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Determinations of the Employment Relations Authority[1]

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The focus of this research note is the decisions or "determinations" of the Employment Relations Authority (the Authority) under the Employment Relations Act 2000 (the ERA). But the note also takes a look back to the adjudication decisions of the Employment Tribunal (the Tribunal) to examine whether the switch to the Authority and the change of legislation from the Employment Contracts Act 1991 (the ECA) have made any difference to decision outcomes and remedies in the employment jurisdiction. Some very preliminary comparative analysis was presented in McAndrew (2001), but the present paper takes the comparison much further.

For the past decade, a database of Employment Tribunal decisions has been under constant construction at the Industrial Relations Research Centre of the University of Otago Business School. The database records the details of all Tribunal adjudication decisions.

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 type of representation; characteristics of the Tribunal adjudicator, hearing and decision, including for example the gender of the adjudicator, location of the hearing, length of the hearing, Tribunal registry, and length and legal complexity of the decision; and various measures of the outcomes of the cases – who won, who lost, and the nature of remedies awarded, if any.

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The Employment Institutions Information Centre of the Department of Labour generously provided comparable data on Authority determinations. That sample consisted of all determinations issued by the Authority in the first 18 months of its existence. So the Authority sample for the paper consists of the 624 determinations issued by the Authority from the inception of the Authority through April 2, 2002.

For comparison purposes, the Tribunal sample is all adjudicated decisions issued by Tribunal Members in the 18 months to September 30, 2000. That represents the final year and a half of the "permanent" Tribunal, before some Tribunal Members moved to the Authority and were replaced on the Tribunal by temporary Members. The makeup of the Tribunal was quite different thereafter, and the overall decision profile of the Tribunal was also quite different than it had been. The Tribunal sample numbers 1,566 issued decisions for the 18 month period.

For the balance of the paper, the data will be presented largely in percentage terms. This allows for a more direct comparison between the two institutions than would drawing raw numbers from two samples of such significantly different sizes. In sheer numbers of decisions, the adjudication output of the Tribunal was almost exactly two and one half times the determination output of the Authority for the 18 month sample periods. For readability, figures will be rounded to the nearest whole number, so percentages may not always sum to precisely 100.

The Authority and Tribunal caseloads

The difference in decision numbers notwithstanding, the caseload of the Authority does not look much different to that of the Tribunal before the ERA. Fifty seven percent of determinations were issued by the Authority's Auckland registry, 23 percent were issued by the Wellington registry, and 20 percent were issued by the Christchurch registry. Those figures virtually mirrored the Tribunal figures (incorporating the Hamilton and Dunedin registries with Auckland and Christchurch respectively). One third of Authority determinations have been issued by female Authority Members, two thirds by male Authority Members, and that is about proportionate to the numbers of female and male Members[2]. Precisely the same was true in the Tribunal sample.

While there have been some changes around the edges, the essential shape of the institutions' caseload, in terms of the types of cases being heard and decided, remains

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[2] The gender makeup of the Authority has altered somewhat over the last 18 months. It commenced operation with 13 Members, five of whom were women with one of them on parental leave. Over time, two of the women (including the one on parental leave) resigned, two additional appointments were made (both male), and just recently three further appointments have been made, including two women. Accordingly, there are now 14 Members, five of whom are women.

largely the same, as illustrated in Table One. A number of speculations could be made about different aspects of the table. One suspects, for example, that with expanded resources the Mediation Service is doing a more effective job in tidying up wage arrears, and even fewer of those are going to formal determination now than was so during the Tribunal era. The reduction in cost decisions presumably reflects a different approach to dealing with costs in the Authority.

The interim injunction numbers obviously reflect a new jurisdiction, but in other respects – bargaining cases or union access, for example – the expanded jurisdiction of the Authority over the Tribunal hardly registers on the radar screen.

Table One: Proportion (%) of cases by primary issue

	Tribunal	Authority
Arrears of wages & holiday pay	11%	7%
Compliance orders	2	4
Costs	23	15
Disputes	2	6
Personal grievances – dismissal	42	42
Personal grievances – disadvantage	3	2
Interim injunctions	0	4
Preliminary issues, practice, procedure	15	18
Other matters	1	2

Stripped of preliminary and procedural issues, and of followup costs decisions, the substantive work of the Authority remains largely focused on unjustifiable dismissal personal grievances, as was the case for the Tribunal, both during our sample period and indeed throughout its existence.

Given the continuing preponderance of personal grievance cases, for the balance of this research note the focus will largely be on personal grievances. Before moving to that focus, however, it is worth recording the outcomes for the Authority's broader caseload. As is evident in Table Two, the outcome pattern has changed in only small ways in the new institution, and not in any statistically significant way.

Table Two: Employee success rates (%) by primary issue (major case categories only)

	Won	Lost	No Advantage
Arrears of wages, holiday pay			
Tribunal	88%	11%	1%
Authority	79	17	5
Compliance orders			
Tribunal	82	13	5
Authority	80	20	0
Disputes			
Tribunal	34	59	6
Authority	49	51	0
Personal grievances			
Tribunal	58	42	0
Authority	58	42	0
Preliminary issues, and practice and procedure			
Tribunal	38	37	25
Authority	32	36	32

The personal grievance profile

During the sample 18 month periods, excluding purely preliminary matters and separate costs awards, the Tribunal issued 748 personal grievance decisions and the Authority issued 279. Those are the sample numbers on which the following discussion is based. Table Three provides a profile of the grievance caseloads, set out by grievance type.

The geographical spread was similar to that for the broader caseloads of the institutions. There is a continuing, gradual northward shift of the grievance caseload. For the Authority, 58 percent of grievance determinations were issued from the Auckland registry, whereas Auckland and Hamilton accounted for 54 percent of the Tribunal grievance output during the sample period. The Wellington Authority issued 24 percent of the grievance determinations (25 percent in the Tribunal), and the Christchurch Authority issued 18 percent (down from 21 percent for the Christchurch and Dunedin Tribunals).

