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CONTRACTING MEDIATION: THE IMPACT OF DIFFERENT STATUTORY REGIMES

*Ellen J. Dannin**

The United States is making a commitment to increased and institutionalized use of alternative dispute resolution ("ADR"), most often based on the claim that it is superior to and certainly different from traditional litigation.¹ Mediation in particular, in the popular view, is supposed to be user-friendly, nonadversarial, and conducive to optimal, wholistic resolutions.² Litigation, in contrast, is supposed to be slow, costly to all, impersonal, formal, legalistic, and incapable of giving complete or satisfactory resolutions.³ This implicitly assumes that ADR (mediation and arbitration) and litigation are discrete processes, each

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1. Cf. Glen Sato, Comment, *The Mediator-Lawyer: Implications for the Practice of Law and One Argument for Professional Responsibility Guidance—A Proposal for Some Ethical Considerations*, 34 UCLA L. REV. 507, 507-08 (1986). This, of course, is not the case among serious sociolegal scholars. They have long made sophisticated critiques of ADR and its use by dominant groups as a method of constructing and promoting ideologies. For an overview of critiques and debates see Christine B. Harrington & Sally Engle Merry, *Ideological Production: The Making of Community Mediation*, 22 L. & SOC'Y REV. 709, 709-14 (1988); George Pavlich, *The Power of Community Mediation: Government and Formation of Self-Identity*, 30 L. & SOC'Y REV. 707, 709-15 (1996); see also MARTHA MINOW, *PARTIAL JUSTICE: LAW AND MINORITIES IN THE FATE OF* LAW 15, 21 (Austin Sarat & Thomas R. Kearns, eds., 1991).

2. See, e.g., Helen Elkiss, *Alternatives to Arbitration: Are Unions Ready for Change?*, 48 LAB. L.J. 675 (Nov. 1997).

3. See Thomas D. Rowe, Jr., *American Law Institute Study on Paths to a "Better Way": Litigation, Alternatives, and Accommodation*, 1989 DUKE L.J. 824, 825-26, 830 (describing criticisms of litigation and exploring their dimensions); Roselle L. Wissler, *Mediation and Adjudication in the Small Claims Court: The Effects of Process and Case Characteristics*, 29 L. & SOC'Y REV. 323, 323-24 (1995).

with uniform and intrinsic natures.⁴ This, in turn, suggests an assumption that they retain these qualities under all circumstances. In this popularized, Manichean and romanticized view, ADR, particularly mediation, possesses uniformly positive qualities and litigation uniformly negative ones.⁵ This paradigm has come to infuse our current system of justice, including the courts,⁶ the legislature,⁷ and even legal education.⁸ The pervasive acceptance of this viewpoint has serious consequences for how justice is to be administered in the United States for the foreseeable future.

This development is odd, given that there has long existed convinc-

4. Carrie Menkel-Meadow argues that U.S. scholarship treats ADR as if it were a monolith: Recent scholarship on this subject continues to treat "adjudication" on the one hand and "ADR" on the other as if they were uniform processes, even where they may "meld" into each other. Modern scholars continue to conflate all ADR processes (even when describing them as different, they continue to attribute the same qualities to all forms of ADR) just as they view adjudication as if it were the same in a local small claims court in a rural community and a federal district court in a major city (not to mention the differences in "adjudicatory" effects of such rulings as summary judgment).

Carrie Menkel-Meadow, *Whose Dispute is it Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663, 2666 n.18 (1995).

5. See Wissler, *supra* note 3, at 323-24; Rowe, *supra* note 3, at 830; Menkel-Meadow, *supra* note 4, at 2666.

6. Compare the United States Supreme Court's strongly pro-arbitration decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25-28 (1991), which provided a strong endorsement for arbitration in non-union employment disputes with *Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70 (1998), which takes a less expansive view of arbitration, essentially reaffirming *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 49, 52 (1974), as to whether arbitration agreements in collective bargaining agreements are effective waivers of statutory rights.

The majority of state courts provide for ADR. See Calvin Morrill, *Institutional Change and Interstitial Emergence: The Growth of Alternate Dispute Resolution in American Law, 1965-1995* (May 1998) (unpublished paper, on file with author).

7. See Steven H. Goldberg, "Wait a Minute. This Is Where I Came In." *A Trial Lawyer's Search for Alternative Dispute Resolution*, 1997 BYU L. REV. 653, 665. On April 21, 1998, the House of Representatives voted 405-2 for the Alternative Dispute Resolution Act of 1998, which requires all federal district courts to authorize the use of ADR in all civil actions, and on October 10, 1998, it was passed by both houses. See *Congress Approves Bill Requiring Courts to Authorize Alternative Dispute Resolution*, LAB. REL. WEEKLY 2218 (Oct. 20, 1998); *Alternative Dispute Resolution: House Passes Bill Requiring District Courts to Use Dispute Resolution in Civil Actions*, Daily Lab. Rep. (BNA) No. 14, at D-21 (Apr. 23, 1998). In August 1997, the Massachusetts Committee Against Discrimination began referring parties to ADR because parties were not voluntarily choosing it. See *Massachusetts Discrimination Commission Will Push Harder for ADR in Some Cases*, Daily Lab. Rep. (BNA) No. 198, at D-25 (Oct. 14, 1997).

8. See Goldberg, *supra* note 7, at 658-59; Sally Engle Merry, *Disputing Without Culture*, 100 HARV. L. REV. 2057 n.7, 2060 (1987) (book review). Anyone teaching in a law school today cannot escape noticing ADR's influence on legal education, both in individual course offerings and in the content and approach of other courses. See, e.g., RICHARD MARCUS, ET AL., *CIVIL PROCEDURE: A MODERN APPROACH* (2d ed. 1995) (introducing alternatives to litigation and discussing ADR). A decade ago this was not the case. See Sato, *supra* note 1, at 507 n.2; Morrill, *supra* note 6.

ing countervailing evidence, in particular as to the nature of litigation. Many studies have revealed that litigation does not have a uniform nature.⁹ Many factors determine its positive and negative qualities, including the number of judges, the scope of discovery, and the availability of effective sanctions for abuse of process.¹⁰ We also know that changes in substantive law affect the quality of litigation by creating, expanding or contracting rights.¹¹ Legal changes that can affect litigation include creating new causes of action, making proofs more or less complicated for existing rights, and altering remedies, for example, by providing attorneys fees or increasing or limiting recoveries.¹² These affect the attractiveness of litigation as a way to solve a problem and thus the number of litigants who will find it worthwhile to sue.¹³ Finally, qualities that one side may deem as negative the other may see as positive, so evaluating the positive and negative qualities of litigation depends on the point of view one takes.

Given mediation's increasingly institutionalized role as a part of the justice system and impact on litigants and litigation, we need to examine it more closely.¹⁴ To the extent that mediation is a close relative

9. See Menkel-Meadow, *supra* note 4, at 2666.

10. See, e.g., Rowe, *supra* note 3, at 853, 863-65.

11. It is clear that thinking of litigation or ADR as discrete entities ignores important realities about law. In a sense, legislation is a form of ADR because it is a method of resolving disputes that is an alternative to litigation. It resolves them on a wider basis than on an individual case. See Goldberg, *supra* note 7, at 679. If this is true of legislation, then what of the common law? Both create and can eliminate causes of action.

12. See generally Rowe, *supra* note 3, at 851-52, 858-59.

13. See generally *id.* at 832.

14. Increased scrutiny of ADR is revealing unanticipated flaws. See Wissler, *supra* note 3, at 352-53 (opining that adjudication is perceived as fairer and as allowing greater participation). Sally Engle Merry criticizes using "user-satisfaction" surveys to evaluate the success of ADR, because a focus on the user's subjective experience reveals nothing about important justice issues, such as whether rights were protected or power redistributed. See Engle Merry, *supra* note 8, at 2059 n.13. The recent explosion of pre-dispute arbitration agreements in non-union employment relationships shows that ADR can be an instrument of injustice. See, e.g., Michael R. Holden, Note, *Arbitration of State-Law Claims by Employees: An Argument for Containing Federal Arbitration Law*, 80 CORNELL L. REV. 1695 (1995); Lisa B. Bingham, *An Overview of Employment Arbitration in the United States: Law, Public Policy and Data*, 23 N.Z. J. INDUS. REL. 5 (1998).

In recognition of these problems, on May 21, 1997, the National Academy of Arbitrators issued guidelines opposing mandatory arbitration as a condition of employment. On July 10, 1997, the EEOC stated that civil rights laws play a unique role and involve core constitutional principles. See *EEOC Policy Statement on Mandatory Arbitration*, Daily Lab. Rep. (BNA) No. 915.002, at D-30 (July 11, 1997). Furthermore, Congress has entrusted their interpretation, administration, and enforcement to the federal government, including agencies and courts which are responsible for their development and interpretation. See *id.* Civil rights are public rights, and the public needs to know the outcome of cases. See *id.* Moreover, civil rights issues need Supreme Court review so errors can be corrected and outcomes can be uniform. See *id.* This public process gives guidance as

of litigation it is likely to be genetically subject to similar strengths and weaknesses.¹⁵ Although mediation attempts to focus on the parties' relationship rather than legalism, it cannot fully do this.¹⁶ We already know that mediation, as is the case with litigation, does not exist outside law and society.¹⁷ Law informs people whether or not a justiciable dispute exists and thus whether that dispute may be resolved with the aid of public agencies.¹⁸ Law provides the yardstick that informs disputants, including those in mediation, whether they have achieved fair outcomes compared to litigation.¹⁹

Clearly mediation and litigation are both creatures of the law. If mediation and litigation are both affected by the same factors and in the same ways, then we may be making serious mistakes. We are training the next generation of law students, making major policy decisions, and deciding court cases based on an unexamined, romanticized, and potentially inaccurate view of mediation and may be committed to a course that will not be easily reversible. In the employment area we can already see that employees are being deprived of judicial fora for statutory grievances and due process protections in favor of alternative dispute resolution. The further institutionalized entrenchment of mediation may work an injustice in the case of the least powerful in our society.

This article focuses on the extent to which substantive law affects mediation. Our experience with dispute mediation in the United States is insufficiently long to provide a case study in which a mediation procedure remained the same while the substantive law was changed. One powerful and instructive instance of such a situation can, however, be found in New Zealand labor law.²⁰ The mediation procedures under the

to employer, employee, and union rights and duties and also informs the public of the costs of discrimination. *See id.* Private processes do not allow for development in the law. Mandatory arbitration has a built-in bias for the employer who is a repeat player and thus has better information it can use in choosing an arbitrator. *See id.* An employer is also likely to be seen as a source of future business by the arbitrator, but the employee is not. *See id.* Furthermore, mandatory arbitration is imposed by an employer as an aspect of "its superior bargaining power." *Id.* The average person will not realize how much is at stake in signing a waiver of the right to trial as a condition of employment. *Id.*

15. *See* Engle Merry, *supra* note 8, at 2070.

16. *See id.* at 2068-69.

17. *See, e.g., id.* at 2064-65.

18. *See id.* at 2061-64; *see also* Ellen J. Dannin, *Consummating Market-Based Labor Law Reform in New Zealand: Context and Reconfiguration*, 14 B.U. INT'L L.J. 267, 268 (1996) (exploring the impact of social mores on parties' understanding of their legal rights).

19. *See generally* Rowe, *supra* note 3, at 901-02.

20. A description of the enactment of the ECA and its impact can be found in ELLEN J. DANNIN, *WORKING FREE: THE ORIGINS AND IMPACT OF NEW ZEALAND'S EMPLOYMENT CONTRACTS ACT (1997)* [hereinafter DANNIN, *WORKING FREE*]. For an assessment of the ECA

Labour Relations Act 1987 and its replacement legislation, the Employment Contracts Act 1991, are virtually unchanged,²¹ though the substantive laws and their underlying purposes differ radically. The issue, then is, whether although the mediation procedures have remained the same, the experience of mediation has altered.

New Zealand provides a robust model for consideration. Not only does the change in substantive law while maintaining institutionalized mediation provide a rare opportunity for study, New Zealand is sufficiently similar to the United States to make the comparison meaningful. Both are developed, industrialized countries, and both also have a strong mix of industrial, service, and agricultural sectors. Both are heirs to the common law and thus apply similar bodies of law and concepts. Both share common histories and cultures as former British colonies with indigenous peoples, and immigration has led to more mixed cultures and populations in both. Since the early nineteenth century, there has been persistent interchange between the two countries. Finally, both are democracies with educated, literate populations.²² In sum, on the key factors that are important in affecting the way people are likely to work and interact with one another and with the law, New Zealand and the United States are quite similar.

I. AN INTRODUCTION TO NEW ZEALAND LABOR LAW AND MEDIATION

A. *The Substantive Law*

In 1894, New Zealand became the first country to legalize collective bargaining.²³ The Industrial Conciliation and Arbitration Act 1894 ("IC&A Act") and its progeny institutionalized processes which today

from multiple points of view and disciplines, see *Symposium on New Zealand's Employment Contracts Act*, 28 CAL. W. INT'L L.J. 1 (1997).

21. See Interview with Joyce Hawe, General Secretary of the North Island Clothing and Laundry Workers Union, in Wellington, N.Z. (Aug. 4, 1997) [hereinafter Interview with Joyce Hawe]. Hawe stated that the key differences are that grievance resolution under the Labour Relations Act was more informal and nonadversarial. See *id.*

22. See JOHN DEEKS ET AL., *LABOUR AND EMPLOYMENT RELATIONS IN NEW ZEALAND* ch. 3 (2d ed. 1994); A.J. GEARE, *INDUSTRIAL RELATIONS: A GENERAL INTRODUCTION AND THE NEW ZEALAND SYSTEM* (3d ed. 1995) [hereinafter GEARE, *INDUSTRIAL RELATIONS*]. See generally *THE POLITICAL ECONOMY OF NEW ZEALAND* (Chris Rudd & Brian Roper eds., 1997). I also make these statements as one who has lived for extended periods of time in both countries.

23. See Ellen Dannin, *Bargaining Under New Zealand's Employment Contracts Act: The Problem of Coercion*, 17 COMP. LAB. L.J. 455 (1996) [hereinafter Dannin, *Bargaining Under New Zealand's Employment Contracts Act*].

are referred to as alternative dispute resolution.²⁴ Wages and other terms of employment were set through a process of government conciliation and interest arbitration. In 1971, the law was revised to provide for the mediation and arbitration of workplace disputes and, in particular, of personal grievances.²⁵ In 1973 the law added progressive steps to resolve a claim of unjustifiable dismissal.²⁶ In later years, the basic law was expanded through a series of amendments.²⁷ The last of these was the Labour Relations Act ("LRA"), enacted in 1987.²⁸ As a result, for nearly one hundred years, what we now call ADR has played a key role in New Zealand labor relations, and mediation has been used to resolve workplace disputes for nearly three decades.²⁹

The IC&A Act's last iteration, the Labour Relations Act 1987, was not identical to the U.S. National Labor Relations Act ("NLRA") but has basic features which are quite similar.³⁰ Both promote the organization of employees so they can bargain effectively with employers; both encourage the process of collective bargaining as the way to set terms of employment; and both foster an ongoing relationship among employer, employee, and union. Among the LRA's express purposes were "facilitat[ing] the formation of effective and accountable unions and . . . employer[] organisations;" providing for the "orderly conduct of [workplace] relations;" and "provid[ing] a framework to enable agreements to be reached."³¹

New Zealand's Employment Contracts Act 1991 ("ECA") was a radical change in the substantive law of the workplace.³² The ECA governs employment relations through a contractual regime and has as its chief express purpose: to "promote an efficient labour market."³³ The ECA assumes that equality of power between employers and employees

24. See Lorraine J. Skiffington, *There Must Be a Better Way: Alternative Dispute Resolution*, EMPL. L. BULL. 23 (Mar. 1997) [hereinafter Skiffington, *There Must Be a Better Way*].

