Issues Relating to Employment Court Hearings

A Judge's Perspective

Judge Bruce Corkill

Section 189

Section 189 is the gateway provision by which evidence may be placed before the Employment Court. Under the heading "Equity and good conscience", the subsection provides:

> ...
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> (2) The court may accept, admit, and call for such evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not.

Equity and good conscience provisions are of long standing. They have their antecedents in English statutes of the early 17th century that set up Courts of Request.[1] These have been described as "a sort of poor [persons] Chancery", applying what one author has described as a type of rough and ready local justice to litigants in small cases.[2]

Since then, the term has generated a lot of litigation and consideration of scope, since provisions of this kind are now used in a wide range of circumstances affecting courts and tribunals. A rather more sophisticated understanding is required now, than was the case in the 17th century.

A useful description was given by the High Court of Australia in *Sue v Hill*, where Gleeson CJ, Gummow and Hayne JJ observed:[3]

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1 Which have been described as early versions of small claims tribunals: Neil Rees '"Procedure and evidence in "court substitute tribunals""' (2006) 28 Aust Bar Rev 41 at 60.

2 At 60, referring to O Howard Beale "Equity and Good Conscience" (1937) 10 ALJ 349.

3 *Sue v Hill* [1999] HCA 30, (1999) 199 CLR 462 at [42] (emphasis added, citations omitted).

> Provisions of this type are not inimical to the exercise of ... judicial power ... They do *not* exonerate the Court from the application of substantive rules of law and are consistent with, and indeed require the application of, the rules of procedural fairness.

In *Qantas Airways Ltd v Gubbins*, the NSW Court of Appeal considered the meaning of an equity and good conscience clause when assessing the jurisdiction of an equal opportunities tribunal.[4] The majority observed that the words "equity good conscience and the substantial merits of the case", the particular term which was under consideration in that instance, were not terms of art and had no fixed legal meaning independent of the statutory context in which they are found.[5] Fundamental to a proper application of the provision would be a clear understanding of the statutory framework of the provision.

Returning to s 189, on any view, its language is broad. Thus:

a) The subsection relates to "evidence and information". The word "information" was introduced in 2000; its use possibly suggests a category of material that would not necessarily qualify as "evidence" in the formal sense. It may be an indication that the Court potentially has a broad power to receive material that may qualify as "evidence", or may not, in which case it is better described as "information".

b) The subsection no longer carves out the application of the equity and good conscience jurisdiction from cases involving economic torts, injunctions or judicial review proceedings, as was previously the case.[6] Accordingly, it is broader in scope than was the case prior to 2000.

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4 *Qantas Airways Ltd v Gubbins* [1992] 28 NSWLR 26 (NSWCA).
5 At 29.
6 Employment Contracts Act 1991, s 126(1).

c) The Court may "accept", "admit", and "call" for such evidence and information. So, not only does the Court have the ability to accept and admit evidence, it may *call* for it of its own volition.[7]

d) The term "equity and good conscience" is not defined. It is one of those concepts where you know it when you see it. The term "equity" suggests fairness, impartiality, and even-handed dealing; the body of principles constituting what is fair and right. Early writers have suggested that in ordinary language "equity" means natural justice, although concepts of equity tend to be understood as relating to discrete legal principles, whereas natural justice is a more flexible concept because the extent of such obligations will vary depending on the subject matter.[8]

"Good conscience" extends the required approach. This phrase invokes the idea of a moral sense of right and wrong.

Thus, the phrase "equity and good conscience" encompasses the idea that evidence should be treated according to the substantial merits of a case, and without undue regard to technicalities or forms.

e) The Court has a discretion; it may act as "it thinks fit".

f) That is the case whether the evidence or information is strictly legal evidence or not – that is, evidence which satisfies, for example, admissibility criteria as stipulated in the Evidence Act 2008, or at common law.

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7 See equivalent provision for the Employment Relations Authority in the Employment Relations Act 2000, s 160(2).

8 Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act - A commentary* (2nd ed, LexisNexis, Wellington, 2015) at [3.3.27].

g) Subsection (2) is associated with subsection (1), which places emphasis on supporting successful employment relationships and promoting good faith behaviour. The objects of Pt 10 in which the provision sits are described in s 143 and also provide important context, as do the objects of the Act itself as described in s 3. Also relevant are the numerous other provisions describing particular aspects of the Court's specialist employment jurisdiction.

The Employment Court is not included in the statutory definition of "court" in s 4 of the Evidence Act. That Act has largely codified the law of evidence in New Zealand for courts in the ordinary jurisdiction. Specialist courts, however, have specific provisions about evidence – for example the Maori Land Court,[9] the Environment Court [10]and the Family Court,[11] as well as the Employment Court. In these instances, a different approach may well be appropriate having regard to their specialist roles.

That all said, the provisions of the Evidence Act, and the common law rules of evidence can be important guiding factors for determining the admissibility of evidence.[12]

A very recent judgment of the Court of Appeal, *A Preliminary Conduct Committee of the Nursing Council of New Zealand v Health Practitioners Disciplinary Tribunal*, analysed a provision which is similar to, but not identical with, s 189(2).[13] The provision under consideration is found in cl 6 of sch 1 of the Health Practitioners Competence Assurance Act 2003 and says:

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9 Te Ture Whenua Māori Act 1993, s 69; Māori Land Court Rules 2011, rr 6.17–6.25.

