The evolving role of the Employment Relations Authority Te Ratonga Ahumana Taimahi in the age of pandemia

ANDREW DALLAS*

Abstract

The Employment Relations Authority Te Ratonga Ahumana Taimahi (Authority) is the principal adjudicative institution in Aotearoa New Zealand's employment jurisdiction. This article, which is written from a participant/observer perspective, examines how the Authority, which operates as an "investigatory" rather than a more traditional adversarial tribunal, responded to the Covid-19 pandemic and considers and evaluates what lessons might be learned. It also reflects on the future of the Authority's expanded collectivist jurisdiction within the context of pandemia and structural economic change.

Key Words: Covid-19; Employment Relations Authority; dispute resolution; institutions; adjudication.

Introduction

The Employment Relations Authority Te Ratonga Ahumana Taimahi (Authority) is the principal adjudicative institution in Aotearoa New Zealand's employment jurisdiction. It uniquely exercises its jurisdiction as an investigatory rather than adversarial tribunal. The placing of a tribunal at the centre of adjudicated employment dispute resolution in Aotearoa New Zealand is consistent with comparable jurisdictions: Australia, England (and devolved tribunals in Wales, Scotland and Northern Ireland), South Africa, Canada and Ireland. Indeed, by existence and/or design, such placement can reasonably be said to represent international institutional best practice.[1]

Within this context, this article examines how the Authority has responded to the recent Covid-19 pandemic and considers what lessons might be learned.[2] It also reflects on the future of the Authority's expanded collectivist jurisdiction in an era of pandemia.

---

* Chief of the Employment Relations Authority Te Ratonga Ahumana Taimahi (Authority).

The views expressed here do not necessarily reflect the views of the Authority. I am grateful for the helpful comments from the article's peer reviewers.

[1] See, Andrew Leggett, *Tribunals for Users: Report of the Review of Tribunals by Sir Andrew Leggett*, Stationery Office, 2001.

[2] There is an emerging body of literature about how employment/industrial tribunals dealt with the pandemic. See, for example, Justice Iain Ross AO, 'The Fair Work Commission's Response to Covid-19', *Australian Journal of Labour Law* (2022) Vol. 34: 10-19, Richard Bales, "Novel Issues in Canadian Labour Arbitration Related to COVID-19" (2021) Arbitration Law *Review 13, Lilach Lurie and Reut Shemer Begas "Labour Courts in Israel during the Covid-19* Crisis" LLRN Conference, 27 May 2021 and COVID and Leigh Johns, "the JobKeeper Jurisdiction of the Fair Work Commission" ILERA Study Group Paper, June 2021.

The Authority: a very brief history

The concept of an investigative body to resolve employment relationship problems in Aotearoa New Zealand arose out of dissatisfaction with the Employment Tribunal (Tribunal). The Tribunal had been established by, and operated under, the Employment Contracts Act 1991 (ECA), which was enacted by the Fourth National Government (1990-1999) as a purportedly, speedy and accessible dispute resolution forum. However, due to a limited jurisdiction, legal complexity, reliance on formal legal processes including production of a transcript of proceedings and over-supervision by the Employment Court, which sat above it, the Tribunal achieved limited success and oversaw significant delays.[3]

The Labour Coalition Government (1999-2008), which committed to repealing the ECA, had by February 2000 agreed, as an institutional response to supporting its proposed Employment Relations Act 2000 (ERA), to abolish the Employment Tribunal and to create a new institution – the Authority, with full, first-instance jurisdiction to hear and determine "employment relationship problems".[4]

While the ERA places considerable emphasis on the primacy of mediation,[5] to promote dispute resolution at the lowest possible level,[6] it also recognises there will be some matters that will require adjudicative intervention by the Authority.[7] This conceptualisation has been recognised by New Zealand's senior courts, the Court of Appeal[8] and the Supreme Court.[9] The New Zealand Law Commission has observed that the Ministry of Business, Innovation and Employment's (MBIE) mediation service and the Authority "forms part of an integrated dispute resolution process".[10]

The Authority today

As with any employment/industrial tribunal, the Authority sits at the intersection of a series of socio-economic, socio-political and socio-legal realities which have helped shape and reshape