25. See GEARE, INDUSTRIAL RELATIONS, *supra* note 22, at 385.

26. See *id.* at 386.

27. See *id.* at 384-86; MIKE DAWSON, HANDLING PERSONAL GRIEVANCES UNDER THE LABOUR RELATIONS ACT 1987: A GUIDE FOR UNION ADVOCATES 11 (1988) [hereinafter DAWSON, LABOUR RELATIONS ACT].

28. See DAWSON, LABOUR RELATIONS ACT, *supra* note 27, at 11.

29. See DANNIN, WORKING FREE, *supra* note 20, at 26-38.

30. For a description of the LRA, see Ellen J. Dannin, *Labor Law Reform in New Zealand*, 13 N.Y.L. SCH. J. INT'L & COMP. L. 1, 40-45 (1992).

31. Labour Relations Act of 1987, preamble, (a)-(c).

32. The changes brought about under the ECA have been referred to as a radical and fundamental transformation of its industrial relations system. See Christopher L. Erickson & Sarosh Kuvilla, *Industrial Relations System Transformation*, 52 INDUS. & LAB. REL. REV. 3, 14-16 (1998).

33. Employment Contracts Act of 1991, preamble.

is irrelevant to their ability to strike a bargain and contract for the sale of a worker's labor power.³⁴ Since the enactment of the ECA in 1991, union representation has declined dramatically—from 41.5% when it was enacted in May 1991 to 19.9% in December 1996.³⁵ In that same period, union membership dropped from 603,118 to 338,967.³⁶

B. The Procedures for Dispute Resolution

It is astonishing that, despite their radical differences, LRA and ECA dispute resolution procedures are identical in most respects—at least on paper. The main changes are in wording: “employee” is substituted for “worker;” references to unions are eliminated;³⁷ and the “Employment Tribunal” replaced the “Mediation Service.” With such minor changes one might expect personal grievances to be little altered. However, within a short time, it became clear that ECA mediation had engendered greater formality, a more adversarial attitude, more protracted disputes, crowded dockets, a devaluation of negotiation as a method for solving workplace problems, and a lower likelihood that a rift between employee and employer would be resolved amicably.

1. Personal Grievances Under the Labour Relations Act³⁸

The LRA defined personal grievances as including unjustifiable dismissals, “other unjustifiable detrimental actions such as sexual harassment, duress, and discrimination,” or unjustifiable action by the employer which has affected the worker's employment to the worker's disadvantage.³⁹ Access to the personal grievance procedure was limited to

34. See Raymond Harbridge & Aaron Crawford, *The Impact of New Zealand's Employment Contracts Act on Industrial Relations*, 28 CAL. WEST. INT'L L.J. 235, 250 (1997).

35. See *id.*

36. See *id.*

37. Compare the LRA's Seventh Schedule (Clauses to be Inserted in Awards and Agreements in Relation to Settlement of Personal Grievances) with the ECA's First Schedule (Standard Clauses in Relation to Procedure for Settlement of Personal Grievances). This paper considers only personal grievances and not other employment disputes, such as disputes of interest, disputes of rights or breaches of contract. Both the LRA and ECA distinguish personal grievances from disputes. A dispute of rights is a disagreement about the “interpretation, application, or operation of an employment contract.” ECA § 2; see LRA § 2. For a description of the system, see DEEKS, *supra* note 22, at 94-96.

38. In addition to the narrative description below, see the APPENDIX for a table comparing the two systems.

39. LRA §§ 209(a), 210-214. For a general description of the process, see GEARE, INDUSTRIAL RELATIONS, *supra* note 22, at 436; A.J. GEARE, THE SYSTEM OF INDUSTRIAL RELATIONS IN NEW ZEALAND 360-73 (2d ed. 1987) [hereinafter GEARE, THE SYSTEM OF INDUSTRIAL RE-

those union members whose work was covered by an award or agreement.⁴⁰ Managers and others outside the award structure took employment-related disputes to the common law courts.⁴¹ As a result, two separate systems of labor or employment law developed – one for union members and one for all other employees. High union membership and coverage meant that nearly half of workers had access to the personal grievance procedure.⁴² In addition, to its express legal protections, the LRA's standard procedures for personal grievances could be enhanced by collective agreement.⁴³

Under the statutory process, a personal grievance typically commenced when an employee was discharged. Either the employee or union could request a written statement of reasons for dismissal, and the employer had to provide the statement within fourteen days.⁴⁴ A worker invoked the personal grievance process by submitting it to the employer "as soon as practicable after the grievance has arisen so as to enable the employer to remedy the grievance rapidly and as near as possible to the point of origin."⁴⁵ If the grievance could not be resolved, the worker

LATIONS IN NEW ZEALAND]. These changes were the result of a long campaign by the New Zealand Business Roundtable and the New Zealand Employers Federation. *See* Ellen J. Dannin, *Hail Market, Full of Grace: New Zealand Employer Organizations Lobby for Labor Law Reform 2* (Nov. 20, 1998) (paper presented to the Social Sciences History Association) (on file with author) [hereinafter, Dannin, *Hail Market, Full of Grace*]. The New Zealand Business Roundtable is an organization of elite businesspeople which has, since the 1980s, advocated for the liberalization of the New Zealand economy. *See* DANNIN, *WORKING FREE*, *supra* note 20, at 26-33. The New Zealand Employers Federation is an umbrella organization of constituent employer organizations which provide many services to employers, including representation. *See id.*

40. *See* LRA §§ 209(d), 216.

41. *See* Andrew Caddie & Richard Harrison, *New Information: Employment Contracts Act*, N.Z. FORESTRY 47 (Feb. 1994). The primary LRA remedy was reinstatement. *See* LRA §§ 209(f), 228. Those who were not covered by the LRA personal grievance procedures could pursue court actions under the *Addis* rule, which restricted the remedy to actual loss, and "alternative actions under the Contractual Mistakes Act and the Fair Trading Act." Memorandum from Paul Bell to Honorable W.F. Birch, Minister of Labour 3 (Nov. 16, 1990) (on file with author) [hereinafter Memorandum from Paul Bell]. However, three New Zealand cases in the period 1988 to 1990 expanded the remedies available to include compensation for mental distress, anxiety, humiliation, loss of dignity, and injury to feelings. *See* GEARE, *THE SYSTEM OF INDUSTRIAL RELATIONS IN NEW ZEALAND*, *supra* note 39, at 228.

42. Union membership from December 1985 to May 1991 was well above 40%. *See* Harbridge & Crawford, *supra* note 34, at 250.

43. *See* LRA §§ 214-215.

44. *See* LRA § 225. Additional sources of information were the UB5, employer response to an application for unemployment benefits. *See* DAWSON, *LABOUR RELATIONS ACT*, *supra* note 27, at 40; *see also* LRA Seventh Schedule No. 16(1)(b) (outlining a union's rights if an employer fails to provide the required statement).

45. LRA Seventh Schedule No. 2.

could ask the union to pursue it,⁴⁶ and the union could then “take the matter up with the employer” — first verbally and then, if necessary, by submitting a written statement setting out the “nature of the grievance,” the “facts giving rise to [it],” and “[t]he remedy sought.”⁴⁷ The employer then had fourteen days to respond.⁴⁸

At this point, the government provided mediation assistance through a grievance committee composed of equal numbers of union and employer representatives.⁴⁹ Mediators were employed by the Mediation Service, and their role was to “assist employers and their representatives and workers and their representatives to achieve and maintain effective labour relations” and to “assist [the parties] to solve the dispute.”⁵⁰ The members of the committee were “not junior and senior council [sic] who put a case” to a court.⁵¹ The committee was intended to involve all parties in the decision-making process.⁵²

The grievance committee could hear witnesses and examine documentary evidence.⁵³ The chairperson could question witnesses for clarification and give guidance to the parties.⁵⁴ Once the presentations were made, parties could examine each other’s presentations jointly or separately.⁵⁵ If they separated, the chairperson could float between rooms to encourage settlement or bring them back together.⁵⁶ The grievance committee voted as to how to resolve the matter.⁵⁷ If an employer refused to cooperate, the union could set up the grievance committee with only union members to make the decision (leaving the employer with no appeal except with leave of the Labour Court) or seek to have the grievance heard directly in the Labour Court.⁵⁸ LRA mediation was essentially med-arb, because if the parties could not resolve the grievance, the mediator as committee chair made the decision.⁵⁹ The mediator’s deci-

46. See LRA Seventh Schedule No. 3.

47. LRA Seventh Schedule Nos. 4-5.

48. See LRA Seventh Schedule No. 6.

49. See LRA Seventh Schedule No. 7.

50. LRA § 253(1), (2)(c).

51. Mediation Service, Summary of Submission on Options Paper: The Employment Contracts Bill 2-3 (Apr. 1991) (on file with author).

52. See *id.* at 2.

53. See LRA Seventh Schedule No. 8.

54. See LRA § 253.

55. See DAWSON, LABOUR RELATIONS ACT, *supra* note 27, at 50.

56. See *id.*; see also LRA Seventh Schedule No. 11(1)(A).

57. See LRA Seventh Schedule No. 11(1)(A).

58. See LRA § 218(1)(a), Seventh Schedule No. 16.

59. See LRA Seventh Schedule No. 11(1)(A).

sion could be appealed de novo to the Labour Court.⁶⁰

Practicing lawyers had little presence in grievance committees. Normally a union representative brought the case, and an Employer's Association advocate represented employers in 50% of cases.⁶¹ Half of employers represented themselves or hired a lawyer.⁶²

2. Personal Grievances Under the ECA

The philosophy of the ECA would appear to have no place for a statutory personal grievance procedure. The drafters wanted to "normalize" labor law as much as possible, which to them meant treating it as contract law and using the common law courts. Indeed, ECA proponents contended that a contractual system would end workplace conflict.⁶³

A personal grievance procedure was included with other last minute changes in late April 1991.⁶⁴ This occurred behind closed doors, so it's not clear why something so antithetical to the views of ECA proponents happened.⁶⁵ Some claimed "a personal grievance procedure was included in legislation for the purpose of limiting damaging strike action where it appeared a dismissal had been unreasonable."⁶⁶ Others said it was done so as not to encourage employees to seek collective agreements or join unions.⁶⁷ Given the timing and events, a more credible reason appears to be that it was done to placate massive opposition to the ECA which saw nearly one-sixth of the New Zealand population involved in public protest.⁶⁸ This left only a few days to draft these and other provisions, since the ECA was supposed to be in effect on May 1, 1991.⁶⁹ With no time to draft a new procedure, the old procedure was in-

60. See LRA Seventh Schedule No. 16-18.

61. See W.R.C. GARDINER, *The Employment Tribunal: A Report from the Trenches* 6.

62. See *id.*

63. See Dannin, *Hail Market, Full of Grace*, *supra* note 39, at 4.

64. See 43 Parl. Deb. (2d ed. Sess.) 1431 (1991) (N.Z.).

65. NZBR Executive Director Roger Kerr referred to its inclusion and extension of coverage as unfortunate. See Roger Kerr, *Bargaining Under the Employment Contracts Act*, EMPL. L. BULL. 97 (Sept. 1995).

66. Barbara Burton, *Random New Year Jottings*, EMPL. L. BULL. 7 (Jan. 1997).

67. See Memorandum from Bell, *supra* note 41, at 3.

68. See DANNIN, *WORKING FREE*, *supra* note 20, at 152-54. Burton's explanation, *supra* note 66, appears to be a long after-the-fact justification. If it or Bell's arguments had held weight, a personal grievance procedure would have been included in the draft bill, but none was.

69. See DANNIN, *WORKING FREE*, *supra* note 20, at 152-54. See generally 43 PARL. DEB. (2d Sess.) 1430 (1991) (N.Z.).

corporated with only minor tinkering,⁷⁰ in essence only those changes necessary to make it consistent with the ECA, chiefly the elimination of any references to unions.

The ECA defines a personal grievance as a claim an employee has "against the employee's employer or former employer" that the employee has been unjustifiably dismissed; that the employee's employment or conditions of employment have been "affected to the employee's disadvantage by an unjustifiable action by the employer;" that the employee has been discriminated against; that the employee has been sexually harassed; or that the employee has been subject to duress in relation to membership or nonmembership in an employees' organization.⁷¹ The ECA extended personal grievance coverage to all employees, not just union members, thus displacing the common law system with the ECA's statutory process. As a result 1.6 million were eligible to file grievances compared to 625,000 under the LRA.⁷² Assuming workplace disputes continued at the same level as under the ECA, one would expect personal grievance filings to more than double based solely on this increased coverage.

Contrary to the hopes of ECA proponents, workplace disputes can and do exist under a contractual regime. In 1997, 25% of workplaces surveyed reported having had a dispute or grievance during the prior year.⁷³ The most common concerned performance (33%), discipline (28%), redundancy (i.e. layoff for lack of work) (12%), and contractual

70. Minister of Labour Bill Birch noted: "It largely maintains existing definitions and procedures, keeping the resolution of grievances close to the work-place." 43 PARL. DEB., H.R. (1st Sess.) 480 (1990) (N.Z.).

71. See ECA § 27. Sexual harassment claims could use either the personal grievance procedure of the ECA or the complaints procedure of the Human Rights Act but not both. See Julie Kemp, *Walking the Fine Line of the Human Rights Act Successfully in the Workplace* 6 (Mar. 3-4, 1997) (paper prepared for the 11th Annual Industrial Relations Conference) (on file with author).

72. See Raymond Harbridge, *Recent Industrial Disputes and the Impact on Future Industrial Relations Management* 9 (March 3-4, 1997) (paper prepared for the 11th Annual Industrial Relations Conference) (on file with author) [hereinafter Harbridge, *Recent Industrial Disputes*]. Roger Kerr, Executive Director of the New Zealand Business Roundtable, one of the major advocates of the ECA, complained about this extension of access to personal grievances: "The ECA was a massive step backward in this regard, and Employment Court rulings have made the problem worse. The extension of the law to employees in the executive category, for example, is probably the greatest protection system for incompetent managers ever devised." Roger Kerr, *Obstacles to Employment and Productivity Growth in New Zealand's Labour Market* 7 (Mar. 3, 1997) (paper prepared for the 11th Annual Industrial Relations Conference) (on file with author).

