

The Employment Tribunal - Four Years On

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This paper contains comment on a number of aspects of the Tribunal's operations and should be read as the personal observations of one member of the Tribunal, rather than the views of the Tribunal itself or any others of its members.

Introduction

The Employment Tribunal was created under the Employment Contracts Act 1991 (the ECA) which became law on 15 May 1991. In August 1991 the Tribunal opened its doors for business. My own experiences as a member of the Tribunal for almost five years have led me to the views expressed here about the Tribunal's three broad methods of operation used in resolving employment related disputes. I have referred to these three methods under the headings of General Function, Mediation and Adjudication. These functions or operations are contemplated by the ECA at s.76, where the objects of the Act in relation to the institution of the Tribunal were said to be:

- to establish a specialist Tribunal to deal with the rights of parties to employment contracts,
- to provide services to assist employers and employees to mutually resolve differences that may arise between them,
- to provide, through a low level and informal Tribunal, fair and just resolution of differences in cases where mutual resolution by the parties themselves is inappropriate or impossible.

A wide brief was given for the Tribunal to offer its services to any parties believed to be in need of help to resolve any differences arising out of or in connection with an employment relationship. The ECA intended that the Tribunal would not only pick up the pieces once the employment relationship had been damaged or broken, but would also try to prevent or reduce the causes of breakdown by helping employers and employees achieve and maintain good employment relations.

To meet the objectives of the ECA, the Tribunal has taken up its job in the three broad ways contemplated by the Act: first, by providing mediation assistance to employees and their employers who are in dispute; second, where mediation is not practicable, by issuing a formal determination of the legal rights and remedies of such parties following adjudication; and third, by giving general assistance to parties including those whose employment relationship has not necessarily been damaged or destroyed but may be in a building stage or a subsequent preservation stage.

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The predominant users and uses of the Tribunal have clearly stood out over the last few years. Those who refer most of the Tribunal's work are employees who have been or who claim to have been dismissed, and who also complain that the dismissal was unjustified. In the year ending 30 June 1995, employees with this particular type of personal grievance brought 82 percent of the employment disputes of any kind that were disposed of by the Tribunal in any way. The way that the Tribunal most often performs its functions is by providing mediation services. In the year ending 30 June 1995 there were 3,040 applications¹ to the Tribunal, of which 78 percent were resolved or otherwise disposed of by mediation. As these statistics suggest, on most of its sitting days in most of its cases, the Tribunal will be giving mediation assistance to employer and employee parties who are in dispute over a claim of unjustified dismissal.

Other kinds of cases dealt with, although far less frequently than dismissal-personal grievances, are the non-dismissal types of personal grievances (including general disadvantage grievances, sexual harassment and discrimination) and wage recovery actions, penalty actions, applications for compliance orders, and disputes about the meaning of employment contracts. By design of law, the employer party to an employment contract is not able to invoke the remedy of personal grievance. And as most of the other remedies that are available from the Tribunal under its statutory jurisdiction are employee remedies, employers as a class are not able to be significant initiators of proceedings in the Tribunal. In practice, employers are reactive users of the Tribunal who become involved as the respondent party to claims of personal grievance and other proceedings.

General function of the Tribunal

For the year ending 30 June 1995, there were 458 "General Mediations"² recorded as having been attended to by the Tribunal. These are cases where the Tribunal provides help relatively quickly to sort out miscellaneous employment related actual or potential problems. There are no express statutory restrictions on the circumstances in which the Tribunal is able, under s.78 of the ECA, to "assist" employers and employees to achieve and maintain effective employment relations. The availability of Tribunal assistance need not require a situation to have developed to the stage where a formal claim has had to be referred to the Tribunal. A Tribunal member might be asked to assist when parties have foreseen that a problem is brewing and they are anxious to prevent any deterioration of the situation. The role to generally assist or facilitate might also be discharged, when the requirements of other Tribunal work permits, by a Tribunal member helping parties having difficulties in contract negotiations to conclude a new or revised employment contract. Also, members have on occasion agreed to appointment as an arbitrator where the parties to an employment contract have provided for arbitration as an alternative method of dispute resolution.

¹ 1995 Report of Department of Labour - Appendix 3

² 1995 Report of Department of Labour - Appendix 3

Members also make themselves available on request to give instruction and to talk to employer, employee and other interest groups about the work of the Tribunal and aspects of employment law and practice.

