CLEW 50th ANNIVERSARY SEMINAR 2021

"Don't throw the (21 year old) baby out with the bathwater"

Rethinking the Legislative Architecture – the Employment Relations Act 2000

14 April 2021

Chief Judge Christina Inglis[1]

I echo Professor Anderson's admiration for the work that the Centre for Labour, Employment and Work does and the contribution it has made over an impressive 50-year history. It has continued to encourage what is sometimes lacking, namely thoughtful reflection and debate on employment law. Informed reflection and debate is important because it supports healthy development of the law, critically considering what the law is being asked to deliver, whether it is achieving those ends and what might be done to address any issues.

CLEW's 50-year existence has seen several iterations of umbrella legislation - the Industrial Relations Act 1973, the Labour Relations Act 1987, the Employment Contracts Act 1991 and the Employment Relations Act 2000. The Employment Relations Act has lived longer than any of its predecessors. The organisers of this conference have asked us to consider whether the current statutory umbrella remains fit for purpose. Professor Anderson evidently thinks not. He identifies a number of deficits in the legal framework and advocates for a fresh-fields approach to addressing them. I query whether a number of the criticisms are less about the overarching design integrity of the umbrella and more about disappointed potential in terms of what has been happening beneath it. The rhetorical, and provocative, question I pose is if the umbrella is replaced, is there a risk that the baby will be thrown out with the bath water?

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[1] Chief Judge of the Employment Court, New Zealand. I would like to record my thanks to Clare Abaffy, Judges' Clerk, for her assistance in the preparation of this paper. Any mistakes are mine, not hers.

One of the enduring strengths of the Employment Relations Act is its durability - no mean feat in an area of the law which is subject to often competing interests and philosophical divides. Much may come down to the way in which the overarching objectives of the legislation are expressed, underpinned by bed-rock concepts which now appear to be broadly accepted. The underlying objectives include:

- Recognising that employment relationships must be built on good faith behaviour;
- Acknowledging and addressing the inherent inequality of bargaining power in employment relationships;
- Promoting mediation as the primary problem-solving mechanism;
- Reducing the need for judicial intervention.

The new Employment Relations Act marked a significant shift in thinking, namely an understanding that employment is a human relationship and is not simply a contractual, economic exchange.[2] How did Parliament intend this goal to be achieved? Through:[3]

> … services, bodies and judicial institutions designed to support good faith and the overall objectives of providing informal, accessible and effective means of problem resolution that, in turn, are intended to support and enhance ongoing employment relationships wherever possible.

This translated into legislative provision for a pyramid approach to dispute resolution - providing for the bulk of issues to be dealt with by specialist employment mediators within Mediation Services;[4] unresolved matters to then go to the Authority, an investigative body with

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2 The explanatory note to the Employment Relations Bill (8-1) states: "This basis requires specific recognition in any regulation of the relationship - something not satisfactorily achieved by general contract law. The overarching objective of the [Act] is therefore to build productive employment relationships through the promotion of mutual trust and confidence in all aspects of the employment environment. The employment environment encompasses the entire complex and dynamic system of relationships. It includes all participants not just employers and employees." For a contrary view see Jack Hodder "Employment Contracts, Implied Terms and Judicial Law Making" (2002) 33 VUWLR 895, observing that employment is a contractual arrangement, and cannot be divorced from a commercial context. The judicial law-making role is limited.

3 Above n 2, at 2.

4 See Employment Relations Act 2000, ss 144-153, 159 and 188(2). See also Employment Court Regulations 2000, reg 4.

broad statutory powers tasked to deal with matters expeditiously, on the overall merits and without regard to undue technicality;[5] and the remaining slice of the pyramid reserved for a traditional adversarial hearing in the Court, guided (subject to law) by equity and good conscience.[6] The Court of Appeal was to have a limited role, dealing with appeals but only with leave and, in undertaking its appellate function, could not interfere with the Court's interpretation of contract and was required to have regard to the Court's specialist knowledge.[7]

What clearly emerges from all of this is that the thrust of the umbrella's design envisaged specialist input at each phase of the process, delivered in a fit-for-purpose way at each individual level and recognising that employment relationships have the best chance of survival if issues are dealt with sooner rather than later. Supporting and enhancing employment relationships, where possible, was to be the end-goal for each of the institutions.[8]

While Parliament's intent in relation to the institutional design has from inception been clear, it might be said that the history of legislative amendments to the Act post 2000 reveals a Parliamentary frustration that what it had in mind was not translating into reality. Four amendment Acts underscore the point:

- The **Employment Relations Amendment Act (No 2) 2004** was said to be a Bill that "furthers Government policy by amending the Employment Relations Act 2000 … to *enable it to better meet its key objectives of promoting fair, productive, and effective employment relationships between employees, employers, and unions*".[9] The Bill made it clear that good faith is wider in scope than the implied mutual obligations of trust and confidence; introduced the capacity for the Court and Authority to make recommendations to employers where a personal grievance was found; introduced facilitation (allowing for recommendations in collective bargaining); excluded challenges to the Court over matters related to the Authority's procedure; and limited judicial review of the Authority.