[3] Margaret Wilson, "20th Anniversary Employment Relations Authority", Auckland, 4 November 2020 and see, generally, Gordon Anderson, "The Specialist Institutions: The Employment Court and the Employment Tribunal" (1996) 21 *New Zealand Journal of Industrial Relations* 1, Alastair Dumbleton, "The Employment Tribunal – Four Years On" (1996) 21 *New Zealand Journal of Industrial Relations* 21 and Ian McAndrew, "Adjudication in the Employment Tribunal: Some Facts and Figure on Caseload and Representation" (1999) 24 *New Zealand Journal of Industrial Relations* 365

[4] Cabinet Minute, *Employment Relations Bill: confirmation of government reform package for the ad hoc Committee on Employment Relations Bill*, CAB(00) M4/6(1), AER(00), 9 February 2000. As to the development of the Authority, see Lorraine Skiffington "The Making of the ERA – a recipe for success" [2001] *Employment Law Bulletin* 37, Margaret Wilson, 'New Zealand's path forward' [2001] *Employment Law Bulletin* 1 and Margaret Wilson "The Employment Relations Act: a statutory framework for balance in the workplace" (2001) *New Zealand Journal of Industrial Relations* 5 and Alastair Dumbleton, 'The Employment Relations Authority gets under way' *New Zealand Journal of Industrial Relations* 26(1) 119-130 and Alastair Dumbleton 'The Employment Relations Authority : powers that will be' *Employment Today*, August 2000, 10.

[5] A free service provided by the Ministry of Business, Innovation and Employment.

[6] Employment Relations Act 2000, s 3(a)(1)

[7] Employment Relations Act, s 143 (a), (b) and (c)

[8] *A Labour Inspector v Gill Pizza* Ltd [2020] NZCA 192; [2021] NZSC 184.

[9] *FMV v TZB* [2021] NZSC 102.

[10] New Zealand Law Commission, *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals*, Report 85, March 2004 at 292 and New Zealand Law Commission, *Tribunal Reform*, October 2008 at 7 and para 5.23.

its existence.[11] However, the Authority still holds true to its founding kaupapa (principles): the resolution of employment relationship problems in a principled, practical, sensible and cost-effective manner in communities across Aotearoa New Zealand. The Authority does this by establishing the issues in dispute, the facts, applying the law and making a determination according to the substantial merits of the case, without regard to technicalities.[12] The Authority has broad and exclusive jurisdiction, including: disputes about the interpretation, application or operation of employment agreements; determining whether or not a person is an employee or contractor; personal grievances (including joining a controlling third party); determining pay equity claims; matters related to good faith; recovery of wages, minimum entitlements and/or penalties; interim and permanent reinstatement; disputes about employee inventions and patents granted; and collective bargaining (including: facilitating bargaining and fixing the provisions of a collective agreement).[13]

To support the exercise of its jurisdiction, the Authority has been afforded extensive powers including: to call for evidence from the parties or any other person; require any person to attend an investigation meeting to give evidence; interview any person at any time; fully examine any witness; decide whether an investigation meeting is public; and follow whatever procedure it considers appropriate. It can take into account such evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not. It can resolve the employment relationship problem, however described; find that a personal grievance is of a type other than alleged and make, in relation to any employment agreement, any order that District or High Court could make about contracts under any rule or enactment (now, except freezing and search orders).[14]

Once the Authority issues a determination, there are two clear, unrestricted rights of challenge to an Employment Court: a complete rehearing of the entire matter (de novo challenge) or a non de novo (partial rehearing/appeal) of part of the Authority's determination. However, despite the availability of these rights of challenge, the rolling average of challenges for the last three years is just 17 per cent.[15] Of those matters challenged to that court, only 25 per cent on average, result in a substantive judgment. More remarkably perhaps, given the Authority's position as a primary arbiter of fact, the Court of Appeal has in the last five years agreed with the Authority in 75 per cent of cases which commenced in the Authority and ended up before that court.[16]

The Authority in the shadow of Covid-19

The Authority is procedurally accessible and is not bound by technicalities. When investigating employment relationship problems, Members determine their own procedure having regard to the principles of natural justice and contextual factors. In light of this, the Authority has significant flexibility in terms of practice and procedure relative to other courts or tribunals.

