A Practical Guide to Litigating in the Employment Court

Judge Christina Inglis

The Employment Court is generally the third port of call in the journey through the litigation process. Most disputes and grievances are resolved before this point, either at mediation or following investigation and determination by the Employment Relations Authority (the Authority). Each forum requires a different approach, and an appreciation of what is required, to enable you to achieve the best outcome for your client.

Before venturing into any of the employment institutions it pays to develop an understanding of the way in which they are structured and what they are designed to do. While mediation, Authority investigations, and the Court's adversarial processes fundamentally differ, the objectives of the Employment Relations Act 2000 (the Act) underpin each. There is an emphasis on good faith obligations, alternative dispute resolution, and the desirability of resolving employment disputes at the lowest level possible.

The employment institutions enjoy exclusive jurisdiction. The Court has (for the purpose of supporting successful employment relationships and promoting good faith behaviour) jurisdiction to determine all matters before it in such manner and to make such decisions or orders[1] as in equity and good conscience it thinks fit.[2]

The Court's jurisdiction is broad, but not unlimited. It includes:[3]

- Challenges against determinations of the Authority;
- Actions for the recovery of penalties under the Act;
- Questions of law referred to it by the Authority;
- Applications for special leave to have matters before the Authority removed into the Court;
- To hear and determine matters removed to it from the Authority (first instance hearing);
- Questions as to whether any person is to be declared an employee;

[1] Subject to certain limitations, set out in s 189 of the Employment Relations Act 2000.
[2] Employment Relations Act 2000, s 189.
[3] Section 187.

- Compliance orders under s 139;
- Proceedings relating to strikes and lockouts (seeking damages, injunctions, compliance orders);
- To hear and determine any application for review of the exercise, refusal to exercise, or purported exercise of powers under the Act (s 194).

Should your case actually be in the Employment Court?

Be aware of the jurisdictional issues that can arise between the Employment Court and the High Court.[4] The boundaries can be difficult to discern.

Should the case be investigated by the Authority or heard at first instance in the Court? Not all cases proceed through the Authority. Occasionally it will be necessary to consider whether the criteria for removal to the Court for hearing at first instance are made out.[5] An application for special leave to remove may be advanced, where the Authority has declined an application.[6]

If you are seeking a search or freezing order (pursuant to s 190(3) of the Act) you will need to file an application in the Court, not the Authority, because the Authority does not have the power to make such orders.[7]

Not all decisions of the Authority are susceptible to challenge to the Court: s 179(5), *H v A Ltd*.[8]

[4] See, for example, *Hibernian Catholic Benefit Society v Hagai* [2014] NZHC 24; *RPD Produce Holdings v Miller* [2013] NZHC 705, (2013) 10 ELR 521.
[5] Section 178(2) - an important question of law is likely to arise other than incidentally; the case is of such a nature and of such urgency that it is in the public interest that it is removed immediately to the Court; the Court already has before it proceedings which are between the same parties and which involve the same, similar or related issues; in all the circumstances the case should be removed.
[6] Section 178(3). The application must be in form 3.
[7] See Practice Direction: *Freezing and Search Orders*, Chief Judge Colgan, April 2012.
[8] *H v A Ltd* [2014] NZEmpC 92.

Consider alternatives – such as whether action in the District Court to enforce orders made in the Authority may be preferable to compliance proceedings in the Court.[9]

Pleadings and timeframes

The Employment Court Regulations 2000 (the Regulations) set out the procedures that need to be followed in pursuing matters. Where no procedure has been provided for the High Court Rules apply: reg 6.[10]

There are a number of practice directions that have been issued, including in relation to seeking freezing or search orders, cross-challenges and the format of pleadings. These are located on the Employment Court webpage (http://www.justice.govt.nz/courts/employment-court). The website also contains other useful information about the processes of the Court, judgments of the Court, and guidelines for appearances before the Court.

Make sure that your pleadings comply with the relevant requirements.

