Regulating dispute resolution in the employment jurisdiction: some insights into regulating for decent work from an empirical study of policy for and the operations of the institutions 1990-2010

SUSAN ROBSON*

Introduction

This paper is based on the premise that regulating for decent work would be dependent on an enforcement system that supports policy objectives aimed at protecting the rights and interests of the vulnerable and/or low paid. It argues that reliance on apparently neutral agencies for enforcement of employee protections may be less effective than resort to partial and collectivised interests, like employer and employee groups.

This proposition is derived from an empirical study of the dispute resolution institutions of the employment jurisdiction from 1991 to 2008, and an analysis of the effect of policies for their operations on the quality of the employment outcomes that were the aim of those policies.[1] This period marks the rise and dominance of individual over collective employment arrangements, and the reliance by employers of the low paid on state subsidies in the form of welfare assistance and tax relief to those in full time employment.

The study establishes that the policy goal of the Employment Contracts Act 1991 (ECA) of 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. The policy decision to modify rather than replace this system during the formulation of the Employment Relations Act 2000 (ERA) resulted in reinforcement of the 1991 policy goal and the undermining of its own, apparently different, aims. A failure to associate advocacy cultures with employment policy objectives and a reliance on institutional neutrals as a substitute for a return to collectivist and protectionist approaches to labour issues may explain why the ERA's core policy goal, a rise of mended over ended employment relationships, never occurred.

A brief description of the way the entry-level institutions operated precedes analysis of the collectivist and individualist representative cultures of this jurisdiction, with particular emphasis on the role of information provision in the achievement of policy goals. A consideration of the advantages for protective goals of locating their enforcement with stakeholder rather than institutionally neutral agencies concludes this paper.

* Susan Robson, Barrister and PhD student in Otago University Law Faculty's Centre for Legal Issues

1 Susan Robson, Barrister and PhD student in Otago University Law Faculty's Centre for Legal Issues. Provisional title for PhD thesis: *The policy response to problems of process in the employment jurisdiction, 1990-2008.*

Policy and Institutional operation 1991-2008

The ECA's creation of a specialist employment jurisdiction and its universalisation of the personal grievance (the compromise brokered between the advocates for retention of the grievance committee system and those favouring use of the civil courts[2]) provided a forum previously denied to individualised employees,[3] and the legal profession. They were quick to take advantage of the opportunity offered by the mandate for the newly created Employment Tribunal of low level, informal, speedy, fair and just resolution services.[4] Claim numbers rose, lawyers replaced union and employer association advocates,[5] and their preference for adjudication over mediation quickly rendered the Tribunal establishment membership of 14 inadequate. Delayed claim resolution soon became endemic.

The administrative response was to offer mediation to those who chose adjudication as a first attempt at resolution, and was available significantly earlier than a hearing.[6] The result was that rising proportions of resolutions were mediated and declining proportions were adjudicated, but adjudication continued to be the mode of first choice of rising numbers of claimants.[7] Additionally, the number of claims per application increased,[8] as did the number of ancillary decisions required of adjudicated outcomes.[9]

Analysis of Tribunal delays following the 1996 post-election Coalition Agreement coincided with a ministerial determination to rid the jurisdiction of the Employment Court. Delay was attributed to an increasingly legalistic approach to adjudication imposed by the Employment Court exercising its supervisory or review function, and the use of legal representation that "introduced a level of formality and a more adversarial approach to claims".[10] The problem was regarded as compounded by the Tribunal's passivity.[11]

---

[2] All unions, many employers, and most submissions to the Select Committee favoured the status quo, as did policy advisers from the Departments of Labour, Justice and the State Services Commission. The Business Roundtable and policy advisers in the Treasury sought abolition of the labour jurisdiction institutions and reliance on the civil courts. The Employers Federation sought abolition of grievance committees but retention of the specialist nature of the jurisdiction. It opposed the civil courts option.

[3] The common law action, wrongful dismissal, limited remedies to compensation for the notice period.

