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Disputes Tribunal appeals

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identify futile and fertile grounds of appeal

In 1988 the Disputes Tribunals Act 1988 established a tribunal with authority to consider claims of only $3,000–$5,000 (still only $6,000–$10,000 in today's terms). The Act provided a balance to the de minimis claim figure by providing that:

> The Tribunal shall determine the dispute according to the substantial merits and justice of the case and in doing so shall have regard to the law but shall not be bound to give effect to strict legal rights or obligations or to legal forms or technicalities (s 18(6)).

The de minimis nature of this tribunal was irrevocably changed on 1 August 2009, when the Disputes Tribunals Amendment Act 2009 came into effect increasing claim limits to $15,000 and $20,000. This change was accompanied by government signals that it could go further and by general support from the legal profession which has little experience with the system.

Despite this increase in the maximum claim figure the limited rights for disgruntled parties to seek redress have not changed. The situation remains as it was back in 2001 when Potter J said:

> It is necessary that parties who use the facility of the Disputes Tribunal to resolve disputes (and if appropriate the limited right of appeal afforded by the Disputes Tribunal Act to the District Court) recognise from the outset that the decision of that body is one they must accept, abide by and they must get on with their lives. (*Sutherland v Disputes Tribunal* HC Auckland M 404-1908-00, 3 May 2001 at [18]).

The appeal options of the Disputes Tribunal differ substantially from those found in the District Courts Rules 2009 (SR 2009/257) and High Court Rules. Part 4 (ss 49–53) of the Disputes Tribunals Act 1988 contains the rights to rehearings and appeals. Under the Act, the rights to rehearings and appeals are clear and strictly limited.

As reiterated in *Dorbu v Magnall* DC Auckland CIV 2008-004-2318, 12 December 2008, effectively the only ground of appeal is that "the manner in which the referee conducted the hearing was unfair to the appellant and prejudicially affected the result of the proceedings".

In late 2009, the authors carried out a research study to review Dispute Tribunal appeals over the previous five years and in particular during 2008 and 2009. The results of the study reiterated both the limited appeal rights under the Act and the general misunderstanding of the parameters and scope of redress.

In addition to case law searching on decisions, a key data input into the research study was the "cases of interest" digests that the Ministry of Justice periodically publishes. The 234 cases of interest selected by MoJ from the last five years were considered in particular detail.

2008 and 2009 were interesting years for the Disputes Tribunals. There was a continuing trend of high levels of appeal failure, as appellants attempted to appeal outside the allowed parameters. In 2008/2009, only four per cent of Disputes Tribunal decisions were taken to appeal and of those, only eight per cent were successful.

Judge Spiller, then Principal Disputes Referee, in his article "The changing face of the Disputes Tribunal" ([2009] NZLJ 94) commented on the fact that judges have begun complimenting referees on the high standards of their decisions. However, whilst we do not dispute this improvement in standards there is no evidence to suggest that the low appeal success is due more to the quality of referee decision-making than the severe limits on appeal rights.

In this article we: revisit the principal grounds for appeal; identify a number of cases from 2008 to 2009 which illustrate the futility of many attempts; consider the available arena; discuss the areas which have seen the greatest appeal success; and consider the possible impact on the judicial system of the 2009 increased jurisdictional limits.

THE CRITICAL TEST: PROCEDURAL UNFAIRNESS

Section 50(1) says:

> Any party to proceedings before a Tribunal may appeal … on the grounds that—
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> (a) The proceedings were conducted by a referee … in a manner that was unfair to the appellant and prejudicially affected the result of the proceedings.

There has been much vacillation over the years as to the meaning of these words. Pre-1993, more judges found in favour of appellants where the referee had made a mistake on a point of law, such as the interpretation of an Act, whereas other judges refused to diverge from the strict wording of s 50 and only awarded appeals based on patent procedural errors.

The watershed decision that tackled the previously vexed question and drew a line in the sand, was *NZI Insurance New Zealand Ltd v Auckland District Court* [1993] 3 NZLR 453. This clearly established that despite the obvious error in the referee's interpretation of the Insurance Law Reform Act 1977, no ground for appeal could be established. This seemed to rule out the possibility of appealing if the referee made a mistake concerning the law.

In the years after 1993 the *NZI* case was faithfully followed and appeal became much harder. However, in 2001 in another *NZI* case, the issue was reopened and a less hard line approach advocated (*New Zealand Insurance Ltd v District Court* (2001) 16 PRNZ 493). The understanding became that if the point of law which the referee failed to have regard to, was the issue central to the decision, then this equated to

procedural unfairness. This was because the case will be deemed as having been "not determined according to the substantial merits and justices of the case". This once again opened the appeal doors wider but left uncertainty over what can and cannot be the subject of an appeal.

Despite the precedent established in 2001, which was intended to compensate those who have been subject to blatant injustice in the Disputes Tribunal, judges in many cases remain unable to assist unhappy participants.

