INSTITUTE OF EMPLOYMENT RIGHTS
COMPARATIVE NOTES 2

resolving employment rights disputes through mediation: the New Zealand experience

SUSAN CORBY

foreword

As Secretary of the New Zealand Council of Trade Unions I welcome this booklet *Resolving employment rights disputes through mediation*, which contrasts the New Zealand system of mediation with current and proposed dispute resolution systems in Great Britain. It is a useful contribution to the important debate about how effective and reasonable outcomes can be delivered to working people with disputes.

Since 1991 New Zealand has experienced a massive experiment in labour market de-regulation. It has also seen the introduction of a new Employment Tribunal with the power to both mediate and adjudicate which all employees have access to.

The Employment Tribunal continues and expands a long tradition of industrial mediation in New Zealand. The union movement in New Zealand supports the Employment Tribunal. Of course there are frustrations. The Employment Tribunal's enormous jurisdiction has inevitably led to large workloads and long delays even for mediation. Adjudication in the Employment Tribunal can be a legalistic, expensive and sometimes alienating place for a worker.

A system for resolving employment rights disputes needs to provide its users with pragmatic help and fair processes. The clear analysis contained in this booklet will focus the debate towards these goals.

Angela Foulkes
Secretary NZCTU

resolving employment rights disputes through mediation: the New Zealand experience and ACAS arbitration

SUSAN CORBY[1]

Institute of Employment Rights

Comparative notes

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177 Abbeville Road
London SW4 9RL
0171 498 6919
fax 0171 498 9080
email ier@gn.apc.org
www.ier.org.uk

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introduction

This booklet puts the case for mediation as a mechanism for resolving employment rights disputes between the individual worker and the employer. It draws on the New Zealand (NZ) experience, where mediation is conducted under the auspices of the employment tribunals and produces a high settlement rate. Mediation, it will be argued, is more effective than conciliation and has the advantages of arbitration, and none of its drawbacks. Primarily this is because the parties can keep their options open. They can go to mediation and, if that fails, proceed to adjudication by a tribunal. In contrast, arbitration is an alternative to adjudication by a tribunal and the parties have to choose between the two processes. Yet the Employment Rights (Dispute Resolution) Act 1998, provides for arbitration for unfair dismissal disputes in Great Britain (GB), and mediation, surprisingly, does not seem to have been considered.

In addition, the booklet looks at the NZ worker's unfair dismissal rights both in the light of the comprehensive recommendations of the Institute of Employment Rights (IER) and the more limited proposals of the Labour government[2]. It finds that even though both the NZ and the British industrial relations systems have been subject to deregulation and anti-unionism, in some respects unfairly dismissed NZ workers fare better than their British counterparts.

definitions

Conciliation may be defined as a strategy whereby a third party assists the parties to the dispute to reach a settlement and, importantly, it is a voluntary process in that it can be declined by either party. Moreover, any settlement is voluntary and can only be reached if both parties accept it. In GB conciliation is provided by conciliation officers from the Advisory, Conciliation and Arbitration Service (ACAS) which, although government funded, is an independent agency whose policies are guided by a tripartite council. Conciliation officers explain the tribunal's adjudication procedure and the relevant law and, as an ACAS leaflet says,

1: The author would like to thank the British Academy for their travel grant to New Zealand and Victoria University, Wellington, New Zealand for giving me a visiting lectureship.

2: Ewing, K. (ed) (1996) *Working life: a new perspective on labour law,* London: Lawrence & Wishart. Department of Trade and Industry (1998), *Employment Relations Bill,* www.parliament. the-stationery-office.co.uk/pa/cm199899/cmbills/036/1999036.htm

they 'help the parties to establish the facts and clarify their thoughts'. They also convey the views of one party to another but 'do not make decisions on the merits of the case nor impose, or even recommend, a particular settlement'[3].

Mediation is essentially a 'facilitative function'[4]. The mediator, like the conciliator conveys information and clarifies issues but, in addition, gives a view on the strengths and weaknesses of a case and recommends a settlement. Thus mediation can be differentiated from conciliation by the degree of initiative taken by the third party, but like conciliation the process is voluntary: the parties can decline mediation or leave without agreement. If there is a settlement, it is determined by the parties.

Arbitration is a process whereby a third party makes an award having heard the cases of both parties. The parties lose their power over the settlement entirely as the decision is the arbitrator's, not the parties'.

In practice, the demarcation line between conciliation and mediation is blurred. Some ACAS conciliators are more proactive than others. Moreover, the demarcation line between mediation and arbitration is blurred in that some NZ mediators practice med/arb: 'where the parties … agree and the mediator consents, to decide such matters as they may refer to him for decision'[5].

why New Zealand?

It is appropriate to compare the processes for resolving employment disputes in GB with those in NZ. Both have a similar legal environment: they are common law jurisdictions in unitary states and have a similar, although not identical system of individual statutory employment rights. In particular, the unfair dismissal provisions (called unjustified dismissal in NZ) are similar and in both jurisdictions these give rise to the largest category of tribunal claims[6]. Also both have a similar political environment: they have Westminster style governments and, since the 1980s, laissez-faire economics have determined government policies

3: ACAS (undated) *Individual conciliation – a short guide* London, ACAS.

4: Department of Labour (1991) *A guide to the Employment Contracts Act 1991.*

5: This definition is taken from the NZ legislation, s.64 Industrial Relations Act 1973. This Act is repealed and, although there is no longer a statutory definition of med/arb, the use of med/arb continues.

6: According to the annual report of the Employment Tribunal Service, unfair dismissal claims amounted to 46 per cent of all tribunal claims in GB in the year ending 31 March 1998. In NZ unjustified dismissal claims amounted to 80 per cent of all tribunal claims in the year ending 30 June 1997, according to the Department of Labour's annual report.

with market disciplines being injected into the public services by privatisation, contracting out and purchaser/provider splits.

Importantly, both have a similar industrial relations environment: since 1979 in GB and 1991 in NZ, there has been a move from collectivism to individualism, with a marked decline in trade union membership and the proportion of the workforce covered by collective bargaining, the development of legal constraints on industrial action and the ending of multi-employer bargaining in many industries. In addition, the employment dispute resolution institutions in GB and NZ have similar objectives. In GB employment tribunals aim to be 'easily accessible, informal, speedy and inexpensive', the criteria set out in the Donovan Report[7]. In NZ s.76(c) Employment Contracts Act 1991 provides for 'a low level, informal, specialist Employment Tribunal to provide speedy, fair and just resolution of differences'.

Just because a practice is successful in one country, it may not be successful in another. The contexts of GB and NZ, however, are sufficiently similar to suggest that the NZ experience is relevant. Accordingly, having first looked at the tribunal system in both countries, the booklet turns to alternative dispute resolution generally and then considers mediation as practised in NZ.

background to the NZ system

From 1894 to 1991 NZ had a legal system which supported trade unionism and collectivism. From 1936 union membership was compulsory by law essentially for workers below managerial level in the private sector and an agreement/award applied to all employers who had workers in the occupation concerned and/or were in the relevant industry. To resolve disputes there was an Industrial Conciliation Service and arbitration for disputes of interest (the formula-

7: Report of the Royal Commission on Trade Unions and Employers' Associations chaired by Lord Donovan (1968) Cmnd. 3623. London: HMSO. See para 572.

about the author

Susan Corby is a senior lecturer in human resource management at the University of Greenwich and is currently a member of the Employment Appeal Tribunal and the Central Arbitration Committee. Previously she was a senior full-time official with the Association of First Division Civil Servants (FDA) and the Royal College of Midwives.

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