Legislation, mediation and unions: New Zealand's *Employment Relations Act 2000*

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Abstract

This paper examines the effectiveness of recent New Zealand legislation in addressing issues of workplace disputes, with a particular focus on the role of unions. One of the most crucial aspects of the *Employment Relations Act*, introduced by the new Labour government in 2000, was its provision for mediation services to employers and employees. This initiative was explicitly intended to provide a quick, inexpensive method of solving workplace conflicts, in contrast to often costly and lengthy legal proceedings. The main principle was that conflicts are best settled by the parties themselves, with a minimum of third party involvement. In the paper, we provide an overview of current mediation provisions and how they differ from the provisions under the *Employment Contracts Act 1991*. We then go on to examine the practical outcomes from mediation: to what extent have the Act's stated goals been achieved and how might mediation processes be improved? The paper highlights how cases that are reported as 'individual grievances' may be better understood as collective issues requiring collective solutions. Drawing on concepts of worker voice and silence, we then examine the low rates of reported grievances among the most vulnerable workers, particularly those in small workplaces with low rates of unionisation. We illustrate how this apparent silence might be better understood in terms of the power relations between employer and employee. We conclude by suggesting that, while mediation procedures have been a qualified success, they should be supplemented by greater union involvement and more comprehensive collective agreements that address the power imbalances often fundamental to workplace conflict.

1. Background to the current legislation

During the final decade of the nineteenth century and the early twentieth century, both New Zealand and Australia were at the forefront of social and economic reform internationally. Integral to this reform was the establishment in both countries of centralised conciliation and arbitration, with a guaranteed bargaining role for unions. With respect to New Zealand, the First Labour Government introduced significant further legislation in the 1930s, including the 40-hour week and compulsory unionism. For the following five decades, a tripartite 'historic compromise' between government, business and unions underpinned a highly regulated, centralised industrial relations system. However, during the 1980s the Fourth Labour government initiated the 'New Zealand experiment', which ushered in a process of widespread deregulation, decentralisation and privatisation. It was a National Party government, though, which fully applied this process to the decentralisation and deregulation of industrial relations in 1991.

The *Employment Contracts Act 1991* (ECA) represented a huge institutional break in New Zealand's industrial relations system, ending compulsory conciliation and arbitration, its guaranteed bargaining role for unions and the tradition of tripartism.

The Act completely dismantled the system of industrial awards, which had already been moving towards more direct bargaining at the workplace and industry level. In its place, the ECA set bargaining in an individual context, removed any state support for collective bargaining. Union access rights to workplaces were severely curtailed, and the legal status of unions was downgraded through the removal of statutory recognition procedures. The government went so far as to cease formal collection of statistics on union membership.[1]

Prior to the ECA, employment rights had been transmitted to workers primarily through the medium of unions (Anderson 1991: 129). The ECA reoriented labour law around the individual worker, giving unions the status of being one choice among several the individual might make. The impact of the legislation upon unions was immediate and, within its own terms, extremely effective. By December 1993, just a little over 2 years after the Act had been introduced, one third of union members had been lost and almost 20 percentage points taken off union density. By the end of the 1990s, union membership had halved and collective bargaining coverage collapsed from around half the workforce to less than a quarter. As Table 1 indicates, union membership and density have never recovered from this period.

Table 1: Trade Unions, Membership and Union Density 1985-2003 (selected years)

			Potential union membership		**Union density**	
	Union membership	Number of unions	Total employed labour force	Wage and salary earners	(1) / (3) %	(1) / (4) %
	(1)	(2)	(3)	(4)	(5)	(6)
Dec 1985	683006	259	1569100	1287400	**43.5**	**53.1**
Sep 1989	684825	112	1457900	1164600	***47.0***	**55.7**
May 1991	603118	80	1426500	1166200	***42.3***	**51.7**
Dec 1991	514325	66	1467500	1153200	***35.1***	**44.6**
Dec 1992	428160	58	1492900	1165700	***28.7***	**36.7**
Dec 1993	409112	67	1545400	1208900	***26.5***	**33.8**
Dec 1994	375906	82	1629400	1284900	***23.1***	**29.3**
Dec 1995	362200	82	1705200	1337800	***21.2***	**27.1**
Dec 1996	338967	83	1744300	1389500	**19.9**	**24.4**
Dec 1997	327800	80	1747800	1404100	**18.8**	**23.3**
Dec 1998	306687	83	1735200	1379200	**17.7**	**22.2**
Dec 1999	302405	82	1781800	1414100	**17.0**	**21.4**

[1] The Industrial Relations Centre at Victoria University of Wellington has conducted voluntary surveys of trade unions since December 1991. This paper draws on this IRC survey data.