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5 See Employment Relations Act 2000, ss 156-176.
6 See Employment Relations Act 2000, ss 177-199.
7 See Employment Relations Act 2000, ss 214-218.
8 See Employment Relations Act 2000, ss 3 and 143.
9 Employment Relations Law Reform Bill (92-1) 2004 (explanatory note) at 1. Emphasis added.

- The **Employment Relations Amendment Act 2010** was said to "provide more flexibility, greater choice, and ensure a balance of fairness for both employers and employees in the principal Act while improving its overall operation and efficiency. *These changes will allow for employment problems to be resolved more quickly, reduce costs, support more efficient, effective, and flexible processes around ending the employment relationship, and help restore the confidence of all parties in the personal grievance system and the employment institutions.* It is also intended that *by assisting employment relationship problems to be resolved more quickly the negative impact of these problems on workplace productivity will be reduced*".[10] Amongst other things, the amendments required the Authority to prioritise matters that had attended mediation; added penalties for obstructing or delaying Authority investigations; and allowed mediators and the Authority to make non-binding recommendations.

- The **Employment Relations Amendment Act 2014** was said to implement Government policy aimed at "creating an employment relations framework that increases flexibility and choice, ensures a balance of fairness for employers and employees, and reduces compliance costs, particularly for genuine small to medium-sized enterprises."[11] The Act introduced a requirement that the Authority give oral determinations and oral indications of preliminary findings; specified a one-month timeframe within which the Authority must provide a written determination in respect of oral determinations; specified that the Authority may determine a matter without holding an investigation meeting; required the Authority to issue a determination "as soon as practicable" and not later than three months after the last date of evidence or information received from the parties, and set out mandatory (limited) content for written determinations.

- The **Employment Relations Amendment Act 2015** and the **Employment Relations Amendment Act 2016** were said to be designed to promote fairer and more productive workplaces through a number of improvements to the employment relations, employment standards, legislative framework. The 2016 Act amended the objects section by inserting s 3(a)(v): "by promoting mediation as the primary problem-solving

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10 Employment Relations Amendment Bill (No 2) 2010 (196-1) (explanatory note) at 1. Emphasis added.
11 Employment Relations Amendment Bill 2014 (105-1) (explanatory note) at 1-2.

mechanism other than for enforcing employment standards" and introduced new functions for the Chief Executive to promote the objects of the Act - including by providing information and advice about employment relationships.

The reason why these amendments[12] may be said to be relevant to today's discussion is that they give pause for thought – does history suggest that the legislative framework needs to be re-written or might it suggest something else?

This segues into Professor Anderson's concerns about the cost of enforcing employment rights and interests. He suggests, and I agree, that the institutions have fallen out of reach for many. That is not, however, a recent phenomenon which has arisen since the Employment Relations Act was enacted. Concerns about the cost (and delay) of pursuing claims through the Employment Tribunal underlay the move to the new model. The fact that concerns about accessibility continue to be voiced suggests that it is an issue which needs serious thought if the employment institutions are to remain relevant to those they are designed to serve. There is much to be said for the suggestion that it would be very helpful for the thinking to be informed by research and analysis, rather than anecdote and speculation.[13]

Access to justice is a fundamental aspect of upholding and protecting the rule of law. Barriers to participation are not unique to the employment jurisdiction but are acutely felt and have a distorting ripple-like impact. As is well accepted, barriers may be social/cultural and institutional. Social/cultural factors include issues such as poverty, education, discrimination, literacy, language barriers and cultural norms; institutional barriers include pressure on resources, organisational structure of justice institutions, limited effective legal assistance and representation, and difficulty enforcing decisions once made.[14] Each are very much at play within this jurisdiction and sit uncomfortably with the underlying purposes of the Act, including to ensure that employment disputes are dealt with as close to the problem as possible.

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12 A sub-set of 55 other Acts passed that have amended the Employment Relations Act 2000 over the years (including consequential amendments arising for the passage of other legislation).

13 Bernard Walker and R Hamilton "The 2010 review of the Personal Grievance System: Commentary" (2009) 34(3) NZIER 83.

14 See "Access to Justice – stocktake of initiatives" (New Zealand Law Society, draft research report, 8 May 2020) at 3.17.

Problems left to fester are likely to balloon into something much bigger, problematic, intractable and disruptive for all concerned.

