Running a Case in the Employment Relations Authority

by Rosemary Monaghan, Chief of the Authority (September 2014)

Before you go to the Authority

Litigation should not be treated as the first step when an employment relationship problem arises. The scheme of the Employment Relations Act 2000 is to encourage low level resolution of the problem by the parties themselves. The first steps should be to:

(i) raise the problem with the other party, particularly if it is a personal grievance; and
(ii) attempt mediation.

1. Raise the problem with the other party

This part of my discussion is aimed particularly at personal grievances, although the general proposition that the parties should attempt to resolve a matter themselves still applies.

Section 114(1) of the Act says employees wishing to raise a personal grievance must *'raise the grievance with his or her employer'* within 90 days of the action in question arising. It is a concern to see how often a grievance is lodged as an employment relationship problem in the Authority, without this step having been taken.

Even if it is acceptable the approach is risky, particularly if the contents of the SOP do not raise a grievance clearly enough on the application of the general test of what amounts to the raising of a grievance.[1]

2. Attempt mediation

Mediation is not expressed to be mandatory when an employment relationship problem arises, but the scheme of the Employment Relations Act 2000 is to encourage mediation before an approach is made to the Authority.

The Act promotes attempting mediation first by:

- obliging the Authority to direct that mediation be used if mediation has not already been attempted;
- providing for only limited exceptions, namely that mediation,
    - will not contribute constructively to resolving a matter,
    - will not be in the public interest,
    - will undermine the urgent or interim nature of the proceedings, or
    - will otherwise be impracticable or inappropriate;[2] and
- requiring the Authority to prioritise matters in which mediation has already been attempted.[3]

Despite this, in practice the majority of problems lodged in the Authority have not been to mediation. The Authority's support officers refer these problems directly to mediation. If an

[1] *Premier Events Group Ltd* v. *Beattie (No 3)* [2012] NZEmpC 79; *Pollard Contracting Ltd v Donald* [2014] NZEmpC 137
[2] S 159, and note the further exception in s 159(1A)
[3] s 159A

issue requiring a member's attention is identified the file will be referred to a member, but otherwise members do not see the file until after mediation has been attempted.

Commencing a matter in the Authority

Statements of problem (SOP) and statements in reply (SIR) are the equivalent of pleadings in the Authority. Although they are not subject to the rules applying to pleadings in courts, they must still fully and fairly inform the other party and the Authority of what is being sought and why. Moreover clear and focussed SOPs and SIRs enhance the prospects of an efficient investigation and are likely to reduce costs significantly.

1. Statements of problem

A good statement of problem will:

- identify the actionable issues between the parties;
- give a basic outline of the facts in support of the position taken on the issue, without setting out all of the evidence in support as that comes later; and
- identify the remedies sought, ensuring that the remedies relate to the actionable issues and are available in law to remedy those issues.

By 'actionable issues' I mean issues which the Authority has jurisdiction to address. Statements of problem sometimes contain numerous complaints whose relevance is not clear, or which may be of concern to the individual at a personal level but are not matters for litigation.

The Authority's jurisdiction

The Authority has jurisdiction to address:

- disputes about the interpretation, application or operation of an employment agreement;
- claims of breach of employment agreement;
- certain aspects of collective bargaining;
- personal grievances;
- the recovery of wages or other money;
- claims for penalties;
- requests for compliance orders;
- objections to demand notices issued by Labour Inspectors;
- requests for orders for interim reinstatement;[4] and
- in respect of employment agreements, to make certain orders available under enactments or rules of law relating to contracts.[5]

Personal grievances

When the 'actionable issue' concerns a personal grievance, the underlying accounts should reflect the underlying legal definitions and tests.

Relatively simple claims of unjustified dismissal for misconduct may include the employee's outline of the alleged conduct, of what the employer did about it, and specify what was unfair

[4] s 161
[5] s 162

or unjustified. However the term 'personal grievance' extends to unjustified disadvantage grievances, sexual harassment and discrimination.