[4] Employment Contracts Act 1991, s 76(c).

[5] Margaret Robbie *Representation, Procedure and Process in Mediation and Adjudication since the Employment Contracts Act* (Paper for Diploma Industrial Relations Victoria University of Wellington, 1993).

[6] Of the 683 applications that were actively resolved by 31 March 1992, 47 per cent were solely mediated, 47 per cent solely adjudicated and 6 per cent required adjudication following mediation.

[7] In the 1992/93 year, 56 per cent of applicants sought adjudication, rising the following year to 62 per cent. The mode of resolution for those years for adjudication was 35 per cent and 32 percent, and for mediation 64 per cent and 68 per cent. By 1997, adjudicated resolutions were 12 per cent of total resolutions.

[8] For the year ended 30 June 1992, 2332 applications (containing 2547 claims) were filed, a difference between application and claim numbers of 215, or 8.44 per cent of total claims. The following year the difference was 13.11 per cent. In the 93/94 year, it was 16.26 per cent. By the 97/98 year, the difference was 20.68 per cent.

[9] In the 1991/92 year, 349 decisions were recorded on 312 adjudicated applications. Substantive decisions made up 89 per cent and ancillary (interlocutory and costs) decisions 11 per cent of the total. The following year 680 decisions were made on 585 applications (86.14 per cent). By the 98/99 year, the proportion of substantive decisions had reduced to 71 per cent and ancillary decisions had risen to 29 per cent of recorded decisions.

[10] Department of Labour "The Supervisory Role of the Employment Court over the Employment Tribunal" undated at [54].

[11] As above.

Policy for ERA institutional alternatives was dominated by the problems experienced by the Tribunal. Modes of resolution were separated into the Mediation Service and the Employment Relations Authority, and the Employment Court was relieved of its supervisory powers of review. Mediation was semi-compulsory, the Authority would investigate problems by use of inquisitorial powers, and litigants who favoured adversarial processes could do so at the Court, but only after resolution was attempted via mediation and investigation.

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 were the primary policy objectives.[12] The style of both mediation and adjudication would be less formal and legalistic with emphasis on the interpersonal, problem solving skills of mediators and simpler procedures, administration and decision-making for Authority adjudication.[13] Administrative processes aimed at encouraging informality and increased ease of access to the institutions were thought to be a better solution to the problem of undesirable formality of lawyer representative behaviour than restricting rights of representation.[14] The result was an increased reliance on institutional dispute resolution by individuals but significantly earlier resolution rates,[15] largely as the result of mediation's filtering function.

However, a greater commitment to use of qualitative research for policy purposes after 2000 revealed that the government's desire for a rise in mended over ended employment relationships was never fulfilled. The institutions were dominated by dismissal grievances, as was the Tribunal. Reinstatement, the primary remedy, was rarely utilised. The hope that facilitation of problems by the Service would replace the evaluative mediative style of the Tribunal went unmet. Separation of resolution modes reduced incentives on mediators to offer or exercise statutory powers of decision making when prospects of settlement were unlikely. Settlements were achieved on the basis of the higher costs of proceeding, rather than any meeting of minds about the problem at issue. Compensation levels were lower than the costs of achieving them, particularly if both mediation and adjudication was required.

Two representative cultures

The three advocacy groups in this jurisdiction, lawyers, self-employed advocates and union/employer association advocates, differ in their training and qualifications for the advocacy role, their approaches to issues of process, and in the business opportunity that representation offers. This analysis focusses on lawyers and union/employer association advocates because, combined, they represent over 85 per cent of parties.[16]

For union and employer association representatives (for whom advocacy of individual problems is an incident of servicing their memberships' collective interests), individual casework is time consuming

[12] Office of Minister of Labour, Cabinet Submission "Employment Relations Bill – Finalisation of Outstanding Elements" (17 February 2000) at [5].
[13] Department of Labour "Employment Institutions – Options Paper" (28 January 2000) at 3.
[14] At [41].
[15] Personal grievances dominated the subject matter of mediations. By 2002, they constituted 65 per cent of the workload.

