



COVERSHEET

Minister	Hon Brooke van Velden	Portfolio	Workplace Relations and Safety
Title of Cabinet papers	Introducing an Income Threshold for Unjustified Dismissal Strengthening consideration and accountability for the employee's behaviour in the personal grievance process	Date to be published	By 31 January 2025

List of documents that have been proactively released		
Date	Title	Author
November 2024	Introducing an Income Threshold for Unjustified Dismissal	Office of the Minister for Workplace Relations and Safety
20 November 2024	Introducing an Income Threshold for Unjustified Dismissal ECO-24-MIN-0265 Minute	Cabinet Office
12 November 2024	Regulatory Impact Statement: Introducing an income threshold for unjustified dismissal	MBIE
November 2024	Strengthening consideration and accountability for the employee's behaviour in the personal grievance process	Office of the Minister for Workplace Relations and Safety
20 November 2024	Strengthening consideration and accountability for the employee's behaviour in the personal grievance process ECO-24-MIN-0268 Minute	Cabinet Office
7 November 2024	Regulatory Impact Statement: Strengthening consideration and accountability for the employee's behaviour in personal grievance process	MBIE

Information redacted

YES / NO (please select)

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Some information has been withheld for the reasons of Confidential advice to Government.

In Confidence

Office of the Minister for Workplace Relations and Safety

Cabinet Economic Policy Committee

Strengthening consideration and accountability for the employee's behaviour in the personal grievance process

Proposal

- 1 I propose a suite of changes to personal grievance settings in the *Employment Relations Act 2000* (the Act), focussed on strengthening consideration and accountability for the employee's behaviour in the personal grievance process.

Relation to government priorities

- 2 The proposals in this paper address the ACT New Zealand – New Zealand National Party Coalition Agreement (the Coalition Agreement) commitment to simplify personal grievances, including removing eligibility for personal grievance remedies for at-fault employees.

Executive Summary

- 3 Personal grievances are claims that employees can raise against their current or former employer. The process requirements of personal grievances are strict, leading to cases where employees who engaged in serious misconduct could still receive financial remedies. Remedies in such situations have been significantly increasing.
- 4 The Employment Relations Act (2000) allows for the courts to make reductions to remedies when the employee contributes to the personal grievance, but these reductions have become smaller. This has led to increasing uncertainty and potential costs for employers, and has incentivised employees to try their luck at raising a personal grievance in the hope that they will get a financial pay out. This is not the balance personal grievances are meant to strike.
- 5 To strike a better balance, I propose to:
 - 5.1 remove eligibility for all remedies where the employee's behaviour amounts to serious misconduct,
 - 5.2 remove eligibility for reinstatement and for compensation for hurt and humiliation when there is contributory behaviour by the employee,
 - 5.3 allow remedy reductions of up to 100 percent where an employee has contributed to the situation which gave rise to the personal grievance,
 - 5.4 require consideration of whether the employee's behaviour obstructed the employer's ability to meet their fair and reasonable obligations, and

- 5.5 increase the threshold for procedural error in cases where the employer's actions against the employee are considered fair.
- 6 Overall, these proposals should mean that remedies fairly reflect the level of employee behaviour, reassure employers that they can do the right thing, and disincentivise employees from trying their luck at raising a personal grievance.

Personal grievances are complaints employees can raise against their employers

- 7 A personal grievance is a claim that employees can raise against their employer. Any employee may raise a personal grievance, except for those employed on a valid 90-day trial period.¹
- 8 The Act establishes several reasons an employee may raise a personal grievance: unjustified dismissal, unjustified disadvantage,² discrimination, sexual and racial harassment, duress over union membership, or an employer's failure to comply with specified employment obligations.
- 9 Personal grievance claims can escalate through the employment dispute resolution system if not dealt with (i.e. mediation, the Employment Relations Authority (the Authority), and the Employment Court (the Court)).³
- 10 Under current settings, if a personal grievance is successful, the Authority or Court may grant one or more of the following remedies to the employee:
- 10.1 **reinstatement** of the employee in their former position or in a position no less advantageous to them,
 - 10.2 the **reimbursement of wages** or other money lost as a result of the grievance (generally up to a maximum of three months of ordinary pay, with discretion for higher reimbursement), and/or
 - 10.3 **compensation for humiliation, loss of dignity, and injury to the feelings** (hurt and humiliation) of the employee, or the loss of any expected benefit.
- 11 The Authority may also award costs to the successful party.⁴

