EFFECTIVE ADVOCACY IN THE EMPLOYMENT RELATIONS AUTHORITY – A MEMBER'S VIEW

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Effective advocacy is about persuasion. It is the work done to help persuade a decision-maker that your client has a better (or at least more likely) explanation than the other party about what happened, how it happened and what should happen about it.

For employment lawyers the dispute resolution regime of the Employment Relations Act 2000 (the Act) provides four forums where this skilful exercise of persuasion may be carried out:

(i) *mediation*, where the parties are assisted to resolve their problem themselves on terms acceptable to them (and where your client and the other party are the primary decision-makers); and

(ii) adjudication by *investigation*, where an Authority member leads an inquiry into the problem by questioning witnesses, providing an opportunity for further questioning of those witnesses by representatives, considering submissions from the representatives and then determining the appropriate resolution of the problem (within the range of remedies allowed by the Act); and

(iii) adjudication by *adversarial contest*, where parties' representatives lead an examination of evidence from witnesses and provide submissions to an Employment Court judge who decides the appropriate resolution of the problem (within the range of remedies allowed by the Act); and

(iv) adjudication of *appeals* on sufficiently important questions of law by a judge of the Court of Appeal decided after hearing submissions from the parties' legal representatives.

The following observations on effective advocacy in the Authority are not a 'how to' guide for each step of the investigation process – lodging a statement of problem or reply, attending a case management conference, preparing and lodging witness statements and additional documents, taking part in the investigation meeting and providing closing submissions – but focus more on the purpose of the activity and how to act persuasively in it.[1]

[1] The views expressed in this paper are mine, not the Authority's as a whole or necessarily shared by other Members. Papers with more detailed guidance on the steps in an investigation include:

- Anderson, *A Cost Effective Employment Relations Authority investigation*, NZLS Employment Law Conference 2002.
- Beck, Toogood and Wilson, *Investigations in the Authority – it's not a Court, get over it!* NZLS Employment Law Conference 2004.
- Monaghan and Arthur, *Deciding disputes by investigation rather than adversarial methods: The experience of the New Zealand Relations Authority* (2009) 19 JJA 108 (available at *www.aija.org.au/Tribs09/Papers/Arthur&Monaghan.pdf*).
- Monaghan, *Running a case in the Employment Relations Authority,* September 2014 (available on request by email to *deborah.downie@era.govt.nz*).

Change languages, and thinking, when you cross the border

Effective advocates "speak the language" of each different forum. In the Authority some of the differences of terminology – such as "lodging" not "filing" statements and documents, and providing 'witness statements' not "briefs of evidence" – make no real difference. Others relate directly to the distinctive investigative method of the Authority – and advocates who do not use the correct terminology may not be applying the most effective thinking for their client's case. The following two examples illustrate the point.

Firstly, some advocates who talk of "discovery" not generally being required or available in the Authority may then fail to pursue disclosure of relevant material as a result. Effective advocates will do so by asking the Authority to use its powers under s 160(1)(a) of the Act to "*call for*" evidence and, if necessary, issue a witness summons to produce documents as a means of getting relevant records disclosed.[2]

Secondly, some advocates will say, during a case management conference, that they do not intend "*calling*" a particular witness – applying the approach appropriate for preparation for an adversarial hearing in the Court but not to that of an Authority investigation. The Authority's investigative powers reverse an aspect of judicial impartiality in the adversarial system whereby the judicial officer presiding in a Court "*must take great care not to trespass into the territory of the litigants, and must allow the evidence to unfold as the litigants would have it revealed to the Judge*".[3] An Authority member, by contrast, may decide an investigation needs to hear from particular witnesses, not simply those that the parties wish to have heard. In this forum effective advocates propose particular witnesses as necessary for the investigation but can also usefully explain why the Authority not need to hear from a witness that the Member or the other party has suggested.

Focus on the purpose: how does this help the decision-maker decide?

Asked what makes for an effective advocate, a typical response from an Authority member might be something like: someone who makes things clear, keeps it brief but covers all the key points.