[16] Kathryn Beck and Ian McAndrew "Decisions and Damages: An Analysis of Adjudication Outcomes in the Employment Tribunal and the Employment Relations Authority" (paper presented to New Zealand Law Society Employment Law Conference, November 2002).

and requires consideration of the effects of the workplace problem at issue on others. The interests of individual members cannot compromise collective interests.[17]

When confronted by conflict, union organisers regard conciliation of employer and employee interests as the fundamental requirement of their task with retention of the job for the employee as a major goal. Much of their effort, therefore, lies in repair of damaged work relationships. This involves a heavy emphasis on negotiation, education and keeping lines of communication open.[18] Unwinding a dismissal or a warning is, therefore, of greater importance than pursuing other remedies like compensation. Much of their effort is expended on avoiding the need for outside intervention.[19] Union member employees are better equipped to recognise problems in need of resolution than their non-union counterparts.[20] In larger unionised worksites, union delegates traditionally took on relationship repair tasks, thereby ensuring that attempts at de-escalation of conflict occurred before the need for disciplinary action arose. Union organisers also need to establish working relationships with management to facilitate the dialogue necessary to negotiate problems in the workplace as they arise. Resort to grievance committees prior to 1991 occurred in the name of the grievant's union so that only those grievances with prospects of success were taken. These factors help to explain why the dismissal grievance rate through the 1980s was steady and low, relative to the 1990s.[21]

The speed with which lawyers replaced union and employer association advocates as representatives, the significant increase of personal grievance claims and the predominant choice of adjudication as the mode of their resolution marked the successful establishment of a new jurisdiction for the legal profession in 1991.[22]

Lawyers have different professional responsibilities and focus than collective advocates. In part, this arises from the imperative in legal training to identify the source of breach, in conflict, before considering remedy. The first task of the lawyer is, therefore, allocation of responsibility for breach, which, in terms of the client relationship, generally involves a search for fault by the other party.[23] Codes of ethics underline these obligations by endorsing zealous advocacy of clients' causes, short of dishonesty, but without regard to the interests of justice in the particular case or broader social concerns.[24] Of itself, this imperative lends itself more easily to position taking and confrontationalism, so that the search for breach renders restoration of relationships much more difficult than assertion of

[17] Members of some employer associations pay for dispute resolution services provided by their association.
[18] Dianne Donald "Unions and Personal Grievance Resolution: Managers of Discontent The Role of Unions in Advancing or Impeding the Informal Resolution of Personal Grievances in NZ Organisations" (MA Dissertation, University of Waikato, 1998).
[19] As above.
[20] AC Nielsen "Survey of Employment Disputes and Disputes Resolution" Department of Labour, November 2000.
[21] Donald shows that about 500 grievances a year were dealt with by the Department of Labour for each of the five years prior to 1991. Department of Labour claim statistics show a rapid rise of claims for each of the five years after 1991, although the annual rates of rise were inconsistent and unpredictable.

[22] It was well positioned to take advantage of an increasingly deregulated economic, social and political environment that saw increased numbers of dismissals arising from employer perceptions of more flexibility to *fire at will*, white collar and professional employee perceptions of the economic advantages to be gained by challenging dismissals, and the widespread publication of this means of deriving financial gain: Joanna Cullinane and Dianne Donald "Personal Grievances in New Zealand" (paper presented to Association of Industrial Relations Academics of Australia and New Zealand 14th Annual Conference, Newcastle, February 2000).
[23] "A lawyer should advance their client's partisan interests with the maximum zeal permitted by law" Christine Parker and Adrian Evans *Inside Lawyers' Ethics* (Cambridge University Press, United Kingdom, 2007).
[24] Robert Kagan *Adversarial Legalism, The American Way of Law* (Harvard University Press, USA) 2001) at 55.

