"In search of simplicity in employment law and practice: an issue of access to justice"

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A prelude. It will soon become apparent that this paper is riddled with questions, and not so many answers. That is deliberate. I hope it will generate reflection and discussion, perhaps even heated debate. I hope too that the discussion will prompt us all to think about ways we, as individual participants in employment law and practice, can make some positive change – both small and big.

If we accept (as I think we must) the basic proposition that employment law is fundamentally designed to serve the broader public interest and, in particular, employees and employers (the end goal), and that employment practice provides the necessary infrastructure to do so, we need to ask some hard questions about the extent to which what we are doing and how we are doing it supports, undermines or obfuscates the goal. I suggest that if we do nothing the future looks decidedly bleak for the very people this specialist jurisdiction is designed to serve. It goes without saying that it would be a most unhappy irony if access to the employment institutions was to become the playing field of an elite few.

The point is that access to justice for all is central to the Rule of Law. As Lord Bingham has observed:[2]

> It would seem to be an obvious implication of the principle that everyone is bound by and entitled to the protection of the law that people should be able, in the last resort, to go to the Court to have their civil rights and claims determined. An unenforceable right or claim is of little value to anyone.

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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] Tom Bingham *The Rule of Law* (Penguin, London, 2011) at 85. See also Bridgette Toy-Cronin "A Defence of the Right to Litigate in Person" (2017) 37 OJLS 238 at 245.

There are many tentacles which could be explored. I am focussing on one, and at this stage at a relatively superficial level – complexity in employment law and practice.

Many years ago, Lord Cooke of Thorndon presented a ground-breaking paper entitled "The Struggle for Simplicity in Administrative Law",[3] reflecting on the growing complexity of administrative decision making and the developing grounds for reviewing it.[4]

Why did this state of affairs warrant reflection? Complexity breeds difficulties. It obscures the real issue. The wood (did something go wrong with the decision?) becomes invisible for the trees (the application of an increasing web of legal concepts, such as irrationality, sliding scales and Wednesbury unreasonableness). Complexity gives rise to problems of interpretation and application for both the decision-maker and those affected, or potentially affected, by the decision and it spawns delay.

What has all of this got to do with employment law? A great deal, I would suggest. Not only because administrative law has much in common with employment law (particularly personal grievances),[5] but because it reminds us of the need to step back from what has become familiar and take stock.

Similar concerns which prompted Lord Cooke to put pen to paper, have been growing incrementally in the employment sphere for many years, reflected in the increased complexity of pleadings and hearing times in both the Court and the Employment Relations Authority.[6] It may also go some way to explaining the demonstrable increase in demand for support and assistance in employment matters, including the pressure on Community Law and the Citizens Advice Bureau, together with the burgeoning number of independent investigators, offering their services to employers to undertake employment investigations on their behalf.

And a review of media stories over recent years reflects a common theme of thinly veiled complaint – namely that the permissible field of employer action has become increasingly

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3 Robin Cooke "The Struggle for Simplicity in Administrative Law" in Michael Taggart (ed) *Judicial Review of Administrative Action in the I 980s - Problems and Prospects* (Oxford University Press Auckland 1986).

4 For a more recent discussion of the rise of formalism and complexity see Philip Joseph *Constitutional and Administrative Law in New Zealand* (3rd ed, Brookers, Wellington, 2007) at 853–858. See also Philip Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers, Wellington, 2014) at 900-904.

5 Including that an employer is required to act fairly and reasonably in reaching decisions which may impact on an employee's employment and in terms of the supervisory role of the employment institutions (the Authority and the Court) in checking that those decisions have landed within the permissible target range.

6 For example, hearings in the Court in 2019 were on average around 40 per cent longer than hearings in 1989.

difficult to identify, with employers being obliged to navigate a series of hoops, uncertain as to whether they will later be assessed as having successfully done so. It might be said that for some, perhaps many, employment law and practice has become a dauntingly complex maze which is best avoided.

