TUNING IN TO THE EMPLOYMENT RELATIONS AUTHORITY INVESTIGATION PROCESS: DISCHARGING YOUR OBLIGATIONS TO THE AUTHORITY AND YOUR CLIENTS

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Tuning in

The following provides practical advice and guidance as to how practitioners can add value to the Employment Relations Authority (Authority) investigation processes and maximise their effective participation. We acknowledge the pressures practitioners are under but believe this practical advice and guidance will be mutually beneficial.

Effective advocacy is about persuasion. It is also about judgment, organisation and time management and crucially, tuning in to the forum in which you appear. Recognising the uniqueness of the Authority's role, its inherent flexibility in approach and the needs of Authority Members, will help you get the best client outcome in an efficient and cost-effective manner.

The paper will also discuss how to approach an interim reinstatement application and the unique challenges associated with applications of that type.

What is the Employment Relations Authority Te Ratonga Ahumana Taimahi?

The Authority is the principal adjudicative institution in Aotearoa New Zealand's employment jurisdiction. It has a focus on accessibility and conducts its business in an investigatory and less traditionally adversarial manner, than found elsewhere in the court system.[1] The Court of Appeal in *Labour Inspector v Gill Pizza Ltd*[2] described the role of the Authority performing judicial intervention at the lowest level, as a "specialist decision-making body that is not inhibited by strict procedural requirements".[3] In *FMV v TZB*[4] the Supreme Court put it this way:[5]

> The current Act takes a different approach. It provides that the Authority is an "investigative body". Rather than holding hearings, the Authority holds "investigation meetings". Its job is to "resolv[e] employment relationship problems by establishing the facts and making a determination according to the substantial merits of the case, without regard to technicalities". It must of course comply with the principles of natural

1 For a brief history of the Authority and its current kaupapa see, Andrew Dallas, *The Evolving role of the Employment Relations Authority Te Ratonga Ahumana Taimahi in the age of pandemia, (2023) New Zealand Journal of Employment Relations* 47(2) (available at www.ojs.aut.ac.nz).

2 [2021] NZCA 192.

3 At [50].

4 *FMV v TZB* [2021] NZSC 102.

5 At [58].

> justice and support the aims of both Part 10 and the Act generally, but otherwise the Authority is empowered (indeed, it is required) to "act as it thinks fit in equity and good conscience". In addition to calling for evidence, it can interview the parties or any person, examine any witness and hold any investigation meeting in private. And, consistent with natural justice principles, it may allow witnesses to be cross-examined.

The Supreme Court also discusses in some depth, the history of the Authority's exclusive jurisdiction and places it within the context and theme of the Act by noting:[6]

> … as its name suggests, the current Act takes a relational approach, insisting that employment is more than a market transaction theoretically conducted at arm's length between individuals with equal bargaining power. The result is that while the employment agreement remains very important, it is the employment relationship that is the real focus under the current Act. The scope of the employment relationship is wider than the employment contract and it adds an additional dimension to contractual rights and obligations.

With regard to s 161 of the Employment Relations Act 2000 (the Act), the majority in *FMV* held that an employment relationship problem was "an issue that arose out of an employment relationship, and in a work context".[7] This has led to some commentators noting that while confusion still may remain over s 161(1)(r) in regard to tort actions:[8]

> … we are of the view that the jurisdictional changes brought about by *FMV* are overall beneficial. Applicants have the opportunity to bring a wider variety of claims in the employment jurisdiction without the generally higher costs and longer delays associated with the civil jurisdiction and with the option of attending mediation provided by the MBIE.

To support the exercise of its jurisdiction, ss 157 and 160 of the Act define what the Authority may do in investigating employment relationship problems. The extensive powers afforded the Authority include:[9]

> … to call for evidence from the parties or any other person; require any person to attend an investigation meeting to give evidence; interview any person at any time; fully examine any witness; decide whether an investigation meeting is public; and follow whatever procedure it considers appropriate. It can take into account such evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not. It can resolve the employment relationship problem, however described; find that a personal grievance is of a type other than alleged and make, in relation to any employment agreement, any order that the District or High Court could make about contracts under any rule or enactment (now, except freezing and search orders).

In addition, the Authority must comply with principles of natural justice, must promote good-faith behaviour, support successful employment relationships and generally, further the objects of the Act.

What is a representative's role and duty?

An investigative approach, while still recognising adversarial concepts, is a different experience. It is the Member's investigation and you are there to add value while fulfilling duties to your client. To assist us you should:

- think about how you can help the Authority investigation;

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6 *FMV v TZB* above n 4 at [46].
7 At [94].
8 John Rooney and Sara-Jane Lloyd, "Update on the *FMV v TZB* case" [2023] Employment Law Bulletin 37.
9 Above n 1 at 3.

