EMPLOYMENT SERVICES DISPUTE RESOLUTION HUI 2021

AUCKLAND

The Engine Room of Employment Dispute Resolution in Aotearoa:

Mediation Services

The Context in Which it Sits

June 2021

Chief Judge Christina Inglis[1]

Thank you for inviting me to speak at your conference, and for giving me such wide parameters for what I might say.

Can I start with a navel-gazing set of questions – why does a specialist employment resolution system exist in Aotearoa; what are its perceived benefits and what is its potential?

The way in which the dispute resolution processes for employment matters have been structured is unique, and deliberately so. It is evident that Parliament had a particular vision in mind with its institutional design. All of this clearly emerges from the Employment Relations Act 2000 and the pre-parliamentary material. As stated in the explanatory note of the original version of the Employment Relations Bill:[2]

> … a strong emphasis is placed on the prior resolution of problems by the parties themselves, who will have access to a wide range of resources, through information provision, structured or unstructured mediation and other services to voluntarily resolve matters at an early stage.

The Employment Relations Act was designed to herald in a new way of thinking about employment relationships – less about contracts and more about relationships. The focus on relationships is seen, for example, in the mutual obligations of good faith; the primacy of mediation as a means for dealing with issues; the statutory recognition that early intervention,

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

2 Employment Relations Bill 2000 (8-1) (explanatory note) at 8.

at the lowest possible level, has the greatest prospect of success in supporting employment relationships. And it is crystal clear that the statutory emphasis is on relationship building, not a brisk parting of the ways at the first hint of trouble. The fact that reinstatement has been reinstated as the primary remedy reflects this,[3] as does the suite of flexible powers that have been conferred on Mediators to deal with the variety of cases coming before them.[4]

What is also crystal clear is that it is the parties – employees and employers – who are the focus, not the institutions – Mediation Services, the Employment Relations Authority and the Employment Court. They are there in a supporting role.

The recurring question that might usefully be asked is how do we discharge our role in assisting those at centre stage to work their way through issues, disputes and challenges? What stage of a relationship breakdown offers the best chance of effective support, and how might that support be delivered? And might the way we think about these issues develop over time, along with our understanding of the way in which work is done, the way society views work and working relationships, and our developing understanding of mechanisms for relationship repair and building?

These questions are not easy, or entirely comfortable. Ultimately it boils down to who do we serve; how are we doing it; and can we do it better in Aotearoa 2021?

The past 18 months have presented a number of challenges, but also opportunities. For the Court it has caused us to think hard about the possibility of doing things in a different way. It has also driven home the need to be clear about our processes so that the public (including litigants and would be litigants and their advisers) understands what we do and how they can access us. In this regard a considerable amount of effort went into public engagement on a range of issues, such as how (for example) cases were being triaged and what parties and their advisers could expect from the Court during the pandemic; providing reassurance that even if the doors to the courtroom were physically closed they remained open. The Judges continued to hear and decide cases that needed to be dealt with; convened telephone conferences and discussed how matters might be progressed; undertook telephone hearings, and hearings via AVL, and dealt with applications and other proceedings on the papers. None of this was easy,

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3 Employment Relations Act 2000, s 125; Employment Relations Amendment Act 2018, s 47.
4 Employment Relations Act 2000, ss 144-153.

the vast majority of it was undertaken from private homes throughout New Zealand, but we were greatly assisted by Court staff and the Ministry of Justice.

On the upside, what this disconcerting period of time provided was an opportunity to think about the way in which we have traditionally done things and reflect on what might usefully change going forward.

The Employment Court is, of course, in a relatively fortunate position. It does not deal with the volume of cases that the other two institutions deal with. But I do not doubt that it is the pressure of cases, and the lessons learned from COVID-19, that will be prompting similar reflections, both within each of the institutions and more broadly – focussed on how we meet the underlying objectives of the legislation, namely to deliver prompt, efficient, just and effective support at each level of the process, in challenging circumstances. The only certainty is that we will be confronted with more challenges, although perhaps in different forms.

In this context – if access to the dispute resolution services provided for under the Act is compromised, what is the likely outcome? Might it result in employers and employees increasingly looking elsewhere for dispute resolution options? Might it impact institutional reputation? Might it impact the extent to which we are seen as relevant? Why does any of this matter? I suggest that it matters a great deal.

As the authors of the leading text on employment law in New Zealand point out:[5]

> 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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> …
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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.

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5 Gordon Anderson, John Hughes and Dawn Duncan *Employment Law in New Zealand* (2nd ed, LexisNexis, Wellington, 2017) at 1 (footnotes omitted).