There will be other ways in which assistance might be given and employers, employees and their representatives are encouraged to contact a Tribunal member or Tribunal secretary with proposals or requests for help. Whether requested assistance is available will depend on a number of factors including other work and time commitments of the Tribunal. It is most unlikely that the Tribunal will attend to matters or situations that are not in any way connected with an employment relationship. However, where there is doubt about the connection, assistance may still be given if the substance of the dispute can be more efficiently dealt with than the jurisdictional issue. An example is a dispute arising out of what may arguably be an independent contractor relationship between the parties. Generally, when assistance is called, for members will adapt to whatever role has been identified and agreed to by the parties as being most likely to help them resolve their differences.

In carrying out its general function the Tribunal has no authority to intrude in employment related disputes without the invitation or agreement of the parties. When the wider public may have an interest in a dispute, where for example there is a strike or threat of strike in an essential service or industry, the Tribunal will usually touch base with the employer and employee parties or their representatives merely to confirm to them the availability of assistance should that subsequently be requested by both parties.

Mediation

The differences between adjudication and mediation as methods of dispute resolution are constantly in front of Tribunal members, who are actively involved with both procedures every week. The collective opinion of the parties and their representatives as to which is the better method is reflected in the wide acceptance and use of mediation. The reasons why people have taken themselves and their dispute to adjudication without attempting mediation remain, in most cases, unfathomable to me. In the great majority of cases, mediation offers a saner, less expensive and far less arduous way all round of addressing adversity in employment, and life in general. Courtroom litigation, is by its very nature, not a people friendly process. Even in the Tribunal, where the character of adjudication is required to be low level and informal, the necessary questioning and cross-questioning of men and women about relevant (and sometimes irrelevant) aspects of their personal lives, and the wear and tear generally of having to be an adversary, have a tendency to buckle the spirit of people. I am sure that many have been left rueful of the whole adjudication experience even when they have won the battle. The desire to avoid the ordeal of litigation trial has often been expressed by parties in mediation as a strong motivation to settle the dispute. There will, of course, always be a small number of cases which for various reasons will simply be unsuitable for disposal by mediation.

In the mediation role of the Tribunal, the promise of the ECA is, in my view, being effectively delivered. People in dispute about employment matters are provided with a neutral place and a skilled neutral intermediary to assist them to resolve their differences in a way

of their choosing. Mediation has been made accessible to disputants acting for themselves or through representatives, and the cost of access is nominal.

A significantly high proportion of cases referred to mediation in any year is settled by that means, thus avoiding the need for adjudication. Tribunal Member Ralph Gardiner in 1993 reported the settlement rate in mediation to be 85 percent³ and my assessment is that this level of success continues.

By comparison with the availability of adjudication at some times and in some localities, the mediation service provided by the Tribunal is speedy. Statistics taken for the month of April 1996 show the waiting times for mediation conferences held throughout New Zealand⁴. In the Auckland region, where the bulk of the Tribunal's workload arises, the wait is currently two and a half months. For other main regions currently the waiting times are Wellington three months, Christchurch four months and Dunedin five months. For adjudication on the other hand, the waiting times are Auckland eight months, Wellington seven months, Christchurch nine months and Dunedin nine months.

The ECA at s.76 contemplates that mediation is to be preferred over adjudication as a form of dispute resolution. Given that the Tribunal does not have the unlimited membership or the resources to be able to give the same priority to both mediation cases and adjudication cases, it is appropriate that there should be some differential in waiting time so that mediation can be made available relatively quickly to those seeking it. Citizens have a proper interest in seeing that, in the delivery of justice, the state provided resources of the courts and tribunals are used in ways that are most productive and economic. The statistical likelihood is that mediation will resolve a dispute brought to the Tribunal, and from the viewpoint of efficiency and economy, mediation is clearly superior to adjudication. In the course of a week, one member is able to give mediation assistance to the parties in up to 10 different cases, whereas one member sitting as an adjudicator in one week is unlikely to preside over more than three cases and will usually require additional days for preparation of a written decision. It is correct therefore, in my view, that the Tribunal should schedule its workload to have those cases going to mediation dealt with more quickly than those in which parties decline the opportunity to attempt resolution by mediation. Should the mediation turn out to be unsuccessful, the parties are not penalised with any more waiting time in the queue to adjudication than would have been required if mediation had not been attempted.

