

## PRACTITIONER PAPER

### Dispute Resolution in the Employment Tribunal

#### Part Two: Adjudication

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Adjudication under the Employment Contracts Act (the ECA or the Act) is synonymous with arbitration, and chosen to help emphasise the break from the arbitration-based industrial relations system that prevailed previously in New Zealand. Many advocates will, by now, be acquainted with the difference between mediation and adjudication or arbitration. The process of adjudication before the Employment Tribunal is similar to the process which takes place before the Employment Court, or for that matter, the process which takes place before the District or High Courts. In adjudication, both parties put to the Tribunal argument and the evidence in support of that argument. The process of adjudication leads to a decision by the Employment Tribunal. The decision is legally binding on the parties unless appealed on an issue of fact or law to the Employment Court. This paper deals with the practicalities and points of procedure involved in adjudication before the Employment Tribunal.

#### The adjudication setting

The typical adjudication setting in the Tribunal involves five conference tables. Each table will have a microphone, and one table will have the Tribunal recording equipment. The hearing will be fully recorded, and transcripts made available for any appeal that might follow. Do not rattle papers or click pens; the recording equipment is sensitive, as probably is the Tribunal secretary operating the equipment. The head table will be for the adjudicator. Directly in front of the head table will be two tables for the applicant and the respondent, and their respective advocates if they have representation. Employers and employees may represent themselves in adjudication, as in mediation. Alternatively, they may have advocates representing their interests.

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In Tribunal proceedings, advocates may or may not be lawyers. For clarity and consistency, the discussion will assume throughout that the parties are represented by advocates in the adjudication process.

To continue with the setting, the distance between the adjudicator's table and the tables of the parties is 2.5 metres. One advocate will be sitting with an advisor from the company. At the next table the grievant will be sitting with his or her advocate. Counsel are robed when appearing before the Employment Court, but advocates are not robed when appearing before the Tribunal. The table directly across from the table of the secretary of the tribunal is where the witnesses will give evidence. Witnesses will stand beside this table and be put on oath or affirmation prior to giving evidence.

The physical setting described above requires a particular style of advocacy, a point not immediately grasped by some advocates. The setting is more akin to a conference room than to the High Court. The tables are close, the atmosphere more relaxed, and the tone of advocacy more businesslike than rhetorical. It is unnecessary to stand in order to make submissions or objections. There are water jugs and glasses on all tables. Advocates are required to have five copies of all exhibits, and to have supplied these copies to the secretary of the Tribunal prior to the commencement of the hearing. When the advocate raises the exhibit during the hearing, the secretary will distribute the exhibit to the other party, the witness, and the adjudicator, while keeping one copy. There is nothing to prevent the advocate organising the labelling of exhibits prior to the hearing. Advocates will be seated when the adjudicator enters the room. There are seats behind the advocates' tables for the public to sit in on the disputes. Most of the adjudicators do not require advocates to rise when they enter the room. If the adjudicator has this requirement, it will be announced by the secretary of the Tribunal.

On the morning that this description was prepared, a personal grievance was to be argued before the Tribunal in Dunedin. The advocate for the employer was feeling particularly prickly. The Tribunal had steadfastly refused to alter the date of the hearing which had been agreed to six weeks previously. He was irritated because he failed to recognise that five copies of the exhibits were required. He had had to make photocopies on the Tribunal's photocopier, and been charged 25 cents per copy. Outrageous!

The advocate for the employee was feeling more relaxed. She had just finished a cigarette outside the Tribunal rooms as the adjudicator arrived. Smoking is not allowed in the Tribunal offices. She had shaken the adjudicator's hand as the adjudicator was entering the Tribunal rooms, but knew that this would be of little effect. She had lost the last three cases before this adjudicator. It had started to rain just before she put out her cigarette. The adjudicator entered his office, and commenced his morning search for his glasses. The office was filled with the aroma of freshly brewed coffee for the clients of the Tribunal. The coffee has yet to be conceded to the user pays philosophy, although the Tribunal itself requires a minor filing fee. The Tribunal secretary finished watering the tomato plants which grow in the window of the adjudicator's rooms just before the adjudication hearing commenced.