- know your client's case and distil it;
- co-operate with the other side, be pleasant, constructive, and professional; you are likely to need each other's assistance;
- resolve document issues in a timely, full, and fair fashion, agree timeframes and cooperate with extensions where appropriate and carefully consider whether concessions can be made in your client's interest;
- understand what will be relevant to the Authority and what will assist the member to reach a decision – tell them where to look;
- be aware that your application or response and documents together with witness statements are the basis for the Member's preparation and should, in content, be only what is necessary for the investigation (no warehousing of information required);
- adhere to directed timelines and if an extension or adjournment is sought, recognise this is an indulgence and formally apply setting out reasons for such in writing with supporting documentation;
- practice tolerance of others including self-represented parties or inexperienced representatives; and
- reflect on the dynamics of a situation where participants may be distressed, angry or fearful of a process in which you may be comfortable.

The very beginning

Let us now turn to practical matters, as a fictional Austrian nun once sang, "let's start at the very beginning!".

Realistically preparing your client

Often neglected in a rush to litigation is the vital preparatory step of fully briefing your client in what to expect from the Authority process and the likely outcome. Unprepared individuals may be at a disadvantage which can lead to inefficiencies in the process.

While there are many different approaches and some eschew a crude cost/benefit analysis, an approach you may like to consider is to provide a tailored legal opinion (in plain accessible language) on the likely outcome. This should at least identify the strengths and potential weaknesses of your client's case. If your client's case is marginal or being pursued for seemingly irrational reasons, tackle this gently and carefully highlight pitfalls and risks of costs. On the latter, be sure you detail the Authority's approach to daily tariff-based cost awards as a sobering factor. Some care and time are required where English is not a person's first language, to explain the legal concepts involved.

Approaching this task as if preparing for adjudication may assist in the drafting of a focused application or statement in reply. It will also help identify your overall theory of the case and will highlight what information/evidence you need to obtain both from your client and the other party and how best to present such.

Then consider the value of meeting with your client to discuss your opinion. Of assistance may be reading Authority decisions, as you will notice we inevitably take an issues-based approach that first defines questions we must determine – consider structuring your opinion along the same lines.

Do the above task whether you're the applicant or the respondent party, preferably before mediation. On the subject of mediation, we overwhelmingly recommend it and as early as practicable, rather than tactically delaying until directed by the Authority. Nothing more, in our experience, entrenches positions, than mediation procrastination. Meet your client after mediation and reassess positions if required.

Do not be afraid to be constructively critical of your client's position and promote a realistic approach. Even if you consider your client's case is "clear cut", you should avoid describing it this way – prepare them for the nuances or surprises that might occur during an investigation. Sometimes the best cases can be undone by parties acting in an arrogant, self-righteous or high-handed manner during an investigation meeting. Impressions count, so caution your client around their approach to giving evidence.

Do caution your client very carefully on the cost of litigation as the Authority is a low-level accessible forum and costs awards are generally modest.

Statement of problem

To advance an employment relationship problem in the Authority requires a prescribed form statement (there are seven form options for resolving employment relationship problems). Familiarise yourself with our process requirements and the Authority's consolidated practice direction.[10]

In submitting the most common form, a statement of problem, which you are encouraged to lodge online, do not neglect the basics as they can cause unnecessary delay if not accurate, you need to:

- detail the correct parties (ie correct legal entities) and provide accurate addresses for service and copy your application to the other party on lodging;
- be aware of the "doctrine of undisclosed principle" if the employer party is not disclosed clearly as a company;[11]
- include client's address in the intituling and your own full contact details;
- if seeking to join a party to the proceedings, be specific and set out reasons for seeking joinder (note the specific service requirements of s 103B of the Act to join a controlling third party);
- be aware of the limitations around utilising s 142Y of the Act when seeking to establish a person is involved in a breach of employment standards;
- check compliance with Employment Relations Authority Regulations 2000;
- identify the category of application and the requirements of such. If for example it is an interim reinstatement application there are strict documentation requirements. An out of time issue may require a proper application to seek discretion to be heard or if joining additional parties is at issue, make the appropriate application;
- do not omit to tick the box of whether the parties have attended mediation;
- if in doubt, check the Act and the Authority's website;
- if seeking urgency set out the reasons why in some detail including any supporting documentation; and

[10] *Practice Directions of the Employment Relations Authority Te Ratonga Ahumana Taimahi*, 3 July 2023, available at: www.era.govt.nz/about-us/what-we-do

[11] *Cuttance (t/a Olympus Fitness Centre) v Purkiss* [1994] 2 ERNZ 321 at [332]-[333] and [338].

- do not forget to pay the application fee.

