Three years out: the Labour Court's treatment of dispute resolution procedures

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In this paper the author evaluates the performance of the Labour Court based on cases decided by it. She concludes that, with a few reservations, the Court's decisions appear well suited to the purpose and policy of the law it is seeking to interpret and to the facts of particular cases.

I INTRODUCTION

The three years which have passed since the enactment of the Labour Relations Act 1987 (LRA) have left us with a sufficient body of cases decided under the Act to appraise the Labour Court's performance. This exploration starts from certain premises and will measure the success or failure of the Labour Court against that yardstick. The premises are certainly subjective, and those who believe that the Court and the LRA should serve other functions may well find themselves in complete disagreement with the views expressed here.

It might be possible to get up a good argument as to the primary function of the LRA. Peter Boxall summarises the themes of the statute as "equity, flexibility and sanctity".[1] Those qualities certainly exist as guiding principles in the LRA. I think, however, that a fairly good case could be made that its most important feature, and one affecting the daily life of workers, unions and employers, is its increased emphasis on dispute resolution procedures through its disputes of rights[2] and grievance procedures[3] as vehicles for channeling, defusing, and resolving industrial conflict.

My basic premise is that conflict is inevitable within human relations.[4] It can be dealt with in a variety of ways, but it must be accommodated within or without institutions. The varieties available are numerous. For example, some seek to repress

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1 P Boxall *An Introductory Guide to the Labour Relations Act 1987* (1987) 5.

2 Ss 186-192; Sch 6.

3 Ss 209-229; Sch 7.

4 There are those who accept this view, see eg, D McDonald "Co-operation and Conflict: A Trade Union Point of View" in J Howells, N Woods, F Young (eds) *Labour and Industrial Relations in New Zealand* (Pitman, Carlton, Victoria, 1974) 221. There are, of course, those who take the position that conflict is an aberration and the result of poor communications. See eg, P Edwards *Conflict at Work: A Materialist Analysis of Workplace Relations* (Blackwell, Oxford and New York, 1986) 20.

and punish evidence of conflict, while others channel conflict but do not offer effective resolution of the dispute. Other methods attempt both to channel and resolve the underlying dispute, hoping this will be the least destructive to society.[5]

I tend to support the last view, which holds that if effective accommodations are not made to address conflict and resolve it, it will find far more destructive and ultimately less satisfying outlets. It follows from this that a system developed to address conflict can only be successful if it is effective. Effectiveness depends on making a larger number of matters amenable to resolution and on providing participants with the feeling - win or lose - that they have been heard.[6]

A second important, although less pragmatic, policy reason to encourage broad access to dispute resolution mechanisms is found in the meaning of democracy. The laws and institutions of a democracy should advance democratic goals, such as voice, which in turn depends on the promotion of economic and social justice. It is inimical to the endurance of a democracy that it should foster or permit institutions to exist which promote anti-democratic, totalitarian values.[7]

Access to a process which addresses one's grievance, even if one does not ultimately prevail, eases discontent in the workplace.[8] The other side of the coin is that attempts to suppress conflict do not make it vanish but, rather, lead to increases in negative behaviour, which are destructive of harmony and productivity. In the workplace these can take the form of slowdowns, outright sabotage, turnover, absenteeism, friction, rules infractions, demotions, discharges and even strikes.[9]

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5 For some examples of both, see P Willman *Technological Change, Collective Bargaining, and Industrial Efficiency* (Clarendon, Oxford and New York, 1986) 202.

6 An example of the effect of making a matter resolvable as a means of addressing and defusing conflict is supplied by Margaret Wilson, who notes that strike statistics disclose that dismissals were a significant cause of strikes until they were remediable through collective bargaining. Strikes caused by dismissals were halved after this innovation. See M Wilson "A Few Observations on the Law Relating to Security of Employment" in *The Industrial Law Seminar* (Legal Research Foundation 1979) 3-4. This idea is akin to the idea of "voice" versus "exit voice" developed by Freeman and Medoff in R Freeman and J Medoff *What Do Unions Do?* (Basic Books, New York, 1984).

7 Compare J Gross (1985) Ind & Lab Rel Rev 10.

8 See R Freeman and J Medoff, above n 6.

9 Alan Geare noted that although the employer prevailed in *NZ Bank Officers IUOW* v *ANZ Banking Group* [1979] AC 379, in that the Court held it did not have to discuss increased interest rates with the union, it inevitably lost since there then followed a series of stopwork meetings and strikes for over a year until the employer at last recognised the union's right to negotiate the issue. See A Geare *The System of Industrial Relations in New Zealand* (2ed, Butterworths, Wellington 1988) § 712. It is estimated that the costs of turnover alone are from 200 to 400 times the hourly wage for the position, that many hours are lost to other expressions of conflict, and that this hidden consequence of conflict is far more costly than a strike. See also B Brooks "Some Reflections on Industrial Conflict in New Zealand" in J Howells et al, above n 5, 205; P Edwards, above n 5, 10, 256; A Geare, above, §§ 901-916; NZ System of Industrial Relations (Victoria University

One of the most dramatic examples of the power of unresolved conflict and the failure of unilateral action by one party to the conflict was the ferry strike in late 1989. Briefly, the dispute which led to the strike concerned the question of overstaffing. The union opposed the employer's proposal to reduce the number of employees. The employer then took unilateral action and dismissed nine employees. The consequence, as most will recall, was a strike in which the employer lost $500,000 in gross revenues a day, passengers and others were severely inconvenienced, and the Labour Court held four hearings within a week,[10] with the attendant costs of public expenditures. In the end, the employer capitulated and agreed to the negotiations, essentially returning to pre-strike conditions.

