# Employment advocates: **dangerously incompetent or** access-to-justice warriors?

You can't have someone who's effectively on minimum wage paying a barrister to run a personal grievance

**Diana Clement**

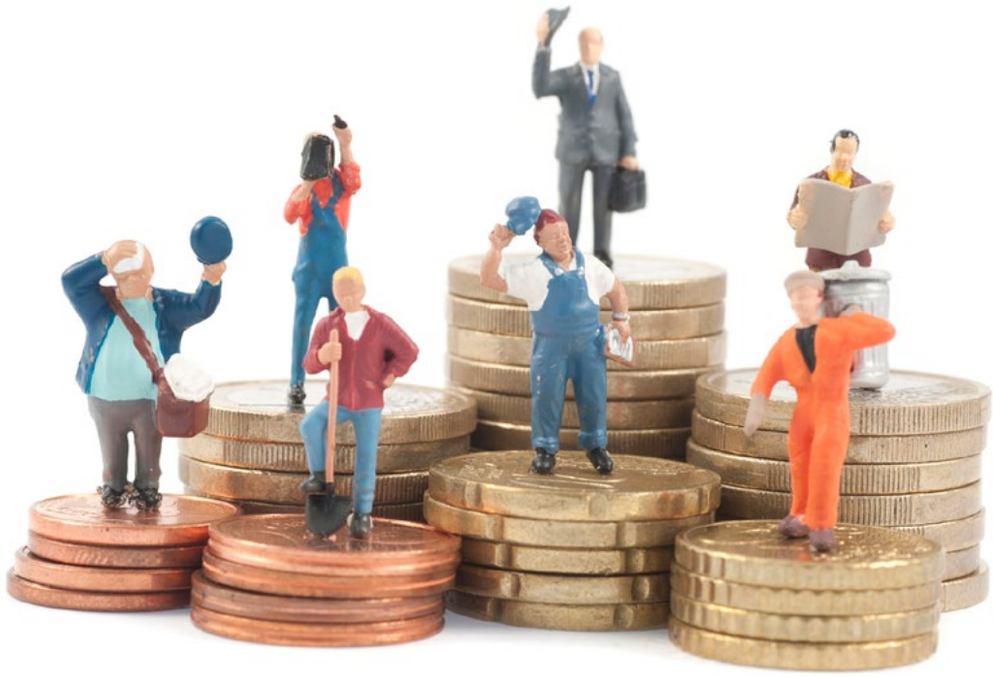

Photo: wakila / Getty Images

Should lay employment advocates be allowed to represent clients? It's a question ADLS' Employment Law committee has asked workplace relations and safety Minister Michael Wood to bump up his agenda.

Stories of incompetence, guerrilla tactics and overcharging by advocates are not uncommon, with the Employment Relations Authority (ERA) issuing practice notes as a result, and even the Employment Court's Chief Judge Christina Inglis weighing in.

The issue has a long history, dating back to the 1890s. From then, until 1991 when the Employment Contracts Act (ECA) was enacted, only employer or union advocates could appear in the then Arbitration Court.

With the ECA, the unions' monopoly on legal representation ended and the then Employment Tribunal and Employment Court first accepted lay people acting as advocates. An industry arose as a result.

Several iterations of law reform led to the current system where the ERA and the Employment Court offer a form of dispute resolution designed to relieve congestion in the civil court system.

The new system opened up a new industry in representing employees, often on a no-win no-fee basis which can be lucrative and leading to what some say is a ballooning industry of unregulated representatives.

The shortcomings of a cohort of those advocates form the foundation for arguments for action, ranging from regulation at one end to disbanding the entire industry at the other.

## The problem

No-one knows how many employment advocates there are. They range from one-man or woman bands to human resources consultancies employing dozens of people. Some advocates have law degrees. But many don't.

Unlike lawyers, advocates are not subject to the standards required of a lawyer under their Conduct and Client Care Rules. The problem, says employment lawyer Garry Pollak, is inexperienced and disreputable advocates who use what he calls a loophole as a business opportunity to serve their own interests. "I'm happy to say that. I've been saying that for years."

