Models of employment dispute resolution in New Zealand: are there lessons for Europe?

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Introduction

A recent Eurofound study documented the wide diversity in the use of alternative dispute resolution (ADR) mechanisms to resolve individual conflicts at the workplace in Europe (Purcell 2010). Some countries, including Austria, Germany, Denmark, Ireland, Norway, Sweden, and the United Kingdom were identified in the report as being relatively high users of ADR techniques, while in many others, including new Member States in Central and Eastern Europe, ADR for individual workplace disputes is at an embryonic stage. Adding further to the diversity, different Member States have experimented with different techniques or combinations of techniques, including conciliation, mediation, arbitration, and other means.

The limited evidence available for the Eurofound report indicated that the use of ADR techniques for individual conflicts arising in the workplace generally had a high rate of success. At the same time, it was noted that the use of ADR is growing within the EU but, within each country, starting from a different position and in the context of different traditions in employment relations. Accordingly, with continued room for experimentation with ADR on the horizon throughout, particularly continental Europe, it is instructive to examine whether there are lessons to be learned from other countries with wide experience of ADR in employment disputes. New Zealand is one such country.

Over the past 25 years, the mechanisms for establishing terms and conditions of employment in New Zealand have changed dramatically from a system of collectivisation that essentially blanketed the country's workforce, pulling everyone along together, to a fragmented system in which the vast majority of the workforce are now on individual contracts.

Over the same period, a reasonably stable, if narrow, legislated package of minimum standards has remained in place, assuming greater significance with the fragmentation of wage and conditions setting and the resultant disparity of workers' circumstances and earnings over the period. The 'minimum code' essentially covers minimum wage standards and time off, including both 'guaranteed' time off for annual leave and public holidays and contingency leave for illness, bereavement, and parenting.

Finally, the period saw an early expansion of coverage of employment rights dispute resolution mechanisms from union members only to all employees in the workforce – top to bottom – and, with one or two recent exceptions, protections and entitlements have remained universal. At the same time, New Zealand has experimented with three quite distinct models of institutions and processes for the resolution of employment rights disputes. The purpose of this paper is to present the three discrete models, each of which was deemed to be 'successful' by various standards and parties, and to assess their potential value for European jurisdictions.

Resolving employment rights disputes

New Zealand began using conciliation and arbitration for wage and conditions setting as early as 1894. However, formal procedures for handling individual employment rights disputes only came much later, in the 1970s. This differs very much from the continental European history where rather early in some countries – notably France (1806), Belgium (1809), Italy (1893) and Germany (1890, 1904 and 1926) – special courts or tribunals were introduced to deal with the problem of class bias and lack of experience of the judiciary as well as the cost, delays and formalities of the ordinary courts (Ramm 1986: 270). But, of course, New Zealand is a very much younger country.

In New Zealand visible employment relationship problems have been predominantly about challenging dismissals from employment, but include also other 'rights disputes,' principally around contract

interpretation, actions for recovery of wages or other remuneration, and a range of other mechanisms for enforcement of rights and obligations and the protection of workers. It is convenient to talk principally about challenges to dismissals to illustrate the workings of the employment rights dispute resolution system, given that a high percentage of cases entering the 'formal system' involve dismissals.

Having said that, it is well to point out that any matter of concern to an employer or employee regarding their relationship can be brought forward as an employment relationship problem and advanced to at least the mediation stage of the formal procedures. To qualify for attention beyond mediation, the concern must be one that can be classified as a recognisable cause of action under employment legislation.

Until the early 1970s, employees had only limited legal avenues under common law to challenge a dismissal. The *Industrial Relations Act 1973* (the IRA) introduced the 'personal grievance' of 'unjustifiable dismissal' and that concept of 'unjustifiable action of the employer' causing the employee either dismissal or a lesser 'disadvantage' remains the basis of most personal grievances today. The concept of 'unjustifiability' may revolve around questions of either good or proper cause for the employer's action, or the adoption of a fair procedure in dismissing or disadvantaging the employee or in making the decision to do so.

