ADVOCACY IN THE EMPLOYMENT COURT –

SOME OBSERVATIONS

Judge Christina Inglis

Effective advocacy takes many forms. It is not simply the way in which counsel manages to extract a devastating concession in cross-examination, or the flourish with which they deliver closing submissions. Much comes down to tactics, pleadings and written submissions. A reputation for sound judgment, honesty and integrity will also go a long way.

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 alternative dispute resolution, the mutuality of obligations, and the desirability of resolving employment disputes at the lowest level possible without the need for unnecessary judicial intervention.

Some of the most effective employment lawyers seldom appear in the Court. That is because they have given their clients realistic strategic advice about the pros and cons of litigation and have been able to satisfactorily resolve matters without engaging in the adversarial process.

Before filing proceedings in the Court consider the alternatives. What is your client seeking to achieve and is the litigation process likely to deliver it? Is it even *capable* of delivering it?

Are you in the right place at the right time?

Having decided to venture down the adversarial route, ensure that you are in the right forum. Procedural wrangling often provides an interesting, but ultimately unnecessary, distraction.

Employment litigation is not always straightforward. There are a number of jurisdictional hurdles that must be navigated and issues that must be considered, including (at the initial stages) as to whether your case should:

- Remain in the Authority or be removed to the Court for first instance hearing.
- Be in the High Court or the Employment Court.
- Come straight to the Employment Court on an originating application.

The ability to challenge decisions of the Authority is constrained. Issues relating to the circumstances in which a decision can be challenged prior to substantive investigation have recently been traversed by the full Court in *H v A Ltd*.[1]

Check the applicable timeframes for filing and comply with them. If you are out of time an application will need to be filed with a supporting affidavit.

Consider whether all of your client's grievances, some of which may date back several years, can now be pursued, and familiarise yourself with the relevant jurisprudence before filing.

Think outside the square. Is it preferable to pursue a breach of an Authority compliance order in the Court or might the District Court processes offer some advantages?

Not all litigation in the Employment Court warrants a belts and braces approach. The amount of resource reasonably required, given the nature and magnitude of the claim and the interests at stake, is a matter of judgment. It pays (in both a literal and figurative sense) to assess this at the outset and to regularly review it, with your client, throughout the litigation lifecycle.

Picking up the telephone to opposing counsel will often be a useful first step. The early stages of litigation frequently provide the most productive opportunity for maximising the returns for your client, before positions have hardened.

Pleadings are pivotal…

Remember that pleadings offer a fertile opportunity for persuasion.

The statements of claim and defence are the first documents the Judge is likely to look at. They set the tone, and the foundation, for what follows. A weak foundation

[1] *H v A Ltd* [2014] NZEmpC 92.

can severely compromise the outcome. Keep your pleadings under review and take steps to amend them if necessary. Return to the pleadings when preparing the evidence and submissions.

The machine gun approach is seldom effective, and may suggest an element of desperation or uncertainty about the claim.

Clarity of pleadings is important – the purpose of them is to put the other side, and the Court, on notice of what your client's case is. Be concise but be clear. The pleadings are your first opportunity to create a favourable impression and to inform the Judge of what to look for and expect at trial. Do not miss the opportunity. Ensure that all elements are pleaded. Non-compliant pleadings will usually need to be re-crafted.

Consider the type of challenge being pursued. Be aware of the potential opportunities, and pitfalls, of the challenge elected. It is not possible to hedge your bets by seeking both a de novo and a non de novo hearing within the one statement of claim. If pursuing a non de novo challenge you must set out the errors of fact and law that are alleged.

Pay attention to remedies. They continue to be an area of weakness. Specify the nature and scope of the relief sought and ensure that claimed losses are adequately quantified. Doing so will help ensure that the right evidence is presented at trial.

Many of the Court's practices and procedures are dealt with by way of practice notes, posted on the Employment Court webpage.[2]

… so is procedure

The Employment Court Regulations 2000 set out the procedures that need to be followed. Where no procedure has been provided for the High Court Rules will generally apply.

[2] http://www.justice.govt.nz/courts/employment-court.

Applications should be in the proper form, supported with appropriate affidavit evidence. Informal applications are liable to be rejected.

