt. A consideration of its role in reviewing Authority processes will follow. The extent of the EC’s acknowledgement of the policy desire in the new legislation to restrict this aspect of its role under the ECA will be traced through a series of decisions it made about Authority processes. An exploration of the reasons for this approach will consider the relationship between policy requirements for informality and judicial expectations of role and status as the means by which the policy objective to reduce the need for judicial intervention was ignored.

**Operations**

The number of proceedings filed at the EC declined after the ERA took effect, but, given the variations of data and input (the monthly monitoring reports appear to count all applications as separate proceedings, so that a proceeding that generated interlocutory activity would be counted many times over), turns less on the number of proceedings filed than the work that they generated. The number of proceedings completed (or fully disposed of) in the first 3 full years of the new Act showed a drop from 245 (101 of which were judgments) in the 2001/2 (July to June) year to 122 (77 judgments) the following year and 47 (24) in the 2003/4 year.

Comparisons between final and interlocutory (or ancillary) judgments appear not to have been made by the Department, although later in the decade data collected about the number of judgments (substantive and ancillary) issued by each of the judges between 2006 and 2012 revealed an annual average total of 160 but with marked variations.

The point of analysing the distinction between substantive and ancillary (costs, interlocutory, and other procedural decisions that do not resolve the substantive claim/s at issue) judgments lies in what it suggests about the type of work the EC performed. Research revealing that as the need for substantive trials reduces, ancillary decision-making rises, attributes this to the phenomenon of lawyers negotiating in the ‘shadow of the courts’ where the increased likelihood of negotiated settlements of proceedings increases the number of interlocutory or process issues requiring adjudication.

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5 Department of Labour, Industrial Relations Service – Monthly Monitoring Reports for 2001, 2002: 277 proceedings were filed in 2001, 249 proceedings were filed in 2002.

6 Monthly monitoring reports were summaries compiled by the Department of the applications, judgments, withdrawals and applications outstanding for the relevant month.


8 Department of Labour to Minister of Labour, *Key Messages: Employment Relations: The ERA is working* (undated draft c 2006).

9 The lowest annual number of judgments for the period 2006-12, was in 2008 (117), and the highest was in 2012 (216)

10 Galanter, note 7.
The proportion of ancillary decisions can be calculated by reference to the number of applications outstanding to show that in its first two full years of operation under the ERA the proportion of ancillary to substantive decisions rose significantly between 2001 and 2002.\textsuperscript{11} Separating out ancillary decisions also affected apparent disposition rates. The Department’s Monitoring Reports treated all judgments as dispositive, suggesting that for this period there was an even split between judgments and withdrawals.\textsuperscript{12} Separating ancillary from substantive decisions reveals that a higher proportion of proceedings were disposed of by withdrawal.\textsuperscript{13}

The EC’s judgment website\textsuperscript{14} showed a steadily rising rate of ancillary decision making: for the last half of 2006 44% of the decisions published were ancillary; in the 2007 year they constituted 55% rising to 66% in 2008. By then the number of substantive judgments issued annually was between 41 and 62, except for 2007 (79).

**Process Reviews**

**2000 - 2004**

*The David decisions*

The two EC judgments on the cross-examination issue described in chapter 7, *David v A.E Tilley*\textsuperscript{15} and *David v Employment Relations Authority*\textsuperscript{16} were amongst the first to consider procedural issues following the commencement of the new statute.

Just as submissions from the legal profession on the Employment Relations Bill focused on potential problems for natural justice of the Authority’s investigative role, rights to cross-examination were raised as an issue of natural justice. The issue was litigated within months of the publication of judicial and practitioner concerns about the Authority’s intention to restrict cross-examination in its investigations.\textsuperscript{17}

In what appears, with the benefit of hindsight, as a rehearsal for the *David* decisions the Chief Judge in September 2000 (in an article acknowledging that the EC’s workload would be dependent on the extent to which the processes of the Authority and the Mediation Service were accepted)\textsuperscript{18} set out the case for asserting rights of review, in the face of the privative provisions of s 184. Section 27(2) Bill of Rights Act 1990 (BORA) was cited as the yardstick for assessment whether rights to justice

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\textsuperscript{11} Department of Labour, note 5: in 2001 the proportion of ancillary to substantive judgments was 14\%, in 2002 it was 29\%.

\textsuperscript{12} Ibid: in 2001 the proportions were 52\% judgments, 48\% withdrawals; in 2002 they were 51\% and 49\% respectively.

\textsuperscript{13} The adjusted disposition rates are: 44\% judgments, 56\% withdrawals for 2001 and 35\% judgments 65\% withdrawals for 2002.

\textsuperscript{14} www.justice.govt.nz/courts/employment-court/judgments-of-the-court

\textsuperscript{15} *David v A.E Tilley* [2001] ERNZ, 93.

\textsuperscript{16} *David v Employment Relations Authority* [2001] ERNZ, 354.

\textsuperscript{17} The Employment Law Bulletin (Lexis Nexis) carried a number of articles in 2000 and 2001 about the natural justice implications of the Employment Relations Authority investigative process, cited below.

would be compromised by the Authority, and as a basis for confronting the problem of restricted powers of review.

The right to test an opponent’s case by cross examination, held to be a principle of natural justice by the High Court in *Trustees of Rotoaira Forest Trust v Attorney-General*,19 was the subject of commentary by employment lawyers about the new Act published shortly after that of the Chief Judge.20 Like him they focused on the ‘right to judicial review’ guaranteed by s 27(2) BORA and the audi alteram partem rule (the arguments heavily relied on by David).21 One expressed concern about the indication from Authority members that cross-examination was incompatible with the investigative process mandated by the Act. He concluded by opining that:

…there is every prospect that the procedure which the Employment Relations Authority seems likely to adopt in exercising its adjudicative role may be the subject of challenge.22

The issue for the Authority in David’s claim against A.E Tilley was whether he was an employee or a participant in a Work and Income work experience scheme. Included in the list of witnesses for the employer was a Work and Income official. David, however, was relying on a conversation with another employee to assert a job offer. This was sufficient for him to claim that an issue of credibility arose (potential conflicting versions of the conversation) such that he had a right to cross-examine the employer’s witnesses. The Authority did not accept that cross-examination was the only means by which conflicts in the evidence could be resolved. The parties were directed to file briefs of evidence and lists of questions they wanted the Authority to consider in its investigation.

The Authority declined an application to remove the matter to the EC. The application for removal relied on s 178(2)(a), that an important point of law was in issue: whether parties to Authority investigations had unfettered rights to cross-examine, or should be advised how that right would be granted; whether they could be ordered to provide lists of questions for the Authority, and if it could exclude witnesses and order briefs of evidence to be filed prior to an investigation meeting. Since these questions all concerned procedural matters the Authority considered that it was required to balance two competing interests – compliance with the rules of natural justice and its power to set its own investigative procedure. It determined that natural justice includes a right to be heard but that this was not synonymous with unfettered rights to cross-examination. It did not accept that rights to be heard were compromised by the directions concerning the way the investigation would be conducted.

David’s response was to file two applications to the EC – for removal23 and review.24 Accepting at face value David’s allegation that an unfettered right to cross-examine

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22 Johnstone, note 20.
23 Employment Relations Act 2000, s 178(3).
24 Employment Relations Act 2000, s 194.
was a breach of the principles of natural justice and that this was a question of law applicable to all those who “take exception to the Authority following the process that has been described in the practice note issued by the Chief of the Authority.” The EC ordered removal of the proceeding and the application for review to be heard by a Full Court.

The Authority Practice Note and the reasons the Full Court attributed to its existence became a major focus of the EC’s criticism. It was first described as:

…a statement of the Authority’s policy and is indicative of a mind-set or attitude against cross-examination. As such it is of questionable validity because it precludes the proper acknowledgement of litigants’ rights on a case-by-case basis.

This was an aspect of the connection the EC made between rights to individual treatment and its view of the Authority’s function as essentially judicial and adversarial. To make that connection it was required to ignore almost all of the statutory provisions that described the Authority’s functions as investigative, or inquisitorial. The EC position can be contrasted with that of the Court of Appeal (CA) the following year, in Claydon v Attorney-General, that described employment tribunals like the Authority as having procedures directed at dispensing informal, practical, speedy, and inexpensive administrative justice:

In summary the nature of the justice that tribunals dispense reflects the fact that they are discharging a role that is different from that of a Court.

Additionally the CA held that the statutory substitution of rights of appeal for the right to a fresh hearing by the EC underlined the administrative nature of Authority decisions:

It is clearly a protection mechanism, the protection being that offered by a judicial process.