10 Resource Management Act 1991, ss 276–276A and 277A.

11 Family Court Act 1980, s 12A(4); Family Court Rules 2002, rr 48 and 170–172.

12 *Maritime Union of New Zealand Inc v TLNZ Ltd* [2007] ERNZ 593 (EmpC) at [14]; and *Auckland District Health Board v Bierre* [2011] NZEmpC 108.

13 *A Professional Conduct Committee of the Nursing Council of New Zealand v Health Practitioners Disciplinary Tribunal* [2020] NZCA 435 [*Professional Conduct Committee v HPDT*].

> The Tribunal may receive as evidence any statement, document, information, or matter that may in its opinion assist it to deal effectively with the matters before it, whether or not that statement, document, information, or matter would be admissible in a court of law.

The Court emphasised that a two-step analytic approach is necessary.

The first involves, in effect, a determination as to whether the evidence would be "admissible in a court of law".

The second involves the exercise of the residual discretion in light of the first conclusion.

It summarised the position in this way:[14]

> ... [To] be properly exercised, the ... discretion to admit evidence not otherwise admissible in a court of law in our view requires the Tribunal to make its discretionary decision *knowing, and having assessed the significance of*, the fact that such evidence is inadmissible under the Evidence Act. That exercise will give a principled basis to its decisions ... when it admits evidence pursuant to that discretion. That discretion is, as the Tribunal described it in *Re Vatsyayann*, a residual one and, as with all judicial and quasi-judicial discretions, is to be exercised in a principled manner according to law.
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> (Emphasis added)

The issue before the Court in that instance was whether a hearsay statement of an alleged victim of professional misconduct by a health practitioner was admissible.

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14 At [38], referring to *Re Vatsyayann* HPDT 338/Med10/152P, 10 November 2010.

Accordingly, the first step involved careful analysis of the hearsay provisions of the Evidence Act, focusing particularly on the criteria contained in ss 16 and 18.

Then the Court stated that at the second stage, the decision-making body needed to weigh any unfair prejudice which would be occasioned by the respondent's inability to cross-examine the witness in question. On the particular facts, the hearsay statement was critical evidence for the purposes of a serious misconduct charge. The potential for unfair prejudice was relatively significant.

The admissibility standard at the second stage was broad, and reflected the principal purposes of the statute under consideration.

This two-step approach is potentially applicable to s 189(2). If applied, the Court would first need to consider the rules of evidence, whether according to statute or at common law, to determine whether the evidence was "strictly legal". Then, with reference to the equity and good conscience jurisdiction under the Employment Relations Act 2000, the Court would consider what would best ensure justice in an employment law context.

Thus, the discretion would be exercised in a principled way, informed by the rules of evidence. The alternative – sometimes referred to as evidential open slather – would be avoided.

Such assessments, of course, must be undertaken on a case-by-case basis.

There are numerous examples of cases where the position under the rules of evidence has been established, and the Court has declined to exercise the residual discretion. Some examples are:

a) In *Morgan v Whanganui College Board of Trustees*, the Court of Appeal held that the breadth of the equity and good conscience

provisions could not mandate the admission of without prejudice communications. After referring to the protections provided by s 57(1) of the Evidence Act, the Court held the residual discretion could not override that privilege.[15]

b) In *George v Auckland Council*, the Court held that the equity and good conscience provision could not be used to override the confidentiality provisions of s 148 so as to admit in evidence threats allegedly made at mediation.[16]

c) In *Pallin v Department of Social Welfare*, Cooke J said of a similar provision in the Children and Young Persons Act 1974 that the discretion could allow the receipt of hearsay, even if such was not admissible under strict rules of evidence.[17] But such a provision would not give power to override statutory rights or duties to *withhold* evidence, such as where the statement was medically privileged.[18]

I now give a few examples where the residual discretion has been exercised to permit the introduction of evidence, even when not allowed for under the strict rules of evidence:

a) In *Auckland District Health Board v Bierre*, the defendant sought leave to extend time for raising her personal grievance with reference to the exceptional circumstances criteria of s 115(a) of the Act, which relates to being affected or traumatised.[19] An issue

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15 *Morgan v Whanganui College Board of Trustees* [2014] NZCA 340, [2014] 3 NZLR 713, [2014] ERNZ 80.

16 *George v Auckland Council* [2013] NZEmpC 76, [2013] ERNZ 492 at [35].

17 *Pallin v Department of Social Welfare* [1983] NZLR 266 (CA) at 268.

18 See also *Complaints Assessment Committee v Medical Practitioners Disciplinary Tribunal* [2005] 3 NZLR 447 (CA) at [70]; not disturbed on appeal: [2006] NZSC 48, [2006] 3 NZLR 577. The Tribunal could have regard to evidence that would otherwise be admissible, that could not override privilege under s 32 of the Evidence Amendment Act (No 2) 1980.