Discrimination, sexual or racial harassment, and duress over union membership are less frequently reported grounds for personal grievances, but those are simply matters of fact. There is no defence of the action being 'justifiable' in discrimination, harassment or union duress complaints. If it is shown to have happened, it is unlawful.

The protection of the personal grievance provisions, when introduced in 1973, was available only to union members covered by union-negotiated documents.

Remedies in rights matters have remained largely unchanged. Disputes over contract interpretation and actions for recovery of unpaid remuneration or claims alleging non-compliance with the minimum code, involve remedies based on what is proven to have been lost and owing. Personal grievance remedies are more discretionary. They principally include reinstatement to a lost position, reimbursement of wages or other remuneration lost as a result of the unjustifiable action of the employer, compensation for lost tangible benefits such as pensions or the private use of work vehicles, and compensation for 'humiliation, loss of dignity, and injury to feelings' attributable to the unjustifiable action.

Reinstatement is relatively infrequently sought in New Zealand, and so does not often feature as a grievance remedy. Reimbursement of wages lost is, for a variety of reasons, usually awarded on only a partial basis, although with a minimum of the lesser of three months wages or the amount actually lost.

Compensation for 'humiliation, loss of dignity, and injury to feelings' is the most commonly sought and most often awarded remedy, albeit that compensation is an evidence-based remedy with the onus on the grievant to show relevant suffering. In this aspect, most continental European countries, especially those in the German tradition, differ as the legislator and the courts are reluctant to grant compensation that exceeds financial damages and compensation for pain and suffering for mostly physical damages. In New Zealand, the party prevailing in a matter in adjudication will usually be entitled to an award of costs from the other party on a modest contributory basis, particularly where the employee is the successful party. In Europe the prevailing party is usually entitled to full reimbursement of costs up to fixed amounts.

In mediation, monetary remedies will usually be paid as a single global compensation payment under the tax-free 'humiliation, loss of dignity, and injury to feelings' head, but loosely calculated in negotiation to incorporate consideration of remuneration lost, legal costs incurred, and hurt and humiliation suffered, massaged by the realities of the financial constraints the parties may be under, bargaining skills, tolerance for the process, and other intangibles.

The first employment relationship problem resolution model: tripartite committees

The first New Zealand Department of Labour (DOL) Mediation Service was established in 1972. Where conciliators had long chaired union-employer wage negotiations from beginning to the end point of agreement or impasse, mediators were introduced in the 1970s as 'trouble shooters' charged with brokering deals to avoid negotiation impasses defaulting to arbitration. But the new mediators did double duty, also playing a key role in the first model of individual employment rights dispute resolution, chairing tripartite grievance committees that included union and employer representatives.

The committees were a forum for achieving a mediated settlement between the parties, but, failing agreement, the mediator could make a ruling on the grievance or dispute, or that part of it that remained unresolved. It was not uncommon for parties to narrow the gap between them – for example, on the quantum of monetary remedies for an unjustified dismissal – but ultimately leave it to the mediator to determine the exact remedy within the narrowed parameters. If agreement was reached in mediation, that was the end of the matter. If the mediator was required to make a decision, either party had the option of referring the matter to the Arbitration Court (from 1987, the 'Labour Court') for a full evidential hearing with legal representation if they were unhappy with the mediator's ruling.

The committees were a forum in which the core interests of the parties in dispute could be explored and a compromise sought, but backed by access to adjudication by the mediator, or ultimately by the Courts, on the basis of established rights. Lawyers were specifically excluded from involvement in the committees, reflecting the committees' place as a vehicle for problem resolution through mediation or low-level adjudication, rather than as a part of the judicial system. Only if the matter was not resolved to the satisfaction of the parties in these low-level procedures did it escalate into the judicial system.

The second employment relationship problem resolution model: the Employment Tribunal

The grievance committees system remained in place until 1991. Then all of the existing institutions were swept aside by new legislation, the Employment Contracts Act (the 'ECA'). While the ECA effectively deregulated the bargaining environment for interest matters, it extended the regulatory framework for rights matters. Grievance procedures were now incorporated by law into every employment contract in New Zealand, substantially expanding the 'catchment area' and significantly increasing the employment disputes caseload. With the dramatic decline of union density under the ECA, employment lawyers emerged as a legal specialisation to fill the representation void.