Recent trends in personal grievance cases incentivise the wrong behaviours

- 12 Personal grievance protections are meant to strike a balance between protecting employees from unfair employer behaviour, allowing employers to take appropriate

¹ Specifically, they cannot raise an unjustified dismissal personal grievance claim.

² This can include; being given a warning, suspension, or demotion without good reason, having hours of work or pay changed without consultation, being misled by their employer, etc.

³ If the claim relates to discrimination, employees may progress their grievance either through human rights or employment institutions. Human rights institutions include the Human Rights Review Tribunal.

⁴ Costs are intended to cover the cost of legal representation during the Authority's investigation meeting and determination, but do not account for the wider costs incurred by employers and employees to get to that point.

action against employees when they do something wrong, and providing certainty of rights and obligations for all parties.

- 13 However, some employer procedural requirements and recent judicial decisions on remedies and reductions have distorted this balance, tipping it in favour of employees and creating additional costs for employers.

Strict procedural requirements mean that some employees engaged in serious misconduct nonetheless receive remedies

- 14 For an employer's action against an employee to be considered justified under the Act, it must be procedurally and substantially justified. Procedural requirements require employers to follow a 'fair and reasonable' process, underpinned by the requirement to act in good faith. This generally includes investigating the matter, communicating concerns to the employee, giving the employee a chance to respond and considering their response, and considering mitigating factors before making a decision.
- 15 I have heard from employers and employment lawyers that these procedural requirements are increasingly challenging to meet. This has led to some employees successfully raising personal grievances even where they have engaged in serious misconduct, including at least seven cases in the three years to February 2024.⁵ Serious misconduct includes behaviour which deeply impairs or destroys the basic confidence or trust that is essential to the employment relationship. This includes violence, fraud, theft, dishonesty, and drunk and disorderly behaviour.
- 16 I have heard from employers that employees can be obstructive in this process and prevent the employer from progressing a fair and reasonable process. For example, some employees avoid or delay investigation or disciplinary meetings or fail to respond to the employer's communications about their concerns. This could result in a personal grievance being established due to procedural errors due to no fault of the employer.

Remedies for employees have been going up, whilst reductions for contributory behaviour have become smaller

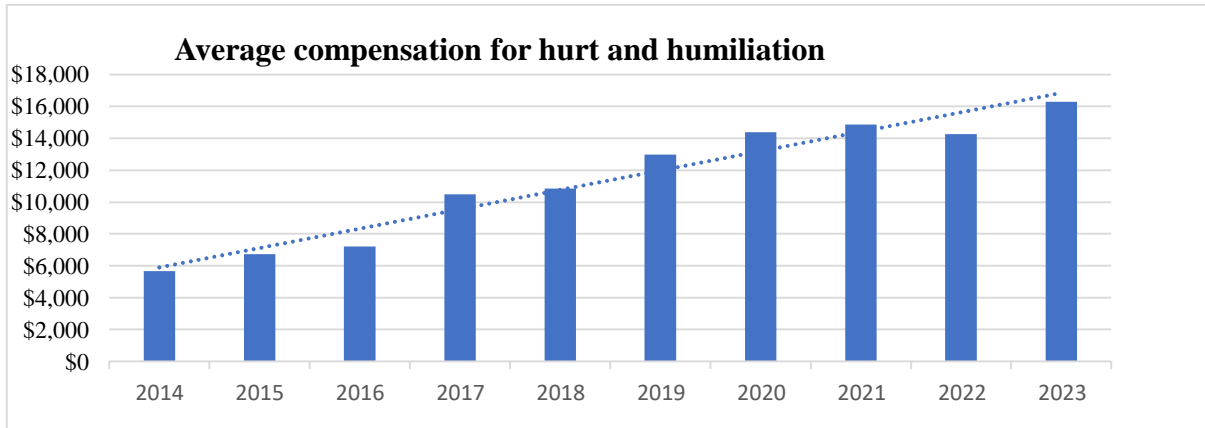
- 17 Remedies are the primary tool to redress personal grievances. In general, remedies are not intended to put the employee at a financial advantage, but restore them to the financial state or position they would be in had the personal grievance not taken place. All the remedy types, apart from reinstatement (which is used rarely⁶), provide monetary remedies to employees.
- 18 In the 12 months to November 2023, the average award for remedies was \$24,599, with 70 percent of this for hurt and humiliation, and only 30 percent for lost wages.