As to the practice of mediation as a professional skill, it has been the subject of much written dissection and analysis by those who are involved with and study dispute resolution. Skills are taught in comprehensive courses run in universities and other institutions. Mediation is promoted by specialist organisations such as LEADR (Lawyers Engaged in Alternative Dispute Resolution) and there are at the moment moves to promulgate rules and codes of practice for mediation where used in many fields. It may not be productive to create too much of a science around mediation. I would certainly not like to see mediation conferences

³ (1993) *NZ Journal of Industrial Relations* 18(3): 342-351

⁴ Employment Tribunal End of Month Report for April 1996

in the Tribunal begin to focus unduly on the process itself at the expense of the objective of the process, which is to produce some consensus between the parties in dispute.

In the employment dispute field the practice of mediation undoubtedly has its own character developed over many years by the statutory ancestors of Employment Tribunal members. Several people who are currently members have previously held office and carried out similar work under the Industrial Relations Act 1973 and Labour Relations Act 1987. Their well honed skills and practical experience have been passed on to Tribunal colleagues who do not go back before the ECA.

Advocacy in mediation

I have encountered many employees and employers who showed themselves perfectly capable of representing themselves in mediation. I have also met many who were wise enough to have brought with them an objective representative, not necessarily a professional advocate, to support them and express the employee's or employer's views and needs. In practice it seems to be more usual for one or both parties to choose to be assisted by an advocate. Unrepresented parties can, however, expect at the outset of a mediation conference to be given by the mediator a plain description of the process, including the role of the mediator, and advice generally about what can and cannot be achieved through this process. There are, nonetheless, limits to the help that can be given and the mediator will not assist to the point of becoming the advocate of the unrepresented party. I have no feeling that advocates are unnecessary or a hindrance to the mediation process. To the contrary, there are often mediations where the Tribunal member can stay more in the background because the advocates themselves are able to use their skill to help their clients resolve the dispute in the best way of their choosing. Employment is an aspect of life that is of fundamental importance at some time for most people, whether employees or employers, and because of the serious affects employment disputes can have, the parties should continue to have a right to choose whether to be represented in the mediation process.

In the Tribunal the standard of advocacy or representation is wide, as it is elsewhere in law and practice. I see in mediation conferences advocates who serve no useful purpose other than to occupy a chair and solemnly read a statement of claim or document that is most likely to have been read earlier by the other party and the mediator. Others seem bent on testing the limits of the tolerance and reserve of the very people they should be conciliatory towards and seeking to persuade. I have never understood the apparent strategy of some advocates and their client parties in mediation, that the way to reach agreement with someone is to denounce them, behave aggressively and generally cause them aggravation and annoyance. In this regard it is an important function of the advocate in mediation, one not always managed, to try to ensure that the client keeps control of his or herself in what will be a strange and often tense situation. Since a mediation conference is a voluntary meeting, some self discipline is necessary if one of the parties is not to become inflamed into walking out; it is not the time or place to let the mouth and body language run riot. Advocates who are used to court room practices need to remember that it is not the mediator's mind they should be trying to reach out to, but the mind of the other party sitting at the table. That party needs to be drawn into some communication at the basic person to person level, and learned

submissions that might assist an adjudicator are of little use if they cannot be easily understood by a lay party who will need to be persuaded to reach agreement.

Another criticism I have of some advocates is that during the mediation it becomes obvious that they have not taken the trouble before the mediation conference to discuss with their client the nature of such a conference. Nor have they explored the client's attitude or position about possible proposals for settlement of the dispute. Mediators are wary of doing anything to make up parties' minds for them. Realistically, in most cases, settlement will require a sum of money to be offered by one party and accepted by the other. A party ought, then, to come to the mediation conference with at least some idea as to an amount or a "ball park" of money that could, from their point of view satisfactorily change hands, always depending on the way the mediation develops. No firm decisions need be reached by the parties before the mediation conference, but neither should their minds be totally blank when the conference is commenced and suggestions begin to be made for their consideration.

Employer concerns in mediation

Under current law it is an employer who is always destined to be the party on the receiving end of a personal grievance, the type of dispute most often brought to mediation in the Tribunal. Not surprisingly some employers have expressed criticism of the mediation process. It is regarded by these reluctant participants as a no-win situation involving a meeting which is not truly voluntary but must be attended under the threat of resort to adjudication by the applicant party. To some employers the system has seemed to be stacked against them.

