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Adjudication Outcomes in the Employment Tribunal: Some Early Comparisons with the Employment Relations Authority

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The New Zealand Employment Tribunal has now functioned in its mediation and adjudication jurisdictions, resolving and arbitrating employment rights disputes, for a full ten years. The Tribunal will be finally disestablished early in 2002. The Employment Relations Authority established under the Employment Relations Act 2000 has replaced the adjudication function of the Tribunal, and the Authority will complete the Tribunal caseload still outstanding at the final closing down of the Tribunal, likely to be something in the neighbourhood of 100 cases. A number of Members of the Employment Tribunal have been appointed to the Authority, so the change in institutions has not been without some continuity of personnel. Temporary transitional Members have, in turn, served on the Tribunal, replacing those appointed to either the Authority or the new Mediation Service also set up under the Employment Relations Act.

As a matter of legislative policy, the Authority's approach to case determination is to be investigative, with the initiative in the hands of the Authority Member, rather than continuing the more traditional adversarial model of advocate-directed case presentation practiced, again as a matter of legislative policy under the Employment Contracts Act 1991, by the Employment Tribunal.

The anecdotal evidence is that proceedings in the Authority have indeed emerged as often less legalistic, less formal, less concerned with technicalities, and less expensive than the Tribunal adjudication process, as it had evolved over the decade. That is not to suggest that the Tribunal often conducted its adjudications in a legalistic, formal, and overly technical fashion. The Tribunal was, in fact, in most respects a flexible and accessible institution. Nonetheless, the Authority is charged with conducting its hearings in a more proactive and less restrained way than the Tribunal was authorised to do, and the anecdotal evidence is that the Authority's approach has been well received by interested parties.

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Although the institutions have changed under the Employment Relations Act 2000, the basic law related to personal grievances, with only a couple of notable exceptions, remains essentially unchanged. This has naturally given rise to a curiosity among both practitioners and scholars as to how the case outcomes in the Authority's determinations compare with outcomes in the Tribunal's adjudication decisions over the decade of the latter's existence. This short research note sets out to provide some limited, early answers.

The database of decisions

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

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

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

A number of academic and practitioner papers have issued from this project to date, including annual "facts and figures" reports published in the corresponding issues of the *New Zealand Journal of Industrial Relations* in 1999 and 2000 (McAndrew, 1999; McAndrew 2000). In those papers, relying on data for the years 1992 through 1999, I reported on the general profile of the Tribunal's caseload and detailed outcomes for personal grievance cases, highlighting factors that appeared to be associated in one manner or another with grievance outcomes, and last year focusing on trends in the primary area of grievances over dismissal for misconduct.

It is not intended here to reproduce the general profile data or to specifically update data presented in earlier papers. The intent of this present report is to compare early grievance outcomes data from the Employment Relations Authority with grievance outcomes data from the database of Employment Tribunal decisions.

Grievance outcomes

How parties fare in the Tribunal and the Authority is always of interest to both practitioners and scholars. To explore this, I have looked at just the substantive personal grievance decisions issued by the Tribunal in the years 1992 through 2000 inclusive, in the four primary personal grievance categories – dismissals for serious misconduct, dismissals for poor performance, dismissals for redundancy, and disadvantage arising from alleged unjustified actions of the employer – and personal grievance determinations issued by the Authority in the same four grievance categories from the commencement of its operation in October 2000 through mid-September 2001. Authority personal grievance determinations in those areas for what is essentially the first year of its operation numbered 90 (34 misconduct, five poor performance, 28 redundancy, and 23 disadvantage). Tribunal decisions in which a personal grievance in one of the four areas was the primary claim totaled about 3000.

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

For the purpose of our analysis, a successful outcome for the employee – a "win" – consists of a decision by the Tribunal or the Authority that the employee has a personal grievance.

