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*Te Whare Wānanga
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Patrick Moll

Abstract.....

I. Introduction.....

II. New Zealand's new systems.....

 1. The Mediation Service.....

 2. The Employment Dispute Resolution Service.....

 (a) Mediation.....

 (b) Arbitration.....

 (c) Conciliation.....

 (d) Dispute Review Panels.....

More competition for employment courts – Dispute resolution and judgements outside the courtroom

 (c) Jurisdiction.....

 (i) What is the jurisdiction of the Employment Dispute Resolution Service?.....

 (ii) Arbitration.....

 (iii) Conciliation.....

 (iv) Dispute Review Panels.....

 3. The Employment Court.....

III. Employment dispute resolution in other jurisdictions.....

 1. Germany.....

 2. Ireland.....

 3. England and Wales.....

 4. Canada.....

 5. Comparison.....

IV. Conclusion.....

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Table of Contents

Abstract.....	3
I. Introduction.....	4- 5
II. New Zealand's new system.....	5-21
1. The Mediation Service.....	6- 8
2. The Employment Relations Authority.....	8-20
(1) Members of Authority.....	9-10
(2) Role of Authority.....	10-14
(a) What does 'investigating' mean?.....	10-11
(b) What are the principles of natural justice?.....	11-14
(3) Informality.....	15
(4) How to commence the process?.....	15-16
(5) Jurisdiction of the Authority.....	16-20
(a) What does 'good faith' mean for the Authority's process?.....	19-20
3. The Employment Court.....	20-21
III. Employment dispute resolution in different countries.....	22-32
1. Germany.....	22-23
2. Ireland.....	23-25
3. England and Wales.....	25-27
4. Canada.....	27-28
5. Comparison between the institutions.....	38-31
IV. Conclusion.....	31-33

Abstract

This paper is dealing with the tendency to resolve employment disputes in Employment Tribunals instead of Employment Courts. As a result Employment Courts lose parts of its original jurisdiction to these institutions. New Zealand has recently followed this trend by establishing the Employment Relations Authority. The author will describe the employment dispute resolution system in New Zealand. However, the main focus will be on the role, power and jurisdiction of the Employment Relations Authority because it is an entirely new institution for New Zealand. The new legislation is accompanied by terms that require clarification because they are not defined in the act. The Author will try to shape the patterns of this provisions and make suggestions for improvements.

The second part of the paper will show the approach of other countries to resolve industrial disputes. Germany, England, Ireland and Canada have developed mechanisms that differ from New Zealand's legislation. This is followed by a comparison where differences and similarities will be presented. The Author will explain why Germany cannot make legislation similar to the one of Common Law countries.

The author will come to the conclusion that New Zealand has made a promising step by creating the Employment Relations Authority. But there are concerns about the lack of safeguards that restrain the power of the Authority.

The text of this paper (excluding table of contents page and Appendix I) comprises 12.533 words.

I. Introduction

In western industrialised societies it is quite common that a party litigates when the party thinks he/she has been treated unfairly or has a claim against the other party. In cases where claims result from personal relationships such as family or employment relationships the courtroom is often not the best place to settle the dispute. Because of the special relationship of the parties a personal atmosphere and a process without legal technicalities promises to be an easier way in order to settle the claim. Since the 1960's it is well known that opponents themselves best resolve industrial disputes. England, for example, has established in 1964¹ an industrial tribunal to deal with payment disputes between employees and employers. Since then industrialised countries have established similar institutions in order to support employees, employers, trade unions and employers' associations in their attempt to resolve their disputes. S 101(a) of the Employment Relations Act states that in order to resolve industrial disputes, "access to both information and Mediation services is more important than adherence to rigid formal procedures". Following this idea the Employment Relations Act 2000 has established a system where individual and collective disputes are resolved in a mutual agreement rather than by a third party decision.

A further reason to settle disputes outside the courtroom is the fact that Courts just would not be able to make a judgment in a reasonable period of time. The legal proceeding is too formal and therefore too time consuming. The parties would have to wait very long for a decision and would have to face high financial risks. Therefore disputes where emotional problems are more important than legal problems are better resolved during Mediation. If the parties are not able to settle the dispute through Mediation it is necessary that a third party makes a final and binding decision for them. For this purpose the Employment Relations Act 2000 establishes the Employment Relations Authority to make fair determinations that settle the dispute.

Industrial dispute resolution in New Zealand begins with Mediation on the lowest level but can extend up to the making of binding decisions. The purpose of this paper is to show the industrial dispute resolution mechanism of New Zealand. New Zealand has experienced in 2000 some major changes through the introduction of the Employment Relations Act.² The author will try to answer some of the open questions, which came up with the new legislation. It will be focused on the Employment Relations Authority and its

¹ S. Deakin and G. Morris Labour Law (2 ed, Butterworths, London, 1998) 2.4.1

ability to investigate. Furthermore, the Author will define what it means for the Employment Relations Authority³ to act within the principle of natural justice during the investigation process. The Author will explain his concerns about the fact that the Authority has powers of a court but does not respect the rules of a court procedure. Finally, suggestions will be made how the system could be improved without jeopardising the advantages of a fast and inexpensive procedure. The paper will also show the advantages and disadvantages of industrial dispute resolution outside the courtroom.

In a second step the industrial dispute resolution institution of Germany, Ireland, England and Wales and Canada are presented. All of them have experienced changes in recent years in order to make them more effective. The Author will compare them with New Zealand and show if solutions from other countries could improve New Zealand's legislation. It will also be shown why the German legislation varies from the one of Common Law countries and why a similar dispute resolution mechanism has not been introduced.

II. New Zealand's new system

The Employment Relations Act 2000 has altered, among other things, the dispute resolution system for employment relation problems⁴. This was necessary because the procedure under the old Employment Tribunal was criticised as being too formal and too time consuming.⁵ Now it mainly consists of three different institutions building a hierarchical structure. The first institution to which parties go is the Mediation Service; this is followed by the Employment Relations Authority and should this fail the parties can "appeal"⁶ to the Employment Court⁷. The underlying policy for all of the institutions and procedures is outlined in s 143 ERA. The most important insight, which was the reason to establish the Authority, is number (f) where it is recognised "that judicial intervention at the lowest level needs to be that of a specialist decision-making body that is not inhibited by strict procedural requirements".

² hereinafter referred as to the ERA

³ hereinafter referred as to the Authority

⁴ for definition see s 5 ERA

⁵ Paul Roth "Review: Employment Law" (2001) 4 NZLR 475, 477

⁶ please see page 16

⁷ hereinafter referred as to the Court

1. *The Mediation Service*

The first possibility to settle employment relation problems in New Zealand is provided by the Mediation Service. Mediation became under the ERA compulsory and has to be attended in all employment disputes. In comparison to the Authority the Mediation Service is the main Mediation provider.⁸ The chief executive of the Department of Labour must employ under s 144(1) ERA staff that provides Mediation. They also determine how the service is provided. In s 143 the ERA recognises that employment relationship problems are best solved by the parties themselves or with little help from a Mediator. Consequently, the state provides a low-level Mediation Service in order to resolve most issues. In an attempt to assist the parties the Mediator can provide the service by way of telephone, e-mail, facsimile etc.⁹ This enables the Mediator to act quickly and enables the parties to resolve their problems instantly. In practise, it is more likely that the Mediator meets with the parties in personal. Here the Mediator can ask for information from the parties including documents or statements.¹⁰ The parties give the information voluntarily so there are no sanctions that can be imposed upon a party to provide information. But if a party does not give adequate information it is likely that the Authority orders further Mediation because the parties have not explored all Mediation possibilities. The Authority member has to ask whether the Mediator has acted differently if he/she has had the missing information and based on this whether a settlement could have been possible.

The service ranges from providing information up to assisting parties when they want to alter their terms and conditions of employment.¹¹ The main purpose, however, is to provide Mediation in order to limit further judicial intervention. The Mediation service is designed to resolve problems at a short notice and in a flexible way, before the parties become entrenched in their positions.¹² Formal requirements are kept to a minimum to facilitate a speedy process. Therefore Mediators work without a specific code of practice. The person who is providing the service decides about the appropriate measures to deal with the case.¹³ Consequently, the possibilities to have failures in the procedure reviewed are restricted. The Act prevents the Mediation services from being challenged on the ground that either the nature and content of the services were provided or the manner in

⁸ Alastair Dumbleton "The Employment Relations Authority gets under way" (2001) 26(1) NZJIR 119, 119

⁹ s 145(2) ERA

¹⁰ s 147(2) ERA

¹¹ s 144(2) ERA

¹² Gilbert, Scott-Howman, Smith *A Guide to the Employment Relations Act* (Butterworths, Wellington, 2000)

10.3

¹³ s 147(1) ERA

which the service is provided was inappropriate.¹⁴ The provision of immunity supports the process by allowing Mediators to offer their service in a fast, flexible and non-legalistic manner without having to fear that their methods are declared as inappropriate. It also pays tribute to the fact that Mediators are normally not as much legally trained as judges. It cannot be expected that Mediators are capable of carrying out an entire legal procedure. In addition, to ensure independence, the Mediator cannot be a member of the Authority or the Court simultaneously.¹⁵

The Mediator has no power to make determinations. The parties must reach any settlement in a voluntary agreement. In that case the parties can have the agreement signed by the Mediator. The terms become binding and enforceable and could not be brought, with exceptions, before an institution of a higher hierarchy.¹⁶ The parties can also agree that the person providing Mediation makes a binding decision to settle the case. Binding agreements and terms of settlements are enforced by way of compliance order obtained before the Authority or in case of monetary settlements, by way of compliance order or through the District Court.¹⁷ The Authority or the Court does not review the settlement.