73. See Department of Labour, *Contract: The Report on Current Industrial Relations in New Zealand* 10 (Nov. 1997).

disagreements (9%).⁷⁴ Not all these workplace problems necessarily result in filing for mediation with the Employment Tribunal, either because they are resolved or the employee decided not to file.⁷⁵

The ability to resolve many grievances and disputes in the workplace does not mean that the Employment Tribunal has been left with nothing to do. Rather, as TABLE I demonstrates, dramatically increased filings have resulted in a growing backlog.

TABLE I⁷⁶

YEAR TO JUNE	OUTSTANDING APPLICATIONS AT START	APPLICATIONS RECEIVED	APPLICATIONS WITHDRAWN	APPLICATIONS DISPOSED	OUTSTANDING APPLICATIONS AT END
1992*	17	2,332	459	743	1,079
1993	1,079	3,207	743	1,568	1,919
1994	1,919	3,592	1,046	2,447	1,954
1995	1,954	4,284	976	3,040	2,184
1996	2,184	5,144	1,121	3,218	2,985

* First year of operation. The ECA was effective May 15, 1991.

The ECA requires that every contract have a personal grievance procedure which defines the substantive violations as set out in the ECA "unless the employment contract gives an extended meaning to the term."⁷⁷ Failing to provide for a personal grievance procedure means

74. *See id.*

75. A recent survey found that sixty-nine percent of workplace disputes go no farther than either internal discussion, dismissal, or discipline. *See id.* Seventeen percent of those not resolved are taken to the Employment Tribunal, and sixteen percent go to independent mediation. *See id.*; *see also* Colmar Brunton Research, Executive Summary: Survey of Labour Market Adjustment Under the Employment Contracts Act 8 (Aug. 1997).

76. Harbridge & Crawford, *supra* note 34, at 251.

77. ECA § 31. Some contracts include the procedure provided for in the First Schedule. *See, e.g.,* Wellington City Transport Limited, Collective Employment Contract 49-50 (1996-1999). In the alternative, some contracts incorporate those terms by reference. *See, e.g.,* South Fish Group, Collective Employment Contract 16 (May 1, 1994 through Apr. 20, 1996); Individual Employment Contract Between McCain Foods (N.Z.) Limited and Employee 15 (1996-1997); Mainland Products, Collective Employment Contract 26 (Aug. 23, 1996 through Aug. 22, 1997); Seaford Products Ltd, Dunedin, Collective Employment Contract 22 (Aug. 10, 1996 through Aug. 9, 1997); Cadbury Confectionery Ltd.: Confectioners, Stores, Cleaners & Cafeteria Staff, Collective Contract of Employment 31 (June 16, 1996 through July 15, 1997). Rarely, the parties might vary them, for example, by providing an additional internal dispute resolution process designed to settle grievances early and informally. *See* J. Wattie Foods Ltd., Collective Employment Contract 44-46

that the ECA's first schedule becomes part of the contract.⁷⁸ In keeping with its free market philosophy, parties are not required to use the Tribunal,⁷⁹ and use of the Tribunal and Court is not free.⁸⁰

Some ECA supporters believed that most would opt out of the statutory procedures because they would be too slow,⁸¹ and private procedures offered greater confidentiality.⁸² Overall, about ten percent of all contracts now provide for dispute resolution other than the mediation and arbitration provided by the government.⁸³ Indeed, a strong impetus towards an alternative is avoiding delay.⁸⁴

The ability to opt out of the statutory procedure doesn't go far enough for some, such as the New Zealand Employers Federation

(Aug. 2, 1996 through Aug. 1, 1997).

78. See ECA § 32(2)(b).

79. See ECA §§ 78(4), (5). Some New Zealand employers advocate using alternatives, such as mediation and arbitration, as a way of avoiding the expense and uncertainty of the Tribunal processes. See Skiffington, *There Must Be a Better Way*, *supra* note 24, at 23; Caddie & Harrison, *supra* note 41, at 47. Apparently, most have not actually done so at this point. See Peter Churchman, *Avoiding the Rigour of the Personal Grievance Provisions of the Employment Contracts Act*, 22 N.Z. J. IND. REL. 171, 177-81 (1997). The New Zealand Employers Federation and New Zealand Business Roundtable have long campaigned to privatize all mediation and arbitration functions. See N.Z. Employers Fed'n, Employment Contracts Bill 1991: Submission B24-25 (Jan. 30, 1991); N.Z. Bus. Roundtable, *New Zealand Labour Market Reform: A Submission in Response to the Green Paper* 10 (Apr. 1986). It wanted to semi-privatize mediation functions so that mediators would become employees and would be engaged by the choice of the parties. See N.Z. Employers Fed'n, Employment Contracts Bill 1991: Submission C18 (Jan. 30, 1991). At the same time, it supported state funding for mediation and arbitration: "it is in the national interest that the parties to industrial relationships have free access to resolution procedures." N.Z. Employers Fed'n, Employment Contracts Bill 1991: Submission B25 (Jan. 30, 1991). During the ECA's drafting, it was recommended that the ability to contract out of the procedure and use private mediation and arbitration be made clear. See Memorandum from Paul Bell, *supra* note 41, at 3.

80. In its earliest years, the filing fee for personal grievances was \$NZ35, and adjudication fees were \$NZ75 per half day in the Tribunal and \$NZ150 for a half day in the Court. See John Hughes, *The "Freedom" to Enforce Contracts*, INDUS. L. BULL. 6 (Aug. 1992). With the cost of an attorney, one day at the Employment Tribunal costs about \$NZ1300; an additional two days to prepare the case adds \$NZ3900. The average cost of a Tribunal case is \$NZ1500 to \$NZ5000. See Lorraine Skiffington, *The Employment Tribunal and Employment Court Three Years on . . .*, EMPL. L. BULL. 55, 55-56 (June 1994) [hereinafter Skiffington, *The Employment Tribunal*].

81. See 43 PARL. DEB. (2d Sess.) 1458 (1991) (N.Z.).

82. See *Big Bucks Beckon Bargaining Agents*, PSA J. 2 (July 1991). Privatizing employment disputes has also brought abuses and a need for regulation. See *id.*

83. See RAYMOND HARBRIDGE, ET AL., EMPLOYMENT CONTRACTS: BARGAINING TRENDS & EMPLOYMENT LAW UPDATE 1996/97, at 48 (1997). Nine percent of contracts have alternative personal grievance provisions, fifty-four percent in the government trading sector, seventy-eight percent in agriculture, and seventy-one percent in communications. See RAYMOND HARBRIDGE, ET AL., EMPLOYMENT CONTRACTS: BARGAINING TRENDS & EMPLOYMENT LAW UPDATE 1995/96, at 12 (1996).

84. See RAYMOND HARBRIDGE, ET AL., EMPLOYMENT CONTRACTS: BARGAINING TRENDS & EMPLOYMENT LAW UPDATE 1995/96, at 12 (1996).

("NZE") and New Zealand Business Roundtable ("NZBR"). They oppose requiring any procedure and statutorily mandating the level of protections and remedies.⁸⁵ Part of this opposition is motivated by ideology, but part of it is a reaction to decisions through the Employment Tribunal and Court that decreased employer power to act unilaterally to impose working conditions or to terminate workers.⁸⁶ Employers complain bitterly about several well-publicized victories in personal grievance cases that they see as not allowing employers to make unilateral and unreviewable personnel decisions.⁸⁷ The move from statutory institutions thus appears to be an effort to establish a regime to restore this power to employers,⁸⁸ rather than a desire to achieve what are normally seen as the benefits of ADR.⁸⁹ One popular device for avoiding fairness

85. See N.Z. Employers Fed'n, Submission to the Labour Parliamentary Select Committee on the Review of the Employment Contracts Act 1991, at 20 (May 26, 1993). The NZBR argues that mandatory personal grievance procedures and institutional arrangements—that is the Employment Tribunal and Court—constitute a key impediment to employment. Furthermore, it argues, a standard grievance procedure reflects an outdated conflict model of employment relations which mistakenly assumes employees had less bargaining power. See N.Z. Bus. Roundtable, *Moving into the Fast Lane* 32 (Mar. 1996). The NZBR contends that employment at will would result in a superior system because employers and employees in long term relationships have a strong incentive to think about how to handle a relationship. See N.Z. Bus. Roundtable, Submission to the Labour Select Committee on the Employment Contracts Bill 12 (Feb. 1991). The more heavily invested in the relationship they are, the scarcer their opportunities and skills, the more likely they are to agree on a grievance mechanism. See *id.* In other cases, it is best to break off the relationship and look elsewhere for contractual partners. See *id.* Any limitations on an employer's right to fire only increases the costs of employment and thus reduces employment. See *id.*

86. New Zealand employers dislike having to engage in a procedurally fair process to discharge a worker, even when that means following procedures they themselves instituted or agreed to. See, e.g., Gordon Anderson, *Reforming Procedural Fairness Requirements*, EMPL. L. BULL. 114, 115 (Sept. 1998) [hereinafter Anderson, *Reforming Procedural Fairness Requirements*]; Burton, *supra* note 66, at 7; Rebecca MacFie, *Labour Department Officials Push Limits of EC Act*, EMPL. L. BULL. 30 (Mar. 1997). Employers have tried to limit their susceptibility to personal grievances by including a wide range of creative language in written contracts which waives claims and which gives employers the unilateral right to impose changed conditions. See, e.g., Mark Gosche, *The Impact of the Employment Contracts Act 1991: Reviewing the Act—Unions and Bargaining Agents* (May 15, 1992) (paper presented to a public seminar at the Industrial Relations Centre, Victoria University of Wellington) (on file with author).

87. Several large recoveries by executives and managers received prominent news coverage. See Finlay MacDonald, *You're Fired, I'm Hired*, LISTENER 28 (Oct. 8, 1994). However, the average payout for successful claimants is \$NZ5000. See *id.* at 30.

88. See Skiffington, *There Must Be a Better Way*, *supra* note 24, at 24.

89. Some New Zealand employer groups have long advocated preventing interference with their ability to manage. The NZBR, for example, urges rejecting giving workers substantive rights. See Gordon Anderson, *The Judiciary, The Court and Appeals*, EMPL. L. BULL. 90 (Nov. 1993) [hereinafter Anderson, *The Judiciary*]; Gordon Anderson, *Further Reforms to Employment Law?*, EMPL. L. BULL. 2 (Feb. 1993) [hereinafter Anderson, *Further Reforms*]. The NZBR argues that requiring fairness decreases unemployment, because employers then worry they cannot fire an underperforming employee and are thus reluctant to hire new workers. See MacDonald, *supra* note

is the fixed-term contract.⁹⁰ Employers have argued that fixed-term contracts create no employee rights, no employer liability, and thus no personal grievances.⁹¹ Fixed-term contracts demonstrate that there seems to be no limit to employers' quest for absolute, unfettered control. The record for the shortest term fixed-term contracts may be one that operates hour-to-hour.⁹² A second key way to avoid personal grievances is either contracting out work or using independent contractors.⁹³ Non-employees have no rights under the ECA.⁹⁴ Many of these are similar to the motives that have led United States employers to seek predispute arbitration agreements.

An aggrieved employee may ask for a written statement of the employer's reasons within sixty days of being dismissed, and the employer must provide it within fourteen days.⁹⁵ The employee has ninety days from the time a grievance arises to submit it to the employer.⁹⁶ If discussions between the employer and employee fail to resolve the grievance, the employee must then submit a written statement setting out the nature of the grievance, the facts giving rise to the grievance, and the remedy sought.⁹⁷ The employer may grant the grievance or, within fourteen days, give the employee a written response setting out the employer's view of the facts and remedy sought.⁹⁸

The matter may next be filed with the Employment Tribunal if it remains unresolved or, if the employer fails to provide a written statement, within fourteen days after the employee provided a written response.⁹⁹ The Tribunal is to provide "[a]ppropriate services that will

87, at 28-29.

90. See Churchman, *supra* note 79, 172-77.

91. See *id.*; Bernard Banks, *More on the Hagg Decision — A Possible Turning Point*, EMPL. L. BULL. 62 (June 1997).

92. See "Model" *Contracts That Don't Hit the Headlines*, PSA J. 8-9 (Mar. 1992).

93. See Anderson, *Reforming Procedural Fairness Requirements*, *supra* note 86, at 114.

94. See Churchman, *supra* note 79, at 181-87.

95. See ECA § 38. An alternate source for information can be the UB5, the employer's statement why the employee was terminated, provided to the Department of Social Welfare when the employee applies for unemployment benefits. See MIKE DAWSON, *HANDLING PERSONAL GRIEVANCES UNDER THE EMPLOYMENT CONTRACTS ACT 1991: A GUIDE FOR UNION ADVOCATES* 40 (1992) [hereinafter DAWSON, *EMPLOYMENT CONTRACTS ACT*].

96. See ECA § 33(2), (3), First Schedule Nos. 2-3. Section 3 also provides that the Employment Tribunal has the power to grant an expansion of the time to file. See ECA § 3.

97. See ECA First Schedule No. 4. A personal grievance manual prepared in 1992 for the Trade Union Education Association advised that the worker's written statement should be brief but factually correct. See DAWSON, *EMPLOYMENT CONTRACTS ACT*, *supra* note 95, at 18.

98. See ECA First Schedule No. 5. The ECA permits waiving the exchange of written statements. See ECA § 6.

99. See ECA First Schedule No. 7.

facilitate the mutual resolution by parties to employment contracts of differences that arise between them”¹⁰⁰ and to serve as a “low level, informal, specialist [body] to provide speedy, fair, and just resolution of differences between parties to employment contracts” when “mutual resolution is either inappropriate or impossible.”¹⁰¹ Parties appearing before the Tribunal may be represented by any representative the party authorizes, including a barrister or solicitor.¹⁰²

The Employment Tribunal mediates or, if unsuccessful, later adjudicates/arbitrates the grievance.¹⁰³ The ECA does not permit the Tribunal member who mediates to arbitrate/adjudicate the case.¹⁰⁴ However, the parties may give the mediator authority to make a final, binding, and nonappealable decision during the mediation process.¹⁰⁵

C. Impact of Differences in ECA Procedure

Before examining the impact of substantive changes, we need to consider the extent to which different procedures have affected mediation. Essentially, homologous procedures exist under each statute; and the few differences grow out of the ECA’s elimination of a role for unions.¹⁰⁶ For example, having equal numbers of employer and union representatives meet guided by a mediator at the worksite has been re-

100. ECA § 76(b).

101. ECA § 76(c).

102. See ECA § 90.

103. See ECA First Schedule No. 8. Some members only mediate, some only adjudicate, and some do both. See GEARE, INDUSTRIAL RELATIONS, *supra* note 22, at 482. See generally ECA §§ 78, 79, 80. Dividing mediation from adjudication means that a case may be heard twice if it does not settle before adjudication, thus potentially doubling the Tribunal’s caseload.

104. See ECA § 81(5); see also Walter Grills, *Dispute Resolution in the Employment Tribunal – Part One: Mediation*, 17 N.Z. J. IND. REL. 333, 335 (1992).

