MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

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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Regulatory Impact Statement: Strengthening consideration and accountability for employees' behaviour in the personal grievance process

Coversheet

Purpose of Document	
Decision sought:	Analysis produced for the purpose of informing Cabinet decisions
Advising agencies:	Ministry of Business, Innovation and Employment
Proposing Ministers:	Minister for Workplace Relations and Safety
Date finalised:	7 November 2024

Problem Definition

The personal grievance and wider dispute resolution system settings in the Employment Relations Act 2000 (the Act) intend to balance interests of both employers and employees in settling employment disputes.

In theory, the system should be able to sort between cases that would likely succeed if progressed to the Employment Relations Authority (the Authority), and cases which would likely not succeed if progressed (i.e. 'low merit' cases). Cases that would likely succeed would be appropriately compensated for (either via remedies or private settlements) and low merit cases would exit the system at the earliest point. Whilst low merit claims cannot be eliminated, the ideal is that the number is minimised.

Stakeholders raised a range of issues with the dispute resolution system and personal grievance settings. A common theme was that there are significant costs in the dispute resolution system which create a large incentive for parties to settle personal grievance claims, regardless of the merit of the claim. These costs include legal representation, time, and reputational costs. There were mixed views on whether these incentives overall favour employees or employers, but stakeholders agreed that low merit claims exist.

There are significant data limitations in quantifying the scale and cost of potential low merit claims; as many prospective or actual claims do not interact with the formal dispute resolution system (e.g. parties settling prior to mediation), and challenges in determining whether a claim could be 'low merit'. However, the limited information we do have about low merit claims suggests that the problem is limited.

So, the overarching problem is that the tilt in remedy settings (via case law decisions) towards employees interests, combined with the high costs and stress of participating in the system, has increased the risk that some employees will be incentivised to raise low-merit claims; though we cannot quantify this problem, as such claims are hard to define and may be settled before they enter the formal system. Ultimately, the limited evidence points toward the increased risk of low merit claims being raised but does not confirm whether this risk has materialised. Either way, low merit claims can result in significant costs for individual employers.

Because much of what drives employee and employer incentives sits outside of the personal grievance remedy settings, officials' preference is to undertake a full review of the dispute resolution system. Such a review could surface options that directly address the problem and restore balance between employer and employee interests.

However, since this Regulatory Impact Statement (RIS) responds to Ministerial direction to progress the Coalition Agreement on changes to remedy settings, a full review of the dispute resolution system is out of scope. Within this constraint, we see an opportunity to make changes to personal grievance settings that could reduce the incentive for employees to make low merit claims without significantly impeding access to justice.

Executive Summary

Personal grievances are claims employees can raise against their current or former employer - they provide recourse for employees who have experienced an unjustified action or dismissal by their employer. When the Authority establishes that a personal grievance exists, they may award remedies (including *compensation for lost wages*, *hurt and humiliation*, and *reinstatement*), which are intended to put the employee back in an equivalent position had the grievance not taken place.

The ACT – New Zealand National Party Coalition Agreement (the Coalition Agreement) committed to '*consider simplifying personal grievances and in particular removing the eligibility for remedies if the employee is at fault*'. We believe this commitment arose out of concerns that the current personal grievance settings were weighted too far to the employee side. This potentially creates incentives for employees to raise low merit claims and incentivises employers to settle at mediation to avoid the further costs of having to defend themselves against claims in the Authority.

Through targeted stakeholder engagement with employer and employee groups, employment lawyers, dispute resolution experts and technical experts, we received a range of views. All stakeholders agreed that low merit claims entered the dispute system, noting that various wider dispute resolution settings influenced the incentives for employees to raise these claims. This included wait-times for mediation and the Authority, and lack of regulatory oversight of employment advocates, amongst other things.

In assessing the possible options within the scope of the Coalition Agreement, we have set the objectives for the policy changes to '*disincentivise employees from making low merit claims'* while '*maintaining access to justice*'.

Based on stakeholder feedback and limited data, we consider that the tilt in remedy settings (via case law decisions) towards employees' interests, combined with the high costs and stress of participating in the system, has increased the risk that some employees will be incentivised to raise low-merit claims; though we cannot quantify this problem, as such claims are hard to define and may be settled before they enter the formal system. Ultimately, the limited evidence points toward the increased risk of low merit claims being raised but does not confirm whether this risk has materialised. Either way, low merit claims can result in significant costs for individual employers.

Because much of what drives these incentives sits outside of the personal grievance remedy settings, we consider that a full review of the dispute resolution system could allow us to recommend changes that directly address the problem. However, this review is out of scope of the Coalition Agreement.

In September 2024, the Minister for Workplace Relations and Safety agreed to make the following changes to give effect to the Coalition Agreement, which forms the scope of the options in this RIS:

- **Option 1.a** - Require consideration of whether the employee's behaviour obstructed the employer's ability to meet their fair and reasonable obligations.
- **Option 1.b** – Increase the threshold for procedural error in cases where the employer's actions against the employee are considered fair.
- **Option 2.a** – Remove eligibility for all remedies where the employee's behaviour that contributed to the issue that gave rise to the personal grievance amounts to serious misconduct.
- **Option 2.b** – Remove eligibility for compensation for hurt and humiliation when there is any contributory behaviour.
- **Option 2.c** – Remove eligibility for reinstatement when there is any contributory behaviour.
- **Option 3** - Increase remedy reductions where an employee has contributed to the situation which gave rise to the personal grievance.

Overall, we consider that options 1.a, 1.b, 2.c, and 3 strike an adequate balance between the above two objectives. These options could have a minor to moderate flow-on impact to disincentivising low merit claims, providing reassurance to businesses that a dismissed employee who contributed to the issue will not be reinstated to their role and receive higher remedy reductions. While doing this, we consider they will have only minor access to justice impacts.

For options 2.a and 2.b, the combined impact is that they are expected to have a large effect on reducing incentives for employees to raise low merit claims, but at the expense of significant access to justice issues. This is particularly the case for option 2.b. As hurt and humiliation compensation is usually the biggest remedy, automatically removing this for any contributory behaviour would affect the proportionality of reductions.

Limitations and Constraints on Analysis

The scope of this policy work was set by the Coalition Agreement to '*consider simplifying personal grievances and in particular removing the eligibility for remedies if the employee is at fault'*.[1] We have only considered the personal grievance settings where an employee's behaviour is considered, specifically the remedies settings and a small part of the fair and reasonable employer test.

Wider settings and institutions, such as the dispute resolution system, are out of scope of this work. As well as regulatory options (e.g. regulation of employment advocates), a dispute resolution system review could have investigated non-legislative/regulatory options, such as information and education tools, so that employers and employees understand their rights and obligations, and enhancements to existing dispute services required under legislation. As a wider dispute resolution system review is out of scope, so are non-regulatory options.

In addition, as the Coalition Agreement specifically focused on personal grievance remedy settings (i.e. how the Authority and Court decide on and reduces remedies), officials did not consider other regulatory/policy levers that could have had a more direct impact on employee behaviour than remedy settings (Confidential advice to Government

[1] https://assets.nationbuilder.com/actnz/pages/13849/attachments/original/1715133581/National_ACT_Agreement.pdf?1715133581

Confidential advice to Government
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In terms of data, there are several key constraints and challenges:

- There are essentially no data sources that enable us to quantify the amount of 'low merit' personal grievance claims that filter through the system or get resolved before entering the system. As such, we must primarily rely on stakeholder feedback to understand the nature and scale of the problem. One source that provides some insight is questionnaire data from MBIE mediators.

- There is very limited demographic data available on employees who use MBIE mediation services, and no demographic data available from the Authority or Court on people applying for, or receiving, determinations. This means that demographic and/or distributional analysis of the current state and impacts of options is very hard (e.g. we don't know the ethnic or gender breakdowns, or income levels, of people who seek determinations from the Authority). The best we can do is make inferences using what we know about the general working population data.

- There are significant constraints on the information MBIE gathers on private settlement agreements. While MBIE records the numbers of Records of Settlements (ROSs), some of which are agreed through mediation, the terms that parties agree to are private. So, we cannot compare the sizes of private settlements to the sizes of remedies issued by the Authority, which could help build a picture of how many prospective or actual low merit claims exist.

