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Managers' Attitudes to Teleworking

GLENDASCHOLEFIELD* and SIMON PEEL**

Abstract

This paper investigates managers' attitudes to and perceptions of teleworking. Despite many predictions that teleworking would become a significant mode of work, evidence suggests that the uptake of teleworking has been much less than might otherwise be anticipated. It is suggested that managerial resistance may play a part in this. This study surveyed 123 managers in marketing firms in New Zealand and followed this up with eight in depth interviews. It is clear that while managers overwhelmingly report positive attitudes towards the concept of teleworking they have significant concerns which affect their actual usage. This paper contributes to our understanding of these contradictory attitudes on the part of managers and suggests further avenues for research.

Keywords: Teleworking, managers' attitudes, human resource management.

Introduction

It is more than 30 years since futurist Alvin Toffler pointed to the absurdity of "ship(ing) millions of workers back and forth across the landscape every morning and evening" (1970: 4). Since then, writers such as Charles Handy have predicted that one third of employees would be working from home by the turn of the century. While in some workplaces teleworking is not uncommon, at least in an ad hoc opportunistic way, as a new form of work teleworking has not caught on nearly as much as has been predicted. While accurate figures are difficult to attain, research shows that only six percent of the EU workforce teleworks (Sanchez, Perez, Carnicer & Jimenez, 2007) and the UK figure is lower at four percent (Lupton and Haynes 2000). This article explores the role that manager's attitudes and perception play in teleworking adoption, and how these might go some way towards explaining why teleworking has not enjoyed the widespread adoption that might have been anticipated. It investigates managers as key stakeholders and decision makers in the utilisation of and effectiveness of teleworking arrangements. It suggests that while managers may express support for and endorsement for the concept of teleworking, in practice there are myriad reasons why they may not want to enable its use in practice.

Broadly speaking, teleworking is the concept of employees conducting their tasks by means of communication technologies from a location other than the usual workplace. Other terms have similar meanings and are often used interchangeably, although teleworking and telecommuting have been mostly used in the literature (Baruch and Yuen, 2000). As we study managers' attitudes towards and perceptions of a particular mode of working, we use the term 'teleworking' in alignment with by other researchers in the field (for example, Sanchez et al., 2007; Morgan 2004). We define it as '*paid employees who conduct their tasks from home at least one day per week, using communication technologies to do so.*'

* Glenda Scholefield is post-graduate student at Unitec and Product Manager at ASB Bank.

** Simon Peel is the Dean of Research at the Unitec Institute of Technology. speel@unitec.ac.nz

The concept of teleworking became a popular topic for academic discussion following the 1970's world oil crisis, when alternatives to traditional commuting were suddenly of great importance (Baruch & Yuen, 2000). Over the next two decades, interest in teleworking reappeared in conjunction with various significant occurrences, for example the advent of the new style of human resource management practices of the 1980s and the trend towards flexible employment practices as one way to achieve competitive advantage (Lim & Teo, 2000; Haddon & Brynin, 2005; Sanchez et al., 2007). Teleworking became more viable with the technological advances of the 1990s – particularly the fast-growing commercial and domestic usage of the Internet and email (Siha & Monroe, 2006). Teleworking is attracting even more attention in the twenty-first century, with issues such as traffic congestion, pollution and work-life balance gaining prominence and contributing to its contemporary relevance (Harpaz, 2002). With the ongoing fast-paced developments in technologies, teleworking will become even more accessible and affordable (Roukis, 2006; Kowalski & Swanson, 2005; van Winden & Woets, 2004). For example, the number of Western households with broadband Internet is rapidly expanding, particularly where purchasing decision-makers are educated professionals (Dwivedi & Lal, 2007; Gill, 2006; Halal, 2004). Trends indicate that employees and employers will increasingly prefer or insist on flexibility (Johnson, 2004; Rosendaal, 2003; Canny, 2002). Also, organisations today need to be responsive to a dynamic market in order to be successful or even just to survive (Schoemaker & Jonker, 2005; O'Keeffe, 2002).

Given this, it could be expected that teleworking would become a common mode of employment. However, the predictions of renowned futurists such as Alvin Toffler and Charles Handy of widespread use to teleworking have not come to pass (Ndubisi & Kahraman, 2005). In 2000, only six percent of the European Union workforce was teleworking (Perez, Sanchez, Luis Carnicer & Jimenez, 2004). Even the United Kingdom's National Economic Development Office's 1986 prediction that 10-15 percent of the country's workforce would be working from home by 1995 has proved to be greatly overestimated. According to the 1997 British Labour Force survey, the actual figure in 1995 was only four percent (Lupton & Haynes, 2000). However, evidence points to growth in teleworking in more recent years. For example, the number of employees in the United States whose employer permits them to work away from the office at least one day per month increased 63 percent between 2004 and 2006 (Telework Trendlines, 2007).

The study of teleworking is of considerable contemporary importance. In Western nations, where a service-based knowledge economy has overtaken the traditional manufacturing-based economy (Hill, 2005; Green, 2003), there is potential for teleworking to become more common. Yet, until as recently as the late 1990s, there were very few robust scholarly studies conducted in the field, due at least in part to the lack of consensus on an exact definition of the concept (Kowalski & Swanson, 2005; Mokhtarian, Salomon & Choo, 2005; Harris, 2003). Of the research that has been done in the area, most has focused on the individual teleworker (Bailey & Kurland, 2002). Although this has resulted in some valuable insights, there remains a lack of research from a management perspective (Perez et al., 2004).

Lupton and Haynes (2000) state that it is somewhat of a mystery why teleworking has not become widespread, as organisations benefit from increased productivity as well as saving on many of the costs incurred in running an office. Robert and Borjesson (2006) point out that firms that support teleworking improve their environmental profile. Other advantages for employers include being better-able to offer customer service outside of traditional business

hours, attract and retain skilled staff in a tight labour market and respond to the changing demographic such as the increase of women in the workforce (Morgan, 2004; Ahmadi, Helms & Ross, 2000).

On the negative side of the equation is the lack of social interaction causing feelings of isolation – and the risk of this resulting in decreased job satisfaction and company loyalty (Perez, et al., 2002b; Wicks, 2002; Ward & Shabha, 2001). Another disadvantage is the lack of company support for the employee. One survey found that over 30 percent of teleworker respondents stated that the lack of support, including technical assistance, was a disadvantage of working from home. The same study identified that difficulty in maintaining focus at home was a problem for some, but that this appeared to be dependent on the particular home environment (Mann, Varey & Button, 2000). However, many believe that if a teleworking programme is implemented properly, the advantages far outweigh the disadvantages (for example Carr, 2006; Madsen, 2006; Ammons & Markham, 2004).

While factors influencing teleworking adoption include employee demand as well as organisational factors, it would not be possible to adopt a teleworking scheme without managerial approval. Even in lieu of existing organisational backing, a manager who is keen to implement teleworking for their staff will likely lobby the relevant decision-makers for permission. As organisational support is vital for teleworking adoption (Perez, Sanchez & Luis Carnicer, 2003b) and managers' roles are critical in the uptake and success of teleworking. Given this fact, the present study investigates managers' attitudes towards teleworking. Teleworking research lends itself to the study of white-collar, relatively autonomous work situations (Ahmadi et al., 2000). Morgan (2004) suggests that the biggest barriers to teleworking adoption are negative attitudes and perceptions on the part of managers. These opinions are then shared with other managers, thus perpetuating the negative view of teleworking. For this reason, more research into managers' attitudes is potentially valuable. This study responds to the gap in the empirical research identified by Bailey and Kurland (2001) in that it focuses on stakeholders, other than individual teleworkers, who influence or are influenced by the adoption of distributed work arrangements.

The Study

This study investigated middle managers' perceptions of teleworking using a mixed method of a quantitative paper-based survey and qualitative in-depth interviews. In selecting marketing managers, we chose a particular type of management context and a white-collar office environment. Many marketing roles, such as conducting market research, preparing communication briefs, writing advertising copy, designing promotional collateral, booking media, analysing results and reporting, could feasibly be carried out from home by means of commonly available and relatively cost-effective technologies. We limited our sample to managers with a moderate number of direct reports who were full-time and employed under a conventional employment arrangement, rather than part-time, temporary or contract.

The first phase of data collection was a survey questionnaire which was intended to give a broad view of marketing managers' perceptions of teleworking. It consisted of 22 questions as well as a section for open ended comments. It concluded with an opportunity to volunteer for phase two of this study – an in-depth interview. The questionnaire was mailed to marketing managers of companies with at least 25 staff across all industries from the two

largest cities in New Zealand – Auckland and Wellington. A pack including a covering letter, questionnaire and post paid return envelope was mailed out to 628 managers. A total of 123 completed questionnaires were received which was a response rate of 20 percent. Of the 123 respondents, 42 managers volunteered to be interviewed, an indication of the level of interest in the subject of teleworking.

For the second phase of data gathering, eight managers were selected for in-depth interviews. They were selected purposively based on a number of factors including having at least three full-time, permanent direct reports, as coming from a mix of industry sectors, a mix of ages and gender, whether teleworking was feasible for their direct reports, and a mix of those who had adopted teleworking and those who had not. The interviews were semi-structured and were conducted by the researcher face-to-face and audio recorded for subsequent verbatim transcription.

There were a number of limitations concerning the sample that should be noted. The sample targeted larger organisations despite the fact that New Zealand has a large proportion of small and medium enterprises. The volunteer nature of the interview sample also meant that it was likely that those managers with stronger views, either for or against, would be more likely to provide their details and participate further in this study.

Survey Findings

The questionnaire respondents were 64 percent male and 36 percent female. The tables below show other relevant sample information. The data on the age outlined in table one show the relative youth of marketing managers. In addition, the bulk of respondents were from organisations with more than 50 employees and had marketing departments of between one and nine employees as shown in tables two and three

Table 1: Age of the Marketing Managers

Under 25	25-34	35-44	45-54	55-64	65+
2%	7%	41%	28%	22%	0

Table 2: Number of Employees

Numbers of:	1-9	10-19	20-29	30-39	40-49	50+
Employees in organisation	0	0	4%	4%	7%	85%
Employees in marketing unit	76%	17%	1%	2%	1%	1%

Table 3: Number of full time direct reports

0	1-2	3-5	6-8	9-11	12-14	15+
11%	23%	33%	20%	7%	4%	3%

Table four (below) reports the answers to a series of yes/no questions. Of those with direct reports, the majority stated that it was possible for them to telework, however, managers were evenly split between those who reported that they currently had some form of teleworking arrangement in place and those who reported that they did not. A larger number (62 percent) stated that they had considered allowing their reports to telework. Overall, the respondents saw the advantages as outweighing the disadvantages.

Table 3: Sample of survey questions

	Yes	No
Is it possible for your reports to telework?	68%	32%
Do they telework now?	48%	52%
Have you considered allowing teleworking?	62%	38%
Overall, do the disadvantages outweigh the advantages?	38%	62%

Respondents were asked a series of questions and asked to indicate the extent of their agreement or disagreement with each of them. These are shown in table five (below) followed by a brief commentary.

Table 5: Sample of survey questions

Teleworking will:	Strongly Agree	Slightly Agree	Not Sure	Slightly Disagree	Strongly Disagree
increase company costs overall	2%	18%	33%	35%	15%
improve employee satisfaction	36%	39%	15%	7%	3%
improve preferred employer status	27%	49%	15%	7%	2%
improve environmental awareness and corporate social responsibility	8%	43%	24%	19%	6%
create physical isolation that will have a negative impact on performance	15%	46%	13%	18%	9%
create physical isolation that will have a negative impact on loyalty and retention	5%	30%	21%	29%	15%
affect the performance of the team negatively	8%	29%	14%	33%	15%
create difficulty in performance managing teleworkers	10%	41%	6%	33%	10%
make workers more distracted from their core work tasks, being at home	9%	41%	21%	20%	9%
result in workers working just as hard even though they are out of sight of management and co-workers	21%	33%	30%	12%	3%
allow the possibility of technological malfunctions that will have a negative impact on productivity overall	20%	48%	15%	13%	5%

From the relative agreement or disagreement with the statements, we can see that 50 percent disagree that it would lead to increased costs for the company with a large proportion unsure whether this would be the case. A solid majority of respondents agreed that teleworking can improve employee satisfaction and that a teleworking arrangement could improve the company’s preferred employer status. As for whether supporting teleworking would mean that the company would be seen as more environmentally conscious and socially responsible, respondents were divided although a slight majority agreed with only 25 percent disagreeing.

A key question in the management of teleworking is whether a teleworker's physical isolation from the company and their co-workers will have a negative impact on the individual's performance. A majority agreed that the physical isolation of teleworking could result in reduced performance. With regard to the impact on loyalty and retention, opinion was divided. Opinion was also divided with regard to negative impact on the work team although 48 percent disagreed with the statement regarding the negative effect.

The literature suggested that a potential concern with teleworking is that it might be more difficult to manage the performance of teleworkers. Again, respondents were divided with a slight majority suggesting that it could be more difficult to manage teleworkers. As to whether teleworkers be more easily distracted from their core work tasks while working at home, the pattern of responses to this question was very similar to the earlier question relating to negative impact on worker's performance, with 50 percent agreeing, 29 percent disagreeing and 21 percent unsure.

Previously, a majority of respondents indicated that teleworkers might be less productive and might be more prone to distraction. When asked whether, despite being out of sight of management and co-workers, teleworkers would work just as hard, a majority of respondents agreed that they would work just as hard. A larger majority agreed that technological malfunctions at the teleworker's home will have a negative impact on their productivity overall.

Interview Findings

One-third of the respondents, 42 people, volunteered to participate in the second phase of this study which consisted of an in-depth interview. Eight in-depth interviews were conducted with five male and three female managers. Five had some sort of informal ad hoc teleworking system in place and three reported no teleworking occurring. The interview transcripts were analysed and comments relating to the managers' perceptions of aspects of teleworking were highlighted.

When asked to identify the main benefits of teleworking respondents most commonly identified the ability to focus on a project or task without distractions and interruptions. Other benefits identified, by more than two respondents, were attracting and retaining staff in a tight labour market and achieving better work life balance. When asked about the main disadvantages, all respondents cited technological unreliability and access issues affecting productivity. Other disadvantages offered by three or more respondents were home distractions, lack of impromptu communication and face to face contact, lack of service, and issues with building team relationships.

Respondents were asked about the factors that might limit the actual use of teleworking. All respondents stated that it would only work for certain personality types. Six out of eight suggested that it would work occasionally but not routinely due to the impact on individual and team performance. Other limitations cited by multiple respondents were that it would only work well when there was a suitable work environment at home, clear goals and outputs, a special project, regular contact, and appropriate technology. When asked why teleworking is not more common, two or more respondents cited accessibility of office systems, the need for a change of managerial mindset and increased trust, and the need for social contact. A typical comment was that: "...there are certain roles which will work and certain roles

which won't work... it's not for everybody and it can't be for everybody." As the interviews progressed, the reservations became more apparent, although most continued to indicate throughout the interview that they supported the concept of teleworking. What emerged were many statements that demonstrated concern about various facets of teleworking. For example, when discussing whether performance management would be any more difficult, one interviewee replied:

I think possibly it could be – that you're not seeing them day to day. When you're managing somebody... are they there, are they available, are they doing what people have asked them? You know what people have asked them because they're right there, they're in front of you, you're getting that feedback all the time.

When asking whether teleworkers would be able to be as responsive as someone working in the office, another interviewee stated:

No, probably not in all instances... are they refreshing their email every two or three minutes to check that they've got a new email coming in? And in theory they should be answering their phone and have their mobile on and everything else like that.

Many interviewees were concerned with the issue of home-based distractions: *"...being at home, having the distractions, having the temptations, I'd say people probably wouldn't work quite as hard as they would do at work"*.

Discussion

This section discusses a number of key themes emerging from this study. The starting point is the finding that while managers indicated support for the concept of teleworking, they identified significant areas of concern that limited their actual usage of it. The balance of the discussion explores some of the reasons why there may be a gap between this overall favourable attitude and managerial practice.

Managers in our study were largely supportive of the concept of teleworking. Sixty-two percent of questionnaire respondents stated that they believed there were mainly benefits to be gained for organisations implementing such an arrangement with benefits identified such as improved employee satisfaction and preferred employer status. However, only around half of those for whom teleworking was feasible for their staff actually had some form of an arrangement in place. Despite supporting the concept of teleworking, most had concerns about how it might actually work in practice. The most common concerns were the risk that technological problems, physical and social isolation, and home-based distractions would result in loss of productivity. These factors are often cited in the literature as potential disadvantages of teleworking (Perez et al., 2002a; Wicks, 2002; Ward & Shabha, 2001; Ahmadi et al., 2000; Mann et al., 2000). This indicates that there are similarities between New Zealand managers' and their European and North American counterparts' attitudes towards teleworking.

The interviews with managers added richness to this finding. Six out of the eight interviewees stated that they were in favour of teleworking and indicated a range of benefits. Yet, while all had direct reports for whom teleworking was feasible, only informal arrangements were in place. The interviewees went on to identify significant disadvantages and many of the

benefits had conditions or qualifiers attached. A common theme was that teleworking was only suitable some of the time and therefore, several managers reported ad-hoc arrangements with staff. 13 out of the 39 respondents who added comments to the questionnaire stated that they used teleworking on a 'when required' basis. The managers' negative attitudes towards many aspects of teleworking and overall lack of utilisation corroborates Grantham and Paul (1995) and Lupton and Haynes' (2000) proposal that managers' negative attitudes are the single largest barrier to teleworking.

If most managers were in favour of teleworking overall, but identified more disadvantages than benefits, why might this be? One explanation is social desirability bias. Respondents may have wanted to portray themselves as modern, progressive, open-minded and flexible in their management style, and thus open to alternative ways of working, masking their antipathy towards the topic.

A major preoccupation on the part of managers (in the questionnaire and interviews) was the reliability and usability of information and communication technologies. For example:

I strongly believe that the success and effectiveness of teleworking is largely dependent on having competent technology (often difficult to get!). "It would be more prevalent but for the cost – and unreliability – of the technology.

Some writers have confidently asserted that since the 1990s teleworking has become a practical opportunity for many employees (Kowalski & Swanson, 2005). Nevertheless, some researchers of the day decried the lack of high bandwidth and Intranet accessibility, and proposed that this was a large reason for the prevalence of teleworking being lower than expected (Pliskin, 1997). A decade on, the interviewees observed similar hindrances, despite the fact that New Zealand has one of the world's highest levels of broadband internet and cellular telephone penetration (OECD, 2008). This raises the question of whether these hindrances are real or whether they merely provide managers with an acceptable reason to restrict the use of teleworking.

Another significant theme from this study is the importance of trust. While managers did not speak directly of lack of trust, it emerged as a theme in the interviews and can be seen to underpin questionnaire respondent's beliefs that productivity would be less for teleworkers. This supports Lupton and Haynes's (2000) contention that trust is a major factor in the reason teleworking has not become widespread – in fact, they go as far as to state that managerial trust is the largest obstacle. Cascio (2000) states that trust is so important that even if every other factor is ideal, without it, it is impossible for teleworking to be a success. Managerial attitudes to teleworking are linked to company culture. According to Kowalski and Swanson (2005), if the organisation's culture is not one established on trust, then the managerial trust required for teleworking implementation is unlikely.

This study supports previous research which indicates that key factors in the lack of teleworking adoption are managers' perceptions concerning the need for and enjoyment of social interaction and the prevalence of distractions in the home. The questionnaire asked whether or not a teleworker's physical isolation from the company and their co-workers would have a negative impact on the individual's performance. Although the term 'social interaction' was not used in the question, it is the social interaction aspects of employment that physical isolation would have the greatest impact on, as work tasks and functional communication are still able to be conducted from home. 61 percent believed that the

teleworker's performance would be negatively affected due to being physically absent from their workplace and colleagues. The pattern of responses indicated that managers were also concerned about distractions in the home. However, some saw fewer distractions at home. Cascio (2000) discusses a study that found teleworkers to be 40 percent more productive while working away from the office, mainly because they have fewer distractions. Thus, whether teleworkers are more or less productive may depend on the particular circumstances and distractions of their home environment in contrast to the distractions to be found in their workplace.

There is much in the teleworking literature regarding environmental benefits but managers in this study did not regard them as a key factor in decision making. This supports the Siha and Monroe (2006) contention that potential environmental benefits have played a relatively small part to date in motivating organisations to adopt teleworking. They draw attention to the growing number of United States government initiatives being put into place to incentivise teleworking adoption and suggest that governments in other nations will follow suit. This level of government involvement will have the effect of creating more organisational and public awareness.

Conclusions

This research began with something of a mystery. That is, there has been a much lower uptake of teleworking than was predicted decades ago. The fact that the mystery remains is due to the lack of scholarly studies on the subject. As managers are the ones who make teleworking possible, managers were the subject of this investigation. Although they may state that they are supportive of teleworking, busy managers are unlikely to make the necessary efforts to implement such an arrangement for their staff when, in reality, they have mixed feelings about the concept. This is especially so as many of their concerns involve productivity, something of immediate importance to most managers.

Most managers in this study stated that they were in favour of teleworking. Three-quarters of questionnaire respondents and interviewees believed that employee satisfaction and preferred employer status is improved. However, only around half of those for whom teleworking was feasible for their staff actually had some form of an arrangement in place. Although the majority of the interviewees stated that they were supportive of teleworking, they identified many more disadvantages than benefits. Many of the benefits that were noted, had conditions or qualifiers attached.

From a review of the literature, one might surmise that managerial trust and control issues would be the two main factors affecting managers' attitudes. In this study, technological issues, lack of social interaction and the prevalence of home-based distractions were prevalent. However, trust can be seen to underpin performance concerns and the lack of supportive managerial attitudes and organisational culture are also factors. Overall, it is suggested that managers' mixed feelings regarding the concept may be a key reason why teleworking has not become widespread. These findings are not incongruent with the findings of other studies in the area, most of which have been conducted in Europe and North America. However, some limitations should be noted. Teleworking research is beset by issues of definition and interpretation, despite the best efforts of the research to clearly define the domain of interest. It is likely that respondents continued to utilise their own definition of teleworking, although this was less of an issue with the interviewees, where they could be

reminded of the definition throughout the discussion. The possibility of social desirability bias affecting managers' responses was noted earlier.

There are many research opportunities in the field of teleworking. Future research could consider one or more variable in the adoption and success of a teleworking arrangement. For example, does it depend on the individual employee – the level of their need for social interaction or their particular home environment in terms of its distractions? Or does it depend on their manager's perceptions of one or more of these factors? Do demographic variables such as age and gender affect adoption? Further research is needed into other work contexts.

With continued advances in telecommunications technology, it is likely that the managers' concerns regarding these issues may become less prevalent, which means that the optimistic predictions from the 1980s and 1990s may yet come true. Younger generations of managers may shift company cultures in ways that favour teleworking. Associated negative side effects, such as the lack of social interaction, will likely be overshadowed by growing public concern over environmental issues and related problems such as traffic congestion. In addition, government and legislative encouragement could play a significant role. In New Zealand the Employment Relations (Flexible Working Arrangements) Amendment Act 2007, requires employees to be responsive to employee needs, which teleworking is one possible response. Because of these and other forces, teleworking is likely to remain a significant area of interest for researchers and practitioners alike.

