

Adjudicatory institutions for individual employment disputes: formation, development and effectiveness¹

Abstract

This article focuses on first instance discrete adjudicatory institutions for the determination of individual employment disputes, generically known as labour courts, in seven countries: France, Germany, Great Britain, Ireland, Japan, New Zealand and Sweden. First, it traces their formation and subsequent development, applying Thelen's four-fold typology of displacement, conversion, layering and drift. Sometimes, this typology is appropriate: French and Swedish labour courts have drifted, and in Germany there was displacement after World War 1. Sometimes, however, the typology, is inappropriate. In Ireland, there has been amalgamation and in New Zealand there was displacement and then adaptation.

It next seeks to understand which of the seven institutions performs the most effectively, examining several criteria including the legitimacy of the labour court, speed, accessibility, cost, informality, and the propagation of legal norms. It finds that comparisons are limited because adjudicatory institutions need to be judged in their context, which varies nationally. Moreover, effectiveness depends on the criterion that is adopted: an institution that scores highly on one criterion, does not do so on another. Nevertheless, despite these limitations, comparisons can be useful to practitioners and academics and Germany's labour court scores highly on many of the criteria used.

Keywords: labour court, judges, adjudication, lay judges, employment disputes, , mediation, path dependency, effectiveness, legitimacy, norms.

INTRODUCTION

¹ The author would like to thank all those who collaborated with the author on research projects on which this paper is based, but particularly Ryuichi Yamakawa and Pete Burgess. The author would also like to thank the reviewers for their very helpful comments.

Traditionally, the protection of individual employees at the workplace and the resolution of grievances and disputes has been one of the key roles exercised by trade unions, but there has been a substantial decline in trade union density in the developed world during the last half century. On average across countries belonging to the Organization for Economic Co-operation and Development (OECD), 30 per cent of workers were union members in 1985, but the corresponding figure in 2017 was only 17 per cent.² At the same time, there has been a growth of statutory and/or contractual legal rights for the individual employee across much of the developed world. These trends have led to juridification, that is increased legal intervention in the employment relationship, with many countries developing specialist and discrete adjudicatory institutions to resolve employment disputes, rather than using the ‘normal’ civil courts.³

The nature and operation of these institutions for adjudicating individual workers’ disputes have been largely ignored in the employment literature, although they have become increasingly salient. Accordingly, this paper seeks to fill this gap by focusing on the institutional architecture in France, Germany, Great Britain,⁴ Ireland, Japan, New Zealand and Sweden, examining the origins of these institutions, delineating their persistence or change over time and providing an empirically grounded evaluation of their effectiveness. The labour courts in these countries are chosen because in some respects they are similar and in some respects they are dissimilar, allowing for a rich exploration as will be shown below.

The plan of this paper is as follows. First, having delineated briefly the legal and industrial relations context and explained the methodology and research questions, this paper will focus on the origins and development of these seven adjudicatory institutions in the context of path dependency, examining to what extent they fit a four -fold typology of displacement, conversion, layering and drift. Next the paper turns to institutional effectiveness, discarding some criteria and adopting others

² Cazes, S., Garnero, A., and Martin, S. ‘The state of trade unions, employer organisations, and collective bargaining in OECD countries. 2017’. <https://voxeu.org/article/trade-unions-employer-organisations-and-collective-bargaining-oecd-countries#:~:text=On%20average%2C%20employer%20organisation%20density,of%20medium%20and%20large%20firms> [accessed 6.4.2021].

³ Simitis, S. ‘Juridification of Labour Relations’ in Teubner G. (ed) *Juridification of Social Spheres*, Berlin: Walter de Gruyter, (1987).

⁴ Great Britain covers England, Scotland and Wales, but excludes Northern Ireland (NI). Labour courts in NI differ in several respects and merit separate comparison.

relating to performance, legitimacy and usefulness. In the conclusions, this paper will discuss the appropriateness of the four-fold typology. Furthermore, albeit that that an institution which scores highly on one criterion, does not do so on another, it will consider which of the labour courts considered here seems to be the most effective.

THE CONTEXT

Some countries, both large and small, including the United States of America (USA), the Netherlands⁵ and Portugal, use the ‘ordinary’ civil courts for the adjudication of individual employment disputes, while Italy has a hybrid: a specialist chamber in the civil court. This paper, however, does not cover civil courts or administrative bodies for individual employment disputes, although in some countries they are significant in enforcing employment standards. It focuses only on discrete adjudicatory institutions that deal with individual employment disputes at first instance and the generic term ‘labour court’ is often used. The nomenclature varies by country, however.⁶

These discrete institutions for determining individual employment disputes can be found in many countries, even though such countries differ in several respects, for instance in their legal origins, in their national business system and in their industrial relations. Thus, some countries where such adjudicatory bodies are found, such as Great Britain and New Zealand have a common law system, while others, such as France and Germany have a civil law system. Using the national business system approach centred on the *Varieties of Capitalism* typology, such adjudicatory institutions for individual employment disputes can be found in co-ordinated market economies (Germany and Sweden for instance) and in liberal market economies (Great Britain and New Zealand for instance).⁷

⁵ The Netherlands also has an administrative procedure for economic dismissals such as the closure of an establishment or restructuring or the employee’s long-term incapacity. <https://business.gov.nl/regulation/dismissal-procedures/> [accessed 6.4.21].

⁶ Japan – rodo shinpan seido, Britain - employment tribunal, France – conseil de prud’hommes, Ireland - Workplace Relations Commission, New Zealand- Employment Relations Authority, Sweden – Arbetsdomstolen, Germany- Arbeitsgericht.

⁷ Hall, P. and Soskice, D. ‘An introduction to Varieties of Capitalism’ in Hancké, B. (ed) *Debating Varieties of Capitalism*, Oxford University Press (2009).

Similarly, such adjudicatory institutions can be found in countries with very different industrial relations. For instance, trade union density in Sweden was 65 per cent in 2018, but only 9 per cent in France according to the Organization for Economic Co-operation and Development (OECD),⁸ although collective bargaining coverage in both countries is over 90 per cent. In contrast, the United Kingdom's collective bargaining coverage was 28 per cent in 2018⁹, just slightly above its union density of 23 per cent. Yet in all these three countries there are tripartite labour courts.

As to trade union organization, in Japan in the main, there are enterprise unions, de facto lifetime employment and seniority-based pay systems determined at enterprise level, whereas Great Britain has horizontal unions and pay systems often mainly based on performance, with company bargaining predominating in the private sector.¹⁰ In Germany there are horizontal unions often engaged in industry wide bargaining, with competency-based systems sometimes combined with limited seniority-based pay systems and neither de facto nor de jure provision for lifetime employment.¹¹

Thus, discrete adjudicatory institutions for employment disputes are to be found in many countries irrespective of whether there is a common law or civil law legal system, whether or not their economy is classed as co-ordinated or liberal, whether their trade union density and collective bargaining coverage is high or low and irrespective of the level at which collective bargaining normally occurs.

Irrespective of the nomenclature, labour courts are frequently justified on the grounds that the workplace is special and so an institution separate from the civil courts is needed. Moreover, in five of the adjudicatory institutions studied here (France, Germany, Great Britain, Japan, Sweden), not only are there labour courts separate from the 'normal' civil courts, but also these labour courts are

⁸ OECD statistics <https://stats.oecd.org/Index.aspx?DataSetCode=TUD> [accessed 7.4.21]. Sweden's high rate of union membership owes much to the fact that the trade unions disburse certain government welfare payments, the so-called 'Ghent system'.

⁹ <https://stats.oecd.org/Index.aspx?DataSetCode=TUD>

¹⁰ Benson, J. 'Alternative dispute resolution in Japan: the rise of individualism', *The International Journal of Human Resource Management*, 21, no.3 (2012) 511–527.

