

What if Voters Wanted a Less Flexible Labour Market?

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Abstract

In the event of a public recognition of the connection between flexible labour markets, wage stagnation and high social inequality ratios, an option for redress in government policy is the re-collectivisation of employers and employees.

The implications for labour law traditions that emerged following the enactment of the Employment Contracts Act (ECA) 1991 (and that were reinforced by the operation of the Employment Relations Act (ERA) 2000) include dispute resolution mechanisms, currently (in New Zealand), fundamental to flexibility.

Analysis of the factors that influenced the transition from collectivist to individualist labour relations suggests a means by which this transition might be reverse engineered. Returning personal grievance resolution, the foundation of the ECA transition, to collectives will be crucial to the success of any reverse transition.

Introduction

The purpose of this paper is to describe the role of conflict resolution mechanisms in labour market flexibility¹ and to discuss how changes to those mechanisms could facilitate a more pluralist² approach to labour relations. Key to the success of the flexibility goal sought by the

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¹ The terms *labour market flexibility* and *freedom at work* were adopted by lobbyists for dismissal-at-will policies, perhaps because these terms concealed what the term could not: see Penelope Brook, *Freedom at Work, The Case for Reforming Labour Law in New Zealand*, (Oxford University Press, Auckland, 1990); For them, flexibility required the abolition of the award system of wage fixing, the exchange of collective for individual bargaining, and barriers of access to dispute resolution as the means of increasing labour productivity. An alternative characterisation of flexibility focussed on its *absolute freedom of action for management* and the ensuing loss of rights and protections for employees: see John Deeks, "New Tracks, Old Maps: Continuity and Change in New Zealand Labour Relations 1984–1990" (1990) 1 NZJIR 15 at 99–116; The freedoms for management changed approaches to work organisation, with increasing recourse to non-standard employment arrangements, such as part-time, fixed-term, temporary and casual work that facilitated both numerical and contractual flexibility for employers, an enhanced capacity to dispense with staff, and a diminished role for work-task capacity in employees in favour of attitudinal tropes like loyalty and commitment to the employer: Jane Bryson, *Administering Workplace Relationships: From IR to HR* in Gordon Anderson (ed) *Transforming Workplace Relations in New Zealand 1976-2016*, (Victoria University Press, Wellington, 2017) at 63; Flexibility for employees has meant that average working hours for New Zealanders have increased by 20 per cent since the 1970s, and recognition of overtime in penal rates has all but disappeared in the private sector: Stephen Blumentheld and Noelle Donnelly, *Collective Bargaining Across Four Decades: Lessons from CLEW's Collective Agreement Database*, in Gordon Anderson (ed) *Transforming Workplace Relations in New Zealand 1976-2016*, (Victoria University Press, Wellington, 2017).

² The terms unitarism and pluralism describe ways of thinking about labour relations: unitarism relies on an acceptance of managerial authority and prerogatives and sees conflict as pathological; pluralism accepts the fact of difference between the sectoral groups that are stakeholders in the industrial system of a state, so conflict is accepted as inevitable. The characterisation of the ECA as "*abolishing the pre-existing pluralistic industrial relations system that provided for a high degree of joint regulation of working conditions and replaced it with*

newly elected National Government in 1990 was the structure of the dispute resolution system introduced by the Employment Contracts Act 1991 (ECA) and the way that system has operated since then.

The dispute resolution institutions established by the ECA, the Employment Tribunal and Employment Court, replaced the stakeholder dominated system of resolving individual claims (Grievance Committees) with the apparently neutral structure of the civil court system, perceived then as either an appropriate barrier to access to grievance resolution or as a mechanism to ensure an orderly transition from collectivist (pluralist) to individualist (unitarist) approaches to labour relations.³ The Tribunal (to which much of the Labour Court's jurisdiction was transferred) offered entry-level adjudication and mediation as alternative modes of resolution of choice for all disputes and grievances. It was quickly dominated by dismissal grievances, lawyers as representatives and arbitration as their choice of mode of resolution. Delayed resolution became endemic.

The policy decision to modify, rather than replace this system during the formulation of the Employment Relations Act 2000 (ERA), reinforced the ECA flexibility goal and undermined the ERA's (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 ensured flexibility's domination of ERA policy, research and legislative amendment, successfully diverting policy attention from outcomes to process.