[11] The various changes to the Authority's role and jurisdiction over the years, including within the context of changes to the broader employment relations system, are set out in Alex Bukarcia and Andrew Dallas, "Good Faith Collective Bargaining under the Fair Work Act 2009: Lessons from the Collective Bargaining Experience in Canada and New Zealand" (Federation Press, 2nd Ed. 2012), pp 61-92.
[12] Employment Relations Act, 157
[13] Employment Relations Act, s 161. The jurisdiction of the Authority is arguably the broadest jurisdiction of any employment/industrial tribunals in comparable countries.
[14] Employment Relations Act s 160
[15] Employment Relations Authority Te Ratonga Ahumana Taimahi, *Annual Report 2022*, May 2023, Wellington at 26
[16] Ibid at 27

Evidence of this came very early on in the pandemic. In preparation for the first nationwide lockdown, the Chief of the Authority was only required to issue one procedural direction to Members regarding unsworn/unaffirmed affidavits for interim matters to allow the Authority to transition (within 48 hours) from being a physical to a virtual tribunal.

In all other respects, the Authority confronted something of a perfect storm entering Covid-19 in early 2020. First, the Authority from establishment, suffered under resourcing both in real terms and compared to other institutions, when workload and cost effectiveness to the State was taken into account. Second, the Authority was carrying long-term vacancies, which were already impacting on workload. Third, reduced mediation services, resulting from operational restrictions during the initial stages of the pandemic in 2020, meant the locus of dispute resolution shifted from the mediation service to the Authority in the first few months of 2020 and remained there for nearly 12 months. Fourth, there was a significant surge in the number of applications lodged in the Authority; approximately 600 more applications received in 2020 than in 2019. Fifth, the Authority did not initially receive additional funding during the pandemic to support its operation despite the obvious labour market effects caused by nationwide and district lockdowns.[17]

While the Authority, as a tribunal, was recognised as an "essential service", it did observe the national-wide Level 4 lockdown and several subsequent lockdowns, particularly in Auckland. This caused major delays to the Authority's operations at times. Over 200 in-person hearings were adjourned, often without a resumption date due to ongoing uncertainties. Additionally, new files had to be worked into the file allocation equation to ensure the Authority's backlog did not completely blow out. Despite these early setbacks, the Authority was the only tribunal or court in Aotearoa New Zealand to consistently offer in-person hearings which allowed it to tread water rather than drown under the weight of its file backlog.

In response to the Authority's early experiences with the pandemic and the obvious effect on operational performance, significant steps were taken in 2021 to address blockages in the system, including through the appointment of ongoing and temporary Members. Unfortunately, this has not been acknowledged in some quarters and delays occasioned by Covid-19 have seen some individuals and groupings levelling criticism at the Authority and/or advancing ill-informed "solutions" to wrongly perceived problems in trade publications and other forums (including some with no obvious link to the employment jurisdiction). By April 2022, workload equilibrium was achieved, and the Authority was able to allocate its remaining file backlog to Members for investigation and determination. Quite the contrast to a year previously, when the number of files awaiting allocation to Members was approaching 500.[18] This also compares very favourably with most other courts and tribunals who continue to deal with extensive backlogs and delays.[19]

In order to maintain relevance during the pandemic, the Authority consciously sought to add value to the efforts of the "the team of five million".[20] It undertook bargaining facilitation involving two groups of critical health workers: laboratory workers, including those testing for

---

[17] Anneke Smith, "Government announces $50 million package to ease backlog in courts", *Stuff,* 24 July 2020.

[18] Employment Relations Authority Te Ratonga Ahumana Taimahi, "Letter to parties from Andrew Dallas, Chief of the Authority", April 2021.

[19] See, for example, Alice Wilkins, "Justice system buckling under backlogs with delays impacting both victims and defendants", *Newshub*, 16 January 2023

[20] As to the concept of the "team of 5 million", see, Alex Beattie and Rebecca Priestley, "Fighting COVID-19 with the team of 5 million: Aotearoa New Zealand government communication during the 2020 lockdown" (2021) *Social Science and Humanities Open*, 4(1) 100209.

Covid-19, and public health sector nurses.[21] The Authority also prioritised matters where determinations might provide useful guidance for others dealing with pandemic-related issues. These included the interface between the government's wage subsidy, the payment of minimum wages and redundancy. *Sandhu v Gate Gourmet New Zealand Limited*[22] is one example, where the Court of Appeal reinstated the Authority's determination after disagreeing with and overturning the Employment Court.[23] Other examples are: *Raggett v Eastern Bays Hospice Trust trading as Dove Hospice*[24] and *de Wys v Solly's Freight (1987) Limited*.[25]

Throughout the pandemic, the Authority held extensive discussions with the Australian Fair Work Commission and the Irish Workplace Relations Commission about what "pandemic best practice" in employment dispute resolution could look like and how best it might be given effect to by institutions. Not only did the institutions learn a lot from each other during these discussions, they also opened continuing new avenues for dialogue and collaboration. The Authority was also conscious of the need to engage with parties, regular users, social partners and representative groupings throughout the pandemic, and did so extensively by providing regular "Covid-19 Updates" as well as updated health and safety advice to those attending in-person hearings.

