EFFECTIVE REPRESENTATION IN THE EMPLOYMENT COURT

A PERSPECTIVE FROM THE BENCH

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Introduction

Cases in the Employment Court take many forms. They range from complex arguments about refined legal points to factual disputes.

Effective representatives in the Employment Court tend to share a number of common attributes, including technical ability, procedural competence, a persuasive manner, sound judgment and thoughtful tactics. They know the law, understand the importance of the facts and how to extract them to their client's advantage, have a well-honed theory of the case and remain focussed on the key issues.

Effective representatives make it easier for the Court to find in their client's favour.

The reality is that most litigation is uncertain as to result. The management of expectations, and the dispensation of clear cost/benefit advice throughout the course of the litigation, is of practical importance and is consistent with the underlying objectives of the Employment Relations Act 2000 (the Act).

Not all litigation is susceptible to settlement. Some matters require judicial intervention and decision. In such cases *the Court is greatly assisted by high standards of advocacy, focussing on the resolution of the key issues in dispute*. The Court is not assisted by representatives who obfuscate the issues and do not understand the applicable principles of law and practice.

Effective representatives *retain a sense of proportion* in terms of approach. There is a concern about the increasing costs of litigation and the challenges this presents, including in terms of access to the Court for genuine litigants. The point made by the Court of Appeal in *Transmissions & Diesels Ltd v Matheson* bears repetition:[2]

> In short, as a matter of proportionality, litigation in this field should not become so expensive as to unreasonably deter parties in employment disputes from exercising their rights.
>
> ... the parties and **those practising in this field should always have in mind the importance of conducting litigation with proper focus on the issues and what is truly at stake and on the containing of costs**.
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> [Emphasis added]

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[2] *Transmissions & Diesels Ltd v Matheson* [2002] 1 ERNZ 22 (CA) at [28]. See also *Victoria University of Wellington* v *Alton-Lee* [2001] ERNZ 305 (CA) at [65].

Pre-trial trip-ups, traps and tips

The *Court is adversarial* not investigative. Approaching the case as if it was an investigation meeting in the Employment Relations Authority is a recipe for disaster.

The Employment Court is a specialist Court and differs in material respects from the Courts of ordinary jurisdiction. Some cases benefit from the involvement of experienced counsel. *Give early consideration to the level of expertise and skill that will be required* and whether senior counsel should be instructed.

If you are venturing into the Court on behalf of your client *you need to have an understanding of the Court's practices and procedures*. Consider them against the statutory objectives underpinning the Act. There is an emphasis on informal dispute resolution, the mutuality of obligations and the desirability of resolving employment disputes at the lowest level possible without the need for unnecessary judicial intervention. This means that before setting foot in the Court or filing proceedings you should be thinking about *alternatives to litigation and actively exploring them*.

It is important to *understand and comply with the Court's formal procedural requirements*. The Court has the power to make Rules but has not done so.[3] The Act[4] and the Employment Court Regulations 2000 (the Regulations) deal with numerous procedural matters. Where no form of procedure has been provided for the High Court Rules apply.[5] There are a number of practice directions, which can be found on the recently updated Employment Court webpage.[6]

Are you in the right place at the right time?

It is not uncommon for cases to go off the rails at a relatively early stage. *Decisions will need to be made at the outset as to the appropriate forum*. Such questions include whether the matter should remain in the Authority or be removed to the Court for first instance hearing,[7] whether it should be in the High Court or the Employment Court, or whether it should be filed in the Employment Court as an originating application. These issues are not always straightforward and require *an understanding of the jurisdictional limitations contained in the Act*. Filing in the wrong forum is likely to be costly and potentially disastrous.

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3 Employment Relations Act 2000, s 212.
4 See, in particular, sch 3 "Provisions having effect in relation to Employment Court".
5 Employment Court Regulations 2000, reg 6(2)(a)(ii).
6 http://www.justice.govt.nz/courts/employment-court/legislation-rules.
7 Section 178.