Discussion of the role of conflict resolution mechanisms will focus on two elements: workplace systems and the (state-funded) institutional system. A description of each will form a basis for policy suggestions for change. This paper anticipates, but does not discuss, changes to the role of the state, in terms of the following prescription:

Today, the challenges [for labour relations] come from globalisation and the increasing use of technology and artificial intelligence in the workplace. The growth of dependent and independent contractor arrangements to avoid the legal incidents attached to the employment contract is also likely to prove a greater challenge to devising a regulatory framework that reflects both the reality of the labour market and the rights of individual employees.

Reliance on the notion of flexibility or traditional collective bargaining techniques is unlikely to provide an adequate response to either of these challenges. It may be that the time has come for a fundamental rethinking of the values and principles that need to underlie a new regulatory framework. A return to the idea of a public interest as opposed to a sector interest to be incorporated into such a regulatory framework may be worth consideration.⁴

one of employer dominated, individualised, regulation of the employment relationship" illustrates the practical application of these terms: Gordon Anderson, *The Capability Approach and the Legal Regulation of Employment: A Comment on Deakin* (2009) 34(1): *New Zealand Journal of Employment Relations*, 27 at 31.

³ Employment-at-will lobbyists in 1990 opposed the maintenance of a special jurisdiction for labour claims, but Cabinet moderates led by the Minister of Labour, Hon W B Birch, regarded the co-option of incentives to collectivise – rights of grievance and informal claim processes – as key to undermining unions and shaping acceptance by potential union members of individual employment contracts: Susan Robson, *Policy, Operations and Outcomes in the New Zealand Employment Jurisdiction 1990-2008* (PhD, University of Otago, 2016).

⁴ Margaret Wilson, *The Politics of Workplace Reform: 40 Years of Change*, in Gordon Anderson (ed) *Transforming Workplace Relations in New Zealand 1976-2016*, (Victoria University Press, Wellington, 2017) at 59.

Workplace Remedy Systems after 1991

Union involvement in conflict resolution in workplaces diminished alongside union membership after 1991, disrupting a resolution culture that relied on an informed collective membership with early access to partial advice and assistance to resolve issues as they arose in regularised, accessible workplace remedy systems. When asked about workplace disputes a decade later, significant differences between employer and employee samples (2000 in each) in their reports of dispute incidence and outcomes⁵ suggested an absence of uniformity about, or common understanding of, remedy systems in workplaces, and differences between unionised and non-unionised employees.⁶ This was consistent with other data 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.⁷ Further research found that employees had difficulty visualising dispute resolution as a process, but larger employers maintained a process driven approach influenced by the ECA; employers viewed these 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.⁸ Employees were dissatisfied, generally, with dispute outcomes and employers believed the majority of disputes were settled amicably.⁹

By the end of the ECA era, the most common source of information for employees about problem resolution in the workplace was their employer (with significant reductions in confidence about its veracity arising from involvement in a dispute).¹⁰ For those whose source of information and support was their union, satisfaction rates with workplace remedy systems were significantly higher.¹¹ When ERA policy makers attempted to replicate this connection, by conferring on the Department of Labour (DoL) and the Mediation Service (MS) information provision roles, they failed to recognise the complexity of the relationship between information and satisfaction. Stakeholders consistently reported, of the ERA, that nothing had changed from the ECA regime.¹² Partiality of source of advice and assistance appears to explain the difference in satisfaction rates between collectivised and individualised employees. This suggests that mere provision (of information) is insufficient to establish

⁵ For example, the employee survey reported 273 disputes per 1000 employees and 20 per cent remaining in their jobs following resolution of a dispute, but the employers reported a dispute rate of 22 per 1000 and 44 per cent remaining in the job: ACNielsen Ltd for Department of Labour, *Survey of Employment Disputes and Disputes Resolution*, November 2000.

⁶ Ibid: 61 per cent of all employees and 79 per cent of union members who had experienced a problem were aware of written guidelines in the workplace for their resolution.

⁷ Waldegrave, Anderson, Wong, *Evaluation of the Short-Term Impacts of the Employment Relations Act 2000*, Department of Labour, November 2003.

⁸ UMR Research Ltd for Employment Relations Service, *The Process of Dispute Resolution – A qualitative study amongst employees and employers*, January 2002.

⁹ Comparison of employee satisfaction rates between the UMR 2002 survey and the Waldegrave (ERS) 2003 survey: UMR 57% dissatisfied with process and 49 per cent dissatisfied with outcome; ERS 65 per cent dissatisfied with actions taken by employer to resolve dispute.

