RUNNING A CASE IN THE EMPLOYMENT COURT

Judge Christina Inglis[1]

Introduction

There is no single "right" way to run a case in the Employment Court. There are, however, wrong ways, which can cost your client dearly. They are best avoided.

The most effective employment representatives give realistic, practical advice to their client about the range of options for dealing with the issues they are confronting. They tend to file succinct and focussed pleadings and evidence directed at the matters at issue; do not get waylaid by irrelevant, ineffective and/or unproductive interlocutory activity; keep a strategic lookout for how their client's interests might best be addressed throughout; and project as reliable, well-informed and articulate at hearing.

The most effective employment representatives tend to appreciate that the most fertile time for resolution is often early on but continue to engage in an ongoing assessment process – after all, what is the use of a win if it comes at a crushing financial cost?

Litigants are entitled to be represented by a person of their choosing.[2] That person does not need to be a lawyer. The Court process tends to be challenging for non-lawyers. There are a number of complex legal issues, procedures and protocols that must be understood and applied.

While non-legally qualified representatives may not have the same high level professional obligations that practising lawyers do,[3] the Court expects all those

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1 Judge of the Employment Court. The views expressed in this paper are the author's personal views.

2 Employment Relations Act 2000, s 236.

3 See Judge Christina Inglis "Courtroom Advocacy – the essential skills: Part 2 – etiquette", 5 May 2015, <https://employmentcourt.govt.nz/about/papers-and-speeches/>.

appearing before it to be familiar with the applicable requirements and to act appropriately, ethically, with integrity, and professionalism at all times.

The following guiding principles might usefully be kept in mind at all stages of the litigation process and both within and outside the Courtroom door:

- Be honest at all times and not do anything to mislead or deceive the Court.
- Do not do anything that undermines the processes of the Court or the dignity of the judiciary.
- Promote and maintain proper standards of professionalism, and uphold the rule of law and the administration of justice.

The lead-up to hearing

Kicking off

There are two Registries, based in Auckland and Wellington. File in the correct one. If in doubt contact the Registrar.

Before filing it pays to ask yourself – is litigation likely to be the most effective avenue for achieving my client's goals? What are the alternatives? If, for example, your client is owed outstanding wages ordered by the Employment Relations Authority and there has been a failure to meet that liability, it may be more efficient (both in terms of time and money) to seek enforcement in the District Court.[4]

If litigation is the preferred route, early decisions will need to be made about forum - should the proceeding be filed in the Employment Court or the High Court? A close

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[4] Refer Judge M E Perkins "The Jurisdictional Divide – cross-jurisdictional enforcement of money claims" (paper presented to Employment Law Conference, Auckland, October 2016); <https://employmentcourt.govt.nz/about/papers-and-speeches/>. Judge Perkins suggests options for collection of monetary awards outside the jurisdiction of the Employment Institutions which may be more effective than those contained in the Employment Relations Act and the other employment related statutes.

reading of the case law will repay the energy required to do it. Read the Court of Appeal's relatively recent judgment in *JP Morgan Chase Bank NZ v Lewis*.[5]

If a challenge is being pursued, give some thought to whether it is preferable to elect a hearing de novo or to proceed on a non de novo basis.[6] The impact can be significant and there are different procedural requirements relating to each.[7]

Consider issues of non-publication. Should orders be sought?[8] If so an application, together with supporting documentation, will need to be filed. Talk to the other side first.

Should an application for stay be advanced? This is often overlooked, and can lead to dramatic consequences for the unsuccessful party in the Authority, namely unheralded enforcement action.

If a matter is urgent, seek urgency.[9]

Pleadings

The most effective pleadings clearly identify the matters at issue from that party's perspective. Jurisdictional issues and issues relating to relief should be considered at the outset.

The pleadings must comply with the relevant requirements. If they are not in order, a Judge is likely to direct amended pleadings at the initial directions conference, if not beforehand.

The requirements for a statement of claim and statement of defence are set out in the Employment Court Regulations 2000. There is useful material on the Employment

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5 *JP Morgan Chase Bank NA v Lewis* [2015] NZCA 255, [2015] 3 NZLR 618.
6 Section 179.
7 See, for example, s 179(4), setting out the matters which must be specified when a party is not seeking a hearing de novo.
8 Clause 12, sch 3.
9 Clause 21, sch 3.

