THE EMPLOYMENT LAW SURVIVAL GUIDE

The six critical keys that every employer needs to know to save themselves from making expensive, frustrating and time wasting employment law mistakes...

With the compliments of
Paul Brown
PB Employment Law

Introduction:

I've been advising people about employment law for over 16 years. And in this time I've seen a lot of businesses and organisations make expensive, frustrating and time wasting employment law mistakes.

A lot of the time these mistakes could have been avoided by following some common sense guidelines.

Which is why I've created "The Employment Law Survival Guide."

In the next few pages you'll discover six simple keys that you need to know to stop making these expensive employment law mistakes. I recommend you read this guide several times and highlight the sections that seem most relevant for your own situation.

Then if you would like some advice on how to handle your employment law issue I invite you to give me a phone call. This phone call is for up to 20 minutes and there is no charge or obligation.

In our phone call I'll explain what your options are to handle your employment law issue and the most helpful steps you can take right now. I look forward to chatting with you soon.

Kind regards

Paul Brown

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"We've used the services of Paul Brown for employment law issues and are delighted with the positive results he has achieved for us. He saved us a lot of money in dealing with an employment matter with one of our staff and we would never had achieved this result without using his services. Paul gave us a step by step process to follow and advised us clearly at every step so we knew exactly what we were doing and why we were doing it. What I like about Paul is that he is very easy to talk to and he also has a wonderful knowledge of what it's like to run a service business. I recommend his services highly to any business with employment law issues. He is an expert on employment law and is the ideal person to talk with if you want great advice and a positive result around any employment related matters."

Selina Kemp
David Kemp Electrical

"I really like using the services of Paul Brown for employment law issues. Paul is responsive and down to earth and he fully understands our business and all our needs. We always get highly relevant employment law advice from Paul and this gives us great peace of mind. I recommend Pauls services to any business person who wants responsive down to earth advice on any employment law matters."

Carol McCann
Financial Controller
Laser Plumbing Christchurch East

Key One: Get Good Employment Law Advice Early

This is the most important key in the whole guide.

Get good employment law advice right at the beginning of any potential problem.

If you think you have an employment law issue that needs resolving, you need to be very certain you have a real issue before you take action.

Here's a good example:

A common employment mistake that many employers make is to call poor work performance a disciplinary issue. But: poor work performance never starts out as a disciplinary issue. There is a clear process with a number of distinct steps that you need to follow before you can call poor work performance a disciplinary issue. Poor work performance will become a disciplinary issue once an employee has had sufficient training and time to improve their performance and does not do so.

If you miss out any of these steps or get them in the wrong order it can cost you dearly when trying to resolve the issue.

Another common mistake where it's quite easy to go off track is medical incapacity.

This is where someone has been off work, genuinely injured, for a month or more with no return to work in sight – the employer keeps getting medical certificates but little else, such as a realistic return to work date. If that's the situation how do you bring the employment relationship to an end?

And how do you do it in a way where you don't have to pay out a large amount of money for an employee taking a Personal Grievance claim?

Before you do anything on an employment law issue I highly recommend you get some good legal advice from someone specialising in employment law. This may only be a brief phone call with the lawyer or the advisor saying 'yes' you are on the right track, keep me posted or 'no, for God's sake, stop, your off track and you're mixing two separate issues.'

At the beginning of any issue it should not cost a lot of time or money to see what your options are.

In fact I offer all potential clients a free phone call for up to 20 minutes to discuss their issue. This is with my compliments and there is no charge or obligation. In our phone call I'll explain what your options are to handle your employment law issue and the most helpful steps you can take right now.

Even if you think you are 100% in the right it still pays to get good employment law advice very early:

Here's a great example of why you need to do this…

I have acted for the NZ Dance & Dancesport Council [NZD & DC) for many years. They are a voluntary organisation who promote dancing throughout NZ by holding competitions and so forth. They have never had a paid employee since they were formed in 1965 – everyone is a volunteer. They had some performance issues with a person in administration, and thought the best way to finally resolve this issue, was to remove that person from his role. The Council [who run NZD & DC] are all experienced business and or professional people, and this person was not even an employee!, And so they all thought it was safe to remove this person from his role.

And they did not take any advice before doing so. …

Unfortunately this person was highly offended to be removed from his role, and took a personal grievance claiming firstly to be an employee, and secondly to be unfairly dismissed. This went to mediation with the Employment Relations Service, then to the Employment Relations Authority, and then to the Employment Court – for a week long court case!!

It cost NZD & DC tens of thousands of dollars and hundreds of hours of time to fight this personal grievance claim, for over a year. NZD & DC won their case in both the Employment Relations Authority and Employment Court, and in the end got back most of their legal fees.

However they only asked me for my help after they had tried to sort it themselves first. And because of that they spent a huge amount of time and money that might have been avoided.

So let me emphasize again this first key once again - get good employment law advice early.

Action Step:

How will you get good employment law advice sooner rather than later so you know exactly what your options are? Who will you go to? PS – well-meaning mates don't count!

Key Two: Hold well run Disciplinary Meetings

Disciplinary Meetings are an area where I see lots of employers making costly mistakes.

Let's say you've followed Key One and you've got some good employment law advice.

You have discovered that you do have a misconduct issue to handle.