- There are internal data-linkage challenges between matching applications to MBIE employment mediation services and applications to the Authority. This means, for example, we can't link unsuccessful mediation attempts to an application to the Authority – we can only go off the aggregate numbers for both these institutions.

On the consultation side, we were limited by only being approved to do targeted engagement, rather than full public consultation, and constrained by the number of groups who responded to our request. We engaged with a variety of employee centred groups (e.g. unions) and a variety of legal experts, but ideally would have liked more employer-centred groups (only BusinessNZ and Employers and Manufacturers Association responded).

Responsible Manager(s) (completed by relevant manager)

Beth Goodwin

Manager

Employment Relations Policy

Ministry of Business, Innovation and Employment

7 November 2024

Quality Assurance (completed by QA panel)

Reviewing Agency:	MBIE
Panel Assessment & Comment:	This regulatory impact statement has been reviewed by a panel of representatives from the Ministry of Business, Innovation and Employment. The panel notes the clear acknowledgement in the impact statement 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 (including gathering further evidence) before implementing any policy changes. With these limitations presented to Ministers, the Panel considers that this statement provides a sufficient basis for informed decisions and therefore meets expectations for regulatory impact analysis. Advising officials should continue to strengthen the evidence base on the functioning of the personal grievance settings, including disputes that do not formally enter the system.

Section 1: Diagnosing the policy problem

What is the context behind the policy problem and how is the status quo expected to develop?

1. The ACT New Zealand - New Zealand National Party Coalition Agreement (the Coalition Agreement) committed to considering simplifying personal grievances and in particular ***removing the eligibility for remedies if the employee is at fault*** (covered in this RIS) and setting an income threshold above which a personal grievance could not be pursued (covered by a separate RIS).

2. Employment relationships in New Zealand are regulated primarily through the Employment Relations Act 2000 (the Act).[2] The Act provides a framework for employers and employees to build productive employment relationships in good faith in all aspects of the employment environment and relationship.

3. Where an employment relationship problem occurs which results in the employee being dismissed or disadvantaged, the law requires employers to follow a fair and reasonable process underpinned by the requirement to act in good faith. Where an employment relationship problem develops and the employer considers termination as the appropriate action, they may only do so after following a fair and reasonable process.

Employees who believe they have been unjustly treated by their employer can raise a personal grievance

4. If an employee believes they have a claim against their employer that meets any of the categories in s103(1) of the Act (e.g. that the employee has been unjustifiably dismissed), they may raise a personal grievance.

5. The purpose of the personal grievance settings is to provide recourse (via compulsory arbitration) for employees who have experienced unjustified action or dismissal by their employer. Personal grievances intend to restore these employees to an equivalent position that they would have been in if the unjustified action or dismissal had not taken place.

[2] There are other pieces of legislation which govern employment rights for specific sectors/groups of workers (eg Screen Industry Workers Act), but almost all other pieces of employment legislation govern specific entitlements to workers (eg minimum wage, holidays etc).

Who is covered by personal grievances?

6. Any employee can raise a personal grievance against their current or former employer if they believe their grievance meets the definition in s103(1) of the Act.[3] The only employees who are partly excluded are those on a valid 90-day trial period, who are excluded from being able to raise a personal grievance for unjustified dismissal for the first 90 days of their employment.[4]

Grounds to raise a personal grievance

7. An employee can raise a personal grievance against their current or former employer on one or more of the following grounds:

    a. ***Unjustified dismissal*** – the employee believes that the employer did not have a good reason to dismiss them or believes that the process used for the dismissal was unfair.
    b. ***Unjustified disadvantage***[5] – the employee was unjustifiably disadvantaged in some manner during their current or former employment.
    c. ***Discrimination***[6] – the employee was discriminated against in the employee's employment.
    d. ***Sexual and/or racial harassment*** – the employee was sexually or racially harassed in their employment.
    e. ***Adverse treatment if affected by family violence*** – the employee was treated adversely by the employer while being affected by family violence.
    f. ***Duress over membership or non-membership of a union*** – e.g. the employee was pressured by the employer to not be a member of a union.
    g. ***Failure of an employer to comply with specified employment obligations***[7].

8. Unjustified dismissal is by far the most common claim, being raised in nearly 80 percent of Authority determinations, with the second most common being for unjustified disadvantage (nearly 50 percent).[8] Many determinations for unjustified dismissal also include at least one other type of grievance claim (often an unjustified disadvantage

[3] Personal grievances were introduced in the Industrial Relations Act 1973 but were only available to union members and claims could only be progressed by a union. The Employment Contracts Act 1991 opened personal grievances to all employees and claims were instead progressed on an individual basis.

[4] The Government recently extended 90-day trials from being available to only businesses with fewer than 20 employees, to all businesses.

[5] This can include: being given a warning, suspension, or demotion without good reason, having hours of work or pay changed without consultation, being underpaid, being misled by their employer, not having the opportunity to respond to allegations against them, not having a safe workplace, or not being informed about proposals which may affect their employment.

[6] The Act includes the prohibited grounds in the Human Rights Act 1993 and adds two further grounds for discrimination: health and safety and union membership.

[7] This includes failures related to continuity of employment for employees affected by restructuring, breaches regarding hours and shifts, retaliation in relation to health and safety or protected disclosure, protection of employee's employment whilst in Reserve Forces service or training, or Easter Sunday rules.

[8] Of the 1,037 personal grievance determinations from 2019-2023, 813 were for unjustified dismissal and 511 for unjustified disadvantage (determinations can cover more than one issue, so many unjustified dismissal claims may have included an unjustified disadvantage claim).

claim), so often the Authority or Employment Court must make determinations on multiple issues.

9. If the claim relates to discrimination or harassment, employees may progress their grievance through either the employment or human rights institutions.[9]

Process and institutions to support personal grievance claims

10. As part of the Act's objective to '*build productive employment relationships*', the Act includes policies, procedures, and services which aim to resolve employment disputes at the lowest possible level.[10] If employees and employers are unable to resolve the grievance, the Act establishes a tiered framework of dispute resolution, encompassing the following services, that can be accessed through an escalation process:

    - ***Mediation:*** Mediation services are the primary mechanism to resolve personal grievance claims or employment problems more generally between parties and preserve the employment relationship. The Act embodies a general presumption that mediation will be the first avenue for dispute resolution before progressing to a determination-making forum. This can be through early resolution or more formal mediation processes.
    - ***Employment Relations Authority (the Authority):*** The Authority is an investigative body that has the role of resolving employment relationship problems that cannot be solved through mediation by establishing the facts and making determinations based on the procedural and substantial merits of the case. The Authority also ensures that records of settlements are complied with.
    - ***Employment Court (the Court):*** The Court has exclusive jurisdiction (and corresponding powers) to deal with a range of employment related issues, including hearing a matter previously determined by the Authority that has been appealed.

11. During mediation, the employee and employer may settle their dispute for an undisclosed amount and agree on terms and conditions of settlement in a MBIE mediator-signed Record of Settlement (RoS).

12. In general, achieving a mediated settlement/outcome is seen as a positive through the Act's objective of resolving disputes at the lowest possible level. However, there are some instances which may necessitate escalation to the Authority, and other situations where the employer may have felt pressured to agree a settlement in mediation (discussed later).

The Authority follows three steps for determining a personal grievance and deciding on a remedy

13. There are three key parts of the Act that require the Authority (or Court when examining an appeal) to consider employee and/or employer behaviour in establishing a personal grievance and determining the remedy. These are as follows:

Step 1 – establishing a personal grievance (section 103A)

14. In this step, for personal grievance claims that include an unjustified dismissal or disadvantage claim (i.e. most claims), the Authority looks at whether a personal grievance exists or not based on the test of justification in Section 103A of the Act. This

[9] New Zealand's Human rights institutions includes a Dispute Resolution Services (an early resolution and mediation service provided by the Human Rights Commission) and a Human Rights Review Tribunal (an independent body that can review decisions about human rights).