In case the Mediator is signing an agreement he/she extends his/her role and takes over the responsibilities of an arbitrator. The nature of Mediation is the attempt to support parties in a dispute to resolve their issues. The role of the Mediator is to help both sides to understand the situation of the other side and to figure out steps to facilitate a mutual agreement.¹⁸ Arbitration on the other side differs from Mediation in the way that the Arbitrator proposes terms of settlement to the parties, which of course have to be accepted voluntarily. Hence, the Arbitrator will gather information about the case and think about a fair outcome.¹⁹ Mediators do not get involved deeply in the case as Arbitrators. The Mediator in fact does not need to know the details of the case because he/she is only interested in a mutual agreement.

If the ERA gives power to the Mediator to reach an enforceable settlement it allocates powers of an Arbitrator to this institution. It could be argued that a Mediator who has the ability to reach enforceable settlements is tempted to suggest terms of settlement instead of just leading the parties through the process. But after all the Mediator under the ERA just signs the mutual agreement. Until this point the Mediator fulfils its role as

¹⁴ Gilbert, Scott-Howman, Smith 10.8

¹⁵ Richard Rudman *New Zealand Employment Law Guide* (CCH, Auckland, 2002) 117

¹⁶ s 149(3) ERA

¹⁷ s 151 ERA

¹⁸ Peter Spiller *Dispute Resolution in New Zealand* (Oxford University Press, Auckland, 1999) 57

Mediator because he/she uses its extended powers only at a point when its role as a Mediator is already fulfilled because the parties have already reached a mutual agreement.

The Act allows parties to use other Mediation (s 154 ERA) or Arbitration (s 155 ERA) service than the one provided by the Department of Labour. In this case settlements are not enforceable. The reason not to allow independent Mediators or Arbitrators to reach enforceable settlements is that the parties should use the provided service. The parties have only limited possibility to have the decision of a lower institution reviewed by the next higher institution when followed the provided system. If the parties use other than the dispute resolution service of the state this limitation would not apply. In this case the settlement must be reviewed entirely by the Court and the aim to ease the workload for Employment Courts could not be reached.

2. *The Employment Relations Authority*

S 156 ERA establishes the Employment Relations Authority that follows the Employment Tribunal. The purpose to create this new institution was to relieve the Employment Court and to establish a more satisfactory dispute resolution system without the disadvantages of the old Tribunal. For example, the Authority is now capable to order interim reinstatements or allowed to decide in union matters.²⁰ These issues have formally been decided by the Court. The Employment Relations Authority is the second step in the hierarchy because under s 159 ERA the parties must have attended Mediation first before going to the Authority. The Authority is also required to consider whether the parties should be directed to use Mediation at any time during its investigation.²¹ The intention is to filter out trivial and minor matters, which do not require further investigation and to settle matters at the lowest possible level with the least expenditure of time and money.²² When further Mediation is not likely to contribute to resolve the matter or is of urgent nature the Authority may not decide further Mediation. Where the Authority has ordered Mediation the proceedings are suspended until the parties have done so. By failing in the first Mediation attempt the parties have shown that their dispute is a difficult one to resolve and investigation is necessary.

¹⁹ A.J. Geare *The System of Industrial Relations in New Zealand* (2 ed, Butterworths, Wellington, 1988) [621,622]

²⁰ *Employment Law Guide* (5 ed, Butterworths, Wellington, 2001) [ER161.3]

²¹ Gilbert, Scott-Howman, Smith 10.15

²² *Employment Law Guide* [159.2]

To achieve the goal making problem resolution faster and easier for the parties the Authority is dealing with these issues in a "non-adversarial way"²³ and should act as informal as possible. Therefore the Authority has to deal with less procedural requirements than a normal Employment Court. In general the Authority is only bound by the principles of natural justice and the provision to act in a reasonable manner.²⁴

Members of the Authority are not judges but are experienced in industrial relations dispute resolution procedure. In case legal advice is necessary during the investigation process the Authority can refer to the Employment Court.²⁵ Under s 178(2) ERA it can remove the case to the Court in total if it thinks that an important question of law could arise. The Authority can also remove the case to the court when it is in the public interest or the Court was involved in a similar or the same case before. A matter is of public interest where vital industries are affected by the dispute. Furthermore, public interest exists where the outcome of the case may affect a large amount of employment relationships. This could happen where, for example, the Court decides that a common feature in employment contracts is seen as unlawful and as a result the contract of a large amount of employees have to be changed.

The parties are also entitled to have their matter removed, or a part of it, to the Court. In this case they have to comply with the same legal requirements as the Authority.²⁶

The Court on the other hand can under s 178(5) ERA remove the case back to the Authority if it thinks that the Authority has not investigated properly.

(1) Members of the Authority

The Employment Relations Authority consists of at least three members of which one is the Chief of the Authority.²⁷ The members are appointed by the Governor-General and are independent from the Department of Labour. The major task of the Authority is dispute resolution on the basis of law and not to resolve questions of law therefore members are not judges, barristers or solicitors. In order to achieve this goal Mediations skills are more important than legal skills. The focus on non-legalistic skills is also

²³ Employment Relations Bill Explanatory Note (2000), 8

²⁴ s 173(1) ERA

²⁵ s 177 ERA

²⁶ s 178(1) ERA

²⁷ s 166(1) ERA

reflected in the possibilities to challenge determinations of the Authority. Challenges are usually not based on legal failures but on unsatisfying determinations.

(2) Role of the Authority

S 157(1) ERA explains the role of the Authority. It states that the "Authority is an investigative body that has the role of resolving employment relationship problems by establishing the facts and making determinations according to the substantial merits of the case, without regard to technicalities". The most remarkable innovation is the investigative role of this institution. Unlike the Employment Court where it is the duty of the parties to provide evidence²⁸ the Authority itself is the investigating body. This role marks a new approach in the tradition of New Zealand decision-making. The aim behind this change is to generate a more active "judge" who pushes the process quickly ahead. Free to decide the circumstances of the investigation procedure the Authority member can accelerate the process at any time to achieve this goal.²⁹

(a) What does 'investigating' mean?

Although the inquisitorial approach is the most remarkable innovation in the role of the Employment Relations Authority the Act itself does not explain what investigating means and which legal abilities go along with it. Some tools of investigating process are given in s 160(1) ERA. Generally the Authority can require evidence and information from the parties or any other person they think can give useful information. It can call any witness to a meeting for examination. The control over the investigating process is distributed to the respective member. The member leads the parties through the whole process and especially distinguishes important from unimportant facts. This does not leave much room for tactical manoeuvres of lawyers. Consequently, the process becomes more speedy and informal than in usual court proceedings.³⁰

In practice, the main investigation work is done during the investigation meeting where the Authority examines parties and witnesses. The Authority is not bound to treat a matter as being a matter of the type described by the parties. It focuses on the resolution of

²⁸ Schedule 3 cl 4 ERA

²⁹ *Employment Law Guide* (5 ed, Butterworths, Wellington, 2001) [ER 160.3]

³⁰ Alastair Dumbleton "The Employment Relations Authority gets under way" (2001) 26(1) NZJIR 119, 121

the problem and therefore can investigate matters, which the parties have not described as major issues.

The investigation has to be "related to" the employment relationship and has to have the purpose to resolve the problem. Cl 1 in Schedule 2 ERA connects the term investigation to its purpose. The power to investigate cannot be used widely despite the freedom the Authority is given by s 160 ERA. The investigator should always keep in mind that the findings must contribute to a fair decision. On the other hand the Authority does not have to "relate to" the matter described by the parties. So the limitation is limited through this provision because the investigator decides freely whether a matter is necessary in order to make a fair determination.