¹¹ Burgess, P., S. Corby, A. Höland, H. Michel, L. Willemez, C. Buchwald and E. Krausbeck. *The Roles, Resources and Competencies of Employee Lay Judges: A Cross-National Study of Germany, France and Great Britain Working Paper 051*, Hans Böckler Stiftung (2017).

mixed: that is there is a mixture of lay and professional judges, with lay judges being drawn equally from employers/ managers and employees. Such ‘mixed’ labour courts, that is professional and lay judges together, are found in many other European countries, apart from those studied here.¹² The rationale is that the workplace has discrete norms of which lay judges will have knowledge, albeit tacitly, but the professional judge will not. On the other hand, the professional judge will have legal expertise, which the lay judges will not. This mixture will enable court judgments to be made that take account of legal imperatives *and* the world of work.

Nevertheless, there are some differences in mixed labour courts. In Germany and Japan there are two lay judges, one drawn from the trade union/worker side and one drawn from the employer/manager side and they sit with a single professional judge. Exceptionally France has four lay judges (two from each side) and a professional judge is only brought in if there is a tie, while in Sweden’s labour court there are seven judges: two professional judges, a neutral labour market expert, two employee lay judges and two employer lay judges. If, however, the Equality Ombudsman brings a case, there are only two lay judges (one from each side) in Sweden’s labour court, so that domination by the unions/employers can be avoided. In Great Britain, mostly a professional judge adjudicates alone. Lay judges (one from each side) only sit with a professional judge sometimes, mainly in discrimination cases where industrial relations norms are rarely a factor in decision-making, unlike in unfair dismissal cases¹³

In Ireland and New Zealand adjudicators sits alone, but although they have to have knowledge of employment law AND the workplace, they are not required to be legally qualified. The rationale is twofold: first the adjudicators, like lay judges in a tripartite institution, will know the context and this will reassure the parties. Second, the adjudicators will be well versed in employment law, but as they are not professional judges used to court procedures, the process will be less formal and more user friendly for unrepresented parties. The counter argument is that the adjudicator will

¹² Austria, Belgium, Denmark, Finland, Luxembourg, Slovenia.

¹³ Sometimes a discrimination case and a dismissal case are taken together as they rely on the same facts. If so, British lay judges will hear both cases together. Also, British professional judges can, in prescribed circumstances, exercise their discretion and opt to sit with lay judges in a vast range of cases, including redundancy pay, holiday pay and unfair dismissal. In fact, they rarely do so.

normally have less legal knowledge than the professional judge and less tacit knowledge of the workplace than lay judges, thus he/she will fall between two stools, neither being professional judges, nor workers/employees or employers/managers.

The main characteristics of each country's adjudicatory regime are summarized in tabular form for ease of reference.

TABLE 1 ABOUT HERE

THE RESEARCH

Previous research

Having briefly delineated the context, previous research is briefly described, before focusing on the research on which this article is based. There have been many country specific studies of the discrete adjudicatory institutions for resolving individual employment rights disputes. To name just a few, Sugeno explained how Japan's labour tribunal procedure was born.¹⁴ Dickens considered Britain's employment tribunals¹⁵ and Höland et al examined Germany's labour courts.¹⁶ Yet comparative research on labour courts has been limited, for instance a comparison of Britain's and Germany's labour courts, a comparison of institutions in Ireland and Sweden, and a comparison of British, German and Japanese labour courts.¹⁷ Moreover, although there have been two recent books looking at the determination of individual employment disputes, those books have a wider range covering not only labour courts, but also labour inspectorates, civil courts and administrative and bodies.¹⁸

¹⁴ Sugeno, K. 'The Birth of the Labor Tribunal System in Japan: A Synthesis of Labor Law Reform and Judicial Reform' *Comparative Labor Law & Policy Journal*, 25, (2004) 519-533.

¹⁵ Dickens, L. 'Employment Tribunals and Alternative Dispute Resolution' in L. Dickens (ed) *Making Employment Rights Effective* Hart (2012).

¹⁶ Höland, A. and Buchwald, C. *Ehrenamtliche Richterinnen und Richter in der Arbeitsgerichtsbarkeit und in der Sozialgerichtsbarkeit: Ergebnisse einer repräsentativen Befragung in Baden-Württemberg, Berlin und Sachsen-Anhalt*, ZSH (2018).

¹⁷ Schneider, M. 'Employment litigation on the rise? Comparing British employment tribunals and German labour courts' *Comparative Labour Law and Policy Journal* 22, (2005), 261-280. Teague, P. 'Path dependency and Comparative Industrial Relations: The Case of Conflict Resolution Systems in Britain and Ireland' *British Journal of Industrial Relations*, 47, no. 3 (2009) 499-520. Corby, S. and Yamakawa, R. 'Judicial regimes for employment rights disputes: comparing Germany, Great Britain and Japan' *Industrial Relations Journal*, 51, no. 5 (2020) 374-390.

¹⁸ Corby, S. and Burgess, P. *Adjudicating Employment Rights: A Cross-National Approach* Palgrave (2014). Ebisui, M., Cooney, S. and C. Fenwick (eds) *Resolving Individual Labor Disputes: A Comparative Overview* International Labor Organization (2016).

Yet despite its paucity, cross-national comparisons of labour courts are useful and informative and this paper will enable readers to look afresh at their own labour court and weigh its advantages and disadvantages against those in other countries.

This research

This paper is based on the findings of several research projects undertaken between 2011 and 2019 in which this author was involved, primarily as principal investigator, but in which others often played a significant part. (See note 1), looking at discrete adjudicatory institutions for employment rights disputes. These research projects determined the choice of countries and included countries where there are mixed labour courts (professional and lay judges together): France, Germany, Japan, Sweden and Great Britain (sometimes – see below), and also institutions for individual employment disputes where there is a single adjudicator: Ireland and New Zealand. They were funded by the Economic and Social Research Council (ESRC),¹⁹ by the University of Greenwich and by Han Böckler Stiftung (HBS).²⁰

Methodology

The author, with co-researchers conducted desk research in all these countries, drawing on official materials, statutes, handbooks and academic articles. In addition, all the countries mentioned above were visited mainly by this author, although sometimes by a co-researcher. In every country qualitative research was undertaken, with interviews being conducted by researchers who spoke the language of interviewees, except in Sweden where all the interviewees spoke English and in Japan where the researcher was accompanied by a Japanese speaker who interpreted. The interviews in every country were with key stakeholders: professional judges/adjudicators, lay judges if applicable in that country, trade unions and employers. The aim was to understand how the institution operated, rather than to explore the psycho-social attitudes of the interviewees, (although this was revealed in some interviews). The number of interviews varied for opportunistic reasons and the requirements of

¹⁹ ESRC RES 000-22-4154, HBS 2015-829-3

²⁰ Pete Burgess was the lead author for the HBS project.

the funding body and varied from 53 interviews in Germany to 12 in Japan. In addition, in every country except Japan, adjudicatory sessions were observed by one of the researchers.

The research questions are as follows. First, given path dependency how can the origins and any subsequent changes of these institutions be explained? Second, of the seven institutions considered here, which is the most effective?

ORIGINS AND CHANGES

Path dependence can crudely be defined as history matters, or the past influences the future. It has been used as a concept to understand institutional stickiness: the functioning of present-day institutions is, to a large extent, shaped by past events which frame the strategic choices open to people and organizations as they respond to new developments.²¹

Teague distinguishes between strong and weak versions of path dependency.²² Where there is strong path dependency, there is institutional persistence, so any institutional change is almost always the result of an exogenous event. A new path is created which leads to a decisive departure from the old ways of doing things. Where path dependency is weaker, the importance of the past is emphasized, but there can be recalibration and institutional change is almost always endogenous. Whether or not key actors, such as unions, employers and government, have strong veto powers serves to explain whether path dependency is weak or strong.

Thelen, in a series of papers by herself and with others, having discussed path dependency, distinguishes between abrupt change and incremental change and categorizes four types of institutional change: drift, conversion, layering and displacement.²³ Displacement occurs when change is abrupt, because of a critical juncture which can be exogenous or endogenous. An old

²¹ Mahoney, J. 'Path dependence in historical sociology' *Theory and Society* 29, (2000) 507-548.