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Employee Well-Being and Union Membership

KEITH MACKY* and PETER BOXALL**

Abstract

Using a random telephone survey of 645 New Zealand employees in unionised workplaces, we compare union members with non-members on four dimensions of employee well-being: felt work intensification in terms of work demands on time and role overload, job-induced stress, work-life imbalance, and job satisfaction. We find no differences between unionists and non-unionists in respect of overall job satisfaction, although two facet-level aspects of satisfaction do predict union membership – promotion opportunities and recognition levels. Union members also report higher levels of work overload and pressure, greater stress, and greater work-life imbalance compared to non-union members. These findings are discussed in relation to theories of union belonging.

KEYWORDS: Unions; work intensification; job satisfaction; work-life balance; stress

Introduction

The relationship between employee well-being and union belonging is a controversial area of research. Much of the prior research has focused on global or overall job satisfaction as the primary well-being indicator when predicting union membership, although it is now recognised that we must also look at job satisfaction at the facet-level (Guest and Conway, 2004; Friedman, Abraham and Thomas, 2006). There is also a need, as Wood (2008) argues, to examine the relationship with union belonging of a much fuller range of the psychological and physiological indicators of employee well-being. In this vein, this paper's objective is to compare union members with non-members in respect of their reported levels of work intensification, job-induced stress, work-life imbalance, and job satisfaction, both globally and at facet level.

The context of the research is one of declining union membership in the Anglo-American world, together with evidence of a growing intensification of work (Allan, Brosnan and Walsh, 1999; Green and McIntosh, 2001; Green, 2004). The data is gathered in New Zealand, a country in which pro-union reforms of employment legislation in 2000 have helped to halt union decline but have not stimulated union renewal (Boxall, Haynes and Macky, 2007). Union density remains around one in five of wage and salary earners (Charlwood and Haynes, 2008). The general aim of this paper is, therefore, to explore New

* Keith Macky is Associate Professor in the Department of Management at Auckland University of Technology (AUT). Private Bag 102 904, Auckland, NEW ZEALAND. +64 9 921 9999 x 5035. keith.macky@aut.ac.nz

** Professor Peter Boxall. Department of Management & International Business, University of Auckland. Private Bag 92019, Auckland, NEW ZEALAND. +64 9 3737999 x 87355. p.boxall@auckland.ac.nz

Please address correspondence to first author

Zealand workers' experiences of work, and the relationship these may have with their motivations to join or not join a union.

We report a large-scale, random telephone survey of New Zealand worker attitudes conducted in 2005. The paper is conventionally organised. We first set out the theoretical background and establish our hypotheses. We then describe our data and variables, and report our analytical strategy and results. The paper finishes with discussion and conclusions.

Union belonging: theory and hypotheses

The theoretical background to this research is an extensive body of literature that seeks to explain why employees do or do not join unions (e.g. McClendon, Wheeler and Weikle, 1998; Guest and Dewe, 1988; Charlwood, 2002; Guest and Conway, 2004). Individual motives for union belonging can be grouped into three broad, interconnected areas: dissatisfaction-threat (e.g. Kaufman, 2004), utility-instrumentality (e.g. Peetz, 1998), and ideological beliefs or feelings of group identity (e.g., Blackwood, Lafferty, Duck and Terry, 2003; Schnabel, 2003).

In brief, the dissatisfaction-threat model posits that employees join unions when their interests are threatened and/or aspects of the employment relationship are so dissatisfying that they seek to engage in collective voice. In the case of threats to their wages or working conditions, union belonging is perceived as providing individuals with a more credible defence through the exercise of collective voice and, potentially, industrial action. In the utility model, it is the perceived ability of a union to deliver benefits greater than the costs of belonging that is critical (Guest and Dewe, 1998; Guest and Conway, 2004). This model is interesting in two ways. It describes workers who are far from dissatisfied or threatened but who join a union on the rational calculus that it will enlarge their relative gains in the workplace. However, it also connects to the dissatisfaction-threat model: research often finds that dissatisfied workers are more likely to join a union when they perceive that the union will be instrumental in resolving their problems (e.g. Kochan, 1979; Premack and Hunter, 1988). The third model sees union membership as stemming from an ideological position or a collective sense of identity among workers. But, again, there is a connection with the dissatisfaction-threat model because pro-union ideologies or collective identities are most likely to develop when groups of workers share a history of disadvantage or injustice (e.g. Kelly, 1998; Blackwood et al. 2003; Peetz and Frost, 2007).

The present study is motivated by a threat-dissatisfaction model of unionism. With regards to individual experiences of work intensification, the threat that union membership might be expected to mitigate is the intensification of work itself, as well as factors posited to cause intensification such as organisational restructuring, downsizing, as well as the use of pay-for-performance and other performance-oriented HRM techniques (Gallie, 2005; Green, 2004; Handel and Levine, 2004; White, Hill, McGovern, Mills and Smeaton, 2003).

If intensified work – through increased hours, role overload, and/or perceived increased pressure from managers to work harder or longer – threatens employee interests or leads to dissatisfaction, then the threat-dissatisfaction model suggests that employees experiencing intensification would be more likely to be union members than not. On the other hand, if unions are instrumental in reducing work intensification pressures for their members, then non-union employees could be predicted to experience higher levels of intensification than

union members. As with the argument about the relationship between union membership and job satisfaction (Guest and Conway, 2004), we need to consider both possibilities. Therefore, because union membership may be associated with either higher or lower levels of work intensification, we formulated the following non-directional hypothesis:

Hypothesis 1: Employee experiences of work intensification will differ between union members and non-members.

Beyond work intensification, the threat-dissatisfaction model of union belonging can also be applied to three other measures of employee well-being used in the present study – job satisfaction, stress, and work-life balance. In the case of job satisfaction, the connection with union membership is well established and with union members tending to be less satisfied with their jobs than non-union members. That said, an influential paper analysing the *British Workplace Employee Relations Survey 1998* concluded that while union membership was not random, unobserved individual characteristics lead employees to both join unions and report dissatisfaction with their jobs (Bryson, Cappellari and Lucifora, 2004). In other words, suggesting that the oft observed relationship between job dissatisfaction and union membership was spurious.

Consistent with the need to study employee well-being in a more comprehensive way (Wood, 2008), the present paper explores whether these individual motivations might include other aspects of the experience of work and, in particular, perceptions of job-induced stress and work-life imbalance. There is a clear relationship between work intensification and such variables (e.g. Eby, Casper, Lockwood, Bordeaux and Brinley, 2005; Green, 2002; Landsbergis, Cahill and Schnall 1999; Sparks, Cooper, Fried and Shirom, 1997; White et al. 2003; Macky and Boxall, 2008), suggesting that intensification typically creates greater levels of stress and work-life imbalance. Such effects logically threaten employee interests.

The threat-dissatisfaction model, then, implies that employees experiencing poorer well-being outcomes from their jobs would be more likely to be union members. However, as argued in respect of hypothesis 1, we must allow for the reverse: if collective action via union membership serves to mitigate factors in the work environment that impact on employee well-being, then it is also feasible that union members would report better levels of well-being at work than non-members. Once again, a non-directional hypothesis was therefore formulated:

Hypothesis 2: Employee psychological well-being, in terms of job satisfaction, job-induced stress, and work-life imbalance, will differ between union members and non-members.

Data and variables

The study utilises data collected from a random CATI survey (response rate = 34.2%) of 1004 New Zealand employees aged 18 or over and who had worked for at least 6 months for an employer with 10 or more employees. Conducted in late 2005, the telephone interviews took, on average, thirty minutes to complete.

The analyses are based on the 645 respondents who reported having a union at their place of work that they could join. Of these, 350 people (54.3%) were members of that union at the time of the survey (thus creating a dichotomous dependent variable coded 0 non-member, 1 member). These respondents were mainly permanent (92.2%) rather than temporary employees, nearly two thirds were female (62.9%), with a mean age of 44.44 years (SD = 11.33), and they had a median tenure with their current employer of 5 years (range = 6 months to 40 years). Most respondents (80.6%) met the New Zealand Department of Statistics' definition of a full-time employee (30 hours or more a week). The median typical weekly take-home pay was NZ\$625 (range = \$65 – \$2000).

Work Intensification was measured by three variables. Firstly, *hours worked* over a defined period of time is a common approach to the measurement of work intensification (e.g., Gallie, 2005; White et al. 2003). For this study, the mean usual hours worked per week was 39.39 (SD = 13.13) with a range from 4 to 95 hours. While the range is large, the mean, median and mode measures of central tendency are all nearly identical and the frequency distribution approximates the normal.

The second intensification measure was *work role overload*, in the sense of feeling that there is too much work to do in the time available (Beehr, Walsh and Taber 1976). This was measured using a six-item scale (Arynee, Srinivas and Tan, 2005) with responses obtained on a 7-point response scale anchored from *strongly disagree* (1) to *strongly agree* (7) (coefficient alpha = .84). Higher scores are interpreted as indicating higher perceived work intensification through work overload. Example items are: *'It often seems like I have too much work for one person to do'* and *'There is too much work to do everything well'*.

Work may also be intensified through the perceived demands and expectations management places on employee time in ways that might interfere with non-work activities. A modified four-item measure of *time demands* originally developed by Thompson, Beauvais and Lyness, (1999) was used. The items were: *'To get ahead in the organisation, employees are expected to work more than their contracted hours each week'*, *'Employees are often expected to work overtime or take work home at night and/or weekends'*, *'Employees are regularly expected to put their jobs before their families or personal lives'* and *'To be viewed favorably by senior managers, employees in my organisation must put their jobs ahead of their family or personal lives'*. Responses were obtained on a 7-point response scale anchored from *strongly disagree* (1) to *strongly agree* (7), with higher scores interpreted as indicating higher perceived work intensification through managerial demands on personal time (coefficient alpha = .85).

Job Satisfaction was measured using Warr, Cook and Wall's (1979) original 15-item instrument, together with an additional item measuring satisfaction with the degree of involvement in decisions. Responses were obtained on a 7-point scale bounded from *very dissatisfied* (1) to *very satisfied* (7) (coefficient alpha = .90)(see Table 4 for items). A measure of overall job satisfaction was obtained by taking an average of the responses to the 16 items. **Job-induced stress** was measured using House and Rizzo's (1972) seven-item instrument with responses obtained on a 6-point scale scored so that higher scores represent greater felt stress (coefficient alpha = .85). Finally, **work-life imbalance** was measured using an instrument Frone and Yardley (1996) developed to measure work-family conflict. Because the wording of the six items includes negative work spillover to non-familial aspects of personal life and friendship, higher scores are interpreted in this study as suggesting greater negative spillover from work to non-work life and therefore greater work-life imbalance. The

response scale was *never, seldom, sometimes, often, very often*, bounded from 1 to 5 (coefficient alpha = .90).

Control Variables: Preliminary analyses indicated that respondent gender ($\chi^2(1) = 3.06, p = .080$), temporary or permanent employment status ($\chi^2(1) = 3.29, p = .070$), and firm size in terms of number of employees ($t(631) = -1.25, p = .213$) were independent of union membership status. However, age ($t(637) = -3.53, p = .000$), log weekly pay ($t(622) = -3.07, p = .002$) and log years' tenure ($t(642) = -5.46, p = .000$) were found to differ by union membership. Older workers, those with longer tenure and those earning higher incomes were more likely to be union members. These last three variables were therefore included as potential control variables in the analyses that follow.

Employees' behavioural and affective commitment to their organisation were also explored as potential control variables on the principle that those experiencing poorer well-being at work and/or higher levels of intensified work can seek to resolve the situation by either exiting or psychologically disengaging from their organisations, rather than by attempting to use collective voice. Both dimensions of commitment were measured using the Organisational Commitment Questionnaire (Mowday, Porter and Steers, 1982). However, neither intentions to stay ($t(642) = 0.79, p = 0.43$) nor affective commitment ($t(640) = 0.29, p = .768$) were found to be associated with union membership.

Principal-axis factor analysis with varimax rotation (available on request) revealed that the work involvement and employee well-being variables were all factorially independent. Nor was a single dominant factor identified, suggesting common method variance is unlikely to be a significant problem in this study.

Analytical strategy and results

Table 1 reports the correlations between the variables of interest in this study. With regard to union belonging, employees with longer weekly working hours, higher perceived role overload and greater managerial demands on their time were slightly more likely to be union members than not, as were those with higher reported levels of job-induced stress and work-life imbalance.

As indicated above, there is potential for union membership to be both a dependent variable, in the sense that well-being at work may influence whether or not someone joins a union, or an independent variable in that membership may, through collective action, influence employee well-being outcomes. A cross-sectional research design such as the present one cannot specify causal direction or whether the nature of the relationship is reciprocal. Furthermore, as Table 1 shows, the work intensification and well-being variables also covary with each other to varying degrees, although not to a level suggesting multi-collinearity. For these reasons, MANCOVA was used to test the hypotheses, with union membership entered as a factor variable, and the well-being variables entered as dependent variables. The control variables of age, log pay, and log tenure were entered as covariates. Bonferroni corrections were applied to all significance levels to reduce the potential for Type I errors arising from multiple statistical tests.

Table 1: Correlations

Variables	Union belonging	1	2	3	4	5	6	7	8
1 Usual hours worked	.08*								
2 Overload	.12**	.24**							
3 Time demands	.09*	.23**	.48**						
4 Job satisfaction	-.03	.00	-.31**	-.36**					
5 Job Stress	.19**				-.41**				
6 Work-life	.11**	.26**	.53**	.50**	.41**				
7 Age	.13**	.32**	.55**	.55**	.35**	.67*			
8 Log tenure	.22**	.01	-.00	-.02	.06	-.03	-.03		
9 Log pay	.12**	.07	.02	.07	.04	.11*	.05	.41**	
		.68**	.21**	.16**	.09*	.23*	.24**	.07	.19**

Notes: Union Belonging coded 0 (not a member), 1 (member). N = 616 after listwise deletion of missing values. * = $p < .05$ ** = $p < .01$ (2-tailed)

Initial multivariate tests did not find any significant effects for employee age ($trace(6, 606) = 1.14, p = .339$) or log tenure ($trace(6, 606) = 1.84, p = .089$) and these variables were therefore dropped as controls from subsequent analyses. For the final model, the *Box's M* test of the equality of the covariance matrix was not statistically significant ($p = .832$), and nor were the Levene's tests of the equality of the error variances, indicating that these assumptions underpinning the use of MANCOVA were met (Hair, Anderson, Tatham and Black, 1998).

In the final model, the multivariate test for union belonging was significant ($trace(6, 612) = 3.23, p = .004$), thereby justifying further analysis. Table 2 reports the tests of between-subjects effects and the marginal means for the intensification and well-being variables. While the magnitude of the difference between the means is not large, all are in the direction of suggesting that union members work longer hours, experience more work role overload, and have greater demands placed on their non-work time by management. They also tend towards having poorer job satisfaction, higher job-induced stress and work-life imbalance. The differences between the means for work overload, time demands, job induced stress and work-life imbalance are statistically significant. However, the differences between union and non-union members in respect of hours worked and job satisfaction are not statistically significant.

Table 2: Union belonging marginal means and univariate tests of between-subjects effects

Variables	Marginal Means		<i>F</i> (df 1, 617)	<i>p</i>
	<i>Non-member</i>	<i>Union Member</i>		
Typical Weekly Hours	39.19	39.26	0.01	.925
Overload	3.44	3.72	6.07	.014
Time Demands	3.19	3.46	3.89	.049
Job Satisfaction	5.19	5.09	1.49	.222
Job Induced Stress	2.61	2.97	18.07	.000
Work-life Imbalance	2.43	2.61	5.19	.023

Of the observed differences, stress appears to be the clearest differentiator between union and non-union members. To further explore this finding, Table 3 reports findings for two regression analyses examining the predictors of job-related stress for union and non-union members separately. In both models, over 50% of the variance in job stress is explained. For both groups, negative spillover from work to non-work life is the clearest predictor of stress, followed by dissatisfaction with one's job.

The within-group analyses then show varying patterns in the predictors of stress, with union members with higher stress also tending to report more role overload, to have longer tenure, and to be permanent rather than temporary employees. For non-union employees, higher stress levels were associated with higher levels of managerial demands on their time, as well as being better paid, female and younger.

Table 3: Standardised Regression Coefficients for Job-Induced Stress

Predictors	<i>Non-member</i> (N = 274)		<i>Union Member</i> (N = 330)	
	<i>B</i>	<i>t</i>	<i>B</i>	<i>T</i>
Constant		-0.11		2.01 *
Age	-.09	-2.05*	-.06	-1.29
Gender (0 M 1 F)	.20	4.37***	.00	0.09
Permanent / temporary (1,0)	.01	0.22	.09	2.21*
Log years tenure	.04	0.87	.09	2.05*
Log weekly pay	.23	3.23**	.02	0.46
Log N employees	.02	0.35	.00	0.09
Usual weekly hours	-.07	-1.05	.04	0.71
Role overload	.07	1.23	.20	4.12***
Time demands	.17	3.27**	.07	0.16
Job satisfaction	-.19	-4.16***	-.20	-4.47***
Work-life imbalance	.46	8.26***	.44	8.26***
<i>Adjusted R</i> ²	.538		.528	
Model <i>F</i>	29.86***		34.40***	

* = $p < .05$ ** = $p < .01$ *** = $p < .001$

To explore whether an aggregate measure of job satisfaction may in fact be masking facet-level dimensions of dissatisfaction that relate to union belonging, a further secondary analysis was performed using logistic regression to analyse whether any aspect of job satisfaction or dissatisfaction predicted the binary union membership variable (Table 4).

Of the 16 facet-level dimensions of job satisfaction measured in this study, only two were found to be useful for predicting whether someone was a member of a union at their place of work: being dissatisfied with the amount of recognition received for good work and being satisfied with one's opportunities for promotion. However, while the overall model for job satisfaction is significant, the level of reduction in the -2log likelihood between the initial and final regression step, together with the small value of the Nagelkerke R^2 , does not suggest that the model explains much of the variance in union membership. Furthermore, knowing an employee's level of satisfaction on these two facets would only improve the odds of correctly classifying someone as a union member by just under 4%.

Table 4: Union membership logistic regression results for job satisfaction – final model

Variable	<i>B</i>	<i>Wald</i>	<i>p</i>	<i>Exp(B)</i>
Constant	-0.10	0.04	.846	0.90
The physical work conditions you have to work in	-0.04	0.03	.578	0.97
The freedom you have to choose your own methods of working	-0.02	0.05	.832	0.99
Your fellow workers.	0.00	0.00	.950	1.00
The amount of recognition you get for good work	-0.20	7.63	.006	0.82
Your immediate manager or supervisor	0.04	0.49	.483	1.05
The amount of responsibility you are given	0.08	1.13	.289	1.08
How much you are paid	0.03	0.34	.560	1.03
The involvement you have in decisions that affect you	-0.10	1.95	.163	0.91
Your opportunity to use your skills, abilities and knowledge	0.12	2.09	.148	1.12
Relations between management and other employees in your firm.	0.02	0.09	.756	1.02
Your chances of promotion	0.12	4.31	.038	1.13
The way your firm is managed	0.01	0.03	.858	1.01
The attention paid to suggestions you make	-0.10	1.72	.190	0.91
Your hours of work	-0.07	1.43	.231	0.93
The amount of variety in your job	0.07	0.97	.326	1.07
Your current level of job security	0.05	0.85	.356	1.05
Initial -2log likelihood = 887.90 Final -2log likelihood = 860.73				
Initial CCR = 54.3% Final CCR = 58.2%				
Nagelkerke $R^2 = .055$ Model Goodness of fit $\chi^2(16) = 27.17; p = .04$				

Discussion and conclusions

This paper throws light on the relationship between employee well-being outcomes of the experience of work and union belonging. In certain conditions, work intensification remains an important managerial 'low-road' for increasing labour productivity and thence organisational performance (e.g. Cooke, 2001). Such a process often has adverse implications for employee well-being and the quality of working life. Our results provide partial support for Hypothesis 1 in that workers experiencing higher levels of work overload, in the sense of having too much work to do in the time available, and who feel managers

make high demands on their personal time, are more likely to be union members. These findings seem consistent with union joining as a threat response to managerial actions that increase demands on workers without necessarily increasing either resources or rewards.

These findings also support a key methodological point for studies of work intensification that use hours worked as the primary indicator (e.g., Macky and Boxall, 2008). In our study, the actual hours worked by an individual do not differentiate union members from non-members whereas perceptions of work overload and managerial demands on time do. Future research needs to be careful to distinguish situations where workers work longer hours in order to meet personal income goals, or because they are highly absorbed in work that interests them, from those situations in which work pressures are imposed on, and are distressing for, the worker. The latter situation can derive from direct supervisory pressure or from the gradual development of an organisational culture in which managers and peers (for example, in teams) create excessive workload norms.

The study also found partial support for Hypothesis 2. The findings on job satisfaction reveal no significant differences in overall satisfaction between union members and non-members, while the findings at the facet level are not strong. Instead, in our study the key differentiators between unionists and non-unionists lie in the areas of stress and perceptions of work-life imbalance. Both higher levels of stress arising from work, and perceptions of a negative balance between work and non-work life, were related to union belonging.

The stress measure used in this study is symptom-based, pointing to both psychological and physiological adverse health outcomes that, for union members, are also associated with being dissatisfied with one's job, work-life imbalance, and perceptions of being overloaded at work. That this pattern of stressors differs from that for non-union members is an interesting result and needs further research.

Pertinent to these findings is the 'demand-control' model of stress, which predicts that jobs with higher demands, combined with low employee control, will be those that create the most strain (Karasek, 1979; Mackie, Holahan, and Gottlieb, 2001; Gallie, 2005; Wood, 2008). To the extent that stress is indicative of a loss of autonomy on the job, union joining behaviour may represent a strategy by which some employees seek to gain greater control over their work pressure and thereby a reduction in job stress.

To conclude, our study shows the value for research on union membership of measuring employee well-being in a more comprehensive way than has typically been done in the past. Our findings show that job satisfaction is not a useful predictor of union membership in New Zealand, while issues to do with work intensification, stress and work-life imbalance are. Union members' discontent in this country is associated with higher levels of stress, role overload, and demands on their personal time, consistent with a demand-control model of job strain. That said, while our research implies that union membership is at least associated with poorer employee well-being at work, we need to understand how effective those same employees perceive their unions to be in responding to these issues. Research of this nature, examining the dynamic interplay among the motives of dissatisfaction/threat, utility, and ideology/identity, is an important agenda for the future.

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Employee Opinion on Work-Family Benefits: Evidence from the U.S.

DONNA M. ANDERSON^{*}, KATHRYN BIRKELAND^{**} and LISA GIDDINGS^{***}

Abstract

We examine employee views on employer assistance for employees' work-family issues and the effect on two measures of employee global attitude towards the employer: *job satisfaction* and *employee attitude*. We use data from the 2002 *National Study of the Changing Workforce*, a nationally representative sample of 2,451 waged and salaried U.S. workers and a hierarchical multiple regression analysis to test for mediating effects of supervisor support and workplace culture. A negative view of an employer's efforts to assist employees with work-family issues results in lower levels of job satisfaction and worsens employee attitude. Supervisor and coworker support moderated the negative effect of employee opinion of a company's work-life involvement on employee attitude, although the support had no effect on mediating the effect of the negative opinion on job satisfaction.

