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EMPLOYMENT LAW

Employment lawyers probe access to justice

By Jenni McManus

Greater use of conditional fee arrangements – including contingency fees – and litigation funding are among a raft of suggestions the ADLS Employment Law Committee is proposing as a means of improving access to justice.

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Employment cases often settle because the parties can't afford to litigate

Employment Court Chief Judge Christina Inglis joined the committee at its monthly meeting in Auckland last Thursday to discuss a list of nine ideas the group thrashed out during lockdown in brainstorming sessions via Zoom.

The list is the result of a challenge laid down by the chief judge when she visited the committee last November: to come back with specific ideas for improving access to justice in the employment jurisdiction.

Rates of settlement are high in employment cases. As one committee member put it bluntly: "It comes down to the fact that people can't afford lawyers because they charge a lot of money." As a hypothetical example, he cited a lawyer charging $500 an hour to a client making only $500 a week.

Employment legislation is designed to encourage early resolution but Chief Judge Inglis noted it was not a one-size-fits-all situation and there would always be cases where it was not in the client's best interests to settle. Nor was it necessarily a good thing for the law if few employment cases made it to trial as precedents would not be laid down.

"I think it's a bit simplistic to say 'yes, it's great to have 80% of cases settling at mediation'... but is it great for justice?" she said. "That's a difficult issue to answer because we need a fair number of cases coming through to set the law. We need cases to go to the Court of Appeal, to get a tick-off, or not."

Committee convener, barrister Catherine Stewart, agrees, saying a certain number of cases need to go to court for issues to be determined "so the law is made around these issues.

> It comes down to the fact that people can't afford lawyers because they charge a lot of money

"If everything settles, you lose those points and the case law and precedents. I've been involved in many cases where there have been novel issues and it would have been fascinating to have an Employment Court determination, but they settled."

Most of the committee's discussion last week was around conditional fee arrangements and litigation funding, and how potential conflicts of interest might be dealt with.

One committee member said instead of running

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the gauntlet of applying for legal aid, he sometimes operated on a no win/no fee basis. "You just don't invoice them unless you win. But you can't charge a percentage of what you recover. There are a number of cases where lawyers have fallen foul of the rules and you have to know what you're doing."

Lawyers could be in breach of NZLS rules, s 334 of the Lawyers & Conveyancers Act 2006 and the champerty and maintenance rules if they charged on a percentage basis– ie, a contingency fee. The same might also apply to using third-party litigation funders if the funder was taking a percentage of the outcome.

The potential for a conflict of interest arises if a practitioner has a financial stake in the outcome of a case. But, as another committee member pointed out, a lawyer working on a normal fee basis might also be said to have a conflict because he/she was not incentivised to resolve the case quickly and efficiently.

Clients find no win/no fee arrangements and contingency fees easy to understand, Stewart says, and see them as an easy way to progress their cases.

"Clients really like that concept and we often get asked about it but employment lawyers to date haven't readily embraced it." The most probable reason is that for lawyers, it's not that simple.

For example, one problem is how success or a win might be defined. Once again, it's not a matter of one-size-fits-all and the lawyer and client might have quite different views about what the terms mean. But whatever the definition, it's imperative that it's set and agreed upfront in the terms of engagement.

"If you think about all the variables that might come from the outcome of a court case, it might not be easy to actually define success," Stewart says.

"I think you've got to think through all the possible outcomes before you start… In the employment law arena, it might not just be a win/lose situation. You might have a partial win on some things, you might have a partial loss on some things or you might have a win but there is a reduction due to contribution by the employee. So, there's a whole range of different scenarios.

Employment Court Chief Judge Christina Inglis

The committee's nine access-to-justice ideas

- Greater use of conditional fee arrangements
- Introduction of litigation funders
- Ongoing government funding for the *pro bono* clearing house
- Increasing legal aid rates
- Streamlining and consolidation of interlocutories by the court
- Sense-checking of cases against costs guidelines
- Higher awards from the Employment Court
- Lawyers reducing their fees
- Encouraging people to join unions

"An employee might get reinstatement but not regard that as success because they were looking for the money. Or you might have a declaration of a breach, but you might not get penalties. And because you can't charge a percentage of what's recovered, it's not just a simple fact of saying 'if you win $100,000, I get $20,000.'

In Australia, the law commission in December 2018 recommended that lawyers be allowed to charge on a contingency fee basis although the government has yet to move on this. It's a similar situation in Ontario where such a move has been flagged a way of improving access to justice.

The argument goes like this: Why should clients be forced to go down the litigation funding route where they'll be up for a 20% to 30% fee when their own law firm might be prepared to fund the litigation on this basis and get a (presumably lower) percentage of the recovery?

Stewart says there are a number of different ways access to justice can be addressed in the employment jurisdiction. Some might stand alone, or a mixture of different options might work in tandem with each other. It's multi-faceted and there's no straight answer.

"There's a range of possibilities in terms of what we might do and it seems to be even more pertinent now, in the wake of Covid-19, that we look at this issue with some seriousness."

A huge coup, she says, was the funding delivered in the 2020 Budget to the *pro bono* clearinghouse run by community law centres. "Auckland Community Law Centre and our ADLS committee have been strongly advocating for that. As a committee we have a *pro bono* system we feed into their cases."

So, what happens next? An interesting question, Stewart says. "The meeting was for the purposes of providing the information to the chief judge. It was a valuable discussion and there are quite a few things we can follow up.

"The big issue is the funding of litigation. Partly that's because the parties feel they don't have the money to proceed. So how do we make that happen?"

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