On every measure, the cost of not having resolved the basic conflict was enormous. The employer lost money, public confidence, and perhaps some leverage with the union. The union experienced the condemnation of the Court, was fined, and was the target of increased public antagonism to "the power of labour". Individual members of the public lost time or had plans disrupted, and the public lost faith in the ability of unions and employers to order their affairs in a rational way.[11] The Labour Court also expressed fears that it had lost by having been unable, by means of sanctions taken against the union, to effect compliance with the law.[12]

The ferry cases dramatise many of the issues that the Labour Court faces as it develops law in this area. Put succinctly, the question is whether the Court has decided

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of Wellington Industrial Relations Centre ed 1989) 13; C Zabala "Sabotage at General Motors' Van Nuys Assembly Plant" (1989) 20 Ind Rel J 20, 29.

10 *NZ Railways Corporation* v *NZ Seamen's Union IUOW* unreported WLC 88c/89 (6 October 1989); *NZ Railways Corporation* v *NZ Seamen's Union IUOW* unreported WLC 88b/89 (29 September 1989); *NZ Railways Corporation* v *NZ Seamen's Union IUOW* unreported WLC 88a/89 (28 September 1989); *NZ Railways Corporation* v *NZ Seamen's Union IUOW* unreported WLC 88/89 (27 September 1989).
A less well publicised, although similar scenario played itself out in numerous Labour Court cases after the Shipping Corporation of NZ dismissed its crew rather than reach agreement with the union as to various issues. *See NZ Seamen's Union IUOW* v *Shipping Corporation of NZ Ltd* 1 [1989] NZILR 106; *Otago Harbour Board* v *NZ Seamen's Union IUOW* 1 [1989] NZILR 106; *NZ Seamen's Union IUOW* v *Shipping Corporation of NZ Ltd* unreported ALC 2/89 (2 February 1989); *Funday Ltd* v *NZ Harbours IUOW* 1 [1989] NZILR 1.

11 The injection of the public interest was an interesting turn of events in this case, since it brought to light the social interest in the way that private bodies order themselves. It raises questions most often ignored or actively ousted from consideration when matters involving corporate bodies are involved.

12 It might be argued that the Court's loss was a matter of perception. It might be argued that the Court's failure was that it did not address the basic conflict and looked only at the symptom of the conflict - the strike. This in itself may have been a problem inherent in the statute, which demands focussing on the strike, rather than the course of dealing which led to the strike. The Court expressed dismay that its processes had been used as a part of a strategy by the parties and questioned whether the end here justified the means, but perhaps, on reflection, we might conclude that this is not inimical to social goals.

the case so as to promote the full resolution of the dispute in a way that the parties and the public can conclude is just. That perception will depend in part on a procedure providing predictability of outcome, so that parties can act with some assurance that certain actions will have certain consequences.

II DISPUTES OF RIGHTS PROCEDURES

The disputes of rights procedure was relatively unchanged under the LRA. It remains essentially a means for resolving contractual ambiguity or extending the application of contractual terms when unforeseen circumstances change their impact or meaning.[13] The usefulness of such a procedure is patent: even the wisest of us, acting in all good faith cannot seem to draft a document[14] or statute capable of enduring for all time - sometimes even a relatively brief time - or which does not mean all things to all people.

Parliament added another reason for enacting this legislation. It was concerned that unions were not living up to their undertakings. If, however, the LRA was to make contracts binding, there had to be a means of resolving problems caused by disputed interpretations and changed circumstances. Such a provision was strongly supported by employers making submissions on the draft legislation.[15] There was support for enacting strategies that would force the parties to approach their undertakings with seriousness and responsibility, since large numbers of people and the economy were affected. Furthermore, lack of certainty leads to a breakdown in trust between unions and employers.

Parliament undercut this support for the sanctity of the agreement to some extent by, at the same time, making labour documents self-policing. The overall impact was to make it more difficult for unions to evade their contractual obligations while easing scrutiny of employer compliance. The cause for this may be informed by specific conscious or unconscious philosophies. On the one hand, the Government may have concluded that these documents are private arrangements lacking a social dimension or impact reaching beyond the workplace. On the other, it may have assumed that lack of compliance by employers is less serious, or less likely to occur, or a matter of entitlement.

It has been left to the Court to give shape to the law as to the consequences flowing from a document of the parties which fails to deal with a subject. Before looking at the Court's decisions in this area, it is helpful to consider some of the circumstances which can lead to this problem. First, not all issues or conditions can be covered in writing in

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13 For a list of some causes, *see* R Miller *The Resolution of Disputes and Grievances in New Zealand* (VUW Industrial Relations Centre, Wellington, 1983) 5.