Those who achieve that standard, in my view, are those who keep this question firmly in mind as they help their client prepare for an investigation: *is this something that will provide a reason to answer one or more of the questions in the case one way and not the other?*

It focuses on what the Member needs to do. At every stage – reading a statement of problem or in reply, talking with representatives in a case management conference, reading witness statements, asking questions in the investigation meeting and listening to closing submissions – the Member is looking for what questions need to be answered and for the reasons to answer those questions in a particular way. By a "reason" I mean a fact or a legal principle (from statute and case law). Everything else is surplus to requirements and a distraction. Effective advocates identify and distil those facts and principles and dispense with the rest. They do that by thinking about what the Member has to think about.

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2 Clause 5(1) and (2) of sch 2 of the Employment Relations Act 2000 (the Act).

3 *Hampton v The District Court* [2014] NZHC 1750 at [24] (HC, Whata J).

It may involve telling clients things they don't want to hear – like leaving out irrelevant comments from their witness statements (often about the character, good or bad, of a party or a witness); that the investigation is not a commission of inquiry about every aspect of the workplace and its history but is about answering particular questions about particular events; and that giving the other side a "hard time" during the investigation meeting (such as by harsh or contemptuous cross-examination) seldom helps or gets anywhere useful.

Where can advocates be most effective in the investigation?

Representatives' roles differ significantly between an Authority investigation and an Employment Court adversarial hearing. Understanding the difference highlights the opportunities, in the Authority, for effective advocacy.

In the Court the representative is at the centre of examining the evidence of the witnesses, by leading examination-in-chief and by testing and challenging what has been said through cross-examination. In the Authority effective advocates make the most difference at the beginning and at the end of the investigation – because they understand the investigative methodology and what the Member needs to do at the start and at the end of it.

Preparation for the investigation

Some representatives may not appreciate how much of an investigation is done before the investigation meeting. Effective advocates know the investigation meeting is the *end* of that process and to be persuasive all their party's relevant information needs to be in front of the Member well *before* then. It contrasts with a Court hearing where, to a larger extent, that event comprises the *beginning* for the judge.

What the statement of problem, statement in reply and their attached documents reveal sets the scope of issues discussed at the case management conference. In turn that influences which witnesses the Member thinks she or he needs to hear from and what documentary or other evidence needs to be provided. In reading the witness statements and any additional documents lodged after that conference, in order to identify any necessary questions for the investigation meeting, the Member then forms important impressions (that shapes her or his own "theory of the case"). Doing that preparatory work means significant elements of the Member's evaluation of the parties' respective cases has occurred before the investigation meeting. Of course that evaluation (and any presumptions made) may be changed by what the witnesses and representatives say and do during the investigation meeting but that change can sometimes be harder to make than it could have been if relevant information was provided sooner.

It is at this pre-meeting stage (either at the time of lodging the SoP or SiR, taking part in the case management conference, or at the latest, when lodging witness statements) that effective advocates can usefully assist the Member get to grip with the facts and issues by:

- providing a one-page, neutral *chronology* (as this sort of summary provided at the investigation meeting or, worse, at the end with submissions is too late to be of any real use).

- providing *photos, videos, plans or diagrams* of relevant parts of the workplace or equipment (showing where relevant events or interactions happened) that often, literally, save a thousand words.
- providing a statement of *agreed facts* to enable the Member and the parties to focus on what remains as questions in dispute to be answered by the investigation.
- encouraging witnesses to describe things in the *plain words* they would normally use (not what they think is better, more formal or "flash"), and then leaving it like that in their witness statements (as for example, not many people, in real life, say they did something "*pursuant to*" a statutory section).
- making appropriate *concessions*, early on, about obviously unwinnable or minor issues (demonstrating a realistic approach, which enhances the credibility of your client's arguments about the genuine points in contention).

Submissions

Submissions (usually made orally at the end of the investigation meeting) are the moment to speak directly to the Member about how the relevant facts and legal principles apply to each question she or he must answer.

