ACCESS TO JUSTICE – the conversation continues…

A speech prepared for the ADLS Burning Issues in Employment Law Forum

5 November 2020

[Chief Judge Christina Inglis]

E ngā mana
E ngā reo
Rau rangatira ma
Tēnā koutou
Tēnā katou
Tēnā koutou katoa

Access to justice is a hot topic, and deservedly so. One basic facet of access to justice is an ability to participate in proceedings.

The issue is, I think, acute in our area of the law and has been for some time. COVID-19 has come along and thrown many existing concerns into sharp relief. I thought that I might touch on three.

There is a growing amount of international research about the impact of the COVID-19 crisis on employee and employer mental health, including increased levels of depression and anxiety.[1] A recent report from the International Labour Organisation ("Managing Work-Related psychosocial risks during the COVID-19 pandemic") observed that:[2]

> People working from home are exposed to specific psychological risks, such as isolation, blurred boundaries between work and family, increased risk of domestic violence, among others. The fear of losing the job, pay cuts, lay-offs and reduced benefits make many workers question their future. Job insecurity, economic loss and unemployment can have a severe impact on mental health.

[1] See, for example, Elie Mimoun, Amichai Ben Ari and Daniella Margalit "Psychological aspects of employment instability during the COVID-19 pandemic" (2020) 12 Psychol Trauma 183; Salima Hamouche "COVID-19 and employees' mental health: stressors, moderators and agenda for organizational actions" (20 April 2020) Emerald Open Research <www.emeraldopenresearch.com>

[2] International Labour Organisation *Managing work-related psychosocial risks during COVID-19 pandemic* (22 June 2020) at 6.

We know that employees who are grappling with mental health issues often struggle to pursue a claim, including because of the emotional energy required to do so.[3] This will likely be an ongoing trend, which will bring many challenges, as we work through the additional stresses and strains caused by COVID-19 and its fall-out. We also know that there are many financial barriers for those accessing the employment institutions at the best of times. These are not the best of times.

It does not take a rocket scientist to conclude that those living through the disruption of COVID-19, with job instability, job reduction or job disappearance, or who have had their terms and conditions negatively impacted, are likely to be at increased risk of falling into the double whammy (mental health + financial difficulty) category. Overseas research suggests that COVID-19 is having a disproportionate impact on some groups in the labour market (based on, for example, gender, education and race/ethnicity).[4] That means that many may fall into the triple whammy (mental health + financial difficulty + disadvantaged group) category. In essence, it can safely be assumed that many who were already confronting barriers to accessing the employment institutions, are now facing an even more daunting set of challenges.

At this time of great uncertainty, the identification of clear stepping stones, ease of access to the institutions, and efficient navigation through the process are likely core pieces of the puzzle.

On a related note, there has been a discernible upswing over the past year or so in what might loosely be called determined litigants – those who are focussed on seeing the claim through to what is perceived to be a just outcome. Applications for leave to appeal to the Court of Appeal and beyond, and applications seeking to reopen adverse decisions, both in the Authority and the Court have significantly increased.[5] This cannot solely be attributed to COVID-19, but the impact of COVID-19 may well contribute to a continuing upward trend.

All of this may present another (broader) way of thinking about access to justice in our jurisdiction. Is what we have been doing and how we have been doing it sufficiently connected to the objectives that employment law is ultimately designed to achieve?

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[3] Research also suggests that it is not always clear what comes first in relation to litigants presenting with mental health issues – the health issue or the litigation process.

[4] See Joseph H Pedtke, Sarah Flood and Phyllis Moen "Disparate disruptions: Intersectional COVID-19 Employment Effects by Age, Gender, Education and Race/Ethnicity" (2020) 6 Work Aging and Retirement 207.

[5] Research suggests that there has been a sevenfold increase in such cases over the last 36 months.

I also predict that, as a result of COVID-19, we will see more unrepresented litigants coming before the employment institutions. I wonder whether this might be a very good time to revisit the lens through which those who represent themselves can sometimes be viewed.