14 To some extent the words "document" and "agreement" - as opposed to Agreement - will be used here to include all forms of agreements or awards negotiable under the LRA since there is considerable overlap in the area of discussion involved here.

15 The Minister of Labour stated in the White Paper that "Employers making submissions on the Green Paper supported sanctity of the agreement during its term ...".

even the lengthiest document. Some will always remain tacit, with the parties relying on common understandings, past history, or the practice in the industry.

It is possible that, in some instances, the failure may not be inadvertent and the parties may have decided in negotiations to leave the matter untouched. They may have done this to avoid making a hard decision, hoping to leave the resolution to the Labour Court through the dispute of rights procedure. That is, the parties could have concluded that they can live with virtually any decision but cannot handle the consequence of being the one responsible for the decision. Thus, although Parliament drafted the LRA with the articulated purpose of making the parties responsible for determining their destinies, certain cases suggest that at least some would prefer to leave difficult decisions for someone else to decide. In other words, if the Court is faced with a decision in such a case, it will only be fulfilling the intent of the parties if it substitutes its judgment for theirs.

In other cases, the parties may have made trade-offs during negotiations which require leaving a matter unaddressed. For example, one party may have traded a proposal as to certain rights for gains in another area. In that case, silence is redolent with meaning and is not inadvertent. The Court's role in such a situation must allow it to leave that bargain undisturbed, lest it upset the sanctity of the agreement.

These are but three scenarios that might give rise to a case brought before the Labour Court and which are outside those contemplated by the legislation. There may well be others which will similarly present the Court with a case more difficult of resolution than the procedure was designed to meet.

In 1987, the Labour Court decided two cases which, read together, leave negotiators uncertain whether it is safe not to delineate all issues within the four corners of the document being negotiated. In *NZ Meat Processors IUOW* v *Fortex Group Inc*,[16] the employer argued that its implementation of shifts at a slaughterhouse was justified by the terms of the parties' agreement. The Court held that the employer was attempting to attribute meaning that it did not have to the document and which was completely outside the parties' intention at the time the agreement was negotiated. The Court held that the employer had misconstrued the scope of the agreement and its purpose. It further held that the subject of introducing shift work was a new matter and it would not permit shift work to start pending resolution of the dispute, reasoning that this would weaken the union's position.

This decision then is a vote by the Court on the side of holding the parties to the bargain they have achieved. The Court also wisely dealt with the practical impact that the current status of the negotiators has on the outcome of bargaining.

The case of *Feltex Woven Carpets Ltd* v *NZ (with exceptions) Woollen Mills IUOW*,[17] presents a stark contrast. In that case, the Court permitted an employer to

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16 [1987] NZILR 787.
17 [1987] NZILR 591.

direct employees to take on new duties. The Court based its decision on the premise that an employer always has the right of full control and the right to subdivide jobs with the introduction of new machinery. Such an outcome is not unexpected generally and is well rooted in the common law view that management has certain rights over the manner in which work is accomplished while denying that workers have corresponding interests in their working conditions.[18] This case would be utterly unremarkable but for the fact that during negotiations the parties had dealt with this question and had not reached this result. In fact, the employer had proposed a clause which would have authorised it to transfer employees to other duties, but this proposal was not agreed to nor included in the document. In other words, the parties had voluntarily entered into an agreement on terms that intentionally did not give the employer this right.

By holding that the employer nonetheless had this right, the Court overturned the agreement reached by the parties and reordered the priorities determined by their mediation of their conflicting interests. That was a disservice done to them, however, the case has wider and more troubling implications for other negotiators. It created both a very high standard which the parties may be unable to meet and heightened uncertainty as to the import of agreeing or not agreeing. Furthermore, the decision is contrary to the legislative purpose of leaving it to unions and employers to decide the scope of their negotiations.[19]

Reading both cases together suggests that parties should be very cautious about what is left unresolved or, in the *Feltex* case, ensuring that what has been resolved be expressed in full in the document lest the parties' intent be overturned. The Court's *Feltex* decision has the effect of weakening the importance of bargaining and injecting great uncertainty as to the effect of the bargain one has struck. The Court committed the cardinal error of ignoring that during the course of bargaining a party may have traded off some proposals for the other party's doing the same. The likely impact of *Feltex* is that if that happens in the course of bargaining then one party may suffer a double loss, having gained nothing for what it traded away in bargaining.

The final decision concerning this general area is *Feltex Furnishing of NZ Ltd* v *NZ (exc Taranaki Ind District) Woollen Mills, Hosiery Factories, Synthetic Fibres Factories, Flax Mill and Flax Textile Factories and Related Trades IUOW*.[20] In this decision, the Labour Court faced questions so challenging it required a rehearing to clarify issues. Briefly, the case presented the question whether parties could enter into an award or agreement with permissive clauses, that is with clauses that did not fully resolve issues. The parties had agreed to leave for future negotiations decisions concerning shifts, job evaluations for new processes, and payments for coverage of breaks, among others.