A Full EC accorded itself the power to review the Authority’s decision by effectively holding that s 194 overrode s 188(4). The latter stated at that time (it was one of the provisions amended in 2004 to reinforce the message) that the EC did not have the power to advise or direct the Authority on the exercise of its investigative role. This was circumvented by reference to the EC’s status as a court of record: if the Authority acted unlawfully then the EC had the power to direct it how to proceed lawfully. At this point it was required to confront s 184 which restricts rights of review under s 194 to bad faith and proceedings upon which the Authority had no jurisdiction whatsoever (e.g determining disputes covered by other statutes). It did so

25 David note 15, at [20].
26 Chief of Employment Relations Authority, Practice Note, Employment Relations Authority Investigations, 6 November 2000.
27 David note 16, at [4]. This was elucidated, later in the judgment, by reference to the evidence of the Chief of the Authority whose experience of cross-examination at the Employment Tribunal was that it was unproductive, time wasting and of no assistance to a decision maker. This was regarded as responsible for tainting the Practice Note.
28 The Court relied on Employment Relations Act 2000, s 143(f) – judicial intervention at the lowest level needs to be that of a specialist decision-making body that is not inhibited by procedural requirements – to confirm that the Authority is judicial in character. David note 16, at [58].
30 Ibid, at [94].
31 Ibid, at [69].
by holding that s 184 could not protect the Authority from review if its determination was tainted by a breach of a principle of natural justice.

Cited in support of this proposition was *NZ Rail v Employment Court*,\(^\text{32}\) notwithstanding the submission from proponents of the power of review that it be distinguished.\(^\text{33}\) The CA in that decision construed the ECA equivalent of s 184 as meaning that no review was possible if the claim before the court was within its statutory powers to decide, the orders made were also within the court’s powers, and there was no bad faith. The CA regarded the application for review as an attempt to get around the statutory exclusion of appeals concerning construction of employment contracts. The CA also explained why the statutory predecessors to s 184 were considered necessary – a decision of the House of Lords was being argued in NZ courts as preferring a concept of jurisdictional error having the effect of considerably restricting the protection afforded by standard privative clauses:

> Patently the statutory change was intended to protect the Arbitration Court’s decisions from challenge by review except on narrow jurisdictional grounds. Some of the wider grounds of jurisdictional challenge of which Lord Reid spoke…were obviously meant to be ruled out. These would include misinterpretations of the kind held to have occurred in *Anisminic* itself which resulted in a conclusion that the tribunal had failed to consider the right question and had rejected a claim on a ground which they were not entitled to take into account…. In all the circumstances the suggestion that the Employment Court lacked jurisdiction in Lord Reid’s and the NZ Parliament’s narrow and original sense of the term jurisdiction is untenable.\(^\text{34}\)

Had the EC in *David* applied this reasoning it could not have accepted that it had the power to review the extent of the Authority’s compliance with the principles of natural justice on a claim (an employment relationship problem) for which the Authority undoubtedly had jurisdiction.

The EC’s subsequent reasoning about rights to cross-examination considered its exclusion in the Resource Management Act 1991 (prohibited in local authority hearings) and the Health and Disability Act 2000 (power to prohibit in Ministerial Inquiries) to mean that:

> …if Parliament had intended to allow the exclusion of the right to cross-examination by the Authority, it could easily have said so. Yet, far from saying so it introduced not once but twice requirements of adherence to the principles of natural justice and also required the Authority to follow a reasonably fair procedure…\(^\text{35}\)

This finding overlooked the open-textured nature of the statutory provisions for the institutions when the legislation was first enacted. The objects provisions of ss 3(a)(vi) and 143(f) – “*reducing the need for judicial intervention and judicial intervention…that is not inhibited by strict procedural requirements*” suggest a Parliamentary intention to privilege the substance of employment relationship problems over the processes required to resolve them. Specific provisions reinforce this intention: s 160 describes the Authority’s investigative powers as including the power to “*follow whatever procedure the Authority considers appropriate*;” s 174 describes what must and what may be recorded in determinations – discretionary are descriptions of the evidence, submissions, findings of credibility and the investigative

\(^{32}\) *NZ Rail v Employment Court* [1995] 1 ERNZ 603.

\(^{33}\) Flaherty, note 21.

\(^{34}\) *NZ Rail*, note 32, at 607.

\(^{35}\) *David* note 16, at [72].
process; s 188(4) prohibited the EC from advising or directing the Authority about the exercise of its investigative role. If they are read together the clear message is that Parliament wanted the Authority to be free to set its own procedures and did not anticipate it could be directed to include, against its will, unfettered rights of cross-examination at investigations.

The decision managed to achieve what few other employment initiatives did - accord amongst union and employer associations:

> It is rare, if not unique, in these times for a press release from the Employer and Manufacturers’ Association to be headed “EMA in Accord With CTU” but this case has resulted in just this occurrence. A cynic might also take the view that this case is a clear illustration of a third “social partner” in modern industrial relations — the legal fraternity — represented in this case by their union the NZ Law Society.

Although leave to appeal was granted by the CA, the substantive appeal was never heard: Parliament opted, instead, to amend the Act to clarify that Authority compliance with the principles of natural justice did not require it to allow cross-examination, although it retained a discretion to do so. The need to intervene was questioned on the basis that the result would have been the same had the CA decided the issue, although the opposite position, that the Minister had little choice but to proceed with a statutory amendment, was also aired. The debate, in other words, pitted collectivised users of the employment institutions (union and employer associations), employment law academics and Authority members against employment lawyers.

At the heart of this episode (which began in May and ended in December 2001) lay the struggle between negotiated and adversarialist approaches to dispute resolution that the new statute sought to resolve. By these decisions, it can be argued that the EC exposed its inability to adopt a neutral position in that struggle:

> In late 2004 Parliament enacted a number of amendments to the Employment Relations Act 2000 for a variety of reasons including to address some decided cases that it perceived were not consonant with the spirit of the legislation and, in particular, the unique investigative problem resolution methods of the Employment Relations Authority. An earlier amendment to the 2000 Act had addressed specifically the consequences of a judgment of a full Court of the Employment Court in David v Employment Relations Authority that determined that a right of cross-examination of witnesses in the Employment Relations Authority was a natural justice right of which parties could not be deprived by a blanket Authority practice. This amendment

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36 This provision was amongst those amended in December 2004 to strengthen the prohibition against directing the Authority on the exercise of its investigative function.
38 *Employment Relations Authority v David* [2001] ERNZ 294.
39 Employment Relations (Validation of Union Registration and Other Matters) Amendment Act 2001, s 11.
40 Employment Relations Act 2000, s 173(1).
42 Anderson, note 37.
43 For an alternative explanation, the EC preference for common law over statute, see Anderson, note 81 below.
was in the nature of an emergency or running legislative repair carried out even before the Court of Appeal was able to decide an appeal from this Court’s judgment.44

**The Metargem decision**

The amendments might have emphasised for the EC a Parliamentary intention to limit EC powers to intervene in procedural matters at the Authority. But they did not. In a reprise of the situation that saw David removed to the EC, the grievant in *Metargem v Employment Relations Authority*45 sought declarations and orders from the EC about pre-investigation meeting directions. These were directions aimed at ameliorating concerns about the absence of the right to cross-examine. Notifying the Authority of credibility issues potentially confers an advantage on the other party because it alerts them and undermines the element of surprise. The direction empowered the parties to list all their issues and to choose whether to exchange this list. The plaintiff objected, alleging that the directions raised serious issues of natural justice. The Authority sought the views of the other party who could not accept that any natural justice issue was at stake (because the right to be heard remained) but in any event was intending to exchange its list. The Chief Judge quashed the direction and made a declaration that the Authority’s direction permitting or requiring a party to communicate with the Authority privately, in the absence of the other party breached natural justice and was therefore outside the Authority’s jurisdiction.46

The EC’s description of the plaintiff’s case included the following:

Mr McBride began by telling me that the issues were touched upon but not determined by the Full Bench of this Court which decided David v Employment Relations Authority. Nor was the issue answered by the legislative change that followed David.47

By this time the CA decision in *Claydon* was available for the guidance of the EC. The plaintiff sought to distinguish what the Court of Appeal held about the nature of employment tribunals:

…the procedures of which were suited to dispensing informal, practical, speedy and inexpensive administrative justice. The nature of such bodies is that they generally have wide discretions and ample scope for value judgments based on their perceptions of criteria such as reasonableness, equity and merit of a case…48

Apart from recording the submission that *Claydon* should be distinguished, the EC made no further reference to it insisting that it retained a power of review, notwithstanding:

…it is not possible readily to reconcile the privative provisions of the Employment Relations Act 2000 with the liberal remedial provisions of the Judicature Amendment Act 1972. In the absence of any attempt to repeal the review jurisdiction of the Court I take it I am free (and bound) to exercise it but at the same time I must respect the statutory boundaries especially of s 188(4). I see nothing there or in s 184 preventing the Court from declaring …that the Authority has acted without jurisdiction and informing it how it may proceed in order to stay within permissible bounds. That would not amount to advising it how to proceed when it is acting

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44 *Clerk of the House of Representatives v Witcombe* [2006] ERNZ 196, at [22].
45 *Metargem v Employment Relations Authority* [2003] 2 ERNZ 186.
46 Ibid.
47 Ibid, at [14]
48 *Claydon v Attorney-General*, note 29 at [94].
within its jurisdiction. That is what s 188(4) is directed to. Nor can s 184 avail if the Authority has exceeded its powers.49

Having decided that it had the power to review the issue of the direction, the EC then proceeded on the basis that the other party would not exchange its list (when it specifically stated that it intended to do so). It dealt with that problem of the evidence by saying:

I am satisfied that it is only natural and to be expected that the plaintiff should feel apprehensive about private communications from his former employer to the Authority for which no pressing reason exists.50

The EC focused on the absence of an obligation to exchange the list as the natural justice problem. It restricted remedies to quashing the Authority’s direction, declining to declare that the requirement to provide questions in advance was unreasonable. By this means the Authority attempt to accommodate concerns about the absence of a right to cross-examine was overridden.

