Employment Institutions and their contribution to better work stories

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Mauri ora kia tātou,
E koa ana te ngākau i tae mai ahau i tēnei ra i runga i te reo karanga o te rā.
Nō reira, ka nui te mihi ki a tātou katoa

Greetings, thank you for having me here today, my name is Kathryn Beck and I am a Judge, Kaiwhakawā, of Te Kōti Take Mahi o Aotearoa, the Employment Court of New Zealand.

Employment law is a dynamic and often complex area of law. Perhaps more than any other specialist jurisdiction, it is subject to constant change as the market adapts to new technology, societal outlooks change and political agendas are implemented from year to year and government to government. It also touches the lives of individual New Zealanders in a unique way, touching on their livelihoods, their ability to feed, house, clothe, raise and educate their loved ones, and can play a key role in an individual's conception of their self-worth, their place in the world and the building up of their mana.

On the other side of the coin are Kiwi businesses, the overwhelming number of which are small businesses. This is defined as organisations with fewer than 20 employees. There are approximately 530,000 small businesses in New Zealand representing 97 per cent of all organisations; they contribute to 29 per cent of the country's employment.[2] In this environment, where dedicated inhouse HR practitioners with specialist knowledge of employment law are likely to be something of a rarity, there is a clear need for the law to be clear, understandable and accessible to both employers and employees.

In Aotearoa New Zealand, with the Employment Relations Act 2000, we underwent a shift in focus as to how we conceive employment; we frame it not simply as a contract, but as a

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[1] Judge of the Employment Court. The views expressed in this paper are my own personal views. I would like to acknowledge the contribution of Michael Kilkelly, Judges' Clerk, to the preparation of this paper.

[2] "Small Businesses in 2019" Ministry of Business, Innovation and Employment <www.mbie.govt.nz/>.

relationship. That redefinition has not removed the level of complexity, insomuch as it has recognised that the complexity involved in an employment relationship goes beyond a simply contractual realm and into one with responsibilities and obligations of a relationship: good faith, fairness, reasonableness, trust and confidence.

The Employment Relations Act 2000's new and unique way of conceiving of employment relationships requires a jurisdiction and institutions that are ready and equipped to facilitate such an approach. We often talk about the Act as if it is new and, relative to many other pieces of legislation, it is. But as the Chief Judge recently pointed out, the Act has lived significantly longer than many of its post-War predecessors[3], and there is still a feeling that there is more potential to be mined from that framework.[4]

A lot of time is devoted to talking about the law itself and the issues that arise; minimum entitlements, collective bargaining, exploitation of migrant labour, dismissals and grievances. The institutions themselves are often ignored or brushed over. They are viewed as simply the forum in which the disputes are litigated. I would like to suggest that this, relatively traditional, perspective can damage the efficacy of the outcomes that these institutions are specially designed to achieve. One of the more depressing elements of this is that often it is people like us (or like you will be soon) – lawyers, decision-makers and advocates – who are barriers to achieving these outcomes. This is why applying fresh eyes and minds to these institutions is essential; and, while this isn't necessarily an old dogs/new tricks scenario, new lawyers and law students have an advantage in this regard.

Broadly speaking, the employment institutions are made up of three key players: Mediation Services, the Employment Relations Authority and the Employment Court.

Mediation

Mediation is the first port of call for almost any dispute. The explanatory note accompanying the initial Employment Relations Bill gives a helpful overview:[5]

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3 Previously a new government would mean a new piece of industrial/labour legislation. However, unlike its predecessors the Employment Relations Act has survived two changes of government with particular provisions being amended and then reversed back depending who is in power, for example, s 41 initiation of bargaining and s 125 reinstatement as the primary remedy.

4 Christina Inglis, Chief Judge of the Employment Court of New Zealand "Rethinking the Legislative Architecture – the Employment Relations Act 2000" (paper presented to the CLEW's 50th Anniversary Seminar, Victoria University of Wellington, 14 April 2021).