FORUM SHOPPING

Despite the limited grounds, a dissatisfied participant has a surprising number of options as to where to go for redress. There is an unsatisfactory juxtaposition between having a choice of forum but severely limited scope when you get there. It would be interesting to see research on whether this range of options has actually encouraged the filing of futile appeals.

The forum options available are a rehearing, an appeal to the District Court, an application for judicial review to the High Court and even appeal (without the requirement for leave) to the Court of Appeal or High Court.

The provisions regarding rehearings granted by referees, as against those ordered by an appeal court are set out in s 49 of the Act. The grounds for rehearing are limited but an interesting distinction exists between rehearing rights against orders by a referee (where parties fail to reach their own agreement) and referee-approved agreed settlements. Where the referee determines the dispute under s 18(5) and makes an order under s 19, a rehearing may be ordered, whereas, if a settlement is reached by the parties, a rehearing should only be ordered if new information comes to light after the event (and in 28 days) which would have had a bearing on the party's decision to settle. Strategies in light of this distinction are considered in the "Fertile Not Futile" section below.

Section 50 of the Act sets out the rules and requirements for appeals to the District Court. There is no filing fee and this seems an easy option for unrepresented parties, if pointless.

The option of judicial review is found not in the Act but in the Judicature Amendment Act 1972. It was thought back in 2007 after *Cruickshank* that successful applications for judicial review would be limited to cases with some "truly significant issue at stake" (*Cruickshank v Disputes Tribunal* [2007] NZAR 602 and see "Student Companion" [2007] NZLJ 348). However since then there have been a number of successful appeals as discussed further below.

FUTILE APPEALS

Dorbu provides a pointer to why so many appeals attempted by litigants in person fail, involving as it did a claim filed against a barrister's wife and then an appeal conducted by her husband. In this case an award was made against Mrs Dorbu, concerning a motor vehicle accident in a car park. The subsequent appeal cited four grounds of appeal. Judge Joyce dismissed the appeal finding no merit in any of the four. If this is the measure of success of a member of the profession with expertise, what chance do non-lawyers have?

It is clear from reading *Dorbu* that the Judge had little sympathy for the appellant. However, the outcome was still the same in *Birk v G & E Weir Ltd* DC Nelson CIV-2008-042-0161, 22 September 2008, at [26] and [27] where the Judge's sympathy clearly lay with the appellant:

> [It is] not my task on appeal to decide whether or not the Referee had made the right decision, but rather to determine whether there had been procedural unfairness … Whilst sympathetic to the obvious upset exhibited by Mr and Mrs Birk and their "plaintive cry" that all they were seeking is justice, I am unable to grant their appeal.

In this dispute over a house extension, Mr and Mrs Birk found themselves being ordered to pay an unpaid invoice, when they had filed a claim to seek recompense for additional expenses they had incurred due to building inadequacies. At their hearing, they misunderstood the rules about witnesses and without the crucial persons present failed to make their case, whilst the counter-claiming builder succeeded in his counter-claim for payment. Judge Zohrab did remit one matter to the Tribunal but the Birks were still left with the responsibility of payment of the invoice. This is a good illustration of the risk applicants run in seeking claims under s 10(1)(b) regarding liability for a debt. The Birks not only failed twice to achieve their desired result but ended up the loser and poorer.

The *Decortiles* case provides another example of stated grounds of appeal that fail to provide any evidence of procedural unfairness to the Judge and consequently led to the inevitable result (*Decortiles Ltd v Athfield,* DC Auckland CIV 2009-004-995, 17 September 2009).

Another 2009 case provides an illustration of a futile appeal where counsel for the appellant's submissions were favourably described by the judge as "carefully crafted". However, the Judge, acknowledging "the narrow basis upon which this Court could consider appeals", rejected the appeal because "I am not satisfied that the result was plainly unjust" (*The Web Company NZ Ltd v Cowan* DC Nelson CIV-2009-042-143, 23 June 2009).

"Futile" definitely comes to mind on reading *Dance v Boulden* [2009] DCR 492, where the appellant in person based the appeal on an argument that the referee "excessively questioned him". Judge Hinton displayed considerable patience but the inevitable result ensued.

Judge Zohrab in *Quovadis Sequentis Ltd v Dawson* DC Blenheim, CIV-2009-006-091, 24 September 2009, at [23] said: "the parties before the Tribunal ought not to expect a determination otherwise than on a very broad basis of justice as a particular referee views the matter. The law in contractual terms is secondary to the overall substantial justice of the matter." It is hardly surprising that it is hard to succeed on appeal in the light of such a sentiment.

Since the two *NZI* decisions referred to in Judge Spiller's article, the bar for procedural unfairness seems to have been set high. This is well illustrated by a comment in *Holmes v Walker-Murch* [2009] DCR 423 at [2]: "The Tribunal has been set up to allow people, ordinary citizens, to have access to a means of settling disputes quickly and cheaply without regard to technicalities so that they can get on with their lives".