Check the timeframes for filing and comply with them. For example, a challenge must be filed within 28 days of the date of the Authority's determination: s 179(2). You will need to apply for leave beyond this timeframe.[11] Any such application will need to be adequately supported by affidavit evidence explaining the delay.

The Christmas period, and how it is to be treated, is not beyond doubt.[12]

No action may be commenced in the Court in relation to a personal grievance more than three years after the date on which the personal grievance was raised.[13]

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[9] Section 141.
[10] The Court has the power to make Rules for the purposes of regulating practices and procedures but has not yet done so: s 212.
[11] Regulation 13A.
[12] See, for example, *Vice-Chancellor of Lincoln University v Stewart* CC5B/08, 13 May 2008 (finding that reg 74(b), which excludes the Christmas period, was subject to s 179 of the Act and, as regulations cannot override Acts, the regulation was ineffective). Compare *New Zealand Air Line Pilots' Association v Airways Corporation of New Zealand Ltd* [2014] NZEmpC 90.
[13] Section 114(6).

If you are challenging a determination of the Authority, the statement of claim must be accompanied by a copy of the Authority's determination.[14] The prescribed fee must also be paid at or before the time for filing a statement of claim.[15]

The statement of claim must specify whether the challenging party is seeking a full hearing of the entire matter (de novo hearing) or a non de novo hearing.[16] If non de novo, the challenging party must set out the alleged errors of law or fact, any question to be resolved and the grounds on which the election is made.[17] The decision is an important one and may affect the outcome.[18]

The statement of claim must set out clearly the general nature of the claim, the facts on which the claim is based, identify any relevant employment agreement or legislation relied on, the relief sought (and method of calculation as appropriate), any claim for interest, and the grounds of the claim.[19] For a non de novo challenge, the statement of claim must set out any alleged error of law or fact, any question of law or fact to be resolved, the grounds on which the election is made, and the relief sought.[20]

As soon as practicable after filing a statement of claim a copy endorsed by the Registrar, including the attachments, must be served on the defendant.[21] Unlike in the Authority, it is the representative's responsibility to serve documents on the opposing party.[22]

The statement of defence must fairly set out what is admitted or denied and provide details of any positive defence.[23] Like a statement of claim, each paragraph must be concise and confined to one topic. If a non de novo hearing is sought by the plaintiff the statement of defence should set out the defendant's view of the appropriate nature and extent of the hearing.[24]

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[14] Regulation 7(2).
[15] Employment Court Regulations 2000, reg 7.
[16] Regulation 11(1)(g).
[17] Section 179(4).
[18] See the discussion in *Sefo v Sealord Shellfish Ltd* [2007] ERNZ 680 (EC); *Sealord Shellfish Ltd v Sefo* [2008] NZCA 54.
[19] Regulation 11.
[20] Regulation 11(1)(g)(i)-(iv).
[21] Regulation 12.
[22] Regulation 28.
[23] Regulation 20(2).
[24] Regulation 21(2).

The statement of defence must be served as soon as practicable after filing.[25] A failure to do so requires an application for leave to defend.

The purpose of pleadings is to put the opposing party, and the Court, on notice of what your client's case is – be clear. Be thorough – a failure to plead, for example, unjustified disadvantage may impede your ability to pursue the allegation at trial.

Documents may be filed electronically.[26]

Directions conferences – what to expect

A directions conference will be scheduled with a Judge shortly after the statement of defence has been filed, or earlier if the circumstances warrant it. You will receive a letter of advice from the Registry as to the date of the conference and the matters to be considered.

If your matter is urgent, seek an urgent hearing. Ensure that any such application is adequately supported and that you are in a position to proceed if urgency is granted.[27]

Be prepared for what will be covered at the conference and ensure that you come armed with appropriate instructions and a working knowledge of the case. The Judge will want to discuss substantive issues with you and you will be expected to be in a position to respond.

The Judge may ask that the parties be present at the initial conference or at subsequent conferences.