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18 Compare J Atleson *Values and Assumptions in American Labor Law* (University of Massachusettes Press, Amherst, 1983) 8-9, 44-45.

19 Department of Labour *Government Policy Statement on Labour Relations* (1986) 3, 11.

20 Unreported WLC 39/89 (17 May 1989).

No explanation was provided as to why the parties had chosen this course of action. It can be speculated that these issues may have been too difficult to resolve at the time in the abstract and were unnecessarily impeding progress in the negotiations, or it is possible that the parties truly did regard them as unlikely to occur and not amenable to resolution in the abstract. They may have wanted to leave the matter to another body to resolve, each party being willing to live with any outcome on the matter but not wanting to "take the heat" from their constituencies if they expressly agreed to use provisions in the LRA designed for that purpose.[21]

The intriguing problem for the Court was whether such issues would then be resolvable through a disputes of rights or a disputes of interests procedure. On the one hand the parties had negotiated and reached the agreement they were happy with. In fact, it was not a party who brought this issue to the Court but, rather, the Registrar. Thus, in one respect it could not be said that the matters had not been dealt with. The Court was intrigued by this possibility; however, it concluded that a provision that envisaged the possibility of future negotiations cannot be anything other than a matter not dealt with or dealt with in the most general terms. It concluded that to permit the parties to evade making the initial decision would be a breach of the LRA.[22]

No award or agreement can provide for all terms and conditions to address all eventualities. As a practical matter, they have to deal with certain issues in a general way, so questions are left open for later interpretation and application. The Labour Court has best served the interests of the parties and helped to maintain the honesty of the system when it has not allowed the parties to evade the established process and get more than was bargained for. If the policies the Court is trying to promote are to make contract obligations enforceable and to encourage the parties to resolve their own disputes, then two of these decisions of the Labour Court certainly work towards that end, whereas one is a step backward and sends contradictory messages.

III PERSONAL GRIEVANCES

Personal grievances have provided the Labour Court with more fertile ground for interpretation and development, partly through the greater number of cases it has had to

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21 Compare LRA s 147(2).

22 This decision is a vote for keeping the parties in the disputes of interests procedure. It suggests that the Court might take a dim view of parties' decisions to take too free a hand in fashioning a dispute resolution mechanism. In other words, it is likely that it would not approve of a document that provided that all disputes as to interpretation must be decided through economic action. Compare s 187. Just how much individual choice and creativity is permitted will be an interesting question. On the other hand, the procedure provided may be so rational and widely acceptable that there is little desire to develop alternatives. Presumably, the parties could opt for private arbitration.
Compare *NZ Seamen's Union IUOW* v *Gearbulk Shipping (NZ) Ltd* unreported WLC 74/89 (24 August 1989), in which the Court held that the Court could not adjust a personal grievance raised in the midst of an application for a compliance order since to do so would be to evade the grievance committee, a procedure not allowed by the statute.

decide in this area. This may in part be due to the more extensive changes in the personal grievance procedure from past legislation.

In addition to substantive law in this area, there is a range of procedural issues which still await exegesis. The procedure provided in Schedule 7 could provide fertile ground for experimentation. No one has answered the question of just how far parties can go in modifying the procedures in the schedule or fine tuning them to meet individual needs. For example, the parties could more clearly define the role of the union in the earliest stage of grievance presentation to require, preclude, or permit union presence in articulating and screening grievances before they are presented. On the one hand, employers may think they would prefer not to have a union interpose itself between management and its workers. However, a union can play an important role in defining, rationalising, and mediating conflict, perhaps even counselling and conciliating in such a manner as to avert the creation of a grievance. Some would even argue that it is to the employer's advantage to ensure the union's participation.[23]

A second area of potential modification is the addition of time limits for the presentation of grievances.[24] Time limits can have a potent effect on the resolution of workplace conflict. On the one hand, they can frustrate the presentation of meritorious disputes. On the other, they have the advantage of ensuring that facts are fresh, that witnesses are available, and that matters prosecuted are ones people care about. It is obvious that time limits can be created which are so short they make the grievance procedure inaccessible and thus of little help in defusing conflict. This would be inimical to the grievance process. Absent or long time limits, however, present their own problems. They may make grievances impossible to present.[25] So far, the Labour Court has not had to address the issue of a time limit that is short. Where it has spoken on the issue it has done so indirectly by addressing the problems created by grievances not filed promptly. The Labour Court has chosen to address this problem by means of the remedy it is willing to provide or by imposing costs.[26] Its message is clear: it does not approve of delay.

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23 "Contractual grievance procedures provide a mechanism for generating operating rules for the enterprise and for obtaining a modicum of employee consent and reconciliation to the hierarchical command of the workplace. Indeed, the law of the collective contract co-opts unions into the uncomfortable position of performing certain managerial functions": K Klare "Critical Theory and Labor Relations Laws" in D Kairys (ed) *The Politics of Law: A Progressive Critique* (Pantheon, New York, 1982) 71.