Why should any of this matter to us? After all, if complexity in employment law and practice has been trending upwards, that means more work for the lawyers and advocates; human resources advisers; independent investigators; and unions. And, for those with business acumen, it surely offers up an alluring range of lucrative opportunities.[7] The reason why it should matter is reflected in a somewhat depressing, but simple, equation:

> (Employment law and practice) + complexity = more work (for non-parties) = more $ (for non-parties) = less $ (for parties)

The equation gives rise to a number of obvious consequences, including diminished access to justice. Why? It puts many rational people off pursuing or defending their legal rights. And it prompts the banging of the economics-of-settlement drum, reinforcing that a party who wishes to seek to enforce their legal rights beyond mediation is likely setting off on a fool's mission. It may be said to reinforce a message that is found nowhere in the Employment Relations Act – namely that an employment relationship is, after all, a transactional one.

The application of witting or unwitting undue pressure to settle on the basis of cost is problematic. It likely has a distorting effect on the cases coming before the Court and being exposed to the sanitising light of day in the public domain; it indiscriminately weeds out meritorious claims; and disproportionately impacts on those with the most to lose.[8] The risk is that people effectively become resigned to accepting that the Authority and the Court are not open to them, even if they have a problem which those institutions have the expertise to resolve or could give access to rights they are entitled to.

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[7] For a discussion of the issues in relation to the costs of litigation in New Zealand generally, see Bridgette Toy-Cronin "I fought the law and the lawyers won" (22 July 2020) Newsroom <www.newsroom.co.nz/ideasroom/i-fought-the-law-and-the-lawyers-won>.

[8] Darryn Aitchison "Sarah's Story" (paper presented to Barriers to Participation; a Symposium, 13 September 2018).

It also stunts the development and understanding of the law. While not every case will, or should, come before the Court for resolution, the point is that for every problem solved by the Court, several others are solved in the shadow of the Court's intervention.[9] It remains problematic that some very important categories of case, such as sexual harassment, do not tend to find their way past stage one of the dispute resolution process. From 2015 to 2019, the Authority considered 14 cases focussed on alleged sexual harassment – the Employment Court, none.[10]

Returning to the potential perils of complexity in employment law and practice. Increased complexity undermines the ability of employers and employees to understand their fundamental rights and obligations and to comply with the law without recourse to the Authority or Court; it provides a fertile feeding ground for legal challenge; it promotes a perceived and/or actual need for technical advice and assistance; and nurtures a perception that the legal landscape is full of dangerous pot-holes and subterraneous land mines. It serves to alienate those who are ill-equipped to deal with complexity. For those who do proceed, it can mean financial ruin and the stress and strain of pursuing or defending employment rights and interests over extended periods of time and through multiple layers of institution.[11]

What might be done to reduce unnecessary complexity (and, as a by-product, delay and cost – financial and non-financial (such as mental and emotional stress))? One answer might be the injection of a dose of simplicity into both the law and its practice.

Lord Cooke's fundamental point was that, at its heart, administrative law is about supervising decision-makers in the discharge of their statutory tasks. His concern was that the decision-maker's role, and the Court's subsequent supervisory role in assessing the extent to which the decision-maker has met or fallen short of the standard, had been unhelpfully weighed down by

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9 Robin Knowles and others "Access to Justice for Litigants in Person (or self-represented litigants) – A Report and Series of Recommendations to the Lord Chancellor and to the Lord Chief Justice" (November 2011) at 34.

10 Ministry of Business, Innovation and Employment *Bullying and Harassment at Work - Issues Paper*: *An In-depth Look* (2020), at [343].

11 Accessibility of the law, understanding rights and obligations and being able (financially and otherwise) to enforce them once understood, was the umbrella concern articulated at two symposia in New Zealand involving employers, employees and community groups (entitled "Barriers to Participation in the Employment Institutions"). The symposia were co-hosted by the Employment Court, the Employment Relations Authority and the Auckland University of Technology, Work Research Institute, and brought together community groups, senior employment practitioners, unions, academics and policy-makers to explore the barriers to participation and what might be done to break them down.

developments in the common law, and the patch-work of legal tests which had morphed over time. He concluded his critique with a plea for simplicity:[12]

> Just as I have gone to the length of suggesting that fair means fair, so I ask you to entertain the serious possibility that reasonable means reasonable. The definition in the Concise Oxford Dictionary, reflecting as it should ordinary educated usage, is 'within the limits of reason'. What is outside those limits is unreasonable; what is inside them is reasonable.