Table Three: Proportion (%) of cases by nature of primary grievance

	Tribunal	Authority
Dismissal: misconduct	25%	34%
Dismissal: performance	8	4
Dismissal: redundancy	20	21
Dismissal: constructive	15	15
Dismissal: all others*	25	22
Dismissal: all cases	**93**	**96**
Disadvantage	6	4
All other grievances	1	0

* This category includes cases where the primary issue involved proper submission of the grievance, the existence of an employment contract, or whether (other than in constructive dismissal cases) a dismissal occurred, as well as including grievances protesting dismissals for reasons other than misconduct, performance or redundancy.

As might have been expected, though, some of the logistics have changed. In the Tribunal, 68 percent of grievance hearings took no more than one day, and 86 percent were over in two. In the Authority, 95 percent of grievance investigation meetings are over in two days, and 77 percent in one day.

Eighty six percent of Authority grievance determinations fit into 10 pages or less, whereas by contrast, only 45 percent of Tribunal grievance decisions were 10 pages or less.

As for the parties to grievance proceedings, 54 percent of grievance applicants to the Authority were male, down slightly from 61 percent of Tribunal grievants. Table Four sets out the major categories of party representation. The figures show a small but perceptible, and perhaps predictable, movement towards self-representation, mainly amongst applicants, seemingly at the expense of lay advocates. Certainly there is no lessening of the use of lawyers in the Authority, proportionally speaking, relative to their involvement in the Tribunal adjudication process under the ECA.

Table Four: Proportion (%) of grievance cases by party representation

	Self Represent	Lawyer	Advocate	No Show
Employee Rep				
Tribunal	5%	67%	28%	<1%
Authority	12	67	21	<1
Employer Rep				
Tribunal	5	70	20	5
Authority	7	68	16	8

Table Five illustrates that there has been a change in the overall profile of grievants bringing cases for determination by the Authority, by comparison with grievants going through to adjudication in the Tribunal.

Table Five: Proportion (%) of grievance cases by applicant occupation*

	Tribunal	Authority
Aggregate Categories		
Managers, Supervisors & Administrators	23%	25%
Professionals, Technicians & White Collar Workers	24	35
Sales & Service Workers ("Pink Collar Workers")	23	15
Blue Collar Workers (Trades, Plant, Miscellaneous)	30	23
Summary Categories		
Managers, Supervisors, Administrators, Professionals, Technicians & White Collar Workers	47	60
Pink Collar & Blue Collar Workers	53	38
Sectors		
Public Sector	10	11
Private Sector	90	89

* The applicant category "Unions, employee organizations or mixed occupations" (less than 1% of Tribunal grievance applications and 2% of Authority grievance applications) has been excluded from this table, and the percentages calculated as proportions of the sum of all other personal grievance applications decided.

Table Five presents aggregate and summary categories for indicative purposes by collapsing the many more specific occupations in the standard classification of occupations used by Statistics New Zealand.

There were some corresponding changes in the industry makeup of respondent employers. Most noticeably, only 22 percent of grievance respondents in the Authority were in the wholesale and retail trade and restaurants and hotels sector, compared with 38 percent of respondents from this sector in the earlier Tribunal period. The most significant increases in respondents were in the community, social and personal services sector, the finance, insurance, real estate and business services sector, and the utilities sector.

Grievance outcomes

How parties fare in the Authority, and whether they are doing "better" or "worse" under the ERA, are naturally of interest to both practitioners and scholars, as are indications of what factors seem to make the difference between winning and losing.

In the adjudication or determination of a personal grievance 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 (or not) an employee was justifiable in all the circumstances. A party can, then, "win" a grievance case without *wholly* winning the case.

Perhaps the most obvious example would be where the applicant employee is found to have been unjustifiably dismissed, but to have contributed to the situation in such a way and to such an extent that the remedies to the applicant are required to be reduced. So a "win" in a personal grievance claim is often a matter of degree rather than a matter of absolutes.

For the purposes of analysis here, a successful outcome for the employee – a "win" – consists of a finding by the Authority or the Tribunal that the employee has a personal grievance. With that definition, "no advantage to either party" outcomes are negligible in number in grievance cases and, so, are omitted from the rest of the analysis. Grievant success rates recorded below are presented as percentages of the total "win" and "lose" outcomes only.

Frequency tabulations essentially record history while statistical correlations record patterns in the historical relationships between variables. Neither are necessarily statistically significant or useful predictors of the future. But they are, nonetheless, interesting to observe. For example, Table Six shows the employee success rates for personal grievants by institution and registry for the 18 months sample periods.

Table Six: Grievant success rates (%) by institution and registry

	Auckland (incl Hamilton Tribunal)	Wellington	Christchurch (incl Dunedin Tribunal)	Overall
Employee won				
Tribunal	53	57	68	57
Authority	50	70	66	58

As indicated earlier, in both the Tribunal and the Authority female Members issue about one-third of the decisions, as might be expected from the relative numbers of female and male Members. Earlier reports have seen gender surface occasionally as a factor seemingly associated, under some limited circumstances, with adjudication outcomes (see Morris, 1996; McAndrew, 2000; McAndrew, Dowling and Woodward, 1997-98). This has rarely been borne out at a statistically significant level.

Table Seven shows employee success rates by institution, and by adjudicator and applicant gender. There are some differences by adjudicator gender that are consistent across the two institutions, but again these are historical patterns and not necessarily reliable predictors for the future. The patterns are not further accentuated by crossing adjudicator and applicant gender. Female applicants had marginally better success rates with both male and female adjudicators.

Table Seven: Grievant success rates (%) by institution and gender

	Adjudicator Gender		Grievant Gender	
	Female	**Male**	**Female**	**Male**
Tribunal	51	60	60	56
Authority	49	62	62	53

Table Eight shows employee success rates by representation. There are no remarkable patterns other than the improved performance of grievants in the Authority, by comparison with the Tribunal, where either the grievant or the respondent employer chose to self-represent.

Table Eight: Grievant success rates (%) by institution and representation

	Grievant Representation			Respondent Representation			
	Self-Rep	Lawyer	Advoc	Self-Rep	Lawyer	Advoc	No-Show
Tribunal	40	59	59	73	53	58	100
Authority	64	57	55	83	50	56	95

It will have been apparent from Table Five that, in terms of occupational profile, the personal grievant clientele of the Authority has changed a little from that of the Tribunal's adjudication jurisdiction. In the Authority, "pink collar" and "blue collar" workers together represent just 38 percent of grievants, whereas they were 53 percent of grievants in the Tribunal's adjudication jurisdiction. As a group, managerial and supervisory staff, together with professional, technical and white collar workers now represent 60 percent of grievants whose cases are decided by the Authority, with each of those sub-groups other than managers having greater representation before the Authority than before Tribunal adjudicators.

