THE EVOLUTION OF RIGHTS DISPUTES AND GRIEVANCE PROCEDURES: A COMPARISON OF NEW ZEALAND AND THE U.S.

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INTRODUCTION

Much of the attention given to New Zealand's Employment Contracts Act 1991 (the ECA)[1] has focused on its approach to union representation, bargaining, and the role of the Act in deregulation of the New Zealand labor market.[2] Other aspects of the ECA have received relatively less attention from industrial relations scholars and others. Among these lesser publicized components of the ECA are the changes in the way employee rights disputes are resolved. Furthermore, the evolution of the way rights disputes have been addressed in New Zealand leading up to enactment of the ECA has been relatively ignored.[3]

This Paper will explore how rights disputes, and in particular grievance procedures, are regulated under the ECA in a labor market that has been historically statute based. In particular, the focus will be on the Employment Tribunal as a specialized body which was set up to provide a relatively informal way to manage grievances brought by employees. The evolution of rights disputes legislation in New Zealand will be compared to the evolution of grievance procedures in the U.S. Such comparisons may be instructive in light of recent research that has shown organizationally based grievance procedures in the U.S. may be adopted in the absence of specific statutes. Instead, much of the development of grievance and other dispute management mechanisms is explained as an attempt by firms to show compliance with federal guidelines associated with equal employment opportunity

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1. Employment Contracts Act, 1991 (N.Z.) [ECA].

2. *See, e.g.*, Ian McAndrew, *The New Zealand Employment Tribunal: A Review and Assessment*, 33 ASIA PAC. J. HUM. RES 36 (1995).

3. *Id.*

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goals.[4] This research is also supported by empirical evidence that other personnel management practices are adopted to show a good faith effort by the firm to comply with government goals.[5]

EVOLUTION OF NEW ZEALAND'S APPROACH TO RIGHTS DISPUTES

Historical Development of Rights Disputes and Grievance Procedures in NZ

The personal grievance procedure first became part of New Zealand industrial law in 1970, being introduced in an amendment to the Industrial Conciliation and Arbitration Act of 1894. Previous to that time, statute-based procedures for rights disputes had been a part of industrial relations, but grievance procedures were not specifically mentioned. Most employees were covered by agreements that established working conditions on an industry-wide basis.[6] Concern over the number of strikes in response to employee dismissals at the time was a prime motivation for this amendment.[7]

The Industrial Relations Act of 1973 replaced the previous legislation, distinguished between interest disputes and rights disputes, and required procedures to address these to be specified in contracts and documents. Rights disputes, or those concerning contract interpretation or administration, were thus differentiated from interest disputes, associated with contract negotiations. A procedure was specified in the legislation for grievance committees to be formed to handle grievances, generally chaired by a government mediator.[8] As unions were a dominant part of employee relations during that time, access to the procedure was limited to union members covered by a union-negotiated document. Thus, a grievance was always brought on behalf of the employee by the employee's union, not by the employee. At the consent of both parties, if an agreement could not be reached, the government mediator could decide the case or it could go to the Arbitration Court for decision.

The 1973 legislation distinguished between a dispute and a personal grievance, with separate dispute committees to handle disputes. Disputes were somewhat broadly defined as matters related to matters dealt with in this (award or agreement) and not specifically and clearly disposed of by the terms of this (award or agreement).[9] As in the grievance procedure, a com-

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4. John R. Sutton et al., *The Legalization of the Workplace*, 99 AM. J. SOC. 944 (1994).

5. Chester S. Spell & Terry C. Blum, Workplace Pre-employment Drug Testing: Weapon in the War on Drugs or Response to the Institutional Environment?, Paper presented at the Academy of Management Conference Annual Meeting (Aug. 12, 1996) (unpublished paper, on file with author).

6. Joseph B. Rose, *Rights Disputes Procedures in Canada and New Zealand*, 15 NZ. J. INDUS. REL. 145, 151 (1990).

7. Gordon Anderson, *The Origins and Development of the Personal Grievance Jurisdiction in New Zealand*, 13 NZ. J. INDUS. REL. 257, 261 (1988).

8. Industrial Relations Act § 117, 1973 (N.Z.).

9. McAndrew, *supra* note 2, at 38.

mittee chaired by a neutral chairperson could arbitrate if initial efforts at mediation failed. The disputes procedure was criticized at the time, however, because many argued that unions were abusing the procedure by contesting new matters that were intended to enforce only established worker rights.[10]

It should be noted that the 1973 legislation applied to the private sector.[11] Public sector employees, which included those in the post office, health, education, and the railways sectors, did not come under grievance and other provisions of the Labour Relations Act until the State Sector Act of 1988, when a unified industrial relations system came into being in New Zealand.[12] Thus, while the public sector has been the single largest employer for many years, this Paper focuses on legislation relating to the private sector before 1988 and from then on the industrial relations system as a whole.