19 *Auckland District Health Board v Bierre,* above n 12.

arose as to the admissibility of evidence which was to be given by a nurse manager and a doctor who worked for the Employers' Occupational Health Service, to whom the employee had been referred. She challenged the admissibility of this evidence on grounds of confidentiality. The Court found that in the particular circumstances, there could be no reasonable expectation of confidentiality in information about the applicant's health and related matters.[20]

b) In *Schneller v Ranworth Healthcare Ltd*, an issue arose as to the impeachment of a witness who, when being examined in chief, gave oral evidence that was in conflict with what she had previously advised the lawyer calling her would be her testimony.[21] The Court dealt with this issue by permitting counsel leading her evidence to *cross-examine* her on the inconsistencies which arose. This was equitable because the witness had, in effect, made a previous statement which was inconsistent with her present testimony.

c) In *Chief Executive of Manukau Institute of Technology v Zivaljevic*, when faced with an objection to the calling of evidence as to whether certain communications raise a personal grievance, the Court considered it was preferable for the purposes of a de novo hearing to allow the introduction of evidence that provided a complete picture of the interactions between the parties; consequently, the objection that only restricted evidence should be introduced on a non-de novo hearing was not allowed.[22]

d) In *ANZ National Bank Ltd v Doidge*, the Court called for evidence to address the real issue between the parties.[23]

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20 Alternatively, with reference to the criteria of s 69 of the Evidence Act 2006, public interest factors outweighed privacy factors.
21 *Schneller v Ranworth Healthcare Ltd* [2006] ERNZ 593 (EmpC)
22 *Chief Executive of Manukau Institute of Technology v Zivaljevic* [2019] NZEmpC 105.
23 *ANZ National Bank Ltd v Doidge* ERNZ 518 (EmpC).

e) In *Miller v Fonterra Co-operative Group Ltd*, an affidavit from a deceased deponent was admitted.[24]

f) In *Attorney-General (on behalf of the Director-General of the Ministry of Agricultural and Forestry) v National Union of Public Employees (NUPE)*, oral evidence was admitted for the purposes of an interim injunction hearing on the grounds of extreme time pressures operating, partly in reliance of s 189(2).[25]

g) In *IHC New Zealand Inc v Scott*, expert evidence was admitted late partially in reliance of s 189(2), because the Court could be assisted by that evidence given the case involved young persons who were intellectually disabled.[26]

h) In *Hall v Dionex Pty Ltd*, evidence of inappropriate material discovered on an employee's laptop was admitted on the ground of relevance, though it was arguably excluded by s 137 of the Evidence Act.[27]

i) In *Mathews v Bay of Plenty District Health Board*, testimony containing opinion evidence as to historical provisions in various CEAs, that were not directly within scope of the witness's knowledge or expertise, was admitted.[28]

These examples all demonstrate the ability of the Court to deal with the substantial merits of the employment relationship problem before it. But I

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24 *Miller v Fonterra Co-operative Group Ltd* [2012] NZEmpC 49, [2012] ERNZ 100.
25 *Attorney-General (on behalf of the Director-General of the Ministry of Agricultural and Forestry) v National Union of Public Employees (NUPE)* [2001] ERNZ 177 (EmpC) at [23]–[27].
26 *IHC New Zealand Inc v Scott* EmpC Auckland AC 45/06, 8 August 2006 at [12]–[14].
27 *Hall v Dionex Pty Ltd* [2015] NZEmpC 29, [2015] ERNZ 502 at [85].
28 *Mathews v Bay of Plenty District Health Board* [2018] NZEmpC 136 at [10]–[26].

emphasise again that representatives should adopt a principled approach to the subsection. The Court is more likely to be assisted by submissions that focus on the two-step approach, so it can consider the issues in a fully informed way. Analytic rigour is necessary.

Admissibility refresher

Concerns about the role of written briefs of evidence arise from time to time. There appears to be a renewed push to challenge the requirement for these in civil cases.[29] While the key concern is access to justice, there are also concerns that briefs fail to comply with the rules of evidence and are commonly full of submissions and inadmissible opinion and material that is not relevant in the legal sense.

In a recent example, a Judge observed that certain witness statements bore "all the hallmarks of intensive legal authorship, including substantial submission".[30]

Before discussing some of these issues in more detail, it is worth emphasising that having to debate admissibility issues can have a downside. For the representative wishing to defend the contents of a controversial brief, there are obvious cost implications – the cost in arguing the point, as well as a potential liability for costs. For the other party, there are similar considerations, as well as the possibility of the Court determining the evidence may be admitted with any issues going to weight.

Rule 9.7(4) of the High Court Rules is useful. It provides that every brief must be in the words of the witness and not in the words of the lawyer involved in drafting the brief; and must not contain evidence that is inadmissible in the proceeding; it must not contain any material in the nature of a submission; and

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29 Courts of New Zealand "Improving Access to Civil Justice" (22 September 2020).
30 *SCC (NZ) Ltd v Samsung Electronic New Zealand Ltd* [2018] NZHC 2780 at [202].

it must avoid repetition. It does not provide an opportunity to "air irrelevant grievances".[31]

A proper understanding of the concept of relevance assists in ensuring briefs do not contain inadmissible evidence. Again, the Evidence Act is of assistance. Section 7(3) provides that:[32]

> Evidence is *relevant* in a proceeding if it has a tendency to prove or disprove anything that is of consequence to the determination of the proceeding.
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> (Emphasis added)

This may be more focused than the definition of "relevant documents" which appears in reg 38 of the Employment Court Regulations 2000 which is a definition given for the purposes of the disclosure regulations.

In *Wi v R*, the Supreme Court said that the statutory definition of relevance:[33]

> ... [I]s not an exacting test: nor should it be. Any definition of relevance has to accommodate all kinds of evidence and in particular circumstantial evidence, individual pieces of which are often of slender, and sometimes very slender, weight in themselves. The question is whether the evidence has some, that is any, probative tendency, not whether it has sufficient probative tendency. Evidence either has the necessary tendency or it does not.