²² Teague, P. 'Path Dependency and Comparative Industrial Relations: The Case of Conflict Resolution Systems in Ireland and Sweden' *British Journal of Industrial Relations* 47, no. 3 (2009) 499-520.

²³ Mahoney, J. and Thelen, K. 'A Theory of Gradual Institutional Change' in J. Mahoney and K. Thelen (eds) *Explaining Institutional Change: Ambiguity, Agency and Power* Cambridge University Press (2010). Streek, W and Thelen, K. 'Introduction: Institutional Change in Advanced Political Economies' in W. Streek and K. Thelen (eds) *Beyond Continuity: Institutional Change in Advanced Political Economies*, Oxford University Press (2005). Thelen, K. 'How institutions evolve: insights from comparative historical analysis' in J. Mahoney and F. Rueschemeyer (eds) *Comparative Historical Analysis in the Social Sciences* (Cambridge University Press (2003). Thelen, K. 'Institutional Change in Advanced Political Economies' *British Journal of Industrial Relations* 47, no. 3 (2009) 471-498.

institution is abolished and a new institution is created from scratch. This is relatively rare and occurs where there are weak veto possibilities. Conversion occurs when an institution changes its role, whether or not its name remains the same, again where there is no veto by powerful players. There is no critical juncture where there is drift; an existing institution is not changed as there are powerful veto players, but its rules and regulations do so. With layering, a new institution is added, either by being placed on top of, or alongside of an existing institution, with the latter remaining unchanged, enabling powerful players to retain the status quo at least in part.

This paper will seek to apply this typology to the labour courts considered here, examining institutional changes over time. In so doing, the paper will consider whether the four-fold typology is sufficient to capture the nuances of the institutional change reported here.

Germany

Germany's labour courts exemplify institutional change in the form of displacement following a critical juncture, an exogenous shock. They were established in 1926 in the wake of Germany's defeat in World War 1, the country's reduction geographically and then political upheaval, with the empire ending and the Weimar Republic being formed. These labour courts displaced earlier trade courts which had limited jurisdiction and covered a few trades only. They survived the Third Reich, albeit with limitations on their jurisdiction, but regained their pre-fascist jurisdictions after World War 2. Since then, their jurisdiction has increased, both because of new national laws, for instance on dismissal protection and co-determination, and European Union employment law. They cover individual and collective disputes and all workers/employees except established civil servants (*Beamte*).²⁴ Accordingly after their formation, there was *drift*.

Great Britain

From the end of World War 2, governments created several specialist tribunals, mainly concerned with administrative matters in respect of the burgeoning public sector. Accordingly, when the

²⁴ Burgess, P., Corby, S., Höland, A., Michel, H., Willemez, L., Buchwald, C. and Krausbeck, E. 'The roles, resources and competencies of employee lay judges: a cross-national study of Germany, France and Great Britain' *Working Paper 051* (2017) Hans Böckler Stiftung.

government passed the Industrial Training Act 1964, it established yet another tribunal, the employment tribunal, to hear appeals by employers against the state in respect of industrial training levies, instead of giving jurisdiction to the civil courts.²⁵ This is an example of what Thelen would call *layering*, a new institution placed alongside existing institutions.

Other administrative jurisdictions, that is an employer v. the state, followed, for instance as result of the Selective Employment Payments Act 1966 and the Docks and Harbour Act 1966. The Redundancy Payments Act 1965, however, provided for claims by employees against their employers in respect of entitlements to, and amounts of, redundancy payments (not whether the redundancy was fair or necessary).²⁶ Yet this was not just a private matter as the government had a direct interest in these redundancy payments: employers could be reimbursed by the state and the Secretary of State always had a right to be represented at any Tribunal hearings under the Act. 'It could be argued that the employer, in resisting an employee's claim for a redundancy payment, was acting as the State's agent in the protection of the Redundancy Fund'.²⁷

Yet concurrently, British governments of the 1960s were increasingly concerned about the number of strikes, particularly unofficial strikes. In response, a Royal Commission in 1965, chaired by Lord Donovan, was established 'to consider relations between managements and employees and the role of trade unions and employers' associations ... and to report'.²⁸ The Royal Commission received many submissions, including from the Ministry of Labour which submitted that disputes regarding employment rights, particularly dismissals, redundancy and suspension, were a significant factor in unofficial strikes. It recommended that the existing employment tribunals should determine all types of employee/employer disputes arising from the contract of employment, but not collective disputes.²⁹

²⁵ This paper uses the term 'employment tribunals', although until 1995, they were called 'industrial tribunals'.

²⁶ Meeran, G. 'Employment Tribunals' p. 129 in L. Dickens and A. Neal (eds) *The Changing Institutional Face of British Employment Relations* (2006) Kluwer.

²⁷ Greenhalgh, R. *Industrial Tribunals: A Practical Guide* (2nd ed) 1995 p. 10, Institute of Personnel and Development.

²⁸ Royal Commission on Trade Unions and Employers' Associations *Report* chaired by Lord Donovan, Cmnd, 3623 (1968) HMSO.

²⁹ Then called industrial tribunals

The Royal Commission largely accepted this, and so did the government. When it enacted unfair dismissal legislation in 1971, it tasked employment tribunals with resolving the resulting private disputes, albeit with the same institutional personnel as before, a professional judge and two lay judges. At virtually the same time employment tribunals lost their administrative functions with, for instance, the abolition of the selective employment tax, the abolition of the industrial training levy and the abolition of a state redundancy payments scheme. As a result, the institution, while retaining its original name, changed its role from an administrative forum to a party v party forum, a *conversion* that has not occurred in respect of any other British tribunal.

Legislation to confer individual employment rights mushroomed from the 1970s and successive governments gave employment tribunals the jurisdiction to hear individual disputes arising from these new statutory rights, although purely contractual matters have mostly remained with the civil courts.³⁰ Accordingly after the government effected an initial conversion, it was content that there was then *drift* from the 1970s onwards.

Japan

Japan's labour tribunal procedure is an example of institutional change through *layering* in response to a rise in civil litigation. Between 1991 and 2004 when the Labor Tribunal Act was passed, 'the number of civil actions involving labour relations tripled, while the number of entire civil litigation in the same period [grew] 1.5 times'.³¹ At the same time labor administrative agencies also received an increasing number of grievances from individual workers.³² This is attributed to the Japanese recession in the 1990s, when enterprises downsized, unemployment increased, the number of irregular workers grew, and the traditional Japanese industrial relations system eroded.

As to the process: after reforming the administrative and economic systems in the 1990s, the Japanese government embraced widespread criminal and civil judicial reform, with parliament establishing a Judicial System Reform Council in 1999. A Labour Study Group, containing

³⁰ Corby, S. 'British Employment Tribunals: from the side-lines to centre stage' *Labor History* 56, no 2, (2015), 161-179.

³¹ See note 14. Sugeno, K. (2004) p.522.

³² Yamakawa, R. 'Systems and Procedures for Resolving Labor Disputes in Japan, *Comparative Labor Law & Policy Journal* 34, (2014) 899-927.

management and worker representatives plus academics, (a similar make-up to Britain's Royal Commission) was then set up under the aegis of the Judicial Reform Promotion Headquarters led by the Prime Minister to develop a new institution for employment disputes. The Study Group's proposals were accepted by all the political parties and were embodied in legislation.³³

Japan's new institution involved placing (layering) a new judicial regime, a labour tribunal procedure, alongside the civil court system, satisfying those with a vested interest in the extant system, which continued unchanged. As a result, however, a Japanese claimant now has the choice of using the traditional civil court system with a professional judge adjudicating alone applying the civil court procedure, or a swifter, more informal procedure emphasizing mediation and with decision-making by a professional judge together with two lay judges, so taking account of workplace norms.³⁴ If a party, however, objects to an adjudication of the labour tribunal, it can transfer the dispute to the 'ordinary' civil court for a rehearing.