### The adjudication format

Having set the scene, the sequential steps of the hearing are easy enough for an experienced advocate to anticipate. The following is the usual order of proceedings in a contractual interpretation dispute:

1. The secretary of the Tribunal identifies the applicant, the type of dispute or grievance, the section under the Act in which the action is taken, and the respondent.
2. The adjudicator introduces herself or himself, and asks if the parties wish to raise any procedural or jurisdictional matters prior to the commencement of the applicant's case.
3. The applicant presents an opening statement which identifies the applicant's argument or legal theory, indicates what the evidence will show, and specifies the remedies sought.
4. The applicant presents evidence. Examination in chief is normally conducted via a written brief of evidence. Cross-examination and re-examination are completed. The adjudicator asks points for clarification.
5. The respondent presents an opening statement which identifies the respondent's argument or legal theory and indicates what the evidence will show.
6. The respondent presents evidence. Again, examination in chief is normally conducted via a written brief of evidence. Cross-examination and re-examination are completed. The adjudicator may ask points for clarification.
7. The respondent presents the closing argument. The closing argument summarises the evidence, and identifies legal precedent. Photocopies of all cases cited are to be provided to the adjudicator by the advocate.
8. The applicant presents closing argument. Again, the closing argument summarises the evidence, and identifies legal precedent. And again, photocopies of all cases cited are to be provided by the advocate to the Tribunal.
9. The adjudicator may allow the respondent a right of reply where the applicant's closing raises argument which the applicant could not anticipate.

The format, however, is not so straight forward in the case of a personal grievance.

### Threshold issues in personal grievances

In most legal jurisdictions, the burden of proof lies with the applicant or plaintiff. However, in the case of unjustified dismissals or actions, the burden lies with the respondent employer to justify the dismissal even though the employer is not the applicant or asserting party. The

applicant must simply establish a prima facie case which involves proving that the applicant was an employee rather than an independent contractor, that the applicant was actually dismissed, and that there are grounds for doubting the justification of the dismissal. However, the prima facie case is not always a simple matter.

At the commencement of grievance hearings many adjudicators will give the advocates the opportunity to raise any jurisdictional and procedural issues. There are two types of issues which the advocate for the applicant must anticipate. First, the respondent may maintain that the Tribunal does not have jurisdiction to hear the matter because the applicant is or was an independent contractor, and not an employee. The purpose here is not to discuss case law, but to give practical guidance to what advocates can procedurally expect before the Tribunal. Nevertheless, we would refer to the case of *The Ministry of Transport v George Winiata Rex Tito* 293AP/91 for a full discussion which sets out the range of tests for distinguishing the difference between an employee and an independent contractor.

The second type of procedural jurisdictional issue relates to the question of whether the employee was dismissed or resigned. While the onus is on the employer to justify a dismissal, the applicant employee, in establishing the prima facie case, must establish that the employee was actually dismissed, in order that the onus of justification is shifted to the respondent employer. In most cases the parties will agree that a dismissal has taken place. However, often an employee who has resigned will maintain that he or she was forced to resign, and that the forced resignation was a constructive dismissal. We would refer you to *Auckland etc Shop Employees' IUOW v Woolworths (New Zealand) Limited* (1985) AP963 for a full discussion of the issues related to constructive dismissal.

Where the questions of independent contracting or constructive dismissal arise, the onus is with the applicant employee to establish the balance of probability that the applicant was indeed an employee, or that the applicant was indeed dismissed, or perhaps both. In terms of procedure, most adjudicators will ask the applicant to present argument and evidence in respect to the threshold issue. The adjudicator will then ask the respondent employer to present argument, evidence, and summary in respect to the threshold issue. Next the adjudicator will ask the applicant to sum up the evidence in respect to the threshold issue, and sometimes the adjudicator will make an oral decision on a jurisdiction question. Often, though, the adjudicator will reserve a decision in respect to jurisdiction, but will ask the parties to proceed with the substantive issue.