It is, of course, a political question whether there should be a personal grievance remedy at all in law, or whether it should be in its current form under the ECA. The question cannot productively be debated at a mediation conference. I will usually emphasize to a skeptical party that the mediation conference is indeed a voluntary meeting and that at any time and without attracting any criticism from the Tribunal, either party is free to leave if it is felt necessary to do so.

Some employers insist that they should not have to make settlement proposals, such as an offer to pay money, and that it is a matter of principle to them that they have been right in the actions complained about by their employee or former employee. The answer to those parties is that they have a freely available option to defend the claim in adjudication and seek from the Tribunal a determination of their liability, which they may hope will uphold any principles that are felt to be at stake. The exercise of that option may however carry a price. There will be the direct and indirect cost and inconvenience in some cases of having employees of a respondent employer and other people attend the adjudication as witnesses to support the defence. Often there will also be increased legal/advocacy costs, a large proportion of which must usually be written off even when the respondent succeeds in its defence. There is also the possibility of media attention and other publicity being given to the case. A quick weighing up of these and other practical considerations often leads a doubting respondent party to see mediation as the better of the two options and to carry on with efforts to settle.

It is of no interest to the Tribunal how advocates are rewarded for their services by their clients, but it does seem to annoy some employers who complain about those advocates thought to charge clients on a contingency fee basis. Under this arrangement, a client who initiates proceedings bears no cost unless and until the claim is successful. The advocate becomes a financial backer of the proceedings, and the cost of failure is unfortunately not something the client has to seriously weigh in deciding whether to take or continue a case. The practice of advocacy before the Tribunal is for the moment largely unregulated and only the general law of agency applies. Client and advocate enter into a contract and are free to decide for themselves how reward for services is to be worked out and paid for, if at all. In a free market, contingency fee advocacy is simply one of several ways in which a representative is able to provide services. Most of the advocates who are not solicitors and who are thought to work on a contingency fee basis have been appearing regularly in the Tribunal for several years now. I would not have expected them to have survived long if their work was somehow illegal, unethical or simply unwanted by those who need representation in employment disputes.

There is some speculation that some respondents find that it makes sense to pay something to settle cheaply and quickly, even when an application is probably unmeritorious, rather than pay a larger sum to defend the claim, probably successfully, in adjudication. I have found no sign yet that the mediation process is to any significant degree being taken advantage of by applicants or advocates who are simply out to milk a situation in this sense. Truly unmeritorious applications usually meet firm resistance from the respondent to any request to attend a mediation conference, and I expect that most "try on" cases are given up because there is no serious drive to continue to adjudication with the attendant risk of being ordered to pay the successful party's costs.

The recent establishment of the Employment Law Institute has been a very worthwhile step for the employment advocacy profession. Together with other Tribunal members I support the objectives of the Institute, which include the promotion of professional standards for advocates, the establishment of a code of conduct and the provision of training for advocates, including lawyers, who practice in the Employment Tribunal. From a consumer protection point of view, it is a good thing for members of the public to be able to choose to retain an advocate who is accountable to a reputable organisation, should some complaint arise about the advocate's conduct. Members of the public who engage a solicitor receive similar protection through the Law Society which has a function of regulating the professional conduct of its members. The many good advocates now around will have their firms or practices enhanced by the opportunity to organise under a body such as the newly formed Institute, and the efficiency of the Tribunal will also be increased as the Institute works towards meeting its objectives.

The mediation work of Tribunal members has given them the regular opportunity to keep in touch with workplace reality and stay attuned to the wider needs and interests of the labour market. It is routine for parties and their advocates in mediation to offer the Tribunal member their personal experiences and knowledge of conditions of employment and business life under the ECA and other legislation, even when the things spoken of are not necessarily central to the matters in dispute. Through relatively frank and informal discussion free from the constraints and formality of a "court" hearing, mediators have this chance to maintain or revise their knowledge of the current employment practices and thinking of employers and

employees in many industries. The insight gained is valuable generally and particularly in the adjudication work performed by members, all of whom hold warrant as both mediators and adjudicators.

Mediator decisions

In most successful mediations in the Tribunal, the parties agree upon the terms of settlement. There is however the alternative of having the terms of settlement created by "decision" of the mediator under s.88(2) of the ECA. The parties must agree to that course and, if they do so, the terms decided by the mediator are final and binding on them. When the Tribunal began its work in 1991 this hybrid of adjudication and mediation found a place and was requested by parties who saw it as a useful option to resolve particular disputes. For about two years, an Employment Court decision for practical purposes stifled the use of this option until that decision was overturned by the Court of Appeal⁵.

