

DENTONS

# Everything you wanted to know about past practice and estoppel but were afraid to ask

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## Labour Spotlight Series

Grow | Protect | Operate | Finance



A close-up photograph of a fossilized insect, likely a dragonfly or damselfly, preserved in a light-colored, textured rock matrix. The insect's body is dark, and its long, segmented abdomen is clearly visible, extending towards the right. The rock surface shows some natural cracks and variations in color, ranging from light beige to a darker, almost black, area where the fossil is embedded.

# **Past practice and estoppel**

Russell Groves and Fatimah Khan

# Uses of past practice in labour law

- A past practice is a long-standing practice that deviates from the terms of a collective agreement
- A past practice can be used as:
  - i. An **aid to interpret** collective agreement language (where there is a *patent* or *latent* ambiguity); or
  - ii. To **establish an estoppel** for the term of the existing CBA.

# Past practice: Interpret collective agreement language

- Past practice can be used as “extrinsic evidence” to interpret existing language in a collective agreement
- This will only be permitted when there is an ambiguity, either patent or latent, in the wording in the collective agreement
  - **Patent ambiguity** exists where the language is unclear or ambiguous on its face
  - **Latent ambiguity** exists where language is clear with respect to the ordinary meaning of words used but is ambiguous in context or with respect to its application to particular circumstances



# Past practice: Interpret collective agreement language

## Case Example #1

*Weyerhaeuser Chapleau v. IWA-Canada, Local 2995*, 2001 CarswellOnt 3498

- Policy grievance alleging failure to pay overtime on premiums earned by employees.
- Article 11.05 of the collective agreement said that hours in excess of eight per shift or forty hours per week were to be paid at 1 1/2 times the “regular basic hourly rate”.
- A decade long past practice had emerged whereby overtime pay calculations included any applicable premiums in the “regular basic hourly rate”.
- Arbitrator held “regular basic hourly rate” in Article 11.05 could be ambiguous given the employer’s practice of using the words “basic hourly rate” to describe earnings eligible for overtime in its job postings
- Arbitrator noted the company’s past practice of grossing up overtime pay to include premiums could be used to resolve this ambiguity because:
  - The past practice had been in place for a long time (10 years); and
  - There was no evidence that this practice was initiated in error or that the company’s previous management was unaware of this practice

## Past practice: Establishing an estoppel

- Doctrine of “estoppel” is that a party cannot insist on the enforcement of its strict legal rights under a collective agreement because, as a result of the ongoing past practice, it has represented to the other party that a different interpretation or result should flow from the collective agreement.
- The doctrine presumes the other party has relied on that representation to its detriment (i.e. lost an opportunity to bargain for that right or something else in lieu of losing the past practice)

## Past practice: Establishing an estoppel

- Past practice can be established with words or conduct, including silence where an objection would be expected
- No ambiguity needed
- A past practice can generally be ended by appropriate notice of intention to reassert the strict rights in the collective agreement. Notice is often time-limited to the end of the term of the current collective agreement in order to permit the issue to be bargained.

# Past practice: Estoppel

## Factors considered by arbitrators

- In certain circumstances, Arbitrators exercise caution in applying the doctrine of estoppel where the basis of the representation has been an established work practice.
- The doctrine of estoppel does not apply where:
  - The past practice was not relied upon to the other party's detriment
  - The past practice is unclear
  - The past practice was not intended to induce reliance (i.e. was not a representation by a party that it would not insist on strict compliance with the terms of the collective agreement)



# Past practice: Estoppel

## Factors considered by arbitrators

- The doctrine of estoppel does not apply where (cont.):
  - The past practice is not inconsistent with the collective agreement
  - The practice did not occur frequently enough
  - The party seeking to assert its strict rights under the collective agreement was unaware of the past practice
  - The past practice at issue is not connected to the collective agreement (with exceptions)

# Past practice estoppel

## Case example #1

*Central Neighbourhood House v. C.U.P.E., Local 4308*, 2005 CarswellOnt 3488

- Grievance alleging employer's practice of filling shift vacancies by gender rather than strictly following the seniority provisions of the collective agreement
- The employer submitted that the union is estopped because:
  - the practice has been in place since the shelter and drop-in first opened
  - the staff previously requested that the practice continue
  - the practice was not objected to in subsequent collective agreement negotiations

# Past practice estoppel

## Case example #1 (cont.)

- The union argued that the evidence did not establish that the practice existed
- Arbitrator held that there were only six instances where a relief shift was assigned on the basis of gender within a one-year period.
- Accordingly, the Arbitrator held “it cannot be said that there is a notorious, established practice” to schedule relief shifts on a gendered basis and therefore the employer’s purported past practice was not helpful.