In an adjudication case where the applicant has been successful to the extent of a finding that he or she has a personal grievance, then remedies are likely to follow. The available remedies, depending on circumstances, are reinstatement of the applicant to a job, reimbursement of lost remuneration, compensation for loss of tangible benefits, and compensation for humiliation, loss of dignity and injury to feelings. The outcome of a case can be measured in terms of any or all of these remedies, in addition to being measured on the straight "win – lose" dimension.

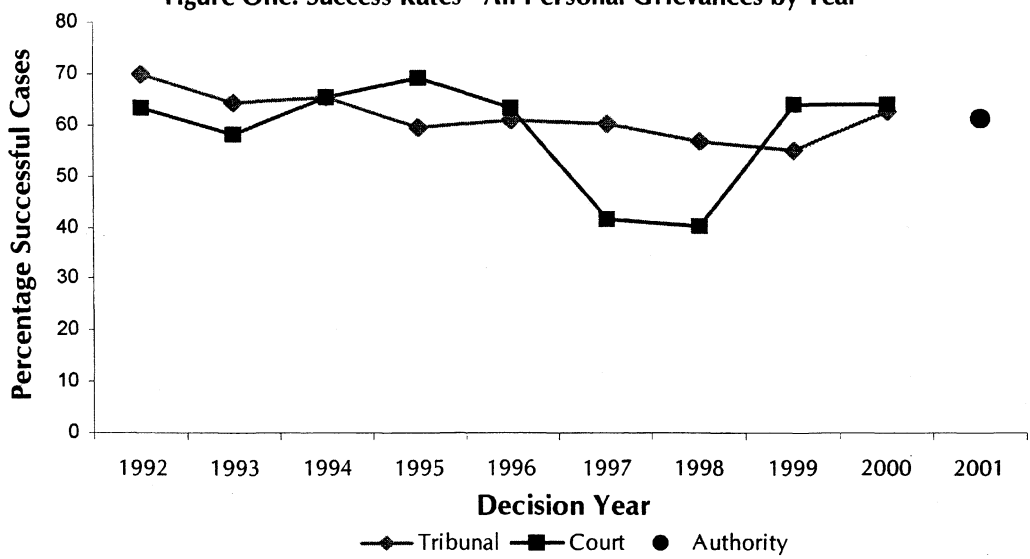
Of these available remedies, compensation for humiliation, loss of dignity and injury to feelings is, at least in some respects, the most useful measure of decision outcomes, both because it is almost universally sought by grievants and it is arguably the remedy over which the Tribunal and the Authority have the greatest discretion. Accordingly, compensation for humiliation, loss of dignity and injury to feelings and the win – lose dimension are used here as the measures of grievance outcomes.

Comparing success rates in the institutions

In the first year of the Authority's operation, employees pursuing personal grievance claims through to a determination won 44 percent of claims of unjustified dismissal for misconduct, 61 percent of claims of both disadvantage and unjustified dismissal for redundancy, and 80 percent of claims of unjustified dismissal for poor performance.

Figure One shows the success rates for applicants in all personal grievances (which is to say, all grievances in the four categories identified earlier) in the Employment Tribunal and the Employment Court during the Employment Contracts Act period, and compares the applicant success rate in all grievances in the Authority in the first year of its operation.