The general practice is to hear the threshold issue, and the substantive issue at the same hearing. Where the adjudicator rules against the applicant in terms of jurisdiction, there is no necessity to comment upon the substantive issue. Some advocates would prefer that the threshold issue be decided before proceeding with the hearing on the substantive issue. That, however, is not the way that the Tribunal or Court normally handle the matter. The reasons the Tribunal and Court will reserve decision on the jurisdictional issue, yet proceed to hear the substantive issue, relate to practicalities: time, witnesses, travelling expenses, and so forth.

There are two practical matters that arise from this discussion. First, the threshold issue is generally held as a separate adjudication within a broader adjudication. The adjudication format outlined above applies in respect to the threshold issue, and advocates should be prepared to argue the threshold issue separately. Advocates should prepare a separate case



in respect to the threshold issue, and that case should be contained in a separate set of written submissions. Second, advocates should be prepared to proceed on the day with the remainder of the case. If the threshold issue is unusually complicated, or lengthy evidence is to be given in respect of the threshold issue, then this should be raised with the secretary of the Tribunal at the time that hearing dates are discussed and agreed to. The possibility of hearing the threshold issue and the substantive issue in one sitting can then be estimated in advance.

### The shifting onus in personal grievances

To establish that the applicant was indeed an employee and in fact dismissed is not, of itself, sufficient to the establishment of a prima facie case by the applicant in an alleged unjustified dismissal or action case. In a leading case on the shifting onus *Woodhouse, P determined in Wellington Road Transport IUOW v Fletcher Construction Company Limited (1982) ACJ663* what constituted a prima facie case for the applicant:

Even so I am satisfied I have reference to the statute itself and as a matter of principle that although an initial onus in the legal sense may be said to rest upon a worker or the union to put forward a prima facie case of grievance that initial responsibility is likely to be sufficiently satisfied once the fact of the dismissal has been established together with the surrounding circumstances which are relied upon as reason for the complaint of unjustifiable dismissal.

The question answered by this decision was that the employee had to establish as part of the prima facie case that there was a dismissal. The question left unanswered was the meaning of the words "established together with the surrounding circumstances which are relied upon as reason for the complaint of unjustifiable dismissal". In *Colgan, J Northern Hotel etc and Related Trades Employees' IUOW v The Little Ponsonby Tavern Limited 66ACL/90*, decisions of the Court in respect to the shifting burden were analysed. In particular, cases were considered where the parties had agreed that a dismissal had taken place, but where the employer insisted that the union had failed to establish a prima facie case because they had not shown an absence, or the possibility of an absence of justification for dismissing the worker.

The *Colgan, J* analysis leads to the general conclusion that a prima facie case requires the applicant employee to establish that there was potentially an absence of justification for the dismissal. We would refer you to *Colgan, J's* valuable analysis, but here we wish to more simply alert advocates to the possibility that the opposing advocate may submit that there is no case to answer on the basis that a prima facie case has not been established. In practical terms, this means that the applicant may have to present evidence, first, in relation to employee status and, second, in relation to the fact of a dismissal and, then third, present still further evidence that raises doubt as to the justification for the dismissal.

#### Alternative Strategies

In this last respect, the advocate for the employee may adopt one of two possible strategies. The advocate may call the employee, and all remaining witnesses, and complete the

employee's case. The advocate for the employer may then submit that there is no case to answer, that the argument is not correct in law, and/or that the evidence is not sufficient to raise doubts about the justification for dismissal. This strategy would be adopted by the advocate for the employee only when the advocate has been able to fully anticipate the argument and evidence of the respondent employer. If that is the case, the applicant will have been able to put his or her own side of the story, as well as presenting rebuttal argument in anticipation of the employer's case.