Dec 2000	318519	134	1818400	1454500	**17.5**	**21.9**
Dec 2001	329919	165	1860700	1500700	**17.7**	**22.0**
Dec 2002	334783	174	1905100	1543200	**17.6**	**21.7**
Dec 2003	341631	181	1956300	1576300	**17.5**	**21.7**

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

With respect to dispute resolution, the ECA created a specialist agency, the Employment Tribunal with powers to mediate and adjudicate on disputes, in addition to the already-established Employment Court. The system that had operated for most of the 1980s had been limited to union members only, with some very limited exceptions. In relation to personal grievances, the ECA extended access to these procedures to non-union members. Mediation was not compulsory.

In 1999, shortly before the passing of the Employment Relations Act, the Employment Tribunal (the first port of call for industrial disputes and personal grievances) had a backlog of over 3,000 claims (Department of Labour 1999). According to media reports at the time, the system had become costly and overloaded, with parties waiting 6 months to have a matter heard and 57 weeks for a Tribunal ruling (*New Zealand Herald*, 14 May 1999, 11 August 1999). The delays associated with the ECA's system of dispute resolution promoted a growth in alternative dispute resolution procedures being provided collective agreements. By 1999, 15 per cent of collectivised workers had ADR clauses in their collective agreements (Harbridge and Crawford 1999: 52). Such clauses were more common in the private sector, covering almost a quarter of all workers with collective agreements. ADR clauses took on a variety of forms ranging from the specification of the use of a private mediator to resolve disputes to grievance procedures that gave final authority to a senior manager in the company.

There was, therefore, an evident need for a more effective framework for the resolution of workplace disputes. For the incoming Labour Government, mediation was to provide the most important mechanism for achieving this goal.

2. Mediation: intent and practice

The Employment Relations Act (ERA) replaced the Employment Tribunal with the Mediation Service and the Employment Relations Authority. The mediation service was put forward as the cornerstone to the government's 'good faith' approach to dealing with industrial disputes. Mediation is not compulsory for parties in dispute, but the Employment Relations Authority may refer them to mediation. The parties can ask a mediator to sign any settlement they reach and that settlement is then enforceable by the Employment Relations Authority and the Employment Court. The parties can also agree to ask the mediator to make a final and binding decision over any issue they cannot agree upon. That decision is then enforceable in the Employment Relations Authority and Employment Court. Parties can also take

unresolved disputes to the Employment Relations Authority, once mediation has been exhausted as an option.

The Employment Relations Act, unlike the Employment Contracts Act, does not include a schedule for the effective resolution of disputes about the interpretation, operation or application of its terms or exemplar procedures for the resolution of personal grievances. Thus, it is up to the parties to the agreement to decide how they will resolve disputes and personal grievances. If the parties to the agreement cannot reconcile their differences in-house, then the Mediation Service, Employment Relations Authority and Employment Court are available to resolve the problem.

Under the ERA, the Employment Relations Service (ERS) provides mediators free to employers and employees. Disputes that might harm the employment relationship are defined in a wide-ranging fashion, to include not only disputes between employers and employees, but also between two or more employees, a union and its members, between unions at the workplace, between a union and an employer, and between an employer and other employers involved in multi-employer bargaining. The overwhelming majority of disputes, though, are between employers and employees.

Dealing with disputes at the lowest possible level is a consistent principle of mediation in practice. ERS information advises parties in the first instance to assess different aspects of a problem, its causes and to ask if it might be solved without external intervention. Also, Department of Labour inspectors can advise on minimum requirements under the Act, thereby resolving some problems before they escalate. Mediation, therefore, is the main avenue for resolving problems that employers and employees cannot deal with themselves. 'Good faith and common sense' (ERS 2003: 9) are seen as fundamental to achieving successful outcomes from mediation, with mediators playing a key role in achieving good faith and ensuring a fair outcome to the process. While attendance by parties at mediation meetings is voluntary, participation may be interpreted as part of the 'good faith' commitment required by the ERA. Consequently, if one party refuses to attend mediation, the other party may take the case to the Employment Relations Authority, which can require the parties to attend mediation. (ERS 2003: 12)

Section 54(3)(a) of the Employment Relations Act states that every agreement must contain a plain language explanation of the services available for the resolution of 'employment relationship problems' which, essentially, are disputes and personal grievances. Further, every employment agreement is required to include a procedure for the effective resolution of disputes about the interpretation, operation or application of its terms and reference to the 90-day period within which a personal grievance must be raised. As with the ECA, the individual does not have to be a union member to take a personal grievance case to mediation or beyond.