[10] Two key elements that the Act promotes to achieve its objective of 'building productive employment relationships' is the use of 'mediation as the primary problem-solving mechanism' and 'reducing the need for judicial intervention'.

requires the Authority to check whether the actions taken by the employer against an employee were those of what a '*fair and reasonable employer could have done in all the circumstances*'.

15. Before dismissing an employee, or taking any action which could disadvantage them, an employer must follow a fair and reasonable process as outlined in section 103A of the Act, underpinned by the requirement for both parties to act in good faith. For unjustified dismissal or disadvantage claims, this process includes[11]:

    - investigating the allegations against the employee,
    - communicating the concerns to the employee,
    - providing the employee with a reasonable opportunity to respond to the employer's concerns,
    - for performance issues or other medium-term problems, providing clear standards to meet and a genuine opportunity to improve, and
    - considering mitigating factors and alternatives (e.g. a 'warning' rather than dismissal).

16. The Authority/Court can establish a personal grievance based on whether the employer failed to take the above steps prior to acting against the employee (*i.e. the dismissal was procedurally unjustified due to an unfair or incomplete process)* and/or if the final decision itself was unfair to employee *(i.e. the dismissal was substantively unjustified).* While this allows the Authority/Court to establish a personal grievance purely based on an employer's procedural failings, the Court has clarified in various rulings that procedure and substance are highly intertwined. This is because an employer's procedure reflects the way in which they gathered the facts used to justify acting against an employee. If procedural fairness was not maintained, the substantive conclusion may not be justified.[12]

17. In addition, the Authority cannot establish a personal grievance against an employer solely due to procedural defects so long as those defects are only '*minor*' and did not treat the employee unfairly.[13] So, where the Authority establishes a personal grievance based on procedure, the procedural defects are normally significant in nature (e.g. failing to give an employee opportunity to comment or not communicating concerns).

Step 2 – deciding whether to award a remedy, if a personal grievance is established

18. If a personal grievance is established, the Authority has the discretion to award one or more of the types of remedies available under the Act.

19. Remedies are the primary tool to redress personal grievances. In general, remedies are not intended to put the employee at a financial advantage but to restore the employee to the financial state or position they would be in had the grievance not taken

[11] There are some instances where a summary dismissal (i.e. without payment or notice) is justified, for example violent behaviour or theft, but the requirement to follow a fair and reasonable process is still required.

[12] These principles were outlined in the case *Concrete Structures (NZ) Ltd v Rottier [2021] NZEmpC 95, [2021] ERNZ 418*

[13] A 2010 amendment bill introduced this section (s103A(5)) to prevent employers from having personal grievances established against them for only minor procedural failings that did not result in the employee being treated unfairly. https://www.parliament.nz/en/pb/bills-and-laws/bills-digests/document/49PLLawBD17991/employment-relations-amendment-bill-no-2-2010-bills

place. All the remedy types, apart from reinstatement (used very rarely)[14], provide monetary remedies to employees.

20. The Authority may award one or more of the following remedies to the employee:
    a. ***reinstatement*** of the employee in the employee's former position or in a position no less advantageous to the employee[15];
    b. the ***reimbursement of wages*** or other money lost because of the grievance (up to a maximum of three months' ordinary pay); and
    c. compensation for ***humiliation, loss of dignity, and injury to the feelings*** (i.e. hurt and humiliation) of the employee, or the loss of expected benefit.
21. In addition, the Authority and Court also have the power to order one party pay costs relating to the case to the other party (i.e. the cost of representation for the hearing time reflecting the Authority's daily tariff rate).[16]

How much remedy gets awarded?

22. In the 12 months to November 2023, the average award for remedies was $24,599[17], with 70 percent of this for hurt and humiliation and only 30 percent for lost wages. Unlike reimbursement for lost wages, hurt and humiliation is not subject to a maximum reimbursement amount.[18]
23. Overall, the size of remedies being awarded by the Authority are increasing. This is largely due to increases in compensation for hurt and humiliation, which has been driven by recent Court rulings, including the introduction of compensation 'bands' for levels of harm in 2017 and an increase to those bands in 2023.[19] Compensation for hurt and humiliation was on average approximately $5,661 in 2014 and in 2023 was $16,283.

Step 3 – reducing the remedy if the employee contributed to the problem

24. Where a personal grievance has been established, section 124 of the Act requires the Authority or the Court to:
    - *'consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance, and*
    - *if those actions so require, reduce the remedies that would otherwise have been awarded.'*

[14] There was only one case of successful permanent reinstatement in 2023 and two cases in 2022 by the Authority.

[15] In the Act, reinstatement is intended to be the primary remedy. However, in practice, it is rarely used by the Authority.

[16] Often the Authority will 'reserve' a determination on costs and allow an opportunity for parties to figure out the costs themselves. One party may apply for a separate determination from the Authority on costs.

[17] On top of this remedy figure, $2,472 in costs were awarded to employees.

[18] 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.

[19] The three bands, as of 2023 based on the case *GF v Comptroller of the New Zealand Customs Service [2023] NZEmpC 101* are:
- Band 1: (low-level loss or damage): up to $12,000;
- Band 2: (mid-level loss or damage): $12,000 – $50,000; and
- Band 3: (high-level loss or damage): over $50,000.

25. The purpose of this clause is largely to consider the contributory behaviour of the employee. This includes situations where there was serious wrongdoing from the employee.

26. This clause grants the Authority/Court broad discretion over determining what contributory employee behaviour is, the levels of contributory behaviour, how much to decrease the remedies by, and which remedies to decrease.

Case law guides how the Authority assesses contributory behaviour and determines the level of remedy reduction

27. The principles, tests and thresholds that the Authority and Court use to determine contributory behaviour, and the levels of remedy reductions, have developed through case law. In addition, a variety of highly specific tests that cover a broad range of behaviours and situations has emerged through case law, which the Authority and Court uses to determine the extent of the contributory behaviour and the appropriate level of remedy reductions.

Establishing contributory behaviour

28. The test for how the Authority and Court establishes 'contributory behaviour' from employees is based on case law. The Court case *Maddigan v Director-General of Conservation [2019]* summarised the factors that the Authority needed to consider when determining if the employee contributed to the situation that gave rise to the personal grievance. These are:

- *whether the employee's alleged contributory conduct was culpable and blameworthy;*
- *whether the conduct created or contributed to the situation;*
- *what is a fair assessment of the extent of contribution;* and
- *if the reduction should be applied across all or some of the remedies*.

29. When assessing strength of contributory behaviour, the Authority and Court look at causation, proportionality and justice. For conduct to require reduction, it not only must be causative of the outcome, but must also be blameworthy (i.e. needs to be more than simply accidental conduct). When assessing the 'extent' of the employee's behaviour, the Authority and Court assesses the levels of *'blameworthy contributory conduct'* to determine how much the employee's contribution and if that should amount to requiring a remedy reduction and by how much.

Determining remedy reductions

30. The Authority and Court aim to make the reduction proportionate to the employee's level of contribution. Case law from *Xtreme Dining Ltd v Dewar [2016] NZEmpC 136* clarified that:

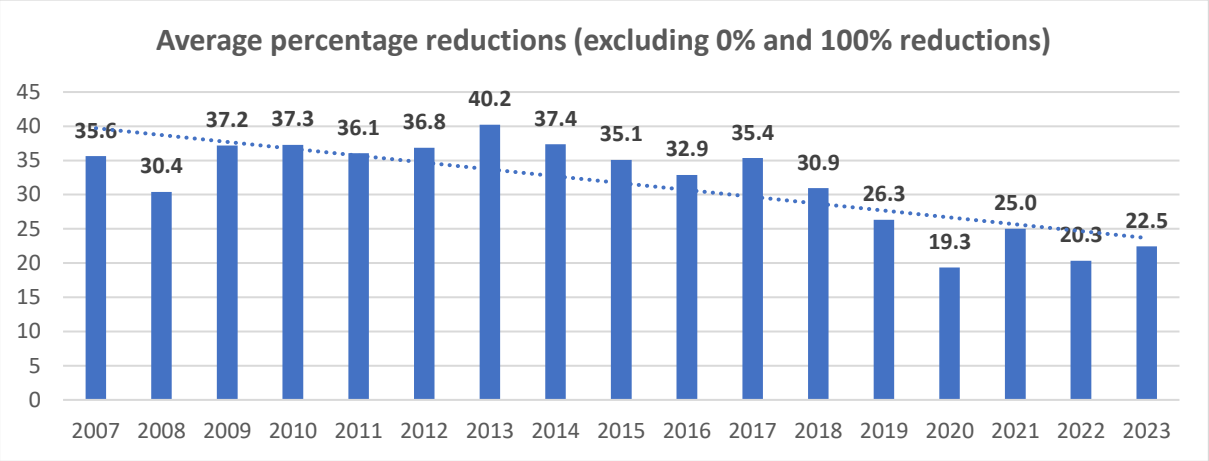
- in rare cases the Authority or Court may decline to award remedies where it would be inconsistent with '*equity and good conscience*' – this amounts to employee contributory behaviour which reaches the level of '*disgraceful, outrageous or particularly egregious'* behaviour.
- in exceptional cases a reduction of 50 per cent may be warranted, and
- care should be taken before imposing a reduction of 25 per cent, as it is of '*particular significance'*.

