

Barriers to participation: what would make a difference & would it work?

Jayne McKendry
National Advisor Policy and Operations

Introduction and recap from last year's symposium

For those of you who don't know the CAB well, we are effectively a federation, with 83 CABs throughout NZ, joined through a common constitution, shared aims and values, model of service delivery and quality assurance system. CABs all use an IT infrastructure that is developed and maintained by the national office. This provides a knowledgebase of information and resources direct to the public and it supports our volunteers working with clients including being used to record all client interactions.

Questions about rights at work and breaches of minimum entitlements have been in the top ten categories of enquiry to CABs for at least the past 7 years, moving from the 8th most common enquiry in 2012 to the 3rd in 2017 and 2018, with over 15,000 enquiries last year.

When someone comes to the CAB because they have a problem in their employment, we help them to understand their rights and entitlements, clarify their options for next steps including accessing other services if needed, and if they need it, we help them to take action, as this example shows:

Our client has just resigned. He does not have an employment agreement and has not been getting pay-slips. His employer was very angry at being given notice and told the client to 'Just go'.. Our client wants to know how can he get his pay-slips, and the pay he is owed?

We helped the client write a letter to his employer setting out his rights and the employers legal obligations. Our client returned an hour later telling us that his employer had texted him back straight away, said that he will post all his payslips to him and will make sure he gets his holiday pay.

At last year's symposium, I shared some of our clients' experiences, using these to identify some of the reasons why people don't use employment dispute resolution processes. These included:

- Being unsure what their rights actually are.
- Being dependent on the income derived from their employment and unwilling to 'rock the boat' in case they lose their job.
- Being dependent on their employment for their right to stay in New Zealand

- Not knowing how to resolve employment issues, or not being able to get a response from their employer.
- Knowing the steps to take but lacking the energy, ability or support to stick with the long haul that is often involved in pursuing a dispute.

What has happened in our world, since the last symposium?

As I noted earlier, the number of people seeking information, advice and help from CABs about problems at work continues to rise. You could argue this is a good thing.

At a recent forum hosted by the Government Centre for Dispute Resolution, it was noted that New Zealand currently invests most time and energy in resolution services, less in prevention and least of all in providing information. It was also noted that a preferred future state would be to learn from the insights available if we look into why people currently need to use resolution services, and to use these insights to redirect our energy to information and prevention activities, thus reducing the need for resolution services at all.

The key contribution the CAB currently makes is in both information and prevention, including helping people, employers and employees, to navigate the dispute resolution options available.

In January this year, we did an analysis of employment dispute enquiries made to CABs during the 18 months from 1 July 2017 to 31 December 2018. This revealed 5 key aspects of the employment relationship that cause disputes for our clients: unfair disciplinary processes, breaches of health and safety rights including bullying and harassment, disputes about pay including at the end of the employment relationship, and disputes about leave entitlements.

Time is short, so here are just three examples, to give you a sample of our client's experiences:

Our client is waiting for her final pay. She is in frequent contact with her ex-employer, who responds by giving a date that the pay will be provided on, but the payment never arrives. When the client threatened to take her ex-employer to court, the ex-employer said she will pay her within the next two days. However, the payment still has not been received and when the client tried to get in touch with her ex-employer, the phone was unanswered. What should she do?

One about disciplinary processes

Client was called into a meeting where he was provided with a Performance Improvement Plan. He has been working for this employer for a number of years and at no point prior to this meeting was any issue raised with the client about his work.

His manager has told him that failure to meet the requirements of the Performance Improvement Plan within 3 months may result in termination of his employment.

And one about leave entitlements

Client has had several days off work because of sickness. She has been paid since returning to work but this didn't include the days she had off sick. When she talked to her employer about this, she was told the business is in financial difficulty so he can't pay her sick leave. Our client knows this isn't fair, but how can she get what is owed to her?

What would make a difference for these people?

We all know that employers have a responsibility to ensure that any action taken that affects an employee is done for good reason, and that they use fair processes when doing so.

The experiences of the people who come to CABs suggests that these behaviours are lacking in many workplaces throughout New Zealand.

It seems that many employers are unaware, unable, or unwilling to meet these responsibilities. Employers are frequently applying processes and behaving in a manner which breaches their employee's rights, causing disputes in the workplace. Even when the original issue is between two employees, for example a situation of bullying between employees, disputes often occur as a result of failures on the part of the employer to respond appropriately.

The focus of this symposium is what would make a difference & would it work?

We have some ideas, based on what we see our client's experiencing. Our ideas are about what could be done to both reduce the number of employment disputes, and to make it easier for people to resolve any disputes they *do* have.

These ideas start at the information end of the continuum, and move through prevention to resolution.

1. **Employees need easy access to free, independent, information, advice and support to counteract the inherent power imbalance in the employment relationship.** Bear in mind that some people distrust, even fear, government agencies and processes, so the non-government sector and unions do play a vital role in this area. So we need to make sure that community based services are adequately resourced and promoted, and are enabled to develop services that reach all populations of workers.

- 2. There is a critical need for easily accessible, one-to-one support services (advocacy) that include the capability and capacity to accompany employees to meetings with their employer, to help negotiate resolution in a timely way.** This could include being available to help the employee understand the process, to act as a witness to the discussion at the meeting, or to help the employee to present their arguments and ensure the employer meets their obligations. This type of support has the potential to prevent some workplace problems becoming employment disputes.

A range of services are available now that help meet this need but capacity and capability issues limit reach, and cost, eligibility or membership criteria can be a barrier.

Cost is definitely a barrier our clients mention. Community Law Centres and CABs help to fill this gap, however neither of these solutions are available full-time or everywhere there is need. The CAB cannot provide legal representation, nor give legal advice in very complex situations. Community Law Centres are only available to those who meet their income threshold criteria and have a limited role in providing legal representation for individual clients. So there is clearly a gap here.

- 3. We need to diversify the ways employers are assisted to meet their employment obligations.** As I noted at last year's symposium, every employer interacts with Inland Revenue and ACC. Employers may also deal with agencies like WorkSafe NZ, the Companies Office or the Charities Services, the Ministry of Social Development (MSD) and Immigration NZ. Could an integrated approach be taken so that the various interactions employers have with government agencies are used more effectively to reinforce, and enforce, employees' minimum employment rights?

Is it feasible to leverage employers' interactions with government agencies to provide prompts for action that support employees' rights, or education about employers' obligations, or ways to assess their compliance with minimum employment standards?

One of the issues that many people come to the CAB about is final pay. This might not seem like a big deal, but it can mean the difference between paying the rent and putting food on the table this week, or not. And that can make the difference between continuing to keep one's head above the debt and poverty line, or not. So a very simple solution could be a no-cost service that helps both employers and employees calculate final pay including holiday pay entitlements. Something like the employment agreement builder perhaps.

- 4. Finally, we need to make it easier for employees (and third parties) to report a breach of employment rights,** anonymously if they wish and with protection from any negative consequences of holding their employer to account.

At last year's symposium, we heard about less complex, no-cost models for resolving employment disputes that operate in Australia and in Ireland. It would benefit all parties to explore similar processes for New Zealand. Important features of such a system would be that it is simple to access, widely available, has capacity to provide assistance in a timely way, can operate successfully without the need for legal representation, and can exert authority over employers who are breaching employee's rights. Our current services and institutions all contribute to meeting these needs to some extent but in a manner that is complex for consumers to access and navigate, time consuming, and very expensive both financially and personally.

Thank you.