So you might think that the next step is to hold a disciplinary meeting with the employee involved. Wrong!!! Before you get to the disciplinary meeting the very first step must be an investigation.

So many employers skip over the investigation but it's the very foundation for the disciplinary meeting. And it often requires just as much effort and preparation as the actual disciplinary meeting.

A recent example is: *Bula v Aoraki Mount Cook Alpine Village Ltd* [2018] NZERA Christchurch 65. This is what the Employment Relations Authority said about the poor disciplinary process:

> *[Para 49] - Mr Bula said Aoraki's investigation into his conduct was an example of "form over substance" because he said Aoraki focused on the form of a proper investigation and lacked a commitment to proper fact finding and decision-making. Mr Bula pointed to the tight timeframes of the investigation and the initial refusal to grant his representative an extension to submit his response to the tentative conclusion letter as examples. Mr Bula also raised a number of procedural defects in Aoraki's investigation.*
>
> *[Para 74] - Mr Bula should have been provided with copies of the policies and procedures that Aoraki wished to discuss with him. A fair and reasonable employer does not believe or expect an employee to have company policies and procedures committed to memory.*
>
> *[Para 75] - An employer's mind should be open during an investigatory process and it should not withhold vital material so as to achieve some type of "gotcha" outcome.*
>
> *[Para 103] - ….the investigation conducted by Aoraki into Mr Bula was procedurally unfair and was not the action of a fair and reasonable employer. The defects in the process followed by Aoraki to dismiss Mr Bula were not minor and they did result in him being treated unfairly. The dismissal of Mr Bula by Aoraki was procedurally and substantively unjustifiable.*
>
> *[Para 136] In summary, Aoraki must settle Mr Bula's personal grievance by paying him within 28 days of the date of this determination [almost $43,000].*

Summary – well run disciplinary meetings are vital to defending a personal grievance for an unfair dismissal.

The first step in doing an investigation is to determine "What is the complaint or the issue?"

Now that's not always straightforward. For example if you have an anonymous complaint the Employment Court has said it is inherently unfair to use anonymous complaints to take disciplinary action. So complaints must be signed. This can raise new issues if the person complaining wishes (for good reason) to remain anonymous - think of sexual harassment complaints. So you've got to go through these preliminary issues in the investigation.

There's also the key issue of 'who' will carry out the investigation. Beware of DIY – otherwise known as the "Clint Eastwood / Dirty Harry" syndrome. It can be dangerous to be "judge, jury and executioner" , meaning you – as the boss – saw the misconduct / investigated it / and fired the employee. This leaves you wide open for a claim of bias and predetermination, because there was not a fair and impartial investigation, and bias in the decision to dismiss.

In some cases it will be safer to get a third party to investigate the matter, and make a recommendation to you as the decision maker.

But there are also risks in relying on others to carry out the investigation. Small companies usually do their own investigations but a big company will either have experts in-house or they'll bring in experts from external sources to do the investigation.

Either way, the decision maker must be able to justify the decision to dismiss, which means being able to explain why any explanations from the employee were not accepted, and why the results and recommendation of the investigation were accepted.

So it's really important you get good advice – at the beginning.

You may not need your hand held by a lawyer at every step but the lawyer or the advisor will want to be involved from the very beginning so that we can set it up properly.

Now let's assume you've done the investigation. Let's say it's a great investigation and you've got really good evidence of misconduct. The next step is setting up the disciplinary meeting.

The Disciplinary Meeting

Anyone accused of misconduct and especially serious misconduct justifying dismissal, has a right to know what evidence you have. This means you must give full disclosure of the results of the investigation.

So you can't hold anything back and say "hey, I've got this statement, what do you say about this? " - when you have other more 'unhelpful' statements. In this situation all statements must be disclosed, regardless of content.

If you do not do this you are gifting the employee great evidence of an unfair dismissal, which then has the potential to cost you dearly. So when you invite an employee to a disciplinary meeting you've got to give copies of everything that the investigation turned up.

So you might have interviewed 5 people, 3 of whom support the allegation against the employee, but 2 of whom support the employee. All statements must go to the employee. If you have CCTV / security camera footage about the "incident" it must be given - in its entirety - to the employee.

You can't with-hold the results of an investigation from an employee facing allegations of misconduct.

If you do you are now breaching your "good faith" obligations (see section 4 of the Employment Relations Act 2000). And remember that we still haven't got to the disciplinary meeting.

The next step is asking the employee to attend a disciplinary meeting.

This should never be done verbally because if things don't go well you may need evidence of having complied with all the steps of procedural fairness. The invitation to attend a disciplinary meeting letter will include: *"this is what the issue is, this is our evidence, we've given you all the documents, signed complaints, copy of the investigation report etc."*

The employee must be advised that they've got the right to bring representation and I find it good practice for the employer to say who will be there, such as other people from the company and if their lawyer or advisor will be here.

The possible outcome must also be stated – sometimes this will be dismissal but not always. The point is to give the employee fair warning of the seriousness of the issue.

Certainly for smaller companies, I like to have the decision maker at the disciplinary meeting (if possible). In this way, the decision maker has heard all the explanations first hand.

At this stage we still have not got to the disciplinary meeting.

We then talk about suspension.