5 Employment Relations Bill (8-1) (explanatory note) at 8.

> The Bill embodies a general presumption that mediation will be the first port of call for dispute resolution before any decision-making forum is sought. Mediation, in this context, takes on a very broad and flexible meaning, in effect covering any service or intervention that can make a difference. The Bill gives the providers of these services wide discretion to operate as they see fit to meet the objectives of mediation, including the ability, by the consent of the parties, to conclude mediated settlements with no right of appeal. While mediation is not compulsory in all cases, the Bill makes it a general prerequisite that all mediation options should be exhausted, wherever practicable, before further actions can be taken

The emphasis on mediation is unsurprising when you consider the relational focus of the legislation. The Act established a specialised mediation service, which is run by the Ministry of Business, Innovation and Employment, with responsibility for providing support to parties in an employment relationship to promptly and effectively solve their employment relationship problem.[6] The goal is early resolution, allowing the parties either to return to a constructive employment relationship or, where necessary, to properly conclude one. The services can be provided flexibly: for example, there is an opportunity to hold one on a marae or to utilise new tools like Zoom. In this Covid environment, Zoom mediations and mediations conducted via phone are becoming more common. The mediation styles employed by the MBIE Mediators have been described by commentators as "eclectic" or a "hybrid approach", allowing Mediators to mix and match styles to the employment problem before them.[7] Clearly a highly technical claim will require a vastly different approach to a sensitive bullying grievance. Likewise, maintaining an ongoing relationship is dealt with differently to a termination or "divorce".

The powers and protections placed over the mediation process further indicate both how central mediation is intended to be, and the importance of getting it right.

Any settlement reached in mediation is final, binding and enforceable on the parties,[8] and, as the Court has recently found, in some cases on the representatives as well.[9] The mediation itself is treated as sacrosanct – nothing from it can later be adduced in evidence at the Authority or the Court. There is even the opportunity – although it seems this is rarely used – for the parties to have the Mediator make final, binding and enforceable decisions – no appeals, reviews or challenges.[10]

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6 Employment Relations Act 2000, ss 144 and 145.
7 Grant Morris "Eclecticism versus Purity: Mediation Styles Used in New Zealand Employment Disputes" (2015) 33 Confl Resolut Q 203 at 214.
8 Section 149.
9 *Culturesafe NZ Ltd v Turuki Healthcare Services Charitable Trust Ltd* [2020] NZEmpC 165.
10 Section 151.

Mediation is the bread and butter of an employment lawyer. Around 76–81 per cent of employment disputes settle in mediation. There are many incentives to settle that go beyond simply reconciliation; cost, time, stress and the unappealing adversarial process ahead are all pressures that come to bear. Also, the range of things that can be agreed as part of a settlement are far more extensive than what can be ordered by the Authority or Court. Obvious examples are written or verbal references, agreed public statements, transfer to another role etc. In reaching an agreed settlement, the parties have control over the outcome. They lose that control once a third party is making the decision.

Mediation is a unique environment that requires a representative to put on a different hat to the one they might wear either in court or in a more commercial mediation. Gung-ho lawyers and advocates are often cited as one of the factors that can have a negative impact on the likelihood of success. There is a temptation by some in mediation to treat it as a form of quasi-litigation – an opportunity to ram home the superiority of your legal argument in order to induce a good settlement for your client. For some representatives, the dollar figure is often seen as the best indicator of success. This begs the question: Is the Act's goal of promoting good faith relationships being upheld if mediation is viewed, not as a tool for the purposes of restoring a relationship, but as an opportunity to haggle over the appropriate pay-out?

The way representatives approach the process plays a crucial role in defining its success. Outcomes should not only be measured in monetary terms, but also by the way in which it facilitates an ongoing relationship between the parties or sets them up for future (productive) relationships

The Employment Relations Authority

If a claim fails to settle in mediation, the next port-of-call is the Employment Relations Authority. The Authority has first instance jurisdiction over the vast majority of employment relationship problems and disputes, including in relation to minimum entitlements, collective bargaining, personal grievances, interpretation of an agreement and many others.[11] It may also make any order that the High Court or District Court may make relating to contracts.[12]

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11 Section 161.
12 Section 162.