Figure One: Success Rates - All Personal Grievances by Year

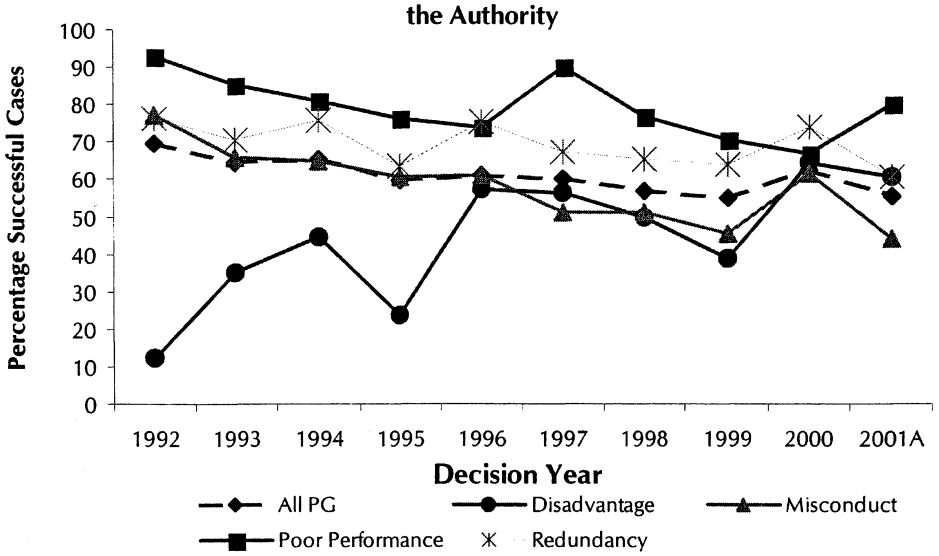


It is noteworthy that the applicant success rate in the Tribunal has remained relatively steady, though showing a gradual slight decline through the 1990s, until reversing upwards in 2000 in, some would suggest, the shadow of the environment created by the impending implementation of the Employment Relations Act.

Grievant success rates in the Employment Court show a more variable pattern over time. The reasons for that need some attention, but are beyond the scope of this short research note. It is of interest that in the year 2000, the grievant success rates in the Tribunal and the Court came together, and that the grievant success rate in the first year of the Authority is marginally lower, but close to the same level.

Figure Two provides more detail. It shows the success rates in the Tribunal through the year 2000 and in the Authority in 2001 (indicated by "2001A") for all grievances (duplicating the Tribunal line in Figure One) and for each of the four major categories of grievances that we have been tracking.

Figure Two: Personal Grievance Success Rates in the Tribunal and the Authority



Several interesting patterns are apparent in Figure Two. Though the numbers remain relatively small, disadvantage grievances have gradually increased over the years, and particularly in recent years, and Figure Two shows that the applicant success rate in disadvantage grievances has also risen very dramatically over the past decade.

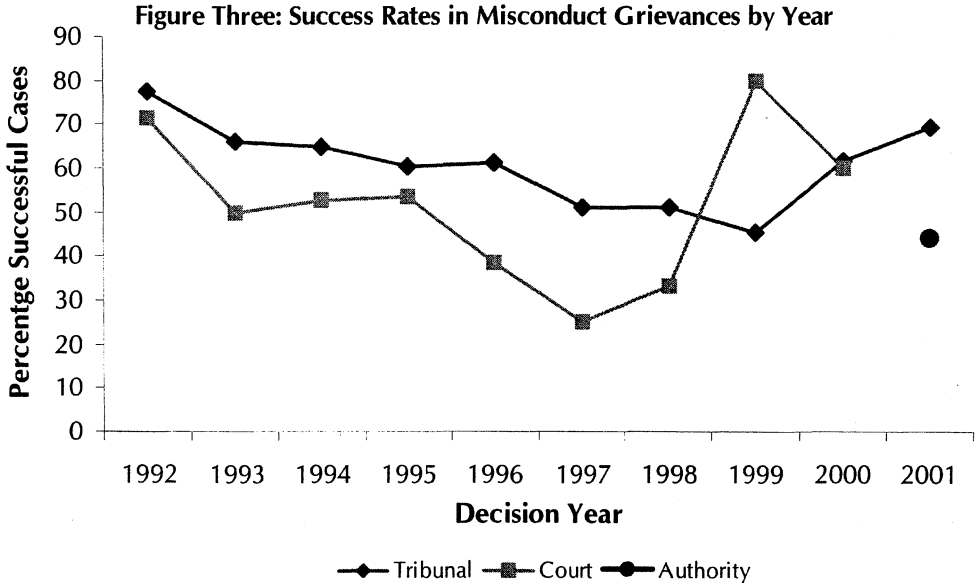
As discussed in last year's report (McAndrew 2000), the grievant success rate in grievances protesting dismissal for misconduct experienced a marked and steady decline through 1999. However, that trend was sharply reversed in the year 2000, again perhaps in the shadow of the new environment promised by the Employment Relations Act. Interestingly, the Employment Relations Authority has, in turn, reversed that blip in the downward trend of success rates in misconduct cases.