Too many employers at this stage say something like *"I'm suspending you because this looks like serious misconduct to me and we'll have the meeting on xyz date – but you will be paid for the suspension."* – in the belief that is ok. It is not.

You are gifting an employee grounds for a personal grievance if you suspend an employee for no good reason and without discussing this issue with the employee – before the decision is made about suspension.

The reason for this is because suspending an employee can create the impression and presumption of wrong doing when none may have occurred. There have been cases where the suspension was used to deliberately humiliate an employee (for example by calling in security guards to publicly escort someone out the building).

It doesn't matter what your Employment Agreement says (and I write these agreements) employment law cases say there is no automatic right to suspend an employee.

If you think there are grounds to suspend the employee, you've got to talk to the employee and explain why they should be suspended. The employee has the right to comment on the proposal to suspend them.

Most employers just skip right over this and just say look you are suspended until the meeting and I'll see you next week. To me this is taking unnecessary and quite avoidable risks.

Then there is the issue of a paid or unpaid suspension? It is always to safer to go paid, unless or until the actions of the employee start to unnecessarily drag things out.

We haven't even got to the disciplinary meeting and already some employers will have created great arguments of procedural unfairness or a lack of good faith.

So that's why I say go back to Key One:

Get Good Employment Law Advice early.

The decision to suspend an employee or not, should be a decision that's made after you've had good employment law advice. And once that's happened whether they are on suspension or not we then get to the disciplinary meeting.

A really common issue for a lot of employers is that they really don't want to run a disciplinary meeting themselves. Especially in small businesses the boss will often have a close working relationship with the employee / there are often blurred boundaries between a working relationship and a social relationship, all of which causes the boss huge stress about running a disciplinary meeting. If that's the case I say to my clients: if you are just not comfortable with it, don't do it.

Some clients like to take quite a leading role with me being fairly quiet in the disciplinary meeting. Others are the opposite. They want me to lead the entire discussion and they'll sit there and chip in on the points that they think they should cover off.

Either approach is fine because anything is better than an employer getting all stressed about the thought of the disciplinary meeting, and then stumbling their way through the meeting.

It's quite easy for a disciplinary meeting to go off track. No problem if the employee says something they may regret, but perhaps a big problem if the employer does this.

The Disciplinary Meeting:

So the Employer has done an investigation. They believe they know what the issues are.

Suspension has been considered and discussed. Correct notice given. They are at the disciplinary meeting - and then employee comes out of left field and says something like: *"oh but you didn't know but Jane / John has been doing this (same conduct) and has been allowed to get away with it for years, and when I do it, you want to fire me"* or something completely left field that the employer is not prepared for.

The very worst thing an employer can do then is to press on with the disciplinary meeting. If you get caught out by something which you simply do not know the answer to, then you can and should adjourn the meeting and be open and honest about it.

Something like: *"I did not know about that. I'm going to talk to that person. I'm going to see what they say / I will get back to you / we will arrange another meeting."*

And just adjourn the meeting to carry on with the investigation later. Most employers don't want to go backwards at that stage but if you miss it out and make a decision to dismiss when there was a fair and reasonable explanation, the big danger of course, is an unfair dismissal, with big awards of compensation.

At the end of the disciplinary meeting you must make a decision. Do we call it misconduct (and perhaps give a written warning?) or serious misconduct (and give a final written warning?) , or is it a sufficiently serious breach of trust and confidence that will justify termination?

At the end of the disciplinary meeting the employer must make a decision.

Is there enough evidence to dismiss? If yes – stop!

The employer needs to stop and talk to the employee one last time before they make a final decision.

Even if it's only to go and get a coffee and have a chat, I always call a break. And this is so that I can show if I'm challenged on the decision that we did not make an immediate decision; we did consider the explanations given; we gave the employee the opportunity to make any comments of the proposed decision, and we reflected on those comments (even if very briefly) before the final decision was made.

If you have to go and talk to other people about what was said then you'll need to continue the disciplinary meeting later on but to be fair that doesn't happen too often.

Most issues are pretty straightforward: *"this is the issue, you need to explain to us your view."*

In those kinds of disciplinary meetings it's still just as important to take that break, consider what was said, and then come back with a preliminary decision.

Too many employers want to get this over and done with. They don't like employment law, it's all taking too much time, they think their lawyer / representative is costing too much money, and they want to get on with it.

Big mistake.

You have to show the process was fair. And then you need to explain to the employee concerned why you haven't accepted their explanation, why you have preferred alternative evidence and why you think this justifies termination.

Once again don't rush it.

The employee by this stage having been told they are likely to be fired may well want to reconsider their view.

It's often at this stage where we get into these discussions about resignation rather than termination.

It is very risky for an employer (on their own) to accept a resignation in these circumstances because it could look like the employer forced the employee into resigning rather than be fired.

At the same time there are plenty of employees who see the writing on the wall and do not want a termination on their CV and so they ask to resign.

That's another really good reason to have representation to make sure that the process is transparent and if an employee resigns it can be shown that they were not forced to do it.

Merely having a resignation in writing will not prove the resignation was freely given.

The reality is that there's an awful lot that can go wrong in disciplinary meetings and the common mistake of employers is that they rush it.

I personally think it is fair and reasonable that an employee knows exactly what the allegations are, and have seen all the evidence about the allegations, and have been given every possible opportunity to explain anything that they want, with anybody they want as a supporter or representative.