Statutory definitions apply to these grievances, and should always be considered when the SOP is being prepared.[6]

Bare allegations of disadvantage, harassment or discrimination do not do enough to show what the actionable issue is. If these allegations may follow what amounts to a discursive account containing numerous complaints, that does not assist. The Authority will address the allegations with reference to the statutory components, and it is often difficult to match the two.

The SOP should:

- in the case of disadvantage in employment, say:
    - what disadvantage the employee suffered in the employee's employment,
    - what action of the employer's caused the disadvantage,
    - what was unjustified about that action, and
    - when and how the personal grievance was raised;
- in the case of sexual harassment, say:
    - what were the actions amounting to sexual harassment,
    - whose actions were they,
    - that the behaviour was unwelcome or offensive, and
    - what detrimental effect on the employee's employment resulted;
- in the case of discrimination, say:
    - what the employer did, or did not do, to or for the employee,
    - was the action or inaction caused by one of the prohibited grounds of discrimination, and
    - if so, which of them.

Penalties

The Authority has the power to order penalties for breach of the employment agreement, and for breach of any statutory provision which also includes a right to seek a penalty.[7]

When penalties are sought, the SOP should identify the relevant provision of the employment agreement, or the statutory provision, said to have been breached. Although informality in the setting out of SOPs and SIRs is encouraged, if the Authority cannot identify what is being relied on in support of the claim it is likely to fail.

For example, claims for penalties for breach of good faith are common. Equally commonly SOPs do not point clearly enough (if at all) to the facts in support, and do not recognise the difference between s 4 and s 4A in the context of penalties. SOPs should reflect those sections and identify:

- what conduct amounted to a failure to deal in good faith,
- how the conduct was,
    - deliberate, serious or sustained, or

[6] s 103
[7] s 133

- intended to undermine bargaining, an employment agreement or an employment relationship.

Note that some penalty provisions specify that penalties must be sought by a Labour Inspector. The penalty provision in the Holidays Act 2003 is an example[8], as is the requirement in the Employment Relations Act concerning written employment agreements.[9]

Remember there is a 12-month time limit on claiming penalties.[10] You need to know when the breach in question occurred. If it occurred outside the time limit, think carefully about whether or how to proceed with the claim.

Finally, penalties are payable to the Crown. If you want all or any part of a penalty to be paid to the applicant, you should say so in the SOP and include the reason for the request.[11]

Applications for interim reinstatement

An order for interim reinstatement is not an end in itself. It is a holding measure pending the hearing of the full or substantive problem and its associated remedies, and on the basis that reinstatement is one of the remedies sought in the substantive matter.

The documents to be filed when an order for interim reinstatement is sought are: the statement of problem; and an undertaking as to damages. Although the legislation does not require it, in practice the Authority requires an affidavit or affidavits in support of the application, and in reply to the application. Well-prepared affidavits mean there is no need for an oral hearing of evidence, and an investigation meeting can be dispensed with altogether if the parties agree to present their submissions in writing. The application can then be heard and determined 'on the papers'.

Affidavits in support of an application for interim reinstatement do not need to canvas the detailed substance of the employment relationship problem. They should be concerned with whether the circumstances meet the legal tests for a grant of interim relief. The employee need give only enough of an outline of the circumstances of the dismissal to show it is arguable that the employer acted unjustifiably. The more detailed account can come later when the substantive claim is heard. It is important that the employee also discuss why there should be an order for interim relief, with reference to why the circumstances mean it would not be in the interests of justice for the employee to wait until the substance can be heard and determined, and why this outweighs the employer's interests.

Similarly affidavits resisting the application should comment briefly on the substance of the claim (or could even concede the existence of an arguable case), and focus on why an order for interim relief is not in the interests of justice from the employer's perspective.

Orders and interim orders in respect of restraints of trade and confidentiality provisions

The Authority is able to consider claims arising from alleged breaches of restraints of trade and confidentiality provisions in employment agreements. Such claims are initiated by the lodging of an SOP in the usual way, together with the application for an order for interim relief if that is sought. Requests for interim relief must be accompanied by an affidavit and

[8] s 76
[9] s 65(4)
[10] s 135(5)
[11] s 11

an undertaking as to damages. The proposed content of orders sought should also be provided.

