



Resolving Employment Disputes; What Might It Cost?

At times employers seek my assistance to resolve employment disputes and as a part of that process they may consider resolving the matter by attempting to reach a settlement with the employee, either through without prejudice discussions between the parties or their representatives, or at mediation. When this situation arises, I usually get asked about what it might cost if the case progresses to the Employment Relations Authority.

So, in this post we will discuss resolving an employment dispute through a process that seeks to negotiate a settlement, review some key financial and strategic considerations for employers, consider the components that might make up an offer, and discuss the approach taken by the Courts to determine compensation awards.

Options for Settling Employment Disputes

There are several avenues for resolving employment disputes, each tailored to different situations:

Negotiating a settlement between the parties directly or at Mediation: This is often the first step in the dispute resolution process, and if done at mediation, its facilitated by a mediator from the Ministry of Business, Innovation, and Employment (MBIE). It's a voluntary and confidential process aimed at reaching a mutually agreeable solution.

Employment Relations Authority (ERA): If mediation fails, either party can take the dispute to the ERA, which investigates the matter and makes a binding determination.

Employment Court: Parties dissatisfied with the ERA's decision can challenge the decision in the Employment Court. In certain defined circumstances, the Employment Court's judgment can also be appealed, through the Court of Appeal and the Supreme Court.

Settlements: financial and strategic considerations

Employers must carefully consider several factors before deciding to settle:

Cost of Litigation: The direct costs of taking a case to the ERA or court can be substantial, not just in terms of legal fees but also in the time and resources diverted from normal operations. Even if an employer is successful in the ERA, a claim for costs will only be a contribution at most. The Authority can choose to let costs lie where they fall, award costs to the successful party, invite the parties to settle costs between themselves or set out a timetable for each of the parties to file a submission on costs. As a starting point, the ERA currently uses a notional tariff of \$4,500 for the first day of an investigation meeting in the ERA and \$3,500 for each additional day.

Risk of Adverse Publicity: Employment disputes can attract negative media attention, which may harm the employer's reputation. While settlements (either directly or via mediation) remain confidential, determinations in ERA cases and judgements in Employment Court cases are publicly available.

Risk of Reinstatement: The ERA can order reinstatement wherever it is practicable and reasonable to do so, if it is found that an employee has been unjustifiably dismissed and if the employee wants to return to their job.

Probability of Success in the ERA or Court: Even if an employer believes they have a strong case, the unpredictability of outcomes and the possibility of an appeal should be considered.

Potential for Precedent: Settling might avoid establishing a legal precedent that could affect future cases.

Expectations: Even though the process of reaching a settlement and the details of the agreement are supposed to remain confidential, if word gets out amongst your team that an employee reached a settlement and received a payment, it can be unsettling, and it can also influence your employee's expectations for any future disputes.

Components of an Offer to Settle

When settling employment disputes, the components of an offer can vary significantly, especially in direct negotiations between the parties. Often there will be components such as notice paid in lieu (if the employee's employment is ending), a compensation payment under section 123(1)(c)(i) of the Employment Relations Act 2000 for hurt and humiliation (which is tax-free), a reference or Certificate of Service, and a contribution to the employee's legal/representative costs. However, during direct negotiations or via mediation, parties can freely determine the components of a settlement offer. I've seen a number of settlements that have included items such as a phone or laptop, and even the occasional settlement that includes a tool or piece of equipment.

Considerations Regarding the Components Offered

When considering what to offer and the amount/s to offer, as well as of course taking into account what might resolve the matter for the employee, employers consider things such as the employee's length of service, the type of claim/s made by the employee e.g. unjustified disadvantage or unjustified dismissal, the likelihood of success and the significance of any potential risks if the case progressed to the

ERA, and the potential costs associated with not resolving the matter efficiently (and where the employee remains employed, this can include the costs and time required to take other actions, and/or the potential impact within the workplace that an unresolved issue can have e.g. on workplace culture).

Another consideration could be the bands for hurt and humiliation awards applied by the Courts, which were revised in 2023 by Chief Judge Inglis in an Employment Court decision where the Reserve Bank's Inflation Calculator was applied, resulting in bands as follows:

- Band 1: low level loss/damage = \$0 – \$12,000
- Band 2: mid level loss/damage = \$12,000 – \$50,000
- Band 3: high level loss/damage = over \$50,000

Case law can provide some guidance as to which band a case may fall into, but this can still be difficult to assess.

Remedies the ERA can Award

In an ERA case, the Authority Member can award a range of remedies which can include:

Interim reinstatement: If an employee has been dismissed, the Authority Member can order that they be reinstated on a temporary basis while they investigate whether the dismissal was justified.

Reinstatement: If the Authority Member finds that an employee was unjustifiably dismissed and they want to return to their job, they can order reinstatement wherever it is practicable and reasonable to do so.

Reimbursement: If an employee has been dismissed or subject to other unjustified action by their employer, the Authority Member can order the employer to reimburse the employee for wages lost until they are reinstated, or until they get another job.


Compensation: The Authority Member can order compensation to be paid to an employee for hurt and humiliation caused by dismissal or unjustified action.

Compliance: The Authority Member can order an employer to comply with their obligations e.g. pay wages and holiday pay owed to an employee, comply with the terms of the employment agreement or any settlement agreement (which the ERA can also require of an employee), or to pay a penalty as allowed for in the Employment Relations Act.

Conclusion

Settling employment disputes requires a thorough understanding of the legal landscape, strategic assessment of risks and benefits, and a clear view of the financial implications. Whether through direct negotiation or through formal judicial processes, each approach has its unique components and considerations. Employers and employees alike must navigate these processes with careful planning and, ideally, with expert advice to achieve the most favourable outcomes.

Do not hesitate to contact me to discuss this topic further or a particular matter that you might like assistance with.

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