Employment Court Workshop: Procedure 101

This paper was presented by Judge Corkill at a workshop held at Auckland, Wellington and Christchurch in August and September 2018

Introduction

This is a workshop aimed at helping upskill less experienced practitioners.

We recognise that those who have not previously appeared in the Employment Court, which is a specialist court, may need upskilling as to the procedural complexities of running a challenge and other proceedings, and as to the formalities of an Employment Court hearing.

We think there is a wider range of practitioners appearing in the Court than used to be the case, some of whom let themselves down because they are unfamiliar with the processes and expectations of the Court. A key theme of this presentation will be that the processes of this Court are markedly different from those of the Employment Relations Authority (ERA).

I refer to the ERA, because a significant proportion of the proceedings that are filed in this Court are challenges from determinations of the Employment Relations Authority.

I expect you will know that a relationship problem involving an employer and an employee, if unable to be resolved by the parties directly, will go to mediation with an MBIE mediator. If not resolved there, a relationship problem will then be filed in the ERA, which will hold an investigation meeting. For present purposes, all that needs to be said about that is that the processes of the ERA are, as required by the statute, relatively informal. As it says in the Employment Relations Act 2000 (the Act), the ERA is an example of a "specialist decision-making body that is not inhibited by strict procedural requirements".[1]

By contrast, the processes of the Employment Court are more formal and deliberative, akin to those which you would expect to see, for example, in the High Court.

However, the Court has jurisdiction to hear and determine not only challenges against ERA determinations, but questions of interpretation of law, review, and injunctions in respect of strikes and lockouts.

The Court usually comprises a Judge sitting alone. However, at the direction of the Chief Judge, a full Court of at least three Judges may hear cases.

The first part of this workshop will relate to processes involved in initiating proceedings, and a whistle-stop tour of interlocutory steps that may be taken in the Court, in order to prepare a case for hearing.

In this part of the workshop, experienced lawyers were asked to comment on some of those steps from their perspective as experienced employment law practitioners.

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[1] Employment Relations Act 2000, s 143(f).

Then we will move into the second phase of the workshop, where we will talk about and illustrate aspects of a defended hearing, so that you can obtain some impression as to the expectations that we have on people who represent parties in proceedings before the Court.

This is intended to be an interactive workshop. It will be relatively informal. If you have any questions or observations, please do not hesitate to let me know. As time permits we do want this occasion to be interactive.

A final preliminary point relates to the Court's website. Most of what we are going to discuss is explained on the Court's website. It has been deliberately formatted and arranged so as to assist not only experienced practitioners but also those who are not, as well as members of the public who are coming into contact with the Court for the first time. Less experienced practitioners will find a wealth of helpful information, including precedents, which may assist them. It may also be useful to refer clients and potential witnesses to particular information: for example, under the heading "What to Expect at the Employment Court".

I also point out that there is a useful section on the website entitled "Judicial Papers and Speeches", about such topics as running a case in the Employment Court, etiquette, and, more recently, issues as to compensation in the Court.

Finally, I refer to the excellent database of judgments of the Court, from 1 July 2006, as well as appellate judgments and judgments of note.

A good range of judgments prior to that date can be found on the NZLII website, which of course also contains judgments from the Courts' general jurisdictions, as well as Tribunals. All of these resources are searchable.

After the workshop, you will be emailed a copy of this presentation.

Starting a proceeding

Pleadings

The importance of carefully designed pleadings cannot be underestimated.

As was noted in one well known Court of Appeal statement (*Price Waterhouse v Fortex Group Ltd*) it has become fashionable in some quarters to regard the pleadings as being of little importance, and that the exchange of briefs prior to trial "might be seen as curing any lack of particularity in the pleadings".[2]

It is misguided to think that the filing of a statement of claim or a statement of defence is simply the opening shot, and that what then matters is what happens thereafter. The pleadings are a constant reference point. They are a road map which explains to the other party and to the Court what the issues are in the case.