I wonder whether there is room for a more Cooke-ish approach in our jurisdiction, stepping back and focussing less on the detail and more on the key behavioural principles contained within the Act. This, of course, requires us to actively grapple with fairness, reasonableness and good faith in a substantive, rather than procedural, way. It is an uncomfortable zone for those who prefer a procedurally laden approach to determining whether something has gone wrong with the ultimate decision. It is an equally uncomfortable zone for those who see fairness, reasonableness and good faith as illusory concepts which are difficult to pin down. Lord Cooke would disagree with them.

A focussed approach on key behavioural principles (effectively substance over form) might also be seen to be consistent with the relational rather than merely transactional nature of employment relationships; the scheme and purpose of the Act; and the descriptive, rather than prescriptive, way in which Parliament has characterised employer/employee obligations. It might also be said to be consistent with provisions of the Act relating to justification, which stress the need to assess whether what the employer did and how they did it was within the permissible range, and the directive that minor errors in procedure are not to be treated as determinative. Interestingly, a random review of cases coming before the Court suggests that most time and effort is spent focussing on perceived deficiencies in process, rather than the substantive decision. While procedural requirements are designed to support good decision-making, they are not an end in themselves, as the Act makes plain. A skewing of the sort that appears from the random sample may be said to sit most uncomfortably with the Act.

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[12] At 14.

The way in which various rights and obligations are expressed by Parliament is, of course, an important element in the quest for simplification in the law.[13] But the issue extends well beyond the way in which statute law is expressed, to the way in which both statute and common law is explained by the institutions who have the task of doing so. In a system that engages around 550,000 employers and 2.3 million employees,[14] imposes numerous rights, liabilities and obligations on multiple actors, and is designed to operate in large measure on the basis of voluntary compliance, it is surely crucial that the law is translated in a readily digestible and timely way.[15]

What about process? We are fortunate that our legislative framework is designed in a flexible way, conferring a broad discretion on the three employment institutions to adopt a range of fit-for-purpose practices and procedures to support the objectives of the legislation and which are suitable to each forum, and (distilled further) to each case which presents itself for determination.

In this regard, one of the key objectives of the Act is to facilitate early, efficient, practical and non-legalistic dispute resolution between the parties. The statutory emphasis is on building productive relationships, repairing them where possible. The statutory emphasis is not on promoting a parting of the ways on purely financial terms. Nor is the emphasis on protracted dispute resolution. The underlying premise of the Act is that relationships have the greatest chance of rehabilitation where matters are dealt with at the least formal level possible and as promptly as possible. Is this statutory objective being fully met?

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[13] "Legislation is central to our legal system. It is the dominant source of law. It has an essential and pervasive role in our national life… So the Commission is to advise on making the law as understandable and accessible as practicable and on making its expression and content as simple as possible" (Law Commission *Legislation and its Interpretation – Discussion and seminar papers* (NZLC PP8, 1998) at 1). See also Legislation Design and Advisory Committee "Legislation Guidelines: 2018 Edition" (March 2018) at 7–8; Ross Carter *Burrows and Carter Statute Law in New Zealand* (5th ed, LexisNexis, Wellington, 2015) at 117–119.

[14] Statistics New Zealand "New Zealand business demography statistics: At February 2019" (25 October 2019) <www.stats.govt.nz/information-releases/new-zealand-business-demography-statistics-at-february-2019>.

[15] Parliament of course has a role to play (Law Commission Legislation Manual – Structure and Style (NZLC R35, 1996) at 33–35), as do commentators, including academics. That makes it important for the Court to have the ability to express an early view on the impact of statutory amendments; or (for example) the impact of national disasters or pandemics on employer/employee rights and obligations. It might be thought that the unique statutory power conferred on both the Authority and the Court to make recommendations to an employer concerning the action that should be taken to prevent similar employment relationship problems occurring, would be a useful lever (Employment Relations Act 2000, s 123(1)(ca)). A review of the cases suggests that recommendations have been made in around 20 cases over the last 10 years.