What this might suggest is that blue and pink collar workers are more amenable to settlement of their grievances by negotiation or mediation under the ERA mix of procedures, while white collar workers, including managerial and professional staff, are more inclined to want – or at least more likely to get – an investigation and determination from the Authority.

As is evident in Table Nine, managers, supervisors and administrators also appear to have fared better in the Authority than they did in the Tribunal, in terms of grievance outcomes. There are, on the other hand, no clear patterns of grievant success, or changes in grievant success rates between the Tribunal and the Authority, by industry of the respondent employer.

Table Nine: Grievant success rates (%) by institution and occupation

	Managers, Super-visors & Admin	Profess, Tech & White Collar	Pink Collar Workers	Blue Collar Workers
Tribunal	55	58	55	59
Authority	70	52	60	52

Table Three set out the distribution of Tribunal decisions and Authority determinations by the nature of the grievances. Table Ten sets out grievant success rates in the two institutions by the nature of the grievances. The numbers, in both the Tribunal and Authority samples, are essentially consistent with the broad pattern of grievant success

in the Tribunal during the decade of the 1990s. The one exception would be the relatively sharp drop in applicant success rates in constructive dismissal cases coming before the Authority for determination.

Table Ten: Grievant success rates (%) by primary grievance issue

	Tribunal	Authority
Dismissal: misconduct	57%	54%
Dismissal: performance	71	70
Dismissal: redundancy	68	70
Dismissal: constructive	48	33
Dismissal: all others*	55	68
Dismissal: all cases	**58**	**58**
Disadvantage	53	50
All other grievances	41	N/A

* This category includes cases where the primary issue involved proper submission of the grievance, the existence of an employment contract, or whether (other than in constructive dismissal cases) a dismissal occurred, as well as including grievances protesting dismissals for reasons other than misconduct, performance or redundancy.

Finally, before turning to examine the data for any statistically significant relationships that might allow for some real predictability in grievance outcomes, it is appropriate to set out the distribution of primary financial remedies to successful grievants.

Of successful grievants in the Tribunal sample, 63 percent received wage reimbursement awards, 85 percent received compensation awards under the humiliation head, while less than five percent received compensation awards under the "loss of benefits" head.

In the Authority sample, 50 percent of successful grievants received wage reimbursement awards, 86 percent received compensation awards for humiliation, loss of dignity, and injury to their feelings, and just three percent received compensation for "loss of benefits."

Table Eleven sets out, in dollar brackets, the distribution of awards of wage reimbursement and compensation for humiliation, loss of dignity, and injury to feelings to those successful grievants who received those awards. What Table Eleven shows is some movement, in both remedy categories, from the $1-4999 range to the $5000-9999 range, something which may simply reflect an allowance for inflation over time, or which may reflect a shift in decision-maker thinking. It is perhaps noteworthy that

matters come to determination in the Authority more quickly than was often the case in the Tribunal, and yet wage awards have moved a little higher.

Table Eleven: Proportional distribution (%) of remedies to successful grievants

	$1-4999	$5000-9999	$10000-19999	$20000-49999	$50000+
Wages					
Tribunal	64%	21%	9%	3%	3%
Authority	62	28	7	0	3
Compensation					
Tribunal	75	16	8	1	0
Authority	69	26	4	0	1

Determinations and remedies: looking for explanations

As noted earlier, simple frequency tables and correlations between variables, while sometimes interesting to observe and speculate about, are merely historical facts. They don't usually tell us anything definitive about causal relationships between variables. Nor do they carry any predictive value.

Some of the data presented above showed perceptible patterns in the relationships between some variables. However, variables can have more than a random relationship without having a direct causal relationship. A more sophisticated regression analysis allows for some tighter and more validly grounded speculation about which factors are demonstrably associated with adjudication or investigation outcomes.

It is safe to assume – and important to acknowledge – that, by a wide margin, the major determinants of adjudication or investigation outcomes are the merits of the cases decided. But of course those are largely locked in place by the time the adjudication or investigation process begins.

What is examined in this part of the paper, using regression analysis, is whether there is evidence of any associations between investigation or adjudication outcomes, in the Authority and the Tribunal respectively, and any of the variables defining case types, or the parties, or the decision process.

A regression analysis is a statistical technique that can divide the sample of decision outcomes (such as all grievant wins, or all compensation awards) first according to the variable (whether type of case or occupation of the grievant, or whatever) 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 sub-sample. The process continues until all variables associated with the outcomes to a statistically significant degree have been recognized[3].

We look first at the full samples of adjudicated decisions in the Tribunal and determinations in the Authority, before narrowing to the personal grievance outcomes as the bulk of the substantive decision making work of both institutions.

Figure One illustrates the primary relationships associated with adjudication outcomes across the full range of the 1,566 decisions issued by the Employment Tribunal in the 18 months to September 30, 2000. Employees prevailed in 885 of the 1,566 decisions (57 percent) and lost in 597 ((38 percent), while there was no clear advantage to either party in 84 cases (5 percent). The case variable most strongly associated ($p = <.0001$, where .05 or less indicates statistical significance) with win-lose outcomes was employer representation. In other words, the statistical package first separated the full sample of 1,566 decisions into bundles or sub-samples of different win-lose ratios on the basis of employer representation.

So, again across the full range of decisions, applicant employees were most likely to be successful (91 percent) where employers were not present or represented at hearing. Employee applicants were progressively less likely to be successful where the employer self-represented (73 percent employee success), where the employer was represented by an advocate (60 percent employee success), and where the employer was represented by a lawyer (49 percent employee success). Again, the regression analysis establishes that these differences represent more than mere chance distributions, and have (or had) some predictive value in terms of Tribunal decision outcomes.