If the employer rushes any part of this process then they are going to have difficulty justifying the procedure used to terminate employment.

Every dismissal must be for good reason and done fairly.

"CYA" - one of my favourite expressions for employment law is "CYA". This means 'Cover Your Arse'.

And so when I tell clients we need to stop or we need to pause, or I need something further in writing or whatever, I just keep saying "this is CYA". And my clients know I am building up the evidence to be able to prove that there was a fair process leading to a fair decision – and that it is the arse of my client I am protecting!

Put it this way -CYA is not just protecting your backside but also protecting your wallet!

Here's the bad news:

There have been plenty of dismissals where there were good reasons to dismiss but they were procedurally unfair. And because of that the employer ended up paying out thousands of dollars in compensation to the fired employee. The sad news is that if the employer had got the process right they would not have paid out a cent. Employers often think it's hard to get the disciplinary meeting process right. It's not actually. They just need to spend a bit more time and effort on the process.

Here is a good example of what can happen when you get the disciplinary meeting process wrong…

A worker threw a boiling cup of coffee at another worker, and was awarded just over $15,000 for an unfair dismissal….

Annette Williams and Priscilla Horne both worked for Independent Stevedoring Ltd (ISL). They got into a heated argument at work. Punches were thrown. At the end of the fight, Williams walked away to make a coffee and claimed that Horne continued to abuse her. At this point, Williams threw her cup of boiling coffee at Horne's face and chest.

ISL carried out a disciplinary process and had a number of meetings but made significant errors in the process. ISL did not tell Williams when the disciplinary process had started, they didn't tell her about the possible outcomes, they did not tell her she was entitled to representation, they did not give her a copy of all of the statements, and ISL had not even talked to all of the witnesses or even explained that their primary concern was not so much the fight but the throwing of the coffee after the fight had ended.

It is baffling how such a large company with easy access to as many lawyers as they want got the process so very wrong.

The finding of the Authority was completely predictable – the Authority said: *"I find ISL's failure to comply with the statutory requirements was not minor and did result in Ms Williams being treated unfairly. The decision to dismiss in all the circumstances known at the time was not one that a fair and reasonable employer could have made".*

The original award for lost wages was almost $20,000, and $12,000 in compensation for the unfair dismissal, but both amounts were reduced by 50% because Williams did contribute to her own dismissal by throwing a cup of coffee into the face of Horne.

If ISL had got the process right - which by law they were required to do - then they would not have paid any compensation to Williams.

Action Exercise:

What will you do to make sure that your investigation before the disciplinary meeting is done fairly with full disclosure? What will you do to make sure you hold a well-run disciplinary meeting? Which other people will be with you in your disciplinary meeting. (You should never do it just by yourself).

Key Three: Don't do DIY Employment Law

If you've ever watched home improvement shows they always make everything look so easy. But the reality is that those TV shows don't show about 90% of what happens to complete a project.

As experienced tradespeople know all too well, home improvement shows are more about people than projects. In their pursuit of drama and a compelling story, they bypass a whole lot of details about how repairs and renovations actually get done.

A good example is floor sanding. Renting equipment to refinish your hardwood floors sounds reasonable enough at first glance—after all, you're just sanding off the top layer of wood.

How hard can it be? It's actually a lot harder than you think. Sanding machines require "the right touch" by someone who does floor sanding day in and day out. No matter how many times you watch a video, you won't get the feel for a floor sanding machine unless you use it a lot. Sanding one spot a few seconds too long can result in drum marks on the floor that will be extremely difficult to cover up. In other words if you make a tiny error it can be very expensive and time consuming to fix.

The same principle applies with Employment Law. Given the outrageous sums of money charged by some firms to do a fairly basic letter I completely understand employers wanting to give it a go. But, if you make a mistake it can 'bite you in the bum' and end up costing you a huge amount of money and stress.

Here's a good example of DIY Employment law that trips up a lot of employers.

Don't respond to personal grievance letters without taking advice.

You've dismissed an employee and have now received a personal grievance letter from that employee, or their lawyer or representative. Many employers make the big mistake of replying to this letter without taking professional advice.

So what happens is that the employer immediately takes a defensive position and writes a letter justifying their actions. They will draft a reply that says something like this…

"We sacked Johnny or Mary and we had a good reason to do so / we explained our concerns / asked for an explanation / this is what they said / in our view it was a fair and reasonable decision not to accept this explanation / the dismissal was justified" - or words to that effect.

What many employers forget is that everything in writing will be used against you. Also the moment you send a reply to the other side you have committed your position in writing. Which make it extremely difficult for someone like me to come in later and try and present a different argument.

So when I'm advising clients I ask them not to send a reply without me seeing it first. I don't mind if a client writes a reply provided I can read it before they send it.

If a reply is sent without taking professional advice it can limit your settlement options.

So for example let's say the employer got the process wrong on some point but nevertheless there was clear wrongdoing by the employee. In this situation I would accept that there are some procedural concerns, but I would say that these concerns are minor, and need to be weighed up by the wrongdoing of the employee (which in the Employment Relations Act is called "contribution" – meaning the Employee has contributed to their own dismissal).

