New Zealand Journal of Industrial Relations, **25(3):** 303-315

Adjudication in the Employment Tribunal: Some Facts and Figures on Dismissal for Misconduct

Ian McAndrew *

The New Zealand Employment Tribunal has been up and running for nine years under the Employment Contracts Act 1991, but is now approaching closure. It has operated as an accessible and functional "storefront" tribunal for the settlement of employment disputes, some criticism of creeping legalism, formality and expense in the adjudication function notwithstanding. The fact that the Tribunal has provided both mediation and adjudication processes through its Members made it a relatively rare species among industrial and employment tribunals throughout the world, and a valuable "laboratory" for the study of dispute resolution.

The New Zealand Labour-Alliance coalition government, elected in late 1999, has signalled the end of the Employment Tribunal with the implementation of the new Employment Relations Act 2000. The new law has an intended focus on the enhancement and preservation of employment relationships and a more emphatic reliance on a range of mediation services to achieve those objectives. For a number of reasons, much of the Employment Tribunal's work under the Employment Contracts Act has consisted of mediating or adjudicating the terms of dissolution of employment relationships that had gone awry, with only relatively limited opportunities to intervene for the preservation of employment relationships.

The new government has determined as a matter of policy to change that emphasis, and has elected to do so by the creation of a wide-ranging mediation service within the Department of Labour, backed by the investigation and determination processes of the new Employment Relations Authority and somewhat revised functions for the Employment Court. While there have been changes in philosophy, grievance and rights disputes processes, and institutions, the substance of the law relating to grievances, contractual rights and their enforcement has not been subject to a major shift in the new legislation.

In the wake of the new legislation, the Employment Tribunal is not quite dead and buried yet. Indeed, it continues to function at pretty close to full pace and will do so for some time to come. Under s.249 of the Employment Relations Act, the "permanent" Tribunal

* Ian McAndrew is a senior lecturer in industrial and employment relations at the University of Otago. He has been a Member of the Employment Tribunal since 1993, and has recently been appointed Chief of the Tribunal. The views expressed here are, however, his personal views only. He is grateful to the New Zealand Law Foundation for continued funding support for the research reported here, and to Nancy Benington for legal research assistance.

remains in office until the end of January 2001 continuing to determine matters that are within its jurisdiction – which is to say, in broad terms, employment relations difficulties that arose before October 2, 2000 – in the same manner as it has done in the past. Even beyond January 2001, however, under s.250 of the new law the Tribunal is to continue through "temporary" Members to determine matters that are within its jurisdiction and formally filed with it by June 30, 2001.

Quite a number of Members who were serving on the Tribunal when the Employment Relations Act 2000 was passed into law were appointed to either the new mediation service or as Members of the Employment Relations Authority, thereby at least temporarily slowing the work of the Tribunal. Departing Members have now been largely replaced by new temporary Members, who join a core of Members continuing from the "permanent" Tribunal.

With a substantial case load already awaiting determination, and the requirement to accept case filings until the middle of 2001, it is presently expected that the Tribunal will continue to hear and determine cases in mediation and adjudication until early 2002. The Employment Relations Authority may act in the name of the Tribunal under s.252 of the Employment Relations Act, and it could be anticipated that the Authority will commence to do so in a final "mopping up" capacity once the Tribunal has determined essentially all cases commenced under the Employment Contracts Act.

The database of decisions

A database of Employment Tribunal adjudication decisions (and Employment Court judgments) has been under continuous construction at the Industrial Relations Research Centre of the Department of Management at the University of Otago since 1995. In recent years, the New Zealand Law Foundation has provided generous financial support to the project, allowing for the accelerated development of a more comprehensive database.

The database of employment decisions begins with the case summaries published by the Department of Labour's Employment Institutions Information Centre and made available as a part of the *Brooker's* employment law package. Having extracted the data from those summaries, our research staff then examine the decisions themselves for data on additional variables.

The variables captured for the database are in several categories: the issues involved in the case; characteristics of the parties, including gender, occupation, industry, and representation; characteristics of the Tribunal adjudicator, hearing and decision, including for example the gender of the adjudicator, location and length of the hearing, and length of the decision; and various measures of the outcomes of the cases – who won, who lost, and the nature of remedies awarded, if any.