But, for reasons outlined below, the applicant employee cannot always fully anticipate the employer's case. A second strategy, appropriate to such circumstances, is for the employee's advocate to present only sufficient evidence to establish a prima facie case, and to endeavour to reserve the right to complete the employee's case after the employer has fully presented argument and evidence. Once the onus has clearly shifted, then the format for the grievance may be radically altered. The practical consequence is that, having established the prima facie case, the advocate for the applicant employee may insist that the respondent employer present justification and evidence in respect to the dismissal prior to completion of the applicant's case. The grounds for this submission are that the party which bears the onus is obliged to begin the case. The applicant is then likely to request the Tribunal's consent to present rebuttal evidence after the completion of the employer's case. On a number of occasions the Court has actually insisted that the employer first commence with submissions and evidence. The extent to which this approach might be adopted by the Tribunal has yet to be fully tested.

This type of cut and thrust is highly likely under the ECA, in that the employee applicant is often disadvantaged in respect to evidence. There are no provisions for discovery in either the Act or its regulations, as they relate to the Tribunal. The employee applicant must rely on the power to subpoena witnesses and their accompanying documents as evidence. Hence, the applicant is unable to anticipate the contents of the documents, and witnesses who remain in the employ of the employer are notoriously reluctant to testify against their employer. The applicant can gain a substantial advantage by having the employer's argument and evidence put first.

### Respondent cross examination of applicant

We are unwilling to predict whether, or under what circumstances, the Tribunal would insist on the respondent employer commencing and completing their case prior to the completion of the full case of the employee. The advantages are mixed. If the employer is required to complete the case, then the employer will be allowed the final summing up. In addition, the continuity of the employee's case is disrupted in that rebuttal evidence would be required later in the hearing. Nevertheless, where the employee has been unable to anticipate the employer's full argument and evidence, then the manoeuvre makes sense. If this move was overruled by the adjudicator, then the employee's case would have to be completed. The applicant employee, and each of the employee's witnesses would be examined by the advocate for the employee, and cross-examined by the advocate for the employer. The cross examination can cause particular problems for the employer if the advocate for the employer does not attend to a particular requirement.



That requirement is that the employee, and each witness for the employee, must have the opportunity to answer any arguments, allegations, and contradictions that will be made later when the employer's case is put. The employer's advocate must say "Let me put to you Mr Employee, that your employer will say that you were three hours late on the Monday morning. Would you say that your employer is not telling the truth?"

If the employer's advocate does not put all important allegations, contradictions, and arguments to the employee, then one of three things may happen. First, it is always possible that the advocate for the employee may be asleep during the evidence given by the employer and witnesses for the employer, and that nothing will happen. Second and more probably, the advocate for the employee will object to the admission of the employer's contradictory evidence on the basis that it has not been put to the employee, and therefore its truth has not been properly tested. Third, the advocate for the employee may simply ask that rebuttal evidence be allowed. In this way, the employee's advocate achieves in part that which is sought by insisting that the employer's case be put first.

It is entirely arguable both that the employee is entitled to have allegations, contradictions, and argument put to the employee by the employer's advocate, and also that these allegations, contradictions and arguments should be put, and understood by the employee, in the context of the actual "accuser's" evidence. That would require the employer to proceed first, after a prima facie case is established, and before rebuttal evidence is put by the employee.

The accused in a criminal trial not only hears the allegations as put by the Crown, but understands the context of these allegations. The accused hears the evidence of the Crown from which the allegations arise prior to putting the accused's evidence and being cross examined by the Crown. The employee does not have the analogous benefit of hearing the context of evidence from which the allegations arise. This means that the advocate for the employer should meticulously put these allegations to the employee and witnesses for the employee. The practical advice is that time should be spent specifically preparing for the cross-examination of the employee, not only to cover facts relevant to legal points, but to ensure that the employee has a fair opportunity to understand the overall context of the case being put against her or him. This will ensure that there is an argument available on behalf of the employer that rebuttal evidence should not be called.