This decision was amongst the last that asserted the power to advise and direct the Authority about procedural issues via use of the s 194 power of review. It was followed in 2004 by a decision acknowledging that such supervisory powers as the EC had were restricted to applications for review. Acknowledging that it was “unable to direct the Employment Relations Authority as to its processes” it made no orders but treated the Authority decision to adjourn an investigation as a determination susceptible to challenge.51

Post-2004 decisions

In succeeding amending legislation52 passed in December 2004, limitations on EC powers of removal and review were imposed.53 These amendments were a reaction to the David and Metargem judgments54 but in describing them one of the judges said that their effect awaited “judicial interpretation”.55

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49 Metargem, note 46.
50 Ibid, at [68].
51 Munro v Village Care New Plymouth Ltd [2004] 2 ERNZ 40.
52 Employment Relations Amendment Act (No 2) 2004.
53 Those amendments of provisions concerning the Authority (ss 173-184) were aimed at emphasising that procedural issues arising from its investigations could not be the subject of challenge and reviews could not occur until a matter was concluded by the Authority. They were reinforced by amendments to Employment Relations Act, 2000, ss 188 (Court’s jurisdiction) and 194 (Court’s powers of review).
54 Minister of Labour to Cabinet, paper, Review of the Employment Relations Act 2000: Outstanding Matters, 21 July 2003 at [31]: The Court has…twice exercised its review jurisdiction over the Authority and declared that initial procedural directions made by the Authority were invalid. Neither decision considered the possibility that any defect in initial procedural directions might subsequently have been cured during the actual investigation, nor even that the right to challenge the matter in the Court de novo caters for any need to correct procedural defects. Judicial review at the stage of preliminary directions, before the Authority has issued its determination, means that the significance of any potential breach is being assessed in isolation from the overall natural justice of the whole investigation process. It has been a long standing principle that apparent breaches of natural justice can be cured by subsequent actions. Judicial review at this early stage also fails to adequately recognise the availability of a de novo hearing as a superior remedy for any breach of natural justice.
55 Judge Barrie Travis, Employment Court, Procedure is Power — Procedures in the Employment
Perhaps for this reason the amendments were considered a few months later in *Keys v Flight Centre*. The gap between what the parties and what the EC thought were the issues was described thus:

On an academic note, one would be justified in becoming somewhat dazzled by the line of legal arguments submitted by the parties on what they believed to be the issue, as compared with the reasoning actually employed by the Court, for there seems to be little in common between the two. …

Here, Keys submitted that the issue turned on whether the Authority had jurisdiction to grant Anton Pillar orders. Counsel for the plaintiff and respondents made submissions accordingly. The Court, however, formulated the issue as concerning whether the Authority’s determination as to whether it had jurisdiction to grant the order was a matter of procedure. Deciding that it was not, the Court concluded that the right to challenge the determination was available to Keys, and that she would have to exhaust that avenue before judicial review proceedings would become available to her.  

The application for review of an Authority decision to issue an Anton Pillar order was struck out because the EC accepted there was an unexercised right of challenge to that decision and ss 143(fa), 184(1A)(b) and (c) and 194(3) (all newly amended provisions) required rights of challenge to be exhausted before reviews could be undertaken. However the EC could see no reason why the plaintiff could not immediately file a challenge – its concluding comments invited one by indicating that an application for leave to challenge out of time would be granted.

At this point the Authority investigation had not yet begun. Recorded in the EC judgment are submissions about its powers to intervene in uncompleted investigations, in which the s 3(a)(vi) objective of reducing the need for judicial intervention, and the policy behind the 2004 amendments were cited:

…the Bill improves the ability of the Employment Relations Authority to deliver speedy, effective, and non-legalistic problem resolution services by restricting the ability of the Employment Court to intervene during Authority investigations. This will ensure that the focus remains on the immediate employment relationship problem itself, rather than on how the institutions deal with it…[T]he Court may not intervene in Employment Relations Authority investigations on procedural grounds until the Authority has concluded its investigation and issued a determination.

The EC response was to ignore the larger point about not disrupting unfinished investigations in favour of holding that the Authority decision to issue the Anton Pillar order was a final determination about a jurisdictional (not a procedural) issue so that, but for the requirement to hear challenges before reviews, it retained a power of review. By emphasising the distinction between procedural and jurisdictional or substantive issues the Court retained its powers of review.

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*Court* [2005] ELB 47.
56 *Keys v Flight Centre* [2005] ERNZ 471.
58 *Keys v Flight Centre*, note 56 at [32].
59 Alternative motivations for the EC should be conceded, given the irrevocability of an Anton Pillar order once issued and implemented.
The EC also chose to ignore the same submission in *Oldco PTI (NZ) v Houston* from the respondent to a challenge based on *Keys* of an Authority refusal to issue a non-publication order and close its investigation to the public. This application was a reasonably transparent device to delay the investigation (there was a peculiar and remarked-upon absence of any evidence of the need for such orders) and could have been treated as such, given the clear procedural status of the issue. However the EC took the opportunity to expand on the point that consumed its attention in *Keys*: a definitive interpretation of s 179(5):

> It is important to emphasise that the scope of s 179(5) does not depend on the nature of the power being exercised by the Authority in its determination but rather on the effect of the determination itself. That effect must be analysed in order to decide whether or not the determination falls within the restriction imposed by the s 179(5) on the right of challenge. ...the application of s 179(5) will always depend on the effects of the particular determination sought to be challenged.

This meant that procedural decisions could be distinguished from substantive and jurisdictional decisions - those to which s 179(5) did not apply. Maintained in this judgment was an EC silence on the requirement to abstain from intervening in Authority investigations until they were concluded.

Obiter discussion about the effect of s 179(5) in *X v Bay of Plenty District Health Board* was based on the idea that procedural rulings that affected outcomes could be regarded as capable of challenge, “*notwithstanding the provisions of s 179(5)*”. The EC based its discussion on the practice of the CA, which declines to hear appeals of interlocutory rulings by the High Court, unless they affect substantive outcomes. This enabled the EC to conclude:

> These Court of Appeal decisions are on all fours with the approach adopted by Judge Couch in Oldco. It is the consequences that flow, from what might be regarded as an interlocutory determination by the Authority, that will determine whether or not it is a determination about procedure or whether it is a determination that has affected substantive rights.

Clearly procedural means may be taken by the Authority to make a determination which may have substantive results. The circumstances of Rawlings are a clear example. If a determination has such substantive effects then s179(5) will not operate as a bar.

The CA in *Employment Relations Authority v Rawlings* issued a definitive judgment on EC powers to hear reviews and challenges concerning Authority procedure:

> We are satisfied that ss 179(5) and 184(1A) are intended to prevent challenge or review processes disrupting unfinished Authority investigations. But once the investigation is over and a determination has been made, there is no reason for limiting the challenge and review jurisdictions of the Employment Court. If the procedure adopted by the Authority had had a

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60 *Oldco PTI (NZ) v Houston* [2006] ERNZ 221.
61 Suggesting that the likelihood of damage arising from the irretractability of the Authority decision was low to non-existent.
62 *Oldco PTI (NZ)* note 60, at [46].
63 *X v Bay of Plenty District Health Board*, 10 December 2007, ARC 78/07.
64 Ibid, at [19].
65 Ibid, at [33], [34].
decisive influence on result (eg by refusing an adjournment and proceeding in the absence of a witness), the affected party, in the course of questioning that result, will be entitled to put in issue procedure.  

However the CA failed to persuade the EC that the main issue, on challenges or reviews of Authority decisions on procedure, was whether the Authority had concluded its investigation. The EC continued to insist on an analysis of the effects of a decision in order to classify it as procedural, substantive or jurisdictional. Although coming after the timeframe of this thesis the following decisions illustrate the judicial tropes under analysis.

An Authority ruling that its recommendation to the parties (under the then recently amended s173A) was rejected so that the matter required a full investigation was treated as a jurisdictional rather than a procedural determination. The EC held that the distinction between whether or how the Authority is empowered to act describes the difference between jurisdictional and procedural decisions for the purposes of ss 179(5) and 188(4). If jurisdictional then those privative provisions do not apply. This enabled the EC to determine the substantive issue of the challenge – whether the Authority was correct that the recommendation was not accepted. The EC found that it was – thus reaching the same result as if it had treated the challenge as barred by s 179(5).