Court website relating to pleadings, including copies of relevant forms for downloading which contain red-line explanatory notes to assist parties to fill in the documentation correctly. A copy of the statement of claim form is annexed by way of example (***ANNEXURE A***).[10]

Helpful commentary in respect of pleadings can also be found in publications such as *McGechan on Procedure* and *New Zealand Procedure Manual: High Court.* The Court website also provides guidance.[11]

Note that reg 6 provides that every matter must be disposed of in accordance with the Regulations, but that where no form of procedure has been provided for in the Act or regulations the Court must apply the provisions of the High Court Rules affecting any similar case. The application of this provision is not always straightforward, as a recent case relating to whether a plaintiff is required to file a reply to a positive defence illustrates.[12]

It is a good idea to keep the pleadings under review as the case progresses. Setting down is a watershed moment – after this time, leave is required to file an amended pleading or pursue an interlocutory application. Leave should not be assumed. Note too that the applicable timeframes shift. Where, for example, an amended statement of claim introduces a fresh cause of action, a statement of defence must be filed within 10 working days of service. After setting down, the relevant period to file a statement of defence is five working days.[13]

It goes without saying that timeframes for filing must be complied with. If timeframes cannot be met, the proper course is to seek an extension. Do so in advance rather than retrospectively.

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10 You can download a copy at: <https://employmentcourt.govt.nz/>; "Employment Court forms and fees".

11 See Employment Court Website - Practice Directions [PDF] – "Electronic filing" at 6: <https://employmentcourt.govt.nz/legislation-and-rules/>.

12 *Stormont v Peddle Thorp Aitken Ltd* [2017] NZEmpC 12.

13 See Employment Court Website – Practice Directions [PDF] – "Amended pleadings generally" at 10: <https://employmentcourt.govt.nz/legislation-and-rules/>.

Disclosure

While a formal process for document disclosure is provided for under the Regulations, it is not uncommon for the parties to deal with disclosure on an informal basis and for issues to be resolved in discussions between the representatives. However, there will always be cases where this is not possible or where it is desirable to follow a more formal process. Note that the timeframes for filing objections to disclosure and seeking verification orders are provided for in the Regulations and are relatively tight.

Directions conferences[14]

Directions conferences are generally scheduled by the Registrar once the statement of defence has been filed. The Registrar sends out a notice, which usefully sets out the matters which will likely be covered by the Judge (***ANNEXURE B***).

Be prepared, and have instructions, to deal with matters such as alternative dispute resolution, whether interlocutory applications are likely to arise, availability for hearing, and the appropriate costs categorisation for the proceedings (a copy of the Costs Guidelines is ***ANNEXURE C***). You should also advise the Registry as to who will be appearing at the telephone conference, including whether your client will be present.

Alternative dispute resolution

The Court is obliged to give consideration to the possibility of mediation, or further mediation, throughout the litigation lifecycle. This reflects the focus of the Act on early resolution between the parties themselves and the perceived benefits of a mutually agreed, rather than Court imposed, outcome. The issue will be raised by

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[14] For regulations concerning case management, see Employment Court Regulations 2000, regs 54-60.

the Judge at the first directions conference. If you perceive there to be a benefit in attending mediation, say so. If you consider that a Judicial Settlement Conference might assist, explain why. It is helpful to speak to opposing counsel about such matters in advance. It is even more helpful to have instructions from your client.

The Judge's role at a Judicial Settlement Conference is to guide the parties' discussions and assist in working through the issues. It is not to crystal ball gaze (an inexact activity at the best of times) and tell the parties what the result is likely to be if the matter goes to litigation.

There is little point in indicating an interest in attending a Judicial Settlement Conference if your client has an inflexible attitude to the claim. Nor is it helpful to attend a settlement conference hoping the Judge will tell the other side how hopeless their case is. Litigation is seldom so clear cut, and even more so before evidence has been tested and an in-depth analysis of the factual and legal issues has been undertaken.

