ELINZ CONFERENCE 2022

Spokes in the wheels of justice – employment law and practice: how can we contribute to a smoother ride?

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Chief Judge Christina Inglis

Events like this are important – they provide a welcome opportunity to step back from the day-to-day and reflect on the bigger picture: what we (collectively, as different institutions, bodies and organisations, and as individuals) are doing and why.

Each of us will have a different view of what the big picture contains, in terms of its perspective, composition, detail, shading, size and scope. But I hope that for all of us the frame within which the big picture sits is conceived of as the rule of law – the ideal that all are equal before and under the law, and have equal access to the law's benefit.

I start with what was likely intended as a rather mundane observation by a senior employment practitioner. I had asked them what they thought the Employment Court could do to enhance accessibility and improve the experience of those coming before the Court. At the time I thought their response was rather depressing, or at the very least tepid. The practitioner said, and I quote:

> "You can fiddle around with things as much as you like but it won't make any real difference."

The observation is one that has sat, like a yellow post-it note, in the inner recesses of my brain popping up at inopportune times to mull over.

The observation, borne of years' of experience in our jurisdiction advising employers and employees, undertaking employment investigations, attending mediations, appearing in the Employment Relations Authority, litigating cases in the Employment Court and the appellate Courts, belies (intentionally or otherwise) a fundamental issue which I suggest is worth seriously reflecting on – if fiddling is a waste of time what **would** make a real difference?

I think it is fair to say that if the ideal (that all are equal before the law and have equal access to the law's benefits) sits at one end of the spectrum our jurisdiction has some way to go.

The reality is that we have not achieved the goal of equal access – accessing our institutions (Mediation Services, the Authority, the Court, the Court of Appeal and the Supreme Court) can be, and often is, expensive, time consuming and draining.

The process of achieving access is impenetrable to some; unknown to others; and alien and off-putting to a number of would-be users of the employment institutions who never cross the first threshold. In this regard we have little understanding of the size, scale and nature of unmet need in this jurisdiction. That is problematic, for obvious reasons.

It is also apparent that some see the way in which we operate as promoting a positional, entrenched approach which does not sit comfortably with their conception of dispute resolution; a way of doing things which can be bruising, rather than restorative of equilibrium, and inclined to leave lasting damage – to mana, reputation, future job prospects, health, financial and industrial stability.

No wonder then that many see the answer as early resolution on a transactional basis. The difficulty I perceive with that approach is that the employment relationship comes to be viewed as a commodity. And if the employment relationship comes to be viewed as a commodity, that moves us very far away from the underpinnings of the Employment Relations Act 2000 and Parliament's intent.

Pressures on participants and our employment institutions are likely to continue to mount – from globalisation / corporate mobility; fragmentation of the labour market and deconstruction of the traditional notion of work and the way in which work is undertaken; climate change; an aging / more diverse population; technology and rapid information (and disinformation) flows.

The good news is that with pressure comes the need to think about things differently (necessity being the mother of invention), and COVID-19 is a very good example of what can be achieved in a short space of time to keep the wheels of justice moving.

So now might be the optimal time to take a step back and reflect on the extent to which we help rather than hinder, and our place in the grand scheme of things – both now and into the future. It is both timely and necessary that we do it – there being nothing certain about our continued place in the framework.

It might be said that we (collectively) have over the years built up a complex, expensive, opaque set of mechanisms, largely based on traditional models from other Courts, to assist, manage and resolve employment relationships and their inevitable issues. I suggest that the way in which we have approached this building work has much to do with what we, as institutions and representatives, are familiar and comfortable with, rather than adapting a deliberately fit-for-purpose model.

As I have said, the complexity of the structure we have created is daunting for many, and contains numerous booby traps for the unsuspecting – even at the early stages of the process. This may be said to be reflected, at least in part, by the reality that many of those experiencing employment relationship problems, who do choose to engage with the processes set out in the Act, feel a need to engage representation to help them at mediation and the Authority (both stages being intended by Parliament to be non-technical and relatively informal, driven by specialist mediators and Authority members).