### Presentation of evidence

In adjudication proceedings before the Tribunal, evidence is presented in a customary sequence: by examination in chief, cross examination and re examination. The Tribunal encourages the presentation of a written brief in respect to the examination in chief. This allows the adjudicator to come to terms early with the witnesses' perceptions of the facts and, from the advocacy point of view, it leaves these perceptions for the later perusal of the adjudicator. Written briefs also allow the detailed presentation of the calculations of wage arrears, costs, and other matters which are difficult for the adjudicator to take notes on. Written briefs are particularly effective when presenting evidence from expert witnesses where that evidence must be considered, digested, and thought through at a later date. In addition many industries have a language all their own, and the technical context of the industry is

sometimes necessary to understanding the sense of a particular case. Here again written briefs are useful, as sometimes are other visual displays. Remember that the adjudicator is not a mathematical genius, technical expert, or wizard. Information has got to be conveyed in an understandable form.

The Tribunal does not strictly apply the rules of evidence in so far as those rules are exclusionary. Many of the reasons for refusing to admit evidence relate to criminal law, and the exposure of certain forms of evidence to untrained juries. Adjudicators are either legally trained or long since hardened to the problems of evidence. The Tribunal, therefore, admits most forms of evidence, but assigns appropriate weight to that evidence in the process of making decisions. Advocates should by all means raise objections to evidence put before the Tribunal, and be prepared to argue the principle involved in the objection. But the advocate should also be prepared to make submissions on the weight which should be placed on that evidence if admitted. The Tribunal is not bound by the evidence acts. Nevertheless, the provisions within the acts have been placed there for sound reasons. Rather than merely citing the rule, the advocate should tell the Tribunal the sound reasons for the rule, and particularly for the application of the rule to the particular facts at hand.

For example "I object, that is hearsay!" is unconvincing. But the Tribunal cannot ignore the argument that, "that is not only hearsay, but the third report in the tenuous linkage of reports. The witness has testified that he was told on Sunday night by the night watchman that the foreman was made aware of the applicant's early departure from the plant on Friday night by the on-call electrician".

The following objection is also unconvincing: "I object, that is similar fact evidence!" On the other hand, the Tribunal is likely to be entirely convinced by the following: "My objection is that the employer may have dismissed three union delegates in three years, but that does not mean that the last union delegate was dismissed for union activities, nor is there any proof that the first delegates were dismissed for union activities. Even if the first two delegates had been dismissed for union activities, that provides no direct evidence that the last union delegate was discriminated against. I ask the Tribunal to consider the question of similar fact evidence".

### Submit All Relevant Evidence

From the Tribunal's point of view, decisions are generally overturned because of evidence which has not been admitted, not because of the admission of too broad a range of evidence. The adjudicator must simply show that he or she has properly weighted the evidence, and selected points of evidence for emphasis with a mind to their relevance.

Similarly, advocates should be careful to ensure that all relevant evidence is presented to the Tribunal. One should bear in mind the comments of Chief Judge Goddard in *Stams v Denhards Bakeries Co* 73WLC/91. The Judge, in essence, concluded that where a party is able to produce a witness, but does not do so, the inference can draw that the witness' evidence does not support the case:



The respondent was in a good position to produce these witnesses. It knew for sometime what case it had to answer. We cannot speculate about what the witnesses may have been able to say, if called. We can, however, legitimately infer that if they had been able to support the respondent's case they would have been called to give evidence. The failure to call them leads to an inference that a conscious decision was made by the respondent not to do so.

The Judge does not go so far as concluding that their evidence would be contradictory. Aside from speculation about what that evidence might have been, the failure to produce witnesses and the ensuing silence often hang heavily against the actual evidence given. If the evidence is likely to be contradictory, then don't produce the witness. If the evidence is supportive, do not overlook calling the witness. A failure to do so can have an unnecessarily negative impact on the course of your evidence.