Directions will be issued in advance of the Judicial Settlement Conference making it clear what documentation is to be filed to assist in the discussions. (An example of a notice of directions for a settlement conference is ***ANNEXURE D***). This will be determined by the presiding Judge and may vary from case to case. Will-say statements (statements setting out what the key witnesses will likely say if required to give evidence) are likely to be directed together with a memorandum identifying the key legal and factual issues, and referring to any relevant cases.

The parties will also be requested to identify what steps have been taken to settle matters to date and the details of any settlement offers that have been made, together with an identification of the perceived impediments to settlement. All of this material is designed to assist the Judge, who will have read it in advance of the conference, to understand the nature of the issues involved from each party's perspective and how resolution might be achieved.

The Judge conducting the settlement conference will not preside at the hearing and does not discuss the case with the trial Judge.

Interlocutories

Interlocutory activity is sometimes necessary (although often it is not). If you are seeking interlocutory orders, pursue them on a formal basis. This is made clear in a practice direction – "Applications to and Communications with the Court".[15]

Obviously there are occasions where urgency prevents strict compliance with the appropriate forms. In such cases communications with the Registry on a less formal basis may be acceptable. If in doubt, speak to the Registry staff.

It is expected that counsel will discuss interlocutory matters with each other prior to launching into print. Many issues are capable of resolution and this presents a cost effective way forward, which is encouraged by the Judges.

Briefs of evidence

You should ensure that the briefs of evidence cover off each of the evidential issues that need to be addressed, including as to relief. It is often helpful to cross-check the draft brief against the relevant pleadings.

A useful set of pointers can be found on the Court website.[16]

Generally, timetabling orders will require that briefs of evidence be filed identifying specific pages in the bundle of documents. It is not uncommon for briefs to be filed omitting such references and then for updated briefs to be handed up at hearing. This wastes time and resources and is a judicial irritant.

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15 See Employment Court Website Practice Directions [PDF] - "Applications to and Communications with the Court" at 3: <https://employmentcourt.govt.nz/legislation-and-rules/>.

16 See Employment Court Website - "What to Expect at the Employment Court"; <https://employmentcourt.govt.nz/what-to-expect/before-a-hearing>.

Review the material incorporated in each brief of evidence and take a scalpel to inadmissible material. Leaving it in will invite objection.

You will be directed to file both hard and electronic copies of briefs of evidence. These are destined for the Registry file, the Judge and the transcribers.

There is some flexibility in terms of the way in which witnesses present their evidence, including evidence given in advance, via video link or by affidavit. If your witness is going to be unavailable on the date set down for trial, or it would be costly or inconvenient for them to appear in person, discuss the issue with the opposing representative in the first instance and then seek formal orders, as appropriate.

Admissibility

Admissibility issues should be identified in advance of the hearing. Discuss matters with the opposing representative to see whether an agreed position can be reached. Outstanding issues of admissibility ought to be highlighted to enable them to be dealt with in a timely manner.

The bundle

Be discerning about the documents you propose to have included in the bundle for hearing. Failure to do so may have adverse costs consequences.

Some documents will invariably be required, including the applicable employment agreement (although this is omitted on a surprisingly frequent basis). Vast swathes of email communications spanning a number of weeks and dealing with matters of no real relevance to the proceedings should be excluded.

At the hearing

Appearing in the Employment Court can be daunting. There are some helpful resources on the Court's webpage in respect of the way in which hearings are conducted, including photographs and diagrams of the Court layout and who is positioned where.[17]

The Court is a formal forum.

Handy hints (many of which may appear patently obvious) include:

- **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 or blouse, tie for men, 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 stands up, **states their name**, identifies the party they appear for and then sits down. The defendant's representative 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.
- **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.

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17 See Employment Court Website - "What to Expect at the Employment Court"; <https://employmentcourt.govt.nz/what-to-expect/during-a-hearing/>.

- **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 behaviour.

It is very important to appreciate the distinction between processes in the Authority and the Court. They do not bleed into one another to the extent that some parties appear to believe. So, for example, a challenge does not operate as a stay[18] and the Court does not receive any documentation from the Authority.

Importantly, the Judge will not be taking an investigative role. The procedure in the Court is adversarial and can be compared with proceedings in the High Court.

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[18] Which means that any orders made by the Authority remain enforceable pending the outcome of a challenge, absent the grant of a stay in the intervening period.