Those who are at a high point of stress in their lives (often having lost or being at risk of losing their livelihood and economic stability) must then navigate a system that is in all probability unfamiliar, daunting, emotionally and financially draining and full of risk including to the individual's privacy, self-esteem and (more broadly) in terms of outcome.

Take, as an example, a worker on the minimum wage. They have been dismissed from their employment in circumstances which they consider to be unfair. They have a family to support and much of their dignity and self-respect is bound up in their employment status. They wish to get their job back.

They talk to their employer, who stonewalls them. They do not have access to a union. They try to find someone to help them. They will probably talk to a family member, a friend or a trusted member of their community. (Where they go from this point may well be influenced by any experience the family member, friend or trusted member of their community has previously had with the employment institutions).

They may consult the internet, speak with their local Citizens Advice Bureau or a Community Law Centre. They may instruct a representative.

A grievance is raised and filed in the Authority. Sometime later there is a direction to mediation. Mediation does not take place immediately.

When mediation does occur it is held away from the workplace, in an unfamiliar office environment. The worker is told that if they pursue their grievance there will likely be delays in having their grievance heard and determined; if they want to pursue reinstatement an interim order might need to be sought and there is a risk they will not succeed; if they want to protect their name from internet searches they will need to seek non-publication orders which may not be granted; if they do win in the Authority the employer is then entitled to pursue a completely fresh challenge in the Court; pursuing a claim may well be damaging to their future employment prospects; and that the current approach in both the Authority and the Court is that costs follow the event (that the current daily tariff in the Authority is $4,500 for the first day and $3,500 thereafter) and scale costs are generally awarded in the Court which can run into tens of thousands of dollars. The worker is offered $3,000 compensation in full and final settlement (about 4 weeks' pay net excluding KiwiSaver, so less than one day in the Authority).

Let's pause at this point:

- What is it likely the worker will do?
- What is the likely impact on the worker of their experience with the process to date?
- What is the likely impact on the employer of their experience of the process to date?
- What is the likely ripple effect for other employment relationship problems and disputes and their resolution in the shadows?
- What is the likelihood of the worker and the employer reporting their experiences back to their friends, family and communities? How is that reported experience likely to impact on those peoples' perceptions of employment law and practice? More fundamentally, how would the reported experiences likely measure up to the rule of law picture frame?

None of these are trick questions; and the answers seem to me to be fairly obvious.

The practitioner was right in one sense – fiddling about in the Employment Court is unlikely to make much of a difference to our unnamed worker on the minimum wage.

But what the observation prompts, at least for me, is consideration of the possibility that we may have lost sight of the wood for the trees.

- **Who** are our institutions designed to serve?
- **What** are we meant to be serving up and why?
- **Is** what we are currently serving up, and the way in which we are serving it up, fit for purpose?

The answer to the first two questions, I suggest, lies in the architectural framework of the Employment Relations Act and the very clear Parliamentary intention which emerges from it.

In this regard, and as the Supreme Court has recently emphasised in *FMV v TZB* **[**2021] NZSC, [2021] 1 NZLR 466 102, the Act recognises the employment relationship is a relational, rather than a commercial, contract.

To state what will no doubt be obvious – workers are not economic commodities and ought not to be treated as they were.

As with all relationships, and as the Act itself makes clear, there are much broader elements both at play and at stake, supported via a statutory framework recognising baseline behaviours of fair treatment and good faith; the centrality of the relationship and a focus on its restoration, recouperation and preservation rather than its ready termination; substantively addressing and redressing wrongs in a meaningful way.

If we fail, by substance, process and accessibility, to adequately address the broader, non-financial, elements of the relationship when we deal with problems, to what extent are we meeting Parliament's intent?

I return to the metaphorical wheel.

It is those who are party to the employment relationship who hold centre stage in all of the work that we do – they are the centre of the spokes of the wheel – it is not the Court, the Authority, Mediation Services, the Labour Inspectorate, or the representatives.