⁵ The Authority and Court are not required to determine whether the employee engaged in serious misconduct. The seven cases are where the Authority did determine this, and there could be other cases where the employee engaged in serious misconduct, but the Authority did not make a specific determination.

⁶ There was one permanent reinstatement in 2023, and two in 2022.

Unlike reimbursement for lost wages, hurt and humiliation is not subject to a maximum amount.⁷

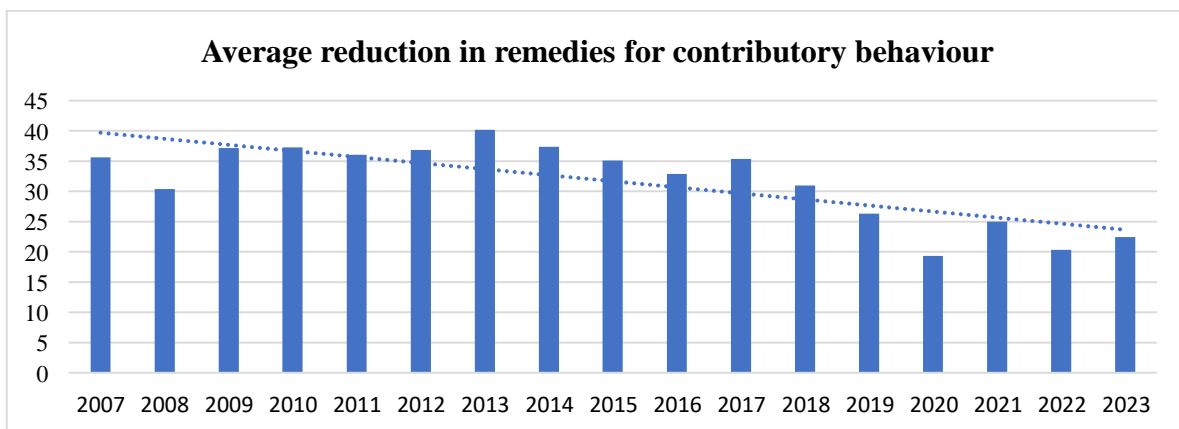
- 19 There has been a significant and sustained shift in the awarding of remedies, driven by changes in case law. Where the Authority or Court awards hurt and humiliation compensation, the average amount has nearly tripled since 2014:



- 20 The Authority and Court have the power not to award remedies. Case law has developed limiting this to exceptional cases, where the employee’s behaviour is ‘disgraceful, outrageous or particularly egregious’. This threshold is rarely met, with only two instances occurring in the two years to February 2024.

- 21 Where remedies are awarded, the Authority may reduce the level of remedies if the employee contributed to the situation that gave rise to the personal grievance. In the three years to February 2024, approximately 16.4 percent of personal grievance remedies were reduced due to contributory behaviour.

- 22 Recent case law has made the average remedy reductions smaller.⁸ This case law stated that remedy reductions of 50 percent and above are to be applied in ‘exceptional circumstances’ only, effectively limiting the Authority from making reductions greater than 50 percent. In 2013, the average reduction applied to an employee’s remedies was around 40 percent; in 2023, the average was just 22 percent.