31. In the three years to February 2024, approximately 16.4 percent of cases with unjustified dismissal and/or disadvantage claims had remedy reduction. Consistent with the case law, most cases were reduced by between 10 and 30 percent, with a few

cases at around the 50 percent threshold. There were only two cases where no remedies were awarded (equivalent to a 100 percent reduction).

32. Consistent with case law, data shows that remedy reductions issued by the Authority have decreased over time, illustrated in Figure 1 below.[20] Average remedy reductions have reduced from around 35 to 40 percent in the years 2009 to 2015, to between 20 and 25 percent in the years 2020 to 2023.

Figure 1 – Average remedy reductions issued by the Authority for contributory behaviour by year



What is the policy problem or opportunity?

33. The overarching problem is that the the tilt in remedy settings (via case law decisions) towards employees interests, combined with the high costs and stress of participating in the system, has increased the risk that some employees will be incentivised to raise low-merit claims; though we cannot quantify this problem, as such claims are hard to define and may be settled before they enter the formal system. Ultimately, the limited evidence points toward the increased risk of low merit claims being raised but does not confirm whether this risk has materialised. Either way, low merit claims can result in significant costs, lost time, and stress for individual employers, especially small employers with limited resources, who may find that the easiest and cheapest option is to agree to a financial settlement.

34. By the term 'low merit', we mean claims from employees that are unlikely to succeed at the Authority[21] and/or are speculative in nature and intended to extract a settlement from the employer.

35. It is very difficult to quantify the amount of personal grievance claims which are low merit in nature. There are essentially no measures which represent the number of low merit claims made, so we are primarily reliant on stakeholder feedback for understanding the nature and scale of the problem. Stakeholders were clear that some low merit claims progress through the system, and the costs of these claims to individual employers can be high. As there can be significant costs involved in progressing through the system, there is an incentive for employers to provide a

[20] 100 percent reductions have been excluded from the average calculations. This is because since the 2016 *Xtreme Dining* case, 100 percent reductions have been recorded as 'no remedy'. So, keeping 100 percent reductions in the data set would make the average reductions pre-2016 slightly higher.

[21] Feedback from unions and legal experts during consultation indicated that many employees are in emotional distress when they raise claims, which could lead to situations where claims are raised which do not have real basis, but the employee may genuinely believe that they have been hurt and seek recourse.

financial settlement for low merit claims to avoid these costs, and hence an incentive for employees to lodge such claims.

36. One source that provides some insight into the size of the problem is questionnaire data from MBIE mediators, with the mediators' views on why employment disputes came to mediation.[22] In 2022/23 and 2023/24, MBIE mediators indicated that around two to four percent of employment relationship problems that come to mediation were '*frivolous or opportunistic*' in nature, which partly aligns with our above description. However, this data alone is not sufficient to confirm the size of the issue – only that MBIE mediators and stakeholders believe some low merit claims are filtering into the system. We do not know how many low merit cases are raised and settled prior to mediation.

37. Whilst low merit claims cannot be completely eliminated, the ideal is that the number is minimised. When low merit claims do come into the system, they should be dealt with in a timely and effective manner. This would minimise time, cost and stress for employers, employees, and the employment regulator.

Setting out the problem – what do stakeholders think?

38. We received approval from the Minister to consult with a targeted group of stakeholders on the Coalition Agreement, including:

- employer representative groups (i.e. BusinessNZ and the Employers and Manufacturers Association (EMA))
- employee representative groups (e.g. Unions, including the New Zealand Council of Trade Unions (NZCTU) and affiliates).
- legal experts/employment layers, and
- private employment dispute resolution service providers.

39. Feedback was overall mixed. Amongst the various groups, views diverged on whether the current settings for remedies (and remedy reductions) were weighted in favour of employers or employees, how well these settings were working and what changes should or could be made.

Views on the problem(s)

40. Stakeholders across the spectrum largely believed that there were strong incentives for both employers and employees (for different reasons) to settle personal grievance claims before they reach the Authority. However, employer and employee groups strongly differed on which side had the balance of power in settlement negotiations, and which side the current personal grievance settings favoured in general.

41. Employer representatives believed that the current settings broadly favour employees, affording them more power in settlement negotiations, especially since employees have the power to raise and progress claims. The unions took the opposite view, noting that employers have more resources and information than employees to help them negotiate settlements, and that there are significant professional and personal risks for employees in taking claims. They also noted the emotional distress that personal grievances incur on employees, so this was not a move taken lightly.

42. In terms of procedural requirements, employer representatives and some legal experts thought that the requirements were too rigid. They believed that employers should always follow a proper process, but that the current settings inhibited employers from being able to quickly address serious employee misconduct without risking a

[22] MBIE surveys mediators after each mediated event. The survey includes a question on the reason why the dispute between the employer and employee occurred. Mediators can only chose one of 10 responses and will chose the most applicable response.

successful personal grievance. The unions disagreed, believing that any further move to weaken procedural requirements could result in a loss of natural justice rights and loss of employment protection.

43. Most stakeholders also believed that the current settings had all the elements required for the Authority and the Court to take contributory behaviour into account. Though there were different views about the consistency of the judgements made in applying the available elements.

44. For remedy reductions, stakeholders generally believed that the prospect of remedy reductions only marginally impacted on employer and employee behaviour and is not considered by parties until late in the process (once it's clear that a personal grievance is likely to be established). Employer representatives believed that the Authority was too lenient in applying remedy reductions, whereas unions and legal experts thought that the Authority was well equipped in using its discretion to apply reductions on a case-by-case basis. However, legal experts also noted that Court decisions had constrained the Authority in being able to apply the full spectrum of remedy reductions.

Setting out the problem – what drives employee and employer behaviour?

45. A major topic in consultation were the drivers of employer and employee behaviour. When there is the potential for a personal grievance to be raised, both employers and employees have a range of choices about how to proceed.

46. From an employer perspective, notwithstanding any personal beliefs, the choice about how to respond to a personal grievance claim involves weighing up:

- the costs of challenging the claim through the dispute system to the Authority, plus potential remedies that the Authority may require them to pay to the employee, versus
- the cost of settling with the employee if the employee is willing to settle.

47. From an employee perspective, notwithstanding the emotive factors at play (e.g. distress of losing a job, mental health etc), the choice about whether to raise, progress, or settle a claim against their current or former employer involves weighing up:

- the cost of progressing the claim through the dispute system to the Authority (e.g. paying a lawyer or employment advocate), plus the prospect of a remedy, versus
- the benefit of settling with the employer if the employer is willing to settle.

48. Personal grievance claims are costly and time consuming for employers to defend or settle, regardless of the merit of the claim. Likewise, there are also costs and risks to the employee for progressing a personal grievance to the Authority, which are weighed up against a possible remedy. Arguably the most significant risk for employees is the publication of a decision, which can have repercussions for future employment.