KEYWORDS: work-family benefits; workplace policies; employee attitudes

Introduction

A subtle shift in demographics in the American workplace has translated into what appears to be, at least according to the popular press in the United States, a "backlash" against family-friendly policies (Allerton, 2000). The number of unmarried and single U.S. residents increased by 3.3 percent between 2005 and 2006 from 89 to 92 million individuals, or 42 percent of all adults. 60 percent of those individuals had never been married, 25 percent were divorced and 15 percent were widowed (Wells, 2007). In 2000, less than one third of all households in the US had children under the age of 18 living in them (Popenoe, 2007). This was down from a half in 1960 and is projected to drop to a quarter in the coming years (*ibid.*). These demographic changes have fueled a growing number of advocacy organisations promoting the rights of single, unmarried, and/or childless individuals about what they perceive as unfair treatment in society on behalf of the government and, in particular, employers.¹ According to these groups, childless single employees "feel put upon, taken for granted and exploited—whether because of fewer benefits, less compensation, longer hours,

^{*} Donna M. Anderson, Ph.D., Professor of Economics (contact author: anderson.donn@uwlax.edu) (608)785-6864)

^{**} Kathryn Birkeland, Ph.D., Assistant Professor of Economics; Lisa Giddings, Ph.D

^{***} Associate Professor of Economics. University of Wisconsin-La Crosse, La Crosse, Wisconsin, 54601, USA.

mandatory overtime, or less flexible schedules or leaves—by married and child-rearing coworkers” (Wells, 2007, p. 37).

In the U.S. popular press, much has been made of worker dissatisfaction with family-friendly workplace benefits. Bella DePaulo (2006) annotates experiences and complaints from single employees about perceived work inequities on her blog and in her book *Singled Out: How Singles are Stereotyped, Stigmatized, and Ignored, and Still Live Happily Ever After*. In her book, *The Baby Boon: How Family-Friendly America Cheats the Childless*, Elinor Burkett (2000) argues that childless workers earn less money and receive fewer benefits than their coworkers who are parents. This translates into a growing number of workers without young children who are resentful because they believe they must cover for the minority of workers with young children (Poe, 2000). Jerry Steinberg, the founder of No Kidding!, a Canadian-based association for the childless with more than 40 chapters in North America, claims that “the child-burdened work less and are paid the same, or more, and we’re tired of it” (Poe, 2000, p. 79). Survey results from the firm Adecco USA of Melville, N.Y. found that while employees admired working parents’ “ability to do it all,” 36 percent reported that flexibility at work negatively affected team dynamics and 31 percent claimed that employee morale suffered (Wells, 2007). From that same survey, 59 percent of working men between the age of 35 and 44 said that flexibility for working mothers caused resentment among coworkers (Wells, 2007). Lisa Belkin of the *New York Times* chimed in recently on the profitability of family friendly policies, reporting that in this recession some companies have begun to cut costs by eliminating their flexibility policies (2009).

To some extent, the dissatisfaction appears misplaced, given the U.S.’ low ranking in the world in generosity of paid family leave.ⁱⁱ The Federal Government only enacted any sort of protected leave as recently as 1993.ⁱⁱⁱ Further, according to the U.S. Society for Human Resources, in 2000 only 37 percent of U.S. companies offered paid parental leave (and usually only to certain categories of workers), 12 percent offered paid maternity leave, 7 percent offered paid paternity leave, and only 1 percent was considering such benefits in the future (Poe, 2000). Nevertheless, the popular press has picked up on this dissatisfaction. The danger of such media-fueled backlash is that anecdotal accounts could lead to reckless inferences about the validity of investing in work-life resources. Employers could conclude that the pursuit of policies and programmes assisting workers with work-family challenges children is unworthy.

Using data from the 2002 *U.S. National Study of the Changing Workforce* (NSCW), our goal is to shed some light on the pervasiveness of workers’ views on organisational support for work-family policies, and whether this view impacts a worker’s global attitudes towards the organisation. This research shows that over 25 percent of U.S. workers’ view work-life challenges as outside the responsibility of the employer, and further, after controlling for employee and workplace characteristics, this view negatively effects an employee’s job satisfaction and attitude toward the employer.

Review of Literature

The research on the spillover between work and family has gained momentum in the last decade. This research has focused on the effect in general (Bailyn, Drago & Kochan, 2001; Barnett, Marshall & Sayer, 1992; Grzywacz, Almeida & McDonald, 2002; Jacobs & Gerson, 1998, 2001; Leiter & Durup, 1996), gender, marital, and presence of children effects (Dilworth, 2004; Duxbury & Higgins, 1991; Hundley, 2001), industry differences (Anderson, Morgan & Wilson, 2002), and workplace characteristics that mediate spillover and improve job satisfaction, including the amount of autonomy and pressure a worker has on the job (Anderson & Delgado, 2006; Wallen, 2002). Overwork and the loss of leisure has been the subject of several popular books, including *The Time Bind: When Work Becomes Home and Home Becomes Work* (Hochschild, 1997), and *The Overworked American: The Unexpected Decline of Leisure* (Schor, 1991). It was in part due to this research that companies began instituting family-friendly policies, including on-site childcare centers, eldercare referrals, more generous parental leave policies, and flexible schedules. This began in U.S companies in the early 1980s, and really took off a decade later (Galinsky, Friedman and Hernandez, 1991).

There is a growing literature on the effect of family-friendly policies on employee attitudes and work satisfaction. Much of this literature focuses on the effect of such policies among those who use the benefits or flexibility (Eby, Casper, Lockwood, Bordeaux & Brinley, 2005; Lilly, Pitt-Catsouphes & Googins, 1997; Baltes, Briggs, Huff & Neuman, 1999). Other research focuses on the effects of particular types of policies offered such as on-site childcare (Goff, Mount & Jamison, 1990; Kossek & Nichol, 1992; Miller, 1984) or telecommuting (Bailey & Kurland, 2002; Duxbury, Higgins & Neufeld, 1998; Igarria & Guimaraes, 1999), while other strands of research focus on how family-friendly policies alter workplace issues including job satisfaction, organisational commitment, turnover rates (Batt & Valcour, 2003; Allen, 2001; Behson 2002; 2005; Clark 2001; Thompson, Beauvais & Lyness, 1999; Abbasi & Hollman, 2000), satisfaction (Kossek & Ozeki, 1998; Lambert 2000; Haar & Spell, 2004; Greenberger, Goldberg, Hamill, O'Neil & Payne, 1989; Boles, Howard & Donofrio, 2001), and productivity (Konrad & Mangel, 2000).

Recently, however, (and possibly in response to the media focus on backlash against family friend policies) the literature has begun to explore the effect of family-friendly programmes among non-users and on notions of fairness and justice within organisations between single, childless workers and those workers with families (Rothausen, Gonzalez, Clarke & O'Dell, 1998; Grover, 1991). There is evidence, for example, that simply offering family-friendly options can have a positive impact on employee attitudes, regardless of whether employees actually use the programmes (Grover & Crooker, 1995). Other research shows that such policies are mainly intended for and used by workers with families (Young, 1997a, 1997b; Parkinson, 1996).

Authors have also documented perceptions of unfairness among childless workers. In a survey of 78 companies conducted by the Conference Board, Parkinson (1996) reports that 75 percent of workers said that their company was not adequately addressing childless employee's needs. In another survey, Flynn (1996) showed that 81 percent of employees

believed that single employees “end up carrying more of the burden than married employees” (p. 59). Still, other studies document different treatment of single employees versus employees with families (Casper, Herst & Swanberg, 2003; Casper, Weltman & Kwegisa, 2006) including social exclusion (Casper et al., 2006), unequal work opportunities (Flynn, 1996; Young 1999), unequal access to employee benefits (Grandey, 2001; Rothausen, et al., 1998; Grover, 1991; Kirby & Krone, 2002; Parker & Allen, 2001; Young 1996; Lambert, 2000) and unequal respect for nonwork roles (Young, 1999; Kirby & Krone, 2002; Casper et al. 2003).

Two recent studies from New Zealand have explored the question of worker backlash against colleagues with children. Haar and Spell (2003) and Haar, et al (2004) examine the relationship between employee non-utilisation of work-family practices and attitudes towards satisfaction, turnover, commitment, and support. Each study uses employee data from New Zealand local government organisations with seven work-family practices: unpaid parental leave, paid parental leave, domestic leave bereavement leave, an employee assistant programme, flexible working hours, and before and after-school childcare. The authors in both studies found that, although non-users of work-family programmes have strong negative feelings towards work-family practices, the negative attitudes do not lead to a backlash against more global attitudes towards the organisation, such as job satisfaction and job-turnover intention.

We intend to mirror these two studies with a unique U.S. dataset that focuses on work-family issues in the workplace, although with three significant changes. We use a direct measure of employee attitude towards organisational assistance in employees’ work-family issues rather than usage of work-family benefits as the pivotal independent variable. In addition, we use two control variables for workplace culture: job pressure and amount of autonomy. Finally, we use two measures of factors that would potentially mediate a negative relationship between employee dissatisfaction with employer involvement in work-family issues and global attitudes towards the company: supervisor support and workplace culture.

Data and Methods

The data for this research come from the 2002 *National Study of the Changing Workforce (NSCW)*, conducted under the auspices of the Family and Work Institute (Bond, Galinsky & Swanberg, 1998). The NSCW provides a nationally representative sample of U.S workers. Due to their likely control over their schedule, individuals who categorised themselves as exclusively self-employed were deleted from the sample and only waged and salaried workers were investigated. The 2002 NSCW has a total sample of 2,810 waged and salaried workers. After cases with non-responses were excluded, we were left with a sample of 2,454.

The two measures of employee global attitude towards the employer used as the dependent variables are *job satisfaction* and *employee attitude*. *Job satisfaction* is measured using an index of two separate questions from the 2002 NSCW: “How satisfied are you with your job?” and “Would you take the same job again?” The scale has reliability (Cronbach Alpha)

of .78. *Employee attitude* towards the employer is measured using an index of two separate questions: “Do you work harder than you have to for the company?” and “How loyal do you feel toward your employer?” The scale has reliability (Cronbach Alpha) of .68. For each scale, a higher number is associated with more job satisfaction and a better employee attitude towards the company, respectively.

The independent variable of interest is a dichotomous variable in which the respondent is asked whether he/she agrees or disagrees with the statement that “work-family problems are workers’ problems and not the company’s” (0=disagree, 1=agree). The need for controlling for the potential effects of employee characteristics has been noted in the work-family research cited above. Individual and/or family level variables that are hypothesised to predict job satisfaction and employee attitude towards the employer include respondent’s sex, whether a spouse or partner is present in the household, level of education, and the presence of children under 13 in the household.

Relevant working conditions that have been found to effect job satisfaction and attitude are reflected in pressure, and autonomy on the job. These variables are available as indexes in the NSCW (Bond et. al., 1998). An index of job pressure averages three questions found in Table 1 that employ a 4-point Likert scale (Cronbach alpha = .47). The index ranges from 1=low pressure to 4=high pressure. Autonomy on the job (Cronbach alpha = .67), takes the mean of the three items and ranges from 1= low autonomy to 4 = high autonomy.

Supervisor and coworker support indices are also provided in the dataset. Supervisor support averages the means of nine items (Cronbach alpha = .88), and ranges from 1 = low support to 4 = high support. The coworker support index (Cronbach alpha = .74) averages the level of agreement to three questions and ranges from 1 = low coworker support to 4 = high coworker support. Table 1 presents a listing of the variables, definitions, and descriptive statistics.

Table 1: Variable Definitions and Descriptive Statistics by Work-Family Question Response:
Valid % / Mean (Std. Error)

Variable Name	Variable Definition	“Work-Family problems are the worker’s problems and not the company’s”	
		Disagree or Strongly Disagree	Agree or Strongly Agree
JOB SATISFACTION***	Index of two questions: “How satisfied are you with your job?” and “Would you take the same job again?” Higher number=higher satisfaction	3.521 (.014)	3.033 (.030)
EMPLOYEE ATTITUDE***	Index of two questions: “Do you work harder than you have to for the company” and “How loyal do you feel toward your employer?” Higher number=better attitude	.088 (.017)	-.244 (.032)
JOB PRESSURE***	Index of 3 items: “Job Requires that I work very fast”; “Job Requires that I work very hard”; and “Never have enough time to get everything done on the job” 1=low pressure to 4=high pressure	2.837 (.016)	3.090 (.025)
AUTONOMY***	Index of 3 items: “Freedom to decide what I do on my job”; “Own responsibility to decide how job gets done”; and “I have a lot of say about what happens on my job” 1=low autonomy to 4=high autonomy	3.038 (2.691)	2.691 (.030)
COWORKER SUPPORT***	Index of 3 items: “I feel part of the group of the people I work with”; “I have the coworker support I need to do a good job”; “I have the coworker support I need to manage work/family life” 1= low support to 4= high support	3.534 (.012)	3.157 (.027)
SUPERVISOR SUPPORT***	Index of 9 items: “My sup keeps me informed of things I need to do job well”; “My sup has realistic expectations of my job performance”; “My sup recognizes when I do a good job”; “My sup is supportive when I have a work problem”; “My sup is fair when responding to employee personal/family needs”; “My sup accommodates me when I have family/personal issues”; “I feel comfortable bringing up personal/family issues with my sup”; “My sup cares about effects of work on personal/family life” 1= low support to 4=high support	3.493 (.012)	3.009 (.030)
AGE***	Respondent’s age	41.84 (.287)	38.46 (.463)
SPOUSE/PARTNER IN RESIDENCE**	0=No 1=Yes	33.5% 66.5%	38.0% 62.0%
FEMALE***	0=male 1=female	47.8% 52.2%	60.5% 39.5%
PRESENCE OF KIDS < 13 YEARS**	0=No 1=Yes	67.9% 32.1%	63.1% 36.9%
EDUCATION: Post Secondary Education***	0=No 1=Yes	37.9% 62.1%	52.1% 47.9%
N			2454
%		73.4%	26.6%

Source: 2002 National Study of Changing Workforce
p<.10 ** p<.05 *** p<.01

Descriptive characteristics based on whether respondents agree or disagree with the question “work-family problems are workers’ problems and not the company’s” are presented in Table 1. Approximately a quarter of the respondents agree with the statement. Workers who agree with the statement have significantly lower mean levels of job satisfaction and attitude towards the employer than those who disagree with the statement. The independent variables also reveal a great deal of significant differences. Workers in agreement with the statement report more job pressure, less autonomy, and less support from their supervisor and coworkers than their counterparts. They are also younger, more likely to be male, less likely to have post-secondary education and more likely to have children less than 13 years of age; results that conform to our expectations, except the last one. It is quite possible, however, that having children under the age of 13 is highly correlated with another variable, such as age, which is driving the unexpected result.

A hierarchical multiple regression analysis was done to test the hypotheses that opinion of organisational involvement in a worker’s work-family problems affects the level of job satisfaction and employee attitude toward the employer. Hierarchical multiple regression analysis is the use of ordinary least squares estimation and adding blocks of explanatory variables. The hierarchy keeps the main independent variable, opinion of the responsibility for work-family problems while adding more explanatory variables to determine the level of predictive improvement in the model from each block. Thus, the work-family opinion question was entered as the first block, the demographic control variables were entered as the second block, and the working condition variables were entered as the third block. To test for moderating effects of supervisor and coworker support, these variables were added in step 4.

The base estimation equation is as follows:

$$\begin{aligned} \text{Job Satisfaction}_i &= \beta_0 + \beta_1(\text{work-family}_i) + u_i \\ \text{Employee Attitude}_i &= \beta_0 + \beta_1(\text{work-family}_i) + u_i \end{aligned}$$

Recall that Harr and Spell (2003) and Harr, et al (2004) examined the relationship between non-utilisation of work-family policies and attitudes and found that negative feelings about the policies did not translated into negative global attitudes about the organisation. This suggests the (β_1) coefficient would be insignificant. However, popular media reports on dissatisfaction with family-friendly policies suggest we should expect coefficient (β_1) to be negative. (The work-family question asks whether the individual feels that work-life problems are the responsibility of the worker, where work-family equals 1 if the respondent agrees and equals 0 if the respondent disagrees). This would mean that those who agree that work-family problems are the responsibility of the worker, not the employer, have lower job satisfaction and a poor employee attitude. The estimation equations with the additional levels of explanatory variables are summarised as follows:

$$\begin{aligned} \text{Job Satisfaction}_i &= \beta_0 + \beta_1(\text{work-family}_i) + \beta_2(\text{demographics}_i) + \beta_3(\text{workplace conditions}_i) \\ &\quad + \beta_4(\text{support}_i) + u_i \\ \text{Employee Attitude}_i &= \beta_0 + \beta_1(\text{work-family}_i) + \beta_2(\text{demographics}_i) + \beta_3(\text{workplace conditions}_i) \\ &\quad + \beta_4(\text{support}_i) + u_i \end{aligned}$$

We expect that the coefficients on job pressure should be negative for both job satisfaction and attitude while the coefficients on the level of autonomy should be positive. It is not clear in the literature whether the demographic variables should positively or negatively effect job satisfaction and attitude. Supervisor and coworker support should have a positive effect on satisfaction and attitude.

Results

Results of the regression analyses appear in Table 2. The results in models 1 and 5 reveal that agreement with the work-family statement results in lower job satisfaction and worsens employee attitude. The significance of this independent variable does not change with the addition of the demographic characteristics, shown in models 2 and 6. For both equations, the demographic characteristics offer additional predictive power (job satisfaction: F change=7.106, p =.000; employee attitude: F change=6.174, p =.000). Age is positively related to job satisfaction and employee attitude. Being female does not affect job satisfaction, but is significantly related to a better attitude towards the employer. Having a spouse or partner in residence leads to higher levels of job satisfaction, but is insignificant in the employee attitude model. Finally, education and the presence of children less than 13 years of age does not affect job satisfaction, although not having post secondary education and having children under 13 leads to a better attitude.

Table 2: Ordinary Least Squares Regression Results

Ordinary Least Squares Regression Results								
Dependent Variable	Job Satisfaction				Employee Attitude			
	Model 1	Model 2	Model 3	Model 4	Model 5	Model 6	Model 7	Model 8
Work-Family Problems	-.611*** (.038)	-.586*** (.039)	-.457*** (.038)	-.197*** (.035)	-.313*** (.037)	-.307*** (.037)	-.237*** (.037)	.034 (.036)
Age		.006*** (.001)	.004*** (.001)	.005*** (.001)		.005*** (.001)	.004*** (.001)	.005*** (.001)
Female		.035 (.034)	.081** (.0323)	.043 (.029)		.074** (.033)	.115*** (.032)	.085*** (.029)
Marital Status		.113*** (.038)	.118*** (.036)	.112*** (.032)		.012 (.037)	.004 (.035)	.000 (.033)
Education		.020 (.034)	-.017 (.036)	.059** (.029)		-.084** (.033)	-.150*** (.032)	-.091*** (.030)
Kids less than 13		.033 (.038)	.014 (.017)	.014 (.032)		.104*** (.018)	.075** (.036)	.073** (.033)
Pressure			-.148*** (.023)	-.078*** (.021)			.068*** (.023)	.124*** (.021)
Autonomy			.317*** (.021)	.149*** (.020)			.291*** (.021)	.162*** (.020)
Supervisor Support				.313*** (.028)				.271*** (.029)
Coworker Support				.441*** (.028)				.310*** (.029)
Constant	.151	-.199	-.665	-3.089	.085	-.146	-1.151	-3.026
Adj. R-square	0.094	0.106	0.193	0.368	.028	.038	.113	.234

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 * p<.10 **p<.05 ***p<.01

Models 3 and 7 add the working conditions variables and in both, job autonomy and pressure significantly affect satisfaction and attitude, although while higher levels of autonomy relate to higher levels of satisfaction and attitude, more pressure relates to lower job satisfaction, as expected, but a better attitude towards the employer. The positive effect of job pressure on employee attitude was unexpected, but it could mean job pressure is interpreted by the employee as measuring his or her importance to the employer. The effect of work-family opinion on both job satisfaction and attitude was mitigated somewhat by adding this additional block of explanatory variables, but the negative effect remains significant.

Further, for both groups of workers, adding working conditions offers additional predictive power beyond that contributed by individual and family characteristics (job satisfaction: F change=133.332, p=.000; employee attitude: F change=103.989, p=.000). The independent

variables significant in model 6 retain their significant relationship to employee attitude in model 7. However, although the independent variables of age and marital status retain their significant relationship to job satisfaction in model 3 with the addition of the working variables, being female becomes significant, suggesting that the gender effect was suppressed in model 2 for these workers.

Finally, the additions of coworker and supervisor support variables in models 4 and 8 have differing effects. In model 8, not only are they significantly and positively related to employee attitude, but their addition has made work-family opinion no longer related to attitude, indicating they have moderated the negative impact of the work-family opinion. However, while the two support variables are significantly related to job satisfaction, work-family opinion continues to affect job satisfaction, indicating that the finding is robust. As a whole, support adds significantly to satisfaction (F change=339.115, $p=.000$) and for employee attitude (F change= 188.165, $p=.000$).

Differences in the effects of the independent variables on the two dependent variables raise an important question concerning worker productivity. Which is more harmful: a negative attitude towards the *employer* or towards the employee's *job*? In other words, is an employee more likely to leave the company or engage in other actions that hurt productivity if he or she is unhappy with the *job* or with the *employer*? Although this paper does not address this question, it does suggest that high supervisor and coworker support in job-related and family-related issues reduces negative feelings an employee may have towards the employer that offers generous work-family benefits. The mediating effect is not seen, however, in the job satisfaction model. The persistence of dissatisfaction with a company's assistance with work-family issues despite the introduction of other explanatory variables, most importantly supervisor and coworker support, suggests the handling of work-family benefits can be a delicate and complicated endeavour.

Conclusion

While there has been much international research on the benefits of work-family policies for employees and the organisation, there has been limited research on what workers think about employer involvement in an employee's work-family problems. The most significant findings of this research using U.S. data are that over a quarter of U.S. workers' view work-life challenges as outside the responsibility of the employer, and further, after controlling for employee and workplace characteristics, this view negatively affects an employee's job satisfaction and attitude toward the employer, although supervisor and coworker support mediates the effect on attitude. This result differs from the New Zealand studies mentioned earlier that concluded the potential for backlash is insignificant and overblown by the media. In fact, this research suggests that serious attention should be paid to human resource policies that promote cafeteria plans, providing "something for everyone".

Notes

ⁱ Three of these associations are The Childfree Network, The American Association of Single People and The World Childfree Association

ⁱⁱ Australia and the U.S. are the only two OECD countries without a national programme of compensated birth and adoption leave. The Australian government, however, provides a significant lump-sum birth grant and also income-tested family benefit payments to families with one-earner (Brusentsev & Vroman, 2007)

ⁱⁱⁱ In the U.S., parents may take up to 12 weeks unpaid for childbirth or care of a child up to 12 months of age as part of the U.S. Family and Medical Leave Act, although employers with fewer than 50 employees are exempt. Five states and Puerto Rico provide some benefit payments to parents missing work around the time of childbirth [California, Hawaii, New Jersey, New York, Rhode Island and Puerto Rico] (Susan Kell Associates, 2007).

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Grievance Processes: Research, Rhetoric and Directions for New Zealand

BERNARD WALKER* and R.T. HAMILTON**

Abstract

Individual-level conflict is a central aspect of contemporary employment relations. The literature is somewhat fragmented, focusing on certain aspects of grievances and dominated by North American writing. The implications for New Zealand are explored and compared with local research which has been driven largely by policy and operational needs. At a time when political debate over grievance laws is once again intensifying, three main areas emerge as priorities for future New Zealand research: a focus on the decision-making processes of employers and employees; what happens in the early stages of within-company resolution; and the merits of alternative dispute resolution procedures.