damage and remedy (compensation), even if restoration of the working relationship is the more desirable option for the client.[25] Additionally, lawyers are more likely to accept that resolution of conflict is dependent on exit from relationships,[26] with the price of the exit measured in monetary terms. Employees who relied on them were more likely to have been dismissed by the time they sought representation.[27] Their remedies (if available) are, therefore, likely to be less immediate than those for unionised employees, notwithstanding that lawyers are more likely to be associated with getting 'the best deal' at the other party's expense, an assumption not generally supported by research.[28] A related, but opposing idea, that negotiation on financial matters through lawyers will do little to increase independent communication between the parties has been shown to have some validity.[29]

Lawyers were associated with the problem of delay at the Tribunal: resort to them obliged other parties to engage lawyers; hearing times were drawn out; scheduling and rescheduling was complicated by their unavailability.[30] They were blamed in the business press for undermining the Tribunal's ability to reach commonsense decisions on dismissals and compensation and as responsible for ignoring its mediation option in favour of arbitration, rendering it slow and legalistic.[31] However, when they did attend mediation they were regarded as inept: they lacked the skills to negotiate and cut a deal, failing to recognise that their task was to resolve the matter and the mediator [was] a tool of their trade.[32] The price of their representation was also a source of concern. Fees were payable regardless of outcome and costs awards never met the full cost of representation.[33] This highlighted the connection between business opportunity and the reluctance of lawyers to acknowledge the validity of non-judicial processes (thus, establishing why the adjudication option remained the preference of grievants at the Tribunal, even after it became clear that the mediation option had many more advantages for them).[34]

By contrast, the cost of union membership was described 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 sort out the problem on the job (i.e. before matters escalated to dismissal).[35]

[25] C Menkel-Meadow "Towards Another View of Legal Negotiation: the structure of problem solving" (1984) 31 UCLA Law Review 754.
[26] Richard L. Abel (ed) *The Politics of Informal Justice* (Academic Press, New York, 1982).
[27] UMR Research Ltd for Employment Relations Service "Department of Labour Problem Resolution Services Research Project: A Qualitative Study amongst Employees and Employers" (July 2004).
[28] PSC Lewis *Assumptions about lawyers in Policy Statements: A Survey of Relevant Research* (Lord Chancellor's Department, 2001).
[29] As above.
[30] Minority of the Labour Select Committee "Report of the minority of the Labour Select Committee on the inquiry into the effects of the Employment Contracts Act on the New Zealand labour market" (21 September 1993).
[31] Graeme Hunt "Employment Tribunal no place for expensive lawyers" *The National Business Review* (New Zealand, 26 February 1993).
[32] WRC Gardiner "A Report from the Trenches" (paper presented to International Employment Relations Association Conference, Hamilton, July 1995).
[33] As above.
[34] Alan Rau, Ed Sherman and Scott R. Peppet *Processes of Dispute Resolution: The Role of Lawyers* (4th ed, Foundation Press, 2006).
[35] Gardiner, above n 32.

Negotiating the resolution of a dispute for lawyers is not a separate process to litigation because litigation is the means by which the negotiations begin.[36] By contrast, collectivist advocates look to institutional intervention only after discussion and negotiation fail to produce a settlement. These differences of style (over whether institutional intervention is the first or the last step in the resolution process) affect outcomes, with the higher likelihood that unionised employees will keep their jobs with minimal financial implications of disputing for their employers whilst their non unionised counterparts exchange their jobs for money.

In addition to effects on outcomes, lawyer preferences for adjudication affected the mediation function (in both eras) to the extent that it served two purposes (as the basis of litigation risk analysis, a necessary pre-condition of settlement for legal representatives, or as assisted negotiation with the aim of resolution for collective advocates) and two constituencies: as a first forum for the assertion of party rights and obligations for the legally represented, or a final step in a negotiated resolution process for union members.