Openings (and closings)

The order in which each party will present their case is generally determined by the Judge at a telephone directions conference, at a pre-trial stage.

An opening statement is helpful to the Judge to enable them to have a clear "roadmap" of the case from each party's perspective, but is not mandatory. A brief oral opening identifying the key issues and the witnesses to be called will often suffice.

You will be expected to present your closing as soon as the evidence has been concluded.[19] There is no need to provide written closing submissions, although it is generally helpful for the Judge. Cross-references to particular pages of the transcript are particularly helpful.

While citing a lengthy list of cases in support of a proposition of law may appear to be impressive, it is seldom of any real assistance to the Judge. Cite the lead authority, cite it correctly, cite it accurately, and then move on.

Remember the obligation to draw any adverse authorities to the Court's attention.

Evidence

Briefs of evidence are generally read out by the witness in Court after they have been sworn in or affirmed. In some circumstances, the briefs are taken as read. This latter option can have some obvious advantages in terms of time-saving, but is not the usual practice.

It is not uncommon for counsel to take the opportunity to lead additional evidence from their witness to supplement their written brief. The purpose of exchanging written briefs in advance of trial is so each party has a clear idea as to the evidence-

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[19] See Employment Court Website - "What to Expect at the Employment Court"; <https://employmentcourt.govt.nz/what-to-expect/during-a-hearing/>.

in-chief the opposing parties witnesses will give. Seeking to supplement the evidence in a surprising, unexpected and/or extensive way is likely to give rise to objection and may lead to the evidence not being allowed or an adjournment being granted with unpalatable costs consequences.

Some cases will require the attendance of an expert witness, but many do not. It may be that the costs associated with both parties calling an expert can be avoided, or minimised, by approaching issues in a more flexible manner. It is helpful for the representatives to discuss issues such as this well in advance.

The way in which the experts give their evidence is likely to be raised at a directions conference. Give some thought to it beforehand, including whether there is scope for the witnesses to confer, identify the issues which are/are not in dispute between them and to give evidence together (or "hot tub") at the hearing. This can have particular benefits for the Judge in terms of understanding the evidence and listening to the experts responding to questions together.

Cross-examination is an opportunity to test the opposing party's evidence. It is not intended to provide a platform for theatrics or reducing the witness to tears. The most effective advocates treat witnesses with courtesy and focus on the facts. In some cases credibility becomes a key focus. The contemporaneous documentation often proves pivotal in such circumstances.

Re-examination can be a mine field. In attempting to patch up the damage done in cross-examination, it is not uncommon to dig the hole even deeper. Sometimes it is better to leave the hole and move on to other witnesses who may be able to retrospectively fill it in.

It is important not to ask leading questions in re-examination. Not only is it likely to prompt an objection, or a rebuke from the Judge, it invariably diminishes the worth of any answer that is given.

It pays to be selective when raising an objection. Where an objection is warranted, stand up, explain the basis for the objection and then sit down.

Documents at hearing

The documents are important. Do not overlook them – both the strong and weak aspects from your client's perspective. A well briefed witness will usually have viewed the documents in the lead-up to hearing.

Do not assume that you can supplement the bundle during the course of the hearing. You may be able to persuade the Judge that additional documents ought to be handed up, but you may not receive a warm reception to such a proposal, particularly if the other side can assert prejudice as a result. Your position will be strengthened if you have previously drawn the documents to the other side's attention and can explain why they are coming to light at a late stage.

Trial by ambush is effective on the big screen but not in real life.

After the hearing

Costs

The general practice is for costs to be reserved. If costs have been reserved, the representatives will be expected to confer and seek to agree costs. The pilot Costs Guidelines[20] (attached as ***ANNEXURE C***) should assist in this process. If resolution does not prove possible, you will need to file costs submissions, together with any relevant supporting material.

Next steps?

There are essentially three potential avenues for challenging a judgment, although each has its own particular threshold requirements – an appeal to the Court of Appeal (which requires leave to be obtained from the Court of Appeal); an application for

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[20] Guideline Scale; www.employmentcourt.govt.nz.

judicial review (filed and heard in the Court of Appeal); and an application for rehearing (filed and heard in the Employment Court).