Generally the following matters will be covered during the course of the conference:

- Whether the parties should be directed to mediation, or further mediation (the Judge is required to consider this under s 188(2) of the Act). A judicial settlement conference (JSC) might be offered. Before the directions conference discuss the possibility of further mediation and/or a JSC with your client and obtain instructions.
- Are there any outstanding interlocutory issues, including disclosure? Are they likely to be resolved between the parties? If appropriate they will be timetabled.

[25] Regulation 19(3).
[26] Practice direction: *Electronic Filing*, Chief Judge Goddard, 29 April 2005.
[27] Clause 21, Sch 3.

- Estimate of hearing time. You will likely be asked how many witnesses you are proposing to call, what the key issues are likely to be, and how long any investigation meeting in the Authority took. Your estimate must include time for the hearing of the evidence and submissions.
- Confirmation as to the nature of the hearing, including (if it is a challenge) whether it is de novo or non de novo. If it is the latter, what you contend the nature and the extent of the hearing should be. The defendant's view ought to have been included in their statement of defence, with the plaintiff having 14 days to respond. Note: a summary of argument is required to be filed at least 14 clear days in advance of the date fixed for the hearing for non de novo hearings.[28]
- Where will the hearing be? From time to time the Court sits outside the main centres.[29] What dates? Witness availability (and your availability) will need to be checked in advance.
- Whose case will be presented first?
- Who will take primary responsibility for compilation of the bundle of documents for the hearing (generally, but not always, the plaintiff).
- When briefs of evidence will be filed and served.

Note: while hearing management is provided for under the Regulations for hearings estimated to occupy not less than three days,[30] this is not now generally applied.

It is helpful to agree at the outset that, unless expressly stated in the bundle, each document in it is what it purports to be on its face, was sent by any purported author to, and was received by, any purported addressee on its face, is admissible in evidence, and is to be received into evidence as soon as it is referred to by a witness in evidence or in submissions but not otherwise. If there are going to be issues with the admissibility of documents, highlight them at an early stage, so they can be dealt with.

The Judge will discuss with the parties any outstanding aspects of the case and a date for the hearing will be allocated at the conference or subsequently.

[28] Regulation 13.
[29] Regulation 25, including having regard to the needs and convenience of the parties and witnesses.
[30] Regulations 55 – 59.

A party's conduct during the course of the Authority's investigation may give rise to a request for a good faith report.[31] Such a report sets out the Authority's assessment of the extent to which the parties involved in the investigation facilitated rather than obstructed the investigation and acted in good faith towards each other during the investigation.[32] The report is considered by the Judge and may have an impact on the way in which the hearing progresses.[33]

The Judge will issue a minute after the directions conference. Timetabling directions will be set out. Parties are required to comply.

Interlocutory steps

The Court encourages parties to deal with interlocutory matters informally. Stay applications can often be dealt with on an agreed basis, by way of a payment in to Court.

If informal resolution is not possible, and it is necessary to seek an order from the Court, pursue an application. Do not leave it to the last minute. Check the correct procedure and follow it.[34] Many applications are able to be dealt with on the papers.

After the statement of defence is received the Court allows time for both parties to complete disclosure and inspection. Generally this is conducted on an informal basis. If no agreement can be reached the formal process[35] of notices for disclosure (in Form 6) and objections (Form 7) will need to be followed.

Note: The Court does not receive any documents from the Authority. Seeking to produce additional documents during the course of the hearing carries risk.

Amended pleadings must be marked in a clear way to indicate changes to the original pleadings.[36]

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[31] Section 181.
[32] Section 181(1).
[33] Section 182(2).
[34] For example, an application for stay of proceedings must be in form 14.
[35] See regs 37 – 52.
[36] Practice direction: *Amended Pleadings*, Chief Judge Goddard, 29 April 2005

Under s 221 of the Act in order to effectually dispose of any matter before it, the Court may direct parties to be joined or struck out; amend or waive any error or defect in the proceedings; extend the time within which anything is to or may be done; and generally give such directions as are necessary or expedient in the circumstances.

Strike out applications, interrogatories and requests for further particulars are not common. While there are no express provisions relating to security for costs,[37] the Court has accepted that it has jurisdiction to deal with such applications.

