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RESEARCH NOTES

Unions and Union Membership in New Zealand: Annual Review for 2000

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Introduction

This paper reports the results of Victoria University's Industrial Relations Centre's most recent survey of trade union membership in New Zealand. The survey carries on from our earlier surveys of trade union membership under the Employment Contracts Act 1991, for the years 1991 to 1999. The data reported herein covers the first three months of the new Employment Relations Act (enacted on 2 October 2000), to 31 December 2000, and records the first increase in trade union density since the mid-1980s. The data also report a substantial increase in the number of trade unions. As at 31 December 2000, the 134 trade unions identified for the survey represent a jump of 63 percent in the number of trade unions, up from 82 identified by last year's survey.

The Employment Relations Act (ERA) 2000 replaced the Employment Contracts Act 1991 (ECA). The Act's explicit promotion of collective bargaining and 'good faith employment relations' attempts to restore some measure of fairness and equity to the regulation of employment relations. The objects of the Act with respect to the recognition and operation of unions are:

- To recognise the role of unions in promoting their members' collective interests.
- To provide for the registration of unions that are accountable to their members.
- To confer on registered unions the right to represent their members in collective bargaining.
- To provide representatives of registered unions with reasonable access to workplaces for purposes related to employment and union business.

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In pursuit of these objectives, the ERA establishes a union registration system and grants registered unions bargaining rights together with rights of access to workplaces (specified in sections 19-25). To gain registration, a union must have more than 15 members, and provide a statutory declaration that it complies with the requirements of s.14 of the Act regarding rules, incorporation and independence from employers. The Act requires the statutory declaration to stipulate that the union is 'independent of, and is constituted and operates at arm's length from any employer' (s.14(1)d). The Registrar of Unions may rely on the statutory declaration to establish entitlement to registration. Only registered unions may negotiate collective agreements, and collective agreements apply only to union members and to all members of the union whose work falls within the agreement's coverage clause. These coverage clauses will apply to any future employees, presumably giving unions an advantage in workplaces where turnover is high.

Methodology

When the ECA ended the practice of union registration, it not only removed the distinct legal status of trade unions but it also brought to an end the official collection of data on trade union membership. In the absence of official data, the Industrial Relations Centre at Victoria University of Wellington began to undertake voluntary surveys of trade unions in December 1991, and these surveys continue to the current date. In addition to information on aggregate membership, our surveys have also sought information on gender and industry breakdown and organisational affiliations.

The ERA's registration requirements require unions to submit an annual return of members to the Registrar of Unions, stating the number of members as at 1 March. This means a return to the official collection of data on union membership.

For this year's survey we identified a total of 137 trade unions. Of these, 82 were unions contacted in last year's survey. Other unions were identified through the website of registered unions (ERS Website 2001), through searches of data bases of incorporated societies and through our parallel analyses of collective agreements, research also conducted at the Industrial Relations Centre. Each union was sent a survey requesting information on membership numbers as at 31 December 2000, including membership by gender and at the two-digit industry level.

Following a series of reminders and follow-up letters to non-respondents, a total of 94 responses were received. A further 12 respondents were able to provide details over the phone. Of those not responding, 10 were new unions, that is unions not previously known to us and registered under the ERA. These were attributed a membership of 15, the minimum required for registration. Three unions were eliminated on the basis of their appearing to be no longer active. For the remaining 18 non-responding but active unions, estimates were made of membership based on previous years' returns and newspaper reports.

Of the 134 unions identified by our survey all but four are currently registered under the provisions of the ERA. Many were not registered at the time they provided their figures to

us but during this transitional period we have not made registration a pre-requisite for inclusion in the survey.

Results: Union numbers and membership

The 134 active unions identified in our survey had a combined membership of 318,519 at 31 December 2000. This represents an increase of 16,114 or 5.3 percent over the course of the year.

Table 1: Trade Unions, membership and union density 1985-2000 (selected years)

			Potential union membership		Union density	
	Union member ship	Number of unions	Total employed labour force	Wage and salary earners	(1) / (3) %	(1) / (4) %
	(1)	(2)	(3)	(4)	(5)	(6)
Dec 1985	683006	259	1569100	1287400	**43.5**	**53.1**
Sep 1989	684825	112	1457900	1164600	**47**	**55.7**
May 1991	603118	80	1426500	1166200	**42.3**	**51.7**
Dec 1991	514325	66	1467500	1153200	**35.1**	**44.6**
Dec 1992	428160	58	1492900	1165700	**28.7**	**36.7**
Dec 1993	409112	67	1545400	1208900	**26.5**	**33.8**
Dec 1994	375906	82	1629400	1284900	**23.1**	**29.3**
Dec 1995	362200	82	1705200	1337800	**21.2**	**27.1**
Dec 1996	338967	83	1744300	1389500	**19.9**	**24.4**
Dec 1997	327800	80	1747800	1404100	**18.8**	**23.3**
Dec 1998	306687	83	1735200	1379200	**17.7**	**22.2**
Dec 1999	302405	82	1781800	141400	**17**	**21.4**
Dec 2000	318519	134	1818400	1454500	**17.5**	**521.9**

Source: Household Labour Force Survey, Table 3, Table 4.3 (unpublished)
Industrial Relations Centre Survey
(Notes: Total employed labour force includes self-employed, employers and unpaid family workers.
Column 5 figures in italics are different to those previously reported due to a revision of Labour force figures in 1997 by Statistics New Zealand)

Interestingly the first figures released by the Registrar of Unions for unions registered at 1 March 2001 show a total membership at 319,660, with 121 unions registered at that date (ERA Info, 2001, p.12). These figures confirm both the upward trend in membership and also give rise to confidence in the robustness of the data collected during the 1990s by the Industrial Relations Centre surveys.