Lawyers who oppose the very existence of advocates could be accused of defending their patch. However, even some employment advocates also note problems with their industry.

Pollak began his career as an advocate, representing employers in the Arbitration Court. "I didn't have a law degree in 1979 when I started," he says. "Only advocates from a union or employers' organisation were allowed to attend [Arbitration Court hearings]." In that era, unions would have culled the poor cases that make their way into the ERA today.

Pollak now laments the lack of barriers to entry for the current breed of advocates. "Maybe they've been a payroll officer or a personnel officer. Many are individuals who have taken

**Continued on page 09**

**Continued from page 06**

their own personal grievance [case], and say 'well, I had to pay somebody to do this. It's easy because I got a settlement. I'm going to do this for everybody else now and make a business out of it'," Pollak says.

The ADLS Employment Law committee, says convenor Catherine Stewart, is especially concerned that the public may be misled or simply confused when they engage an advocate, believing they are in fact engaging an employment lawyer.

"The public needs to have full information about the type of representative that they are engaging so that they can make their own informed choices," Stewart says.

"Members of the committee have experienced many examples where a client has instructed them after having been initially represented by an advocate and the client genuinely thought that their former representative was a lawyer."

In an undergraduate thesis *Non-Lawyer Employment Advocates and the Trade-Off Between Accessibility and Capability,* solicitor Sarah Dippie summarised these complaints under three broad headlines: fees, professional obligations and competence.

## Overcharging

Overcharging has been considered professional misconduct for lawyers since the 1940s. There are no such rules for advocates.

Employment issues don't usually result in a clear 'winner' or 'loser', Dippie notes in her thesis. As a result, an advocate might frame a nominal sum as a 'win', triggering a fee, even if their client is entirely unsatisfied, she wrote.

"Both contingency and percentage arrangements result in the advocate having a direct interest in the outcome of cases. This removes their professional independence and could incite overly zealous behaviour."

**Lawyers who oppose the very existence of advocates could be accused of defending their patch. However, even some employment advocates also note problems with their industry**

Both lawyers and advocates accuse the other side of overcharging. Employment advocate Nathan Santesso says while he earns 'decent money' after 10 years in the business, it's not on the same scale as a lawyer who might be charging $400+ per hour.

Danny Gelb, who runs Employment Law Advocacy, argues that many clients couldn't afford lawyers' fees.

"You can't have someone who's effectively on minimum wage paying a barrister .... to run a personal grievance. They just don't have the resources. And that's where advocates do have a place in the employment law arena.

"Should advocates be allowed to represent [others] in the authority and in the Employment Court? It would be a dangerous scenario to stop them from doing so. It'll limit the justice that's available to the common person."

He adds: "One thing I'd say in favour of many advocates is they have a focus on getting a matter resolved, as opposed to taking on a lengthy battle. Because there's a major conflict of interest when representing people [in] any law matter. If [lawyers] resolve the problem too quickly for the client, they limit their fees whereas some advocates operate either on a fixed-fee basis or a contingency, more commonly known as a no-win no-fee basis.

"So it's actually in their interest to get the matter resolved in a timely manner and move on to the next one. When you get to those lengthy, elongated battles, there's always two winners, two losers. The two winners are normally the representatives. The two losers are the parties."

Santesso says many clients have no-one else to turn to and the Labour Inspectorate can't take these cases. He does *pro bono* cases where the client can't pay and he volunteers at the Citizens Advice Bureau.

Even with the paid clients, when Santesso doesn't win, he doesn't get paid. He notes that there are few other options for many of his clients. "The real victims are the employees who are forced to try to hire someone to deal with the lawyer."

While advocates get criticism, Santesso says lawyers clog up the system. "They bring on all kinds of technicality, injunctions and things like that. It's really not supposed to be like that. It's supposed to be a lay person's jurisdiction. That's how it is in Australia."