Pay close attention to the applicable timeframes. Cross-challenges continue to trip up some representatives. A challenge (including a cross-challenge) must be pursued within the 28-day timeframe for filing a statement of claim.[8] An application for leave to extend time will be required outside this timeframe.[9] The delay will need to be explained by way of affidavit.

It is also important to *comply with timetabling orders*. Seek orders from the Court in the appropriate manner if an extension is required. It is helpful if you have talked to the other side first.

Non-publication orders?

Turn your mind to whether non-publication orders ought to be sought.[10] This is often overlooked. It is important to appreciate that *orders made in the Authority do not automatically carry over into the Court*. If you delay, the horse may have bolted. If an application is going to be advanced, ensure that it is adequately supported by affidavit evidence. The other party's agreement to an order does not mean that it will be made – the Judge must be satisfied that the grounds have been sufficiently made out.

No stay of proceedings

Be aware that a challenge does not operate as a stay of proceedings,[11] although some representatives appear to assume that it does. Consider your client's position, and take appropriate steps, *before enforcement proceedings are instituted*. Talk to the other side and see if an agreed position can be reached, for example by way of a payment in to Court.

Urgency

Some matters need to be dealt with urgently. Where urgency is sought, the Court is obliged to consider the application and may, if satisfied that it is necessary and just to do so, order a hearing as soon as practicable.[12] It is good practice to advise the Registry that an urgent matter is on its way and that an application for urgency will be advanced. The Registrar will draw this to the attention of a Judge. It is *not good practice to keep Registry staff (and the Judge) waiting for something that does not eventuate*.

Clearly spell out how urgent 'urgent' is. *Be prepared for urgency to be granted*.

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8 Section 179(2); see also "Revocation of Practice Direction" http://www.justice.govt.nz/courts/employment-court/legislation-rules.
9 See reg 13A.
10 Schedule 3, cl 12.
11 Section 180.
12 Schedule 3, cl 21.

It will sometimes be appropriate to seek ex parte orders from the Court. An application for a search order is one such example.[13] Care needs to be taken to follow the correct procedure and to ensure that the right material, including undertakings, is before the Court.[14] It is very important to remember your obligations in pursuing an application on an ex parte basis, and to comply with them.

Pleadings

Pay particular attention to the pleadings. *The purpose of them is to put the other side, and the Court, on notice of what your client's case is*. The requirements are set out in the Regulations.[15] It is not uncommon for the Court to require statements of claim to be re-pleaded because of drafting infelicities.

Sometimes it will be necessary to file amended pleadings. They must be marked in a clear way to indicate changes to the original pleadings.[16] Remember that an application for leave will be required once setting down has taken place.

Type of challenge

Consider the type of challenge being pursued. The statement of claim must specify whether a full rehearing is being sought (a hearing de novo).[17] If not, the election must include a number of matters, including reference to the alleged errors of law and fact.[18] A statement of defence to what is colloquially known as a non-de novo challenge may set out the defendant's view on the nature and extent of the hearing[19] and the plaintiff may then file a response within 14 days.[20] *Be prepared, at the initial conference with the Judge, to discuss issues relating to the nature and extent of the hearing*.

If you are filing a non-de novo challenge, a direction as to the nature and extent of the hearing will subsequently be made by the Judge[21] and a summary of argument will need to be filed 14 days in advance of the hearing.[22]

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13 Section 190(3).
14 See http://www.justice.govt.nz/courts/employment-court/legislation-rules, "Freezing and Search Orders", April 2012; also High Court Rules Part 32.
15 See regs 11 and 20.
16 Employment Court consolidated practice directions - July 2015.
17 Section 179(3).
18 Section 179(4).
19 Regulation 21(2).
20 Regulation 21(3), (4).
21 Section 182(3).
22 Regulation 13.

It pays to *have a clear idea as to why a particular election is being made, what is hoped to be achieved and the potential risks involved*.

