ELINZ 25th ANNIVERSARY CONFERENCE 2021

A privileged position – the important role played by representatives in employment dispute resolution

16 April 2021

Chief Judge Christina Inglis[1]

I am honoured to have been asked to give the introductory address at this special occasion – a conference celebrating a milestone event for the Employment Law Institute of New Zealand, reaching the ripe old age of 25. The organisation plays a key role in drawing representatives together, building relationships, sharing experiences and developing ideas for improvements in practice. I see such initiatives as particularly important in this area of law.

As the authors of the leading text on employment law in New Zealand point out:[2]

> Perhaps more than any other field of law, employment law is the one that has the most obvious, continuing, daily impact on people's lives. It is from employment that, directly or indirectly, the great majority of New Zealanders derive their economic security.
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> Employment law is the field of law that regulates the working life of these employees. It defines the mutual obligations between them and their employer, regulates the conditions under which work is performed, and sets the rules that regulate access to employment and exit from it.

What employment representatives do, and how they do it, is important – they can act as oil on troubled waters or a wind-turbine whipping up a storm that does lasting environmental damage. Employment disputes take many different shapes and forms. No dispute, at least in my experience, is exactly the same as another.

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1 Chief Judge of the Employment Court, New Zealand. I would like to record my thanks to Michael Kilkelly, Judges' Clerk, for his assistance in the preparation of this paper. Any mistakes are mine, not his.

2 G Anderson and J Hughes *Employment Law in New Zealand* (LexisNexis, Wellington, 2014) at 1.

Some disputes fester for years before reaching a breaking point. Others deteriorate quickly, throwing the key players into a state of instant panic. What the people immersed in the problem often lack is one vital ingredient – the knowledge necessary to deal effectively with the issues they face. That is no doubt why they turn to representatives for advice, generally in stressed, pressured and very challenging personal circumstances.

It is at this initial point, probably more than any other point in the process, that a representative's skill, experience, knowledge, and understanding of human nature is at its most critical. At that moment in time, there is an opportunity to put things back on the rails or, conversely, to set the wheels in motion for a train wreck. Somewhat contradictorily, it is also the moment in time that the likelihood of an amicable resolution dims. That is because bringing in the representatives often signals escalation, and brings with it a distancing of the protagonists from each other. Some characterise this moment in time as "the kiss of death". The challenge for representatives, then, is to bring to the process less of the Grim Reaper and more of the matchmaker.

I want to focus on what I perceive to be the hallmarks of effective representation in this specialist jurisdiction.

Representatives, like legal problems, come in all shapes and sizes, but effective representatives all tend to have one overarching characteristic in common – namely a genuine interest in people and problem-solving. That interest forms the basis for a number of other things, including the ability to engage with the client to identify what the problem actually is and what the potential options for resolving it might be. It also facilitates the development of a relationship of trust, not only with the client but with the other side. Both are of fundamental importance. The reality is that reputations matter – a reputation for honesty, integrity and fair dealing can go a long way in negotiations. But as with many things, once lost, it is difficult to regain.

There is, of course, little point in a relationship of trust if it is not supported by technical knowledge. The Institute's work in developing educational tools is an excellent initiative, and there are many other opportunities available to representatives. The point is that anyone who holds themselves out as an expert in a particular field owes it to those paying for their services to know what they are doing.

In our jurisdiction, we are lucky to have regular and accessible updates on cases, legislation and broader legal issues provided by various publications. Keeping up to date with trends is also important, for example the range of compensatory awards being given in the Employment Relations Authority and the Court,[3] and the regular offering of seminars and conferences focussed on employment law and practice provide additional opportunities for remaining abreast of developments and building collegial support. It is true that continuing education takes time out of a busy day but it is a necessary part of practice, and the effort is more than repaid by the benefits.

Much has been said over the years about the standards of behaviour of some representatives and we have all heard our fair share of horror stories. The Institute is well aware of those concerns and has been exploring ways in which they might usefully be addressed. I do not think that anyone would argue with the proposition that high standards of conduct are reasonably expected of *all* representatives working in this jurisdiction, whether they hold a practicing certificate as a lawyer or not. Suffice to say that it is not appropriate to advance claims that are known to be untrue; to apply undue pressure on the other side to meet settlement demands; to issue threats; shout at Mediators, Authority members and/or their staff; fail to keep your client informed or obtain proper instructions.

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3 Ministry of Business, Innovation and Employment "Compensation and cost award tables" Employment New Zealand <www.https://www.employment.govt.nz>.

What if you have the misfortune to be dealing with a representative who is failing to act in a model manner? Judge Smith recently set out a checklist of helpful tips, which I endorse:[4]

- Rise above it; don't take it personally.
- Treat the representative in the same dignified way as you would a person you do respect, and who respects you in turn.
- React to rudeness with courtesy and politeness – listen intently and don't interrupt until they are finished talking.
- Pause before responding; just because someone has said something in an email that you or your client disagrees with, does not mean it requires an immediate response.
- In correspondence, respond succinctly and in a matter of fact way – avoid emotive or rude or rambling correspondence.
- In proceedings, seek advice from someone with experience.

Effective representatives put the interests of their client first and continue to self-check along the way as to whether what is being done, and how it is being done, is consistent with that overarching objective. Appreciating the boundary lines of one's own capacity, and what can/cannot competently be dealt with, is also key. There will always be cases that require a different skill set – no-one is capable of being all things to all people or being all things to all employment relationship problem files. Sometimes it will be appropriate and necessary to refer a client to someone else. And the reality is that the skills required at mediation differ from those usefully deployed at an investigation meeting before the Employment Relations Authority and those skills differ again in the adversarial setting of a hearing in the Employment Court. Competent representatives are able to read the tea leaves and act nimbly, moving to alternative approaches when necessary or identifying what additional or alternative assistance ought to be applied.