Interestingly, given the continuation of in-person hearings during the pandemic, the Authority, in contrast to many other tribunal and courts, has only witnessed a limited increase in the use of technology as part of its daily operations. This has occurred in two main areas. First, with the investigation of more 'straightforward' matters – for example, where there is limited or no factual contest (which were, and are, also dealt with "on the papers"). Second, through the holding of 'hybrid' hearings where some witnesses attend in-person while others attend via audio-visual links or telephone.

In the "post"-Covid-19 environment

Prior to the pandemic, the Authority had a vision to be a world class employment/industrial tribunal. The pandemic, its trials, tribulation, learnings and its aftermath have only strengthened this resolve. Various initiatives are currently underway to achieve this vision, whether they be new or restarted, after a period of pandemic induced hibernation. Many examples could be provided but the following illustrate the point.

In early 2022, the Authority refreshed its website, which now has greater emphasis on assisting parties, particularly self-represented parties, to navigate the Authority.[26] A new website will also assist the Authority to engage with parties accessing its new jurisdictions (see below). Also in 2022, the Authority reviewed its costs regime. As a result of that review, and in consultation with the social partners, Business New Zealand and the New Zealand Council of Trade Unions Te Kauae Kaimahi, the Authority promulgated a new practice direction on costs. This includes a presumption of cost-neutrally for all "collective matters" within the Authority's

[21] See, *Association of Professional and Executive Employees Incorporated v New Zealand Blood Service* and Another [2020] NZERA 127 and *20 District Health Board v New Zealand Nurses Organisation* [2021] NZERA 368

[22] *Sandhu v Gate Gourmet New Zealand Limited* [2021] NZCA 203 (CA); *Sandhu v Gate Gourmet Limited* [2020] NZERA 259.

[23] At [61].

[24] [2020] NZERA 266

[25] [2020] NZERA 285

[26] See, www.era.govt.nz

jurisdiction.[27] Early indications are that the new collective matters costs approach is working well in practice.[28]

Further, as part of the Authority's commitment to increased transparency and accountability it has introduced two further initiatives. First, the Authority commenced issuing an annual report. The first report which was promulgated in May 2023 covered the period 2020-2023.[29] Second, the Authority will convene national engagement forums with invited representatives of groupings interested in its work. These will commence in the fourth quarter of 2023.

Notwithstanding the pandemic, since 2020, the Authority's jurisdiction has expanded in several key areas. This includes reforms in extending the reach of personal grievances to include triangular employment arrangements and time-extensions for certain grievances, as well as new collectivist measures for achieving gender-related pay equity, new screen industry workplace relations and the introduction of the fair pay agreement regime.

Triangular employment arrangements

Triangular employment arrangements – typically a labour-for-hire arrangement whereby an employer (a labour hire company or agency) arranges for an employee's placement, or assignment, with or to "a controlling third party" – have a relatively fraught legal history. Typically, employees could only bring a personal grievance against their employer and not include the controlling third party.[30] The Employment Relations (Triangular Employment) Amendment Act 2019 extended the Authority's personal grievance jurisdiction to make it possible for an employee to join a controlling third party to their personal grievance claim. To date, the Authority has not received a high volume of applications.[31] However, with the ongoing restructuring of the methods and patterns of work, particularly in the private sector, it is expected application numbers will expand in the medium to longer term.

Extended time for sexual harassment personal grievances

At the time of writing, the Employment Relations (Extended Time for Personal Grievance for Sexual Harassment) Amendment has just been enacted by Parliament. The Act extends the Authority's jurisdiction to investigate and determine sexual harassment personal grievances by changing the standard requirement to raise a personal grievance from 90 days to 12 months. The period of 12 months would begin from the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is later. To the extent this change results in an increased number of grievances by extending the 90-day timeframe remains to be seen. In any event, an important reform and one the Authority will specifically comment upon as part of its annual reporting.

---

[27] See, "Practice Note 2, Costs in the Employment Relations Authority Te Ratonga Ahumana Taimahi", 29 April 2022.