24 This discussion is not to ignore those time limits which do exist within the grievance procedure, see eg, s 225.

25 A time limit of twenty-four hours may have contributed to an inability to deal with the underlying controversy in *WR Ropiha* v *Weddel Crown Westfield Ltd* ALC 46/89 (6 June 1989).

26 See *NZ Workers' IUOW* v *Papanui Station Prospectors of Tahora 2 F2* unreported CA 172/89 (21 November 1989) in which the Court held that although there was no time limit in the statute, delay could affect available remedies; the union could permissibly take the position it did not want to support a stale grievance; the Labour Court could refuse leave; or the committee could reject the grievance, evidently on grounds of laches.

An important area for development must be the definition of a union's "taking a matter up with the employer".[27] Does this create an obligation on the union to prosecute the matter to its fullest? Must a union take the worker's view on a grievance or can it evaluate the merits and act on that evaluation? If a union reaches the conclusion that a grievance has no merit or should be settled on certain terms, is that action conclusive or preclusive? In other words, who "owns" the grievance? That is, what rights does a worker have to direct the processing of his or her grievance?

Thus far, the Court appears to have come down on the side of the union's ownership. Thus, if a union has investigated a grievance and is in possession of all relevant facts, it can then decide not to proceed. The Court has held that a union has no legal obligation to take a grievance if it has made an adequate investigation and has made a balanced decision as to its lack of merit.[28] Indeed, this union ownership is so clear that a grievant acts at his or her peril in trying to divest the union of that ownership, as by failing to request the union to take any step under the grievance procedure.[29] Decisions in this area make it clear that even if a union is guilty of a lengthy failure to act, the Court will not divest the union of its rights, holding that the basic right to pursue a grievance belongs to a union.[30]

On the other hand, the Court has required that once a union takes a case up, it is obligated to pursue it actively, promoting the grievant's interest.[31] In *Air NZ Ltd* v *Johnston*, the Court of Appeal discussed this issue at length and stated that a union has a responsibility to pursue a grievance promptly and to advance it as far as it decides is reasonably necessary. It held that the union's assessment of the merits of a grievance is not sacrosanct and that "failure" within the meaning of the law does not require that a culpable omission or breach have occurred. Of particular note is the appellate court's statement that the purpose of the legislation is to ensure that a worker is not completely dependent on a union.

In deciding personal grievance cases, the Court has been called upon to define concepts, some of which, although preliminary to the substantive decision, have nonetheless had the effect of broadening or narrowing access to the grievance procedure.

The Court has had to give flesh to the meaning of "unjustifiable". It has given it a wider definition than "wrongful" under the prior statute. This was an easy decision, since the statute itself provides that it is not limited to unjustifiable dismissals.[32]

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27 LRA Sched 7, cl 4.

28 See *Rangi Dudley Williams* v *Printpac - UEB* unreported WLC 20/89 (23 March 1989).

29 See *Arthur Gibson* v *Telecom (Wellington) Ltd* unreported WLC 36/89 (15 May 1989).

30 See *Wilkie* v *Carter Holt Ltd* unreported WLC 10/89 (9 March 1989). In that case, the union had failed to act until after the grievant secured a solicitor who filed an application to the Labour Court. As a consequence, no efforts to advance the case had occurred until nearly a year had passed since the grievant had been discharged. See also *Wanganui Area Health Board* v *Williams* unreported CA 143-89, CCH Par 78-314 (18 August 1989).

31 See *Johnston* v *Air NZ Ltd* unreported WLC 2/89 (3 February 1989), affirmed, *Air NZ Ltd* v *Johnston* unreported CA 84/89, CCH Par 78-310 (4 August 1989).

32 LRA s 209(a).

Conceivably then, it could be extended to include non-promotion, demotion, or loss of fringe benefits. Such an extension would represent, at its clearest, the clash of policies of nonintrusion versus the provision of an effective dispute resolution mechanism at an early stage of conflict.

Related to this is the important area the Court has begun to address in defining "disadvantage", as used in s 210. There is undoubtedly an area at each end of the spectrum where all can agree disadvantage exists or does not exist; however, there remains a huge area in the middle range between an employer's frowning at a worker and hurting his or her feelings and a discharge which is unresolved. If more items are defined as being subject to the personal grievance procedure, then this may have the effect of addressing incipient areas of discontent and preventing them from festering. A failure to treat many or even most problems present in the workplace as legitimate is a failure to appreciate the presence of workers as making contributions to an enterprise at a level different from an inanimate object. Limiting grievances, then, to problems of financial loss, and particularly to dismissals, fails to deal with a wide range of problems in the workplace likely to lead to discontent and disruption.

The decision in *Alliance Freezing Company (Southland) Ltd* v *NZ Amalgamated Engineering & Related Trades IUOW*,[33] is a direct, although limited, repudiation of past decisions which imposed such restrictions.[34] Although the Court of Appeal stretched the definition only to apply to a final warning, in explaining its decision, it opened the possibility that the procedure might have greater utility in its reasoning that the ordinary meaning of disadvantage does not require financial or material loss. The Court stated that it is best to resolve a final warning and not let it fester.