Sweden

The development of Sweden's labour court over the last century can be categorized as *drift*. In short, the Labour Court has broadened its scope, while continuing to remain true to its collectivist origins, with which both employers and unions were content. Sweden's collectivism first emerged in the 'December Compromise' of 1906, when the employers' organization recognized the right of employees to organize themselves and then in the 1928 Collective Agreements Act. This Act provided for the establishment of the Swedish labour court (*Arbetsdomstolen*), whose primary task was to adjudicate on the interpretation and application of collective agreements and the non-strike requirements of the 1928 Act. This emphasis on collectivism and the interpretation and application of collective agreements regulating the terms and conditions of manual workers continued when the labour court's scope was widened first from 1947, to cover collective agreements for salaried

³³ Yamakawa, R. 'Japan' in Ebisui, M., Cooney, S. and C. Fenwick (eds) *Resolving Individual Labor Disputes: A Comparative Overview* (2016) International Labor Organization.

³⁴ Yamakawa, R. (2014) Note 32.

employees in the private sector and second from 1968, to cover collective agreements for public sector employees.

Since 1974 the labour court's scope was widened yet again to cover individual employment disputes, but in accordance with its collectivist origins, only trade unions, employers, employers' organizations and the Equality Ombudsman can bring claims. Also, before a claim is submitted there will have been negotiations between the union and the employer. A non-union employee or a unionized employee who does not have union support, can only lodge a claim with the district court.³⁵ Over 10 years ago, a government inquiry found that the social partners wanted individual and collective employment disputes to continue to be heard by the labour court and not to be transferred to the civil courts,³⁶ and there has been no appetite then or since for more radical changes. In other words, the Swedish labour court remains, but it has drifted. Its form has not been altered. It has not been displaced or converted, but its scope has been gradually widened.

France

France's labour courts (*conseils de prud'hommes*) similarly can also be classified as *drift*, with gradual changes, but no large departures. The French labour courts were created in 1806 as a forum to settle individual employment rights disputes in the private sector without the involvement of professional judges or the intervention of the state. Originally, consisting only of representatives of employers as the adjudicators/ lay judges, the *conseils* became bipartite in 1848 when representatives of unions joined. From then on, the unions exercised strong veto powers and only agreed to minor changes. In 1907 the principle of election of these lay judges on both sides through a system of 'colleges' became firmly established underlying the lay judges' democratic roots; first there was election only by men but then women were enfranchised in 1944. There was further reform of the electoral system in 1979 with the election of adjudicators every five years using a system of list-based proportional voting based on nominations from employers' associations and trade unions. This system of election of lay judges was replaced from 2018, by the nomination of lay judges by trade

³⁵ [In English - Arbetsdomstolen](#) [accessed 11.4.21]

³⁶ Mål och medel (2010) <https://www.regeringen.se/rattsliga-dokument/statens-offentliga-utredningar/2010/06/sou-201044/> [accessed 29.4.21].

unions and employer organizations. Yet apart from the system of election and selection, and the increase in employment rights, the *conseils* have changed little: they remain restricted to individual employment disputes in the private sector,³⁷ remain bipartite and, most importantly the original aim of avoiding professional judge intervention, which dates back over a century and a half remains. Four lay judges (two on the employer side and two on the union side) adjudicate and only if there is no agreement is the professional judge brought in to break the tie. This occurs in a minority of cases.³⁸

New Zealand

New Zealand is an example of *displacement* and then *drift*. From 1894 to 1991 there was a succession of work-related institutions. First, a tripartite Court of Arbitration was established to formulate and interpret binding awards for specific, unionized industries. Then in 1973 an Industrial Court was established to deal with personal grievances, but it too was tripartite and only adjudicated union members' personal grievances in the private sector. In 1978 the Industrial Court was merged with an Industrial Commission to form the tripartite Arbitration Court to hear disputes of rights and disputes of interests. In 1987 there were further changes: a new tripartite body, the Labour Court, was established to hear personal grievances from union members in the public and private sectors.

These tripartite bodies, where only unions or union members could claim, were swept away by a new government, which wanted to advance neo-liberalism, and passed the Employment Contracts Act 1991. This Act established a new institution, a unipartite employment tribunal authorized to conduct mediation *and* adjudication and with an adjudicator (not a professional judge) warranted to undertake mediation and/or adjudication, with access no longer restricted to union members, and with appeals to an Employment Court on law and fact. This was a 'root and branch transformation'³⁹ and such an endogenous change can be categorized as displacement.

³⁷ Public servants (fonctionnaires) are subject to a system of administrative justice.

³⁸ Burgess, P., Corby, S., Höland, A., Michel, H., Willemez, L., Buchwald, C. and Krausbeck, E. 'The roles, resources and competencies of employee lay judges: a cross-national study of Germany, France and Great Britain' *Working Paper 051* (2017), Hans Böckler Stiftung. It is estimated that about a fifth of hearings result in a tie-break, perhaps because both sides have a mutual interest in keeping out the professional judge. See also Ministère de la Justice (2012) *Activités de Conseils de Prud'hommes*

³⁹ Rasmussen, E. and Greenwood, G. 'Conflict Resolution in New Zealand, chapter 21 in Roche, K., Teague, P. and Colvin, A. (eds) *The Oxford Handbook of Conflict Management*, (2014) Oxford University Press: OUP. The Employment Contracts

When a government of a different political complexion took office, it did not sweep away what its predecessor had done; for instance, it did not restore compulsory union membership. Instead, under the Employment Act 2000, (amended in 2002 and 2010), it changed the unipartite Employment Tribunal into the unipartite Employment Relations Authority and emphasised the importance of good faith bargaining for stable industrial relations. Apart from this change of name and new emphasis on good faith bargaining, there are many similarities between the Employment Relations Authority and its predecessor. For instance, as before, access to adjudication is not restricted to union members. As before, the adjudicator sits alone and is not required to be legally qualified and many adjudicators moved to the new institution. Also, as before, appeals on fact and law are to the Employment Court. Indeed, the main difference is that the Employment Relations Authority has been changed into a purely adjudicatory institution and mediation is the purview of a separate Mediation Service.⁴⁰ In sum, after displacement in 1991, there was drift as only a few changes were made to the rules and regulations in respect of the institution's structure.

Ireland

Examining the origins of the seven adjudicatory institutions depicted here, the fourfold typology described above is not appropriate as Ireland is an example of *amalgamation*. Prior to the Workplace Relations Act 2015, there were a number of work-related adjudicatory institutions. One of these institutions was the Rights Commissioner Service which adjudicated on party v party complaints on unfair dismissal, redundancy compensation, maternity pay and leave, working time and discrimination in respect of protected characteristics. Rights Commissioners were not required to be legally qualified in contrast to the chair of the Employment Appeals Tribunal (EAT), who sat with two lay judges. The EAT heard appeals from certain decisions of the Rights Commissioner. Yet, it was curiously named because this tripartite court also adjudicated at first instance on certain matters such as redundancy, minimum notice periods and unfair dismissal where a claimant could choose whether to go to a Rights Commissioner or to the EAT. Yet another institution was the Equality

Act *inter alia* individualized the employment relationship and outlawed compulsory union membership. See p. 456 for the quotation.

⁴⁰ Corby, S. and Burgess, P. *Adjudicating Employment Rights: A Cross-National Approach*, Chapter 9, (2014), : Palgrave.

Tribunal, which mediated and adjudicated on claims of unlawful discrimination in employment, pensions and the provision of goods and services. Added to the mix was a National Employment Rights Authority, an enforcement and inspection body and a tripartite Labour Court which heard appeals from the Rights Commissioners and the Equality Tribunal, as well as making recommendations on collective industrial relations issues.