If a witness is unavailable, consider alternatives such as the giving of evidence by audio visual link (AVL), an application to take their evidence in advance of the hearing, or an affidavit (if not contentious).

Witness summonses can be issued under clause 6 of Schedule 3 of the Act and must be in form 5.[38] A witness appearing in court on a summons is also entitled to witness expenses.[39]

The Court may make orders prohibiting publication of any evidence given or pleadings filed or the name of any party or witness or other person not be published, on such conditions as the Court thinks fit.[40]

Briefs of evidence and bundle of documents

Briefs of evidence should address the issues raised in the pleadings and contain facts. Avoid submissions, irrelevancies and speculation.

The purpose of exchanging briefs of evidence in advance is to ensure that the parties are aware in advance of the evidence in chief to be given on behalf of the other party. Counsel are expected to use that knowledge to prepare succinct and focussed cross-examination.

Quantification of alleged losses and steps taken to mitigate loss are often absent or not adequately addressed.

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[37] Other than security for costs pending appeal provided for in reg 69.
[38] Regulation 33.
[39] Regulation 35.
[40] Clause 12, Sch 3.

Briefs should refer to page numbers in the bundle of documents filed with the Court.

Briefs of evidence should be filed both in hard copy and electronically in Microsoft Word format to facilitate the typing of the transcript.

The parties are expected to co-operate in the production of a bundle of documents for hearing. Be selective about the documents for inclusion.

Three copies of the bundle of documents are required for the hearing.

What is likely to happen in Court?

The Court comprises a Judge sitting alone. At the direction of the Chief Judge a full Court may hear cases.[41]

Unlike the processes of the Authority, litigation in the Employment Court is adversarial.

The usual Court processes apply to appearances, calling evidence, cross-examination and submissions. The process is formal. Counsel are robed, unless it is a chambers hearing.

Witness-based hearings are recorded. The evidence is typed up and handed to the parties in the courtroom on the same day.

Hearings involving witnesses generally commence at 9.30 am and finish at 4.30 pm. This is designed to ensure that the transcript of evidence can be completed by the end of each day. Remind your witnesses that the evidence will be transcribed, and that they will need to speak clearly.

Witnesses generally read their pre-prepared witness briefs and are then cross-examined. Occasionally the Court may allow briefs to be taken as read, particularly where the proposed evidence is uncontroversial.

Note that the Court has broad powers to accept, admit and call for such evidence as in equity and good conscience it thinks fit, whether strictly legal or not.[42]

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[41] Section 209.

You will be expected to present submissions immediately following the conclusion of the evidence.[43] Written submissions are generally provided; two copies should be handed up (one for the Judge and the other for the registry file).

As in the Authority, any party to any proceedings in the Court may appear personally or be represented by an officer or member of a union; an agent; or by a barrister or solicitor.[44] There are many litigants who represent themselves in this forum. This may present additional issues for you to navigate. A pro bono legal assistance service is being piloted in Auckland, providing free, limited assistance with the drafting and preparation of initial Court documents (either a statement of claim or statement of defence).[45]

Costs

Costs are generally reserved and are usually dealt with on the papers. The Court's approach to costs differs from the daily rate approach that generally applies in the Authority.

The Court has a broad discretion as to costs.[46] The starting point is usually two thirds of actual and reasonable costs, discounting or uplifting for various factors, such as Calderbank offers, conduct of the proceedings, undue hardship. A party wishing to rely on undue hardship must put appropriate supporting material before the Court.

Useful summaries of the Court's approach to costs can be found in the following Court of Appeal judgments:

Binnie v Pacific Health [2002]1 ERNZ 438
Victoria University of Wellington v Alton-Lee [2001] ERNZ 305
Health Waikato v Elmsly [2004] 1 ERNZ 172

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[42] Section 189(2).
[43] Practice Direction: *Closing Submissions*, Chief Judge Colgan, August 2012.
[44] Clause 2, Sch 3.
[45] Further information on this service can be found on the Employment Court website.
[46] Clause 19, Sch 3 and reg 68.