Because of their importance, it is vital that those preparing a statement of claim or statement of defence give very careful thought to what it is they are trying to achieve. As you move closer to a hearing, it is worth revisiting your pleading to see if it requires amendment. Rigorous analysis should focus on:

- What are the key facts?
- What are the causes of action?
- What are the elements of each cause of action?
- What relief is being sought?

Pay particular attention to regs 11 and 20.

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2 *Price Waterhouse v Fortex Group Ltd*, CA179/98, 30 November 1998 at 17.

11 Statement of claim

(1) Every statement of claim filed under regulation 7 or regulation 8 must specify, in consecutively numbered paragraphs,—

(a) the general nature of the claim:

(b) the facts (but not the evidence of the facts) upon which the claim is based:

(c) any relevant employment agreement or employment contract or legislation and any provisions of the agreement or the contract or the legislation that are relied upon:

(d) the relief sought, including, in the case of money, the method by which the claim is calculated:

(e) the grounds of the claim:

(f) any claim for interest, including the method by which the interest is to be calculated:

(g) in the case of a statement of claim filed under regulation 7, whether a full hearing (a hearing *de novo*) is sought, and, if not, the matters required by section 179(4) of the Act, namely,—

(i) any error of law or fact alleged by the plaintiff; and

(ii) any question of law or fact to be resolved; and

(iii) the grounds on which the election is made, which grounds are to be specified with such reasonable particularity as to give full advice to both the court and the other parties of the issues involved; and

(iv) the relief sought.

(2) The matters listed in subclause (1) must be specified with such reasonable particularity as to fully, fairly, and clearly inform the court and the defendant of—

(a) the nature and details of the claim; and

(b) the relief sought; and

(c) the grounds upon which it is sought.

(3) Each paragraph of a statement of claim must be concise and must be confined to 1 topic.

20 Statement of defence

(1) Every statement of defence filed in accordance with these regulations—

(a) must be in form 4; and

(b) must specify, in consecutively numbered paragraphs,—

(i) whether the defendant admits or denies each of the allegations of fact contained in the plaintiff's statement of claim so far as those allegations affect the defendant; and

(ii) where the defendant has a positive defence, the details of that defence.

(2) The details of a positive defence must include—

(a) the general nature of the defence; and

(b) the facts (but not the evidence of the facts) upon which the defence is based; and

(c) references to any relevant employment agreement or employment contract or legislation and to any provisions of the agreement or the contract or the legislation that are relied upon.

(3) Each paragraph of the statement of defence must be concise and must be confined to 1 topic.(4)

(4) Every statement of defence must specify the matters listed in subclause (1)(b) with such reasonable particularity as to fully, fairly, and clearly inform the court and the other parties of the nature and details of the defence to the plaintiff's claim.

(5) Every admission or denial must not be evasive but must substantively answer the point.

Within those broad parameters, there does need to be sufficient particularity as to fully and fairly inform the other party and the Court as to the points of the parties' case. There must be enough detail to supply an outline of the case being advanced, which is sufficient to enable a reasonable degree of pre-trial briefing and preparation. Discovery and interrogatories are only an adjunct to these elements.

When it comes to the hearing itself, the Judge will be paying close attention to the pleadings, since these provide a framework for analysis of the evidence and submissions. The Judge will likely work his or her way through the statement of claim, reading it against the statement of defence, so as to distil the issues in the case.

In the end, good pleadings will lead to an accurate identification of the key issues which the Court must resolve.

These observations reinforce the importance of a "theory of the case". This is a concept referred to in many modern texts about advocacy. As it is put in one of them, "To have a theory of the case means that the advocate must prepare a succinct, persuasive version of the facts which encourages the fact-finder to decide in his or her client's favour. In doing that it is often helpful for the advocate to ask, why should my client win?"[3]

If a clear and viable theory has been identified right at the start, it is more likely to be reflected not only in the pleadings, but in the subsequent steps that need to be taken, in the leading of evidence and cross-examination of witnesses, and in the submissions presented to the Court. The clearer all this is from the outset, the more likely it is that you will be able to follow through and present a clean case.