The government wanted to simplify and unify these overlapping institutions, so it established a new institution that brought together and rationalized the existing institutions: the Workplace Relations Commission (WRC). As a result, all complaints requiring adjudication are now heard by a single person, a WRC adjudicator, thus replacing Rights Commissioners, the Equality Tribunal and the first instance jurisdiction of the EAT. The newly named adjudicators, however, were normally those who had adjudicated before in one of the predecessor institutions. At the same time the tripartite Labour Court became the single appeal body for all WRC appeals and took over the appeals functions of the EAT, which was then abolished.⁴¹ In short, there was a process of endogenous change and *amalgamation* as a new institution was formed from several of the pre-existing institutions.

To sum up, adjudicatory institutions for employment disputes emerged at different times and by different processes. Examples of displacement, conversion, drift, and layering have been found, but the four-fold typology does not fit every labour court studied here and so ‘amalgamation’ has been added in respect of Ireland. Thelen’s typology, including its limits, will be discussed later.

EFFECTIVENESS

So far this paper has discussed the origins, development and the resulting structures of labour courts in seven countries. These features can be considered in isolation, but that ignores their overriding purpose: the adjudication of individual employment disputes. Accordingly, this paper now examines the performance of these labour courts and this leads on to the second research question, which of the adjudicatory institutions discussed above is the most effective. Effectiveness has a number of

⁴¹ Workplace Relations Act, 2015.

meanings. A brief trawl of synonyms of effectiveness includes efficiency, performance, competency, and usefulness. Accordingly, several criteria of effectiveness are used here.

Difficulties in measuring effectiveness

Before, explaining and adopting the criteria used here, the criteria that are *not* considered are now discussed, as well as problems over the comparability of data. First, the effectiveness of an adjudicatory institution cannot be measured by the number of, or proportion of appeals from its decisions. Although at first sight it may be assumed that the fewer appeals there are, the more the institution's decisions are accepted by the parties and thus the adjudicatory institution has performed well, that is not necessarily so. This is because the opportunity to appeal varies. In Great Britain, for instance, it is limited to a point of law and only nine per cent of cases that have been heard by the Employment Tribunal are appealed to the Employment Appeal Tribunal.⁴² In France over 60 per cent of cases heard by the *conseil de prud'hommes* were appealed, as there can be an appeal on law and fact.⁴³ In Japan there is no appeal; instead there is a rehearing in a civil court. In Sweden, there is no appeal from the labour court. See Table 1. Accordingly, the rate of appeal has not been adopted as a criterion of effectiveness.

Another criterion that is not used here is whether those with 'good' claims win or whether they lose because of poorly designed institutions, as there is not the data to discuss this. Moreover, who wins depends on whether one's viewpoint is that of the employee making a claim, or the employer responding to a claim. In France over 70 per cent of claimants win at the labour court.⁴⁴ In Great Britain's labour court, of 110,663 claims received in the year from April 2019, and excluding cases that were settled, withdrawn or struck out, nine per cent were won by the claimant as against five per cent by the employer.⁴⁵

⁴² Calculated by the author and based on the statistics for 2019 provided by the Ministry of Justice.

⁴³ This compares with 19 per cent for other first instance courts.

⁴⁴ Corby, S. and P. Burgess *Adjudicating Employment Rights: A Cross-National Approach* (2014) Palgrave.

⁴⁵ Ministry of Justice. Table ET_3 Employment Tribunal - Percentage of disposals by outcome and jurisdiction5, 2007/08 to Q1 2020/21.

A further criterion of labour courts' effectiveness is the number of cases that they adjudicate, but that is also problematic and so this criterion has been abandoned too. Partly the number of cases adjudicated depends on the extent of employment rights. Partly it depends on the ease and cost of making a claim (issues considered below). Partly it depends on the existence and performance of bodies outside or inside the adjudicatory institution that resolve disputes voluntarily by mediation or conciliation, that is alternative dispute resolution (ADR), obviating adjudication.⁴⁶ In all the countries considered here, there is ADR but the extent that ADR forestalls labour court adjudication varies greatly, see below.

It can be argued that the performance of an adjudicatory institution is better if claims are adjudicated after an adversarial process as the institution satisfies its remit. Of course, ADR is speedier and less adversarial than adjudication and is generally held to be less stressful, especially for an unrepresented claimant. ADR is also cheaper than adjudication: it reduces the costs to the public purse that a labour court system entails and in many countries the costs to the parties themselves, especially if they are legally represented. In addition, ADR may provide outcomes which could not be achieved by adjudication. On the other hand, legal norms are not propagated and claimants may settle for less than they might obtain from adjudication.

McDermott, examining ADR in Australia and Britain in the context of discrimination claims, considers that pushing complainants towards ADR is not a panacea,⁴⁷ while Genn succinctly comments: the 'outcome of mediation [and conciliation], therefore, is not about *a just* settlement, it is *just about settlement*. (Original emphasis.)⁴⁸ Accordingly, this paper does not seek to rate the effectiveness of the labour court by the success or failure rate of the separate process of ADR. It concentrates solely on adjudication.

⁴⁶ See 'Resolving individual labour disputes: a general introduction' in Ebisui, M., Cooney, S. and Fenwick, C (eds), *Resolving Individual Labor Disputes: A Comparative Overview* (2016) International Labor Organization).

⁴⁷ McDermott, T. 'The Role of Mandatory ADR and Agency Engagement in Resolving Employment Discrimination Complaints: An Australian Perspective' *International Journal of Comparative Labour Law and Industrial Relations* 31, no.1 (2015) 27 – 46.

⁴⁸ Genn, H. 'What is civil justice for reform, adr, and access to justice'. *Yale Journal of Law & the Humanities*, 24 no. 1, (2012) p. 397.

Apart from the problem of identifying criteria for any meaningful comparison, a further difficulty arises in the lack of comparable data, for instance when comparing the fee for making a claim. In New Zealand it is a flat rate, but in Japan it varies according to the amount claimed, for which the author has not been able to find any further data. To take another example, in France the labour court data for the time elapsing between a claim being submitted and the result of adjudication includes the time spent by the judges in conciliation/mediation before they adjudicate. In New Zealand, where there is a separate body for mediation, it does not.

Having discarded a number of criteria for measuring the effectiveness of labour courts and bearing in mind the problems of making meaningful comparisons, this paper now turns to the criteria of effectiveness which have been used here. We distinguish between efficiency criteria and the criteria of legitimacy and of usefulness as norms are propagated.

Table 2 summarizes comparisons by country in respect of the key criteria adopted. Below, however, the criteria are discussed more discursively, with illustrations by country to allow for more nuances than can be shown in a table.

Table 2 about here

The 'Donovan' criteria

Over 50 years ago, a British Royal Commission chaired by Lord Donovan set out four criteria for assessing labour court effectiveness: 'easily accessible, informal, speedy and inexpensive'.⁴⁹ These are efficiency based criteria.

Accessibility has a number of dimensions: availability, geographical location and the ease of making a claim. Essentially all workers/employees can take claims to the labour courts of New Zealand, Ireland, Great Britain and Japan. In France and Sweden, however, large segments of the adult population are excluded. The French labour court can only be accessed by workers/employees in the private sector. The Swedish labour court cannot be accessed by workers directly. A claimant's

⁴⁹ Royal Commission on Trade Unions and Employers' Associations chaired by Lord Donovan, *Report Cmnd, 3623* (1968) HMSO. Para 572.

case must be brought before the labour court by a union or the Equality Ombudsman. In Germany, senior civil servants (*beamte*) are excluded.

