

PRACTICE NOTE 1

STEPS TO BE TAKEN IN PROCEEDINGS

Under the Employment Relations Act 2000 (the Act), the Authority is an investigative body whose role is to resolve employment relationship problems by establishing the facts and making a determination according to the substantial merits of the case, without regard to technicalities: Section 157 of the Act.

Set out below is an outline of the steps that parties before the Authority can expect will generally be taken, from the time proceedings are commenced until they are determined. The steps may change from those described below where necessary to meet differences between individual parties, the nature of their employment relationship problem and any particular requirements for conducting an investigation into the problem.

The purpose of this note is to give employers and employees, unions, representatives, members of the public, and anyone having an interest, a broad outline of how the Authority will conduct investigation meetings and what will usually happen at various stages until any proceedings are determined. Periodically the Authority will reassess the procedures below and, if necessary, changes to this note will be made.

Commencement of Proceedings

1. Proceedings are commenced in accordance with the requirements of the Employment Relations Act 2000. A case is begun by lodging a statement of problem (or statement of matter). A response is given through a statement in reply. The forms are available from the Auckland, Wellington or Christchurch offices of the Authority and from the website of the Employment Relations Authority at: www.era.govt.nz.
2. Authority Officers will check to see that the wording and contents of the statement of problem and statement in reply are such as to fully, fairly and clearly inform all parties and the Authority. If not, either by telephone or other convenient method, an Authority Officer will seek clarification or any necessary additional information from the author of the statement. Only properly completed statements will be accepted as “lodged” in the Authority.

Communication

3. Correspondence and any other documents sent to the Authority (by letter and email) should be copied to the other party at the same time it is sent to the Authority. If a party does not do so, the Authority will provide the other party with a copy.
4. Authority Members will not usually deal with one party or representative, whether in person or by telephone, without the other party or their representative being present.

Referral to mediation

5. If the matter has not been to mediation when it is lodged in the Authority, an Authority Officer may refer the parties off to mediation before the file is put before a Member.
6. When parties are sent to mediation they will be reminded of the legal requirement that they engage with each other in good faith during the mediation process.

The case management conference

7. Once an Authority Member has considered the information provided by the parties in their statements, a preliminary case management conference will be held with them or their representatives, if any. This will be either by telephone, in person, or other convenient means of communication. Who attends the case management conference is a matter for the parties. Typically, if parties are represented, only the representative will attend the case management conference. If anyone else is attending, the Authority Member should be advised in advance or at the start of the call.
8. The purposes of the case management conference include:
 - (i) Identifying factual and/or legal issues central to the employment relationship problem and its determination, and if possible agreeing upon the resolution of related non-contentious matters;
 - (ii) Giving the parties an opportunity to identify issues and witnesses they believe are relevant;
 - (iii) Considering the need to formally give orders or make directions, either at the request of any party or by the Authority of its own initiative;
 - (iv) Considering if the matter should be either referred back to mediation by agreement, or directed to mediation by the Member;
 - (v) Setting a timetable for necessary steps to be taken by the parties or anyone required to attend before the Authority;
 - (vi) Fixing the date, place and time for a meeting to start the investigation (to be confirmed by written notice);
 - (vii) Identifying any security concerns and any other particular needs such as whether an interpreter will be required at the investigation meeting;
 - (viii) Outlining how the Member intends to conduct the investigation meeting and addressing any other concerns regarding the proposed process, including whether the Member considers the case may eventually be one suitable for an oral determination or oral indication of preliminary findings (and then making any arrangements needed for that purpose, including when any other evidence and submissions should be lodged).

The investigation meeting

9. Investigation meetings will commence with the Authority Member confirming the procedure to be followed in the particular case, including arrangements for hearing from witnesses. A formal opening is not required from parties. Information will usually be provided to or obtained by the Authority in the form of sworn or affirmed evidence, typically by a witness confirming on oath or by affirmation a statement of evidence already provided. In some cases, the Authority Member will advise during the case management conference that statements of evidence are not required. In some circumstances and with the Authority's consent, witnesses may give oral evidence supplementing their written witness statement. Following this or at any other time, the Authority may fully examine the witness. Cross-examination of witnesses by the parties will then be permitted provided that such questions are relevant, necessary, courteous and not repetitive.
10. Further inquiries for the Authority to make in relation to the evidence or anything else of relevance to the investigation may be proposed by the parties or their representatives. The Authority will consider any such proposals and make such inquiries it thinks necessary. The Authority may also request further evidence it identifies as relevant.
11. At any time while any case is before the Authority for determination, the parties may be directed to undertake mediation or further mediation (see section 159 of the Act). During the course of the investigation, the Authority Member may offer the parties the opportunity to consider seeking further mediation or discussing between themselves whether they wish to settle the matter.
12. At any time while any case is before the Authority for investigation and determination, the parties may agree in writing to confer on the Authority the power to make a written recommendation in relation to the matters in issue: Section 173A of the Act.
13. At the close of an investigation meeting parties, or their representatives, may sum-up by making points about the information gathered by the Authority and in doing so may refer to any applicable legal principles. Any relevant case law referred to in such closing submissions should be accurately cited. If referring to cases from overseas jurisdictions, a copy of the case should be provided. Copies of cases cited from New Zealand courts are not required.
14. Concise, written closing submissions should be provided to the Authority which should summarise the main legal principles applied to the facts of the particular case. The Authority Member will invite the parties to speak to those submissions at the conclusion of the investigation meeting but that oral address must be brief.

The process of determination

15. Because of the statutory presumption that oral determinations or oral indications will be given where practicable, the process the Authority will adopt at the end of the investigation meeting, in those cases, will be different from the process to be adopted where the decision is reserved. If the Member has confirmed either an oral determination or an oral indication will be given, it is likely the investigation meeting will usually then be adjourned for the time the Member thinks necessary to formulate the determination or indication. The Member will indicate how long

that adjournment is expected to be. The parties or a representative of the parties would normally attend the delivery of the oral decision or oral indication but on some occasions it may be convenient for the Member to arrange to deliver the decision or indication by telephone conference call instead.

16. The Member delivering an oral determination or indication must be heard without interruption. In the event Members are unable to deliver their determination or indication orally because of interruption from the parties or their representatives, the Member may terminate the investigation meeting and issue a written determination in due course.
17. The Authority may also reserve its determination where the Member is satisfied there are other good reasons why it is not practicable to give an oral determination or indication. Examples of where a member might consider this include:
 - (i) where issues of fact or law require further contemplation;
 - (ii) where substantial detailed evidence requires further consideration;
 - (iii) where the Member considers the conduct of any person present creates an unacceptable risk to the safety of the Member or others present.
18. The public may attend any investigation meeting unless excluded by order of the Authority.
19. The Authority's determinations are generally public documents and, subject to the terms of any non-publication order, will be published on the Ministry of Business, Innovation and Employment's database accessible through the Authority website at: *www.era.govt.nz*.

This note replaces that dated 30 March 2011 and is effective from 1 April 2016

James Crichton
Chief of the Employment Relations Authority
31 March 2016