Disclosure

The disclosure procedures in the Court differ from those applying in the High Court. Generally disclosure issues are resolved between the parties. Occasionally that does not prove possible. Familiarise yourself with the applicable timeframes and procedure for seeking disclosure orders, the grounds on which disclosure can be objected to[23] and the continuing nature of the obligation to disclose. Remember that non-party disclosure is available.[24]

Be aware that documentation is not provided to the Court by the Authority. If you want to refer to any such documentation it will need to be put before the Court in the usual way.

Remedies

Remedies continue to be an area of weakness. It is important to specify the nature and scope of the relief sought and ensure that claimed losses are adequately quantified.[25]

It is not uncommon for parties to forget to lay a foundation for the relief sought. *A Judge is unable to make findings in an evidential vacuum* – adequate evidence must be before the Court.

Good faith and professionalism

How your client acted in the Authority may impact in the Court. The Judge may request a good faith report from the Authority. This will be done where it appears from the Authority's determination that a party to a proceeding may have obstructed rather than facilitated the Authority in its investigation.[26] This may ultimately lead to a plaintiff being restricted in the way in which it can pursue its challenge.

How you act may also have an impact. All representatives appearing before the Court should jealously guard their professional reputation. The representatives who tend to enjoy the most judicial respect are the ones who have built up a reputation for honesty, integrity, courtesy, being prepared and professionalism.

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23 Regulations 37–52.
24 Schedule 3, cl 13.
25 Section 123.
26 Section 181.

It pays to be careful of the way in which correspondence and documentation is crafted. It is likely to come before the Judge at some stage and can leave a lasting impression. The most effective representatives tend to *enjoy respectful, collegial relationships with other representatives*. This enables them to have constructive discussions about various matters, including settlement and contentious trial issues.

Representatives who are overly invested in a case are generally less effective. Maintaining *objectivity is crucial*.

Adjournments

Last minute applications for adjournments are sometimes unavoidable. If such an application is required, speak to the other side as soon as possible, alert the Registrar, file an application and ensure that the reasons for an adjournment are adequately particularised. Assuming that an adjournment will be granted, even if sought on a consent basis, is a high risk strategy. Court time is a precious commodity and adjournments have a broader impact.

Conference calls – an opportunity not to be squandered

Once the statements of claim and defence have been filed, the proceedings are referred to a Judge. Generally an initial telephone directions conference will be convened at this stage. The Judge will have read the file in advance of the conference and may well wish to have a substantive discussion about various matters. The initial conference presents a useful opportunity to help shape the hearing, identify outstanding issues, offer options for dealing with them and have input into how the proceedings will progress.

Matters for discussion

The Judge will find it *unhelpful if you are not prepared*. Be ready to engage in a substantive discussion about the following matters:

- Alternative Dispute Resolution (ADR): whether there should be a direction to *mediation* and/or the parties' views on whether attendance at a *judicial settlement conference* (JSC) might assist;

- Whether the case is ready to be set down for hearing or whether there are *outstanding interlocutory issues*. It is helpful if the representatives have discussed matters in advance of the conference, in an effort to agree what can be agreed and to narrow the scope of what remains in issue. Outstanding interlocutories will be timetabled through to a hearing;

- The nature and extent of the hearing on a *non-de novo* challenge;

- The *estimate of hearing time* – be realistic, and ensure that you factor in time for submissions. Underestimates are disruptive and costly for the parties;

- Number of proposed *witnesses*; *venue* for hearing; possible hearing *dates* (check witness availability, and your own, before the conference). In terms of venue, be aware that the Court sits outside the main centres when appropriate. Consider this option, and the potential benefits of it, in advance.

- Whether any *expert witnesses* will be required and, if so, how their evidence might be dealt with;

- *Timetabling orders* through to hearing, including for the exchange and filing of witness briefs, the bundle of documents and any submissions.

