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The 2010 review of the New Zealand personal grievance system: Commentary

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Abstract

Following its election in 2008, the National-led government has moved to amend grievance laws. The arguments for and against such changes are well-rehearsed in terms of the values involved. What is missing, however, are empirical studies to substantiate or refute the claims made by either side. The present article outlines the nature of the research needed, highlighting the role of researchers, as well as the need for employers, unions and practitioners to collaborate in establishing a field of knowledge.

Introduction

Once again the pendulum of legislative change in New Zealand has begun to swing back. After three terms of a left-wing government, a change of government now brings a move to the right. This time, however, the focus has shifted to personal grievances and employment relationship problems (ERPs). This area survived the radical changes of the ECA 1991 and was not on the most recent list of changes sought by Business NZ (Business New Zealand, 2010). Nonetheless, it has remained the subject of ongoing criticism from the right-wing and employer groups (Anderson, 2002).

This commentary concerns the discussion paper released by the Minister of Labour on 2 March 2010, reviewing Part 9 of the Employment Relations Act (Department of Labour, 2010). In this article we commence with a brief outline the content of the discussion paper, then place the New Zealand debate in the broader context of developments affecting grievance laws internationally. A central issue emerging across many countries concerns the absence of research-based evidence to inform those debates. Given that each country's grievance system is somewhat unique, we argue that this highlights the need for more research concerning New Zealand grievances. This is not only an issue for academics but will require the participation of a range of practitioners and other parties.

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The Discussion Paper: Review of Part 9 - Personal Grievances

The discussion paper contains the Minister's statement that the aim of the consultation is to achieve employment law that is "both fair and flexible for all". Specifically, the objectives of the review (which presumably now indicate the goals for the system) are to consider whether the personal grievance system:

1. Strikes a fair balance between employer flexibility and employee protection
2. Does not impose unnecessary costs or obligations for employers or employees
3. Supports improvements in workplace productivity
4. Is efficient and effective, and
5. Has met its objectives (as set out in the Employment Relations Act 2000).

The consultation seeks input from both "people who have had direct experience of the personal grievance process", and also those without direct experience "but whose understanding of the process affects their decisions or behaviour in the workplace" (Department of Labour, 2010: 3).

The discussion paper focuses on eight main topics related to personal grievances, and these are summarised in Table 1.

Table 1: Outline issues from Discussion Paper Review of Part 9: Personal Grievances

Topic	Issues noted	Possible options listed
1. Cost of problem resolution	Perceptions of cost may lead parties to avoid formal processes and settle informally (private settlements)	• Helpline for employers and employees (particularly SME) • Information provision / promotion
2. Quality of employment advocates	Concerns regarding the tactics and competency levels of some advocates	• Regulation - requiring membership of professional organisation • Self-regulation – sector to list professional members, and/or its own rating and reporting system • Information provision
3. Balance of fairness	Perceived bias; process is more important than substance. Current system is too complex and needs more clarity and certainty. Remedies are not adequate.	• Changes to the current test of justification (s103A) • Information promotion and support on processes
4. Access to justice	Access to information, knowledge of processes, and affordable advice or representation - costs may be too high and/or the system too complex	• Information provision and promotion on processes, likely costs, and options for support without costs

5. Responsiveness and timeliness of services	Delays due to long waiting times and/or avoidance by parties - can lead to escalation and increased costs	• Change Authority processes • Possible Authority practice notes • Greater use of technology • Earlier intervention
6. Impact on SMEs	SMEs have less experience and resources in resolving problems, with fewer processes and procedures in place, less information and awareness of the options, time and financial costs Harder for SMEs to comply with procedural requirements	• Code of Employment Practice • An employment facilitation process • Extend trial period beyond 90 days for firms with < 20 employees • Extend 90-day trial to medium-sized business (20-49 employees) • Diagnostic problem-solving tool • Helpline (employers & employees) • Information provision and promotion (awareness raising)
7. Eligibility for raising a grievance	System's functionality improved if legislation applied differently to different types of employees Concerns that a grievance can be filed up to three years after first raised	• Limit eligibility by length of service • Extend the current 90-day trial period, as in (6) above • Reduce the current 3-year limitation for lodging a grievance
8. Effectiveness of remedies	Reinstatement ineffective as a primary remedy Current remedies are insufficient, fail to address the full range of costs Remedies need to be effective and provide credibility - monetary remedies not effective in rebuilding relationships or learning from errors	• Remove reinstatement as a primary remedy • Regulate costs and remedies • Non-monetary remedies, incl. training/education (for both employers and employees) • Practice notes for the Authority • Increase financial remedies • Information promotion

There are two main aspects for possible commentary in relation to the discussion paper. The first aspect concerns the nature of the "issues" listed in the paper, and particularly how much (or how little), information exists concerning these. The second aspect concerns the political dimensions and the process for determining how the issues are addressed with the "possible options" listed. It is not practicable to attempt to cover both topics in one article, and therefore this commentary will restrict its focus to the first aspect, concerning the existing research since this is a foundational matter which has significant implications.