But again, a question arises as to whether the identified barriers to the employment institutions arise because of, or despite, the current legislative structure. The answer to the question matters because it raises serious access to justice issues. Why? Because a right (basic employment entitlements) without practical access to a remedy is hardly a right worth having. Or, to put it another way, unequal (access to) justice is an oxymoron.[15]

I suggest that the clothing of the dispute resolution process with a number of the trappings of the familiar adversarial system of litigation has impacted the original conception of what the Act could deliver.[16] That conception envisaged non-adversarial processes being applied to the bulk of employment disputes. As has been observed:[17]

> As the Act makes plain, Parliament intended the Authority to be an accessible forum for parties (of varying financial means; capabilities; and resources) to bring their employment issues to it for speedy, non-technical, pragmatic resolution. While there will be some cases where a process more akin to the adversarial processes of the Court might be appropriate, with their associated (often costly) bells and whistles, many cases in the Authority do not require this sort of approach. The fundamental point is that the Authority was designed as a new model for dispute resolution in this jurisdiction, with the Authority member taking on an inquisitorial role and effectively driving the investigative process.

Traditional adversarial processes are not known for speed. The way in which appellate processes are cast may also have an impact. At this juncture it is worth touching on the de novo right of challenge contained within the Act. It appears that a fresh right of challenge was seen to compliment the non-technical, merits based, problem solving approach which would

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15 James Allsop, Chief Justice of the Federal Court of Australia "Values in Public Law" (James Spigelman Oration 2015, New South Wales Bar Association, 27 October 2015) at [16].

16 See, for example, the discussion in Christina Inglis "In Search of Simplicity in Employment Law and Practice: an issue of access to justice" (paper presented to the Employment Law Conference, New Zealand Law Society, Wellington, 22 October 2020).

17 *Elisara v Allianz New Zealand Ltd* [2020] NZEmpC 13, [2020] ERNZ 20 at [26] (footnotes omitted); Employment Relations Act 2000, ss 143 and 157(1).

apply below the Court. Some would say that the complimentary aspirations of the statutory design have yet to come to pass, and that there are parties who see the de novo (second bite at the litigation cherry) route as a useful tactic to burn off the other side's financial resources and/or energy. Others may well see it as an off-putting spectre in terms of cost and delay - why go through the Authority process if you might face a de novo challenge, as of right, to the Court? In this regard it is perhaps notable that the approach to costs in the Authority (generally applied tariff of $4,500 for the first day and $3,500 for each following day) differs from the approach adopted in the Disputes Tribunal (costs generally lie where they fall) and from the approach adopted in some other comparable jurisdictions.

The impact of costs emerges from the following observations in *Elisara v Allianz New Zealand Ltd* (a judgment on a de novo challenge from a determination of the Authority, including as to the costs award in that forum):[18]

> … it is particularly important not to lose sight of the realities faced by many of the litigants who access, or who would like to access, the first instance dispute resolution services of the Authority. A worker on the minimum wage earns $17.70 per hour (which equates to after tax take-home pay of around $15 per hour, assuming no KiwiSaver or student loan or liable parent contribution). That worker would have to work for 304 hours; 38 working days or 7.6 weeks to meet the cost burden applying the notional daily rate for the first day of an Authority investigation. They would also have to avoid incurring any other expenses whatsoever (such as rent, food, transport, childcare, medical, clothing costs) during that 7.6-week period in order to meet such an award out of their earnings. It goes without saying that a dismissed worker who had failed to find alternative work but who wished to pursue a claim against their previous employer for unjustified dismissal and reinstatement would be in an even more difficult position.

The point, for present purposes, is that the current legislative framework confers a broad discretion on the employment institutions in terms of the costs-setting exercise and it is the institutions themselves which have developed an approach of costs generally following the event, in line with the approach adopted in the ordinary courts.

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[18] *Elisara v Allianz New Zealand Ltd*, above n 17, at [30].

One of the perceived benefits of specialist intervention by mediators and Authority members at an early stage was that they could shoulder much of the load that would otherwise fall on the shoulders of litigants, often lacking the financial (or other) capacity to deal with formulating a technical claim, causes of action, identifying documentation for disclosure, draft briefs of evidence and prepare legal submissions. The shifting of load no doubt requires the provision of adequate administrative support to those carrying it, as the experience of other countries which appear to have successfully embraced an inquisitorial model for the early resolution of employment disputes, such as Germany, suggests.

While the inquisitorial model is the one alighted on in the Act, and one which appears to offer a tantalising array of advantages in the quest for access to justice, there are other models which have been used to address the policy imperative of facilitating the provision of speedy, non-technical answers to problems in New Zealand. The Disputes Tribunal model is but one example.[19] The question that Professor Anderson poses provides a very useful opportunity to reflect on the dispute resolution model in employment matters that will most likely deliver, within the range of resources available, the most bang for the access to justice buck.