This suggests that it was more important to the EC to take the opportunity to reinforce its position on the privative provisions than to reduce the need for judicial intervention, or ensure Authority investigations are concluded before it intervenes.

An Authority Minute about evidence that would be accepted at an upcoming investigation was challenged. The Authority intended to reject, as inadmissible, evidence about settlement discussions.

After holding that the Minute was a Determination (notwithstanding that it described itself as “a preliminary procedural matter for resolution prior to the Authority investigating the substantive employment relationship problem”) the EC held:

…the Court’s role is to ensure the Authority’s compliance with applicable legal principles and if this requires the Court to determine whether evidence ought to be admitted or excluded from the Authority’s investigation under its broad statutory powers to admit or exclude evidence, then that is the Court’s function.

This was held to be more important than the Parliamentary intention to ensure the Authority developed its own investigative processes into employment relationship problems without undue interference by the Court.

Much of what followed in this judgment re-stated the EC position about its powers of review described above, from the natural justice and NZBORA issues in David and the categorisation of effect in Keys, OldCo and X to the CA’s judgment in Rawlings.

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67 Ibid, at [26].
68 Grant v University of Otago [2011] NZEmpC 172.
69 Morgan v Whanganui College Board of Trustees [2013] NZEmpC 55.
70 Ibid, at [20].
71 Ibid, at [26].
72 Ibid.
However, a subsequent judgment issued a few weeks later, conceded the error of the EC position. In *McConnell v Board of Trustees Mt Roskill Grammar School*73 a grievant challenged an Authority direction about the admissibility of evidence about what occurred during mediation of the employment problem. The (relatively new) EC Judge had been counsel for the Crown at the Court of Appeal hearing of *Rawlings*.

Relying substantially on that decision she began her consideration of the issue whether the EC had jurisdiction to hear the challenge by reference to the need for Authority investigations to conclude before challenges could be entertained. Referring to the objects in s 143 she held that the narrow approach in *Morgan* to what constitutes a procedural determination was inconsistent with those objectives:

> It would likely encourage challenges at a pre-investigative stage, increase costs and the incidence of judicial intervention, place an enhanced focus on technicalities, and cause (as this case demonstrates) significant delays.75

**Observations about the Court’s approach**

In addition to acknowledging the policy position about intervention in Authority investigations the *McConnell* decision also identified the problem of the EC’s approach to the issue:

> In my view a narrow reading of s 179(5), subjecting a broad range of rulings made by the Authority prior to the conclusion of the investigative process to challenge in this Court, is not consistent with the clear legislative intent of the provision and the statutory scheme more generally.75

That this coincided with commentary about the issue may be coincidental,76 but it highlighted concerns about the EC’s approach to statutory interpretation and its tolerance of nonsensical litigation positions. The circumstances that precipitated the *Rawlings* appeal are illustrative.

The EC’s interpretation of the phrase in s 184(1A) *any matter before the Authority* underlined its practice of ignoring contextual statutory messages about the limits of its powers of review in favour of minute analyses of individual provisions that enabled it to claim expanded powers. The EC held (in *Rawlings*) that this phrase confined s 184(1A) to matters that were still before the Authority (in order to avoid striking out an application for review where no challenge had first been sought). As the CA pointed out this would result in redundancy of the whole provision. That result was easily avoided by regarding the phrase as including proceedings that are or were before the Authority.

The CA raised the role of *Rawlings*’ representative in this proceeding. It questioned the tactical advantage of seeking a review when a range of alternative actions would have better achieved his objectives. The whole proceeding in fact turned on the behaviour of the representative. It was precipitated by a claim to the Authority that

73 *McConnell v Board of Trustees Mt Roskill Grammar School* [2013] NZEmpC 150.
74 Ibid, at [37].
75 Ibid, at [40].
contained sufficient vituperative comment about the Authority membership to warrant
a minute directing the filing of a fresh statement of problem, with a warning that the
proceeding would be regarded as withdrawn if the fresh statement was not filed
within a specified time. When that period elapsed without a fresh claim the
representative was notified that the proceeding was treated as withdrawn. His
response was to file a claim at the EC that also contained irrelevant but vituperative
comment about individuals associated with it. The EC ignored this material in favour
of providing the public forum that the representative said he was seeking, thus
requiring of the Crown the expense of defending (and then appealing) a clearly
vexatious proceeding. The EC furthermore overlooked another crucial issue: there
was no prospect of success of the substantive issue.77

Prospects of success and the folly of seeking a narrower oversight (by choosing
review over challenge) of an employment relationship problem were similarly never
considered in the David and Metargem decisions. Nor did the EC question the effect
of these litigation tactics, whose interests were being served, or why those who sought
Authority assistance78 were so keen to disrupt its investigation of their problems. Put
alongside the ministerial complaint79 that the EC failed to consider the potential of
either an investigation or subsequent challenge for curing any defects of process these
decisions suggest that the EC privileged representatives’ needs (to focus on process
when there were few, if any substantive arguments available) over both client
interests and legislative intentions for problem resolution in this jurisdiction.

Although it can be argued that the EC incentivised resort to process in the absence of
prospects of success as suggested by the way the plaintiffs in Metargem, Oldco, and
McConnell structured their challenges and submissions to conform to the judgments
in David, Keys and Morgan, it is also clear that the EC had its own agenda. David, it
can now be argued, was the product of concerns articulated throughout the select
committee process and after the ERA was passed about the investigatory process for
the Authority. Less apparent were concerns about its reduced powers. Although the
David judgments purported to concern rights to justice and cross-examination they
can more accurately be described as focused on EC powers over the Authority. Those
decisions sought either to reinstate what was thought to have been lost in the new
statute, or to enhance EC powers over the Authority in the new environment. It
matters not which, the point being that the EC was unable to accept the legislative
intention against its oversight of the Authority. So, it fought hard against it, whenever
the opportunity presented itself. On some occasions this occurred at the instigation of
representatives, and on others (e.g. Keys and Morgan) by the EC itself.

An explanation for what appears to be an insistence on retention of traditional judicial
processes lies in Richard Abel’s80 ideas about status anxiety and informal institutions
and Gordon Anderson’s views about how the judicial perception of the common law
and “statutory intervention” affects the regulation of labour relations:

77 Rawlings (note 66) sought reinstatement or a redundancy payment from an employer whose
business had been transferred to the most recent employer some years earlier. The parties’
employment agreement precluded redundancy in that circumstance.
78 The applicants in all cases but Oldco (note 62) were grievant employees.
79 Minister of Labour to Cabinet Economic Development Committee, Paper, Review of the
At the heart of much common law legal education and legal philosophy is an underlying belief that the common law is ‘real law’ and that statutory ‘intervention’ is not only an inferior sort of law but one that should be regarded with considerable suspicion as ‘interfering’ with ‘fundamental common law rights’.  

Abel argues that the use of informal institutions to replace dispute resolution by the courts both attracts professionals in other disciplines (e.g mediators) and affects lawyer and judicial perceptions of their social status. Increased caseloads and expanded jurisdictions operate to raise perceptions of status, as does the power to off load trivial matters. But what happens when informal institutions cut off or reduce the supply of work for the courts, instead of merely alleviating heavy caseloads?

It can be argued that there were signs of the judiciary’s anxiety about issues of status when preparations for review of the ERA began in 2002. The Chief’s Judge’s contribution canvassed a number of issues. They included a suggestion for the exclusivity of the employment institutions to be expressed more plainly in the Act. If it is accepted that demarcation concerns suggest worries about competition for work (in this case from the High Court a higher status forum than the Employment Court for the resolution of commercial disputes involving employees) then this suggestion could be interpreted as articulating anxiety about status.

The Chief Judge also believed there was a need for proper ethical standards for mediators. He suggested a code of ethics. Additionally he was concerned about directions to mediation. At that time the practice in both the Authority and the EC when proceedings were filed was that the clerks receiving them would check whether mediation had occurred. If not they would either arrange for mediation (by contacting the Mediation Service directly) or indicate that the direction to mediation was probable, before payment of a filing fee was made. This was the sort of informality that the Department’s institutional administrators encouraged. The Chief Judge, however, was concerned about the absence of uniformity of practice about directions to mediation by court registry staff. He wanted s 188 “tightened up”.

If Abel is correct that lawyer and judicial perceptions of status are affected by the status of those who first deal with matters in their jurisdiction then this desire for formalising requirements of mediators and the means by which work is directed to them supports that contention.