Advice on content of the statement of problem

Opening: The problem or matter that I wish the Authority to resolve is:

The application should ideally open by concisely stating your client's predominant concern, even if it did not happen in time sequence. Be careful to not "over plead" by throwing in every conceivable issue unrelated to the remedy (or remedies) sought. The employment relationship problem needs to be properly articulated, realistic and focused rather than "scattergun" or speculative.

Briefly explain your issues and link them to your anticipated approach and the evidence you intend to present. For example, if it is a redundancy selection issue that your client considers was motivated by an ulterior motive, state that and describe your client's perception of what happened. This will avoid later delay if the opposing representative asks for more detail in order to prepare a response or worse, say during the investigation meeting that they have not "been put on notice of specific issues" and require more time to respond.

Remember the basics: parties' obligations are often clearly articulated in employment agreements and ancillary documentation or statute. Refer to these when necessary. Understand the context of your client's employment situation. For example, a public sector worker will generally have a more prescriptive employment agreement than a private sector employee with an explicit code of conduct, additional statutory protections and key aspirational good faith or other obligations which may fall on the employer.[12]

Narrative: The facts that have given rise to the problem or matter are:

It can be confusing to the Authority Member if the facts are not presented chronologically. Prepare a separate timeline in date and event order, start with the commencement date of employment. Describe events and background matters. Keep rhetoric and hyperbole out of this, this is not the place to present contested evidence. Refer to key or relevant correspondence and annex appropriately.

Place yourself in both the shoes of the responding party and the Authority Member – ask yourself: have I adequately and concisely defined how the employment relationship problem arose and identified the main events?

Attach all the relevant correspondence. Surprisingly, the documentation we mostly experience as absent are the relevant employment agreements, the first personal grievance letter and/or the response. Please ensure you remove or redact without prejudice and privileged material. This will avoid delay and costs or unnecessary, preliminary disputation. Open settlement offers may be included – early resolution and attempts at such are consistent with the objects of the Act.

If you have recordings of meetings or interchanges, you are ethically obliged to disclose them as early as possible and also it is sensible to provide agreed transcripts. Check the format and delivery of an audio or visual file in advance if you seek to have it played at the investigation meeting. Avoid lodging large electronic files full of extraneous material. Seek prior agreement on what is necessary, relevant and not contested.

[12] See *GF v Comptroller of New Zealand Customs Service* [2023] NZEmpC 101.

Remedies

Trite to state, but this is often the most neglected aspect of applications. Remember to cover the types of available remedies in your initial client briefing and return to this after mediation. It is generally a greatly misunderstood area for applicants, who may from media stories have overestimated what is possible to recover by the reporting of global awards without having context and other complex factors explained.

Put a lot of thought into tailoring your client's main remedies. If you are, for example, seeking reinstatement, be consistent throughout the course of the process – claim it early, after carefully assessing whether an interim action is more effective. Be realistic, permanent reinstatement is not often sought or wanted but in genuine cases it requires careful thought and evidence and a very measured approach if your client is seeking to re-establish the employment relationship.

Compensatory claims need not be exactly quantified, but some indication of the range may assist the other party. Draw to our attention recent comparable decisions of the Authority to aid decision making on the quantum and types of remedies. If your client's sought remedy is marginal, for example the period of lost wages is short, do explain the implications of this to your client on the overall outcome.

Link remedies sought to the identified employment relationship problem. If you pursue a breach of good faith action and are claiming a penalty, only do so if the statutory threshold test has been met. Do not lead your client into believing the full penalty will be awarded. Be particularly realistic about penalties and do not try to double up on penalties in lieu of poorly articulated primary concerns.

Finally, although a bit of an odd point – you and your client must be able to fully articulate and understand the remedies being sought, including their statutory and legal basis and feasibility or likelihood of them being awarded. You must prepare your client to be asked questions about their claimed remedies.

The statement in reply

Drafting your client's statement in reply should avoid adversarial or highly personalised rebuttal. Some genuine strategic thought and initial analysis needs to take place, and this should include mirroring the above approach by first providing your client with a careful opinion/assessment of their situation. Remember to start with the basic premise – in a personal grievance setting the burden of justifying actions rests with the employer party.[13] The statement in reply may also bring some clarity to central factual matters which may not be clearly articulated in the statement of problem.

Try to avoid emotive language and focus upon why you consider your client's actions were reasonable in the circumstances. If your client has already provided a deficient statement (of problem or reply), consider lodging a timely amended one. If you were heavily involved in the dispute process and gave advice to your client that is now being contested, consider withdrawing and instructing a new representative with no conflict as defending your own advice can objectively sometimes be problematic.

