
PRACTICE NOTE OF THE CHIEF JUDGE

1. It has come to the notice of the Judges that there may be some confusion among practitioners, and even inconsistency of practice in the registries, in relation to certain challenges to determinations of the Employment Relations Authority.
2. The difficulty arises when a defendant to a challenge is also dissatisfied with the determination but in other respects, and wishes to put in issue the whole of the determination or aspects of it different to those being challenged by the plaintiff. These are sometimes popularly referred to as “cross appeals” or “cross challenges”. Typically, the plaintiff’s challenge will be filed near the end of the period allowed by statute and any “cross appeal” will be outside that period. Two questions arise –
 - i. If it is outside the period, is leave necessary to file it?
 - ii. In any event, whether it is outside or inside the period, is there a need for a separate challenge involving a separate file and an additional filing fee?
3. The answer to these questions is not to be found expressly in the Employment Relations Act 2000. However, the Employment Court Regulations 2000 provide:

6 Procedure

...

- (2) *If any case arises for which no form of procedure has been provided by the Act or these regulations or any rules made under section 212(1) of the Act, the Court must, subject to section 212(2) of the Act, dispose of the case –*
- (a) *as nearly as may be practicable in accordance with –*
 - (i) *the provisions of the Act or the regulations or rules affecting any similar case; or*
 - (ii) *the provisions of the High Court Rules affecting any similar case; or*
 - (b) *if there are no such provisions, then in such manner as the Court considers will best promote the object of the Act and the ends of justice.*

4. This means that, if the Act and the regulations are silent on a matter of procedure, the Court must dispose of the case as nearly as practicably may be in accordance with the provisions affecting similar situations or the provisions of the High Court Rules, if any. There do not appear to be any provisions of the Act or the regulations affecting any similar case, except indirectly.

5. Regulation 20 requires the defendant to file a statement of defence. There seems to be no reason why such a statement of defence should not include a counterclaim. Under the High Court Rules rule 711 provides:

***711. Cross-appeal** - Where any person other than the appellant wishes to contend on the hearing of an appeal that the decision appealed from should be varied or discharged, that person shall, at least 7 days before the day fixed for hearing the appeal, file and serve a notice of cross-appeal, and this Part shall apply accordingly with all necessary modifications.*

6. The High Court's procedure is also governed by s74 of the District Courts Act 1947 which is as follows:

***74. Cross-appeals** – (1) It shall not be necessary for a respondent to give notice of motion by way of cross-appeal, but if a respondent intends upon the hearing of the appeal to contend that the decision of the Court below should be varied, he shall give notice of his intention to any parties who may be affected by such contention.*

(2) The omission to give such notice within a reasonable time shall not diminish the powers conferred on the High Court, but may at the discretion of that Court be ground for an adjournment of the appeal or for a special order as to costs.

7. The Judges have decided that a “cross appeal” or “cross challenge” may be included in a statement of defence to the statement of claim initiating a challenge to the Employment Relations Authority's determination.

8. Generally speaking, that statement of defence will be filed outside the 28-day period but within the period allowed for the filing of a statement of defence by the notice to defendant subscribed on to the statement of claim. However, leave will still be necessary to file a statement of defence out of time.

**T G Goddard
CHIEF JUDGE**

18 July 2003