⁷ Employees may only receive up to three months of reimbursement of lost wages, with the Authority and Court provided with discretion to exceed this maximum.

⁸ Specifically *Xtreme Dining Ltd t/a Think Steel v Dewar* [2016] NZEmpC 136

- 23 The combination of these trends means that employees who contribute to the situation that gave rise to the personal grievance are more likely to win a case due to procedural error, and when this happens, they get higher levels of remedies.
- 24 It is difficult to truly understand the scale of the issue as I have heard employers may prefer to settle outside the Authority or formal mediation, due to the perception they will have to pay remedies regardless of the merits of the claim. Therefore, avoiding formal processes helps to reduce uncertainty for employers, and avoids costly legal fees.

I have heard this has led to increasing uncertainty and potential costs for employers, and employees raising low merit claims in the hope of a financial pay out

- 25 I have heard that this has led to some employers being uncertain about how to meet their fair and reasonable obligations. The personal grievance process is also costly for employers. It is not just the cost of remedies; employers also have to take time away from the business to prepare for a case, to engage a representative, and manage the stress of going through the process.
- 26 I have heard that this is encouraging employees to ‘try their luck’ at low merit⁹ personal grievance claims in the hope that their employer will offer a financial settlement to make the claim go away. This is a distraction for employers, when they should be focussed on their business.
- 27 This is not the balance that personal grievances are meant to strike. I propose a suite of changes, centred around removing eligibility for remedies, to strengthen the consideration of the role of the employee in the personal grievance process.

I propose five changes to strengthen consideration and accountability for the employee’s behaviour, centred on removing eligibility for remedies

Proposal one: Remove eligibility for all remedies for serious misconduct

- 28 I am proposing to remove eligibility to all remedies where the employee’s behaviour that contributed to the issue that gave rise to the personal grievance amounts to ‘serious misconduct’ (e.g. violence, fraud, theft, or dishonesty). This will reassure employers that when an employee has acted in a destructive or fundamentally inappropriate manner, they can take disciplinary action without the risk of being liable to pay the employee remedies.
- 29 There are some cases where the Authority considers an employee’s action to be serious misconduct, but not serious enough to justify dismissal. An example of this may be low levels of dishonesty or sustained disharmony with co-workers. Removing remedies in these cases may be perceived as disproportionate. However, I consider that there is no place for serious misconduct, so I consider this possibility justified.

⁹ Low merit claims include those with vague evidence of a problem, or where the employee raised the claim purely to seek a settlement from the employer.

Proposal two: Remove eligibility for some remedies where an employee has contributed to the situation which gave rise to the personal grievance

- 30 In cases where the employee does not engage in serious misconduct, if the employee contributes to the situation that gave rise to the personal grievance, I propose to remove eligibility for remedies for:
- 30.1 compensation for hurt and humiliation, and
 - 30.2 reinstatement.
- 31 This is a lower threshold (contributory behaviour) than proposal one, which sets a threshold of serious misconduct.
- 32 Compensation for hurt and humiliation can comprise a significant proportion of overall awards in personal grievance cases. As an example, an account manager was dismissed for an email to a customer that made the company potentially look anti-competitive and risked a Commerce Commission fine. This followed a comparable incident a few months earlier. The Authority determined that a fair and reasonable employer could have considered further disciplinary options rather than a summary dismissal but that a 10% reduction was warranted, given that the employee had not accepted responsibility for their actions and adopted a defensive and hostile approach to the employer's investigation. The employee received \$16,399.78 for lost wages; and \$13,500 for hurt and humiliation compensation.
- 33 Removing compensation for hurt and humiliation where there is any contributory behaviour is intended to reduce perceptions of windfall gains. Employees will still be eligible for reimbursement for lost wages and costs. I consider this is an appropriate balance and enough to incentivise employers to follow a full process before acting against the employee. This approach would be in line with Australia's current approach.
- 34 The previous Government made reinstatement the primary remedy the Authority must consider when an employee succeeds in a claim for unjustified dismissal. Whilst permanent reinstatement is rare, there have been some cases where an employee has been reinstated and had their other remedies reduced for contributory behaviour. For example, in a 2012 case, the Court awarded reinstatement and reduced all other remedies to zero, where an employee in the medical profession was physically violent towards a patient. I have heard from employers that reinstatement is the worst-case scenario for them, and that reinstatement is a major bargaining chip when negotiating a financial settlement with the employer.