[28] See, for example, *New Zealand Tramways and Public Passenger Transport Employees Union v Wellington City Transport Limited* [2022] NZERA 629, *New Zealand Meat Workers and Related Trades Union v Ravensdown Limited* [2023] NZERA 24 and *New Zealand Post Primary Teachers Association v The Board of Trustees of Rodney College* [2022] NZEmpC 195, where the Employment Court applied the Authority's new costs regime in relation to a matter on challenge, in circumstances where the Authority had not fixed its own costs.

[29] Above n 16. For years 2023 onward, the annual report will cover single years.

[30] See, for example, *McDonald v Ontrack Infrastructure Ltd and Allied Workforce Limited*, CA 159/09, 22 September 2009, Member Doyle and *Boyce v Kelly Services Limited* [2017] NZERA Christchurch 163.

[31] See, *Potgeiter v Bliss Beauty NZ Limited and others* [2022] NZERA 275 as an example of one of the handful of applications lodged to date in the Authority.

Pay equity bargaining and dispute resolution

In *Terranova Homes and Care Limited v Service and Food Workers Union Nga Ringa Tota,*[32] the Court of Appeal confirmed the existing Equal Pay Act 1972 covered both equal pay and pay equity claims. Rather than promote further litigation, the Court of Appeal judgment foreshadowed the development of a tripartite pay equity process, which is now enshrined in legislation.[33] Internationally novel, with the closest parallel being the low paid bargaining stream of collective bargaining in Australia, an employee or group of employees can now raise a pay equity claim with their employer or group of employers. The legislation provides the parties then enter into a pay equity bargaining process to agree on an enduring settlement comprising remuneration and terms and conditions of employment.[34]

This process can exist in parallel with collective bargaining, however the fact that the parties may enter into a collective agreement does not settle or extinguish any unresolved pay equity claim between the parties. Dispute resolution in the pay equity jurisdiction utilises existing processes: mediation and the Authority.[35] Ultimately, it enables parties to apply to the Authority for a determination on fixing terms and conditions. The Authority is currently dealing with several pay equity matters including the very public dispute between Te Whatu Ora Health New Zealand and the New Zealand Nurses Organisation.[36]

Workplace relations in the screen industry

As background, in 2010, a protracted bargaining dispute between New Zealand Actors Equity, Warner Brothers Entertainment Inc and New Zealand-based director, Peter Jackson, over the making of the "Hobbit" films in New Zealand, led to the Fifth National Government enacting the Employment Relations (Film Production Work) Amendment Act 2010. This Act became commonly known as the "Hobbit Law".[37] The principal effect of the Hobbit Law was to overturn the decision of the Supreme Court in *Bryson v Three Foot Six*[38] deeming a supposed contractor to be an employee. The case arose from the filming of the Lord of the Rings trilogy in New Zealand a decade earlier. The Hobbit Law effectively removed employment status for people engaged in "film production". In the lead-up to the 2017 General Election, the Labour Party proposed to repeal it. However, after the establishment of an industry working party and the eventual adoption of most of its recommendations, the simple repeal proposal gave way to the Screen Industry Workers Act 2022 which introduced an elaborate, standalone workplace relations system for contractors working in the screen industry.[39]

---

[32] [2014] NZCA 516 (CA)

[33] See, Equal Pay Act 1972, as amended.

[34] For a detailed analysis, see Avalon Kent, "Selected Topics in Employment Law: Pay Equity" in Mazengarb's Employment Law (NZ) (Gordon Anderson et al, eds) and Amanda Reilly, Avalon Kent and Annick Masselott, "Pay Equity Bargaining in New Zealand", Dispatch 43: New Zealand, *Comparative Labor Law and Policy Journal*, August 2022.

[35] *See, for example, New Zealand Public Service Association v Auckland District Health Board and Others* [2022] NZERA 6

[36] See, *New Zealand Nurses Organisation v Te Whatu Ora Health New Zealand* [2022] NZERA 663

[37] For an extensive discussion of the background to, and impact of, the Hobbit Law: see, "Special Issue: The "Hobbit Law": Exploring Non-standard Employment" *New Zealand Journal of Employment Relations* (2011) 36(3).

[38] [2005] 3 NZLR 72 (SC).