The "*issues*" listed in the paper, and their sources, are significant. These are described as matters that have "attracted commentary in recent years, either in the media, anecdotally or that have been raised directly with the Department…by stakeholders and/or social partners" (p.6). These are summarised in the middle column of Table 1. For each issue, the report provides a section "*What we know about...*" which summarises the existing information. Several of these issues are recurring topics that have been identified in earlier Department of Labour reports and Cabinet papers; for example the quality of employment advocates, the responsiveness and timeliness of services, perceptions regarding the balance of fairness, and the disproportionate impact on small and medium enterprises (Cabinet Economic Development Committee, 2007, Department of Labour, 2003, 2007a;b;c;d). Other topics, such as the eligibility for raising a grievance, and aspects of the effectiveness of remedies, are more recent. The "*possible options*" list, summarised in the right column of Table 1, contains a number of proposals that have not been actively explored or pursued, particularly under the previous government. As mentioned, the political dimensions of those shifts are beyond the scope of this commentary.

The International Context

From an international perspective, it is not surprising that grievance laws are the focus for legislative debate. Elsewhere, grievance law and resolution procedures constitute an ever-moving target. In North America, newly introduced protection laws are eroding the traditional hard-line employment-at-will (dismissal-at-will) model. That continent is also experiencing the introduction of controversial new within-organisation EDR procedures which are operated by employers and can remove employees' access to external forums such as the courts or government agencies. In Australia, WorkChoices and other radical changes, which commentators suggest prompted the downfall of the Howard government, are now being reversed to some extent by the Rudd government. Britain, too, has experienced a series of reforms to the grievance system, with the most recent changes paying significant attention to improving within-organisation procedures. Interestingly, those changes were drawn largely from a report which used the current New Zealand model as a well-regarded reference point (Gibbons, 2007).

A key theme emerging in the international literature is the question of whether such changes deliver justice, particularly for employees (Bingham, 2005, Colvin, 2005, Mahony and Klaas, 2008). In New Zealand, the two sides of the debate are well-entrenched. Employer groups claim that the current system is overly complicated, burdensome and biased in favour of employees, with contingency fee advocates contributing to create an employee "gravy train". In support of this, they cite their own member surveys, outcome statistics from the Authority, and anecdotal accounts from members. Hence they argue for reform. In contrast, employee groups argue that the current grievance laws are necessary to safeguard the rights of workers and although the current awards may not fully address the harm that employees may suffer, the system is working adequately (Anderson, 2006, McAndrew, Morton, and Geare, 2004, Shulruf, Woodhams, Howard, Johri and Yee, 2009).

Over the last decade, the Department of Labour sought to resolve these apparently contradictory claims with a series of reports covering many aspects of grievances and employment relationship problems. These generally portrayed the system as functioning satisfactorily and argued that their findings did not support claims such as the gravy train allegations. The reports never gained much attention though and generally did not make their way into the public debate. From a research perspective, a significant limitation was the methodology which made the studies more exploratory or "indicative" than statistically representative (Department of Labour, 2007d: 5). The current discussion paper does refer to the Department's earlier research, noting those findings, but at the same time the paper seeks further input on those topics.

There is only limited research work done by other persons or agencies. Our own research for example, identified a group of employees who were potentially disadvantaged by the current system, but at the same time employers also discussed opportunist claims that they had experienced (Walker, 2009). In general, it would seem that sub-optimal outcomes can occur for *both* employees and employers under the current system, but there is no clear evidence concerning how widespread these are, nor whether one party is more affected than the other. To have credibility, an area of research needs to have findings that are replicated and corroborated across a range of sources and researchers. Importantly then, in terms of local research, there is no comprehensive and universally agreed set of findings concerning grievances. One side argues that the system is in urgent need of reform while the other may counter-argue that 'it ain't broke so don't fix it', but there is little evidence to establish which, if either, is correct. Our article in the current issue highlights a number of key areas requiring future research attention. In terms of the current discussion paper, we propose that each of the issues cited represents a significant but unanswered research question.

The Need for Academic Research

Politics and academic research are however, very different fields. The world of politics does not wait for academics to assemble sufficient studies and reach consensus on the state of a field. Following its election the government introduced the 90 day trial period for small businesses, and has now indicated its willingness to consider further reform. The consultation process associated with the current discussion paper will draw upon feedback and anecdotal accounts concerning experiences of the ERP resolution system (Department of Labour, 2010). Academics will, of course, highlight the shortcomings of such less-scientific processes, with the possibility for lobbying and under-representation or over-representation by certain groups. That however is the nature of political processes.

The topics in the current discussion paper are far-reaching and likely to be controversial. While the disproportionate impact on small and medium enterprises (SMEs) is a recurring topic, the possible options to address these types of issues are markedly different from those advocated under an earlier government. Among those newer options are possible changes to eligibility for raising a grievance. These include a minimum service period (regardless of whether the employee is on a trial period), as well as extending the current trial periods, both beyond the current 90 days for small businesses, and also extending the provision to include businesses with

20 to 49 employees. These options, along with the mention of restrictions by salary-limit, repeat suggestions recently raised in other forums (Taskforce 2025, 2010).