Because no other way of getting information is mentioned in s 160(1) ERA then from involved parties or witnesses it must be assumed that the Authority is not entitled to get information in any other way. But the possibility to get information through these people is broad. Schedule 2 cl 5(1) states that the Authority is free to summon any witness they think is necessary and cl 5(2) enables it to call for any necessary documents as well. This ability is not restricted through the law of evidence. Neither the ERA nor the Evidence Act 1908 refers to Authority hearings in any way. The question is how witnesses are protected in the investigation meeting and which evidence could be legally used to make a determination. The Authority has the powers of a court but does not have its safeguards. The purpose of safeguards in legal procedures is the protection of witnesses in cases where the witness could come into a conflict of interests. It also protects confidential information where the Authority requires disclosure. The Authority should at least be made to use the laws of evidence in analogy, for example s 13 and s 14 of the Evidence Act 1908. A witness could get easily in conflict when he/she has to testify against his/her employer or if the witness is related to one of the parties (even if this is not prohibited in the Evidence Act under s 4 in civil courts). There is no reason why witnesses should be treated differently when examined in the Authority or in a Court because the personal conflict is the same.

(b) What are the principles of natural justice?

The adversarial process in the Common Law system has ensured its fair outcomes through the principles of natural justice. The principles are a safeguard against corruption or unfairness in the system. They ensure the functionality and trust in the whole system

and in this case in Authority's determinations.³¹ Broadly speaking natural justice is "the natural sense of what is right and wrong"³². S 27 of the New Zealand Bill of Rights Act 1990 requires that all tribunals act in accordance with the principles of natural justice. S 173(1)(a) and s 157(2)(a) ERA fulfil this requirement by fixing this principle in two ways. The Authority has to "comply with the principles of natural justice" in its role and its procedure. The Employment Relations Authority Regulations 2000 refer to these principles and explain how they should be interpreted. Regulation 4 states that the principles should support successful employment relationships, help to determine the substantial merits of a case and grant practical justice to the parties.³³ Successful relationships exist in this case where the parties act with each other in good faith. Consequently, it is the task of the Authority to impose the parties to act good faith behaviour where these do not exist.

Because the Act does not give further explanation one has to refer to case law in order to define the term. In *David v Employment Relations Authority*³⁴ the Court stated that the term of natural justice varies "widely according to the nature and the purpose of the particular tribunal and the nature and circumstances of the particular case before it."

The main purpose of this case was to decide if the Authority had to allow cross-examination. The case was based on the Authority's practice not allowing cross-examination. In *David v Employment Relations Authority* the plaintive argued that he should have the right to examine witnesses. The Court reasoned that: "2. ...having regard to the nature of the Authority and the subject-matter ..., cross-examination is a necessary ingredient of the principles of natural justice at every hearing or meeting"

The reason for not allowing cross-examination was to support the investigating role of the Authority. It is the Authority's duty to establish facts on its own and to guarantee a speedy process. Hence, it is difficult to understand why the court on one hand says that the definition of natural justice depends on the purpose of the tribunal, but on the other hand permits cross-examination that contradicts the role of the Authority because it is time consuming and therefore delays the process. Moreover, it takes away some of the Authority's jurisdiction because establishing the facts should be the sole responsibility of the Authority. As a result the Practice Note had to be changed.

³¹ Phillip Green "Viva la difference?" (2000) 7 ELB 137, 139

³² Bryan A. Garner *A Dictionary of Modern Legal Usage* (2 ed, Oxford University Press, London, 1995) 581

³³ Mazengarb's Employment Law (loose leaf, Butterworth's, Wellington) [2312]

³⁴ *David v Employment Relations Authority, Attorney-General and New Zealand Law Society* (29 May 2001) Employment Court WC16A/01 Goddard J

This decision fits into an earlier decision where the principles of natural justice were in question. In *Trustees of Rotoaira Forest Trust v Attorney-General*³⁵ the court summarised the principles of natural justice: firstly, each party must have the opportunity to present its case fully, secondly the opportunity to present evidence and arguing in support of its own case and thirdly, to comment on the arguments or evidence of the other party.

It is very difficult to connect the provision of natural justice with the aim of a fast and informal process. At some point parts of natural justice probably must be sacrificed to maintain the role of the Authority. The Court has decided in *David v Employment Relations Authority* that the right of cross-examination should not be sacrificed.

In *Re Erebus Royal Commission v Mahon*³⁶ the court stated that investigation under the principle of natural justice contains two main provisions. Firstly, the person who makes any findings must base his/her decision upon evidence that has some probative value. Secondly, the investigator must listen to any relevant evidence and argument conflicting with the findings. This includes warning a person that a finding is likely to be made influencing negatively the party's claim. Such a warning enables the party to argue on the finding and prevents it from being defenceless against the new situation. During an investigation meeting that kind of warning is hardly possible without risking a delay. In order to argue substantively to a finding the party might need to consult with his/her representative or doing further research. In this situation the role of the Authority is influencing its provision of natural justice. In recognition that this is not a criminal case and therefore "less" serious for the parties, it is appropriate not to allow further research or consultation in order to keep the hearing going.

In addition, in order to act within the principle of natural justice during the process the Authority has to reveal any information that it receives from the other party in order to enable the other side to respond.³⁷

A further aspect of natural justice is the absence of bias.³⁸ The Authority member is not supposed to support one side in its determination. The investigator has to disregard the behaviour of the parties even if they have caused problems during the investigation process.

³⁵ *Trustees of Rotoaira Forest Trust v Attorney-General* [1999] 2 NZLR 452, 464

³⁶ *Re Erebus Royal Commission; Air New Zealand v Mahon* [1983] 1 NZLR 662, 671 Judicial Committee

³⁷ Gilbert, Scott-Howman, Smith *A Guide to the Employment Relations Act* (Butterworths, Wellington, 2000) 10.16

³⁸ C. Harlon and R. Rawlings *Law and Administration* (2 ed, Butterworths, London, 1997) 502

There are obviously some intersections between natural justice and the power to investigate. In practise, it is most likely that the Authority could harm the principle of natural justice during the investigation process. As shown the principles of natural justice determine how the parties should be allowed to present their case, how witnesses should be examined and mainly that the finding has to be based on proper reasons. When investigating the member has always to consider whether the facts are important in order to reach a determination. But the investigator does not have to distinguish between legal and other argumentation. Findings are relevant when they are the cause or the solution of the dispute. Consequently, the right to investigate ends where the measures of the investigator are not appropriate anymore in the sense of natural justice. This means where a reasonable person is not able to accept the actions of the investigator.

As mentioned above there are some concerns about the protection of witnesses in the process. But in *Re Erebus Royal Commission v Mahon*³⁹ the court did express that "technical rules of evidence applicable to civil or criminal litigation form no part of the rules of natural justice". Public institutions are usually bound by the principles of natural justice if they fulfil sovereign. The reasons why practice codes are omitted for these institutions are that their main purpose is not dealing with legal matters or making legal determinations. While investigating the Authority, for example, establishes the facts and makes a fair rather than a legal determination. Consequently, technical rules of evidence are not necessary where non-legal findings prevail. Therefore in *Re Erebus Royal Commission v Mahon* the judge stated that the findings must be logically comprehensive. By taking this statement into account it is even more necessary that the Authority be bound by certain own written rules through statute.

It is not necessarily true that all errors in the administrative proceeding must be breaches of natural justice.⁴⁰ When reviewing the principles of natural justice it is likely that Courts more readily and strictly insist on compliance with the rules of natural justice the higher the impact of the decision is for the party.⁴¹ The court has to ask how serious the lack of observance of administrative rules has effected the determination and whether its compliance would have made a difference in its decision. Should the court come to the

³⁹ *Re Erebus Royal Commission; Air New Zealand v Mahon* [1983] 1 NZLR 662, 671 Judicial Committee

⁴⁰ G.D.S. Taylor *Judicial Review* (Butterworths, Wellington, 1995) 13.13

⁴¹ Philip A. Joseph *Constitutional and Administrative Law in New Zealand* (2 ed, Brookers, Wellington, 2001) 23.2.1

solution that a different proceeding could have changed the outcome it must refer the case back to the original institution. But where a compliance with natural justice would not have changed the outcome there is no need for an additional hearing.

(3) Informality

A further aspect supporting a quick decision is the informality of the process. The respective member of the Authority who is responsible for the case is relatively free from formal constraints. S 174 ERA states what kind of information the Authority has to record and which ones not. Relevant facts and legal findings have to be stated and explained. The Authority does not have to record the whole investigation meeting including evidence or statements. The intention is to "produce determinations with fewer details" and reduced legalism to situations where the facts influence the findings.⁴² A further advantage of fewer records is the possibility to reconstruct the whole case and to understand why a determination has been made. A matter of concern is the fact that probably not enough records exist if a party wishes to challenge the Authority's determination at the Court. It would be difficult to prove that the Authority might not have acted in good faith when there are no records.⁴³ But detailed records are not necessary in cases where the party wishes to challenge the determination in a hearing de novo.⁴⁴ This is a whole new hearing where the Court is able to establish its own findings without referring to findings of the Authority.