105. See ECA § 88(2); Grills, *supra* note 104, at 336; Interview with Alastair Duncan, Organiser, Service Workers Union, in Wellington, N.Z. (July 29, 1997) [hereinafter Interview with Alastair Duncan]. Alan Geare points out that the statute presumes a greater distinction between mediation and adjudication than exists in practice. For example, mediators may push parties to settle by telling them what is a reasonable settlement, and some adjudicators may encourage informal bargaining. Section 88(2) implicitly recognizes this. See GEARE, INDUSTRIAL RELATIONS, *supra* note 22, at 482-83. Giving the mediator the power to adjudicate can be used as a tactic:

[V]ery frequently it was a very useful tactic to walk into the room and even before you presented your case to say, “We’re here to get a settlement and to that end, we give the mediator the power to make a decision.” And frequently, that was a much more effective position, because that then put the employer party on the back foot. If they are not going to trust the person who was supposedly mediating to also adjudicate or arbitrate, then it doesn’t make them look very good.

Interview with Alastair Duncan, *supra* note 105.

106. See GEARE, INDUSTRIAL RELATIONS, *supra* note 22, at 469.

placed by the employer, employee, and their representatives (if any) meeting at the Employment Tribunal offices. The place and participants mean that LRA mediation had a strong relationship to collective negotiation and was situated within a negotiated relationship.¹⁰⁷ LRA personal grievances were not strictly personal because they were never far removed from collectivity and the worksite.¹⁰⁸ A dispute over an interpretation would send the union to the employer to try to change the interpretation.¹⁰⁹ If there was a serious problem, the union was more likely to strike than file a personal grievance.¹¹⁰ Unions saw strong union organization as the best way to prevent grievances from arising.¹¹¹ Substituting for this structure with a meeting between the parties and their representatives is only outwardly the same. The two processes exist within different power contexts and with different resources and options arrayed on each side. A personal grievance under the ECA is exactly that: personal.

The drastically reduced union presence has meant eliminating their gatekeeper role in defusing disputes, in achieving early resolutions, in sorting out whether a worker wanted to pursue a grievance, and in providing a sympathetic ear if the employee simply wanted someone to listen.¹¹² Organiser Alastair Duncan observed: "A lot of the calls that we received then, as now, really are people bringing up and wanting somebody to say, 'Hey, that's bad. What's happened to you isn't fair.' . . . [They wanted] simply the affirmation that what had been done to them was wrong."¹¹³ The greater union presence prevented some problems and diverted many others away from the more formal grievance process by achieving an early reconciliation.¹¹⁴

Minor changes have caused ECA mediation to have more of an adjudicative flavor. ECA grievances have a statute of limitations.¹¹⁵ Access to the ECA personal grievance procedure is a matter of statutory right,¹¹⁶ as opposed to being based on union membership and collective

107. See Interview with Graeme Clark, General Secretary, Manufacturers and Construction Workers Union, in Wellington, N.Z. (July 28, 1997) [hereinafter Interview with Graeme Clark].

108. See *id.*

109. See *id.*

110. See *id.*

111. See NEW ZEALAND AMALGAMATED ENGINEERING AND RELATED TRADES INDUSTRIAL UNION OF WORKERS, STRATEGIES FOR CHANGE: REPRESENTING WORKERS IN A NEW ENVIRONMENT 39 (1987).

112. See *id.* at 39.

113. Interview with Alastair Duncan, *supra* note 105.

114. See *id.*

115. See ECA § 26(a); GEARE, INDUSTRIAL RELATIONS, *supra* note 22, at 465, 469.

116. See *id.* If the parties fail to agree to another procedure, ECA Schedule No. 1 is deemed to

bargaining coverage. Increasing coverage to all employees means more than simply doubling the numbers of people eligible to file personal grievances; it means that over half of those with personal grievances have no experience with union representation.¹¹⁷ They are thus likely to bring more personal and less collective attitudes into mediation.¹¹⁸ LRA mediation or med-arb was nonbinding; parties could take de novo appeals to the Labour Court.¹¹⁹ This provided more fluidity and allowed the parties and the (nonlawyer) mediators to focus their efforts on the situation and resolving the problem, as opposed to applying the law to the facts. All were aware that mistakes were not necessarily fatal, that they could alter their positions and present new evidence after seeing the other side's case.¹²⁰ Although these changes appear to be around the margins, they have helped transform how mediation operates and how the parties experience it.

This does not mean that LRA mediation was in all ways fairer or a resounding success or that ECA mediation is in all ways unfair or a failure. The Tribunal has had good statistical success in resolving disputes.¹²¹ Eighty-five percent of cases are resolved at the mediation conference.¹²² Half of those unresolved settle or are withdrawn after mediation and before adjudication.¹²³ Mediation is also relatively efficient. Ninety-two percent of grievances taken to mediation are resolved in less than two days, and seventy-five percent take less than one day.¹²⁴

The increased filings shown in TABLE I above don't suggest that grievants have abandoned the Tribunal. There are enough disputes and enough belief that the Tribunal has something to offer that filings continue to be made and made at ever increasing levels. However, as will be discussed in the next sections, employers, employees, unions, and government officials complain that mediation is now too formal, too expensive, too adversarial, and too likely to reach unsatisfactory outcomes. These criticisms will be explored here in the context of how the substantive law has affected mediation and caused these complaints to be raised.

be part of the contract. *See* ECA Schedule No. 1.

117. *See id.*

118. *See* Interview with Graeme Clark, *supra* note 107.

119. *See* LRA § 217(1)(a).

120. A de novo appeal gave the parties a second chance to get case the right. *See* Interview with Graeme Clark, *supra* note 107.

121. *See* GARDINER, *supra* note 61, at 5.

122. *See id.*

123. *See id.*

124. *See id.*

1. Effects of the Substantive Law: Ascertaining Whether a Personal Grievance Exists

The ECA's substantive law, founded in its contractual nature, makes mediation more difficult. At a basic level, it is harder to know whether a personal grievance even exists because it is now more difficult to ascertain the terms of employment covering the employee and to gain access to employees.

a. Contract Terms

An employee cannot claim to have been unjustifiably dismissed or unjustifiably disadvantaged unless the employee's terms of employment are known. It is now, however, more difficult to collect this information. Under the LRA, a worker's terms could be determined by examining one collective document, usually an award, and this one document set terms for many workers, i.e., all those in a specific job classification over a wide geographic area and across employers.¹²⁵ Awards were written and could not be varied except by the union and employers – and certainly not by individual employees.¹²⁶ Organisers were aware of and familiar with award terms they administered, their settled interpretation, and the union's future goals as to their interpretation and enforcement.¹²⁷

The ECA establishes a complex, anarchistic, even chaotic, system of wage setting.¹²⁸ The ECA promotes individual contracts,¹²⁹ and nothing requires them to be in writing.¹³⁰ In fact, most employment contracts

125. See DANNIN, *WORKING FREE*, *supra* note 20, at 14-15.

126. See LRA §§ 186-208.

127. See generally Interview with Campbell Duignan and Neville Donaldson, Organisers, United Food and Beverage Workers Union, in Dunedin, N.Z. (July 25, 1997) [hereinafter Interview with Duignan and Donaldson]; Interview with Alastair Duncan, *supra* note 105; Interview with Joyce Hawe, *supra* note 21.

128. There are serious gaps in information available about the form and content of employment contracts. The ECA requires the government to collect only collective employment contracts and only those from worksites with more than twenty employees. Employer compliance has been as low as 5% of the contracts from worksites with over twenty employees. See DANNIN, *WORKING FREE*, *supra* note 20, at 174. This eventually forced the Department of Labour to post a disclaimer as to the validity of the data derived from their sample. See *id.* Most workplaces in New Zealand are far smaller than twenty employees; 80% of companies employ five or fewer workers. See RICHARD RUDMAN, *HUMAN RESOURCES MANAGEMENT IN NEW ZEALAND: CONTEXTS AND PROCESSES* 45-46 (1991); see, e.g., GEARE, *INDUSTRIAL RELATIONS*, *supra* note 22, at 499; Richard Whatman et al., *Labour Market Adjustment Under the Employment Contracts Act*, 19 N.Z. J. IND. REL. 53, 54 n.2 (1994).

129. See DANNIN, *WORKING FREE*, *supra* note 20, at 231-34.

130. See Interview with Lucy Highfield, Attorney, Service Workers Union, in Wellington,

in New Zealand appear to be oral.¹³¹ A survey found that only 18.7% of long-term employees had a written contract, and, of professionals, only 27.3% did.¹³² Employees with oral contracts may believe they don't have a contract and thus any rights, because they don't realize custom and practice can create enforceable contract terms.¹³³

Unions are not involved in the formation of most contracts and are generally not even a party to employment contracts they negotiate,¹³⁴ rather, they are employee agents, and that agency can be revoked or created at any time.¹³⁵ A union may even represent a worker but have had nothing to do with creating the worker's employment terms.¹³⁶ Contracts can be collective or individual.¹³⁷ Individual contracts are not necessarily individualized contracts, but each may have one or two unique terms.¹³⁸ More than one contract can apply to an employee, and employers have actively sought this sort of arrangement by using a base collective contract with general terms applicable companywide (essentially the terms that in the United States would go in an employee handbook), in connection with a more detailed collective contract and an individual contract with wage and other individual terms.¹³⁹

Written contracts do not necessarily eliminate problems with ascertaining terms. Before it can be determined that a personal grievance exists, all relevant contracts must be located.¹⁴⁰ This is not easy when so many contracts come into existence without stable employee representation.¹⁴¹ A potential grievant may be covered by an unknown number of agreements, not all may be in writing, and they may be varied by the employee's agreement with the employer or by simple acquiescence in the employer's actions.¹⁴² Some contracts allow the employer unilater-

N.Z. (June 10, 1996) [hereinafter Interview with Lucy Highfield].

131. See *id.*

132. See Erling Rasmussen, *Workplace Transformation Under the Employment Contracts Act 1991*, 454, 456 (Ray Fells & Trish Todd eds., Feb. 1996) (Current Research in Industrial Relations: Proceedings of the 10th AIRAANZ Conference).

133. See Interview with Lucy Highfield, *supra* note 130.

134. See DANNIN, *WORKING FREE*, *supra* note 20, at 217-20.

135. See Ellen Dannin, *Solidarity Forever? Unions and Bargaining Representation Under New Zealand's Employment Contracts Act*, 18 LOY. L.A. INT'L & COMP. L.J. 1, 23-33 (1995).

136. Cf. ECA § 19(2).

137. See ECA Preamble.

138. See Dannin, *Bargaining Under New Zealand's Employment Contracts Act*, *supra* note 23, at 455-56.

139. See Interview with Francis Wevers, Management Consultant, The Umbrella Group, in Wellington, N.Z. (May 20, 1992) [hereinafter Interview with Francis Wevers].

140. See Interview with Alastair Duncan, *supra* note 105.

141. See *id.*

142. See *id.*

ally to vary the rules from time to time, so one party can effectively amend the document and the other will not know this has happened.¹⁴³ Many employment contracts are now written by inexperienced people, and because of this, they are badly drafted and difficult to understand.¹⁴⁴ Especially in small workplaces, written contracts are often no more than one to two pages long and cover only basic terms, often no more than working hours.¹⁴⁵ The ECA has also led to a series of union amalgamations as a result of the steep loss of members.¹⁴⁶ This means that organisers are less familiar with the broader range of a particular group of employees' needs, their contract terms, and their history.¹⁴⁷

Service Workers Union Organiser, Alastair Duncan, describes how these problems affect his job:

Well, the first real needle in that particular haystack is going to be is there in fact a contract to check. The Service Workers Union, although it has a number of national contracts, a small number of multi-employer contracts, and then site contracts, probably half the calls that we would receive or any organiser would receive are for workers who either don't have a contract or, if the contract exists, they've never seen it.

So accessing the actual documentation, if such documentation exists, can be the first hurdle. Probably of those, half who are unaware or at least are not covered by a contract that we hold a copy of, they'll have something in writing. It'll usually be pretty shonky [bad]. But then that will leave a good number who simply have nothing. Who have in fact a verbal contract that may have done no more than identi-

143. See Interview with Duignan and Donaldson, *supra* note 127; Interview with Alastair Duncan, *supra* note 105; Interview with Lucy Highfield, *supra* note 130. Graeme Clarke, however, contends that this may not be a large problem in personal grievances.

[T]he contract gets made by performance. If you agree to do something, it becomes part of your contract. So it's often difficult to say what someone's contract is in such circumstances. But really the contract would have very little bearing on a personal grievance situation. The only time when the contract would really come into play would be perhaps in work performance. The boss asked you to do Job X, and you say, no, that's not part of my contract and that implies quite a confident level of awareness that isn't present in a non-union site. I mean, the boss asks you to do a job, you do it.

Interview with Graeme Clark, *supra* note 107.

144. See Interview with Alastair Duncan, *supra* note 105.

145. See Interview with Graeme Clark, *supra* note 107; Interview with Duignan and Donaldson, *supra* note 127; Interview with Lucy Highfield, *supra* note 130.

146. See Interview with Duignan and Donaldson, *supra* note 127.

147. See Interview with Alastair Duncan, *supra* note 105.

fied salary and, perhaps, hours. Perhaps not even that.¹⁴⁸

Since the ECA allows parties to agree to an alternative procedure¹⁴⁹ a grievant must determine if such an alternative has been agreed to in order to avoid fruitlessly pursuing a grievance in the wrong forum using the wrong procedure.¹⁵⁰ In addition, it must be determined whether the agreed-upon procedure is inconsistent with the ECA's minimum requirements, because section 32 states that parties cannot limit remedies.¹⁵¹

All this ambiguity and uncertainty creates fertile ground for disagreement and misunderstanding as to basic rights and duties and makes all disputes more complex. Even though no definitive ruling need be made on intent or the agreement's terms in mediation, the parties are likely to act in mediation based on their understandings of those terms. Agreement as to the meaning of ambiguous or missing terms is less likely when a dispute is brought into mediation. The task of ascertaining the parties' intent (assuming there was one on the points in dispute) will be clouded by emotion and an awareness that any particular interpretation will lead to a specific outcome. Parties are thus likely to be less willing and even to lack incentive to agree as to the document's intent and terms. In such a context, mediation must overcome many hurdles to achieve party concurrence on a resolution. Finally, all this complexity and uncertainty is likely to create an insuperable hurdle for those employees in the least advantaged situations.

b. Access to Grievants

The ECA's time limits for filing personal grievances makes it necessary to learn about a grievance, ascertain the worker's rights, and decide whether to pursue them more quickly. The ECA, however, makes all this more difficult by giving unions less access to employees. The LRA provided union representatives with a statutory right of access to the workplace.¹⁵² Under the ECA access is limited,¹⁵³ so a union or other representative may have trouble learning that a grievance exists at all or in time to file. In the worst cases, an employee may be fearful or igno-

148. *Id.*

149. *See id.*

150. *See id.*

151. *See* Nicola Crutchley & Virginia Hardy, Running an Employment Law Case 15 (Apr.-May 1996) (N.Z. L. Soc'y Seminar).

