ANDERSON
EMPLOYMENT LAW ADVOCACY
Email: Lawrence@AndersonLaw.nz
Phone: **0276 529 529**

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Legal Review Secretariat c/- Sapere Research Group
By Email: secretariat@legalframeworkreview.org.nz

The Regulation of Lawyers and Legal Services in Aotearoa New Zealand

Background

1. I am writing with regard to the discussion document of June 2022 titled The Regulation of Lawyers and Legal Services in Aotearoa New Zealand.

2. I am the director of Employer Help Limited and No Win No Fee Kiwi Limited. We provide advocacy services to both employers and employees in employment disputes.[1] I hold a Graduate Diploma in Business (Dispute Resolution); I am an AMINZ Associate;

3. To date I have represented hundreds of clients at Mediation; a handful in the Employment Relations Authority ("ERA"); and defended two challenges to the ERA in the Employment Court and won both of those cases for our clients.[2]

4. Most of our work involves providing an advocacy service to the consumer where we put in a lot of time and effort into advancing client cases where the client has no money to pay for it. Over 90 percent of cases are done on a "no win, no fee" basis. The consumer simply does not have the money, or people that earn high incomes have outgoing expenses like mortgage payments, and they too simply cannot afford to pay for representation as it is delivered.

5. The consumers that are calling us want "no win, no fee" services, they want to use an advocate (because they cannot afford a lawyer), and on this basis they do shop around.

6. It is our view that if our role is removed or heavily circumscribed there will be more scope for employers to take advantage of their employees, particularly with unjustifiable actions and unjustifiable dismissal without the concern for the consequences of that. The employer has a high degree of power, particularly economic power in the employment relationship, and the employer's pursuit of litigation.

7. Advocates provide access to justice where the client is unable to pay upfront or where a client is not eligible for legal aid.

8. The Early Resolution service administered by the Ministry of Business, Innovation and Employment does not handle personal grievance claims; neither will the Labour

[1] Employment Relations Act 2000, s 236
[2] Surplus Brokers Limited v Armstrong [2020] NZEmpC 131; STL Linehaul Limited v Waters [2022] NZEmpC 114

Inspectorate. Both have proven to fail in giving advice to employees about the 90 days notification period to raise a personal grievance.

9. I would like to set out key points for consideration on a number of issues raised in the discussion document.

Risk of harm and high risk areas of practice

10. We strongly believe that employment law matters are not a high risk area (compared for example with the criminal jurisdiction) for the following reasons.

11. Most cases that advocates take on are done on a "no win, no fee" basis for personal grievances for unjustifiable dismissal, or disadvantage; wage arrears; and holiday entitlement issues.

12. For the employer, taking cases against employees is not something that we are interested in defending an employee on a "no win, no fee" basis at all, as it does not yield any fees unless the client is paying an hourly rate. I refer to issues advanced by the employer such as: restraint of trade; seeking compliance of employment agreement provisions; and applications for penalties against employees who have allegedly breached employment obligations. "No win, no fee" advocates do not do those cases, unless they are expecting to not be paid anything.

13. The consequence of a client not being successful before the ERA is limited to the daily tariff rate of $4,500 for the first day, and $3,500 for subsequent days. An employer may successfully defend a grievance paying their counsel $20,000 or more, and may only be able to recover the daily tariff of $4,500 for the first day. A recent example illustrates an extreme case of this, JAMISON v PETS IN THE CITY MT WELLINGTON LIMITED [2022] NZERA 203 where an employer was charged $41,454.42 and could only recover $2,000.[3]

14. Notably, the Employment Court has adopted a guideline scale in line with the High Court Rules daily recovery rates keeping costs predictable and reasonable.

15. The ERA adopts an inquisitorial process, it is not adversarial, therefore if an advocate makes any errors or omissions the ERA will identify the relevant law and apply it to the facts of client's case.

16. We suggest that ACC claimants who are seeking review and challenge to ACC decisions would be at higher risk in comparison when there are bigger entitlements at stake, such as ongoing compensation, medical cover, etc.

Employment Advocates: No professional body to complain to

17. The requirement to licence immigration advisors came about because of the damage that unscrupulous immigration advisors were doing to New Zealand's international reputation. There is a big difference between that and employment advocates working internally in New Zealand. Immigration advisors charge a lot of money for their work and the consequences of poor advocacy are much greater than a grievant

[3] https://www.leightonassociates.co.nz/post/employers-beware-a-costs-nightmare-by-lawrence-anderson

who is not paying anything for an advocate to advance their case on a "no win, no fee" basis.[4]

18. Where problems may arise with an advocate, the client has options: They can seek to change representation engaging another advocate or lawyer; if presented with a Record of Settlement, they don't have to sign it. This is in addition to the client being able to file a dispute about fees, or file a lawsuit for damages if necessary.