Introduction

This article provides an overview of the literature concerning employment grievances, relating this to the New Zealand setting and defining an agenda for further research. In the process we point to the disconnection in New Zealand between the political lobbying and the shortage of evidence-based findings. Given the breadth of this topic however, we have selected the most salient areas for discussion. Individual-level outcomes are explored, but not organisational-level outcomes such as productivity and organisational performance where there are fewer clearly established findings. We also give only brief coverage to post-settlement employment as this is less common in this country. The timeframe of the discussion covers research from the mid-1980s, since earlier literature was less well developed (Bemmels and Foley, 1996), while the radical changes affecting both the internal and external contexts of organisations mean that earlier findings may no longer be relevant (Kaminski, 1999; Lipsky, Seeber and Fincher, 2003).

Individual-level conflict is a central aspect of modern employment relations. Recent decades have seen marked increases in the volume of formal, individual-level employment disputes across countries. The USA has experienced a “litigation explosion” of discrimination complaints and lawsuits (Lipsky et al., 2003: 54), with wrongful discharge litigation becoming one of the nation’s premier growth industries (Feuille and Delaney, 1992: 201). Similarly, in the UK the number of employment tribunal applications more than trebled between 1988 and 1996 (Burgess, Proper and Wilson, 2001), a pattern mirrored in New Zealand with a major increase in personal grievance claims during the 1990s (May, Walsh, Thickett and Harbridge, 2001). Some writers

* Dr B. Walker, Lecturer, Department of Management, University of Canterbury

** Professor R.T. Hamilton, Department of Management, University of Canterbury

suggest that individual-level disputes may now represent a more accurate indicator of organisational conflict than traditional collective action (Knight and Latreille, 2000).

The handling of individual-level disputes involves balancing justice for both sides, providing suitable protections for employees while at the same time supporting the functioning of organisations. It is also highly politicised. The New Zealand debate involves lobbying from employer groups and unions, and in recent years the issue has attracted media attention with employer allegations that the current system serves as a “gravy train” (EMA Northern, 2006a; 2009b). The recently elected National-led government introduced a 90 day probationary period restricting entitlement to grievance protections from early 2009, and has announced its intention to further review personal grievance procedures, intimating the likelihood of further legislative change as a response to employer criticisms.

Background and Context

The term “grievance” is defined as “a mechanism for aggrieved employees to protest and seek redress from some aspect of their employment situation” (Feuille and Delaney, 1992: 189). Any discussion needs to acknowledge the significant differences across countries in terms of legal provisions, structures and systems. One approach, exemplified by the United Kingdom, Australia and New Zealand, follows European countries by developing extensive statutory individual-rights protections, with enforcement and dispute resolution through national labour courts or employment tribunals.

In contrast, North America places the onus on employers to resolve disputes and there has developed a long-standing division between union and non-union situations. Hence, there are two distinct grievance systems, each with extensive literatures. Union settings involve formal, multi-step grievance procedures which typically culminate in arbitration by a neutral third-party. A grievance in this context is usually a claim by an employee or the union that the employer has violated the contract (Feuille and Hildebrand, 1995, p.344). Non-union settings have evolved from a situation with few protections for employees, to the recent widespread adoption of dispute resolution systems. Among these however, there is considerable diversity in terms of scope and complexity, with differing procedures and protections. Unlike traditional union procedures, non-union systems use a range of alternative dispute resolution (ADR) options, including open-door systems, early neutral assessment, review panels, mediation and arbitration (Bingham, 2004: 145; Feuille and Delaney, 1992).

The term “employment dispute resolution” (EDR) typically refers to the use of a third-party such as an ombuds (person), mediation, or arbitration to resolve employment disputes outside a collectively bargained grievance procedure (Bingham and Chachere, 1999: 95). Initially, non-union provisions performed a similar role to union grievance procedures, dealing mainly with contractual violations and violations of organisations’ own policies. Now however, North American EDR, using employer-based or third-party programmes extends to systems which go as far as to substitute for the statutory remedies usually available through the courts and government agencies (Bingham and Chachere, 1999). These types of EDR systems can exist both in non-union workplaces, as well as in union settings where they operate alongside union

grievance procedures. Although the latter, more extreme forms are not “grievances” as typically understood, the processes do nonetheless have many commonalities with, and relevance for, grievance research.

The New Zealand system offers a significant contrast to North American systems where employment-at-will, that is, employment being immediately terminable without recourse, forms the legal setting for most private sector employees. The New Zealand grievance process is based on statutory protections rather than employment contracts, with legislated systems for handling individual-level disputes including the forums of the Employment Relations Authority and the courts. At the same time though, New Zealand does participate in the broader international pattern of decentralising dispute resolution to the workplace level, and uses ADR with state-sponsored mediation.

The Grievance Literature

There is no “complete theory” of individual-level employment dispute processes which Bemmels and Foley (1996) suggest is a reflection of the nature of the phenomena. Research into grievance procedures is complicated firstly by the variety of forms that these can take. Moreover any grievance process will involve a sequence of different steps with many differing individuals involved as the dispute progresses, moving from first-line local staff to more senior staff and external representatives as the dispute progresses. Given this complexity, Bemmels and Foley (1996) propose that any all-embracing theory would be “incomprehensible”, and instead it is more appropriate to develop theoretical explanations for different phases. This is reflected in the existing literature which tends to be fragmented, dealing with separate aspects of the overall process.

In comparison with the international literature, New Zealand research has often been instigated by the Department of Labour and hence driven by policy and operational needs. Recent reports have included a diverse range of approaches including surveys of employers and employees (Department of Labour, 2000, 2002c, 2007d), interviews with parties (Department of Labour, 2002c, 2007d), a brief “snapshot” analysis of mediations (Department of Labour, 2007c) and Authority determinations (Department of Labour, 2007b), as well as focus groups (Department of Labour, 2002c, 2007a). A number of common themes emerged from these publications. The reports outlined the incidence of employment relationship problems and the associated financial, personal and social costs. The various avenues of resolution were identified, and the issue of representation was discussed with regard to issues of quality and the effect that this had on resolution processes. The situation for small and medium enterprises was portrayed as particularly difficult, as these were typically over-represented in the numbers of employment relationship problems, with those problems having a disproportionately large impact on such organisations. While these reports cover a variety of issues, they are often limited by methodological factors including sample size and response rates, and consequently the reports themselves state that their “findings can only be indicative” (Department of Labour, 2007d: 5; 2007b).¹

The following discussion is structured around the four sequential phases of the grievance process: (1) the incidence of grievable events; (2) grievance initiation; (3) grievance processing; and finally (4) outcomes.

1. Incidence of Grievances

The emergence of a grievance contains a number of sub-stages. The process commences with the initial perception that a 'grievable event', a mistreatment or breach of employee rights, has occurred. Surprisingly, the literature contains little information on these events although a number of studies have suggested that their incidence is high (Bemmels and Foley, 1996; Department of Trade and Industry (DTI), 2005a, 2005b; Lewin, 1999; Lewin and Peterson, 1988). Of significance is the apparent drop-off between the large numbers of potential events and the much smaller number actually pursued as grievances. The next sub-stage consists of initial, informal complaints and their resolution directly between the parties. USA research suggests most grievances are never put in writing but instead are dealt with informally between workers and their supervisors (Lewin, 1999). Again, the incidence of this resolution is not known, but it is estimated that in union firms there are about 10 unwritten grievances for every one filed formally (Lewin and Peterson, 1988).

In the next sub-stage, actual formal filing, data for non-union North American settings comes from company records. The definition of what constitutes a grievance varies by company, but overall studies suggest an average annual rate of around five grievances per hundred employees (Lewin, 2004). In contrast, the union filing rate is around 10%, twice that of non-union organisations (Bemmels, 1994; Lewin, 2004; Lewin and Peterson, 1988). By comparison, United Kingdom data is drawn from applications to an external forum, the Employment Tribunal, rather than in-house grievance procedures and there the annual rate was 1.9 per thousand (approximately 2%) of employees (Knight and Latreille, 2000). Beyond these aggregated figures, American, British, Canadian and other studies report wide variation in grievance rates across industries or sectors (Bemmels and Foley, 1996; Earnshaw, Goodman, Harrison and Marchington, 1998; Hayward, Peters, Rosseau and Seeds, 2004; Lewin and Peterson, 1988), a pattern that is mirrored in New Zealand (Department of Labour, 2003b). Overall, little is known about the causes of these variations.

International between-country comparisons are problematic, with the New Zealand situation further compounded by both the limited data and the use of measures not directly comparable with American grievances. New Zealand surveys suggest that in a 12 month period, around 35% of employees experienced a 'problem' that was discussed with a supervisor or manager (Department of Labour, 2000), while estimates of issues that are not resolved by discussion with a immediate manager or supervisor but proceed to third party involvement range from 1.5% to 15%, with a higher incidence in the private sector (Department of Labour, 2000, 2003b, 2007d). While absolute numbers are not directly comparable, the limited research does suggest a similar pattern to elsewhere, with high levels of informal or private resolution and only a small proportion proceeding to the formal institutions (Department of Labour, 2002c, 2007a). Interestingly, in terms of the contemporary debates, one recent report (Department of Labour, 2007d) suggests a low incidence with the majority of New Zealand businesses having no employment relationship problems in the 12 months surveyed, whereas in contrast an employer-

group survey proposed that 30% of employers experienced a grievance over a similar period (EMA Northern, 2006b).

2. Grievance Initiation

(a) Demographics

Early grievance research assumed that filing behaviour may be explained by demographic factors or personal disposition. Subsequent studies however, failed to produce any correspondingly simple answers; the findings varied and the studies tended to describe what occurred rather than developing specific theory that could explain differences (Allen and Keaveny, 1985; Bacharach and Bamberger, 2004; Lewin, 1987; Lewin and Peterson, 1988). The matter is further compounded with the relationships also varying by grievance issue (Bemmels and Foley, 1996; Lewin, 2004; Lewin and Peterson, 1988). New Zealand data covers a range of factors such as age, tenure, ethnicity, union membership, and sector, however as findings vary both within countries and between countries, there are no clear reference points for making inter-country comparisons (Department of Labour, 2000, 2007c).

(b) Context of Work

Other studies explored the link between grievance filing, the work context and possible work-related determinants. More aversive supervision or job characteristics for example, were expected to result in increased grievance filing (Bamberger, Kohn and Nahum-Shani, 2008; Klaas, 1989a). Despite the intuitive appeal of such links, once again empirical studies generated inconsistent findings (Bacharach and Bamberger, 2004; Bemmels, 1994; Bemmels and Foley, 1996; Bemmels, Reshef and Stratton-Devine, 1991). The roles of unions and management have however proven significant. Management policies requiring written applications for example, have been associated with increased grievance rates, heightened formality and escalation of disputes (Antcliff and Saundry, 2009; Gibbons, 2007; Lewin and Peterson, 1988). Union policies of 'taking certain grievances through the procedure', along with stewards' encouragement of filing, were also related to increased grievance filing (Bemmels and Foley, 1996). In contrast, perceived supervisor capabilities, and shop steward attempts at informal resolution, were both negatively associated with grievance rates (Bemmels, 1994; Bemmels and Foley, 1996; Bemmels et al., 1991).

There is little New Zealand data to directly compare these findings with, however the international research does highlight the critical nature of the roles of management and unions and this has significant implications for both New Zealand practice and research. Existing reports note issues such as the key functions unions can perform assisting with resolving issues in the workplace, as well as the effects of the varying levels of ability among managers (Department of Labour, 2002c; Donald, 1999). Walker (2009) also observed the influence that different approaches from employers and representatives have on the course of grievances, creating types of interactions that move the dispute towards either escalation or resolution.

(c) Employee Decision-Making

A different line of inquiry has explored the process of employee decision-making; how do employees decide for example, whether or not to file a grievance. Unlike the earlier, more descriptive work, decision-making models typically involve the application of specific social science theory. Several of these models are outlined in terms of their potential relevance for the New Zealand situation.

Of particular significance is Klaas' (1989a) model based on expectancy, procedural and distributive justice theories. This proposes a "rational, calculative" decision-making process where, in terms of expectancy theory, employees weigh up the relative attractiveness or utility of filing, taking into account factors such as the likelihood of winning and expected remedies, comparing these against alternatives such as quitting or inaction. Employees motivated by a genuine sense of inequity are likely to engage in additional "alternative responses" such as disruptive behaviour if grievance procedures on their own do not restore equity - whereas those filing for purely instrumental reasons of political or economic gain, are less likely to do this. Subsequent empirical investigations have supported this model (Lewin, 2004; Olson-Buchanan, 1997).

Cappelli and Chauvin (1991) developed an "efficiency model" which also proposed that employees will weigh up the costs and benefits (or effectiveness) of grievance filing compared with other options such as exit or remaining silent. In particular, labour market conditions such as high unemployment, and higher wage premiums (compared to the local labour market), were identified as key determinants of the benefits of filing. This was consistent with the findings of Brown, Frick and Sessions (1997) whose 30-year data from Germany and Britain showed the demand for grievances to be cyclical, with macro-level factors such as unemployment and vacancy rates exerting a much stronger influence than changes in the legal infrastructure. Bacharach and Bamberger (2004) however, found little support for the direct relationship with unemployment or wage premiums. Instead they returned to a more traditional issue of the relative power of the parties. Drawing on power dependence theory (Lawler, 1992), they proposed the more conceptual notion of "labour power", meaning the employee's perception of the extent to which the employer is dependent on the employee, as a key determinant of employees' filing decisions.

More recently Olson-Buchanan and Boswell (2008) proposed a model which seeks to unify earlier work regarding the separate aspects of the dispute process into an integrated theoretical framework. This extends back to the pre-grievance stage, using a sense-making perspective which incorporates individual's perceptions before, during, and after grievance activity, explaining how an individual firstly concludes they have been mistreated, and then responds to this mistreatment.

The Exit-Voice-Loyalty model

Hirschman's (1970) exit-voice-loyalty (EVL) model has been the dominant employee decision making model. Originally developed as a model of consumer behaviour, it proposes that, when confronted by deterioration in a relationship, a party can respond through either "voice" seeking to redress the situation, or "exit" by changing to another product. The individual's loyalty to the

supplier is the key determinant of whether voice or exit behaviour will occur. Freeman and Medoff (1985) adapted the model to industrial relations, proposing that through offering a voice option in the form of grievance procedures, unions produced positive benefits for organisations (Boroff and Lewin, 1997; Lewin, 2005). By having a voice option as an alternative to exit, employers would benefit through reduced turnover, as well as learning about problems more quickly, and gaining more specific information to address the issues. Similarly, employees could also benefit through being able to resolve disputes, restoring their employment relationship and so being able to remain with the company. The traditional wisdom became that voice action, through grievances, was advantageous for both employers and employees (Feuille and Delaney 1992).

Unlike other decision-making models however, the research surrounding Hirschman's (1970) model has not been limited to the initial grievance-filing decision but has extended to other aspects, particularly the proposed beneficial outcomes that are predicted to occur in relation to filing. This has produced unexpected findings which challenge the traditional wisdom. Contrary to those predictions, a series of studies reported negative outcomes following grievance filing and settlement, thus questioning both the traditional wisdom and the adequacy of the EVL model. Comparing employees and supervisors involved in grievances with those who were not, one year after grievance settlement, both performance ratings and promotion rates were lower, and turnover rates were significantly higher, for grievance filers compared to non-filers. No significant differences existed between the filer and non-filer groups prior to, or during, filing and settlement. A similar pattern of outcomes occurred among supervisors involved in those grievances (Lewin, 1987; Lewin, 1999; Lewin and Peterson, 1988; Lewin and Petersen, 1999). So the debate has expanded to encompass competing models which offer alternative explanations for those outcomes. This research will therefore be discussed in relation to those outcomes, below. The area has important implications for not only understanding how employees experience, and respond to, instances of perceived mistreatment, but also possible changes that occur in the employer-employee relationship.

Decision Making Models: Applications and Limitations

While the decision-making approach appears to hold explanatory power, it has limitations. Internationally the work has been tended to be confined to a single decision, namely the initial decision to lodge a grievance, and has not extended to the other decisions throughout the subsequent stages of grievance processes. Furthermore, the work has focused predominantly on the employee perspective with significantly less attention to that of the other key player, the employer. Consequently there are still considerable unexplored areas concerning decision-making in grievance processes. One further potential limitation concerns generalisability, and the question of whether the nature of grievance initiation is the same across differing jurisdictions. In North America for example, it is more typical for grievances to occur with an expectation that the employee will continue their relationship with the same employer. In contrast, New Zealand grievances have tended to occur where the employment relationship has ended, and grievance procedures have often addressed the "terms of dissolution" of such relationships (McAndrew, 2000: 303). There is only limited information concerning grievance initiation decisions in New Zealand and in the absence of such data, it is difficult to assess whether parties are in fact, weighing up the same issues and making the same type of decision.

Although those limitations are acknowledged, it would seem that the area of decision-making, especially by employees, may have considerable potential relevance for New Zealand. The international research suggests that this is an important component in understanding grievance behaviour, yet this aspect of New Zealand grievances still remains ill-defined. The development of grounded findings may provide insights and contrasts for the politicised debate, including issues such as alleged opportunism among employees. Klaas (1989a) for example distinguishes between instrumental and genuine grievance activity, while two New Zealand Department of Labour reports (Department of Labour, 2002c, 2007d) suggest that, at most, only a small minority employees are likely to pursue grievances for purely opportunistic, financial gain – contradicting employer claims.

New Zealand reports have also noted factors that operate in the opposite direction, exerting significant deterrent effects on employee decision-making, particularly the specific social, personal and financial costs experienced by employees (Department of Labour, 2007d). Unlike the international literature the New Zealand information also extends to an outline of elements of employer decision making, in terms of the factors involved, and decision-areas such as the choice of resolution method (Department of Labour, 2007d, 2007a). While the existing information is largely descriptive, Walker (2009) developed a grounded theoretical model of employer and employee decision based on a power dependency framework, as part of a wider grievance process model. This adopts a cost-benefit perspective using elements similar to those noted in Department of Labour reports (Department of Labour, 2007d) but incorporating a sequence of stages as well as noting employer behaviours that are outside the intent of current legislation. It seems that understanding decision-making, particularly from the employee perspective, may be a particularly central element in developing greater knowledge of New Zealand grievance dynamics. Research exploring this area could begin to explain why employee behaviours occur, rather than simply observing overall grievance numbers and making generalisations based on anecdotal evidence.

3. Grievance Processing

Grievance processing refers to “when, where, and how grievances are resolved” (Bemmels and Foley 1996: 372). The inherent focus on the grievance-handling system of a specific country or organisation means that research findings are often interwoven with details of the structures and procedures in a particular locality, thus limiting generalisability. A variety of indicators are used in evaluating grievance processing, but the two main criteria are speed and satisfaction (Budd and Colvin, 2008).

Firstly, the “speed” literature emphasises measures such as the length of time until settlement (Lewin and Peterson, 1988; Ponak and Olson, 1992; Ponak, Zerbe, Rose and Corliss, 1996), the ‘level’ or step at which settlement occurs, and settlement rates (Dastmalchian and Ng, 1990; Lewin, 1999; Lewin and Peterson, 1988; Ng and Dastmalchian, 1989). In North America for example, the bulk of grievances are typically settled at the first or second steps, with only a very small proportion (around 2%) settled at the final step of either procedure (Feuille, 1999; Lewin, 2004; 2005; Lewin and Peterson, 1988). In New Zealand, reports address aspects such as resolution methods, timeframes associated with each method, costs, and numbers resolved by

each method (Department of Labour, 2007a, 2007c, 2007d). Not surprisingly, in-house resolution generally proves more rapid and less expensive, and as with North America, only a small proportion of cases reach the later stages of the Authority or Employment Court.²

Secondly, ‘satisfaction’ measures typically consider parties’ perceptions of procedures, especially their fairness. The organisational justice literature addresses how employees determine if they have been treated fairly, and the impact of those perceptions, with employees who believe they are treated fairly tending to be more favourably disposed toward the organisation (Cohen-Charash and Spector, 2001; Greenberg and Lind, 2000). While much of the grievance processing research is both descriptive and limited by context, the construct of organisational justice with the three aspects of distributive, procedural and interactional justice, provides a theoretical framework with potential to generalise across settings (Colquitt, Conlon, Wesson and Porter, 2001).

Research concerning grievance processes generally confirms the importance of those perceptions of justice or fairness in employees’ assessments of the effectiveness of systems (Bemmel and Lau, 2001; Blancero, 1995; Boroff, 1991; Lewin, 1999; Nurse and Devonish, 2007). Fairness can be more important than speed (Gordon and Bowlby, 1989, Lewin, 1999), with perceived procedural justice significantly predicting a belief in overall workplace justice (Fryxell, 1992), as well as being linked to satisfaction with the union and management (Fryxell and Gordon, 1989). Usage of grievance procedures, which can itself be used as a criterion (Bingham, 2004), has also generally been found to be associated with the perceived fairness of the system, with positive employee perceptions of effectiveness related to increased employee use (Lewin and Peterson, 1988; Mesch and Dalton, 1992; Petersen and Lewin, 2000). Blancero and Dyer (1996) for example, report systems that are perceived as ‘credible’, ‘accessible’ and ‘safe’ were used more, while Colvin (2003) suggests the neutrality of decision-makers promotes usage.

New Zealand reports propose relative satisfaction concerning procedures; for example in a recent survey of employers, around two-thirds expressed satisfaction with resolution procedures and outcomes (Department of Labour, 2007d). Contrary to employer claims, the employers surveyed perceived employment relationship problems as resulting in an overall benefit rather than a cost for business, with indications that the direct financial costs for employers were quite low in comparison with countries such as the UK (Department of Labour, 2007d; Gibbons, 2007; Shulruf, Woodhams, Howard, Roopali and Yee, 2009). There is however no consensus on what constitutes “effectiveness” in grievance procedures (Lewin 1999). While there are numerous measures used, there is little clarity on precisely what constitute optimal outcomes. In response, Budd and Colvin (2008) propose the three concepts of ‘equity’, ‘efficiency’ and ‘voice’ as core standards which could be utilised for comparison and evaluation of procedures.

In the North American context, the evaluation of grievance systems takes on particular significance in comparisons of non-union systems utilising ADR processes, against traditional union-based procedures. A key question concerns the extent to which the newer alternative systems provide workplace justice, especially for employees (Bingham, 2004; Colvin, 2003, 2005; Klaas, Mahoney and Wheeler, 2006; Mahony and Klaas, 2008). Traditional systems contain strong procedural safeguards with well-established due process protections, however the few studies that have examined non-union procedures have tended to find fewer protections, with

wide variation in terms of procedural formality and only modest independence from management (Feuille and Delaney 1992; Feuille and Hildebrand 1995). Specific shortcomings are identified for each of the various ADR forms (Budd and Colvin, 2008; Mahony and Klaas, 2008), but Bingham's (2004) review of the existing evidence suggests that mediation produces better organisational outcomes than either no intervention or an adjudicatory option such as arbitration. Other writers however question ADR procedures with Van Gramberg (2001) for example, suggesting a "second class" nature of justice afforded to employees through newer Australian grievance systems.

