ETHEL BENJAMIN ADDRESS

A YELLOW BRICK ROAD?

Paving the way for lay litigants in the Employment Court

31 October 2025

Chief Judge Christina Inglis[1]

Ethel Benjamin was a pioneer. She was certainly unafraid of change, especially change designed to protect the rights of the vulnerable. After being the first woman in Aotearoa New Zealand to be admitted to the bar, she helped establish the Otago Branch of the New Zealand Society for the Protection of Women and Children; pushed for the appointment of its female leadership and, as one of the Society's honorary solicitors, donated her time and effort to liberating women and children from abusive situations.[2]

Ethel understood that significant change would be required not only within the law but within the practice of the law to ensure that substantive legal rights were exercisable in reality.

In the memory of the woman herself, and the mighty trail she blazed, it seems a more than appropriate occasion to discuss what changes we might consider, some 130 years later, to bridge the gap between promise and reality in employment law. While Ethel did not practice employment law, I am confident that she would have considered it a worthwhile endeavour.

Why do I say that?

Employment law is, at its heart, designed to protect those who are vulnerable to abuse in the workplace. That is why the law applying to workplace relations is not left to the general law of contract. Employment law provides protection against exploitation, including via

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[1] Kaiwhakawā Matua o Te Kōti o Aotearoa | Chief Judge of the Employment Court of New Zealand. I would like to acknowledge the assistance of Judges' clerk, Aimee Harper-Smith, in the preparation of this paper. Any mistakes are mine, not hers.

[2] Janet November "Solicitor for the Society for the Protection of Women and Children" in *In the footsteps of Ethel Benjamin: New Zealand's first woman lawyer* (Victoria University Press, Wellington, 2009) at 75.

guaranteed minimum standards, such as minimum wage and holiday pay;[3] protection against disadvantage, including the termination of employment for improper reasons or discrimination on an unlawful basis;[4] and it requires that workers be treated fairly, in accordance with obligations of good faith.[5]

In other words, Parliament has effectively created a reinforced concrete floor beneath which employers cannot go.[6]

How reassuring the concrete floor must look to employees; the various minimum entitlements conferred by the Employment Relations Act 2000, and the constellation-like cluster of worker rights statutes orbiting around it. How bright the array of remedies, penalties and the Court's injunctive powers must appear to those who have been wronged; who have been arbitrarily dismissed or disadvantaged in their work, often with devastating effect.[7]

All they have to do, surely, is drive along the yellow brick road towards the sign that says: "Justice Delivered Here".

The reality is somewhat less alluring. As Ethel identified long ago, a legislative entitlement does not always make for a smooth ride. Our yellow brick road is heavily tolled; the journey is perilous, riddled with legal potholes and technical complexity. No doubt this goes some way to explain why it is not infrequently said that only the foolhardy would venture along the road without the assistance of a lawyer.

I think it is uncontroversial to say that, as at 2025, the integrity of the yellow brick road is under threat, not just in Aotearoa New Zealand but in many other comparable jurisdictions.[8] The threat has a number of elements to it but sitting at its heart, at least from my perspective, is

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3 Minimum Wage Act 1986 and Holidays Act 2003.

4 Employment Relations Act 2000, pt 9.

5 Section 4.

6 *Faitala v Terranova Homes & Care Ltd* [2012] NZEmpC 199, [2012] ERNZ 614, at [39]; and *Terranova Homes and Care Ltd v Faitala* [2013] NZCA 435, [2013] ERNZ 347 at [28].

7 The "floor" is important for employers too – it means that the same minimum entitlements must be met by *all* employers, avoiding a situation where unscrupulous employers can obtain an unfair competitive advantage over those who treat their workers fairly and reasonably (in other words, avoiding a race to the bottom).

8 Guy Davidov and Brain Langille "Understanding Labour Law: A Timeless Idea, a Timed-Out Idea, or an Idea Whose Time has Now Come?" in The Idea of Labour Law (Oxford University Press, Oxford, 2011). See also Joanne Conaghan, Richard Fischl and Karl Klare (eds) Labour Law in an Era of Globalisation: Transformative Practices and Possibilities (Oxford University Press, 2004); Daniel Galvin "From Labor Law to Employment Law: The Changing Politics of Workers' Rights" (2019) 33 SAPD 50; and Noel Whiteside "Before the Gig Economy: UK Employment Policy and the Casual Labour Question" (2021) 50 ILJ 610.

employment law's inaccessibility for an increasing number of those it is designed to protect.[9] I am not alone. It has been observed that:[10]

> One of the most salient aspects of the crisis [in employment law] is [its] inability in an increasing number of cases to deliver rights and entitlements to workers.

Stepping back, some might regard it as a very good thing that the journey along the yellow brick road is off-putting, and exclusory for many. After all, fewer cases mean lower legal, and other, costs; employers can get on with running their businesses without the unwelcome distraction of having to respond to legal claims; compliance costs go down and surely productivity goes up?

Those who understand basic Rule of Law principles will likely take a decidedly different view.[11]

Simply encapsulated, access to justice is an integral element of the Rule of Law; if all are to be equal before the law they must have equal access to the law's benefit; if there is not access in reality, the Rule of Law is imperilled.