The fuss kicked up when the plans for the Authority were announced back in the late 1990s has been largely forgotten. At the time, there were comparisons made to Elizabethan "Star Chambers", secretive decision-making bodies that made often arbitrary and political rulings without due process. It is safe to say that this particular outlook was overblown. What it does emphasise though is that the Authority was not set up to be the same as other tribunals. As a concept, it was revolutionary and unparalleled in New Zealand law. Its role, as defined by the Act was to be:[13]

> (1) … an investigative body … resolving employment relationship problems by establishing the facts and making a determination according to the substantial merits of the case, without regard to technicalities.
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> (2) The Authority must, in carrying out its role,—
> (a) comply with the principles of natural justice; and
> (b) aim to promote good faith behaviour; and
> (c) support successful employment relationships; and
> (d) generally further the object of this Act.
> …

That may not sound particularly ground-breaking but what it described is what had been referred to as an inquisitorial approach to decision-making. It is an approach frequently seen in European civil law jurisdictions but almost unheard of in common law jurisdictions. In most cases, we follow what is called the adversarial model of decision-making. The concept of a decision-maker as a dispassionate referee between plaintiff and defendant is one that is rooted in this adversarial model. In that model, although the decision-maker has powers to control the processes before them, the opposing sides of a legal issue contest the result by argument; there is significant freedom to present the material, arguments and rebuttals. The investigative method sees the decision-maker take an active fact-finding approach where they choose what is relevant, question the various parties and their witnesses – if necessary, calling for certain documentation to be produced and even calling for people they want to hear from.

There are significant restrictions that prevent the Court from intervening in the Authority's processes. An amendment was passed only a couple of years after the passing of the Act in order to achieve this:[14]

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13 Section 157.

14 Employment Relations Law Reform Bill 2003 (92-1) (explanatory note) at 7.

> In addition, the Bill improves the ability of the Employment Relations Authority to deliver speedy, effective, and non-legalistic problem resolution services by restricting the ability of the Employment Court to intervene during Authority investigations. This will ensure that the focus remains on the immediate employment relationship problem itself, rather than on how the institutions deal with it.

The "de-legalisation" of the Authority was, of course, still accompanied by the requirement that the principles of natural justice be observed.

How an investigation meeting looks in practice has more in common with a boardroom than a courtroom. People sit around a large table, all at the same level. There are some common elements; briefs of evidence are filed, oral submissions are given, and there is generally an opportunity to question the other party's witnesses. Other elements are unique – the Member may cross-examine witnesses in a way which would be considered unacceptable in a court; they may tell the parties what evidence they want to see and what witnesses they want to hear from;[15] and they may give an oral determination at the hearing before providing written reasons. There is no official record kept of what takes place in an investigation meeting.

All of these innovations are designed to create a speedy and accessible dispute resolution service.

The employment jurisdiction (both the Authority and the Court) is unique in that it allows anyone to appear as a representative – this means not only lawyers and self-litigants, but lay advocates, union representatives, sometimes even family members. It is therefore essential that the processes be navigable. Say, for example, a large retail company dismisses a minimum wage employee who brings a claim to the Authority. Under the adversarial model, although the onus to prove justification is on the employer, it would be up to the employee to present, define and run their case. In the Authority, the Authority member runs the case. The investigative approach attempts to negate these "legal mismatches" and increase access to justice.

Once again, representatives carrying a single-minded approach into the Authority are likely to dull the efficacy of the process. While there can certainly be animosity between the parties, representatives can have a significant impact on how adversarial or non-adversarial this process becomes and how much harm, or not, is done in the process.

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15 James Crichton "Appearing in the Employment Relations Authority" (2017) ELB 24.

As with mediation, the Authority process, done properly, requires a lawyer to take off their adversarial litigation hat and adopt a different mindset. It provides a unique way to tackle the many diverse issues that labour law provides. However, it is important to remember that these processes are not designed only to be navigated by lawyers. The user-friendliness is contingent on representatives (including lawyers) enabling the processes to run as they were intended.