So, what Mediators do and how you do it is important, not just for the individuals who come before you but more generally. You play a key role in the delivery of civil justice in each particular case you deal with, but, perhaps more importantly, you have the ability to send powerful messages to those who have never set foot through the employment mediation door, but who have heard whisperings on the community grape vine about dispute resolution in this jurisdiction. I would hazard a guess that virtually every employer and employee, and virtually every representative and support person, who engages with the dispute resolution services provided for under the Act mops up an impression of both process and outcome and talks to their orbit of acquaintances about their experience. That, in turn, likely impacts either positively (encouraging others to think about mediation as a help) or negatively (as a hindrance or a waste of time and/or money). None of this is unique to Mediators – it occurs in relation to the Employment Relations Authority and the Court too, but it does prompt reflection.

If you were a fly on the wall, and overheard a conversation around the water cooler about a mediation you had led, what would you like to hear?

A. The Mediator helped us get to the bottom of what had gone wrong and agree on some steps to repair our working relationship.
B. The Mediator was super-efficient. We were able to agree a settlement figure within ½ hour and leave.
C. The Mediator warned me that taking my grievance any further would be risky – not only financially expensive but I would probably be publicly named, and that might impact on my reputation and career prospects. I decided it was much better to settle even though I thought I had a good case.
D. The Mediator had read everything in advance and was on top of the facts and the law. They listened to what I had to say. They made us all think about things from a different angle.
E. The representatives did most of the talking. They managed to sort out a deal which the Mediator ticked off.
F. I never want to go through that awful process again.

The point is that reputation, and the incremental build-up of reputation over time, matters – not only for the individual Mediator working in the engine room but for the workability of the engine (Mediation Services) itself.

Conceptualising mediation as the engine room of the dispute resolution processes for employment matters is, I think, accurate – the statistics speak for themselves. According to what I am told are the most recent publicly available figures (from 2018), Mediation Services deal with over 7,000 applications per year and sign off on around 9,000 settlements in total, making up about 76% of all employment cases in New Zealand.[6] These figures are impressive. They reflect that a great many people with employment disputes are being enabled to resolve them without the need for litigation. That, in turn, reduces the number of proceedings filed in the Employment Relations Authority and, in turn, the Employment Court, the Court of Appeal and the Supreme Court.

I suggest, though, that without qualitative analysis the settlement figures present only part of the story. And what of the apparently growing number of employment disputes that are now being dealt with elsewhere, by private mediation and arbitration? What percentage of Mediator signed-off settlement agreements emerge from a mediation conducted by that Mediator? Should alarm bells be ringing?

I want to touch on seven qualitative, rather than quantitative, factors that may be said to have a significant impact within the engine room:

- First, Mediator expertise. The Act puts an emphasis on the specialist expertise of each player in the dispute resolution process – Mediators[7]; Authority Members[8]; Judges of the Court[9]. What this means is that we can all be expected to hit the ground running, applying our knowledge of employment law and practice to the particular case coming before us, enabling us to focus on problem solving. That is particularly important in an area of law in which parties can, and do, appear without representation. Keeping up to date with changes in the law and trends is important, for example the range of compensatory awards being given in the Employment Relations Authority and the Court,[10] the primacy of reinstatement as a remedy, what the Court is saying about the steps that a fair and reasonable employer can be expected to take, the nature and extent of good faith

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6 Peter Franks "Barriers to participation: a mediator's perspective" (paper presented in "Barriers to participation: A Symposium", Auckland University of Technology, 13 September 2018) at 3.

7 Employment Relations Act 2000, ss 144-145 and 153.

8 Employment Relations Act 2000, s 166A(1).

9 Employment Relations Act 2000, ss 200. See also s 216, which requires the Court of Appeal to have regard to the special expertise of the Employment Court when determining an appeal.

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

obligations, the way in which remedies might be calculated etc. Expertise, and a good grasp on the applicable legal framework, are key to the delivery of effective mediation services in this specialist area of the law – particularly where time is at a premium.

- Second, in Aotearoa 2021, each of the employment institutions can reasonably be expected to bring cultural competence to their work, and I know that Mediation Services has been actively taking steps in this regard. The potential role for tikanga Māori in the resolution of employment matters is but one example.[11] There is, I think, considerable merit in trying to understand who the employment institutions do not tend to see – what is it that either attracts, or puts people off, utilising our services? To what extent are the institutions reflecting the communities they serve and to what extent are they delivering services in an accessible manner? In other words, who is missing out and why?