The restoration of this alternative under the mediation jurisdiction has not seen a big revival in the making of "decisions" pursuant to s.88(2) of the ECA. Possibly that is because mainstream mediation has evolved by now into an adaptable process with which advocates have become familiar enough to enable them to finally bring about settlement even in cases where "a decision" made by the mediator might have initially seemed to be the only option short of adjudication. A further possibility is that when parties invite mediators to give to them some evaluation of their respective cases (usually given to each in confidence), a party who receives an adverse opinion of their case will be reluctant to ask the mediator to make a decision that is likely to confirm this adverse assessment.

If parties anticipate that a "decision" may provide the best resolution of a particular dispute, it is desirable for the mediator to be given some idea in advance of that possibility. Parties or their representatives are recommended to raise this at the earliest, preferably before the parties meet together, so that the mediation conference can then be conducted in a way that will preserve this possibility. Sufficient factual information needs to be given by the parties to allow the mediator to make a reasoned and principled "decision". I am aware that some large employers who may be exposed to personal grievances more frequently favour this alternative, and have some arrangement with employee representatives to ask for a "decision" from a mediator rather than proceeding to adjudication.

Parties and their advocates who are preparing to attend any mediation conference in the Tribunal should regard the mediator as their tool, and parties should feel free to give special instructions to the mediator as to the way his or her role will best be performed in the interests of both parties.

By comparison with adjudication I have long come to regard mediation as an opportunity for productive interchange at an ordinary level between disputants, in a way that addresses the needs of the parties as people, without too much distraction from the rule of case law and the ritual of trial. This side of the Tribunal has developed into a successful role.

⁵ *Schaffer v Gisborne Boys High School* [1995] 1 ERNZ 94.

Adjudication

Less successful or satisfactory in my view, has been the development of the adjudication role of the Tribunal. The object of the ECA was to establish, ". . . a low level, informal, specialist Employment Tribunal to provide speedy, fair, and just resolution of differences between parties to employment contracts" (s.76(c)). This role was created in recognition of the fact that sometimes parties themselves, even with mediation assistance, are not able to resolve their differences.

In concept, a "speedy" tribunal in the employment area is, to me, one that is able to hear and determine a case within no more than about three months after the matter has been referred to that tribunal. The reasons why the Employment Tribunal has had difficulty in performing its adjudication function in a speedy fashion have been the subject of commentary before, but they bear repeating again briefly. First, by requirement of the ECA, there was a period of three months after the Act came into force before the Tribunal could open its doors for work. During that period a steady influx of claims came into the system, but hearings of those cases by the Tribunal could not begin until 19 August 1991. Second, when the Tribunal did get under way, as well as the post 15 May 1991 ECA claims that had come in, the Tribunal took over the responsibility of handling pre-15 May work which the former Mediation Service under the Labour Relations Act 1987 had not been able to complete before the repeal of that act. In Auckland, these transitional cases continued to occupy most of the time of most of the members until well into 1992, and I expect the same happened in other Tribunal offices. Third, the number of members and staff needed for the Tribunal was significantly underestimated. The 14 original Tribunal member appointments soon proved to be too few. The number of members was doubled, but not until the end of 1994 after the inevitable delays in the recruitment and appointment process. Fourth, under the ECA, the personal grievance remedy (which provides the Tribunal with most of its work) became available to about twice the number of workers who had been able to invoke the remedy under the previous legislation. In association with this change, the right to pursue the grievance was taken from the grievant's union and given directly to the grievant, thereby removing a useful filter preventing unmeritorious claims from surfacing in the system.

All of this occurred in the early 1990s, a time when the rights awareness of the public generally was expanding and the inclination of people to challenge all kinds of perceived breaches of rights was growing; the Privacy Act, the Bill of Rights Act, and the Human Rights Act were enacted in or recently before 1993. For the several reasons given above the Tribunal quickly fell behind in the task of adjudicating speedily in all types of case, not just personal grievances. At the same time the number of applications grew steadily, rather than falling away after the initial testing out of the new Tribunal system. Recently, in the last 12 to 18 months, instead of any easing off in new applications to the Tribunal, there has been a growth spurt. In the year ending 30 April 1996, there were 5,122 applications of all kinds received for disposal in the Tribunal, whether by adjudication or mediation. By comparison, in the year ending 30 April 1995 there were 3,985 applications, 3,482 for the same period in 1994, and 3,146 in 1993⁶.