The dominant effect on the institutions was lawyer insistence that they operate judicially. Acting judicially was regarded as synonymous with adversarial modes of adjudication: David v Employment Relations Authority[37] represented an attempt to impose upon the Authority the adversarial mode of adjudication legislatively discarded in favour of the investigative mode. When this failed, passive resistance to ERA policies for informality of process via reliance on causes of action, use of submissions, and separate consideration of substantive and procedural issues proved to be more successful than the direct action that proceedings over Authority powers signified. Additionally, the Mediation Service was forced to abandon facilitative styles of mediation for the evaluative style that was a feature of Tribunal mediation because legal representatives adopted a variety of techniques to avoid contact with mediators known to rely on a facilitative style. Mediators were required to preside over negotiations of relatively small claims that took as long to resolve as higher value or more substantive problems, thus generating the perception that mediation was simply a means of transferring money from employers to employees, as opposed to a forum for the resolution of workplace problems.[38] This was viewed as jeopardising the Service's capacity for early intervention in subsisting relationships.[39] The behaviour of representatives was regarded as the root of the problem.[40] It attracted policy scrutiny (the 2004 statutory amendments to the mediation function were designed to counter these negative effects) but resulted in no change to representative style or substance. A later policy initiative devoted to the obstacles that representation posed for informality was successfully diverted to analyses of non-legally qualified individual advocates (e.g no-win-no-fee), notwithstanding this group's low incidence as representatives at the Authority.[41]

Employers reported unions as moving to resolve disputes more quickly and pragmatically than lawyers did, and all parties to disputes resulting in mediation assistance expressed the view that the involvement of lawyers in a dispute tended to draw out the process and raised the expense much more

[36] Menkel-Meadow, above n 25.
[37] *David v Employment Relations Authority* [2001] ERNZ 354.
[38] Department of Labour for Minister of Labour "Problem resolution under the Employment Relations Act" (February 2003) <www.dol.govt.nz> at 4.
[39] Department of Labour for Minister of Labour "Review of the Employment Relations Act – Proposals for Legislative Fine Tuning" (March 2003) <www.dol.govt.nz>.
[40] Department of Labour for Minister of Labour Issues Paper "Review of the Employment Relations Act" (undated, c February 2003).
[41] Minister of Labour to Cabinet Economic Development Committee "Review of the Employment Relationship Problem Resolution System" (4 November 2007) EDC (07) 24/6.

than was the case if the employer worked with the relevant union.[42] This was also the view of the Department of Labour when it opposed a Legal Services Agency proposal to approve legal aid for mediation on the grounds that representation there was unnecessary and would undermine the policy goal of a low-level, informal, non-legalistic, problem-solving function for the Service.[43]

If collective representatives were regarded as having cheaper and more pragmatic dispute resolution consequences for employers, their resolution mode of choice had similar implications for the public purse. The significance of the difference in time and cost between mediated and adjudicated resolutions has remained constant over both eras,[44] as has the conformity of resolution outcomes (compensation settlements/awards of less than $10,000).

Policy and Information Provision

Information provision and its timing was a major policy theme for the ERA.[45] It is also a marker of cultural difference between advocacy types and the extent to which remedy systems in workplaces are well known, regularised and accessible. 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. The connections established below between representation, workplace remedy systems, individualism and the need for institutional dispute resolution suggest why.

Workplace remedy systems

Accessible workplace remedy systems are more common in unionised than non-union workplaces, and union members are more likely to be aware of them. Non-union workplaces are more likely to exhibit an absence of uniformity about, or common understanding of, remedy systems, and a low level of awareness about public sources of information relevant to disputes.[46] This affects satisfaction with

[42] Tony Waldegrave, Diane Anderson, Karen Wong "Evaluation of the Short-Term Impacts of the Employment Relations Act 2000" (November 2013) Department of Labour <www.dol.govt.nz> at 117.

[43] Letter from Department of Labour (IRS: Stockdill) to Legal Services Agency (Banantyne) (16 February 2001).