It cannot seriously be doubted that, when enacting the Act, Parliament intended a new model of dispute resolution for employment matters. This was largely a response to concerns that the pre-existing model was unnecessarily clunky, legalistic and slow.[16] The new Act made it clear that disputes were best resolved between the parties themselves, at an early stage, and at the lowest level possible.[17] Mediation services were to be delivered flexibly by specialist mediators;[18] investigations were to be conducted by a new body (the Authority) in a non-technical, practical and expeditious way; and the Court's role was to deal with matters that could not otherwise be resolved or which, by their nature, were best dealt with in an adversarial (as opposed to investigative) forum. The Court of Appeal and the Supreme Court were required to have regard to the specialist jurisdiction when deciding any matters on appeal, and appeal rights were to be limited.[19]

All of this serves to emphasise the key point – that substance is intended to have greater weight than technicality in this branch of the law; early decisions are generally good decisions insofar as industrial stability and the preservation of working relationships are concerned; some cases are suitable for resolution at a lower level, some are not. The Act effectively prescribes a horses-for-courses approach.

Parliament subsequently enacted further amendments in 2004, designed to reinforce (some might say put in bright flashing lights) the underlying policy objectives of the legislation.[20] It may be said that the amendments reflected a degree of Parliamentary frustration. The Explanatory Note to the Employment Relations Law Reform Bill 2003 (92-1) said:[21]

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[16] Green Party representative Sue Bradford, during the first reading of the Employment Relations Bill in 2000 expressed the underlying intention this way: "One feature of the new bill which I am particularly impressed with is the move to begin the process of delegalising the Employment Tribunal system. Mediation will become the first port of call in trying to resolve disputes quickly and fairly, so that expensive lawyers and long delays will become a thing of the past. This will be of huge benefit to both workers and employers." (16 March 2000 582 NZPD 424).

[17] Employment Relations Act 2000, s 143.

[18] See also Ministry of Business, Innovation and Employment, above n 10, at [322], which notes a "consistent theme from stakeholders we spoke to when developing this issues paper, that Mediation Services is not currently seen as providing a low-level resolution service, but is viewed as a formal and adversarial process, generally involving lawyers and focussed on negotiating settlements."

[19] Those Courts have no jurisdiction to hear appeals on the Employment Court's construction of contracts: ss 214(1) and 214A(1). See also s 216.

[20] The amendments included limiting the Court's ability to entertain applications for judicial review of matters before the Authority (s 184(1A)) and to advise or direct the Authority on the exercise of its role, powers, jurisdiction or procedure (s 188(4)).

[21] (Emphasis added).

> 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 emphasis on the employment relationship is, I think, telling. It reinforces substance rather than process; practicalities rather than technicalities; the relationship rather than undue legalese; problem solving rather than problem creation. It is also telling that later amendments went further, requiring the Authority to deliver oral determinations except in limited circumstances, namely when it was impractical to do so. Parliament could not have been clearer – giving prompt answers to questions, without great legal or technical fanfare, was to be seen consistently with the legislation's underlying objectives. Is that objective being met? A survey of Authority determinations suggests that prior to the amendments approximately 99 per cent were written rather than oral; since the amendments came into effect approximately 92 per cent are written rather than oral (so a seven per cent reduction).

I think it is fair to say that challenge rights have themselves given rise to a number of challenges in terms of the quest for simplicity.[22] As the explanatory note of the reported version of the Bill reflects, allowing almost unrestricted de novo challenge rights to a decision of the Authority was prompted by concerns raised by, among other groups, lawyers.[23] The outcome was that a party could have a fresh hearing in the Court, after (generally) a mediation, an investigation and reasoned decision of the Authority, with further (limited) rights of appeal thereafter to the Court of Appeal and Supreme Court.

All of this can be contrasted to, for example, the Disputes Tribunal model which shares a number of comparable policy imperatives to the Authority in terms of its design (namely

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[22] As have the availability of various legal pathways, some of which are forked (alternative claims in the Human Rights Review Tribunal) and some of which are parallel (proceedings in the High Court in relation to the same subject matter). See Employment Relations Act 2000, s 112; Human Rights Act 1993, s 79A. See also *Diamond Laser Medispa Taupo Ltd v The Human Rights Review Tribunal* [2019] NZHC 2809; *FMV v TZB* [2019] NZCA 282, [2019] NZAR 1385.