Questions of equity and justice are not simple matters. In non-union North American settings, grievance systems can be unilaterally designed and imposed by the company, raising crucial questions regarding justice for employees. An especially controversial area concerns the ability of an employer to impose mandatory company-based arbitration as a condition of employment, requiring employees to relinquish their rights to external forums such as the courts, or government agencies. While the New Zealand situation seems far less extreme, there are nonetheless questions concerning the extent to which ADR procedures used in current forums such as Department of Labour mediation, do provide justice for both employees and employers. These international questions also provide a caution for policy-makers considering any possible changes to the New Zealand system. The issues highlight a further, significant research gap concerning within-company resolution in New Zealand. While it seems the majority of disputes are settled privately, and many resolved internally, particularly in larger organisations (Department of Labour, 2007d; EMA Northern, 2006b), from an employee perspective the processes involved may not be prompt or effective, and only 20 - 46% of disputes end with the employee remaining in their job (Department of Labour, 2000, 2003b). Conversely employers also argue that private settlements do not necessarily represent justice but are simply a pragmatic way of avoiding the possibility of high costs associated with forums such as the Authority (Bond, 2004; Department of Labour, 2007d; EMA Northern, 2006b). Although New Zealand legislation requires that companies have a written "plain language explanation" of their resolution procedures, the limited local research questions the extent to which these written procedures translate into systems are in fact, credible, accessible and safe for employees (Blancero and Dyer, 1996; Department of Labour, 2000, 2002c; Walker, 2009). There is a need for further investigation into the processes that do actually occur within New Zealand organisations, before grievances reach external forums, and particularly within-company resolution.

4. Outcomes

Grievance outcomes have been studied over different time intervals, including the longer term implications for employees who remain with the employer post-settlement. In the North American union environment, Feuille and Hildebrand (1995) suggested that most grievances were resolved in the employee's favour. This situation is mirrored in the limited New Zealand information concerning Authority determinations (Department of Labour, 2007b; EMA Northern, 2009a). Feuille and Hildebrand (1995) noted however, that there was no single explanation for why employees prevail in some grievances and not in others, and this is symptomatic of the lack of theoretical development. More broadly, potential determinants that have been investigated include the grievant's work background (Klaas, 1989b), the industrial relations climate of the organisation, the salary of the grievant, the grievance issue (Ng and

Dastmalchian 1989), the nature of the forum (labour versus employment arbitration) (Bingham and Mesch, 2000; Klaas et al., 2006), as well as extraneous factors such as the gender of the grievant and/or decision maker (Bemmels, 1991; Dalton and Todor, 1985; Dalton, Tudor and Owen, 1987). These have shown possible links, and it would seem that in general, factors other than the merits of the case may influence settlement decisions, again raising questions regarding the justice delivered by the system. Firm size is also implicated, and this pattern is especially evident in New Zealand where smaller firms are more likely to be involved in dispute hearings (Department of Labour, 2007d, c); in the UK they are also more likely to lose compared to large firms (Saridakis, Sukanya, Edwards and Storey, 2008). The relationship with organisation size requires further investigation; New Zealand reports suggest that possible explanations may include lesser HR resources and expertise in smaller businesses, along with their lesser experience in dealing with individual-level disputes (Department of Labour, 2007, 2007c).

Representation is another recurrent topic with Antcliff and Saundry (2009) finding no links between actual representation and UK company grievance hearing outcomes, although high union density was linked with more favourable outcomes for employees. In New Zealand, McAndrew (1999) found that in the earlier Employment Tribunal, employers without professional representation were less likely to achieve successful outcomes, while another key predictor of the outcome was the nature of the grievance McAndrew (2000). More recently, reports have noted comparatively high levels of representation in general (Department of Labour, 2003b, 2007b), as well as a positive relationship between representation and settlement outcomes at mediation (Department of Labour, 2007c), however the causes of this are unclear. The influence of representatives is a contentious issue in New Zealand, with employers alleging that “no-win no-fee” contingency representatives inflate grievance rates by pursuing cases that lack merit and are based solely on minor procedural technicalities (EMA Northern, 2006a, 2007). Reports however suggest this type of representative was only involved in a small percentage of problems and did not have a significant influence overall (Department of Labour, 2007d). The varying approaches of different representatives has however been noted (Department of Labour, 2007a, 2007d), including the competency levels, and negative effects of some advocates, as well as the positive roles that others such as unions can play in managing and resolving grievance issues, as mentioned earlier (Department of Labour, 2002c; Donald, 1999), with Walker’s (2009) grounded theoretical model addressing the dynamics involving representatives and the effects these have on dispute outcomes.

In general, while many jurisdictions including New Zealand have data concerning outcomes in terms of aspects such as win/lose rates and settlements, these tend to often simply report *what* happens. These however cannot be read at face-value and in isolation; they need to be read in the context of a theoretical framework and an understanding of *why* these occur. A greater understanding of employee decision-making for example, may demonstrate that factors such as costs may mean that employees will only pursue cases with a very high probability of success. This information would therefore imply that one would actually expect a higher proportions of outcomes in favour of employees, rather than assuming that a 50/50 balance of win/lose outcomes is the benchmark for equity. Furthermore, in contexts such as New Zealand it is necessary to be clear about exactly what a system is seeking to achieve and why. If a system is seeking to achieve early, low level resolution, then this needs to be based on a clear theoretical model and outcomes can be measured against those criteria. At the same time, there are hotly

debated issues as to what constitutes a suitable measure of equity and “justice” in both processes and outcome measures. These issues are currently sparking calls for a whole new programme of research into non-union and EDR systems in North America.

Longer-term research on post-settlement issues in North America has found that some employees do experience significant negative outcomes, particularly in areas of performance, promotion attendance and exit, the reverse of what was predicted by the EVL model. These outcomes are however consistent with an alternative model, that of organisational punishment - industrial discipline (Arvey and Jones, 1985; O’Reilly and Weitz, 1980). Therefore one explanation for these negative outcomes is simple ‘retaliation’, with employees who file grievances and their supervisors, being punished (see Klaas and DeNisi, 1989). Alternatively, there is another possibility; the negative post-settlement outcomes may be due to real behavioural differences, with grievants and their supervisors genuinely being poorer performers. The process of grievance filing and resolution then prompts employers to pay closer attention to their performance, which reveals the performance deficits (Lewin and Petersen, 1999; Olson-Buchanan, 1996).

Studies also suggest that the experience of mistreatment on its own, independent of taking grievance action, is significantly linked to exit (Boswell and Olson-Buchanan, 2004; Olson-Buchanan, 1996). Various other factors appear to be involved. The type of mistreatment or grievance for example, was also influential with ‘personal’ grievances against supervisors’ actions being more strongly linked with lower performance ratings and higher work withdrawal than ‘policy-related’ issues (Boswell and Olson-Buchanan, 2004; Klaas and De Nisi, 1989). The type of voice also proved influential with loyal employees raising issues but in less formal ways, which could be construed as supporting the EVL model (Olson-Buchanan and Boswell, 2002). Overall however, there is still mixed evidence supporting each of the potential explanations, with no single unequivocal conclusion.

An important implication is that when the grievance process is triggered by deterioration in the relationship between the employee and employer, it would seem that formal grievance activities often do not successfully restore that relationship - irrespective of whether or not the grievance procedures themselves contribute to that decline. This poses questions as to whether formal grievance procedures, perhaps including external mediation, can achieve the resolution and restoration of relationships that is often desired, especially when such interventions only occur after there has been relationship deterioration. In New Zealand, post-settlement outcomes have had less prominence because grievances continue to be dominated by disputed dismissals where relationships have already ended (Department of Labour, 2007b, 2007c). Instead, the question becomes why this occurs, especially when the intent of the current legislation was to promote early intervention, proactively restoring or maintaining employment relationships (Department of Labour, 2002a: 6). Reports have noted for example, that rather than being opportunists, New Zealand employees were in fact, often reluctant to pursue grievances due to concerns about potential retribution, harm to their career, and the likely demise of the employment relationship as an almost-inevitable consequence of a grievance – elements that match overseas retribution interpretations (Department of Labour, 2002c). This also raises the question of how employees deal with perceived mistreatment and whether some issues are not pursued. Similarly, employers may tend to avoid dispute resolution outside the company due to concerns about relationship damage, often perceiving mediation as a “road of last resort” (Department of Labour, 2002c).

Perhaps the smaller size of New Zealand workplaces means that parties are more acutely aware of the potential consequences of grievance action, compared to their North American counterparts. These matters again relate to the issues already noted such as employee decision making and within-company resolution, and thus represent fertile ground for further investigation.

Reinstatement serves as another focus of research. The international literature suggests this is awarded in about half of grievance cases (Lewin, 1999; Williams and Taras, 2000), however there is wide variation in estimates of numbers who subsequently return to work, ranging from 38% to 91% (Eden, 1994; Lewin, 2005; Malinowski, 1981; Williams and Taras, 2000). Canadian and British findings suggest that reinstated employees do not tend to remain with their employers long term (Dickens, Hart and Weekes, 1984; Lewin, 1999; Trudeau, 1991). In contrast, while reinstatement is the “primary” remedy for grievances in New Zealand (ER Act s101(c), s125), in practice it is rarely sought by applicants, a similar situation to Britain (Corby, 2000; Department of Labour, 2002b, 2003a, 2003b). Again, this raises questions regarding the causes of this phenomenon. Are within-company processes perhaps so effective that if resolution is possible, it is normally achieved at that stage – or conversely, are New Zealand employers so unforgiving that embarking on grievance action effectively signals the end of an employment relationship (Department of Labour, 2002c)?

A Research Agenda for New Zealand

The international literature highlights a range of research areas with potential relevance for New Zealand. At the same time, it exposes the limited body of New Zealand research at a time when this is much needed to inform contemporary debates and policy. Internationally, a range of research is needed and this includes the development of models which capture the ongoing dynamic nature of grievance processes involving a progression through a sequence of stages, as well as extending the existing one-sided perspectives to capture the interactive nature of grievances. While the New Zealand shortfalls reflect international patterns to some extent, there are a number of issues of particular local significance which we have identified in the paper. In concluding, our overview is that the most urgent New Zealand needs are centred on three areas³. Firstly, there is a shortage of information concerning decision-making, particularly by employees and employers. The factors driving the behaviours of these parties remain ill-defined even though this may be quite a critical issue. There is a need to explore decision-making throughout all stages of the grievance process, from the perspectives of multiple parties. This could include issues such as the alleged prevalence of opportunism, and the numbers of employees who simply decide to exit rather than pursue a dispute.

Accompanying this, the role and influence of third parties in grievances, including representatives and unions, is relatively uncharted. There are indications that these parties are quite influential (McAndrew, 1999; Walker, 2009) but the dynamics are not clearly established. Similarly, the role of HR staff in grievances also warrants investigation, in terms of both their current functions and also their potential to assist in low-level resolution.

A second little-explored area concerns the early stages of grievances, particularly within-company dispute resolution. For example, what actually happens in the early stages, particularly when significant numbers of problems are apparently resolved within organisations and never reach external forums, and yet why do disputed dismissals make up such large proportion of grievances? The 90-day “probation period” also represents a new area requiring thorough investigation. Related to this is the issue of private resolution, concerning grievances that are resolved with the assistance of an external party other than official Department of Labour agents. A third, related area needing research is the introduction of ADR procedures such as mediation with an emphasis on informal confidential resolution. While there are numerous critiques of ADR and ‘private’ (as opposed to ‘public’) justice (van Gramberg, 2001), the full implications for grievances have yet to be explored, and these point to the challenging task of evaluating issues of justice and equity in the New Zealand context. Those issues also extend to questions such as access to the higher level forums of the Authority and the Employment Court when critics argue that factors such as costs make these inaccessible for many employees.

Grievances represent an important area of contemporary employment relations. Amidst the current political debates there is a need for research-based evidence in place of rhetoric, however as yet the limited existing local research often provides conflicting results without clear patterns. Internationally, it is well recognised that the field is confronted with major challenges with regard to research access and the design of appropriate methodologies (Bingham, 2005, Bingham and Chachere, 1999, Lewin, 1999). Although these are more pronounced in North America where the employer-centred systems mean that data resides only within the organisation, similar issues remain problematic in a New Zealand context. Nonetheless, an improved understanding of the issues has the potential to benefit employers, employees and policy makers, producing systems that achieve both justice and efficiency.

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Notes

¹ The studies tend to be descriptive rather than driven by theory, and as yet, generally do not have the support of significant amounts of independent academic research.

² A Department of Labour (2007d) employer survey suggested that around 60% of employment relationship problems are resolved within the organisation

³ These areas now form the focus of the author's ongoing research

Secondary Boycotts and Ally Doctrine in the U.S. Law of Strikes

JACOPO BUSNACH RAVENNA*

Abstract

The paper aims to schematically illustrate the legal genesis of the concept of secondary boycott in U.S. statutory law and its application in the relevant case law. For this purpose, a brief overview of the historical origin of the right to strike is provided, along with the analysis of the evolutionary process which led to its inclusion in the Constitutional Charts of many European countries. This introduction is followed by a description of the legislative steps towards the enactment of the Wagner Act (1935), as amended by the Taft-Hartley Act (1947), and of the Landrum-Griffin Act (1959), especially focusing on the different sanctions which may spring from group ostracism against neutral employers. The distinctiveness of the so-called “ally doctrine” as regards the labour unions’ liability for instigating secondary boycotts is further portrayed, as an exception to the guarantee of free speech contained in the First Amendment to the U.S. Constitution.

Introduction

When employers undergo trade unions’ collective actions such as strikes or boycotts, they always strive to reduce, as much as possible, the impact that the work stoppage can provoke on the going concern. In fact, one of the most critical issues arising from a strike lies in the fact that work stoppages may permanently affect the firm’s productivity (Bock, 2005).

Concerned about the risk that such collective actions could affect national security, legislators throughout the ages have been adopting measures aimed at restricting strikes, ranging from civil sanctions to total ban (Chepaitis, 1997). All the same, the constant tendency for almost all legal systems is by now to grant workers valuable tools in order to counterbalance the inescapable disproportion in bargaining power between the two negotiating parties in employment contracts. This trend has been translated into regulations which have increasingly equipped workers and their representatives, namely trade unions, with appropriate legal protection against employers’ retaliatory conducts. This development has been suddenly boosted by the drafting of constitutional principles protecting the right to strike (Pope, 1999). However, it should be noted that almost all subsequent, both legislative and regulatory, interventions have been aimed at limiting the sphere of application of such right.

Deprived of workers, the employer is likely to hunt for other sources in order to replace the striking labour force. If these attempts succeed, the effect of the strike is likely to fade away and thus the very significance of the striking workers’ grievances – which originally prompted the strike – tends to blur. Meanwhile, on the other side of the river, unions calling a strike strive to make it successful and do their best to prevent employers from getting outside

* LLB, Bocconi University (2007); Visiting Student, University of Richmond School of Law (2008); JD, Bocconi University (2009); Associate at Gianni, Origoni, Grippo & Partners – M&A Department (2009 - now). I would like to acknowledge the support of my fellow and friend Luigi Russi, whose commitment and enthusiasm I will never forget.

workers. This mostly defensive counter-activity, which targets the secondary means used by the primary employer, is often referred to as a “secondary boycott”. Its essence was defined as “a combination to influence A by exerting some sort of economic or social pressure against persons who deal with A” (Frankfurter and Green, 1930 as cited in Dereshinsky, Berkowitz and Miscimarra, 1981).

Generally speaking, these kinds of activities are deemed to be unlawful under U.S. law, the system with which this article is chiefly concerned. In particular, such practices are normally outlawed to the extent to which they follow the notion of “unfair labour practice” set forth on a statutory basis, although this notion is often construed differently by the courts. Both aspects of the issue, and the peculiar tenets of the “ally doctrine”, will be analysed in the following paragraphs.

This paper starts with describing, in unbiased terms, the legislative process which led to the recognition of the right to strike by the major legal systems worldwide. In particular, within the U.S. framework, the legislator had to cope with such recognition in order to make it consistent with the privileges traditionally claimed by the powerful industrial lobbies.

Without prejudice to the social consequences driven by the enactment of workers-oriented provisions within the U.S. capitalist framework, the fragility of this equilibrium has also awakened interest of legal scholars, who have attempted for a long time to regulate the relevant issues taking them back to the common principles of labour law. However, as this paper aims to demonstrate, such attempt often collided with the increasingly evolving standards and practices, that may be hardly contained within the narrow limits of the statutory law. In such respect, both case-made law and non-governmental organisations are likely to play a primary role in regulating the delicate issues arising from strikes.

An Overview of the Right to Strike

From Crime To Right

The right to strike suffers from being preceded by the social fact of the strike: the law reacts to this phenomenon, the law does not dominate it (Sinay, 1966 as cited in Betten, 1985). In the industrial relations environment, strikes are coessential with the employment relationship and are often related to workers’ complaints regarding the performance of the contractual obligations under the conditions set forth unilaterally by the employer. This explains why most of the striking activity occurs during the negotiation phase between the employer and the unions, namely when the different contractual power must be properly offset.

The factors that trigger a strike are diverse and not necessarily interrelated, but as a whole they share the embodiment of demands which employees want to press on the employer. In this sense, strikes are powerful weapons aimed at enforcing a particular policy within the workplace. However, it should also be pointed out that sometimes strikes occur in response to significant influences outside workers’ control and in such circumstances, work stoppages do not reflect the workers’ claims and therefore may not be managed within a single work unit.

Strikes are always collective. This feature has a historical explanation because as long as employees were supposed to work under conditions unilaterally set by the employer due to the absence of a collective bargaining infrastructure on the labour side, courts used to

construe work stoppages, literally, as a just cause of termination of the employment contract. Later on, workers have realised that the counterpart would have paid attention to their grievances only if they had acted collectively and ensured the solidarity of other workers. In other words, employees have gradually become aware of the fact that only a high number of strikers would have affected the employer to such an extent that they could not remain insensible to their complaints. In modern labour practice, the collectivity requirement generally necessitates that the strike be announced in advance; otherwise, in the absence of previous proclamation, a sum of individual abstentions would instead arise.

Along with other collective actions, strikes were originally outlawed as criminal offenses – no matter how many participants gathered at the strike. The rationale of such a legislative choice apparently lies in the social alarm arising from strikes, which may result in emulative acts performed by workers belonging to other industrial sectors, potentially able to pose a threat to national security. Not surprisingly, the toughest legislation regarding labour practices was enforced by most of the totalitarian regimes spreading over Europe since the early 1930s (Jacobs, 2008).

Past the phase during which strikes constituted criminal offences, workers' participation in them still constituted a breach of the employment contract: the worker, in fact, stops carrying out what they have promised to do (Murcia and Villiers, 1997). However, a particular *fictio juris* aimed at avoiding harmful contractual consequences with respect to striking employees, namely dismissal or more feeble penalties, has been elaborated. According to the so-called “suspension of contract theory,”¹ the strike merely suspends the effectiveness of the contract but leaves it intact. This technique openly pretends that work stoppages do not infringe on labour obligations but “hibernating” them instead, in the hope of a full recovering once the conflict has been resolved (Murcia and Villiers, 1997). It does so by assuming that only the main effects of the contract (*i.e.*, the respective obligations of lending one's services and paying the wage) come to a standstill. On the other hand, several collateral duties remain in force, such as the duty of loyalty and the duty to protect and safeguard the employer's property.

The latest step of this labelling process is the abolishment of civil sanctions for participation in a strike, and ending up with the recognition of strike as a right to be exercised by workers under certain conditions (Betten, 1985). The fundamental achievement of such an evolution is to make the employment contract much less precarious; preventing it to be terminated because of the possible reprisals by the employer and providing the labour relationship with legal protection also during the time of the work stoppage. Nonetheless, courts often reserve the right to downgrade the strike from a right to a mere liberty whenever it is called for political purposes, which at least in theory should always happen with the general strikes.²

The Constitutional Overlay

In the general theory of law, the holder of a right cannot suffer any loss because of its exercise. This principle is clearly expressed by the Latin brocard *qui iure suo utitur neminem laedit*,³ logically intended to elude contradictions inside a legal system, which should never provide different legal responses to the same human act (*i.e.*, prohibiting and in the meanwhile permitting it). The mentioned standard also highlights the difference existing between rights and liberties: only the latter, in fact, may expose those who exercise them to a detriment, although not of criminal kind.

Many of the EEC founding Countries, such as France⁴ and Italy,⁵ have developed the general concept of freedom of association typically contained in post-WWII Constitutional Charters (such as the German one),⁶ turning it into a specific right to strike, albeit to be exercised in compliance with the law. This “southern European” notion of strike, which is also expressly mentioned in the Spanish Constitution,⁷ opposes the “northern European” concept of strike,⁸ where it appears mostly as a series of statutory immunities from certain torts which workers usually commit while striking (Betten, 1985).⁹

At the national level, attempts to achieve a statutory regulation have failed nearly everywhere; this also explains the *interim* role played by courts in elaborating the recognition of the right to strike. At the European level, following a meeting held in 2000 in Nice, the Council adopted the Charter of Fundamental Rights, among which six big chapters,¹⁰ the Solidarity pillar contains a provision (Article 28) expressly dedicated to the right of collective bargaining and action:

“Workers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action”.

This provision marks the conclusion of a long legislative path inaugurated with the European Social Charter of 1961.¹¹ The latter, in turn, was the forerunner to the 1989 Community Charter of the Fundamental Social Rights of Workers, which, until the new millennium, has been the main supranational source for the exercise of the right to strike apart from national laws and practice. This is also thanks to the regulation of all those labour disputes exceeding the Member States’ boundaries. The Nice Charter surpasses the 1989 one, on the one hand, because it guarantees not only social rights but all rights and freedoms of the citizens within the EU and, on the other hand, because it is an official document agreed upon by all Member States whereas the Social Charter was not agreed upon by the United Kingdom.

Strikes as Conspiracies: the Boycott

When unions call a strike, they are accountable for its effectiveness. Now, a strike’s outcomes may never be ascertained *ex ante*; however, in order for it to be worthwhile for workers to undergo a certain degree in striking, the projected outcomes must at least offset such hazard. But still, although the real effects of a strike are unpredictable, unions will make every effort to make the strike at least look successful in order to persuade striking employees that the struggle is worthwhile. Indeed, unions will have no interest in involving its affiliates for a lost cause; however, the boundary between success or defeat is often very thin, because labour disputes are definitely unpredictable.

One of the most valuable means to persuade doubtful employees, although in the short term, is intimidation aimed at weakening the employers. In fact, challenging the equilibrium between the employer and its employees often urges the former to “enter the lists” against his will. *À la guerre comme à la guerre*. These kind of practices occurring during strikes, commonly referred to as boycotts, may consist of violence to persons or properties linked with the employer, or of a complete social or business ostracism, or of both (Cogley, 1894).

The origin of the word “boycott” is shrouded in the mists of history. It is commonly attributed to a rent dispute between a group of Irish tenants and a land agent, Captain Charles C. Boycott, during Ireland’s Land League rent wars in the 1880s (Minda, 1999). In the legal field, in spite of being more than a century of judicial praxis, the meaning of “boycott” is still controversial and courts continue to argue around its interpretation. One shared aspect is that the word boycott is usually encoded with metaphoric images recalling the idea of a conflicting group refusing to deal.

Black’s Law Dictionary defines it as “an action designed to achieve the social or economic isolation of an adversary” (Garner, 2004).¹² This inclination to associate the concept of “boycott” with “insurgency” has strongly influenced the way judges have interpreted its legal meaning, with the consequence that all non-peaceful boycotts have been outlawed in most of the Western countries. Unlike the primary effects of a labour dispute, whose legality is granted by the constitutional overlay covering the exercise of some of the most important collective rights, non-peaceful boycotts have been held as criminal offences.