Santesso argues that the litigation specialists he comes up against have a vested interest not to settle too soon, instead of settling cases confidentiality and cheaply.

"They squander that, because they feel uncomfortable with that. And they head as fast as they can get to the employment court, that's where they're the most comfortable. My goal is to solve the problem. And a bit of a failure for me is if it ends up in the ERA."

Pollak, however, says that lawyers are often cheaper than advocates. "I'm actually quite good friends with two [advocates], and it's a bloody rort. If [an advocate is] charging five grand

**Continued on page 10**

**Catherine Stewart**

**Nathan Santesso**

**Danny Gelb**

**Continued from page 09**

for mediation and they're doing three mediations a week but doing bugger-all work, they can make 15, 20 grand a week."

Pollak acknowledges there are some "bloody awful lawyers as well", who fall short of standards. "At least clients can challenge the work they do, and the fee. And to be a member of the Law Society, you have to have indemnity insurance."

Advocate Ashleigh Fechney agrees that some advocates charge too much. "The real problem with a lot of advocates is they work on a no-win no-fee basis. And that goes up to about 40% [of winnings]. The less-than-ideal advocates will be willing to do the least amount of work for that money," she says.

### Professional obligations

Dippie notes that while lawyers are bound by their Conduct and Client Care Rules and unions by a variety of rules as well as the democratic structure of their organisations, employment advocates are answerable only to general consumer law such as the Consumer Guarantees Act.

Misbehaving is not uncommon. The name Allan Halse is often raised. Halse and his company CultureSafeNZ was ordered in February this year by the ERA to pay $18, 000 for making disparaging remarks about an employer. It was not the first time Halse, his company and/or employees had been slapped with penalties.

Concerns about employment advocates led to the issuing in 2019 of a practice note. **Conduct of Representatives in the Employment Relations Authority**.

Among other points, it notes that representatives should be polite and constructive in their dealings with the ERA and comply strictly with timetables. The practice note went as far as to say that representatives needed to have finished sorting their papers and talking to clients before the hearing's appointed start time.

The issue of vexatious employment advocates has been noted all the way to the top.

In 2019, Chief Judge Inglis voiced her concerns. In her costs judgment in *Ward v Concrete Structures* she made comments about an advocate who had been involved in the case.

"There is a limit to the extent to which the court can appropriately address professional standards issues which arise in respect of the conduct of some advocates and which impacts on often vulnerable litigants, the opposing party and more generally in terms of the efficient and effective administration of justice... all of this is, of course, a matter for Parliament if it so chooses, not the court."

**There's an access-to-justice argument in there. I think they are such a part of the landscape now and fill a potentially valuable role in the market, that they shouldn't be banned**

### Competence

In her thesis, Dippie outlines several competence issues in relation to some employment advocates. The problems include not understanding the law and the preparation of documents.

"Lawyers are required to have a law degree, a current practising certificate and complete 10 hours of continuing professional development annually. Currently, advocates do not have any such requirements," she says.

Santesso does not agree that advocates are necessarily less knowledgeable than lawyers. "I have an honours degree in law and I did my dissertation in employment law," he says. "I've been admitted to the bar [but] none of that stuff actually prepared me. What helps you is just doing the cases [and] advocates do only employment law. So they are very experienced and very knowledgeable."

### Regulation

Some lawyers argue that there is no need for independent advocates to exist. Others simply want the industry to be regulated, as conveyancers and immigration advisers were.

Pollak is in favour of banning all lay advocates except those who represent employers' associations or unions.

"There is an inherent difference between representing an employee or a worker in court who's part of an association as opposed to representing the public generally. You don't get complaints from the authority or the court about representatives from employers' associations or unions."

Graeme Colgan, barrister and a former Chief Judge of the Employment Court, has described advocates as anywhere from appropriately competent at one end to the dangerously incompetent at the other extreme. "The same goes for their ethical practices."