Or there might be a recent case that is helpful to my position, or I might have a good relationship with the representative on the other side, and might ring that person for an 'off the record discussion'. There are numerous possibilities that can be written off by a rushed reply, from an employer that was under pressure.

CYA. Never do DIY employment law. Get advice.

Keep in mind that employment law is a specialist area of law and it's one of those areas of law that are constantly changing – so make sure the person you go to for advice actually knows employment law, and it's not an add on to their main area of work.

The 90 day trial period is a good example.

This area of law has been very difficult for employers who are constantly getting it wrong. A recent court case found a 90 day trial period invalid because the 90 day trial period did not have a start date! (Much to the amazement of some employment lawyers and advisors).

The employer said the employment agreement had a start date so that's the start date of the 90-day trial period. Unfortunately, the Court said 'no, sorry that argument is not accepted'. And the result was the 90-day trial period was found to be invalid so the dismissal and reliance on it was unjustified. Which had the inevitable result of an award of compensation, to the employee, for an unjustified dismissal.

I don't expect employers to keep up with these changes constantly arising out of court cases, and neither would I expect general legal advisors to know the latest developments in employment law either. It's a specialist area and it needs specialist advice. And getting it wrong is increasingly expensive: in this example the worker was fired without warning at Day 80 of the 90 day trial period, and received almost $30,000 in compensation for unfair dismissal.

Naturopath Vicki Martin worked for Healthy Living Trading Company, trading as the Hardy's health stores chain. She was fired 80 days into the job, with no prior warning or discussion and was simply told she had failed the 90-day trial period. To make matters worse, Hardy's claimed that there were work performance issues but admitted these had never been put to Ms Martin. In defence of this, Hardy's brand manager Margaret Hardy accepted Martin was never told her job was at risk. But Hardy said her style was to "nurture, not criticise" so she provided positive feedback to Martin.

At the Employment Relations Authority Hardy's argued that it was a justifiable dismissal because Ms Martin was within the trial period and Hardy's had concerns about Ms Martin's work. The ERA did not accept this at all, and said: *"…the failure to properly address performance concerns with Ms Martin was an unjustified disadvantage – it was not something that a fair and reasonable employer could have done, even if the trial period provisions had been valid and enforceable,".*

The Authority decided Martin should be awarded $20,700 for lost wages and $10,000 compensation for humiliation, loss of dignity and hurt feelings.

Getting it wrong can be very expensive….

The cheapest time to settle a personal grievance letter is…..now

Another reason I say don't do DIY employment law is because by far the cheapest time to resolve a Personal Grievance is straight after receiving a PG letter.

Employers are unlikely to be able to sit back and objectively weigh the situation up and have enough knowledge to know what the cost of fighting is and what is the cost of settling.

Employers are going to want to defend their business and they are going to want to defend their decision to dismiss. However it's at this stage where some matters can be settled at a pretty minimal cost. And often that minimal cost will be far less than the legal fees of fighting on.

Some employers say well look you are just encouraging employees to have a crack in the hope that they may get easy money. I fully understand that argument and there's some merit to it.

But I tend to look at it like this:

"What is the best outcome for my client?" And if I can get rid of a time wasting personal grievance for something under $2,000 then I say that will be cheaper than going to mediation and settling for the same amount there – but with the addition of a couple of grand in legal fees.

Having said that and this is based on my experience, some employment lawyers and employment advocates are well aware that their clients want to fight and that they know there are significant fees to be charged by encouraging clients to fight on. The employer needs to make a pretty hardnosed commercial decision about whether to fight and pay a truckload of money in legal fees or whether to settle. It all depends on the quality of their advisor. Are they truly acting in the best interests of the client or have they got a rather cynical streak of self-interest going on?

And it's up to the employer to make that call.

"I couldn't recommend Paul any higher. I had a problem with a franchise owner within my company and the solution Paul provided was a dynamic, fair and affordable one. Paul not only handed me the perfect solution he also helped me with the implementation of it and kept me calm. When I got frustrated "Paul would say… Stop Stop Stop and I would have to Listen Listen Listen. My company now has a completely different BETTER structure and I feel like I have the ownership of my company back. We also managed to have a few laughs along the way, I endorse Paul to everyone I meet, he is doing it different and has a fantastic company culture. Paul has made a huge difference to my business = life!

Danny Dehek
Elite 6 Business Networking
Christchurch.

Key Four: Go to mediation with the Employment Relations Service (ERS) as soon as possible

The ERS is a Government department and is part of MBIE. I've seen employers waste an awful lot of time refusing to go to mediation. Or - worse - waste an awful lot of time and money getting their lawyer or advisor to write time wasting nonsense about refusing to go to mediation.

Mediation is the primary remedy under the Employment Relations Act, and the Employment Relations Authority will not hear a matter without first considering if mediation will be useful.

So very rarely are there justifiable reasons to refuse to go to mediation. For the vast majority of unfair dismissals, I don't know why you'd spend a lot of time, effort and money trying to fight going to mediation, when the usual result of that, is the other side making an application to the Employment Relations Authority. This will automatically increase costs, and the Authority will do all they can to encourage the parties to go to mediation.

The bad news is that mediation will take time (about half a day) , and preparation will be required, and there will be costs to have your lawyer or advisor there.