This judicial sentiment clearly reflects the intention of government for the tribunals, however, in *Holmes*, the unsuccessful appellant described as a "senior" complained that the referee had allowed the respondent to "behave or conduct himself in an intimidating, derogatory and accusatory manner towards her", which included standing up every time it was the respondent's turn to speak and interjecting into his statements Maori words she did not understand, and which

were not translated. Is not the Tribunal supposed to ensure that ordinary vulnerable citizens, eg seniors, can get a fair hearing and ensure that they believe this has occurred?

The final and expensive option is judicial review. Perversely because of the small number of cases concerned, there has over the years actually been a success rate of 33 per cent but this is not a fair reflection of the likelihood of success nor an advertisement for using this option. Between 2005 and 2009 there were 15 applications for judicial review to the High Court; of the ten unsuccessful appeals the most recent was in 2008. The Court was critical of some of the referee's work and in the noted "This dispute remains in a sorry state", yet, again the appeal was dismissed for want of evidence of procedural unfairness. (*Hamilton v Disputes Tribunal* HC Dunedin CIV 2007-412-861, 8 October 2008). His final words were "the proceeding in this Court has achieved nothing other than extra cost". The cost exposure on judicial review should discourage indiscriminate use of this option.

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FERTILE NOT FUTILE

Despite the litany of failures described above and extracted from the 1,660 unsuccessful appeals over the past five years, 223 appeals did succeed. The ground of appeal that proved most successful overall has been a range of procedural errors determined as passing the test in s 50(1)(a) but in the last two years other grounds have been a more fruitful.

In *Great Barrier Island Ferry Co Ltd v Davies* [2010] DCR 50 at [32], the ferry company succeeded on the grounds that reliance on statements of a critical but absent witness was sufficient to have resulted in procedural unfairness: "It is clear that the Tribunal, whilst having regard to the law, is not bound to give effect to strict legal rights or obligations or to legal forms or technicalities. It is important however in my view that the reasons show that the final decision was arrived at having proper regard to the law. Reasons however are not conclusions, rather it is the reasons which lead to the conclusions."

In *Vercoe v Read* [2010] DCR 456, the unfortunate and unanticipated role of a witness as a support person was again sufficient to pass the s 50(1)(a) test of unfairness.

Baxter v Cox [2009] DCR 315, highlights the challenges for referees, many of whom are not lawyers, to keep up with and understand all the nuances of the law. Two issues were of note, the first around the true legal identity of the parties and the second regarding relevant legislation. Section 50(2)(a) providing an additional ground of appeal for failure to consider legislation brought to the referee's attention.

Finally, *Turoa Village Residents' Association Inc v Snowmass Venture Ltd* DC Auckland CIV-2008-004-2002, 4 December 2008 possibly provides a window on what is to come, as appellants have more to lose financially and more complex disputes come before the referees. The appeal succeeded even though the sympathies of Judge Joyce seemed to be with the referee, commenting that there was "no expectation that referees should act as if nursemaids to litigants" but went on to say "but with respect, referees must be alive to the need … for parties to have adequate time and chance to respond to legal arguments of more than day to day simplicity".

A final piece of fertile ground for those considering appeals is the rehearing option. In the last few years referees conducted rehearings on approximately six per cent of all cases. This is in roughly three times the number of appeals filed but 30 times the number of successful appeals. We are not able to determine success rates after rehearings but it does raise the option of a rehearing as a more fruitful option.

Practitioners advising clients prior to a hearing would be wise to explain the difference between rehearing rights in the case of an agreed settlement rather than an order. Participants need to be mindful that if they settle, a rehearing can only be granted if new information has become available.

INCREASING JURISDICTION-INCREASING CHALLENGE?

On 1 August 2009, announcing the enactment or passing of the Disputes Tribunal Amendment Act 2009, the Hon Simon Power MP, Minister of Justice said:

> Being tied up in district court dealing with small claims is one of the trouble spots for small businesses; it costs them valuable time and money. The government is very keen to smooth the way for these businesses, so we will encourage the use of the lower-cost and lower-compliance Disputes Tribunal by raising the threshold at which cases can be heard there.
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> Currently, the maximum claim level of the Disputes Tribunal is $7,500, or $12,000 with the consent of both parties. To make life easier and cheaper for small businesses, the Government will lift those levels to $15,000 and $20,000. This is designed simply to lighten the load on small and medium-size business so they can get on with the business of producing goods and services.
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> I would not rule out further changes to the threshold, as long as the character of the tribunal can be maintained. (*Press Release*, 4 February 2004)

In the closing months of 2009 it was noticeable that more small businesses were starting to appeal against decisions (unsuccessfully). There is no evidence currently to explain why but the authors surmise that difficult economic times, increasing amounts at stake and a reducing number of other options have and will force businesses (that would previously have given up and moved on) to have a crack at appealing. If this is the case and the trend continues, it will become more important for counsel to understand what the best chances of appeal are and for government to consider wholesale changes to the Act, rather than simply further increases in claim limits.

Of course there is always the possibility that faced with a requirement for an "information capsule" the unrepresented appellant might actually accept the wise words of Potter J and "get on with their lives". ❐