Since the early 1980s, changes in the wider sphere of the political and social climate in New Zealand have made their effect known on industrial relations. These changes have in turn impacted the way employee rights issues have been resolved. One major piece of legislation that changed the scope of grievance procedures was the Labour Relations Act of 1987. The reasons for which a grievance could be made were expanded to include sexual harassment, discrimination, unjustifiable dismissal, and duress associated with union membership.[13] The inclusion of sexual harassment may be seen as a result of pressure on the government by the feminist movement to consider it as an equal opportunities issue. Also, access to the procedure was extended to all union members, who could now bring a grievance directly against their employer.[14] Unions were required to represent a member, however, if the member requested it. The Act[15] created a Labour Court (to replace the Arbitration Court) which could issue compliance orders to abide by the decision of a grievance committee, assess fines, and seize property.[16]

The reform of New Zealand industrial relations continued in a more dramatic way after the election of a National Party government in 1990. This government's centerpiece in terms of employee relations was allowing employment contracts to be made between individual employers and employees. While the changed nature of bargaining and employment contracts on the enterprise level got the most media attention, much of the policy debate was about rights procedures and the associated institutions.[17] Access to grievance procedures was extended to all employees, since grievance proce-

10. *See, eg., id.*
11. Industrial Relations Act, 1973 (N.Z).
12. State Sector Act § 67, 1988 (N.Z.).
13. Labour Relations Act §§ 210-213, 1987 (N.Z.) [LRA].
14. LRA § 218
15. LRA § 278.
16. Rose, *supra* note 6, at 148.
17. *See, e.g.*, Pat Walsh & Rose Ryan, *The Making of the Employment Contracts Act, in* EMPLOYMENT CONTRACTS: NEW ZEALAND EXPERIENCES (Raymond Harbridge ed., 1993).

dures were implied into all employment contracts. Before this, only the 40 percent of the workforce that were union members had access to grievance procedures.[18]

The other change was institutional. The institutional changes made by the ECA established a lower body, the Employment Tribunal, which could mediate and arbitrate, though arbitration is now called adjudication under the ECA.[19] As a specialist institution, the Tribunal would be a way for grievances to be settled in a less formal manner than in a court. The Labour Court was replaced by the Employment Court as an appeal court for the Tribunal. While the role of the Employment Court and its decisions continue to be the source of a major debate,[20] this Paper will focus on the Tribunal's role as a first avenue for addressing grievances. While the parties involved can express a preference for mediation or arbitration, the Tribunal has, since its inception, generally encouraged mediation over arbitration as a much faster, simpler, and confidential process. A grievance unsettled in mediation can proceed to arbitration, but this happens in less than 10 percent of all mediation cases brought before the Tribunal.[21]

Grievance Procedures under the ECA

The Tribunal is intended to be a lower level, relatively informal body to apply, but not develop, legal principles.[22] The Tribunal can, as noted above, not only mediate or arbitrate over personal grievances associated with dismissal from a job, but can also hear disputes over wage rates and attempts by individuals to recover wages or other compensation. It can also decide on penalties when contracts are breached and give orders to comply with previous Tribunal decisions. The Tribunal theoretically hears only rights disputes and not issues associated with contract negotiations. However, in practice the Tribunal can provide mediation over any matter if it deems its involvement will improve or maintain any employment relationship.[23] The Tribunal's decisions may be appealed to the Employment Court. Officials of the Tribunal, almost all of whom can hear either mediation or adjudication, are appointed by the Governor General of New Zealand and serve four-year terms (some temporary members with shorter terms can also be appointed).

As noted before, the ECA has preserved the two-tiered system of mediation, where the parties are informally aided in reaching a resolution, and an adjudication, where a judgment is made.[24] Mediation is the more com-

18. McAndrew, *supra* note 2, at 39.

19. Employment Contracts Act § 77, 1991 (N.Z.).

20. *See, e.g.*, Gordon Anderson, *The Specialist Institutions: The Employment Court and the Employment Tribunal*, 21 N.Z. J. INDUS. RELATIONS 1 (1996).