I venture to suggest that it also helps to deal with clients more effectively. If, in framing a theory, you identify not only the strong points of the case, but also its

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[3] A Willy and J Rapley *Advocacy (*Thomson Reuters New Zealand, 2013).

weak points, then you will be better placed to advise a client whether a particular cause of action is actually worth being pursued. A scattergun approach diminishes the credibility of the case, and indeed the lawyer or advocate who adopts such an approach. A Judge looking at a well-crafted pleading which focuses on issues from the start, is more likely to have confidence in the way in which the case is being presented.

Particular issues concerning the commencement of a case:

There are two types of challenge by which proceedings are initiated in this Court.

An election by the challenger "seeking a full hearing of the entire matter", is defined as a "hearing de novo". All matters that were before the ERA will thereby be at issue on the challenge.

A non-de novo challenge (although this term is not used in the relevant section, s 179), is a narrower form of "appeal". It identifies some, but not all of the determination that is challenged.

In such a case, there are several statutory consequences:

a) A party who does not seek a hearing de novo must specify what it says are errors of law or fact in the ERA's determination. This is to enable the Court to conduct a restricted and more focused hearing of the "appeal".
b) However, the election does not dictate the way in which the case will be heard. So there may be evidence or further evidence about the matters in issue in a non-de novo challenge, noting that the ERA does not maintain a record of its investigation meetings; thus, unless evidence is led about evidence given in the ERA (including documents it received), the Court may only have before it references to evidence in the ERA determination which, if the challenge is based on errors of fact, may be problematic.
c) In such a case, the Court must direct, in relation to the issues involved in the matter, the nature and extent of the hearing.

These processes are not well understood. For instance, some representatives who want to challenge part-only of a determination, say they are seeking a de novo challenge in respect of that part. It is debatable as to whether such language is appropriate; the choice of process may have significant consequences as to the process to be adopted. If the challenge is de novo, the ERA's findings will be less

significant. If the challenge is non-de novo, in the end the Court must decide if the ERA was right or wrong.

Where a challenger wishes the Court to conduct a comprehensive review of part of a determination, the direction of the Court as to the nature and extent of the hearing will be very important.

So, it may be necessary to seek a broad direction confirming that a full range of evidence will be placed before the Court, and a full description of the issues which will then have to be decided, to seek out the question of error, will be appropriate.

Other issues relating to the commencement of a case:

There are three other brief topics relating to the commencement of such proceedings that need to be mentioned.

The first relates to so-called “cross challenges”. In other jurisdictions, a defendant might respond to matters raised in a statement of claim by bringing a counter-claim. There is no such option under the the Act. A plaintiff brings a challenge if that party is dissatisfied with the determination of the ERA; if a defendant is also dissatisfied with that determination, then that party must bring their own challenge.

This can give rise to timing problems. Section 179 provides that an election must be brought within 28 days after the date of the determination. The practical difficulty which not infrequently arises is where one party wishes to wait and see whether the other party will challenge; the problem of “If you do, I will”. If the party initiating the first challenge does so towards the end of the period of 28 days, the other party may have limited time for initiating their own challenge, especially if this occurs on the last day, as frequently happens.

Sometimes, the other party simply does not meet the necessary timeframe, in which case it becomes necessary for that party to seek leave to file their challenge out of time. The necessary documentation is on the website.

There is a more general point relating to time limits which it is appropriate to mention briefly. These relate to the timeframes for raising a personal grievance, as set out in ss 114 and 115 of the Act. A grievance must be raised within 90 days, beginning with the date in which it is alleged the action amounting to a personal grievance occurred or came to the notice of the employee, whichever is the later, unless there is consent from the employer.

Where the employer does not consent to a grievance being raised after the 90-day period, leave can be sought. There is a threshold of "exceptional circumstances" (those words receive some definition in s 115); and the ERA must be satisfied that it is just to grant leave. Sometimes, where leave is declined by the ERA, the issue may come to the Court by way of challenge.