Another aspect of the ease of making a claim is whether conciliation/mediation is required before an application for adjudication can be made. In all the countries considered here, there is ADR but the extent that ADR forestalls labour court adjudication varies greatly. In New Zealand the parties must attempt ADR, using an institution separate from the labour court, the Mediation Service, (which settles over 80 per cent of claims), before submitting a claim for adjudication.⁵⁰ Similarly in Great Britain, claimants must try to resolve their dispute and apply for what is called ‘early conciliation’ which is carried out by the Advisory, Conciliation and Arbitration Service (Acas). Only if Acas issues a certificate, saying that conciliation was not possible can the claimant lodge an application with the labour court.⁵¹

In all the other countries, the claimant does not face any institutional barriers before making a claim to the labour court. In Ireland, although there is a separate mediation service, a claimant can apply directly to the Workplace Relations Commission for adjudication. In the other countries considered in this paper, ADR is carried out *after* a claim is filed and is part of the pre-hearing process. Thus, in Germany and Sweden⁵², conciliation is conducted by the professional judge alone.⁵³ In France, conciliation is undertaken by two lay judges (one from each side), but less than six per cent

⁵⁰ Also an ERA adjudicator may, at any time, refer the parties to mediation, if he/she considers that mediation will still be helpful in resolving the problem, whether or not the claimant has taken part in mediation before. <https://www.era.govt.nz/steps-in-the-authority-process/getting-the-issues-straight/> [accessed 18.8.21].

⁵¹ Acas claimed that 20 per cent of its early conciliation notifications resulted in a settlement between the parties in 2019-20. It also claims that it achieves 70 per cent resolution if calculated according to whether the case either before, or after a claim was made, was positively resolved following Acas conciliation. See Acas annual report 2019 to 2020, p.13. ‘Positively resolved’ generally means privately settled or withdrawn. In addition, a professional judge may mediate in discrimination cases listed for a hearing of several days.

⁵² In Germany, works councils must be consulted on every dismissal before a claim is filed and they are found in the larger establishments. In Sweden, before a claim is filed the union will have had negotiations with the employer and/or the employers’ association. See Corby, S. and Burgess, P. *Adjudicating Employment Rights; a cross-national approach*, (2014) Palgrave p.62.

⁵³ In addition, Germany’s Labour Courts Act s.57(2) specifies that the labour court should seek to encourage a settlement between the parties at all stages of the proceedings. Also, the Labour Courts Act s.54a(1), specifies that the court may provide for extra judicial mediation, but it is suggested that this rarely occurs in practice. See Wass, B. in Ebisui, M., Cooney, S. and Fenwick, C (eds), *Resolving Individual Labor Disputes: A Comparative Overview* (2016) International Labor Organization.

of claims were settled.⁵⁴ In Japan, mediation is carried out by the professional judge *and* two lay judges together and there is a high success rate: over 70 per cent in the years 2016- 2019.⁵⁵

Turning to geographical location, this author is not able to measure this, as the number of adjudicatory institutions must be related not only to the size of the country and its population, but also to the distribution and concentration of the population in that country and whether there are easily accessible transport links such as a road and train networks. Accordingly, whether, for instance, there is more geographical accessibility in France where there are 210 labour courts, than in Germany where there are 110 such courts (with some additional court sessions in rural areas) is questionable.⁵⁶

A further aspect of accessibility is the ease of lodging the claim itself. In four of our seven countries, a claim can only be lodged if a designated application form is used. See Table 2.

As to informality, there are various manifestations. First the layout of the room: employment rights adjudication is conducted with the parties and the judges/adjudicator seated around a table as in Japan, New Zealand and Ireland. In all the other institutions considered here, the room format is court-like: the judge(s) face the parties and, except in Germany, are on a dais. Another manifestation of informality is whether or not the professional judge wears a robe, as in France and Germany, but not in Great Britain or Japan or, of course, in New Zealand and Ireland, where the adjudicator is not a professional judge.

Informality can also be gauged in respect of representation. In most of the labour courts considered here, (Germany Great Britain, New Zealand), there are no restrictions on claimant representation. In Japan, although claimants can represent themselves, mostly they are represented by lawyers. Other non-legal representation can be requested by a party, but a lay judge interviewee, told the author that the ability to request was not publicised and that he did not know of such a request ever having been made.

⁵⁴ Figures for 2013. Note 43 p. 14

⁵⁵ Statistics given to the author.

⁵⁶ See Note 24.

Yet another aspect of informality relates to the conduct of proceedings, for instance cross-examination in Britain's employment tribunals and in New Zealand's Employment Relations Authority. This compares with submissions in the labour courts of Germany and France and is a significant reason why employment cases there are have shorter hearings and thus are speedier. It has been argued, however, by some scholars, that procedural informality may lead to legal inaccuracy and thus is not necessarily desirable.⁵⁷

Speed has two aspects: the time from the claim being made to the results of the adjudication being notified to the parties can be measured and/or the length of the hearing itself can be measured. As to the former, whether or not ADR is part of the labour court process will have a bearing on speed. In Great Britain, in the three months from October 2019 the mean figure from claim to disposal for cases where there was a single claimant was 39 weeks, rising to 149 weeks where there were multiple claimants, as in equal pay cases. As to the hearing itself, apart from often voluminous written evidence, witnesses are cross-examined and afterwards a long judgment is handed down, summarising the relevant law, setting out findings of fact, giving reasons for the decision, and the reasons for any dissent. Accordingly, the hearing itself can take many days: five days is not uncommon, and occasionally, hearings have lasted 15 days or more. Often, the judgment is reserved and is only sent to the parties about a month after the hearing.⁵⁸

In France, a case takes over a year from the claim being made to judgment being delivered, although the actual hearing is short, three or four hearings in a morning, because there are only submissions and the perusal of documents, not cross-examination.⁵⁹ After the hearing, the presiding lay judge drafts a written judgment, perhaps helped by the court clerk. Although a French labour court judgment is shorter than its British counterpart, it can still take some weeks to complete. The Swedish Labour Court aims to deliver a judgment eight months after the submission of a claim,

⁵⁷ See Genn, H. Tribunals and informal justice, 56 no. 3 *Modern Law Review* (1993) 393.

⁵⁸ Ministry of Justice 2020 *Tribunal Statistics Quarterly, October to December 2019*.

⁵⁹ <https://www.droit-travail-france.fr/conseil-prud-hommes.php> [accessed 20.4.21]

although in practice the mean time is 12 months.⁶⁰ In Ireland the mean time from claim to dismissal was 35 weeks in 2019.⁶¹

German labour courts are speedier than those in France or Britain. A German professional judge holds a conciliation hearing normally three to six weeks after submission of the claim and the hearing itself normally takes less than half an hour.⁶² If there is no resolution, the case proceeds to a full hearing with the same professional judge joined by two lay judges. The actual full hearing is brief; as in France, typically four or five cases are heard in a morning as there is no cross-examination. Subsequent to the hearing, the professional judge, after deliberating with the lay judges, promulgates the judgment on the afternoon of the day of the hearing. Cases that ended in a judgment took seven months on average, with 51 per cent concluded within 6 months in 2019.⁶³

In Japan the mean time was considerably shorter: 2.5 months from the claim being made to determination.⁶⁴ Moreover, Japan's labour tribunal considers a case over three consecutive days: the first day for clarification of the issues, the second day for mediation and the third day for adjudication. In no other country are there *consecutive* days for conciliation and/or some form of prehearing and the main hearing.

The Covid pandemic will have lengthened the time from claim to disposal considerably in all these countries.

The final 'Donovan' criterion is inexpensiveness to the parties. There are no fees to file a claim in the labour courts in France, Great Britain, Sweden, and Ireland.⁶⁵ In Japan, claimants have to

⁶⁰ Votinius, J. J. 'Sweden' in Ebisui, M., Cooney, S. and Fenwick, C (eds), *Resolving Individual Labor Disputes: A Comparative Overview* (2016) International Labor Organization p. 260.

⁶¹ Workplace Relations Commission Annual Report 2019.

⁶² See Note 40.

⁶³ Statistisches Bundesamt (2019), *Rechtspflege: Arbeitsgerichte*, Fachserie 10 Reihe 2.8. Table 2.3.

⁶⁴ Yamakawa, R. in in Ebisui, M., Cooney, S. and Fenwick, C (eds), *Resolving Individual Labor Disputes: A Comparative Overview* (2016) International Labor Organization.