Helpful Resources:

Employment Court Website: <https://employmentcourt.govt.nz/>

Employment Relations Act:

<http://www.legislation.govt.nz/act/public/2000/0024/latest/DLM58317.html>

Employment Court Regulations:

<http://www.legislation.govt.nz/regulation/public/2000/0250/latest/DLM2034701.html>

High Court Rules 2016:
<http://www.legislation.govt.nz/regulation/public/2016/0225/latest/DLM6959801.html>

Judicial papers and speeches:

<https://www.employmentcourt.govt.nz/about/>

Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

<http://www.legislation.govt.nz/regulation/public/2008/0214/latest/DLM1437811.html>

New Zealand Law Society "Appearing in courts and tribunals"

<https://www.lawsociety.org.nz/practice-resources/new-zealand-law-society-guide-for-new-lawyers/appearing-in-courts-and-tribunals>

New Zealand Law Society "Etiquette Guidelines for Counsel in Court" (May 2009)

ANNEXURE A r 7(l)

Form 1

Under the Employment Relations Act 2000

In the Employment Court No: /
(Auckland, Wellington or Christchurch* Registry (the reference number allocated by the registry, i.e. EMPC/)
*Corresponds to the ERA registry)

Election to have matter heard in the Employment Court

Between ……

[*full name*] of ……
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[*address*] ……
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Plaintiff

(note: if more than one plaintiff, list them separately as 2nd plaintiff, 3rd plaintiff etc)

And ……..
[*full name*] of .....
.....
[*address*] ……
……..….
Defendant

(note: if more than one defendant, list them separately as 2nd defendant, 3rd defendant etc)

[Note please: the names of the parties should coincide with the names written on the determination of the Employment Relations Authority that is challenged]

To the defendant

And to the Registrar of the Employment Court

Statement of claim

Section 179, Employment Relations Act 2000

Election

1 I, the plaintiff, by filing this statement of claim, elect to have the Employment Court at …….. [place] hear a matter dealt with in a determination of the Employment Relations Authority.

Determination

2 I attach a copy of the determination to which this election relates.

3 This election relates to the whole of that determination (*or* the following part of that determination), namely, [specify the part of the determination to which this election relates]

[Note: If you elected to challenge the whole of the determination cross out "(or the following part of that determination), namely)
If you elected to challenge the part of the determination cross out the words "the whole of that determination" and specify the part of the determination to which your election relates. For example, you may chose to challenge the award granted by the Authority, or one cause of action determined by the Authority etc.]

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Particulars of claim

4 [Specify, in consecutively numbered paragraphs (4,5,6 etc, the particulars required by regulation 11 of the Employment Court Regulations 2000.]

[Here specify the facts, in chronological order (but not the evidence of the facts) upon which the claim is based;
Particulars are the details, the "who, what, when, where and how," of the statement of claim. They are the facts and events you, the plaintiff, rely on. This may include: what did or did not happen, who was involved, and when and where these facts and events took place.
Particulars are not the same as evidence. Particulars only set out what facts and events you intend to prove. They do not have to say how you intend to prove them. Nor do they have to disclose the identities of your witnesses.
A good set of particulars tells the defendant what the thrust of the case against them is, and what they must do to prepare their defence.
Poor particulars can cause adjournments, hearing delays, additional expense or inconvenience, and can even cause the claim to be struck out.
State any relevant employment agreement or employment contract or legislation and any provision of the agreement of the contract or the legislation that are relied upon.]

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(Continue with numbering if required)

Hearing de novo

7 I seek a full hearing of the entire matter (a hearing de novo).

or

Hearing only in respect of certain issues

7 I do not seek a full hearing of the entire matter (a hearing de novo). I seek a hearing only in relation to certain issues involved in the matter.

(Please circle only one option 7)

7A [*If a hearing de novo is not sought, specify in consecutively numbered paragraphs the matters required by section 179(4) of the Employment Relations Act 2000, namely, -*

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

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

(c) 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

(d) the relief sought.]

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On the above basis the plaintiff seeks the following relief or remedy:
[Here specify the order/s that you want the court to make; The relief sought is a remedy or compensation for a wrong or grievance. You should clearly say what you are asking for from the defendant. For example, this could be reinstatement, money, compensation, and the method by which the claim is calculated; damages or things you want the defendant to do or stop doing, any claim for interest, including the method by which the interest is to be calculated.]

