

Barriers to participation

What's in the way of resolving workplace problems?

BY **ROBIN ARTHUR**

BARRIERS TO PURSUING EMPLOYMENT CLAIMS WERE under scrutiny at a recent symposium hosted in Auckland by AUT's Work Research Institute, held with the support of the Employment Relations Authority and the Employment Court.

The gathering included academics, lawyers, union and business representatives, government officials, community sector workers, employment mediators, Authority members and Employment Court judges.

Chief Employment Court Judge Christina Inglis opened the symposium with remarks reflecting on concepts in the Employment Relations Act 2000 and the intention to support employment relationships by resolving disputes through Employment Mediation Services, the Authority and the Court. However she noted that while this "sounds like nirvana for employees and employers alike" there were questions about whether there was "a pool or pools of people who never get near the door" and, if so, what discouraged them. Access to justice was the focus of much judicial and academic attention across jurisdictions, including the recent report of the Justice Project in Australia. Chief Judge Inglis noted those access concerns were not limited to the poor:

"What, for example, of people (employees and employers) who are not in poverty but who still cannot afford the high fees which inevitably accumulate when pursuing or responding to employment disputes to mediation and beyond? And what of other potential barriers, including the spectre of name publication, information deficits, vulnerability, and other non-financial impediments?"

Employment mediator **Peter Franks** provided an historical overview of the dispute resolution provisions in employment legislation. People who were marginalised in the labour market were probably the same as those who did not know about and did not use the employment dispute resolution system, he said. For employees, they were low-paid and disproportionately likely to be young people, women, people without formal qualifications, and Māori or Pasifika. They were more likely to work in the hospitality and retail industries. For employers, they were likely to be small businesses



▲ The Symposium organising committee (from left to right): Employment Relations Authority Chief James Crichton, Employment Court Chief Judge Christina Inglis, Authority member Robin Arthur and AUT Professor of Work Erling Rasmussen.

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which operate on low margins and employ few staff.

Another barrier to participation was information. Employment law is complex and some people simply had no sense of how the legal system works. One measure to improve access would be to expand the number of competent representatives who do not charge fees. Mr Franks called for increased funding to community law centres so this service is available across the country for employment mediation and for litigation of cases which have a reasonable prospect of success.

Citizens Advice Bureau national policy adviser **Jayne McKendry** reported increasing inquiries to CAB's 83 locations nationwide from

people seeking information about dealing with workplace issues. Bureau advisers had identified the following reasons why many employees hesitated to question their employer:

- Dependence on the employer for the job, income and, in many cases, support for visa applications;
- Uncertainty as to their rights;
- Not knowing how to resolve issues;
- Being ignored when they raised issues; and
- Knowing what to do but not having the energy or capacity to stick with the often long process of resolving a complaint with an employer.

Migrant workers' experiences were described by **Olivier Christeller**, from FIRST Union and **Mikee Santos** of Migrante Aotearoa, a Filipino workers' network. They said exploitation of migrant workers was compounded by normalisation of unlawful practices in some communities, including paying for jobs needed to support residency applications. There was also widespread scepticism about the prospect of success through the dispute resolution system where employers refused to respond or used "phoenixing" of companies to avoid liabilities when legal action against them was successful.

The complexity of problems experienced by some people, which incidentally include employment issues, was movingly explained in an anonymised case study described by **Darryn Aitchison** of the Auckland Community Law Centre. He too called for greater support for law centres and other community sector organisations who could more readily reach people needing advice or advocacy to resolve their issues.

Recorded interviews with Australian Fair Work Commissioner Tim Lee and Ireland's Workplace Relations Commission director

general Oonagh Buckley shared their experiences in addressing barriers to participation.

The employment relationship problems that reached the stage of mediation were described as the tip of the iceberg by AUT Professor of Work **Erling Rasmussen**. The scale of those issues was masked by other 'exit' options exercised by workers, apparent in the level of staff turnover in some sectors or workplaces, and a "psychological" exit where people stayed in their job but were not engaged with their work. Available data on employer experiences suggested more than 20% required management action on employment relationship problems each year. However, survey information was lacking on employee experiences. He called for Statistics New Zealand and the Ministry of Business, Innovation and Employment to gather that information so the scale of problems could be accurately assessed and properly addressed.

A lively discussion of the issues raised by earlier speakers began with comments from a panel comprising distinguished academic and politician **Professor Margaret Wilson**, Government Centre for Dispute Resolution director **Caroline Holden**, Business New Zealand policy manager **Paul Mackay** and New Zealand Law Society Employment Law Committee convenor **Maria Dew**. A wide-ranging question and answer session canvassed ideas for further discussion or change that included:

- Better funding for CABs, community law centres and unions to improving access to advice and advocacy.
- Improving support for small business in complying with the law and responding to problems.
- Encouraging government agencies to survey employee experiences to provide better information to address workplace issues.
- Wider use of telephone, internet and other technologies for online resolution of disputes.
- Adopting a general 'no costs' regime in the Authority similar to Australia, Ireland and Britain with legal costs against unsuccessful claimants only allowed where their case was established to have been vexatious or highly unreasonable.
- Anonymising party names in Authority determinations so parties were not discouraged from pursuing issues due to a fear of publicity or 'blacklisting' as a result of a Google search.

Symposium papers will soon be publicly available online through the Work Institute website: www.workresearch.aut.ac.nz. The symposium organisers hope analysis and discussion about barriers to participation can continue at a further gathering, open to all interested people, sometime next year. ■

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