In short, evidence will be relevant if it might prove or disprove a matter at issue.

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31 *Scott v Williams* [2018] NZSC 185, [2018] NZFLR 1 at [63] per Glazebrook J.

32 This may be more focused than the definition of "relevant documents" which appears in reg 38 of the Employment Court Regulations 2000 which is a definition given for the purposes of disclosure.

33 *Wi v R* [2009] NZSC 121, [2010] 2 NZLR 11 at [8].

Relevance is determined by the pleadings which define the issues; the issues define what evidence is relevant and therefore admissible.[34] This supports the view that relevance is a relational concept which cannot be determined in a vacuum.[35]

Although s 7 of the Evidence Act provides a threshold for admissibility, relevant evidence might still be inadmissible under the general exclusionary test in s 8 where evidence may be excluded if its probative value is outweighed by the risk of unfair prejudice or the needless prolonging of the proceedings. These criteria emphasise the Judge's gatekeeping role.[36]

You should bear in mind the potential pitfalls of attempting to object to proposed evidence on grounds of relevance at an early stage. Sometimes it is preferable, and more efficient, to wait for the hearing when the issues may be clearer and/or better understood by all, although an objecting party is entitled to obtain a ruling before it is required to call evidence in response.

Care needs to be taken with regard to reply briefs. Such a brief does not provide an opportunity to restate or enlarge on facts already set out by the witness, it is merely repetitious and argumentative. Nor is it appropriate for a party to keep its powder dry by putting up a barebones case at the outset, so that a more elaborate presentation of evidence can be given after seeing the other party's proposed evidence.

While on the subject of briefs, I should make brief mention of two practical topics. The first relates to the need to include express reference to what a witness may have said or not said at the investigation meeting.

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34 *APN New Zealand Ltd v Simunovich Fisheries Ltd* [20090] NZSC 93, [2010] 1 NZLR 315 at [17], citing *Television New Zealand Ltd v Ah Koy* [2002] 2 NZLR 616 (CA) at [17].

35 The Law Commission has said "Relevance is not an inherent characteristic of any given item of evidence and relevance cannot be determined in the abstract.": Law Commission Evidence Law: Codification (NZLC PP14, 1991) at 22.

36 *R v Hoggart* [2019] NZCA 89 at [80].

Because the Authority does not maintain a record and may not, in its determination, have included reference to facts which are said to be relevant to the challenge, it may be necessary to cover the topic in evidence. In a non-de novo challenge, the challenger has the responsibility of proving the Authority erred in fact or in law. In such a case, the Court will likely need confirmation of the evidence which the Authority received, whether that evidence was given by witnesses, was contained in documents, or both.

The second relates to evidence in support of remedies. The Court has referred to this problem on several occasions.[37] Adequate evidence as to the consequences of an asserted grievance, or as to quantum of any monetary claim, must be given, as must details of mitigation.[38] A claim for lost wages must be proved with particularity; but note the position as to onus where the wage or holiday and leave records are non-compliant.[39] The provision of inadequate evidence may impact adversely on findings as to remedies.

Hearsay objections

The Court often receives ill-informed hearsay objections. If an objection is to be raised, it is as well to be familiar with the fundamental rules on that topic as contained in the Evidence Act.[40] I repeat that the provisions of the Evidence Act are likely to be relevant to the *first-step* of the required analysis under s 189(2).

The statutory provisions state:[41]

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37 *Lim v Meadow Mushrooms Ltd* [2015] NZEmpC 192, (2015) 10 NZELC 79-060 (remedies).

38 *Radius Residential Care v McLeay* [2010] NZEmpC 149, [2010] ERNZ 371 (mitigation).

39 Employment Relations Act, s 132(2); Holidays Act 2003, s 83(4).

40 For a careful analysis of the application of the hearsay provisions of the Evidence Act, see *Professional Conduct Committee v HPDT*, above n 13, at [40]–[45].

41 The double-quoted words in this section have statutory definition in s 4 of the Evidence Act.

a) Hearsay is *inadmissible* unless an exception applies: s 17.

b) A "hearsay statement" is one that was made by a person other than a "witness" and is offered in evidence at the proceeding to *prove the truth of its contents*: s 4.

c) "Statement" includes a spoken or written assertion by a person of any matter, or non-verbal conduct of a person that is intended by that person to be an assertion of any matter: s 4.

d) It does not apply to statements made by a person who is called to give evidence in Court. A "witness" can repeat his or her own prior statements. A "witness" can also repeat statements of any other "witness" who has given evidence.

The two main exceptions to the fundamental rule are:

a) Section 18 provides that a hearsay statement is admissible if the circumstances provide reasonable assurance as to the statement's reliability, and the statement maker is either unavailable or undue expense or delay would be a cause to require him or her to be a witness.

b) Section 19 provides that hearsay statements within business records are admissible evidence if the composer is unavailable or if the Judge sees no useful purpose in requiring that person to give evidence or undue expense or delay would be involved.[42]

[42] The language used in these exceptions receives elaboration in s 16.

