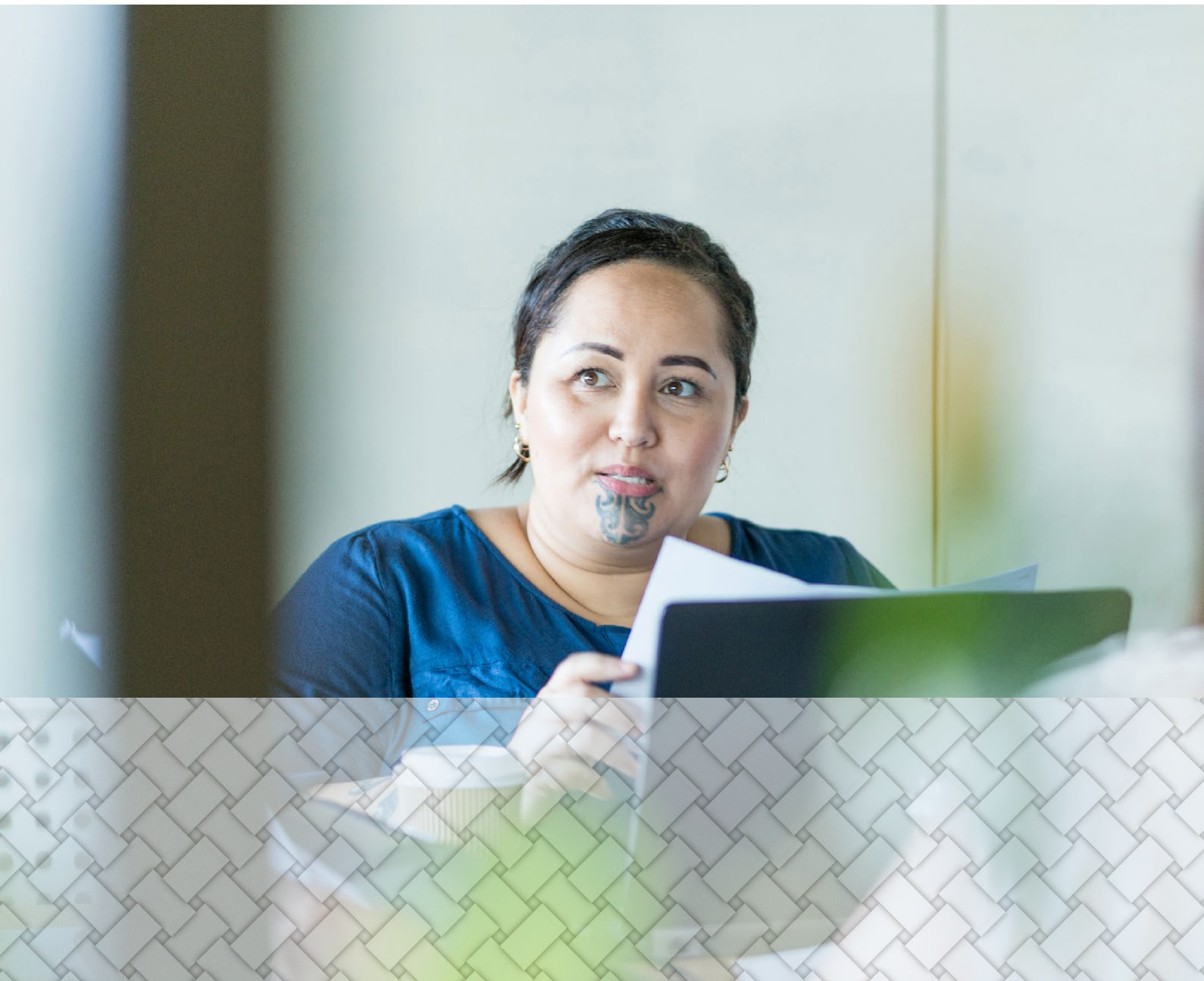




Employment Relations
Authority
TE RATONGA AHUMANA TAIMAHI

Practice Direction of the Employment Relations Authority Te Ratonga Ahumana Taimahi





**Employment Relations
Authority**

TE RATONGA AHUMANA TAIMAHI

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Practice Direction

Under the Employment Relations Act 2000 (the Act), the Employment Relations Authority Te Ratonga Ahumana Taimahi (the Authority) is an investigative tribunal. The Authority's primary role is to resolve employment relationship problems by establishing the facts and making determinations according to the substantial merits of the case, without regard to technicalities.

To establish facts and make determinations the Authority normally carries out an investigatory process in which claims are set out and responded to, evidence is submitted, and submissions are made.