A number of academic and practitioner papers have issued from this project to date, including the first "facts and figures" report published in the corresponding issue of the *New Zealand Journal of Industrial Relations* in 1999 (McAndrew, 1999). In that paper, relying on data for the years 1992 through 1997, I reported on the general profile of the Tribunal's caseload and detailed outcomes for personal grievance cases, highlighting factors – including the nature of representation – that appeared to be associated in one manner or another with grievance outcomes.

The intent of this present report is to share some further, updated data on Tribunal decisions with the industrial relations and employment law community, illustrating the range of case issues being decisioned by the Tribunal, and highlighting some apparent trends and associations. The particular focus of this paper is the body of Tribunal adjudication decisions on personal grievance claims over dismissals for alleged misconduct. But first, the general profile.

The Tribunal's adjudication workload

Table One sets out the Tribunal's caseload profile. The sample for this table consists of all adjudication decisions issued by the Tribunal for the years 1992 through 1999 inclusive. The categorisation is by the primary subject of the application only.

As might be expected, substantive personal grievance claims make up the largest category of adjudication cases in the Tribunal, accounting in *Table One* for 42 percent of decisions issued. The popular perception is that an even higher percentage of the workload of the Tribunal is taken up with personal grievance claims and that is undoubtedly true. The grievance proportion of cases resolved in the Tribunal's mediation jurisdiction would certainly be higher.

In addition, many of the other decision categories in *Table One* include preliminary, interrogatory or supplementary matters related to a primary personal grievance claim. Most obviously, a proportionate number of costs decisions would derive from personal grievance claims, but so too would many of the decisions categorised in *Table One* under such headings as Jurisdiction, Remedies, Discovery, Rehearing, Removal, Stay, Strike Out, Compliance, Consent, Submission, and Practice and Procedure.

There are some changes evident from the corresponding table of 1992 – 1997 decisions published same time last year. On a base of six years of decisions (about 5,300), even a quite small change in the overall percentage breakdown of cases with the addition of the decisions for a further two years (1998 and 1999) may be indicative of a developing trend.

Table One: Type of Adjudication Case 1992-1999

Type of Adjudication Case	*Frequency*	*Percent*
Personal Grievance: Duress and Miscellaneous	8	0.1
Personal Grievance: Sexual Harassment	32	0.4
Personal Grievance: Unjustified Disadvantage	134	1.9
PG: Dismissal: Constructive Dismissal	502	7.0
PG: Dismissal: Misconduct	855	11.9
PG: Dismissal: Poor Performance	459	6.4
PG: Dismissal: Redundancy	587	8.2
PG: Dismissal: Other	453	6.3
Apprenticeships	5	0.1
Arrears (Wages)	715	10.0
Arrears (Holiday Pay)	184	2.6
Costs	1502	21.0
Dispute	140	1.9
Jurisdiction	133	1.9
Parental Leave	9	0.1
Penalty	25	0.3
Remedies	34	0.5
Application for Discovery	61	0.9
Application for Rehearing	55	0.8
Application for Removal Order (to EC)	174	2.4
Application for Stay	37	0.5
Application to Strike Out Proceeding	83	1.2
Compliance Order	253	3.5
Consent Order	276	3.8
Submission of Grievance	202	2.8
Practice & Procedure (Other)	253	3.5
TOTAL	7170	100.0

One thing that is apparent is a decline in adjudicated decisions on personal grievance claims alleging unjustified dismissal for alleged misconduct as a percentage of both dismissal claims and personal grievance claims more generally. For 1992 – 1997, Tribunal decisions on misconduct dismissals accounted for 31.4 percent of dismissal case decisions. With the inclusion of data for 1998 and 1999, dismissal cases accounted for only 29.9 percent of dismissal claims adjudicated.

There was only a much smaller decline in performance dismissal decisions as a percentage of the total with the addition of the 1998 and 1999 data, and a small proportional increase in redundancy dismissals. The "dismissal – other" category has seen an increase from 13.0 percent of dismissal decisions through 1997 to 15.9 percent of dismissal decisions through 1999. This category includes dismissals for incapacity by way of illness or injury, for absence without leave, for breach of trust and confidence, and for incompatibility, among other reasons, and the increase is diffused among them, though trust and confidence is prominent. The noteworthy change, though, was in misconduct dismissal decisions, and this paper takes up that theme a little later after the presentation of more general, summary profile data on the Tribunal's adjudication output.