⁶ Employment Tribunal End of Month Reports

When the ECA was in Bill form in early 1991, I read and reread the above quoted words of s.76(c) of the statute which described the new institution in respect of its adjudication function. What I thought was intended was something in character more like the grievance and disputes committees which had operated under the Labour Relations Act, and not something like the Labour Court under that Act. It remains my view that the essence of adjudication in the Tribunal was intended by the ECA to be the determination of the rights and remedies of employees and employers in a summary way; that is, without undue regard for the formalities of law as may be applied in the High Court, the Employment Court or the District Court even in its civil jurisdiction. "Low level" and "informal" were not only descriptions of the ambiance of the Tribunal but were also a reference to matters of procedure and style in respect of both decision making and decision delivery.

Legalism in the Tribunal

From time to time commentators have said of adjudication in the Tribunal that it is carried out with too much "legalism". Procedurally, the minimum requirements for an adjudication hearing are set out in the Employment Tribunal Regulations 1991 at regulation 49. The few basic requirements are written in reasonably plain language. They are uncomplicated and are no more than necessary for a tribunal having powers and remedies as wide as those of the Employment Tribunal. As emphasized in the Regulations and the ECA (regs 2 and 49(2), s.88(3)), when adjudication is being conducted the overriding consideration is fairness to both parties. To my knowledge, adjudication hearings generally have not been and are not being conducted in any way that does not meet these requirements or the fundamental rules of natural justice which the Tribunal is also bound to follow. Neither, to my knowledge, are these basic standards being unnecessarily exceeded. If there is excessive legalism associated with Tribunal cases this has not noticeably increased the length of hearings, most of which are finished in a day or less.

If there are grounds for complaint about excessive legalism in the Tribunal they are unlikely to arise from the way the hearings are generally conducted. Rather, they arise from the way that the law, once interpreted by judicial decision where necessary, has been explained or communicated to employees and employers and to the general public. People are deemed to know the law, but they can no longer rely on being able to confirm their rights and obligations by a reading of the ECA. Instead, they must try to absorb many long and complicated Employment Court decisions that expand upon and qualify concepts that, initially, might have seemed to ordinary employees and employers to have been expressed plainly and simply enough. Increasingly, the Court of Appeal seems to be given the role of a specialist employment court. Its decisions, many of which are at variance with those of the Employment Court, add further to the legal tracts that have supplanted the statute as the primary and public source of employment law. With the increased prominence of the Court of Appeal in this area of law, the appeal cycle time, from Tribunal through Employment Court to Court of Appeal, means that parties are less often in a position to confidently identify the law at any moment in time. They must take the chance that changes of law may emerge from appeal cases after they have acted according to pre-appeal law. I do not know how even practitioners who specialise in employment law manage to keep up, let alone the ordinary consumers for whose benefit (fictionally it may seem) statutes such as the ECA are supposed to be written and enacted.

The Tribunal is bound to follow previously decided cases from superior courts and therefore it is quite usual in adjudication hearings for argument to be given about any Employment Court or Court of Appeal decisions that may (or may not) be on point. In writing a decision the adjudicator will often find it necessary to refer to such court cases, sometimes at length. The appearance of "legalism" in the Tribunal, is likely to come then from the increasing prominence of court case precedent in this area of law and the consequent reliance upon that precedent by parties in adjudication hearings.

I have mentioned decision delivery in the context of the "low level, informal" Tribunal. All decisions of the Tribunal are required by the Employment Tribunal Regulations 1991 to be reduced to writing. The drafting of a decision can take several days even after the adjudicator has a clear idea of what the outcome of the case is to be. Too much time spent in writing up the decisions from cases affects the rate at which the Tribunal can deal with other cases awaiting hearing. It is a matter for each adjudicator how he or she chooses to present any written decision that is to bear his or her signature and become his or her responsibility for acceptance by the parties. The statutory and regulatory requirements are not however onerous; "*The Tribunal shall . . . give its reasons . . . for its final decision in the proceedings*" (Reg.48, Employment Tribunal Regulations).