The ECA promoted institutions and processes to match its central theme – employment relationships were now to be seen as legal contractual relationships, and dealt with accordingly. The ECA created the Employment Tribunal. The Labour Court became the Employment Court, with an appellate and supervisory jurisdiction over the Tribunal. Employment Tribunal members were each independent statutory officers, warranted as both mediators and arbitrators. Less than half were lawyers; others had backgrounds in union or employer representation or in the now-disestablished Mediation Service.

The Tribunal was assigned both the mediation and adjudication functions for rights disputes, but the processes were to be separate and carried out by different members in relation to any given matter. There was pressure on parties to mediate rights matters, but ultimately if one party elected not to, then the matter could proceed directly to adjudication.

Tribunal members were entitled to issue binding rulings in mediation of a rights dispute with the consent of all parties, thus resembling the 'med-arb' practice in the earlier grievance committees, but the option was seldom used. The reluctance to use the option is usually attributed to the fact that the Tribunal was initially denied the right to adjudicate in mediation by an early Employment Court ruling and by the time that decision was overturned, the Tribunal had established such a high settlement rate that members were reluctant to compromise the mediation process by advertising the med-arb option.

As with the tripartite committee model that preceded it, the Tribunal's processes for resolution of employment rights disputes developed an enviable record of success. Over the life of the Tribunal, over 80 per cent of rights cases filed went to mediation, and 85 to 90 per cent of those were settled (Department of Labour 2000: 4). The mediation process usually took the form of the parties coming

together with the mediator for just three or four hours in a single session, with relevant documents having been submitted in advance.

Several factors conspired to ensure that a particular style of mediation developed in the Tribunal. Under the ECA, employment relationships were solely about legal rights and obligations. So too were cases arising out of employment relationships. And most that came to the Tribunal were terminated relationships in which the dismissed employee was challenging the 'justifiability' of the dismissal. If parties were unable to reach a settlement in mediation, a formal adjudication process was the next forum realistically available to them. That being the case, the likely outcome in adjudication hovered as a powerful influence on parties in mediation.

Employment Tribunal members, being adjudicators as well as mediators, were ideally placed to advise parties on the likely outcome if their case proceeded to adjudication. So the usual approach to mediation in this model was an evaluative 'litigation risk analysis' in which the mediator heard the facts and arguments presented by each side, and was then able to advise each side about the strengths and weaknesses of its case and the prospects in adjudication. The mediator then used that advice as leverage to guide the parties towards a settlement that was, ideally, in proportion to the merits of the case, though subject to the realities of the situation in which the parties found themselves (for different theoretical approaches to mediation see Alexander 2008).

In large measure, then, Tribunal mediators were 'deal makers,' engineering agreements on 'exit packages' for dismissed employees using directive, evaluative mediation techniques. To some extent the mediation process mirrored that of the grievance committees; mediation was a forum for exploring the interests of the parties, given each of their circumstances, but within a framework based on the parties' legal prospects if the matter had to go further.

The ECA charged the Tribunal with being a 'low level, informal Tribunal' even in its adjudication function. As such, the entire employment disputes resolution system beyond the direct efforts of the parties to resolve matters themselves was housed in the Tribunal. The bridge to the judicial system was the right of appeal from Tribunal adjudicated decisions to the Employment Court.

It is widely accepted that the initial informality of the Tribunal's adjudication practice was compromised to some extent during the decade of its existence; the process gradually became more formal, more legalistic, and more costly. Adjudication in the Tribunal was adversarial in nature and style. The representatives of the parties, most often lawyers, largely shaped the cases put before the adjudicator, and were generally given the scope to put forward what they considered to be the full and best case at their disposal.

In its supervisory role, the Employment Court became more demanding of the Tribunal's processes so that pre-hearing interrogatories, the hearings themselves, and the decisions that eventually followed all became longer and more detailed as the Tribunal sought to cover all bases in arriving at its decisions. Representation costs increased. So did time delays to hearing, and then to decisions. And costs and delays became the twin criticisms confronting the Tribunal model, with parties waiting sometimes months for a mediation, months more for adjudication, and paying thousands of dollars in representation costs that, from the grievant's point of view, had to be recovered before any net gain was realised.