Four drivers that influence employee and employer behaviour

49. When it comes to making the above cost-benefit calculation, based on our consultation, we identified four overarching drivers of employer and employee behaviours. These factors are set out below. The first two drivers are in scope of the Coalition Agreement (in orange); the latter two are out of scope (in blue) but relate to the problem that the Coalition Agreement seeks to address, which is reducing incentives for employees to make low merit claims.

Key drivers of employer and employee behaviour	
Prospect of success	This is the chance of the Authority establishing a personal grievance. Stakeholders indicated that the prospect of winning or losing a case is difficult to predict, which sometimes incentivises both parties to settle. Employer representatives noted that failure to follow proper process resulted in some employers losing against low merit claims, even where they believed the dismissal was justified. The unions, however, believed that the current procedural requirements provided enough flexibility for employers.
Prospect of remedies and reductions	This is the chance of the Authority awarding remedies to the employee. This includes the amount of remedy that could be awarded and the prospect of the Authority reducing (or removing) remedies where there has been contributory employee behaviour. It also includes the prospect of reinstatement. Stakeholders differed as to whether they thought remedies were too high or too low on average. Employer representative groups believed that some remedies were too high (i.e. hurt and humiliation) and incentivised employees to make claims due to the perception of 'windfall gains'. They also voiced concerns around the threat of reinstating employees, noting that this was sometimes used as a bargaining chip in settlement negotiations. On the contrary, employee representative groups believed that remedies were too low, and seldom covered the employee's cost to get to the Authority (i.e. the cost of legal representation or hiring an employment advocate).
Wider dispute resolution settings	This is the time, money and stress required to progress a personal grievance through the dispute resolution system. This also includes the institutional settings that support personal grievances (e.g. mediation services), the wait-time for the Authority and its tariff rates, and the wider actors in the dispute system (e.g. employment advocates). Most stakeholders expressed concerns with the wider dispute resolution settings. Two overarching concerns were employment advocates and their '*no win, no fee'* model, which they believed encouraged employees to make low merit claims, and the wait-times to get to the Authority, which are often over one year from the time of application and create costs and stress for both employers and employees. Stakeholders noted that these system costs, especially the wait time, are a major factor for employees and employers deciding to settle or not.
Other motivations	This includes wider financial considerations and risks, resources available, personal beliefs, and the risk of precedent setting. These factors cannot be quantified but do play a part in employers' and employees' decision making. Stakeholders noted that some businesses and employees may decide to progress and defend claims based on principle (i.e. both sides believe they're 'in the right'). Employers are also concerned about 'precedent setting' when settling claims, and the economic cycle also plays a part in decision making

Setting out the problem - What the data and evidence says

50. Across the above four drivers, we have identified some data which supports (but not necessarily concludes) the idea that employers are incentivised to settle claims.

Evidence around the 'prospect of success' driver

51. Overall, employees win most personal grievance claims. In 2023, the Authority dismissed around 23 percent of personal claims (i.e. employers 'won' 23 percent of the time), with this rate hovering at around 25 percent over recent years. In 2023, employees won (i.e. had their case 'granted') 64 percent of the time and partially won a

further 13 percent of cases. These outcomes may be contributing to some employer perceptions that if they allow a claim to progress to the Authority (i.e. they do not settle), there is a high chance a personal grievance will be established against them (notwithstanding the merits of the individual case).

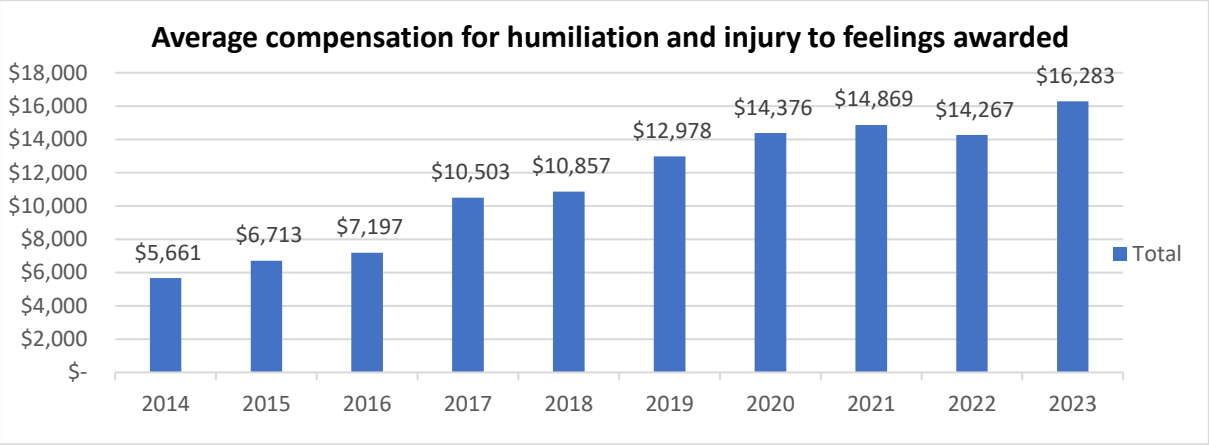
52. MBIE Employment Services data also shows that most MBIE mediations result in employers and employees settling.[23] This is depicted in the table below. While the settlement rate dropped to 67 percent in 2023/24, Employment Services noted that the current economic conditions could be influencing this. Some employers are struggling to afford the levels of compensation that employees ask for, and an increasing number of disputes which are difficult to resolve through mediation alone.

Employment Services Mediation – Work Related Problem and Settlement [24]		
Fiscal year	**Mediation Events**	**Settled**
2020/2021	5,114	76%
2021/2022	4,155	73%
2022/2023	4,097	72%
2023/2024	4,274	67%

Evidence around the 'prospect of remedies and reductions' driver

53. As outlined in section 1 above, remedies on average are increasing in size, which has largely been driven by increases to hurt and humiliation compensation (the size having tripled on average between 2014 and 2023, illustrated in Figure 2 below). In addition, reductions in remedies for contributory behaviour have been decreasing on average, as outlined in Figure 1 and paragraph 32 above. So, this arguably creates a larger incentive for employees to raise personal grievance claims, including low merit claims.

Figure 2 – Average compensation amounts for hurt and humiliation awarded by the Authority per year (2014 – 2023)



Evidence around 'wider dispute resolution settings' driver

54. Feedback from stakeholders indicated that wait-times for the Authority from date of application could be upwards of one year, which creates additional stress, uncertainty, and potential costs for employers and employees. This is likely to further incentivise parties to settle. There was an increase in wait-times for Authority determinations over

[23] Because applications for the Authority and MBIE mediation services are separate applications, it is not possible to link the non-successful mediations to Authority determinations. We can only infer what happens based on the number of Authority determinations compared to unsuccessful mediation events, where there is a lag in the data due to wait-times for the Authority.

[24] While work related problems are largely comprised of personal grievance related claims, they also include other disputes between individual employers and employees (e.g. unpaid wages, holiday entitlements etc).

the COVID-19 pandemic, up to 319 days in January 2022.[25] Based on feedback from stakeholders, this problem has worsened due to the recent economic and labour market downturn, with more people seeking mediation services. This view is supported by the 24 percent increase in the number of applications for mediation for work-related problems in the 2023/24 year.

55. Employer representatives also noted that the costs that the Authority may award to the winning party only cover the Authority's tariff rates, not the wider costs and/or legal fees incurred. So, even if the employer 'wins', the real costs of defending themselves against a personal grievance claim is higher than the costs that they could be awarded against the employee.[26]

56. Nearly all stakeholders raised the issue of insufficient oversight of non-legal employment advocates. Employer representatives were concerned that some non-legal employment advocates were encouraging employees to make speculative claims and that part of their business model was to incentivise the employee to extract a settlement from employers. Nearly all stakeholders were concerned around the quality of advice being provided by some non-legal employment advocates, and lack of recourse for parties impacted by the poor performance of a non-legal employment advocate[27]. We heard concerns that some non-legal employment advocates were driving unrealistic expectations from employees.

Evidence around 'other motivations' driver

57. This driver relates to the personal values and experiences of employers and employees, which makes it very difficult to gather evidence on. However, feedback from stakeholders and MBIE mediators indicated some personal grievances are raised and/or progressed 'on principle', and that some employers may take a hardened approach to defending against such claims (i.e. more willing to challenge).