Reasonable parties reading decisions delivered to them by courts and tribunals need to have some faith in the ability of judges and adjudicators to get things right. Parties can be expected to take this on trust to some extent because judicial officers are appointed, and are periodically reappointed in some jurisdictions such as the Tribunal, with the recommendation of a senior minister of the Crown, usually after a formal consultative selection process. Parties before the Tribunal then cannot reasonably expect to read a decision in which the adjudicator has expressed and justified every thought and conclusion about every fact and every legal principle that might have been raised by the case. The regulations do not require it and the parties, who after all were present at the hearing of their own case, do not need a "blow by blow" retelling of the circumstances surrounding the issues which are identified for determination by the adjudicator.

As a low level domestic tribunal, the Employment Tribunal should write primarily for the employee and employer parties in the case, so that those people may know the outcome of their case and the essential reasons for the result. Others who may be interested, the general public, the media and scholars, are entitled to attend hearings and hear for themselves the evidence and argument. They can appreciate by now that matters of legal principle in employment law will not usually be determined finally by the Tribunal, but by the Employment Court or, increasingly, the Court of Appeal. Most decisions of the Tribunal turn on the application of established principle to different fact situations, and do not decide new law. For the appellate courts, a full transcript of the hearing is available if the court or the parties on appeal see the need for information that has not been recorded by the adjudicator in the decision.

In this regard the standards for the Tribunal should be similar, if not to the former grievance and disputes committees, then to those of the former Industrial and Arbitration Courts which exercised some of the jurisdiction now had by the Tribunal. Between 1973 and 1987, in most cases those courts issued a concise and robust account of the case and its outcome, and

decisions of five or so pages were apparently felt by those courts to be adequate even for cases that may have occupied several days of hearing.

Adjudication ought to be regarded as very much a last resort in steps taken to resolve a personal grievance. On occasions, it is apparent to the Tribunal from the parties correspondence that the observance of the procedures has been merely perfunctory. From early on in the dispute the grievant has been intent on waving the big stick of adjudication and the enforceable remedies available there, without first making serious attempts to discuss with the employer and come to some consensus about the grievance, ". . . rapidly and as near as possible to the point of origin" (1st Schedule of ECA, cl.3). An exchange of words and thoughts by plain talking between employer and employer is what is required initially, and not the filing of formal statements of claim and defence by their advocates. The reference of grievances to the Tribunal is expressed to be pursuant to a power rather than a right. If any of the several prescribed conditions under which a grievance may be referred by a grievant has not been met, the Tribunal is likely to decline the reference and require the parties to fully observe the standard statutory grievance procedures before seeking adjudication.

Another matter arising in the adjudication of unjustified dismissal claims is contribution. Before embarking on adjudication, grievants and their advocates should give careful thought to the impact that proven contribution is likely to have on the mind of the adjudicator, and consequently in the scope and scale of any remedies that are awarded. A significant reduction in any monetary remedies can leave the grievant, after paying advocacy costs, worse off financially, even although the grievant's dismissal has been declared unjustified. I have heard quite a few cases where it becomes all too apparent during hearing that a dismissal will not be able to be justified, but it is also equally apparent that the employee played a part in, ". . . the situation that gave rise to the personal grievance"; (s.40(2) of ECA). This phrase means, according to the Employment Court, ". . . the entire situation and not simply that part of it which is concerned with the process and manner in which the dismissal was carried out." In presenting the case for the applicant some advocates overlook the place of contribution. Section 40(2) was included in the ECA to make the personal grievance remedy, which is otherwise unique to employees, less of a one way street. It allows an employee's conduct to be weighed up or looked at "in the round" together with any actions of the employer that may be found to have caused a dismissal to be unjustified. Except in cases of redundancy, dismissal usually comes at the end of a chain of action and reaction which has grown from some initial act or omission of either or both of the employee and the employer.

Finally, I would like to see the jurisdiction of the Tribunal changed in at least one respect, to expressly allow adjudicators to adjust the rights and obligations of parties whenever contracts of employment are shown to have been entered into illegally, under a mistake, through misrepresentation and in certain other circumstances in which a strict application of the law of contract may produce arbitrary consequences. For this purpose remedies are available under several statutes (Illegal Contracts Act 1970, Contractual Mistakes Act 1977, Minors Contracts Act 1969, Contracts (Privity) Act 1982). At present, the Tenancy Tribunal and Disputes Tribunal, in addition to the courts, may exercise the powers of relief under these

⁷ *Country Fare Ltd v Dixey* [1995] 2 ERNZ 372 at 395, Palmer J.

acts which apply to contracts generally. Those powers should be expressly extended to the Employment Tribunal's jurisdiction over employment contracts.