When practical barriers inhibit employees and employers exercising their rights, the legitimacy, relevance and effectiveness of the justice system suffer.[12] The Employment Court, and the Employment Relations Authority which sits beneath it, run the risk of becoming the preserve of an elite few, and their protective function largely inoperative, at least for those they were originally designed to serve.

I have increasingly come to wonder whether we may have collectively lost our way, bogged down in a quagmire of legal formality and procedure that serves to undermine, rather than enhance, access to justice in the employment institutions; that alienates rather than enables those who ought to be at the centre of our endeavours; and that feeds a sense of cynicism that the law is more of a hindrance than a help in the practical world of employment.

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9 See the Ministry of Justice *Access to Justice: 2023 Legal Needs Survey* (29 October 2024), which recorded a high number of participants experienced an employment issue in 2023.

10 Davidov and Langille, above n 8, at 6.

11 For a discussion see Susan Glazebrook "The Rule of Law: Guiding Principle or Catchphrase?" (2021) 29 Wai L Rev 2; and see NZLS *Strengthening the Rule of Law in Aotearoa New Zealand* (June 2025) at 12–13.

12 Bridgette Toy-Cronin "Designing legal assistance services for civil justice problems" (2024) NZLJ 379; and Helen Winkelmann "Access to Justice: We Need More (Than) Lawyers" (2022) 30 Wai L Rev 2.

Reassessing the realities of the journey, for those who are entitled, by law, to travel along the road, may be said to be timely. That is because the number of people choosing to represent themselves in the Employment Court is rising.[13]

In parallel to the rising number of litigants travelling solo, is an increasing chorus of complaint about the problems they allegedly cause. If only, it is routinely said (at least within my earshot), these people could and/or would get a lawyer.

Might it be time, in the employment jurisdiction, to interrogate this narrative of legal need?

To what extent is the narrative of legal need reflective of reality; and if it *is* real – you really *do* need a lawyer to navigate the employment dispute resolution system – what does that say about the system we have constructed?

Is it possible that we have paved the yellow brick road in a way that facilitates travel by ourselves, as lawyers, Judges and Authority members, rather than those with the legal need – employees and employers?

Might it be that it is the system, rather than the individuals who the system is designed to serve, which needs to change?

Might the conversation be more fruitful if it was less about legal need and more about empowerment?

I seek to explore these issues in this paper, drawing from a review of Court files from the year 2000 (70 in total),[14] and a comparative review of Court files in 2022/23; a survey of Registry staff and a survey of Judges of the Employment Court. In doing so, I wish to acknowledge the hard work of Aimee Harper-Smith, Judges' clerk, in pulling together facts, figures and themes. The underlying purpose of the review and the surveys was to try to get an informed understanding of the sort of issues faced by litigants in person in the employment jurisdiction then and now, so that consideration could be given to what might usefully be done – to turn the so-called litigant in person "problem" into an opportunity.

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[13] A review of the first 70 Court files from the year 2000 showed there to be one self-represented litigant; the first 70 files from 2022 and 2023 showed there to be 10 and 13 respectively.

[14] The files related both to the appeal system under the Employment Contracts Act 1991 and the first batch of challenges coming through under the new Employment Relations Act 2000.

Introducing Worker A

At this early juncture it is convenient to introduce Worker A. Worker A has been dismissed from their minimum wage job by their employer, Employer B. Worker A has four children to support; rent to pay; electricity and medical bills to meet and food to put on the table. They have no savings, hire purchase payments to meet; the job market is far from buoyant and Worker A has limited marketable skills in the regional community in which they live.[15]

Worker A wants to challenge the justification for their dismissal. What options might they have?

Might they engage a lawyer to take their case?

Worker A has been reading the news and has followed the relatively recent case Associate Professor, Dr Siouxie Wiles took against her employer, Auckland University. The claim was focused on an alleged failure by the University to protect her from harm during the COVID-19 pandemic, during which she provided extensive media commentary and received, in return, a significant amount of abuse and vitriol.

Worker A sees that Dr Wiles succeeded in her claim against the University, and that she was awarded $20,000 by way of compensation, reflecting the assessed impact of the University's breaches of their employment obligations on her.[16] Worker A reads the Court's subsequent costs judgment and sees that Dr Wiles' legal bill was around $600,000; the University's legal bill was reported to be $1.4m. The University was ordered to pay Dr Wiles $205,000, a shortfall of around $395,000.[17] At this point Worker A's eyes start to water.

Worker A could engage the services of an employment advocate, but it is not uncommon for advocate costs to be broadly similar to those charged by qualified lawyers; nor are they regulated.[18] If Worker A was a member of a Union, their Union could represent them. Worker

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15 Worker A may also experience a range of ethnocentric impacts, noting that New Zealand's diversity population is prominent and increasing; see Mai Chen *Superdiverse Stocktake: Implications for Business, Government & New Zealand* (Superdiversity Centre, November 2019) at 33.

16 *Wiles v Vice-Chancellor of the University of Auckland* [2024] NZEmpC 123, [2024] ERNZ 488.

17 *Wiles v Vice-Chancellor of the University of Auckland* [2025] NZEmpC 109.

18 See the examples of advocate costs pointed to in Sarah Dippie "Non-Lawyer Employment Advocates and the Trade-Off Between Accessibility and Capability" (LLB (Hons) Dissertation, University of Otago, 2020) at 13. As advocates are unregulated, they do not need any qualifications or experience to practice as an employment representative.