(4) How to commence the process?

Despite its informality a person who wants to apply for a determination by the Authority has to fulfil some formal requirements. The Authority has jurisdiction to write a Practice Note⁴⁵ that functions as a procedure code in order to guide parties and their representatives through the process.⁴⁶ If a party wishes the investigation of a matter, he/she has to complete a statement of problem form in order to inform the Authority and opponent about the problem. It also consists of the facts and the resolution sought by the applicant. The Authority will then present a copy to the other party who has to reply to the problem. The reply will be forwarded to the applicant. In case the other party does not

⁴² *Employment Law Guide* (5 ed, Butterworths, Wellington, 2001) [ER174.2]

⁴³ Phillip Green "Viva la difference?" (2000) 7 ELB 137, 144

⁴⁴ s 179(3)(b) ERA

⁴⁵ Employment Authority Regulations 2000 < <http://www.gp.co.nz/wooc/bills/analysis/2000186-reg.html> > (last accessed 12/05/02)

⁴⁶ Richard Rudman *New Zealand Employment Law Guide* (CCH, Auckland, 2002) 121

reply the Authority can under Regulation 9 of the Regulations commence investigating the matter and hold an investigation meeting.⁴⁷ This provision has proven to be useful in practice in order to omit delays. Authority staff will check the statements and if necessary further information will be required. During a first meeting the member will prepare the investigation meeting to make sure that the hearing will focus on the core problems.⁴⁸ It is normally open to the public but the public could be excluded under certain circumstances. The meeting has the form of a "round table" where the Authority member, parties and witnesses are seated at a table; a clear difference to the formal courtroom seating. The member investigates the matters by collecting all necessary facts. The meeting concludes with a final statement by the parties or their representatives. The member then will make its own decision and submit the written determination a few weeks later to the parties.⁴⁹

The process concludes with a binding determination made by the Authority. Once a determination is made the Authority cannot take it back or alter it. It has fulfilled its task and further or new facts could not be recognised anymore.⁵⁰ Even if the parties request in a mutual agreement to change the determination it can not be altered because the Authority has lost its jurisdiction with respect to the particular case. The Authority has no jurisdiction to alter determinations of the Authority or to interpret its own determinations. The jurisdiction provided by s 161 ERA is closing and does not allow any other interpretation for additional jurisdiction. The Court also has no jurisdiction under s 187 ERA to interpret or to alter an Authority's decision. It can only make a new judgement. The parties can apply for the reopening of the investigation when new facts emerge that have not known before. The Authority must also decide that reopening the investigation would be reasonable.⁵¹ It is reasonable when it is likely that the outcome would differ from the previous determination. But with respect to its principles a reopening would not be reasonable because of the negligence of the party, for example if a party has not prepared its case properly. Furthermore, not revealing all facts during the meeting would clearly be seen as breach of good faith. It would be unreasonable to permit reopening to a person who as acted in bad faith.

⁴⁷ *Mazengarb's Employment Law* (loose leaf, Butterworths, Wellington) [2322]

⁴⁸ Gilbert, Scott-Howman, Smith *A Guide to the Employment Relations Act* (Butterworths, Wellington, 2000) 10.16

⁴⁹ Rudman, 122

⁵⁰ *Employment Law Guide* (5 ed, Butterworths, Wellington, 2001) [ER174.3]

⁵¹ Schedule 2 cl 4 ERA

(5) Jurisdiction of the Authority

One major task of the Authority is to take over some of the work the employment Court has done previously. Under s 161 ERA it now has a broad jurisdiction, which covers most of the issues arising during an employment relationship. The jurisdiction to make determination about these issues is exclusive. This means that parties are not entitled to take any action that arises from or is related to an employment relationship to any other dispute resolution institution. Because its jurisdiction is exclusive⁵² no other institution can make decisions about these matters and this means also that the Authority has not jurisdiction about things that are not listed in s 161(1). S 161(2) ERA states that the Authority is not entitled to make determinations relating to any matter involving bargaining and fixing terms and conditions of employment. Under s 163 ERA the Authority cannot make any determinations with respect to collective agreements. But its new power includes the ability to order interim reinstatement in matters of personal grievances.⁵³ If it comes to individual employment agreements the Authority is entitled to change certain aspects of the contract.⁵⁴ This jurisdiction as well was previously part of the Employment Court.

The shift of power relieves the Court from its workload and strengthens the Authority's role as major dispute resolution body. Although the Authority has this power it should exercise it only as last resort, because it is still the alteration of a mutual agreed contract. Individual employment agreements should only be changed where the parties have not been able to resolve the issues during Mediation or with assistance of the Authority and if no other remedy is appropriate.⁵⁵

As mentioned above the Authority has to respect only a few formal requirements while making a determination. Nevertheless, a party is able to challenge a determination by applying for a new hearing at the Court.⁵⁶ This challenge is not an appeal (the Act uses the term "election") in its legal sense because the reviewed decision was not made by a court. The person who challenges the determination does also not want to have a certain question of law to be reviewed. The Court reviews the fair outcome of the determination and not only the legal application of law. A further difference to an appeal exists in the

⁵² *Employment Law Guide* [ER161.11]

⁵³ s 127(1) ERA

⁵⁴ s 162 ERA

⁵⁵ s 164 ERA

⁵⁶ s 179(1) ERA

fact that the Court not only reviews matters that have already considered by the previous instance. The Court does in case of a hearing de novo also consider new facts.⁵⁷

Therefore it is sufficient if the party is *just* dissatisfied with the Authority's determination. The "appellant" only has to specify which part he/she is dissatisfied with and whether a hearing de novo should be held.⁵⁸ The party challenging a determination does not have to state a specific legal error or an error in the proceeding. It is enough if the party thinks that a different determination would be adequate with respect to the facts found by the Authority member. This makes it very easy for a party to have the case reviewed because a legal reasoning is not necessary. Just the feeling not have been treated fairly is enough to get an entirely new hearing.

A hearing de novo is unlikely to happen where a party has not acted in good faith during the investigation process. The Authority will submit a report to the Court to assess whether the parties have acted in bad faith. However, it remains the decision of the Court to grant a hearing de novo even if a party has acted in bad faith.⁵⁹

The party can also elect a hearing where the Court only reviews a question of law.⁶⁰ The process takes place regardless of whether a party has previously acted in good faith or not. S 180 ERA clarifies that the making of an election does not suspend the effect of the Authority's determination unless either the Court or the Authority orders that it should.

It should be noted that the Act provides two different ways of challenging the Authority. The previous section describes how a determination according to the respective matter could be challenged. To promote flexibility and informality not all actions of the Authority members can be reviewed by the Court. S 184 ERA limits the possibility to challenge determinations or orders in the Authority's procedure. The challenge could only be based on a lack of jurisdiction. The lack occurs where the Authority was not entitled to one of its actions or if it has acted in bad faith. The requirement to act in good faith is unquestionably an aspect that could not be relinquished in the Authority's process but it could become a loophole for complaints of unsatisfied parties.

In addition, any statutory decision made by the Authority can be reviewed in a judicial review by the Court but only after all other ways of appeal have been exhausted.⁶¹

⁵⁷ *Employment Law Guide* (5 ed, Butterworths, Wellington, 2001) [ER179.2]

⁵⁸ s 179(3) ERA

⁵⁹ s 183 ERA

⁶⁰ s 179(4) ERA

⁶¹ s 194 ERA

(a) What does 'good faith' mean?

One must distinguish between the duty of the parties to act in good faith with each other and the duty of the Authority member to act in good faith towards the parties. The term "good faith" is mainly used in collective bargaining; therefore definitions have always had this procedure in mind. In case the parties are dealing with each other or with the Authority the situation is comparable to the one of collective bargaining. In both situations either party wants to achieve an advantage without giving away too much. Consequently, most of the good faith requirements could be used here as well. The Minister of Labour has approved a Code of Good Faith⁶² for collective bargaining. Provisions of the Code of Good Faith have to be used where appropriate. Number 5.1 of the Code requires the parties have to indicate any concerns about whether the other side is not acting in good faith. This requirement should also be effective during the process before the Authority. Whenever the parties think a member of the Authority is not acting in good faith they should explain this to the member in order to enable the member to carry on in good faith. In case they do not do so they themselves act in bad faith and are not entitled to have their issue reviewed before the Court anymore.

More difficult is the situation where the Authority member is acting towards the parties. The Authority is not required to act in good faith but its determination could be challenged if acting in bad faith.⁶³ Because the Act is using the term good faith in other sections of the ERA one must define good faith and conclude that everything that is not good faith is automatically bad faith.

The explanatory note of the Employment Relations Bill distinguished between the "general principles of good faith" and other more specific principles. This division is realised through the general requirements of good faith in s 4(1) ERA. The core principles for good faith bargaining are established in s 32 ERA. Hence, no such description exists for the dispute resolution institutions only the general principles will apply here.