The *Alliance* decision itself demonstrated that the Court is not likely to permit access to the grievance procedure to resolve any workplace dispute. In *Alliance* the Court held that the employer's merit system had been unilaterally instituted without discussion with the union and, as a consequence, had not become part of the contract of employment. Therefore, the employer was free to discontinue it or administer it as it liked.[35] Logic suggests that the arbitrary institution, termination, and administration of

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33 Unreported CA 89/89 (20 December 1989).

34 See eg, *Larsen & Hill* v *Ford Motor Company of NZ Ltd* [1987] NZILR 289 (Arb Ct) (final written warnings do not give rise to personal grievances); *NZ Nurses IUOW* v *Royal Plunket Society (Inc)* [1984] ACJ 441 (the transfer of the grievant, although occasioning extra supervision of her and travel, and being in the nature of a discipline affecting the grievant's career, was not a disadvantage directly affecting employment).

35 The Court did not discuss whether the disciplinary system had been unilaterally implemented or not. This case raises a matter which presents a serious oversight in the LRA, that is, it provides no incentives for employers to bargain with unions and even encourages unilateral action. When one party is able to remove itself from the bargaining arena, the overall process of collective bargaining is damaged. Compare E Dannin "Collective Bargaining, Impasse and Implementation of Final Offers: Have We Created a Right Unaccompanied by Fulfillment" (1987) 19 U Tol L Rev 41, 64-67 for a discussion of a similar problem under United States labour laws.

a merit system can easily give rise to disputes to the same or greater extent than a final warning can. At some point the Court is likely to find itself having to move from this point to some other at which it can find a sounder resting point based on the policy it expressed in the decision: either the purpose of a grievance procedure is to resolve disputes and not allow them to fester or it is to be carefully limited to certain matters contained in the contract of employment.

In *Canterbury Hotel, Hospital, Restaurant, Club and Related Trades Employees' IUOW* v *The Elms Motor Lodge Ltd*[36] the Court engaged in another extension of coverage, this time through defining the word "worker". This threshold decision is the sort which inevitably narrows or broadens the availability of the grievance procedure. In this case, the grievant would not have been found to have been an employee under many prior definitions, since he had not started working in the classification for which he was hired.

The Court expressly repudiated prior definitions, holding that "worker" was defined differently in the LRA, thus making Industrial Relations Act cases inapplicable. Furthermore, the Court stated, Parliament cured the past defect that allowed an employer to insulate itself from liability by saying that work had not commenced. The Court noted that, although there must be the usual elements of offer and acceptance of clear terms, consideration and an intent to be bound, the reality of working life is that many contracts are made without any reduction to writing and it would be unreasonable in the area of employment law to require such a thing. As a practical matter, it said, employers and workers burn their bridges with only an oral undertaking.

The Court's decision marks an effort to marry the law with common experience. Rather than requiring legalistic formulae as a basis for the cause of action, the Court saw into the heart of the matter and rendered a decision which could commonly be accepted as just. Some may, however, see this as a major and even unwarranted enlargement of rights in this area.

The Court has made important strides in establishing the rules through which it will examine the substantive issues presented in grievance cases. Specifically, the Labour Court has been concerned with the question of whether it should examine evidence of

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Nonetheless, the Labour Court continues to hold that employers cannot be forced to negotiate, and its reasons for failing to negotiate are immaterial. See *Armourguard Rescue Services Ltd* v *NZ Public Service Association (Inc)* unreported WLC 79/89 (1 September 1989); compare *NZ Insurance Trust IUOW* v *Lombard Insurance Co Ltd* 1 [1989] NZILR 29.

36 Unreported WLC 59/89 (7 July 1989). The decision in this case, which stresses the importance of relying on common usage and experience over technical requirements, is an echo of the Court's statement in *NZ Baking Trades Employees' IUOW* v *Findlay's Gold Krust Bakeries, Ltd* unreported WLC 47/89 (6 June 1989) that the purpose of the LRA is to have grievances fully heard. The Court stressed that s 279(4) requires it to emphasise ultimate fairness over more technical restrictions.
The Court may have been helped in its decision by the definition of "worker" in the LRA as including a person intending to work, s 2.

whether an employee is guilty or confine itself to the question of whether the employer made a reasonable investigation before having taken its action. The Court has frequently stated that it does not want to second guess the employer.[37] As a result, the Court has held that the employer has the burden of proving, not that serious misconduct occurred, but that the employer was justified in taking its actions because it had conducted a complete and fair investigation which established a strong suspicion of serious misconduct reasonably founded on established facts, including having provided grievants an opportunity to explain or comment.

The Court has not yet had to face the hard case in which the employer has conducted a reasonable investigation and yet has indisputably come to the wrong decision. It may be that if this is known with certainty it can be taken as evidence that the investigation could not have passed muster. On the other hand, it certainly has become clear that the Court will not simply acquiesce in any action taken by an employer.

