Barriers to participation: what would make a difference, would it work?
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Reprising some earlier discussion about barriers in the institutions

by Robin Arthur, Member of the Employment Relations Authority

My contribution this morning is to briefly recap some of the concerns and ideas touched on at last year's symposium, about barriers to participation in the three formal stages of the statutory dispute resolution system under the Employment Relations Act – in mediation; Authority investigations and Employment Court proceedings.

From that wide ranging discussion I'll mention three themes under the headings of firstly, knowledge and personal resources, secondly, public resources and thirdly, the fear or reality of negative consequences.

- **Knowledge and personal resources**

The first theme concerns parties' **knowledge** – what they know about what they can and cannot do; their **resources and personal capacity** to pursue or defend a case (which is not just about money but also the other burdens or demands of their life that hamper the capacity to take part), and their **confidence** in themselves and the system – reflected by the reference in the Act to the **inherent inequality** of workplace relations. One example is the difficulties faced by visa-dependent migrant workers who must often overcome barriers of culture and language to raise and pursue resolution of their employment problems.

- **Public resources**

The second theme concerns publicly-available resources – that is the limits of the advice and assistance available to **workers** about their rights and how to pursue them and for **employers**, particularly those in small business and new to being an employer, about how to participate appropriately when problems are raised and need to be addressed in mediation or beyond in the Authority and the Court.

This resources issue also relates to how much of a barrier is created by what is needed, or perceived to be needed, to take **part** in those formal stages – and the questions become:

- whether those barriers can be adequately addressed by giving people information about what they need to know and to do it themselves (as the CAB network, for instance, now strives to do in some cases), *or*
- whether (as the Bureaux's speaker at last year's symposium put it), "placing too much reliance on employees self-advocating for their rights will have limited success", *and*
- whether more should be done to significantly increase what low-cost or free representation is available (such as by, for example, better resourcing of Community Law Centres and unions)?

And that leads to the question of whether the emphasis on **representation**, the supposed need for it at the mediation and Authority levels, has *itself* become a barrier to participation –

meaning some parties believe that because they cannot afford a representative (whether a lawyer or other non-regulated advocate) there is no point in trying to pursue or defend their case?

Would that barrier, perceived or real, be reduced if parties had to attend mediation and Authority investigations without representatives present, with the mediators and the Authority members (as the object of the Act requires them to) being alive to and taking care to *address* any inherent inequalities between the parties taking part in those processes?

- **The fear or reality of consequences**

The third theme concerns the fear or the reality of negative consequences that might flow from pursuing a case. The two examples concern the effect of publication of the **names of parties** in Authority determinations and the **costs** regime applied in the Authority.

These examples are important not just because of their potential effect in relation to the *hundreds* of cases determined by the Authority each year but also because of the question of whether changing those present practices might then affect the rate and range of settlements reached in the *thousands* of cases resolved earlier in *mediation* each year. I want to describe both examples in a way that relates to the *purpose* of today's discussions – not just to further detail the *existence* of barriers but to *challenge ourselves* about whether any suggested changes to remove those barriers would make a *positive* difference. Would they work, without unintended *negative* consequences?

This **first example** concerns the effect of including the **names of parties** in *most* of Authority determinations, that are then published on the Employment Law Database. Only limited exceptions to that 'open justice' presumption are presently permitted. Employers can easily check the database to see whether a job applicant has ever previously been the subject of an Authority determination. The Chief of the Authority has reported getting letters from former employees, whose cases have been determined sometimes years earlier, who say publication of their names has meant they can't get another job. And, anecdotally, some representatives have also reported they know client human resource managers and recruitment agencies routinely use such a database search as part of evaluating candidates.

Ireland's Workplace Relations Commission changed, four years ago, to a presumption of not publishing party names in its determinations and reported the move was widely supported by worker and employer representatives.

Thinking about today's emphasis on changes that would make a difference, we collectively would need to be clear about how not routinely publishing parties' names might affect how other parts of the system work. While some workers might then feel more confident about beginning a case, might some employers also then decide not to settle in mediation because they could continue to defend the matter in what would then be the entirely confidential process of an Authority investigation, with no fear of ending up on the public record? But should employers' names still be published in determinations about successful *penalty* claims, by Labour Inspectors and employees, because publication is part of a deterrence factor that helps enforce employment standards?

The **second example** regarding **costs** in the Authority also highlights that question about the potential effect on settlement rates in mediation. Why don't we have the same approach as the equivalent tribunals in Australia, Britain and Ireland who have a "no-costs" regime, except for proven frivolous or highly unreasonable cases? If no fear of a costs award in the Authority meant more workers were confident to begin their case, and felt less pressure to compromise and settle in mediation, would many more then carry on to the Authority *or* would such a change simply boost the settlement amounts employers offered in mediation (to avoid the transactional cost of having to go on to the next stage)?

But could such a 'no costs' regime also reduce the ability of workers to get representation or, if represented, reduce the value of a successful outcome? If a worker succeeds but the employer does not have to contribute to her costs for representation, all those costs would have to be paid from her awards of lost wages or distress compensation. Would that matter if there were measures to limit or *remove* the participation of representatives anyway or there was a *boost* to *free* representation? The point here is that any change cannot be seen in isolation. Its effects on how the rest of the system operates, and the overall justice of outcomes at every stage, need to be considered as a whole.

A last point concerns the ability to make changes – in my view no legislative overhaul is needed to make changes such as those canvassed in these two examples. The existing statutory discretions granted to Mediation Services and the Authority already provide considerable scope and flexibility to make such changes, if the case for them is compelling. It would require changes of their own **policy** in how they do things, and possibly some Government decisions about resources to support them, but there is room to address and remove some identified barriers without having to change the law itself.