Another area which may seem minor, but which is likely to prove controversial, concerns the legal test of justification (s103A) and accompanying procedural aspects. Two versions of the test of justification had emerged in case law. The previous government argued that the test that had developed from the Court of Appeal was one of a number of issues that were not in keeping with the intent of policy and the legislation, and so replaced that test with a legislative definition (which used the other version), in the 2004 ER Amendment Act. This revision provoked the ire of employers however, as it was seen as making it more difficult to dismiss an employee, and thus shifting the balance in favour of employees. Any further change will thus involve debate as to what truly constitutes a 'balanced' position.

Researchers also need to explore the experience of other countries in relation to developing new policy and legislation. The development of a Code of employment practice, for example, is listed as another possible option. Although these types of moves may have an intuitive appeal as a means of simplifying matters, there are a number of cautions (Hughes, 2010). Responding to criticisms of their own system, the British sought to simplify procedural matters and reduce claims by moving from a non-binding code to highly prescriptive statutory regulation of within-company discipline and grievance procedures. In practice however, this produced the opposite outcomes; the processes in smaller businesses became more formalised and adversarial, and for many businesses the number of claims increased (Gibbons 2007). At the same time, between-country comparisons need to take into account the full nature of another system, rather than simply comparing one aspect in isolation, such as eligibility for raising a grievance. Each system has developed in its own unique manner and thorough, comprehensive comparisons are needed, unlike the over-simplified and inaccurate comparisons that can occur in public debates.

The paper also points to possible changes to remedies. This aspect is likely to be much debated in its own right, but there appears to be little research concerning the effects of such provisions. Changes to remedies can also have significant implications for other aspects of employment relations. Overseas evidence shows that the external framework, including potential penalties or remedies, influences the day-to-day organisational practices for dealing with disputes, while some local writers argue that the current penalties are ineffective and function only as an "exit price" (Anderson, 2003;2006, Department of Labour, 2002, McAndrew, et al., 2004).

Studies are not only needed to address the legislative framework and external forums, but also the less accessible area of within-organisation resolution processes. In a final section, the discussion paper explores a number of issues with regard to early intervention and mediation. There is an amount of existing research (Department of Labour, 2008) and while it is generally agreed that early resolution is desirable for reducing grievance costs and preserving employment relationships, the real difficulty is how to apply this in practice. In the USA, attention has been given to the development of integrated conflict management systems (ICMS) which employ a "co-ordinated set of organisational mechanisms to identify conflict in its early stages, manage it to prevent escalation, and resolve it efficiently to maintain positive workplace relations" (Gadlin, 2005: 371-372). This approach is however centred on large organisations, which raises questions as to how these principles can be applied among smaller enterprises. There is a need to

shift the attention to more proactive methods for dealing with conflict (Lewin, 1999). The paper outlines some possible means for improving early intervention, including the use of technology, and the development of advisory services, similar to the work of ACAS (Advisory, Conciliation and Arbitration Service) in the UK, which includes training, mediation and conciliation, and advice. Although external resources and systems are important, the ways in which organisations handle conflict is often an expression of deeper aspects concerning organisational culture and relationships, and these are often less amenable to change than policymakers anticipate.

Conclusion

These developments highlight the increased need for researchers to direct new attention toward area of employment protection and resolution systems. These are not simple matters for investigation though. The introduction of the 90-day trial period for example, has coincided with a recession and high unemployment, making it particularly difficult to assess the effects on hiring practices. There is little information concerning the consequences of that change, while the government apparently does not have information on how many employers are using the scheme (Radio New Zealand, 2010). Tracking dismissal cases that occur within the current 90-day period is highly problematic; while employers can generally be accessed through their employer-organisations, there are no equivalent sources for locating dismissed employees. In addition, the task of identifying 'opportunist' claims is far from straightforward. If, as employer-organisations suggest, a proportion of claims are settled privately, then no independent third party evaluation of a case occurs; the same claim that an employer considers opportunist could well be one that the employee views as genuine.

There is a lot at stake. The USA and British experience shows that grievance legislation and procedures not only affect the parties directly involved in grievances but also set a broader context which shapes day-to-day practices in organisations. While there will always be a minority of rogue employers and rogue employees, the challenge for legislators is to create and maintain systems that achieve an equitable balance, protecting the majority of participants in the workforce. For researchers, the challenge is, therefore, to assemble evidence-based findings that contribute to open and informed debate among the politicians and lobby groups. This is not a task for academics and researchers to attend to on their own. Given the complexity of the subject, a new attitude to research will be needed among employers, employees, unions and other practitioners. They, too, will need to be involved in a collaborative effort, supporting the implementation of studies that can begin to assemble the required data.

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