The trend in dismissal for misconduct cases has essentially moved in two-year stages: applicant success rates were about 75 percent in 1992, about 65 percent in 1993 and 1994, down to about 60 percent in 1995 and 1996, about 50 percent in 1997 and 1998, down further to about 45 percent in 1999, before climbing back over 60 percent in the year 2000. Grievant success in Authority determinations of misconduct cases in 2001 has returned to 44 percent, apparently effectively continuing the two year pattern, save only for the hiccup in 2000.

As noted in last year's research note, some of the most interesting information arises in looking at misconduct cases, by which again I mean personal grievances protesting allegedly unjustifiable dismissals for the expressed reason of serious misconduct. As noted, in general terms, grievant success rates in misconduct cases in the Tribunal fell steadily and significantly through the Employment Contracts Act period, but that trend was reversed in the Tribunal in 2000.

As Figure Three shows, the reversal continued in the Tribunal in 2001, even as the success rate in the Authority took on the appearance of being an extension of the downward trend so apparent in the Tribunal between 1992 and 1999. This is doubly interesting because in 2001, of course, about half of the Tribunal Membership of the previous year had been replaced by temporary Members, with nine of those who departed the Tribunal doing so on appointment as Members of the Authority.

Figure Three: Success Rates in Misconduct Grievances by Year



Compensation outcomes compared

Figure Four shows Authority compensation outcomes for each of the four categories of personal grievances under study. This early picture is unremarkable.

Figure Five shows that, while there is not an exact match, there are no clear patterns of difference in overall compensation awards for the four categories of grievances in the Tribunal, the Authority, and the Employment Court (under the Employment Contracts Act). This general finding largely holds true as well when comparing compensation awards in the Authority and the Tribunal for grievances of the various major types.