# Past practice estoppel

## Case example #2

*Centre de counselling de Sudbury and USW (Plante), Re*, 2018 CarswellOnt 9239

- The union grieved the employer's change to the grievor's scheduled hours of work and her compensation for working the changed hours.
- The grievor was facilitator in the employer's Partner Assault Response (PAR) program. On days when the grievor was required to facilitate the PAR program, she would work 8:30 a.m. to 4:30 p.m. and would work additional hours required to complete the program, typically until approximately 8 to 8:30 p.m. She would also accumulate flex time for hours worked past 4:30pm.



# Past practice estoppel

## Case example #2 (cont.)

- The union argued the employer was estopped from requiring the grievor to work the new PAR shift running from 12:30 p.m. to 8:30 p.m. The estoppel was created, according to the union, from the employer's consistent past practice of scheduling employees to work from 8:30 p.m. to 4:30 p.m. and treating the hours worked after 4:30 p.m. as flex time.
- Arbitrator found no estoppel was present in this case because:
  - There was no evidence that the employer ever stated or even implied that it would continue its practice of starting work at 8:30 a.m.
  - Where an employer has discretion under a collective agreement, arbitrators have not interpreted the consistent exercise of that discretion, even on a long-term basis, as a representation that it will continue to exercise the discretion in that manner.

# Past practice estoppel

## Giving Notice to End Past Practice

- If a party wishes to end a past practice that may create an estoppel they must:
  - Give **clear notice** (ideally in writing) that the past practice will end with the expiry of the current collective agreement
  - The notice must be given to an individual with **authority** to bargain on the other side
  - The notice should be given **prior to the start of bargaining**, but at least in time for the party to bargain the issue.

# Tips for employers

- Be aware of obligations under collective agreement
- Careful drafting during bargaining is needed
- Be aware of practices that do not comply with language of collective agreement

A close-up photograph of a fossilized insect, likely a dragonfly or damselfly, preserved in a light-colored, textured rock matrix. The insect's body is dark, and its long, segmented abdomen is clearly visible, extending towards the right. The rock surface shows some natural cracks and variations in color, ranging from light beige to a darker, almost black, area where the fossil is embedded. A large, solid purple shape is overlaid on the left side of the image, partially obscuring the rock and serving as a background for the text.

# **Issue estoppel**

## Russell Groves



# Issue estoppel

- Different from past practice estoppel
- Precludes the re-litigation of issues which have been decided in a prior proceeding whether or not the claims and defences were the same as in the current proceeding
- Can be an issue for unionized employers because same section of a collective agreement may be the subject of interpretation and application on successive occasions and grievances

# Issue estoppel

- Issue estoppel applies in labour arbitrations where:
  1. The same question was decided in the prior proceeding;
  2. The decision said to have created the estoppel be both judicial and final; and
  3. The parties to the earlier decision be the same.

# Issue estoppel

## Previous arbitral awards

- Unless the collective agreement expressly provides that an arbitration decision binds the employer in future cases involving identical circumstances, issue estoppel does not apply
- Arbitrator are not strictly bound by a prior award as to the interpretations of a collective agreement
- The prior award should be followed as a matter of principle unless the arbitrator has a clear conviction that the earlier interpretation is wrong

A close-up photograph of a fossilized insect, likely a dragonfly or damselfly, embedded in a light-colored, textured rock surface. The fossil shows the segmented body, legs, and wings of the insect. A large, dark purple, arrow-shaped graphic element points from the left side of the image towards the right, partially overlapping the fossil.