152. *See* LRA § 56(1).

153. *See* ECA §§ 13-15; *see also* Interview with Joyce Hawe, *supra* note 21.

rant and may wait too long before taking action.¹⁵⁴ Learning that a grievance exists and bringing a timely grievance depends on the sophistication of an employee or the degree to which a union has organized a workplace and been able to maintain organization, solidarity, and discipline.¹⁵⁵

The decline of a union presence in New Zealand society¹⁵⁶ and in a specific workplace coupled with employers' greater willingness to exclude unions and take extreme actions means employees are less likely to have the courage to challenge an employer action, including taking up grievances. They may also lack easy access to information to decide whether they have a viable grievance. The lack of a union presence means less support to employees considering whether to challenge an employer action. While the figures of increased Employment Tribunal filings might suggest that there is no problem with workers' finding their way to mediation when problems arise, they could also reflect a very high level of employer wrongful actions with only a small percentage resulting in formal filings. With what is known about the ECA's impact on wages and other working conditions, this latter conclusion seems likely. Unfortunately, we currently lack data as to how these changes are affecting filings.

2. Factors that Increase Adversarialness

Factors that are making ECA mediation more adversarial include the entry of representatives with little or no background in industrial relations or mediation; changing work from a relationship to a contract or market exchange; new methods of paying representatives; and changes in Tribunal adjudication.

a. The Entry of New Representatives

When the LRA was enacted in 1987, lawyers were for the first time permitted to represent parties before industrial courts and tribunals.¹⁵⁷ Law firms had no experience in labor law, and no group of labor representatives outside unions and the Employer Associations existed. This

154. See Interview with Duignan and Donaldson, *supra* note 127.

155. See *id.*

156. See *supra* notes 35-36 and accompanying text.

157. See Keith Peterson, *In Defence of the Employment Court*, THE INDEPENDENT, Apr. 4, 1997, at 21. Lawyers did represent employees who were not union members before the High Court in contractual disputes concerning employment. See DEEKS, *supra* note 22, at 382-84.

situation continued with little change during the LRA years. Under the ECA, anyone who has not been convicted of a serious felony in the last ten years can be a representative.¹⁵⁸ ECA proponents advocated the entry of new employee representatives to compete with unions in order to create competition that would, they said, lead to superior services for workers.¹⁵⁹ The New Zealand Employers Federation contended the availability of superior alternative representation had caused the rapid decline in union membership.¹⁶⁰

In fact many employees, both individually and collectively, are now choosing to be represented by a range of non-union people or organisations. This includes lawyers, accountants, private consultants, a parent, a friend or a workmate.

The essential feature, however is that to gain the right to represent and to keep it, the representative is being required to understand the needs and aspirations of the individual or group being represented, to understand the needs and aspirations of the employer concerned and to become a constructive part of that enterprise focused partnership.

That is pretty new and radical stuff for most traditional unions and as those figures show, they have lost out in the transition.¹⁶¹

There is reason to doubt this rosy picture. Certainly, managers and others now able to invoke mediation could afford lawyers and other representatives.¹⁶² Lawyers also might be available to the impoverished through legal aid, but no funds were provided for other sorts of representatives.¹⁶³

158. See ECA § 11.

159. See DANNIN, *WORKING FREE*, *supra* note 20, at 45-48.

160. See *id.*

161. *The "New" Unions*, *THE EMPLOYER*, 145 (Dec. 1995).

162. See John Haigh, *The Role and Future of the Labour Court - Does it Have One?* 7 (May 1991) (on file with author).

163. See *id.* During the ECA's drafting, it was noted that access for individuals who cannot afford the procedural costs must be addressed "if the equity side of the framework is not to be overlooked." Memorandum from R. A. Stockdill (General Manager, Industrial Relations Service, Department of Labour) and D. J. Martin (Assistant Commissioner, State Services Commission) to Minister of Labour and Minister of State Services (Nov. 12, 1990) [hereinafter Stockdill & Martin]. Despite this caution, in 1991 access to legal aid was tightened. See Skiffington, *The Employment Tribunal*, *supra* note 80, at 56. Eligibility was set at less than \$NZ2000 per year disposable income and less than \$NZ2000 of disposable capital, levels so low as to "effectively preclude [] legal aid for most claimants, except the most destitute, or ironically those who are already unem-

It would be inaccurate to claim that lawyers are innately incapable of participating in mediation; lawyers have many relevant skills, including negotiating, conciliating, and researching.¹⁶⁴ However, in this case, lawyers and consultants were not drawn to mediation by the opportunity to exercise those skills so much as by their perception that mediation offered a new source of income.¹⁶⁵ At the ECA's enactment, there was literally an explosion of new employment practitioners.¹⁶⁶ Half the advertisers in a 1991 employment handbook were legal firms and others offering their representational services.¹⁶⁷ Within the ECA's first year, there were between 50 to 100 labor consultants competing for work.¹⁶⁸ Wheeler Campbell, for example, set up a bargaining agency and advocacy service (not including mediation or adjudication) charging \$NZ5.00 a week per person for groups of under five and \$NZ3.00 per person for groups over fifty, amounts essentially in the range of union fees.¹⁶⁹ Typical legal charges are \$NZ150-300 per hour.¹⁷⁰

The new labor representatives came from many backgrounds. Some had gained experience as employer negotiators, often for the Employers Association or one of its affiliates,¹⁷¹ while others received their training as union representatives.¹⁷² However, many lacked any ex-

ployed and have no reason to seek the services of the Employment Tribunal." *Id.*

164. Cf. Sato, *supra* note 1, at 514.

165. New Zealand legal practice underwent a transformation from being a profession to a business during the 1980s. See Michael J. Powell, *Business Management and the Professions: The Changing Nature of the New Zealand Legal Profession*, in *CONTROLLING INTERESTS: BUSINESS, THE STATE AND SOCIETY IN NEW ZEALAND* 208 (John Deeks & Nick Perry eds., 1992). When the ECA was proposed, the United Food and Chemical Workers Union predicted:

In the rush that will follow enactment of this legislation New Zealand will see a plethora of "consultants and experts" offering their services to groups of workers. Their interests will be profit motivated and based on expediencies, rather than on the overall needs of the workers, or indeed, the enterprise breeding another sector of society with parasitical tendencies.

United Food & Chemical Workers Union of New Zealand, Submission on the Employment Contracts Bill 13 (Feb. 6, 1991).

166. See Yvonne Oldfield, *The Employment Tribunal: A View From the Inside*, *LABOUR NOTES*, Sept. 1994, at 11.

167. See *id.*

168. See Patricia Herbert, *Negotiators Flourish in the World of Contracts*, *PRESS*, Feb. 20, 1992, at 7; see also *We've Arrived, But the Work's Just Starting*, *THE EMPLOYER* 1 (June 1991).

169. See Rebecca Macfie, *First Salvo Fired in Bargaining Bids*, *NAT'L BUS. REV.*, May 8, 1991, at 3. By 1994, non-lawyer advocates were receiving \$NZ600 a day for a hearing. See Skiffington, *The Employment Tribunal*, *supra* note 80, at 55.

170. See *Big Bucks Beckon Bargaining Agents*, *PSA J.* 2 (July 1991).

171. See Herbert, *supra* note 168, at 7.

172. See Interview with Francis Wevers, *supra* note 139; see, e.g., Herbert, *supra* note 168, at 7.

perience with employment law and resolving workplace disputes.¹⁷³ Some lawyers had no copy of the statute, relying instead on common law contract concepts.¹⁷⁴

At first, mediation was a bit of a mystery to some lawyers who argued their case across the table comfortably enough but then didn't seem to know how to negotiate and cut a deal. That, of course, had long been the very bread and butter of the union officials and their Employers' Association counterparts.¹⁷⁵

The new entrants easily lost sight of the fact that it was not the mediator they needed to persuade but the other party.¹⁷⁶

One lawyer said he observes lawyers approaching "litigation in a military fashion, ie [sic] on the basis of the more firepower (in terms of weight of paper) that they can generate in any given case, the more likely they are to be successful."¹⁷⁷ Their training may encourage them to focus more on the process of litigating and lose sight of issues personal to the grievant or to overall justice,¹⁷⁸ especially when they see it as being to their own and their client's advantage. They may not understand the need to focus on the parties' motivations – to seek revenge, have a day in court, clear one's name, receive payment, or be reinstated – and how these make resolution more or less possible.

This enormous influx of new types of practitioners has had an impact on mediation, including increasing adversarialness, and this impact has many causes. It is assumed that lawyers are necessarily adversarial, so more adversarialness might be assumed to be caused by increasing numbers of lawyers. In the United States, lawyers are often seen as one—or even “the”—source of adversarialness. Lawyers' education, which is designed to prepare them to be litigators, certainly prompts them to frame problems in terms of legal norms.¹⁷⁹ However, assuming a simple cause and effect relationship between more lawyers and increased adversarialness ignores the complex ways by which the new practitioners—consultants as well as lawyers—have affected ECA me-

173. See Interview with Duignan and Donaldson, *supra* note 127.

174. See MacDonald, *supra* note 87, at 28, 30.

175. GARDINER, *supra* note 61, at 6.

176. See Alastair Dumbleton, *The Employment Tribunal - Four Years On*, 21 N.Z. J. INDUS. REL. 21, 25 (1996).

177. Kenneth Johnston, *Costs in the Employment Area*, EMPL. L. BULL. 2 (Jan. 1994).

178. Cf. Richard Weisberg, *The Hermeneutic of Acceptance and the Discourse of the Grotesque, With a Classroom Exercise on Vichy Law*, 17 CARD. L. REV. 1875, 1875-77 (1996).

179. See, e.g., Herbert Jacob, *The Elusive Shadow of the Law*, 26 L. & SOC'Y REV. 565, 570 (1992); Goldberg, *supra* note 7, at 661-65, 671-72.

diation.

The entry of the new practitioners signals the entry of new classes of litigants. Under the LRA, only union members had access to mediation.¹⁸⁰ Others took their cases to the common law courts where their rights were litigated.¹⁸¹ Personal grievance mediation was handled by a small cadre of professional, trained representatives on both sides: for the most part salaried union organizers represented workers, and salaried Employers Association representatives or advocates represented employers. They were people with a strong background in and understanding of industrial relations and the conditions of particular industries.¹⁸² Most new representatives lack experience in dealing with industrial matters in general and specific industry history, modes of operation, or needs.¹⁸³

Not only did representatives in the past have deep experience in workplace issues, they had ongoing relations with one another.¹⁸⁴ Employer and union representatives knew there was no such thing as just one case. They knew they would have multiple contacts with one another extending over many years and existing outside any one dispute or employment relationship. This meant that they went into each mediation knowing one another, able to anticipate how each would behave, and knowing they would be interacting many times in the future; all this is to say they were conscious they acted within many long-term relationships. In addition, they understood that any specific dispute existed within a web of ongoing relationships – between the employer and particular employee, the employee and other employees, the employer and its other employees, the employer and union, the union and its members, and the workplace within the industry and larger society.¹⁸⁵

This representational ecosystem has now been displaced. The drop in union representation left a vacuum that was filled by the new repre-

180. See LRA § 209(d).

181. See *id.*

182. See Interview with Joyce Hawe, *supra* note 21.

183. See Interview with Duignan and Donaldson, *supra* note 127.

184. See Interview with Joyce Hawe, *supra* note 21.

185. Andrew Little, legal counsel for the Engineers Union, observed that unions approach grievances or other legal actions differently than do lawyers in private practice. They first try to avoid the need for a third party by vigorously trying to sort the problem out on the job. See GARDINER, *supra* note 61, at 12; cf. Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 17, 25-26 (1983). Other areas of law, such as regulatory policymaking by government agencies also can involve litigation within and as part of ongoing relationships. See Cary Coglianese, *Litigating Within Relationships: Disputes and Disturbance in the Regulatory Process*, 30 L. & SOC'Y REV. 735, 737 (1996).

sentatives. Mediator Yvonne Oldfield observed that in her first three months on the Tribunal she had only three to four cases brought by unions.¹⁸⁶ Consultants were far more in evidence:

These consultants (working usually on a commission basis) fill a market niche for workers who are not unionised and cannot afford the expertise of specialist employment lawyers. There are probably many reasons for this - low levels of unionisation perhaps as well as a tendency of union officials to settle problems without recourse to the Tribunal.

The Tribunal has undoubtedly provided a growth industry for consultants and lawyers. The majority of employers appearing there appear to be small firms. Larger firms, perhaps, are more likely to be unionised and/or to manage basic personnel functions (like pay systems) better.¹⁸⁷

The Mediation Service itself recognized the importance of these relational skills and of teaching them to disputants to avoid future disputes, as well as settling the substantive issues in dispute.¹⁸⁸ The enactment of the ECA, however, refocused attention on the immediate dispute and the short term.

b. Changing Work from a Relationship to a Contract or Market Exchange

ECA proponents opposed including a personal grievance provision in the ECA.¹⁸⁹ They continue to take the position that doing so was a mistake and that what has developed is an outmoded conflict-model of labor relations that distorted the ECA's contractual and market basis.¹⁹⁰ Others contended that market forces cannot promote successful mediation because it must be based in an awareness of the ongoing relationship. In 1991, the Mediation Service argued that, although a right may be established in a contract or a grievance procedure, differences between the parties "will inevitably be accompanied within the work place by differences in personalities, philosophies, and general understand-

186. See Oldfield, *supra* note 166, at 11.

187. *Id.*

188. See Mediation Service, *supra* note 51, at 3.

189. See N.Z. Bus. Roundtable, *Moving into the Fast Lane* 32 (Mar. 1996).

190. See *id.*

ing.”¹⁹¹ It thus follows, the Mediation Service said, that the ongoing nature of the employment relationship means there is both a legal and personal aspect to the relationship.¹⁹² This requires a dispute resolution process which is more than merely a legal one:

Agreement is important, not only to overcoming the immediate impasse, but to encourage the effective future operation of their on-going relationship. Dispute and grievance procedures therefore involve a committee procedure where the initial, and most important obligation, is on the parties to voluntarily resolve their own differences. This primary objective is distinctively different from the Tribunal or Court where issues are determined on behalf of the parties, according to rules of evidence, and procedure designed specifically to keep the distance between the Tribunal or Court, and the disputant parties.¹⁹³

The Mediation Service explained that the process which the grievance committee first engages in allowed the mediator to acquaint parties with the law, “improve [their] personal relationships, and to plan to avoid future disputes.”¹⁹⁴ Judge Goddard, then Chief Judge of the Labour Court, observed: “It is not so often a question of deciding between conflicting accounts of the facts as of deciding between competing interpretations and perceptions of undisputed facts.”¹⁹⁵ He pointed out that “there are two or three or even more disparate communities of right-thinking persons whose differing ideologies and employment cultures are entitled to consideration when it comes to determining the justice of a particular case.”¹⁹⁶

This underscores the problem created by an influx of representatives and grievants with no background in labor relations and oriented towards seeing employment problems as isolated cases. An inexperienced

191. Mediation Service, *supra* note 51, at 1.

192. *See id.* at 2.

