

Employment Advocate vs Employment Lawyer: A comparative analysis between New Zealand, Australia, and the United Kingdom

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Abstract

New Zealand is facing a burgeoning number of employment advocates in its legal system, especially since the Covid-19 pandemic. As part of the enactment of the Employment Relations Act (ERA) 2000, New Zealand's parliament intended that employment disputes be resolved in a non-adversarial and efficient manner that required little legal representation. Employment advocates are meant to meet that need; a relatable agent for an employment litigant that resolves disputes faster and cheaper. However, there have been increasing concerns from the employment judges, the New Zealand Law Society, lawyers and the public about the professionalism and competency of employment advocates. Recent case law questions whether employment advocates can continue to operate without restrictions or an oversight body. This paper demonstrates why some employment advocates operate below the standards expected by the courts and the impact it has on their employment litigants or clients. An international comparison to paid agents in Australia and McKenzie friends in the United Kingdom is also included. This paper recommends that the current operations of employment advocates undermine employment litigants' access to justice and that New Zealand's parliament needs to reconsider the role of employment advocates in employment disputes.

Keywords: employment advocates, employment law, professionalism, UK McKenzie friends, Australian paid agents.

Introduction

Like many other countries, New Zealand's employment market was adversely affected by the Covid-19 pandemic; the legal employment issues were both legally complex and arguably dominated employment disputes in the courts. At the same time, New Zealand's courts saw an increasing number of unrepresented litigants and legal advocates before the courts (Jones, 2019). Yet, without legal representation, many New Zealanders are unable to access justice, depriving them of their rights¹. It is widely acknowledged that New Zealanders who receive little to no legal assistance face challenges navigating the legal system and do so to their detriment. Moreover, they may often face a severe disadvantage compared to their opposing parties. Yet often, employment litigants decide to save money and do it themselves (self-representation) or use an employment advocate.

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¹ New Zealand is a signatory to International Covenant on Civil and Political Rights (ICCPR). Article 14 (4)(d) of the ICCPR allows a person to choose the right to defend themselves or anyone of their choosing.

Legal assistance and representation in the employment courts are made possible through the Employment Relations Act (ERA) 2000, where the employment litigants can choose to self-represent themselves, appoint a lawyer or use a [non-lawyer] employment advocate. The more significant challenge for employment litigants when choosing to use an employment advocate is knowing they are getting better or similar legal assistance as if they had used a lawyer.

However, many employment litigants are unaware of the difference between an employment advocate and a lawyer. With little to no restrictions placed upon them, employment advocates market themselves as employment experts with high-visibility websites (Dippie, 2020). In this paper, the difference between employment advocates and lawyers is explored and discussed; which is timely, given the increasing number of employment advocates now appearing in New Zealand's employment courts.

Background

Lawyers are a fundamental part of the legal profession whose work impacts people's lives in countless ways. A \$NZD 4 billion market, New Zealand's legal profession is projected to grow as the economy recovers from the effects of the Covid-19 pandemic (IBISWorld, 2022). A typical lawyer has undergone specialised education and professional legal and ethical training. Furthermore, lawyers face a future of ongoing professional development and scrutiny of their conduct from New Zealand's Law Society because, if nothing else, being a lawyer is an indicator to the public of trust and expertise.

Professionalism from the courts, their administration and those who work in the court system is a prerequisite for effectively realising employment litigants' rights to access justice. Professional associations like the New Zealand Law Society play a vital role in upholding professional standards and maintaining public confidence and trust in the legal profession. While the legal advocacy association² does play an essential role in representing the interests of its membership, this paper will demonstrate that some employment advocates operate outside the professional body to the detriment of their unsuspecting and vulnerable employment litigants.

While there are good statistics on the number of lawyers practising law in New Zealand, it is difficult to determine the number of employment advocates in the New Zealand courts because they are unregulated and are not required to be registered or licensed. This is unique to New Zealand as neither Australia³ nor the United Kingdom allow employment advocates to operate in the Employment Courts in the same way that New Zealand does. Therefore, Australia's paid agents and United Kingdom's McKenzie friends are included as an international comparison and provide a background against which New Zealand's employment advocates should be viewed.