Table 1 shows trade union membership since 1985. Union density is defined as the proportion of potential union members who belong to a union (Bamber and Lansbury, 1998). The numerator and denominator in this equation vary from country to country and there is no agreed "correct" method. What is important is consistency in reporting. Previously, our surveys have reported density using the total employed labour force as the denominator. This category includes employers, self-employed and unpaid family members, many of whom do not usually represent potential union members. In this year's review, we also report density based on wage and salary earners only and provide figures for previous years as a point of comparison.

Results: Union size

Prior to 1987, New Zealand had numerous small unions, most of whom were dependent on the protections of the arbitration system. The introduction in the Labour Relations Act 1987 of the requirement that unions have a minimum membership of 1,000 ensured that the number of unions dropped dramatically between 1985 and 1989. During the ECA, when registration provisions were abolished, the number of unions varied between 58 (in 1992) and 83 (in 1996).

The ERA has introduced a new system of union registration with a minimum membership requirement of 15. The effect of this and the requirement that only registered unions can participate in collective bargaining is shown clearly in Table 2. The number of unions with fewer than 1,000 members has doubled. A large number of these small unions are completely new to the system having only been incorporated (under the Incorporated Societies Act 1908, a precursor to registration) since April 2000. Furthermore, a majority of these new small unions are enterprise or workplace based, a relatively unusual form of worker representation for New Zealand and perhaps an unforeseen consequence of the new legislation.

Despite the significant rise in the number of unions, the membership of small unions has only risen from four percent to six percent of total membership. The contribution of these new unions to the overall increase in membership is only 16 percent or around 2,500 of the 16,114 new members. Interestingly the growth in membership has come from the largest and smallest unions, 59 percent of new members have joined unions with memberships larger than 10,000 and 32 percent have joined unions with memberships smaller than 1,000.

Table 2: Membership by union size (1999 and 2000)

	December 1999			December 2000		
Membership range	Number	Members	%	Number	Members	%
Under 1000	48	12703	4	101	17894	6
1000-4999	22	43709	14	21	44568	14
5000-9999	3	19669	7	3	20260	6
10000+	9	226324	75	9	235797	74
Totals	82	302405	100	134	318519	100
Average size		3688			2377	

Source: Industrial Relations Centre Survey.

Even with the rush of new small unions, the concentration of overall union membership in the top 10 largest unions remains largely unchanged from the previous few years at 77 percent. This tendency for membership to be concentrated in the largest 10 unions was in part a consequence of the 1,000 member rule introduced in 1987. This set in motion a process of union amalgamations and mergers which bore fruit in the 1990s, boosted by the elimination of many unions under the ECA. Between 1984-1991, the largest 10 unions represented around 45 percent of all union members. By 1994 the largest 10 unions represented 70 percent of all union membership (Harbridge, Hince and Honeybone, 1994) and concentration has stayed high since.

Table 3: Membership of largest 10 unions (various years)

	Numbers of unions	Total membership of largest 10 unions	Total union membership	Concentration
1984/1985	259	292856	666027	44%
990	104	275854	611265	45%
994	82	261186	375906	69%
1999	82	234523	302405	78%
2000	134	244560	318519	77%

Source: Industrial Relations Centre Survey
Harbridge, Hince & Honeybone, 1994

Results: Union membership by industry and gender

Our survey asked unions to report the percentage of their members employed in various industry groups. We use the Australia, New Zealand Standard Industry Classification (ANZSIC) coding as a framework for this. Table 4 examines where gains and losses in membership by industry have occurred. Losses have only occurred in two industry groups, energy and utility services and finance, insurance and business services. A significant gain (albeit from a low base) was also made in two sectors, agriculture fishing and forestry and retail, wholesale, restaurants and hotels. The apparent gain in agriculture fishing and forestry was actually due to the inclusion of a union (now registered) that had not been counted in previous surveys. The membership gain in retail, wholesale restaurants and hotels may be evidence of unions beginning to make inroads in this growing, but hard to organise service sector. However, as revealed by Table 6 total union membership in the industry remains low at approximately 3.6 percent.