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[3] For purposes of this paper I have used *AnswerTree*, a statistical analysis technique that creates classification systems displayed in decision trees. CHAID (Chi-squared Automatic Interaction Detector) is a highly efficient statistical technique for segmentation of sample populations, and is the technique used in *AnswerTree*. Using as a criterion the significance of a statistical test, CHAID evaluates all of the values of a potential predictor variable. It merges the values that are judged to be statistically homogeneous (similar) with respect to the target variable and maintains all other values that are heterogeneous (dissimilar). It then selects the best predictor variable to form the first branch in the decision tree, such that each node is made of a group of homogeneous values of the selected variable. This process continues recursively until the tree is fully grown. The statistical test used depends upon the measurement level of the target variable. If the target variable is continuous, an *F* test is used. If the target variable is categorical, a chi-squared test is used. For this paper I have used Exhaustive CHAID, a more recent modification of CHAID developed to further refine the CHAID technique.

Figure One shows, also, some of the second-tier factors associated with Tribunal decision outcomes in some of the sub-samples generated on the basis of employer representation. There were no further explanatory factors in the sub-sample of decisions in which the employer self-represented. For the sub-sample of cases where the employer was represented by a lawyer, the factor next most strongly associated with outcome ($p < .0001$) was the nature of, or primary issue in the case.

The success details for the various case types have not been reproduced in Figure One. They largely mirror the numbers presented in Table Two, though with more specifics and with some consolidation of case types. For two bundles or sub-samples of case types – the first including disputes, jurisdictional issues, and practice and procedure questions, and the second including some dismissal types, including misconduct and incapacity – a third predictor of likely outcomes emerges as groupings of Tribunal adjudicators.

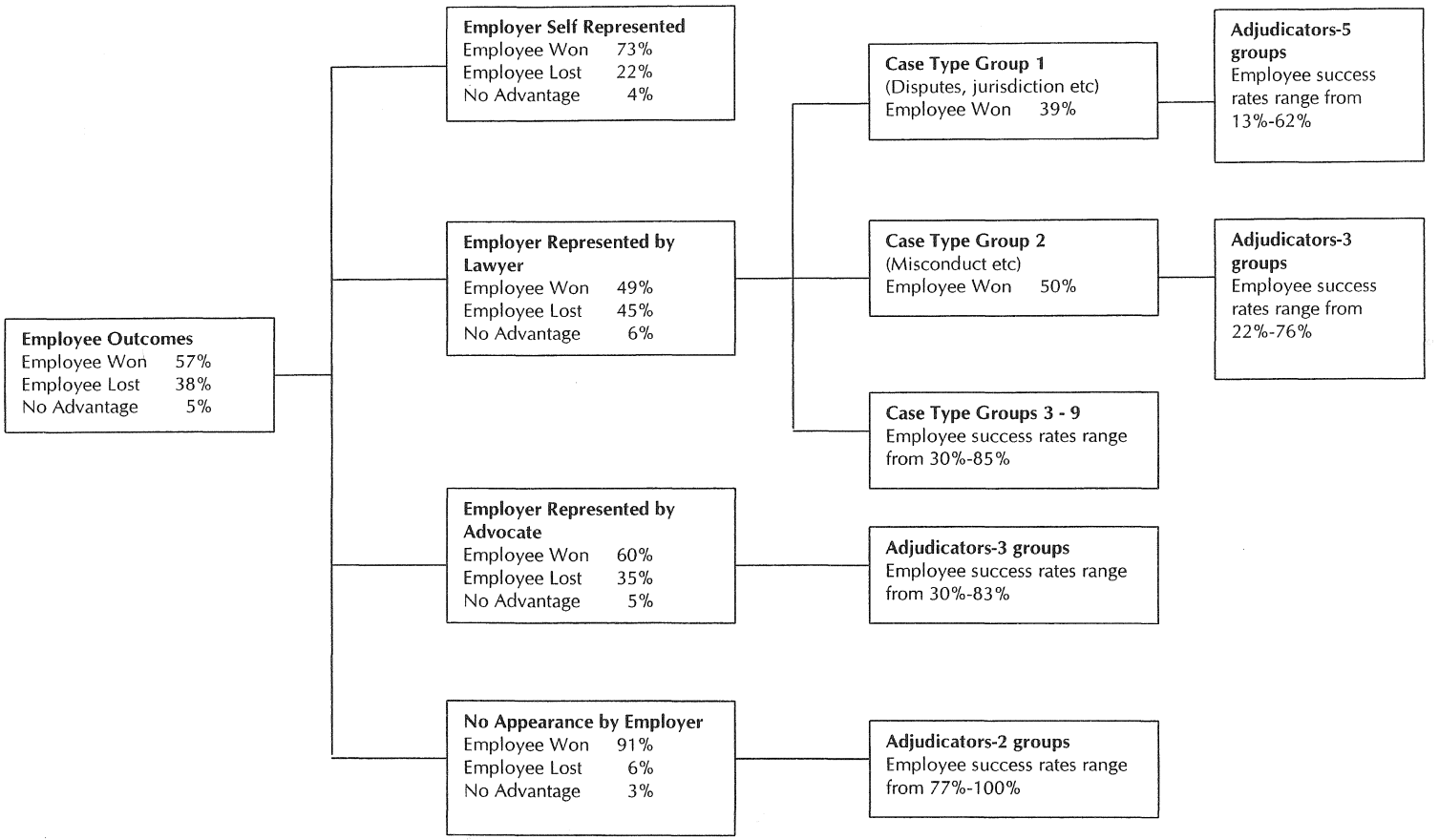
Groupings of adjudicators as predictors of outcomes is not uncommon in statistical analyses of Tribunal decisions. What it means, in the case cited immediately above for example, is that the 28 or so Employment Tribunal adjudicators can be sorted into five distinct groups according to their different likelihoods that employees will have been successful in winning cases before them on disputes, jurisdictional issues and practice and procedure matters. The three case types – disputes, jurisdictional issues and practice and procedure matters – are unrelated, except in that the statistical package has identified that the same adjudicators have the same decision profiles across the three types of cases.

In the cases of dismissals for misconduct and incapacity (again, two different case types linked only by a common predictor), adjudicator identity is again the predictor, although the groupings are different from the previous grouping, and in fact adjudicators are sorted into only three groups representing three different decision profiles (22 percent employee success, 49 percent employee success, and 76 percent employee success).