This paper considers whether employment advocates should or could be recognised as professionals in New Zealand's courts. Historically, legal litigants have expected legal expertise from legal representatives (in and out of the courts), but today, employment litigants

² In New Zealand, it is the Employment Law Institute of New Zealand

³ Australia's parliament intended the Fair Work Commission to operate efficiently, informally and in a non-adversarial manner – so the issue of legal representation (formal on non-lawyer employment advocates) relies on s596 of the Fair Work Act (Cth) 2009 – where the Fair Work Commission requires permission for such representation. Arguably there has been more legal representation than anticipated.

arguably have much higher expectations, such as earlier resolutions and fair compensation exit packages. Therefore, this paper also seeks to identify if employment advocates have a professional identity and concludes by suggesting that the introduction of regulation for employment advocates is long overdue.

The nature of the legal profession

Typically, a professional group is defined by its autonomy: using collegial control as a gatekeeper for entry into the profession, along with professional training and monitoring of a member's conduct during practice (Freidson, 1984). Burk (2002) defines a profession as “a relatively high-status occupation whose members apply abstract knowledge to solve problems in a particular field of endeavour” (p.21). In the case of lawyers, a certified university law degree⁴ followed by professional exams must be met before membership into the New Zealand Law Society (the oversight body for [practising] lawyers in New Zealand⁵). Moreover, the New Zealand Law Society can refuse entry to the profession if the applicant is not of ‘good character’ despite acquiring the educational requirements. ‘Good character’ is defined broadly, but any act of dishonesty (including academic dishonesty), financial incompetency (bankruptcy, for example), prior criminal convictions, or even evidence of mental or emotional instability could be considered a failure in good character standards⁶.

Formal supervision and ongoing teaching enable new lawyers to build on knowledge, skills, and professional attributes; the objective is for the lawyer to assume responsibility for their legal practice progressively. Thus, in those early years of practice, new lawyers must practise under the direction of an experienced senior practitioner who takes full accountability for the work produced by the new lawyer. Furthermore, ongoing professional development [educational] is also required throughout a lawyer's professional career in order for members to be kept up to date with the relevant law changes, technical skills and standards required by the profession. These educational requirements create barriers to exclude unqualified persons from practising law.

These standards of expertise and technical knowledge enable lawyers to conduct themselves with professional competence inside and outside of the courts; their client validates this specialised expertise, forming the basis of a trust relationship. Therefore, a lawyer's work also has a level of public interest and altruism (Barney, 2004) and establishes ethical foundations. For New Zealand's legal profession, the ethical requirements are codified in The Lawyers and Conveyancers Act 2006 with a particular reference to one of a fiduciary⁷.

A fiduciary has a fundamental obligation⁸, motivated by the duty of loyalty, honesty and trust rather than the possibility of financial gain (Curry & Whiteside, 2016). So, while it is acknowledged that New Zealand has its fair share of incompetent, lack-lustre lawyers who meet the requirements to enter practice (for example, see New Zealand Herald article⁹, (New

⁴ The Council of Legal Education (made up of Judges, the Law Society, and the universities) determine the law courses required for a certified law degree

⁵ The NZ Law Society was founded in 1869 with the passing of the NZ Law Society Act

⁶ For an example of this, see Neilson, N., (2020). *Fit and proper person test divides NZ courts*. Lawyers Weekly. Retrieved from <https://www.lawyersweekly.com.au/biglaw/29218-fit-and-proper-person-test-divides-nz-courts>

⁷ s4(c) of the Lawyers and Conveyancers Act 2006

⁸ In *Chirnside v Fay* [2006] NZSC 68

⁹ Corbett, J. (2001, March 17) *Indictment: a case of bad lawyers*. NZ Herald.

Zealand Law Society, 2023)), there is no doubt that lawyers are generally well-educated and more able to navigate the legal system than those who have no legal training at all, as in the case of employment advocates.

Consequently, professional self-regulation is exercised formally and monitored by the New Zealand Law Society, whose over-arching objective is to protect the public, the legal profession and legal institutions against lawyers who have failed to maintain minimal professional standards (Maute, 2008); and therefore also has the authority to evaluate and take disciplinary action against members who fail to conduct themselves appropriately. Conduct that might be considered inappropriate includes a lack of professional proficiency (either wilfully or recklessly and breaches an applicable rule within the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, for example the failure to charge fair and reasonable fees) and/or unsatisfactory conduct unbecoming of a lawyer (sexual harassment for example).