¹⁰ UMR Research, above n 8.

¹¹ Waldegrave, et al, above n 7.

¹² Waldegrave, et al, above n 7; 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 Rasmussen (ed) *Employment Relationships: New Zealand's Employment Relations Act*, (Auckland University Press, Auckland, 2004) 60, 99.

confidence in remedy systems if it does not incorporate partiality.¹³ Partiality, in turn, appears to be dependent on a relationship of trust and confidence between seeker and provider.¹⁴

Policy for Workplace Systems

Policy about the workplace, a major challenge to unitarism, given its potential to confront the hegemony of human resources management, requires a commitment to raise rates of collectivisation or a willingness to impose regulatory requirements of information provision, employee representation, and remedy systems, if the need for ready access to partial advice and assistance for the resolution of workplace problems as they occur is to be met:

While union involvement may be the most effective mechanism of voice, alternative mechanisms, such as mandatory elected workplace delegates and representative committees, also allow for the expression of worker voice and provide a possible catalyst for union involvement. What must be enshrined into law, however, is that effective participative and representational structures within employing entities are a matter of right, a condition of employing labour, and not a matter of employer benevolence.¹⁵

The increased collectivisation option would require changes to the current rules of access for union officials and clarification of employer obligations of neutrality towards collectivised employees and their representatives. This option has the advantage of strengthening an information and remedy system that already exists in some sectors (e.g teaching and nursing in the public sector). Its major disadvantage lies in the likely opposition of employers with negative views of unions: in the research about disputing in the workplace, employers of unionised employees (large employers) had a more positive view of union involvement in disputes than non-unionised business employers.¹⁶

The regulatory option would require employee protections and training provision for elected workplace representatives, and their active enforcement, particularly during beginning phases. This option caters for those employers actively resistant to the idea of union involvement in their workplaces whilst establishing a transition phase for potentially higher rates of union density, but poses problems for small businesses that would more easily be overcome by reliance on the collectivisation option.

These options are not mutually exclusive. The regulatory option's capacity to facilitate increased collectivisation rates suggests its use as a transitional, or fortifying strategy.

¹³ The provision of professional, accurate and partial information to parties which reflects and advocates their particular interests.

¹⁴ Phillip de Wattignar to Department of Labour: *Response to Green Paper on the Improvements to the Employment Relationship Problem Resolution System*, (undated, c 2008).

¹⁵ Gordon Anderson, *Competing Visions and the Transformation of NZ Labour Law* in Gordon Anderson (ed) *Transforming Workplace Relations in New Zealand 1976-2016*, (Victoria University Press, Wellington, 2017) at 207.

¹⁶ UMR Research, above n 8.

Institutional Resolution System after 1991

The domination of the employment jurisdiction by employer association and union advocates changed with the extension of grievance rights to all employees, when it began to host two different advocacy cultures, individualist (lawyers and employment advocates) and collectivist. Their differences are reflected in workplace resolution rates and institutional functioning. Higher rates of disputing and resolving in-house by the collectivised results in less need for institutional dispute resolution. The opposite occurs for those reliant on individual representatives: lower rates of in-house disputing and resolving, longer duration and more costly disputes and greater need for institutional intervention.¹⁷

The explicit intentions of both statutes for the institutions – low-level informal resolution – represented attempts to replicate the tropes of collective advocacy. However, the absence of statutory guidance on dismissal grievances¹⁸ and diminishing stakeholder involvement in their consideration shifted the focus away from the workplace into the courtroom, so that grievance resolution became more obviously rooted in the common law than prior to the ECA. The result was a judicial development of the principles of justification for dismissal that morphed into a preference for issues of process over those of substance, and the dominance of compensation as remedy for breach. Because justification 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. 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 is in this examination. Mediated or private settlements are incentivised if the compensation sought or accepted is lower than this cost. In turn, confidential (mediated or private) resolution of contested dismissals have shielded from the public gaze the implications of simple repetition over a long period, a problem for researchers¹⁹ and thus for those sectors of the population negatively affected by the status quo. This phenomenon, attributed as an explanation for both the sexual abuse by clergy of children within the Roman Catholic Church and the 2015 Baltimore riots,²⁰ has had two effects: it strengthened

¹⁷ Susan Robson, *Policy, Operations and Outcomes in the New Zealand Employment Jurisdiction 1990-2008* (PhD, University of Otago, 2016).