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Prescribed fee

8 The prescribed fee accompanies this statement of claim (*or* has already been paid).

Signature of plaintiff .....
Date: .....

Notice to the defendant

(1) If you intend to defend the proceedings, you must, -
  (a) within 30 clear days after the date of the service of this statement of claim on you, file a statement of defence with the Registrar of the Employment Court at [*place*]*;* and
  (b) without delay, serve 1 copy of that statement of defence on the plaintiff.

(2) If you fail to file a statement of defence, you may defend the claim only with the leave of the Court.

(3) You will be notified of the place, date, and time of the hearing of the claim and of any management meeting in respect of the hearing of the claim.

Registrar of the Employment Court: .....
Date: .....

This statement of claim is filed by ....., whose address for service is ..... and whose telephone number is ..... and whose fax number for service is ..... and whose document exchange box number for service is ..... and whose e-mail address for service is .....[1]

[your name and address for service; it is also useful to include your phone number and email address if applicable]

or

This statement of claim is filed by ....., on behalf of the above-named plaintiff, whose address for service is ..... and whose telephone number is ..... and whose fax number for service is ..... and whose document exchange box number for service is ..... and whose e-mail address for service is .....[1]

[name and address for service or a person who is filing the statement of claim on your behalf (lawyer, advocate or agent); it is also useful to include their phone number and email address if applicable]

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[1] Although a full postal address must always be supplied, the supply of a telephone number and the supply for service of any 1 or more of the following, namely, a fax number, a document exchange box number, or an e-mail address, are optional

ANNEXURE B

DIRECTIONS CONFERENCE GUIDELINES

A directions conference with a Judge will generally be scheduled once the pleadings have been filed.

The purpose of the conference is to discuss how the case will be progressed. Timetabling orders may be made.

The Judge will expect you to be familiar with the case and to be in a position to address each of the matters listed below, as appropriate. That means that it is important that you prepare adequately for the conference and obtain any necessary instructions from your client in advance of it.

Matters likely to be covered at the conference:

a. What are the key issues in the case?

b. Would attendance at further mediation be helpful?[21] If not why not? Is a judicial settlement conference sought? If so why?

c. Are there any outstanding matters that need to be dealt with (including in relation to disclosure) or is the case ready to be set down for a hearing?

d. If there are any outstanding matters, what are they and what timetabling orders might be required to deal with them?

e. If a non-de novo challenge, what directions might appropriately be made in relation to the nature and extent of the hearing?[22]

f. Who are the potential witnesses? Will expert evidence be required? If so what directions might be appropriate in relation to the way in which their evidence will be given?

g. The likely hearing time required, both for the evidence and submissions.

h. Would hearing management be helpful?[23]

i. The order in which the parties will present their cases, having regard to the nature of the proceedings.[24]

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21 Refer Employment Relations Act 2000, s 188.

22 Refer s 182(3)(b); refer also Employment Court Regulations 2000, reg 21(5).

23 Refer regs 56-60.

24 Refer reg 22.

j. Preferred venue. Note that setting down cases outside the main Court centres (Auckland, Wellington and Christchurch) is dependent on court room availability in other Courts.

k. Possible dates for hearing. What dates are you, your client and the proposed witnesses likely to be unavailable over the next six months?

l. Timeframes for the exchange of witness briefs.

m. The timeframe for filing, and the primary responsibility for preparing, a bundle of documents.

n. What is the appropriate costs categorisation for the case?[25]

Note: Parties are encouraged to discuss matters in advance of the directions conference in an effort to identify and resolve any outstanding interlocutory issues. A Judge may decide that a conference is unnecessary if a joint memorandum dealing with the above matters is filed in advance. If so, the Registrar will advise you of the position and of any directions that the Judge has made.

You may find the following information (which can be found on the Employment Court webpage) useful when preparing for the conference:

Employment Relations Act 2000
Employment Court Regulations 2000
Interlocutory applications
Disclosure
Briefs of evidence and the common bundle
Mediation and judicial settlement conferences
Practice Direction: Costs – Guidelines scale

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25 Practice Direction: Costs – Guidelines scale www.employmentcourt.justice.govt.nz/legislation-and-rules.