Another concern raised by the Chief Judge, the issue of equitable remedies, illustrates Anderson’s point about the EC’s preference for the common law over statute. Anton Pillar orders and Mareva injunctions were characterised as requiring “the special skills of a Judge used to the techniques of equity. This point has been raised with the Judges with some emphasis by practitioners.” The concern was based on Authority resort to these remedies. It was the subject of consideration four years later, in Axiom

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82 Chief Judge, Employment Court to Minister of Labour, letter, Review of the Employment Relations Act, 30 October 2002.
83 Susan Robson: recollection of instructions to Authority support staff about receiving claims not subject to mediation, October 2000, and their subsequent practice upon receipt of these claims: October 2001- January 2002.
84 Chief Judge, note 82.
85 Ibid.
Rolle PRP Valuation Services Ltd v Kapadia. The Full EC held that neither it nor the Authority had the power to make Anton Pillar orders. Its concession that similar powers could be exercised by resort to the High Court Rules, (“available in this Court, although not in the Authority”) an aside at the end of a 29 page judgment, underlined its preference for a focus on common law powers it lacked over statutory powers it could exercise. Its eagerness to differentiate the powers it had from those held by the Authority, arising from what McAndrew describes as a discontent about the powers and deference extended to the Authority by Parliament, was characterised as a concern about its “inappropriate emasculation.”

Parliament intended to make it difficult for parties to avoid the unique investigative problem-solving approach of the Authority at first instance. It wished to emphasise to parties unfamiliar and uncomfortable with a radically different process of litigation to traditional adversarial and arguably formulaic process of the Employment Court, that it would become difficult to leap-frog the Authority’s process simply for the purpose of avoiding application of these new procedures.

This passage suggests another way of interpreting the EC reaction to the statutory diminution of its powers of process review. In essence the legislature wanted the EC to treat challenges as originating proceedings. This raised a practical problem for those trained in legal method. Originating proceedings require a different approach than appeals. The accepted basis of the appeal procedure is the assessment of the means by which issues were treated in the originating jurisdiction. This assessment is both procedural and substantive. Limiting it to a substantive inquiry eliminated a basis for reasoning about the decision below. The effect was the conceptual equivalent to losing an arm or a leg. The re-adjustment required of the bench was a revised perception of judicial role that it was reluctant to accept.

By contrast the Authority membership reacted differently to its new role. It was enthusiastic about the investigative process, in large part because it afforded the membership wider powers than the Tribunal had. Its decision to explain, in public meetings, how it intended that process to operate not only raised the ire of practitioners, it ultimately triggered the David decision. Through that lens it is possible to characterise David as Goliath’s initial reaction to the first arrow, and the EC decisions of the 12-year period between David and McConnell as reiterating that reaction.

86 Axiom Rolle PRP Valuation Services Ltd v Kapadia [2006] NZEmpC 43.
87 Ibid, at [99].
88 Ian McAndrew The Employment institutions in Rasmussen (ed) Employment Relationships, Workers, unions and employers in New Zealand (Auckland University Press, Auckland, 2010) at 90: this was a reference to the ECs expressed discontent about the powers and deference extended to the Authority
89 Clerk of the House of Representatives v Witcombe note 44, at [22], [23]
90 Julie Morton, M.Com Thesis, Reducing Legalism: The Impact of the Employment Relations Act 2000, University of Otago, August 2003: Morton’s accounts of her interviews with Authority members reveal this enthusiasm, notwithstanding that she chose to prefer the accounts of others of members roles in the investigation process.
91 Johnstone, note 20.
Conclusions

It remains unclear whether there was any connection between the reduction of work for the EC, judicial concerns that this affected its relevance to the jurisdiction, and its response to policy about process. Its determination to retain powers of process review over the Authority, and to elevate the importance and number of its own procedural or ancillary decisions suggest a difficulty accepting the policy desire to reduce the need for judicial intervention in employment relationship problems.

More interesting was its method of response. It chose to fight the desire to rid the jurisdiction of legalist and adversarialist approaches to dispute resolution by resort to legalism and adversarialism. This suggests both a paucity of alternatives and a judicial confidence about the absence of effective sanction. Statutory amendment – the only sanction available to the legislature – failed as a deterrent, although it did result in ever more strained (or ridiculous) interpretations of statutory language. It can be argued that this tendency, rather than the amendments, was the EC’s ultimate undoing. Its judgments in Rawlings and Morgan were unsustainable in large part because they exposed a judicial agenda set against plain statutory language.

In turn this reveals the problem of policy desires for informality of process in traditional court systems. It suggests that a focus on process (by higher of lower status institutions) is such a central and basic judicial function that legislative attempts to tinker with it (or intervene) will be met by strenuous and sustained judicial opposition.

The effects of this response on dispute resolution in this jurisdiction are, however, arguable. The determination to retain the power of process review was limited in its effect to the decisions cited above. Fewer than 10 proceedings over a 12-year period addressed the issue. This suggests a minimal effect, or a limited appetite amongst employers and employees for the type of inquiry that process reviews require.

Of greater significance is the trend identified by Galanter of managerial judging. He attributes high settlement rates, rising costs, public perceptions of trials as expensive and risky and changing ideologies as the reasons why judges in the 21st century are required to make more procedural, evidentiary and management decisions than substantive judgments. Galanter’s lawyers devote more time to settlement than litigation processes, so that the complementary relationship between litigation and negotiation results in litigation as a tactic of negotiation, rather than the other way round. Rising rates of ancillary decision-making by the EC set against relatively stable numbers of substantive judgments suggest the existence of this trend in N.Z. The policy emphasis on negotiated resolution in this jurisdiction, and high settlement rates following mediation tend to confirm its existence.

Thus if litigation is a tactic of negotiation and managerial judging a means of promoting settlements, the goal of privileging negotiated resolution of problems could be regarded as met, if the related goal of a rise of mended over ended employment relationships is ignored.

This raises the central difficulty of policies focused on incentivising relational over contractual, or negotiated over adjudicated, problem solving that rely on the

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92 Galanter, note 7.
institutions of the law. The evidence of the preoccupations and practices of the EC over the ERA period under review undermines the belief that collectivist dispute resolution values can be enforced via rules for informality.

Over both periods under review the EC took seriously the constitutional role of the courts of independence from the Executive. Specialty of (and the statutory basis of its) jurisdiction failed to affect EC attachment to the common law traditions of the civil courts. This became the source of tensions with the Executive in both eras: procedural fairness (a common law principle apparently overlooked in 1990 by the radical lobby in its preference for the civil courts) appeared to undermine employment-at-will, and appellate powers of review undermined procedural informality. These tensions had opposing effects on policy outcomes. The EC focus on procedural fairness failed to inhibit achievement of the employment-at-will policy goal, perhaps because it facilitated reliance on legalised principles of process. The ERA policy desire to informalise problem resolution was a more direct attack on judicial procedural values. The speed with which the EC asserted powers of review that it lacked may well have been sufficient (absent high numbers of decisions) to assure the legal profession that little, if anything, had changed (procedurally) with the enactment of the ERA. This signalled that the EC, not the legislature, would be the arbiter of procedural issues, thus establishing a basis for ensuring frustration of the procedural informality policy goal.
Chapter 9
Conclusions

Introduction

This chapter aims to establish the connection between selection of dispute resolution system and success in meeting employment policy objectives. It argues that choice of institutional structure determined the type of advocacy culture likely to dominate the jurisdiction that, in turn, had implications for policy goals.

A theme of the ECA policy process, the role of desired policy outcomes in choice of conflict resolution delivery mechanisms, meant that greater labour market flexibility was achieved in part as the result of its alignment with the dispute resolution system that was selected for the jurisdiction in 1991.

Key to its success were decisions made by National Government moderates about institutional structure, the basis of claim, and personnel (representatives and decision-makers/facilitators). By retaining a separate specialised dispute resolution system, universalising access to the personal grievance, and welcoming the legal profession into a jurisdiction previously (all but) denied it, all measures bitterly opposed by the radical lobby, the moderates lay the groundwork for tipping the balance of labour market power that the radical agenda sought.

Initial clarity of ideological purpose for the ECA meant that its policy makers perceived no need for clarification or amendment of its intentions for the employment institutions, at least until after 1996. Nor did the problems experienced by the Tribunal and its users affect achievement of the flexibility goal. They evidenced its success.

The policy decision to modify rather than replace this system during the formulation of the ERA reinforced the ECA policy goal and undermined its own, apparently different, aims. Left intact was the institutional structure, claim-type and personnel of the ECA. This had two major effects. It underscored the dependence of the flexibility goal on this triumvirate and emphasised flexibility’s domination of ERA policy, research and legislative amendment, successfully diverting policy attention from outcomes to process.

The ERA failure to associate advocacy cultures and the institutions to which they were aligned with employment policy objectives, and its reliance on institutional neutrals as a substitute for a return to collectivist and protectionist approaches to labour issues ensured its core policy goal, a rise of mended over ended employment relationships, never occurred.

The following account of policy themes common to both eras (individualism and collectivism, remedies and protections, contract and relationship) and the quest for access to justice: the ERA era’s contribution to a dispute resolution system antithetical to its aims; help establish these conclusions.