¹⁸ 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.

¹⁹ Caroline Morris, *An Investigation into Gender Bias in the Employment Institutions* (1996) 21(1) *New Zealand Journal of Industrial Relations*, 67, 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.

²⁰ 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."

perceptions that employee rights were appropriately addressed and upheld; and has been the means by which practices that affected collective interests could be ignored.²¹

Separated resolution modes (adjudication and mediation) have been a feature of both eras. Similarity of outcome from reliance on mediation, settlements involving money transfers, suggests that separate modes function as negotiation-persuasive. The trend during the ECA era, increased reliance on mediation followed by rising rates of private settlement, has been reflected in the ERA period. Mediation appears to perform, in terms of establishing precedent or guides to settlement, the same function as adjudicative modes are said to have, but by different means. Mediation models the behavioural tropes that facilitate resolution, whilst adjudication establishes precedent for legal issues. The ubiquity of grievance claims meant there was less need for a focus on legal issues than behavioural modelling. By this means, collective advocacy's preferred resolution mode and reliance on negotiation skills came to influence the behaviour of individualised advocates, but not their expectations of institutional resolution: separate modes also minimise the impact of risk assessment deferral that affects individualised grievants, and was a cause of the delays that beset the Tribunal; deferral preserves the (advocate's) business opportunity of asserting or resisting a claim; mediation reduces the business risk in the presence of incentives to settle to avoid further advocacy costs and the absence (at lawyer insistence) of constraints like the power of adjudication in mediation; reliance on the cost of representation is incentivised as the means of achieving or denying mediated outcomes.²²

The Employment Court (EC) judiciary was divided by status and attitudes to adversarialism from 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 process issues following the Authority's establishment²³ and the loss of its powers of review over entry-level adjudication²⁴ sent an unequivocal message that the (ECA) status quo on process should be maintained for the ERA, notwithstanding clear statutory provision to the contrary. This appears to have influenced lawyers associated with undermining mediator and Authority member confidence and commitment to the then new regime.²⁵

The position was exacerbated by the DoL's failure to recognise that the success of ERA 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 DoL'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 MS 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

²¹ Robson, above n 17.

²² Ibid.

²³ *David v A.E Tilley* [2001] ERNZ, 93; *David v Employment Relations Authority* [2001] ERNZ, 354; *Metargem v Employment Relations Authority* [2003] 2 ERNZ 186; *Munro v Village Care New Plymouth Ltd* [2004] 2 ERNZ 40.

²⁴ *Keys v Flight Centre* [2005] ERNZ 471; *Oldco PTI (NZ) v Houston* [2006] ERNZ 221; *Employment Relations Authority v Rawlings* [2008] ERNZ 26.

²⁵ Robson, above n 17.

use of powers to utilise the statutorily mandated range of mediation styles, therefore, atrophied. Lawyer preferences for the shuttle style of the ECA prevailed.²⁶

Lawyer reaction to the use of the s 150 arbitral power in mediation formed the basis of DoL's fears that it would undermine the policy desire for informality and flexibility of mediation style by incentivising resort to legalist or formalist demands for rules of process. The DoL took the view that arbitral modes of problem resolution attracted those demands. It now appears that resolution mode 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 resolution to which lawyers have rights of representation. This means that 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.²⁷

For these reasons, the connection between selection of dispute resolution system and success in meeting employment policy objectives appears to be dependent on choice of institutional structure and the type of advocacy culture it attracts. The greater labour market flexibility sought by the ECA was achieved in part as the result of its alignment with conflict resolution mechanisms modelled on the civil court structure and the legal profession. The ERA's 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.²⁸

Policy for an institutional resolution structure

From 1973 to 1991, Grievance Committees, consisting of stakeholder representatives, determined individual disputes. Access to this form of institutional resolution was restricted to union members. A policy choice for facilitating higher rates of union membership is, therefore, a return to restricted access to institutional resolution, but this is impracticable in the current labour environment. However, it is possible to conceive a resolution system based on collective resolution values and practices and managed by stakeholder representatives (the state, employers, employees and dependent contractors). There would be a different role or focus for institutional mediation, a diminished or extinguished need for separate institutional low-level adjudication, and retention of the Employment Court. Such a system would likely retain the MS but tweak its current powers, practices, data collection obligations and claim outcomes:

Mediation powers

Existing powers to mediate could be augmented by an institutional power to offer advocacy or negotiation services from relevant unions and employer associations to individualised employers, employees and dependent contractors, if negotiation of an outcome was sought by

²⁶ Ibid, see also Employment Relations Act 2000, s148A(2): This amendment in 2016 was necessary to protect employees from negotiating away during mediation statutory entitlements like holiday pay and the minimum wage, thus underlining the problem of mediator failure to attend to substantive (as distinct from process) issues during mediation. This problem was also highlighted in *8i Corporation v Marino* [2017] NZEmpC 69.