Informal resolution of disclosure issues is encouraged. If that is not possible follow the correct procedure, and do it at an early stage. Do not leave it to the last minute.

If your matter is urgent, seek urgency with evidence as to why urgent determination is necessary. Be careful what you wish for - make sure that both you and your client are actually ready to proceed urgently.

Avoid slippage – the Court expects timetabling orders to be complied with. Be realistic about timeframes from the outset and take appropriate steps to deal with any unexpected issues in a timely manner. If slippage is unavoidable keep the Court informed via memoranda. A favourable response to a request for an indulgence is more likely to be forthcoming if it is not left to the last minute.

Comply with any directions made by the Court.

Be aware that the Court does not receive any documents from the Authority. Seeking to produce additional documents during the course of the hearing carries risk.

Tips for attendance at the initial conference

The initial conference with the Judge presents a useful opportunity to help shape the litigation.

Be adequately prepared. Familiarise yourself with the file prior to the initial conference. The Judge may well want to have a substantive discussion about the issues, and you need to be in a position to respond. Counsel with carriage of the case ought to attend. A memorandum filed in advance is helpful and may, if jointly filed, obviate the need for the conference.

Have a detailed discussion with your client *before* the conference about the possible benefits of alternative dispute resolution – this will be one of the first matters raised by the Judge. You will be expected to be in a position to advise whether there is any

perceived benefit in mediation. The possibility of a judicial settlement conference may also be raised. If it is not, but you think there might be some advantages in it, say so.

Indicating a willingness to attend mediation or a JSC will not be interpreted as a sign of weakness by the Judge, and ought not to be interpreted in that way by the opposing party.

Be realistic in your assessment of likely hearing time – there is a growing trend towards underestimation. Adjourning part-heard is undesirable, for the parties, the Court, and counsel.

Identify any outstanding interlocutory matters. Only advise that a case is ready to be set down for hearing if it is. Belated applications, that have the effect of deferring long scheduled fixtures, are unwelcome.

The lead-up to hearing

Very occasionally, feverish interlocutory activity may be necessary on a particular file. However such an approach can backfire. It comes at a cost and has the potential to obscure the key matters at issue.

It is not uncommon for applications to be filed without any prior discussion with opposing counsel. Always attempt to talk to the other side first – many matters (such as stay applications) can be dealt with by consent.

Briefs of evidence are exchanged in advance. Counsel should use this process to identify the matters in dispute and to prepare succinct and focussed cross-examination. Cross-examination that is directed at the material issues can shorten trial time and will better enable the Judge to understand the true nature of your case.

When drafting briefs, care should be taken to address all of the issues raised in the pleadings. Relief is often overlooked. Make sure it is adequately addressed. The Court's ability to make orders in an evidential vacuum is limited.

Exercise some editorial control over content. Your witnesses might want to express firm views on the law, but the Judge will not be interested in them. Nor will the Judge be drawn to extraneous, argumentative, abusive and repetitive material. Stick to the point. And remember, it is the witness's evidence, not your own.

Identify potential issues with the documentation and evidence at an early stage. It is not an agreed bundle if it contains documents that are disputed. Having admissibility issues dealt with in advance of trial can save precious hearing time and avoid overruns. While some evidence admissibility arguments need to be advanced and are important, some challenges to admissibility of intended evidence and/or documents are unhelpful. It pays to be discerning.

Take care in preparing the bundle of documents. Comply with the directions that have been made. You will not be thanked if each party files their own bundle or multiple bundles, if there is no index, if the pages are not consecutively numbered, if the documents are not chronologically ordered or in some kind of logical sequence, or if they bear no correlation to the briefs of evidence.

The hearing

Bear Kirby J's ten "Rules" of advocacy in mind:[3]

1. Know the Court that you are appearing in;
2. Know the law, including both the substantive law relating to your case and the basic procedural rules that govern the body you are appearing before;
3. Use the opening of your oral submissions to make an immediate impression on the mind of the decision maker and to define the issues;
4. Conceptualise the case and focus the attention of the Court directly on the heart of the matter viewed from the interest you are propounding;
5. Watch the Bench and respond to the Judge;
6. Give priority to substance over attempted elegance;
7. Cite authority with discernment;
8. Be honest with the Court at all times;

[3] M D Kirby "Ten Rules of Appellate Advocacy" (1995) 69 ALJ 964.