In other words, boycotts have not been afforded with the same protection granted to other legitimate forms of protest occurring during work stoppages: the legislator’s reasoning might be that such an indirect pressure asserted on the employers is of a kind that cannot be simply considered as a breach of contract. Yet, boycotts are the concomitants of nearly every strike of considerable dimensions (Cogley, 1894). As a matter of fact, it is often hard to determine whether strikes involving retaliatory conducts by the workers may be deemed as non-peaceful boycotts, and consequently they should be outlawed. After all, the employees’ boycott against the employers, often consisting of a concerted refusal to work for purposes of advancing a dispute over wages, hours and working conditions, is the essence of all strikes (Minda, 1999). Such investigation is quite tricky, because biased courts may be end up preventing all significant strikes, therefore introducing the dimension as an indicator of the lawfulness of a strike. Finally, it should be clarified that labour disputes are amongst the few legitimate tools at the workers’ hands, and should not be outlawed without a specific reason restricting the constitutional freedom, irrespective of the number of participants to the work stoppage.

Other Collective Forms of Intimidation

Picketing

An implicit condition underlying the choice of striking is that the places which the workers have temporarily and voluntarily surrendered must not be filled by others, otherwise the production damage might be neutralised and thus the employers have no incentive to comply with the workers’ grievances. According to Black’s Law Dictionary, picketing consists of:

“The demonstration by one or more persons outside a business or organization to protest the entity’s activities or policies and to pressure the entity to meet the protesters’ demonstration aimed at publicizing a labor dispute and influencing the public to withhold business from the employer” (Garner, 2004).¹³

Usually picketing is accompanied by patrolling with signs, and its intimidating meaning is addressed not only to the employers striking but also to workers who refuse to join the strike (roughly called “scabs”). However, picketing targets are not confined within the firm’s

boundaries. In particular, it is pretty common that picketers turn to the general public, making them aware of the motivations lying beneath their striking activity. In this sense, although picketing is constitutionally guaranteed as a form of free speech and as the legitimate exercise of the freedom of assembly and association, it can be limited where it constitutes a threat to public order. The general rule applied in some countries is that peaceful picketing is presumed lawful when also the strike is considered lawful (Jacobs, 2008).

Blacklisting

Blacklisting is a side practice commonly exercised by unions during labour disputes, which some regard, instead, as an attempt at revenge undertaken by both conflicting parties (Cogley, 1894). It consists of “a list of persons marked out for special avoidance, antagonism, or enmity on the part of those who prepare the list or those among whom it is intended to circulate” (Ballentine, 1969). It also indicates the act of putting a person on such a list, which employers will do by identifying undesirable employees whereas unions will record workers who refuse to become members or to conform to its rules. Indeed, blacklisting does not necessarily require the physical presence of written documentation, and can instead be pursued informally and by consensus.

The scope of blacklists is clearly discriminatory, as far as they aim at demarcating a certain group of people who share the same objective for mainly retaliatory purposes. Like picketing, blacklisting entails coercive effects irrespective of evident threats of work slowdown through a strike (VV.AA, 1961). The slippery aspect of blacklists is that, unlike picketing, the anonymity of their drafters limits the other party’s reaction and thus grants an almost full impunity. The more specific blacklists are, the more likely the legislator is to outlaw them. So if this determinativeness characteristic is absent, blacklists should rather be deemed as newspaper advertisements (VV.AA, 1961), and therefore courts are mostly willing not to prosecute their drafters.

The Secondary Boycott in the American Legislative History

The Legislative Path

The different shapes adopted by the secondary boycott, which will be later analysed both in its substantial layout and in its effects on labour relations, are the outcome of a suffered legislative path of the U.S. Congress that dates back to 1932. At common law, boycotts were outlawed under a variety of legal theories (Dereshinsky et al, 1981). The courts’ holdings have been multiple and often contrasting, so it is not possible to outline the judicial evolution which has taken place in the absence of a statutory law.

During the Hoover Administration (1929-1933), the legislator enacted the Anti-Injunction Bill (also known as Norris-LaGuardia Act),¹⁴ under which “yellow-dog” contracts¹⁵ had been outlawed. It can be seen as an expression of liberal policy, upon appraisal of the attribution to U.S. employees of the freedom to form unions without employer interferences. For our purposes, it is also notable that the Act deprived the courts of the injunction tool, on which they commonly relied as a means to stop secondary union activity.

Three years later, with the National Labor Relations Act (NLRA, also known as Wagner Act),¹⁶ collective bargaining became the accepted national labour policy, mainly thanks to a steadily higher support of union growth by the Federal Government. Despite the NLRA's enactment, the Norris-LaGuardia Act was not abolished so conflicts emerged between their respective provisions. In particular, the NLRA's scope was limited to workers in the private sector and did not cover agriculture and domestic employees, supervisors, independent contractors and all those employees whose employers were subject to the Railway Labor Act.¹⁷ The major legacy of the Wagner Act is, however, the establishment of the National Labor Relations Board (NLRB),¹⁸ a federal agency in charge of investigating and ruling unfair labour practices as well as conducting elections among workers, a channel through which they could express their will to be represented by unions in the workplace.

After the NLRA passed, the co-existence of two Acts treating secondary boycotts in a different manner had the effect of making them a powerful weapon available to unions (Dereshinsky et al, 1981). This critical situation urged the Congress to react, and in 1947 the NLRA was amended by the Labor Management Relations Act (LMRA, also known as Taft-Hartley Act).¹⁹ During the parliamentary debate on the secondary boycott section, co-sponsor Senator Haft explained that “[t]his provision makes it unlawful to resort to a secondary boycott to injure the business of a third person who is wholly unconcerned in the disagreement between an employer and his employees”.²⁰ Unfair union labour practices were reformulated in more precise terms, and secondary boycotts were eventually banned. Furthermore, many union privileges granted in the Wagner Act were abolished. Even though workers still secured the right of organising and bargaining collectively, the Taft-Hartley Act also recognised the possibility to not to join any union and finally outlawed all those enterprises, known as “closed-shop”²¹ which hired only unionised workers.

Framing the Secondary Boycott Under the Statutory Law

As briefly stated above, secondary boycotts occur when the aggrieved party attempts to either boycott a third party or to coerce it into joining an ongoing boycott. Thus, workers instituting a boycott may refuse to patronise firms that continue to deal with the initially boycotted party (The Columbia Encyclopedia, 2008).

Assuming that the (primary) employer cannot afford to comply with the requests which have triggered the strike, they can still seek help from another (secondary) employer in order to be supplied with the workers needed for a temporary period of time. Consequently, unions may react by damaging this secondary employer in order stop them from making business with the struck employer through secondary boycotts. In other words, secondary boycotts always arise out of a primary dispute between a labour union and a primary employer and involve a neutral third party. These innocent employers are also referred to as “noncombatants”, i.e. people drawn into a dispute not of their own making.

Unlike primary boycotts, the legislator has a relevant interest in restricting pressures exerted against third parties in controversies for which they are not liable, and that they neither have the power nor the authority to solve. This rationale justifies rules that would be impermissible if imposed on primary boycotts (Anderson, 1984). The pertinent provision is Sec. 8(b)(4)(A) of the NLRA as amended by the Taft-Hartley Act, titled “Unfair Labor Practices by Labor Organization”:²² assuming that the secondary employer remains neutral irrespective of the

dispute's outcome, entangling attempts made by unions are to be held unlawful and shall be prosecuted in the forms prescribed, which often involve the NLRB (Dereshinsky et al, 1981).

Courts realised very soon that the strict application of this provision led to great uncertainties. In fact, the language of the law bared several ambiguities: the definition of "employee" could not be analogically extended to those categories of workers excluded in the NLRA, and the same happened with the correspondent definition of "employer". Furthermore, since Sec. 8(b)(4)(A) prohibited only inducements to employees, the courts had come to the paradox that inducements and threats made directly to secondary employers did not violate the secondary boycott statute.²³

In 1959, the Congress enacted the Labor-Management Reporting and Disclosure Act (LMRDA, also known as the Landrum-Griffin Act).²⁴ For our purposes, the law incorporates the secondary boycott provision in the new Sec. 8(b)(4)(B) of the amended Wagner Act, still titled "Unfair Labor Practices by Labor Organization".²⁵ This insertion succeeded in closing the aforementioned loopholes, and as a result two goals were accomplished: the range of employers covered by the act was broadly extended, and the new language of the rule prevented its misapplication by the courts.

Despite these two relevant achievements, the doctrine of secondary boycotts must still face borderline situations, where the law is in fact developed on a case-by-case basis. Both the common-situs picketing and the ally doctrine pose several questions about the effectiveness of the NLRA provisions, which still lack ultimate answers and which should be viewed in a perspective *de jure condendo*.

"Common-Situs" Picketing in a Nutshell

The basic principles for common-situs cases were established by the U.S. Supreme Court in the *General Electric* case²⁶. Since the mid 1950s, General Electric (hereinafter "GE") had followed a policy of reserving a gate exclusively for independent contractors' employees working on its premises, who performed a wide variety of tasks at its manufacturing facility. In July 1958, following a strike called by the union which resulted in picketing of the entire plant, the separate gate was also picketed and most of the independent contractors' employees were forced to stay out of the factory.

Ruling on the case, the NLRB applied a literal approach to the statute and held that the union's conduct constituted an unfair labour practice in violation of Sec. 8(b)(4)(B) of the NLRA as amended by the Taft-Hartley Act. On the other hand, the Supreme Court, in reviewing the Board's decision, concluded that "[t]he key to the problem is found in the type of work that is being performed by those who use the separate gate"²⁷. The evidence arising from the case was that the independent contractors' employees had done work which was very similar to the tasks normally performed by the striking employees. Because of the integration of the independent contractors' employees into the production process of GE, it was possible to infer that the two groups of workers were, by and large, almost replaceable and furthermore that they were an essential element in the non-paralleled competition that GE and the independent contractors had created (Chepaitis, 1997).

Beside the criterion of the type of work performed by the neutral employees, the Supreme Court also held that an unfair labour practice by the unions may come to light only if the independent contractors' work is "of a kind that would not, if done when the plant were engaged in its regular operations, necessitate curtailing those operations"²⁸. In other words, similarly to the exception under the "ally doctrine" regarding employers performing struck work, the Court introduced a "related work" test for determining the lawfulness of picketing that occurs at a primary site (Dereshinsky et al, 1982). Nevertheless, the judicially provided threshold was very vague, as it restricted the relevant work to that "connected to the normal operations" of the primary employer.²⁹

Other Peaceful Secondary Activities

With regard to all possible forms of secondary boycotts, which overall consist of techniques intended to exert pressure on unrelated businesses (Group, 2008), employees' secondary actions are only one side of the coin. Typically labour unions arrange secondary boycotts different from those involving employees vis-à-vis ineffective alternative measures. Among them, consumer boycotts comprise practices of disseminating information aimed at eliminating consumer demand for products supplied by the target employer (Dereshinsky et al, 1981).

As a way of advertising and promoting the dispute, unions' activities directed to consumers should never be restricted according to the First Amendment to the U.S. Constitution,³⁰ which inter alia expressly prohibits the legislator to enact laws infringing the freedom of speech. In spite of its constitutional overlay, such a freedom had to be balanced with the neutral employers' right not to be harmed because of non-related labour disputes. An ad hoc solution was apparently found through the "publicity exception" contained in Sec. 8(b)(4)(ii)(B)³¹ of the NLRA as amended by the Taft-Hartley Act, which subordinates the legality of consumer secondary boycotts induced by labour unions to a number of conditions.

Another remarkable secondary boycott practice is the so-called "hot cargo clause" (Armstrong, 1955) a contractual provision contained in union contracts obliging the employer (or allowing employees) to refrain from handling or working on goods stemming from a struck plant, or from dealing with employers listed on a union "unfair list." Cargo clauses were outlawed by the Taft-Hartley Act on the basis that, through a pressure on the struck employers, they tended to settle strikes on terms favorable to workers. The function of these clauses is to secure permission from an employer to exert secondary pressure upon any person doing business with the employer who has a dispute with the labour organization (Armstrong, 1955).

The pertinent rule is Sec. 8(e)³² of the NLRA as amended by the Landrum-Griffin Act, titled "Enforceability of Contract or Agreement to Boycott any other Employer", which provides some exceptions. According to the legislative history of Sec. 8(e), there should be no doubt that the legislator's intent was to grant the employer a freedom to choose whom to deal with. This freedom was intended to be as broad as possible. By referring the proscription to "express or implied" agreements, the legislator aims to extend the prohibition to all those clauses that might reasonably be intended by the contracting parties as a veiled agreement not to handle or to work on goods stemming from a struck plant, or to deal with employers listed on a union "unfair list" (Yale Law Journal, 1961).

Genesis of the Ally Doctrine in Acts and Case Law

The Very Beginning: the Ebasco Case

It should now be clear that the secondary boycott statute protects only disinterested parties, in other words third parties whose intervention in the controversy has no valuable effect. However, if the secondary target has previously accepted farmed-out struck work or is somehow related to the primary employer, then it is not deemed to be neutral to the latter's labour dispute, but is instead considered an ally of the primary employer (Anderson, 1984).

This concept of alliance has no statutory basis. Relying on Senator Taft's remark expressed during the Senate's pre-enactment of Sec. 8(b)(4)(A),³³ Judge Rifkin ruled on the Ebasco case³⁴ finding that "no unfair labor practice resulted from picketing a secondary employer to whom struck work was being transferred by the primary employer" (Wooden, 1958). According to Sec. 10(l), the federal district courts have jurisdiction to restrain activity temporarily when the regional attorney has "reasonable cause to believe" that the activity constitutes an unfair labour practice. Using this rule, a regional director of the NLRB sought a preliminary injunction against some Ebasco striking employees. In fact, they were alleged to have also picketed an independent partnership, called Project Engineering, forcing some of its draftsmen to quit. However, on the basis of a previous contract, Ebasco was entitled to supervise the work done by Project's employees and even to set their wages.³⁵ This led the court to say that Project actually ran a business "identical to Ebasco's".³⁶ Judge Rifkin highlighted a noteworthy detail about this case, namely that the effect of the strike had been fully balanced by Project's activity, as if Ebasco had hired strikebreakers. As a result, the picketing clearly did not have as its object "requiring . . . any . . . person . . . to cease doing business with any other person". Finally, the court held that the provision of the NLRA prohibiting secondary activity applied only where it could truly be said that the other person had no interest in the dispute (Chepaitis 1997), which takes us back to what was underlined in the beginning of the paragraph, *i.e.* that the secondary boycott statute does not apply here since Project by no means can be considered a disinterested party.

Conditions Under Which Alliances Arise

Integration of Business and Operation: the Struck Work

As in the *Ebasco* case, two independent employers may become allies when B's business expands with work that would otherwise be handled by A's striking workers (VV.AA, 1980). This was particularly evident in the aforementioned seminal struck-work case, because already before the strike Ebasco had subcontracted workers to Project, and had furnished supervisors entitled to exercise a pervasive control over Project's employees. However, after the *Ebasco* ruling courts have not implied that secondary employers are to be deprived of the protection afforded to neutral ones by Sec. 8(b)(4)(B) solely because they make use of externalised struck work. In the case *Royal Typewriter Co.*³⁷ a company struck by its repairmen instructed customers to let their typewriters be fixed by any independent repairman of their choice, and promised them to pay the receipts. Since there was no integration between the two businesses, the court held that the picketing towards the independents constituted a violation of the NLRA because Royal and the secondary employers could not be deemed to be allies.

What is struck work? The significance of this question is self-evident, because on its boundaries rests the rationale of the NLRA provision. It is widely agreed that struck work is work which – *but for* the strike – would be performed by the employees of the primary employer. The formula should be read as following: the performing of subcontractual obligations by a secondary employer on the primary's behalf is not alone sufficient to make them allies, when the contracted work would be done regardless of the strike (Levin, 1970). In both the *Ebasco* and the *Royal Typewriter* decisions, the secondary employers clearly performed work that, but for the strike, would have been performed by the (striking) primary employees (Dereshinsky et al, 1981).

Furthermore, some courts have added the malice factor in order to restrict the sphere of application of struck work. In other words, there should also be evidence that the work was intentionally transferred to the secondary employer in order to avoid the impact of the primary dispute. The rebuttable consequence of such a test is the assumption that entering into subcontracts after a strike has been called is a reasonable proof of the intent to evade it. Insofar as this practice imposes a reverse burden of proof, it improperly contradicts the flexibility which should be typical of contractual negotiations, and therefore should be rejected.

Common Ownership and Control

The first application of the ally doctrine occurred barely one year after the ruling about Ebasco. In the case *Irwin-Lyons*³⁸ both the primary and the secondary employers were owned and managed by the same corporation: here the court held that a common ownership affects the business activities to such an extent that the second corporation will never be “wholly unconcerned” in the first's labour disputes. The rationale of this ruling lies in a judicial presumption applied by the court, *i.e.* that commonly owned and managed employers engage in “one straight line operation”.³⁹

This test assumes that enterprise A is enterprise B's production arm, but if plainly applied may lead to deadlocks. In fact, it fails to give a logic explanation to those cases where, although the goods produced or the services provided are different (thereby forbidding the inference that it is a common production that turns the two firms into “allies”), two enterprises still share the same substantial expectations by creating a community of interests. Perfectly aware of the inaccuracy underlying the straight line prerequisite, the NLRB eventually discarded it as a valuable means to disclose alliances between employers and, therefore, to make the secondary boycott provision inapplicable.

The “one straight line operation” concept has never been properly defined in case law, and, as a result, it is still used with different meanings and for different purposes. In particular, where the “straight line” element is too mild to encompass relevant cases of common ownership and control, the “actual common control” standard comes up. Briefly, this standard consists of a number of tests taken by courts which consider several corporate factors such as whether the companies exchange employees, advance each other credit, make sales to each others, etc (Dereshinsky et al, 1981). Ça va sans dire that the efficiency of such a method cannot be generalised, since the tests are conducted on a case-by-case basis. However, it is essential for the control exercised on the two entities to be actual, since potential influence is too common to warrant application of the doctrine (Levin, 1970).

Co-employers

As underlined above, a close relationship between employers is not a necessary condition to consider them allies. It is worth recalling Senator Taft's statement about the "unconcern" element as a requisite for the application of Sec. 8(b)(4)(B): according to it, a secondary employer may still be concerned in the primary's dispute as far as he supervises, on the latter's behalf, employees accomplishing their tasks. It is important to emphasise the fact that the extension of such a supervision goes far beyond a mere control of the final result, whereas it entails that secondary employers are in charge of overseeing the labour process *in itinere*. What triggers the existence of a co-employers relationship is different than under the single entity doctrine: in fact, the attention is here focused on the degree of control that one employer exercises over another employer's employees. Not surprisingly, co-employer cases mainly occur when A's work is subcontracted to B but A still retains some control over the labour relation policies of B. The language used by scholars in shaping the co-employers doctrine tends to associate it with the single entity doctrine. Although the distinction between the two concepts is philosophically insignificant, it is however tactically crucial because circumstances suggesting coemployer status are even more prevalent than those required for singleness (Levin, 1970).

The rate of control exercised by the secondary employer which allows him to be viewed as a co-employer is fairly disputed. Courts have consistently contended that, unlike the influence stemming from the holding entity, it is sufficient for this kind of control to be merely retained, meaning that – while in the former case the holding entity is in a position to exert an all-encompassing influence on the way in which the controlled firm operates – in the latter situation, instead, the co-employer must merely be in the position to affect specific aspects of the other employer's labour relations: it merely retains control in some areas, while leaving the rest to the other employer's discretion. Finally, secondary employers shall be free from unnecessary pressure exercised by the primary ones (Levin, 1970), otherwise the integration between the two enterprises would end up being too close and they should be considered as a single entity.

Common Control over Labour Relations

The cut-off of such an interrelatedness between two (formally) separate business entities may be found in those situations where the employment conditions for both the enterprises are set by only one employer. In this case scholars tend to recognise the two entities as a single enterprise. Here the application of Sec. 8(b)(4)(B) should be granted only to those businesses which the secondary employer could freely discontinue, even running the risk to be sued by the primary employer for breach of contract (Levin, 1970).

Usually this common control over negotiations in the labour market is strictly linked with common ownership, which makes companies horizontally integrated. However, this element is not necessary: it may also happen that unrelated enterprises' workers, even represented by different unions, go on strike against one employer in order to prevent the latter to fix work conditions for the workforce as a whole. A crucial consequence stemming from the horizontal integration between two companies is that when employees of one do not engage in concerted bargaining activity, they compete with employees of the other company (Chepaitis, 1997). Briefly, assuming that two enterprises (A and B) actually form one integrated and multi-shaped enterprise, a picketing activity of A's striking workers damages B no more unlawfully than it would damage A. This conclusion is made possible by courts through a much broader

construction of the term “other person” contained in NLRA.⁴⁰ It goes without saying that this results in an extension of its sphere of application.

From Alliance to Neutrality: the Way Back

Once a neutral employer becomes an ally, under which conditions can he restore his neutral status? The issue has a huge relevance for the secondary employers, to whom the NLRA affords the right to be preserved from boycotts only if they have no (actual) tight relations with the primary employer.

The case law that has evolved under the ally doctrine identifies factors that may be used to appraise the secondary employer's neutrality (Minch, 1977). As stated above, the lawfulness of secondary activities should be determined by assessing whether its economic impact is disproportionate to the secondary's involvement with the primary employer. In the Morrison's case,⁴¹ some laundry workers went on strike with the purpose of renegotiating the collective agreement. When the union found out that the enterprise relied on a secondary employer whose employees performed struck work on Morrison's behalf, it requested that the secondary employer either affirm or deny that it was performing such work (Dereshinsky et al, 1981). Having received no response, the union picketed the secondary employer; but the Trial Examiner found in such a behavior a violation of Sec. 8(b)(4), since at the time the union commenced picketing at the secondary employer's premises, it had ceased performing struck work and hence it should not be held an ally anymore.

Contra, the NRLB reversed this decision holding that “the ally, in order to expunge its identity with the primary dispute, is under an affirmative duty to notify the picketing union that struck work shall no longer be performed”.⁴² This obligation however is neutralised when unions know or should have known, through the exercise of ordinary care, that during the time of picketing the secondary employer does not perform struck work. The Morrison's case does not jeopardise the protection granted to former allies, who can still enjoy the application of the NLRA provisions simply breaking their link with the primary employers. However, it still entails that upon termination of the ally status an affirmative duty of notification arises every time unions are not able to discover the relinquishment of struck work on their own.

Concluding remarks

Secondary boycott provisions, along with exceptions to the general rules such as the ally doctrine, reflect an underlying policy of balancing the rights of unions to pursue their economic interests with the protection afforded to nonaligned parties. The single enterprise and the coemployers doctrines rest on the need to overcome the employers' neutrality, every time that their businesses are identifiable with those of the primary employer's ones to such an extent that, the secondary workers being the primary's fellows, they may justifiably be reached. Nonetheless, this sort of immunity granted to labour activities has been judicially created on a case-by-case basis, hence heavily relying on each factual background. Ever since, moreover, reversals of policy and disagreements have been so frequent that foreseeing a certain judicial outcome relative to secondary boycotts is nearly impossible.

The US statutory law has long provided sections outlawing secondary activities performed during strikes, even though the term “secondary boycott” is never used by the legislator. Other legal systems, such as the vast majority of European countries, consider secondary activities rather as collateral behaviors typically related to work stoppages, in other words as devices aimed at ensuring the effectiveness of strikes. As a result, courts within the EU are quite reticent to shield unoffending employers from pressures in controversies that are not their own. This approach is indeed endorsed by a stronger unionisation, which tremendously affects labour relations and the policy making in the labor law field.