Despite these points of concern, the Employment Tribunal and its mediation and adjudication functions were widely respected as soundly based and effective in the context of what, by the turn of the century, was now a well-entrenched contract-based employment relations system in New Zealand (Hodge 2000).

The model today: new institutions under the Employment Relations Act 2000
With another change in government, the Employment Tribunal was disestablished by the Employment Relations Act 2000 (the 'ERA').

The evaluative, directive style of mediation, and an expensive, increasingly legalistic, adversarial style of adjudication, both usually dealing with termination of employment relationships, were not seen as

consistent with the ERA's very different focus on 'supporting and enhancing positive employment relationships.' A wider and less formal style of dispute resolution aimed at repairing employment relationships, rather than winding them up, was to be preferred.

To implement the new employment rights dispute resolution scheme, the incoming Labour government re-established a Mediation Service within the DOL and installed the adjudication function in a new Employment Relations Authority, promoted as an inquisitorial tribunal charged with investigating and determining employment rights disputes and intended as a more proactive, informal, accessible forum than the Tribunal's adjudication jurisdiction was seen to have become, less subject to legal manoeuvres, and less expensive for the parties.

The Mediation Service

In putting together the new Mediation Service, several modes of intervention were anticipated.

It was always likely that the mediation of rights-based disputes – principally grievances, and in the main dismissals – would remain a staple of the mediation workload, as it had been in the past. While it was hoped that new approaches would mean that many intended dismissals would be cut off at the pass, the ERA did not significantly change the contractual basis of employment relationships installed by the ECA, and so rights-based cases could be expected to continue to flow in. In the present scheme virtually all rights matters are mandatorily sent first to the Mediation Service for attempted resolution once they enter the formal employment relationship problem resolution system outside the workplace.

Relatedly, however, the philosophy of the ERA dictated that mediation services, including hands-on involvement by a mediator, be available for early intervention to assist parties with workplace problems, without regard to how the problems were defined and with a minimum of paperwork, cost or fuss (Hooper 2002). This was intended to be the core mediation intervention to maintain and enhance employment relationships, the corollary hopefully being a dramatic reduction in dismissal cases. And a proactive approach to assisting parties to improve their relationships was also to be available, leading with an extensive range of web-based, hard copy, and call centre information services.

To provide this full suite of services, the DOL recruited a mixed staff of 40 mediators, in addition to call centre and support staff. About one-third of the mediators were legally qualified. About half had employment relations backgrounds, including a small core held over from the Tribunal. Others had dispute resolution training or backgrounds in fields other than employment, being recruited for their mediation process expertise rather than any employment relations expertise (Risak and McAndrew 2011).

This recruitment strategy was intended to pull together a force of mediators who would fit the profile of the anticipated workload. The diversity brought strengths, but also some complications, including early workload and pay inequities. And there were, inevitably, differences in mediation philosophies and in personal mediation styles, and unevenness in the mediation services that parties experienced. Many parties and advocates, accustomed to mediators providing leadership and guidance through an evaluative mediation style, felt the process was rudderless when working with a more passive, facilitative style of some of the new mediators.

The Employment Relations Authority

The other part of the institutional dispute resolution equation to come under scrutiny was the perceived need to streamline adjudication procedures.

The new Authority was intended to function quite differently from the Tribunal in its adjudication jurisdiction. The Authority was to replace what was seen as the Tribunal's relatively formal, costly, adversarial, lawyer-driven, court-supervised adjudication process (and corresponding decision outputs) with a less formal, less legally technical, self-supervising, member-directed investigative process and shorter, to-the-point decisions (Green 2000). This change in approach would, it was reasoned, produce shorter hearings and encourage at least some parties to represent themselves, further reducing costs.

The Authority was initially established with 13 members, nine of whom were held over from the Tribunal. A majority of those appointed to the Authority were lawyers, but not all of them. The Authority was again positioned as the peak of the employment relationship problem resolution system rather than as a part of the judicial system. The Employment Court was given no direct supervisory jurisdiction over the Authority, a move that was seen as allowing the Authority to dispose of cases efficiently, without getting bogged down in the sort of legal requirements that had been imposed on the Tribunal by the Courts.