Sensible concessions may go a long way to assisting your client and the Authority process. Strategically, concessions also assist settlement negotiations. If your client has engaged in

[13] Employment Relations Act 2000, s 103A.

a procedurally defective process concede this but then highlight how such defects may have been remedied or ameliorated. Be realistic.

Section 103A(5) of the Act needs to be carefully examined. Pedantic process scrutiny is common when facing claims, but the test is twofold – minor or technical defects that still result in unfairness are problematic. Highlight contribution but go beyond broad statements, explain the factors you wish the Authority to take account of and make sure they are later covered in evidence and submissions. Be realistic, case law does not point toward huge reductions in remedies for contribution, without extraordinary reasons.

"Strike outs"

The Authority has no formal strike out jurisdiction but can very sparingly with a high threshold, deem a claim to be frivolous and/or vexatious and able to be "dismissed" pursuant to s 12A, sch 2 of the Act. Such applications need to be made separately with compelling grounds set out and be aware there is no jurisdiction for a partial dismissal of part of a claim. There must be significant lack of legal merit so that it is impossible for the claim to be taken seriously.[14]

Counterclaims

Counter or cross claims need to be realistic and supported by compelling evidence and should be set out in a separate application and not just referenced as part of a Statement in Reply. However, they are often dealt with at the same investigation meeting. If your client believes they have suffered loss, it must be carefully itemised and quantified with supporting documentation.

The Authority's jurisdiction gives plenty of scope to devise innovative remedial remedies for whichever party involved.[15]

Case management conference

This will be your first encounter with the presiding Member so be prepared. The case management conference can involve both parties:

- identifying preliminary matters (including whether a new or further mediation direction is appropriate);
- being prepared to broadly identify the issues to be resolved – what the employment relationship problem is;
- identifying relevant witnesses including if any are to be directed to attend or summoned (including on the Authority's volition) and whether expert witnesses may be required;
- discussing the investigation meeting duration and format, for example will audio-visual link evidence play a part – if this is agreed it must be a question resolved well in advance. Avoid disputes with late applications for parties to give evidence by audio-visual link;
- agreeing the date and location of the investigation meeting and being prepared to be flexible about the location and format of the investigation meeting – this is within the discretion of the Authority Member. We try to be accommodating of needs and accessibility issues. The ultimate decision on venue location rests with the Authority;[16]

[14] *Gapuzan v Pratt & Whitney Air New Zealand Services (T/A Christchurch Engine Centre)* [2014] NZEmpC 206 at [58].

[15] Above n 3.

[16] Employment Relations Act, s 173(5) and Employment Relations Authority Regulations, r 20.

- timetabling exchanges of witness statements;
- agreeing how an agreed or common paginated bundle is to be produced by the parties and provided to the Authority;
- exploring the possibility of producing an agreed statement of facts or at least an agreed timeline of events;
- identifying information disclosure requests and ongoing issues;
- discussing any directions of the Member;
- identifying any client security or access issues to be accommodated (eg provision of an interpreter); and
- some parties provide an advance memorandum – this may be useful, particularly if you are seeking a direction, but do keep it brief and focused unless a complex issue is evident.

Disclosure

The Authority has no formal disclosure regime but can, under s 161(1)(a) of the Act, call for any information that is related to the employment relationship problem and will direct parties to disclose this if it will assist the Authority's investigation. Disputes about information provision and its relevance are best resolved between the parties but the Authority can be called upon to assist and give its view of relevance, including where appropriate, directing that summoned witnesses bring documentary evidence to an investigation meeting. The Authority expects representatives to act ethically and disclose material when directed as ultimately, s 134A of the Act provides for a penalty for obstructing or delaying an Authority investigation without sufficient cause.

Be tolerant and helpful of inexperienced parties whether they be self-represented or unqualified advocates. Do not get into an argument during a case management conference, calmly address issues through the Member.

Witness statements

Assist your client to provide a focused witness statement based around the identified issues where remedies are sought. It is often useful if chronologically ordered. Be aware it must stand up to scrutiny of questioning and cross-examination during the investigation meeting. It will be sworn or affirmed so it should be accurate. If there are problems or contradictions in your client's evidence, try and deal with these in the witness statement. Test the evidence by posing questions you would pursue if acting for the other party.

Try and avoid the embarrassing situation where your client does not comprehend, recall or contradicts their own witness statement when giving oral evidence. Wherever possible, keep it simple and concise and in your client's own words (or first language with an agreed or certified translation). Do not confuse your client by including legal concepts or phrases they may not be able to understand. Beautifully constructed (and often too long) witness statements composed by representatives are rarely persuasive. They can also be counterproductive as they tend to confuse witnesses during questioning.

Once a witness statement is completed, re-assess it against the disputed matters you need to establish to persuade the Authority in your client's favour. Ensure the evidence is focused on the remedies being sought. Context is important but irrelevant context is just distracting.

