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Improving Access to Civil Justice

Submissions by ADLS Employment Law Committee

The ADLS Employment Law Committee ("Committee") welcomes the opportunity to make these submissions on "Improving Access to Civil Justice". The Committee is comprised of 26 practitioners who specialise in employment law and work for firms, in-house teams, unions and as sole practitioners and barristers. We regularly meet with stakeholders in the employment law sector to discuss new initiatives and provide feedback.

The Committee has read with interest the Improving Access to Civil Justice Consultation Document by the Rules Committee published on 14 May 2021. There is a twofold significance of this project for the practice of employment law. Firstly, litigation in the Employment Court will be affected by any changes to the High Court Rules because Regulation 6 of the Employment Court Regulations 2000 requires that in the absence of a relevant procedural provision in those Regulations, relevant High Court Rules will apply. Secondly, we have experience of now more than 2 decades of practice in an investigative civil litigation regime operated by the Employment Relations Authority under the Employment Relations Act 2000.

In particular we would like to offer our experiences of this more investigative/less adversarial civil litigation regime for the Committee's consideration, particularly as to the difficulties experienced in practice of this model of civil litigation.

Regulation 6

We thoroughly endorse the Rules Committee's views on the importance of proportionality in cases, however we also consider that if there are to be changes to the High Court Rules which might impact the Employment Court through Regulation 6 there are some unique features of the employment jurisdiction which need to be taken into account.

We consider that proportionality in the employment jurisdiction should take into account more than a strictly numerical approach to the financial cost of the litigation versus the possible financial outcomes. In employment law there are often cases where a union, for example, brings a case

against an employer where there is only a small amount of money at stake (say a few hundred dollars) which would be far outweighed by the cost of running the case; however the outcome has ramifications for thousands of workers around the country and therefore sets an important precedent which has much more than financial value. There are also cases in the Employment Court where the desired outcome cannot be measured in purely financial terms, such as the restoration of *"mana"* to a wronged party, or the principle of vindication which might have an impact on a party's future career prospects, or the reinstatement of a party to a position. Proportionality in the employment law jurisdiction should therefore not be seen in the context of financial remedies alone.

Our Experience of the Employment Relations Authority

In the employment law jurisidction there is a two-tier hierachy model which is meant to be essentially an investigative model in the Employment Relations Authority and an adversarial regime in the Employment Court. In light of our experience with both models we have identified some potential issues for the Rules Committee to consider.

We would also reccomend that the Rules Committee may wish to conduct its own more intensive research into the 21-year history of the Employment Relations Authority and those who operate contemporaneously within and also outside this system, i.e. specialist employment lawyers and Authority Members who are the adjudicators involved.

We will summarise our points under a number of subject headings which are in no particular order.

Evidence

1. An investigative model raises issues about litigants' rights such as cross-examination, entitlement to call evidence etc that a judge/adjudicator does not wish to consider. The Employment Relations Authority currently allows cross-examination by representatives in addition to the questioning by Authority members in their investigative role.

2. Traditional evidence gathering techniques such as document discovery, interrogatories, interlocutories need to be addressed. These are rare before the Employment Relations Authority, although there is an informal disclosure approach in the Authority which is not statute-based and which contrasts with the more formal apporach in the Employment Court governed by the Employment Court Regulations.

3. Will parties be entitled to be present during judicial evidence gathering exercises conducted by the Court, e.g. by telephone, email and video conference? Generally speaking represented parties are not present during the case management conferences conducted by the Employment Relations Authority.

Potential increase in costs for participants

4. It has been our experience in the employment field, that, while many low level and simple cases can be dealt with satisfactorily through the Employment Relations Authority, there is still a large group of cases for which costs are high. Our experience is that the process in the Authority has generally (but not in all cases) become more legalistic and expanded over the years, partially due to the Authority members not adequately regulating and controlling their investigations and partially due to the way that lawyers and representatives run their cases. Costs are particularly an issue where there is a challenge to the Employment Court, which is heard on a *"de novo"* basis meaning that parties have to pay for two full hearings. Furthermore, inadequate resourcing by the Government may lead to parties/counsel doing the work for the judge and thereby defeating the costs savings' objective. We cannot over-emphasise this failing in the employment area – it has caused the Employment Relations Authority to sometimes revert to a largely adversarial mode of litigation in many instances in order simply to get through its workload.

5. There is also an increased emphasis on, and therefore the cost of, litigation planning by the Court and participation in this by counsel. An investigative methodology requires significantly more 'front end' preparation and participation in judicial conferencing and planning by both counsel and judges.