3. Outcomes

The Employment Relations Act, then, introduced a shift from an often cumbersome legalistic framework towards the parties themselves resolving disputes. In this section of the paper, we ask to what extent the goal of more rapid, less costly dispute resolution by the parties, assisted by mediation, has been achieved and how the current system might be improved. We focus specifically on the role of unions, previously marginalised by the Employment Contracts Act but with a greater potential

role under the new legislation. How might unions be able to expedite the resolution of workplace conflicts and also identify systemic organisational or industrial problems that may appear as 'personal' grievances?

The broad goal set for mediation by the ERA has been achieved in its early years of operation: during 2003, the Mediation Service received 9256 applications and had dealt with 9,278, although there had been a slight increase (877 to 1,038) in outstanding applications at the end of the year (see table 2).

Table 2: Claims before the Mediation Service

Year to June	Applications outstanding at start	Applications received	Applications re-opened	Applications withdrawn	Applications disposed of	Applications outstanding at end
2001	0	4,767	0	164	3,959	808
2002	815	8,134	115	285	8,187	877
2003	877	9,256	202	318	9278	1038

Source: Department of Labour, *Annual Report 2002/3*

A 2003 survey conducted by the Department of Labour (Waldegrave, Anderson and Wong 2003[2]) found that 15 per cent of employees had experienced a dispute in the previous 12 months. Clearly, then, we are dealing with an issue of considerable magnitude. The survey also revealed that a substantial majority of both employees and employers preferred to deal with problems directly, rather than through a union. Unsurprisingly, union members had a higher rate of preference for working through a union. Employees who were on collective agreements, established union members, in larger organisations and in central government were the most likely to report problems, while employees in the smallest organisations (1-3 employees), in agriculture and business/property services reported only a 2 per cent rate of problems. Only 42 per cent of enterprises had formal dispute resolution procedures, 23 per cent had informal procedures of some kind and 31 per cent had no procedures.

Those employees who knew least about dispute resolution were concentrated among the low-paid, new workers, part-timers, non-union members and those without a formal contract – that is, the most vulnerable members of the workforce. A bare majority (52%) of employees with problems used an 'external' agency – unions (47%), private mediators (17%), lawyers (16%), consultancy companies (5%), Employment Relations Authority (4%), Department of Labour mediation service (3%), Employment Tribunal/Court (3%). Dissatisfaction with the process and outcomes remained high, particularly among Maori, although (unsurprisingly) those who were satisfied with the outcome were generally satisfied with the process. There was a direct correlation between organisational size and use of external mediators – similarly, larger unions made greater use of mediation.

Respondents reported that the involvement of lawyers as employee representatives tended to lead to a protracted, more expensive process than where the employer dealt with the relevant union (2003: 117). Mediators were seen generally as providing

[2] For detailed figures see Waldegrave et al 2003: 109-124.

inexpensive, reliable resources and faster, informal, less legalistic resolution of problems, with the ability to deal with problems at lower levels, although problems for low-paid workers, particularly Maori and Pacific Islanders, were reported. Concerns about mediators included lack of experience in particular areas or industries and the failure to encourage resolution – to facilitate, rather than mediate. Unions were also concerned about the increasing engagement of lawyers, especially by employers. (2003: 123-4)

4. Issues

The survey data raise a number of issues concerning the role of unions in addressing workplace disputes. Within a decentralised, deregulated environment, how might unions occupy a greater role in both the identification of systemic problems and in providing collective solutions to those problems? Unions are typically better equipped to identify and distinguish between the individual (or interpersonal) and organisational (or industrial) aspects of specific problems.

The language and categorisation of the mediation process remains, however, individualist (see table 3). The great majority of cases are classified as 'personal grievances' – yet this includes issues that may well be organisational or industrial. For example, the most numerous source of dispute (unjustified dismissal – 2,400 cases in 2002/3) could be addressed by more comprehensive clauses in collective agreements on consultation, communication and termination. Just as the transaction costs of negotiating individual rather than collective contracts are often prohibitive, so the transaction costs of individual conflicts could be reduced substantially by addressing collective sources of grievance. Mediators can also have a broader role than dealing with individual cases. The legislation permits them to become involved in collective bargaining at any point in the process. This denotes possibilities for them to alert the parties to problems that may be prevented by more effective collective agreements, and to contribute to the maintenance of 'good faith' bargaining.