This legal system of underlying professional accountability supports the notion of trust and confidence in providing legal services to the public. It reiterates the legal profession's devotion to service and the public¹⁰. For this reason, the Lawyers Standards Committee (through the New Zealand Law Society) investigates and determines complaints against a member¹¹. Disciplinary action (through the Disciplinary Tribunal) can result in a warning, a financial penalty, or more dire consequences for serious breaches, such as expulsion from the profession.

Legal clients rely on a lawyer for their legal expertise and guidance when at their most vulnerable; thus, a lawyer is bound to serve the client's best interests as a fiduciary. Moreover, where the lawyer's scope and work may have grown to include developing areas of law, such as climate change and environmental matters, lawyers have a monopoly in the courts regarding legal representation. Consequently, lawyers are bound to be available to the public and have limited instances where they can refuse to take on a client¹². For most legal disputes in the courts, the public has little choice but to seek a qualified lawyer. However, this is not the case for employment disputes.

Employment advocates

The use of representatives or agents are not new to New Zealand's employment disputes jurisdiction. The Labour Relations Act 1987 allowed any party before the Court to have an agent or representative¹³. However, it was the Employment Contracts Act [1991] which saw the greatest changes in employment conditions in New Zealand whereby employees (and employers) could continue to choose their own representation to both negotiate an employment contract and represent them in an employment dispute¹⁴; this continued with the introduction of the ERA¹⁵.

¹⁰ s3(1) Lawyers and Conveyancers Act 2006

¹¹ Complaints can be made by a client or a member of the public

¹² Conveyancers Act 2006 ("LCA") and Conduct and Client Care Rules 2008, Rule 4 & 4.1, a lawyer can only refuse instructions from a client when reasonable

¹³ Labour Relations Act [1987] s299 – allows a party to have self-represent, an agent or barrister or solicitor.

¹⁴ Harbridge, R. & Moulder, J. (1993). *Collective bargaining and New Zealand's Employment Contracts Act: One year on*. Journal of Industrial Relations Vol 35(1) pp 62-83.

¹⁵ ERA, clause 2, schedule 3.

When the ERA was introduced, it addressed the political objectives of the Labour Party by tackling the major social issues associated with employment relationships. Academics, such as Rasmussen (2010), argued that the ERA would influence New Zealand's labour market for decades. Regardless, academics and practitioners alike believe the introduction of the ERA opened the floodgates for employment advocate representation in the employment jurisdiction (see Clement, D. (2022))¹⁶.

Consequently, a new industry of unregulated employment advocates has emerged in New Zealand and shows no sign of slackening. Some practise as sole advocates while others belong to medium to large firms with principal(s) advocate(s). As the scope of employment disputes has grown, so has the work of the employment advocate. Employment advocates can now supply most of the same legal employment services a lawyer. As a result, fierce competition exists in the employment dispute space. This reiterates the seminal work of Abbott (1988) – skilled specialists only grow in their scope and jurisdiction if there is an area of growth that can be claimed, a niche into which the skilled specialists can. Indeed, this growth has enabled employment advocates to offer boutique and specialist services, creating a specialism that is hard to displace by lawyers unless the dispute goes beyond the employment jurisdiction into the upper courts.

Where lawyers are required to meet all the necessary competencies of the profession, there is no such requirement placed upon employment advocates. Furthermore, employment litigants have no practical guidance regarding what information employment advocates may or may not provide. In 2021, the New Zealand Law Society emphasised the importance that only lawyers, who hold a current practising certificate, can provide legal advice and made a distinction between lawyers and non-lawyers in a press release (New Zealand Law Society, 2021). It did so to protect the public because there is good reason to prevent those without prerequisite legal training from holding themselves as employment legal experts. The fear that employment litigants are disadvantaged by an employment advocate who fails to know what the employment courts require and how to navigate the legal system accordingly is real and concerning. In *Ward v Concrete Structures (NZ) Ltd*, the judge noted concerns about the need for more regulation of employment advocates, the absence of an oversight body and the impact on the employment litigants they represent¹⁷.