A is not a member of a Union, along with an increasing number of other workers in Aotearoa New Zealand.[19]

Worker A might be left wondering whether there are realistically only two options available – abandon any hope of pursuing a claim or representing themselves.

Worker A decides to pursue their claim, travelling solo down the yellow brick road.

What awaits them?

The file review and survey results suggest that their solo journey will not be easy, and that they will need to navigate a number of roadblocks. I focus on four – there are many more.

Roadblock 1 – Costs

Having decided to represent themselves, Worker A has avoided incurring legal costs for themselves; they have not, however, avoided a potential liability for their employer's costs if their employer chooses to be represented.

For reasons which remain somewhat elusive, at least to me, the Employment Relations Authority has (since its inception) adopted a costs-follow-the-event approach; this can be contrasted to the approach to employment disputes in other comparable overseas jurisdictions, and can be contrasted to the approach to costs in another investigative, merits-based, non-technical body in New Zealand, namely the Disputes Tribunal (a no costs regime).

Currently if Worker A fails in their claim of unjustified dismissal in the Authority they will almost certainly be ordered to pay costs – $4,500 for the first day of the hearing in that forum and $3,500 for each subsequent day.[20] Assuming the investigation meeting in the Authority takes two days, Worker A will need to find $8,000. If Worker A was still working on the minimum wage,[21] it would take them 340 hours, or about 9 weeks, to meet that payment, forgoing all of their other costs in the intervening period.

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19 Union membership has steadily decreased over the past decade, with 14.5 percent of employees holding membership in 2024 compared to 20.9 percent in 2010; compare the statistics in the *Union membership return report 2024* and *Union membership return report 2015* (Ministry of Innovation, Business and Employment and Registrar of Unions).

20 "Practice Direction of the Employment Relations Authority" (February 2024) at 5.

21 Being $23.50 per hour for adult workers; Minimum Wage Order 2025, cl 4(a).

Worker A would also likely be ordered to pay costs within 28 days of the Authority's determination and compliance action could be taken against them if they failed to pay within that time.

Worker A has been unable to find alternative work in the intervening period and their position is even more perilous than it was before.

A related point might also be made. Worker A will have attended mediation as part of the dispute resolution process.[22] It is highly likely that the costs liability spectre will have been raised with them in that forum, along with a warning that if they proceed along the yellow brick road and past the mediation pit stop they run the risk of being publicly named and having their future employment prospects damaged by on-line publication. The person raising these roadblocks may well be the mediator.[23]

Worker A decided not to return to the car park despite the ominous warnings. They proceeded down the yellow brick road towards the enticing flashing neon sign: "Justice Delivered Here".

Roadblock 2 – Procedural complexity

The file review reflects that while Worker A, as a litigant in person, would have been something of a pioneer in 2000, two and a half decades later they are treading a well-worn path. That is because, while entitled to do so, it was extraordinarily rare for a party to represent themselves in proceedings in the Employment Court 25 years ago.

In the periods of time reviewed, one litigant (who was sole director and shareholder of the plaintiff company) appeared in person in the Court in 2000; 10 appeared in 2022 and 13 in 2023. The trajectory is decidedly upwards in the Court and shows no sign of reversing. A similar trajectory is noted in the Employment Relations Authority's most recent annual report.[24]

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22 See ss 159 and 188. The Authority is directed to prioritise matters that have been to mediation and the practise is to effectively require parties to mediate, unless mediation is prohibited (certain cases may not be subject to mediated settlements; see s 159AA).

23 See the discussion in *MW v Spiga* [2024] NZEmpC 147, [2024] ERNZ 678 at [71]–[76].

24 Employment Relations Authority *Annual Report 2024* (June 2025) at 15; self-representation in the Authority increased from 15 percent in 2022 to 19 percent in 2024.

The file review also clearly reveals that, in order to get to the finish line (judgment), the initial steps (filing a claim and serving it on the other party) are likely to present considerable difficulty.[25]

By way of example, in one reviewed file Registry staff followed up with a litigant in person eight times to check that service had taken place, and that it had been done consistently with the requirements of the Employment Court Regulations 2000.

Another file revealed a misunderstanding of the process, the litigant assuming that once they had filed their statement of claim they did not have to do anything further until they decided to progress it. Despite efforts to communicate with the litigant, they disengaged from the process and the file was eventually administratively closed.

The file review reflected that, in comparison to those with legal representation, litigants in person tend to face more adverse applications which they then struggle to respond to, such as applications for security for costs (requiring the payment of money into Court before further steps can be taken in the proceeding) and applications for stay (preventing orders of the Authority being enforced pending the outcome of the appeal process).

In virtually all such cases the litigant in person appears to have had significant difficulties understanding the process, its implications and what was required to respond to an application made against them – often leading to adverse results and sometimes total disengagement from the proceedings.

Roadblock 3 – Understanding the law

Understanding the substantive law relevant to one's case is commonly perceived as the biggest roadblock for litigants in person, as the Chief Justice has previously observed.[26]

The file review underscored this point. It reflected a relatively high degree of confusion as to what claims litigants can bring to the Employment Court, and what information might be relevant to a claim or defence. Multiple claims focussed largely on concerns about the way in which the Authority member had handled their case, rather than the merits of their substantive

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[25] It may be that part of the difficulty arises because the procedure in the Court differs markedly from that applying in the Employment Relations Authority; there it is Authority staff, not the litigant, who ensure that the claim is brought to the attention of the other party.