ANNEXURE C

Under the Costs Guidelines Pilot referred to in the Chief Judge's Practice Direction of 28 October 2015 the following approach will generally apply. The proceeding will be assigned a category (Schedule 1). Costs will generally be assessed by applying the appropriate daily recovery rate (Schedule 2) to the time considered reasonable (Schedule 3) for each step reasonably required in relation to the proceeding or interlocutory application (Schedule 4).

Schedule 1

Categorisation of proceedings

For the purposes of applying the time allocations set out in Schedule 4, proceedings will be classified as falling within one of the following categories:

Category 1 proceedings	Proceedings of a straightforward nature able to be conducted by a representative considered junior by the Employment Court.
Category 2 proceedings	Proceedings of average complexity requiring a representative of skill and experience considered average in the Employment Court.
Category 3 proceedings	Proceedings that, because of their complexity or significance, require a representative to have special skill or experience in the Employment Court.

Schedule 2

Appropriate daily recovery rates

The appropriate daily recovery rates for the categories of proceedings set out in Schedule 1 are as provided for in Schedule 2 of the High Court Rules, as amended from time to time.

Schedule 3

Determination of reasonable time

1. Reasonable time for a step is-

(a) The time specified for it in Schedule 4; or

(b) A time determined by analogy with that schedule, if Schedule 4 does not apply; or

(c) The time assessed as likely to be required for the particular step, if no analogy can usefully be made.

2. A determination of what is a reasonable time for a step will be made by reference-

(a) To band A, if a comparatively small amount of time is considered reasonable; or

(b) To band B, if a normal amount of time is considered reasonable; or

(c) To band C, if a comparatively large amount of time for the particular step is considered reasonable.

Schedule 4

Time allocations

		Allocated days or part days		
		Band A	**Band B**	**Band C**
	Commencement			
1	Commencement of proceeding by way of challenge by plaintiff	1.5	2	4
2	Commencement of defence to challenge by defendant	0.5	1.5	3
3	Commencement of other proceeding by plaintiff	1.6	3	8
4	Commencement of defence to other proceeding by defendant	1	2	4

		Allocated days or part days		
		Band A	**Band B**	**Band C**
	Other pleadings and notices			
5	Application for special leave to remove matter	1	1.5	3
6	Filing opposition to application for special leave to remove matter	0.5	1	2
7	Application for rehearing	0.5	1	2
8	Filing opposition to application for rehearing	0.5	1	2
9	Notice of objection to jurisdiction	0.3	0.6	1
10	Pleading in response to amended pleading (payable regardless of outcome except when formal or consented to)	0.6	0.6	1
	Case management			
11	Preparation for first directions conference	0.2	0.4	0.5
12	Filing Memorandum for first or subsequent directions conference	0.2	0.4	0.5
13	Appearance at first or subsequent directions conference	0.2	0.2	0.4
14	Preparation for case management meeting	0.2	0.4	0.5
15	Filing Memorandum for case management meeting	0.2	0.4	0.5
16	Appearance at case management meeting for sole or principal representative	The time occupied by the meeting measured in quarter days		
17	Second or subsequent representative if allowed by court	50% of allowance for appearance of principal representative		
	Disclosure, inspection and interrogatories			
18	Notice to answer interrogatories	0.4	1	2
19	Answer to interrogatories	0.4	1	2
20	Notice to admit facts	0.4	0.8	1
21	Admissions to facts	0.4	0.8	1
22	Notice requiring disclosure	0.4	0.8	1
23	List of documents on disclosure	0.5	2	4