The current model in operation

A review of the employment rights dispute resolution system commissioned by the DOL in 2007 (Woodhams 2007; McDermott Miller 2007) has provided a comprehensive portrait of the current New Zealand model in operation.

Taken as a whole, private sector employers reported having an average of one and one half employment relationship problems coming to the attention of management per year for every 100 employees. The rate was close to double that average for small employers, but considerably lower for employers with more than 100 employees. The average in the public sector, which involves generally larger employers by New Zealand standards, was less than one problem coming to the attention of management per 100 employees per year.

Over 90 per cent of private sector employers and 80 per cent of public sector employers had experienced no employment disputes during the 12 months survey period. While the incidence of problems was higher per 100 employees in the small firm sector than in larger organisations, the likelihood of any particular small business experiencing a problem was substantially less – only 6 per cent of small businesses had experienced an employment dispute during the survey year.

There were an estimated 21,000 employment relationship disputes that came to the attention of New Zealand employers in the 12-months survey period to 31 March 2007 (McDermott Miller 2007: 3). Employers were most likely to try to resolve these problems internally through some form of negotiation or at least discussion. Sixty per cent were settled internally, about half of those with the assistance of external advisors. About 40 per cent proceeded to the employment institutions and their processes.

Internal resolution directly between the parties was the quickest and least expensive resolution to obtain, with a median time of one month from problem to final resolution, and a median direct cost of (NZ) $300 (about €200).

There is no evidence that New Zealand employers have consciously invested much in internal problem resolution mechanisms, so these successes are more likely to have come from *ad hoc* responses as problems arose, but they do emphasise the value to be had from effective internal procedures, particularly in relation to disputes arising from individual performance and behavioural problems. It is likely also that the extensive, no-cost DOL web-based and telephone advisory services contributed to internal resolutions of employment relationship problems by the parties.

Internal resolution, but involving external advisors and advocates contracted by the parties, added time (median two months) and considerable cost (median $5,800 – about €3,600) to the dispute resolution process, although it could be supposed that parties might more often tend to reach out to external advisors for complex or difficult-to-resolve problems, rather than for routine performance or conduct issues.

Using the Mediation Service

Of the estimated 21,000 employment relationship problems coming to the attention of employers in the 12 months survey period, 40 per cent were not able to be resolved internally. Three in every four of those disputes were resolved in mediation, the vast majority through the DOL Mediation Service, the rest through private mediation. Most of those resolutions came in direct mediation; very few cases involved the parties asking the mediator to make a decision. There is also the option of the mediator making a recommendation for resolution to the parties, but there is no data on the uptake of that option; it is not

thought to be high. The median time frame for resolving a rights case in mediation was five months from the time that the matter came to the attention of management (so including any time taken in efforts to resolve the matter internally). Anecdotal evidence would suggest that some of those not settled in mediation 'on the day' would subsequently be settled or withdrawn on the basis of the discussions held in mediation.

The median direct cost to the employer for matters resolved through the Mediation Service during the DOL survey year was $7,275 (about €4,600). There is no cost to the parties for the use of either mediation or information services of the DOL. Some part of the resolution costs would ordinarily be a payout to the employee. Almost 80 per cent of settlement figures in mediation were less than $5,000 (about € 3,150), while 44 per cent were less than $2,000 (about €1,300). In a quarter of cases, there were no payouts to the grievant at all. Most of the balance of the resolution costs would be the price of professional advice and representation.

A related study of mediation experience (Martin and Woodhams 2007) showed no clear profile to parties using mediation; collectively they mirrored the New Zealand workplace. Respondent employers were distributed across all workforce sizes and industries, again without any discernible, disproportionate patterns. A significant minority of both applicant employees (44 per cent) and respondent employers (40 per cent) used lawyers to represent them at mediation. Applicants were far more likely (43 per cent) than respondents (16 per cent) to be represented by an advocate – whether a union representative or private consultant – who was not a lawyer.