In addition, the decision of Colgan, J in the appeal of *Singh v Deka New Zealand Ltd* 21 AEC 91 is both a reminder that critical witnesses should be brought forward at the Tribunal adjudication stage, and a signal that the Employment Court is likely to take a narrow view as to the introduction of rebuttal evidence on appeal. One feature of the Deka appeal was made pursuant to s.95(4)(b). Deka sought to admit evidence which was not before the Tribunal. The Judge outlined two tests as to the admission of such evidence. The first test was whether the party could have called a witness by the exercise of reasonable diligence. In this case the witness in question was an employee of the company, and there was no convincing evidence that he could not have been called to give evidence to the Tribunal. The second test related to whether the failure to produce the witness related to an exceptional circumstance.

Deka argued that the importance of the particular witness' testimony did not become apparent until the case was being heard before the Tribunal. In essence the course of the evidence had taken counsel for Deka by surprise. The Colgan, J conclusion was simply that this was the nature of the adversarial system, and that while the system provided checks, like the opportunity to call for rebuttal evidence, it was not exceptional that the opportunity to present evidence on more minor issues is, from time to time, foregone. The message from the comments of the Chief Judge, and from the Colgan, J analysis is that the failure of the parties to put their cards on the table may mean either that they might be perceived to be cheating (even if they're not), and that the game may come to a conclusion, and the proceeds be taken home, without the last hand being played.

### Equity and good conscience

The final point about the ECA to be addressed here is its emphasis on the Tribunal's and Court's duty to decide and act in equity and good conscience. We could not find more eloquent words in which to make the point than those of Chief Judge Goddard in *Food & Chemical Workers' Union v Talley Fisheries Limited* 73WLC/91. The Chief Judge commented that the structure of the previous Labour Relations Act of 1987 resulted in many cases ...

... being determined on highly technical grounds. Now that these chains have been broken, it is quite plain that, wherever possible, technicalities must be put to one side and both the Court and the Tribunal exercising their respective jurisdictions must recognise that the duty which they are required to discharge is a duty to do substantial justice to the parties according to the real equities and merits of the case before them.

The Chief Judge goes on to identify the Tribunal's responsibilities more precisely:

The Employment Tribunal is required (as is the Employment Court) to determine all matters before it in such manner and to make such decisions or orders (not inconsistent with the act or any other act or with any applicable collective employment contract) as in equity and good conscience it thinks fit: s.79(2) and s.104(3). In the case of the court there are certain exceptions with which we are not presently concerned. Equity and good conscience imports a broader view of justice and fairness than is comprehended by the mere enforcement of rights.

The approach to equity and good conscience focuses not only on the interpretation of the substantive aspects of the law. Szakats, *Law of Employment*, has described the procedure of the former Labour Court as "not entirely adversary but substantive inquisitorial elements are included in it". The point made in *New Zealand Insurance Guild IUW v The Insurance Council of New Zealand* 1976 ICJ/173 is recited. The Court has "a duty to strive to reach a conclusion on the matter and not likely allow the onus of proof to be decisive". The same comments may be made about the Employment Tribunal, which is directed to take into account equity and good conscience, and not constrained by the traditional laws of evidence and procedures. Adjudicators will have to find the delicate balance between an inquisitorial approach, and overstepping into the adversarial arena.

### Concluding comments

This two-part analysis has looked at the processes which are provided by the Employment Tribunal for resolving disputes over employment contracts. The processes have been identified as mediation and adjudication. The analysis has argued that the primary emphasis of the Employment Contracts Act is on mediation, and that this is appropriate to the Government's deregulation of the labour market. Mediation, as a disputes resolution process, is designed to promote bargaining and accommodation, and therefore is the appropriate process for a deregulated and efficient labour market.

This is not an analysis which represents an official policy of the Tribunal, or a report of Government policy. The analysis reflects my personal reading of the Act and presents my personal views in respect to the resolution of disputes. I have endeavoured to provide a practical description of the processes of mediation and adjudication. However, I have purposefully refrained from either offering legal advice or commenting on areas of the law upon which I am required to adjudicate.