RESPONDING TO A PERSONAL GRIEVANCE

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Most of my work involves advocating for employees in pursuing their personal grievance claims, and most of that work is done on a ‘no win, no fee’ basis. We often get paid through resolution, and the employer will pay our fee as part of a settlement agreement whereby our company would invoice the employer directly.

Having spent years taking personal grievance claims against employers for my employee clients, I’ve learnt many tricks of this trade. This experience has become mostly useful to how I would manage being on the other side of the table—being the defending of an employer from a personal grievance claim.

Free employment law advice

It should not be a surprise to employers that their employees have access to free employment law advice and that there are ‘no win, no fee’ representatives that are waiting for their call to help.

As a situation is developing, it’s common for an employment representative to be invisible to the employer in their helping the aggrieved employee drafting text messages and e-mails and managing their situation from in the shadows, pushing it towards being a meritorious claim.

It can become obvious to me where their employee is being given advice and is acting on it by their employment lawyer or employment advocate that remains invisible in the background.

So similarly, we often advise the employer on how to respond and how to counter-attack.

When a personal grievance is raised

Unlike ‘no win, no fee’, employer has to pay no matter what, whether they pay the employee to go away and pay their own costs in defending it. This can include cases that have no merit at all. It will still cost the employer.

When an employer receives a personal grievance letter, it’s at this point that the paper trail, facts, and events of what happened will matter even more so. This is why early sound advice and the employer taking the correct actions is important and to not make the situation any worse than it already is.

When claims are raised against an employer, it’s most likely that the representative acting for the employee is taking the case on a ‘no win, no fee’ basis. The employee will want some ridiculous amount of money, and the representative will want quick money for themselves.

It’s at that point that an employer has to decide whether to try and settle early or to defend it and fight it all the way, but that comes with costs, loss of productivity, and risk.

Responding to a personal grievance

In representing an employer, it’s important to not show any weakness, to sew the seed of doubt, and highlight all of the risks that the employee would have if they were to take a claim beyond mediation to the Employment Relations Authority.

It’s important that a response is well considered and that the facts of what happened are clear. It can be useful to provide text messages, e-mails, or written communication to support the facts of what happened and a reasonable explanation as to how the employer can justify their actions. A well-considered response should persuade the ‘no win, no fee’ lawyer or advocate to cut their losses and walk away, or at least to persuade their own employee client to accept a low-ball settlement offer.

If an employee is claiming loss of earnings, then it’s also important to put mitigation of loss in issue with the employee. This means asking the employee for evidence that the employee has lost wages and has gone to efforts to find another job. If the employee was dismissed but has started another job soon after the dismissal, then their claim for lost earnings will be pretty low. Quite often I find that representatives will seek three months lost earnings and not be forthcoming with what their client actually lost. If the case proceeds, dishonesty, not providing the information, or being unwilling to actively look for another job will not help them in their case.

If, for example, the claim is for an unfair dismissal and the employee contributed significantly to the situation that gave rise to their dismissal, the response needs to articulate what the employee did and why the dismissal was justified in the circumstances and that alternatively, if the employee were to succeed in a claim, that any remedies awarded would be reduced for the employee’s actions in contributing to the situation that arose. Egregious conduct of an employee that’s found to have occurred although not know at the time of dismissal can also be later taken into consideration to reduce remedies to a grievance on an ‘equity and good conscience’ basis.

The 90-day time limit rule is also important, and care should be taken in responding to something that happened more than 90 days ago. The 90-day rule should always be put in issue if it appears a grievance has been raised outside of 90 days. Section 114 of the Employment Relations Act 2000 describes the 90-day time limit. The 90 days begins with the date on which the action alleged to amount to a personal grievance occurred or came to the notice of the employee, whichever is later, unless the employer consents to the personal grievance being raised after the expiration of that period. If the employer’s response impliedly consents to grievances being raised outside of 90 days, then the employer will have difficulty in later relying on the time limit rule as it may not be used to preclude the bringing of a personal grievance if an employer has impliedly consented to a grievance being raised outside of 90 days. Care must be taken on jurisdictional issues like this. Employers faced with a personal grievance really should pay for and get proper advice as soon as possible before responding. This will help avoid making any fatal mistake.

Pointing out the employee’s risk of costs against them should they not succeed in their claims against the employer is often useful. If a case goes to the Employment Relations Authority, an unsuccessful party to a decision will have a liability to contribute to the other party’s costs. The daily tariff starts at $4500 for the first day and $3500 for subsequent days. If a case is challenged in the Employment Court, the costs are dealt with on a guideline scale and end up becoming a lot higher than this.

Of course, tabling the possibility that the employer might make a counter-claim against the employee is also quite useful if the facts of the matter permit a legitimate counter-claim. For example, seeking a penalty against the employee for having breached the duty of good faith or if there are any losses caused by the employee, seeking damages.

In my experience, how an employer responds to a personal grievance claim will have an influence how far that case is taken against that employer’s business. A well-considered response is thoroughly important in the early stages of defending a claim.

Employer help

We are Employment Law Advocates that represent employers in defending personal grievance claims by direct negotiation, mediation, the Employment Relations Authority, and where necessary on appeal in the Employment Court. We work to reduce the damage for employers.

Areas in which we defend employers include:

- Unjustified dismissal claims commonly referred to as unfair dismissal
- Personal grievance claims whether allegedly unfair dismissal or unjustified disadvantage
- Breach of contract claims
- Holiday pay and minimum entitlement claims

We are also able to assist in dealing with:

- Restraint of trade issues
- Confidentiality and non-solicitation issues

We have a high success rate in fighting against meritless personal grievance claims, particularly in dissuading employees from taking claims further.

We also assist employers in managing issues with employees and provide guidance where problems arise. Some of the most common areas we assist employers are:

- Misconduct and serious misconduct issues
- Employee performance issues
- Disciplinary matters and disciplinary meetings
- Workplace investigation help
- Restructuring and redundancy
- Employment agreements and workplace policies
- Managing 90-day trial periods and probationary periods correctly

Our focus is to work proactively with our clients to make sure their legal bases are covered and to reduce the risk of problems arising later. Dealing with the issues properly at the start as they arise will avoid later risk and expense. We work to reduce costs and to reduce the damage. ■

For more details, contact Lawrence Anderson on 0800 946 549 or 0276 529 529 or Lawrence@AndersonLaw.nz or visit AndersonLaw.nz.