[26] Helen Winkelmann "Access to Justice – Who needs Lawyers" (paper presented for the Annual Ethel Benjamin Commemorative Address, University of Otago, November 2014).

claim.[27] This confusion tended to consume a considerable amount of case management time and energy by Judges and Registry staff, at times with limited apparent impact.

Roadblock 4 – Sense of alienation rather than participation (exacerbated by use of legalese)

Research suggests that litigants in person often experience a sense of alienation and dislocation from what is occurring in their case.[28]

Their participation has been described as akin to a game of snakes and ladders; on one roll of the dice climbing to a more participative rung but then sliding back down as they encounter new challenges.[29] The survey of files is broadly consistent with the outcome of this research, reflecting that litigants in person often struggle to understand how the employment institutions fit together – where to go, when and how to get there, and the general structure of proceedings.[30]

It goes without saying that navigating a system in a participatory way is not easy when language is a barrier. Again, the point was reflected in the file review, with difficulties understanding concepts that are very familiar to those who work within the legal system, but not to those who are outsiders – in other words, the file review very much reflected what might be termed the "othering" phenomenon.

I have only highlighted four roadblocks that Worker A is likely to encounter – as I have said, there are many others.[31]

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27 An early amendment to the Act made it clear that parties could only file a challenge (appeal) to a determination based on substance rather than procedure; Employment Relations Amendment Act (No 2) 2004, s 59; and Employment Relations Act 2000, s 179(5). Several of the Judges reported a fundamental difficulty amongst lay litigants in understanding the nature of a de novo and non-de novo challenge, and unlimited appeal rights; ie why must I now defend my success in the Authority in front of the Court?

28 McKeever and others "The snakes and ladders of legal participation: litigants in person and the right to a fair trial under Article 6 of the European Convention on Human Rights" (2022) 49 Journal of Law and Society 71 at 87–89; and Bridgette Toy-Cronin "Keeping Up Appearances: Accessing New Zealand's Civil Courts as a Litigant in Person" (PhD Thesis, University of Otago, 2015) at 210–211.

29 McKeever and others, above n 28, at 89.

30 For example, the survey reflected that a number of litigants in person see the Employment Court as the first port of call when seeking to challenge a decision by their employer/ee or, after having been to the Authority, they assume that the same processes will apply.

31 See, for example, Richard Moorhead and Mark Sefton Litigants in person – Unrepresented litigants in first instance proceedings (Department for Constitutional Affairs, March 2005); Darwin F. Rice "What are the barriers Experienced by Self-Represented Litigants in Civil Court?" (PhD, Public Policy, and Administration Dissertation, Walden University, 2021); and Melissa Smith, Esther Banbury and Su-Wuen Ong *Self-Represented Litigants: An Exploratory Study of Litigants in Person in the New Zealand Criminal Summary and Family Jurisdictions* (Ministry of Justice, July 2009) at 65–69.

Why does any of this matter?

There are a number of reasons why we might be concerned to ensure that employees (such as Worker A) have genuine access to the Employment Relations Authority and the Employment Court.

First, New Zealand has committed on the international stage to protecting worker rights and supporting stability in industrial relations, and was a founding member of the International Labour Organisation (a tripartite body comprising government, business and worker representatives).[32]

Member states have an obligation to be active and responsive in upholding the principles and objectives of the Organisation.[33]

As recently as 2019, the Organisation adopted the Centenary Declaration for the Future of Work, outlining the commitment of member states to ensuring decent work for all, and re-emphasising the need to respect fundamental worker rights, adequate minimum wage, maximum limits on working time and health and safety at work.

The Organisation had, in the wake of the growing influence of neoliberal economic policies (from the 1970s), earlier reaffirmed its core principles in the Declaration on Fundamental Principles and Rights at Work in 1998, reasserting the responsibility of member states to ensure that economic progress goes hand in hand with social progress, namely the upkeep and development of labour opportunities and rights.[34]

In 2021 the United Nations published "Guiding Principles on Business and Human Rights". The Principles highlight that corporations, as employers, have a powerful influence on human

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[32] Declaration concerning the aims and purposes of the International Labour Organisation (10 May 1944) (Declaration of Philadelphia).

[33] As recalled in the International Labour Organisation *Declaration on Fundamental Principles and Rights at Work* (adopted 18 June 1998 and amended 10 June 2022); and see the discussion in Christina Inglis *Sailing on Uncertain Seas* (paper presented for the NZLS Employment Law Conference, Auckland, 1 November 2024).

[34] The Organisation continues to be engaged with the challenges presented by globalisation, the gig economy and technological advancements, reaffirming its core values that member states are expected to respect, in line with their resources and circumstances; see Gilbert F. Houngbo *Jobs, rights and growth: Reinforcing the connection* (International Labour Organisation, 2025).

rights, and (importantly for present purposes) that workers *must* have access to *effective* remedial avenues when their rights have been breached.[35]

In summary, our interest in supporting access onto, and along, the yellow brick road for Worker A is reinforced by the commitments we have on the international stage.