Understanding the status of the employment advocate in the legal system

Many would agree that the ERA was well-drafted and unique in its range because it addressed the perceived power imbalance in the employment relationship between employers and employees. Described as a well-balanced and practical piece of legislation (Wilson, 2001), the ERA encourages productive employment relationships through good faith bargaining and making access to employment dispute resolution easier with a strong focus on mediation¹⁸. This was partly achieved by introducing the Employment Relations Authority (Authority) and the Employment Court (EC). Parliament fully intended that the Authority would *investigate employment problems in a speedy and non-adversarial way, with informality emphasised so*

¹⁶ Clement, D., (May 2022). Employment advocates: dangerously incompetent or access-to-justice warriors. Retrieved from <https://adls.org.nz/employment-advocates-dangerously-incompetent-or-access-to-justice-warriors/>

¹⁷ *Ward v Concrete Structures (NZ) Ltd* [2019] NZEmpC 111

¹⁸ Employment Relations Bill 2000 (8-1). Retrieved from http://www.nzlii.org/nz/legis/hist_bill/erb200081263/

that practical decisions could be achieved quickly¹⁹. From this perspective, clause 2 in Schedule 3 should be read and understood; the reach of the lawyer's monopoly was never intended to extend into the employment jurisdiction. Instead, parliament understood the formality of the legal profession and, whether intentionally or not, wanted to avoid that formality in resolving employment disputes and, if possible, without judicial intervention. From this context, employment advocates emerge (Dippie, 2020).

However, the underlying question of whether employment advocates could be considered an unexpected consequence of the ERA's clause 2 has been largely ignored. This is partly because parliament could not have foreseen the burgeoning numbers of employment advocates now operating in the employment jurisdiction. Moreover, while the expectation that the Authority would be a place of relaxed procedural rules, this has not been met. Ordinary folk who use the Authority (to achieve the full benefit of their legal rights) without proper legal representation do so at significant risk of failing to make out viable legal cases (O'Barr & Conley, 1985; Smith et al., 2009). Nevertheless, the underlying question of whether employment advocacy qualifies as a profession in the same way as law practitioners has led to increasing debates in and out of the employment jurisdiction and Courts.

The key to this is understanding that the knowledge base in employment advocacy still needs to be developed sufficiently for professional accountability. There are no education requirements or a system of certification/licensing for employment advocates; consequently, there is no control over who can practise. Potential employment litigants have no basic standard to determine if the employment advocate has the experience or the legal skillset to meet their needs.

The New Zealand courts still need to be asked to consider if the relationship between an employment litigant and employment advocate is fiduciary in nature. Although the relationship between the employment litigant and employment advocate is mutual, it is doubtful if parliament ever considered the relationship as no more than a paid McKenzie friend (this is discussed later in this article) and likened to a standard more aligned with a business providing a service as defined by the Consumer Guarantees Act 1993 (CGA). The difficulty in applying the CGA to employment advocates is two-fold. Firstly, the CGA applies only to those in trade, which employment advocates might be, but is probably beyond what parliament considered when the CGA was enacted. Secondly, the consequences of incompetence are long-lasting for the employment litigants. Judge Inglis stated that "effective representatives make it easier for the Court to find in their client's favour" (Judge Inglis, 2014). Once the Court reaches a decision, it cannot be re-litigated in that court – it must be appealed (if that is possible), which incurs more costs for the employment litigant.

Consequently, New Zealand employment advocates have attracted enduring criticism for stumbling through the court processes and failing to represent the employment litigants with the legal and technical expertise required for an employment dispute. As a result, there are increasing instances of New Zealand's employment court judges having to reprimand employment advocates for their incompetence. Furthermore, in an attempt to prevent further issues, the Ministry of Justice also published a practice note to help educate employment advocates in court procedures (*Conduct of representatives in the Employment Relations Authority* in 2019²⁰). Therefore, despite the intentions of parliament to have a relatable agent

¹⁹ Employment relations bill 2000 (8-1) at p. 9. Retrieved from

http://www.nzlii.org/nz/legis/hist_bill/erb200081263/

²⁰ "Practice Note 3 Conduct of Representatives in the Employment Relations Authority" (30 April 2019)

representative in the employment courts for employment litigants, the issues are sufficiently severe to warrant reconsideration from parliament.

Furthermore, it is hard to argue against the fact that potential employment litigants can be misled to think that employment advocates are experts in their area, given some of the claims made in their promotional marketing (Dippie, 2020). The New Zealand Law Society is aware that some employment advocates overstate their skills and experience, giving the public the wrong impression about [potential] outcomes (New Zealand Law Society, 2021). Regrettably, some employment litigants often appear to have been no better off than if they represented themselves.