Proposal three: Allow remedy reductions of up to 100 percent where an employee has contributed to the situation which gave rise to the personal grievance

- 35 I propose amending the Act to clarify that the Authority and Court have the full spectrum of remedy reductions (up to 100 percent) available to them. If the above proposals are agreed to, the remedy reduction will be applied to lost wages, as employees who contribute to the situation that gave rise to the personal grievance will not be eligible for hurt and humiliation or reinstatement remedies.

- 36 This will remove the effect of the 2016 case law and I expect that the range of remedy reductions will increase. This change maintains the Authority and Court's discretion in determining proportionate remedy reductions.

Proposal four: Ensure the Authority and Court consider whether an employee was obstructive

- 37 I propose to require the Authority and Court to consider if the employee's behaviour obstructed the employer's ability to meet their fair and reasonable obligations, when the Authority is assessing whether a personal grievance has been established. I consider this strengthens the existing policy intent to provide a 'reasonable opportunity' to employees and maintains the employee's obligation to act in good faith.

Proposal five: Increase the threshold for procedural error in cases where the employer's actions against the employee are considered fair

- 38 The fair and reasonable employer test states that the Authority or the Court must not determine a dismissal or an action to be unjustifiable solely because of defects in the employer's process, if those defects were minor and did not result in the employee being treated unfairly.
- 39 I propose to remove the term 'minor' from the test, so the focus is on whether the result led to the employee being treated unfairly. This is intended to signal that the fairness of the situation is more important than any particular procedural error.

Implementation

- 40 The Ministry of Business, Innovation, and Employment (MBIE) is the administering agency for the Act. For implementation, MBIE will:
- 40.1 update its content on the Employment New Zealand and MBIE web pages,
 - 40.2 provide updated information, guidance, and training to its frontline staff, and
 - 40.3 engage with stakeholders to update them on the legislative changes through its usual engagement and communication channels.
- 41 These initiatives will be undertaken within MBIE's existing baseline funding.

Cost-of-living Implications

- 42 There are no direct cost-of-living implications associated with the proposals in this paper.

Financial Implications

- 43 There are no financial implications associated with the proposals in this paper.

Legislative Implications

- 44 Legislation will be required to amend the Act to include these changes.

- 45 The 2024 Legislation Programme includes an Employment Relations Amendment Bill, with a category seven priority – policy development to continue in or beyond 2024.
- 46 If Cabinet approve these proposals, I propose to issue drafting instructions for this change to be included in the Employment Relations Amendment Bill.

Impact Analysis

Regulatory Impact Statement

- 47 A Regulatory Impact Statement (RIS) has been completed and is attached.
- 48 MBIE’s RIS panel notes that the RIS acknowledges that the evidence base for the case for change is weak, and that officials’ preference is to conduct a wider review of the dispute resolution system. With this, the panel considers that this statement provides a sufficient basis for informed decisions and therefore meets expectations for regulatory impact analysis.

Climate Implications of Policy Assessment

- 49 The Climate Implications of Policy Assessment (CIPA) team has been consulted and confirms that the CIPA requirements do not apply to this proposal as the threshold for significance is not met.

