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The Employment Relations Authority Gets Under Way

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One of the principal changes to the specialist institutional arrangements under the new legislation is the establishment of the Employment Relations Authority. The Chief of the Employment Relations Authority surveys the functions, powers and procedure of the Authority. He compares the Authority with the Tribunal, and suggests that the Authority is not simply an altered Tribunal, but a markedly different and unique institution.

Introduction

The Employment Relations Authority is a product of the changes made by the Employment Relations Act 2000 ("the Act") to the procedures and institutions for resolving problems in employment relationships. The Authority commenced work on 2 October 2000, when the Act came into force.

Mediation

Comparison between the Authority and the former Employment Tribunal, which was disestablished by the new legislation, is inevitable, particularly with regard to the judicial decision-making function given to both institutions. Any comparison must, however, be made in the light of the major shift under the Act to mediation as the primary means of resolving employment-related disputes. No longer is mediation simply an optional or desirable step to be taken before seeking a binding decision or ruling. It is now obligatory under the Act in all but exceptional situations. These are defined in the statute as situations where the Authority (or the Employment Court in matters before it) is of the opinion that mediation will be futile, or will be contrary to public interest, or where mediation needs to be by-passed for reasons of urgency.

The Authority and mediation

Mediation is not a function of the Authority. Under the Act it is the Mediation Service of the Department of Labour that is the main mediation provider. Through the changes in the Act the Mediation Service is the key institution in the new statutory framework, with the Authority intended to play a back-stop role to resolve what the Government hopes will be only a small proportion of cases requiring judicial decision-making.

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The Department of Labour has boasted a free, fast and fair mediation service, and all the signs are that this indeed is the reality. Also, it appears that a good success rate is being achieved by the new statutory service. Parties who are directed or referred by the Authority to the Mediation Service have received swift attention and this in itself must contribute to the achievement of settlement in mediation. It appears even at this early stage that mediation is playing a significant part, as intended, in reducing the requirement for judicial intervention by institutions such as the Authority and the Employment Court.

The Employment Court

The Employment Court remains among the institutions, although with a significantly altered jurisdiction from that given to it by the Employment Contracts Act 1991. The primary role of the Court is now to decide difficult issues of law, to determine applications for injunctive relief where sought in relation to strikes or lockouts, and to hear any challenges brought by a party dissatisfied with a determination of the Authority.

Problems in the previous system addressed

In (1996) 21(1) *NZJIR* I reviewed the operations of the Employment Tribunal, which had then been in existence for about five years. I said in my paper that the development of the adjudication role of the Tribunal had been less successful than its mediation function. Particular problems I mentioned were the delay in disposing of cases; the inclusion of too much general detail in written decisions; in personal grievance cases the perfunctory observance by employees and their representatives of initial steps in the standard settlement process in their haste to get to adjudication; and the absence of jurisdiction in the Tribunal under statutes such as the Illegal Contracts Act 1970 and the Contractual Mistakes Act 1977.

In reforming the procedures and institutions, the Employment Relations Act has in one way or another addressed all of these problems, or has at least provided the means for the Authority to do so in its particular work. However, it must be recognised that the Authority is not a re-fitted Employment Tribunal, but is a new and quite different institution in the way it operates under the Act. Speed, informality, practical and summary decision-making, and summary decision recording are key specifications in the Act for the Authority. To meet the statutory objectives, it must now perform and develop with these foremost in mind.

Investigatory role of the Authority

Although the Authority determines judicial proceedings and therefore is a court of law, it is the Authority itself that is required to establish the facts of cases before it. This is to be done by investigation. This change brings a departure from the adversarial method of judicial decision-making used in most civil courts and tribunals in New Zealand. For practical purposes this means, amongst other things, that evidence left uncalled by parties

for tactical or other reasons, may now be called and examined by the Authority itself, and lines of witness examination or questioning that deliberately have not been pursued by a party may now be followed by the Authority. As always, however, relevance will usually be the deciding factor for the Authority in seeking itself to obtain any information.

Speed

The problem of delay in judicial institutions is one that is chronic and widespread, and a major subject of complaint about courts of law made by parties and the public generally. Although the Authority has at the time of writing dealt with only a relatively small number of cases (22 through to completion), so far there have been no appreciable delays and cases have been disposed of within, at most, a few weeks of commencement. This speed has in my view been experienced by parties as a very real benefit of the problem solving process in the Authority, as without delay the impetus towards resolution of a dispute can be maintained, memories of what happened remain fresh, and parties have less time on their hands to unnecessarily add layers of additional issues and matters to problems, making them more complicated than they need to be or were originally.

In many cases parties have availed themselves of quick access to the Authority, sometimes to the extent that mediation followed by an investigation have taken place within a few days of a dismissal and while a dismissed employee has still been within a notice period or is still receiving pay in lieu of notice. Applications for interim reinstatement and other interim injunctive relief have their own requirements for urgency, and priority is given for early handling of these cases.