If you consider that the issues raised may warrant *full Court* consideration, say so and explain why. Grounds include:

- Where an established point of employment law is to be challenged as being "no longer correct";
- Where there are conflicting decisions of single Judges on a point of law;
- Where there is a new point of law that would benefit from a considered judgment of three (or occasionally more) Judges.

Ultimately it is the Chief Judge who decides to constitute a full Court.[27] That decision is best made early on in the proceedings.

Interlocutory activity – think before filing

Be discerning with interlocutory activity. It is relatively easy for parties to descend into interlocutory warfare – it comes at a cost and can be distracting.

The Court encourages parties to deal with interlocutory matters informally. Before advancing an application talk to the other side and see if agreement can be reached. If the position needs to be formalised a consent memorandum can be filed.

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[27] Section 209.

If you do venture down the interlocutory route, it pays to *reflect on the overall strategy of the case and broader costs issues, weighing up what is likely to be achieved*. Sometimes it is preferable to concentrate your client's restricted resources on preparation for the hearing and in identifying, and pursuing, the points that really matter.

Do not expect costs to be reserved on interlocutory applications. Keep the burgeoning level of costs under review to ensure that what is being done is cost effective and in line with the overall strategy of the case.

Stay tuned for opportunities for settlement

One of the objectives of the Act is to encourage resolution of disputes between the parties. Judges are obliged to consider the possibility of further mediation throughout the litigation lifecycle. Representatives should be doing the same. Keep options for resolution under review and encourage your client to take the same approach.

Mediation and JSCs

The possibility of mediation or a JSC will be raised by the Judge at the initial conference. Some potential advantages of a JSC:

- The involvement of a Judge to assist the parties in their discussions (which may be useful for unrealistic clients);
- The ability to achieve outcomes that would not be available via a Court order (for example, an apology or a reference);
- They are informal, private and shorter than trials.

The Judge who presides at a JSC will not hear the case in the event that it proceeds to a hearing. While a JSC may not resolve all matters between the parties, it may refine the issues for subsequent determination. Often the parties' agreement at a JSC will be recorded in a consent judgment, formally setting aside the Authority's earlier determination and sometimes combined with non-publication orders.

If you consider that a JSC might be beneficial, raise it at the initial conference. *Be prepared to explain why you think it would help*. A JSC requires a relatively extensive application of judicial resources. The Judge is unlikely to be willing to commit these resources unless there is a real possibility of settlement. The Court cannot direct the parties to a JSC. Accordingly both parties need to be agreeable to such a step.

Directions will be issued in relation to the conduct of a JSC.[28] This will include the exchange of documentation. It helps if the material filed in advance of the conference *clearly sets out the contentious issues, the relevant law and what the impediments to settlement are*. You will be expected to come to the JSC prepared to discuss the relevant facts, the applicable legal principles, why those principles may not apply in the way you contend and possible options for resolution. *Be creative in terms of options.* You are now being paid to think outside the square. *Leave your adversarial hat at the door*. The attendance of combative representatives tends to hinder, rather than help.

Remember, it will often be more cost effective to seek to resolve matters directly with the other side. If you do achieve settlement, ensure that you promptly advise the Registry.

Preparation is pivotal

The Judge can usually tell who is well prepared and who is not from their vantage point on the bench. It is possible to win cases with nothing more than the scantiest preparation but this is the exception rather than the rule. Realising the night before the hearing that a pleading is deficient, that a key document is missing, that a witness needs to be called, or that a hopeless case ought to have been settled, leads to an uncomfortable position that is not easy to recover from.

Briefs of evidence

It is helpful to review your client's briefs of evidence against the pleadings to *ensure that all issues that need to be covered are covered.* They should be in the witness's own words and be confined to factual matters (unless an expert witness). Keep them focussed or the main points may be lost.

Admissibility issues

The documents are likely to play a key role at the hearing. Identify potential issues with the documentation at an early stage. It is not an agreed bundle if it contains documents that are disputed. It is helpful to have admissibility issues identified, and dealt with, in advance of the hearing.