But there is a further time limit of which representatives should be aware, which is that any action in the ERA or the Court based on the raising of a personal grievance must be brought within three years.

Interlocutory steps

Disclosure

Disclosure in the Employment Court is not the same as discovery in the courts of general jurisdiction, such as the High Court. For those practitioners who operate elsewhere, it is as well to know how the process works in this Court.

Parties who have a clear focus on the issues will often be able to resolve requests for disclosure informally. This is obviously desirable, since it is less expensive for clients, and avoids the necessity of engaging in what is a fairly technical process. The Court expects representatives of parties to co-operate with each other with regard to disclosure.

The process and forms are carefully described in the Employment Court Regulations (regs 37 to 52). The Regulations make it clear that the object of the process is to ensure that each party has access to relevant documents of the other party, "it being recognised that, while such access is usually necessary for the fair and effective resolution of differences between parties to employment relationships, there are circumstances in which such access is unnecessary or undesirable or both".[4]

This overarching objective recognises the importance of relevance, proportionality and discretion.

In considering the extent of disclosure, an argument is often raised as to whether an applicant is doing no more than engaging in unnecessary fishing – that is, a party is seeking information or documents so as to discover a new cause of action

[4] Employment Court Regulations, reg 37.

or to discover circumstances which may or may not support a baseless or speculative cause of action.

But as the High Court has noted, the whole purpose of discovery is to fish for documents, in the sense that the party does not know exactly what documents the process will reveal or their contents. So, fishing may be legitimate if the categories of documents are indeed relevant to a matter at issue, as pleaded. But there is also impermissible fishing where documents which are sought are not relevant to matters arising from the pleadings, and it is simply hoped that material that might lead to a new cause of action will emerge. In short, common sense is critical.

I have referred to "relevant" documents. That term is defined broadly under the Regulations. It is akin to the *Peruvian Guano* test which will be familiar to some.[5] That particular test has been modified in the High Court, but not in this Court.[6]

If, however, the parties cannot resolve this issue themselves, a notice of disclosure (Form 6) may be served.

Once that notice has been served, two potential tracks may follow:

a) Within 14 days, the responding party must assemble all relevant documents, make a list or index of documents, advise time and place for inspection, and/or advise that a document is no longer in the party's position and explain what has happened to it. If the receiving party is dissatisfied with the documents disclosed, then within five days after the disclosure an application may be made to the Court for a verification order – that is, an order that the opposing party disclose in a sworn or affirmed statement whether any document or class of documents that have not been disclosed are in fact in their possession, and if not whether they once had them and if so when it was parted with and what became of it. If the Court is satisfied of the

5 *The Compagnie Financiere et Commerciale du Pacifique v The Peruvian Guano Company* (1882) 11 QBD 55 (CA).
6 *ASB Bank Ltd v Nel* [2017] NZCA 559 at [17].

probable existence of the document or class of documents, a verification order may be made.

b) The second track, which may arise from a notice for disclosure, relates to objections. A party may object to disclosure on the grounds of legal professional privilege, self-incrimination or that disclosure would be injurious to the public interest. In doing so, the document must be described sufficiently so as to enable it to be properly identified. If the originating party wishes to challenge that objection as being ill-founded, then it must bring such a challenge to the Court within five clear days, seeking an order that the objection is ill-founded, and directing that the documents be disclosed. In resolving this issue, the Court may inspect the documents in issue to assess the validity of the claim.

It is to be noted that the timeframes are tight. The expectation is that these processes will take place in a "speedy, fair and just" way.[7]

A final comment to make regarding these processes relates to confidentiality. Unlike the position in the High Court, confidentiality is not a ground of objection. If a confidential document is in fact relevant, then the Court is at liberty to make protective orders. For example, if the documents are commercially sensitive, there may be an order that is produced to counsel and technical advisers only; and appropriate orders may be made at trial to maintain the protection.

[7] Employment Court Regulations 2000, reg 4.