In general, good faith is based on mutual trust, confidence and fair dealing between the parties.⁶⁴ This includes not directly or indirectly misleading or deceiving each

⁶² Code of Good Faith for Bargaining for Collective Agreements < www.ers.dol.govt.nz/act/code.html > (last accessed 22/05/02)

⁶³ s 184(2)(c) ERA

⁶⁴ Employment Relations Bill Explanatory Note Governmental Note (2000) 2 ELB 25, 27

other.⁶⁵ In my opinion this aspect does not fit into the Authority's neutral role. There is no reason imaginable why a member of the Authority should mislead the parties. A clear advantage of the tripartite dispute resolution system. The Act in s 4 comes from the assumption that good faith in the ERA has to be respected in a two party relationship, either between employee and employer or between unions and employers or their representatives.

Good faith behaviour requires also that the Authority member is not dealing with the parties directly when they are represented, even when the investigator thinks that the process will benefit from a direct involvement of the parties.

The Court can accept a challenge where the Authority suffers from lack of jurisdiction caused by acting in bad faith. The question is whether the Court finds that the Authority has acted in bad faith, does it have to alter the determination? Must it also consider whether the decision would be different if the Authority has not acted in bad faith? If the Court answers this question "no" it would be unnecessary to hold a hearing de novo when the outcome remains the same.

In case a party challenges the determination it must be assumed that the Employment Court at first will have to accept a complaint of a party because it will require deeper investigation to clarify whether the Authority has acted in bad faith or not. But decisions of the Authority stay in effect for as long as the Court has not decided otherwise. Consequently, there is no apparent disadvantage in this provision.

3. *The Employment Court*

The Employment Court is the third step in the employment relations system. Its primary role is now to decide difficult cases especially where industrial dispute-settlement is involved and when a party challenges the determination of the Authority.⁶⁶ The Court also has jurisdiction to determine all matters that come before it as it thinks fit in equity and good conscience.

For some matters the Employment Court is the first institution because they are too complicated or too important to be conferred on the Authority. These are, for example, to determine whether a person is an employee or to determine the lawfulness of strike or lockout.⁶⁷ It has the same jurisdiction as the Authority to make orders according to

⁶⁵ *Mazengarb's Employment Law* (lose leave, Butterworths, Wellington) [ER.12]

⁶⁶ s 187 ERA

⁶⁷ s 100(1)(a) ERA

individual employment agreements.⁶⁸ It has not the power to cancel or vary collective agreements. But it has under s 192 ERA the power to suspend a single term of the agreement and to order the parties to reopen bargaining.

In accordance with its exclusive jurisdiction the Court has a wide power to call for any information or evidence that it thinks fit, regardless whether it is strictly legal or not.⁶⁹ In common with Authority and Mediation Service the Court has the provision of flexibility.

Where the Court has to decide about a matter it at first has to consider whether the parties have made an adequate Mediation attempt. If not, it has to order further Mediation.⁷⁰ The Act does not determine which attempt is adequate. But the same consideration has to be done by the Authority as well so both institutions should use the same definition. A Mediation attempt has not been sufficient where the parties have not used the Mediation service at all or where the parties have acted in bad faith towards each other. An attempt has also not been made where the parties have not contributed enough to the procedure so that the other side was reasonably able to agree to a settlement.

When the Court is dealing with a challenge by making a hearing de novo the nature of the hearing should be that the court establishes its own opinion without referring to the Authority's determination. However, the Court of Appeal decided in *Coutts Cars Ltd v Baguely*⁷¹ that the Court should not be constrained by the determination but should recognise its arguments.

Orders, decisions or proceedings can under s 193 ERA only be challenged on the ground of lack of jurisdiction. A Court's decision can be appealed to the Court of Appeal on question of law only (s 214 ERA).

In relation to the Authority the Court does not have the power to advise or direct the Authority on how it should use its investigative powers and jurisdiction.⁷² But it does have the power to review whether the Authority has complied with the principles of natural justice.

⁶⁸ s 190 ERA

⁶⁹ Gilbert, Scott-Howman, Smith *A Guide to the Employment Relations Act* (Butterworths, Wellington, 2000) 10.24

⁷⁰ s 188(2) ERA

⁷¹ *Coutts Cars Ltd v Baguely* [2002] 6 NZELC 96, 97 (CA) Gault J

⁷² s 188(4) ERA

III. *Employment dispute resolution in different countries*

1. *Germany*⁷³

The dispute resolution system for labour relationships in Germany has to be distinguished between individual and collective relations. The first step for individual dispute resolution normally takes place between the parties themselves, mostly represented by a lawyer. A representation through a union or an employers' association is also possible. This stage of dispute resolution is entirely voluntary and not regulated in legislation. In practise, lawyers give written offers for a settlement to the other party and after exchanging some of these offers the parties will settle their dispute in a mutual agreement. This first attempt became a part of custom in order to avoid legal costs. If the parties cannot reach an agreement one party will take legal action to the Employment Court.

The first official step in Court is the conciliatory hearing.⁷⁴ A major principle before the employment court is the expedited procedure (*Beschleunigungsgrundsatz*)⁷⁵. This means the judge has to accelerate the process wherever possible. The overall aim is to secure that the parties reach an agreement as soon as possible. Where they do not reach an agreement it enables the judge to compose a judgment immediately. This limits the risk of legal costs for the parties especially in unfair dismissal cases where employers have to pay outstanding wages. If the parties meet for an additional hearing the judge encourages them to agree to a contemporary appointment.

§ 54 (s 1) (cl 3) of the Employment Court Code contains the patterns for a compulsory conciliatory hearing. The whole hearing is more an informal Mediation process rather than a legal proceeding, despite its appearance. The parties have to carry out this hearing before they can get a judgement. During this phase the judge can act with disregard to certain formalities. The Court, for example, does not call the parties to exchange written statements about the dispute. This should enable judge and parties to have an unaffected conversation without having already an opinion in mind. Furthermore, the judge is only allowed to take actions that could be made immediately during the procedure, so no time is lost because the parties have to produce additional documents or call for witnesses. Judge and parties have to work with the documents they brought to the first hearing. The judge can investigate by examining the parties. The aim of the

⁷³ for non New Zealand legislation see Appendix I

⁷⁴ § 54 s 1 cl 1 Employment Court Code (*Arbeitsgerichtsgesetz*)

⁷⁵ § 9 s 1 Employment Court Code (*Arbeitsgerichtsgesetz*)

conciliatory hearing is to reach a compromise. The role of the judge is thus inducing the parties to settle their dispute in a mutual agreement. He/She is doing so by giving legal advice and making suggestions for a settlement. In practice, an effective method is pointing out how a possible judgement could look if the parties do not agree to a compromise. Often parties then decide to settle their dispute rather than having a judgement. The agreement is similar to a contract, so formal court provisions are not necessary to make the agreement legally binding.

The hearing takes place the first time the parties appear before the court but the judge can order further hearings when he/she thinks a settlement could be reached in a later hearing. The employment court usually consists of a professional judge and two lay judges; one each from the employee's and employers' side, but in the conciliatory hearing it consists only of the professional judge.

In case the parties cannot agree to a settlement the judge will appoint a date to commence the normal legal proceeding. The judge will in this case not refer to the conciliatory hearing. It is treated like it has never happened.

For collective disputes no resolution mechanism exists. The parties are dealing with the issues on their own. In practice, if no agreement is reached after a certain time the parties usually agree to an adjudicator. Strikes and lockouts are usually not practised during this time although unions use token strikes to support their demands. The collective partners usually agree to a dispute resolution process in advance.

2. Ireland

Ireland is one of the fastest growing economies in Europe. It is argued that a reason is the small amount of industrial disputes. The Labour Relations Commission⁷⁶ is the institution for dispute resolution in Ireland. It deals with both individual and collective disputes.

Following the Industrial Relations Act the Rights Commissioner⁷⁷ is appointed to investigate disputes, grievances and claims of individuals or small groups of workers. The proceeding begins when a party submits an issue to the Commissioner's office. The Commissioner will then schedule a hearing where the parties present their cases. Commissioners are employees of the Labour Relations Commission. They are

⁷⁶ Industrial Relations Act 1990 s 24 (1)

experienced Mediators but not judges. Despite this lack of legal education their decisions are binding. The Commissioners investigate the matter and settle the dispute by making either non-binding recommendations or binding decisions, depending on the legislation under which a case is referred.⁷⁸ Should the parties not be able to settle their claim or the parties wish recommendations or decisions reviewed, the Commissioner will appeal to the Employments Appeal Tribunal. If further investigation is necessary or a complicated question of law arises the case will directly be referred to the Labour Court.