Each of these components are simply designed to support the employment relationship, to assist the parties to act appropriately and to resolve their difficulties – and (more broadly) by shining a light on the path that employers and employees are expected to take, thereby supporting the broader statutory objective of industrial (and economic) stability.

That light shining function is, in my view, crucial to the rule of law. If cases are not brought, or seldom get to an adjudicative stage, (in other words, either never coming to the institutions because they are viewed as inaccessible and/or irrelevant or are otherwise resolved in the dark woods beside the path) what of the sanitising light of day and the ability to make clear what the legal obligations and liabilities in particular areas of employment law are?

The point is that for every case decided by the Court, the Court of Appeal and the Supreme Court, many many more are resolved in the shadow of the law.

Two other things might usefully be noted about the employment relations jurisdiction wheel.

First, the wheel has been specifically designed by Parliament to operate in a unique way from most other Courts and tribunals. That is important, as Parliament has a vision as to how the objectives it has identified for employment relationships are best able to be met. It is the roadmap set by Parliament, not by custom and practice developed in other jurisdictions, that sets the route for our journey. In other words, Parliament's intention is to be respected and upheld, so that we are all travelling towards the correct destination.

Second, each of the spokes (the Court, the Authority, and Mediation Services) are designed by Parliament to play a very different role and in a very different way to one another.

This unique statutory design for each of the employment institutions is underscored by a very straightforward formula – there is a base expectation of behaviour; an acknowledgment that relationships run into difficulties from time to time; a clear recognition that problems have the best chance of constructive resolution if they are dealt with as soon as possible, at the lowest

level possible, and as directly as possible; and a recognition that some problems benefit from a more legalistic approach and are best heard in the Court.

The statutory focus is squarely on early engagement and attending to and restoring the relationship. The specified tools at an early stage are non-technical and investigative, not adversarial. They are designed to be efficient and non-burdensome to the parties. Mediators and the Authority members are meant to do the heavy lifting – all of that requires resource, expertise and time.

And while a more legalistic approach is anticipated, not surprisingly, in the Court, the Act makes it clear that the Court has a broad suite of powers and ability to exercise them in a way that best meets the objectives of the legislation.

In order to squarely meet the statutory design, accessibility (in the broad sense) is surely one of the keys. Again – I suspect we have some way to go.

But if the familiar way of dealing with employment relationship problems is not working effectively for a number of the people we are here to serve (and I venture to suggest that it is not) ought we to be giving some thought to a recalibration, to ensure that what we are doing and the way in which we are doing it is firmly grounded in, reflects and supports clear Parliamentary intent?

The good news is that we all have a sphere of influence where we can look to make fundamental change – it is crystal clear that Parliament has deliberately left significant latitude to each of the employment institutions to work out how they will operate in order to meet its underlying objectives of the Employment Relations Act and has made numerous amendments over the years to reinforce the point.

In other words, there is nothing radical about each of us returning to the Employment Relations Act as a benchmark, to review what we are currently requiring people to do and why; what we ourselves are doing, how we are doing it and why we are doing it in this way, having regard to the statute under which we operate.

To mix up the metaphors, we might collectively find that:

- a smorgasbord rather than a set piece menu is appropriate, focussing on what is needed by the parties in the relational context rather than the chef imposing a set approach;
- that a renewed focus on restorative practices would sit most comfortably with the statutory scheme;
- and that a suite of institutions which are truly accessible – via more than just a door, a portal or an 0800 number – is achievable and is necessary.

Speaking for myself, this requires the Court to take a dispassionate look at itself – to focus on our users, or would be users, rather than what we are familiar with; to re-read the Employment Relations Act and recent developments in the common law, to inform an assessment of what the best, most approachable, most relevant version of Te Koti Take Mahi, the Employment Court of Aotearoa New Zealand, might be in 2022 and beyond.

So, in answer to the question we have all been asked to reflect on today – namely how can we contribute to a smoother ride – I suggest we all (including the Court) return to the workshop, take the wheel apart and look at re-building it according to Parliament's specifications.