²⁷ Ibid.

²⁸ Ibid.

the parties, or appeared to facilitate a faster or more efficient process than mediation. Incorporation of collective representatives in service provision might furthermore augment MS powers (currently vested in the Authority) to facilitate collective bargaining.

Mediation practices

Arbitration under s 150 ERA is rarely sought by parties to mediation, nor is it offered. Changes to the power to arbitrate would result in parties understanding at the outset of institutional resolution that a mediator could decide the matters at issue in the event of a failure to settle. Dissatisfaction with an arbitrated outcome, regardless of the collective status of the dissatisfied party, would be the subject of consideration by collective representatives who would decide whether the outcome should be further negotiated or referred to the EC.

Mediation personnel

The current practice of recruiting mediators who are not required to have workplace resolution qualifications and/or experience would cease, in favour of those who do. If the MS is to be managed by workplace stakeholders, the resolution workforce would likely come from within those ranks, having the connections or relationships of trust (skin in the game) necessary for establishing the authority or status that resolving workplace problems require.

Data Collection

Current confidentiality practices have rendered the substance of mediation claims opaque to outsiders. An anonymised data collection system that itemised the employment issues and practices subject to mediation and the mediated outcome would establish a source of information for collective bargaining purposes and for labour relations research. Information about dispute triggers and its analysis would then inform collective bargaining strategies and advocacy education/training, given the likelihood of workplace systems as a subject of collective agreements.

Claim outcomes

Claim type and numbers will reflect the efficacy of workplace systems. The policy hope will be for a reduction of claims, increased variation of claim substance, group claims (where practices affecting more than one employee can be the subject of negotiation and mediation) and the probable formation of compensation tables for dismissal grievances.

Representation

Individualised representatives could have rights of appearance before the EC but not at the MS. Grievants could retain the right to seek advice and private resolution assistance from their representatives of choice, but if they require MS assistance they will be dependent on the services offered there.

Employment Court

The strategic interests of collectives in litigation outcomes could establish a basis for ceding to them exclusive responsibility for deciding which issues require litigation and which can be resolved by other means. This would result in individuals having conditional access to the

EC, so it would likely become a source of litigation in itself. An alternative approach would retain the current jurisdiction over individual and collective claims, conditional upon prior mediation, but with automatic rights of joinder or audience in respect of individual claims for collectives who regard their memberships as potentially affected by the matters at issue.

Conclusion

Notwithstanding the major focus in this paper on the institutions, it can be argued that the greater changes demanded by pluralism will be required of the workplace. Workplace remedy systems or their absence either diminish or facilitate the need for institutions in the resolution of individual disputes, so the closer policy attention is paid to that aspect of conflict management, the less the need for complex institutional provision.

Much of the description of institutional functioning centred on the demands and consequences of legal method. It raises the issue whether entry-level resolution should host competing advocacy cultures. A collectivist advocacy culture aligns more closely with pluralist values. It reduces the legal method's need for the Authority and establishes the MS as a more appropriate recipient of Authority funding.²⁹

The relatively minor changes required of the MS and the EC, thus, reflect the fact that statutory recognition of the advantages of collective approaches to resolution already exists. The suggested restriction of representative access to the MS to collectives may, therefore, liberate it to function as envisaged in 2000, particularly if changes to workplace systems reduce the number of individual disputes requiring institutional assistance.

²⁹ Institutional separation of mediation (MS) and adjudication (Authority) results in differences of cost to the state. Notwithstanding that there is no difference in the problems they resolve, or in their remedies (compensation and costs) they produce different outcomes. The Authority's membership constitutes 40-50 per cent of the number of mediators but it investigates between 9 and 15% of the annual number of problems mediated by the MS. In 2007, the Authority made 182 compensation and 148 costs orders (from 847 grievance determinations) totalling \$1.836m. The cost to the public purse of achieving these money transfers totalled \$6.03m: Robson, above n 17.