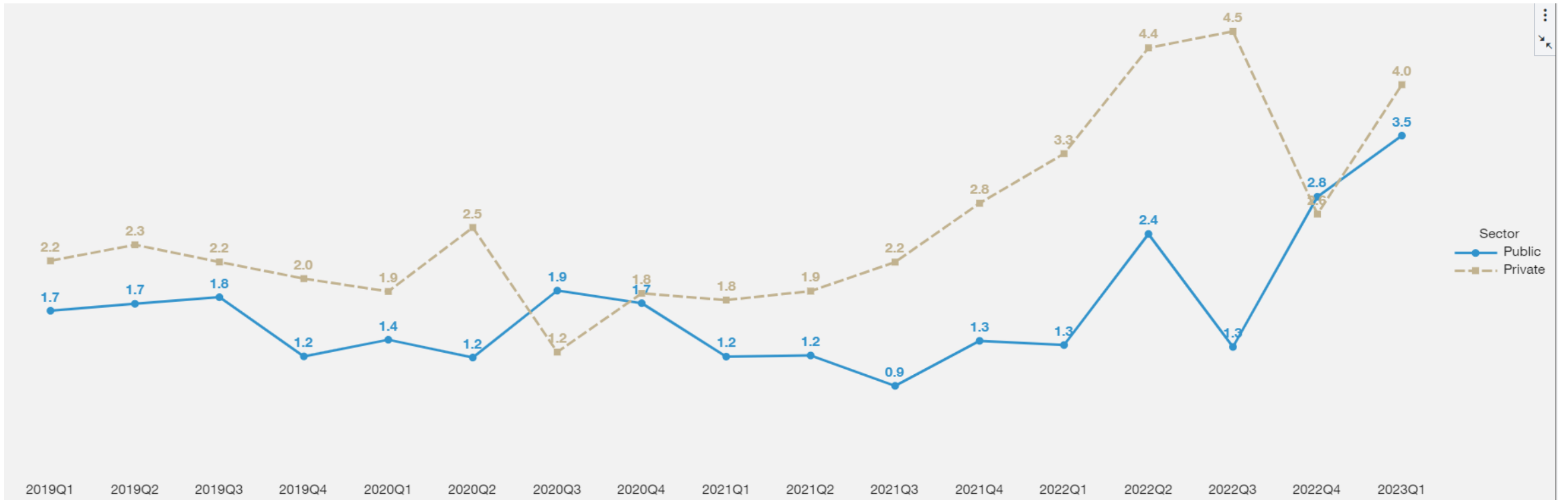
# **Collective bargaining trends**

Emily Kroboth



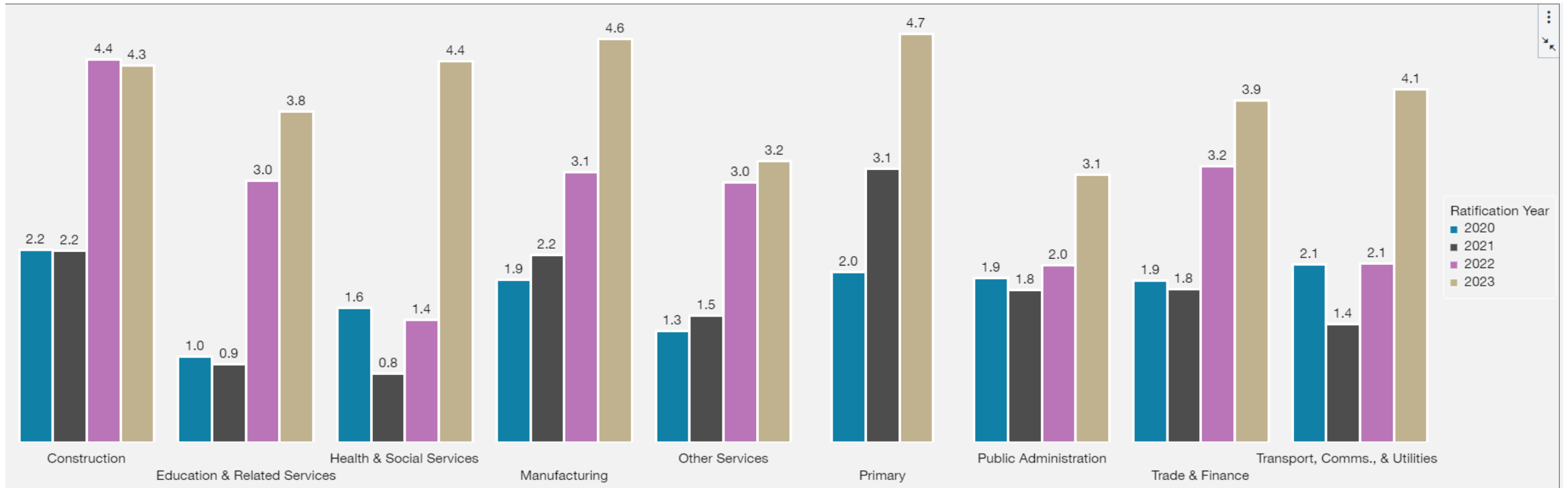
# Wage trends

*Wage increases continue to rise in times of inflation*