All this assumed, would an exclusive regulation on secondary boycotts make any sense? Considering that specific by-laws would involve extremely different prohibited activities, ranging from picketing at the neutral employer’s premises to engaging in actions harmful to the latter’s productivity, the judicial struggle for unambiguity would be harsh. The answer is therefore negative. Narrowing the issue, legislators should instead develop general guidelines aimed at preventing litigation among parties and at the same time at encouraging courts to adopt permanent determinations. For this purpose, a crucial substitutive role shall be played by administrative bodies or by international organisations such as the International Labor Organization (ILO), a specialised agency operating under the UN aegis, whose near-worldwide scope could even result in a harmonisation of the different national legal frameworks related to the strike phenomenon.

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Notes

¹ The suspension of contract theory has been widely adopted by European courts, in an attempt to overcome the lack of constitutional grounds of the right to strike.

² The qualification of strikes as *rights* instead of *liberties* represents one of the most valuable achievements within the modern legal tradition. Granting workers with a freedom to strike would have merely prevented them from being charged with a criminal offence. However, workers would have been still liable towards their employer for the breach of contractual obligations. In addition, this would have entitled the employer to withdraw from the contract without any further duty to the striking employee. By contrast, workers having the *right* to strike may not be held liable for any work stoppages at all, provided that the latter occur within the limitations set forth by law.

³ He who acts in accordance with a right of his does not damage others.

⁴ See 1946 CONST. preamble para. 7 (Fr.) (“The right to strike shall be exercised within the framework of the laws governing that right”) (translation provided by the author), which the Preamble to the 1958 Constitution refers to.

⁵ See COST. art. 40 (Italy) (“The right to industrial action shall be exercised in compliance with the law”) (translation provided by the author).

⁶ See GG art. 9 (F.R.G.) (“All Germans shall have the right to form corporations and other associations”) (translation provided by the author).

⁷ See C.E. art. 28.2 (Spain) (“The right of workers to strike in defence of their interests is recognized. The law governing the exercise of this right shall establish the safeguards necessary to ensure the maintenance of essential public services”) (translation provided by the author) and C.E. art. 37.2 (“The right of workers and employers to adopt collective labour dispute measures is hereby recognized. The law regulating the exercise of this right shall, without prejudice to the restrictions which it may impose, include the guarantees necessary to ensure the functioning of essential public services”) (translation provided by the author).

⁸ In England, see generally Trade Union and Labour Relations Act, 1974, sect. 18(4), which prevents terms of collective agreements prohibiting or restricting the right of workers to engage in a strike to form part of any employment contract.

⁹ The distinction may be further splitted when considering that the “continental Northern European approach” is basically different from the “British Northern European approach”

¹⁰ They are: 1) Dignity; 2) Freedom; 3) Equality; 4) Solidarity; 5) Citizenship; 6) Justice. A seventh chapter containing the final provisions follows. However, it should be noted that the Charter is not legally binding *as is*, having only been “solemnly proclaimed” by the European Parliament, the Council and the European Commission. It was however included in the proposed European Constitution, signed in October 2004 but which failed to be ratified after referendum defeats in France and the Netherlands. Nonetheless, the Charter was referred to in the Lisbon Treaty, and will be therefore legally binding within the EU once the ratification process will be completed.

¹¹ European Social Charter art. 6.4, Oct. 18, 1961, as revised at Strasbourg on May 26, 1996, Europ. T.S. No. 163, 36 I.L.M. 31 states:

With a view to ensuring the effective exercise of the right to bargain collectively, the Contracting Parties . . . recognise: . . . the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into.

¹² See also entry ‘boycott’: Ballentine, J.A. (1969). *Ballentine’s Law Dictionary*. (3rd ed). Rochester, NY: Lawyers Co-operative Pub. Co

A species of ostracism, a combination in refusing to have business dealings with another until he removes or ameliorates conditions deemed inimical to the members of the combination, or some of them, or grants concessions which are deemed to make for the removal or amelioration of such conditions.

¹³ See also entry ‘picketing’ in: Ballentine, J.A. (1969). *Ballentine’s Law Dictionary*. (3rd ed). Rochester, NY: Lawyers Co-operative Pub. Co. “The establishment and maintenance of an organized espionage upon the works of an employer and upon persons going to and from them.”

¹⁴ The name of the Act derives from its sponsors: NE Senator George Norris (R) and NY Representative Fiorello H. La Guardia (R).

¹⁵ The expression “yellow dog” refers to those clauses contained in employment contracts which state the employee’s consent not to join a labor union as a condition of employment. The formula indicates the metaphoric transformation of all workers waiving their rights in yellow dogs, a symbol of slavery and submission to the owner.

¹⁶ The name of the Act derives from NY Senator Robert F. Wagner (D), who had already promoted the Social Security Act and is considered one of the architects of the modern social state. The NLRA was one of the most significant legislative initiatives of Franklin D. Roosevelt’s New Deal, and resulted in a deep change of the U.S. labor law. Although toughly hindered by the employers, the NLRA was active only from 1938 on, after several head-on collisions between the two parties such as the almost two-month long occupation of General Motors.

¹⁷ The Railway Labor Act (RLA) is the first federal law governing labor relations in the transportation industries. Passed in 1926, the Act was amended in 1936 to cover the emerging airline industry.

¹⁸ The NLRB substituted a much weaker organization established under the National Industrial Recovery Act. It is formed equally by both workers' and employers' representatives for a total number of six.

¹⁹ The name of the Act derives from its sponsors: OH Senator Robert A. Taft (R) and NJ Representative Fred A. Hartley (R). Still effective, the Act was legislated overriding President Harry S. Truman's veto.

²⁰ 93 Cong. Rec. 4198 (1947).

²¹ Except in those states that have enacted "right-to-work" laws, the Taft-Hartley permitted the "union-shop" clause, which although not requiring the union membership as a precondition for the employment still forced the employed worker to join the union within a period of time following its hiring.

²² The provision reads as follows:

8(b) It shall be an unfair labor practice for a labor organization or its agents . . . 4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person.

²³ *Id.*, at 5.

²⁴ The name of the Act derives from its sponsors: GA Senator Phil Landrum (D) and MI Representative Robert P. Griffin (R).

²⁵ The provision reads as follows:

8(b) It shall be an unfair labor practice for a labor organization or its agents . . . (4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is: . . . (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing.

²⁶ *Local 761, International Union of Electrical Workers v. NLRB (General Electric)*, 366 U.S. 667, 674 (1961).

²⁷ *Id.*

²⁸ *General Electric*, *supra* note 26.

²⁹ *General Electric*, *supra* note 26.

³⁰ The provision reads as follows:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

³¹ The provision reads as follows:

8(b) It shall be an unfair labor practice for a labor organization or its agents . . . (4)(ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is . . . (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person.

³² The provision reads as follows:

8(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void.

³³ See *supra* note 14.

³⁴ *Douds v. Metropolitan Federation of Architects (Ebasco)*, 75 F. Supp. 672 (S.D.N.Y. 1948).

³⁵ During the strike, Project also performed work for Ebasco and some of it was even transferred to Project in the half-finished state in which the strikers left it.

³⁶ See note 14.

³⁷ *NLRB v. Business Machine Mechanics Local 459 (Royal Typewriter Co.)*, 228 F.2d 553 (2d Cir. 1955), *cert. denied*, 351 U.S. 962 (1956).

³⁸ *Marine Cooks and Stewards Union (Irwin-Lyons Lumber Co.)*, 87 N.L.R.B. 54 (1949).

³⁹ *Id.*. Here the NLRB held that, because the two commonly owned companies were engaged in “one straight line operation”, neither could claim neutrality from the other’s labor disputes.

⁴⁰ Judge Rifkin affirmed: “To give such broad scope to the term would, for instance, reach out to and include the business relation between an employee of the primary employer and the primary employer”. (*Ebasco*, *supra* note 65).

⁴¹ *Laundry Workers Local 259 (Morrison’s of San Diego)*, 164 N.L.R.B. 426 (1967).

⁴² *Morrison’s of San Diego*, *supra* note 41.

The 2010 review of the New Zealand personal grievance system: Commentary

BERNARD WALKER and R.T. HAMILTON*

Abstract

Following its election in 2008, the National-led government has moved to amend grievance laws. The arguments for and against such changes are well-rehearsed in terms of the values involved. What is missing, however, are empirical studies to substantiate or refute the claims made by either side. The present article outlines the nature of the research needed, highlighting the role of researchers, as well as the need for employers, unions and practitioners to collaborate in establishing a field of knowledge.

Introduction

Once again the pendulum of legislative change in New Zealand has begun to swing back. After three terms of a left-wing government, a change of government now brings a move to the right. This time, however, the focus has shifted to personal grievances and employment relationship problems (ERPs). This area survived the radical changes of the ECA 1991 and was not on the most recent list of changes sought by Business NZ (Business New Zealand, 2010). Nonetheless, it has remained the subject of ongoing criticism from the right-wing and employer groups (Anderson, 2002).

This commentary concerns the discussion paper released by the Minister of Labour on 2 March 2010, reviewing Part 9 of the Employment Relations Act (Department of Labour, 2010). In this article we commence with a brief outline the content of the discussion paper, then place the New Zealand debate in the broader context of developments affecting grievance laws internationally. A central issue emerging across many countries concerns the absence of research-based evidence to inform those debates. Given that each country's grievance system is somewhat unique, we argue that this highlights the need for more research concerning New Zealand grievances. This is not only an issue for academics but will require the participation of a range of practitioners and other parties.

* Both authors, Department of Management, University of Canterbury

The Discussion Paper: Review of Part 9 - Personal Grievances

The discussion paper contains the Minister’s statement that the aim of the consultation is to achieve employment law that is “both fair and flexible for all”. Specifically, the objectives of the review (which presumably now indicate the goals for the system) are to consider whether the personal grievance system:

1. Strikes a fair balance between employer flexibility and employee protection
2. Does not impose unnecessary costs or obligations for employers or employees
3. Supports improvements in workplace productivity
4. Is efficient and effective, and
5. Has met its objectives (as set out in the Employment Relations Act 2000).

The consultation seeks input from both “people who have had direct experience of the personal grievance process”, and also those without direct experience “but whose understanding of the process affects their decisions or behaviour in the workplace” (Department of Labour, 2010: 3).

The discussion paper focuses on eight main topics related to personal grievances, and these are summarised in Table 1.

Table 1: Outline issues from Discussion Paper Review of Part 9: Personal Grievances

Topic	Issues noted	Possible options listed
1. Cost of problem resolution	Perceptions of cost may lead parties to avoid formal processes and settle informally (private settlements)	<ul style="list-style-type: none"> • Helpline for employers and employees (particularly SME) • Information provision / promotion
2. Quality of employment advocates	Concerns regarding the tactics and competency levels of some advocates	<ul style="list-style-type: none"> • Regulation - requiring membership of professional organisation • Self-regulation – sector to list professional members, and/or its own rating and reporting system • Information provision
3. Balance of fairness	Perceived bias; process is more important than substance. Current system is too complex and needs more clarity and certainty. Remedies are not adequate.	<ul style="list-style-type: none"> • Changes to the current test of justification (s103A) • Information promotion and support on processes
4. Access to justice	Access to information, knowledge of processes, and affordable advice or representation - costs may be too high and/or the system too complex	<ul style="list-style-type: none"> • Information provision and promotion on processes, likely costs, and options for support without costs

5. Responsiveness and timeliness of services	Delays due to long waiting times and/or avoidance by parties - can lead to escalation and increased costs	<ul style="list-style-type: none"> • Change Authority processes • Possible Authority practice notes • Greater use of technology • Earlier intervention
6. Impact on SMEs	<p>SMEs have less experience and resources in resolving problems, with fewer processes and procedures in place, less information and awareness of the options, time and financial costs</p> <p>Harder for SMEs to comply with procedural requirements</p>	<ul style="list-style-type: none"> • Code of Employment Practice • An employment facilitation process • Extend trial period beyond 90 days for firms with < 20 employees • Extend 90-day trial to medium-sized business (20-49 employees) • Diagnostic problem-solving tool • Helpline (employers & employees) • Information provision and promotion (awareness raising)
7. Eligibility for raising a grievance	<p>System's functionality improved if legislation applied differently to different types of employees</p> <p>Concerns that a grievance can be filed up to three years after first raised</p>	<ul style="list-style-type: none"> • Limit eligibility by length of service • Extend the current 90-day trial period, as in (6) above • Reduce the current 3-year limitation for lodging a grievance
8. Effectiveness of remedies	<p>Reinstatement ineffective as a primary remedy</p> <p>Current remedies are insufficient, fail to address the full range of costs</p> <p>Remedies need to be effective and provide credibility - monetary remedies not effective in rebuilding relationships or learning from errors</p>	<ul style="list-style-type: none"> • Remove reinstatement as a primary remedy • Regulate costs and remedies • Non-monetary remedies, incl. training/education (for both employers and employees) • Practice notes for the Authority • Increase financial remedies • Information promotion

There are two main aspects for possible commentary in relation to the discussion paper. The first aspect concerns the nature of the “issues” listed in the paper, and particularly how much (or how little), information exists concerning these. The second aspect concerns the political dimensions and the process for determining how the issues are addressed with the “possible options” listed. It is not practicable to attempt to cover both topics in one article, and therefore this commentary will restrict its focus to the first aspect, concerning the existing research since this is a foundational matter which has significant implications.

The “*issues*” listed in the paper, and their sources, are significant. These are described as matters that have “attracted commentary in recent years, either in the media, anecdotally or that have been raised directly with the Department...by stakeholders and/or social partners” (p.6). These are summarised in the middle column of Table 1. For each issue, the report provides a section “*What we know about...*” which summarises the existing information. Several of these issues are recurring topics that have been identified in earlier Department of Labour reports and Cabinet papers; for example the quality of employment advocates, the responsiveness and timeliness of services, perceptions regarding the balance of fairness, and the disproportionate impact on small and medium enterprises (Cabinet Economic Development Committee, 2007, Department of Labour, 2003, 2007a;b;c;d). Other topics, such as the eligibility for raising a grievance, and aspects of the effectiveness of remedies, are more recent. The “*possible options*” list, summarised in the right column of Table 1, contains a number of proposals that have not been actively explored or pursued, particularly under the previous government. As mentioned, the political dimensions of those shifts are beyond the scope of this commentary.

The International Context

From an international perspective, it is not surprising that grievance laws are the focus for legislative debate. Elsewhere, grievance law and resolution procedures constitute an ever-moving target. In North America, newly introduced protection laws are eroding the traditional hard-line employment-at-will (dismissal-at-will) model. That continent is also experiencing the introduction of controversial new within-organisation EDR procedures which are operated by employers and can remove employees’ access to external forums such as the courts or government agencies. In Australia, WorkChoices and other radical changes, which commentators suggest prompted the downfall of the Howard government, are now being reversed to some extent by the Rudd government. Britain, too, has experienced a series of reforms to the grievance system, with the most recent changes paying significant attention to improving within-organisation procedures. Interestingly, those changes were drawn largely from a report which used the current New Zealand model as a well-regarded reference point (Gibbons, 2007).

A key theme emerging in the international literature is the question of whether such changes deliver justice, particularly for employees (Bingham, 2005, Colvin, 2005, Mahony and Klaas, 2008). In New Zealand, the two sides of the debate are well-entrenched. Employer groups claim that the current system is overly complicated, burdensome and biased in favour of employees, with contingency fee advocates contributing to create an employee “grave train”. In support of this, they cite their own member surveys, outcome statistics from the Authority, and anecdotal accounts from members. Hence they argue for reform. In contrast, employee groups argue that the current grievance laws are necessary to safeguard the rights of workers and although the current awards may not fully address the harm that employees may suffer, the system is working adequately (Anderson, 2006, McAndrew, Morton, and Geare, 2004, Shulruf, Woodhams, Howard, Johri and Yee, 2009).

Over the last decade, the Department of Labour sought to resolve these apparently contradictory claims with a series of reports covering many aspects of grievances and employment relationship problems. These generally portrayed the system as functioning satisfactorily and argued that their findings did not support claims such as the gravy train allegations. The reports never gained much attention though and generally did not make their way into the public debate. From a research perspective, a significant limitation was the methodology which made the studies more exploratory or “indicative” than statistically representative (Department of Labour, 2007d: 5). The current discussion paper does refer to the Department’s earlier research, noting those findings, but at the same time the paper seeks further input on those topics.

There is only limited research work done by other persons or agencies. Our own research for example, identified a group of employees who were potentially disadvantaged by the current system, but at the same time employers also discussed opportunist claims that they had experienced (Walker, 2009). In general, it would seem that sub-optimal outcomes can occur for *both* employees and employers under the current system, but there is no clear evidence concerning how widespread these are, nor whether one party is more affected than the other. To have credibility, an area of research needs to have findings that are replicated and corroborated across a range of sources and researchers. Importantly then, in terms of local research, there is no comprehensive and universally agreed set of findings concerning grievances. One side argues that the system is in urgent need of reform while the other may counter-argue that ‘it ain’t broke so don’t fix it’, but there is little evidence to establish which, if either, is correct. Our article in the current issue highlights a number of key areas requiring future research attention. In terms of the current discussion paper, we propose that each of the issues cited represents a significant but unanswered research question.

The Need for Academic Research

Politics and academic research are however, very different fields. The world of politics does not wait for academics to assemble sufficient studies and reach consensus on the state of a field. Following its election the government introduced the 90 day trial period for small businesses, and has now indicated its willingness to consider further reform. The consultation process associated with the current discussion paper will draw upon feedback and anecdotal accounts concerning experiences of the ERP resolution system (Department of Labour, 2010). Academics will, of course, highlight the shortcomings of such less-scientific processes, with the possibility for lobbying and under-representation or over-representation by certain groups. That however is the nature of political processes.

The topics in the current discussion paper are far-reaching and likely to be controversial. While the disproportionate impact on small and medium enterprises (SMEs) is a recurring topic, the possible options to address these types of issues are markedly different from those advocated under an earlier government. Among those newer options are possible changes to eligibility for raising a grievance. These include a minimum service period (regardless of whether the employee is on a trial period), as well as extending the current trial periods, both beyond the current 90 days for small businesses, and also extending the provision to include businesses with

20 to 49 employees. These options, along with the mention of restrictions by salary-limit, repeat suggestions recently raised in other forums (Taskforce 2025, 2010).

Another area which may seem minor, but which is likely to prove controversial, concerns the legal test of justification (s103A) and accompanying procedural aspects. Two versions of the test of justification had emerged in case law. The previous government argued that the test that had developed from the Court of Appeal was one of a number of issues that were not in keeping with the intent of policy and the legislation, and so replaced that test with a legislative definition (which used the other version), in the 2004 ER Amendment Act. This revision provoked the ire of employers however, as it was seen as making it more difficult to dismiss an employee, and thus shifting the balance in favour of employees. Any further change will thus involve debate as to what truly constitutes a 'balanced' position.

Researchers also need to explore the experience of other countries in relation to developing new policy and legislation. The development of a Code of employment practice, for example, is listed as another possible option. Although these types of moves may have an intuitive appeal as a means of simplifying matters, there are a number of cautions (Hughes, 2010). Responding to criticisms of their own system, the British sought to simplify procedural matters and reduce claims by moving from a non-binding code to highly prescriptive statutory regulation of within-company discipline and grievance procedures. In practice however, this produced the opposite outcomes; the processes in smaller businesses became more formalised and adversarial, and for many businesses the number of claims increased (Gibbons 2007). At the same time, between-country comparisons need to take into account the full nature of another system, rather than simply comparing one aspect in isolation, such as eligibility for raising a grievance. Each system has developed in its own unique manner and thorough, comprehensive comparisons are needed, unlike the over-simplified and inaccurate comparisons that can occur in public debates.

The paper also points to possible changes to remedies. This aspect is likely to be much debated in its own right, but there appears to be little research concerning the effects of such provisions. Changes to remedies can also have significant implications for other aspects of employment relations. Overseas evidence shows that the external framework, including potential penalties or remedies, influences the day-to-day organisational practices for dealing with disputes, while some local writers argue that the current penalties are ineffective and function only as an "exit price" (Anderson, 2003;2006, Department of Labour, 2002, McAndrew, et al., 2004).

Studies are not only needed to address the legislative framework and external forums, but also the less accessible area of within-organisation resolution processes. In a final section, the discussion paper explores a number of issues with regard to early intervention and mediation. There is an amount of existing research (Department of Labour, 2008) and while it is generally agreed that early resolution is desirable for reducing grievance costs and preserving employment relationships, the real difficulty is how to apply this in practice. In the USA, attention has been given to the development of integrated conflict management systems (ICMS) which employ a "co-ordinated set of organisational mechanisms to identify conflict in its early stages, manage it to prevent escalation, and resolve it efficiently to maintain positive workplace relations" (Gadlin, 2005: 371-372). This approach is however centred on large organisations, which raises questions as to how these principles can be applied among smaller enterprises. There is a need to

shift the attention to more proactive methods for dealing with conflict (Lewin, 1999). The paper outlines some possible means for improving early intervention, including the use of technology, and the development of advisory services, similar to the work of ACAS (Advisory, Conciliation and Arbitration Service) in the UK, which includes training, mediation and conciliation, and advice. Although external resources and systems are important, the ways in which organisations handle conflict is often an expression of deeper aspects concerning organisational culture and relationships, and these are often less amenable to change than policymakers anticipate.

Conclusion

These developments highlight the increased need for researchers to direct new attention toward area of employment protection and resolution systems. These are not simple matters for investigation though. The introduction of the 90-day trial period for example, has coincided with a recession and high unemployment, making it particularly difficult to assess the effects on hiring practices. There is little information concerning the consequences of that change, while the government apparently does not have information on how many employers are using the scheme (Radio New Zealand, 2010). Tracking dismissal cases that occur within the current 90-day period is highly problematic; while employers can generally be accessed through their employer-organisations, there are no equivalent sources for locating dismissed employees. In addition, the task of identifying 'opportunistic' claims is far from straightforward. If, as employer-organisations suggest, a proportion of claims are settled privately, then no independent third party evaluation of a case occurs; the same claim that an employer considers opportunistic could well be one that the employee views as genuine.

There is a lot at stake. The USA and British experience shows that grievance legislation and procedures not only affect the parties directly involved in grievances but also set a broader context which shapes day-to-day practices in organisations. While there will always be a minority of rogue employers and rogue employees, the challenge for legislators is to create and maintain systems that achieve an equitable balance, protecting the majority of participants in the workforce. For researchers, the challenge is, therefore, to assemble evidence-based findings that contribute to open and informed debate among the politicians and lobby groups. This is not a task for academics and researchers to attend to on their own. Given the complexity of the subject, a new attitude to research will be needed among employers, employees, unions and other practitioners. They, too, will need to be involved in a collaborative effort, supporting the implementation of studies that can begin to assemble the required data.

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Chronicle: June 2009 – September 2009

June 2009

The impact of the recession and swine flu featured prominently in several media reports in June 2009.

The advent of swine flu raised the issue of payment to healthy workers if a business was forced to close down. The *Dominion Post* highlighted that the Government had sought legal advice on whether businesses, ordered to close because of swine flu, could be forced to pay healthy workers for the duration. Employers argued that there was a lack of clarity in the law and that it would be a financial burden if businesses were forced to continue paying staff while not working. In addition, there was a call for the Government to guarantee that employers would not be left to ‘carry the can’ for the pandemic. Union leaders also stated that workers should not be penalised either by using up sick days. A spokesperson for the Minister of Labour Kate Wilkinson said that while an employee had to be paid if ready and willing to work, but that a forced closedown of a business was a ‘unique’ situation.

