HOW NO WIN NO FEE WORKS

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How “no win, no fee” works

How “no win, no fee” works is that when we offer “no win, no fee”, we pursue the client’s case without requiring any upfront payment other than any disbursements that may be necessary. We consider that if we take such a case on, the case has merit and we will win and get the fee at the end. Sometimes that might mean that we must go to the Employment Court after the Employment Relations Authority.

We might require something upfront for our time in testing the waters if the case isn’t so strong and this would be first agreed with the client. But the only time we really need an upfront disbursement payment is where the client’s employer has shown behaviour that it is reasonable to conclude that they will be unlikely to agree to mediation or that negotiating with them would be impossible. It is very often that this happens. In such cases we will need a filing fee upfront from the client to lodge the case with the Employment Relations Authority straight off the bat.

We work towards getting the employer to put money on the table. If the amount that is offered by the employer is reasonable, we take it, and the fee will come out of this on a reasonable basis according to our time and effort spent on the case to date. But if there is little or nothing offered, we just keep pursuing the case further.

We first ask the employer to pay our fee directly. The fee is typically greater of what the hourly rate fees would have been for our time at $300 plus GST per hour, or a third plus GST of the overall financial settlement. In the rare event that the employer refuses to pay us directly, then our client is charged directly the fee.

If a reasonable offer is made by the employer, the client will accept the offer as per our advice. If the employer’s offer is not reasonable, then we take the case further until we achieve a decision in our client’s favour, or a reasonable offer is made by the employer to settle the case then as explained, we take it. The merits and risks are carefully considered.

If the client is being unreasonable and not wanting to accept a reasonable settlement

then that is fine, the client pays for our time, and it proceeds forward on an hourly rate basis from that point. No more "no win, no fee", because we got a result, and the client is refusing to take it. This problem is rare for us.

Client commitment is very important

For a "no win, no fee" arrangement to be successful we need the client's commitment: we need them to communicate with us; we need them to do what we reasonably ask of them, for example, we will ask the client for all information and supporting documents including bank records, IRD records, evidence of job searching, and other relevant information. The client needs to give us the opportunity to "win". Disappearing or not cooperating with us will result in termination of the engagement and fees being charged for our time. Because how can we win if we are not being given to us by our client that we need to get a win?

I would like to comment here that the biggest settlements we have achieved have been after the witness statements have been written, by our firm, and then it is the employer's turn to file their statements. Often the employer does not have a reasonable explanation for what they did and how they did it (i.e., justifying the dismissal) and at that point their lawyer's fees are getting high. Good luck to their lawyer to come up with a story for them and write their statement for the employer. It is at that point that the real offers start coming out. But if not, we just keep on going. In order to achieve this, our client needs to be committed and participate actively in the drafting of their witness statements. If they don't do that, then we won't be able to get that win.

> "If a reasonable offer to settle is made, we take it. If not, we continue further to the Employment Relations Authority (and Employment Court as required)"

Employment Dispute Resolution Process and Risks

The issues can be settled at any time during the process by agreement with the employer. We raise claims and attempt to negotiate an outcome. A mediation meeting is often necessary and can take 1 to 2 months to secure a mediation date. If the employer refuses to attend mediation, we will need to file an application to the Employment Relations Authority to get the employer to the mediation table.

As I have mentioned briefly already, the Employment Relations Authority is the next stage after mediation and will require documents to be formally filed including a detailed witness statement written by the client that refers to the client's supporting documents. The client participates actively, we write the witness statement, we do the documents, we are all happy.

It typically takes around 12 months to get an ERA hearing date and the authority can take up to 3 months to make a decision on the case after that. The Employment Court is the appellate court from the ERA. If our client wins in the ERA and the employer is unhappy with the ERA decision, most likely they are very unhappy, the client may be dragged into a challenge proceeding to the Employment Court because the employer may challenge it. Alternatively, it might be that our client does not win in the ERA, in which case we can discuss options from there taking a challenge to the court.

The ERA is a risky place: it is not a court of record; most written decisions will state a disclaimer by the ERA member that "As permitted by s 174E of the Act this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received", so in other words, not all evidence and submissions may be considered to the same extent that they would be in the Employment Court (in comparison, the Employment Court records, transcribes evidence, and the Judges fully consider all evidence, submissions and write about it in detail in their written decisions, the ERA Members are not required to do those things); the ERA is not administered by the Ministry of Justice, more so, it is the Ministry of Business, Innovation and Employment that runs the ERA; and the decision maker, the ERA member, is not a judge, more so, an ERA member may not have been a lawyer in their previous career - their job when advertised by MBIE is open to employment relations consultants too.

The point in all that is this; we might not win in the ERA for reasons beyond our control, and we might want to challenge the case to the Employment Court to get the win.

After mediation or if the case is not settled by agreement, the ERA and court determinations are made public, and our client's name will most likely be published. Non-publication orders are difficult to obtain if there is no sufficient evidence to support a non-publication order for our client. We rarely see legitimate circumstances that permit non-publication of names.

The issue of costs in the ERA is dealt with on a notional daily tariff basis, the first day is $4,500, subsequent days $3,500. In the Employment Court, costs are dealt with on a guideline scale and cost liability is much higher. A costs bill of $20,000 is not uncommon for an employee who has lost in the Employment Court.

So, all that being said, the client should reign in their expectations and let us work efficiently and effectively and we will work towards achieving an equitable solution for them.

We take a carefully considered approach

Resolution by agreement is the best possible outcome to save time, energy, stress and costs for everyone involved. Resolving a client's case by agreement and achieving a financial settlement as early as possible will provide our client with certainty and eliminate risk.

What we can do for employers and employees

We represent our clients in direct negotiations, the Employment Mediation Service, the Employment Relations Authority, and the Employment Court. ■

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