193. *Id.* The importance to unions of the relationship can be seen in the following checklist for a union considering whether to seek an injunction: 1) whether this is more of an industrial dispute than a legal matter; 2) the relative speed of procedures; 3) whether there is an ongoing relationship between employer, employee, and union; 4) the existence of any time or statutory limits; 5) prospects of success under different procedures; 6) whether equity and good conscience support the claim; 7) the nature of an employer as an opponent; 8) the existence of favorable precedent; 9) costs; 10) who bears the burden of proof; 11) the past record, reputation and history of the employer; 12) the employer's financial situation; and 13) union policy. *See* Peter Fenton, *Preparation and Advocacy: Injunctions / Interim Orders 1* (Sept. 1993).

194. Mediation Service, *supra* note 51, at 3.

195. Judge C. Goddard, *Employment Contracts Bill*, Comments By the Chief Judge of the Labour Court 14.

196. *Id.*

enced practitioner might see a dispute as merely an individual's disagreement and as just a case, just something to be won, just something to generate income. A more experienced representative, in contrast, would understand the dispute was enmeshed and intertwined with the enterprise's viability.¹⁹⁷ What has thus come to exist is

an apriori [sic] system which attempts to place a monetary value on a failed employment contract. . . . In practice the Employment Tribunal has become little more than a clearing house for unjustifiably dismissed employees, with its primary role as [arbiter] of the labour market, deciding the economic worth of the unjustifiably dismissed.¹⁹⁸

With the relationship aspect of work now absent from the legislation, representatives are less likely to look at the long-term. In their training manual, Nicola Crutchley and Virginia Hardy tried to address this problem by emphasizing that although employment law is about employment contracts, attorneys must recognize that employment disputes operate within a framework of personal relationships within the workplace and beyond.¹⁹⁹ They observed that lawyers must recognize that a dispute is also about how to maintain, develop or sometimes dissolve the relationship.²⁰⁰ This requires recognizing the range of interests involved in achieving a practical and lasting relationship.²⁰¹

New entrant representatives operating in a contractual, rather than a relational regime, are less likely to understand that, in certain contexts, mediation—and even litigation—exist as a normal part of the adjustments necessary in an ongoing relationship, that they actually need not excite lasting acrimony.²⁰² It is easier to maintain cordial relations and

197. Cf. Sato, *supra* note 1, at 511-12.

198. Skiffington, *The Employment Tribunal*, *supra* note 80, at 56. Despite the changed nature of mediation, many mediators still talk as if the cases are relational, ignoring the reality of the process they are engaged in. As Service Workers Union representative Alastair Duncan put it:

It's the divorce settlement and yet you will still get a number, and in fact, just about every mediator, if you simply take a precis of what they say in the opening, you really would think that this is marriage guidance. That you had two equal parties with some strain in the relationship.

Well, if six months ago your violent partner throws you out of the house and you wait six months to go to marriage guidance. I've got a concern that this mediation process is in fact ignoring the enormous power imbalances that exist.

Interview with Alastair Duncan, *supra* note 105.

199. See Crutchley & Hardy, *supra* note 151, at 2.

200. See *id.*

201. See *id.*

202. An example of litigation not disturbing an ongoing relationship exists in environmental disputes. See Coglianese, *supra* note 185, at 737.

take a long term view when disputing takes place between organizations.²⁰³ In the LRA context, even though a personal grievance involved an individual employee and often a small employer, the central role played by representatives of the union and Employers Association shifted the process of disputing and resolution to a less personal one taking place between institutions. Their presence also meant that much grievance handling took place outside the arena of mediation and in a way that fostered the relationship. Union representatives acted as filters in determining which claims to file as grievances.²⁰⁴ They also were available to defuse and channel worker anger. In contrast, the purpose of the ECA in focusing on the individual makes disputes and mediation personal.²⁰⁵ Employer and employee representatives – even when they continue to be the Employers Association and a union – act as individual agents appointed to act in this discrete matter.

Some management consultants not only do not work to defuse and depersonalize disputes, they have actively encouraged anti-union, antagonistic attitudes among employers “and openly promote[d] union busting policies.”²⁰⁶ Work is so important to each of us—employer or employee—that when a dispute occurs it is easy for tensions to increase and for the dispute to become intensely personal, especially in a small company and under any system. An example can be observed in the Tangent Tanners submission on the ECA:

Small business succeeds on the backs of hard working enterpreneurial [sic] individuals and couples who are prepared to risk everything for a return that is often not commensurate with the effort. Such people rely on their wits to make it work and are unable to afford professional assistance when faced with any problem.

203. See *id.* at 749.

204. See Harbridge, Recent Industrial Disputes, *supra* note 72, at 9. Unions could act as a go-between:

A worker who has been unfairly treated may choose to go straight to the employer to talk about the problem. But this does not have to be done; the worker can go straight to the union – the shop steward if there is one or else the organiser. This should be done as soon as possible.

The shop steward or the organiser will talk to the employer. Their aim should be to solve the problem at this stage in the fastest possible way.

NEW ZEALAND AMALGAMATED ENGINEERING AND RELATED TRADES INDUSTRIAL UNION OF WORKERS, *supra* note 111, at 38.

205. Cf. Coglianese, *supra* note 185, at 753.

206. Gordon Anderson & Pat Walsh, *Labour's New Deal: A Bargaining Framework for a New Century?*, 18 N.Z. J. IND. REL. 163, 172 (1993); see also Janet Hector et al., *Industrial Relations Bargaining in the Retail Non-food Sector: 1991-1992*, 18 N.Z. J. INDUS. REL. 326, 332 (1993) (changes in representation in the retail sector).

In a typical case a worker who doesn't fit in the close knit small business team can hold the employer to ransom. No matter how wonderful the dismissal procedure [sic] may be it ignores the type of individual that operates our small businesses. They are not the type to enter into the charade of warnings and other bally hoo when an inadequate employee lacks the basic decency to admit that their face doesn't [sic] fit.²⁰⁷

Mediation under the LRA was designed for primary involvement by nonlawyers.²⁰⁸ Procedures were less formal.²⁰⁹ The law provided that no case should fail for want of form, and outcomes depended as much on equity and good conscience as law.²¹⁰ ECA mediation is not a comfortable forum for nonlawyers. Now, if a grievant fails to file proper formal pleadings, the case must be amended and refiled.²¹¹ Where before matters might be handled through phone calls, the ECA requires the parties to reduce everything to writing, so that five to ten page statements of facts are now common.²¹² Union and employer representatives feel that it was easier to resolve matters informally and more quickly under LRA mediation.²¹³

The presence of lawyers in this environment contributes to making the environment more legalistic.²¹⁴ Lawyers are trained to resolve disputes in a formal environment, while union and Employer Association

207. M. J. Pausina, Submission to Labour Committee from Tangent Tanners Limited (Feb. 5, 1991) (on file with author).

208. See Interview with Alastair Duncan, *supra* note 105.

209. See *id.*

210. See DEEKS, *supra* note 22, at 381-85; see also, e.g., Interview with Alastair Duncan, *supra* note 105.

211. See Interview with Duignan and Donaldson, *supra* note 127.

212. See Interview with Alastair Duncan, *supra* note 105; Interview with Joyce Hawe, *supra* note 21.

213. See Interview with Joyce Hawe, *supra* note 21; see also Anna Dunbar, *Cards Today 'Stacked Against Employer,'* PRESS, Sept. 14, 1994, at 1. Small employers are also harmed by facing a more experienced representative, as was noted in an employer's experience under the LRA.

It is at this point that timely action by the Union concerned could clean up the problem but that does not happen. Instead the Union, used to dealing with employers with large numbers of people, goes straight to P.G. Claims, a process which the small businessman cannot understand and often cannot afford the time or money to find out about. From this point on the small businessman is dead meat in an environment that he can't [sic] understand, and at the mercy of a system that could not care less about him as the ritual is played out and the legislation followed to the letter by those who are well paid to do so.

Pausina, *supra* note 207.

214. See Labour Select Committee, Report of the Labour Committee on the Inquiry Into the Effects of the Employment Contracts Act 1991 on the New Zealand Labour Market 46 (1993) (Majority Report).

representatives were accustomed to greater informality. Union representatives see the Tribunal or Court as a last resort.²¹⁵ Lawyers have traditionally been trained to think more abstractly about cases and legal doctrine and to make more technical or legalistic arguments, as opposed to focusing on the role a particular dispute plays in that ongoing relationship,²¹⁶ and this is a reasonable response to contract legislation. Some mediators try to level the mediation playing field by requiring lawyers to use plain language so they can be understood by the nonlawyers involved in the mediation.²¹⁷ In some cases, such a requirement has put lawyers at a disadvantage because the lawyers became nervous or found it difficult to present their cases when required to use plain language.²¹⁸ The result is mediation as a clash, not only of disputants, but of cultures and language.

Unions have been forced to respond to these changes in law and representatives by hiring their own legal officers.²¹⁹ Non-union member employees have also sought out lawyers, because for them, the loss of employment is a high-priority problem in the depressed New Zealand economy. "With everything to lose (but probably already lost), they have invariably chosen to pursue financial compensation by legal means, and in doing so, have defeated the Act's intention to maintain a low-level system of dispute resolution."²²⁰

All this means is that ECA mediation is being shaped by employee groups and interests which were not part of the process in years past: by the entry of new sorts of representatives with little or no experience with workplace issues; by those with strong training in other disciplines which they then bring into mediation; by those with a contractual rather than a relational orientation; and even by those opposed to basic tenets of industrial relations.

c. New Methods of Paying Representatives

In debates on the ECA, MP Ian Revell praised what he anticipated

215. See Interview with Duignan & Donaldson, *supra* note 127. Even union lawyers tended to see cases differently from organisers. They might feel they needed to make a list of questions for the organisers because they felt organisers often missed details important to the lawyer. See, e.g., Interview with Lucy Highfield, *supra* note 130.

216. See Interview with Duignan and Donaldson, *supra* note 127.

217. See Interview with Joyce Hawe, *supra* note 21.

218. See *id.*

219. See Interview with Alastair Duncan, *supra* note 105; Labour Select Committee, *supra* note 214, at 46.

220. Skiffington, *The Employment Tribunal*, *supra* note 80, at 56.

would be the informality and accessibility of the ECA and said that the Government was not interested in providing a "lawyers' feast."²²¹ Of course, it did just that. New representatives were attracted to mediation as a lucrative new source of income. Some, more prescient than MP Revell, predicted just this outcome.²²² The question of how the lawyers would be paid didn't trouble the ECA's theoreticians, but the reality for most workers is captured in a submission on the ECA written by Harry Harris, a grocery store clerk with two young children.²²³ He explained that he grossed \$NZ339 a week, including overtime, and netted \$NZ270.²²⁴ This was \$NZ50 less than he could receive on the dole.²²⁵ Like Harris, most employees could afford union representation which cost about \$NZ1.50-\$NZ4.00 a week but, as Harris observed, he could not afford to pay the representatives that were supposed to enter the market.²²⁶

As the level of union membership has declined, union representation is less available. In the main, unions, which are struggling financially, are not willing to represent a grievant who is not already a member.²²⁷ For people like Harris, there is less access to unions, less ability to

221. See PARL. DEB. (2d Sess.) 1463 (1991) (N.Z.).

222. See Memorandum from Stockdill & Martin, *supra* note 163, at 2.

223. See Letter from Harry J. Harris to the Labour Select Committee (Feb. 8, 1991) (on file with author).

224. See *id.*

225. See *id.*

226. See Jane Adams & Carol Brown, *A Warning: Why You Must Belong to NZNO*, NURSING NZ 33 (Apr. 1995); Philippa Branthwaite, *Who Gives You the Best Deal?*, NZ NURSING J. 9 (July 1991). Karen Roper, Public Service Association Assistant General Secretary for Research and Publicity, observed that the union was initially concerned about handling personal grievances if demand for them were to grow, as seemed likely. See Karen Roper, *The New Act's Effects on Public Sector Employees 7* (paper for Longman Professional Conference on the Employment Contracts Act, May 8, 1991). She was confident that the union could keep the basic membership fees low and still guarantee a basic level of service to all members, allowing the nonprofit PSA to compete with lawyers and private agents. See *id.*

227. Unions vary in their willingness to assist a nonmember worker. Some refuse, while others are willing to help if they have the time. Those with a general policy of refusing may provide assistance if it seems likely to further union goals, such as organizing a plant, or because the case involves an important point of law. See Interview with Graeme Clark, *supra* note 107; Interview with Duignan and Donaldson, *supra* note 127; Interview with Joyce Hawe, *supra* note 21; Interview with Lucy Highfield, *supra* note 130. Not all people who join unions want to start a formal personal grievance process, but most realize they may want union support in negotiating employment conditions or supporting them in workplace disputes.

I suppose it's the other end of the spectrum to the debate as to why people join unions.

They don't join the Service Workers Union for a health insurance program. They don't join for our superannuation program. I think most people who join the Service Workers Union also don't join for color television or for a finance plan or for a wine club, which other unions have promoted. People join because, at the end, of the day they've either

pursue a grievance within a more formal, legalized process, and no ability to pay a representative whose fees could be higher than any recovery.²²⁸ For people with low wages and thus no likelihood of a large recovery, even with the recent development of contingent fees may not provide access.²²⁹ If lawyers' presence shapes the system into one in which having a lawyer becomes necessary to success, then those whose cases cannot attract a lawyer – because the grievant cannot afford a lawyer or the case is unlikely to generate a large enough award – will be—and are being—shut out of the system.²³⁰ Many wage earners who are not members of unions are not taking cases to mediation, because they cannot afford to.²³¹

On the other hand, the cost of the new representatives has been a factor pushing settlement, especially when the worker is represented by a union. A mediator can explain to an employer that the case has so far cost it several thousands of dollars and will cost more, whereas, the union member is paying only a \$NZ4 weekly fee and is not getting a lawyer's bill.²³² If an employee is represented by a lawyer, the high fees put pressure on the worker to settle quickly.²³³ Unions have tried to advertise membership as providing cheap representation in the case of a personal grievance,²³⁴ but the slide in union membership has nonetheless contin-

got a problem or they can perceive that they need someone to stand along side them and, if necessary, give the boss the fingers.

Interview with Alastair Duncan, *supra* note 105.

228. See Interview with Duignan and Donaldson, *supra* note 127. ECA monetary remedies are so low they should provide almost no incentive to pursue a grievance and on the employer's part not to settle immediately. A worker who has been discharged might still file a personal grievance to gain reinstatement. Reinstatement, however, has always been uncommon. Under the LRA, reinstatement was the primary remedy for an unjustified dismissal. See LRA § 228(1). However, it was only ordered in 17% of cases; the ECA does not give reinstatement primacy as a remedy, and reinstatement is ordered in only 4.4% of successful adjudicated grievances. See Christine French & Paul Tremewan, *Empl. L. Update* 40 (Nov.-Dec. 1994) (N.Z. L. Soc. Seminar). This very low level of reinstatement means grievances are less a makewhole remedy than a vehicle for making transfer payments from employer to employee. See *id.*

229. See MacDonald, *supra* note 87, at 28-29. The complex array of ways in which lawyers and consultants are paid merits further study. Experience with United States civil cases suggests that hourly fee arrangements can have an impact on the way cases are conducted but so can the side an attorney represents. See Herbert Kritzer et al., *The Impact of Fee Arrangement on Lawyer Effort*, 19 L. & SOC'Y REV. 251, 262-64 (1985).