Questioning of witnesses

There are a number of provisions of the Evidence Act governing the questioning of witnesses. I do not intend to summarise all of them here, as they are largely self-evident. But I do emphasise four:

a) Section 85(1) which relates to "unacceptable questions": the Judge may disallow, or direct that a witness is not obliged to answer, any question that the Judge considers improper, unfair, misleading, needlessly repetitive, or expressed in language that is too complicated for the witness to understand. The section also describes criteria which may be considered when determining whether such circumstances may exist. Thus, any particular vulnerabilities can be taken into account.

b) Cross-examination duties in s 92: this is the time-honoured rule that requires a party to put its case to an opposing witness. Thus, 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 that person could reasonably be expected to be in a position to give admissible evidence on that topic. This has often been described as a rule of fairness. Has the witness been given a reasonable opportunity to respond to the fact that other evidence will be relied on to challenge what the witness is saying?[43]

c) Section 96 which governs cross-examination on previous statements of witnesses. If the previous statement has not been included in the common bundle,[44] the Evidence Act provides a process for production, which is as follows:

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43 *R v Soutar* [2009] NZCA 227 at [27]; and for an example in civil proceedings *Alesco New Zealand Ltd v Commissioner of Inland Revenue* [2013] NZCA 40, [2013] 2 NZLR 175 at [44].

44 See below at p 20.

- The cross-examining party questions the witness without showing the document or disclosing its contents to the witness, if the time, place and other circumstances about the making of the statement are adequately identified.
- If the witness confirms what they said on a previous occasion, that is the end of the matter.
- If the witness either does not recall or misstates what was said earlier (that is, "does not expressly admit making the statement"), and the party wishes to prove what was said on the earlier occasion, then the witness must be shown the statement if it is in writing or disclosed to the witness if it was not in writing and be given an opportunity to deny making the statement or to explain any inconsistency.
- The policy for these requirements is fairness to the witness. But if undertaken properly, it can be an effective challenge to the reliability of the witness.

d) Section 35 relates to previous consistent statements. I refer to this for completeness, because it is not a section that is referred to with any frequency, perhaps because representatives are not familiar with it. Prior consistent statements are expected to be included in the agreed bundle. If, however, the document had not been included in the bundle and a party wishes to rely on it, then s 35 will apply to the application for leave to produce the document. It provides that a previous statement of a witness that is consistent with that person's evidence is admissible in a civil proceeding if it responds to a challenge that will be, or has been made, to the veracity or accuracy of the witness, based on a previous inconsistent statement, or a claim of invention on the part of the witness; or forms an integral part of the events before the Court.[45]

[45] The section has given rise to significant litigation. For example, *Hart v R* [2011] 1 NZLR 1; and *Ranganui v R* [2011] 1 NZLR 23.

Other modes of giving evidence

Parties may be able to agree facts. A statement of agreed facts can lead to greater efficiency. However, such a statement can either have too much irrelevant and unnecessary detail; or insufficient detail for the issues under consideration. The document needs to be prepared with close regard to the issues in the case.

A related problem concerns documents. Sometimes statements of agreed facts are not supported by relevant documents which may have been considered by the Employment Relations Authority. I repeat an earlier point. If the case before the Court is a non-de novo challenge where the Court must determine whether the Authority erred in law, there may be an unrealistic constraint on the Court's ability to assess that error if the documents which the Authority considered are not produced.

An option which might be considered in such a case is whether a direction should be made in such a case for the Authority to produce a record of its proceeding.

Note that a formal application may be made for a witness to give their evidence by Audio Visual Link (AVL). In some circumstances (for example a lockdown), it may be appropriate to request the use of a Virtual Meeting Room facility, which means either a representative and/or a witness can be linked in from an audio-conferencing facility which is outside a courthouse. However, this is likely to be a rare event, and one which would require a proper evidential foundation. In such a case, the Court will issue appropriate directions to cover, for instance, the taking of an oath or affirmation, or production of documents. A convenient summary of likely directions is found in the Supreme Court and Court of Appeal Remote Hearings Protocol, although these may require modification.[46]

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[46] The Chief Justice and the President of the Court of Appeal "Supreme Court and Court of Appeal Remote Hearings Protocol" (14 August 2020) <www.courtsofnz.govt.nz>.

Particular problems can arise where evidence is to be given by a witness in a language other than English. Thus:

- The brief of the witness giving evidence in a foreign language should be in the language the witness speaks; but it should be accompanied by a translation of the original brief in English.
- A suitable translator must be available; ultimately, it is the prerogative of the Judge to approve the use of a particular translator, even where a party has made the necessary arrangements as is the usual practice.[47]
- If the person who is not an English-speaker is a party, it may well be necessary for the translator to be present at all times, so that the party is appraised of evidence given by other witnesses.
- Sometimes, the Court has to deal with more than one non-English language, in which case it is necessary to have more than one translator present.

Next, I refer to a mechanism which may assist in the proper presentation of potentially complex evidence where there are many individual claims, such as where there are multiple disputes over leave entitlements: a Scott Schedule. This provides a means where the position of each party can be listed in tabular form, allowing a response to be recorded for each party on a per allegation basis, together with references to relevant documents or other evidence. A separate column allows for the Judge then to record a finding for each allegation, when considering the matter later.[48]

Expert witnesses

Section 25 of the Evidence Act provides for opinion evidence from experts to being introduced in civil proceedings. Such evidence is generally only admissible where the expert witness has complied with the Code of Conduct in

47 See Employment Court of New Zealand "What to Expect at the Employment Court" (10 March 2020) <www.employment court.covt.nz>.