It is all about the remedies!

Concentrate on ensuring your client has adequately and expansively spoken about the impact of the employment relationship problem on them, whether this is a grievance or a response to such. It is in the final analysis, nearly always about the monetary remedies so do not skimp on this part of the statement and any evidence you can bring to validate remedies sought. Avoid hyperbole and unsustainable assertions. While good medical evidence is always helpful, supportive evidence from friends and family/whānau members is often just as persuasive or compelling.

Resist using technical, diagnostic or defined medical terms which have no foundation in the evidence. Medical evidence, in particular, needs to be handled with respect and regard had to privacy and dignity issues both in presentation and during cross-examination.

If there are cultural factors at issue, consider leading explanatory evidence or get your client to discuss this aspect in some depth. It is vital to prepare your client to speak about their distress and other impacting factors during the investigation meeting.

Understand how the Authority will distinguish between the statutory concepts of humiliation, loss of dignity and injury to feelings, they are subtly different. Tailor the evidence to address each head if possible.[17]

Final preparation

Adequately prepare your client and witnesses for the investigation meeting by going over their evidence and questions you anticipate will be asked. Describe the Authority process and what they are likely to encounter. This could even include describing the layout of the investigation meeting room. It can be a shock to participants when they discover it is a relatively intimate process. Ideally, you should encourage your client to engage in prior observation of an Authority investigation meeting. Do so yourself as a representative, you are most welcome.

At the investigation meeting

You will be asked to identify any preliminary issues before the meeting commences. If these are major points of contention or late matters, it is a good idea to provide a memorandum prior to the investigation meeting.

It is rare for the Authority to ask for opening statements but if the matter is complex a brief opening identifying issues may assist. Some Members may ask the responding party to go first, to justify their actions but this will normally be foreshadowed during the case management conference. Otherwise, you should prepare your client to give evidence at the commencement of the investigation meeting.

Be aware that by this point in the investigation, the Authority ought to have all relevant information disclosed and that information must be conveyed precisely and in a focused manner. The Authority proceedings are not recorded or transcribed.

Prepare yourself that it may not be smooth sailing, sometimes unrepresented or poorly represented parties turn up at an investigation meeting having not lodged any evidence or previously participated in the Authority process. In such cases, the Authority will inevitably

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[17] *Richora Group Ltd v Cheng* [2018] NZEmpC 113 at [41]-[51].

exercise pragmatism and allow a party to have their say but with safeguards to ensure natural justice.

Cross-examination

A sound approach to practice is that cross-examination ought not be repetitive – that is, by canvassing matters already fully addressed by the Member, unless you have genuinely a fresh angle. Cross examination is a skill and exercise of judgment. Also, actively listen to what is interesting to the Member and what you can assist with.

Do not badger or harass a witness. Take your time but stay laser focused on relevant issues; be polite and courteous; recognise the power imbalance that exists between you and the witness and avoid causing unnecessary distress. Allow a witness space to answer, even when you do not consider the question has been addressed to your satisfaction. However, do not neglect your duty to put difficult questions or contradictions to witnesses but do so in a respectful manner.

You should aim to state questions concisely (one at a time), in an understandable format – pitch your tone and complexity appropriately and avoid alienating legal jargon. Check to see if the question has been understood. Respect that recall of events may differ between parties.

Be very sparing and careful if attacking a person’s credibility and only when absolutely necessary. Avoid attempts at mere character assassination. Respect people’s dignity. Do not abuse a “lack of knowledge” situation, particularly where one party is self-represented.

Keep to “questions” and leave statements to your legal submissions. The Member will likely keep you focused. You will be afforded an opportunity to ask follow up questions arising from the Member’s questions and cross-examination. Utilise this opportunity to try and repair any damage your client has done to their cause but do not ask leading questions and be careful not to dig them into a bigger hole.

Do not assume the Member will cover every relevant question – be across your case and be prepared to help fill in any gaps. However, try and avoid just asking questions to satisfy your client’s needs – focus on the task of persuading the Authority. You should prepare your client for the not infrequent times when it comes to your turn to ask questions and you find the Member has covered off all relevant matters and issues. This is a question of judgement, when to rest, as further questioning may sometimes undo your client’s case.

Be very strict with your client regarding how they behave during an investigation meeting. Prepare them for hearing evidence they will strongly disagree with and that it may get very emotional. Prepare them for the uncomfortableness of cross-examination and how best they can get their perspective articulated.

Be clear to your client that you may not wish to probe and ask questions on sensitive evidence or press witnesses on their perception of say the emotional impact on close associates that they have observed. There are times when silence is the best approach and just appreciate that someone’s perspective of a situation is valid.