Do not take a lazy approach to admissibility issues – while s 189(2) of the Act allows the Court to admit evidence and information as in equity and good conscience it thinks fit,

[28] See www.justice.govt.nz/courts/employment-court/how-the-court-works/before-the-hearing.

whether strictly legal evidence or not, it is not sufficient to simply refer to this provision and assume the Judge will let in a report prepared by a purported expert who has not been called as a witness. The power contained within s 189(2) is discretionary. The Court's discretion is to be exercised judicially and in accordance with principle. The principles underlying various provisions in the Evidence Act 2006 (including reliability, probative value and prejudicial effect) and the interests of natural justice, are likely to provide a useful focus for consideration.

Other logistics

Consider other matters well in advance of the hearing:

- Will an interpreter be required?
- Is there a need for a witness to give evidence in advance of the hearing?
- Will any of the witnesses need to give evidence by video link?
- Is any special assistance required?
- Will you need access to equipment (such as a projector) to present evidence in Court?

At the hearing

Familiarise yourself with the Court process. There are useful materials online,[29] which include tips for appearing in the Employment Court, photographs and diagrams of the Court layout and an outline of various stages of the hearing process.

Court proceedings are formal. Treat them as such.

Adversarial nature

Proceedings in the Court are adversarial. The *representatives **must** put their client's case, including adequately putting matters to a witness in cross-examination*.

The Judge does not have an investigative role. While the Authority member will likely have actively shaped and explored the evidence and questioned the parties and their witnesses, the Judge's role is different. You will be expected to *call the evidence that is relevant to the matters at issue*.

[29] www.justice.govt.nz/courts/employment-court/how-the-court-works/at-the-hearing.

Opening

An opening is not mandatory but is helpful. It does not need to be elaborate but it should give the Judge an insight into what the theory of your client's case is and why they should succeed. Identify the order in which witnesses will be called. It is often helpful to refer the Judge to the key documents. Identify where the main factual differences are likely to lie.

Exchanging briefs

The purpose of exchanging briefs in advance is to ensure that the parties are aware of the evidence-in-chief to be given on behalf of the other party. Be wary of seeking to expand on it – it is likely to give rise to complaint from the other side and may not receive warm judicial endorsement. If amendments/corrections are to be made to the witness's evidence-in-chief, ask the Judge at the outset whether they prefer this to be done as the brief is read or at its conclusion. Judicial preferences vary.

Cross-examination

Cross-examination is daunting for most witnesses (and many representatives). The witnesses who tend to withstand cross-examination the best are usually the ones who have been well briefed.

Some tips for maximising the impact of your cross-examination:

- Prepare in advance;
- Have a list of points you want to cover and cross them off as you go;
- Confine yourself to one question at a time;
- Use simple, clear language;
- Remain respectful throughout;
- Make good use of the documents – they are often of pivotal importance in a case;
- Listen to the answers;
- Stay focussed;
- Beware the perils of failing to put a matter in contention to the witness.

Sometimes it will be necessary to raise an objection during the course of the opposing representative's cross-examination:

- Do not remain seated - stand up;
- Be selective but don't be a doormat;
- Explain the basis for your objection;

- Rise and say “as your Honour pleases” once the ruling has been given.

Re-examination

Re-examination follows cross-examination. You can *only re-examine on points arising out of cross-examination*. Consider whether there is any need to re-examine. If you do re-examine, it is generally preferable to limit it to the important points. Sometimes the hole simply gets bigger, including in the mind of the Judge. *Do not lead on re-examination*, however tempting it is to do so. It is likely to significantly dilute the impact of the answer.

Judge’s questions

After re-examination inquire of the Judge whether he/she has any questions for the witness. If so, the representatives will be given an opportunity to ask further questions arising out of the Judge’s questions. *It is not an opportunity to repair damage caused during cross-examination or to fill in gaps left in the evidence-in-chief*.