Table 3: Settlements reached by the Mediation Service 2001/2002

Settlement Type	Number	Percent
Bargaining	160	3
Collective Agreement	51	1
Disciplinary Problems	63	1
Dispute	98	2
Employee – Definition	90	2
Good Faith	72	1
Individual Agreement	116	2
Interim Reinstatement	2	0
Minimum Code	79	2
Personal Grievances[1]	3478	72
Redundancy	278	6
Restraint of trade	16	0
Strikes and Lockouts	23	0
Unions	3	0
Recovery of Wages	242	5
Parental Leave	7	0
Other	126	3
Total	**4.802**	**100**

Source: Department of Labour, *Annual Report 2002/03*
[1] Personal Grievances include: discrimination (63), disadvantage (953), duress (18), sexual harassment (41), racial harassment (3), unjustified dismissal (2400) and other (0).

Such measures, though, do not help those workers who are not covered by collective agreements. As noted above, the lowest levels of awareness of dispute resolution procedures occurs among the most vulnerable of workers – obviously, a low incidence of reporting of problems does not indicate a low incidence of problems. On one hand, we have an apparently successful system for processing those grievances that are publicly voiced. On the other, a large section of the New Zealand workforce (predominantly those officially identified as 'vulnerable') has little discernible voice and remains non-unionised. Union membership in New Zealand has become increasingly concentrated in the public sector and a few areas of the private sector workforce (Industrial Relations Centre survey 2004).

The current context: unions, legislation and the ECA legacy
The decentralised, deregulated regime inaugurated by the Employment Contracts Act precipitated a far more rapid shift to the right in New Zealand than experienced in other countries. Unlike its National Party predecessors, though, the current Labour government has adopted an incremental approach to industrial relations reform. The individualist legacy of the Employment Contracts Act remains largely intact under the Employment Relations Act, despite the government's formal commitment to

collective bargaining. Unions remain marginal to the great majority of workplaces – and this is unlikely to change in the foreseeable future.

We noted at the outset of this paper that New Zealand shared with Australia a common heritage of centralised conciliation and arbitration institutions. Yet the two countries have diverged considerably over the past two decades, in a way that highlights the importance of centralised institutions and the current difficulties faced by New Zealand unions.

While in Australia, as in New Zealand, neo-liberalism strongly influenced policy agendas in the main political parties, the Hawke and Keating ALP governments (1983-1996) enacted a more measured process of decentralisation of industrial relations than occurred in New Zealand. Two major factors contributed to the more gradual process of change in Australia. The first was constitutional: Australia's federal system, with governments at Commonwealth, state or territory and local levels, including upper houses in Commonwealth and state jurisdictions (with the exception of Queensland). The second was political: the Accord between the Australian Council of Trade Union (ACTU) and the Labor government. The resolutely anti-union Howard government, in power since 1996, has still been unable to break the institutional legacy of the conciliation and arbitration system, which has been weakened but not abolished – largely due to opposition in the Federal upper house, the Senate. Over 80 per cent of Australian workers remain protected by the industrial award system. Further, the annual tripartite National Minimum Wage Case (the 'Safety Net Review') continues to provide significant protection to the most vulnerable workers.

In New Zealand, however, decentralisation and deregulation prevail – the government and unions appear unable to challenge the neo-liberal hegemony established during the 1990s – and the relationship between the Labour Party and the New Zealand Council of Trade Unions (NZCTU) is not as close as that required by the ALP-ACTU Accord. There has been no concerted attempt to reinvigorate collective, tripartite institutions. The individualist character of the mediation provisions exemplifies this situation.

The environment engendered by the Employment Contracts Act both undid much of the progress achieved by unions during the previous century and endowed employers with formidable self-confidence: they have become accustomed to getting their own way. Hence the leading employer association, Business New Zealand, has campaigned vigorously against the mild reforms currently proposed in the Government's *Employment Relations Law Reform Bill* (such as the requirement to bargain and communicate in good faith) – for example, in vehemently defending managerial prerogative and the 'right' to hire and fire:

> The test for a justifiable action (including dismissal) has been changed from what a reasonable employer would do to what is fair to both employer and employee. This can be very subjective; the likely outcome will be courts ruling on whether a dismissal was 'fair' in the circumstances. Effectively this will take away your right to make decisions about your business and give that right to the court. (BNZ 2004: 2)

Faced with such opposition, the government may well dilute even these mild reforms (Hansard, 30 March 2004), especially as the opposition National Party has become reinvigorated in recent months under Don Brash, a former Reserve Bank Governor. He has previously stated that the Employment Contracts Act's deregulation was 'not complete. It retained certain minimum entitlements that must be observed in employment contracts, including a minimum wage, minimum holiday entitlements, parental leave and equal pay for men and women.' (Brash 1996) A future National government may be less cautious in implementing its agenda than the current Labour government. Nonetheless, it is worth noting that the present macroeconomic and political situation for unions is as good as it has been for many years: steady growth in the economy and employment rates, unemployment at its lowest level since the 1980s (Statistics New Zealand 2004) and a Labour Government in power. Yet, as the previous discussion indicates, the advances made by the labour movement have not been substantial.