Again, however, it is important to caution that whatever differences in values, or in the exercise of discretions, or in mere circumstances or case allocations that lead adjudicators into predictable groups, they pale in significance relative to the merits of cases heard and decided as predictors of decision outcomes. Any factors identified here are very much secondary to case merits as predictors of decision outcome patterns.

That said, of the variables tested, employer representation was the most significant predictor of outcomes for the Tribunal sample.

Figure One: Predictors of Tribunal Outcomes



For the sub-sample in which the employer was represented by a lawyer, case type and, for some case types, adjudicator identity were secondary, but still statistically reliable predictors of likely outcomes, or rather of win-lose ratios over time.

For the separate sub-samples of decisions in which the employer was represented by a lay advocate, and again where the employer was neither present nor represented, adjudicator identity was in each case the factor next most strongly associated with win-lose ratios, much more strongly ($p < .0001$) where the employer was represented by an advocate than where the employer was not present or represented ($p < .05$). We will examine the significance of this factor as a predictor of decision outcomes more fully below in the discussion of factors associated with personal grievance outcomes.

A regression analysis was also run on the full sample of 624 determinations issued by the Employment Relations Authority in the 18 months to April 2, 2002. There is less to be said about that. The factor most strongly associated with outcome in the model was case type, the figures again being along the lines of those presented earlier in Table Two, but with somewhat more detail. Secondary predictors were thrown up by the statistical model as being significant for several case types. These were, however, mainly personal grievance types, and these will be dealt with below.

Factors associated with grievance outcomes

The same sort of regression analysis was run on all personal grievances decided by the Tribunal and the Authority during their respective 18 month sample periods. All of the usual variables – descriptors of case types, the parties, and the process – were included in the model; basically all of the case variables other than what is acknowledged as the key one, the merits of the case. Figure Two diagrams the results of the Tribunal analysis, while Figure Three shows the tree diagram for the Authority analysis.

For the Tribunal sample, adjudicator identity is the first predictor, with Tribunal Members sorted into four distinct groups, with employee win rates of 35 percent, 53 percent, 65 percent, and 77 percent. The groups did not have any evident distinguishing profiles. They each had about the same number of Members; there were male and female Members in each group; and there were lawyers and non-lawyers in each.

As is apparent from the figure, there are secondary predictors associated with the 65 percent and 77 percent groups, but not for the other two groups. For the 65 percent group, employees were far more successful (74 percent) grieving dismissals for "the usual reasons" – misconduct, performance or redundancy – than they were for all other grievance types (55 percent). For the 77 percent group, employee grievants were markedly less often successful (66 percent employee success) when the employer was

Figure Two: Predictors of Tribunal Outcomes in Personal Grievances

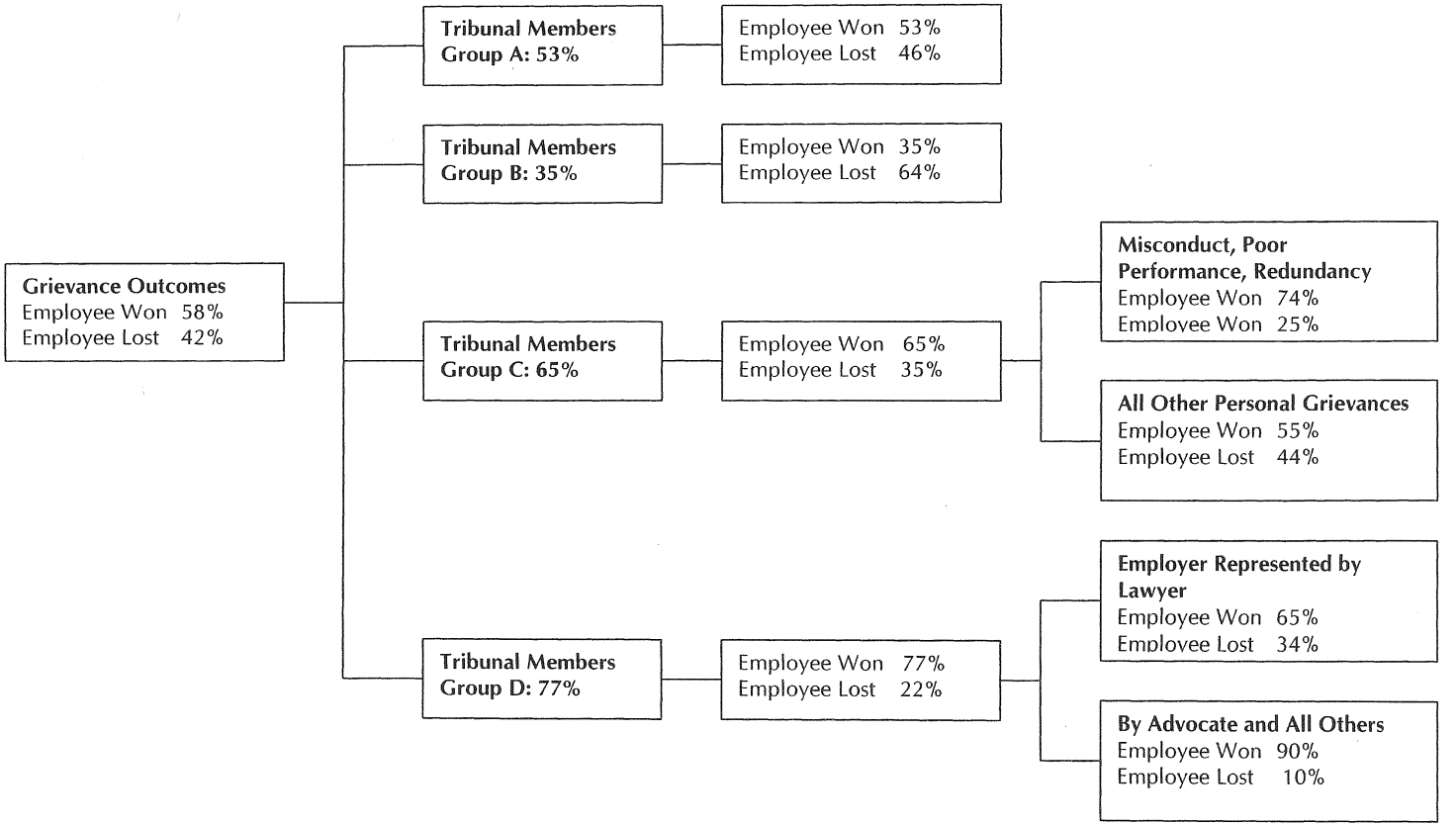
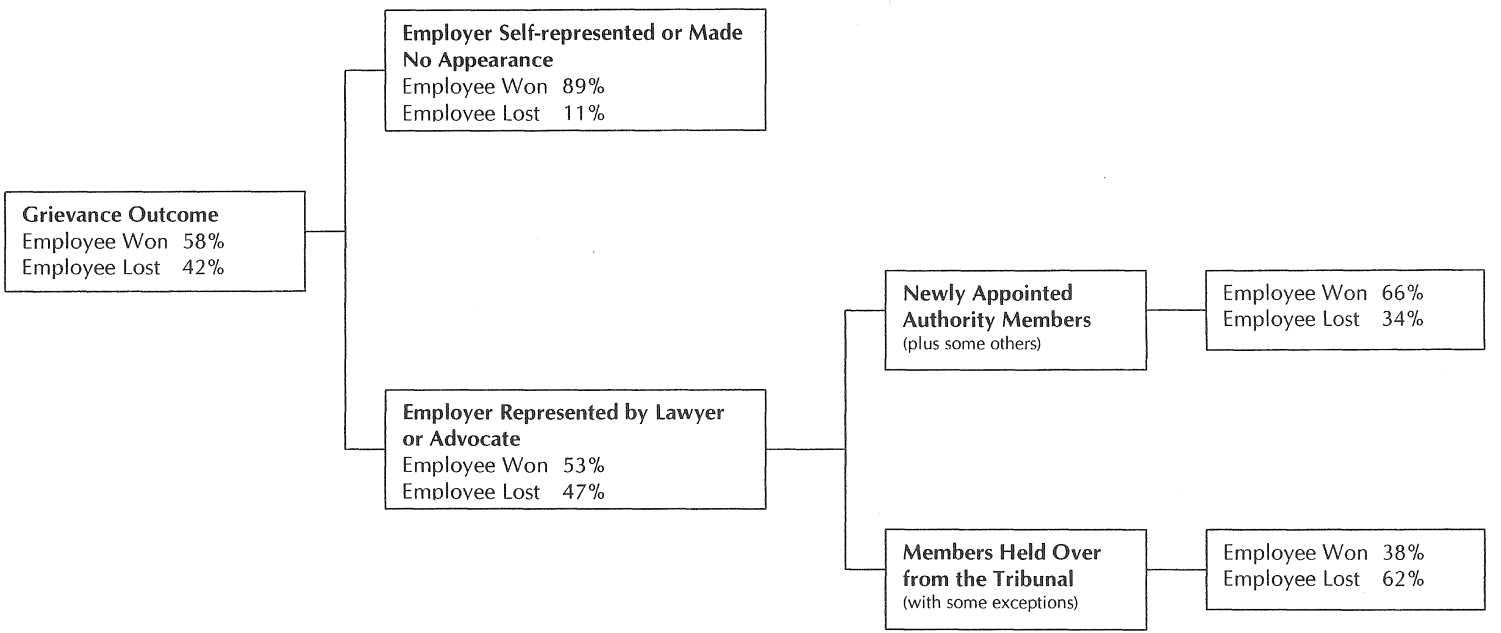