Second, and on a related note, we might be interested in facilitating Worker A's access to the Authority and the Court because employment rights are human rights, and human rights are important.[36]

In this regard labour rights are explicitly incorporated in the Universal Declaration of Human Rights: including the right to work, the right to free choice of employment, and the right to just and favourable conditions of work.[37] Further, employment engages privacy rights, the right to freedom of expression and the right to freedom of association.

Third, employment is of central importance to most peoples' lives. As described by an English academic, Philippa Collins, in her book "Putting Human Rights to Work":[38]

> …A decent life of work makes a significant contribution to [a person's sense of dignity, freedom and autonomy]: as Bob Hepple noted "Work is, for most people, the way in which they can best express their dignity and autonomy as human beings and contribute to society." It provides opportunities for self-realisation, membership of a community, and a sense of self-worth.

Hardly surprising then that problems at work tend to have a significant impact on the individuals involved, and a ripple effect out to their colleagues, the workplace, their families, friends, the community and the economy.

The 2023 Legal Needs Survey identified the impacts in employment most commonly include experiencing harassment, threats or assaults, loss of employment, and – for 86 percent of

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35 UN Human Rights Office of the High Commissioner *Guiding Principles on Business and Human Rights – Implementing the United Nations 'Protect, Respect and Remedy' Framework* (16 June 2021).

36 See the discussion in Christina Inglis *Employment Rights ± x = Human Rights: finding the "x" in Aotearoa New Zealand 2025* (paper presented to the Bill of Rights Seminar, Christchurch, 13 August 2025).

37 *Universal Declaration of Human Rights* GA Res 217, III (1948) at art 23.

38 Phillipa Collins *Putting Human Rights to Work* (Oxford University Press, Oxford, 2022) at 4 (footnote omitted).

participants – poor mental health.[39] Pausing there, it can probably safely be assumed that the prospect of engaging in a foreign, complex and procedurally laden dispute resolution system with many technical twists and turns will be more difficult, daunting and off-putting for an employee who is (at the same time) suffering poor mental health as a result of their experiences at work.

Fourth, we return to the Rule of Law.

If the yellow brick road does not support access to the employment institutions to resolve workplace disputes, the legitimacy, and perceived utility, of the institutions suffers, as does their ability to serve people's needs.[40]

It is certain, as night follows day, that employment disputes will continue to arise. If access to the dispute resolution processes provided under the Act is stymied, those disputes will simply play out elsewhere – the waterfront strikes in the early 1950s might be said to provide a graphic example.

Assuming all of this matters, what might be done?

At the outset it might be noted that the cost and complexity Worker A will likely encounter when navigating the employment dispute resolution processes, and what some might describe as the increasingly illusory nature of employment rights, may come as a surprise to anyone who has read our empowering legislation, the Employment Relations Act.

As the Act makes clear, there is a Parliamentary recognition of the importance of sustaining and supporting productive, functional employment relationships. The way in which that is to occur is through early access to fit for purpose employment dispute resolution procedures focused on merits-based problem solving rather than technicalities.[41]

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39 Ministry of Justice, above n 9, at 65 and 68. 58 percent of respondents who reported having experienced an employment issue in the previous year also reported that the issue had a high or severe impact on them. Notably, employment issues ranked higher than the 13 other categories of issues in respect of causing 'poor mental health'— including money/debt-based issues and family/whanau relationship-based issues.

40 Helen Winkelmann, above n 12, at 2–3, citing Sir Geoffrey Palmer "Rethinking Public Law in a Time of Democratic Decline" (2021) 52 VUWLR 413 at 415; and NZLS, above n 11, at 10.

41 Ian McAndrew, Julie Morton and Alan Geare "The employment institutions" in Erling Rasmussen (ed) *Employment Relationships: New Zealand's Employment Relations Act* (Auckland University Press, Auckland, 2004) at 102.

The statutory roadmap requires that all employment agreements be in writing and that they must have a "plain English" explanation of the "services available" for the resolution of employment relationship problems.[42] It might be noted that the "services available" are those prescribed under the Act, namely access to free confidential mediation services (provided by the State); the Authority (an investigative body charged with resolving employment relationship problems by establishing the facts and making a determination according to the substantial merits of the case); and then access to the Employment Court (a specialist Court with exclusive jurisdiction).

I am not aware that anyone has explored what the statutory reference to 'dispute resolution availability' means for the purposes of the Act, but the dictionary definition of "availability" might assist. It defines availability as "capable of being used; at one's disposal."[43] If that is the correct definition of the phrase for the purposes of the Act, Worker A might (at this stage of their journey) be scratching their head.

What is very clear is that both the Authority and the Court are granted significant latitude by Parliament as to how they carry out their functions and pursue the Act's objectives, including the building of productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship.[44] And both institutions are required, where not contrary to the Act, to deal with matters coming before them consistently with "equity and good conscience".[45]

All of that leaves significant scope for adapting processes and procedures to ensure that they enhance, rather than roadblock, accessibility. To put it another way, the yellow brick road's (statutory) foundation appears well capable of supporting a different, perhaps even radically different, mode of travel.

Deploying significant change in our jurisdiction will almost certainly require fundamental attitudinal shifts from all players. It will require commitment, confidence, and effort, reimaging and then implementing what the new "normal" might look like.