The professional and technical standards expected of lawyers do not apply to legal advocates. Regrettably, it is evident that, without clear and concise professional codes of conduct and ethics, the behaviour of some employment advocates remains unacceptably low. Recent case law from the employment jurisdiction has established instances where employment advocates have failed to act with care when performing work for employment litigants; examples include but are not limited to the employment advocate breaching the confidentiality and non-disparagement clauses of a settlement agreement²¹, failing to file the required documents to the court, filing documents that were primarily irrelevant and poorly constructed²², failing to appear at required hearings²³, and using social media to air grievances²⁴. It is also evident that there seem to be no consequences for employment advocates' misconduct; the courts cannot prevent an incompetent employment advocate from acting for another employment litigant. There are no legitimate powers to use against employment advocates who do not engage in professional, respectful, and collaborative relationships (as intended by the ERA).

Chief Judge Christina Inglis notably said²⁵

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 impact 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 [at 12].

However, the idea of self-regulation of the employment advocates is not new. The Employment Law Institute of New Zealand Inc. (ELINZ) (an incorporated society formed in 1995) recognises that a legal advocate should be a 'fit and proper person' and that there must be professional standards for employment law advocacy. ELINZ had prestigious beginnings, with Judge Horn as its first patron and its executive members a mix of practitioners, lawyers, and law lecturers. ELINZ wanted to be the standard bearer for employment advocates. However, ELINZ membership is voluntary and has no legislative authority; more importantly, ELINZ is fully aware that there are probably more non-members than members.

ELINZ developed their code of conduct and a complaint mechanism to improve its legitimacy. However, this applies only to its members; without legislative authority, punishments cannot be enforced. Nevertheless, errant members can resign their membership, thus avoiding the

²¹ *Turuki Healthcare Services v Makea-Ruawhare* [2018] NZERA Auckland 136

²² *Neil v New Zealand Nurses Organisation* [2019] NZERA 98

²³ *Rawlings v Sanco NZ Ltd* [2006] NZERA 131

²⁴ *Ibid* at 17

²⁵ *Ward v Concrete Structures (NZ) Ltd* [2019] NZEmpC 111 at [12].

complaints process altogether, undermining ELINZ's credibility. Consequently, the existence of ELINZ has done little to remove incompetent or unethical employment advocates²⁶.

Furthermore, without considerable support from policymakers and the state, the burdens and pressures of disciplinary actions would fall squarely upon the [executives] of ELINZ. Unlike the New Zealand Law Society, ELINZ is not financially or logistically supported to investigate and prosecute disciplinary cases. Using the example of the legal profession, ELINZ would have to undergo radical restructuring of its disciplinary system to gain any credibility. Regardless, regulation is warranted only because it may enjoy some success at preventing incompetent and/or unethical employment advocates from acting. Ergo, the current status quo of employment advocates is incompatible with an effective system of accountability, professionalism or otherwise.

Moreover, employment disputes can be emotionally gruelling, with no clear winners. The remedies tend to favour compensation, and costs are often split between an employee and employer, so dispute settlement is usually in both parties' interests (Pennington, 2005). From this perspective, a settlement is a low-value option for both parties because costs tend to be much less. Yet from a legal standpoint, settlement is more desirable, especially for employment litigants. Settlement tends to be quicker, less traumatic for the employment litigants and a way of avoiding the employment tribunal process altogether (MBIE, 2022). More importantly, hefty legal fees are avoided for the employment litigants (New Zealand Herald, 2005) and align with parliament's intention of evading the adversarial environment of the court system (i.e. ERA) for low-level employment disputes.

However, for many potential employment litigants, the choice of an employment advocate versus a lawyer is based on cost; the perception is that lawyers are expensive; therefore, employment advocates should be the cost-effective and cheaper option. Legal aid cuts in New Zealand have exacerbated this thinking, with Chief Justice Dame Helen Winkelmann describing New Zealand's legal funding as underfunded and with a pressing need for investment (McManus, 2022). Yet, despite the government's budget announcements in 2022 to inject much needed funds into the legal aid sector, the lack of legal aid has, without doubt, driven the increasing numbers of employment advocates (McManus, 2022) and inadvertently driven up the fees of employment advocates.