The Employment Appeal Tribunal is a body of appeal but mainly it is the first step for individual claims such as redundancy, payments or leave. It consists of a chairman and a union and an employer's representative. The Tribunal's purpose is to handle disputes in a fair and speedy way for individuals who seek remedies for infringements of their statutory rights. After a claim has been filed a copy of the claim is sent to the person against whom the claim is made in order to arrange an appointment with the parties for a hearing. The nature of the hearing is investigatory. The chairman will examine parties and witnesses in order to assess the evidence. After the hearing the chairman makes a binding decision. Against this decision a further appeal to the Labour Court is possible which will then conclude with a legally binding decision.⁷⁹

To settle collective disputes the Industrial Relations Commission provides a Conciliation service. S 42 of the Industrial Relations Act 1990 provides the Commission with the power to create a Code of Practice, which regulates the Conciliation process. The parties can refer to this service "[w]here negotiating arrangements are not in place and where collective bargaining fails to take place"⁸⁰. An Industrial Relations Officer whose function is to mediate between the parties carries the Conciliation service out.⁸¹ He/She is appointed by the Commission and comes from an independent public service background.⁸² The Conciliation process is informal and non-legalistic in its practice and voluntary in its process. The aim is to reach a mutual agreement to settle the dispute. The

⁷⁷ s 35 (1)

⁷⁸ EMIRE Ireland < www.eurofound.ie/emire/IRELAND/RIGHTSCOMMISSIONER-IR.html > (last accessed 08/05/02)

⁷⁹ Guide to the Labour Court < www.labourcourt.ie/labour/labour.nsf/LookupPageLink/HomeServiceGuide > (last accessed 01/05/02) 5

⁸⁰ s 2 of the Code of Practice on Voluntary Dispute Resolution under section 42 of the Industrial Relations Act 1990

⁸¹ S 42 of the Industrial Relations Act 1990 Provides the Commission with the power to create a Code of Practice, which regulates the Conciliation process.

⁸² Conciliation Service < www.lrc.ie/lrc_services/Conciliation_service.htm > (last accessed 09/05/02)

Officer has no power to make decisions against the will of the parties nor is he/she investigating the issues.

In case the Conciliation fails the Labour Court will investigate the dispute. The investigation proceeding commences when the Commission has reported to the Court that no further efforts could be made in order to resolve the dispute and the parties have requested investigation.⁸³ Besides, the Labour Court is not a court of law despite its name.⁸⁴ It functions as an industrial relations tribunal. After investigating the dispute the Court makes a recommendation that is not binding for the parties.

3. *England and Wales*

In case a party wants to litigate in England or Wales it will not find a separate Employment Court system. Claims must be made before a tripartite employment tribunal or if it is a financial claim, which is not directly related to the employment contract, the country courts. The reason is that financial claims are treated as normal contractual claims between employee and employer and the country courts are first instance in the civil procedure.⁸⁵

The industrial dispute resolution procedure is similar in its hierarchy to the one in New Zealand. In the first step the parties try to reach a private settlement. The Advisory, Conciliation and Arbitration Service (ACAS) supports the effort by providing assistance through Mediation. The service is an offer to the parties it is used voluntarily. Settlements must also be agreed voluntarily and Officers do not help the parties by recommending terms of settlement. ACAS works independently from governmental supervision. Its patterns are outlined in the Employment Tribunals Act 1996.⁸⁶ If a party believes there is a ground for a complaint he/she fills out an application form and submits it to the Employment Tribunal. It will forward the request to the ACAS. The Tribunal also sends a copy to the other party including the request to comment. The Conciliation Officer will then invite the parties to meet in order to resolve the problem. An agreed settlement is recorded and becomes binding when both parties had independent legal advice in advance in order to be able to rate the effects of the agreement. The service is free of charge for the parties.

⁸³ Industrial Relations Act 1990 s 26 (1)

⁸⁴ Guide to the Labour Court < www.labourcourt.ie/labour/labour.nsf/LookupPageLink/HomeServiceGuide > (last accessed 01/05/02) 5

⁸⁵ S. Deakin and G.S. Morris *Labour Law* (2 ed, Butterworths, London, 1998) 2.4.

⁸⁶ s 18 and s 19

Since May 2001 the ACAS also offers Arbitration in order to resolve unfair dismissal disputes. Cases dealt with in Arbitration do not come before the Employment Tribunal because the decision is binding and cannot be reviewed by the Employment Tribunal. The hearing takes place in private and will be kept confidential. Arbitration is voluntary so any party can withdraw at any time or agree to a settlement at any stage of the process. In the hearing the Arbitrator is the only one who can examine witnesses he/she is also not bound by other rules of procedure than the Order.⁸⁷ The advantage for the parties is fewer costs and a final decision made more quickly.

Should Conciliation fail the parties can apply for a hearing before the Employment Tribunal. The Service of the Employment Tribunal and Employment Appeal Tribunal is provided by the Employment Tribunals Service, which is an executive agency of the Department of Trade and Industry.⁸⁸ The Tribunals consist of a chairperson and two lay members coming from the employee and employer side. The chairperson has jurisdiction to decide cases on his/her own if the plaintiff desires statutory payment from the employer. This claim is only decided on the grounds of law and therefore does not necessarily need the opinion of the labour parties.

If the Tribunal has jurisdiction to hear a matter it will hold a pre-hearing where the parties present written and oral statements. After the pre-hearing, which is carried out only by the chairman, the chairman will respond to the appellant whether the claim has "reasonable prospect of success".⁸⁹ In case it has no prospect of success the appellant can only continue by paying a deposit. This ensures that the public does not have the burden of unreasonable costs.

The full hearing in which a lawyer mostly represents the parties follows this. The form of the proceeding is adversarial rather than investigatory in nature. Each party has to present and prove its case and is entitled to cross-examine the other party's witnesses.⁹⁰ But the Tribunal can order disclosure and compel witnesses to attend. However, the proceeding should remain informal where appropriate and not be bound by any enactment or rule of law for proceedings and evidence in the courts of law.⁹¹

The process concludes with a summary of the chairman. This summary is a judgement, which contains the relevant facts, the decision and a short reasoning. The

⁸⁷ The ACAS Arbitration Scheme (England and Wales) Order 2001

⁸⁸ Deakin and Morris, 2.4.1.

⁸⁹ The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2001 Schedule 1 cl 7(4)

⁹⁰ R. Rogowski and T. Wilthagen *Reflexive Labour Law* (Deventer, Kluwer, 1994) 81

⁹¹ The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2001 Schedule 1 cl 11

parties can request an extended version because an appeal could only be preceded with a full reasoning.⁹²

The Employment Appeal Tribunal hears appeals from Employment Tribunals on points of law. It has the same powers as the High Court with regard to the process including summon of witnesses and the request for evidence. The Tribunal can make its own entirely new decision or order the case back to the original tribunal, which in this case has to consider the guidelines of the Appeal Tribunal.

4. Canada

The Canadian industrial dispute system is split up into the federal legislation that covers some selected federal jurisdiction industries (such as banking, broadcasting or interprovincial transportation)⁹³ and the legislation of the provinces that covers industries based in the provinces. Here only the federal dispute resolution mechanism will be presented.

Canada has experienced its latest industrial dispute resolution changes in 1999. The Canadian Labour Code was amended to establish the Canadian Industrial Relations Board. It is established by Part I s 9 of the Canadian Labour Code as an independent, representational, quasi-judicial tribunal responsible for the interpretation and application of the Code.⁹⁴

Industrial disputes are usually resolved in two steps through Conciliation and Mediation. In case of a dispute, most likely during collective bargaining, either party can address the Ministry of Labour filing a notice of dispute. The Ministry will forward the note to the Federal Mediation and Conciliation Service (FMAS). The neutral Conciliation Officer will meet with the parties sorting out the problems in order to bring the bargaining process to a successful ending.

Where Conciliation attempts have not been successful either party or the Minister of Labour can request Mediation. An Officer of the FMAS also provides Mediation. During the Mediation period the parties have the legal right of strike or lockout. In practise, only after an unsuccessful Mediation process the parties commence with industrial action.⁹⁵

⁹² Employment Appeal Tribunal Rules 1993 s 3(1)(c)

⁹³ G.P. Rossiter "Labour dispute resolution in Canada" (2001) 8 ELB 158,158

⁹⁴ Canada Industrial Relations Board *Estimates 2000-2001* < www.tbs-sct.gc.ca/report/tbsplans/00-01/dwnld/rpp00_e.pdf > (last accessed 15/05/02) 3

⁹⁵ Mediation and Conciliation Services < <http://labour-travail.hrdc-drhc.gc.ca> > (last accessed 15/05/02)

In case the parties cannot reach a settlement through Mediation or the Officer thinks that Mediation is not appropriate he/she will investigate the facts and write a report, which will be forwarded to the Labour Relations Board. The report does not contain any conclusions or favours a single party. It should only enable the Board to commence with its work. In order to commence a proceeding the trade union or employers' organisation has to apply in writing to the Board. The Board will either convene a new full hearing or meet only with the parties to make a determination based on the report and the evidence given by the parties. The Board has the right to examine witnesses, call for evidence or order disclosure but it has not to work in compliance with the formalities of a Court. The hearing is held by a chairperson and a union and an employers' organisation member.