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42 Section 65(2)(vi).
43 Tony Deverson and Graeme Kennedy (eds) *The New Zealand Oxford Dictionary* (Oxford University Press, Oxford, 2005) at 70.
44 Section 3.
45 Sections 157(3) and 189.

As Justice Miller (of the Supreme Court) has observed extrajudicially, there is considerable scope for the employment institutions making informed assessments, on a case-by-case basis, as to where on the procedural niceties spectrum each case might sit.[46] As he observed, and I respectfully agree, some employment cases simply do not require a Rolls Royce valet service – they just need to progress in a fairly rudimentary way to a decision on the merits as soon as possible. The Act reflects that thinking (procedural fitness for purpose).

The processes adopted in the Employment Court and the Authority have culminated over time, largely borrowed from the courts of general civil jurisdiction, notably the High Court. Those procedural rules have recently been reviewed and amended. At their core, and as if on cue, the amendments seek to redress the balance against the rise of procedural complexity and costs in general litigation, and its detrimental consequences for access to justice.[47]

I have previously suggested that reducing the procedural and substantive complexity of employment law and practice is fundamentally consistent with the scheme and purpose of our empowering statute, and essential if the law is to serve those it is designed by Parliament to protect (complexity reduction).[48]

As the Act makes clear, the focus is to be on the relational rather than transactional nature of employment relationships; the descriptive rather than prescriptive nature of employee/employer obligations; the ability to deal with a claim on a basis other than as described by a party; and on the key behavioural principles of fairness, reasonableness and good faith. In particular, the Authority is directed to undertake its work in a non-technical, merits based way. A perfect foundation one might think for transition to a new, more flexible, way of working.

The Family Court (another people-centric Court), has moved to a model where navigators work alongside participants from an early stage, navigating any barriers that arise (be those

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46 Forrest Miller "Barriers to participation in employment litigation: what might make a difference and would it work?" (paper presented to the AUT and Victoria University Symposium, Victoria University of Wellington, 22 May 2019).

47 See the High Court (Improved Access to Civil Justice) Amendment Rules 2025 (to come into force on 1 January 2026); and Francis Cooke "High Court Rules civil changes" Courts of New Zealand <www.courtsofnz.govt.nz/about-the-judiciary/rules-committee/new/access-to-civil-justice-consultation>.

48 See Christina Inglis "In search of simplicity in employment law and practice: an issue of access to justice" (paper prepared for the NZLS Employment Law Conference, Wellington, 2020). A review of judgments delivered by the Court may suggest that interlocutory applications are becoming somewhat of a process mill. That may give rise to concerns as the research reflects that litigants in person face more adverse applications (such as security for costs applications).

procedural, financial, social or cultural) and supporting an understanding of the justice pathways available, empowering participants to make informed decisions about resolving their dispute in line with their individual circumstances.[49]

Might we usefully borrow the thinking underpinning such a model in the employment institutions (provision of navigational aids)?

The file review and the survey results suggested an underlying concern that Registry staff not be seen to be giving "advice". It may be useful to reflect on whether there is room for a more *proactive role in terms of assistance and support*.[50] After all, we work in an area of the law in which there is a statutorily recognised inherent inequality of power; within a Court which is expressly directed to exercise its powers consistently with equity and good conscience and with broad procedural and other powers; and within an Authority which is investigative.

Might the giving of more substantive information and guidance be aligned to – perhaps even required by – our specialist jurisdiction; might the provision of more substantive information and guidance serve to reduce unnecessary costs and time in engaging repeatedly with litigants over the same issue; and might it not result in getting the case to an early hearing on the merits, rather than getting tangled up in the process?

It also appears that the timing of support and information is key.

The review reflected that a lack of clarity at the early stages of the litigation lifecycle often led to *snowballing levels of frustration*, made the file take longer and more difficult to manage, and resulted in documents that were harder to follow and less useful for the litigant in person's case. It also led to Registry staff spending considerable time following up on the same matter.

Might a "*starter pack*" usefully be provided to litigants in person at the time they first engage with the Court? A starter, or information, pack could include a glossary of legal terms, together with basic explanatory documents covering common steps, such as service, and templates and

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[49] For a discussion about the initiative and its success, see Malatest International *Evaluation of the Kaiārahi Service for the Ministry of Justice* (February 2024). See also the District Court *Te Ao Mārama Best Practice Framework* (Te Whare, March 2024), which highlights the importance of initiatives that foster connection between courts and the community.

[50] See Duncan Webb "The right not to have a lawyer" (2007) 16 JJA 165 at 173–174; and John M. Greacen "Legal Information vs. Legal Advice: A 25-Year Retrospective" (2022) 106 *Judicature* 48. Interestingly, the file review also reflected that in the year 2000 Employment Court Registrars appeared to have little difficulty telling people, lawyers included, what might be required from a procedural perspective, including a step required under the legislation.

guidelines for the preparation of briefs of evidence, affidavits, notices of opposition and the like.[51]

Visual flowcharts showing the usual trajectory of a case from its inception pre-Authority, filing in the Authority, mediation, Authority investigation, Court and appellate routes, as well as information about the nature of each of the institutions, might well help to remove much of the mystique.