Employment advocates use various methods to charge fees, including contingency payment arrangements (*no win, no fee*, for example), percentage payment arrangements of the settlement package or an hourly rate. However, as is often the case, winning in an employment dispute can be subjective²⁷, with few cases resulting in a winner/loser scenario. The case law has identified instances where employment advocates have significantly overcharged the employment litigants²⁸; a lack of transparency of the fee calculations²⁹ whereby the hourly rate for the employment advocate outstripped the going rate for a lawyer³⁰ or the fees outstripped the actual settlement³¹. Typically, the fees charged by some employment advocates establishes

²⁶ Nutsford, M. (2019). "Special article: President's resignation" (29 March 2019) ELINZ Newsletter, Employment Lore

²⁷ *The Order of St John Midland Regional Trust Board v Greig* (2004) 7 NZELC 97,610, [2004] 2 ERNZ 137 at [14]

²⁸ *Lucas v Te Rito Daycare Ltd* [2018] NZERA Auckland 5

²⁹ *Brown v Te Kohu Logging Ltd* [2018] NZERA Auckland 2

³⁰ *Cross v D Bell Distributors Ltd* [2017] NZERA Auckland 391

³¹ *Albon v Kinetics Group Ltd* [2018] NZERA Christchurch 153

that their employment litigants are left without redress if things go wrong. Furthermore, the fees of employment advocates remain out of the public domain, and only when the Judge has called for costs are instances of overcharging and unethical fee-charging revealed (as demonstrated by the examples used here).

In contrast, a lawyer's fees must be fair and reasonable (proportionate to the expertise required). Overcharging by lawyers is considered professional misconduct, so the lawyer concerned could face disciplinary action from the New Zealand Law Society³². However, this is not the case for employment advocates. The case law illustrates that the employment advocates charging arrangements can be unethical and beyond the public interest.

Furthermore, the lack of competency to carry out client tasks effectively adds further weight to the fact that employment advocates need more legitimacy. To maintain and develop legitimacy, certain fundamental factors, such as legal competence, appropriate responsiveness to the court's directions, professional civility and sound representation of their employment litigants including court preparedness, are critical. Such factors resonate strongly with the criticism of employment advocates in the case law literature, the New Zealand media and the New Zealand Law Society. The effectiveness of employment advocates as a means for increasing the public's trust and confidence in resolving employment disputes efficiently and significantly, and the perceived legitimacy of the employment advocates as Parliament's answer to an efficient resolution of employment disputes without lawyers have not been met. Instead, there has been, on the part of some employment advocates, inconsistent and poor performance, with severe long-term outcomes for their employment litigants.

McKenzie Friends and United Kingdom (UK)

In the UK, non-lawyer advocates are more commonly known as McKenzie friends and are not limited to employment disputes. Derived from the 1970 UK case *McKenzie v McKenzie*, a McKenzie friend is a support person to an unrepresented party in a legal dispute and is generally not legally trained. At the time of the McKenzie judgement, the UK Court of Appeal had in mind the sort of assistance not provided by a lawyer, and over the years, the use of a McKenzie friend is now widespread throughout the UK legal system. In 2010, guidance was issued by the Master of the Rolls and the President of the Family Division: *Practice Guidance: McKenzie Friends (Civil and Family Courts)*. With leave of the court, a McKenzie friend is allowed to sit with an unrepresented litigant, can take notes and give advice, but cannot speak for the litigant or interfere with proceedings.

The most recent decision where a paid McKenzie friend facing the consequences of incompetence and poor conduct is a 2019 case heard in the English High Court³³. In that case, the Court ruled that unqualified advisers, including those known as paid McKenzie friends, should be held to the same standard as a lawyer if they hold themselves out to be experts (Nugent, 2019). The Court concluded with the proposal that a paid McKenzie friend must sign up for a code of conduct, followed by a recommended ban on fee charging (which was later withdrawn) (Clapham & Collinge Solicitors, 2023). So, while the decision in the UK

³² Rule 3.4(a), 9 and 11.1 of the Lawyers and Conveyancers Act (Lawyers: Rules of Conduct and Client Care) 2008

³³ *Paul Wright v Troy Lucas (a firm) & George Rusz* [2019] EWHC 1098 (QB)

establishes that if a McKenzie falls below acceptable standards of skill and care, they can become liable – this has not been the case for New Zealand.

Regardless, the UK has had other instances where the McKenzie friend's conduct and competence have fallen below an acceptable standard; a McKenzie friend was jailed for perverting the course of justice in the family court³⁴, prohibited from appearing after they brought several *totally without merit* claims³⁵ and excluded from the court³⁶. Arguably the UK legal system has had more prolonged exposure to non-lawyer advocates, such as McKenzie friends, but the examples used here illustrate some of the risks and difficulties the litigants face. Similarly, there is no complaint process for litigants if the McKenzie friend's conduct and competence fall below an acceptable standard. Furthermore, the risk is generally greater for UK litigants because McKenzie friends have no indemnity insurance, a standard requirement for British lawyers.