[44] In 1990, mediations cost $415 - $587, adjudications between $2470 and $8258: Department of Labour to Treasury: "Cost of mode of resolution" at 6.3.97.
A cost benefit or utility analysis attributed an economic benefit of $58.9 million to the Service, a $3.2 million benefit to the Authority and a negative economic benefit to the Court - its costs were very high and the estimated benefit of its dispute resolution very low: Dr Geoff Plimmer and Chris Cassels report for Department of Labour "Greater strategic positioning of service delivery to achieve outcomes" (undated but c Nov 2005)
The Authority's membership is 35-50 per cent of the number of mediators employed by the Service but it investigates 9-15% of the problems mediated by the Service: Department of Labour and Ministry of Business Innovation and Employment claim and use statistics for the Mediation Service and the Employment Relations Authority
Authority determinations cost at least $7,000 each or more than $13,000 per proceeding: Department of Labour "Employment Authority Cases 2007-8" (undated c late 2008)
The cost/transfer ratio is 2:6; for every $2 that form the subject of compensation or costs awards, the Authority costs $6 to administer: Calculations based on costs of administering the Authority in 2007-8 and compensation and costs awards for those years published on the Ministry of Business Innovation and Employment website

[45] Requirements of consultation, good faith, bargaining processes, the form and content of employment agreements are some examples of the focus on information provision.

[46] The Department of Labour Infoline was used by 10 per cent of employees as a source of information about a particular dispute and as a source of information about dispute procedures by seven per cent of employers; its other institutions – the

workplace dispute outcomes: non-union employees are dissatisfied generally with dispute outcomes whilst their employers believe the majority of disputes are settled amicably; unionised employees have higher levels of satisfaction with dispute resolution processes and their employers a more positive view of union involvement in disputes than non-union employers. These differences are replicated in perceptions of the Mediation Service. It has a facilitative role for unionised workplaces but is regarded more suspiciously by their non-union counterparts (as a pseudo court process with the employer on 'trial' for alleged breaches).[47]

These connections between collectivisation, information about dispute resolution, and acceptance of the utility of state provided mediation services suggested to mediators that access to early intervention processes to stop problems from escalating and the provision of professional, accurate and partial information to disputants were major constituents of successful workplace remedy systems.[48]

These views were shared by collectivised users of the Mediation Service but not their non-union peers. They were most likely to require assistance to settle the terms of already dissolved employment relationships and did not accept that mediation would have assisted them before termination occurred.[49] Their employers complained about the emphasis within mediation on risk management (cost of dispute escalation) rather than genuine settlement, the pressure to settle via compromise over money, and the absence of settlement guidelines or information about its processes and outcomes,[50] thus, establishing a perception of the Service as having a regulatory or judicial, rather than an ameliorative or facilitative, function and as an unlikely early intervener for non-unionised workplaces.

Advocate approaches to information provision

Given that information provision in adversarial arbitration attracts a plethora of formal exclusionary rules (and interlocutory processes), but is regarded as a core 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. Sharing or corralling information had implications for both the mediative and adjudicative modes of resolution for both eras.

The exchange of collectivist for individualist advocates that accompanied the establishment of the Tribunal highlighted the benefits for the institutions, and of the sifting functions that unions and employer associations performed. They limited their advocacy to grievances with prospects of success. Their substitution by lawyers removed this mechanism for screening out unmeritorious cases.[51] Mediation became the means by which filtering occurred for the individually represented as the result of its function as the forum that preceded adjudication, its use of the evaluative mediation style and lawyer reliance on Tribunal members' adjudication experience. Thus, mediators provided for those, who engaged lawyers, the function that collective advocates performed themselves, before resort to the Tribunal: the assessment of strength of case or position is a form of information provision that lies at the heart of the advocacy role.

Labour Inspectorate and the Tribunal were a source of information for less than three per cent of each group: AC Nielsen for Department of Labour "Survey of Employment Disputes and Disputes Resolution*"* (November 2000).

[47] UMR Research Lt, above n 27 at 77.