Every order or decision made by the Officer is final and binding and could usually not be reviewed by a court.⁹⁶ Review is only possible if the Board has acted outside its jurisdiction, failed to observe a principle of natural justice or has acted by reason of fraud.

The procedure is similar where the dispute is individual in nature. Where a party has applied to the Board for settlement of a dispute the Board will forward the application to a Labour Relation Officer. The Officer will inform every party affected by the application and call for responses. If necessary the party's will be invited to a pre-hearing to make an attempt to resolve the problem. During the Mediation meeting the Officer will try to settle the dispute. The aim is a speedy and informal process to reach a mutual agreement. Most individual disputes are solved in this stage. Where this is not possible the Officer will make an inquiry of the matter and report to the Board. The parties will have the chance to comment on this report. A hearing that concludes with a final decision follows this.⁹⁷ An appeal is possible under the same circumstances like in collective disputes.

5. Comparison between the institutions

After showing the approach of some other countries to resolve employment relationship disputes a comparison of the differences and similarities may now be made.

When evaluating the legislations one sees clearly the difference between the Common Law countries and Germany as representative for the Civil Law system. Where

⁹⁶ s 22(1) Canada Labour Code; s 18.1(4) Federal Court Act

⁹⁷ The Role of the Board's Labour Relations Officers < www.cirb-ccri.gc.ca/publications/info/2_e.html > (last accessed 15/05/02)

all Common Law countries prefer three steps in order to resolve their employment disputes and have therefore founded three different institutions. Germany has more or less only one step and one institution, the Employment Court. The advantage of Conciliation and Mediation is recognised in Germany as well but it is still up to the parties to resolve their (individual) problems with the help of a Mediator. Consequently, expenses arise because Mediators are privately organised and charge for their service. There is no public institution that offers Mediation service or at least legal information. This role is mostly taken over by lawyers, trade unions or employers' associations. A reason might be that industrial disputes are seen as a matter of the collective partners where state influence should be kept minimal as possible. The individual employee on the other hand enjoys sufficient protection through the law reviewed and enforced through Employment Courts.

The establishment of an institution in Germany similar to the Employment Relations Authority because of constitutional requirements is not possible. Article 101 of the German Basic Law guarantees the right that a legal case is heard by a judge and Article 92 states "[j]udicial power is vested in the judges". Consequently, a person who is not a judge could not make judgements or other enforceable legal determinations.

A further interesting aspect to look at is the next step where Mediation was not successful. The Common Law countries have created an institution in order to avoid an early involvement of the Employment Court but their legal status is confusing. New Zealand is the exception because it is agreed that, "the Authority is a court of law"⁹⁸. Other countries like Ireland and England are reluctant to describe their Employment Tribunals as a court although it has the same powers and responsibilities. Probably because to underline the non-formal proceedings the word 'court' is omitted. However, in Germany and New Zealand the second step of dispute resolution takes place in a court even if New Zealand does not give it that name. Further similarities are that both tribunals have an investigating process where the facts are established and both institutions can act without regard to certain formalities. One might say that New Zealand has made Mediators into "judges" and Germany has made judges into Mediators.

A further difference is found in the labour jurisdiction of the countries. In all the examined countries, except Canada, the (federal) government has jurisdiction to establish the laws of employment. The Canada Labour Code is primarily concerned with collective

⁹⁸ Alastair Dumbleton "The Employment Relations Authority gets under way" (2001) 26(1) NZJIR 119, 120

aspects of labour relations whereas individual employment rights are a matter of the provinces.⁹⁹ Consequently, Canada consists of many different dispute resolution mechanisms.

Also unique is the Canadian approach to have a separate body for the investigation process and the final decision. The Labour Relations Board decision is based on the findings of the Officer. But it is problematic if the Mediator is simultaneously the investigator because of the conflicting nature of the functions.¹⁰⁰ Its final report should not support one side but with the experience of the Mediation process it is difficult not to be biased, especially where the other party has prevented the settlement. As shown above the Authority is not bound by certain rules of practice only by the principle of natural justice. A conflict exists where the Authority makes legal determinations without having to respect a legal procedure. Canada has solved the problem because investigating the facts and making a final decision are made by two different institutions. In this case the investigator can work without legal formalities but the procedure that leads to the final decision is held before a body that has to respect certain court rules.

Similarities between Ireland and New Zealand are found in the investigating power of the dispute resolution institution based on the judges role in Civil Law countries. Both countries favour a strong investigator rather than responsible parties in order to achieve a final settlement. Nonetheless, Ireland has decided to create different mechanisms for individual and collective disputes. Regarding the fact that in New Zealand mostly single employers bargain with trade unions a separation of dispute resolution duties similar to Ireland is not necessary.

There are some obvious differences between Common Law countries and Germany as Civil Law country. Differences exist in both the individual and collective dispute resolution procedure. Collective dispute resolution begins in all jurisdictions with Conciliation. Germany has in this area no legal proceedings only customised processes and offers no state resolution system. The other countries, however, have developed a detailed resolution proceeding, which could be used voluntarily to avoid industrial action. In Ireland, as an example, the industrial partners could go through Conciliation and investigation in order to settle the issues. This may be the reason for the small amount of industrial disputes in Ireland. Canada on the other hand has a compulsory dispute

⁹⁹ G.P. Rossiter "Labour dispute resolution in Canada" (2001) 8 ELB 158, 160

resolution procedure for federal industries in order to prevent industrial action in important industries. This kind of dispute resolution has in Germany no tradition because the independence of industrial partners is respected in Germany. As a result the parties can at any time quit dispute resolution process and resolve their issues on their own or take industrial action. In defending the German lack of industrial dispute resolution institutions one must recognise that the amount of industrial action is not significantly higher than in other countries.

IV. Conclusion

Making an overall evaluation it could be said that employment dispute resolution systems are working successfully in all countries. Statistics of all countries show that about 2/3 of the cases are solved at the first stage in Mediation or Conciliation.¹⁰¹ As a result of this success governments have created more and more detailed dispute resolution mechanisms over the last years. I see a hazard in the tendency extending the jurisdiction of industrial tribunals at the cost of Employment Courts. There are good reason why Courts have to comply with legal procedure rules. Mainly the protection of witnesses and parties are under threat to be eliminated. Moreover, Employment Courts are limited in their jurisdiction to review decisions of industrial tribunals. I believe that one should not sacrifice basic judicial principles for the purpose of a quick settlement. Moreover, it is also a matter of concern that clear legal procedure determinations such as the laws of evidence are replaced by uncertain principles such as natural justice. Is much more difficult for the Court to determine the patterns of these terms and to decide whether they have been respected or not. Consequently, Employment Courts are under threat of losing their main tasks of making legal determination in employment disputes. Courts in the reviewed Common Law countries are now limited to dealing with legally difficult questions that require legal expertise.

Complications could arise from the fact that members of the Authority are not professionally dealing with the law. The Employment Relations Authority has now

¹⁰⁰ Rossiter, 160

¹⁰¹ see for example: Ireland (85%) Labour Relations Commission Annual Report, 4 <
www.lrc.ie/images/lrc2000_4.pdf > or England (71%) ACAS Annual Report 20
<www.acas.org.uk/publications/pdf/ar2001_complete.pdf (last accessed 05/06/02)

abilities formally carried out by the Employment Court. I agree with Judge Colgan¹⁰² when expressing concerns about the fact that the Authority is dealing with relatively complex legal matters without having knowledge of at least general legal principles. Errors in the procedure could terminate the purpose of a speedy process and delay the whole settlement. In *Baguley v Coutts Cars Ltd*¹⁰³ the Authority decided that not revealing the criteria for choosing a certain person for redundancy is not bad faith. The determination has been challenged by the applicant in the Employment Court, which decided that the employer has not acted in good faith.¹⁰⁴ This relatively simple redundancy case was brought up to the Court of Appeal before a final decision was reached. Germany, in this aspect, could be a role model where the judge functions also as a Mediator. It is surely easier to train judges as Mediators than vice versa.

Without question the provision of natural justice, good faith and the investigation process are linked together in certain ways. It is most likely that a breach of good faith is also a breach of natural justice and vice versa. The most delicate of the Authority's power is the ability to investigate matters; errors are most likely to occur in connection with this power. Although the definition of natural justice is not entirely clear this term has a positive effect because it is flexible and will work as a safeguard. It will be a future task of the Employment Court to narrow down the term. In case the role of the Authority and the provision of natural justice are coming into conflict I would favour letting the provision of an informal and speedy proceeding prevail. Should the Authority not be successful in long term with a safeguard, in future such a safeguard could be omitted in order to achieve this goal. The German legislation contains the limitation that parties can only use findings they can provide directly during the hearing. This might be a fair and useful regulation to restrict the principle of natural justice in practice.