230. See Labour Select Committee, *supra* note 214, at 46.

231. See *id.*

232. See Interview with Alastair Duncan, *supra* note 105. An employer's lawyer told the union representative his fees were \$NZ30,000 for a case involving a two-day hearing. See Skiffington, *The Employment Tribunal*, *supra* note 80, at 56.

233. See Interview with Duignan and Donaldson, *supra* note 127.

234. See, e.g., Membership pamphlets and advertisements from the Service Workers Union, Engineers Union, and Public Service Association (on file with author).

ued.²³⁵

In fact, some unemployed grievants do pay representative's fees.²³⁶ Factors driving this include not only the dramatic drop in union membership,²³⁷ but also the influx of new employees entitled to bring personal grievances.²³⁸ These are mainly higher level employees and managers who have no history of union representation, who are more accustomed to lawyers, and who also can afford lawyers fees.²³⁹

The form of representatives' payment can influence the process of mediation. Under the LRA, employer industry groups provided representation and advice as a benefit of membership, just as unions represented workers.²⁴⁰ When employer and union representatives were paid a salary, they had an incentive to resolve problems as quickly as possible to lower their case loads. The new representatives who bill hourly lack such an incentive to early resolution,²⁴¹ because they can benefit from more procedural formality and slower settlements.²⁴² Hourly paid representatives will not necessarily cause delay to pad their bills; they may feel they need to appear strong and aggressive in the hope of being retained in future cases.

d. Changes in Tribunal Adjudication

Although the focus of this article is substantive law's impact on mediation, there were changes in procedure that also contributed to altering the nature of mediation under the ECA. What is particularly interesting is that some seemingly less significant procedures made out-size contributions to transforming employment mediation in New Zealand. Among these are matters such as making a transcript and the scope of appeal from Tribunal adjudications. In LRA mediation there

235. For a discussion of the ways in which the ECA has decreased union membership, see DANNIN, *WORKING FREE*, *supra* note 20, at 167-303.

236. Ian Bray, the Hotel Association's executive director, yearned for a return to pre-ECA days when "most disputes were settled amicably and swiftly because there was little or no financial benefit to union delegates to prolong disputes." Dunbar, *supra* note 204, at 1.

237. See Interview with Graeme Clark, *supra* note 107; Interview with Duignan and Donaldson, *supra* note 127; Interview with Joyce Hawe, *supra* note 21; Interview with Lucy Highfield, *supra* note 130.

238. See GARDINER, *supra* note 61, at 6.

239. See Labour Select Committee, *supra* note 214, at 45.

240. See Interview with Joyce Hawe, *supra* note 21.

241. See *id.* In the past union and employer negotiators knew each other and worked together. Now lawyers take the view "let's make a quid out of it!" MacDonald, *supra* note 87, at 28, 30.

242. See Interview with Duignan and Donaldson, *supra* note 127; Interview with Alastair Duncan, *supra* note 105; Kritzer, *supra* note 229, at 570.

was no sworn evidence nor transcript.²⁴³ The committee composition and process required the parties to be actively engaged in seeking an agreed settlement.²⁴⁴ If none was reached, the committee made a majority decision, which in splits meant following the mediator's decision.²⁴⁵ A de novo appeal could be taken to the Labour Court, so the parties entered mediation knowing they could retry the case there.²⁴⁶

The need to record evidence in adjudications because appeals are no longer de novo means the Employment Tribunal needs more equipment and staff. This makes it harder to arrange a hearing at short notice and makes the Tribunal a place that is increasingly formal and legalistic.²⁴⁷

The ECA made Employment Tribunal arbitration decisions binding, with appeal only on points of law.²⁴⁸ The Clerical Workers Union correctly predicted this would make mediation a more formal, adversarial process.²⁴⁹ It contended that the value of mediation was in promoting settlement through an "informal and frank atmosphere" which was essentially a "mediated negotiation."²⁵⁰ It further argued that "[t]he functions of Mediation and final tribunal of facts are simply not compatible" and predicted that the change would lengthen mediation hearings, require lawyers, and increase expense and time.²⁵¹ Labour Court Chief Judge Goddard expressed strong reservations about giving binding adjudicative powers to mediators, many of whom lacked legal training: "They will be the only statutory adjudicators with such far-reaching powers who are not required to meet criteria of legal qualification and minimum experience."²⁵²

Although binding adjudication occurs after mediation, this change in the personal grievance process has transformed mediation into a pre-

243. See Neville Taylor, *The Employment Tribunal — Is There a Better Way?*, EMPL. L. BULL. 102 (Sept. 1996).

244. See *id.*

245. See *id.*

246. See *id.*

247. See Labour Select Committee, *supra* note 214, at 46.

248. See ECA § 104.

249. See New Zealand Clerical Workers Union, Submission to the Labour Select Committee on the Employment Contracts Bill 29 (Feb. 1991) (on file with author).

250. *Id.* at 40.

251. *Id.* at 29.

252. Goddard, *supra* note 195, at 16. Minister of Labour Bill Birch described the new mediators' backgrounds: Tribunal members are not required to be legally qualified. They are appointed based on specialist expertise and knowledge in industrial relations and applying employment law. These skills can be acquired in many ways, not solely legal education. Five have legal qualifications, many came from the Mediation Service, and the rest have extensive industrial relations experience. See 43 PARL. DEB. (2d Sess.) 4550 (1991) (N.Z.).

trial process. Discovery is not available for personal grievances,²⁵³ so those interested in winning grievances rather than resolving them use mediation for discovery.²⁵⁴ This makes the parties less open during mediation and makes settlement more difficult. United Food and Beverage Workers Union representatives Neville Donaldson and Campbell Duignan described the situation in the Dunedin area as follows:

ND: I have had instances where I have presented my argument in mediation. The employer or the lawyer have taken an immediate adjournment and then have advised the adjudicator or the chairperson that they have no wish to settle and will not be reappearing and just gone on and said this goes to adjudication. And then they have gone away and presented their case based on the facts presented.

CD: Just used it as is a fishing expedition basically.

ND: Yeah. So when I approach mediation now I approach it on the basis of providing the absolute minimum of argument, if you'd like, that I think is necessary if they're there to genuinely settle the case to resolve it. I do not as a practice present all my argument at mediation. I will always keep one or two key issues that I think are important up my sleeve in case I'm up against an employer who has no intention of settling.²⁵⁵

Service Workers Union representative Alastair Duncan had similar experiences in the Wellington area: "What it does raise is the question of whether you play all your cards in the mediation process."²⁵⁶

Even lawyers have criticized this development:

Establishing a contractual system of employment relations has led to increased formality and the diminishing role of unions has left employees with no option but to engage the services of lawyers or advocates to resolve their employment disputes. Mediation at the Tribunal has become a legal forum where advocates with vested economic interests argue against each other from prepared mediation statements, acting out choreographed tactical exchanges designed to assess the op-

253. See Phillipa Muir, *Effect on Personal Grievance and Sexual Harassment* 11. For an example of how lawyers were advised to handle cases, see French & Tremewan, *supra* note 228, at 24-51.

254. See Interview with Duignan and Donaldson, *supra* note 127.

255. *Id.*

256. Interview with Alastair Duncan, *supra* note 105.

position's arguments rather than resolve the dispute.²⁵⁷

Even if settlement is unlikely, mediation cannot be avoided because participating in it is the only way to get a timely adjudication hearing.²⁵⁸ In these cases, mediation is not filling the role intended for it and ties up mediation resources unnecessarily.

3. Increased Filings and Delay

The key complaint heard about mediation is that it now takes much longer than under the LRA. Despite having doubled the number of Employment Tribunal members—roughly reflecting the increase in those able to file PGs under the ECA—case filings have so increased that the Tribunal remains seriously backlogged.²⁵⁹

Before the ECA, mediations usually took place in a week to a month following a request.²⁶⁰ Organiser Neville Donaldson explained:

If I had to wait more than a week I was absolutely bloody raving. Raving. If I had a case, I'd ring Walter Grills, who is our local mediator. Now if I couldn't get him to that factory, right there and then, I would expect he would be hearing [us] within a day at his offices.²⁶¹

In 1990, employer Carter Holt Harvey complained that a few cases under the LRA had taken as long as three months to get a hearing scheduled.²⁶² Now waiting periods in the largest urban areas are three to nine months for mediation.²⁶³ In less urbanized areas, delays can be as much as eight months for mediation.²⁶⁴ One lawyer noted: "Of particular concern is the recent increase in withdrawals (up to 47% for adjudications), which may indicate applicants are just giving up on the proc-

257. Skiffington, *There Must Be a Better Way*, *supra* note 24, at 24.

258. See Interview with Duignan and Donaldson, *supra* note 127.

259. See Skiffington, *There Must Be a Better Way*, *supra* note 24, at 23-24; see also Dumbleton, *supra* note 176, at 24; Interview with Graeme Clark, *supra* note 107; Interview with Duignan and Donaldson, *supra* note 127; Interview with Alastair Duncan, *supra* note 105.

260. See Interview with Joyce Have, *supra* note 21; Interview with Duignan and Donaldson, *supra* note 127.

261. Interview with Duignan and Donaldson, *supra* note 127. Others shared Neville Donaldson's view. See Interview with Graeme Clark, *supra* note 107; Interview with Joyce Hawe, *supra* note 21.

262. See Carter Holt Harvey Ltd., Submissions to the Parliamentary Select Committee on the Employment Contracts Bill 24 (1991).

263. See Skiffington, *There Must Be a Better Way*, *supra* note 24, at 23-24; Dumbleton, *supra* note 176, at 24; Interview with Duignan and Donaldson, *supra* note 127; Interview with Alastair Duncan, *supra* note 105.

264. See Taylor, *supra* note 243, at 101.

ess.²⁶⁵

No doubt some of the delay is caused by doubling personal grievance jurisdiction. Most of the Employment Tribunal's work involves personal grievances concerning unjustified dismissal. In the year ending June 1996, eighty-four percent of the cases mediated or adjudicated were personal grievances for unjustified dismissal.²⁶⁶ This does not, however, fully explain the delay. Doubling personal grievance jurisdiction does not mean doubling all Tribunal work. Under the ECA mediators also lost certain sorts of jurisdiction and other sorts of cases have declined as a result of the decline in collective bargaining.²⁶⁷ The number of mediators has been doubled, though certainly some backlog resulted from the government's failing to appoint mediators from the ECA's effective date of May 15 till August 19, 1991.²⁶⁸ Some of the backlog and delay is also likely attributable to the fact that the fourteen people appointed to the Tribunal included only eight former mediators.²⁶⁹ Thus when mediators were finally appointed, only half were experienced mediators.²⁷⁰ In 1994, additional members were appointed to bring the Tribunal to twenty-four full-time equivalents, but only fifty percent had a mediation background.²⁷¹

In addition to these problems, some of the delay appears attributable not just to more potential grievants but to the fact that the new jurisdiction brought different sorts of employees into mediation—members of middle management, many of whom were affected by workplace restructuring and whose cases tend to be more complicated

265. Skiffington, *The Employment Tribunal*, *supra* note 80, at 55.

266. See Harbridge, *Recent Industrial Disputes*, *supra* note 72, at 8.

267. A major part of the mediator's work under the LRA involved mediating disputes of interests. See LRA §§ 132-151. The ECA contains no such provision.

268. During the ECA's drafting, Industrial Relations Service Manager Ralph Stockdill and Assistant State Services Commissioner D.J. Martin noted that extending jurisdiction meant a commitment to providing an adequate forum: "[c]learly the resourcing implications for the Mediation Service and Labour Court are considerable." Memorandum from Stockdill & Martin, *supra* note 163, at 5; see also GARDINER, *supra* note 61, at 2.

269. See Rebecca Macfie, *Legal, Industrial Mix on Tribunal*, NAT'L BUS. REV., Aug. 14, 1991, at 3; 43 PARL. DEB. (2d Sess.) 3981 (1991) (N.Z.).

270. See GARDINER, *supra* note 61, at 2. It had less work conciliating disputes of interest. See *id.* at 2-3. Some ECA supporters believed that most would opt out of the statutory procedures because they would be too slow. See 43 PARL. DEB. (2d Sess.) 1458 (1991) (N.Z.). This suggests that adequate resources were not provided, because the government thought they would not be needed. The problem of delay and its linkage to insufficient mediators continues. The 1996 Coalition Agreement between the National and the New Zealand First Parties. Coalition Agreement – Policy Area: Industrial Relations (Dec. 6, 1996) item number six stated that it would boost resources for Employment Tribunal and Court.

271. See Skiffington, *The Employment Tribunal*, *supra* note 80, at 55, 57.

and take more time than “wage earners’ cases.”²⁷² These cases had more money at stake, and the grievants had a greater propensity and ability to use attorneys²⁷³ – all of which contributes to delay.

Delay has also been caused by the complex task of trying to interpret and apply radically different legislation, which also had serious drafting flaws.²⁷⁴ Throughout the period unemployment has been high,²⁷⁵ making employees less able to find alternative employment after a termination. This made them more interested in pursuing a grievance rather than moving on. Even more important, the government introduced a six month bar from receiving unemployment benefits if termination was justified at the same time the ECA was enacted.²⁷⁶

Delay is a serious problem for grievants who have been dismissed. Not only do they lose pay, but, as time goes by, reinstatement becomes less likely. Over time an employer may restructure a job out of existence or the employee may find a new job and not want to return to what is seen as an abusive situation.²⁷⁷ Delay frustrates and demoralizes the grievant, friends, and family,²⁷⁸ as well as affecting other employees in the workplace.²⁷⁹ As time passes they lose any connection between the harm suffered, their own rights, and the efficacy of law.²⁸⁰ The situation is not likely to improve. There is strong pressure to transfer ECA jurisdiction to the common law courts,²⁸¹ where delay is much greater.²⁸² This will further decrease the value of personal grievances to employees.

272. See Labour Select Committee, *supra* note 214, at 45.

273. Lawyers cause delay by making formal, legalistic arguments and because it is more difficult to reschedule a case quickly. *See id.*

274. The ECA was drafted to embody an ideology. Its drafters assumed that all problems would be resolved by the market. *See generally* DANNIN, *WORKING FREE*, *supra* note 20, at 88-114, 304-15.

275. *See id.* at 88. “239,700 jobless out of a working-age population of 2,219,500 with no sign of improvement.” *Id.*

276. *See* N.Z. Employers Fed’n, Submission to the Labour Parliamentary Select Committee on the Review of the Employment Contracts Act 1991, at 16 (May 26, 1993). The NZEF argued that delay and the increase in cases was not due to employers acting more aggressively but, rather, to increased Tribunal jurisdiction and removing the *de novo* appeal to the Court, as well as increased employee incentive to file personal grievances. *See id.*

277. *See* Interview with Alastair Duncan, *supra* note 105; Interview with Joyce Hawe, *supra* note 21.

