



The database of decisions

A database of Employment Tribunal adjudication decisions (and Employment Court judgments) has been under continuous construction at the Industrial Relations Research Centre of the Department of Management at the University of Otago since 1995. In recent years, the New Zealand Law Foundation has provided generous financial support to the project, allowing for the accelerated development of a more comprehensive database.

The database of employment decisions begins with the case summaries published by the Department of Labour's Employment Institutions Information Centre and made available as a part of the Brooker's employment law package. Having extracted the data from those summaries, our research staff then examine the decisions themselves for data on additional variables.

The variables captured for the database are in several categories: the issues involved in the case; characteristics of the parties, including gender, occupation, industry, and representation; characteristics of the Tribunal adjudicator, hearing and decision, including for example the gender of the adjudicator, location and length of the hearing, and length of the decision; and various measures of the outcomes of the cases – who won, who lost, and the nature of remedies awarded, if any.

A number of academic and practitioner papers have issued from this project to date, including the first "facts and figures" report published in the corresponding issue of the *New Zealand Journal of Industrial Relations* in 1999 (McAndrew, 1999). In that paper, relying on data for the years 1992 through 1997, I reported on the general profile of the Tribunal's caseload and detailed outcomes for personal grievance cases, highlighting factors – including the nature of representation – that appeared to be associated in one manner or another with grievance outcomes.

The intent of this present report is to share some further, updated data on Tribunal decisions with the industrial relations and employment law community, illustrating the range of case issues being decided by the Tribunal, and highlighting some apparent trends and associations. The particular focus of this paper is the body of Tribunal adjudication decisions on personal grievance claims over dismissals for



Grievance Outcomes	Frequency	Percent
Grievant Won	1420	64.3
Grievant Lost	788	35.7
TOTAL	2208	100.0

Again, I will return to this theme of declining success rates for grievants or applicants in due course, particularly in relation to claims surrounding dismissals for misconduct, where the trend seems quite marked.

In an adjudication case where the applicant has been successful to the extent of a finding that he or she has a personal grievance, then remedies are likely to follow.

The available remedies, depending on circumstances, are reinstatement of the applicant to a job, reimbursement of lost remuneration, compensation for loss of tangible benefits, and compensation for humiliation, loss of dignity and injury to feelings. The outcome of a case can be measured in terms of any or all of these remedies, in addition to being measured on the straight "win- lose" dimension represented by *Tables Two* and *Three*.

Table Four: Compensation for Humiliation, Loss of Dignity and Injury to Feelings 1992 - 1999

Level of Compensation	Frequency	Percent
No Compensation Awarded	318	16.1
Up to \$5000	1147	58.0
Between \$5000 and \$10000	398	20.1
Over \$10000	115	5.8
TOTAL	1978	100.0

Of the available remedies, compensation for humiliation, loss of dignity and injury to feelings is, at least in some respects, the most useful measure of decision outcomes, both because it is almost universally sought by grievants and it is arguably the remedy over which the Tribunal has the greatest discretion.

Table Four shows the distribution of compensation awards under this head to grievants successful in

winning their cases in adjudication in the years 1992 through 1999. The major movement from the data published last year for decisions issued from 1992 through 1997 was an increase in the percentage of successful grievants awarded no compensation from 12.6 percent for the period to 1997 up to the 16.1 percent figure when 1998 and 1999 decisions are added. *A closer look at dismissal decisions*

The sense that applicants are doing less well as time goes by is confirmed by looking at the percentages of adjudication decisions of all types won by applicants over the years: 69.7 percent in 1992, 63.9 percent in 1993, up a bit to 66.5 percent in 1994, but thereafter a gradual but consistent slide: to 59.7 percent in 1995, then 58.7 percent in 1996, 56.9 percent in 1997, 55.1 percent in 1998, and finally 54.0 percent in 1999. Interestingly, figures for 2000 indicate a reversal in this trend, although the entries in the database for this year are obviously yet to be completed.

The extent of the decline over time naturally raises the question why it is happening. I am not yet in a position to give any real answers to that question, but it is interesting to examine the phenomenon in a little more detail.

Last year's report looked at factors that appeared to be statistically associated with personal grievance outcomes – personal grievances being the largest part of the Tribunal's caseload – and found that the variable that was the best predictor of the win – lose outcome was the nature of the grievance. So, in looking for more detailed trends, that would seem to be the place to start. *Table Five* shows grievance outcomes by type of grievance for the years 1992 - 1997, borrowed from last year's paper, set alongside the same figures but with the numbers for 1998 and 1999 incorporated, so 1992 - 1999.