Settlement figures reported in this study were broadly consistent with the survey data reported above, with the most common settlement amount being in the range of $2,000 to $5,000 (about €1,300 to €3,150). Settlements in mediation often include provisions that would not be awardable or available in an adjudication forum such as certificates of service (included in 18 per cent of settlements), references (about 15 per cent), dismissals rewritten as resignations, apologies, provision for return of the employer's property, or an agreement between the parties to not speak ill of one another. In addition, confidentiality is an agreed provision in almost all settlements made in mediation.

Significantly, while there has been some uptake of early intervention, employment relationship-mending mediation, and indeed of proactive collective relationship-building mediation assistance, most of the work of the Mediation Service remains event-based and, in the case of rights disputes, end-of-relationship centred. Parties typically file some papers in advance of the mediation meeting so that the mediator has some idea what the employment relationship problem is about, more so when the matter has been referred back to mediation by the Employment Relations Authority. Matters are typically scheduled for a half day, and while there are certainly exceptions, most that are going to resolve do so within four hours.

Adjudication in the Authority

With success at earlier steps – roughly 30 per cent in direct negotiations, another 30 per cent in negotiations assisted by external advisors, and another 30 per cent in mediation – only a small minority of cases that come to the attention of the employer end up in the Employment Relations Authority for determination.

As expected, adjudication lifts the stakes again in terms of both time and money, although the costs of accessing the Authority are limited to minimal filing fees. The average time passing between an initial application to the Authority and a hearing of the case was reported in 2007 as being about five months. The Authority delivers its determinations in an average of another month and a half thereafter. Parties are even more inclined to use legal representation in the Authority, and representatives are likely to put more time, effort, formality and expense into preparing their cases for adjudication there.

In one small study (DOL 2007), 97 per cent of employee grievants and 88 per cent of respondent employers engaged representatives – mostly lawyers – for the Authority hearing. So, with awards to successful grievants somewhat higher than settlements in mediation, the overall cost to employers tends again to be at a substantially higher level for matters taken to the Authority than for those resolved earlier in the sequence of available processes.

While the anecdotal evidence is that costs of having a case heard in the Authority are increasing, the Authority process remains an investigative, member-directed one, relatively informal and technicality free, by comparison with the previous adversarial Tribunal process. Advocacy is low-key, determinations are brief and to the point, challenges are relatively infrequent and, while delays do occur, they are minimal by comparison with the delays experienced in the Tribunal in the 1990s.

At least at the present point in time, the Authority remains at the peak of an effective, accessible New Zealand employment relationship problem resolution model rather than at the bottom of the judicial system.

What research has been done has found that parties using the current employment disputes resolution services register a fairly high degree of satisfaction with both the processes and outcomes. Anecdotally, the most common criticisms of the mediation process remain unchanged from the Tribunal days: mediation of the type employed deals with the symptoms of problems rather than the core or cause; and employers are induced to pay out money 'to make the problem go away' under circumstances where a grievance or complaint is perceived by them to lack merit. From the grievant perspective, the level of compensation generated by the system for employer wrongdoing remains inadequate.

In addition there is sometimes expressed concern about unevenness in the skills of the mediators. Nonetheless, when utilised, the mediation experience was considered fair by the vast majorities of both principals and advocates, and was valued for testing the merits of a prospective personal grievance case in the Employment Relations Authority and for reaching a settlement once an employment relationship is over. Likewise, high percentages of parties using the Authority also report being satisfied or very satisfied with the experience (Kalafatelis and Hickey 2008).

Conclusions from the New Zealand experience

This is not the place to present hard data on each of the models of employment dispute resolution trialled in New Zealand in the past quarter century, even if reliable comparative data were available. Suffice for now to recall the three models, and to provide some brief conclusions from the experience of them:

- the tripartite grievance and disputes committee model;
- the Employment Tribunal model characterised by the combining of mediation and adjudication in the one institution but with separation of process, largely evaluative, end-of-employment-oriented mediation, and low-level adversarial adjudication; and
- the present ERA-model featuring extensive information availability, separation of the mediation and adjudication functions into separate institutions, an effort at least at proactive, remedial mediation, despite a continuing preponderant demand for evaluative, 'divorce' oriented mediation, and a less formal, inquisitorial mode of adjudication.