The Employment Court

After the Authority investigation is completed, the Member issues a determination. At that point the clock starts ticking for the parties to decide whether they are satisfied, and if not, whether they wish to "challenge" the determination in the Employment Court.[16] Challenges take two forms – de novo and non-de novo, but there are other ways of getting to the Court.

There are a number of proceedings for which the Court has first instance jurisdiction; for example, s 6 declarations such as *Leota,*[17] proceedings related to strikes and lockouts, freezing orders and search orders, and declarations of breach sought by the Labour Inspector under Part 9A. The Court also has some limited powers of judicial review. If you were trying to pin where we sit in the Court structure, it would be somewhere alongside the High Court; the Court has exclusive jurisdiction to make authoritative statements of law in relation to employment law, the High Court Rules are frequently used and there is no dollar limit of the claims we can hear. Appeals go to the Court of Appeal.

More regularly, claims come before the Court by way of challenge to a determination of the Authority. This is not strictly speaking an appeal; challenges can either come by way of a de novo challenge or by way of the imaginatively titled non-de novo challenge.

A hearing de novo is a full hearing of the entire matter. "De novo" is just Latin for "from the beginning". The parties rewind and begin their claim again before the Court. That probably sounds like a pretty inefficient way of going about things and there are certainly cases that come to the Court where that may be a valid criticism. So why not just have an appeal on a question of fact or law as is the process in the civil jurisdiction?

That was the way the Court operated under the previous legislation, the Employment Contracts Act 1991. The answer lies in the context of the way the Authority operates. You will remember

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16 Section 178.

17 *Leota v Parcel Express Ltd* [2020] NZEmpC 61, {2020] ERNZ 164.

that we discussed how revolutionary and unheard of this investigative model was and is in determining a civil claim. When you design a decision-making body that's designed to be, as some have called it, "rough and ready", able to make decisions speedily, effectively and non-legalistically, it was considered that there would need to be a safety net. The de novo challenge is that safety net; it is designed to apply the more traditional adversarial approach in situations where the parties feel, correctly or otherwise, that the less legalistic approach led to the wrong outcome.

There are some common mistakes when it comes to de novo challenges that those appearing in the Court need to remember. Everything is back in contention. That means a party must present their case from the beginning – all of it; witnesses, legal submissions, evidence and, as is often forgotten, a claimant they must re-establish evidence of their loss. Everything is back up for grabs, even findings that went in the challenger's favour.

The alternative form of challenge is a non-de novo challenge. This has much more in common with a traditional appeal; an issue or issues of fact or law that you want the Court to revisit is identified and challenged. The claim must specify the part of the determination to which the claim relates. The Court will then discuss, usually at the first directions conference, the nature and extent of the hearing with the parties before making directions. The "nature and extent" can often prove to be something of a hurdle as often many facts and issues that form the background to the case need to be ascertained; and with no record in the Authority, in practical terms the proceedings can quickly become indistinguishable from a de novo hearing.

The reasons for challenging non-de novo may be pragmatic or strategic. You may for example have realised that you are unlikely to convince the Court that you didn't botch your procedure in dismissing an employee during the lockdown, but you may think the Authority made an error in finding that it was not substantively justified. In that case, you may bring a non-de novo challenge to the Authority's determination but just on the finding of substantive justification. Conversely, you may be an employee who was found to have been unjustifiably dismissed, but the Authority decided that by continually turning up to work late and hungover, your conduct had contributed to the dismissal and, therefore, reduced your remedies. Thinking strategically, you may choose to bring a non-de novo challenge to the contributory conduct finding but leave the unjustifiable dismissal finding in place.

There is of course always the risk that a cross-challenge from the other side will broaden the scope of the proceedings but that, in and of itself, should not side-line a thorough consideration of how your case might best be presented to the Court. As a representative, factors to consider include the costs to your client mentally, financially and in terms of time. As a representative it may be a lot easier to put in a statement of claim challenging the whole thing, but your client's interests need to be considered.