Dissatisfied with a judgment of the Court?

There is a limited right of appeal from the Employment Court to the Court of Appeal. Leave to appeal must be sought from the Court of Appeal and it must be based on a point of law not fact. Leave may be granted where the question is one of general or public importance or for other reasons the Court of Appeal considers justified. A decision on the construction of an individual employment agreement or a collective employment agreement is not susceptible to appeal.[47]

In determining any appeal, the Court of Appeal is obliged to have regard to the special jurisdiction and powers of the Court and the objects of the Act.[48]

An application for leave to appeal must be filed within 20 working days from the date of the judgment of the Court.

There can be a further right of appeal, by leave, to the Supreme Court.[49]

An application for review may be brought under the provisions of s 194 of the Act in relation to the exercise, refusal to exercise or purported exercise of a statutory power or statutory power of decision, by the Court. The procedure provided by the Judicature Amendment Act 1972 should be followed. The application for review is brought in the Court of Appeal.[50] Where a right of appeal exists, that right must be exercised before review proceedings can be commenced.[51]

In some circumstances, for example where fresh evidence has come to hand, an application for a rehearing may be made. An application for rehearing (Form 13) must be filed within 28 days from the date of the judgment, and any opposition within 30 days after the date of service of the application.[52]

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[47] Section 214.
[48] Section 216.
[49] Section 214A.
[50] Section 213.
[51] Section 194(3).
[52] Clause 5, Sch 3 of the Act; regs 61 – 63.

Settlement conferences/mediation

The Court has a statutory duty to consider whether an attempt has been made to resolve the matter by the use of mediation. It *must* (not may) direct mediation or further mediation unless it considers this will not contribute constructively to resolving the matter or there are questions of urgency or public interest.[53] The Judge is also required to consider the possibility of mediation during the course of the hearing and in determining the matter.[54] If the Judge directs mediation the parties are required to attempt in good faith to reach an agreed settlement of their differences.[55]

These provisions reflect the underlying objectives of the Act.[56]

Parties and their representatives should review the possibility of Alternative Dispute Resolution (ADR) throughout the lifecycle of the proceedings. The Court is supportive of parties seeking to resolve matters between themselves.

The plaintiff can withdraw the proceedings at any time if the matter settles or they no longer wish to proceed.[57]

If both parties agree, a JSC may be convened. The process is voluntary. The Court *cannot* direct the parties to attend a JSC. The Judge *can* direct the parties to mediation.

The possibility of mediation/a JSC is generally raised at the initial directions conference, but sometimes later in the process. Both provide the parties with a confidential, without prejudice, opportunity to air differences and reach agreement between themselves without the expense, and risk, of proceeding to a hearing. Aggrieved parties can achieve outcomes (such as an apology or agreed public statement) that they are unable to achieve by Court judgment.

A JSC takes place before a Judge. Documentation is filed in advance, including will-say statements and documents that each party say are relevant. The parties must also file a memorandum setting out what the key issues impeding settlement are from their perspective and what, if any, offers have been made to settle.

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[53] Section 188(2)(a), (b).
[54] Section 188(2)(c).
[55] Section 188(3).
[56] Section 3.
[57] Clause 18, Sch 3.

The Registry provides written advice to the parties about what is required, and when, at the time the JSC is scheduled.[58]

Parties are expected to come to a JSC prepared to genuinely explore settlement. An uninterrupted opportunity is given to each party to highlight the key points.

The Judge will assist the parties in their discussions but is not there to give a concluded view on the merits of the case.

The discussions are across the table – not through the Judge. Ultimately it is the parties' conference, which the Judge assists in facilitating.

If parties do not reach a settlement at the JSC, a different Judge conducts the main hearing.

If the parties do reach a settlement the terms are often recorded in a consent judgment, signed by the presiding Judge. A formal notice of discontinuance is also generally filed.

[58] A copy of this advice can be found on the Employment Court website.