Paid agents and Fair Work Commission of Australia

In Australia, [non-lawyer] employment advocates are called paid agents. However, unlike in New Zealand or the UK, legal representation or otherwise is not automatic in the Fair Work Commission³⁷. Whether a lawyer or a paid agent, an application³⁸ must be made to the Fair Work Commission to represent a client. Nevertheless, like the New Zealand framework, the Australian Federal government intended that the “law operate efficiently and informally, and where appropriate, in a non-adversarial manner”³⁹ and that any party dealing with the Fair Work Commission should be able to represent themselves adequately. However, critics of the Fair Work Act 2009 (Cth) argue that a party's right to legal representation in the Fair Work Commission (FWC) is minimised and seen as a significant obstacle because the exclusion of lawyers in a formal court is unprecedented (House of Representatives & Commonwealth Parliament, 2001). However, the Explanatory Memorandum to the Fair Work Act asserts that legal or any other representation (paid or not) should not be necessary before the Fair Work Commission and, thus, sets a higher bar for representation (Mourell & Cameron, 2009). The s596 of the Fair Work Act 2009 (Cth) states that the Fair Work Commission may only grant permission for legal representation if:

1. It would enable the matter to be dealt with more efficiently, taking into account the complexity of the matter; or
2. It would be unfair not to allow the person to be represented because the person is unable to represent himself, herself or itself effectively; or
3. It would be unfair not to allow the person to be represented taking into account fairness between the person and other person in the same matter.

Despite this, it is unusual for an application for legal representation (lawyer or paid agent) to be refused, especially if the person is a non-English speaker, has difficulty reading or writing or is a small business owner with few to no resources to call upon.

³⁴ *H (Children: exclusion of McKenzie friend)* [2017] EWFC B31 (05 March 2017)

³⁵ *AG v Vaidya* [2017] EWHC 2152 (Admin)

³⁶ *LFL v LSL (McKenzie Friends: breach of court orders)* [2017] EWFC B62,

³⁷ The Fair Work Commission is the equivalent of New Zealand's employment tribunal and employment authority.

³⁸ s596 Fair Work Act 2009 (Cth)

³⁹ Explanatory Memorandum, *Fair Work Bill 2008* [2291] – [2292]

The Law Council in Australia has strongly criticised s596, calling it more restrictive than parliament intended. This was demonstrated when, in *Stephen Fitzgerald v Woolworths*⁴⁰, a full bench determined that representation extended to out of court activities, such as preparing applications and making submissions (coined as *shadow lawyers*). Furthermore, the Law Council argues that the parties are entitled to legal representation because of the severe implications of employment disputes. Australia, like New Zealand, is also a signatory to the *International Covenant on Civil and Political Rights* and s596 is a breach of the International Covenant. More importantly, the Law Council points out that large corporations may not have lawyer representation in the Fair Work Commission, however, will still have in-house legally trained employees, resulting in unfairness to individuals and small businesses⁴¹.

Highlighted in *Woodward v Greyhound Australia Pty Ltd*⁴² where the court had to consider whether a solicitor could represent the employer, the disgruntled employee in that case was represented by a senior project officer employed by the Transport Workers Union (not legally qualified). The Commissioner decided in favour of the employer, affirming that the appointment of the experienced solicitor was *just and reasonable* – reiterating the Law Council’s claim.

Despite the focus on s596, Australia has had its own experience with paid agents. Similar to New Zealand, there is no restriction on who can act as a paid agent. Moreover, there is no formal licensing or registration of paid agents in Australia, nor is there a professional body that deals with the conduct of paid agents. If a party is unhappy with the performance of their paid agent, the Fair Work Commission recommends that they complain to their state consumer protection agency (like New Zealand’s Commerce Commission who has oversight of the Consumer Guarantees Act) – which infers that the Australia’s parliament considered paid agents similar to a trade person providing a service (Fair Work Commission, 2023).