The *Dominion Post* also reported that the increasing number of swine flu cases created a catalyst for employers to “get serious” about their employees’ health. Barbara Buckett, an employment lawyer, stated that given that the World Health Organisation was considering declaring a pandemic, employers should look at their obligations and responsibilities to provide a safe work environment and be community sensitive. Ms Buckett went as far as saying that infectious staff could be deemed, for the purposes of health and safety law, hazards in the workplace and employers may be sued for loss and damage if the illness was spread from the workplace.

The Government announced a review of the Holidays Act in which the aim was to examine how to reduce the burden of compliance for business and to make it easier for both employers and employees. The review would be carried out by a working group made up of two business representatives, two union representatives and an independent chairperson. According the *Dominion Post*, Minister of Labour Kate Wilkinson said that she expected the outcome would be a change to the current legislation that would be “comprehensible and fair”. Employer groups were quick to point out the faults of the current legislation, saying that any changes needed to reflect ‘the real world’ and that the current legislation was particularly confusing for certain sectors and occupational groups, such as hospitality and seasonal horticultural workers. One proposed provision was the ability to ‘cash up’ one week of leave which drew concerns from Council of Trade Unions’ Vice-President Richard Wagstaff, who said that it could be abused by some employers. Employment lawyer Peter Cullen summed it up best when he said that it would be a challenge for the working group to satisfactorily address the diverse requirements of all industries and yet at the same time create a simpler piece of legislation.

A Private Members Bill, drafted by Labour MP Darien Fenton, aimed at setting minimum redundancy entitlements for redundant workers during the recession period failed to find favour with the Government. According to the *Nelson Mail*, the Minister of Labour Kate Wilkinson said that it was “not my priority to try to impose minimum statutory redundancy on businesses that are struggling enough to survive and to keep their staff”. However, in the *Sunday Star Times* it was claimed that people were worse off in 2009 than during the 1987 share market crash as the Employment Contracts Act 1991 had reduced the number of employees on collective contracts which meant that fewer employees today were covered by redundancy agreements.

The *Sunday Star Times* also reported that victims of the recession were ‘not only out of work and stressed’ but they were also chasing bigger compensation payouts. An Auckland employment lawyer claimed that during this recessionary period, there was an increase in the number of employees taking stress-related personal grievance cases and also claiming larger amounts for hurt and humiliation. In a summary of cases heard by the Employment Relations Authority in 2008, the *Dominion Post* found that there was a record of 521 cases heard. The average payout for hurt and humiliation in Wellington was \$6,474, in Auckland \$4,851, and in Christchurch \$4,896. In the *Sunday Star Times* a clinical psychologist commented that there was often a “causation contest” in stress-related personal grievances relating to whether the stress was work related or caused by a non work issue.

The *Nelson Mail* reported that an Air Nelson baggage handler who was dismissed for recording false luggage weights had lost his appeal before the Employment Court. The worker falsified the weights as a form of personal industrial action. While trained in a new automated system he had continued to use a manual system which the airline claimed created a potential risk to aircraft safety and was in breach of explicit operational instructions.

A woman who was awarded \$16,000 after she was told her job was no longer available when she wanted to return from parental leave. According to *NZ Herald*, the woman worked as a manager at the Penrose Branch of Allied Work Force Ltd. Early in her parental leave she suffered a miscarriage and met with her human resources manager to discuss returning to work. She was informed that a restructure had occurred and that her old position had been awarded to another employee. She was offered a new position on the same salary but after mentioning that she was planning to have another baby, the offer was withdrawn. The Employment Relations Authority found that the employer had not taken into account the considerable trauma the woman had undergone and awarded her \$8,308 in lost wages and \$8,000 in compensation for hurt and humiliation for the insensitive and unsympathetic treatment she had received.

The *Timaru Herald* reported on a local seven year saga which finally came to an end (refer June 2007 Chronicle) when a former Temuka police officer’s claims of constructive or unjustified dismissal against the Police were dismissed by the Employment Court. The officer resigned in 2003 after he questioned his Sergeant’s ability and challenged the numerous inquiries that followed the stand-off with the manager, including a sexual harassment complaint against him. The officer filed a personal grievance for constructive dismissal and unjustified disadvantage because of

his dissatisfaction with how police dealt with investigations into a complaint he made about his supervising officer. The Employment Court dismissed the claims saying the Police did not breach any express or implied terms of his employment agreement. In relation to the alternative claim for unjustified dismissal the judge found that at all times, the Police had been a fair and reasonable employer, and any disadvantage suffered by the officer were not the responsibility of the Police.

The *Press* reported that a Christchurch company was ordered to pay \$8,000 for wrongful dismissal after the employer dismissed an employee for suspected drug dealing. The company disregarded accounts of the incident by those involved and relied instead on the “profuse sweating” of the employee while he was undergoing questioning. The employee was caught on camera allegedly exchanging a bag containing drugs with another employee. The other staff member maintained he was only paying back some money owed to the employee and denied buying drugs. The Employment Relations Authority found that the company relied almost entirely on the video evidence and gave too little weight to the oral evidence from staff. The worker was awarded compensation of \$2,500 and a contribution for lost wages of \$5,500.

A deal between Work and Income and McDonald’s could see beneficiaries working in McDonalds restaurants. In a select committee hearing, the Minister of Social Development Paula Bennett revealed the agreement and said that up to 7,000 unemployed people could be used for the McDonald’s restaurant expansion plans over the next five years. Under the deal with McDonald’s, Work and Income would assist with the recruitment and training of 7,000 staff to be placed in service roles. Labour Party Employment Spokesperson Ruth Dyson said that while jobs at McDonald’s were better than being on the dole, the plan was ‘not the best example’ of the Government’s commitment to ‘upskilling the economy’. It was also stressed that the deal followed the Government’s decision to cut a tertiary education training allowance for beneficiaries.

According to the *NZ Herald*, many expatriate New Zealanders were returning home as a result of the recession but thousands were returning “to the dole queue and a strong reality check when it comes to finding a new job”. Figures provided by Minister of Social Development Paula Bennett showed that 3,000 people, out of the 26,000 who returned over the past year, were receiving the unemployment benefit. Of those unemployed, many were highly skilled. A Department of Labour spokesperson said that the tightening of immigration rules in other countries in response to the economic downturn was driving New Zealanders to return because it was harder to get work overseas.

July 2009

On 1 March 2009, the *Employment Relations Amendment Act* (also known as the “90 day probation period Act”) came into force and as a result the Department of Labour was inundated with enquiries regarding the changes. According to an article in the *Dominion Post*, nearly 30,000 people sought information through the Department of Labour website and more than 400 employers and 248 workers received telephone advice from the Department. The Minister of Labour Kate Wilkinson stated that she had been informally approached by business representatives about making the scheme

more widely available, but added that any decision was unlikely in 2009. A spokesperson from the Northern Employers and Manufacturers Association said he knew of 25 companies using the new provision and thought that the actual number could be much higher. He also stated that employers not would exploit the law as they invested time and resources to train staff and they would not dismiss them without reason. The Council of Trade Unions claimed that they were aware of at least six workers who had lost their jobs under the new law.

An Employment Court decision to pay on-duty rest home carers while taking a sleep break would result 'in carnage at rest home doors as families drop off their loved ones and run', according to a *Dominion Post* article. It was estimated that costs for providing overnight care would almost double and that the result would be that ACC and District Health Boards would have to reduce the level of care they currently provided.

High profile television reality star, the 'Lion Man' Craig Busch (refer to Chronicle December 2008) claimed unjustified dismissal from Whangarei's Zion Wildlife Park. In a *NZ Herald* article, it was noted that his hearing before the Employment Relations Authority had been postponed until August 2009 due to the fatal mauling of an animal handler by one of the tigers at the park. Mr Busch was dismissed after being accused of serious misconduct, including allegations of safety protocol breaches, inappropriate behaviour and poor performance.

The *Sunday Star Times* reported that Air New Zealand dismissed an employee for apparently sending offensive emails, but the Employment Relations Authority found that the employee has been unjustifiably dismissed. In response the airline sent an email to more than 11,000 staff attacking the employee's actions and provided graphic descriptions of the most offensive messages. One employment lawyer called the actions of Air New Zealand both 'petty' and 'childish' and showed a level of disrespect for the Authority. Air New Zealand responded that the email was sent to ensure that all staff had the relevant facts as an earlier media report had said that the e-mails weren't that bad. Air New Zealand also announced that it would appeal the Authority decision.

In another high profile employment issue involving Air New Zealand, it was reported that a veteran pilot had won his long-running battle against the airline for age discrimination (refer to Chronicle October 2008). The Boeing 747 captain and flight instructor was reduced to a lower rank of first officer when he turned 60 because being under the age of 60 was necessary to do his job. He appealed to the Supreme Court against a Court of Appeal decision that said age discrimination was not the reason he lost rank and was shifted to a lower-paying job. The Supreme Court ruled that Air New Zealand had discriminated against the pilot and awarded him costs of \$15,000. The case will now return to the Employment Court as the pilot intends to seek reimbursement from Air New Zealand over lost pay and damages, which could amount to hundreds of thousands of dollars. At the same time, he announced his intention to retire in September 2009.

A rather bizarre case of a journalist who was dismissed because his editor believed rumours he was selling illicit drugs from office toilets and was linked to criminal gangs was reported in the *Dominion Post* and the *Waikato Times*. The employee was on sick leave when drug squad detectives went to his place of employment wanting to speak with him. His employer was informed by the detectives that as part of their surveillance of an address the employee had been seen five or six times and that 'he was not at the address for work purposes'. A further article in the *Sunday Star Times* reported on other rumours included involvement in a \$5 million P ring out of Paremoremo prison. During the case, there were also allegations of industrial espionage on an unprecedented scale where reporters working for the *Herald on Sunday* were ordered to steal stories out of the *Sunday Star Times* newspaper. The employer, APN Newspapers, claimed the dismissal followed a proper, careful, patient process and that the journalist had failed to obey a reasonable and justified instruction by refusing to provide his notes to his editor. The Employment Relations Authority adjudicator, Rosemary Monaghan, reserved her decision.

The Employment Relations Authority was told that a 'fractious' working relationship between two Massey University managers resulted in the resignation of one and the other going on stress leave. Cheryl Kent, who was employed as a physical resources manager, had accused her employer of failing to investigate complaints that she was constantly being bullied by her manager. However, the university responded that the woman had plenty of opportunities to raise her concerns but she did not, despite being an assertive and forthright person. The woman claimed that the university had a duty of care in protecting her from bullying from a man who had a history of bullying type behaviour. The complaint was considered to be a relationship issue not bullying and the investigation stopped when the manager resigned.

The *Nelson Mail* highlighted local job losses at the Nelson office of the Ministry of Social Development. The Public Service Association (PSA) expressed concern at the cuts during a time of rising unemployment. PSA National Secretary Brenda Pilott stressed that the cuts were being made at a time when 1,100 people a week were signing up for the unemployment benefit.

There were a growing number of unscrupulous Marlborough vineyard labour-hire contractors who were short-changing seasonal employees, according to the *Dominion Post*. Wine Marlborough advised grape growers to take a close look at the labour-hire contractors they use during the pruning season after reports that some of the contractors were illegally paying their workers as little as \$6 an hour (less than half the statutory minimum wage). Winter was one of the busiest times in vineyards, with more than 80 labour-hire contractors, employing 3,500 employees worked in the region, pruning and tying down vines. In previous years, the region had struggled to get enough workers, but this year there was plenty of labour available, creating pressure among the labour-hire contractors to secure contracts with the vineyards owners. As prices for jobs fell, there was pressure on labour-hire contractors to cut wages and costs, which had encouraged some of them to skimp on payments to staff and the Inland Revenue Department. The Department of Labour figures also showed a 125 per cent increase in complaints regarding vineyard labour-hire contractors in which there were 90 complaints made about 30 companies between 2008-09 while in the previous year there were only 40 complaints received about 13 companies. However, a Department of Labour spokesperson attributed the rise to seasonal

workers becoming more aware of their rights, rather than just increased non-compliance by their employers.

August 2009

A number of strikes hit the media headlines during August. The *Nelson Mail* and the *Waikato Times* reported that more than 1,000 telephone line engineers went on strike to fight for redundancy protection. The employees worked for companies which were contracted to Telecom which had announced plans to move to a new owner-operator model.

Meanwhile, the four different unions representing bus drivers and cleaners returned to the negotiations with NZ Bus after a pay offer was rejected. The unions were seeking a 6.8% pay rise, against a company offer of 3.5% for 2009 and 3% for each of the following two years, which would guarantee industrial stability for buses needed for the 2011 Rugby World Cup. One of the unions negotiators stated that the employers offer to their 870 drivers and cleaners was so wide of the mark that there was little point in putting the proposal to a stop work meeting. The unions argued that the current starting rate for drivers was only \$14.05 an hour which was only \$1.55 above the statutory minimum wage.

Other high profile employment disputes received media coverage. NIWA scientist Jim Salinger was given a date for his Employment Relations Authority hearing which will be in Auckland during October 2009 (see May Chronicle). The *Dominion Post* reported that 'Lion Man' Craig Busch had withdrawn his bid to be reinstated to the Zion Wildlife Park (see July Chronicle). Zion had launched numerous counterclaims, including the recovery of thousands of dollars worth of machinery, tools and equipment and the entire park's animal and zoo records which it alleged that Mr Busch had taken.

A dispute over a \$7 discrepancy in a café's takings ended up costing the business owner several thousand dollars. The Rangiora cafe (near Christchurch) was found by the Employment Relations Authority to have unjustifiably dismissed an employee which started with a heated discussion with one of her employee who overlooked a refund worth \$7. As the employee left the café, she told a co-worker that the owners "could stick their job up their" She was told the next day to resign by her employer. The Authority said that the central matter was whether the woman's parting words amounted to a resignation and found that the outburst was an expression of frustration not a resignation. The employer failed to undertake a proper investigation into the background to the dispute. The employee was awarded 13 weeks pay minus 10 days sick leave, a \$120 refund for the return of her cafe uniform and \$6,000 compensation for hurt and humiliation.

A Court of Appeal ruling reported in the *Nelson Mail* found that employers cannot order workers to do the jobs of colleagues lawfully on strike. This decision overturned an earlier Employment Court judgment which ruled that the Employment Relations Act allowed employers to instruct take that action. The Engineering, Printing and Manufacturing Union took the case to the Court of Appeal after the Employment Court rejected their claim. The Court of Appeal's ruling will make it difficult for

employers to hire 'strike-breakers' during lawful strikes, but the Court stressed its ruling had no ramifications for employers faced with illegal strikes. The Court of Appeal ruling stated that the Employment Court's judgement was inconsistent with the words of the legislation and difficult to apply in practice. The Court of Appeal also released its judgment on a case involving striking Air Nelson engineers that centred on the same legal question.

It was major news when Wespac Bank dismissed the employee who had inadvertently transferred \$10 million dollars to a Rotorua garage proprietor who subsequently absconded to China. The *Sunday Star Times* reported that the woman made a second error subsequent to highly publicised error when she again keyed in the wrong loan amount. She was called to a meeting with her bosses, accompanied by a representative of Finsec (the bank workers union) and was subsequently dismissed. The woman vowed to fight her dismissal and take a case to the Employment Relations Authority.

The *NZ Herald* reported that a train conductor, who was dismissed for sexually harassing a female colleague, was reinstated and was awarded 30 weeks of wages and \$5,000 compensation for humiliation, loss of dignity and injury. The conductor employed by Veolia Transport (the company that runs Auckland's trains) was found by the Employment Relations Authority to have been subject to a 'faulty inquiry'. A female colleague claimed that the man twice touched her inappropriately and made a formal complaint to the company. A resultant enquiry found on the balance of probabilities that deliberate sexual harassment had occurred and the employee was subsequently dismissed. The Authority concluded the company had 'failed to conduct an inquiry that was full and fair enough to establish the allegations to the necessary high degree of probability'. It ordered the conductor to be reinstated, despite Veolia Transport saying his return to work was impractical and unsafe.

A psychiatric nurse, who was dismissed after he hit a patient while being attacked, was awarded nearly \$30,000 for unfair dismissal and his employer the Whanganui District Health Board was ordered by the Employment Relations Authority to reinstate him. The nurse was badly injured, when a patient he was trying to restrain, kned him in the stomach. The nurse's hand hit the patient's face in the ensuing struggle making him bleed. The Authority said there was insufficient evidence of assault; yet, in dismissing the employee, the board had relied on allegations.

In a rather extreme case of taking work frustrations out on an employer, a 25-year veteran Inland Revenue Department (IRD) employee drove his car through the foyer his workplace after having been involved in a 3 years long employment dispute. The Christchurch man crashed through two sets of glass doors and smashed a third on the other side of the foyer before coming to a stop, according to the *Dominion Post*. Interestingly, the disgruntled employee claimed that he went to great lengths to avoid any risk to staff hence his actions took place on a Saturday morning. The employee said that he was fed up with concealment of workplace bullying and incompetent management at the IRD. The man appeared in the Christchurch District Court charged with intentional damage and reckless driving.

September 2009

The *Dominion Post* reported that organisations specialising in disability support face an increase of their annual salary payments in the range of \$40 million if the Employment Court upholds a decision for carers on night duty to be paid the minimum adult wage of \$12.50 per hour (see July Chronicle). Carers would also be able to claim back pay for up to six years if the court upheld an earlier decision involving carer Phillip Dickson. A lawyer representing the provider organisations explained to the Court that they were unable to afford the additional \$40 million annual wage bill. The test case involved a carer who overnight looked after five people living in a community house but was paid only the equivalent of \$3.77 per hour. The three judges hearing the case reserved their decision.

A survey of 1500 business enterprises by Business NZ found that the 2005 amendments to the Holidays Act 2003 had increased costs for 74 per cent of the respondents. The increased complexity of the legislation was another major problem, according to the *Bay of Plenty Times*. This was used as background to the review of the Holidays Act 2003 announced in June 2009 by the Minister of Labour Kate Wilkinson (see June Chronicle). The working group reviewing the legislations was to focus on 'vexed issues', including the calculation of relevant daily pay as laid down in the act, trading annual leave for cash, transferring the observance of public holidays and the entitlements of casual employees. The New Zealand Chambers of Commerce argued in their submission that the terms of reference for the review were not broad enough and that the legislation needed a 'fundamental rethink'. New Zealand Chambers of Commerce representatives argued that as the labour market had become more complex, the conventional nine to five, Monday to Friday working week was becoming less common and, thus, the legislation was struggling to adequately deal with the complexities of modern work patterns.

The proposed Auckland Supercity started to have an impact on the 6,800 employees employed by the eight existing local authorities. The *NZ Herald* reported that the Local Government (Tamaki Makaurau Reorganisation) Act 2009 would have significant repercussions for all employees employed by the local authorities as the local authorities will cease to exist on 31 October 2010. The new legislation required the Transition Agency to "...plan and manage all matters in relation to the reorganisation to ensure that the Auckland Council is ready to function on and from 1st November 2010". It must develop an organisational structure for the Auckland Council and a change management plan that had "...regard to the existing employment agreements applying to the staff". Former Alliance Cabinet Minister and trade union leader Laila Harre was appointed to the Transition Agency to manage the human resource and change management aspects of the transition.

Once again, professional firefighters took industrial action over the breakdown in their 14-month negotiation with their employer for a pay rise. The *Southland Times* reported that local firefighters had joined their colleagues nationwide in refusing to perform any administrative duties, including processing jobs. In addition, the firefighters were only going to respond to emergency incidents but were not going to operate the computers. The industrial action was in its second week and would continue until 24 September 2010.

As a sign of the recession's impact on employees, the *Sunday Star Times* reported that an increasing number of people facing redundancy or workplace restructuring were seeking legal assistance from local community law centres. As a result the centres were struggling to cope with the higher demand for their services. The Wellington Community Law Centre used to have one volunteer employment lawyer available during its weekly clinic but as a result of the extra demand, the Centre was forced to roster three lawyers and even then they were unable to keep up with the demand. The Centre's manager Geoffrey Roberts said that he could not recall such a heavy demand on services. Similarly the Canterbury Community Law Centre had 600 employment inquiries in the past year and had also witnessed a growth in consumer and debt issues.

In a reference to the TV comedy series 'The Office', a *NZ Herald* article stated that the real life situation is rarely so amusing. The article was about a recently released book called *Inhuman Resources: A guide to the psychos, misfits and criminally incompetent in every office*, written by Australian author Michael Stanford. While the book is intentionally funny the author said that the humour should not mask the serious message that work colleagues can make working life miserable. According to Stanford, there are a range of characters in the workplace from the simply annoying to the toxic. Factors that have increased workplace friction are e-mail (it can be used in a manipulative way) and the recession (people becoming fearful and misbehave). One expert interviewed said that unlike Australia, conflict in New Zealand workplaces was not necessarily aggressive as New Zealanders on the whole displayed stoicism and a desire to avoid conflict at all costs.

Another article related to psychopathic workers in the workplace. A *Dominion Post* article claimed that up to one in ten workplaces "harbour a psychopathically oriented worker", according to research by Dr Giles Burch a senior lecturer in management at University of Auckland. A psychopath worker was one who displayed antisocial behaviour and a chronic disregard for ethical principles. Dr Burch pointed to character traits such as superficial charm, an inflated sense of self-worth, pathological lying, cunning, manipulation, lack of remorse or empathy and a sense of impulsive non-conformism. He said that these workers create 'toxic' workplaces, rife with bullying, manipulation, sexual harassment, lying and fiddling the books. They also made those who work with them ill through insomnia and depression. The worrying aspect was that individuals with these personalities were increasingly being employed by highly competitive organisations for their aggressive behaviour, thus rewarding and reinforcing their behaviour. The banking, finance and media sectors were particularly prone to psychopaths and they generally rose to management based on their superficial charm and apparent decisiveness – which were mistaken for leadership qualities. The best way to avoid hiring psychopaths was to use behavioural questions in staff interviews such as asking for examples of teamwork and following up with referee checks.

In an article on workplace bullying, the *Sunday Star Times* quoted research which said that one in ten workers had been bullied by a work colleague in the past six months. The two year project, which was conducted by three universities, surveyed 20 organisations in the hospitality, health and education sectors. 1,600 employees completed a questionnaire and preliminary results showed that a significant number had been victims of workplace bullying, with many still suffering the effects.

Bullying was defined by the researchers as a situation in which a person feels they have been repeatedly on the receiving end of negative actions from another worker, in an environment where it is difficult to defend themselves. Some of the worst places for bullying appeared to be restaurant kitchens and there was reference to the 'Gordon Ramsay effect'. Hospital staff reported bullying from relatives of patients and teachers recorded instances of bullying from pupils. Other findings were that bullying not only occurred from the top down but could also occur in reverse. Many organisations, while they have harassment and stress policies, do not actually know how to handle workplace bullying. The article went on to say that it was incumbent on management to be proactive and develop a work culture that promotes collaboration, respect and an environment that treats people with dignity.

The *Dominion Post* featured a *Harvard Business Review* paper which claimed that there was solid evidence that office cubicle culture does not work. The claim by researchers Laura Sherbin and Karen Sumberg was that cubicles reduced the opportunity for people to get together and share information. Cube farms discouraged collaboration, stifled employee engagement and, as a result, strangled innovation. According to the research, both baby boomers and generation Y workers resented barriers that would hinder networking and that workers were looking for more efficient ways to work collaboratively.

Colin Ross & Erling Rasmussen
Auckland University of Technology