Table 4: Union Membership change by Industry (1999 and 2000)

Industry Group	Dec 1999	Dec 2000	Change 1999 -2000
Agriculture, fishing, forestry etc	1265	2312	**2.8%**
Mining and related services	718	752	**5.8%**
Manufacturing	65172	1162	**9.2%**
Energy and utility services	4753	3843	**-16.0%**
Construction & building services	3667	4009	**9.3%**
Retail, wholesale, restaurants, hotels	12038	14413	**9.7%**
Transport, storage and communication	34467	36895	**7.0%**
Finance, Insurance and business services	17420	14341	**-17.9%**
Public and community services	162905	170792	**4.8%**
TOTAL	**302405**	**318519**	**5.3%**

Source: Industrial Relations Centre Survey

Trade union membership is now heavily concentrated in a small number of industry sectors. Table 5 shows that 76 percent of union members are in just two sectors - public and community services (including education and health) and manufacturing. More importantly, the great bulk of the membership increase in 2000 was in these two sectors. These two developments are a mixed blessing for the union movement. Neither sector represents a significant growth area of the economy. Table 7 shows that since 1991, the growth of the manufacturing labour force has not kept pace with that of the total labour force. During this period, manufacturing's share of employment has slipped from 17

percent to 15.5 percent. The situation is only slightly better in public and community services where employment has grown at the same rate as in the labour force as a whole. Note this category includes a range of employment that is not in the public sector and consequently does not capture the fact that public sector employment has been declining since the 1990s (see appendix).

Table 7 also shows that the largest labour force growth in the last decade has been in three sectors. The finance, insurance and business services sector has experienced by far the largest growth with its labour force increasing by 53 percent. The other two sectors to grow faster than the labour force as a whole are retail, wholesale, restaurant and hotels (29 percent) and construction and building services (28 percent). The state of trade unionism in these growth sectors is mixed. Table 6 shows that union density in the finance, insurance and business services sector is 6.4 percent. What is more, trade union membership declined by 17.9 percent in this sector during 2000. In the retail, wholesale, restaurant and hotels sector, although union density is only just above half that of the finance sector at 3.6 percent, membership grew by 19.7 percent in 2000, the largest increase for any sector (noting the growth in the agriculture sector was due to the inclusion of one particular union). In construction and building services, union density is twice that of the finance sector at 12.6 percent and membership grew in this sector by 9.3 percent in 2000.

Table 5: Union membership and growth by industry 2000

Industry Group	Union membership 2000	Membership by industry %	Breakdown of new members 2000 %
Agriculture, fishing, forestry etc	2312	0.7%	.5%
Mining and related services	752	0%	0.2%
Manufacturing	71162	22.4%	37%
Energy and utility services	3843	1.2%	-6%
Construction & building services	4009	1.3%	2%
Retail, wholesale, restaurants, hotels	14413	4.6%	15%
Transport, storage and communication	36895	11.6%	15%
Finance, Insurance and business services	14341	4.5%	-19%
Public and community services (includes non public sector employment)	170792	53.6%	4.9%
TOTAL	**318519**	**100%**	**100% (16114)**
Membership private sector	**Approx. 153200**	**48%**	
Membership public sector	**Approx. 165300**	**52%**	

Source: Household Labour Force Survey
Industrial Relations Centre Survey

As reported in previous years women's representation in unions is consistently higher than their representation in the workforce. The percentage of union members who are female remains around 48-50 percent. This year it is 50 percent. The percentage of the labour force that is female is 45 percent.

Table 6: Density by industry, selected industries

	Labour force 2000 (000s)	Approx. density 2000
Manufacturing	282.2	25.2%
Construction & buildingservices	114	12.6%
Retail,wholesale, restaurants, hotels	401.3	3.6%
Transport, storage communication	113.9	32.4%
Finance insurance &business services	225.1	6.4%
Public sector *	260.8 (Feb 2001)	Approx. 60%

Source: Household Labour Force Survey

* Quarterly Employment Survey

Table 7: Sectoral changes in employment (000s) 1991-2000

Industry Group	Labour force Dec 1991	Labour force Dec 2000	Percentage change employment
Agriculture, fishing, forestry etc	155.4	158.8	2%
Mining and related services	5	1.6	-32%
Manufacturing	254.8	282.2	11%
Energy and utility services	14.2	8.2	-42%
Construction & building services	88.8	114	28%
Retail, wholesale, restaurants, hotels	310.7	401.3	29%
Transport, storage and communication	94.7	113.9	20%
Finance, Insurance and business services	146.7	225.1	53%
Public and community services (includes Non-public sector employment)	402.9	499.5	24%
TOTAL	**1479.3**	**1818.4**	**23%**

Source: Household Labour force Survey (by NZSIC)

Results: Peak body affiliations

Throughout the 1990's New Zealand had two peak union bodies. The largest of these, the New Zealand Council of Trade Unions (NZCTU) was formed in 1987 to replace the Federation of Labour (FOL) and the Combined State Unions (CSU). In 1993 the Trade Union Federation (TUF) was formed as an alternate body from a core of blue-collar unions. In 2000, TUF merged with the NZCTU.

We asked each union to report on their peak council affiliation and the results are reported in Table 8 below with the figures in brackets representing the share of total membership belonging to CTU affiliates. Affiliates of the NZCTU comprise 86percent of total union membership.