Table Five: Grievance Outcomes by Type of Personal Grievance

		1992-1997		1992-1999	
Type of Personal Grievance		Win	Lose	Win	Lose
Dismissal:	Count	174	198	232	268
Constructive Dismissal	Percent	(46.8%)	(53.2%)	(46.4%)	(53.6%)
Dismissal:	Count	416	239	511	340
Misconduct	Percent	(63.5%)	(36.5%)	(60.1%)	(39.9%)
Dismissal:	Count	303	62	373	85
Poor Performance	Percent	(83.0%)	(17.0%)	(81.4%)	(18.6%)
Dismissal:	Count	302	121	408	179
Redundancy	Percent	(71.4%)	(28.6%)	(69.5%)	(30.5%)

Dismissal:	Count	168	104	281	169
Other	Percent	(61.8%)	(38.2%)	(62.4%)	(37.5%)
Other Personal Grievance	Count	57	64	84	87
	Percent	(47.1%)	(52.9%)	(49.7%)	(50.3%)

What is apparent on the face of *Table Five* is that the success rate for grievance applicants has declined with the addition of the 1998 and 1999 case decisions in each of the three major dismissal case categories that come before the Tribunal - dismissals for misconduct, dismissals for poor performance, and dismissals for redundancy. Of these, the most marked decline with the addition of case decisions for the last two complete years is in the category of dismissals for misconduct, which is also the largest category in terms of numbers of dismissals, as it has been throughout the life of the Tribunal. Against a base of over 400 case decisions for applicants in the period through 1997, an overall decline in the success rate of almost 3.5 percentage points over an additional two years is quite significant.

For completeness, *Table Six* sets out the distribution of compensation awards for successful grievants for the full period 1992 through 1999. The addition of case data for 1998 and 1999 causes no marked changes in the patterns that were reported last year through 1997, and so the discussion of compensation won't be taken any further in this report.

Table Six: Compensation for 'Humiliation, Loss of Dignity, and Injury to Feelings' by Type of Grievance, 1992-1999

Type of Personal Grievance		Level of Compensation			
		None	Up to \$5000	\$5001 - \$10000	Over \$10000
Dismissal:	Count	35	127	57	13
Constructive Dismissal	Percent	(15.1%)	(54.7%)	(24.6%)	(5.6%)
Dismissal:	Count	68	307	105	31
Misconduct	Percent	(13.3%)	(60.1%)	(20.5%)	(6.1%)
Dismissal:	Count	34	244	78	17
Poor Performance	Percent	(9.2%)	(65.0%)	(20.9%)	(4.6%)
Dismissal:	Count	43	243	96	26
Redundancy	Percent	(10.5%)	(9.0%)	(23.5%)	(6.4%)

Dismissal:	Count	37	178	52	14
Other	Percent	(13.2%)	(63.3%)	(18.5%)	(5.0%)
Other Personal Grievance	Count	14	46	10	14
	Percent	(16.7%)	(54.8%)	(11.9%)	(16.7%)

Focusing on misconduct dismissal decisions

As noted above, case decision data for each of the three major bases of dismissal have shown a decline in grievant success rates. *Table Seven* demonstrates that this has been pretty consistently true throughout the life of the Employment Tribunal, again most dramatically in the case of dismissals for misconduct. While grievant wins have trended downward on a slightly rocky road over time in the cases of dismissals for poor performance and redundancy, wins by applicants grieving their dismissals for misconduct have dropped quite markedly in several dramatic steps, falling fully 30 percentage points over the period from 1992 through 1999.

Grievants enjoyed a high of some 77 percent success in grieving misconduct dismissals in the first full year of the Tribunal, 1992. In approximate figures, this dropped by about 10 percentage points to the mid-60s percent in 1993 – 1994, and then by about another five percentage points to 60 percent for the following two years, 1995 – 1996, and then another drop of about 10 percentage points to around 50 percent for the two years after that, 1997 – 1998, and finally another five percent drop to the mid-40s percent in 1999; more than 30 percentage points in seven years.

Table Seven: Employee Win Rate by Reason for Dismissal 1992-1999

Reason for Dismissal	1992	1993	1994	1995	1996	1997	1998	1999
Dismissal: Misconduct	64 77.1%	78 66.1%	96 65.8%	65 60.2%	68 60.7%	45 51.1%	50 50.5%	45 44.6%
Dismissal: Poor Performance	51 92.7%	59 85.5%	59 80.8%	55 76.4%	34 73.9%	46 90.2%	40 76.9%	29 70.7%
Dismissal: Redundancy	48 76.2%	41 70.7%	69 75.8%	48 63.3%	49 75.4%	47 67.1%	54 65.1%	51 63.8%

The decline in grievant success rates over time holds true for most, but not all, of the several sub-categories of the “misconduct” category in the database, and the fall is more dramatic in some sub-categories than in others. “Disobedience” offences have seen the most substantial decline in win rates for grievants, falling in a reasonably straight line from 76 percent success in 1992 to 50 percent in 1995 to 40 percent in 1997 to about 30 percent in 1998 and to slightly under 20 percent in 1999. At the other extreme, there have been some relatively minor variations year to year in success rates for applicants grieving dismissals for alleged theft offences, but no substantial change over the life of the Tribunal. Workers grieving their dismissals for theft had a success rate of 56 percent in Tribunal adjudications in 1992, a success rate of 54 percent in 1999, and an overall success rate for the period of 59 percent.