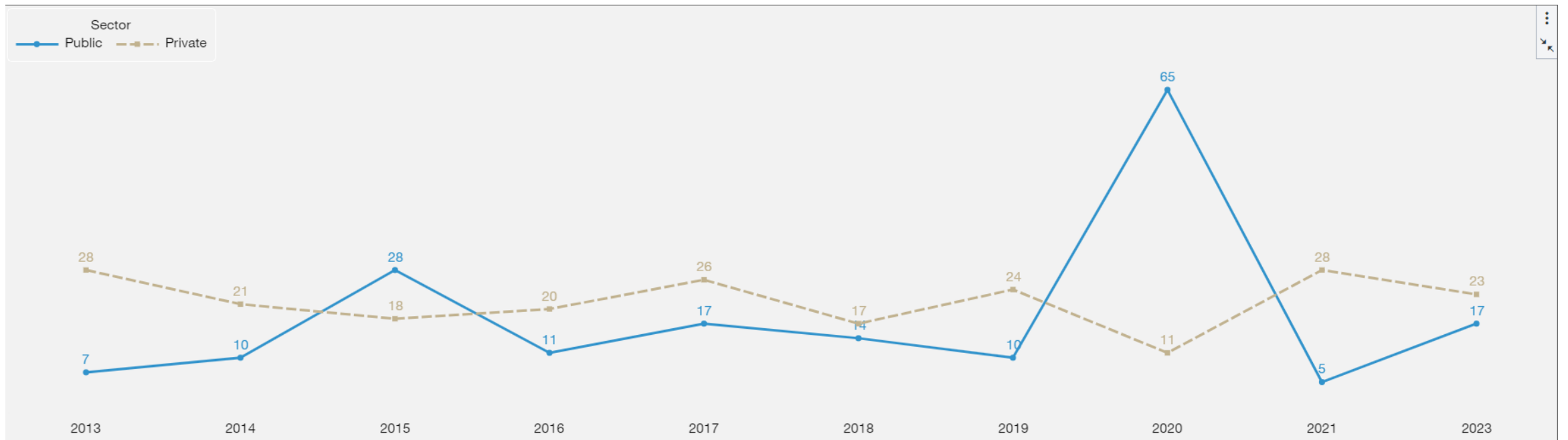
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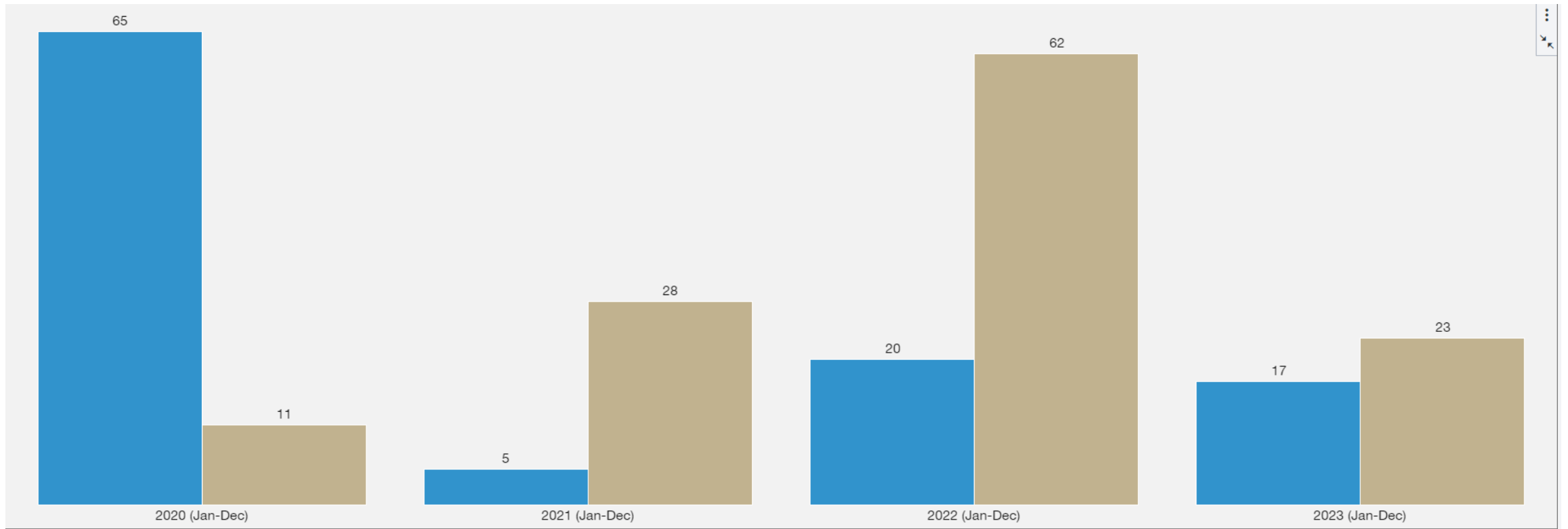
# Work disruptions