Officials consider that a review of the dispute resolution system could surface options that directly address the problem

58. Ideally, the dispute resolution system should be able to distinguish between cases that would likely succeed if progressed to the Authority and low merit cases. However, it is not feasible to eliminate low merit claims as some claimants will genuinely believe they have a case, and the merit of a claim can only be determined by going through the formal dispute resolution process. The ideal is that the number of low merit claims is minimised.

59. As outlined above, we know from stakeholders and mediators that low merit claims make it into the system, that parties are largely driven to settle them (either at or prior to mediation), and that this results in significant costs for some employers. These costs exist in the wider dispute resolution system and include legal representation, time, reputational costs, and uncertainty of outcomes.

60. We also consider that remedy settings, specifically the trends in case law that have increased the average size of remedies and constrained remedy reductions, may also be contributing to incentives for some employees to raise low merit claims.

61. However, as mentioned above, there are significant data limitations in quantifying the scale and cost of potential low merit claims as many prospective or actual claims do

[25] For Authority determinations set in April 2018, the average wait time from application was 198.6 days, whereas for determinations made in January 2022, this was 318 days. 234 (2022). Hon Paul Goldsmith to the Minister for Workplace Relations and Safety - New Zealand Parliament (www.parliament.nz)

[26] The Authority's tariff rates are $4,500 for the first day of an investigation meeting and $3,500 for each additional day of investigation meeting.

[27] Employment advocates who are practising lawyers are subject to the code of conduct of the NZ Law Society.

not interact with the formal dispute resolution system (e.g. parties settling privately, prior to mediation).

62. Because much of what drives incentives for employees to make low merit claims sits outside of the remedy settings, officials' preference is to undertake a full review of the dispute resolution system. Over time, MBIE has observed that the wider dispute resolution system settings, including the time, quality of advice employees and employers receive, and the money and stress required to progress a personal grievance through the system, are key drivers of employer and employee behaviour. These can create significant costs for both employers and employees.

63. This view was reaffirmed by almost every stakeholder during engagement. We heard that costs can be significant[28] (e.g. legal representation, Authority daily tariffs, potential productivity losses, reputational risks for both employers and employees, and wider wellbeing impacts) and often far outweigh any remedies that are awarded. These costs create strong incentives for employers and employees to settle to avoid further litigation and costs, even in cases considered to be low merit.

64. Changes to the wider dispute resolution system settings are likely to be more impactful on reducing incentives for employees to raise low merit claims, and the costs of dealing with those claims. As such, officials' preference is to progress a review of the dispute resolution system, which could surface policy options that more directly address the problem and restore balance between employer and employee interests. However, a full review of the dispute resolution system is out of scope.

65. This RIS responds to the Ministerial direction to progress the Coalition Agreement regarding changes to remedy settings. Within this constraint, we see an opportunity to make changes to the personal grievance settings that could reduce incentives for some employees to make low merit claims without significantly impeding access to justice.

66. The options assessed in this RIS are therefore changes to the remedy settings themselves, plus minor changes to the test of justification.[29] These levers directly impact on the *'prospect of remedy'* driver where contributory employee behaviour is found, signalling that such behaviour will be more stringently considered and penalised, thereby disincentivising such behaviour. This could disincentivise low merit claims - i.e. employees who may have engaged in such behaviour could be disincentivised from raising a claim due to reduced prospects of a remedy. If the employer is more certain they will not have to pay a remedy, they may be more confident not to settle or settle for a lower amount.

What objectives are sought in relation to the policy problem?

67. The objectives for the policy problem are to *'disincentivise employees from making low merit claims*' while '*maintaining access to justice'*.

68. These objectives relate to the following:

    1. *Disincentivise employees from making low merit claims*: Whilst acknowledging that low merit claims cannot be eliminated, this objective is intended to change behaviours, particularly employee behaviours, in their willingness to make personal grievance claims that are vexatious, opportunistic, or speculative in nature. None of the in-scope options impact on access to the personal grievance system, nor regulate any party's behaviour. Instead, the in-scope options aim to have a flow-on impact on this objective, through changing employees' incentives

[28] During consultation, EMA noted that the minimum cost to settle just around any personal grievance claim was approximately $10,000 - $15,000, which is indicative of the possible minimum cost to defend a claim before it goes to the Authority. This means that some employers could be incentivised to settle for an amount less than this.

[29] Changes to the test of justification in scope are those which do not do not fundamentally change the obligations of employers. The changes in-scope are based on stakeholder feedback and where employee contributory behaviour as considered for remedy reductions interacts with the test of justification.

and behaviours. They reduce the prospect of a remedy, thereby shifting negotiating power to the employer side.

2. *Maintaining access to justice*: This is about ensuring that all employees retain natural justice rights and access to recourse in response to any adverse action by their employer. This also includes retaining proportionality in the remedy settings, so that inappropriate employee behaviour is accounted for, but not disproportionately penalised. The in-scope options directly influence this objective.

69. These two objectives directly compete. A significant reduction in the likelihood of an employee receiving a remedy strengthens accountability for their behaviour. This likely reduces the incentive for them to raise a low merit claim but could impact on access to justice if they perceive their genuine claim now has a lower chance of success.

Section 2: Deciding upon an option to address the policy problem

What criteria will be used to compare options to the status quo?

70. Based on the above two competing objectives, we assessed the options against the following criteria:

    A. Disincentivise employees from progressing low merit claims;
    B. Reduce cost(s) for employers in addressing low merit and contributory behaviour claims;
    C. Incentivise employers to follow proper procedure in all circumstances;
    D. Maintain access to justice for employees; and
    E. Workability and ease of implementation.

71. We note the direct trade-off between criteria A and B with criterion D that finely balances employer and employee interests. Options that reduce costs for employers are likely to also reduce access to justice for employees, since employees do not know what the likelihood of success for their case will be and reducing the potential rewards for (partly) successful cases could discourage employees across the board from taking claims.

What scope will options be considered within?

72. The scope of the work is personal grievance settings which incorporate an employee's behaviour, notably the remedy settings. In summary, the scope of options are:

    - Minor changes to '*step 1 – establishing a personal grievance (section 103A)'* [30] that introduces some consideration of employee behaviour, and
    - Changes to '*step 2 – awarding remedies (section 123)*', including establishing new thresholds for not awarding remedies, and
    - Changes to '*step 3 – reducing remedies (section 124)*', including clarifying the amounts of remedy reductions that are possible.

73. Because the scope focused on remedy settings, we were not able to consider other settings prior to establishing a personal grievance that could have targeted low merit claims earlier in the process. Confidential advice to Government

74. For possible non-regulatory options that could impact on employer and employee behaviours (e.g. information and education tools and changes to services), these would be part of a full review of the dispute resolution system. As this review is out of scope of the Coalition Agreement, an analysis of possible non-regulatory options is also out of scope of this RIS.

What options are being considered

75. We have assessed the status quo alongside the following options, grouped at each of the three steps summarised above. There are a range of feasible combinations of options. We also assess the Minister's preferred package of options against the status quo to show their combined impacts.

Status Quo/counterfactual

[30] Whole-scale changes to the test of justification are out of scope, as this would change the basis for how personal grievances are established and invoke significant policy work. Therefore, only minor changes in line with feedback received during consultation are in scope.

Option Zero: Status quo – no change to the personal grievance settings in the Employment Relations Act 2000.

Options under *step 1 – establishing a personal grievance (section 103A*)

Option 1a: Require the Authority to consider if the employee's behaviour obstructed the employer's ability to meet their 'fair and reasonable' obligations.

Option 1b: Increase the threshold for procedural error in cases where the employer's actions against the employee are considered '*fair*'.

Options under *step 2 – awarding remedies (section 123)*

There are several combinations of options available under step 2, where the Authority decides whether to award a remedy. There are two key policy decisions here:

1) What should the behavioural threshold for removing eligibility for remedies be?
2) Which remedies should the behavioural threshold apply to?