The rhetoric can be that litigants who are not represented by a skilled professional are difficult and that their presence is unhelpful. Venturing into mediation, the Authority or the Court unaided is sometimes characterised as misguided, even an error of judgment. But is it possible that this sort of rhetoric says more about the processes and procedures that we have constructed at each level of our three-stage dispute resolution process (mediation, investigations in the Employment Relations Authority, hearings in the Court), seen as requiring specialist knowledge to navigate and which we feel comfortable with? Might the processes and procedures at each level serve less as a bridge and more as an alienating chasm?

The point is made in a recent paper published in the Cambridge Law Journal. The research examined the creep of the legal profession into lower level dispute resolution; the rise of County Courts in the United Kingdom; the move from self representation and the advent of the "Litigant in Person". The author concludes that:[6]

> [Litigant in person] is a concept that only makes sense where legal representation is the norm. More than this, the term only exists in the context where self-represented parties have lost their less formal forums. … The appearance of the term … does not signify the LiP's incorporation into legal process; instead it marks their *distance* from what is legally appropriate. … Their inability to perform successfully … reinforces the need for legal professionals.

The lock down impacted across all Courts and Tribunals. The employment institutions were no exception, and there were (and continue to be) media reports about backlogs and difficulties with progressing employment disputes. The Court was in a relatively fortunate position – it remained open for business; telephone conferences were convened; AVL was utilised to a greater extent; matters that could be dealt with on the papers were dealt with on the papers and the wheels kept turning.

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[6] Kate Leader "From Bear Gardens to the County Court: creating the litigant in person" (2020) 79 CLJ 260 at 286.

Much of this was down to the combined efforts of employment practitioners and parties – their hard work, good will, collegiality and willingness to work co-operatively with the Judges and Court staff to do what we could, in very trying circumstances, to keep the door to the Court open, even when it was physically closed.

COVID-19 and its fall-out has, and continues to, place pressure on the capacity of the institutions to deal with cases in the usual way; to progress them promptly and effectively. There is a need to continue to look for practical answers to difficult questions, particularly as the Employment Relations Act 2000 makes it clear that employment disputes are best addressed as soon as possible and at the lowest level possible. COVID-19 has highlighted challenges in that regard.

And that segues into my third point – is there perhaps a subtle downwards pressure on access to the employment institutions to assert rights and interests in the shadow of COVID-19? In a period of time when a great number of people in the employment sphere are struggling; where some senior executives are "leading the way" by taking pay cuts, might there be a pressure not to be the fly in the ointment seeking to assert perceived rights and interests when times are challenging for all and, conversely, might there be pressure to waive rights?

Professor Guy Davidov has recently written an article in the Oxford Journal of Legal Studies, exploring the waivability of worker rights, asking what is free choice and what level of free choice should we require for waivers of worker rights, assuming that we are willing to accept them in specific circumstances.[7]

Finally, can I finish on a group exercise – which simply involves you listening to a question and then quietly self reflecting:

The question:

"In what, if any, circumstances would I personally pursue a claim against my employer?"

If the thought of being a litigant in an employment matter fills you with horror, why is that so? Is it:

- That you are unclear about where the legal rights and wrongs will be found to lie?

[7] Guy Davidov "Non-waivability in Labour Law" (2020) 40 OJLS 482.

- The thought that you might have to meet your own legal costs and those of the other side if you happen to be wrong about the strength of your claim?
- The fear that even if you succeed in the Authority you may have to go through it all again in the Court on a de novo challenge?
- A concern that the stress and strain will impact on your mental and physical health and that of your family?
- A worry that you would have to live under a cloud of stress and uncertainty for many months, possibly years, before it is ultimately resolved?
- A concern that your name will be searchable on the internet, worldwide, and that you will forever be branded as the troublesome employee who should be avoided at all costs?

And, to complete the question-asking circle, if we would not personally pursue a claim because of impediments we think we might confront along the way, might it not behove us to think about how the roadblocks for the ventilation of legal disputes in our jurisdiction might be reduced?

There may well be a silver lining to COVID 19 – it has opened our minds to doing things in a different way. It might give us the opportunity to have a hard look at what we are doing and why and make some innovative changes so that access to all to the employment institutions to assert and defend employment rights and interests becomes less of an aspiration and more of a reality.

I see the users of the institutions as pivotal in discussions as to how we might address some of the issues we confront – what can we do better, or differently?

And I have set up a mechanism for innovative brainwaves to be relayed:

Suggestion box @ ChiefJudge.Inglis@justice.govt.nz