48 See Appendix A for a template.

sch 4 of the High Court Rules. However, s 26(2) provides the Court with discretion to admit expert opinion evidence notwithstanding the failure of the witness to comply with the Code.[49] That said, a witness should be familiar with the Code: such a witness should be in a position to answer any questions which may be asked so as to test their familiarity with its contents, and observance of its requirements.

The Act does not contain guidance on the exercise of this discretion. A recent review of the Evidence Act by the Commission addressed whether it was desirable for the statute to do this. Ultimately, the Law Commission concluded that legislative amendment was unnecessary, as the courts were taking a consistent approach by assessing whether the "substantial helpfulness" test in s 25 was met, notwithstanding non-compliance with the Code.

But it is worth bearing in mind that the substantial helpfulness "necessitates consideration of an amalgam of relevance, reliability and probative value in assessing the admissibility of expert evidence."[50]

To expand, the Court has to evaluate the soundness of the opinion given by the expert, and the extent to which it is supported by evidence. That may require an examination of the internal consistency and logic of the evidence of the expert, the care with which it has been presented, the precision and accuracy of thought as demonstrated by the answers given, especially if the cross-examination is searching and informed; the extent to which the expert witness has conceived an opinion and is reluctant to re-examine it in the light of later evidence, or whether that person demonstrates a flexibility of mind which might involve changing or modifying opinions previously held; and finally, whether or not the witness is biased or lacks independence.[51]

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49 Law Commission *The Second Review of the Evidence Act 2006 – Te Arotake Tuarua i te Evidence Act 2006* (NZLC R142 2019); and for further discussion of the Review, see Allison Ferguson and Guy Tompkins *Evidence Act for Civil Litigators* (NZLS CLE Paper, 19 May 2020)..

50 *Mahomed v R* [2010] NZCA 419 at [35]; and see *Pora v R* [2015] UKPC 9, [2016] 1 NZLR 277 at [41].

51 *Loveday v Renton* [1990] 1 Med LR 117 at [125].

A practical consideration when considering the calling of expert evidence, is whether both sides need to incur the cost of their own expert; a single witness will likely suffice if two sides can agree to do so.

The advantages of separate experts conferring prior to the hearing, and the giving of concurrent evidence, might also be considered. In such a circumstance, each expert gives a summary of their evidence within a limited time frame, and each other expert may make a comment on that evidence within a limited time frame. Once each expert has been through that process, the experts are cross-examined.[52] The Court may also direct a pre-hearing conference of expert witnesses.[53] These tools are designed to obtain clarification and elucidation of the real issues.

Bundles

The Court proceeds on the basis that all relevant documents will be included in the common bundle.

As is well known, the Court will timetable the preparation and filing of common bundles of documents. Unless a particular document is subject to objection, the Court will provide directions with regard to the admissibility of a document included in the common bundle. If there is an objection as to admissibility, that should be recorded in the index. Unless there is a specific objection, each document contained in the common bundle will be regarded as having been produced by consent when it is referred to in evidence by a witness, or in submissions. Each document will be considered to:

- be admissible;

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52 See for an explanation of the process, *Commerce Commission v Cards NZ Ltd* [2009] 19 PRNZ 748. See also, *"Expert Evidence in Civil Proceedings"*, J Katz QC, for a thorough analysis of provisions and practices relating to the giving of expert evidence.

53 High Court Rules, r 9.44.

- be accurately described in the index to the common bundle;
- be what it appears to be;
- have been signed by any apparent signatory;
- have been sent by any apparent author and to have been received by any apparent addressee; and
- have been produced by the party indicated in the index to the bundle.

These stipulations are not always noticed by representatives. Consequently, a document may be referred to by a witness for one party, but its significance may not be appreciated by the other party. The Judge, however, has received the document in evidence and is entitled to refer to it, perhaps to the surprise of a party.

A related problem is the distinction between disclosure and admissibility. Merely because a document has been disclosed does not mean it is admissible. Perhaps because a representative has not grasped this distinction, a document may be included in a common bundle without an objection being recorded.

Note the importance of the index which can be important in clarifying the nature of the document, and both of which can then be relied on by the Judge.[54]

It is helpful if documents are placed in date order, unless there is a reason not to. The Court sees too many bundles where documents are placed in a random order, which can lead to unnecessary complication when piecing a chronology together.

Whilst on the subject of bundles, I refer to the Court's current pilot relating to electronic bundles, an initiative which is being undertaken by the Specialist Courts; the pilot includes not only the Employment Court, but also the Environment Court and the Coroners' Court.

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54 See Appendix B for a template.

Under the pilot, there will be a discussion at the pre-trial conference with the presiding Judge as to whether the case is suitable for an electronic bundle. If so, the Judge will direct which party is to prepare the bundle in digital form. The Court has prepared a protocol which will then be issued, stipulating the technical requirements of such a bundle.

Subsequently, the bundle may be used in Court, with appropriate technology enabling lawyers and the Judge to navigate the bundle, so that representatives can see its pages on their own laptop, or on monitors provided in the courtroom, including for the witness.

It is not intended that electronic bundles be used in all cases; under the pilot, there will be careful discussion as to whether electronic bundles should be used. A decision in that regard will depend on such factors as the volume of documentation involved, and the ability of the representatives involved to utilise the technology.