Grievance outcomes

How parties fare in the Tribunal is always of interest to both practitioners and scholars. To explore this, I will, for clarity of analysis and presentation, limit the sample to just the substantive personal grievance decisions issued by the Tribunal in the years 1992 through 1999 inclusive. Those decisions – again just on the primary grievance claim in each application – number 3,217.

As I noted in the corresponding piece last year, in the adjudication of a personal grievance claim, and perhaps particularly in the case of a dismissal claim, there are sometimes many points of substance or procedure or even jurisdiction encompassed within the overall question of whether the employer's action in dismissing or disadvantaging the employee was one that was justifiable in all the circumstances. A party can, then, "win" a personal grievance case without necessarily *wholly* winning the case. Cases where a successful grievant's remedies are reduced for contributory misconduct would be an obvious example. So a "win" in a personal grievance case may be a matter of degree rather than a matter of absolutes.

For the purpose of our analysis, a successful outcome for the employee – a "win" – consists of a decision by the Tribunal that the employee has a personal grievance. Defined in these terms, *Table Two* shows the success rate for personal grievants for the years 1992 through 1999 inclusive.

Table Two: Grievance Outcomes 1992 – 1999

Grievance Outcomes	*Frequency*	*Percent*
Grievant Won	1978	61.5
Grievant Lost	1239	38.5
TOTAL	3217	100.0

What is of interest here, and evident by contrasting *Table Three*, reproduced from the corresponding paper in 1999, is the decline in the success rate of personal grievants.

Table Three: Grievance Outcomes 1992 – 1997

Grievance Outcomes	*Frequency*	*Percent*
Grievant Won	1420	64.3
Grievant Lost	788	35.7
TOTAL	2208	100.0

Again, I will return to this theme of declining success rates for grievants or applicants in due course, particularly in relation to claims surrounding dismissals for misconduct, where the trend seems quite marked.

In an adjudication case where the applicant has been successful to the extent of a finding that he or she has a personal grievance, then remedies are likely to follow.

The available remedies, depending on circumstances, are reinstatement of the applicant to a job, reimbursement of lost remuneration, compensation for loss of tangible benefits, and compensation for humiliation, loss of dignity and injury to feelings. The outcome of a case can be measured in terms of any or all of these remedies, in addition to being measured on the straight "win – lose" dimension represented by *Tables Two* and *Three*.

Table Four: Compensation for Humiliation, Loss of Dignity and Injury to Feelings 1992 – 1999

Level of Compensation	*Frequency*	*Percent*
No Compensation Awarded	318	16.1
Up to $5000	1147	58.0
Between $5000 and $10000	398	20.1
Over $10000	115	5.8
TOTAL	1978	100.0

Of the available remedies, compensation for humiliation, loss of dignity and injury to feelings is, at least in some respects, the most useful measure of decision outcomes, both because it is almost universally sought by grievants and it is arguably the remedy over which the Tribunal has the greatest discretion.

Table Four shows the distribution of compensation awards under this head to grievants successful in winning their cases in adjudication in the years 1992 through 1999. The major movement from the data published last year for decisions issued from 1992 through 1997 was an increase in the percentage of successful grievants awarded no compensation from 12.6 percent for the period to 1997 up to the 16.1 percent figure when 1998 and 1999 decisions are added.

A closer look at dismissal decisions

The sense that applicants are doing less well as time goes by is confirmed by looking at the percentages of adjudication decisions of all types won by applicants over the years: 69.7 percent in 1992, 63.9 percent in 1993, up a bit to 66.5 percent in 1994, but thereafter a gradual but consistent slide: to 59.7 percent in 1995, then 58.7 percent in 1996, 56.9 percent in 1997, 55.1 percent in 1998, and finally 54.0 percent in 1999. Interestingly, figures for 2000 indicate a reversal in this trend, although the entries in the database for this year are obviously yet to be completed.

The extent of the decline over time naturally raises the question why it is happening. I am not yet in a position to give any real answers to that question, but it is interesting to examine the phenomenon in a little more detail.

Last year's report looked at factors that appeared to be statistically associated with personal grievance outcomes – personal grievances being the largest part of the Tribunal's caseload

– and found that the variable that was the best predictor of the win – lose outcome was the nature of the grievance. So, in looking for more detailed trends, that would seem to be the place to start. *Table Five* shows grievance outcomes by type of grievance for the years 1992 – 1997, borrowed from last year's paper, set alongside the same figures but with the numbers for 1998 and 1999 incorporated, so 1992 – 1999.