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1 The move against the Employment Court was by those in the Coalition Cabinet who identified with the radical lobby in 1990. They were undermined and outmanoeuvred in 1999 in the same ways that they were in 1991.
Policy Goal Setting

*Individualism and Collectivism*

The major outcome sought for the ECA was an individualised workforce. Flexibility was perceived as only possible if the workforce was de-collectivised. An anticipated rise in dismissal rates, an important element of flexibility, explains why the means of resolving dismissal disputes was so hotly contested within the National Government Cabinet. The radical desire to limit claims to the common law action in the civil courts was intended to raise barriers to access to relief. This cut across moderate beliefs that union members required incentives to abandon collectivism. Since a key reason for union membership was perceived to be access to personal grievance rights, universalising this right (ensuring access to justice for all) would incentivise de-collectivisation. Since this is what occurred it can be argued that the decision to adopt the latter option helped to achieve that result. The subsequent decision to opt for a specialised, informal dispute resolution system over the civil courts reinforced public perceptions of ease of access to relief (justice) whilst facilitating the desired outcome (labour market flexibility). In this jurisdiction informality and accessibility of dispute resolution system did not alter outcomes associated (by the radicals) with civil courts. The use of arbitrative neutrals ensured that the power imbalances required of the flexibility outcome were facilitated, as they would have been by the civil courts.

It can therefore be argued that universal rights to claim in an apparently accessible resolution system were crucial to public acceptance of an individualised workforce.

The belief of policymakers for the ERA that individualism and collectivism in the workforce could co-exist was undermined by the failure to achieve the rise sought in mended over ended employment relationships and a reduction in contested dismissals. The absence of evidence of internal political debate about this belief suggests a failure to recognise which of the tropes of collectivism and their interaction (relevant to dispute resolution) was unique or exclusive to collectives and unable to be replicated by alternatives. The policy hope that the Mediation Service would operate as the source of information about workplace disputing and become a trusted early intervener so that dismissal rates were reduced never materialised because the policy goal failed to account for the dependence of protections from dismissal on collectivised approaches to workplace resolution mechanisms.

*Remedies and Protection*

The National Government moderates who favoured ease of (over barriers to) access to relief for contested dismissals correctly perceived that protection against dismissal, a trope of collectivism, had to be replaced with a tangible alternative if an individualised workforce was to replace a collectivised one. Disconnected from union membership the ECA personal grievance claim, if successful, was remedied by compensation not reinstatement. Retention of job, the outcome sought by union advocates of personal grievances for the period after which the claim was created in 1973, served as a protection against unjustified dismissal so the substitution of protection for remedy was significant to the facilitation of flexibility.²

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² It should be conceded, however, that by the mid 1980s the incidence of reinstatement under the Labour Relations Act 1987 was reducing; in 1987 - 25% of remedies, decreasing to 12% in 1991. In
ERA positioning of reinstatement as the primary remedy failed to replicate the success of compensation for the ECA policy outcome. Damages, the remedy aligned to legal method, are the consequence of what Abel describes as its fundamental trope – the severing of relationships. This suggests a fundamental marker of the difference between individualist and collectivist advocacy cultures: repair or severance, the precursors of protection or remedy.

By 2000 the delays of the ECA era had established severance and compensation as the sole remedial option for contested dismissals. An unforeseen but logical consequence was the transformation of compensation into an incentive to claim, morphing a remedy into (an individualised) protection. The EC focus on procedural fairness during the ECA era ensured that employers with the resources to do so developed their own rules and practices to guarantee compliance with process requirements only to find that no matter how carefully crafted the rules, they nevertheless remained the subject of intense legal and judicial examination. The cost of a contested dismissal was in this examination. Mediated or private settlements were incentivised if the compensation sought or accepted was lower than this cost. The early availability of mediation after 2000 became a risk-free means of asserting a claim in the hope that the cost of proceeding further would yield a settlement.

A secondary effect of ECA procedural fairness was that it reinforced public perceptions of a responsive dispute resolution system, whilst the labour market became increasingly flexible. For the radical lobby the persistence of the dominance of dismissal grievances in the EC should have functioned as a source of assurance that employment-at-will was being established. The radical lobby focus on the costs of achieving that outcome failed to alert those more directly affected by employment-at-will to the cost of relying on remedies as a substitute for protection: roughly equal chances of success for employers and employees arising from grievance claims; repetition of claim matched by repetition of (individual) outcome in the consistency of compensation awards over the whole period under review; liability for costs if unsuccessful; costs of representation matching or exceeding compensation and costs awards.

Repetition of claim and remedy in this jurisdiction did not result in calls for protections from dismissal during the period under review, although small employers made calls for protections from advocates of rogue employees.\(^3\) The dominant practice of confidential (mediated or private) resolution of contested dismissals shielded from the public gaze the implications of simple repetition over a long period, a problem for researchers\(^4\) and thus for those sectors of the population negatively affected by the status quo. This phenomenon, attributed as an explanation for the

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3 Department of Labour, *Review of the Employment Problem Resolution System* 2007, submissions from employers: their focus was on no-win-no-fee advocates as responsible for meritless claims.

4 Morris, note 2, noted the problem for her research in the confidentiality of mediated settlements meant that a considerable proportion of all matters brought before the employment institutions were unavailable for research scrutiny; Bernard Walker and R T Hamilton, *Grievance Processes: Research, Rhetoric and Directions for New Zealand*, (2009) 34(3), New Zealand Journal of Employment Relations, 43 note that ‘private’ justice inhibits the task of evaluating issues of justice and equity in the New Zealand context.
sexual abuse by clergy of children within the Roman Catholic Church and the 2015 Baltimore riots,⁵ echoes Fiss’s concerns about private resolution: it facilitates repetition of abusive, detrimental or unlawful behavior by the exchange of money (compensation) in return for silence. Wrongdoers remain free to repeat the behavior that through absence of real consequence has the potential to become institutionalised.

Adjudication produces similar outcomes, as is argued of British employment tribunals described as providing limited protection to employees as a result of their sole focus on the rights of the claimant, the wrong already committed and the formal legalistic environment in which they operate.⁶ These outcomes of a system of individualised claimants suggest that substantive redress may lie “outside the law”.⁷

The extent to which this outcome was subsidised by the state became apparent during the ECA era. Cost to the state increased under the ERA. Significantly higher claim numbers, more institutions and personnel contributed to this increase so that the (mid-decade) cost to the state of each dollar transferred (between parties) by the institutions in compensation and costs was over $6. The counter argument, that the institutions set the precedent for private resolution (the cost of which was borne by the parties), is undermined by repetition of outcome, given that the remedy amounts of 2008 were set during the 1990s.

**Contract and relationship**

Choice of statutory language was recognised by both sets of policymakers as an important component of communicating desired outcome. Use of the word *contract* was intended to convey a more direct, individual and formal relationship between employer and employee, more akin to a business relationship, with the suggestion of equal bargaining power: parties would negotiate the terms of their contract similarly to the ways they negotiated contracts to buy and sell property or (other) services.

Incorporation of the word *contract* also signalled the type of dispute resolution system that would enforce the statute’s provisions: modelled on traditional court systems with availability of adjudication at entry level, it would resolve contractual issues more quickly and less formally, but otherwise similarly to traditional courts.

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⁵ Tom McCarthy (dir) *Spotlight*, Universal Studios, 2015, portrayed the repetitious confidential settlement of abuse complaints within the Roman Catholic Church in Boston, United States of America as contributing to the failure to address and stop the abuse; Matt Taibbi, *Why Baltimore Blew Up*, Rolling Stone, 26 May 2015: “A bad thing happens, but somehow nobody is guilty of anything – money just changes hands. ... The game is set up so the only real end for the victim of police abuse to pursue is a check from the government... For all the hundreds of millions of dollars paid out by cities to abuse victims, very little is actually done to discipline rogue police officers.... The problem – of police almost never facing consequences – was the obvious subtext of the Baltimore riots.”


⁷ Ibid at vii; Renton’s prescription is for strengthened trade unions and rights to strike, cf Nicole Busby and Morag McDermont, *Workers, Marginalised Voices and the Employment Tribunal System: Some Preliminary Findings* (2012) 41(2) Industrial Law Journal, 166, who conclude that the barriers to justice for vulnerable employees at British employment tribunals could be alleviated by resort to Citizens Advice Bureaux which they regard as critical to reclaiming labour law’s public law function of translating private disputes into matters of public concern.
The emphasis in the ERA on the relational foundation of the connection between employer and employee by use of the descriptor *employment relationship* was an attempt to broaden the conception of what it encompassed. This language, reflective of earlier statutory usage (labour relations, industrial relations) was intended to convey a return to pre-ECA values for employment issues and a kinder, more respectful basis for the relationship. However, use of the word relationship, with its connotation of a more intimate or domestic connection, may have operated to reinforce an older descriptor, *master and servant*, that more accurately encapsulates the power relationships of the employment jurisdiction of both eras, in that it suggests who were the active and the passive parties of the relationship. It furthermore underlined the connection as individual, privileging individualist over collectivist approaches to employment relations.