Figure Four: Compensation in the Authority

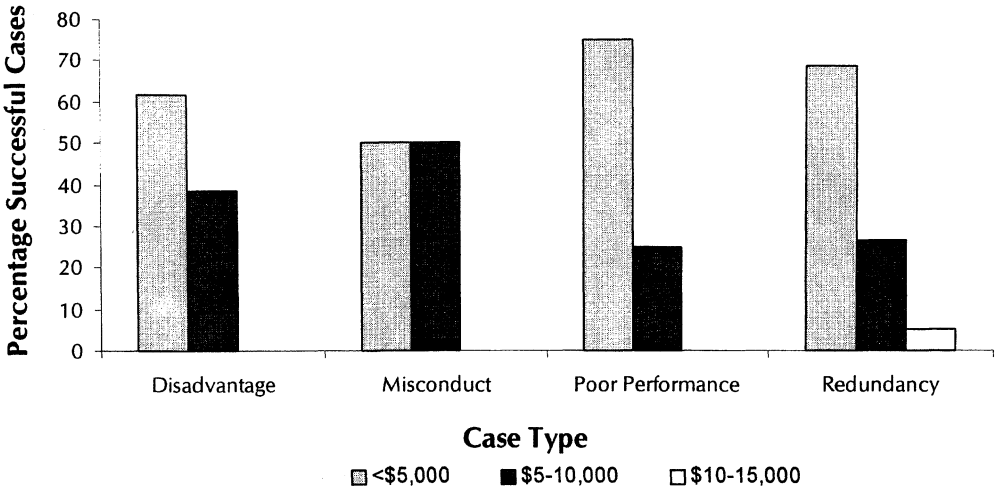
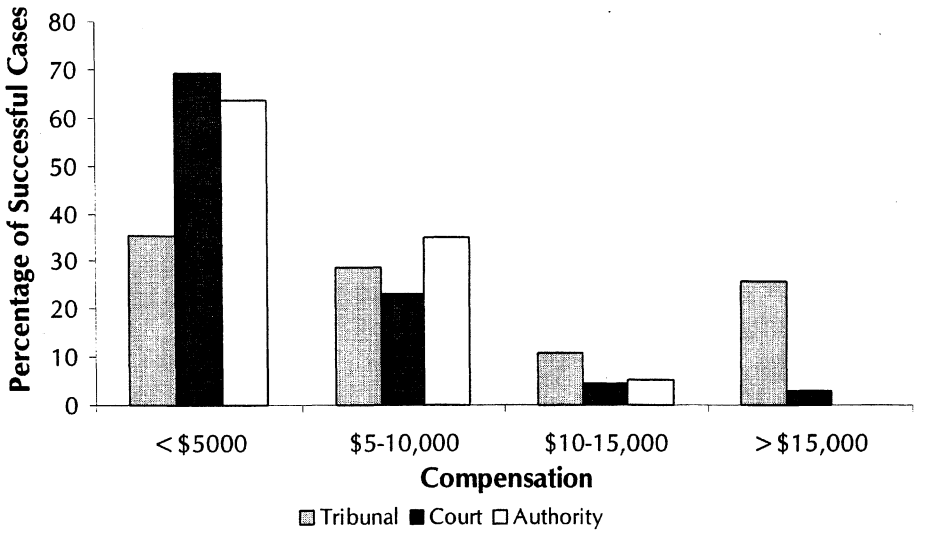
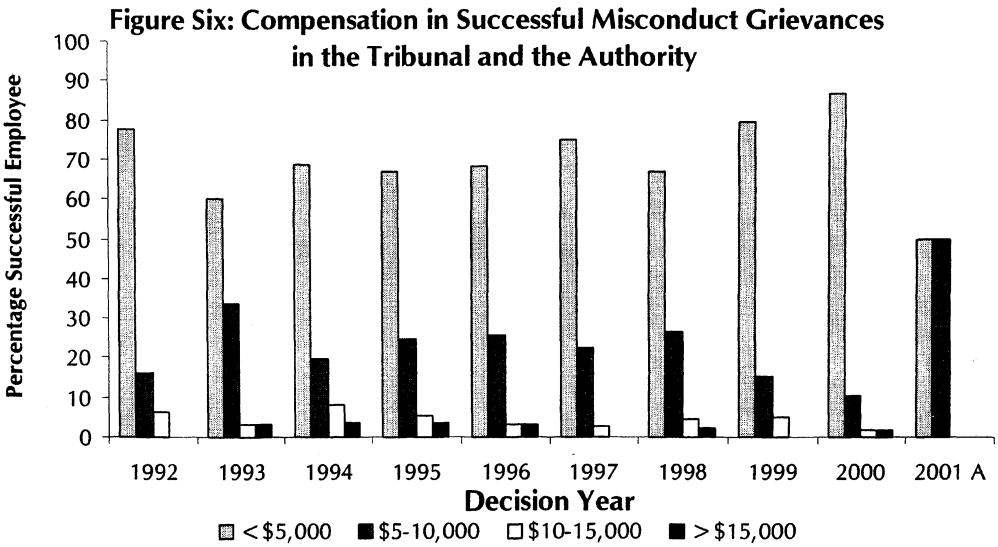


Figure Five: Compensation in All Jurisdictions



Only the compensation pattern for successful misconduct dismissal grievances showed any evident change in the Authority (2001 A) from the pattern of compensation awards established by the Tribunal over the years. This is set out in Figure Six.



What is most apparent in Figure Six is that, while the Authority had not yet ventured into the higher reaches of the compensation range in misconduct cases, it would appear to be moving towards the $5,000 – $10,000 category as the average or "usual" award, whereas the usual compensation award for humiliation, loss of dignity and injury to feelings in misconduct cases (and most others) in the past has been under $5,000.

One might have supposed that this was just an overdue allowance for inflation. But curiously, no similar adjustment is apparent in the compensation figures in the Authority overall or for successful grievants in other major grievance categories.

References

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