

LawNews

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EMPLOYMENT LAW

Pleadings, cross- examination and etiquette under the microscope

By Catherine Stewart, Barrister and Convenor of ADLS' Employment Law Committee, and Daniel Church, Barrister

Courtroom 2 of Auckland's Employment Court is usually an arena where cases are played out between employees and employers – often disaffected with each other – and a scene of cross-examination and scrutiny of evidence in a solemn setting.

But, on a recent Friday afternoon in September, there was a different atmosphere altogether. There was collegiality, interaction, some role-play – and even a bit of laughter – while his Honour Judge Corkill took a break from sitting in the big chair at the front to come down and lead a special session.

It was the Employment Court Procedure 101 workshop – an event aimed at upskilling employment practitioners (both lawyers and non-lawyer advocates) who are less-experienced in the Employment Court arena.

ADLS Employment Law Committee Convenor Catherine Stewart introduced the event, and Judge Corkill led the presentation, with assistance from Philip Skelton QC and Liz Coates of Bell Gully.

Mr Skelton QC and Ms Coates added their own insights on how to effectively represent both the



A full house at the Employment Court Procedure 101 workshop

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plaintiff and the defendant in the Court, from the perspective of experienced practitioners. There was even a "witness" (played by lawyer Charlotte Joy) who bravely subjected herself to the rigours of cross-examination and ably showed all present the challenges of a "hostile witness" when trying to prove a case!

Topics discussed included the importance of clear and well-defined pleadings, different types of proceedings in the Employment Court, disclosure and discovery procedures, examination-in-chief and cross-examination techniques, as well as general etiquette and professional ethics.

The first part of the workshop focussed on pre-trial procedures, with Judge Corkill emphasising the importance of crafting careful and rigorous pleadings. Both the statement of claim and statement of defence are a constant reference point for the Court, his Honour noted. They are a road map which explains to the Court (and the other party) what the issues are in the case. A

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strong pleading will identify, with sufficient particularity, each relevant cause of action and show the Court that party's "theory of the case". By contrast, a "scattergun approach" diminishes the credibility of both the party and their counsel.

Discussion then moved on to types of proceedings in the Employment Court, the most common being de novo challenges to determinations of the Employment Relations Authority, or narrower (non de novo) challenges to some parts of a determination.

As there is no "counterclaim" option in the employment jurisdiction, both parties must bring their own challenge to a determination. In practice, this can sometimes lead to timing difficulties. A challenge must be brought within 28 days, but one party will often wait to see if the party tries to challenge, before deciding to do so themselves.

Judge Corkill then touched on a few interlocutory steps that may be taken in the Employment Court, one of the most common being that of disclosure. Documents sought by one party for disclosure by the other party must be relevant, defined and proportionate to the pleaded issues. His Honour referred to the adage, "Fishing may be OK, drag-netting is not!"

The second part of the workshop focussed on the hearing itself. After a brief word on etiquette and professional conduct, workshop attendees were treated to some helpful demonstrations on the calling of a case, referring a witness to a document not in the common bundle of documents, and leading evidence from witnesses.

Perhaps the most entertaining piece of theatre in the Court that day was a demonstration of how to effectively diminish the credibility of a witness who has made a prior inconsistent statement. The "Five Cs" – confirm, contrast, credit, confront and commit – were employed to great effect by Philip Skelton QC, leaving the witness' credibility somewhat dented!

The importance of leading evidence as to remedies was also referred to, and his Honour noted that this step is sometimes overlooked. If a claimant is seeking compensation for a grievance, he or she must provide a satisfactory evidential basis for doing so. It is therefore often appropriate and necessary to lead as to the financial and/or psychological consequences of a grievance.

Overall, the workshop was very well-received, and attendees came away from it with greater knowledge of and increased confidence in Employment Court procedures. It is hoped that this workshop will become an annual event and, if so, it is highly recommended for those who practice in employment law at a junior level and wish to upskill their Employment Court litigation and advocacy skills.

The paper for the Employment Court Procedure 101 workshop can be found on the Employment Court website at <https://www.employmentcourt.govt.nz/about/papers-and-speeches>. ❖



ADLS Employment Law Committee Convenor Catherine Stewart



His Honour Judge Corkill



Philip Skelton QC addresses the bench at the workshop

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