[39] For more information about screen industry workplace relations system: www.mbie.govt.nz/business-and-employment/employment-and-skills/employment-legislationreviews/workplace-relations-in-the-screen-sector/

The Act, which came into force on 30 December 2022, allows for good faith collective bargaining between registered groups of workers and employers at both occupation and enterprise levels and sets out the mandatory terms for each.[40] The Act provides for an extensive role for the Authority in resolving disputes in the system, including authorising bargaining, facilitating bargaining, determining disputes and dealing with strikes and lockouts (which are both unlawful). The Authority will also be the "arbitrating body" under the Act and is empowered, with the assistance of an employer and worker representative, to fix the terms of occupational and industry contracts utilising "final offer arbitration".[41]

Fair pay agreements

The introduction of a fair pay agreement (FPA) system has been heralded as the most significant labour reform since the enactment of the ECA 1991.[42] Initially proposed in the Labour Party's 2017 election manifesto, it was subject to a long complex policy development and legislative drafting process.[43] In essence, the system, as enacted, provides for the setting of minimum terms and conditions of employment across an industry or sector, through a union bargaining side and an employer bargaining side; bargaining, without recourse to industrial action and reaching agreement. However, the FPA system is not supported across the political spectrum and the major opposition party has pledged its abolition.[44]

The Authority will play an extensive role by resolving coverage and application disputes both in respect of bargaining and for FPAs themselves once in force, and assessing compliance of bargained FPA with relevant legislation. Ultimately, if bargaining sides cannot agree on what is to be included in an FPA, a panel of three Members of the Authority will fix its terms and conditions.[45]

The Fair Pay Agreement Act 2022 came into force on 1 December 2022. At the time of writing, one FPA application for interurban, rural and urban bus transport has been approved by MBIE and four others, hospitality, cleaners, security guard/officer and supermarket and grocery store, are now undergoing assessment.[46]

Access to justice?

There can be little doubt that some communities face barriers accessing dispute resolution services, including in the employment jurisdiction. Although there are some excellent and

[40] The legislation has been subject to some academic criticism: see, Dawn Duncan, 'Hobbit Laws Human Rights and the Making of a Bad Sequel' (2021) *Policy Quarterly* 17(2) 45.
[41] For further information, see: www.employment.govt.nz/starting-employment/workplace-relationships-screen-industry/collective-bargaining-in-the-screen-industry/
[42] Hon. Michael Wood, M.P, Minister for Workplace Relations and Safety "Historic day for everyday workers as Fair Pay Agreements Bill passes third reading", press release, 26 October 2022.
[43] For a detailed analysis of the development of the fair pay agreement system, see, Avalon Kent (2021) 'New Zealand's fair pay agreements: a new direction in sectoral and occupational bargaining', Labour and Industry, 31:3, 235-254 and Rachel Spencer "A Framework for Fairness: A Purposive Approach to Labour Law Evaluation of the Proposed Fair Pay Agreements", a dissertation submitted in partial fulfilment of the requirements of the degree of Bachelor of Laws (Honours), University of Otago – Te Whare Wānanga o Otāgo, October 2021
[44] New Zealand National Party, 'National Would Repeal Fair Pay Agreements', press release, 26 October 2022.
[45] For an accessible summary of the FPA system, see Ministry of Business, Innovation and Employment, "The Fair Pay Agreements System: a guide to participants", December 2022.
[46] www.mbie.govt.nz/business-and-employment/employment-and-skills/fair-pay-agreements/fpa-dashboard/

accessible, particularly online, resources,[47] understanding the processes and requirements for dealing with employment relationship problems can be difficult. This could be due to a person's limited financial resources, language or cultural barriers, physical or mental health issues and the stress and anxiety associated with job loss or business pressures. Better funding for navigation and representation services, including increased legal aid and community law funding and promotion, is needed to improve and assist participation in mediation and the Authority.

As part of any understanding of the future direction of the Authority, consideration is being given to how the communities of Aotearoa New Zealand participate in its processes. The breath of the conversation that now encompasses "access to justice" and its embrace by those who could be best described as having contributed to a lack of access in the first place has tended to undermine both its objective value and conceptual worth.[48] To avoid both this potential definitional controversy and also recognise the need for the Authority to maintain its social licence to operate with the support and trust of the public, it has adopted an "improving participation" strategy called "Six Pillars". The pillars are:

(i) examining and, if necessary, addressing the perceived mischief associated with the identification of certain parties in determinations;[49]
(ii) further reducing barriers caused by costs;[50]
(iii) encouraging straightforward pleadings and simpler processes;
(iv) increased resourcing for the Mediation Service and the Authority;
(v) the regulation of advocates;[51] and
(vi) the streamlining of enforcement processes.[52]