Population Implications

- 50 MBIE, the Authority, and Court do not consistently capture data on employees who raise personal grievance claims, including their age, gender, ethnicity, income, or disability. There is very limited demographic data captured on people who apply for MBIE mediation services. The impacts of the proposals are likely to be mixed, with different impacts for employers and employees depending on the individual circumstances of the case.
- 51 The removal of hurt and humiliation compensation for any employee contributory behaviour could have a disproportionate impact on low-income employees. Reimbursement for lost wages is determined based on the employee’s actual wages, whereas compensation for hurt and humiliation is determined based on the level of impact, which does not take into account an employee’s wages. For low-income workers, hurt and humiliation compensation may therefore be a higher proportion of their remedies.

Human Rights

- 52 I do not consider that these proposals engage the New Zealand Bill of Rights Act 1990 (NZBORA). The Employment Relations Amendment Bill will be assessed by the Ministry of Justice for consistency with NZBORA before introduction.
- 53 Officials have assessed that the proposals are not likely to be considered inconsistent with New Zealand’s international obligations.

- 54 I consider that the proposals in this paper are unlikely to raise Treaty of Waitangi interests.

Use of external Resources

- 55 No external resources were used in the development of these policy proposals.

Consultation

- 56 The following departments were consulted: Department of the Prime Minister and Cabinet, Ministry of Disabled People – Whaikaha, Ministry of Education, Ministry for Ethnic Communities, Ministry of Foreign Affairs and Trade, Ministry of Health, Inland Revenue, Ministry of Justice, Ministry for Pacific Peoples, Ministry for Regulation, Public Service Commission, Te Puni Kōkiri, the Treasury, and Ministry for Women.
- 57 MBIE officials undertook targeted engagement in July-August 2024 with employer representatives, unions, employment law practitioners, and technical experts.

Communications

- 58 I intend to announce that decisions have been made on the Coalition Agreement commitment to remove eligibility for remedies.

Proactive Release

- 59 This paper will be proactively released (subject to redactions in line with the *Official Information Act 1982*) within 30 business days of final Cabinet decisions.

Recommendations

The Minister for Workplace Relations and Safety recommends that the Committee:

- 1 **note** that the ACT New Zealand – New Zealand National Party Coalition Agreement committed to *considering simplifying personal grievances, in particular removing the eligibility for remedies if the employee is at-fault*;
- 2 **agree** to remove eligibility for all remedies when the Employment Relations Authority or Employment Court determines that the employee’s behaviour that contributed to the issue that gave rise to the personal grievance amounts to ‘*serious misconduct*’;
- 3 **agree** to remove eligibility to compensation for humiliation, loss of dignity, and injury to the feelings of the employee when the Employment Relations Authority or Employment Court determines that there is ‘*any contributory employee behaviour*’ that contributed to the issue that gave rise to the personal grievance;
- 4 **agree** to remove eligibility to permanent reinstatement of the employee to their former position or the placement of the employee in a position no less advantageous to the employee when the Employment Relations Authority or Employment Court determines that there is ‘*any contributory employee behaviour*’ that contributed to the issue that gave rise to the personal grievance;

IN CONFIDENCE

- 5 **agree** to clarify that the Employment Relations Authority and Employment Court have the full spectrum of remedy reductions (up to 100 percent) available to them;
- 6 **agree** to require the Employment Relations Authority and Employment Court to consider if an employee's behaviour obstructed the employer's ability to meet their fair and reasonable obligations when establishing a personal grievance;
- 7 **note** that section 103A(5) of the Employment Relations Act 2000 requires that the Employment Relations Authority or Employment Court must not determine a dismissal or an action to be unjustifiable solely because of defects in the employer's process, if those defects were *minor* and *did not result in the employee being treated unfairly*;
- 8 **agree** to remove the term 'minor' from the requirement set out in recommendation 7;
- 9 **agree** that the policy changes be given effect through the Employment Relations Amendment Bill, which holds a category seven priority;
- 10 **invite** the Minister for Workplace Relations and Safety to issue drafting instructions to the Parliamentary Council Office;
- 11 **authorise** the Minister for Workplace Relations and Safety to make decisions, consistent with the policy in this paper, on any issues that may arise during the drafting and parliamentary process, including any transitional provisions.

Hon Brooke van Velden

Minister for Workplace Relations and Safety