Availability of facilitation at entry-level, intended to reinforce the relational over the contractual elements of employment, also suffered from an inadequate or confused policy understanding of cause and effect. Whilst it attracted large numbers (suggesting barriers to access to the system it replaced) failure to utilise its connections with collectivism and to exclude individualist advocates ensured its dominant function was to preside over the terms of ended relationships.

**Policy About Process**

*Specialty of jurisdiction*

Since specialty of the industrial, labour or employment jurisdiction was its feature for the 98 years prior to the ECA, specialty of jurisdiction per se was nothing new in 1991. At that point the jurisdiction was dependent on different personnel, and the regulation of bargaining for employment terms and conditions. Stakeholder representatives dominated advocacy and decision-maker roles in the resolution of personal grievances, a claim available only to collectivised employees. This resulted in different outcomes from those after 1991: reinstatement for the successful grievant (if sought and practicable); low and consistent claim numbers arising from stakeholder sifting (assessments of prospects of success) functions; more informal dispute resolution activity in the workplace; and preferences for a focus on the substance of a dispute.

These elements of the pre-1991 grievance resolution system help to explain why the pre-institutional statutory grievance procedures of the LRA could not be transplanted into the ECA without retention of the collectivist resolution culture on which they were dependent.

Specialty of jurisdiction from 1991 onwards replicated outcomes obtainable in the general civil court jurisdiction because advocates and decision-makers (operating as single neutrals in place of the stakeholder committee system) were more likely to come from the same pool of practicing lawyers as those for the civil courts. The dominance of legally trained personnel ensured that claim process, regardless of statutory policy for it, replicated that of the civil courts. This included reliance on process to defer assessments of prospects of success that required a higher (than previously) dependence on institutional over informal dispute resolution.
The grievants after 1991 also differed from their predecessors: they were less likely to be collectivised; more likely to rely on lawyers as representatives; more likely to come from workplaces whose complaint and remedy systems were inaccessible, or not well understood; more likely to have an imperfect understanding of their rights and obligations; more likely to have restricted access to informed partial advice; and more likely to lack the power to initiate problem resolution processes.\(^8\)

These outcomes conformed to the political and economic environment sought in 1991, a decentralised and deregulated labour market, that in turn is associated with dependency on lawyers, litigation and adversarial legalism to resolve (or suppress) conflict.

If lawyers, litigation and adversarial legalism were perceived to be necessary to help facilitate flexibility of the labour market it can be argued that specialty of jurisdiction helped to mask this connection. Specialty’s initial benefit to the Government arose from the public perception of it as an acceptable alternative to the courts. The lack of political concern about process effects on the Tribunal suggests that the speedy and informal prescription for it was an essentially meaningless compromise necessary to ensure acceptance of a different resolution model. By contrast, political reaction to the EC position on issues of dismissal process tends to confirm that such issues attracted attention only if they threatened to disrupt the flexibility outcome.

The other policy benefit of the jurisdiction’s special status lay in its ability to attract the administrative resource and co-ordination required to alleviate the effects of adversarial process. This ensured that concerns about the jurisdiction’s functioning kept the focus inward, on issues of process, thus diverting attention away from outcomes, in particular the effects of individualism and flexibility on some parts of the workforce.

These connections between specialty of jurisdiction, the legal profession and the flexibility outcome were problematic for ERA policy ostensibly directed at different outcomes. Retention of the institutions of legal method precipitated a power struggle with the profession and judiciary about process issues ensuring that alleviation of problems of process dominated policy for the jurisdiction, and maintained the diversion of attention away from substantive labour issues at the expense of analysis of alternatives.

This forfeiture of the advantage to policy makers of special jurisdictions, the ability to legislate for the institutions, personnel and other factors likely to facilitate desired policy outcomes, formed the basis of the ERA’s failure to deliver the employment outcomes sought for it in 2000.

The one outcome for which the ERA can take credit concerns access to justice, if that concept is interpreted as widening public access to institutional dispute resolution based on legal method. The following section on modes of resolution draws some conclusions about how policies about process affected issues of access.

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\(^8\) This helps to explain why the transplantation of LRA pre-institutional grievance procedures into the ECA failed to yield similar outcomes. The earlier procedures were dependent on collectivised advocates and employees, but the later on individualised advocates and employees.
**Modes of resolution**

**Separation**

Separated resolution modes, a function of reliance on legal method, were a feature of both eras. The difference between them, choice of mode at entry level under the ECA, was effectively eliminated by the ERA. It is unclear whether or how this affected public perceptions of accessibility, but the difference in early use of the Tribunal and the Mediation Service suggest the latter was regarded as the more accessible. That it was free may have contributed to perceptions of its accessibility. It is also possible that the names of these institutions infer particular and different modes of resolution suggesting mediation as a public preference for entry-level resolution.

Similarity of outcome from use of the mediative mode for both eras, settlements involving money transfers, suggests that a function of separated modes of resolution was negotiation-persuasive. The trend during the ECA era, increased reliance on the Tribunal’s mediative mode followed by rising rates of private settlement, can also be discerned in the ERA period.

This suggests that the mediative mode performed, in terms of establishing precedent or guides to settlement, the same function as adjudicative modes are said to have. It did so by different means. Mediation modelled the behavioural tropes that facilitate resolution, whilst adjudication established precedent for legal issues. In a jurisdiction with a persistently dominant claim type, usage data indicates there was less need for a focus on legal issues than behavioural modelling. Thus were the expectations (about institutional dispute resolution) of individualised advocates shaped.

A second effect of the relationship between advocacy function and institutions concerned risk (prospects of success) assessment. Separation of resolution modes was a structural way of minimising the impact of risk assessment deferral that affected individualised disputants, and was a cause of the delays that beset the Tribunal. Deferral preserved the (advocate’s) business opportunity of asserting or resisting a claim. The mediative mode reduced the business risk in the presence of incentives to settle to avoid further advocacy costs and the absence of constraints like the power of adjudication in mediation.

Institutional separation thus ensured that mode accessibility was dependent on choice of advocate. Collectivised parties could access all three institutions at no personal cost, but only if they had appropriate prospects of success. Individualised parties could access them if they had the financial resources to meet the costs of representation, or dispensed with representation altogether. This establishes another perspective on the 1991 debate about mode purity and fairness/justice.

**Informality**

Usage data for both eras suggest a connection between public perception of institutional accessibility and the apparent informality of resolution process under the ERA. If this is accepted, however, repetition of claim and consequence tend to establish that increased access (to justice) was an end in itself. If the aim of informality of resolution process was to contribute to different and better outcomes
for employees at risk of dismissal and this failed to materialise then it can be accepted that process informality per se was not a contributing factor.

Comparative informality of process did, however, contribute to better outcomes for institutional administration. It was facilitated by two factors: significantly higher resourcing of the jurisdiction under the ERA than the ECA; and the transfer of control over claim process from advocates to resolution personnel under the ERA. This also became an end in itself. It reduced the administrative chaos that delay and choice of the adjudicative mode produced under the ECA but it failed to result in administrative efficiencies that could have accompanied this success of outcome. There was no change, in other words, to the passivity or inertia of the ECA era resolution personnel under the ERA. Mediators failed to make use of the wide powers to facilitate and adjudicate that were conferred on them. Authority membership increased whilst investigation numbers remained stable or diminished, a more efficient file allocation system utilised by one region was never adopted for the others, and, over time, resolution work rates fell under the ERA, as they did at the Tribunal.

Information provision

The point already made, that information for disputants from partial sources is more highly valued or useful than that from neutral sources, is relevant not only to policy about source, but also to policy about timing of provision and type of information that can be classified as useful. It furthermore clarifies why resolution accessibility and informality of process, tropes of collective advocacy, could not be effectively transplanted into a neutral, individualist resolution environment for the purpose of facilitating collectivism’s dispute resolution outcomes.

Acceptance of the interdependence of these factors is key. Identifying them as policy facets of the institutions in the hope they would facilitate or replicate collectivism’s outcomes failed to acknowledge the connection between information provision, the timing of problem resolution and the need for recourse to resolution institutions: regularised, accessible workplace remedy systems, an informed collective membership with early access to partial advice and assistance to resolve issues as they arise, can be contrasted with the conditions that best facilitate labour market flexibility - workplace remedy systems that are inaccessible, or not well understood, employees with an imperfect understanding of their rights and obligations, restricted access to informed partial advice and no power to initiate problem resolution processes, and reliance on advocacy dependent on their ignorance of problem resolution processes as its business opportunity.

A higher reliance by individualised grievants on institutional dispute resolution arose from factors that that could not be influenced by the institutions, no matter how they were structured, because outcomes dependent on early information provision and intervention were incidents of collectivised representation, in that they occurred prior to the crystallising of grievances, not afterwards.