Table Five: Grievance Outcomes by Type of Personal Grievance

		Grievance Outcomes 1992 -1997		Grievance Outcomes 1992 -1999	
Type of Personal Grievance		*Win*	*Lose*	*Win*	*Lose*
Dismissal:	Count	174	198	232	268
Constructive Dismissal	Percent	(46.8%)	(53.2%)	(46.4%)	(53.6%)
Dismissal:	Count	416	239	511	340
Misconduct	Percent	(63.5%)	(36.5%)	(60.1%)	(39.9%)
Dismissal:	Count	303	62	373	85
Poor Performance	Percent	(83.0%)	(17.0%)	(81.4%)	(18.6%)
Dismissal:	Count	302	121	408	179
Redundancy	Percent	(71.4%)	(28.6%)	(69.5%)	(30.5%)
Dismissal:	Count	168	104	281	169
Other	Percent	(61.8%)	(38.2%)	(62.4%)	(37.5%)
Other Personal Grievance	Count	57	64	84	87
	Percent	(47.1%)	(52.9%)	(49.7%)	(50.3%)

What is apparent on the face of *Table Five* is that the success rate for grievance applicants has declined with the addition of the 1998 and 1999 case decisions in each of the three major dismissal case categories that come before the Tribunal – dismissals for misconduct, dismissals for poor performance, and dismissals for redundancy. Of these, the most marked decline with the addition of case decisions for the last two complete years is in the category of dismissals for misconduct, which is also the largest category in terms of numbers of dismissals, as it has been throughout the life of the Tribunal. Against a base of over 400 case decisions for applicants in the period through 1997, an overall decline in the success rate of almost 3.5 percentage points over an additional two years is quite significant.

For completeness, *Table Six* sets out the distribution of compensation awards for successful grievants for the full period 1992 through 1999. The addition of case data for 1998 and 1999 causes no marked changes in the patterns that were reported last year through 1997, and so the discussion of compensation won't be taken any further in this report.

Table Six: Compensation for "Humiliation, Loss of Dignity, and Injury to Feelings" by Type of Grievance, 1992-1999

		Level of Compensation			
Type of Personal Grievance		*None*	*Up to $5000*	*$5001 - $10000*	*Over $10000*
Dismissal:	Count	35	127	57	13
Constructive Dismissal	Percent	(15.1%)	(54.7%)	(24.6%)	(5.6%)
Dismissal:	Count	68	307	105	31
Misconduct	Percent	(13.3%)	(60.1%)	(20.5%)	(6.1%)
Dismissal:	Count	34	244	78	17
Poor Performance	Percent	(9.2%)	(65.0%)	(20.9%)	(4.6%)
Dismissal:	Count	43	243	96	26
Redundancy	Percent	(10.5%)	(59.0%	(23.5%)	(6.4%)
Dismissal:	Count	37	178	52	14
Other	Percent	(13.2%)	(63.3%)	(18.5%)	(5.0%)
Other Personal Grievance	Count	14	46	10	14
	Percent	(16.7%)	(54.8%)	(11.9%)	(16.7%)

Focusing on misconduct dismissal decisions

As noted above, case decision data for each of the three major bases of dismissal have shown a decline in grievant success rates. *Table Seven* demonstrates that this has been pretty consistently true throughout the life of the Employment Tribunal, again most dramatically in the case of dismissals for misconduct. While grievant wins have trended downward on a slightly rocky road over time in the cases of dismissals for poor performance and redundancy, wins by applicants grieving their dismissals for misconduct have dropped quite markedly in several dramatic steps, falling fully 30 percentage points over the period from 1992 through 1999.

Grievants enjoyed a high of some 77 percent success in grieving misconduct dismissals in the first full year of the Tribunal, 1992. In approximate figures, this dropped by about 10 percentage points to the mid-60s percent in 1993 – 1994, and then by about another five percentage points to 60 percent for the following two years, 1995 – 1996, and then another drop of about 10 percentage points to around 50 percent for the two years after that, 1997 – 1998, and finally another five percent drop to the mid-40s percent in 1999; more than 30 percentage points in seven years.