What of Professor Anderson's faint praise for the statutory concept of good faith? Again, this may say less about the statute and more about the way in which the Authority and the Court have dealt with the concept.

I do not disagree with the implied characterisation of good faith as having largely assumed the role of understudy – waiting patiently in the wings to be called to take centre stage. And many may endorse Professor Anderson's observation that the central role that Parliament saw for good faith has yet to be fully realised. Similarly, Professor Anderson raises important issues as to the interface between human rights and employment law. He rightly asks where an employer's legitimate sphere of influence begins and ends and to what extent the interests of an employee to enjoy a private life are currently protected. He suggests that it is time for a recalibration – that the scales have tipped too far towards protecting employer interests (such

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[19] Disputes Tribunal Act 1988.

as reputational interests) and away from acknowledging that employees have interests, including an ability to freely express their own thoughts without fear of losing their jobs.

I would simply observe that the realisation of Parliamentary intent, and the exploration of statutory concepts such as good faith, requires issues to be brought before the Court, to enable them to be explored with the benefit of a factual context and informed legal argument. Or, to quote Mr Cranney, in a public speech not so long ago, what is needed is a "continual conveyor belt of … cases coming into [the] Court".[20]

It is probably fair to say that the conversation in relation to the interface between human rights and employment law, and good faith (including whether, for example, tikanga Māori may have a key role to play), is beginning to grow – although some may wish it to pick up the pace.[21]

As the Chief Justice of the Federal Court of Australia pointed out in 2018, when discussing the illusory concept of certainty in the law, and the dangers he perceived in seeking to nail down the minutiae of legal concepts:[22]

> In law, the need to recognise the role of uncertainty in order to make a holistic, contextual evaluation of a legal problem arises from the human relational, contextual and experiential problems that the law is required to resolve. The law is not a bundle of mechanical rules, able to be algorithmically organised and manipulated.

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20 Peter Cranney "on behalf of the New Zealand Council of Trade Unions" (speech at swearing in of Kathryn Beck as Judge of the Employment Court, Auckland, 7 August 2020).

21 See, for example, Christina Inglis "Developing themes in employment law: Placement of the goal posts in a changing world" (paper presented to the New Zealand Industrial & Employment Relations Conference, Auckland, 5-6 March 2019); Liz Coates and Geoff Davenport "Remedies and Costs" (paper presented at the Employment Law Conference, New Zealand Law Society, Wellington, 22-23 October 2020), at [59]; a series of articles on good faith in the Employment Law Bulletin earlier this year, including Ani Bennett and Shelley Kopu "Applying the duty of good faith in practice, in a way consistent with Te Ao Māori, Treaty and employment law obligations" [2020] ELB 114.

22 James Allsop "Uncertainty as part of certainty: appreciating the limits of definitional clarity and embracing the uncertainty inherent in any matter of complexity" (paper presented at the Australian Academy of Science and Australian Academy of Law Joint Symposium, Sydney, 23 August 2018) at [9].

This, he suggested, was particularly important in relational, value-based, areas of the law – the need to understand the context in order to provide a realistic and appropriate answer to a legal question about human engagement.[23] This is, of course, very much the province of employment law and something that the current Act embraces.

Conclusion

Employment relationships are important – for individuals, families, organisations, the economy, and society. It is critical for there to be a clearly defined and unobstructed pathway to enable those who the employment institutions are designed to serve to get the appropriate level of support and intervention needed to resolve matters promptly. I think it is fair to say that we are currently falling short in that regard. It is also important that people understand their rights and obligations (articulated by the Employment Court, the Court of Appeal and the Supreme Court) to guide the conduct of industrial relations going forward, without the need for unnecessary litigation.

One of the features of the current Act is its statement of principles which those involved in employment relationships are expected to be guided by and against which their actions and inactions are to be judged. It is true that much is left statutorily unsaid in terms of the detail. Some might say that that allows breathing space for the law to develop over time, and in a flexible manner, responding to changing circumstances, including in societal norms.[24]

Whether the suggestion of a major reform of the Employment Relations Act is adopted is a matter for Parliament. But in reflecting on aspects of Professor Anderson's important critique I wonder whether there is a utility in identifying what employment law (through the current Act) is designed to achieve; who employment law is meant to serve; where the identified barriers lie and whether the baby needs to be thrown out with the bathwater in order to address them.

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23 At [1] and [2].

24 See, for example, the discussion of good faith in various jurisdictions in Guy Davidov *"A Purposive Approach to Labour Law"* (Oxford University Press, Oxford 2016) at 170.