19. As described in the section above, we strongly do not believe that the employment jurisdiction is "high risk", and we do not see any evidence of employment advocates producing "very negative outcomes" – that is an unsupported assertion.

20. Advocates have been getting the finger pointed at them a lot recently since RNZ's article, this is referenced in page 7 of the discussion document.[5] There have been subsequent articles that have followed including this one referring to "extreme emotional distress" experienced by clients where there is a dispute over fees and a debt collection or dispute process is followed.[6] That assertion is completely over the top and dramatized and has been rebutted,[7] I have written some articles for Leighton Associates including this one referring to our views on employment advocacy regulation in light of what was said in the RNZ article.

21. Taking a case for a client is a lot of work and if the client is to pull out unreasonably or disappear after a substantial amount of work is performed the advocate should be paid for their work. Lawyers handle this in exactly the same way. There is: an invoice; if the invoice is not paid, there is a demand notice; an application to debt collection; a dispute; a decision in the Disputes Tribunal; then there can be further collection and enforcement.

22. In our line of work we are seeing lawyers giving poor legal advice and untenable arguments proffered to ERA Members all the time. Most of the time it seems they are just stringing their employer client along to get more and more in fees.

23. The most extreme in bad lawyer advice we are aware of relates to [redacted] Record of Settlement gagged [redacted] allowed a child sex offender to keep offending. [redacted][8] where a poor interpretation of s 149 was made and that advice was relied upon. We are not aware of the lawyer being investigated or corrected for this significant transgression; they got away with doing that.

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[4] This is my response and suggestion to the common argument that is being voiced that immigration advisors are licenced, therefore employment advocates should be. It is a different playing field.

[5] https://www.newsroom.co.nz/legal-profession-groups-back-employment-advocate-regulation

[6] https://www.rnz.co.nz/news/national/470911/unregulated-employment-advocates-causing-severe-emotional-distress

[7] https://www.leightonassociates.co.nz/post/employment-advocate-regulation-and-no-win-no-fee-contracts-by-lawrence-anderson

[8] [redacted]

24. It is our strong view that the Employment Law Institute of New Zealand must not have anything to do with regulation of employment advocates, and that they should not be taken seriously, this is for the following main reasons:

    a. They are a social club, and as such, irrationally and unfairly selective of who they grant membership to.

    b. Their over dramatization of advocates in the media (as described above).

    c. They do not handle complaints confidentially. [redacted]

    d. They are selective about what complaints they respond to. There are members that we have complained about who have been advertising saying they are "employment lawyers" and also do not provide a written terms of engagement contract to their clients from the outset. [redacted]

25. We would accept regulation and a professional body or licencing for employment advocates but we strongly believe that this must be:

    a. Controlled by an independent body.

    b. Contain rights to review and appeal decisions (including appealing to the Court).

    c. There should be a right to appeal decisions about licencing or membership applications.

    d. It should provide training and help with relevant matters involving client engagement and managing client relationships.

    e. Written terms of engagement and authority to act forms should be mandatory.

    f. Where there are complaints there should be the mandatory use of mediation provided in the first instance to avoid the current problems that the Law Society has with dealing with complaints against its members being overly legalistic and lengthy.

    g. Everybody joining or becoming licenced has a clean slate.

    h. There should be a generous transition period to assist and support advocates into becoming regulated.

26. I am aware that [redacted] (former lawyers, [redacted], now employment advocates) are building a training business to train advocates, HR, and other practitioners specifically on employment dispute processes, the ERA, and the Employment Court. This is a very positive move by advocates for advocates and the training course I am told will be available to begin around November 2022.

Assertion of lack of diversity in legal profession

27. Bachelor of Laws University of Waikato online.

28. there are many Maori and Pacifica women that are participating in undertaking their studies online where they have families to help support where it is otherwise inconvenient to work their lives around having to regularly travel to the lecture theatre.

29. There are many mature students studying law also, many from different backgrounds and areas of other industries and experience.

30. There will be diversity if flexible study options.

31. I strongly suggest that online legal studies be allowed to continue past the Covid-19 pandemic. at the mercy of the New Zealand Council of Legal Education as to whether online studies are permitted in the future.

Yours faithfully,

Lawrence Anderson AAMINZ