Figure Three: Predictors of Authority Outcomes in Personal Grievances



Turning to Figure Three and the analysis of Authority grievance outcomes, the picture is quite a clear one. The first branching of the tree is again on the basis of employer representation, but this is a bit misleading. In fact all that it says is that the employer will fare much better in the Authority if professionally represented (by either a lawyer or an advocate) than if he or she self-represents or does not front the Authority's investigation meeting at all. The vast majority (86 percent) of the case determinations are in the employer-represented sub-sample, and it is the secondary predictor for that sub-sample that is of most interest.

The secondary predictor is again the identity of the decision maker, which is to say that – while again acknowledging case merits as overwhelmingly the most significant determinant of outcomes – a grievant's likelihood of success depends to an extent on who hears the case. However, whereas the groupings of adjudicators in the Tribunal personal grievance sample carried no branding characteristics that distinguished one group from another – in terms for example of qualifications, background or experience – that is not so here.

In Figure Three, Authority Members can be seen to divide into two groups. In the first group, employees prevail in two thirds (66 percent) of grievances; in the second group, employees win just a little more than one third (38 percent) of grievances. The latter group includes only Members who were long-serving Members of the Employment Tribunal prior to being appointed to the Authority, and it includes all but two Wellington Members from that background. The other group, from whom employees win two out of three grievances, includes all of the Members newly recruited onto the Authority from outside the Tribunal. The two groups might seem to be heading in different directions, though it is worth recalling that, overall, the grievant success rate in the Authority is virtually identical to that in the Tribunal, suggesting that factors like case allocation may perhaps be at work behind these figures.

Grievance remedies

Other than win-lose outcomes, there is interest in remedies awarded to successful grievants. Again, it is accepted without reservation that remedies will be essentially dictated by the merits of each case on factors relevant to the determination of different remedies. Nonetheless, decision makers have some degree of legitimate discretion in composing remedies awards, and so it was appropriate that somewhat similar statistical regression techniques be applied to the two principal categories of personal grievance remedies.

Wage reimbursement awards and compensation for humiliation, loss of dignity and injury to feelings were tested for associations with case variables that might serve as

predictors[4]. Compensation for humiliation, loss of dignity and injury to feelings is, in all probability, the remedy which is most discretionary in the hands of decision makers. It is evidence-based, but often less tangibly so than wage reimbursement, and so perhaps a better candidate for identifying predictor variables. Wages reimbursement awards to successful grievants were examined first, however, but not too much was found.

Perhaps surprisingly, there are no predictors at all for wage reimbursement awards in the Authority. What that means, in effect, is that there are no variables associated with the nature of the case, the parties or their representation, or the hearing or hearing officer that are associated with wage reimbursement outcomes in the Authority in a statistically significant way.

