ADLS Employment Law Committee meets the minister

Research done by the New Zealand Bar Association has revealed an effective hourly rate of somewhere between $58 and $96 for employment lawyers doing legal aid work

Jenni McManus

Nine key issues were on the agenda when the ADLS Employment Law Committee met with Workplace Relations and Safety Minister Michael Wood last week for what committee convenor Catherine Stewart described as a 'very constructive and helpful' discussion.

Top of the list were the significant delays being experienced in the Employment Relations Authority (ERA), with some clients waiting months for case management conferences and up to a year for decisions; the need to regulate employment advocates and whether it was appropriate for them to appear in the Employment Court; and whether the Employment Court should be the first-instance decision-maker for fair pay agreements.

It was the first formal face-to-face meeting the committee has had with the minister. "He was certainly receptive to our thoughts and ideas," Stewart says, "and there was a recognition that we are the ones on the frontline, dealing with these issues every day."

The discussion covered the following points:

ERA delays

Stewart says significant delays were being experienced in the ERA before the pandemic and covid-19 has exacerbated an already difficult situation. Wood said it was 'far less than ideal' and Auckland is trying to fill the gaps as quickly as possible, he says.

Regulating advocates

Stewart says this needs to happen and the committee also wants the minister to consider whether advocates should appear in the Employment Court.

"There is a place for them and some do a good job but there are concerns around others' service to consumers," she said. "Sometimes [clients] are under the illusion that they were dealing with a lawyer and it is left to us to pick up the pieces on a file that has gone horribly wrong. There are concerns about their appearances in the Employment Court because often there is a lack of knowledge of due process and procedures."

Stewart acknowledges there are a range of views within the committee "but it's an ongoing issue and it has been boiling over for a long time".

Wood said there was no 'policy resource' to deal with it now but he would be interested in seeing case studies that demonstrate the committee's specific concerns and they could be reviewed as part of broader piece of work on dispute resolution. It was imperative that we have a low-cost system, but it needed to be balanced against having appropriate standards in place, he said.

Fair pay agreements

The issue here is what role the Employment Court might play in fixing terms and conditions if these cannot be agreed.

Under the present proposal, the ERA can make recommendations if the bargaining parties reach a stalemate, and it will set terms and conditions by determination with only limited rights of appeal.

Stewart says the committee's concern is that the system bypasses the expertise in the Employment Court. (Historically, under the predecessor legislation, the Arbitration Court set the terms and conditions).

The question is whether the ERA is properly equipped and resourced for the job, she says, and whether the court would be a better option for determining fair pay and conditions. "It's just about fleshing out what's the best practice. We don't pretend to have all the answers... The committee's concern is to ensure that the Employment Court had a role and that its expertise is utilised."

The committee thought the right to appeal needed to be reviewed, along with the ability of the court to have more input into in fixing terms and conditions by way of a challenge.

Wood said he was 'not entirely closed-minded' on the matter. But he is keen to set up an institution similar to Australia's Fair Work Commission "where all the intuitional expertise is held in one place". He also noted the potential for conflict if the Employment Court was determining terms and conditions in fair pay agreements and also hearing disputes on these matters.

Definitions of bullying and harassment

While the Employment Relations Act defines racial and sexual harassment for the purpose of raising a personal grievance, there is no definition of **bullying or harassment**.
Stewart says bullying is being raised as a disadvantage a grievance and there is considerable judicial comment about what it means. The committee wants to see clarity and firm guidance

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Michael Wood

Catherine Stewart

about how bullying should be defined in the employment law context.

Wood says greater clarity is needed and he is 'relatively open' to looking at the issue.

Extended timeframes

The committee is backing a private member's bill promoted by Labour backbencher Deborah Russell which seeks to extend from 90 days to one year the time limit for an employee to raise a personal grievance alleging sexual harassment. It is also keen to see this timeframe applied to bullying claims.

The current time limit is a blunt instrument, Stewart says. It fails to consider that bullying and sexual harassment often take place over a long period of time and involve a power imbalance between the complainant and the employer.

Some committee members, however, are concerned about how a two-tier system might work in terms of timeframes for raising a grievance. Another option might be to extend the exceptional circumstances provisions of s 115 of the Act although the threshold is high.

Wood says he is 'sympathetic to the issue' and has "given the nod to the private member's bill to proceed on that basis". Extending the exceptional circumstances provisions might be an elegant way to resolve the matter and the way forward is through the private member's bill, providing it is pulled from the ballot. "There is a problem here to be solved," he says.

Legal aid concerns

Legal aid is not working for employment claims, Stewart says. The problem is the fee cap on cases brought before the ERA which does not exist in other areas of civil legal aid.

"There is no one-size-fits-all in employment cases," she says. Some can be resolved relatively quickly but others stretch over several days and involve multiple witnesses.

"We are not here to attack the legal aid system but to work constructively and to advocate for the fixed fee to be removed from that arena and an hourly rate to be used for the employment jurisdiction," she says. "It is an obvious way to improve access to justice."

Research done by the New Zealand Bar Association has revealed an effective hourly rate of somewhere between $58 and $96 for employment lawyers doing legal aid work "and that is probably generous". As a result, few employment lawyers take on these cases.

"It comes back to access to justice because it's a tool for people to be able to access legal help and representation and if it's not working well, that's another barrier for consumers," says Stewart.

The Ministry of Justice is reviewing the legal aid system.

Wood says the matter should be taken up with Justice Minister Kris Faafoi but he is "happy to pick up on the conversation as it pertains to employment law". The trick was to manage costs and 'prevent rorting'.

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The early resolution service (ERS)

The ERS was set up specifically to achieve quick resolution of disputes about the covid-19 wage subsidy. Some MBIE staff have suggested that these quick **telephone resolutions** could be extended to bullying and harassment complaints – a move the committee opposes.

The committee is also concerned that the ERS has not been characterised as a mediation service, meaning users and ERS staff lack the normal protections and safeguards available under mediation.

MBIE recently wrote to the committee, in response to concerns the committee had raised, by confirming that the service was considered to be mediation. The scope of the ERS remains unresolved.

Removal to Employment Court

The committee asked the minister to consider widening the circumstances under which an employment case can be removed from the ERA's jurisdiction and taken direct to the Employment Court.

Stewart says experienced practitioners know instinctively where challenge to the court is inevitable. Bypassing the ERA means clients don't face two hearings on the same facts and issues and an extra set of costs.

Section 178 of the Employment Relations Act sets out the four grounds on which the ERA can order the removal of a matter to the Employment Court, but Stewart says the threshold is high and removal needs to be easier. The difficulty is putting into practice the 'object' section of the Act (s 143) which states that one of its objectives is to recognise that difficult issues of law will need to be determined by a higher court.

The committee hasn't discussed the detail of legislative change, but it has raised the matter as a preliminary concern. Wood queried if there was reluctance on the part of the ERA to relinquish matters and Stewart noted that might be the case.

Wood says the problem has been raised by other groups and urged the committee to collect information on the type of cases which should be referred straight to the court in the first instance.

Torts and employment jurisdiction

The Supreme Court recently clarified the exclusive jurisdiction of the Employment Court over employment matters, saying secondary claims for torts such as defamation could not be filed concurrently with **employment claims**.

If a claim can be framed as a conventional employment relationship problem, then it must be brought before the ERA, the court said.

Stewart says doubt remains about matters that cannot be framed in this way, such as breach of contract and restraint of trade and confidentiality claims and it would be good to have legislative clarity. ■