Other interlocutories

Time does not allow for a detailed explanation of some other interlocutory steps that may be necessary. But it is wise to be aware of them in case they are relevant in a particular case. So, a representative for a party may need to consider whether:

- An application for non-publication of name should be sought, noting that the bar is high for obtaining such an order, since it involves a balancing of open justice factors against any particular circumstances which may apply.
- A request for further and better particulars, if the pleadings do not fully and fairly inform the other party and the Court of the cause of action or ground of defence.
- Requests can be made for interrogatories: that is, a sworn statement responding to questions relating to matters of fact which are in question between the parties; these are generally requested to obtain admissions that will support the case of the interrogating party, or which will destroy or damage the case of the party being interrogated. There is no express regulation providing for this possibility, but the Court applies the relevant High Court Rules, via reg 6 of the Employment Court Regulations.
- Application for stay: bringing of a challenge does not automatically stay any order as to payment or otherwise made by the ERA. A conventional application for stay must therefore be made, explaining why it is in the interests of justice that, for instance, a sum ordered to be paid be not paid to the other party, be paid into Court, or not be paid at all.

Directions conferences

All proceedings filed in the Court are the subject of a telephone directions conference, usually after the statement of claim and statement of defence have been filed, but sooner if there is an application for urgency or for some other reason the processing of the proceeding needs to be expedited.

On the website, you will find “Direction Conference Guidelines”. These outline the matters which are likely to be covered at the conference, such as:

- key issues;
- ADR options;
- outstanding interlocutory matters;
- the direction the Court should make if there is a non-de novo challenge;
- identity of witnesses, and whether expert evidence may be required;
- likely hearing time, whether hearing management might be helpful;
- the order in which the parties will present their cases;
- preferred venue, possible dates;
- a timeframe for filing the bundle of documents; and
- appropriate costs classifications.

It is always good practice to discuss all these issues with the opposing representative, with a view to filing a joint memorandum. This practice allows potential issues to be identified and discussed, and can lead to a better focus on the directions which are actually required. It may even lead to the Judge being able to make directions on the papers without the necessity of the conference call going ahead. If a joint memorandum cannot be agreed, then separate memoranda ought to be filed.

Preparation of witness briefs and common bundle

Following the telephone directions conference, the Court will issue a Minute including a timetable for the filing of witness briefs and a bundle of documents. The Minute will spell out the essential requirements of a witness brief, including the requirement that each brief of evidence is to contain all of the evidence-in-chief that a witness will give, that it is to be filed in MS Word format transmitted electronically so as to assist in the preparation of the transcript, and noting that the purpose of exchanging briefs is to ensure parties are aware in advance of the

intended evidence, so that cross-examination can be prepared and focus can be on the essential issues.

The Minute will also spell out the basis on which documents in the bundle are to be admitted, how objections to documents are to be identified so that those can be dealt with at the hearing; it will emphasise that the bundle is to contain only those documents which will be referred to by witnesses in their evidence, or which are to be the subject of submissions. They are not to be included “just in case”.

At the hearing

Basic tips:

The Employment Court is a formal forum. You should be aware of these useful, and probably fairly obvious, hints:[8]

- **Be punctual**. Tardiness is an imposition on the opposing party, witnesses and the Court.
- **Dress appropriately** – a black or navy suit, with a white shirt and tie for men, and an equivalent level of formality for women, black or navy shoes, and a gown (unless the hearing is in chambers and the Judge has dispensed with the need for gowns).
- **Stand up** when the Judge enters and wait until the Judge is seated before you sit down.
- When the case is called, the plaintiff's representative (or representatives) stands up, **states their name**, identifies the party they appear for and then sits down. The defendant's representative (or representatives) then stands up and does the same thing.
- **Stand up** when you are addressing the Judge or the Judge is addressing you.
- Use **appropriate references** – "Your Honour", "Sir" or "Ma'am" (the Judge); "my learned friend" (opposing representative); "Mr" or "Madam Registrar", "Mr" or "Madam Court Taker"; "Mr" or "Madam Interpreter". Witnesses should be referred to formally unless there is a special reason not to.