Looking for explanations

In presenting last year’s paper, I reported the results of regression analyses which tested for statistically significant associations between certain case variables associated with case types, representation factors, the parties, and the adjudicator and hearing details as independent or causal variables and case outcomes as dependent variables. As previously noted, at least for personal grievances, of the variables in the data base, case type showed up as the most powerful predictor of win – lose outcomes. (It is noted, of course, that there is no measure of the substantive merits of the case in our database, so our analyses largely disregard the most important determinant of the outcome of a case). In any event, for the present report, similar regression analyses were run for just the misconduct dismissal cases.

A regression analysis is a statistical technique that can divide a sample (such as grievance outcomes) first according to the variable (occupation of grievant, whether represented by a lawyer or by a lay advocate, the length of the hearing, and so on) that is statistically most strongly associated with the outcomes. The analysis then goes on to separate each sub-sample created by that first division into still smaller sub-samples according to the variable that is statistically next most strongly associated with the outcomes in each subsample.

Figure One is too large to display correctly in this window: [click here](#) to open a new browser window in which to view it.

The process continues until all variables associated with the outcomes have been recognised. For the present report, the regression technique was applied to the sample of win – lose outcomes in unjustified dismissal personal grievance adjudications for the years 1992 – 1999, where the reason for dismissal was misconduct.

This regression analysis endorsed what was apparent from the frequencies. As is figuratively represented in *Figure One*, outcomes were statistically associated with year of decision. The statistical package found the years 1993 through 1996 to be sufficiently similar in win–lose outcomes for dismissal adjudication decisions involving dismissals for misconduct to be grouped together, but, as a group, sufficiently dissimilar as to be distinguished from 1992 and also from the period 1997 through 1999. In other words, there were three statistically distinguishable periods in terms of applicant success rates in dismissal for

misconduct grievances, with the rate of success diminishing in each successive period. It is noteworthy in looking at *Figure One*, and consistent with the analysis in last year's report, that there were further explanatory factors seemingly associated with outcomes in the middle period, 1993 through 1996. While there are, as again discussed in last year's paper, many possible explanations for the apparent associations with those factors, it is at least a less complicated picture now that those influences are no longer apparent in the years beginning 1997. ***Concluding comment***

This paper has presented an update on the Employment Tribunal's adjudication case profile and the outcomes for parties in the Tribunal's "bread and butter" personal grievance caseload.

Among the principal findings was a gradual decline in applicant success rates in the Tribunal's adjudication jurisdiction. Focusing on personal grievances, it was seen that applicant success rates had dropped over the life of the Tribunal for the three major types of personal grievance dismissal cases: those alleging unjustifiable dismissal for reasons of misconduct, poor performance, and redundancy. In the case of dismissals for misconduct, grievant success rates were seen to have fallen by about 30 percentage points in a series of dramatic steps between 1992 and 1999, although there is a hint on incomplete figures that this may have turned around somewhat in the year 2000.

Regression analysis of case variables against outcomes in misconduct cases confirmed the changing fortunes of the parties over time, but offered few other clues as to why applicant success rates have been in such consistent decline. Of course, that does not mean that there are not explanations; only that the explanations are not available in the case decision data that we keep and that are the subject of this research note.

Over the period of existence of the Tribunal, there have been changes in influential Court personnel, and in Tribunal Membership, and some shifts in the political winds. Perhaps relatedly, there have been a number of particularly significant case decisions during the past decade that trained observers might see as turning points, and a matching of these seminal cases to the pattern of the data, while beyond the scope of this note, might be illuminating. In terms of explanations for the phenomenon of declining applicant success rates there remains also the unmeasured factor of the merits of applicants' cases, and the possibility that the general level of relative merits of cases coming before the Tribunal in adjudication might have changed over time as, for example, employers become more knowledgeable about employees' rights and due process.

One suspects that the explanations for declining applicant success rates, particularly dramatic declines of the magnitude observed in misconduct dismissal cases, are to be found in these sorts of factors. No obvious explanations are apparent in the raw case data.

Reference

Bartlett, Philip et. al. (eds) (2000), *Brooker's Employment Law* Wellington: Brooker's Limited.

McAndrew, Ian (1999), *Adjudication in the Employment Tribunal: Some Facts and Figures on Caseload*