Table 8: NZCTU affiliation (1991–2000)

	NZCTU Affiliate unions	Members	Percentage of members that are CTU affiliates
1991	43	445116	86.5%
992	33	339261	79.2%
1993	33	321119	78.5%
994	27	296959	78.9%
1995	25	284383	78.5%
1996	22	278463	82.2%
1997	20	253578	77.4%
1998	19	238262	77.7%
999	19	235744	78.0%
2000	26	273570	85.9%

Discussion

This paper reports two very interesting findings, the first growth in union membership in over a decade and a large growth in the numbers of unions in New Zealand. The question is how significant and sustainable are these findings.

There seems no doubt that the growth in numbers of unions is a direct and possibly unintended, result of the ERA provision that only a union can be a party to a collective agreement. While the growth in the number of unions may slow down we think it can be expected to continue for some time. The new unions, with their enterprise and workplace focus, look to be a different form of representation for workers compared with existing

unions and whilst their impact on the overall movement and membership at this stage is small this may not stay the case for long. What remains to be seen is whether the new unions will become more like the established unions, whether they will become like the small unions of old, or whether they will prompt a different path and new direction for employee representation in the country.

The membership data revealed by the survey make mixed reading for unions. On the one hand, union membership has increased for the first time in well over a decade. On the other hand, the increase is modest, only just keeping pace with the overall rate of growth in the labour force. Secondly, the distribution of the increase across unions, and the overall configuration of the union movement give unions pause for thought. In terms of the ANZSIC categories, the New Zealand union movement still has its heart in public and community services and in manufacturing. However, these sectors are not significant growth areas of employment. Moreover, union membership remains at relatively low levels in the three industry sectors which experienced above average employment growth in the 1990s, and in fact declined during 2000 in finance, insurance and business services, which is the fastest growing sector. In terms of the public/private sector division, union membership remains much higher in the public sector where employment has declined substantially over the last decade. This is suggestive of a union movement with its strength in declining sectors of the economy.

On the other hand, union membership has risen in two of the three swiftest growing sectors – in retail, wholesale, restaurants and hotels and in construction and building services. These increases are not accidental. The retail, wholesale, restaurants and hotels sector has been the target of significant organising campaigns by the key unions in the sector. The construction and building services sector has been targeted by the Organising Centre which the CTU launched in Auckland in September 2000 with support from key affiliates. A key issue for unions is whether they can continue to make membership gains in these growing sectors of the economy and reverse the decline in finance, insurance and business services. Equally, however, it would be a mistake for unions to ignore the public and community services and manufacturing sectors. Together, these two sectors comprise 43 percent of the labour force and any strategy of union renewal that overlooks their strategic importance does so at great cost. Workers in these two sectors have clearly demonstrated a propensity to join unions greater than workers in other sectors and there is likely to be considerable potential for substantial further membership gains in those sectors. Gains there could have significant overall effects. For example, if unions were able to unionise a further 10 percent of these two sectors, total union membership would increase by 24 percent and union density would rise to 27 percent.

It is important to identify the reasons for the changes in union membership. In previous reports, the explanations for the large-scale union decline in union membership have been considered. The decline has been attributed in large part to the effects of the Employment Contracts Act 1991, including its negative effects on the level of collective bargaining, and the consequent de-legitimizing of the union movement. Significant also during the last 10 to 15 years has been the impact of structural changes in industry that have seen a shift away from employment in manufacturing and other union strongholds to smaller less unionised workplaces, together with a shift from the public sector to the private sector.

The harsh economic environment of the 1990s along with high unemployment also contributed to an unfavourable environment for unions.

In turn we can examine these same factors when looking for explanations of the recent growth in membership. Whilst the data only captures the effects of the first three months of the ERA it appears that its introduction has contributed to an environment more favourable to unionisation. Not only do unions have a new legitimacy via registration requirements and a monopoly over collective bargaining, access rights to workplaces are also a boost to union organising drives.

The ERA however does not represent a return to the "good old days" for unions where compulsory arbitration and compulsory membership meant that little attention needed to be turned to matters of organising and recruitment. The Act promotes collective bargaining and good faith bargaining in an attempt to address inherent power imbalances at the workplace but does not bestow the kind of special privileges, such as compulsory unionism, enjoyed by unions in the past. As noted above, and as exemplified in the construction industry, the CTU, recognising the problems caused by past reliance by unions on favourable institutional arrangements, has taken on board a new campaigning and organising focus learning from the experiences of unions abroad.

In summary some of the factors important for union growth appear to be apparent in New Zealand at present. Low levels of unemployment (running at 5.5 percent for December 2000) point to a tighter labour market and together with a more favourable institutional framework produce a climate more conducive to collective bargaining and organising. Together with this the union movement is turning its attention to innovative strategies for growth and renewal. However, one other important factor for union fortunes, structural change in industry and shifts in the pattern of employment to non-standard forms of employment, shows no sign of reversal. In the union heartlands, absolute decline in employment in the public sector and relative decline in employment in manufacturing, appear to be trends unlikely to be reversed. As elsewhere in the world, New Zealand unions need to make greater inroads into growth sectors of the economy (without ignoring their core constituency) and the part time, casualised and hard-to-organise areas, if they are to achieve anything like the density figures of the early 80's.