The affidavit in support should, again, cover sufficient of the circumstances to establish whether there is an arguable case, and ensure attention is paid to the reasons why the balance of convenience favours an order for interim relief, and such relief is in the interests of justice.

As a general observation, applications for interim relief are usually referred to mediation. Settlements are often reached in mediation without the need for further investigation by the Authority.

Documents in support

Attaching relevant documents to the SOP and SIR is a requirement, although the parties have the opportunity to present further documents in association with the evidence. The early production of relevant documents assists in identifying the issues, and in forming a preliminary view as to the extent of the investigation. Conversely, only documents relevant to the actionable issues before the Authority should be provided. Do not swamp the Authority and the other party with a series of documents whose relevance is not apparent.

Some documents should be provided as a matter of course. They include:

- the written employment agreement;
- letters of warning or dismissal;
- all other relevant correspondence between the parties (not just correspondence emanating from one party);
- relevant employment policies or extracts from manuals – being policies or extracts in force at the time the relevant events occurred;
- wage, time and leave records (if a claim for wages or holiday pay is being made); and
- information about the employee's subsequent earnings when a claim for lost remuneration is being made.

Urgency

If urgency is sought, this should be set out in the covering letter or an attached memorandum. Give reasons for the request.

2.Statements in reply

An SIR must be filed within 14 days of receipt of the SOP, unless the Authority abridges the time on the ground of urgency.

The SIR should give the respondent's account of what happened, rather than just accepting or denying what is in the SOP. However SIRs do not need to set out all of the respondent's evidence. They need only summarise the respondent's view of events - and any reply it may wish to make to the allegations in the SOP - sufficiently to allow ready identification of the issues to be determined.

Usually the employer is the party furnishing an SIR. Sometimes the employer takes the opportunity to include in the SIR a claim for damages against the employee, especially where: the (employer says) the employee terminated employment without providing the required notice; or the employee has breached another term of the employment agreement and the employer has suffered loss as a result. Employers wishing to do this should clearly

identify to the Authority that the SIR contains a counterclaim, and ensure the SIR adequately identifies the basis for the claim.

Teleconferences

The Authority relies on teleconferences, sometimes known as case management conferences, to plan the rest of the investigation. A conference between the Authority and the parties will be convened after a matter has been referred unresolved from mediation – or before mediation in urgent cases.

It is preferable that the party's representative participates in the conference.

The presiding member will have read the papers before the teleconference, so it is helpful if the SOP and the SIR are clear. If they are not the member is likely to seek clarification, and attempt to refine or define the key matters to be investigated.

The teleconference is likely to cover the following:

- introductions;
- whether mediation or further mediation has been or is to be attempted;
- the date, place and likely duration of the investigation meeting – or in some cases whether the matter can be heard on the papers;
- the likely witnesses;
- methods of obtaining evidence and producing further documents;
- timetabling the filing and service of documents, and of any briefs of evidence or affidavits;
- whether any witnesses have special needs, including whether an interpreter will be necessary;
- additional issues raised by either the Authority or a party, such as requests for orders for the prohibiting the publication of the identities of parties or of certain evidence;
- how closing submissions (if any) will be dealt with; and
- any questions.

Do not ignore timetables. If you need an extension: seek it in a timely way; give reasons; and offer a reasonable alternative date. Failing to adhere to timetables, or other failures to observe the Authority's directions, may leave the culprit liable to a penalty for obstructing or delaying an investigation without sufficient cause.

Evidence

Briefing evidence

All witnesses should give thought in advance to what they will say at an investigation, even if there has not been any requirement to provide a written statement.