Ensure your client does not overreact to opposing evidence. Theatrics are for the theatre but be sensitive to genuine witness distress.

Submissions

A useful framework for structuring and providing solid foundations of good submissions is (a) the factual context, (b) the legal issues and (c) applying the requisite legal tests. For personal grievances this is usually the test set out in s 103A of the Act. That test is, of course, whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

Your written submissions should be a concise summary of your client's case and not an extensive legal treatise unless the matter is unusual or legally complex. Most cases are fact based. If you need to expound a relevant legal principle, do it in an accurate short statement, avoid cutting and pasting vast tracts from judgments but do provide an accurate footnote providing citations. You will not be required to provide copies of cases referred to in submissions.

A good submission headings structure in this example of a party responding to an unjustified summary dismissal for serious misconduct claim could be to:

- briefly background the key events;
- identify the issues;
- describe the decision-making process (for example how the decision to categorise the matter as serious misconduct was reached and cite analogous cases on the conduct in question);
- pose s 103A questions, such as:
  - did the employer sufficiently or fully and fairly, investigate the allegations against the employee?
  - did the employer raise their concerns with the employee before dismissing or acting against the employee?
  - did the employer give the employee a reasonable opportunity to respond to the concerns before dismissing or acting against the employee?
  - were proffered explanations fairly considered?
  - were alternatives explored?
- deal with the specific employee issues and then proceed to end by expounding your client's views on the employee's suggested remedies and cover contribution issues under s 124 of the Act; and
- conclude with a brief summary of your client's position.

Do not underestimate the power of a focused and persuasive oral submission. This could either be as a supplement to a brief written submission or a more extensive one. Tell a story and capture the Member's attention on your client's perspective of the situation.

Bland assertions such as "my client looked at alternatives to dismissal" are not enough – describe what alternatives were examined and why they were discounted. If you wish to emphasise a point, ensure it is reiterating what your client has said in evidence.

If an exchange of submissions is timetabled be flexible. Increasingly, audio-visual link is used by the Authority, if a party wishes to address a written submission.

A final point, if you have prepared your submission beforehand and it refers to "undisputed facts", please just check when presenting that such assertions have not been shaken during the investigation meeting.

Interim reinstatement in the Authority

Applications for interim reinstatement and urgency, and responding to such, involve specific requirements which are important to get right because this will assist the Authority in processing, investigating and determining the application in a timely and fair manner and meet the needs of your clients.

Interim reinstatement

In determining whether or not to order interim reinstatement, the Authority must consider the object of the Act to build productive employment relationships through the promotion of good faith:[18]

> One of the central features for the Act is its recognition of the importance of the employment relationship, the obligations both parties have to be responsive and communicative, and that issues ought to be dealt with promptly and between the parties if possible – in other words, supporting constructive employment relationships and repairing them where feasible.

Section 127 of the Act confers jurisdiction on the Authority to grant interim reinstatement pending the hearing of a personal grievance:

> **127 Authority may order interim reinstatement**
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> (1) The Authority may if it thinks fit, on the application of an employee who has raised a personal grievance with his or her employer, make an order for the interim reinstatement of the employee pending the hearing of the personal grievance.
>
> (2) The employee must, at the time of filing the application for an order under subsection (1), file a signed undertaking that the employee will abide by any order that the Authority may make in respect of damages—
>
> (a) that are sustained by the other party through the granting of the order for interim reinstatement; and
>
> (b) that the Authority decides that the employee ought to pay.
>
> (3) The undertaking must be referred to in the order for interim reinstatement and is part of it.
>
> (4) When determining whether to make an order for interim reinstatement, the Authority must apply the law relating to interim injunctions having regard to the object of this Act.
>
> (5) The order for interim reinstatement may be subject to any conditions that the Authority thinks fit.
>
> (6) The Authority may at any time rescind or vary an order made under this section.
>
> (7) Nothing in this section prevents the court from granting an interim injunction reinstating an employee if the court is seized of the proceedings dealing with the personal grievance.

[18] *Humphrey v Canterbury District Health Board, Te Poari Hauora o Waitaha* [2021] NZEmpC 59 at [5].

In considering such an application the Authority is required to consider the following:[19]

(i) Does the applicant have an arguable case for unjustified dismissal (or unjustified disadvantage) and an arguable case for permanent reinstatement?

(ii) Where does the balance of convenience lie? This requires looking at the relevant detriment or injury that the applicant and respondent will incur because of the interim injunction being granted (or not granted)?

(iii) The Authority is then required to stand back and ascertain where the overall justice of the case lies until the substantive matter can be determined.