The Employment Court is unsurprisingly a far more legalistic institution. We do our best to accommodate the parties and representatives who appear, but the processes themselves are much the same as in the civil jurisdiction of the other courts. The cases are heard by a Judge, in a courtroom, in an adversarial setting. At this point, you would have something closer to your traditional lawyer's hat on than you would in mediation or the Authority. However, that is not an invitation to dispense with good faith and fairness.

Decisions of the Employment Court are looked to by employers, employees, unions, business organisations and many others, to provide certainty about the rights and responsibilities of parties to an employment relationship. Legislation such as the Employment Relations Act or the Holidays Act may appear comprehensive, but if you want to know the correct process for a redundancy or how to accurately calculate the annual leave entitlement of your employees, the Court's decisions are crucial. A good example are the 90-day trial provisions. On the face of it, the legislation is straightforward; however, there is a string of Employment Court decisions that have clarified how they apply in reality.[18]

Because of the Court's role in providing certainty and the widespread implications of its decisions for employment relationships, the Chief Judge may choose to convene a full Court to decide cases where the issues are of a wider public interest.[19] A full Court is usually made up of three Judges although that is not a fixed number – it can be anything from two up.

Recently, full Courts have looked at diverse issues such as whether employees were engaged under New Zealand law or foreign law, entitlement to minimum wage during the lockdown, "gross earnings" under the Holidays Act, and contracting arrangements. Usually this will lead to all three Judges coming to a conclusion which is then instructive to the business community

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18 See for example *Smith v Stokes Valley Pharmacy (2009) Ltd* [2010] NZEmpC 111; *Blackmore v Honick Properties Ltd* [2011] NZEmpC 152; *Appleyard v Corelogic NZ Ltd* [2020] NZEmpC 107; and *Senate Investment Trust through Crown Lease Trustees Ltd v Cooper* [2021] NZEmpC 45.

19 Section 209.

and employees in terms of their ongoing relationships, and to lawyers, the Authority and the Court as precedent. However, all three judges do not necessarily need to agree – important issues are not always that clear cut. The decision will then follow the minority/majority model.[20] An example of this is the Chief Judge's recent dissent in *Gate Gourmet*.[21]

Finally, the Court has an equity and good conscience jurisdiction set out in s 189:

> (1) In all matters before it, the court has, for the purpose of supporting successful employment relationships and promoting good faith behaviour, jurisdiction to determine them in such manner and to make such decisions or orders, not inconsistent with this or any other Act or with any applicable collective agreement or the particular individual employment agreement, as in equity and good conscience it thinks fit.
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> (2) The court may accept, admit, and call for such evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not.

This is not, as some parties seem to argue when they are beginning to clutch at straws, "the vibe" or "Mabo". It is not a licence to make arbitrary decisions which would result in different Judges making very different decisions on the same law. Instead, what it means is that the Court systematically brings to the decision of each case a certain attitude which is that it should endeavour to do that which is right in adjusting the position of the parties.[22] Judge Corkill recently noted that the term was not one that was defined but was "one of those concepts where you know it when you see it."[23] Examples of situations in which this equity and good conscience jurisdiction has been utilised include lifting the corporate veil,[24] awarding compensation for hurt and humiliation where no amount was specified,[25] and apportioning penalties.[26] This jurisdiction is a further recognition by Parliament of the unique nature of employment law and of the fact that the strict rules of contract and procedure may sometimes not lead to a fair and equitable outcome in an employment relationship context. It encourages parties, and their representatives, to engage productively, in good faith, and with awareness of the inherent imbalances of power, just as the Act intends.

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20 Section 210.

21 *Gate Gourmet Ltd v Sandhu* [2020] NZEmpC 237, [2020] ERNZ 561.