278. *See* Interview with Duignan and Donaldson, *supra* note 127.

279. *See* Interview with Alastair Duncan, *supra* note 105.

280. *See id.*

281. *See* Anderson, *The Judiciary*, *supra* note 89; *see also*, Anderson, *Further Reforms*, *supra* note 89, at 2.

282. *See* French & Tremewan, *supra* note 228, at 24, 27.

II. DISCUSSION

When the ECA was pending in Parliament, Electricity Corporation asserted that mediation and adjudication were distinctly different: "A mediator will have a good idea of what is acceptable to the parties, whereas the Court will consider what is correct according to the wording of the award or agreement."²⁸³ This, it predicted, would necessarily produce different results from mediation and adjudication.²⁸⁴ A similar view, that mediation is an immutable dispute resolution process and one which is wholly different than litigation, is currently a powerful force shaping how disputes will be resolved in the United States. Will establishing mediation as an institution in the United States trial system improve the administration of justice? Is the popular view, which has prompted this trend, correct in its conclusions and assumptions?

Experience in New Zealand has certainly not borne out this clean division. Virtually identical institutionalized mediation processes operated under the LRA and ECA. Under the LRA it was an informal, inexpensive, and expeditious method for resolving personal grievances, but operated under the ECA it was a more formal, more costly, slower, and less satisfactory process. The ultimate conclusions to be drawn from this experience is that mediation and adjudication are merely different ways of disputing. They are both highly dependent on their contexts and are both affected by forces including contextual changes in substantive law, resources such as the number of judges, procedural devices such as discovery, greater or less difficulty in preparing one's case, and scope of appeal, changes in the sorts of litigants covered by the substantive law, and who representatives are and how they are paid. The New Zealand experience can provide useful insights into how such an institutionalized system is likely to operate in the United States.

More interesting than the fact that delay and other changes have resulted from the change in legislation is how these effects flowed from the changes. For example, it is obvious that extending jurisdiction to give more people access to file grievances and then delaying appointing any mediators for three months will cause a backlog and delay. Appointing additional mediators should have relieved the problem by now, but it has not. One reason appears to be that the ECA did not just double access; it brought in different sorts of grievants. These executives, manag-

283. Electricity Corporation of New Zealand, Submission to the Labour Select Committee on the Employment Contracts Bill 14 (Feb. 1991).

284. *See id.*

ers, and more highly paid workers formerly took their more complex and higher liability employment disputes to the High Court. These new grievants (and other sorts of grievants as well) brought lawyers and consultants into mediation, and these new representatives lacked experience with employment law and how to resolve workplace disputes. The new representatives and grievants have a wholly different approach to workplace problems. They have introduced formal, more lawyerly procedures and a short-term contractual case orientation. They tend to see personal grievances as legal cases rather than as problems in long term relationships that should be addressed through bargaining. This view is consistent with and is reinforced by the ECA itself, which conceives of grievances and disputes as a termination or breach of a contract rather than as a normal process within a relationship that nonetheless can continue if the problem is properly approached.

It is also true that problems such as greater formality can be attributed to the influx of lawyers into ECA mediation. This has also been affected by the change in the scope of appeal – the sort of subject that sends law students into a stupor but which practitioners quickly find shapes how cases are tried and appealed – or not.²⁸⁵ As Christchurch lawyer Neville Taylor observes:

Most persons who have had more than fleeting involvement with the Employment Tribunal would not describe the way it operates in adjudication as being “low level” or “informal”. [sic] Through no fault of the Tribunal, the procedures have, to varying degrees, become quite legalistic and formal. Such an approach is time-consuming, expensive, and less “user friendly” to the lay-person. Within the existing structure, there is probably no escape from such developments. The statute, despite pretensions to the contrary, requires a degree of intrinsic formality and legal procedure. The statutory design of the adjudication role and the prospect of appeals to the Employment Court mean that the Tribunal cannot effectively deliver the degree of informality that is desirable.²⁸⁶

Removing the *de novo* appeal means that some may use mediation for discovery rather than settlement. Once mediation becomes a place to do discovery and improve one’s chances at adjudication the other party must approach mediation with this understanding and hold back information that if revealed in a mediation context might achieve settlement.

285. See, e.g., Engle Merry, *supra* note 8, at 2065-66.

286. Taylor, *supra* note 243, at 102.

Lawyers and consultants were welcomed into ECA practice on the grounds that this would offer choice and improve the process. In fact, it has meant a change in how many mediation representatives make their living. Representatives in LRA mediation were mainly paid on a salary basis, which gave them an incentive to resolve problems as quickly as possible to lower their case loads. The new representatives who bill hourly lack any incentive to resolve the case early²⁸⁷ and may even have incentives to delay a case, either to increase their pay for a case²⁸⁸ or to persuade the client that one is an aggressive representative who should be retained or recommended in future cases.

The ECA's institutionalization of mediation and adjudication in the Employment Tribunal means that parties are less likely to conceive of mediation as something apart from the legal system. Disputants' views of what they ought to get is necessarily shaped by what they think their rights are, which is shaped by what they think the law is, and, to some degree, what the law actually is. When mediation is institutionalized as a step in a formal legal process, conceptions of law and legal rights are ever present and likely to influence party behavior.²⁸⁹

The decline of unions and the ongoing negotiation of workplace relationships means that most personal grievances are truly personal, unrooted, and without any perceptible relationship to larger communal issues or to negotiations past or future. This makes mediation more of a docket clearing process than a means of achieving just resolutions.²⁹⁰ ECA law is about labor markets filled with buyers and sellers of labor power; it rejects employment as a relationship. The ECA's focus is on the moment of contracting, not on fostering ongoing employee-employer interactions. This transformation means that parties to ECA mediation, rather than being bargaining partners, are now opponents, who have little to gain from cooperation.

Keeping the procedural steps the same but eliminating a role for unions within ECA personal grievances means removing unions as grievance screeners engaged in early intervention and resolution. Unions no longer have a workplace presence to police compliance with

287. See *supra* note 240 and accompanying text.

288. See *supra* note 241 and accompanying text.

289. See Jacqueline Nolan-Haley, *Court Mediation and the Search for Justice Through Law*, 74 WASH. U. L.Q. 47, 65-66 (1996). Attention to the law is unavoidable. Unless parties know what the law is they cannot make informed decisions, and unrepresented grievants are likely to be uninformed grievants. See *id.*; see also Marc Galanter & Mia Cahill, "Most Cases Settle": *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339 (1994).

290. See Nolan-Haley, *supra* note 289, at 86 n.87.

workplace terms or to provide expertise and support that can keep a personal grievance from becoming solely personal and destructive.

This raises the intriguing realization that hidden within the LRA was a more important form of ADR than mediation, and that was collective bargaining. Collective bargaining resembles legislation because it is a way to resolve disputes on a broader and more amicable basis than individual litigation. Collective bargaining's very nature means taking a collective, social, and long-term view. It means always being aware of the relationship at the core of the dispute and trying to resolve disputes in a way that does not imperil that relationship. This consciousness of the parties' relationship as the context within which the dispute exists is a quality often ascribed to mediation.²⁹¹ Collective bargaining, including contract negotiations, informal workplace dispute resolution, and even strikes were ways of dealing with workplace problems that prevented many from ever reaching the stage of a formal filing. With the loss of collective bargaining in New Zealand and the loss of collective bargaining as a form of dispute resolution, there has been a greater juridification of the employment relationship.

This insight is directly relevant to experience in the United States. As collective bargaining has declined, a more adversarial and atomized form of dispute resolution has evolved through the expansion of common law doctrine and the enactment of statutes to protect workers from employer actions that are seen as violating public policy. These new causes of action and protections now form a dazzling and rapidly expanding array of tort and contract doctrines, whistleblower and anti-retaliation statutes, and anti-discrimination laws. As has been the case in New Zealand, these causes of action focus on the individual but, in doing so, fail to promote the long term employment relationship.

A similar trend has occurred in the United States as a decline in union presence has been accompanied by increased workplace legislation and regulation. United States employers, unhappy with these increased rights, have tried to cut off access to the courts through the use of disclaimers in handbooks and pre-dispute arbitration agreements.²⁹²

291. See Wissler, *supra* note 3, at 323-24, 347-48.

292. See, e.g., Robert N. Covington, *Employment Arbitration After Gilmer: Have Labor Courts Come to the United States?*, 15 HOFSTRA LAB. & EMP. L.J. 345 (1998); Lucille M. Ponte, *In the Shadow of Gilmer: How Post-Gilmer Legal Challenges to Pre-Dispute Arbitration Agreements Point the Way Towards Greater Fairness in Employment Arbitration*, 12 OHIO ST. J. ON DISP. RESOL. 359 (1997). See generally Steven L. Willborn et al., *Employment Law: Cases and Materials* 103-23 (2d ed. 1998); Lisa Bingham, *Arbitration Update, Labor and the Law: News and Current Events from the IRRS Section on Labor and Employment Law (LEL)* (Sept. 1998) <<http://128.174.170.20/irra/newsletters/199809.html>>.

State and federal courts have experienced an explosion of employment cases and have tried to siphon cases off into other dispute resolution modes that are seen as less expensive and more friendly than litigation.²⁹³ They have done so by liberally approving pre-dispute arbitration agreements and by establishing mandatory diversion to alternative dispute resolution.²⁹⁴ New Zealand employers have also reacted to increased filings of personal grievances by trying to create a workforce not subject to the ECA, by using fixed-term contracts and independent contractors and by attempting to amend the ECA to limit or eliminate the right to file personal grievances.

Unfortunately, none of these statutes, common law developments, mandatory or voluntary alternative dispute resolution procedures does or can do what negotiations and the presence of a workplace steward could do. They do not encourage early intervention and low-level resolution of cases in a way designed to foster the larger relationship. They bring no long-term view. They do nothing to depersonalize disputes. They are unable to achieve agreement on what matters most – the employer and employee working together, each receiving benefits from remaining in their relationship. In essence, all these attempts to substitute for the decline of collective bargaining and the disappearance of union presence are merely ways of cleaning up after the divorce. They are standards imposed on unhappy employers who feel driven to subvert them.

III. CONCLUSION

The experience with mediation under the LRA and ECA illuminates factors that affect how disputes can be resolved. It suggests that alternative dispute resolution methods, and mediation in particular, are not processes wholly different from adjudication. The factors that affect adjudication and make it less or more satisfactory – resources, access, and the quality of the substantive law – also affect mediation. There are many decisions to be made as to how such a system is to function. Clearly, having a judicial system and lawyers is not inferior to mediation and is not wholly separate from mediation; it is simply an altered iteration. Furthermore, the experience of mediation in New Zealand suggests that collective bargaining should properly be viewed as an important form of alternative dispute resolution capable of bringing posi-

293. See *supra* note 7 and accompanying text.

294. See *id.*

tive results to the participants.

APPENDIX

Comparing Personal Grievances Under the LRA and ECA

	LABOUR RELATIONS ACT	EMPLOYMENT CONTRACTS ACT
DEFINITION OF PERSONAL GRIEVANCE ("PG")	Unjustifiable dismissals and "other unjustifiable detrimental actions such as sexual harassment, duress, and discrimination"; or the worker's employment has been affected to the worker's disadvantage by an unjustifiable action by the employer. § 209(a), 210-14.	Unjustifiable dismissals; the employee's employment or conditions of employment have been "affected to the employee's disadvantage by an unjustifiable action by the employer"; that the employee has been discriminated against; that the employee has been sexually harassed; or that the employee has been subject to duress in relation to membership or nonmembership in an employees organization. <i>See</i> § 27.
RIGHT TO FILE PERSONAL GRIEVANCES	Only union members whose work was covered by an award or agreement <i>See</i> § 209(d), 216.	All employees. <i>See</i> § 27(1).
PROCEDURE FOR PURSUING PERSONAL GRIEVANCES	The employee or union may request a statement in writing of the reasons for dismissal. <i>See</i> § 225.	Within 60 days after being dismissed, an employee has a right to ask for a written statement of the employer's reasons. <i>See</i> § 38.
	The employer must provide the statement within 14 days. <i>See</i> § 225.	This must be provided within 14 days. § 38(2).
	PG commenced by submitting it to the employer "as soon as practicable after the grievance has arisen so as to enable the employer to resolve the grievance rapidly and as near as possible to the point of origin. Seventh Schedule. No. 2.	The employee must first submit the grievance to the employer within 90 days. Failure to do so means that the employer need not consider the grievance. <i>See</i> § 33(2), (3); First Schedule Nos. 2-3.

	If not resolved, and if the union determined that the grievance had substance, it would "take the matter up with the employer" — first verbally and then, if necessary, by submitting a "written statement setting out the nature of the grievance, the facts giving rise to it, and the remedy sought." Seventh Schedule Nos. 4-5.	If an employee's discussions with the employer fail to resolve the grievance, the employee must then submit a written statement setting out "the nature of the grievance, the facts giving rise to the grievance, and the remedy sought." First Schedule No. 4.
	The employer then responds within 14 days either by settling the grievance or with its own statement as to the facts and why it is not prepared to settle. <i>See</i> Seventh Schedule No. 6.	The employer then may grant the grievance or, within 14 days, "give the employee a written response setting out the employer's view of the facts and remedy sought." First Schedule No. 5.
MEDIATION	If unresolved, a mediator could be assigned to "assist employers and their representatives and workers and their representatives to achieve and maintain effective labour relations" and to assist the disputing parties to "solve the dispute". § 253(1), (2)(c).	If unresolved or if the employer fails to provide a written statement within fourteen days, the matter may then be filed with the Employment Tribunal. <i>See</i> First Schedule No. 7(b).
	The grievance committee would consider any evidence and then, usually by majority vote, decide how to resolve the matter. Seventh Schedule Nos. 9, 11.	The mediator provides mediation assistance. <i>See</i> First Schedule § 8. "Appropriate services that will facilitate the mutual resolution by parties to employment contracts of differences that arise between them;" and serves as a "low level, informal, specialist [body] to provide speedy, fair, and just resolution of differences between parties to employment contracts" when "mutual resolution is either inappropriate or impossible." § 76(b), (c).
	If the parties could not come to a resolution, the mediator or committee chair made the decision. <i>See</i> Seventh Schedule No. 11.	If necessary, the mediator can adjudicate the grievance based on the "written statements, evidence or submissions provided by the parties, and any other matters the mediator thinks fit." First Schedule No. 8.

APPEALS	Appeal is to the Labour Court, which could hear the case de novo. <i>See</i> Seventh Schedule Nos. 15-18.	Appeal is to the Employment Court which considers only issues, explanations, and facts presented to the Tribunal, except in special circumstances. <i>See</i> § 95(4).
INVOLVEMENT OF LAWYERS	Practicing lawyers are not permitted to participate in mediation. They may appear before the Labour Court.	Parties appearing before the Tribunal may be represented by any representative whom the party authorizes or by a barrister or solicitor. <i>See</i> § 90(1).