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Appendix

Public/Private sector employment breakdown

	Public sector			Private sector			Total
	female	male	total	female	male	total	total
Feb 1991	163.6	138.1	301.7	391.8	506.2	898	1199.7
Feb 2001	160.7	100.1	260.8	563	626.9	1189.9	1450.7
% change			-16%			+24%	0.21
B/down 91			25%			75%	100%
B/down 01			18%			82%	100%

Source: Quarterly Employment Survey

See: 'Differences between the QES and HLFS' (Statistics New Zealand) for an explanation of why the HLFS and the QES are reporting different figures

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Sexual Harassment in Employment: An Examination of Decisions Looking for Evidence of a Sexist Jurisdisprudence

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Sexual harassment within the workplace has attracted much research over the last 15 to 20 years, although very little has been undertaken within the New Zealand context. Decisions were analysed from both the Employment and Human Rights Institutions covering the period from 1991 – 2000. From this analysis there is evidence that sexism does persist in the decisions made in these institutions, but that it may not be as severe as what the literature from other countries suggests is happening there. Examination of the decisions also highlights the apparent lack of consistency in remedies awarded, and the need for the wide legal definition of sexual harassment to be broken down into a grading of behaviours that allows decision makers to adequately address the issues of remedies with some consistency and recognition of the impacts of the behaviour on its victims.

Introduction

There is a concern expressed by some authors about how women are treated in law (Davis, 1994; Estrich, 1991; Fitzgerald, Swan, and Fischer, 1995; Grainer, 1993; MacKinnon, 1979), contending that women are disadvantaged because of a patriarchal or sexist jurisprudence. Estrich (1991) and Fitzgerald et al. (1995) claim that women who take sexual harassment claims to court are poorly compensated. (Conversely, writers such as Patai (1998) contend that claims of sexual harassment have grown out of hand in terms of quantity and substance, and these claims are being fed by a sexual harassment industry.) In New Zealand sexual harassment of employees is currently legislated against in both the Employment Relations Act (2000) and the Human Rights Act (1993). This research looks at decisions made from 1991 to 2000 when the covering legislation was the Employment Contracts Act (1991), which had similar provisions to the ER Act, and the HR Act. There are some of the most progressive statutes in the world (Davis, 1994; Fredman, 1997), Davis (1994) claimed that where the EC Act, on paper, was the best in the world, in practice it was ineffective because it was rarely used by women, and because decision makers failed to treat sexual harassment as serious, and would undermine the legislation by using their discretionary powers poorly.

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Research questions

The research reported here was designed to investigate whether there was indeed a patriarchal jurisprudence in New Zealand with respect to decisions in workplace sexual harassment grievances. The research questions convey the concerns and claims made by the some of the writers on the subject who look from a feminist perspective.

1. If the respondent does not admit to the behaviour labelled as sexual harassment by the applicant, to what extent is corroborating evidence required by the decision maker to accept that such behaviour occurred?

2. Does the applicant's general workplace behaviour, such as use of profanity, style of dress or use of "x-rated" humour have any influence on the decision made about whether sexual harassment has occurred, and if it has, on its severity?

3. Is the applicant held in any way responsible for the behaviour as a direct result of her reactions or resistance to the behaviour?

4. Is the applicant's subjective view of "offensiveness" left as subjective, or is some objective test used?

5. Does the objective test as to whether or not the behaviour caused detriment to the applicant substantially damage the applicant's case in terms of remedies?

6. What are the amounts awarded in remedies to successful applicants in a grievance of sexual harassment and is there any discernable pattern in amounts awarded according to the types of behaviours that applicant was subjected to?

Methodology

This research analysed 30 decisions of cases where there has been a claim of sexual harassment sent for adjudication in the human rights or employment institutions from 1992-2000. The qualitative aspect to the research is based around that carried out by Morris (1996), and uses a content analysis as explained by Krippendorf (1980). The process involves interpreting the words of the decision-makers looking for themes that may reflect sexist attitudes and values, or adherence to myths about how women will react to sexual harassment that could be detrimental.

A random sample of five decisions was given to two outside "experts" to analyse for answers to the research questions. A reliability test was then used to determine the extent of agreement giving a reliability coefficient of 0.96.

Results

Question 1: Corroboration

Table 1: Corroborating Evidence

		Employment institutions	*Human Rights instititutions*
		n = 19	n = 11
Corroborating Evidence	Not relevant	15.8%	9.1%
	Corroboration required	57.9%	45.5%
	Corroboration not required	26.35%	45.5%

The results for corroboration being necessary by the decision maker across institutions appear to be reasonably high at around 53 percent. Corroboration didn't necessarily mean that an independent person had witnessed the behaviour complained of, but simply whether or not the applicant discussed the problem with someone else when it had occurred. Heavy emphasis was put on this type of evidence by Goddard C J in *Managh and Café Down Under v Wallington and Jacobsen,* unreported, WEC 61/96. However such corroboration was not sufficient in *Y v X*, unreported, AT 126/92, with the adjudicator stating:

> "I do not rely on evidence of a complaint being made to people in whom she might naturally have been expected to confide as being evidence of corroboration of the facts complained of . . ."

This adjudicator may have chosen not to put weight on such evidence, but many other adjudicators do; this is sometimes the sole evidence of corroboration.