This updated document sets out the Authority's practice direction, which deals with aspects of this investigatory process, including the steps normally taken, how costs arising out of the process are dealt with and the Authority's expectations of parties who engage in the process. It aims to assist employers and employees, unions, representatives, members of the public, and anyone having an interest in a broad outline of how the Authority will conduct investigation meetings and what will usually happen at various stages until any application is determined.

Periodically the Authority will reassess the procedures below, and if necessary, changes to this document will be made.

Dr Andrew Dallas
Chief of the Authority
1 February 2024

Steps to be taken in the Authority's process

Set out below is an outline of the steps that parties before the Authority can expect, which will generally be taken from the time an application is lodged until it is 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.

Commencement of an application

1. An application is commenced in the Authority in accordance with the requirements of the Act, including by lodging a statement of problem and paying the required fee. A response is given through a statement in reply. The forms are available from the Auckland, Wellington, or Christchurch offices of the Authority and at: www.era.govt.nz
2. Only properly completed statements will be accepted as lodged in the Authority. An Authority Officer (Officer) will check to see that the wording and contents of the statement of problem and statement in reply state details fully, fairly and clearly to inform all parties and the Authority. If not, an Officer will seek clarification or any necessary additional information from the author of the statement.

Communication

3. Correspondence and any other documents sent to the Authority should be copied to the other party at the same time they are sent to the Authority. Consistent with the principles of natural justice, if a party does not do so, the Authority will provide the other party with a copy.

Referral or direction to mediation

4. If the matter has not been to mediation when it is lodged with the Authority, an Officer may refer the parties to mediation before the file is put before a Member of the Authority (Member).
5. A Member may direct the parties to mediation at any time.
6. Parties are expected to cooperate with referrals and must comply with directions to mediation.
7. When parties are referred or directed to mediation, they are required to engage with each other in good faith during the mediation process.

The case management conference

8. Once a Member has considered the information provided by the parties in their statements, a preliminary case management conference (CMC) will be held with them or their representatives, if any. This will be by telephone, in person or other convenient means of communication. Who attends the CMC is a matter for the parties. Typically, if parties are represented, only the representative will attend the CMC. If anyone else is attending, the Member should be advised in advance or at the start of the CMC.
9. The purposes of the CMC 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 the witnesses and other material they believe will assist the investigation;
 - 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;
 - vi. fixing the date, place and time for a meeting to start the investigation (to be confirmed by written notice);
 - vii. identifying any particular needs for the investigation meeting, such as accessibility, an interpreter or security; and
 - viii. outlining how the Member intends to conduct the investigation meeting and addressing any other

concerns regarding the proposed process. This may include whether the Member considers the case one suitable for an oral determination or oral indication of preliminary findings and make any arrangements.

The investigation meeting

10. Investigation meetings are usually conducted in person but may also be held by other means.
11. The public may attend any investigation meeting unless excluded by order of the Authority.
12. An investigation meeting will commence with the Member confirming the procedure to be followed including arrangements for hearing from witnesses. A formal opening is not required from the parties.
13. 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 witness statement already provided. In some cases, the Member will advise during the CMC that witness statements are not required. In most circumstances witnesses will give oral evidence under oath or affirmation 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.
14. 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.

15. At any time while a matter is before the Authority for determination, the parties may be directed to undertake mediation or further mediation.¹ During the course of the investigation, the Member may offer the parties the opportunity to consider seeking further mediation or discussion between themselves to settle the matter.
16. At any time while a matter 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: s 173A of the Act.
17. At the close of an investigation meeting, parties, or their representatives, may make 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 should be accurately cited. If referring to cases from overseas jurisdictions, a copy of the case should be provided. Copies of New Zealand cases are not required.
18. The Authority may seek concise, written closing submissions which summarise the main legal principles applied to the facts of the particular matter.
21. The Authority's determinations are public documents unless subject to the terms of any non-publication order (see below) and will be published on the Authority's website at: www.era.govt.nz
22. A party may apply for a non-publication order from the Authority, which has a discretion under clause 10 of Schedule 2 of the Act to grant the order. However, parties seeking a non-publication order will need to appreciate that while in exercising its discretion the Authority is not subject to direction or advisement², it is bound by the presumption of "open justice" as found to exist by the Supreme Court of New Zealand.³

The process of determination

19. The Authority may reserve its determination where the Member is satisfied there are 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; and
 - ii. where substantial detailed evidence requires further consideration.
20. If the Member has confirmed either an oral determination or an oral indication will be given, it is likely the investigation meeting will then be adjourned. The Member will indicate how long that adjournment is expected to be. The parties would normally attend the delivery of the oral determination or oral indication, but on some occasions, it may be convenient for the Member to arrange to deliver the determination or indication by audio-visual means or telephone instead.