Closing

Expect to launch straight into closing submissions at the conclusion of the evidence. It is not the practice of the Court to adjourn to enable the representatives to file written submissions.[30] Such an adjournment will only be granted in exceptional circumstances.

The most effective closing submissions identify the issues that need to be decided (and those that do not) and present a well ordered, well reasoned, well supported means of getting to the result that you want the Judge to reach. Many successful representatives prepare an outline of their closing submissions before they set foot in the Court to present their openings.

In terms of the legal submissions you present, be aware that a *reputation for reliability and soundness goes a long way* – once lost it is difficult to retrieve.

Accurately cite and read the case (rather than just the headnote or related commentary) before referring to it as authority for the proposition you are advancing. Remember your duty to the Court to identify adverse authorities. It is better to confront them rather than try to side-step the difficulties they present.

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[30] Employment Court consolidated practice directions – July 2015.

Assisting the Judge

Some things that Judges tend to find useful at hearings include:

- An *opening*. It may be brief but it should provide a clear outline of what your case is;
- A *chronology* of key events with references to the bundle;
- *Succinct and focussed presentation*, including in relation to the pleadings, the evidence, and submissions;
- *Written closing submissions* which clearly and accurately set out the issues, the facts and the law;
- A judicious selection of *relevant* documents and authorities. Do not underestimate the potential for judicial irritation where the *bundle of documents* is non-compliant with earlier directions. Multiple bundles or pages that are not sequentially numbered are unhelpful and are liable to slow the hearing down;
- *Realistic estimates* of hearing time;
- *Accurate, well supported, assistance* from representatives.

After the hearing

Costs

Costs will generally be reserved, pending the outcome of the case. The parties will be encouraged to agree costs and, if that does not prove possible, to file submissions and supporting material.

Be aware that *the approach to costs in the Employment Court differs from the Authority and other Courts*. The starting point is usually 66 per cent of actual and reasonable costs, discounting or uplifting for various factors, such as “without prejudice save as to costs” settlement offers, conduct of the proceedings and undue hardship. The following three Court of Appeal judgments provide useful guidance:

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

If a submission is being advanced on the basis of undue financial hardship it needs to be adequately supported by appropriate material to enable the Court to take it into account.[31]

Appeals

There are *limited appeal rights*. An application for leave to appeal will need to be filed within 20 working days of the date of the judgment.[32] An issue of law of public or other importance will need to be identified. In determining any appeal, the Court of Appeal is required to have regard to the special jurisdiction of the Court and the objects of the Act.[33] There is a further right of appeal, by leave, to the Supreme Court.[34]

Other avenues

Other potential avenues include *judicial review* and an application for *rehearing*. An application for judicial review is brought in the Court of Appeal.[35] An application for rehearing must be filed within 28 days of the judgment complained about.[36] Generally this may arise where new evidence has come to light or binding authority applies that was not drawn to the Court's attention.

Conclusion

The most effective employment representatives adapt their approach from mediation, to an investigation meeting, to the Courtroom environment. Each forum brings a different set of challenges requiring a different set of skills.

Developing a clear appreciation of what your client wishes to achieve, and giving them practical, well informed advice about the mechanisms for doing so, is fundamental. So too is an understanding of the legal processes that apply in the Court and how they might best be used to your client's advantage.

The Employment Reports of New Zealand contain numerous cases which have been won on the basis of inventive, well reasoned legal argument and strategically established facts. The Reports are also littered with cases where an argument could have been made, but was not pursued or a claim was not made out because no evidential foundation was laid.

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31 *Merchant v Department of Corrections* [2009] ERNZ 108 (EmpC) at [29].
32 Court of Appeal (Civil) Rules 2005, r 14.
33 Section 216.
34 Section 214A.
35 Section 213.
36 Schedule 3, cl 5; Regulations 61–63.

Judges strive to arrive at a just result. They are assisted by representatives who ensure that the key issues receive the focus they deserve, and when the litigation is pursued (and responded to) in a considered, well thought through manner.