Furthermore, the Fair Work Commission encounters similar problems with paid agents as have both New Zealand and the UK. A Fair Work Commissioner recently described a non-paid agent as “stubborn, misguided and almost wholly incompetent” during the court proceedings (Antrobus, 2022). So, while the intention is for employment litigants to use agents (paid or otherwise), the reality is that, without legal representation, there can be a significant imbalance between the parties. Unlike New Zealand, the Fair Work Commission has an active role in controlling the quality of the paid agents; incompetent (both legally or technically) or ineffective paid agents are prevented from working in the Fair Work Commission again. However, the Fair Work Commission is tasked with assessing the paid agent and whether the assistance provided to the employee litigant has value (Mourell & Cameron, 2009). Consequently, paid agents face greater scrutiny if they are to work in the Fair Work Commission.

What are the solutions?

The challenges and barriers to employment dispute resolution are well-documented (for an example, see Franks, 2018). However, this paper establishes that the legal consequences of using employment advocates can be significant for the employment litigants. Furthermore, as

⁴⁰ *Stephen Fitzgerald v Woolworths Limited* [2017] FWCFB 2797

⁴¹ Law Council of Australia, ‘*Workplace Relations Framework*’, Submission to the Productivity Commission (27 March 2015).

⁴² *Woodward v Greyhound Australia Pty Ltd* [2015] FWC 2570

noted at the beginning of this paper, there are few empirical statistics collected on the employment advocates operating in New Zealand. As a result, quantifying the extent and breadth of the complaints against employment advocates is inherently unknowable unless there is some form of compulsory registration or licensing.

Key to the registration issue is state intervention and the introduction of legislation. Currently, there are no restrictions or mechanisms to ensure that employment advocates are adequately educated and competent to practise. However, registration (or licensing) would require an oversight body, an organisation that would carry out this process. Without a formal oversight body, the competency of employment advocates will continue to vacillate between unacceptably low to reasonably competent. Thus, registration would include elements such as an academic qualification, continuing education, and ongoing monitoring to ensure that employment advocates met specific standards and continued to maintain competence.

Currently, there are no protections from unscrupulous or unethical employment advocates; the public cannot judge whether an employment advocate is appropriately prepared to provide legal services for employment disputes. More importantly, there is no way to assure the public that employment advocates meet a level of competence because there are no standards or enforcement frameworks. For law professionals, the enforcement framework is a disciplinary tribunal, such as the New Zealand Law Society Standards Committee or the Disciplinary Tribunal. The investigations always result in some response, from a low-level informal intervention to a more serious expulsion from the practice. Thus, any requirement for an enforcement framework for employment advocates would require any oversight body to have resources to pursue complaints and undertake investigations. Like the New Zealand Law Society, the oversight body could be funded by a membership fee but would also need some state support. A balance would need to be struck so that any oversight body could avoid expending significant staff hours and considerable monetary funds on a single investigation.

However, rather than having a patchwork of institutions, all working independently, that defines the nature and the length of training for employment advocates and their competency to work in the employment dispute space, it seems more reasonable to extend the work of the New Zealand Law Society. Just in the same way that conveyancing practitioners were established as a profession and regulated in 2006⁴³, this could be applied to employment advocates. This would be the most sensible way forward because employment advocates are offering legal services to employment litigants, and the New Zealand Law Society's most fundamental role is to ensure the public has confidence in the provision of legal services.

At its heart, any regulation of employment advocates would protect employment litigants, the public and users of legal services. The role of ELINZ would need a more comprehensive discussion. Still, regardless it is demonstrated in this paper that its current position is mainly ineffective in regulating employment advocates. More importantly, as pointed out earlier, it would need significant restructuring if it were to take on a role similar to the New Zealand Law Society, a decision that may inevitably result in sunk costs.

⁴³ The Lawyers and Conveyancers Act 2006

Concluding remarks

If employment advocates are to fulfil the intentions of parliament as set out by the ERA, there is no doubt that New Zealand's government must critically review the employment advocacy services. Also noted is the call from the judiciary that some form of continued competence is vital, and they are struggling with those employment advocates whose work and ethics are unacceptably low. Moreover, the impact of Covid-19 has meant there are not only more employment disputes, but the disputes are increasingly complex, so the users of employment advocates are left with no way of assessing the quality of the legal services they obtain. From this perspective, having an oversight body, such as the New Zealand Law Society, would enhance the public's perception of the legal services provided by employment advocates. It is also acknowledged that building the public's confidence in employment advocates is not a straight line; this paper has outlined the challenges and concludes that a legislative change is needed.

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