[48] Phillip de Wattignar to Department of Labour "Response to Green Paper on the Improvements to the Employment Relationship Problem Resolution System" (undated c mid 2008).

[49] UMR Research Ltd ve n 27.

[50] As above.

[51] Paul Roth (Editorial) "The Cost of 'Individualising' Labour Law" [1997] 5 ELB 82.

Since this is not an assessment that the adversarial advocate is prepared to make until after institutional assistance has been sought,[52] choice of representative, therefore, had different consequences for disputants. Union/employer association members took the risk that their organisation would refuse to represent them if their prospects of success were too low. Those relying on lawyers had little or no risk of a refusal to assist but they undertook all the risk associated with their prospects of success whilst also assuming liability for the costs of representation that were payable, regardless of risk or outcome. The risk was mitigated by the cost of proceeding further: unmeritorious claims/defences were capable of settlement if compensation was pitched at a price lower than the cost of representation for an Authority investigation.

If lawyers saw mediators as sources of information, they had an opposing view of Authority members. For them, arbiters, as decision-making neutrals, are required to refrain from providing information or advice to parties to avoid compromising neutrality and/or suggesting predetermination. For collective advocates, for whom information is a basis for accurate assessments of negotiating positions, and information exchange as the means by which disputants work towards resolution, the arbiter performs a facilitative function. This conflict about the Authority's investigative function affected those of its members concerned about the extent to which they could facilitate and engage in information provision and exchange, but only in certain circumstances: where one party was unrepresented and the other was legally represented. The anxiety (of attracting allegations of predetermination and inviting challenge) reported by members in those circumstances centred on issues or evidence that unrepresented parties are unaware of the need to establish.[53] Since obtaining that information is the essence of the investigative role, this anxiety may be attributable to the tropes of adversarial advocacy.

Authority members, otherwise, reported that they conducted their investigations differently depending on the amount of information about the problem they considered that parties had.[54] A component of this issue is the bystander effect that occurs when the extent to which representatives take over responsibility for running a dispute relegates parties to bystander status.[55] Authority members regarded those 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 labels as a substitute for ordinary description.[56] Mediators regard the phenomenon as undermining parties' ability to take responsibility for their role in disputes, and as thus, condemning them to repeat similar mistakes.[57]

Thus is established the connection between information provision, the timing of problem resolution and the need for the institutions: regularised, accessible workplace remedy systems, an informed workforce with early access to partial advice, and reliance on negotiation for problem resolution reduces the need for the institutional resolution of grievances and increases the likelihood that employment relationships can be mended rather than ended.

---

[52] Parker and Evans, above n 23. Parker and Evans' adversarial advocate *combines the 'principle of partisanship'* [meaning *that the lawyer should do all for the client that the client would do for themselves, if the client had the knowledge of the lawyer] and the 'principle of non-accountability' [*meaning the lawyer is not *morally responsible for either the means or the ends of representation]* in order *to act zealously to represent the client's interests.* (pp14-15)

[53] Julie Morton "Reducing Legalism: The impact of the Employment Relations Act 2000" (M.Com Thesis, University of Otago, 2003) at 117.

[54] At 114: 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.

[55] At 33.

[56] At 128.

[57] Phillip de Wattignar, above n 48.

Conversely, the need for institutions is highest where workplace remedy systems are inaccessible or not well understood, employees have an imperfect understanding of their rights and obligations, restricted access to informed partial advice and no power to initiate problem resolution processes, and both employer and employees rely on advocacy which, in turn, is dependent on their ignorance of problem resolution processes as its business opportunity. Workplace remedy systems and representative differences of approach to information provision and the advocacy role are, thus, major determinants of the need for institutional dispute resolution.