Delay

6. At present the delays in cases being dealt by the Employment Relations Authority are of major concern to the Committee, and we note that such delay is also contrary to the statutory objective of expeditious resolution by the Authority. We generally find, somewhat ironically, that cases are dealt with more quickly through the Employment Court than they are through the Employment Relations Authority. It appears that for the Employment Realtions Authority the delay issues arise from administration within the Authority, how members regulate their cases, and inadequate resourcing. We therefore suggest that consideration should be given to methods whereby there can be the avoidance of delay in any investigative model to be adopted by the Courts.

Enforcement

7. If the District Court is to be more investigative in nature to both deal with its caseload more expeditiously and at less cost to participants, consideration should be given to giving it a *sua sponte* power to enforce its own directions and orders rather than simply reacting to a party's request for this. Consideration could be given to introducing an analogous enforcement tool to the Employment Relations Authority which enables members to issue compliance orders for breaches of its orders and settlements. However, we also note that compliance orders can be simply another order for a recalcitrant party to breach, and therefore consideration might be given to arguably more effective enforcement tools such as attachment orders (to wages or accounts) or, in cases involving factories for example, the seizure of machinery.

Appellate structure

8. There needs to be an appropriate appellate structure which accommodates an investigative process at first instance. In the experience of a number of our members, the lack of any record of evidence taken in the Employment Relations Authority (intended to be a time and cost-saving, informal and speedy methodology) is a major issue on appeals to the Employment Court. This has been solved, unsatisfactorily in many respects, by parties starting again on appeal by a de novo hearing process, as referred to above, which increases costs rather than lessening them when a party is dissatisfied with the hearing at first instance.

9. Owing to the lack fo record in the Employment Relations Authority we are aware of cases where parties have changed their evidence from the way it was given in the Authority hearing without this being able to be satisfactorily rebuffed in the Employment Court. This is sometimes addressed by calling a junior counsel as a witness to produce their notes in the Employment Court, although this is clearly not as good evidence as an independent recording. This may also necessitate junior counsel appearing at the Employment Relations Authority which once again increases costs and is not really in keeping with the objective of a low level, informal institution.

10. Some members of our Committee consider that if there is not a comprehensive record in the investigative hearing at first instance then a *"de novo"* hearing at the next stage will be necessary so that all evidence can be tested again.

11. We contrast this with the process in relation to the predecessor to the Employment Relations Authority, the Employment Tribunal, which followed an adversarial regime and appeals were, like in the civil courts, based on the written transcript of the hearing in the Tribunal – typically without further evidence, the appearance of witnesses and without any disclosure of documents.

12. We also consider that the mechansim to remove cases to the Employment Court in the first instance ought to be broadened to avoid excessive duplication of hearings in the more complex cases, and this may also be something to be taken into account if there is going to be a de novo appellate structure in the High Court.

Training for the profession and judiciary

13. Litigation lawyers would need to be provided with significant re-training in order to operate in a more investigative model and learn how to relinquish the now largely full control they have of the conduct of the litigation. This may be seen as an unnatural style of litigating by many lawyers.

14. Judges would also need to be trained to adapt to a necessarily more interventionist judicial style. In our view there are some inconsistencies of approach to the investigative functions among Authority members which results in something of a judicial lottery for litigants and counsel and, without knowing who their judge/adjudicator will be, causes uncertainty about how much adversarial preparation should be undertaken before a hearing.

Disclosure

15. By and large we consider that the "front end" disclosure in the Employment Relations Authority works well, as parties are obliged to annex to their initial pleading any document which they intend to rely upon in the hearing. However, in the absence of more stringent discovery rules there is scope for parties to avoid disclosure of critical evidence which is against their interests, and the disclosure Regulations in the Employment Court can prove invaluable in obtaining evidence for the cases that go to the Employment Court.

Disputes Tribunal

16. If the jurisdiction of the Disputes Tribunal is to be increased then the Committee may wish to give consideration to some features of the Employment Relations Authority which we think work well: namely:
    a. a modest costs award for the successful party; we acknowledge that lawyers are not present at the hearings however in our experience parties generally do seek legal advice and incur legal costs prior to the hearing;

    b. the requirement of legal qualifications for the adjudicators to assist with the quality of decision making.

Further consultation and acknowledgment

Thank you for the opportunity to make our submissions. ADLS would like the opportunity meet with the Rules Committee in person (or remotely via Zoom) as part of the consultation process should this be thought useful.

Yours faithfully

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ADLS Employment Law Committee