Research suggests that many litigants in person have a lot going on in their lives.[52] The file review reflected that missing filing dates is a relatively common phenomenon for litigants in person, which can then lead to a spiral of additional difficulties. Automated *reminders* sent out in advance of due dates might go some way to addressing this issue. The difficulty might also be addressed, at least in part, by Registry staff contacting litigants in person before certain steps need to be taken, providing an opportunity to check in and connect with the litigant about any matters they are struggling with in respect of the proceeding.

There is another, less obvious, step that we might consider taking to smooth the ride for litigants in person in the employment jurisdiction. That step requires a degree of *myth busting*.

The file review suggested that some of the negative chatter about the difficulties associated with litigants in person is more apparent than real. While various steps in the process, particularly at the initial stages, tended to require additional amounts of Registry time, hearing times were not significantly impacted by whether a litigant was represented by counsel or whether they appeared in person. Litigants in person also filed less interlocutory applications. It appears that if left to their own devices they would likely move to a hearing in a more direct, less procedurally laden, manner.[53]

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51 Further resources might also usefully be developed, relating to the likely impact of (say) a security for costs order, and what information should usefully be put before the Court when responding to such an application.

52 Those experiencing employment issues are more likely to be single parents, currently unemployed but seeking work, and be experiencing financial instability and low levels of life satisfaction; Ministry of Justice, above n 9. The file review also reflected that many litigants in person in our jurisdiction are dealing with the pressures of finding and settling into new employment and balancing family responsibilities.

53 Bridgette Toy-Cronin "Vexatious or Vulnerable: Permitted Roles for Litigants in Person in Civil Courts" (2024) 34 Social and Legal Studies 189. The paper discusses the importance of viewing litigants in person as capable, arguing that they are typically viewed as either 'vexatious' or 'vulnerable', both roles presupposing an inability to bring a successful claim. That perception contributes to the exclusion of litigants in person by reinforcing the need for representation. Conversely, a rudimentary review of two full years of Authority determinations (namely 2019 and 2024) reflected that litigants in person only have a four percent lower chance of success than represented parties.

Associated with myth-busting might be a degree of *self-reflection* – whether it may be a case more of "us than them". I say that because the comparative file review demonstrated that the way in which cases are processed by the Employment Court, and practitioners, has increased in complexity over the years. There are, by way of example, now significantly more interlocutory applications filed and the age of cases – the journey from go to whoa – has increased because of it.

Perhaps we could look at rediscovering our statutory roots. That is because a contrast can be drawn between how we do things now and the original conception of the way in which employment disputes might best be dealt with, reflected in the enactment of the Employment Relations Act in the year 2000.

Margaret Wilson, then Minister for Labour and Attorney-General, had conceived of a new way in which industrial relations were to be approached, namely by placing the parties to the particular employment relationship at the heart of any dispute resolution.

She envisaged a system where employees and employers were encouraged to resolve matters directly between themselves; where that was not possible they would have the assistance of free access to a specialist employment mediator; and if that did not deal with the problem, a specialist body (the Authority) would investigate and determine the claim, in a non-technical, speedy manner, delivering a prompt merits-based decision.[54]

Notably the original version of the Bill did not envisage lawyer involvement in the early stage of the dispute resolution process. That omission was not warmly received; it gave rise to voluble concerns from the legal profession. Interestingly, it now appears (25 years later) that around 20 percent of lawyers in the country identify as practicing employment law.[55]

In her 2014 Ethel Benjamin address, the Chief Justice observed that the value of tribunals is that they bolster access to justice by easing formality and legality; but where issues before a tribunal become complex, the tribunal comes to resemble a court and the same disadvantages to unrepresented litigants arise.[56] Those observations are as apt today as they were over a

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54 See Margaret Wilson "The Employment Relations Act: A Statutory Framework for Balance in the Workplace" 26 NZJIR 5 at 10. The change had been prompted by concerns that the Employment Tribunal, which was intended to deal with disputes at a low level of formality, had become more formal, more legalistic, and more costly. It was plagued by delays, with parties sometimes waiting a year or more for mediation and two years for an adjudication hearing: see McAndrew, Morton and Geare, above n 41.

55 NZLS *Snapshot of the Legal Profession 2024* (December 2024).

56 Winkelmann, above n 26, at 14.

decade ago and seem to me to resonate with the rise of formality and legalism in employment dispute resolution.[57]

It should be noted that none of this is peculiar to this jurisdiction. Legal history reflects that formality and legalism had infiltrated all corners of the English legal system by the nineteenth century, driven by what was called "the professional project" and theoretical beliefs about the standards required to serve the ends of justice.[58] Those beliefs have remained prominent in the law generally since,[59] largely (at least as far as I am aware) without any great debate or unpicking of whether they remain valid, or the extent to which such beliefs actually do serve the ends of justice in 2025: I see this as being Justice Miller's underlying point.

What might usefully be reflected on, for today's purposes, is that legal history also demonstrates the competence of litigants in person in low rank courts and tribunals before the rise of procedure and formality.[60]

Returning to the current climate of complexity in employment law and practice – it has tangible consequences. It reinforces the narrative of legal need in a specialist Court and tribunal (the Authority) deliberately designed by Parliament to mute that chatter.