*Strikes cooling off after a 2020 spike*



# Work Disruptions

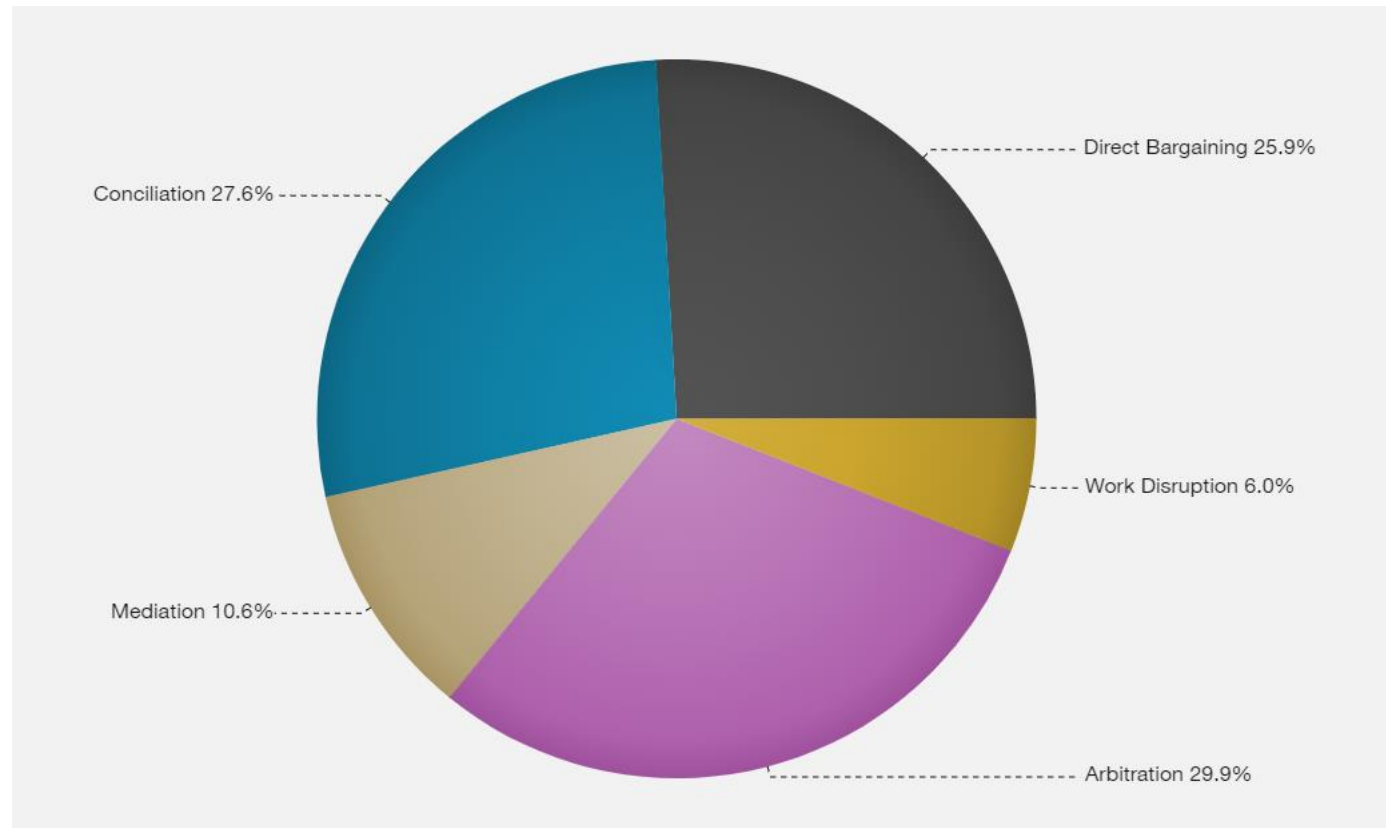
*...and a more recent 2022 spike*





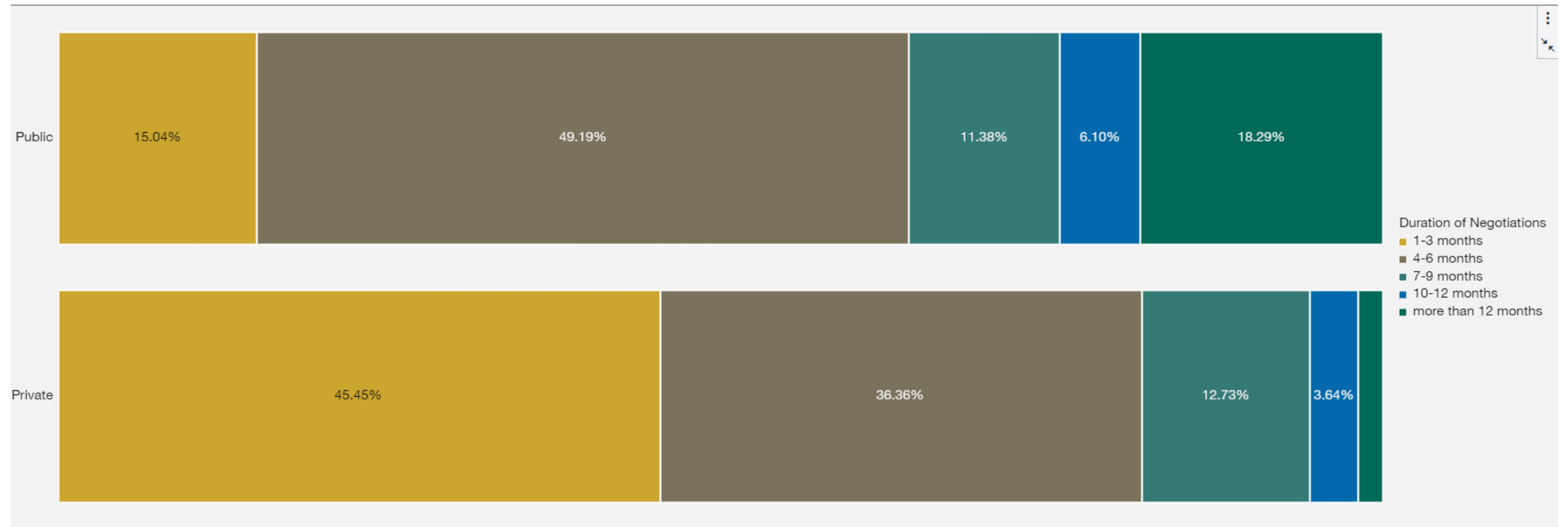
# Settlement negotiations

*Mediations and work disruptions are down*



# Settlement negotiations

*Most settlements are reached in 1-6 months*





# Thank you



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