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8 Chief Judge Inglis "Running a Case in the Employment Court" at 9 <https://www.employmentcourt.govt.nz/about/papers-and-speeches/>. See also Iain Morley "The Devil's Advocate: a spry polemic on how to be seriously good in court" [2008] 27 Civil Justice Quarterly 531-532, (2nd ed, Sweet and Maxwell, 2009); and J Bonifant and A Toohey NZLS "Litigation Skills: A practical guide to judge-alone trials" (2017, New Zealand Law Society).

- **Sit down** when the opposing representative is talking.
- **Stand up** when your witness is giving evidence. You may seek leave to sit down while your witness is reading their brief of evidence.
- **Do not interrupt** the Judge and only interrupt the opposing representative when it is necessary to do so (for example, if they are asking a question you take objection to).
- **Use the microphone** and speak in a clear and measured way.
- **Water is provided** – do not bring a sipper bottle or other refreshments into Court.
- **Be courteous and respectful** to Court staff, the opposing representative, witnesses, the opposing party and the Judge at all times.
- **Listen to the question** the Judge is asking you and try to answer it directly. Asking for clarification if you do not understand what the Judge is getting at, or asking that the question be repeated, is perfectly acceptable.
- Dialogue with the opposing representative is **through the Bench**. It is not direct.
- Present your client's case in a **reasoned, dispassionate** manner. You must **know the facts and the applicable law**.
- Treat the Court as a **place of solemnity**. Do not engage in distracting behavior.

Demonstrations

a) Calling of case:

- The Judge enters.
- Appearances of the representatives are requested, who stand when announcing their presence.
- The Judge asks the representatives whether there are any preliminary matters, such as an order excluding witnesses.
- The Judge then invites the representative for the first party who is to open, to do so.

b) Referring a witness to a document that is not in an agreed bundle:

- This will be the exception, rather than the rule, given the presence of an agreed bundle before the Court.
- The representative makes a preliminary statement, informing the witness (and the Court) that they will be asked to look at (for example) a particular document, and then asks some questions.
- Before doing so, the representative shows the document to the opposing representative, so that there is, if necessary, an opportunity to raise an objection as to its production.
- Subject to that objection, the representative should have sufficient copies of the document for the witness, other representatives, the Court taker, and the Judge.
- The representative should lay a foundation for the production of the exhibit, that is, by questioning the witness about the item and his or her relationship to it, and whether they are familiar with it.

- The representative may then have questions about the document, for the witness to answer.
- It is good practice to ask the witness to produce the exhibit sooner rather than later, as many representatives omit this step if there has been a lengthy passage of questioning.
- There is no magic as to how an exhibit is produced, the two main possibilities being to invite the witness whether they produce the exhibit, as Exhibit A; or the representative informs the Court that they are now producing the exhibit as Exhibit A. The item is then uplifted by the Court Taker, so that an exhibit sticker may be placed on it.

c) Prior inconsistent statements:

This is a means by which the credibility of a witness is challenged, as provided for in s 37 of the Evidence Act 2006. There is a set procedure, sometimes called a five-step procedure, for confronting and impeaching a witness who has made a prior inconsistent statement, such as one which conflicts with something they said in the ERA. Those steps are:

- Confirm: the witness confirms as correct the statement they are currently making, which is to be challenged.
- Contrast: the witness is asked about a previous statement, which is considered to be inconsistent by the advocate.
- Credit: that is, credit is gained for the inconsistent statement to the effect that, for example, it was made formally for the purposes of the previous occasion, such as in a witness brief.
- Confront: the advocate then confronts the witness by putting to him or her the detail of the prior inconsistent statement. If it is written down the statement should be read out verbatim. If the witness disputes the prior occasion, the written statement may be put to the witness.

