A brave new technological world: Opportunities for gain and pain …

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Chief Judge Christina Inglis

E ngā mana
E ngā reo
Rau rangatira ma
Tēnā koutou, tēnā koutou, tēnā koutou katoa

We are in the midst of great change which (I venture to suggest) employment law and those who practise in it are struggling to keep pace with. There are two particular threads to this on which I wish to focus. The first relates to the fragmentation of the traditional model of work and what this means for those caught up in it. The second relates to the sobering reality that the cost of pursuing legal rights in employment matters has become eye-wateringly daunting, if not prohibitive, for many. What relief might the brave new technological world offer? And at what potential risk?

The Employment Relations Act, and the minimum employment standards legislation which operates in a constellation-like effect around it, is premised on the traditional bilateral employment relationship. That model is now not the reality for many in an increasingly casualised and fragmented labour market. In the Court the shift has manifested itself in a discernible upswing in the number of what I call 'confused identity' cases – cases involving litigants who do not know whether they are in an employment relationship or not.

The characterisation issue is of considerable importance as it determines whether a worker falls within the protective ambit of New Zealand's employment legislation or not. This is often not the end of the matter as an increasing number of cases involve additional issues as to who (within what is often a complex web of company structures) the employer is, and whether it is possible to have joint or multiple employers.

While legislation is always speaking, and is said to move with the times, it is undoubtedly true that rapidly emerging ways of work present particular issues for the law. The

casualisation of the workforce, multi-faceted relationships between workers and those engaging them to work, triangular and multilateral relationships with inter-connecting lines, and lengthy interlinked supply chains, all raise difficult issues as to the extent to which current laws apply.

Many Gen-XYZers may well see significant benefits in having the freedom to bunny-hop between 'gigs', scooping up work via cyberspace, without the constraints of the traditional employment model being foisted upon them – although I am not sure that any empirical research has been done to support this rosy coloured assertion. Even if it is true, it must equally be true that this new and exciting way of working presents significant dangers to the most vulnerable members of society.

That is because the flexibility of such arrangements tends to suit highly skilled or mobile workers, who have the ability to cherry-pick and sell their own wares. It tends to bottom-feed on those who are unskilled, who have little or no bargaining power, who have dependents, and who are financially exposed. English may be a second language and they may have little or no knowledge of employment laws in New Zealand. They may find themselves working multiple jobs, engaged and disengaged at will, without protection, and open to significant abuse. There are undoubtedly some who view minimum employment standards as an unnecessary irritant and best avoided, and who try to find increasingly innovative ways to sidestep the costs associated with compliance.

All of this segues into my second point – the cost of pursuing employment rights. Much has been said about litigation costs and access to justice across all jurisdictions in New Zealand. Employment is no exception. A simple statistic may be said to illustrate the point. The generally applied daily rate for costs purposes in the Employment Relations Authority is $4,500 per first day of hearing. It would take a person on the minimum wage 7.5 weeks to pay for one day in the Authority. Costs awards in the Employment Court are generally higher and it is not unknown for a party's legal costs to exceed the financial value of a claim. Costs are likely to be higher where complex issues of employee and employer status arise, as they increasingly do.

It has been suggested that the rising cost of pursuing litigation in employment matters has brought with it an upswing in the number of litigants appearing in person. One estimate puts

the percentage of such cases in the Employment Court at 40 per cent. This may be said to raise access to justice issues in a broad sense – to what extent are such litigants able to substantively engage in a process characterised by formal rules of procedure, evidential requirements, burdens of proof, difficulties of cross examination and legal submission? And might there be an invisible pool of would-be litigants, who the employment institutions never see?

A considerable amount of work, much of it pro bono by members of the employment bar, is being done in the employment sphere in New Zealand to assist such litigants. Former Chief Judge Graeme Colgan, in conjunction with the Auckland District Law Society, oversaw the establishment of a pilot scheme operating out of the Employment Court, with experienced practitioners volunteering their time to assist litigants with their pleadings. A further pilot scheme is currently being developed by the Community Law Centre for roll-out in the Employment Court, with the support of the New Zealand Law Society. The intention is to offer hand-holding, as required assistance to litigants bringing claims in the Court. The Employment Court has also put a considerable amount of effort into developing an extensive set of online resources, with links to source documents, to assist litigants in navigating their way through the Court process.

What more might be done? These sorts of issues are being grappled with across the globe, and are not peculiar to the employment institutions in New Zealand. Some suggest that the traditional way of delivering legal services is out of step, and that lawyers and advocates might wish to reflect on what they are doing, how they are doing it, and what and how they are charging. That may be part of the equation, but it may also mean that the employment institutions themselves could usefully do some navel-gazing.