24	Notice of objection to disclosure	0.2	0.2	0.5
25	Notice of challenge to objection to disclosure	0.2	0.2	0.5
26	Application for verification order	0.2	0.2	0.5
27	Inspection of documents	0.5	1	2
		Allocated days or part days		
		Band A	**Band B**	**Band C**
	Interlocutory applications (including applications for stay, security for costs)			
28	Filing interlocutory application	0.3	0.6	1
29	Filing opposition to interlocutory application	0.3	0.6	1
30	Preparation of written submissions	0.5	1	1.5
31	Preparation of bundle for hearing	0.4	0.6	0.8
32	Appearance at hearing of defended application for sole or principal representative	The time occupied by the hearing measured in quarter days		
33	Second and subsequent representative if allowed by court	50% of allowance for appearance for principal representative		
34	Obtaining judgment without appearance	0.3	0.3	0.5
35	Obtaining certificate of judgment	0.2	0.2	0.2
	Trial preparation and appearance for challenge			
36	Plaintiff's or defendant's preparation of briefs or affidavits	1	2	4
37	Plaintiff's preparation of list of issues, agreed facts, authorities and common bundle	1	2	4
		Allocated days or part days		
38	Defendant's preparation of list of issues, agreed facts, authorities and common bundle	0.5	1	2
39	Preparation for hearing	1.5	2	4
40	Appearance at hearing for sole or principal representative	The time occupied by the hearing measured in quarter days		

41	Second and subsequent representative if allowed by court	50% of allowance for appearance for principal representative		
42	Other steps in proceeding not specifically mentioned	As allowed by the court		
	Trial preparation and appearance for other proceedings			
43	Plaintiff's or defendant's preparation of briefs or affidavits	1.5	2.5	5
44	Plaintiff's preparation of list of issues, agreed facts, authorities and common bundle	1	2	4
45	Defendant's preparation of list of issues, agreed facts, authorities and common bundle	0.5	1	2
46	Preparation for hearing	1.5	2	4
		Allocated days or part days		
		Band A	**Band B**	**Band C**
47	Appearance at hearing for sole or principal representative	The time occupied by the hearing measured in quarter days		
48	Second and subsequent representative if allowed by court	50% of allowance for appearance for principal representative		
49	Other steps in proceeding not specifically mentioned	As allowed by the court		
	Originating applications (including applications for freezing and search orders, interim injunction)			
50	Filing application and supporting affidavits	1	2	3
51	Filing notice of opposition and supporting affidavits	1	2	3
52	Case management (as for ordinary proceeding, refer items 11-17 above)			
53	Preparation of written submissions	0.5	1	1.5
54	Preparation of bundle for hearing	0.4	0.6	0.8
55	Appearance at hearing for sole or principal representative	The time occupied by the hearing measured in quarter days		
56	Second and subsequent representative if allowed by court	50% of allowance for appearance for principal representative		

ANNEXURE D

ADVICE TO PARTIES ABOUT SETTLEMENT CONFERENCE

(This is a guideline of what a judge conducting a settlement conference may require the parties to provide. The requirements may vary from case to case)

[1] A judicial settlement conference has been convened for [DATE] at the Employment Court [PLACE]. As the aim of this conference is to try and reach a settlement of the proceedings the parties are expected to attend with the good faith intention and the authority to achieve this.

[2] In preparation for the conference each of the parties is to file and serve a memorandum to address the questions and attach the information requested below **5 working days prior to the date of the conference.** All answers and information provided will be subject to the following statement of privilege.

Privilege

Settlement conferences and any papers filed in connection with them are without prejudice and are privileged apart from the record of whether a settlement was reached or not. The memoranda requested in this minute will not form part of the formal Court record and, unless requested by any party and consented to by all other parties, it will be destroyed; returned to counsel, and all parties who have provided them; removed from the file; or sealed up at the conclusion of the conference. The documents that the parties have provided to each other should be dealt with in accordance with any agreement between the parties.

Questions

1. What are the issues in this litigation?

2. Which of these issues are inhibiting your ability to settle and why?

3. Have you and the other party engaged in settlement negotiations? Please describe the nature of these negotiations, i.e. counsel to counsel, mediation, etc.

4. What offers of settlement have been made by both parties?

5. What criteria was any offer based on?

6. What else do you believe that the settlement conference Judge should know about this matter that would enable the conference to proceed productively with the full participation of all parties?

Information

1. Attach those documents you intend to rely on at the settlement conference.

2. Attach a one page "will-say" statement from each of your key witnesses. This will begin: "Witness A will say the following …". The "will-say" documents may not be used for the purpose of cross-examination.

3. Submit any expert reports that you rely upon in your settlement negotiations or to support your perspective of the case. Highlight and tab those portions that you consider to be important to your case.

4. Attach a one page summary of any relevant legal issues including the leading authorities.

JUDGE