The good news is that the mediation is free of charge and is provided by the Government.

So here's where mediation fits in.

You've received the personal grievance letter, and you haven't settled it because they are asking too much money. The next step is to go to mediation as quickly as possible.

However having said that, once you've done a reply to the personal grievance letter I tell my clients we are not going to play tennis here.

I'm not going to send letters out explaining why I'm right and they are wrong, when the other side are going to send me one back saying the exact same thing. Save that money and go to mediation.

So just to clarify:

Before going to mediation for my clients I do one thorough and researched reply, with any supporting documents attached to it. If the other side come back and say "no, you are completely wrong / we want a million dollars blah blah blah" there is no point in doing more letters.

The next step is to go to mediation as soon as possible...

The great thing about mediation is that it has a very high success rate. About 75% to 80% of disputes settle at mediation.

The major reason that most disputes settle is because both parties get an independent assessment of strengths and weaknesses of their position.

They also get an independent assessment of the cost of fighting on versus the cost of settling. For both sides of a dispute (employer and employee) this can be somewhat of a wakeup call.

Generally the employee finds out they may not get anywhere near what they think they should and the employer finds out they may end up paying an awful lot of money to defend a debatable position - if the parties choose not settle at mediation.

So it's a bit of reality checking provided by the mediator that encourages the parties to come back down to earth and look at the cost of settling.

Do you have a lawyer at the mediation meetings or not?

See my comments on DIY employment law….you do not need to take any representation to mediation, but (generally) you are a mug not to have representation (provided it is from someone who knows what they are doing!)

I love dealing with unrepresented people because they don't usually have much idea about employment law or cases, or a whole range of other things. And it is my job to exploit that for my client's advantage.

But to be fair it's pretty rare for people go into mediation without representation.

For employers this is another opportunity to settle. If we didn't settle prior to mediation (which happens a lot,) then this is the last chance to settle at a relatively low cost.

Keep in mind that a relatively low cost is not just the amount of compensation but it is also the legal fees paid by the client. The legal fees for an employer will significantly increase at the Employment Relations Authority if we don't settle at mediation.

So mediation puts pressure on both parties to be a little bit more realistic in their views. If you don't settle at medication the only place you can go to with a personal grievance is the Employment Relations Authority.

There is no alternative; you cannot go to any other Court. You cannot jump all this and say I'm going to the High Court because I think it's unfair. If it's an employment dispute it's going to go to the Employment Relations Authority.

Let me give you some ideas of the costs involved if you choose to go to the Employment Relations Authority versus going to mediation.

The average cost to represent an employer at mediation is around $2,500 to $3,500 + gst for a straight forward dismissal. [By straightforward I mean there was clear evidence of misconduct / a fair and reasonable disciplinary process and the decision to dismiss is perfectly justifiable. I do accept there are a wide range of other factors that impact on fees, such as dealing with a complete idiot on the other side of the dispute].

The average cost to the employer for the Employment Relations Authority would be $10,000 plus gst and there is no upper limit.

I know of cases where employers have spent $50,000 or [a lot] more at the Authority.

There have been cases where employers have spent a few hundred thousand dollars on legal fees, at the Employment Relations Authority.

It all depends on the amount of time that was spent in preparation / how much correspondence has there been? / how many people needed to work on the preparation? / were expert witnesses needed? / How many witnesses will there be? , And so forth and so on.

A 2016 study of Employment Relations Authority cost awards, found that for employers, the median costs awarded were only 29% of their court costs - $11,755 - and the median costs award was $3,431.

So you can expect to lose around 2/3rds of your costs – if you win.

Of course, if you lose an Employment Relations Authority case that's a real double whammy.

You will have to pay a contribution towards legal costs of the other side, of $4,500 for the first day, and $3,500 for any days after that.

Plus pay compensation awarded by the Authority as well. Plus any lost wages that are often awarded.

Plus pay your own costs of representation….now that's a bad day in the office……

All up the costs of going to the Employment Relations Authority can be horrendous which is why mediation has such a high success rate. It's that last opportunity for a bit of reality and common sense to come into play.

Case Study:

Remember the example I gave of the NZD & DC at the beginning of this guide? Their fees for mediation, the Employment Relations Authority, and a week in the Employment Court were $76,000 dollars!

That is actually really cheap – but my clients didn't think so! Luckily we had an emphatic win in both the Employment Relations Authority and the Employment Court, so in this particular example, the client got back most of their fees.

Plus my client had used a Calderbank offer [covered in the next section] to good effect which resulted in the recovery of more fees than otherwise would have occurred.

Key Five: Use Calderbank Offers

Calderbank Offers are often used after mediation and before going to the Employment Relations Authority.

Let's review what has happened so far:

The investigation was good, the disciplinary process and dismissal was fair and reasonable, we went to mediation, we did not settle, the other side have filed a claim with the Employment Relations Authority.

Before you get there, use Calderbank Offers.

They are a perfectly legitimately tool designed to put economic pressure and mental stress on the other side.

A Calderbank Offer is a written offer to settle a dispute (such as a personal grievance).

If the other side reject that offer and carry on with their personal grievance and lose, (or win less than the offer) then the other side will be required to pay a lot more of your legal costs.

So this makes it a much bigger gamble for employees to reject a good Calderbank Offer in the hope of winning more.