Effective advocates make powerful submissions by proposing an answer to each point of contention in the case, and then listing particular facts and principles supporting that answer. It requires an exercise in distilling or extracting what matters from what does not. The resulting list is specific, precise and concise about what the evidence shows of what or how something was said or done and how it should be seen. It directly addresses what is wrong with the other party's argument by pointing to the particular facts or principles that show that other view is wrong.

Approaching submissions in this way is doing what the Member needs to do with everything she or he has read and heard in the investigation. It provides reasons to answer a question in the case one way or another.

Large sections cut-and-paste from case law don't do that. An accurate, one-sentence statement of a relevant legal principle (accurately footnoted to the relevant section of a statute or paragraph of a judgment) does.

Assertions about a party's actions – he did have an "open mind" or she did make "reasonable endeavours" – don't help. What does help is a simple list of the corroborated evidence on the facts and the relevant principles that support the assertion.

Appropriate concessions help. If a point or position of your party is not supported by the facts and principles, just say so.

Questioning during the investigation

Often quite contrary to a party's expectations, questioning of witnesses by their representative is considerably less important than the work done by their representative in the earlier marshalling of witnesses statements and documents and then the later making of submissions.

It is important to prepare (but not coach) witnesses about the opportunity to "tell their story" in the investigation meeting – firstly, by writing a witness statement that simply says, in their own words, what they know about the points in issue (the usual who, what, when, where, how and why) and, secondly, by giving straightforward answers to the questions they are asked in the investigation meeting. The Member is interested in the "real people" involved in the case – and how they respond to testing of what they have said in order to resolve any questions of consistency and credibility. The best advice you can give a witness is: "*Just tell it like it is, in your own words*".

While the Authority must allow cross-examination of witnesses, there is an important difference from what happens in the Court.[4] The Authority member is empowered by the Act to "*fully examine any witness*" and does so, almost always, before the representatives of either party ask any questions.[5] This provision for "full" examination by the Authority member usually means the evidence of the witness has already been tested and challenged, to some extent, before representatives have their own opportunity to do so by cross-examination.

The result, for effective advocates, is a need to carefully focus on whether there is some additional or alternative aspect to what the Member has already covered that needs to be addressed in cross-examination. They do not repeat what has been adequately tested by the Member's earlier "full" examination. To do this effective advocates prepare, either physically or mentally, a list of questions for each issue and each witness in the case and then "tick them off" if asked by the Authority member during her or his questioning. The advocate's cross-examination then need only touch on any necessary omitted points that may elicit some other fact or view on a relevant point – and that either puts a hole in the other party's case or might "patch" a hole in their client's case. If an earlier question from the Member has already done that from the point of view of their party, an effective advocate leaves it alone.

Another distinction that bears on the range of questions is that an advocate in the Authority does not have the same obligation she or he may have in the Employment Court to put the essentials of their client's case to a witness where the evidence of that witness contradicts some significant point of that case.[6] Where points of credibility, consistency and so on have been covered by the Member's questions, an effective advocate can rely on those answers rather than repeat the questions.

Conclusion

Your advocacy in the Authority is most likely to be effective and persuasive when you:

- focus on persuading the Member rather than doing anything that is for another 'audience' (such as what may appeal to your client or impress a witness or the other party).
- make credibility-enhancing admissions or concessions about facts or issues to focus the investigation on what is really in contention.
- recognise the investigative nature of the Authority means all your client's evidence and helpful information is needed at the time when the Member is preparing – both for

4 Section 160(2A) of the Act.
5 Section 160(1)(d) of the Act and the Authority Practice Note: *Steps in Proceedings* (March 2011) (*www.era.govt.nz/practice-note.html*).
6 *Wilson v Bruce Wilson Painting & Decorating Ltd* [2014] NZEmpC 83 at [8].

the case management conference (where important decisions about the issues and witnesses are made) and before, not at, the investigation meeting.

- make information digestible – with witness statements in the plain words of the witnesses and, where useful, photos, maps and a concise chronology.
- focus at every stage on what the Member needs – that is reasons to decide a fact or apply a legal principle, relevant to a question in the case, one way or the other. Everything else is smoke.