



Forecasting Risk for your Employer Clients

Margaret Robins, Workplace Law, 8 September 2009





Forecasting Risk for your Employer Clients

The Four Crucial Questions

1. Do employers get a fair deal in court these days, or is the law weighted against them?
2. If an employer is successfully sued, what level of compensation might be awarded against them?
3. How much does it cost an employer to defend an employment dispute?
4. What factors increase the risk or cost?



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The Three Stages of an Employment Dispute

Mediation

provided by the Department of Labour, free of charge

the parties try to negotiate a settlement with the assistance of their lawyers and a trained mediator

if settlement is reached, the mediator draws up a full and final Settlement Agreement that both parties sign.



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The Three Stages of an Employment Dispute

Mediation

80% of all commenced employment disputes are resolved at or before mediation.

10% just dissolve at that point

only 10% of employment disputes go on to a hearing in the Employment Relations Authority



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The Three Stages of an Employment Dispute

Employment Relations Authority

Mediation has failed so the employee commences proceedings in the “ERA”

Witnesses are examined and cross-examined on their written statements

Most Investigation Meetings last one day

The ERA Member issues a written decision and awards costs against the losing party





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The Three Stages of an Employment Dispute

Employment Court

Either party may appeal the ERA's decision to the Employment Court

The Employment Court is a formal hearing. Lawyers wear gowns, as in the High Court.

The Employment Court issues a written judgment and awards costs against the losing party

1. Do employers get a fair deal in court these days or is the law weighted against them?



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Good news and bad news...

The good news: A move away from a “technical” to an “overall fairness” approach.

ERA and Employment Court judgments do not indicate an anti-employer bias.

The bad news: “Mediations in 2006 to 2008 are up 26% on previous years” (Minister of Labour 1 July 2009).

1. Do employers get a fair deal in court these days or is the law weighted against them?

Summary

The good news is that employers these days don't have to conduct a technically perfect disciplinary process, so long as they act with overall fairness

The bad news is that employers are more likely than ever to be on the receiving end of an employment dispute

2. If an employer is successfully sued, what level of compensation might be awarded against them?

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There are two major kinds of compensation available to an employee in an unjustified dismissal claim:

Reimbursement of loss of remuneration caused by the dismissal (usually salary, notice, medical insurance, use of a motor vehicle) and

Compensation for distress and injury to feelings

2. If an employer is successfully sued, what level of compensation might be awarded against them?

Loss of any benefits

reimbursement for *actual* loss, so if the employee finds new employment two weeks after dismissal, s/he is only entitled to reimbursement of two weeks remuneration

The Employment Relations Act says reimbursement “*up to three months remuneration*” The ERA can award more than three months but the employee has to show exceptional circumstances.

2. If an employer is successfully sued, what level of compensation might be awarded against them?

As a general rule, an employer has to be prepared for an award of salary of around 3 months if:

the employer loses the case; and

the employee is still out of work at the date of hearing; and

the ERA or the Court finds that the employee has made all reasonable efforts to find alternative employment.

2. If an employer is successfully sued, what level of compensation might be awarded against them?

2008 awards of compensation for distress

80% of awards: \$8,000 or less

0.07% (13 out of 202) awards more than \$15,000.

The highest award was \$25,000

January to June 2009 awards of compensation for distress

80% of awards: still \$8,000 or less

2 cases over \$10,000 but none over \$15,000

(Department of Labour Compensation Awards; available at
www.dol.govt.nz)

2. If an employer is successfully sued, what level of compensation might be awarded against them?

Summary (for standard, not exceptional) cases:

reimbursement of actual loss up to or around 3 months

compensation for hurt feelings, most less than \$10,000

high earners get awarded reimbursement for longer and receive higher compensation for distress

3. How much does it cost an employer to defend an employment dispute?



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Representatives:

Lawyer

Employment advocate/ consultant

Employers and Manufacturers Association

In house lawyer or Human Resources Manager



3. How much does it cost an employer to defend an employment dispute?

Typical legal costs

Mediation:	\$2,500 to \$7,500
ERA:	\$10,000 to \$30,000
Employment Court:	\$10,000 to \$50,000

Costs awards

no provision for getting mediation costs back except as part of the mediated settlement

ERA awards costs calculated at \$3,000 per day of hearing

Most ERA hearings are concluded in one day

4. What factors increase the risk or cost?



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a claim of workplace bullying

a claim for reinstatement

a very senior employee

an employee in a specialised field whose prospects of securing new employment are small

groups of employees making a class claim

an employee who is, or whose lawyer is, intransigent.



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Summary:

Employment disputes have increased by more than 25% over the last few years

Awards of compensation to employees in standard claims are not outrageous

Costs awards are so low that even a successful employer will be left substantially out of pocket after a standard ERA hearing

In standard cases, employers are better to settle at mediation than go to a hearing

Employers can sue employees but this aspect of employment law is beyond the scope of today's presentation.



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