Some decisions did seem to require corroboration (for example, *A v Mr and Mrs B, and XY Ltd*, unreported, CT 25/95). Here the adjudicator agreed that there was evidence that the employer verbally harassed the applicant but not that he had physically harassed her. Witnesses for the respondent gave evidence that some of the verbal comments complained of were made by the employer, but that they were jokes and nothing to get upset about. The adjudicator agreed that this behaviour did take place. The other claims about specific requests for sex and physical harassment were not held, and the adjudicator mentions in his decision that no other staff saw the incidents described by the applicant. It is highly unlikely that an employer who offers money for sexual intercourse from an employee is going to do this in front of other witnesses.

In *Y v X*, unreported, AT 126/92, the adjudicator found that harassment had not occurred and made the following remarks with regard to corroboration at page 17:

> "What the Tribunal had and must give some weight to, however, is testimony from a number of other employees who denied that they had ever seen any such behavior from Mr X or had been made uncomfortable by his actions. This testimony from other young women who worked in the same kind of situation, and in the same kind of power relationship must be given some weight".

With respect to the point that other employees didn't feel uncomfortable by the actions of Mr X, this particular testimony should not be given weight. An employer who sexually harassers an employee does not necessarily harass all employees, and any inference that X did not harass Y because he didn't appear to harass any other employee is weak.

Managh and Café Down Under v Wallington and Jacobsen, unreported, WEC 61/96 is an appeal by an employer against the finding of an earlier Tribunal. This was in fact one of three cases against this employer for sexual harassment. The Tribunal had discounted the evidence in totality of one of the applicant's witnesses who corroborated her story, as the evidence was said to be 'dripping' with animosity towards Mr Managh. Given that virtually all the respondents' employees were making claims of sexual harassment, animosity is hardly unexpected. To expect witnesses, who had also been harassed by the respondent to give unemotional evidence seems particularly unrealistic, and implies that good witnesses should provide unemotional, rational, and very "male" evidence. The Chief Judge however rightly pointed out the flaws with the Tribunal's reasoning on appeal to the Employment Court.

In *Z v A* [1993] 2 ERNZ 469 the Chief Judge makes some comments about corroboration and credibility at 492:

> "It is not unreasonable to expect a man of the appellant's age and long business career to have left a clearer trail if inclined to act generally towards women in an inappropriate way as was suggested. I have taken into account all the literature . . . but it seems reasonable to expect some evidence of mention of this behaviour if it went on unremitting for 18 months or to expect someone to have noticed some signs of oppression of this kind even without being told."

Goddard C J claims to have taken into account the literature, but seems to reject what it has to say, in favour of how he expects women to react to harassment. Aside from this there were other witnesses who were employees, who gave evidence in support that at least some of the behaviour had taken place, but that they were not offended by it. So at least some of the behaviour was noticed by other employees over the 18-month period.

Question 2: General workplace behaviour

The general workplace behaviour of the applicant was referred to in a sexist manner by decision makers in relation to reasons for their decision in around 23 percent of the case.

References to general workplace behaviour were not particularly common but when used did show sexist connotations; there were no differences noted between institutions.

Table 2: General Workplace Behaviour

		Employment institutions	*Human Rights instituions*
		n = 19	n = 11
General Workplace Behaviour	Not relevant	5.3%	9.1%
	Applicants behaviour considered	26.3%	18.2%
	Applicants behaviour not considered	68.4%	72.7%

In *A v Mr and Mrs B, and XY Ltd*, unreported, CT 25/95 the adjudicator referred to the applicants style of dress at work as not particularly revealing. The clothes the applicant wore were shorts and a tee shirt, which were considered baggy. While in this decision the reference to the applicants clothing did not count against her, it appears that this is only so because the adjudicator found her clothes not be provocative. Reference to the applicant's clothing was irrelevant in this case and shows evidence of sexism.

Section 35 of the EC Act (1991) precludes the decision maker from putting any weight onto evidence of the applicant's sexual reputation. However, in A *v* Z [1992] 3 ERNZ 501 the adjudicator felt it necessary on two occasions to refer to a tattoo the applicant had near her breast. He does go on to say that the Act directs him to take no account of it, but if this is the case, he should not mention it at all, let alone twice.

Question 3: Applicant's responsibility

The frequency (27 percent) with which the decision maker referred to the applicant being in some way responsible for the behaviour because of her reactions or responses to it were very similar to the frequencies for general workplace behaviour.

Table 3: Resistance to the Behaviour

		Employment institutions	*Human Rights instituions*
		n = 19	n = 11
Resistance to the the Behaviour	Not relevant	10.5%	9.1%
	Held responsible	31.6%	18.2%
	Not held responsible	57.9%	72.7%

There did appear to be a distinct difference between the two tribunals' approaches on this question. The Complaints Review Tribunal made less references of this type and when they did, they were less serious or damaging to the applicants' cases.

In *A v Mr and Mrs B, and XY Ltd*, unreported, CT 25/95 the applicant did not tell her employer directly that his advances were unwelcome, but claims that he would have had to be stupid or blind not to have got the message. As the legislation makes it clear that the complainant does not have to express her concern regarding the harassment to her employer if they are the harasser, then this evidence about whether or not she told him that his advances were unwelcome is irrelevant, and should not form part of the decision.