In the concluding section of this paper, we raise for discussion two questions we see as important for the labour movement in New Zealand, given the unfavourable institutional context. How might unions occupy a more strategic role in addressing workplace disputes? How might unions assist the most vulnerable sections of the workforce to achieve a greater voice?

Concluding comments and issues

Any re-establishment of a centralised system of conciliation and arbitration is implausible. Therefore, alternative strategies are worth exploring. One possible avenue may be provided through addressing the issues of employee voice and silence posed in our earlier discussion of mediation and dispute resolution. While there is extensive industrial relations literature on the role of unions in articulating worker voice, understood as the 'ability to have *meaningful* input into decisions' (Budd 2004: 23), there is considerably less on the problem of unions and workplace silence – the grievances and issues that are not articulated. Four decades ago, writing on decision-making and non-decision making, Bachrach and Baratz (1962, 1963) indicated how the operation of power, particularly the capacity of the powerful to exclude issues contrary to their interests, led to the silence – through apathy, resignation and despair – of the least powerful. In many New Zealand workplaces, the absence of unions and a collective voice is accompanied by an absence of individual voice – that is, silence.

There has been a recent growth in literature on employee silence, but mainly from a managerial perspective (for example, van Dyne, Ang and Botero 2003; Bowen and Blackmon 2003). Unions play little or no role in this literature, which interprets the articulation of problems and grievances as the responsibility of managers. In a recent paper, Milliken, Morrison and Hewlin (2004) acknowledge that many employees are discouraged from raising organisational problems, mainly through their fear of the anticipated managerial response. This leads to problems going unaddressed and a lack of organisational knowledge being transmitted to managers. Within this managerial literature, though, it is left to managers to convince employees that they <u>want</u> to hear about the problems faced by employees. On this basis, strategies include: creating a workplace climate in which employees feel safe to articulate problems; referring to people who do so as 'courageous' rather than 'troublemakers'; and creating mechanisms (for example, an organisational ombudsman) through which problems can be voiced outside formal line-management structures (see Milliken *et al* 2004:

25). This literature, though, is clearly hampered by the non-inclusion of unions as the historically most important medium for the articulation of workplace problems.

The low proportion of enterprises in New Zealand with formal dispute resolution procedures, combined with the low usage of dispute resolution procedures among the most vulnerable workers, indicates unions may be able to play a greater role in articulating previously unarticulated grievances. One of the more obvious ironies of workplace voice and silence is that, where unions are present and active, there is far less need for individual employees to articulate grievances. Yet, where unions are absent or inactive, in situations where there is a pressing need for grievances to be articulated, individual employees are considerably less likely to do so. A significant point in this regard is that those worksites with the highest rates of unionisation (over 75 per cent or over) exhibit lower rates of individual disputes going to mediation than those with mid-ranking rates of unionisation (50-74 per cent) (Department of Labour 2003: 113), suggesting the effectiveness of internal collective mechanisms. The available data, then, indicates a spectrum ranging from the majority of (mainly small to medium) workplaces with an absence of both individual and collective voice, through to (mainly larger) workplaces with a strong collective voice, articulated through collective agreements, but where there is less expression of individual voice than in less strongly unionised workplaces.

The stated goal of the current legislation is to provide the quickest, cheapest, most satisfactory way of resolving workplace disputes. Therefore, we would argue that there would be significant benefits in unions occupying the role of default employee representatives. At present, there are signs of an emerging backlog of disputes and of the mediation process developing an increasingly litigious character. According to the available survey data (Department of Labour 2003: 117), the parties in themselves appear less able to solve problems than the parties in conjunction with unions and mediators. Unions, whose resources are constantly stretched, have an interest in ensuring that conflicts are settled as quickly and cheaply as possible, at the lowest level, and in reaching collective solutions to what appear to be individual problems. In contrast, private representatives (most importantly, lawyers) may have a vested interest in lengthening and complicating the process. Mediation may afford the possibility that unions might reassert collectivist principles, particularly (as the legislation permits) if mediators can occupy a greater role in collective bargaining. Many problems that go to mediation could be addressed more effectively through collective agreements, informed by mediation processes.

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