The Court has done this first by delineating the standards to which it will look in making a determination whether an action was unjustifiable. Taken together these spell out a reasonable procedure including notice to employees of their failings and a diligent and fair investigatory process by the employer.[38]

The Court has held that many employer actions have foundered because the employer has failed to make any investigation at all. In others the Court has asked if the investigation undertaken was a reasonable one. In making this enquiry, the Court asks whether the employer listened to the worker's evidence or gave the worker any benefit of the doubt as opposed to proceeding solely on the evidence provided only by those witnesses favoured by the employer. In *W R Ropiha* v *Weddel Crown Westfield Ltd*,[39] the employer terminated an employee accused of stealing a roll of meat without having given credence to the grievant's denials, his crewmates' corroboration of his whereabouts, and a guard's failure to corroborate the accusing supervisor. Instead the employer relied on uncertain identification testimony by its supervisor. Indeed, as set

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37 See *Airline Stewards & Hostesses of NZ IUOW* v *Air NZ Ltd* unreported ALC 113/89 (24 October 1989).

38 In at least one instance, the Court, as part of its remedial powers, spelled out just what it regarded as a reasonable procedure for the employer to observe. It included giving an adequate written job description, establishing a formal disciplinary procedure, observing rules of natural justice, and listening to the grievant's response. *See NZ Labourers, General Workers & Related Trades IUOW* v *Manawatu Ward of the SW North Island Pest Destruction Board* unreported WLC 43/89 (31 May 1989).
In *Garage Builders (North Shore) Ltd* v *Northern Clerical & Legal Employees Administrative and Related Workers IUOW* unreported ALC 21/89 (24 February 1989), the Court held that it was too harsh to dismiss the grievant without any previous warnings and ordered partial payment of wages, reduced as a consequence of the worker's misconduct.

39 Unreported ALC 46/89 (6 June 1989).

forth, the facts described an employer willingly blinding itself to any evidence that might forestall it in its desire to discharge the grievant.[40]

Second, the Court asks whether other employees in similar circumstances have been treated the same. In *Northern Clerical & Legal Employees Administrative & Related Workers Union* v *Printpac UEB Carton*[41] the Court held that an employer had failed to treat the grievant similarly to other employees not terminated for having partners employed by competitors.

The Court looks to whether the employee has received timely, or even any, notice of wrongdoing. This is especially important when an employer has taken action based on a course of past employee wrongdoing. If the employer has condoned the conduct or has failed to provide the worker an opportunity to reform, then its current actions may be unjustifiable. In *Northern Distribution Unions* v *Armourguard Security Ltd*,[42] an employer-union representative was terminated after he stopped his armoured car at the request of other workers he represented. In examining the question of his discharge, the Court held that the employer must first have established that each discipline was justified when it seeks to discharge based on a series of warnings.

Armourguard had failed to do this with each prior warning it relied upon. The first had not been given according to normal procedure, and the grievant had not been provided any notice of it. When it had given a second and final warning, the employer had failed to interview a fellow crew member concerning the incident. Thus, the Court held, this was an unjustifiable warning since there had been an inadequate investigation. As a consequence, the procedures were found to have been so defective that the employer had failed to discharge its burden of proving the discharge was justifiable.

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40 See also *NZ Labourers, General Workers & Related Trades IUOW* v *Manawatu Ward of the SW North Island Pest Destruction Board* unreported WLC 43/89 (31 May 1989). In *Ropiha*, the Court also held that the employer's reneging on an agreement to review the dismissal if the grievant was acquitted in the related criminal case constituted evidence of procedural unfairness. It might also be characterised as evidence that the dismissal was pretextual, that is, not based on the reasons advanced but, rather, on a reason the employer would prefer not to reveal.

41 Unreported ALC 108/89 (3 October 1989).

42 Unreported ALC 129/89 (November 21, 1989). Incidently, in this case, the Labour Court also spelled out certain procedural rules. These are specifically that parties must specify exactly what it is they are appealing and what relief is sought. Here, both the union and employer had failed to do so, relying on the Court to glean this information. In *Keith Nelson t/a Keith Nelson & Associated* v *Auckland Dental Technicians and Assistants IUOW* unreported ALC 94/89 (25 August 1989) the union learned this lesson when the Court eliminated its back pay remedy after receiving evidence that the grievant had refused to mitigate damages. The Court hinted it would have increased the compensatory damages component of the remedy if only the union had appealed this issue. *See also Joint Venture Zublin-Williamson* v *NZ Labourers, General Workers & Related Trades IUOW* unreported WLC 65/89 (31 July 1989).

Similarly, failure to provide an employee with advance notice as to the requirements of a job can be an element in the Court's finding a dismissal to be unjustifiable.[43]

In some cases, the Court has concluded that an employer has trumped up charges or engaged in a pretext in effecting the action.[44] It has not, however, expressed the basis for its decision as being founded in the employer's advancing a pretextual reason for its actions but, rather, has confined its analysis to whether it has engaged in a reasonable investigation, under the standard set out above. Nonetheless, the Court's findings in certain cases clearly can be classified under this rubric.[45]

The Court missed an opportunity for such an analysis in *Post Office Union* v *Telecom (Wellington) Ltd.*[46] At least as the facts were set forth in the decision, certain actions by the supervisor which led to the grievant's not receiving a promotion deserved more prominent consideration in the decision making process. These included his having been rated by a two-person committee composed of a superior whom the grievant had opposed in his role as union representative and another person so unfamiliar with his work conditions that it appeared likely his judgment would be overborne by the superior; the superior's seriously misstating the qualifications of the grievant, including his having served and been rated as qualified as a supervisor previously; and the superior's comment that the grievant was of "suspect loyalty". The Court discounted this evidence in favour of countervailing evidence that the grievant had failed to take training as a supervisor, his not having indicated he had supervisory experience on his application, and the superior's having been a union member. This latter point was supposed to be conclusive on its being impossible that he could not harbour any anti-union feelings.