- Commit: it may not be necessary to go this far, but it is the final question if the witness disputes the prior occasion. If a later witness is to be called to establish the contradiction, then there is a duty to put this question.

d) Evidence as to remedies:

This evidence is often overlooked. A claimant seeking compensatory remedies must provide a satisfactory evidential basis for doing so. Thus, detailed evidence as to the financial and psychological consequences of a termination should be properly led. On a topic such as this, the Court may be prepared to allow oral evidence to be led on the topic of humiliation, loss of dignity, and hurt to feelings, even if the subject is referred to in a written brief. This is to enable the Court to make an assessment of the witness' evidence, particularly with regard to emotional effects; rather than have these described only in writing.

Discussion on other elements of in-Court practice

a) Proper preparation:

It will already be evident that proper preparation is essential, particularly if the representative has not appeared often in this particular forum. One useful tip is to sit in on a hearing involving experienced representatives, so as to see what is involved. As already indicated, proper preparation allows the representative to ensure a focus is maintained on the key issues.

Such preparation may also avoid the problem alluded to by Justice Robert H Jackson:[9]

> … I made three arguments in every case. First came the one I had planned – as I thought, logical, coherent, complete. Second was the one actually presented – interrupted, incoherent, disjointed, disappointing. The third was the utterly devastating comment that I thought of after going to bed that night.

b) Duty to put the case:

At common law, counsel had a duty to "put the case" of his or her client to the witnesses called by opposing counsel. If this involved contradictory material, the purpose was to ensure that the witness might have an opportunity of explaining that contradiction. Now the relevant obligation is found in s 92 of the Evidence Act 2006, where it is clear that a party "must cross-examine a witness on significant matters that are relevant and in issue and that contradict the evidence of the witness, if the witness could reasonably be expected to be in a position to give admissible evidence.

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9 Robert H Jackson "Advocacy before the Supreme Court: Suggestions for Effective Case Presentations" (1951) 37 ABA Journal 801 at 803.

Although the Employment Court is not bound by the provisions of the Evidence Act 2006, it usually regards its provisions as providing helpful guidelines for the wide power of admissibility which exists under s 189 of the ERA.[10]

c) Opening statements:

- An opening submission is usually in writing, though it does not need to be; that said, a written opening is generally helpful to the Court and the opposing party.
- There is no one-size-fits-all for an opening statement, but the following elements may be of assistance:
- Give an introduction, outlining as briefly as possible what the case is about.
- State the theory of the case – do not adopt legalisms, but tell the Court why your client is bringing his or her case.
- State the causes of action.
- State the facts in brief.
- Address, in brief, any legal issues that will arise.
- Deal with any defences.
- Outline the relief sought.
- Set out and briefly describe the witnesses that will be called.

All these points apply to a defence opening address, though the address can be much shorter, since the Court will, by that stage, know what the case is about.

10 *Maritime Union of New Zealand Inc v TLNZ* Ltd [2007] ERNZ 593 (EmpC) at [12]-[27].

d) Examination-in-chief:

- Generally, there is a prohibition against leading questions.[11]
- Often, a useful approach is to start each question during examination-in-chief with “who”, “what”, “when”, “where”, “why”, “how”, or “which”.
- That all said, usually evidence-in-chief is presented by a written brief.
- These points may apply particularly to evidence being led from a witness who is summonsed. It is usual practice for the representatives calling such a witness to advise the Court and the opposing party of the intended evidence, for instance by an indicative brief or ‘will-say’ statement.

e) Cross-examination:

- I emphasise again the importance of preparation. Nothing is so obvious as cross-examination from a representative who is winging it. The same comment may apply to a representative who wanders through the brief of evidence for the witness, paragraph by paragraph, apparently observing it for the first time.
- Focus on what is crucial to the case.
- Avoid irrelevant or trivial material.
- Stick to a prepared plan of attack.
- Do not lose your temper.
- Structure the cross-examination.
- If the witness is evasive, persevere.
- Listen very carefully to every answer, and be prepared to pick up on the response of the witness.

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11 Evidence Act 2006, s 89.