A main reason for the lack of delay in the Authority is the absence of any backlog of cases already awaiting disposal when operations commenced on 2 October 2000. Adequate member resource is another important factor and one that will be critical to the ability of the Authority to deal quickly with cases. For the time being at least, cases are being lodged at a rate that can be managed without putting undue pressure on the pool of 13 appointed Authority members. A careful eye, however, will need to be kept on the volume of work coming into the Authority. If it increases much beyond current levels the Government will be faced with a decision whether to increase the number of members and so maintain the attainment of speedy justice which up until now has been continually clamoured for by the public but has remained largely an ideal.

Informality

With regard to informality, regulations have been made for the Authority. These were drafted to make access to the Authority as easy as possible for all parties, including any wishing to handle their cases themselves without representation. For the same reason the making of detailed rules of practice and procedure for the Authority has been kept to a

minimum. So far all that has been issued is a note outlining the steps that parties can expect will generally be taken from the time a case is commenced until it is finished in the Authority. A copy of the note is annexed.

A step referred to in the note is of central importance to the way cases will be run. That step is the preliminary conference (see para 3 of the note), whose purposes include "settling with the parties particular details as to the conduct of the investigation meeting". It is intended that this conference, often held by telephone, will be the occasion for informing parties and representatives who may be unclear, of the way the investigation is to proceed. The conference is also an opportunity for parties and representatives to make their particular wishes known to the Authority in respect of anything reasonably to do with the case and its investigation, for example, the timing of things which are to be done, the presentation of information – what, how and by whom, etc. The Authority can then make arrangements, including by formal direction where necessary, for the reasonable needs of all parties to be met as far as that may be possible. No party or witness should have to attend an investigation meeting without having a chance to learn and understand from the Authority in detail and in advance, the procedure that will be followed at that meeting. Parties are also to be made aware that investigation meetings, although relatively informal, are occasions which can and usually do lead to determinations that by their very nature have potentially serious legal consequences (for example, reinstatement of employee, order to pay sums of money, imposition of penalties, rejection of claim, etc.).

Informality in the Authority means that meetings often take place with the parties, witnesses and the Authority Member seated comfortably around a table. In this environment orderly and constructive discussion may take place away from the heavier, more suppressed, atmosphere of a courtroom and the trial process. While some seasoned advocates may initially be uncomfortable without the crutch of trial procedures and courtroom trappings, witnesses seem to communicate more readily and naturally and without feeling intimidated by the trial process, particularly cross-examination. In the Authority, relevant information is to be elicited and tested where necessary by the Authority member. That person may therefore be expected to question witnesses to the extent required for the truth of factual matters to be revealed.

Cross-examination

The Authority's practice note (annexed) states that in an investigation meeting there will not be cross-examination by opposite parties or their representatives, although they may be invited to propose additional matters for the Authority to enquire into in relation to the evidence or anything else of relevance to the investigation. Perhaps not surprisingly, this aspect more than any other has proved controversial, particularly with legal counsel and professional advocates generally. If nothing else the note in this part will serve to remind those used to practicing in courts and tribunals that the Authority has an investigative role and does not conduct a trial between adversaries.

It is the Authority member and not the parties that has been charged with establishing the facts and testing the truth of evidence where necessary. That responsibility cannot be delegated to others, and for these reasons the practice has been advised in this way. The role of representatives and indeed the parties they represent is primarily to assist the Authority in its enquiry. It is not their role to endeavour to overcome an opposing party by use of adversarial trial techniques such as cross-examination.

Disadvantage caused by lack of understanding, ability or confidence of parties conducting their own cases, or by the inadequacy of their representation, should not make a difference in the attainment of justice, yet in a trial system these things often affect the outcome. The advocate who cross-examined when he should not have, or did not cross-examine when he should have, or simply failed to call a material witness, was encountered frequently enough in the Tribunal. Good cases were lost and bad cases won, according to the skill of the representative and also whether a party had been able to afford good representation. The investigation process of the Authority now offers a level playing field in this regard.

As the practice note itself says in so many words, its contents are not set in stone but will be reassessed from time to time, particularly in the light of experience as more cases are disposed of. Periodic meetings of members are held for this purpose and some change of practice may be expected in the future.

Onus of proof

The onus of proof has little if any significance under an investigation process in which the investigator is bound to seek material information when crucial facts have not been put in evidence by parties, whether intentionally or otherwise. However, standards of proof varying according to the nature of the matters being investigated and the remedies sought, must continue to be observed by the Authority in assessing information presented to it or obtained by it. Where penalties are claimed for example, to punish a party, the evidence will need to be more certain and more compelling of that result than in cases where arrears of wages are claimed.