Applications for interim reinstatement often involve employment relationships which have ended and may also involve ongoing employment relationships where for example, an employee has been suspended from duties or their position changed. Permanent reinstatement is a specific consideration in an interim reinstatement setting because it is a primary remedy – if a personal grievance is established and the employee seeks reinstatement as a remedy the Authority "must … if it is practicable and reasonable" provide for reinstatement.[20]

Some practical considerations

Requirements at lodgement

As with all Authority applications the first stage is lodgement.[21] Lodgement requirements for those seeking interim reinstatement include an undertaking:[22]

Undertaking in relation to application for interim reinstatement

(1) If an employee applies, under section 127(1) of the Act, for an order for the interim reinstatement of the employee, the employee must, at the time of lodging the application, lodge a signed undertaking that the employee will abide by any order made by the Authority in respect of damages—

(a) that are sustained by the other party through the granting of the order for interim reinstatement; and

(b) that the Authority decides that the employee ought to pay.

(2) The undertaking must be in form 2.

An undertaking is required for all other types of interim injunction applications.[23] The signed undertaking must be provided and must include that the applicant will abide by any order made by the Authority in respect of damages sustained by the other party through the granting of the order for interim reinstatement or other orders.[24] If an undertaking is not provided the application will still be processed by an Authority officer but it will not be treated as an application for interim relief until an undertaking is provided.

An application for interim reinstatement must be accompanied by a supporting affidavit and may also include a separate statement of problem for the substantive matter seeking permanent reinstatement as a remedy. There are occasions when applications for interim reinstatement are lodged without a supporting affidavit. This may be due to the urgency of the matter and the applicant has not had sufficient time to get the affidavit sworn or affirmed.

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19 *Western Bay of Plenty District Council v McInness* [2016] NZEmpC 36 at [7].
20 Employment Relations Act, s 125.
21 Employment Relations Authority Regulations, reg 5.
22 Employment Relations Authority Regulations, reg 7.
23 Employment Relations Act, s 162.
24 Regulation 7, Form 2.

The Authority must when determining an application for interim reinstatement apply the law relating to interim injunctions[25] which requires such decisions be made based on evidence (albeit untested) and secondly, completing all initial lodgement requirements at or as close to lodgement as possible will aid the speed with which the application can be progressed. If there is delay in providing an affidavit this should be drawn to the Authority's attention at lodgement and an indication as to when the affidavit can be expected to be filed. If an undertaking and affidavit(s) are not forthcoming, then the member will discuss this at any subsequent case management conference.

Seeking directions

Though not required, a request for directions sought at lodgement is a practical way to highlight to the Authority relevant matters which may not be included in the initiating documents for example, that urgency is sought and upon what grounds, issues impacting representative availability, or special requirements such as an interpreter.

Where possible one or both parties proposing directions may assist the Authority particularly where complex timetabling is anticipated or for matters involving significant urgency.

Service

Interim reinstatement applications, as with all interim applications will be promptly processed, served and referred by an Authority officer to a Member for initial directions.[26] If you anticipate problems with service raise this with an Authority officer on lodgement, though with employment relationship problems of this type you are likely to have had significant engagement with the respondent or their representative and already advised them the application is pending. It is good practice to copy the opposing representative into your communications with the Authority when lodging the application and to serve the initiating documents on them yourself.

The case management conference

The initial step the parties can anticipate is the Authority convening a case management conference. This will usually be held by telephone but there may be occasions where an audio-visual link is used or an "in person" meeting held. You should be prepared to make yourself available to attend a case management conference at short notice.

For interim reinstatement applications, the case management conference will deal with timetabling including any abridgment of the statutory timeframe for lodging a statement in reply, a notice of opposition (if one is required to be lodged), affidavits in support and reply, submissions and any further relevant disclosure matters.

How mediation fits into the timetable will be a matter for discussion at the case management conference. If, prior to the case management conference you have already secured a mediation date, advise the Authority as soon as practicable.

The Authority will also need to hear from you on what degree of urgency is required. The practical measure of this is how quickly you can provide all the relevant information so the Authority can move to determine the application as soon as practicable.

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[25] Employment Relations Act, s 127(4).

[26] Employment Relations Authority Regulations, cl 16(2).

It is usual for the investigation of an interim reinstatement application, as indeed for any interim matter, to proceed on untested affidavit evidence without oral evidence and cross examination. Affidavits need to adequately set out background matters and address the legal tests to be applied. The application may be determined on the papers or after a short investigation meeting held to consider oral submissions which may be heard by an audio-visual link.

Written directions will normally be issued following a case management conference.

It goes without saying that compliance with timetabling directions is vital – the prompt determination of the application depends on all the relevant information being before the decision-maker for consideration. If you anticipate you will not be able to meet a directed timeframe, promptly raise this with the Authority. It is courteous practice to appraise the opposing representative of the situation and seek their agreement if you want a variation to a timetable before seeking direction from the Authority.