- Avoid long, and argumentative, questions.
- Where appropriate, gain the trust of an opposition witness.
- Know when to sit down.

f) Re-examination:

- Again, a representative who is re-examining his or her own witness may not ask leading questions.
- The second key point is that re-examination may only proceed on the basis of matters arising from cross-examination. It is not an opportunity to raise a new point that has just occurred to the representative.

g) Judge's questions:

- Listen carefully to these.
- You will be given an opportunity to ask questions arising from the Judge's questioning.
- Do not be discouraged by the questions of a Judge, who may simply be testing their own thinking.

h) Closing submissions:

- Again, there is no one-size-fits-all for a closing submission.
- It should, however, be carefully structured.
- A more complete chronology, with cross references to the transcript and documents in the bundle, will be of immense assistance to the Court.
- Address all issues in the case, whether strong or weak.
- Do not avoid a submission which your opponent is likely to raise. If it is unexpected, the Judge will want to know what you think about it.

- Do not make unnecessary concessions; if you do not know the answer, or need time to think, simply say so.
- The order of closing addresses is likely to be as per the High Court Rules, unless the representatives agree to the contrary; that is, the opposing party first, followed by the other party. With the Judge's leave, the party who commenced may be permitted to reply, strictly in reply.

Costs

At the hearing, or after it if leave is granted, a party can apply for a costs order. Such an order relates to the legal costs of the proceedings, but reimbursement of disbursements such as filing or hearing fees may also be sought.

Generally, costs will be awarded to a successful party; where there is a mixed outcome, costs will often lie where they fall.

The Judges have adopted a trial scale of costs, similar in form to that which is applied in the High Court, which guides the making of a costs order for cases filed from 1 January 2016.[12]

The Guideline Scale is intended to support, as far as possible, the policy objective that the determination of costs be predictable, expeditious and consistent. It is not intended to replace the Court's broad discretion under the statute as to whether to make an award of costs and, if so, against whom and how much.

That all said, it will very often be the case that classifications of costs can be agreed between the parties (for example Band B for the normal amount of time which is considered reasonable, and Category 2 which is $2,230 per day); this allows the parties to then carry out a fairly straightforward calculation, having regard to the steps specified in the Guideline Scale.

If there are particular reasons as to why there should be an increase above scale, or a decrease below it, then the Court can under its ultimate discretion consider that possibility; it may well then be necessary for details of costs actually incurred to be provided, such as invoices and timesheets. These possibilities, however, will be the exception rather than the rule.

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12 Employment Court Practice Directions "Costs-Guideline Scale" <https://www.employmentcourt.govt.nz/legislation-and-rules/>.

Detail of the disbursements sought must be given to the Court and the opposing party to see that they are justifiable and payable.

Enforcement[13]

The first possibility to consider is enforcement in the District Court or the High Court.[14]

An order made by the Court, including an order imposing a fine, may be filed in any District Court; an applicant will first need to obtain a Certificate of Judgment from the Registrar of the Court.

Once registration in the District Court occurs, all the enforcement remedies which are available in that Court can be considered. Obviously, this includes charging orders, (which can in turn be enforced by an order of sale in the High Court), warrants to seize property, warrants to recover chattels, orders requiring a judgment debtor to attend Court for examination, warrants of committal for failure to comply with the judgment or subsequent orders (but not for monetary awards), writs of arrest for debtors about to abscond and garnishee proceedings.

Finally, a monetary award might be enforced by the insolvency and liquidation processes of the High Court.

Another option for enforcement of orders of the Court (whether monetary or non-monetary) is a compliance order made under ss 139 to 140A of the Act.

The problem with such an application is the time involved in pursuing it.

Failure to abide by a compliance order of the Court can ultimately lead to the draconian penalties of imprisonment, fine or sequestration of property.

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13 See generally M Perkins "The Jurisdictional Divide – Cross Jurisdictional Enforcement of Monetary Claims" (paper presented to Employment Law Conference, Auckland, November 2016) at 285.

14 See Employment Relations Act 2000, s 141.

However, the Court is very likely to offer time to a defaulting party to comply, before actually imposing one of these remedies.

Compliance orders may be more suitable for the enforcement of non-monetary remedies.