¹ Employment Relations Act 2000, s 159.

² Employment Relations Act, s 188(4)

³ *Erceg v Erceg* [2016] NZSC 135

Costs in the Authority

1. The Authority has the power to order any party to pay any other party in the matter the costs and expenses that the Authority thinks reasonable.⁴
2. Where an applicant or a respondent party has incurred costs for representation by a lawyer or other representative, the Authority may order whichever party is unsuccessful to contribute a specified amount towards the reasonably incurred costs of the other party. And, whether or not any legal costs were incurred, reimbursement of some expenses may also be ordered (such as the Authority lodgment fee).
3. The Authority uses a notional daily tariff as the starting point for assessing costs. The tariff is based on the length of the investigation meeting held in each matter. This tariff may then be adjusted upwards or downwards according to the circumstances of each case.
4. For example, where a successful party's behaviour unnecessarily increased its costs, the Authority may reduce the daily tariff amount. Conversely, if an unsuccessful party turned down an effective settlement offer, the Authority may increase the costs above the daily tariff.⁵
5. The current tariff is \$4,500 for the first day of any matter and \$3,500 for any subsequent day of the same matter.
6. The Authority's discretion regarding costs is generally to be exercised on a presumption that the following categories of matter are not subject to a daily tariff and that parties bear their own costs:
 - i. referrals for bargaining facilitation;⁶
 - ii. disputes about the application, interpretation or operation of a collective agreement;
 - iii. pay equity processes;
 - iv. screen industry processes;
 - v. collective bargaining disputes;
 - vi. disputes about access to workplaces;
 - vii. fixing of the terms of a collective agreement;
 - viii. applications under the Parental Leave and Employment Protection Act 1987; and
 - ix. applications to which s 172A of the Act applies.
7. For all other matters that the Authority may investigate (such as personal grievances and breaches of employment agreements) parties should evaluate what they do in those proceedings on the understanding that, if unsuccessful, they will usually have to contribute to the costs of the successful party, as well as meeting their own costs.
8. The Authority will typically not consider an assessment of costs and expenses until the substantive determination has been made.
9. Parties are encouraged to first try to solve costs on their own terms. If they cannot agree, a timetable set by the Authority will for assessing costs will apply. Usually, the Member will require the successful party to lodge any claim for costs in writing, providing a copy of that document to the other party. The other party will then have the right of reply.
10. A party seeking costs must clearly set out what amount is claimed and the reasons for that position. The claim should be supported by copies of invoices for any fees or other expenses incurred, the time taken by the representative and the relevant hourly rate.
11. Costs associated with preparation for and attendance at mediation, whether by agreement of the parties or at the direction of the Authority, are not typically included in costs awarded (unless some particular or unusual circumstance of the case makes it appropriate to do so).
12. If parties wish to obtain further information about how the Authority sets costs, they may ask the Member during the case management conference or visit www.era.govt.nz/determinations/awarding-costs-remedies/.

⁴ Employment Relations Act, Schedule 2, clause 15.

⁵ An effective settlement offer is one where a party offered to accept a particular sum of money or terms that would have provided an outcome better than later achieved in the Authority's determination, so the parties could have saved the costs incurred of having to go ahead with preparing for and attending an investigation meeting. Information about that offer may be put before the Authority when costs are being assessed to show a reasonable offer to resolve the matter was not accepted and any amount in costs should take this into account.

⁶ Unless the Authority finds the application for referral was frivolous or vexatious.

The Authority's expectations of parties

1. Parties should assist the Authority by:
 - i. helping the Authority meet its statutory obligation to resolve employment relationship problems; and
 - ii. pursuing or defending a matter before the Authority in an effective and efficient way.
2. The Authority expects a party to:
 - i. be polite and constructive in their dealings with Members, Officers, and other parties;
 - ii. comply with the timetabled directions or other directions issued by the Authority;
 - iii. provide all information required by the Authority in advance of its investigation, whether in-person or by other means, including documents, emails, CCTV footage, photographs, social media postings and copies of text messages; and
 - iv. have finished sorting their papers and talking before the scheduled start time of the investigation meeting so all participants can listen quietly to the Member's introduction.
3. Parties should always seek to behave in a way that maintains the integrity of the Authority's investigation and enhances confidence in a fair process without improper influence.



Te Kāwanatanga o Aotearoa
New Zealand Government

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