[23] The first version of the Bill allowed de novo challenges but only at the discretion of the Court and depending on a satisfactory good faith report, which had to be obtained prior to the challenge proceeding (Employment Relations Bill 2000 (8-1), cl 193). The Select Committee changed the wording to make it a right. From the explanatory note of the Select Committee, it is apparent that a number of submitters thought that de novo hearings would create added costs and delay as matters would be relitigated. One union suggested that the right to de novo hearings would encourage large employers to challenge Authority decisions (Employment Relations Bill and Related Petitions 2000 (8-2) (Select Committee report) at 38-39).

providing speedy, non-technical, answers to disputes).[24] The differences in approach to achieving what is ultimately a similar goal gives pause for thought. While lawyers are permitted to appear in the Authority, they are not permitted to appear in the Tribunal.[25] Proceedings in the Disputes Tribunal are recorded;[26] investigation meetings in the Authority are not. Nor is the Authority required to detail the evidence it has heard/received or the submissions that have been made.

This latter combination (of practice and of law) has consequences in terms of procedural simplicity that continue to cause issues – how is an error of fact or law established on a non-de novo challenge when there is no record of proceedings and statutory limitations on the requirement for detailed determinations? Experience suggests that the fall-back option is a more wide-ranging (and therefore expensive) de novo challenge.

Having squeezed through what some might regard as the eye of the litigation needle, and obtained a favourable judgment, is the complexity over? Probably not. It is not uncommon for a litigant to then face a new round of difficulties, this time involving enforcement mechanisms.[27] While the difficulties of enforcement are well known anecdotally within the employment jurisdiction in New Zealand, I am not aware of any studies as to their impact on access to justice. If the situation mirrors that of the United Kingdom, the outlook is grim. In *R (on the application of Unison) v Lord Chancellor*, the Supreme Court had this to say:[28]

> 36. Many [Employment Tribunal] awards go unmet, even if enforcement proceedings are taken. A study carried out by the Department of Business, Innovation and Skills, shortly before the introduction of fees, found that *only 53% of claimants who were successful before the [Employment Tribunal] were paid even part of the award prior to taking enforcement action* ("Payment of Tribunal Awards", 2013). *Even after enforcement action*, only 49% of claimants were paid in full, with a further 16% being paid in part, and *35% receiving no money at all*.

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[24] Disputes Tribunal Act 1988, s 18(6). See *Patterson v District Court, Hutt Valley* [2020] NZHC 259 for a recent discussion of the role of the Tribunal and the underlying purposes of its structure, namely to attempt to minimise the cost of resolving disputes for the parties without legal formalities or other legal requirements (at [16]–[23]).

[25] Section 38. Appeals are only available to the District Court where the proceedings/inquiry were conducted "In a manner that was unfair to the appellant and prejudicially affected the result of the proceedings" (s 50). There is a right to judicial review, including on the ground of error of law, but this is also limited.

[26] Section 51(2).

[27] See Mark Perkins "The Jurisdictional Divide – Cross-Jurisdiction Enforcement of Monetary Claims" (paper presented to Employment Law Conference, Auckland, October 2016); <www.employmentcourt.govt.nz/about/papers-and-speeches>. For a recent example of the difficulties a litigant may face see *Baker v Hauraki Rail Trail Ltd* [2020] NZEmpC 148 at [5].

[28] *R (on the application of Unison) v Lord Chancellor* [2017] UKSC 51, [2017] 3 WLR 409 (emphasis added).

The Court's processes have been built up over time but largely borrow from those in the High Court, including pre-trial conferencing; interlocutories; the preparation and exchange of written briefs of evidence; and the reading of those briefs at the hearing. Consideration is being given to revising the High Court and District Court Rules, with proposals ranging from dispensing with briefs; triaging cases; short-form hearings; limited disclosure; and rigorous case management.[29] The Rules Committee has initiated its review on the express basis that litigation in the Courts has become too expensive for all but the very few – the underlying text appears to be that something needs to be done, and that may include steps that might (to the traditionalist lawyer at least) seem alarmingly revolutionary.