The Tribunal wage result is much more predictable. The key predictor variable for wage reimbursement awards to successful grievants is occupation ($p < .0001$), with the population dividing into two groups – managers, professionals, technicians and associate professionals in the first group; everyone else in the other. Given "ordinary time remuneration" levels for various occupations in New Zealand, it stands to reason that the average wage reimbursement award for successful grievants in the first group was substantially higher than the average award for the second group.

Again predictably, within this latter "all others" category, the nature of employment showed up as a second tier predictor ($p < .01$), the sub-sample dividing between full-time employment on the one limb, and the part-time and casual employment categories on the other. Again it stands to reason that wage reimbursement awards for full time workers would, on average, be higher than those for part-time and casual workers.

And finally, again perhaps predictably, location emerged as a third tier predictor ($p < .001$) for the full-time sub-sub-sample, presumably reflecting different overall wage levels in different regional labour markets.

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[4] The other remedies provided for in the Employment Relations Act 2000, as they were in the Employment Contracts Act 1991, are compensation for loss of benefits and reinstatement to the same or an equivalent position from which he or she was removed. As noted earlier, only about five percent of successful grievants are awarded compensation for loss of benefits, and it is claimed by only a small minority of grievants. The ERA installs reinstatement as a primary remedy for personal grievances. Nonetheless, as was the case under the ECA, reinstatement is apparently still relatively infrequently claimed by grievants at the adjudication stage of grievance processing, and infrequently awarded. Authority determinations for the first 18 months show reinstatement ordered 13 times and refused three times, although it is accepted that reinstatement might have been sought by additional grievants in cases where that has not been recorded in the Authority determination. Either way, reimbursement of lost remuneration and compensation for humiliation, loss of dignity and injury to feelings remain the principal remedies for successful personal grievants under the ERA, as they were under the ECA.

With regard to compensation to successful grievants for humiliation, loss of dignity and injury to feelings, in the Tribunal adjudicator identity was the first and only predictor ($p < .0001$), with Tribunal Members sorting into three groups. The first small group (four Members) made an average compensation award of $2,410 to successful grievants. The second and largest group (14 Members) made an average compensation award of $4,428. The third group (nine Members) awarded an average of $6,638 compensation. There were no clearly distinguishing profiles defining the groups, other than the fact that there were no South Island Members in the high award group.

In the Authority, there was again just one predictor that emerged from the statistical model. Employee representation was the only factor statistically significantly associated ($p < .05$) with compensation outcomes.

Successful grievants represented by lawyers were distinguished from all others, with those represented by lawyers averaging compensation awards of $6,580 and those with any other representation, including self-representation, averaging compensation at the markedly lower level of $3,447. Intuitively, that suggests that lawyers do better than other representation at arguing factors – including reduction of remedies considerations – that go to an award of compensation to successful grievants.

Reduction of remedies

The next point of examination was the issue of reduction of remedies. As is well known, the ERA requires the Authority, as the ECA required the Tribunal before it, to consider whether a successful grievant's contributory conduct requires a reduction in the remedies that would otherwise be awarded. There was interest, for example, in whether there was a pattern to reductions that might explain, or at least be congruent with, the groupings of Tribunal adjudicators as the predictor of compensation awards.

First, regression analyses were run on the simple yes-no question of whether remedies were or were not reduced for contributory misconduct.

In the Tribunal sample, remedies for successful grievants were reduced in 12 percent of cases overall. The first predictor ($p < .0001$) of whether a reduction of remedies was implemented or not was case type. A reduction of remedies was ordered in 27 percent of cases where grievants successfully protested dismissals for misconduct or poor performance. For all other successful grievances, a reduction was ordered in only five percent of cases.

In the misconduct and performance grouping, adjudicator identity emerged as a second tier, statistically significant factor ($p < .0001$). Six Tribunal Members – including three from the relatively small South Island contingent – were grouped by the statistical model as Members who (collectively) reduced remedies in 59 percent of successful

dismissal for misconduct or performance cases. All other Members were grouped together as reducing remedies in less than 20 percent of equivalent cases.

Adjudicator identity also showed up as a secondary factor ($p < .05$) for the second grouping by case type – everything other than misconduct and performance dismissal – but the groupings were less clear cut. There was also less marked difference between them, reductions confined to the limited range of zero to 15 percent of successful grievances.

Did the reduction patterns mesh with the groupings of Tribunal Members in terms of average compensation awards? To some extent they did. For example, all but one of the Tribunal Members in the group averaging compensation awards of $6,638 are in the low reduction rate group for misconduct and performance dismissals. Overall, however, it would be an exaggeration to say that there were clear relationships between adjudicator's compensation award rates and their propensities for reducing remedies. More sophisticated analysis at another time might reveal more, but we are not in a position to make any conclusions along those lines in this research note.

In the Authority sample, a reduction of remedies occurred in just eight percent of successful grievance cases. Case type was again the predictor ($p = .0005$). In dismissals for misconduct (and the "dismissals – other" category), reductions were ordered in 14 percent of successful grievance cases; there were no reductions recorded outside of those two categories.

Costs

Finally, a note on costs. Table Twelve sets out the distribution of costs awards by party and institution in decisions and determinations where a positive cost award was made.

Table Twelve: Distribution (%) of costs awards by party and institution

	$1 – 500	$501 – 1000	$1001 – 2000	$2001 – 5000	> $5000
To employees					
Tribunal	15%	32%	38%	14%	1%
Authority	38	19	18	19	6
To employers					
Tribunal	30	25	30	13	2
Authority	22	15	35	20	8

There have clearly been some changes in the distribution of costs awards in the Authority, relative to the Tribunal sample, but the changes are not uncomplicated. In costs awards to successful employee applicants, awards in what used to be regarded as the "usual" range, say $501 through $2,000 (70 percent of awards in the Tribunal sample) constitute less than 40 percent of awards in the Authority, with the rest pushed out to the lower and higher categories. There are as many awards of $500 or less to employees as there are awards in this $501 through $2,000 range, presumably reflecting in part the different procedures in the Authority, relative to Tribunal adjudication procedures.

On the other hand, low end awards to employers have in fact dropped proportionally in the Authority, relative to the Tribunal sample, with awards above $1,000 to successful employers accounting for 63 percent of awards in the Authority, as against just 45 percent in the Tribunal.