These decisions open a range of possible policy combinations under step 2 (i.e. option 2). For example, there are several behavioural thresholds to select from (ranging *from any contributory behaviour* to *egregious misconduct*) that can be matched with different remedies. Assessing every possible permutation of option 2 is not feasible. Instead, we have focused our analysis on the Minister's preferred package of options under step two, as below:

Option 2a: *Remove eligibility for all remedies when the employee behaviour amounts to* ***'serious misconduct'***, and

Option 2b: *Remove eligibility to compensation for humiliation, loss of dignity, and injured feelings when there is* ***any contributory employee behaviour***, and

Option 2c: *Remove eligibility to reinstatement when there is* ***any contributory employee behaviour*****.**

Options under step three – reducing remedies (section 124)

Option 3: Clarify that the Authority can make remedy reductions up to 100%.

Options being assessed

Option Zero – Status Quo

76. This option would make no changes to the Act, and current practice will continue to develop through case law.

77. Although several stakeholders in consultation noted that the Authority was well equipped to make decisions based on case specific facts, other stakeholders voiced concerns around uncertain and inconsistent outcomes being issued by the Authority. If the status quo remains, some employers, when responding to low merit claims or claims with contributory behaviour, may continue to believe that they are at risk of being penalised by the Authority if the claim makes it that far. Therefore, there remains a strong incentive for employers to settle, and therefore there remains an incentive for

employees to raise a low merit claim. As such, we consider that the status quo does not fully meet the first objective but does meet the second one.

Options under *step 1 – establishing a personal grievance*

78. The intent of the options under this step (i.e. options 1.a and 1.b) is to reduce the level of scrutiny placed on employers' procedural obligations (described in Section 1) and introduce some consideration of the employee's role in a personal grievance.

79. **Option 1.a** amends section 103A of the Act to require the Authority to consider if the employee's behaviour obstructed the employer's ability to meet their 'fair and reasonable' obligations. All of these obligations are placed upon the employer, and include giving the employee a *reasonable opportunity* to respond to the employer's concerns.[31] Obstructive employee behaviour at this step can create uncertainty over whether the employer provided a *reasonable opportunity*, which influences the probability of success for the employee's personal grievance claim, and may result in employers refraining from taking appropriate action.

80. During consultation, employer representatives and some employment lawyers shared situations where the employee obstructed an employer's process. These included avoiding and/or delaying investigation or disciplinary meetings, or not responding to the employer's communications.

81. **Option 1.b** removes 'minor' from section 103A(5)(a) of the Act. Currently, 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.

82. Removing 'minor' leaves the focus being on whether an employer's procedural defects resulted in the employee being treated unfairly. It could address concerns raised by employer representatives and legal experts that too much scrutiny is placed minor errors in an employer's process.

Impacts

83. Together, these options are expected to have an **overall low impact on both objectives.** These options increase the consideration of the role of the employee and may help to address perceptions among some employers that the level of scrutiny on the employer's process is currently too high.

84. This more explicit scrutiny of employee behaviour at step one (option 1.a) may incentivise co-operative employee behaviour during the employer's investigation/disciplinary process. However, feedback from MBIE's Employment Services notes that it is rare that the employer's inability to meet their procedural requirements is completely due to the actions of the employee. We consider the impact will be minor but this could provide slightly more reassurance to employers.

85. For option 1.b, the impacts are more challenging to predict, as it will depend on the Authority and Court's interpretation of the change. However, we consider it unlikely that option 1.b will disincentivise employers to meet their fair and reasonable obligations.

Package of options under *step 2 –awarding remedies*

[31] The overarching duty of good faith still applies. For employees, they have a duty of good faith to engage constructively with their employer in response to an employment dispute or when engaging with an employer's disciplinary or investigation process. However, we heard mixed views from stakeholders as to whether the judiciary considers this kind of obstructive employee behaviour when establishing a personal grievance or considering it when reducing remedies (after a personal grievance is established).

86. We analyse the following options under step two:

Option 2.a - *Remove eligibility for all remedies when the employee behaviour amounts to 'serious misconduct'*
Option 2.b - *Remove eligibility to compensation for humiliation, loss of dignity, and injured feelings when there is any contributory employee behaviour*, and
Option 2.c - *Remove eligibility to reinstatement when there is any contributory employee behaviour.*

87. As described in Section 1, there is no legislated threshold of contributory behaviour which disqualifies an employee from getting a remedy. The current threshold for no remedy in case law is '*disgraceful, outrageous or particularly egregious'* employee behaviour[32]. This is a high threshold which usually only applies to employee violence and/or theft, but where a personal grievance is technically established.

Impacts of Option 2.a - Removing eligibility for all remedies when the employee behaviour amounts to 'serious misconduct'

88. In case law, serious misconduct is a broad and commonly used term, especially as it is often cited by employers as a reason for dismissal[33] (if given). It is considered behaviour that '*deeply impairs or is destructive of that basic confidence or trust that is an essential part of the employment relationship*'[34] and/or behaviour that can warrant a summary dismissal (i.e. dismissal without payment or serving of notice). Case law examples of behaviour amounting to 'serious misconduct' include:

- violence (including assaults and physical and verbal threats),
- fraud (including falsifying information on time sheets),
- theft (including unauthorised possession of company property),
- dishonesty, and
- drunk/disorderly behaviour.

89. However, there are occasions where the Authority and Court has viewed what could arguably be medium to lower levels of contributory employee behaviour as 'serious misconduct' in unjustified dismissal and disadvantage claims (e.g. low levels of dishonesty or sustained disharmony with co-workers). So, there is a risk this option could create a limited number of disproportionate outcomes against employees, where an employee would not be eligible to any remedy, despite experiencing a level of harm that amounted to a personal grievance being established. While the number of cases where this has occurred is likely to be low, we are unable to quantify them, so our understanding of the scale of risk associated with this option is limited. Furthermore, the threshold and scope of behaviours that could amount to serious misconduct could change with case law, making it hard to estimate what the outcomes could be.

90. This option would reassure employers that when an employee has acted in a destructive or fundamentally inappropriate manner, and a personal grievance is established, the employer would not be liable to pay the employee any remedies. However, this behavioural threshold is lower than the status quo (in case law) and carries some risk of unintended consequences. For example, it may incentivise some employers to label or cite behaviours that are only mild-to-moderate in nature as 'serious misconduct', then test that with the Authority and Court. It may also incentivise some employers to goad employees into behaviour that amounts to serious

[32] Xtreme Dining Ltd t/a Think Steel v Dewar [2016] NZEmpC 136

[33] Out of 90 Authority cases in the three years to February 2024 that had remedies reduced (a small proportion of unjustified dismissal cases), in 31 of them the employer cited 'serious misconduct' for the dismissal, which was the second most common reason after 'no reason'.

[34] *Eagle Airways Ltd v Lang EmpC Auckland AEC5/95, 20 February 1995.*

misconduct. It is likely that there will continue to be disputes about the types of behaviour that should be captured by the threshold of 'serious misconduct'. This could put some employees off raising a personal grievance, thereby impacting the '*access to justice objective*'.

Impacts of Option 2.b – removing eligibility to compensation for humiliation, loss of dignity, and injured feelings when there is any contributory employee behaviour

91. This option could reduce perceptions of 'windfall gains' by significantly strengthening accountability on employee contributory behaviour and thereby reducing incentives to raise low merit claims.

92. However, this option would significantly impede access to justice in some cases as any employee wrongdoing that meets the threshold for contribution would remove eligibility to this remedy, even in cases where they have experienced a loss of dignity. This is likely to lead to disproportionate, and therefore unjust, outcomes, as the employer's harm would not be reflected in the employee's remedies, even where it is egregious. **Annex One** describes a possible scenario for what could happen under this option, where a finding of contributory behaviour would result in a 10 percent reduction in remedy under the status quo, but an 85 percent reduction under this option. This is not likely to be an extreme situation, as most remedies for the majority of claimants are made up of hurt and humiliation compensation.

93. This option presents a risk that over time, the Authority and Court will adapt their rulings to avoid these scenarios. In other words, the Authority and Court could increase the threshold for determining contributory behaviour due to the more significant consequence of making this finding. In turn, this could create a greater incentive for more litigation to challenge the Authority's decision.