21. McAndrew, *supra* note 2, at 41.

22. *Id.*

23. *Id.*

24. In practice, the first step in the majority of grievance cases is to resolve matters in-

mon approach: some 78 percent of all cases brought to the Tribunal were disposed of by mediation in 1995.[25] If the matter is unresolved in mediation, a member of the Tribunal may move it into arbitration, but the case must be heard by someone other than the individual involved in the mediation. Mediation decisions are final and binding. *Wilson v. SERCo Group* held that there is no right of appeal to a mediation decision once parties conclude the settlement.[26] There is, however, apparently some informality in terms of cases moving from mediation to adjudication. For example, adjudication generally ends when the adjudicator renders a decision, but adjudicators can, if they think there is a chance for settlement, refer the parties to a mediator for quicker resolution. Mediators can, in certain cases, make a decision for both parties and prevent the case from going to the more formal adjudication process. The Employment Court had prohibited this practice for about two years until its decision was overturned by the Court of Appeals in *Schaffer v. Gisborne Boys High School*.[27]

To date, the vast majority (82 percent) of cases brought to the Tribunal's attention have been by employees for unjustified dismissal. The remainder of these cases involve sexual harassment, wage recovery, and application for compliance orders and other matters.[28] Thus, most cases brought before the Tribunal concern serious and often confrontational issues, which is probably why the intention that the Tribunal be an informal body has not generally been met. Employees are generally the only initiators of grievance procedures, since the Tribunal does not initiate contact with either employees or employers unless the public has an interest in the outcome of a dispute (when a threat of a strike in an essential service, such as health care, exists). In such cases, the Tribunal contacts the parties involved and informs them of the Tribunal's availability.

Under the Labour Relations Act 1987, reinstatement was a primary remedy for proved personal grievance of unjustified dismissal. Even so, reinstatements during the time the Act was in effect were fairly rare. In 1990, for example, the Court awarded reinstatement in just 16 percent of cases.[29] In *X v. Y and the New Zealand Stock Exchange*, the Court held that reinstatement should not be taken to be a general precedent, even though it ruled

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formally with local management, before resorting to mediation. Interview with Dr. Paul Harris, July 15, 1997. Even mediation has been considered a relatively formal process, where the member, his/her union official, the employer or manager, the representative (a lawyer or Employers' Federation advocate), and the mediator may be present. Witnesses and witness statements may also be used if needed.

25. Alastair Dumbleton, *The Employment Tribunal-Four Years On*, 21 N.Z. J. INDUS. RELATIONS 22 (1996).

26. Wilson v. SERCo Group (N.Z.) Ltd. [1992] unreported, A.E.C. 24/92, Employment Court.

27. Shaffer v. Gisborne Boys High School [1995] 1 E.R.N.Z. 94, 95 (C.A.).

28. Dumbleton, *supra* note 25, at 21-22.

29. JOHN HUGHES, THE EMPLOYMENT CONTRACTS ACT ONE YEAR ON: INSTITUTIONS AND GRIEVANCE HANDLING 11 (1992).

in favor of reinstatement in this exceptional case.[30]

Constructive dismissal is the term used when the employee resigns in response to employer activities that effectively force the employee to resign.[31] The case *Auckland etc. Shop Employees IUW v. Woolworths* involved constructive dismissal where an employee, who had been questioned about discrepancies over money collected, had resigned. The case went to the Appeals Court, which held that if an employer investigates the honesty of an employee, the employer has an implied duty to carry out the investigation in a fair and reasonable manner.[32]

As for the hearings themselves, Tribunal cases tend to be resolved quickly. Most mediation hearings are resolved in less than one day. Tribunal records also indicate that three-quarters of adjudication hearings are resolved in the same day, with less than 10 percent taking over two days.[33] Nevertheless, the time for a case to get a hearing can be several months, which has been one of the chief criticisms of the current system, particularly those that go to arbitration.[34] Arbitration cases typically take four to seven months to get a hearing. Mediation cases, depending on whether they are near a major city or in a rural area, may take anywhere from two to several months to get a hearing.[35] The government has offered several explanations for these delays, including the backlog of cases that built up during the creation of the Tribunal in 1991 after the ECA was enacted.[36] However, more important may be the changes in the political environment in New Zealand in the first half of the decade. The awareness of employee rights and challenges to perceived breaches of rights were increasing among the public during that time. The legislature also enacted legislation such as the Privacy Act, Bill of Rights Act, Race Relations Act, and Human Rights Act, heightening attention to individual rights and creating areas of possible grievances on discrimination in hiring and treatment. The caseload for the Tribunal increased from about 3,000 in 1993 to over 5,000 by 1996.[37]

Contemporary Critiques of Grievance Procedures under the ECA

Criticism of the ECA has also been aimed at those sections related to grievance procedures. In fact, some believe that, since the ECA went into effect, nothing in current New Zealand labor law justifies the existence of

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30. X v. Y & the N.Z. Stock Exchange [1992] 1 E.R.N.Z. 863, 879 (1991).