Standard personal grievance procedure

Under the Act there is no statutory procedure or code for the settlement of personal grievance claims corresponding to the procedure that was specified by the First Schedule to the Employment Contracts Act 1991. My earlier criticism of the failure of some parties to properly use that procedure has now been side-stepped by allowing a free-form approach to grievance communication to be taken under the new Act, together with mediation assistance made available to parties at all stages whenever there is an employment relationship problem. There is still a requirement (subject to some exceptions) for grievances to be raised or submitted to the employer by or on behalf of an employee within 90 days after the grievance arose or was discovered.

Statute law relating to contracts

The Authority has been given jurisdiction under particular statutes such as the Contractual Mistakes Act 1977, Illegal Contracts Act 1970 and Contractual Remedies Act 1979, thereby meeting my 1996 recommendation. Indeed, considerably more than this has been given, with the jurisdiction of the Authority extended to relief that is available to the High Court or District Court under *any* enactment, or rule of law even, relating to contracts. As yet, in the relatively few cases handled to date, there has been almost no call for the exercise of this wider jurisdiction. It is there if needed.

Decision writing

With some judicial writing, much of the content of a decision are details well known already to the parties, the restatement of which will add little to their knowledge and understanding of a determination. As was declared in the Bill when it was introduced into Parliament, the intention was that the Authority would make practical decisions quickly, with a minimum of detail, focussing on key issues and how to resolve them. Informality was intended to be emphasised as well.

Provisions of the Act specifying a minimum content for decisions are also an aid to reducing this part of the determination process to the essentials necessary for the parties to know what decision has been reached and how it has been reached without a complete replay in writing.

First determination

The first case determined by the Authority, *Baguley v Coutts Cars Ltd,* No. AA1/00, Auckland, issued on 2 November 2000, concerned a claim that an employee dismissed apparently for redundancy, had nevertheless been unjustifiably dismissed. The Authority determined to the contrary, that the dismissal was justified for genuine reasons of redundancy. It was the luck of the draw that the very first case for determination by the Authority raised significant issues about the impact of the Employment Relations Act, particularly the good faith requirements in employment relationships, on previous redundancy case law. This is the area of law recently developed and re-developed by the Employment Court and Court of Appeal under the Employment Contracts Act 1991 in cases such as *Aoraki Corporation v McGavin* [1998] 1 ERNZ 601 and *Thwaites v NZ Fasteners Stainless Ltd* [2000] 2 NZLR 565.

The issues that emerged in the *Baguley* case were of such importance that it was highly desirable, if not necessary, that the Employment Court should consider and decide such questions as soon as possible. It was therefore a welcome step when the unsuccessful applicant challenged the determination, thus inviting a review of the current law by the Court. This will help all parties to employment relationships as well as the immediate parties in the *Baguley* case. A decision on these same matters from the Court of Appeal is

also desirable to provide early on some future certainty in this important aspect of employment law. The challenge was heard by three judges of the Employment Court on 18 December 2000. At the time of writing the Court's decision remains reserved.

Two other challenges have arisen. These are also in relation to decisions determining claims of unjustified dismissal, although misconduct rather than redundancy was the reason for dismissal in each case.

Challenge by *de novo* hearing

It remains to be seen whether challenge will arise in a high number of cases. If so, the Government will no doubt wish to review the institutional arrangements because the resources of the Employment Court, which currently has five Judges, must inevitably come under strain, particularly where a full hearing of an entire case (*de novo)* is required.

Parties who have been successful in the Authority and have felt that they experienced a speedy and relatively low cost process which also delivered a just result, may feel when later faced with a challenge to the Court that they are being re-cycled into the comparatively slower trial process, one which perhaps may compel them to engage representatives, and a process in which the final result, whether it is the same or different to that given in the Authority, may not be certain. The party in that situation may well wonder about the point of having a system that offers a second and largely unrestricted bite at the cherry, as it were, to any dissatisfied party.

No doubt the views of employers, employees, unions and other interested parties will be considered if, in the light of future experience, some modification to the *de novo* challenge procedure seems necessary or desirable. If a high proportion of Authority determinations are challenged then modification may be necessary. What is done may depend on whether the challenges are tactical – merely to create delay and increase expense and cause disadvantage to one party – or whether they reflect widespread rejection of investigation as a useful method of determining employment relationship problems.

Investigation in the Authority is a process that seems likely to lead to hearings of a more intermittent nature, in short stages, while further information is gathered as required. More time is inevitably required to be put in by members at the front end of most cases, as they plan the course of the hearing, familiarise themselves with the material gathered at preliminary stages of the investigation, and prepare to interview and examine witnesses. Although I have conducted only a handful of investigation meetings to date, my impression is that overall the total time required for the conduct of the investigation and to give a determination is shorter than the adjudication process of the Tribunal. This will not necessarily be so in every case, however.