Table Seven: Employee Win Rate by Reason for Dismissal 1992-1999

Reason for Dismissal	1992	1993	1994	1995	1996	1997	1998	1999
Dismissal: Misconduct	64 77.1%	78 66.1%	96 65.8%	65 60.2%	68 60.7%	45 51.1%	50 50.5%	45 44.6%
Dismissal: Poor Performance	51 92.7%	59 85.5%	59 80.8%	55 76.4%	34 73.9%	46 90.2%	40 76.9%	29 70.7%
Dismissal: Redundancy	48 76.2%	41 70.7%	69 75.8%	48 63.3%	49 75.4%	47 67.1%	54 65.1%	51 63.8%

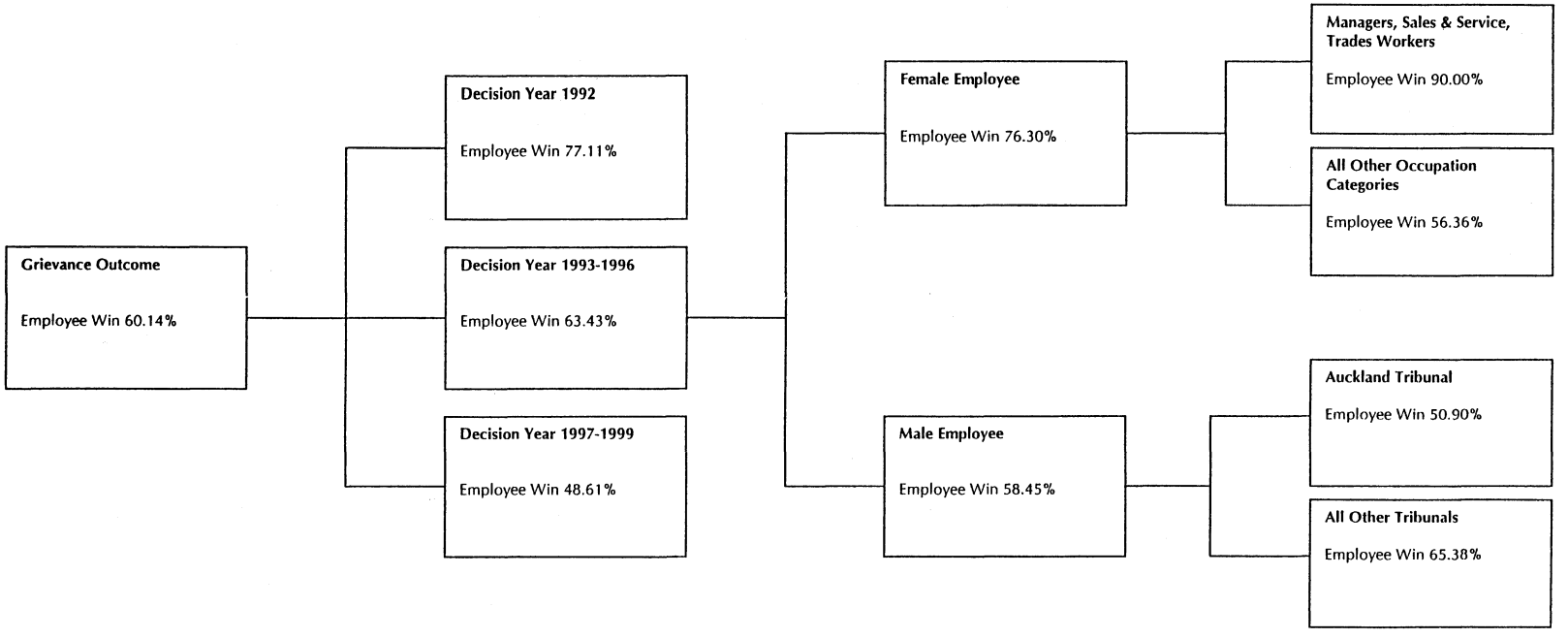
The decline in grievant success rates over time holds true for most, but not all, of the several sub-categories of the "misconduct" category in the database, and the fall is more dramatic in some sub-categories than in others. "Disobedience" offences have seen the most substantial decline in win rates for grievants, falling in a reasonably straight line from 76 percent success in 1992 to 50 percent in 1995 to 40 percent in 1997 to about 30 percent in 1998 and to slightly under 20 percent in 1999. At the other extreme, there have been some relatively minor variations year to year in success rates for applicants grieving dismissals for alleged theft offences, but no substantial change over the life of the Tribunal. Workers grieving their dismissals for theft had a success rate of 56 percent in Tribunal adjudications in 1992, a success rate of 54 percent in 1999, and an overall success rate for the period of 59 percent.