There still remain a number of unanswered and unaddressed questions in the Court's treatment of substantive law. For example, could an employer seek to oust any scrutiny of its actions by entering into a union contract that gives the employer absolute rights to discharge with no repercussions? This question raises a problem in the interstices between the grievance procedure and that of disputes of rights. In other words, if a document says that an employer has the right to act in a certain way towards a worker and it does just that, can a worker ever be said to have a personal grievance, no matter how unjust the action?

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43 In *NZ Labourers, General Workers & Related Trades IUOW* v *Manawatu Ward of the SW North Island Pest Destruction Board* unreported WLC 43/89 (31 May 1989) the grievant was evaluated and then dismissed on criteria never theretofore disclosed as requirements of the job. Most were patently not part of the job the grievant had been hired to perform.

44 Such a situation appeared in *NZ Labourers, General Workers & Related Trades IUOW* v *Manawatu Ward of the SW North Island Pest Destruction Board* unreported WLC 43/89 (31 May 1989), in which the employer discharged a worker for failing to meet job requirements newly minted for each evaluation.

45 See eg *NZ Seamen's Union IUOW* v *Gearbuilt Shipping (NZ) Ltd* unreported WLC 74/89 (24 August 1989), in which the Court noted that the employer's claims for dismissing its workforce had never been raised before and were advanced without any supporting evidence at the hearing.

46 Unreported WLC 118/89 (14 December 1989).

Insofar as remedies are concerned it will be interesting to see if reinstatement as a primary remedy can be effective.[47] So far the Court has been strict in requiring reinstatement and has concluded that it is practicable in a large number of situations, despite employer opposition. For example, in *Northern District Unions* v *Armourguard Security Ltd*,[48] the employer presented witnesses to prove that there was no longer a position for the grievant at the company and the Court found that he was obviously reluctant to follow the employer's rules, a nearly fatal flaw in a business in which an employer needed to have supreme confidence in its drivers. The Court nonetheless stated that inappropriate is not synonymous with impracticable and ordered reinstatement with, however, the action which led to the discharge constituting a verbal warning.

If reinstatement proves to be an effective remedy, it will provide a great incentive to employers to be law abiding and for fellow workers to have confidence that they have recourse to an effective procedure to protect their rights. In other words, the reinstated employee can act as a walking advertisement of the effectiveness of grievance procedures under the LRA. However, it must be admitted that, human nature being what it is, one should not be surprised to see that residual ill feelings make such a remedy less than fully effective.

Indeed, the judges of the Labour Court are given great and virtually unguided discretion to determine and institute creative and effective remedies.[49] Related to this is the Court's ability to reformulate the sort of grievance brought before it by determining that it is of a type other than alleged.[50]

The Court has taken the opportunity to stress the importance of early resolution of as many outstanding areas of difficulty as possible. In *NZ Labourers, General Workers & Related Trades IUOW* v *Manawatu Ward of the SW North Island Pest Destruction Board*[51] it noted that the failure of the committee to resolve factual disputes wasted Court time. In addition to playing an important role in streamlining cases and evidence for presentation at the Labour Court, the Court has recognised that the committee plays another role that is quite different. That is, the committee is to emphasise settlement of the grievance without any requirement for reaching a determination of wrongdoing.[52]

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47 LRA s 209(f).

48 Unreported ALC 129/89 (21 November 1989).

49 LRA s 209(i). The extent of this sort of discretion can be seen in a case such as *Hancock & Co Ltd* v *Wellington Hotel etc IUOW* unreported WLC 9/87 (2 October 1987), in which the Court decided not to issue a compliance order to restrain an allegedly illegal strike on the ground that the issue was disharmony in the workplace and that the problem giving rise to the grievance was merely a part of that serious disharmony.

50 S 220.

51 Unreported WLC 43/89 (31 May 1989).

52 See *Creser* v *Tourist Hotel Corporation of NZ* unreported CA 68/89 (1 September 1989).

IV CONCLUSION

Despite criticism of the Labour Court which can be made in particular cases, it is obvious from this discussion that the Court as an institution is performing its interpretative role well. Its decisions appear well suited to the purposes and policies of the law it is seeking to interpret and also well suited to the facts stated in each case. It certainly deserves high marks with only the few reservations discussed, particularly when one considers the problems that any judicial body faces in trying to knit together larger legal policy with the discrete legal issues it is confronted with in each case and when one considers that it is a body composed of several individuals with differing philosophies, perceptions, and understandings.

It is to be hoped that in the years to come it can continue to build on the foundation it has begun so well.