Barriers to Participation in the Employment Institutions Symposium

Auckland, 13 September 2018

Introductory Remarks of
Chief Judge Christina Inglis[1]

E ngā mana
E ngā reo
Rau rangatira mā
Tēnā koutou, tēnā koutou, tēnā koutou katoa

Welcome to everyone, distinguished guests and presenters.

Thank you to Professor Erling Rasmussen (Professor of Work and Employment at the Auckland University of Technology and leader of the Employment Relations Research Group with the New Zealand Work Research Institute) and Robin Arthur (widely respected member of the Employment Relations Authority), who have formed the hard-working core of the organising committee. And thank you to the Auckland University of Technology's Work Research Institute for hosting this important event - "Barriers to Participation".

The Employment Relations Act 2000 has proved to be an enduring piece of legislative work (and we are lucky to have the lead architect of the legislation, the Hon Margaret Wilson, present with us today). The centrality of the concept of "relationship" is reflected in the short title to the Act and is underpinned by various statutory provisions, including the objects of Part 10 which establishes the three institutions - Mediation Services, the Employment Relations Authority and the Employment Court - and describes the work they are each designed to do.

The institutional focus is on supporting successful employment relationships and resolving disputes via collaboration, information sharing and access to timely expert assistance. Speed and flexibility are key concepts, together with a merits-based approach, all of which sounds like nirvana for employees and employers alike. Is it? That no doubt depends, at least in part, on who is actually accessing the employment

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1 Chief Judge of the Employment Court. The views expressed are my own personal views.

institutions and, perhaps more importantly, who is not. And if there is a pool or pools of people who never get near the door, what discourages them from doing so?

Why does all of this matter? I suggest that it matters a great deal if the underlying objectives of the empowering legislation are to be substantively met. More generally it matters for fundamental reasons relating to access to justice, and the sort of concerns that have been the focus of much judicial and academic attention across jurisdictions. As Lord Bingham observed some time ago in his seminal paper "The Rule of Law":[2]

> ⋯ means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve. It would seem to be an obvious corollary of the principle that everyone is bound by and entitled to the benefit of the law that people should be able, in the last resort, to go to court to have their rights and liabilities determined. This is not a rule directed against arbitration and more informal means of dispute resolution, all of which, properly resorted to and fairly conducted, have a supremely important contribution to make to the rule of law. Nor is it a rule requiring every claim or defence, however spurious and lacking in merit, to be guaranteed full access to the process of the law. What it does is recognise the *right of unimpeded* access to a court as a basic right ... and in my view comprised within the principle of the rule of law. If that is accepted, then the question must be faced: how is the poor man or woman to be enabled to assert his or her rights at law?
> (my emphasis)

I respectfully wonder whether the reference to poverty might not be broadened out. 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?

Assumptions are a dangerous thing and I do not have the answers. This symposium presents an invaluable opportunity to hear from a range of people with a deep understanding of what motivates, or disincentivises, people from accessing the employment institutions to assert or defend their rights and interests. It provides a forum for informed discussion and debate and will provide a platform for further analysis and work.

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[2] Lord Bingham "The Rule of Law" 66 (1) Cambridge L J 67 (2007) at 77; see also Tom Bingham *Lives of the Law: Selected Essays and Speeches: 2000-2010* (Oxford University Press, London, 2011) at 11.

These issues are not, of course new, and are attracting attention elsewhere. Some of you may be aware of the Justice Project in Australia, chaired by the Hon French AC, former Chief Justice of the High Court of Australia.[3] The Project team has just released its report – supported and overseen by eminent lawyers, jurists and academics. The report is long but well worth reading.

Finally, I suggest that the observations in a recent UK Supreme Court decision involving increased fees in the employment institutions may provide a useful launching pad for today's discussions. There it was said:[4]

> [T]he value to society of the right of access to the courts is not confined to cases in which the courts decide questions of general importance. *People and businesses need to know, on the one hand, that they will be able to enforce their rights if they have to do so, and, on the other hand, that if they fail to meet their obligations, there is likely to be a remedy against them. It is that knowledge which underpins everyday economic and social relations.* That is so, notwithstanding that judicial enforcement of the law is not usually necessary, and notwithstanding that the resolution of disputes by other methods is often desirable.
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> When Parliament passes laws creating employment rights, for example, it does so not merely in order to confer benefits on individual employees, but because it has decided that it is in the public interest that those rights should be given effect. It does not envisage that every case of a breach of those rights will result in a claim before an ET [Employment Tribunal]. *But the possibility of claims being brought by employees whose rights are infringed must exist, if employment relationships are to be based on respect for those rights. Equally, although it is often desirable that claims arising out of alleged breaches of employment rights should be resolved by negotiation or mediation, those procedures can only work fairly and properly if they are backed up by the knowledge on both sides that a fair and just system of adjudication will be available if they fail. Otherwise, the party in the stronger bargaining position will always prevail.* It is thus the claims which are brought before an Employment Tribunal which enable legislation to have the deterrent and other effects which Parliament intended, provide authoritative guidance as to its meaning and application, and underpin alternative methods of dispute resolution.
> (my emphasis)

Enjoy the symposium.

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[3] Law Council of Australia *The Justice Project Final Report* (August 2018) <www.lawcouncil.asn.au/justice-project/final-report>.

[4] *Unison v Lord Chancellor* [2017] UKSC 51, [2017] IRLR 911 at [71]-[72].