Looking for explanations

In presenting last year's paper, I reported the results of regression analyses which tested for statistically significant associations between certain case variables associated with case types, representation factors, the parties, and the adjudicator and hearing details as independent or causal variables and case outcomes as dependent variables. As previously noted, at least for personal grievances, of the variables in the data base, case type showed up as the most powerful predictor of win – lose outcomes. (It is noted, of course, that there is no measure of the substantive merits of the case in our database, so our analyses largely disregard the most important determinant of the outcome of a case). In any event, for the present report, similar regression analyses were run for just the misconduct dismissal cases.

A regression analysis is a statistical technique that can divide a sample (such as grievance outcomes) first according to the variable (occupation of grievant, whether represented by a lawyer or by a lay advocate, the length of the hearing, and so on) that is statistically most strongly associated with the outcomes. The analysis then goes on to separate each sub-sample created by that first division into still smaller sub-samples according to the variable that is statistically next most strongly associated with the outcomes in each subsample.

Figure One: Predictors of Grievance Outcomes, Misconduct Grievances 1992 – 1999



The process continues until all variables associated with the outcomes have been recognised. For the present report, the regression technique was applied to the sample of win – lose outcomes in unjustified dismissal personal grievance adjudications for the years 1992 – 1999, where the reason for dismissal was misconduct.

This regression analysis endorsed what was apparent from the frequencies. As is figuratively represented in *Figure One*, outcomes were statistically associated with year of decision. The statistical package found the years 1993 through 1996 to be sufficiently similar in win–lose outcomes for dismissal adjudication decisions involving dismissals for misconduct to be grouped together, but, as a group, sufficiently dissimilar as to be distinguished from 1992 and also from the period 1997 through 1999. In other words, there were three statistically distinguishable periods in terms of applicant success rates in dismissal for misconduct grievances, with the rate of success diminishing in each successive period. It is noteworthy in looking at *Figure One*, and consistent with the analysis in last year's report, that there were further explanatory factors seemingly associated with outcomes in the middle period, 1993 through 1996. While there are, as again discussed in last year's paper, many possible explanations for the apparent associations with those factors, it is at least a less complicated picture now that those influences are no longer apparent in the years beginning 1997.

Concluding comment

This paper has presented an update on the Employment Tribunal's adjudication case profile and the outcomes for parties in the Tribunal's "bread and butter" personal grievance caseload.

Among the principal findings was a gradual decline in applicant success rates in the Tribunal's adjudication jurisdiction. Focusing on personal grievances, it was seen that applicant success rates had dropped over the life of the Tribunal for the three major types of personal grievance dismissal cases: those alleging unjustifiable dismissal for reasons of misconduct, poor performance, and redundancy. In the case of dismissals for misconduct, grievant success rates were seen to have fallen by about 30 percentage points in a series of dramatic steps between 1992 and 1999, although there is a hint on incomplete figures that this may have turned around somewhat in the year 2000.

Regression analysis of case variables against outcomes in misconduct cases confirmed the changing fortunes of the parties over time, but offered few other clues as to why applicant success rates have been in such consistent decline. Of course, that does not mean that there are not explanations; only that the explanations are not available in the case decision data that we keep and that are the subject of this research note.

Over the period of existence of the Tribunal, there have been changes in influential Court personnel, and in Tribunal Membership, and some shifts in the political winds. Perhaps relatedly, there have been a number of particularly significant case decisions during the

past decade that trained observers might see as turning points, and a matching of these seminal cases to the pattern of the data, while beyond the scope of this note, might be illuminating. In terms of explanations for the phenomenon of declining applicant success rates there remains also the unmeasured factor of the merits of applicants' cases, and the possibility that the general level of relative merits of cases coming before the Tribunal in adjudication might have changed over time as, for example, employers become more knowledgeable about employees' rights and due process.

One suspects that the explanations for declining applicant success rates, particularly dramatic declines of the magnitude observed in misconduct dismissal cases, are to be found in these sorts of factors. No obvious explanations are apparent in the raw case data.

Reference

Bartlett, Philip et. al. (eds) (2000), *Brooker's Employment Law* Wellington: Brooker's Limited.

McAndrew, Ian (1999), Adjudication in the Employment Tribunal: Some Facts and Figures on Caseload and Representation. *New Zealand Journal of Industrial Relations*, **24(3):** 365-382.