In *Crawford v Managh and Managh and Associates*, unreported, WT 96/95 the adjudicator listed various things which gave weight to the argument that the applicant had never been harassed by her employer. These include:

- If Ms Crawford had been harassed for so long then it was unlikely that she would have continued to work for him as long as she did.
- That there were never any witnesses to the harassment.
- The applicants would have faced a 26-week stand down period if she had not taken a personal grievance.
- There was a four-day delay between the last request for a sexual relationship and the applicant's resignation.
- The applicant continued to work for the respondent during her last week despite what she had alleged had been going on.

While the Tribunal found in the applicant's favour (on what the Tribunal calls "the basis of *limited* supporting evidence") and concluded that harassment had taken place, the preceding list of things under heading "in support of the respondent's claim" indicate that these things were taken into consideration. This shows a lack of understanding about the ways in which women respond to sexual harassment, (see Fizgerald et al., 1995) and is an example of sexist jurisprudence, in that the real responses of women are ignored and some kind of male model of reaction is being used instead.

In *Managh v Crawford* [1996] 2 ERNZ 392 the Chief Judge makes a disturbing remark, interestingly in support of the victim of the harassment. He claims that "it is obvious that any self-respecting female employee would have left in like circumstance". This statement is made in support of the victim's assertion that she was constructively dismissed because of the sexual harassment, however, this is not necessarily the response that most women have to sexual harassment in the workplace. Also given the role of the Chief Judge in giving guidance to the Tribunal, such remarks could be detrimental to other complainants of sexual harassment.

In *Y v X*, unreported, AT 126/92, the Tribunal held that the employee could have ended her own difficulty with her employer by giving him an outright rejection to his repeated requests for lunch dates. The employee in this case did refuse such invitations, but clearly not as forcefully as the Tribunal would have liked; it blamed the applicant for the behaviour by putting the burden of stopping the requests onto the applicant. Again the legislation is explicit in that the recipient does not have to express their concern to the employer if they are the harasser.

Question 4: Subjective test for offensiveness

The subjective test for offensiveness was only altered to some kind of objective test in seven percent of the decisions. While this percentage is low, it should be zero. The case law that stipulates this subjective test was developed very early and should mean that it is always used. The following tables show the frequency of the subjective test for offensiveness altered in some way to an objective test by the decision maker.

Table 4: Subjective View of Offensiveness

		Employment institutions	*Human Rights instititutions*
		n = 19	n = 11
Subjective view of offensiveness	Not relevant	5.3%	9.1%
	Held responsible	5.3%	9.1%
	Not held responsible	89.5%	58.8%

In *A v Mr and Mrs B, and XY Ltd*, unreported, CT 25/95, the adjudicator explains how the test for words or actions of a sexual nature has been met, but then goes on to say that the applicant has misconstrued a number of actions by her employer, while accepting that others did cause offence. If the test has been met for establishing that the behavior was sexual, then it is not up to the decision maker to decide if the applicant should or shouldn't have been offended. In *A v Z* [1992] 3 ERNZ 501 the Tribunal held that the verbal harassment the applicant complained of was within what would be considered the normal context of humour that goes with working in a pub. As this subjective test for offensiveness is what sets New Zealand law progressively apart from other countries, it is disappointing to see it misused at all.

Question 5: Objective test for detriment

The frequencies of the use of an objective test by the decision maker that damages the applicant's case in some way was quite high at around 40 percent.

Table 5: Objective Test for Detriment

		Employment Institutions	*Human Rights Instititutions*
		n = 19	n = 11
Objective test for detriment	Not relevant	10.5%	0
	Test damaging to complainant	36.8%	45.5%
	Test not damanaging to complainant	52.6%	54.5%

Although the same subjective and objective tests apply under both pieces of legislation and case law, my interpretation of the decisions is that it is the human rights institutions which made more serious use of the objective tests to the applicant's detriment. In *A v Z* [1992] 3 ERNZ 501 the Tribunal held when referring to an incident of alleged verbal sexual harassment, that as it was neither repeated or significant, so it was not detrimental to the employee's employment. However this was only one instance among a series of incidents that included verbal harassment, unwanted touching and sexual assault. At page 509 the adjudicator states, "Did the events as alleged happen? In the affirmative – yes they did". This is a clear indication that the adjudicator accepts the behaviour complained of occurred; yet earlier at page 507 he says:

> "I accept that the incident did happen in the way the applicant and Witness "C" stated it happened. It was, however, in the context of what might be described as ribald banter in a pub . . . . In itself, that is, in isolation, I am of the view that the incident does not fall accordingly within the definition of sexual harassment. It was neither repeated nor in itself, detrimental to the employee's employment, job performance, or job satisfaction."

The comments do not make sense; on the one hand the adjudicator says he accepts that the all the incidents occurred, but on the other, he is saying that as this incident wasn't repeated, it doesn't reach the standard for sexual harassment. As he accepts that all the

incidents did occur, then the assumption is because the applicant wasn't the subject of the exact same joke told in the same way and context again, then it wasn't repeated. Clearly there was repetition of the harassment if he accepts that all the incidents occurred.