Addressing all the tests – do not neglect balance of convenience and overall justice

Affidavits and submissions filed in support of or opposition to applications for interim reinstatement, often focus primarily on the arguable case test for unjustified dismissal (or unjustified disadvantage) and permanent reinstatement and contain little on the balance of convenience or overall justice tests. The latter tests are key balancing exercises the Authority must assess. It is important that the affidavits and submissions address these latter tests as fully and with as much detail and supporting material as possible.

The types of matters which may be relevant to the balancing of relative detriment and overall justice, can include financial circumstances; third party interests; apprehended risks of reinstatement; the potential impact on other legal interests for example immigration status; maintenance of technical or specialist skills and, likelihood of further disciplinary action.

In addition, consider filing affidavits from those who may be directly affected by the grant or decline of the application or from those who have direct knowledge of the impact on the workplace. Bare assertions of consequences are of limited value – more detail is required.

Delay may be a factor that is given significant weight in determining an application for interim reinstatement. If there has been delay in lodging an application, an explanation should be specified in the application and detailed further in the supporting affidavit along with supporting documentation.

The power of a concession

It is not uncommon for the responding party to concede the “arguable case” threshold has been met. Such a concession is often entirely appropriate and sensible. There may also be other opportunities for appropriate concessions to be made by both parties which may assist the Authority’s balancing exercise in an interim reinstatement setting.

A concession, using less adversarial language and/or a mature and balanced reflection on how the employment relationship may have got to the point where the problem has developed and how it may be restored, can assist the Authority’s consideration of the applicable tests. In particular, concessions may assist in the crafting of orders which may in turn assist the parties to get the employment relationship back on track or find a way to end the relationship with both parties’ mana and dignity intact.

Interim orders generally

Often an applicant party for an interim order other than for reinstatement, will also complete an undertaking as to damages. Members can set the procedure they think fit for the investigation of interim employment relationship problems as they can for all the matters before the Authority for investigation. As discussed above, with interim matters consideration will be given as to whether to abridge the time for the lodging of the statement in reply. This is a matter that will be canvassed with you typically at the case management conference, as will the other matters discussed in more detail above.

Ex parte applications

An ex parte order is one made without notice to a party and without hearing from that party. Section 173(4) of the Act refers to the Authority's ability to make such orders.[27] These orders will be rare because of the obvious clash with the usual over-riding requirements of natural justice. Applications under this section may be made, for example, where there is a reasonable basis to find that there is misuse of confidential material and orders without notice to the other party are appropriate.

If an interim injunction is granted on an ex parte basis, the respondent may apply to rescind the injunction and the applicant carries the onus of justifying the injunction.[28] The inquiry is whether the injunction ought to have been granted, applying the usual tests applicable in an interim injunction setting.[29] The assessment is based on the evidence filed in support of the ex parte application and the evidence filed in support of and in opposition to the application to rescind. One example is s 55 of the Parental Leave and Employment Protection Act 1987 which provides that an employee may apply ex parte for an interim order reinstating them or cancelling notice terminating employment.

A note on applications for urgency

As described above, applications for interim reinstatement are dealt with promptly in the Authority. Urgency may be applied for on any matter before the Authority. Clause 17 of sch 2 of the Act provides that where any person applies for urgency the Authority must consider the application.[30] If satisfied it is necessary and just to do so, the Member can order that the investigation take place as soon as possible.

A request for urgency will be referred to a Member as soon as possible. Clearly signalling in the statement of problem or by way of memorandum that urgency is sought along with the grounds upon which the application is made, and key supporting information will assist consideration. The Authority is helped by an indication prior to lodgement that a matter seeking urgency is to be lodged.

Do what you can to assist the Authority with service – effective service is a critical step in the prompt management of an urgency application. Once service is complete the investigating Member may hold a case management conference to hear from the parties on the urgency application which may be convened at short notice. The Member will usually then record their decision on urgency in a notice of direction along with any timetabling directions.

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[27] The Authority cannot make freezing or search orders.

[28] *Sky Holdings Limited v Rockfield Land Ltd* 18/12/03, Heath J, HC Auckland CIV-2003-404-6939.

[29] *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1985] 2 NZLR 129 (CA) at 142.

[30] Employment Relations Act, sch 2, cl 17.

Conclusion

Tuning into the Authority way of doing things will best assist client outcomes. This involves recognising the less adversarial and investigative nature of the process and giving the Authority all the evidence and information linked to the employment relationship problem at issue in an easily digestible format. Help us, help you to be effective and persuasive.[31]

[31] See Robin Arthur, *Effective Advocacy in the Employment Relations Authority – A Member's View*, NZLS CLE Employment Law Conference 2014.