EMPLOYMENT MEDIATION

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For all of our employee clients, whether they have a live employment relationship problem or if they have been dismissed and are seeking compensation, the overall goal is to achieve settlement.

What does that look like? Well, our client gets paid something, we get paid our fee, the issues between the employee and their employer are fully resolved, and there's certainty of the terms of getting paid, getting a certificate of service, or whatever is agreed to.

If what's agreed to is not honoured by the employer, then we have an enforcement procedure to follow. It's rare that we have to seek an enforcement of a settlement.

It can, however, be pretty difficult to get an employer to table a reasonable offer to resolve a case. If an agreement cannot be reached, then we follow the dispute resolution process, which involves seeking a decision from the Employment Relations Authority.

If the case is being taken on a 'no win, no fee' basis, the Golden Rule is: "if there's a reasonable offer made by the employer, we take it; if not, we keep going."

Of course, the client is forewarned of the possible risks if the case does not fall in their favour. I will talk about those below.

Mediation

For most cases, we have to go to mediation first. If we have lodged a proceeding in the Authority, we're still directed to attempt mediation unless there are exceptional circumstances or the employer fails to respond to the proceeding.

Most of the time, the mediator will not read all or any of the supporting documents, but here are some common examples of what mediators will say to an employee about their case.

"It will take over a year to get to the Employment Relations Authority"

They used to say, "six months", but now because of COVID-19 and the tsunami of cases that the Authority has had to deal with, it can now take over a year to get a hearing date.

Quite often we can negotiate a settlement before then in among us, undertaking the process where parties are required to provide their witness statements and documents as timetabled.

When it's the employer's turn to provide their witness statements, firstly, their lawyer is often writing it for them so that will cost thousands, and secondly, the employer will need to come up with a reasonable and convincing story to defend the claims.

If the employee has a strong case and the employer a weak one, the employer might start thinking about putting settlement money on the table as an offer to make the problem go away.

"Your name will be on public record"

Not in every case. It's not entirely impossible for an employee to be granted a non-publication order. The starting point is the principle of open justice and that a high standard must be met before it can be departed from.

Put in a simple way, for the Authority to be satisfied that there should be a non-publication order, an employee needs to show the prejudice or likely harm if they have their name published in a public determination that there would be grounds for non-publication.

The effect of this statement, though, is to scare or make the employee aware that if their name is published, they will have to live with that, and it's always suggested that the employee would automatically have difficulty finding work in the future because employers search the ERA database.

Well, I have got to say on this particular point that most employers, large and small, often demonstrate the inability to complete Ministry of Justice checks or reference checks. I know this because we get a lot of cases where employment is offered and accepted and then the employer later goes about what should have otherwise been the pre-employment checks after the employee has started work. I am, therefore, not convinced that many employers can be bothered or have the time to look up the ERA database to see if a job applicant has taken a former employer to the Authority.

"You only worked for your employer for a short period of time, therefore, you will not be awarded much in hurt and humiliation compensation and/or lost wages."

I don't agree. Quite often I hear this if an employee has been on a 90-day trial period, probationary period, has been a casual employee for a short period, or has been fired not long after commencing employment.

The length of an employee's employment is not a factor in compensating emotional harm, and when turning to lost wages, the Employment Relations Act 2000 at section 128(2), Reimbursement, prescribes an order that the employer pay to the employee the lesser of a sum equal to that lost remuneration or to three months' ordinary time remuneration.

"If you lose, you will have to pay $4500 to the employer"

There is more to it than that. The $4500 comes from the Authority notional daily tariff, and $4500 is for the first day of the hearing, and subsequent days are $3500.

From time to time, the Authority can adjust the daily tariff up or down when considering party conduct (like wasting time) and unreasonable rejection of without prejudice settlement offers.

A case might only be heard in half a day; therefore, half the daily tariff may only apply, that being the amount of $2250.

If the employer is not represented by an advocate or lawyer, the employer is not incurring costs and, therefore, would not be entitled to claim costs at all.

Where the employer is defended by legal representation, the employer's bill at the end of an Authority hearing can easily range between $20,000 and $30,000. So, if the hearing is only one day in duration and the employer wins, then the employer would only be able to recover the typical amount of $4500 of the $20,000 to $30,000 that they have paid their lawyer. It's, therefore, more economically practical that an employer puts money towards a reasonable and early settlement offer rather than paying to fight it.

Challenges in the Employment Court

Win or lose, either the employer or the employee is going to be unhappy with the Authority's decision. When an Authority determination has been issued, the parties have 28 calendar days to file a challenge in the Employment Court.

At the end of the day, the employee may not have to pay the employer for having lost. The employer may settle and pay the employee instead, and the enforcement of an order that an employee pays the $4500 to the employer can be waived in the settlement agreement.

If there's no settlement and the Court decides in favour of the employee, then the Authority's decision to impose costs on the employee gets overturned. If the employee loses their case in the Court, the costs liability are dealt with in a different way and can be a lot higher than $4500.

Take the settlement

All of this process is expensive and risky. I will just remind you of the Golden Rule, that is: "if there's a reasonable offer made by the employer, we take it; if not, we keep going."

Early resolution is good. Getting paid and the certainty of being paid, even if the amount is less than what you want, is a lot better than to risk an adverse cost liability, publication of your name, and to have to worry about the risk of this for over a year or longer. ■

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