- Third, the quality of representation. Parties have a right to be represented by a person of their choosing, including at mediation. Many employees and employers choose to be represented. That is hardly surprising – dealing with an employment dispute is stressful and can be perceived (rightly or wrongly) as requiring a skill set and knowledge base that many do not possess. Employment representatives, like employment disputes, come in a range of shapes and sizes. Their presence and involvement at mediation can be both positive and negative. Much has been said over the years about the standards of behaviour of some representatives, and you are no doubt very well placed to have a perspective on the accuracy or otherwise of those concerns. 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; and the institutions need to be vigilant about upholding those standards. Suffice to say that it is not appropriate for a representative to advance claims that are known to be untrue; to apply undue pressure on the other side to meet settlement demands; to issue threats at mediation; or act without proper instructions. Concerns also continue to be raised about the fee arrangements that some representatives have – I was recently told (by an apparently reliable source) of one example where an employee had signed an agreement providing for their representative to receive 80 per cent of any settlement figure.

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[11] See for example, the discussion in Christina Inglis "The lens through which we look: Employment Law and Practice Part 1 - What of tikanga?" (paper presented to Victoria University and Otago University, May 2021).

- Fifth, cost. It is true that cost is a factor to be considered when reflecting on available options and possible resolution. However, I query the extent to which mediation, as envisaged by the Act, is appropriately reduced to a forum for number crunching.

- Sixth, reputation. It has become notoriously well known that it is not uncommon for the spectre of publication/damage to reputation to crop up as a bargaining chip in mediation. There are obvious difficulties with this, not the least being the impact on access to justice – a person who wishes to pursue their statutory right to take a claim against their employer in a public forum is put off doing so because their name will be published and they may never work again.[12]

- Seventh, timeliness. The Act recognises that employment relationships have the best chance of success if issues are dealt with as close to the source as possible and as quickly as possible. Delays in accessing the employment institutions, most particularly the engine room, are likely to undermine that statutory objective. The reality is that COVID-19 has made accessibility to the employment institutions even more pressing for employees and employers affected by the pandemic. All of this has presented issues for each of the institutions in terms of keeping the wheels of justice turning at a sufficient pace. It also, of course, impacts on the ability to realistically focus on restoring the relationship as opposed to assisting the parties to reach a financially-based parting of the ways.

It is often said that it is a good thing if parties can reach resolution of their differences without the need for litigation and a result being foisted on them. On one level that is undoubtedly true. But I wonder whether there is a need to step back from the attractive simplicity of that statement and take a more inquiring approach. If our end goal is a statistic, then do we run the risk of losing sight of the statutory objectives which, after all, must be the guiding light for each of the institutions in undertaking the tasks Parliament has conferred on them.

The employment relationship is one of the two most important relationships in a person's life. I recently spoke at a conference and suggested that representatives are in a privileged position, often guiding very distressed people through an unfamiliar maze.[13] Mediators, Authority Members and Judges are also, of course, in a privileged position. With privilege comes

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12 James Crichton and Alastair Espie "Non-publication orders – is it time to reverse course?" [2021] ELB16.

13 Christina Inglis "A privileged position – the important role played by representatives in employment dispute resolution" (paper presented to ELINZ 25th Anniversary Conference 2021, Palmerston North, 16 April 2021).

responsibility – including to self-reflect: what are we doing and why, bearing in mind the objectives of the empowering legislation and focussing on the people our institutions are designed to serve.

At this point it is worth returning to the objectives of the legislation under which each of the three employment institutions (Mediation Services, the Employment Relations Authority and the Employment Court) operate. They are focussed on early resolution of employment disputes; preserving employment relationships where possible; addressing the inherent inequality of bargaining power; promoting good faith behaviour, while recognising that sometimes parties will need to be able to access the Court to have issues resolved in a formal, adversarial forum.[14]

Mediation Services was designed as the engine room of the dispute resolution system, and the Act has equipped Mediators with much flexibility and control over their own processes, applying a variety of tools best designed to meet the needs of the particular dispute. Indeed the original conception was that mediation would occur in the workplace, or using phone, fax, or email, rather than in centralised offices.[15]

A conference like this provides a welcome opportunity to think about some of the big issues, and how the statutory vision might best be supported in 2021 and beyond.

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14 Employment Relations Act 2000, s 143.

15 Employment Relations Act 2000, s 145(2)(a); Margaret Wilson "Free, fast and fair – a new Mediation Service for New Zealand businesses and employees" (13 July 2000) <www.beehive.govt.nz>.