Subject to appreciating that nations may have different objectives for their employment relationship problem resolution programmes, it seems fair to summarize that a high rate of problem disposition, a sense of justice for involved parties, and effectiveness in terms of cost and resources would be widely accepted yardsticks. With these criteria in mind, a number of at least tentative conclusions can be advanced from the New Zealand experience.

First, an **investment in education of workers and employers** as to their rights and obligations in the employment relationship, particularly through easy access to detailed, accurate, up to date information via the internet, call centres, and other modern information sources appears to be an investment that pays off, particularly under circumstances where industrial relations systems become fragmented and the traditional 'educators' and 'problem screeners' in unions and employer organisations play a less prominent role around the workplace than they used to do.

New Zealand has developed a comprehensive information provision programme that is seen as very much an integral part of the employment rights dispute resolution model, not as something separate or secondary. It is the first port of call for many employers and aggrieved employees. Most initial calls

intended for the Mediation Service are routed through the free information call line. Labour and Occupational Health and Safety Inspectors are also a part of the information and problem resolution service, in addition to their regulatory roles.

While no direct evidential links have been established, it is likely that the availability of detailed, accurate information has contributed to an increase in matters being resolved internally by employers and employees, and a gradual reduction in the volume of cases entering formal dispute resolution through the Mediation Service or Employment Relations Authority. As an indication, employment relationship problem mediations completed by DOL mediators fell gradually from 6,207 in the 2007/2008 fiscal year to 5,674 in 2010/2011, and continued to trend down in fiscal year 2011/2012. Concomitantly, settlements reached between the parties without mediation assistance, but brought to the Mediation Service for endorsement, increased from 2,787 in 2007/2008 to 4,187 in 2010/2011 and the unofficial numbers were similar for 2011/2012[1].

Second, while it cannot be said that New Zealand has invested to any significant extent in **promoting internal problem resolution systems**, other than offering early mediation intervention, promotion of internal processes for resolution of employment relationship problems would appear to be another wise investment. The advantages to the employer in particular – in time, money, and workplace stability – from resolving issues internally is shown to be substantial. This is especially so where the employer has the capacity to resolve matters without calling on professional assistance. But even where professional legal or human resources advice is required, the costs in time and money still compare favourably with taking a case even just as far as the Mediation Service.

It is likely that more intensive efforts to install internal conflict resolution mechanisms in New Zealand workplaces would further reduce the number of cases entering the formal system.

Third, the **provision of proactive, early intervention, remedial mediation** – as against reactive event-based mediation – is worth exploring, even though the jury is still out on the extent of the market for such services in New Zealand. It has to be supposed that proactive hands-on involvement in preventative and remedial work by the Mediation Service has been a contributor, along with remote information and education, to the gradual decline in matters presented as disputes for resolution in state-provided mediation or adjudication.

Fourth, **promoting mediation, even mandatory mediation of employment relationship problems** that exit the workplace will be productive, given the high proportion of divided parties who reach agreement in mediation, and the comparative savings to employers in time and money relative to processing a case through adjudication.

Not all mediation practitioners or theorists will endorse mandatory mediation. But then, not all mediation practitioners will endorse state provision of mediation. The New Zealand experience suggests that a high percentage of parties going to a free state mediation service, particularly over the dissolution of employment relationships, will have their cases disposed of to a level of satisfaction that at least allows for agreement between them, and that most will report satisfaction with both the process and outcomes.

Fifth, **an inquisitorial adjudication forum**, with a focus on minimizing cost, formality, legal technicality, time delays, or other barriers to accessibility following mediation is to be favoured, as at least an available option, over a more traditional adversarial adjudicatory process.

Realistically, given parties' preference for competent representation in whatever procedures are available, the informality of grievance and disputes committees of the first New Zealand model would be difficult to recreate as a prevailing model without high membership in well-resourced labour unions. But anecdotally, there appears to be no call outside a minority in the employment law bar for an abandonment of the inquisitorial style of adjudication practised in the Employment Relations Authority and a return to the more traditional adversarial approach practised in the Employment Tribunal model in the 1990s.

