Barriers to participation in employment dispute resolution: themes & issues

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The thematic overview below is based on notes taken during discussion and questions.

Barriers to participation: themes, issues and options for solution

- Who is missing out & what are the barriers?
- Information, knowledge & capabilities
- Costs of representation and resolution
- Mediation Service
- Confidentiality
- Employment Relations Authority
- International inspiration

Who is missing out & what are the barriers?

- We need to know more about the characteristics of employees and employers pursuing or not pursuing employment relationship problems (ERP).
  - While youth, people without formal qualifications, women, Maori and Pasifika and other vulnerable workers in the hospitality and retail sectors were identified as experiencing disadvantage, there was a considerable emphasis on migrants.
  - The dependence on employers for income and power imbalance regarding the role of visa applications, fear of retribution for raising issues, a lack of capacity, resilience and the stress associated with entering into the process of complaint and ERP resolution were identified as significant barriers.
- To establish & address why some people are reluctant to pursue resolution of their employment relationship problems, we need to know:

  - what are the key types of workplace ERP and who are the parties?
  - what is the degree of exit or resolution?
  - what are the factors that influence employee exit and the process of exiting?
  - why are some parties reluctant to pursue their rights?
  - more about the range of sectors and workplaces where employees exit.

Options for solution

  - Rebalance 'voice' versus 'exit' options
  - Identify roles unions and employers' associations could play
  - Investigate whether 'business intelligence data' currently collected by Government agencies can be used to establish what types of disputes are arising

- o Investigate whether a survey of employees could be implemented akin to MBIE's National Employment Survey of employers about ERP, for example, by MBIE or Statistics New Zealand.

Information, knowledge & capabilities

Barriers that prevent access to early informal employment problem resolution and dispute resolution through the Mediation Services the Employment Relations Authority and the Employment Court were related to access and understanding of information as well as advocacy and support. The system is complex, locating and interpreting information were identified as barriers.

- o New technology can enhance information, but it can also be a barrier because
  - Many people would prefer phone or face-to-face contact
  - IT literacy, access to devices, connection and language barriers were obstacles to participation
- o Literacy and language barriers were identified for women, youth, people without formal qualifications, Maori Pasifika and migrants
- o People who lack knowledge of their rights seek help from CAB and community law centres
- o Many SME employers have difficulty in understanding & navigating system

Options for Solution

- Community providers such as Citizens Advice and Bureau and Community Law play an important role at the level of inquiry, triaging & education of ERP
  - o is it possible to have a 'one-stop' shop at the community level?
  - o how can we provide better community services for delivery of information, public education and advocacy?
  - o can we increase and explore funding options for community level needs assessment & triaging?
  - o how might we enhance collaboration between community groups?
  - o how can we improve information, research following inquiries & advice at community level?
- Outreach from the legal community can reduce barriers
  - o Provision of 'Pro-bono' work by lawyers was raised several times but it is was also acknowledged as ineffective if information about services had not been disseminated effectively
  - o Gateways for access to services includes referrals from: health professionals GP's social workers, unions, schools, hospitals, and lawyers working alongside mediation services, employment court and the bankruptcy court
  - o It was noted NGOs, community organisations and churches require resources because they hear the problems first
  - o Timely intervention was considered important because early intervention required less intensive assistance and may prevent problem escalation

- Ideas for public education regarding the complexity and training about how to navigate the system and enhance party's knowledge & capabilities, included:
    o embedding knowledge about employee rights through community-based information & training programs
    o provision of support for unrepresented litigants and those with mental health issues
    o free, confidential advice to both employees and (small) employers because "some people know what their rights are but do not know how to settle their dispute"
    o development of training packages about processes designed for SMEs
    o research to establish the extent to which a range of literacies (IT, languages, reading writing and numeracy) affect interpretation and understanding of rights.

Costs of representation and resolution

- Workplace settlements are may be least costly, but we lack evidence to fully understand what costs are involved in disputes settled at the workplace level. The Irish and Australian systems have a no cost system apart from in vexatious or highly unreasonable cases.
    o The Irish example of a WRC identified improvements for one stop shop; with better IT; better complaints systems; and a single application form had a positive impact on complexity of systems
    o No cost = Reduced costs for everybody
 - The Australian example focused on triage processes where services included spending time applicants often resolving the matters at the preliminary triage stage

Options for solution - investigation into costs of representation and resolution

- Questions included:
    o could we enhance parties' capabilities to proceed without having legal representation?
    o can community advice, 'pro-bono' work, education programs facilitate better access?
    o how can we support vulnerable communities and migrant New Zealanders?
    o is there a need for research about modern slavery?
    o how are we preparing for new labour for example - 20,000 builders arriving in NZ?

Mediation Services

- Generally, there were very positive comments about the Mediation Service dealing with many cases in relatively informal settings & within reasonable timeframes. Discussion focussed on:
    o satisfaction surveys providing positive feedback from customers, but little was known about the substance of disputes, agreements reached, preliminary and post mediation processes and experiences
    o private workplace settlements being 'signed off' by the Mediation Service

- o whether agencies other than MBIE could play a bigger role
- o whether or not it was appropriate for the Labour Inspectorate to take a more pro-active role in bullying cases at the level of the workplace
- o the belief that 90 % of ERP cases were filtered out at mediation
- The lack of empirical evidence of barriers to mediation services was repeatedly acknowledged and legal costs were perceived as a barrier, but we also need to research:
  - o who does not access mediation and why not?
  - o the key barriers & how can they be addressed?
  - o whether diversity of mediators & mediation processes could reduce barriers?
  - o the role of confidentiality in exit settlements?
  - o whether increased funding for free competent representatives would make a difference to access?
  - o whether med /arb could be straight forward if implemented on apps such as Zoom, skype phone or online?
  - o whether it would reduce access barriers if the 15 dispute resolution schemes currently in place could be integrated, streamlined and implemented with a best practise scheme across policy domains?

Confidentiality

Confidentiality is a core principle of mediation. It was discussed as necessary in public policy to encourage citizens to resolve their own problems and a barrier to fairness in some cases where ERP result in confidential exit negotiations. It was acknowledged:

- it is easier to achieve settlement if name's and actions aren't mentioned to protect reputations
- however non-disclosure settlements raise the issue of 'gagging'

The Employment Relations Authority

Legal costs were identified as the greatest barrier – "actual costs of going to the Authority are higher than the actual Authority costs". Questions were asked about whether:

- o the cost of legal representation was necessary?
- o it is possible to increase numbers of competent representatives who do not charge fees
- o anonymity was necessary because publicity may a barrier to pursue rights
- o we should follow the Irish approach where there is no cost for the process, numbers of represented parties have reduced, and adjudication numbers have increased
- o improved triaging and support would reduce the need for lawyers
- o bench books & mock cases online would enhance education

International inspiration

- See the two video clips from Ireland and Australia
  - What can we learn from them?
  - Also see the access to justice project by Law Council of Australia:
    www.lawcouncil.asn.au/justice-project/final-report