31. MIKE DAWSON, HANDLING PERSONAL GRIEVANCES UNDER THE EMPLOYMENT CONTRACTS ACT 1991: A GUIDE FOR UNION ADVOCATES 4 (1992).

32. *Id.*

33. McAndrew, *supra* note 2, at 42.

34. Dumbleton, *supra* note 25, at 21, 29 (1996).

35. McAndrew, *supra* note 2, at 44.

36. *Id.*

37. Dumbleton, *supra* note 25, at 21, 29.

specialized institutions such as the Tribunal.[38] While substantive parts of the grievance procedure remained unchanged under the ECA, some changes in procedure and priorities have occurred. Performance-based pay is becoming more common in New Zealand, and some believe more challenges to poor performance appraisals as unjustifiable actions may yet occur.[39] One commentator notes that, since the ECA's scope allows for the creation of fixed-term contracts, the ECA affects issues such as requirements for procedural fairness prior to termination and whether a termination amounts to a dismissal.[40]

GRIEVANCE PROCEDURES IN THE U.S.

Historical Development

Both unions and employers that negotiate with unions in the U.S. have long supported third-party arbitration to resolve disputes. Union members have seen the procedures as a service which the unions were providing. Grievance procedures also provided a way for member rights to be addressed without resorting to a strike action. Finally, arbitration provided a way to set standards regarding worker rights that the unions may not be able to bargain into existence. From the employers' perspective, in return for guaranteeing the right to refer grievances to a third-party arbitrator, they got assurance from unions that they would not strike on administrative matters arising from the collective agreement.[41]

The atmosphere of industrial relations in New Zealand, particularly during the pre-1980s, was such that these agreements were not evident.[42] Until 1973, it was illegal to strike at all in the private sector while an award was in force, which meant that it was illegal to strike per se, since an award was always in force. No strike clauses were included in awards, since strikes were limited by the law. Moreover, since awards were legally binding national, regional, and industrial documents, the award system worked against such agreements. In the U.S., the ability for both parties to damage the other financially through strike action, and the threat of the government becoming involved in the dispute, appeared to contribute to the stability of such no-strike guarantees. Since the government had always played a central role in industrial relations in New Zealand, this threat did not apply to New Zealand industrial relations. In sum, the private sector in New Zealand did not have the collective bargaining tradition of the U.S., the state was a constant

38. *See, e.g.*, Anderson, *supra* note 20, at 1.

39. HUGHES, *supra* note 29, at 2.

40. *Id.*

41. COLIN F. KNOX, A REPORT TO THE WINSTON CHURCHILL MEMORIAL TRUST ON INDUSTRIAL PROBLEM SOLVING PROCEDURES IN THE UNITED STATES OF AMERICA COMPARED WITH THOSE IN NEW ZEALAND 30 (1977).

42. *Id.*

third party in dispute resolution, and compulsory arbitration was an accepted practice until the mid-1980s.[43]

Over the past few decades in the U.S., grievance procedures have increasingly been applied to nonunion and salaried employees in addition to their traditional role in unionized workplaces.[44] This trend could represent an attempt by organizations to adapt to a labor market that is more highly trained, with more people in service and white-collar occupations. Grievance procedures may be adopted as part of a trend to legalize the workplace, as white collar employees demand a more formal employment relationship in preference to autocratic management styles that apparently occur in the absence of due process mechanisms.[45] Thus, such explanations view legalization as a type of bureaucratization of the workplace. However, Sutton, Dobbin, Meyer and Scott believe that such a trend exists, since legalization gives employees formal rights to question managerial decisions through grievance procedures.[46] Thus, employees become more than subordinates; they acquire membership in an association with protected status.[47]

Sutton and his colleagues argue that the trend towards legalization comes in large part from the environment outside organizations. They account for it in terms of changes in relationships of the government, organizations in general, and the political environment of the U.S. in the late 1960s and early 1970s. Governments of states and the federal government became more involved in ensuring employee rights through equal employment opportunity legislation, affirmative action regulations, and related court decisions.[48] These regulations did not force organizations to adopt grievance procedures, but increased uncertainty for organizations about the legality of the employment practices. In the face of these new regulations and government involvement in the employment relationship, organizations voluntarily adopted grievance procedures as a way to show compliance with the perceived goals of the government relating to equal opportunity legisla-