9. Demonstrate courage and persistence under fire. You will generally be respected for it. In any case it is your duty;
10. Address any legal policy and legal principles involved in the case and show how they relate to the case.

Proceedings in the Employment Court are formal. The usual Court processes apply to appearances, calling witnesses, cross-examination and submissions.

Familiarise yourself with Courtroom processes and procedures before you appear. Opposing counsel is your "learned friend" (even if you believe this to be a misnomer), not Jane or John and the Courtroom is not a café – leave any takeaway coffee cups in the rubbish bin outside. Know when to stand and sit, what time to arrive and what to wear.

The Judge is there to adjudicate the proceedings not to investigate the issues between the parties. While the Authority Member is likely to have taken an active role in exploring the evidence and directing lines of inquiry, do not expect the Judge to do this. It is not his/her role to advise you what evidence to call, what line of cross-examination to pursue or what legal points to argue.

You will know far more about the case than the Judge. You will likely have nursed it from infancy, through mediation, an Authority investigation and the pre-trial process. Do not assume an in-depth judicial familiarity with the documents, the intended evidence, or the nuances of your client's position.

An opening provides a useful road map for the Judge. Some cases do not warrant anything other than a brief outline of what your client's case is. It can also be useful to take the Judge to some of the key documents that will be referred to during the course of the evidence. This both familiarises the Court with an important aspect of the case at an early stage and, if not, obviates the need to stop and read a document as it is introduced into evidence by a witness, at least reduces the time involved in doing so. It also gives the Judge the opportunity to tab (and run a highlighter pen over) important documents and passages for future reference. Non-existent or abbreviated openings can, unless the issue is a very simple one, leave the Judge no better informed about the case or what to expect as the trial unfolds.

Preparing and presenting a chronology of significant events will often be a valuable tool, particularly if it is objective and non-controversial. It is likely to assist the Judge to put events in date order.

It is important to adequately prepare your witnesses for the hearing so they know what to expect. Generally briefs of evidence are read, but need not be, particularly if the proposed evidence is not contentious.

Even if a witness reads a brief of evidence, where there are matters of impression, such as determining the non-economic effects of a dismissal, it is often powerful to ask the witness to put their brief to one side and simply describe to the Court in his or her own words (led appropriately by open-ended questions) what the consequences of the allegedly unlawful act were. Some witnesses find this very difficult. In such circumstances it can be useful to call someone who knows that person well to describe what they are unwilling or unable to describe for themselves.

Be aware that resources are limited – be focused in terms of your cross-examination and submissions.

It is seldom a useful litigation strategy to obfuscate the issues.

You will be expected to present submissions immediately following the conclusion of the evidence. Do not view closing submissions as an opportunity to patch up evidential gaps in your client's case. Evidence from the bar is not well received.

Written submissions are most persuasive when they are clearly structured, identify the key issues and are well reasoned. You are not expected to read your written submissions verbatim. It is, however, helpful if there is a degree of connection between your oral and written submissions.

Be prepared to be flexible in terms of responding to questions from the Judge. Do not feel browbeaten into making concessions. Your role is to advocate for your client's position. If the Judge is grilling you over a particular point it is likely that they are trying to work through the issue in their own mind – having an interchange with counsel assists in this process.

Be prepared. Know the facts and the law. Listen to what is being said (and what is *not* being said) by the witness, opposing counsel and the Judge.

Remain focussed – anchor your submissions to the strong points in your case. They may get lost if you insist on arguing everything, however weak or tangentially relevant to the matters at issue.

Judiciously select the authorities that you wish to rely on, and which bear on the real points in issue. And ensure that the cases you rely on actually say what you say they say.

And remember…

The outcome of any litigation is uncertain. The persuasive skills of the advocate can and do influence outcomes:

> At best they will illuminate not only the legal and factual merits of the client's case but also, if there be justice in it, the justice of that case.[4]

Judges strive for a just result. It assists if counsel have illuminated a logical set of legal and factual stepping stones to get there.

[4] R S French AC, Chief Justice of the High Court of Australia "Appellate Advocacy in the High Court of Australia" (speech delivered to the World Bar Conference, Supreme Court of the United Kingdom, London, 29 June 2012).