Witnesses should:

- speak to matters within their direct knowledge;
- be ready to give full and accurate information about those matters, with particular reference as far as possible to,
    - the date when an event occurred,
    - the time an event occurred,
    - who said what to whom (when discussing what happened during a meeting);

- give their account in the language they would normally use (within reason);
- avoid hearsay (although the Evidence Act 2006 does not apply in the Authority, hearsay evidence is not usually persuasive);
- avoid giving an opinion on a matter which is for the Authority to decide (with certain exceptions in the case of expert evidence);
- concentrate on relevant matters; and
- avoid irrelevance, unnecessary detail, and gratuitous and pejorative comments.

Producing documents

The Authority has no formal provision for the disclosure of documents, although individuals can be required by way of a summons to produce specified documents. In simple cases most or all of the relevant documents are provided with the SOP and SIR.

In the more complex cases a procedure reflecting the formal provisions applying in other jurisdictions can assist the investigation. Often the parties are able to engage in such a process themselves without recourse to the Authority. If difficulties arise they can approach the Authority for directions.

There is no need to copy the Authority in correspondence during the process unless or until directions are sought.

On a practical note, it assists in these cases if:

- each party prepares a paginated bundle of documents together with an index;
- the written statements of witnesses refer expressly to these documents where relevant;
- the documents are legible; and
- typed transcripts of handwritten documents are available.

Do not take it upon yourself to redact a document relevant to an investigation. If you believe a redaction is appropriate or necessary, approach the Authority and provide it with the unredacted version together with reasons why specified parts should be redacted. The Authority will hear from the other party and make such directions as are necessary.

Remedies

Provide evidence in support of remedies.

In particular, when the reimbursement of lost remuneration is sought in a claim of unjustified dismissal, include details of:

- efforts made to find alternative employment;
- if no efforts were made, why;
- all other income obtained since the dismissal, if any, including,
    - what work was done,
    - who was the employer or contractor,
    - over what period was the work done, and
    - how much was earned.

Attendance and appearance of witnesses

Witnesses can be summoned to attend and give evidence. There is a prescribed form for a summons, and the Authority's support officers should be approached when a summons is

sought. The party seeking the summons is expected to serve it on the proposed witness in advance of the date of the investigation meeting.

Summonses are useful not only to compel a reluctant witness, but to give comfort to a witness who is worried about being seen to be aligned with one party. Summonses also assist when a witness would need time off work. Often summoned witnesses are willing to provide a written statement of their evidence, and on other occasions the Authority will at least ask for an indication of the matters a summoned witness will cover. It is always helpful if this can be provided, especially as it is not unusual to find the material a summoned witness will be asked to cover is adequately covered by another witness, or it is irrelevant or carries little weight.

Witnesses give their evidence under oath or by affirmation.

As members have differing approaches to the order in which witnesses are heard from, it is important to clarify a particular member's practices during the teleconference. Areas of difference may include whether a member: hears first from the witnesses for one party and then the witnesses for the other; hears from the parties together according to the chronology of events; or hears from the parties together on an issue by issue basis. Individual members may also change their approach if by the nature of a particular case that is warranted. Ensure you have checked with the member before the investigation.

Statements of evidence are taken as read. Witnesses are not asked to read them out at the investigation meeting, but the contents provide the basis for further questioning at the meeting.

The investigation meeting

Investigation meetings commonly begin with introductions, and an explanation from the presiding member of how the meeting will be conducted.

Opening statements from the parties are not required and are not common, although on occasion and by prior arrangement such statements may be presented.

The Authority's proactive approach to questioning is probably well-known. Members prepare their questions on the basis of all of the material provided before the investigation meeting, and concentrate on areas requiring further information or clarification. Again unless another arrangement has been made, members ask their questions, then the parties or their representatives are invited to ask theirs.

Although the aim is to have all relevant material ready and available at the investigation meeting, on occasions members ask for additional information and the meeting may be adjourned to allow time to obtain it.

Finally, until a determination is issued it remains open to the Authority or the parties to propose another attempt at resolving the problem. Sometimes it becomes clear from discussions that a particular stance cannot be maintained, a particular claim is very unlikely to succeed, or the applicant's claim can be limited to an extent that makes settlement possible. In those circumstances an investigation meeting may be adjourned to allow the prospect of settlement to be discussed again, and another member or a mediator may assist.