I think that it is timely to consider these sorts of issues in terms of the way litigation is dealt with in our jurisdiction. It is notoriously well known that litigation in the Authority and the Court has become too expensive for all but the very few, or the very brave. It is not uncommon for Judges to be told at the first case management conference that one or other of the parties has run out of money and are now representing themselves, having spent their limited financial resources on legal advice and assistance in mediation and the Authority. Arguably, at the stage it would be most helpful, legal support runs dry.[30]

Revolutionary answers may indeed be what is required – the good news is that Parliament has conferred considerable scope on Mediation Services, the Authority and the Court to manage their own procedures and to be innovative, flexible and thoughtful in their design and application.[31]

It seems to me that, in considering what answers might be found, the key questions in terms of our practices and procedures are these – what are we requiring parties to do in the full range and diversity of cases at each stage of the process and why? Does what we are doing in the full range of cases coming before us add sufficient value to the overall goal of delivering a just outcome in each particular individual case?

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[29] See Courts of New Zealand "Improving access to civil justice" (2020) <www.courtsofnz.govt.nz/about-the-judiciary/rules-committee/access-to-civil-justice-consultation/>.

[30] For a broader discussion of the issues, in relation to litigants in person, see Toy-Cronin, above n 2, at 242–246.

[31] See Employment Relations Act 2000, ss 145, 147, 157, 160, 188, 189 and 219.

The reality is that some employment cases are straightforward – some are not; some will (if they go to a hearing) require a significant amount of contested evidence – some will largely centre on issues of law or narrow issues of fact. Parties sometimes wish to pursue issues which have little or no relevance to the matters for determination. The point is that not all cases will warrant the full weight of available procedural bells and whistles. What is warranted cannot be whittled down to merely considering what makes financial sense – or we risk undermining the key focus in the Act, namely the employment *relationship*.

And, as the Act makes clear, cases should be pitched at the right level and at the right time. That is reflected in provisions enabling the Authority, on application or on its own motion, to remove matters to the Court.[32] Recent litigation in relation to issues arising out COVID-19 may be said to illustrate the point. It goes without saying that Mediators, Authority Members and Judges have an important role to play in steering a proportionate; one-size-does-not-fit-all path through to the end point. So too do the representatives.

You might be forgiven for thinking that I have developed a Pollyanna-ish view that all complexity can be stripped away from employment law and practice, leaving a nirvana for the parties to freely frolic in. I am not suggesting that complexity has no place in our jurisdiction – plainly it does. And there will always be occasions where the degree of complexity gives rise to financial costs which are proportionate to the benefits (including broader, non-financial, benefits) offered by the outcome (*Terranova* might be regarded as a good example).[33]

However, the point is to prune out as much complexity as possible; to make an informed assessment as to how many bells and whistles need to be rung and blown in each particular case and at each particular stage, keeping the end goal squarely in mind. Otherwise we will all lose sight of the wood and get lost in the trees.

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[32] Employment Relations Act 2000, s 177. And the Court's power to refer questions of law to the Court of Appeal (s 211).

[33] See *Terranova Homes and Care Ltd v Service and Foodworkers Union Nga Ringa Tota Inc* [2014] NZSC 196, [2015] 2 NZLR 437). Contrast the *Matsuoka* litigation, which involved 52 interlocutory applications, described by successive courts as an enormous fishing expedition for an ulterior purpose. In such cases the successful party's win may ultimately have a decidedly hollow ring, the fruits of their success vastly exceeded by the cost of achieving it. See also *Hally Labels Ltd v Powell* [2015] NZEmpC 146 at [14] where neither party received any monetary remedies and accrued costs in excess of $500,000; *Nisha v LSG Sky Chefs New Zealand Ltd (No 2)* [2018] ERNZ 108, where the proceedings were so lengthy that a significant sum was awarded in costs on determining costs.

Or, to put it in a more lyrical way:

> Simplicity is making the journey of this life with just baggage enough.
> (Charles Wagner)