22 TG Goddard "Decision-Making in the Employment Court" [1996] NZLJ 409 at 411.

23 Bruce Corkill, Judge of the Employment Court of New Zealand "Issues Relating to Employment Court Hearings" (paper presented to the NZLS Employment Law Conference 2020, Wellington, 23 October 2020) at 3.

24 *Square 1 Service Group Ltd v Butler* [1994] 1 ERNZ 667 (EmpC).

25 *Rayner v Director-General of Health* [2019] NZEmpC 65.

26 *Labour Inspector v New Zealand Fusion International Ltd* [2019] NZEmpC 181.

Appeals

Appeals from the Employment Court to the Court of Appeal are limited. Leave to appeal can be sought and a point of fact or law must be identified.[27] Leave will generally only be granted where the question is one of general or public importance. The Court of Appeal has applied this standard quite stringently, which is perhaps a recognition of the fact that the Employment Court is a specialist jurisdiction and the Judges appointed to it have specialist knowledge.[28]

No appeals are available against the findings of the Court on the construction of an individual or collective employment agreement. However, appeals against decisions under Part 9A of the Act, enforcement by the Labour Inspector such as banning orders, can be made as of right, meaning no leave is required.[29]

In exceptional cases, leave can be sought to appeal to the Supreme Court[30] – although this is rare, the Supreme Court has decided some very important cases such as *Bryson*.[31]

Conclusion

What I hope is taken away from this quick sprint through the institutions is that employment law is unique, dynamic and relationship focused. It challenges traditional concepts of what it means to be a good lawyer, eschewing the traditional "me versus you" mindset and playing down the minutiae of procedure. Knowledge of the law is, of course, hugely important. But an ability to adapt your approach, depending on the institution and the nature of the case, is almost equally vital. The unique framework of the Act encourages innovation and relationship building and there are many opportunities still to be mined.

The challenge to those with legal backgrounds is how do we oil the cogs rather than clog them up? The answer is applying the right tools to the right machine. Turning up at the Authority armed with an adversarial mindset, unreasonable disclosure requests, or with the intention to put the other party's witnesses through extensive hours-long cross-examination, is about as helpful as turning up in your wig and gown. Similarly unhelpful is heading to a mediation

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27 Section 214.
28 Section 216.
29 Section 214AA.
30 Section 214A.
31 *Bryson v Three Foot Six Ltd* [2005] NZSC 34, [2005] 3 NZLR 721.

intent on berating the opposition into submission. Rather, we need to embrace a structure designed to facilitate the rebuilding of relationships and the efficient resolution of disputes.

The dynamism required of representatives is something that should be an exciting challenge for any lawyer. There is sometimes the perception that employment law is the HR department of the legal world – necessary but not particularly exciting. Not true! Employment law issues are often novel, engaging and with broad overlaps with many other interesting areas of law; human rights, privilege, immigration, conflict of laws, public law, tort, corporate law and even criminal law. In recent cases, the Court has discussed whether the Defence Force had employed an overseas worker under New Zealand law or Washington DC;[32] banned an exploitative employer from employing any person for 18 months and ordered penalties in the realm of $450,000;[33] ruled that an Uber driver was not an employee under the Act;[34] found an overheard telephone call between a lawyer and client was privileged;[35] found that by failing to protect the health and safety of an assisted-living support worker who was assaulted by a service user, an unjustified disadvantage had occurred;[36] and stopped the lockout of Wellington bus drivers.[37] Employment law is broad and dynamic because work is broad and dynamic.

We really do have better work stories!

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32 *Radford v Chief of Defence Force* [2021] NZEmpC 35.

33 *Labour Inspector of the Ministry of Business, Innovation and Employment v New Zealand Fusion International Ltd* [2019] NZEmpC 181, [2019] ERNZ 525.

34 *Arachchige v Rasier New Zealand Ltd* [2020] NZEmpC 230, [2020] ERNZ 530.

35 *Bowen v Bank of New Zealand* [2021] NZEmpC 6.

36 *Davis v Idea Services Ltd* [2020] NZEmpC 225.

37 *MacLeod v Wellington City Transport Ltd* [2021] NZEmpC 55.