Great if they win – but a big gamble if they don't.

So Calderbank Offers mean you are saying to the other side: we want to avoid unnecessary legal costs / we are willing to make a fair and reasonable offer of $5,000 (or whatever your figure is) and if you don't accept our offer and fight on and the Authority finds against you or you win less money than what we are offering you right now, you will be ordered to pay a lot more of our legal fees. Quite a gamble if your case isn't very strong.

If a fair and reasonable Calderbank offer is turned down then that forces the employer to pay a lot of unnecessary money to go to the Employment Relations Authority to defend themselves.

Which is why the employee can get hammered on legal costs if they lose at the Employment Relations Authority or get awarded less than the money that has been offered earlier, in a Calderbank Offer.

Calderbank offers are a tool to increase pressure on the other side to accept a fair offer and move on.

It is also worthwhile remembering that Calderbank offers can be used by both sides of the dispute.

An employee may not want to incur all of the legal fees, and the risk, of going to the Employment Relations Authority, and may offer to settle for say $5000.

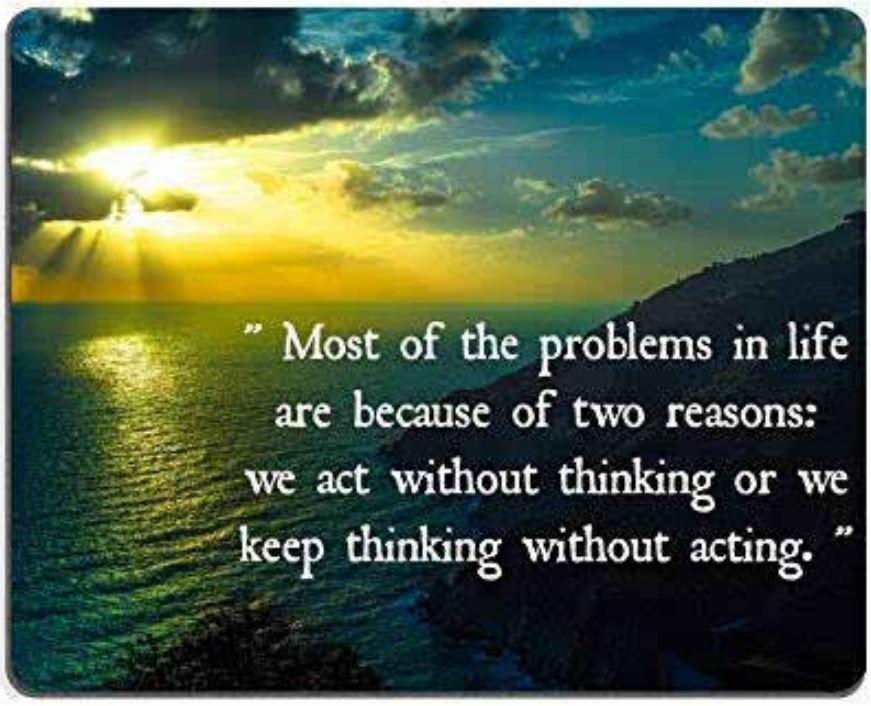
If the employer rejects that offer / goes to the Authority and is ordered to pay more than $5000 , the employer will also be ordered to pay a significant increase in costs owing to the other side.

Exactly how much will depend on the circumstances, but the starting point is $4500 (for the first day) as a contribution towards the legal costs of the other party.

There is no upper limit and the larger law firms can easily charge 25 grand plus for a few days in the Authority.

It's a bad day in the office if you refused to settle for say $5,000, and end up paying around 4 times that amount…

It's quite common for the potential costs liability to be bigger than any award so you can see how it's a good tool for one side of the dispute to put pressure on the other side, to come back down to earth and be a bit more reality based.



Key Six: Avoid the ERA (Employment Relations Authority) if possible

Let's review why you want to avoid going to the ERA if possible.

First of all there are the costs.

The costs of going to the ERA is very rarely less than $10,000 plus and it can easily run into the tens of thousands of dollars.

Employers are not usually experienced litigators. They under estimate the time that it takes to prepare for these things.

And when we say time the standard rule of thumb for every one day in Court there will be 2 to 3 days preparation. So a week of litigation would be 2 to 3 weeks of full time preparation.

The costs can be enormous and then of course employers often under estimate the stress.

If you've got to take staff out of their job and prepare them for the Authority it's a lot of stress for everybody involved. And so anyone appearing as a witness for the employer has to do what's called a brief of evidence which is simply a statement by the witnesses explaining their point of view.

A good one might be 2 to 6 pages. I've seen briefs of evidence go on for 20, 30, 40 pages. Written by a representative or a lawyer the cost of all that can be horrendous.

So the reality of litigation is that most employers vastly under estimate the cost, the time and the stress.

Then there is what we call "litigation risk". This means that no matter how good you think your case is, the reality is somebody else will be making the decision, and they may not agree with you. Therefore everybody going to any kind of court runs the risk of losing their case. And currently the odds of this happening are 50%!

I advise my clients to avoid the Employment Relations Authority - if at all possible (which goes back to Key Five). If you can use a Calderbank Offer to avoid going to the ERA, then by all means do so.

