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Monday 3 October 2022

Honorary Michael Wood, Minister of Workplace Relations and Safety
By Email: M.Wood@Ministers.govt.nz
cc: LeightonAssociatesNZ@gmail.com (Media Liaison Officer: Tristam Price)

ADLS Employment Court Ban on Advocates and Advocate Regulation Proposal

Dear Hon. Wood,

1. I am an Employment Advocate. [redacted]

2. Myself and my constituents are concerned with the proposal put forward from the ADLS Employment Law Committee ("the Committee") that has been published.[1]

3. In considering our views we observe the object of the Employment Relations Act 2000 that this framework addresses the inherent imbalance of power between employer and employee; and the protection of the integrity of individual choice.

4. Employment Advocates are integral to helping resolve employment relationship problems at the lowest possible level. This includes where Advocates, like myself, often offer clients a "no win, no fee" arrangement for cases that have merit.

5. My personal experience in representing employees include having been successful in the Employment Court for clients where the employer has challenged the Employment Relations Authority's determination.[2]

6. When there is a challenge filed in the Employment Court, after service being effected, the respondent has only 30 days to file a Statement of Defence. If the Employee wishes to challenge a loss in the Authority, there is only 28 days to file a challenge.

7. The cases that we take to the Authority for our clients result in a client-practitioner relationship often for the period of 1-2 years or longer. If there is a mandatory change in representation where an Employment Court challenge occurs, there is a limited time (as described above) to file a defence for the employee; the employee may be impecunious and unable to pay legal fees (this may be due to the employer's actions); and a lawyer taking over the case will not have had the benefit and insight into the facts and merits of the client's case. A lawyer would have to start from the beginning to get up to speed with the case at a considerable expense to the client.

8. Notably, as far as I am aware, where there is a challenge to a Judgment of the Employment Court, and the Court of Appeal grants leave to hear the challenge (well,

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[1] https://adls.org.nz/Story?Action=View&Story_id=591&utm_source=LinkedIn&utm_medium=Pagepost&utm_campaign=advocates+employment+court&utm_id=LawNews

[2] Surplus Brokers Limited v Armstrong [2020] NZEmpC 131; STL Linehaul Limited v Waters [2022] NZEmpC 114

before that step), Advocates can seek leave to represent their client on the grounds of their intricate knowledge that they have acquired during the course of representation of the matter. The client would be prejudiced without the Advocate.

9. Therefore, we are concerned that if the Committee's proposal is adopted that employers will have a perverse incentive to challenge Authority decisions where an employee has had success in the Authority, because under this proposal an employee cannot utilise their Advocate for representation in the Court.

10. Giving up and walking away may become the only option for the employee in light of balancing risk and lawyers' fees; considering the pressure on the employee in this 30 day timeframe. The "no win, no fee" contract with the Advocate will entitle the Advocate to fees from the successful Authority determination and the client may still be charged by the Advocate even if there was a win in the Authority. That is currently not my practice to do that as I consider it to be unethical given that currently I am able to defend challenges in the Court.[3]

11. Would such a regime of banning Advocates from the Employment Court be contrary to the Act's object to address the imbalance of power between employer and employee?

12. Would such a regime open the floodgates to employers challenging Authority determinations where the employee has limited options in seeking affordable representation? Or within a reasonable time?[4]

13. Would such a regime restrict Advocates from performing other actions, for example, seeking a declaration of Employee Status under s 6 of the Act, where the Court may be able to hear such a claim sooner than the Authority?

14. If on day one, we told an employee client that any Personal Grievance raised, or Authority proceeding filed, could lead to a challenge that we cannot defend for them, most people are not going to want to go through this dispute resolution process knowing that in the end we cannot help them if their former employer challenges an Authority determination. The effect of this is the employee being denied access to justice by not having the funds to pay for a lawyer.

15. We appreciate there is a push to regulate Advocates. We feel that there are much better ways of doing it. If it was done the way the Committee has described, we are of the view that it would be a disaster for the reasons I have set out above.

Yours faithfully,

Lawrence Anderson [redacted]

[3] It is my personal practice that I continue the "no win, no fee" arrangement to see the case to the end if there is a challenge to the Employment Court.

[4] 30 days to file a Statement of Defence.