[1] All figures provided by the Chief Mediator Judith Scott, DOL Mediation Service, to the authors June 14, 2012.

Sixth and relatedly, there is value in corralling the **relatively informal employment rights dispute resolution system** – including both mediation and adjudication functions – at some distance from the judicial system, while clearly not closing off access to the court system in defined circumstances, including in some form of appellate role.

This is not a universally shared view in New Zealand. The value of a specialist Employment Court, the extent of the jurisdiction given to the Authority outside the supervision of the Employment Court, the right of direct access to the Court bypassing the Authority, and the positioning of the Authority and the qualifications of its membership are all open issues in New Zealand to the point that it would be unwise to yet draw any conclusions or recommendations on any of those specific points.

The value of the New Zealand-experience for Europe

If one looks for lessons to be learnt from a distinct model of employment dispute resolution one has to take into account a range of factors. On the highest level is the ideological approach on how to regulate the employment relationship (*laissez faire* vs. state intervention and the role of individual statutory rights). Also relevant are the industrial relations system (especially as it regards the role of unions and collective bargaining and of statutory representative bodies like works councils with co-determination rights), and the political system (liberal market economy vs. a coordinated market economy) and its institutions.

At a lower level the labour law system itself, the system of enforcement of employment rights and the procedural rules, especially when it comes to the recovery of costs play a certain role in answering the question about the transferability of foreign experiences. In addition, national legal contexts reveal historically embedded systemic differences that can provide insights into the general reasons behind the rapid expansion of mediation in common law jurisdictions like New Zealand, and the comparatively hesitant development of mediation in continental European civil law jurisdictions (Alexander 2001).

The Eurofound comparative study (Purcell 2010) distinguishes different levels at which ADR may be introduced when dealing with individual workplace disputes, and these are very much in line with the present model of employment dispute resolution in New Zealand and the findings above:

- Step one – action is taken to ensure the avoidance of disputes at work through encouraging the most appropriate procedures for handling grievance and discipline and, by implication, improving management practices and behaviours.
- Step two – non-judicial ADR occurs at the workplace and/or higher levels, where management and trade unions, or other representatives, meet to seek to resolve individual disputes. A conciliator or mediator may be involved at this stage, depending on national preferences. This step can include relational mediation.
- Step three – as part of a pre-court application or hearing, ADR is provided by a third-party expert in conciliation and mediation. Arbitration can be applied at this stage if the parties agree.
- Step four – ADR is adopted in the courts, either immediately before a hearing or during it, with conciliation or mediation usually provided by the judge or a lawyer.

The European way, if one may say so, often involves the collective representation of interests (unions and/or works councils) at the different steps – one feature that is different from the contemporary New Zealand approach and which has to be taken into account trying to transfer the experiences in that country. The collective approach to resolving workplace conflict may make the use of mediation less necessary as there are other avenues available – and the collective actors may even oppose the use of new ADR mechanism as they conceive them to be a tool for reducing their influence or even avoiding unions or works councils in new, not yet organised workplaces. The New Zealand experience shows that the weakening of unions may result in the increased need for individualistic conflict resolution mechanism like mediation and adjudication.

Another distinction is the role of judges in the continental European procedural rules – the courts are inquisitorial fora and judges often have the obligation to work towards reaching a settlement whenever

possible. Therefore judges in many jurisdictions have a more proactive and settlement-seeking role than their Anglo-Saxon counterparts. This may make the need for ADR out of court – in mediation or low level tribunals – less necessary as judges can use techniques usually employed by mediators and conciliators. A recent example of this is the new set of provisions in the German procedural rules that allow for the referral of a case to another judge a (so called 'Settlement Judge' – *Güterichter_in*) whose sole job is to try to settle the case 'using all appropriate means including mediation'.

In our view the obvious reason for the success of the several New Zealand models is the fact that mediation is mandatory and paid for by public funds, i.e. it does not involve additional costs for the parties. If European states want to promote this form of dispute resolution they are well advised to take these factors into account.

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