Talking about "litigation risk", I represented Mt Hutt Farms who dismissed their farm manager a few years ago. There was an outbreak of a disease affecting deer called Yersinia, which killed around 20 deer. The farm manager didn't know how to manage the outbreak and was ultimately dismissed (after a fair and reasonable investigation). The total cost to the employer was just over $20,000 for stock losses and vet costs and so forth. The Authority thought it reasonable a manager of a deer farm didn't know how to manage Yersinia, and called it poor work performance. The dismissal was found to be unjustified, and compensation and costs were awarded to the employee.

What if you cannot avoid going to the Authority?

If you are forced to go to the Authority a lot of employers think that they are locked onto a track where they must go and provide a full explanation at great cost about everything.

That's not entirely true. Firstly, you don't have to attend the Authority. The huge risk is that because you did not attend the Authority, they will accept the evidence presented in your absence, and make a large award against you.

Secondly, you could decide (after getting really good advice) that the costs of legal representation are not justified, and you will represent yourself. Employers are allowed to set out in writing their point of view and go along by themselves and answer any questions.

So if it's a pretty factual occurrence of what's occurred / the dismissal is clearly set out and there's no real debate about it, there really are only 2 questions the Authority to decide:

Was this a fair or unfair dismissal?

And if this was an unfair dismissal, how much compensation will the Authority award?

There are times where it may be better to go along by yourself, put your point of view forward, honestly answer all questions, and accept that the Authority will make a decision. At the very least, this will save thousands of dollars in legal costs.

The big risk in this approach is that if you don't do a very good job of representing yourself, you may end up with an award higher than it may have been with representation.

At the end of the day, that is something for the client to be informed about, and then make a decision.

Here's something to keep in mind.

I read a lot of Authority decisions and the penalties are definitely trending upwards.

Historically throughout the 2000's awards by the Authority were very low but there's no doubt that the trend now is for increasing levels of compensation.

Here are two examples:

In a recent case Marlborough Vintners 2011 Limited (MVL) were ordered to pay Anna-Maree Lynch $19,326.96 in lost wages and $18,000 compensation for humiliation, loss of dignity and injury to her feelings, for an unfair redundancy process.

MVL wanted to restructure the accounting side of their business and to replace Lynch, who worked as the accounting and administration manager with an external company. MVL said that they sought advice on restructuring and redundancy procedures from a large firm of national accountants, but at the Authority could not provide any written evidence of this. [Note – see the section on CYA].

With minimal if any consultation, Lynch was called into a meeting and told she was being made redundant. Quite unsurprisingly Lynch was very offended at this and took a personal grievance. For unknown reasons this was not resolved at mediation and went on to the Employment Relations Authority. MVL was not able to provide evidence of consultation about the proposed redundancy, and were not even able to prove that her position no longer existed at the time she was made redundant.

Moore, the director of MVL, defended the lack of documentation supporting his decision to make Lynch's role redundant, saying he was a "big picture" person instead of a "details" person.

The end result was quite predictable - almost $40,000 in compensation.

Even lawyers need good advice….

The Auckland law firm of Kevin McDonald and Associates employed Mr Johnson in 2011. 2 years later Mr McDonald told Mr Johnson that it was possible that he could be made redundant because he was not bringing in fees that were 3 times his salary (as is common in the legal profession).

Mr Johnson, as was his right, asked to see information about why he could be made redundant, but wasn't shown any proof of the economic reasons behind the redundancy. Therefore Mr Johnson thought the real reason for his redundancy was work performance concerns, and not economic reasons. He explained his concerns in detail to his employer, and even offered to have his salary reduced by $20,000, if he could keep his job. However Mr McDonald turned this offer down and made him redundant. The Authority stated the obvious - a fair and reasonable employer should have provided Mr Johnson with a full explanation for the redundancy.

Mr McDonald did not do that and the total award was just over $46,000.

Whenever possible avoid going to The Employment Relations Authority.

How do you choose a good employment law specialist to help you solve your problem?

Let me reply by asking you a serious question:

Who would you hire if you suddenly needed lifesaving heart surgery?

Would you go with a newly qualified doctor, fresh out of medical school with very little real world experience?

Or would you want the most experienced, veteran heart surgeon who had done hundreds of successful surgeries?

When you evaluate it this way, the obvious choice is the experienced heart surgeon.

In a life or death situation, you certainly wouldn't risk rolling the dice with the inexperienced doctor fresh out of medical school.

Now let me ask you another question:

If you decide today that you want to solve your employment law problem as quickly as possible while spending the least amount of money, time and effort who do you hire to help you do this?

Do you choose a lawyer who occasionally handles employment law cases in between other types of legal work?

Or do you hire someone who is an expert on Employment Law and practises employment law fulltime and has been helping their clients get great results for five to ten years or more?

Again the answer is obvious. One of the smartest ways to get great results with your employment law problem is to use an employment law expert with a proven track record.

I've spent over 16 years in handling employment law issues for my clients and I have a great track record of positive results from doing this.

So what do you do now?

If you would like some advice on how to handle your employment law issue

I invite you to have a short phone call with me. This phone call is for 20 minutes and there is no charge or obligation.

In our phone call I'll explain what your options are to handle your employment law issue and the most helpful steps you can take right now. I look forward to chatting with you soon.

Kind regards

Paul Brown

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