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43. A comparison of New Zealand and Canadian approaches to rights disputes made just before the adoption of the ECA noted that procedures in New Zealand are less structured and emphasize mediation more than the Canadian system. Rose, *supra* note 6, at 149. New Zealand dispute resolutions depended more on neutral third-party interventions than their North American counterparts. In New Zealand, at least as compared to Canada, grievance procedures and no-strike clauses in particular received less acceptance. Rose concludes that a greater commitment to honor written agreements between parties and a greater acceptance of grievance procedures as a substitute for strikes existed in Canada than in New Zealand. These tendencies, he notes, were partly due to the decentralized nature of the North American system, where individualized agreements on an establishment level could exist. *Id.* Of course, since then the ECA has made possible such agreements in New Zealand.

44. DAVID W. EWING, DUE PROCESS: WILL BUSINESS DEFAULT? (1989).

45. DAVID W. EWING, JUSTICE ON THE JOB: RESOLVING GRIEVANCES IN THE NON-UNION WORKPLACE (1982).

46. Sutton, *supra* note 4, at 945.

47. PHILIP SELZNICK, LAW, SOCIETY, AND INDUSTRIAL JUSTICE 51 (1969).

48. Lauren B. Edelman, *Legal Environments and Organizational Governance: The Expansion of Due Process in the American Workplace*, 95 AM. J. SOC. 1401, 1406 (1990).

tion, and to send a signal to employees that they were making a good faith effort to adopt due process governance.[49] Spell and Blum's study indicates that such signals may also be at play for other workplace practices, reflected in the growth of drug testing programs in the U.S. in response to federal Drug-Free Workplace directives.[50]

Edelman has also examined the expansion of formal grievance procedures throughout U.S. industries since the mid-1960s.[51] She provides empirical evidence that civil rights mandates since that time created a normative environment that led to the adoption of grievance procedures for nonunion employees.[52] The civil rights movement and mandates of the 1960s such as the Civil Rights Act heightened societal attention to due process and fair governance issues in the workplace. Edelman's analysis indicates that organizations more closely associated with the public sphere were the first to adopt grievance procedures.[53] Later, grievance procedures were increasingly adopted by other organizations in response to professionalization of the personnel function in organizations and changing legal ideologies. Significantly, the evidence shows that the spread of grievance procedures throughout U.S. industries has been a product of normative pressure and not due to statutes, mandates, and executive orders from the government. Grievance procedures, then, lend legitimacy to organizations, because they give the appearance of fair governance, thereby lending symbolic value to the legal environment. Of course, this symbolic value does not depend on the effectiveness of the procedures in addressing employee concerns, or even on whether employees actually use the procedures.

CONCLUSIONS

This Paper shows that the history of employee rights disputes management in New Zealand is very different from its U.S. counterpart. In New Zealand, the government was historically a major player in industrial relations. However, while the ECA shifted the level of contracts and bargaining to the level of individuals and enterprises, due process procedures and an emphasis on a two-tiered system of mediation and arbitration have been preserved. The nature and scope of grievance procedures in New Zealand is becoming in some ways more like those in the U.S., particularly in that formalized grievance procedures have become accessible to a much larger part of the workforce, as they have in the U.S., but for the different reasons described in this Paper.

Sociological investigations of the spread of grievance procedures suggest that legal change in the U.S., in particular civil rights mandates, led to

49. Sutton, *supra* note 4, at 948.
50. Spell, *supra* note 5.
51. Edelman, *supra* note 48.
52. *Id.* at 1435.
53. *Id.* at 1428.

the institutionalization of due process policy. These studies suggest a reason why grievance procedures have become accessible to many managerial and white collar employees. This conclusion has significance for the study of the sociology of law, because it suggests that the effect of law on organizations may be greater, and different, from what was originally intended by law-makers.[54]

In New Zealand, economic and political changes that made the ECA possible led to making formal grievance procedures accessible to managerial and other employees who were not covered by union agreements previously. As has been noted, cases where unjustifiable dismissal rulings resulted in high awards have highlighted these changes, since high income earners not previously covered by a grievance procedure now have access to the system. Equity concerns over the comparative size of awards for unjustified dismissal of high- and low-income earners have already been raised in connection with these events.

These issues, not fully anticipated, may have interest for policy makers and those interested in the sociological effects of law and legal evolution. Both the experience of civil rights legislation in the U.S. and changes in industrial relations and governance mechanisms in New Zealand suggest that these changes have implications beyond what was originally intended. It is intriguing that such a parallel can be drawn with two systems that come from such different industrial relations traditions and employee governance mechanisms.

54. *Id.* at 1436.