In a very interesting book called *"Tomorrow's Lawyers"*, Richard Susskind proffers a number of suggestions, many of which are somewhat alarming (as he rightly points out) for conservative judges and lawyers who prefer to conduct hearings in walnut-veneered rooms and listen to gavels clanking down with a ceremonial thud on the bench. Exciting, he suggests, for those with a little more vision and a desire to look forward, not backward.

I make no comment as to which category I fall into, or the perceived merits or otherwise of his views. But I do think it is worth reflecting on the sort of points he makes.

As one blawger has recently observed, "The Romans said experience is the best teacher". He suggests the legal industry ask itself: "What kind of experience and resources – human and/or machine – are required to make legal services more accessible, efficient and better aligned with legal consumers' needs, expectations, and means?". Many would agree that such a question is worth asking, and attempting to answer.

Might it be that new information and communications technologies can be used innovatively to change and improve the way in which legal services are delivered, to harness technology to break down access to justice barriers?

Lord Justice Briggs plainly thinks so. In his final report on the Civil Courts Structure Review in the United Kingdom, he expressed the view that:

> "… the single most pervasive and indeed shocking weakness of our civil courts is that they fail to provide reasonable access to justice for ordinary individuals or small businesses."

In recommending the development of an online court, he said:

> "I consider that the objective of making the civil courts more generally accessible to individuals and small businesses, for a just resolution of their simpler and small to modest value disputes at proportionate cost, fully justifies the risks in stepping a little into the unknown …".

Online dispute resolution is well accepted in the online world - eBay is the most frequently cited example. It is said to resolve more disputes via its online dispute resolution model than the English civil courts combined (around 16 million disputes a year, over 90 per cent of which are resolved by artificial intelligence, without human involvement). Interestingly, high levels of satisfaction are reported by disputants, even if they lose, because the process tends to be regarded as efficient and transparent (transparency being equated with a perception of fairness).

An online court has been trialled in Israel and in British Columbia, and an online money claims court is operating in the United Kingdom (for amounts up to £10,000). An online interactive triaging service, designed to help litigants in person articulate their grievances and guide them through the litigation process, has operated in the Netherlands.

At age 20 a computer science undergraduate (not a lawyer) developed a legal chatbot – Do Not Pay - a machine with artificial intelligence with which the client can chat to secure legal information relevant to their particular problem. Another program (which goes under the catchy name "Ross"), when asked the question "Can a satirical article be defamatory?" took 15 seconds to provide an opinion backed up by relevant cases and statutes, and offered a confidence score about the chances of success.

Of course employment relationships are more nuanced than financial transactions – the payment of money for goods and services provided. That is made clear by the Act, underscored by its actual title (the Employment Relations Act). To what extent could, for example, online settlement technology deal with the relational aspect of much of the work the employment institutions do? How would it fit with a legislative model which recognises the importance of the mutual obligations of good faith, the need to be constructive in seeking to resolve employment relationship issues and which provides for reinstatement as a remedy, over and above cold hard cash? What of the jealously guarded right to a day in court? What of the vagaries of technology and the ability to determine credibility issues in dispute of fact hearings in a virtual setting?

Do perceived complexities in the way in which technology might assist in the employment sphere mean that the conversation is a dead duck? I hope not.

There is an understandable concern that technology will run ahead of our capacity to manage it. The reality is that the design of online tools is in the hands of humans, not machines. The gatekeepers of the justice system must play a pivotal role in any developments. These might range from using technology to help us do the things we already do, such as improved data retrieval, research and e-discovery; to providing data-rich sources of information to inform our processes and procedures, and offer useful insights into the sort of claims being brought and by whom; or to fundamentally change the nature of the hearing of disputes through online dispute resolution services and courts conducted with limited or no human intervenor.

Much of what is done by lawyers and advocates in progressing claims in the Employment Relations Authority and the Employment Court is informed by case management and trial methodologies which have built up over many years, and which are grounded in a traditional

way of working, processing and transmitting information. Those ways may seem comforting to many, but may well seem incomprehensible to many others, including litigants in person.

It is perhaps likely that as remote means of communication grow as an alternative to face to face communication (in all aspects of life) the current cultural norms attaching to legal process will also change.

All of this reinforces the utility of starting a conversation about some of the ways in which technology might assist in employment matters. Depending on your perspective, three broad drivers of this conversation might be identified: the cost to litigants of access to justice; the cost to governments of funding legal institutions and the pressure to find efficiencies; and the impetus of technology itself.

To what extent should we be getting behind the wheel to enhance access to the employment institutions for employees and employers, to address issues of cost effectiveness and proportionality, coupled with consideration of the sort of safeguards which would be necessarily have to be put in place?

Tēnā koutou, tēnā koutou, tēnā koutou katoa.