Neutrality

If information about employment rights and obligations was best provided before any necessity for it was apparent, if its effectiveness relied on a variety of ways of providing it – formally (training and education) and informally (via membership of a common-purpose community) and if it had to come from partial and trustworthy
sources to facilitate the dispute outcomes sought for the ERA it becomes apparent that institutional *neutrals* could not function as a substitute for collective sources (in information and advice provision) because they could not establish the relationships of trust with those requiring their assistance.

It can furthermore be argued that neutrality itself is associated with one set of outcome goals but not the other. The data for the period under review suggests that the neutral arbiter helped facilitate flexible labour markets, but was antithetical to the goals sought for the ERA. Abel’s thesis about informal institutions and their civil court hostility to values that prioritise maintenance over termination of relationships encapsulates the employment jurisdiction post 1991.

This dichotomy had implications for access to justice, particularly for non-union employees. It confined the object of accessibility to claimants who required help to settle the terms of ended employment relationships. Accessibility was of limited use to those who sought relationship repair.

Lower barriers of access to the institutions were therefore not associated with increased levels of mended over ended employment relationships. Increased institutional accessibility and use may be associated with greater public acceptance of flexible labour markets. If this is the case the moderate decision to factor in public acceptability to policy choices in 1991 and the 2000 decision to retain (and tweak) the ECA model ensured the earlier goals endured.

**Cost**

The major cost of public provision of dispute resolution services during both eras was the labour cost of its personnel – administrators, mediators, Tribunal and Authority members and EC judges. Within that expense, cost varied according to mode of resolution and personnel status. Mediation in the ECA era cost significantly less than adjudication in the Tribunal, not because personnel costs differed but as the result of their significantly different calls on (personnel) time and (scheduling) certainty.

The doubling of resolution personnel in 2000 and the need for separate facilities for the Mediation Service and the Authority did not raise the cost, per dispute, of resolution services because those accessing the services increased at a higher rate, non-judicial resolution personnel were paid at different rates and most resolution services were provided by mediators, the lowest-paid. Cost saving resulting from the quasi-compulsory use of mediation was replicated for the adjudicative mode by stabilising its personnel time and scheduling requirements (notwithstanding the failure or refusal of the Authority leadership to acknowledge this).

The consistent dominance of the dismissal grievance and the unchanging nature of its remedies were not matched in the costs of representation, which rose. The result was a more efficient, accessible dispute resolution system that offered the same results as before, albeit faster, but at an increased personal cost.

By the end of the period under review the institutionalisation of a culture (or rituals) of exchange triggered by dismissal, was apparent. The transfer of money from employer to employee was its object even though its preliminary rituals (dominated by representatives) included demands for reinstatement. Resort to the employment
institutions, Galanter’s bargaining tactic, depended on the relationship of the representatives (independent of the parties) and the intensity of disputant commitment to initial negotiating positions.

The employment institutions were both responsible for, and hostage to, this concept of exchange, as the result of the justice trope preference for the severing over the maintenance of relationships and its requirement for the monetising of damage thereby sustained. Because settling the terms of the exchange comprised the bulk of their work it was responsible for much of their operating costs.

It is thus possible to account for much of the cost of the institutions by reference to the requirements of the dismissal exchange, justice’s tropes of negotiation.

**Personnel**

*Representatives*

The value of having two distinct, antithetical cultures of representation or advocacy in a study of two apparently different policy goals for the resolution of employment grievances lies in establishing a connection between advocacy culture, dispute resolution structure and wider policy goals via analysis of the structure of both eras and the concepts of time and control in policy about dispute resolution.

**Structure**

The structure’s dependence on a dominant individualist culture was essential to the flexibility goal. Resort to the competing culture’s resolution mode (mediation) to cure its defects did nothing to undermine this partnership. It was another source of strength, particularly when mediation was institutionalised. Individualist advocates were associated with its advantages, collective, researcher and administrator views, notwithstanding.

By contrast, when policy no longer appeared to favour flexibility, the collectivist (stakeholder) advocacy culture failed to regain the advocacy position it held prior to 1991. Of a number of reasons for this, that relevant to grievance resolution concerns the dependence of justice’s institutional structure on individualism’s unacknowledged disadvantages for disputants. An advocacy culture derived from a collective membership educated about employment rights and obligations, the advantages of early, informal dispute resolution and the preservation of employment relationships, with a reluctance to advance or contest grievances where prospects of success were low was always likely to have a lower presence in institutions created for disputants lacking those characteristics. The success, therefore, of both the dominant culture and the institutions created for it, was to mask this reality.

Thus, if structural and operational adjustments failed to influence the changes to grievance resolution practices sought for the ERA, and alleviation of the inefficiencies of the ECA regime entrenched the dominance of the individualist advocacy culture, it can be argued that the advocacy culture that an institutional structure attracts determines the success or failure of policy for dispute resolution in this jurisdiction.
Time

Aside from the differences in time when advocacy is engaged, there are different approaches to the valuation of time by each culture. This had implications for the institutions of both eras. The commercial value of time for the individualist culture helped to incentivise preferences for adjudication, the mode of resolution that promised the highest use of time, both in preparation and hearing, but also in the opportunities it offered for resolution deferral. Priorities on the use of time for collectivist advocates are collective, not individual issues, so their incentives were for quicker, shorter modes of resolution. Quicker, shorter process formed the basis of lawyer opposition to those new institutional powers that threatened to reduce the time that could be devoted to billable advocacy tasks (mediator powers of adjudication, cross-examination, submission drafting).

Control

Transfers of control over the passage of the resolution process from advocates to administrators/resolution personnel quickened routes to institutional grievance resolution, as intended. Those that didn’t interfere with advocacy tasks met with greatest success. There was thus no recorded opposition to the speed of mediation availability, nor to its imposition of time maxima, because mediation became the substitute institution to which lawyers could resort as part of a negotiation strategy.

However lawyer resistance to the use of mediator powers to engage directly with disputants and to decide the fate of a dispute in the face of stalemate ensured their atrophy.

The Authority’s investigative powers, welcomed by collective advocates, provoked the greatest resistance from lawyers. Their concerns, that adjudicative powers for mediators and investigative powers for the Authority undermined justice suggest that these powers challenged their attachments to adversarial advocacy and their beliefs about the effects of this type of advocacy on adjudicators. The evidence, that the Authority’s investigative powers had little, if any, effect on outcomes, failed to ameliorate these views – reinstatement of powers to cross-examine were amongst the first changes legislated by the incoming National Government in 2009.

Resolution Personnel

The EC judiciary was divided by status and attitudes to adversarialism from the mediators and members of the Tribunal and Authority, and this difference was maintained over both eras. Whilst the Tribunal membership generally welcomed the policy changes of the ERA (and were keen to ensure they were implemented) the judiciary was more closely associated with the views of the legal profession who opposed them.

The EC’s approaches to the cross-examination issue and the loss of its powers of review were furthermore not confined in their influence to the grievances in which they arose. They sent an unequivocal message that the (ECA) status quo on issues of process should be maintained, notwithstanding clear statutory provision to the

9 Deferral has the advantage of increasing the time an advocate ultimately spends on a dispute, and for employers may result in the eventual withdrawal of a claim by an employee who has found new employment and lost the initial commitment to extract money for the loss of a job.
contrary. This appears to have influenced lawyer advocates associated with undermining mediator and Authority member confidence and commitment to the new regime.

The position was exacerbated by the Department’s failure to recognise that the success of policy initiatives to transfer control of proceedings from advocate to mediator/member was likely to depend on the experience and authority of initial appointments to those roles. The Department’s priority was a more compliant resolution workforce. Its decision to engage mediators with mixed or limited experience of the employment jurisdiction meant that the Mediation Service was variably equipped to withstand the demands of adversarial advocacy, and ill-equipped to adopt a consistent approach to decision-making in the face of mediation failure. Mediator use of powers to utilise a range of mediative approaches therefore atrophied. Lawyer preferences for the shuttle style prevailed.

Thus were policy goals about process in the restructured institutions undermined: the dominant advocacy culture was subtly encouraged by the judiciary to resist change and inadequate attention was paid to the characteristics of a resolution workforce capable of managing that resistance.

**Conclusion**

Replacement of a stakeholder dominated dispute resolution institutional structure by one dependent on legal method helped facilitate the policy goal of flexible labour markets. Attempts by the ERA to mitigate detriments perceived to arise from labour market flexibility were undermined by retention of dispute resolution structures reliant on legal method and the belief that collectivist and individualist approaches to labour relations could co-exist. This suggests that reform of institutional structure is unlikely to facilitate policy change without consideration of the advocacy culture aligned to that institutional structure. It is possible that advocacy culture is a more powerful determinant of policy goals than structure, but their interdependence is key to understanding their effect.

Further research might elucidate differences of outcome from reliance on neutrals versus reliance on stakeholder representatives for the resolution of individual (as distinct from collective) employment issues. Interesting questions remain. Would stakeholder control provide for different outcomes? Would privately negotiated or mediated outcomes align more closely with protective policy goals under stakeholder control? Would the need for resolution outside the workplace reduce?
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