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4 Karen Radich and Kerry Smith "Ethical behaviour in a competitive market" (paper presented to the New Zealand Law Society Continuing Legal Education Conference, Wellington, October 2020).

I think it is fair to say that in Aotearoa 2021 all representatives can be expected to bring cultural competence to their work. Employment law, and our understanding of it, is evolving. I am delighted to see that Jamie-Lee Tuuta, Te Hunga Rōia Māori O Aotearoa, will be speaking at this conference on access to justice through a Te Ao Māori lens. I anticipate this sort of lens being raised more broadly. The potential role for tikanga Māori in the resolution of employment matters has not, I suggest, received the attention it deserves. Yet.

On a more mundane level all representatives can be expected to know the applicable timeframes for notifying grievances and the requirements attaching to them; how to efficiently enforce settlement agreements and Authority/Court orders; seek non-publications orders; deal with documents appropriately; keep abreast of their ethical obligations[5] and understand both the legal basics and where the law may be developing.

Negotiating the employment institutions can often be a slow and arduous experience. That is a significant problem that we face and which has been exacerbated by the COVID-19 pandemic, the resulting lockdowns and economic downturn, and its consequences for many employers and employees. While there are issues for the institutions in relation to such matters, representatives also have a role to play in decongesting the traffic jam. Simple steps can be taken, such as meeting deadlines for filings, adapting to and taking advantage of new technological tools (for example mediation via Zoom or electronic casebooks in the Court), and notifying settlements at an early stage to enable dates for mediations to be reallocated to other parties in a timely way.

No conversation about effective representation in employment matters would be complete without reference to cost. The reality is that securing the services of a representative comes at a financial cost. Sometimes the cost can be ruinous. It continues to concern me deeply that access to the employment institutions has fallen out of the reach of many. We all need to think about what might be done, even in some small way, to widen the gate way.

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5 Radich and Smith, above n 4.

One method (anticipated by the legislative framework we all operate under) is bringing a proportionate, focussed, constructive and problem-solving approach to bear. Such an approach does much to minimise costs. So too does the ability to hone in on the key facts and relevant law; identifying what, if any, additional information might be needed and avoiding unnecessary rabbit holes. A practical example might be, when coming to the Court, giving thought to whether a full de novo challenge is necessary, or if it will result in the unnecessary (and generally expensive) relitigation of issues which the Authority has resolved to your client's (or both parties') satisfaction. In such circumstances, a non-de novo challenge might present the most straightforward, and cost efficient, means through to the end goal.

It is necessary to give full and frank advice about the likely costs and their recoverability so that unnecessary steps can be avoided. Reflect on the basis on which the client is being charged and whether the time and labour involved in each step that is planned for the case is actually necessary, bearing in mind the urgency and complexity of the matter. Consider if it is truly necessary for the other party's representative and the decision-maker to trawl through hundreds of pages of documents or listen to hours of submissions, when the nub of the case may lie in a smaller number of key documents or legal points. Quite apart from earning the gratitude of all involved, the corresponding advantages in terms of efficiency and cost will be a benefit to your client when it comes time for billing or resolving costs.

The potential costs associated with employment disputes is not, of course, simply reflected in an individual client's bank balance. Breaking, and broken, workplace relationships bring significant emotional costs; they consume time and effort, and are generally not easy to manage. Successful navigation invariably requires a cocktail of skills, not the least being sound judgment, common sense and interpersonal nouse.

Access to justice is a pressing issue in this jurisdiction and I am pleased to see it is one of the themes for discussion at this event. The short point is that the availability of a legal remedy (the right to basic minimum employment standards) is of little use if it cannot be accessed. We urgently need to reflect on what the barriers are and how they might be overcome, otherwise we run the risk of the employment institutions becoming increasingly irrelevant to all but a select few.

I am aware of the initiatives the Institute is currently exploring in relation to enhancing access to justice, and congratulate you on the work you are doing.

Conclusion

The employment relationship is one of the two most important relationships in a person's life. Representatives are in a privileged position, often guiding very distressed people through an unfamiliar maze. With privilege comes responsibility – base line competencies and principles being key.

It is certainly true that some matters are difficult to resolve but the point is that the representatives who succeed in providing effective support to their clients tend to be those who bring an understanding of employment law and practice, and perspective, to bear. They are trusted advisers who become known and respected for their ability to think laterally and work constructively to find solutions to sometimes seemingly unsolvable problems. Developing a reputation as this sort of representative, who brings value to the dispute resolution table, requires knowledge, experience and the ability to develop sound relationships.

There is nothing boring about employment law and practice. Technology, climate change and an aging population are but three issues which will likely spawn serious challenges ahead. Watch this space but, while you do, can I finish on the following note. What employment representatives do is challenging and often complex. Those challenges have been significantly increased over the last 14 months with the advent of COVID-19. While I have said a lot about ways in which representatives can think about safeguarding their client's interests it is also necessary to look after your own. Collegial support – the ability to pick up the phone at times of high stress and talk to another person who has a shared understanding of the difficulties you are facing – is important. Building that collegial support is something that I think the Institute should be proud of doing for its members.

Thank you for inviting me to speak at your conference and I wish you all the best for the rest of it.