As early as in 1951 the International Labour Organisation (ILO) recommended (Recommendation No. 92) that industrial disputes are best settled in voluntary Conciliation machinery. The ILO has also recommended that such a system should be free of charge; otherwise especially employees would use the service only reluctantly. Common Law countries have adopted this idea and it is undoubtedly successful, in

¹⁰² Judge Colgan "comments on *Baguley v Coutts Cars Ltd*" (2002) 1 ELB 13,16

¹⁰³ *Baguley v Coutts Cars Ltd* (2001) 6 NZELC 96, 155

¹⁰⁴ *Baguley v Coutts Cars Ltd* [2002] 2 ERNZ 409, 410 (AC) per Goddard CJ

contrast to Germany where no governmental dispute resolution service is offered. A voluntary and free Conciliation service could improve the German labour relations.

Germany

Finally I would like to address the collective dispute resolution mechanisms that have been mentioned. Germany is the only country that is not offering a state dispute resolution service. One reason could be that in Germany unions do not bargain with single employers but only with employers' organisations. These agreements cover a huge amount of people because they are negotiated by area and industry. A single Mediator without legal or commercial background might not be able to deal with this responsibility. Industrial disputes and personal grievances are in this respect not comparable because the consequences for the economy are far more significant. Nonetheless, I think the solutions some countries offer are promising. For example, Ireland has shown the advantages of its service. The service is split between individual and collective disputes, whereas individual disputes concluding with a binding decision but collective disputes remain voluntarily. This model could also be used in Germany because the collective partners stay in control during the whole process and their independence is secured.

§54 conciliatory hearing

(1) The oral proceeding begins with a proceeding before the chairman for the purpose of a conciliatory agreement between the parties (conciliatory hearing). The chairman has for this purpose to examine the entire dispute with the parties by taking freely all circumstances into account. In order to detect the facts of the case he can take all actions that could be undertaken immediately. Examinations under oath are prohibited. The chairman can proceed the conciliatory hearing with agreement of the parties in a further appointment, which has to be taken place as soon as possible.

Basic Law

Article 92 [Court organisation] Judicial power is vested in the judges; it is exercised by the Federal Constitutional Court, by the federal courts provided for in this Constitution, and by the courts of the States [Länder].

Article 101 [Ban on extraordinary courts] (1) Extraordinary courts are inadmissible. No one may be removed from the jurisdiction of his lawful judge.

Ireland

Appendix I

Germany

Labour Court Code¹

§ 9 Allgemeine Verfahrensvorschriften

(1) Das Verfahren ist in allen Rechtszügen zu beschleunigen.

§9 general proceeding rules

(1) The process must be accelerated in all instances.

§ 54 Güteverfahren

(1) Die mündliche Verhandlung beginnt mit einer Verhandlung vor dem Vorsitzenden zum Zwecke der gütlichen Einigung der Parteien (Güteverhandlung). Der Vorsitzende hat zu diesem Zwecke das gesamte Streitverhältnis mit den Parteien unter freier Würdigung aller Umstände zu erörtern. Zur Aufklärung des Sachverhalts kann er alle Handlungen vornehmen, die sofort erfolgen können. Eidliche Vernehmungen sind jedoch ausgeschlossen. Der Vorsitzende kann die Güteverhandlung mit Zustimmung der Parteien in einem weiteren Termin, der alsbald stattzufinden hat, fortsetzen.

§54 conciliatory hearing

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Ireland

¹ translation by Patrick Moll

Industrial Relations Act 1990

24.—(1) There shall be a body to be known as the Labour Relations Commission to fulfil the functions assigned to it by this Act.

35.—(1) The rights commissioners shall operate as a service of the Commission and references to rights commissioners in the Industrial Relations Act, 1969, the Unfair Dismissals Act, 1977, and the Maternity Protection of Employees Act, 1981, shall be taken to be references to rights commissioners so operating.

42.—(1) The Commission shall prepare draft codes of practice concerning industrial relations for submission to the Minister, either on its own initiative or at the request of the Minister.

Code of Practice on Voluntary Dispute Resolution

2 – PROCEDURES

Where negotiating arrangements are not in place and where collective bargaining fails to take place, the following process should be put in place with which management and unions should fully cooperate in seeking to resolve the issues in dispute effectively and expeditiously:-

1. In the first instance, the matter should be referred to the Labour Relations Commission who will appoint an Officer from its Advisory Service to assess the issues in dispute.
2. The Labour Relations Commission Officer will work with the parties in an attempt to resolve the issues in dispute.
3. In the event that the issues in dispute are not capable of early resolution by the Labour Relations Commission intervention, an agreed cooling-off period shall be put in place. During the cooling-off period the Labour Relations Commission Advisory Service will continue to work with the parties in an attempt to resolve any outstanding issues. The Commission may engage expert assistance, including involvement of ICTU and IBEC, should that prove helpful to the resolution of any differences.
4. If after the cooling-off period all issues have been resolved, the Labour Relations Commission will disengage. Before disengaging, the Commission may make proposals to the parties for the peaceful resolution of any further grievances or disputes.
5. In the event of issues remaining unresolved after the cooling-off period, the Labour Relations Commission shall make a written report to the Labour Court on the situation. The Labour Court shall consider the position of the employer and the union and shall issue recommendations on outstanding matters.

England and Wales

Employment Tribunals Act 1996

18. (2) Where an application has been presented to an industrial tribunal, and a copy of it has been sent to a conciliation officer, it is the duty of the conciliation officer-
- (a) if he is requested to do so by the person by whom and the person against whom the proceedings are brought, or
 - (b) if, in the absence of any such request, the conciliation officer considers that he could act under this subsection with a reasonable prospect of success,

to endeavour to promote a settlement of the proceedings without their being determined by an industrial tribunal.

19. Industrial tribunal procedure regulations shall include in relation to industrial tribunal proceedings in the case of which any enactment makes provision for conciliation-

- (a) provisions requiring a copy of the application by which the proceedings are instituted, and a copy of any notice relating to it which is lodged by or on behalf of the person against whom the proceedings are brought, to be sent to a conciliation officer,
- (b) provisions securing that the applicant and the person against whom the proceedings are brought are notified that the services of a conciliation officer are available to them, and
- (c) provisions postponing the hearing of any such proceedings for such period as may be determined in accordance with the regulations for the purpose of giving an opportunity for the proceedings to be settled by way of conciliation and withdrawn.

The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2001 Schedule 1

Pre-hearing review

7. (4) If upon a pre-hearing review the tribunal considers that the contentions put forward by any party in relation to a matter required to be determined by a tribunal have no reasonable prospect of success, the tribunal may make an order against that party requiring the party to pay a deposit of an amount not exceeding £500 as a condition of being permitted to continue to take part in the proceedings relating to that matter.

Canada

Canada Labour Code

9. (1) A board is established, to be known as the Canada Industrial Relations Board.

(2) The Board is composed of

(a) a Chairperson, to hold office on a full-time basis;

(b) two or more Vice-Chairpersons, to hold office on a full-time basis, and any other Vice-Chairpersons, to hold office on a part-time basis, that the Governor in Council considers necessary to discharge the responsibilities of the Board;

(c) not more than six other members, of which not more than three represent employees, and of which not more than three represent employers, to hold office on a full-time basis;

(d) any other part-time members, representing, in equal numbers, employees and employers, that the Governor in Council considers necessary to discharge the responsibilities of the Board; and

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(e) any other part-time members that the Governor in Council considers necessary to assist the Board in carrying out its functions under Part II.

International Labour Organisation
Recommendation No. 52

I. Voluntary Conciliation

1. Voluntary conciliation machinery, appropriate to national conditions, should be made available to assist in the prevention and settlement of industrial disputes between employers and workers.

2. Where voluntary conciliation machinery is constituted on a joint basis, it should include equal representation of employers and workers.

3.

(1) The procedure should be free of charge and expeditious; such time limits for the proceedings as may be prescribed by national laws or regulations should be fixed in advance and kept to a minimum.

(2) Provision should be made to enable the procedure to be set in motion, either on the initiative of any of the parties to the dispute or ex officio by the voluntary conciliation authority.

4. If a dispute has been submitted to conciliation procedure with the consent of all the parties concerned, the latter should be encouraged to abstain from strikes and lockouts while conciliation is in progress.

5. All agreements which the parties may reach during conciliation procedure or as a result thereof should be drawn up in writing and be regarded as equivalent to agreements concluded in the usual manner.

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