[47] See, for example, MBIE: www.employment.govt.nz; Citizens Advice: www.cab.org.nz/category/employment-and-business and Community Law Centres Aotearoa: https://communitylaw.org.nz/community-law-manual/chapter-22-resolving-employment-problems/resolving-employment-problems/

[48] The tension associated with, on one hand a willingness to address issues of access to justice and, on the other, finding workable solutions to achieve the same is highlighted in two recent publications: Rules Committee, *Improving Access to Civil Justice, Initial Consultation with the Legal Profession,* Ministry of Justice, 11 December 2019 and Rules Committee, *Improving access to civil justice*, Ministry of Justice, November 2022. These publications represent a transmission belt from lofty ambition (including proposals that the High Court and District Court adopt "inquisitorial" processes for the resolution of certain claims – which would likely have significantly reduced the costs associated with litigation (because formal legal procedure is a key driver of those costs) and also generally improve the experience for self-represented parties – to post-consultation tepid reality.

[49] While recognising the principles of "open justice" – that is, that justice needs to be seen to be done in public – there is anecdotal evidence that some applicants (mainly workers) perceive that public identification in determinations can lead to unintended consequences, including adverse media publicity and discrimination in future employment.

[50] For example, expanding the criteria when assessing costs applications to include consideration of "ability to pay" any resultant costs order/award.

[51] There are currently no barriers to entry for the representation of parties in the employment jurisdiction. This is because, and for important historical reasons, it is not reserved legal work as defined by the Lawyers and Conveyancers Act 2006. However, while generally beneficial, this does also create problems with rogue and/or incompetent elements. Setting aside the quality of legal representation (which can also dramatically vary in terms of quality and skill but are subject to regulation and supervision by the Law Society), the quality, expertise and experience of advocates varies greatly; as does their behaviour in, and towards, the Authority, in relation to their clients and other parties. Some advocates are excellent, and a number have voluntarily subjected themselves to standards set by professional bodies, such as the Employment Law Institute of New Zealand. However, there is little to no doubt in the Authority's view that the regulation of advocates, through the setting minimum standards of professional and ethical behaviour, experience and qualification levels, requiring lability insurance and ongoing professional development, would significantly improve the jurisdiction as a whole.

[52] These processes, which are largely out of the Authority's hands, are currently complex, unwieldy, time consuming and potentially very costly.

Several of the strategy's pillars are currently being addressed directly by the Authority. However, several others require governmental budgetary decisions or legislative reform.

Employment dispute resolution review

The current government has signalled a review of the dispute resolution system. This was initially slated to coincide with the 20th anniversary of the enactment of the ERA but was pushed back due to the pandemic and other priorities. While the fundamentals of the dispute resolution system remain fit for purpose, the review will need to address a number of minor but critical issues, including historical and/or redundant structural anomalies, the boundaries of dispute resolution processes, the allocation of resources within and between institutions operating within the system and the regulation of advocates. A more expansive review may look overseas for examples of aggregated service delivery models, such as the Fair Work Commission (Australia) or Workplace Relations Commission (Ireland), with a view towards more seamless employment dispute resolution for Aotearoa.

Conclusion

The Authority's vision to achieve world class status as an employment/industrial tribunal was frustrated by the Covid-19 pandemic. However, with no file backlog and increased resourcing, the Authority is now well-positioned to recommence this important journey. As is clear from this article, the Authority is a nimble, procedurally lean and technically unincumbered tribunal. This, together with continuing to investigate employment relationship problems in person for significant periods during the pandemic, meant we were able to achieve workload equilibrium months, if not potentially years, before other tribunals and courts. While achieving "normality" of service delivery levels before like institutions may not have resulted in a technology revolution for the Authority, the commonly accepted view is that "low-tech" solutions to the resolution of employment relationship problems remain the most effective, including most cost effective. This also closely fits with the kaupapa (principles) of the Authority of delivering justice in communities across Aotearoa.

The new jurisdictions with which the Authority has recently been invested demonstrates the confidence of the state in the institution. It also presents both a challenge and opportunity to incorporate these into our forward journey. However, as noted, aspects of the Authority's new jurisdiction, particularly the FPA regime, remains contested. Regardless, the future for the Authority is both an expansive one and one that largely remains unwritten.