I will be running workshops on this initiative early next year, the intention being that this will provide an opportunity for representatives to come up to speed on issues relating to the preparation of these bundles in digital form, and their use in Court. The workshops will provide a hands-on opportunity to experience these processes.

Producing exhibits

A document not incorporated in the common bundle may be produced at the hearing with leave of the Court. If the document has not been disclosed and should have been, its production may not be granted if to do so might cause an injustice.[55]

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55 High Court Rules 2006, r 9.6. If an ERA brief has been included in the common bundle, the Court may well require the witness to be given an opportunity to explain any apparent inconsistencies with the witness brief produced in Court.

It is well to summarise briefly the proper steps for producing an exhibit, which are:

a) Show the proposed exhibit to the opposing representative before it is put to the witness: *"Can this document please be shown to the witness"?* This is to provide an opportunity to object before the intended exhibit is formally produced. It is good practice to do this in advance, such as prior to the hearing, or during an adjournment.

b) Have the proposed exhibit put before the witness – which means the representative needs to use some formula to alert the Registrar or court-taker that you require his or her assistance: "*Do you have before you an email dated ... ?"*

c) Have the exhibit identified for the record: "*Is it timed for 4.05 pm on that day?"* This may be important later, so identification should cover all relevant details. If the document is, say, an email in a string of emails which are already before the Court, then it may be useful to identify the document with regard to the pre-existing exhibits.

d) Lay the foundation for the exhibit – which means the witness must be qualified to produce it, the exhibit must be relevant, and the exhibit must be authenticated: *"Did you send the email?"*

e) Have the witness produce the exhibit: *"Do you now produce it as Exhibit 2?"* It is useful if the representative can identify the letter or number which has been reached in the sequence of exhibits. Have sufficient copies of the exhibit for the other representative(s), the witness, the Judge, and the Registrar/court-taker for the Court's file.

Credibility

Once evidence has been admitted, it needs to be assessed. Often the parties are at odds on factual issues. The traditional approach for the Court in resolving such dispute is to make findings on credibility. Representatives should be familiar with techniques which may be adopted and prepared to address the Court on their application.

A useful description of the factors that a Judge may take into account when deciding whether a witness is telling the truth, is found in *Evidence, Proof and Probability*, by Sir Richard Eggleston in 1983.[56] He lists relevant factors in this way:

1. The inherent consistency of the story: if the evidence of the witness contains internal contradictions, it may not be reliable. The question may be whether some or all of the evidence should be rejected.

2. Consistency with other witnesses: this, of course, involves making an assessment also of the other witnesses, which in turn requires an assessment of their evidence.

3. Consistency with undisputed facts: these include documentary evidence if not subject to attack, facts admitted by the parties, or matters of common knowledge or experience.

4. The "credit" of the witness: in addition to the observation of the witness when giving evidence, this will include extrinsic evidence that has been properly admitted. For example, evidence of a physical or mental defect which would render the evidence

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56 Sir Richard Eggleston *Evidence, Proof and Probability* (2nd ed, Weidenfeld and Nicolson, London, 1983).

unreliable; evidence of bias against a party, or evidence of a general reputation for untruthfulness.

5. Observation of the witness: this will include physical manifestations of telling the truth or not, or of uncertainty, and observing characteristics in the witness box that are actually capable of being tested there. A witness who presents the appearance of being in his 80s and has to be assisted to the witness box is not likely to be believed if he asserts that he knocked out Muhammad Ali during the previous week.

6. The inherent probability or improbability of the story: is the story of the witness at harmony with the preponderance of the probabilities, which are practical, and which an informed person would readily recognise as reasonable in that place and in those conditions?

Modern courts are cautious in assessing credibility purely on the basis of demeanour, it being well established that there can be risks in doing to. All demeanour tells a court is whether a witness appears to be telling the truth that person now believes is the case.[57] Research tells us that memory can become contaminated over time, with repetition, feedback, new information and witness suggestibility. Demeanour cues (such as nervousness) do not necessarily signal a lack of accuracy or of truthfulness. Immaterial inconsistencies may well be poor indicators of reliability.[58] Cultural indicators may be relevant.

I return to the use of s 189(2). In *Xu v McIntosh*, Goddard CJ noted that in Europe and some other countries where the civil law or Napoleonic Code System is enforced, different techniques for assessing credibility are used.[59] He noted that in those jurisdictions many cases are decided with little or no oral

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57 See *Fox v Percy* [2003] HCA 22, [2003] 214 CLR 118; and for another good summary of credibility principles, *Onassis and Calogeropoulos v Vergottis* [1968] 2 Lloyd's Rep 403 (HL) at 431 per Lord Pearce.

58 See discussion of such factors in Robert Fisher "The Demeanour Fallacy" [2014] NZ L Rev 575 at 578–579.

59 *Xu v McIntosh* [2004] 2 ERNZ 448 (EmpC).

evidence, and therefore no cross-examination, with every assertion being tested against documentary support. Under this system, a contentious unsupported assertion would be treated as unproved. He observed that although there has been a degree of convergence between the common law and the civil systems in recent decades, our system has not reached this point of evaluation. Yet, he said the court's equity and good conscience jurisdiction does allow it to borrow from both systems, and to use a wide range of techniques. In short, the flexible processes of the Court will allow it to drill down so as to get to the merits of the particular issues.