⁶⁵ In Great Britain there was a hefty fee to issue a claim and then have a hearing at an employment tribunal between 2014 and 2017, for instance £1,200 for an unfair dismissal, but the Supreme Court held that such large fees restricted access to justice. There have been rumours that the British government wishes to reinstate fees, albeit at a far lower rate than before <https://www.personneltoday.com/hr/government-could-bring-back-tribunal-fees-reports-suggest/> [accessed 9.8.21].

pay a fee related to the amount claimed, although that fee is only half the civil court fee.⁶⁶ In Germany, there is a fee, but that is only paid by the loser *after* the adjudication. In other words, the claimant does not have to pay anything up front. In New Zealand, there is a fee for one day of hearing, with additional fees for every half day after the first day, presumably to encourage brevity.⁶⁷

Legitimacy

Efficiency criteria apart, another criterion of effectiveness in respect of labour courts is whether or not the institution has legitimacy, that is whether it is generally accepted. This is perhaps a nebulous concept, but two aspects are considered here: whether those adjudicating have the appropriate knowledge and whether the parties consider that those adjudicating have the appropriate knowledge and so feel that their case is judged fairly.

Prima facie, there is greater legitimacy where the adjudicators are expert in employment rights disputes, knowing both the law and the context. This is achieved in four countries (France, Germany, Japan, Sweden) by always have lay judges, who have tacit knowledge of the workplace, sitting with professional judges who know the law. This occurs in Great Britain only when the professional judge sits with lay judges and sometimes in Great Britain. (See Table 1.)

In Germany, Japan and Sweden and France today⁶⁸, lay judges are nominated by trade unions and employers' associations which, in doing so, carry out some, albeit informal, quality control. In addition, Japan's trades union confederation (*Rengo*) requires, and its employers' confederation (*Keidanren*) recommends, that those interested in becoming a lay judge first participate in a three-day training programme in individual dispute resolution, funded by the government, but delivered by a private institution.⁶⁹

⁶⁶ Corby S., and R. Yamakawa 'Judicial regimes for employment rights disputes: comparing Germany, Great Britain and Japan' *Industrial Relations Journal*, 51 no.5 (2020) 374-390.

⁶⁷ The fee at the time of writing was NZ\$71.56 and then NZ\$153.33 per subsequent half day, approximately US\$52.00 and US\$110.00 respectively.

⁶⁸ Formerly, French lay judges were appointed after election by members of trade unions or employers' associations. See Burgess et al. (2017) note 38.

⁶⁹ Also, *Rengo* requires its nominees to have more than 15 years of work experience or more than 10 years as a union official/employee. *Keidanren* does not specify any required length of experience. Corby, S. and Yamakawa, R. 'Judicial Regimes for employment rights disputes: comparing Great Britain, Germany and Japan' *Industrial Relations Journal*, 51 no. 5, (2020) 374–390. There is no equivalent requirement in the other regimes discussed here, for pre-appointment lay judge

Unusually in Great Britain, there is no informal quality control of lay judges by unions or employers' organizations. Instead, there is a system of open recruitment with an application form, short-listing and, crucially, a successful interview, after which he/she is appointed to either the worker panel or the employer panel. Research suggests that selection by interview has poor predictive validity.⁷⁰ On the other hand, such an appointment system militates against nepotism and has led to an increase in gender and ethnic diversity.⁷¹

In most of the countries considered here, lay judges' workplace knowledge and experience is general, not specific to sector. The main exception is France, where lay judges are assigned according to one of five, admittedly broad divisions: industry, commerce, miscellaneous activities, agriculture and managers. To a lesser extent, this applies to Germany too: in Berlin and Frankfurt there are chambers embracing certain sectors, (for instance the public sector and construction).⁷²

There is some limited evidence to support the view that the combination of professional and lay judges provides greater legitimacy than a professional judge sitting alone. A study in 2011 of professional and lay judges found that four in five first instance professional judges in Great Britain agreed with the statement 'a three person tribunal generally has a greater legitimacy for the parties than a [professional] judge sitting alone'.⁷³ Users were interviewed as part of this same study and they, too, mainly favoured a tripartite tribunal as most said it gave the parties confidence in the judicial process. One typically commented:

When you explain that you've got one lawyer and the other two are non-lawyers, there is a sense of not just a roomful of lawyers and me; there are some ordinary people in there too.

In Germany also, empirical research indicated that professional judges considered that the presence of lay judges contributed to the legitimacy of the labour court and raised the parties'

training, although all except Germany require some form of on-going training, generally annually, for those appointed as lay judges, encapsulating the latest developments.

⁷⁰ Marchington, M. and Wilkinson, A. *Core Personnel and Development* CIPD (1996) p.123.

⁷¹ A few women reported that self-nomination, introduced in 1999, had enabled them to apply direct, whereas previously they had been blocked by senior males in their organization. See Burgess et al. (2017) note 38.

⁷² See note 36.

⁷³ Corby, S. and Latreille P. (2011) <https://silo.tips/download/the-role-of-lay-members-in-employment-rights-cases-survey-evidence> [accessed 20.4.21].

acceptance of the process and judgments.⁷⁴ In Japan, respondents' evaluation of the professional judge when sitting with lay judges in the labour court was higher than their evaluation of the professional judge when sitting alone in other courts according to a survey in 2011 (3.47 as compared with 2.67).⁷⁵ In Japan too, where the claimant can choose between the civil court or the tripartite labour court, statistics suggests that the popularity of the tripartite labour court has risen more steeply than that of the civil court, where there is a professional judge alone. This figure, however, should be treated cautiously: monetary compensation can be awarded to resolve a dismissal dispute in Japan's labour court, but not in Japan's civil court, which can only award reinstatement or reengagement.⁷⁶

Tripartism apart, a separate British survey goes some way to support legitimacy, whether or not the adjudication was by a professional judge alone, or by a professional judge and two lay judges. It found that 60 per cent of claimants and 64 per cent of employers were satisfied with the workings of the employment tribunal system. Additionally, more than half of claimants (57 per cent) and most employers (85 per cent) believed that the labour court hearing gave each party 'a fair chance to make their case', but attitudes, particularly of claimants, were related to case outcome.⁷⁷ As to whether there is greater or lesser legitimacy where there is a professional judge compared to an adjudicator who is not required to be legally qualified (as in Ireland and New Zealand), this author is unable to find any data.

Another source of legitimacy can derive from hearings being normally open to the public, Adjudication is thus a visible process and the public can see for themselves how justice is done. Unfortunately, there is no data to support or refute this but, Japan apart, in all the countries considered here, the public can attend labour court hearings. Until recently the public could not

⁷⁴ Höland, A. 'Ehrenamtliche Richterinnen und Richter in der Arbeitsgerichtsbarkeit – Laienspieler oder rechtsstaatliche Qualitätssicherung' in Dieterich, T., Le Friant, M., Nogler, L., Kezuka, K. and Pfarr, H., *Individuelle und kollektive Freiheit im Arbeitsrecht. Festschrift für Ulrich Zachert* Nomos Verlag (2010).

⁷⁵ Sato, I. 'Expanding access to justice for labour disputes: the impact of the labour tribunal system', *Social Science Japan* (2012) 8–9.

⁷⁶ See note 66.