If information provision and early intervention are incidents of collectivised representation, an institutional neutral cannot function as a substitute for them (as was hoped) because the information and the early intervention have to come from partial, not neutral, sources that have established relationships of trust with those they seek to assist. Partiality or partisanship – the quality for which adversarial advocates are most admired and criticised[58] – informs the practices of both individual and collective representatives and must be present at the start of the party/advocate relationship. The timing of this commenced relationship is what differentiates the consequences for collective and individual disputants: partial advice early in a dispute helps maintain employment relationships; at a dispute's late stages it functions as the means to extract compensation for the ended relationship.

Stakeholder roles in enforcement of employee protections

If partiality, pragmatism and filtering are incidents of collective representation, there is little reason why they could not also operate to enforce protective provisions for decent work. Stakeholder enforcement of such provisions would be dependent, however, on collectivisation of both employers and employees in the sectors in which decent work is in issue. Enforcement would result from their interaction – whether it occurred by negotiation or litigation, employer and employee groups affected by any issue would be solely responsible for the resolution of issues as they arose.

The advantages of enforcement by stakeholder include coverage, data compilation, and sequenced or agreed use of litigation. Employees in most need of the protection of decent work are all but excluded from the personal grievance jurisdiction, unless they are unionised: the sleepover, KiwiSaver deduction and gender equity issues before the Employment Court were initiated and funded by the Service and Food Workers Union. Conversely, enforcement of the 90-day notification rule by the Court has worked against the interests of union members.[59]

Data compilation refers to information gathered about work practices, wage rates etc. Its analysis reveals problems that are common across a sector, indicating where enforcement or educative effort should be targeted. As the point made below about the Department of Labour's use of data shows, however, the use of such data may depend on the perspective (partiality?) of the interpreter.

Sequenced use of litigation occurs when organisations that control or dominate an issue vulnerable to litigation decide how, when and why the issue should be presented to the courts. Currently, there is little or no control or organisation over employment policy issues that arise in the Employment Court when individuals litigate. Ensuing decisions have precedent value for litigants who follow, but the

[58] Parker and Evans, above n 23.

[59] For example see *Idea Services v Barker* [2012] NZEmpC 112; *Department of Corrections v Waitai* [2010] NZEmpC 164; *Melville v Air New Zealand* [2010] NZEmpC 87.

result is the unsequenced or haphazard development of policy about 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, but incomplete, view of the practices of which they complain.[60]

The disadvantage of reliance on enforcement by a neutral can be illustrated by the Department of Labour's use of the research it commissioned, and the data it collected after 2000. Qualitative and quantitative research about disputing in workplaces and in the institutions it administered was extensively cited in policy papers, but never featured in any substantive change to policy or practice. Clues as to why emerge from the Department's attempts to draw together the results of the surveys and studies it commissioned.[61] 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.[62] Thus emerged a profile of the disputant in the workplace (male, Maori, unionised, full-time, in job for 10 plus 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 one to four years, non-unionised).[63] This focus on statistical data somehow operated to obscure 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 it did nothing substantive with.

Conclusion

This study of the NZ personal grievance jurisdiction provided a rare opportunity to draw a number of comparisons: between institutional provision of dispute resolution services under two statutes; between collectivist and individualist approaches to representation; between the operational effects of the desires for judicial and for informal approaches to institutional dispute resolution. The clash of resolution cultures revealed by these comparisons, and the failure of the ERA to meet the policy goals set for it illustrate the importance of aligning dispute resolution policies with the representative culture that is most likely to contribute to achieving policy objectives. Protective regulation designed for a specified group of employees needs the support and interaction of collectivised representation. Its enforcement may depend more on the engagement of stakeholders than institutional neutrals for success.

[60] Donald Horowitz *The Courts and Social Policy* (Brookings Institution, Washington, 1977) at 38.
[61] Department of Labour "Stock Take of Employment Relations Monitoring Systems" (2005).
[62] AC Nielsen for Department of Labour, above n 20.
[63] This profile comparison is based on the AC Neilson Survey of 2000 and the Martin & Woodhams Snapshot of Mediations of 2007. A more time-congruent comparison is not possible because the profiling of mediation users did not occur until 2007.