Standard of proof

In many proceedings which come before the Court, the appropriate standard of proof will be the civil standard. Representatives need to know what the relevant standard will be when calling evidence in support or in defence.

Sometimes there is debate as to the position when there is a grave allegation, such as an assertion of criminal conduct. The degree of gravity will be influenced by the potential consequences for all concerned of the allegation being improved, which is why the civil standard of proof is flexible and depends on what is at stake.[60] A recent discussion of this issue is found in the Court of Appeal judgment, *Cowan v Idea Services Ltd*.[61]

That all said, there are some specific categories which deserve particular consideration. First, penalties. The appropriate standard of proof for ordinary penalties was discussed fully by the Court in *Radius Residential Care Ltd v New Zealand Nurses Organisation Inc*.[62] After a comprehensive review of the historical approach to a consideration of penalties (where the necessary threshold had been beyond all reasonable doubt), Chief Judge Colgan

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60 See *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1, at [102].

61 *Cowan v Idea Services Ltd* [2020] NZCA 239.

62 *Radius Residential Care Ltd v New Zealand Nurses Organisation Inc* [2016] NZEmpC 112, [2016] ERNZ 733.

considered several subsequent judgments, including those of the Supreme Court where McGrath J wrote in *Z v Dental Complaints Assessment Committee*:[63]

> ... [t]he rule that a flexible approach is taken to applying the civil standard of proof where there are grave allegations in civil proceedings remains generally applicable in England. *There is accordingly a single civil standard, the balance of probabilities, which is applied flexibly according to the seriousness of matters to be proved and the consequences of proving them.* We are satisfied that the rule is long established, sound in principle and that, in general, it should continue to apply to civil proceedings in New Zealand.

Chief Judge Colgan concluded that where the Court was required to consider both a claim for damages and a statutory penalty, arising out of the same breach, this ratio should apply.[64]

So, for the purposes of the penalty claim, the Court should apply a higher than simple requirement of probability over improbability. The penalties claim would require:[65]

> ... [C]onvincing evidence of the probability of a defendant's breach of a statutory provision, or one of an employment agreement, before it can be satisfied on the balance of probabilities, that such a breach as been proven for penalty purposes.

Turning next to pecuniary penalties under pt 9A of the Act, s 142S states that to avoid doubt, where proceedings are before the Court for a declaration of breach, pecuniary penalty order, compensation order, or banning order, the standard of proof is the standard that applies in civil proceedings.

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63 *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [112] (emphasis added, citations omitted).

64 At [98]–[100].

65 *Radius Residential*, above n 62, at [98].

This provision, therefore, will allow the dicta of the Supreme Court as just summarised, to be applied.

A related point should be noted, which concerns the broad range of powers which may be exercised by a Labour Inspector under s 223. Section 229 states when describing how the Labour Inspector may exercise those powers, that a person is not excused from answering a Labour Inspector's questions on the grounds that to do so might expose the person to a pecuniary penalty under pt 9A; that said, the provision goes on to state that any answers given are not *admissible* in criminal proceedings, or in proceedings under that Part for pecuniary penalties.[66]

I refer to claims for sanctions under s 140(6). There, the onus is on the applicant to establish each ingredient of the claim beyond all reasonable doubt.[67]

Finally, I refer to s 196, which relates to contempts. A claim under this section is a criminal proceeding.[68] That has implications on a range of topics including:

a) The fact that the criminal standard of proof applies;

b) As to the mode of taking evidence (that is, should evidence be taken orally as would be the case in a criminal proceeding);

c) That a relevant defendant has an election as to the calling of evidence once the plaintiff's case is closed; and

d) The rules as to self-incrimination apply, which could influence the extent of the evidence an affected defendant might call.

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66 Employment Relations Act, s 229(5A).

67 *Fletcher Development and Construction Ltd v New Zealand Labourers etc IUOW* (1989) 2 NZELC 96,677 (LC) at 96,683.

68 *Ryan Security & Consulting (Otago) Ltd v Bolton* [2008] ERNZ 428 (EmpC) at [8].

In such a case, the Court may consider it necessary to decide whether an order should be made under r 9.10 of the High Court Rules that evidence be given orally.

Conclusion

In her opening address, the Chief Judge stresses the importance of simplicity in employment law and practice.

The evidential issues I have touched on may suggest that the law of evidence is complex. However, any complications that arise in the giving of evidence in the Court, are usually because one representative or the other does not have sufficient familiarity with the rules, or the rationale for them; thus the Court has to step in and resolve issues of relevance, exclusion of evidence or otherwise by reference to the rules to which I have referred. Unnecessary and costly interlocutory warfare can result.

On the other hand, a representative who is familiar with evidential principles can ensure that there is a proper focus on the issues for resolution. Simplicity and clarity of presentation is more likely. In that way, the speedy, fair and just determination of proceedings before the Court can be achieved.

Appendix A

Scott Schedule

No	Description of Allegation (shortest possible summary)	Plaintiff's Position (include references to evidence in each instance)	Defendant's Position (include references to evidence in each instance)	Reserved for Judge's Use
1				
2				
3				
4				
5				
6				
7				

(A4-sized paper in landscape. Headings can be modified, and additional columns added as may be appropriate)

Appendix B

Common Bundle – Index

Document No	Short Description	Date of Document (arranged chronologically)	Party (from whose custody the document has been produced)	Objection (if any)	Page
1					
2					
3					
4					
5					
6					
7					