Summary conclusions

The point of this research note has been to factually record any changes in, particularly, adjudicated grievance outcomes associated with the transition in employment institutions from the Employment Tribunal to the Employment Relations Authority. A concluding summation of key points is an appropriate way to finish.

First, there has been a change in the overall profile of grievants bringing cases for determination by the Authority (versus the Tribunal). Managerial, supervisory, professional, technical and other white collar workers are now 60 percent of grievants in the Authority (versus 47 percent at adjudication in the Tribunal). Correspondingly, pink and blue collar workers are now just 38 percent of grievants in the Authority (versus 53 percent at adjudication in the Tribunal). The big movers in the first group are not the managerial-supervisory types (up only two percentage points), but the professional, technical and white collar workers (up 11 points). Correspondingly, respondent employers – at the Authority level – are increasingly from "white collar industries" such as the financial and business and social services sectors, and much less so than they used to be from the wholesale and retail trade and restaurants and hotels sector.

Second, overall grievant success rate in the Authority is about the same as it was in the Tribunal adjudication jurisdiction (57 – 58 percent), but some specifics have changed. Grievants are more successful in the Authority (versus the Tribunal) where either the grievant is self-representing (win 64 percent in the Authority versus 40 percent in the Tribunal) or the employer is self-representing (win 83 percent in the Authority versus 73 percent in the Tribunal). There is a slight increase in self-representation, particularly among applicants. Winning percentages for the Authority and Tribunal are much closer where the parties both use any representation.

Third, managers, supervisors and administrators are much more successful grievants in the Authority than they were in Tribunal adjudication (70 percent success versus 55 percent) as well as being somewhat more successful than other groups, who all remain in the 50 – 60 percent success range; success rates for all other occupational categories are within seven percentage points up or down between the two institutions. The gap between female grievant success rates (62 percent, up from 60 percent) and male grievant success rates (down from 56 percent to 53 percent) has widened a little in the Authority, relative to the Tribunal.

It is important to note that those figures cited immediately above represent historical patterns, and are not necessarily a reliable basis for forecasting the future. There are, however, some predictors available based on statistical regression analysis.

Fourth, for example, in terms of personal grievance win-loss outcomes in the Authority, the key predictor is Member identity, with Authority Members sorting into two fairly clear camps, with just a little blurring around the edges. Former long-serving Tribunal Members form one group (with the exception of two Wellington Members), from whom grievants win 38 percent of cases. All newly appointed Authority Members are in the other group (along with the two long serving Wellington Tribunal Members and a former, short-term temporary Tribunal member), and from this group grievants win 66 percent of cases.

Fifth, there is some upward movement in wage reimbursement and compensation awards in the Authority versus the Tribunal, primarily more awards in the $5000 - $10000 range (wage awards in this range up from 21 percent to 28 percent; compensation awards up from 16 percent to 26 percent). The upward movement in wage reimbursements may be understated by the figures, given that matters come to determination in the Authority more quickly than was so for the Tribunal.

Nonetheless, remedies awards are still predominantly in the <$5000 range. Wages reimbursement awards in this range are down from 64 percent to 62 percent; compensation awards in this range are down from 75 percent to 69 percent. There has been some reduction in the percentage of successful grievants receiving wage reimbursement awards, which may reflect quicker disposition of cases in the Authority.

Interestingly, while some intuitive factors were seen to be associated with wage reimbursement awards in the Tribunal (occupation and employment status, principally), there were no predictors evident in the Authority wage reimbursement awards. Again, the quicker determinations may be suppressing the influence of those factors in the Authority.

Regarding compensation, Tribunal members sorted into three camps, averaging about $2500, $4500 and $6500 compensation. In the Authority, whether the grievant has a

lawyer or not is the only predictor – successful grievants with lawyers averaged compensation of about $6500; those without lawyers about $3500.

Sixth, there is one consistent story on reduction of remedies in the Authority and Tribunal – a successful grievant is most likely to have remedies reduced where the dismissal has been for misconduct. And, as was true in the Tribunal, it remains true in the Authority that the chances for a successful outcome for the grievant are far less (54 percent) where the dismissal has been for misconduct, than when the dismissal has been for one of the other principal reasons – performance or redundancy (both 70 percent). In the Tribunal, there were a minority of members who reduced remedies for contribution in misconduct (and performance) cases three times as often as others did (almost 60 percent versus less than 20 percent). There are no such differences apparent in the Authority to date. Overall, reductions are down from 12 percent of successful grievance cases in the Tribunal to eight percent in the Authority.

Seventh, reinstatement remains only a very occasional remedy in Authority determinations, as do awards of compensation for loss of benefits.

Eighth, there has been a proportionate increase (in the Authority versus the Tribunal) in costs awards to successful grievants of $<$$500 (from 15 percent to 38 percent), and a considerable reduction in costs awards to employees in the $500-1000 and the $1000-2000 categories (collectively down from 70 percent to 37 percent). This would seem to be consistent with what is a streamlined process, involving shorter hearings and shorter decision documents.

In costs awards to employers, awards of $1-500 and $500-1000 have reduced and awards $>$$1000 have increased (from 45 percent of awards to 63 percent). It is unclear why this would be so. In sum, in the Authority, successful employees are getting less on costs, while successful employers are getting more on costs.

Finally, one fact that does emerge fairly clearly is that there are differences between decision makers in the exercise of judgments and discretions available to them. This shows up in a variety of ways in a variety of places in both the Tribunal sample and the Authority sample, nowhere more starkly than in the division in the Authority, as a broad generalization with some exceptions, between those Members with a Tribunal background and those without. There can be many explanations for those patterns, including circumstantial factors – such as, perhaps, the greater disposition in some parts of the country than others to "try on" less meritorious cases – and deliberate factors – such as case allocation policies. Finding the explanation is beyond the scope of this research note.

There is no suggestion here that anything other than the merits of cases is the overwhelming factor in the determination of cases in both the Tribunal and the Authority. Beyond that central fact, it is important to recognize that decision makers in

our employment institutions are, as they always have been, drawn from an appropriate range of backgrounds, rather than being from a narrow sector of society. That being so, it is unsurprising, and certainly no cause for alarm, that they exercise the discretions available to them around the peripheries of cases in ways that yield a range of different outcomes. Nonetheless, there is a role for research in the future in exploring those patterns more fully.

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