"The ERA and Employment Court see a not insignificant number of very poor representations of parties [and] of misbehaviour between advocates in negotiations and in writing. Even

**Continued on page 11**

**Ashleigh Fechney**

The real problem with a lot of advocates is they work on a no-win no-fee basis. And that goes up to about 40%

**Continued from page 10**

sometimes in hearings. That just shouldn't be happening because it's the clients who suffer," Colgan says.

Nonetheless, Colgan doesn't believe advocates should be banned.

"There's an access-to-justice argument in there. I think they are such a part of the landscape now and fill a potentially valuable role in the market that they shouldn't be banned. The rate of unionisation of all employees in New Zealand is so low [especially] at the vulnerable end of the market.

"So, these are people who simply can't afford to have lawyers doing complicated cases. They are still important cases. And if you banned [advocates] entirely, then you would have them unrepresented."

Colgan adds that there are some "ethical, professional, hard-working, reasonable-charging advocates who do fill a spot in the market".

"The approach should be to regulate and, within regulation, to educate, so providing educational opportunities for advocates to advance." A parallel, he says, is conveyancers or immigration advisers who used to be unregulated, but now are.

The advocates *LawNews* spoke with all supported regulation in some form and cited issues with the industry not dissimilar to those outlined by lawyers. Some see the cowboy end of their industry as not doing them any favours.

"I'm an advocate who is happy to be regulated," Fechney says. "I am a member of the Employment Law Institute of New Zealand. And I'm also a legal aid provider, which is like another level of accreditation. On top of that, I'm actually now in the process of doing Stepping Up, which is the next course required to be a self-employed lawyer."

Or, if Parliament didn't want to go that far, an alternative to licensing could be to continue to allow advocates to appear in ERA cases but set up a system where they need to apply for leave to appear in the Employment Court, Fechney says.

**Members of the committee have experienced many examples where a client has instructed them after having been initially represented by an advocate and the client genuinely thought that their former representative was a lawyer**

Gelb adds: "[Advocates] should be regulated. Because, unfortunately, the industry that we're in at the moment can appear to be like the Wild West. It's disgraceful. It causes untold dramas for the legal profession, the other advocates [and] for the authority and for the Employment Court. The issue is how to regulate it."

On the other hand, the push for change isn't coming from clients who have been abused or didn't get good service, Santesso says. "You don't hear about people in the news saying 'I was misled' or there was any kind of problem. This is gatekeeping. [Lawyers] make a lot of money off employment law."

## The solution

Any solution is likely to be academic. The committee has asked the minister to add the issue to MBIE's agenda, says Colgan. "The committee has said it would like to talk to [minister Michael Wood] about that. The impression I have is it's not high on MBIE's agenda."

Opinions vary on what the solution could look like.

Pollak isn't in favour of a new profession because it would create a second-tier legal system. "Why should we do that? It creates a huge new bureaucracy."

But the committee is working on a solution, with regulation being established by amendments to the Employment Relations Act and with its own set of regulations to be administered by MBIE.

"Consideration would have to be given as to what activities were to be regulated, [such as] advice-giving, negotiation, mediation representation, appearances in the authority or the Employment Court," Colgan says.

Regulating employment lay advocates would be governed by a statutory authority which included a licensing function and an independent authority to decide disputed questions about registration and misconduct, with rights of appeal to the Employment Court.

Stewart adds: "The committee believes that an important factor for any regulatory model is the requirement for advocates to prominently disclose that they are advocates and not lawyers. If an advocate is legally qualified, they can state that but they should also state that they do not hold a practising certificate as a lawyer."

Requirements for registration could include meeting certain standards of fitness and reputation, training and continuing education, Colgan says. "There would be a code of conduct to which licensed advocates would have to adhere." There might also be a requirement to hold a trust account.

The rules should also include regulations around advertising, including references to licensed status.

**Graeme Colgan**

Both contingency and percentage arrangements result in the advocate having a direct interest in the outcome of cases. This removes their professional independence and could incite overly zealous behaviour