In *J v M,* unreported, AT 235/94 the applicant, among other things in her claim of sexual harassment describes an incident of forced sexual intercourse by her employer, and as such this case could be viewed as one of the more serious. In the award of remedies the Tribunal allows for $15,000.00 compensation which seems to indicate that the adjudicator does realise that the harassment was serious. However, the adjudicator also states he has chosen not to grant a higher amount for compensation as the applicant can't have been all that traumatised by the events at the respondent's house (the alleged rape) as she returned

to work for a short time before resigning. Again this rationalisation of the victim's behaviour lacks understanding of victim responses and is sexist, because of the objective test for detriment.

In *Read v Mitchell* [2000] 1 NZLR 470 the Tribunal decided that Read had suffered no detriment as she was sufficiently assertive to deal with the harassment at the time that it occurred. In *Sahay v Onepoto Service Station*, unreported, AP 277/96 Wild J held the sexual harassment had occurred but commented that the sixteen year old complainant should not be "prissy" and that the detriment suffered was low.

Question 6: Remedies

Remedies ranged from between $800.00 and $25,000.00 for humiliation, loss of dignity and injury to feeling, while the behaviour complained of ranged from general verbal comments to rape allegations. The behaviours were categorised into six general groups, and the next table shows both the mean and the median for compensation awarded according to the behaviour type.

Table 6: Average Compensation According to Categories of Behaviour

Type of Behaviour	*Mean*	*Median*
Rape	$8,500.00	$8,500.00
Sexual assault	$9,666.00	$5,000.00
Quid pro quo	$14,166.00	$10,000.00
Unwanted physical contact	$3,960.00	$3,250.00
Personal unwanted verbal attention	$11,285.00	$8,000.00
General verbal comments	$5,000.00	$5,000.00

From this table it can be seen that the highest awards for compensation are for "quid pro quo" harassment. This then indicates that this is the behaviour that is considered to be the most deserving of compensation. The reason this behaviour is considered to be so serious is probably because of the element of coercion that is inherent in such behaviour. But there is clearly coercion in rape and sexual assault also, and I believe it is a reason for concern to see that these behaviours have attracted less in compensatory remedies than "quid pro quo". The other generalisation that can be seen in these averages is that unwanted physical contact surprisingly has warranted the least in compensation.

There is a view that compensation awards link directly to the income level of complainants (Morris, 1996; McAndrew, 1997). However, regardless of this possibility there is still evidence that men will be awarded more for humiliation and hurt feelings than women,

even if the income variable is removed (McAndrew, 1997; Morris, 1996). Given the findings of these two pieces of research, and the low amounts awarded for unwanted physical sexual contact that have been found here, I believe there is evidence of sexism within the decisions on what women's hurt feelings are worth.

As has already been highlighted in *J v M*, unreported, AT 235/94 the amount awarded in compensation for what amounted to an alleged rape was $15,000.00. While this amount is definitely on the high side for the sexual harassment cases, is does seem somewhat low considering the criminal nature of the behaviour complained about, and the obvious harm caused to the victim. Another concern with the remedies in this decision is the adjudicator's comments concerning his taking regard for the part-time nature of the job. While I assume this is an issue which needs to be considered when looking at loss of income, I don't see its relevance to compensation. After all, this award is for the humiliation, loss of dignity and hurt feelings as a result of the alleged rape. The implication is that some how the applicants feelings are not as badly damaged as they would have been had she been employed full-time.

In *Laursen v Proceedings Commissioner* [1998] 5 HRNZ 18 the High Court remarked that comparison with other cases is difficult and overall the amounts awarded in New Zealand are relatively low and out of step with other jurisdictions. In *Managh and Café Down Under v Wallington and Jacobsen*, unreported, WEC 61/96 the Chief Judge pointed out several factors that need to be considered when deciding upon the level of remedies to award, which were later used again by the Complaints Review Tribunal in *Laursen*. Perhaps it would be helpful to view these factors as mitigating circumstances from which a compensation award could be further personalised to the particular circumstances of the case.

Discussion

After analysing the decisions in accordance with the research questions, I graded all the decisions on an overall global choice as to whether or not any sexist elements within them resulted in some detriment to the applicant, and found this to be the case in 43.3 percent of the decisions.

Overall I conclude that there are sexist elements to the jurisprudence in sexual harassment decisions, but that the situation is not as dramatic as the cases that have been described in the United States and United Kingdom. The legislation here does appear to be progressive by comparison to these other jurisdictions, but sexist attitudes still remain with those who have the power to use the legislation to compensate the victims. Some of the problems could be dealt with by giving clearer direction through statute or informed directions from our higher level judges. I believe that sexual harassment is a matter for direct legislation such as other minimums like holidays and wages. Clearer and precise direction in the legislation could help remove more of the decision maker's discretion, and in doing so remove some of the potential for sexist bias to be manifested.

Finally responses and reactions to sexual harassment in the workplace needs further research in New Zealand. While there is considerable literature on this subject internationally, there needs to be some in our own context. This may provide decision makers with valuable information and aid them to make decisions on fact that are more in line with the reality of responses and reactions, rather than the rhetoric of male biased rationality.

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