Case types

One feature that the Authority shares in common with the Employment Tribunal is the nature of many of the disputes that, initially at least, are finding their way to the Authority. The personal grievance industry that thrived during the life of the Tribunal will not recede until there is a change in attitude towards employment relationships and the disputes that can arise from them. The aim of the Employment Relations Act in this regard is for greater recognition to be given to employment as fundamentally a relationship between people, rather than a construct of law for which litigation in the courts is often the usual response to any strain or breakage of legal ties. The first stated object of the Act is important here:

> To build productive employment relationships through the promotion of mutual trust and confidence in all aspects of the employment environment and of the employment relationship.

The success of the new Act will be measured in part by the degree to which that objective can be met and what contribution the Authority, the Court and the Mediation Service make towards that. Time will be needed for change to happen.

With the Authority under way for a mere five months, it may be too early to detect any trends as to the type of cases that will be lodged and the volume of work. Data collected by the Authority shows that the most common employment relationship problem remains the claim of unjustified dismissal, and it follows that employees rather than employers or unions are, for now at least, the party most frequently taking problems to the Authority.

For research purposes the statement of problem lodged in each case can be analysed and usually it is seen that one problem raises a claim for more than one type of legal remedy available under the Act. For example, although the problem may be expressed by an applicant to be unjustified dismissal, therefore raising a personal grievance, other associated claims may have been raised for payment of wages owed prior to dismissal, penalties for breach of the employment contract and a claim for compliance, say in relation to the giving of notice. Thus, although only one problem has been lodged it may comprise four distinct types of claims.

As at 1 March 2001 there have been 289 problems formally lodged with the Authority nationally. Comprised in these are 385 distinct types of claim. Of that number, 159 (39 percent) were unjustified dismissal personal grievance claims. Disadvantage grievances were 46 (11.5 percent) in number. Another significant type of claim was recovery of wages: 71 (17.5 percent). These three types account for 67 percent of the total and they are exclusively employee claims. Less frequent claims in the period can be particularised as follows:, injunction applications (including applications for interim orders): 21 (five percent); recovery of holiday pay: 21 (five percent); compliance with good faith obligations: 19 (4.5 percent); compliance with other terms of employment: 12 (three percent); and penalties for breach of employment contract: 11 (2.5 percent).

So far, relatively few claims have been brought by employers: only 12 out of 289. Unions have pursued claims as an applicant party in eight cases.

It is hoped that in the near future statistics will be available to show the number of problems that have been lodged in which the parties had made no attempt at mediation before approaching the Authority. Most of these cases were misdirected, for they did not cross the high threshold set by the Act before any party can have direct access to the Authority without first attempting mediation. Day-to-day work has shown me that there are a significant number of such cases that are being stopped at the door of the Authority and turned around, whether by direction or consent of the parties, towards the Mediation Service. Given the statutory constraints, it is to be expected that in a very high proportion of employment relationship problems mediation must be undertaken or attempted before any resort is had to the Authority for resolution. Understandably with new-born and unfamiliar legislation, some time will be needed before parties realise that the Mediation Service and not the Authority must be the first port of call in all but the exceptional situations defined in the Act.

Conclusion

The Authority in embarking on its work has so far had a manageable caseload and there is no significant delay. The type of cases have been similar to many of those heard by the Tribunal, and there has been no great call for the Authority to immediately put into operation all of its considerable jurisdiction. A number of applications for an injunction (interim and permanent), an area formerly within the jurisdiction of the Employment Court, have come before the Authority and have been determined quickly. It is perhaps only in this area of law that the jurisdictional changes have yet been truly experienced.

After the Employment Relations Bill was introduced into Parliament and while it was before the Select Committee, many commentators were critical of its provisions in relation to the Authority, particularly the wide scope of its jurisdiction and the lack of judicial qualifications required of its members. The Employment Tribunal, however, successfully demonstrated that lay judicial officers possessed of common-sense and an ability to research and learn could handle a jurisdiction that had formerly been exercised by Labour Court judges.

All of the commentary on the Bill of necessity was made in the abstract, since the commencement of work in the Authority remained a future event. Now that the Authority is under way, time and experience will tell whether the new jurisdiction will lead to excess and error from those entrusted with its administration. A further review after the Authority has been in operation and the Employment Relations Act has been in force for 12 months or more, will give a clearer picture of how the Authority is coping in the new era of employment dispute resolution. The jury therefore will have to stay out for some time yet on the Authority.

Cases

Aoraki Corporation v McGavin [1998] 1 ERNZ 601

Baguley v Coutts Cars Ltd, unreported, AA1/00, Auckland, 2 November 2000

Thwaites v NZ Fasteners Stainless Ltd [2000] 2 NZLR 565