Litigants in person are now an established, and substantial, part of the dispute resolution framework. As I have said, the trajectory is upwards. It is a reality that is, I suggest, here to stay. The difficulty I perceive is not the increasing number of litigants in person, but rather that the processes and procedures of the jurisdiction are ill equipped to deal with them.[61]

So, while some see litigants in person as the problem, it might be said that the problem is a systemic failure to act on the original statutory vision for the employment institutions.

It may be regarded as something of a controversial notion, but in recognition of Ethel Benjamin's propensity to step outside the square, I will express it, nonetheless.

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57 Noting that media coverage reflects that investigations in the Authority have become longer and there has been a reported increased pressure on Community Law and the Citizens Advice Bureau for employment advice and support, arising from the increasing complexity of the law and procedures; see Inglis, above n 48.

58 Kate Leader "From Bear Gardens to the County Court: Creating the Litigant in Person" (2020) 79 CLJ 260.

59 For example, ideas such as that individuals need expert representation to experience a fair trial and that active case management can imperil a judge's impartiality and thus the rule of law. See Adrian Zuckerman "No justice without lawyers – the myth of an inquisitorial solution" (2014) 33 CJQ 355 at 355.

60 Leader, above n 58, at 268.

61 Christina Inglis "If it's broken, fix it – but how? Is support for lay litigants part of the answer?" (paper presented to the Waikato Public Law and Policy Unit, Waikato University, 26 March 2025).

I see the rise of litigants in person in our specialist jurisdiction as something of a positive; it aligns with a very important aspect of the original statutory vision – namely having the parties at the centre of the process, resolving their issues (where possible) between themselves with the support of specialist institutions where they are unable to do so. Might we conceive of a flashing neon sign at the start of the yellow brick road which reads: "Litigants in Person WELCOME here"?

Enter stage door left – Employer B

Employer B should not be forgotten. They too have a significant interest in being able to participate in the dispute resolution process, to defend claims brought against them and to pursue genuine claims without unnecessary impediment.

Employer B is a small owner/operator business, running a local café with three staff. Employer B has invested their life savings into the business, which has tight profit margins and a fluctuating customer base. The litigation that Worker A is proposing to take against them might be ruinous; the cost of defending the claim could shut the business. Employer B reads the Dr Wiles' judgments, looks at the yellow brick road and sees a path to bankruptcy, rather than to vindication.

What are Employer B's options? Might they be very similar to those confronting Worker A?

Where does this leave us?

As the Chief Justice has highlighted,[62] court systems should be fit to be engaged with by the communities they serve, which at times requires innovation and, in pressing times, requires decisive action.

If the protective blanket of employment law has, in reality, shrunk and is at significant risk of further shrinkage, innovation (perhaps radical innovation) is what might well be required, and sooner rather than later. This involves asking, and answering, a number of uncomfortable questions, including of us as lawyers, Judges and Authority members.

Why have we collectively, over the years, considered it necessary to layer formality and procedural barnacles onto the bottom of employment law and practice, in a jurisdiction that is

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[62] Helen Winkelmann "It's complicated: Judicial leadership in the 21st century" (paper presented to the Australasian Institute of Judicial Administration Oration 2025, University of Auckland, 6 June 2025).

people and relationship-centric and which is designed (most significantly at first instance) to be non-technical, merits based and speedy?

Has the concern about procedural fairness, natural justice and the like come at a disproportionate cost to access to justice? One might ask the question in a slightly different way – if justice cannot in reality be accessed is there justice at all?

Do the range of participants currently perceived as necessary in employment dispute resolution actually need to be there to achieve just results?

Might it be worthwhile asking *what* purpose (and *whose* purpose) is being served by each of the complex twists and turns we have built into the procedural and legal maze. To use Justice Miller's analogy, what point is there in having a Rolls Royce parked at the start of the road if the people it is built to transport are left standing in the parking lot watching it drive away?

Concluding remarks

Employment law matters. It needs to be accessible if it is to do the job that Parliament clearly intends it to do; that intention has remained fundamentally unchanged for quarter of a century and has become firmly imbedded in the common law. If the reinforced concrete floor is porous, it does not do its job; and the promise of minimum entitlements and legal rights is illusory.

If access to the employment institutions is, as I have suggested, a goal worth pursuing, it will require us to rethink the way we do things, to ensure that what we do and how we do it is designed for the litigants themselves. That will, of course, likely require a painful period of self-reflection, and a shedding of many comforting traditional ways of doing things. We might look to Ethel's spirit of determination for motivation. As she observed early in her career, speaking (in a rather perky way) about the challenges that lay ahead of her as a pioneer in the law:[63]

> If all were smooth sailing what a dull dreary journey it would be!…if we make up our mind that all difficulties shall be overcome, half the battle is already won...

Reminding ourselves of who Worker A and Employer B actually are might also be motivating.

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63 Ethel Benjamin "Women and the study and practice of the law" *Press* (Canterbury, 13 September 1897) at 5.

They are not fictional characters or mere statistics in a Court's annual report. They are real people, with real lives; they are your siblings, parents, caregivers, family friends, work colleagues, relations, the people you sit next to on the bus, and those you pass in the street every day. The impact of what we do, and how we do it, matters a great deal.

Time for a radical reset? What would Ethel Benjamin think?

Christina Inglis