⁷⁷ Department of Business, Energy and Industrial Strategy (2020) 'Survey of Employment Tribunal Applications: Findings from the 2018 Survey', *BEIS Research Paper 2020/007* (London, BEIS). p.77.

attend hearings of Ireland's Workplace Relations Commission. This bar, however, was recently held to be unlawful by the Supreme Court.⁷⁸

Norms

A further criterion for judging the effectiveness of labour courts is whether judicial decisions are publicly available and thus are useful to the wider public. If they are publicly available, norms are propagated, enabling employers, workers, legal practitioners, trade unions and other advisers to obtain some knowledge of the likely outcome of potential claims and therefore, whether to proceed with a claim or not. Furthermore, Genn argues that publicly available decisions create the "shadow" in which the voluntary settlement of disputes can be achieved.⁷⁹ As well as norms being propagated, where decisions are publicly available, employers who have disregarded the law and lost a case are publicly named.⁸⁰ In six of the seven countries considered here (Great Britain, France, Germany, New Zealand, and Sweden), judgments are available for public scrutiny.⁸¹ Japan is the exception: decisions are only available to the parties.⁸²

DISCUSSION AND CONCLUSIONS

This article has considered discrete adjudicatory institutions for determining individual employment disputes in seven countries, finding several key differences in format. In four of these countries, France, Sweden, Germany and Japan, there are tripartite institutions: a professional judge with lay judges representing workers and employers, although the number of lay judges varies: four in France and Sweden and two in Germany and in Japan. In Great Britain, the labour court is *sometimes* tripartite, but often the professional judge sits alone. (See above.) In Ireland, and New Zealand, the adjudicator is not a professional judge. Table 1 gives details.

⁷⁸ Zalewski v. Adjudication Officer and the Workplace Relations Commission (WRC), Ireland, and the Attorney General, 2021.

⁷⁹ Genn, H. Tribunals and informal justice, 56 no. 3 *Modern Law Review* (1993) 393.

⁸⁰ The principle of naming poor employers has been adopted by the British and German governments in respect of the National Minimum Wage. In Germany, employers who are subject to fines of more than 200 euros are named in the central business register. In Britain, a government department (BEIS) considers all cases for naming where the total arrears owed to workers was more than £500 and considers a lower threshold (£100) in certain cases.

⁸¹ In Germany, both mediation and adjudication hearings are open to the public and decisions are available for public scrutiny, albeit sometimes with the parties' names anonymized.

⁸² See Note 66.

Our first research question was as follows: given path dependency how can institutional formation and change be explained? In answering this, the Thelen typology of conversion, layering, drift and displacement was used and the paper asked whether the seven labour courts considered here fitted that typology.⁸³

In some countries strong path dependency was noted. Over their long histories, the French and Swedish labour courts evolved slowly, taking on new tasks, but not fundamentally changing their format, so appearing to fit Thelen's category of **drift**. In Japan, a labour tribunal was placed alongside of the civil court system, so avoiding a clean break with the past and Thelen's **layering** seems apposite.

This article, however, shows how the four-fold Thelen typology of an institution is not a static construct and can vary over time. For instance, British employment tribunals were first created alongside the civil courts (**layering**), then **converted** from administrative forums to party v party forums and after that they gradually expanded their remit and could be classed as **drifting**. In Germany, there was a clear break from the past after World War 1, that is **displacement**, but since World War 2 the German labour courts have expanded their remit and **drifted**.

In New Zealand, a neo-liberal government took power and **displaced** the previous work-related tripartite adjudicatory institutions with a new labour court, the Employment Tribunal. When a government of a different political hue took office, however, there was no sudden institutional change, no conversion, nor drift. There were relatively minor changes such as a change of name: the Employment Tribunal became the Employment Relations Authority and mediation was hived off to a separate agency (see above), but many of the same adjudicators just transferred to the new institution

The Thelen typology, however, does not capture the changes in Ireland's structure. Here, one institution (EAT) was abolished, which could be characterised as displacement, but other institutions (the Equality Tribunal and the Rights Commissioner Service) **amalgamated** into a single body the Workplace Relation Commission, simultaneously taking on the EAT's first instance jurisdictions. In

⁸³ See Note 23.

short, the Thelen typology provides a useful starting point for categorization, but institutions are not static and the typology is not always appropriate, so this paper adds amalgamation.

Labour courts, however, are created to serve a purpose, the adjudication of individual employment disputes, so having examined the institutional architecture, this paper now considers to what extent this overall objective was achieved. Accordingly, so our second research question was as follows: of the seven institutions considered here, which is the most effective? Various criteria were considered, as 'effectiveness' is a portmanteau term and this article considered a number of criteria including those related to efficiency, such as speed, the cost of filing a claim, and accessibility, and to usefulness (the propagation of legal norms) and whether the institution has legitimacy.

A strong note of caution, however, is advisable in any cross-national comparison as data may be lacking, not comparable or limited. For instance, the evidence on legitimacy is limited as to whether it is greater where there is tripartism or where there is a judge alone. Moreover, it is impossible to compare labour court effectiveness on a number of criteria. For instance, they cannot be compared on the number of appeals as the existence of, or grounds of appeal vary or on the number of claims as that is influenced by the existence of barriers to making a claim as well as the extent of employment rights (see above).

Furthermore, using the yardsticks considered above, one does not find a labour court that scores highly on every criterion. For instance, currently British labour courts are inexpensive: a British claimant does not have to pay any fee to make a claim currently. Yet Britain's labour court procedure is not speedy: it can take over a year from claim to disposal (see above) and a hearing often lasts several days. In contrast to Britain, Japan's labour courts are expensive: the claimant has to pay a hearing fee at the outset based on a sliding scale related to the amount claimed. On the other hand, cases are dealt with speedily (79.4 days) and the hearing itself lasts no more than three days.

Additionally, the criteria considered in this article may not be equally weighted as different stakeholders may give one criterion more importance than another. For instance, claimants may rate inexpensiveness more highly than the propagation of legal norms, but professional judges and lawyers representing the parties may take the contrary view. Alternatively, a criterion, such as the

success rate of cases, will be rated differently by different stakeholders, that is whether they are workers or employers. (This criterion was not used here as comparable data was not available.)

So is there a best model? Comparison sites, for instance for mobile phones or washing machines assess products on a range of criteria and come up with a best buy. It is more difficult with a labour court as it reflects and reinforces the country's industrial relations which differ between countries. For instance, in Sweden's labour court only a union can file a claim on behalf of an individual, not the individual him/herself, but Sweden's union density is 67.0 per cent. That same provision if transposed to France would make its labour court almost unworkable as France's union density is only 7.9 per cent.⁸⁴

Nevertheless, Otto Kahn-Freund rejected Montesquieu's view that it was only in the most exceptional cases that the institutions of one country could serve those of another. Although Kahn-Freund warned that the context should not be ignored, he argued that the legal problems in all industrialized countries had become similar and that institutions may be transplantable. To support his view, he cited Britain's adoption of a tripartite labour court in 1971 which, he argues, was based on those existing in Germany, France and Belgium.⁸⁵

More recently, when Japan decided that it should adopt a bespoke institution for adjudicating individual employment rights disputes, it explicitly considered the regimes in Britain and Germany, inviting British and German employment judges to address a public symposium on their system.⁸⁶ As a result, it copied the use of lay judges, but in many other respects it adapted its labour court to the Japanese context. (Kahn-Freund would have approved.)

Bearing in mind the dangers inherent in transposition and using the criteria adopted here, the German labour court has much to commend it. The court's tripartism, with its lay judges nominated by unions and employers, and hearings open to the public are sources of legitimacy. Furthermore, it satisfies many of the Donovan criteria: it is accessible in that there are no prescribed forms. It is

⁸⁴ <https://ilostat.ilo.org/topics/union-membership/> [accessed 11.8.21]

⁸⁵ Kahn-Freund, O. 'On uses and misuses of comparative law' *Modern law Review*, 37, 1, 1-27, 1974.

⁸⁶ Corby S. and Yamakawa, R. 'Judicial regimes for employment rights disputes: comparing Germany Great Britain and Japan', *Industrial Relations Journal*, 51, no 5, (2020) 374-390.

cheap to make a claim as the fee is only paid after the event by the loser. Hearings in Germany's labour courts are speedy and although the court is more formal than those in some other countries (for instance Ireland and New Zealand), they are less formal than in Britain; legal norms are propagated as decisions are available for public scrutiny. Readers, however, after perusing this article, and in particular after considering Table 2, may have a different view.

To conclude, comparisons are not futile, provided the context is not ignored. They enable academics and practitioners to acquire a deeper understanding of an adjudicatory institution and appreciate the strengths and weaknesses of the various approaches that can be adopted.