Impacts of Option 2.c - removing eligibility to reinstatement when there is any contributory employee behaviour.

94. Reinstatement is rarely awarded by the Authority[35] and is generally not awarded in situations where the employment relationship is fractured or fundamentally broken. Consequently, the direct impact of this option is likely to be low. However, we heard from stakeholders that the threat of reinstatement is a serious concern for employers who anticipate the negative impacts of the employee returning to the workplace. This option will therefore help to increase employer bargaining power during settlement negotiations. On the other hand, it could reduce access to justice for employees who genuinely seek reinstatement from the Authority.

Option 3 – clarifying that up to 100 percent remedy reductions are possible (step 3)

95. This option amends section 124 of the Act to clarify that the Authority has the full spectrum of remedy reductions available to them (up to 100 percent). The intent is to strengthen remedy reductions so that they better reflect the levels of contributory

[35] The Authority awarded permanent reinstatement three times in 2021, twice in 2022 and once in 2023. There were also 18 interim reinstatements between 2021 and 2023 – which occurs during the period the Authority investigates the grievance.

employee behaviour, while also being simple[36] and maintaining the Authority and Court's full discretion to make proportionate remedy reductions.

Impacts

96. Option 3 would overturn the 2016 *Xtreme Dining* precedent[37]and clarify that the Authority has the full spectrum of remedy reductions (up to 100 per cent) available to them. This will allow greater discretion for the Authority to apply reductions between 50 to 99 percent as appropriate, based on case-specific facts, likely leading to a greater spread of remedy reductions over time.

Consistency with international obligations

97. Officials assess that the proposals are not likely to be considered inconsistent with New Zealand's international obligations.

Treaty of Waitangi implications

98. In considering the current remedy settings, we consider that there is alignment between a tikanga Māori approach to dispute resolution and the principle of natural justice. Changes to remedy settings are unlikely to impede Māori employees' and employers' ability to uphold tikanga in their employment relationships, or access tikanga Māori approaches leading up to the Authority (e.g. through a marae-based grievance resolution process where parties can come together to resolve the grievance, and/or engaging with MBIE's tailored Māori mediation service). While some options, particularly the options under step two, may create a cooling effect on some employers' willingness to engage in mediation, we do not consider that there are specific Māori interests regarding tikanga and contributory behaviour settings.

99. Once the options are implemented, tikanga will likely continue to be recognised in the development of common law in cases where it is relevant, such as in the case *GF v Comptroller of the New Zealand Customs [2023]*[38]. We consider that this has a narrow effect, as the Employment Court found that the employer had actively incorporated tikanga values into the employment relationship.

Potential population and distributional impacts

100. MBIE, the Authority, and Court do not capture data on employees who raise personal grievance claims, including their age, gender, ethnicity, or income. There is very limited demographic data captured on people who apply for MBIE mediation services.

101. In general, Māori, Pacifica and disabled employees tend to be overrepresented in low paid occupations and industries. Consequentially, the impacts of a dismissal can be disproportionately high, as these groups are likely to have less income to support themselves before transitioning into new employment, or less options for new employment. While we do not have any data indicating that that these groups are overrepresented in the dispute system, the combined impacts of the proposed changes

[36] Other variations of option 3 were considered which involved establishing potential percentage reduction thresholds based on types and/or levels of contributory employee behaviour. However, in advice provided to the Minister, we noted the design and implementation difficulties with establishing such thresholds. So, only the above version of option 3 was progressed.

[37] This case established the current threshold for not awarding remedies and stated that remedy reductions of 50 per cent and above are to be applied in 'exceptional circumstances' only. This decision has largely constrained the Authority from making reductions greater than 50 per cent.

[38] In this case, the Employment Court found that the New Zealand Customs Service failed to act as a fair and reasonable employer. This was in part due to its failure to adhere to the tikanga values it had incorporated into its employment relationships with its employees, as well as the 'heightened' good employer obligations of the public service. While this appears to have quite specific circumstances, it is an evolving area of the law and further work would be needed to consider what, if any, implications this case law has for wider policy changes.

could further alter the imbalance of power between these groups of workers and employers, making it harder for Māori, Pacifica and disabled employees to potentially negotiate a settlement agreement.

102. The loss of hurt and humiliation compensation for any employee contributory behaviour could have a disproportionate impact on low-income employees. In particular, Māori, Pacifica and disabled employees, who are more likely to experience bullying or harassment in the workplace. 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.

How do the options compare to the status quo/counterfactual?

	Option Zero – Status Quo – no change to the personal grievance settings in the Employment Relations Act 2000.	**Option 1a –** Require the Authority to consider if the employee's behaviour obstructed the employer's ability to meet their 'fair and reasonable' obligations.	**Option 1b -** Increase the threshold for procedural error in cases where the employer's actions against the employee are considered '*fair*' (i.e. removing 'minor' from section 103(5)(a))	**Option 2a -** Remove eligibility for all remedies when the employee behaviour amounts to 'serious misconduct'	**Option 2b -** Remove eligibility to compensation for humiliation, loss of dignity, and injured feelings when there is any contributory employee behaviour	**Option 2c -** Remove eligibility to reinstatement when there is any contributory employee behaviour.	**Option 3 -** Clarify that the Authority can make remedy reductions up to 100%.
Disincentivise employees from progressing low merit claims	0	0 to + Over time, this more explicit consideration of obstructive employee behaviour may disincentivise employees who engage in this behaviour from raising low merit claims, and/or disincentivise this behaviour.	0 Unlikely to be a significant enough change to shift employee behaviour.	+ Could shift employee behaviour and reduce incentives to make a low merit claim.	++ Over time, this is likely to shift employee behaviour and reduce incentives to make any claims, including low merit ones. May reduce employee perceptions of 'windfall gains' to be made through this remedy category.	+ Removes the employee's potential bargaining chip when negotiating a settlement from their employer.	0 to + Sends a signal to employees with contributory behaviour that their claims could result in higher remedy reductions, which could very marginally disincentivise low merit claims
Reduce cost(s) for employers in addressing low merit and contributory behaviour claims	0	0 to + Could increase employer confidence to defend a personal grievance claim when they have tried to follow a fair and reasonable process, but for the obstructive employee behaviour.	0 to + Could increase employer confidence to progress through fair and reasonable process with employees, as the Authority and Court's focus will be more on whether the employer's action(s) were fair as opposed to procedural error.	++ Reduces or outright removes costs for employers where they are confident that the employee engages in serious misconduct. May also lower settlement costs as it gives employers more bargaining power.	++ Reduces costs for employers as no longer required to pay this remedy where there is any contributory employee behaviour, and will be more confident of having to pay low or no costs in response to a low merit claim. May also lower settlement costs as it gives employers more bargaining power.	+ Increases employer certainty and bargaining power when negotiating a settlement with the employee with contributory behaviour or who raised low merit claim.	+ Provides more reassurance to employers that low merit claims or claims with contributory employee behaviour will receive meaningful remedy reductions but could still necessitate a settlement (albeit a lower one).
Incentivise employers to follow proper procedure in all circumstances	0	0 Unlikely to change incentives for employers to follow a proper process as it is not changing employer's obligations – merely clarifying where employee behaviour is considered.	0 Unlikely to change incentives for employers to follow a proper process as their action(s) against the employee will still need to be 'fair' despite their procedural error.	- Would reduce incentives for employers to follow a proper process where serious misconduct is involved.	- - Likely to reduce incentives for employers to follow a proper process as a finding of contributory employee behaviour would lead to no compensation for hurt and humiliation, which is often the most significant portion of overall remedies paid.	0 Unlikely to change incentives for employers to follow a proper process in cases where monetary remedies are available.	0 Unlikely to change incentives for employers to follow a proper process.
Maintain access to justice for employees	0	0 Does not impede access to justice for employees.	0 Maintaining 'fair' requirement maintains access to justice for employees.	- Removes access to justice by removing eligibility to *any/all* remedies where serious misconduct is found.	- - Removes access to justice by removing this remedy where there is contributory employee behaviour no matter how egregious the employer behaviour. Likely to result in unjust outcomes for some employees.	- Removes access to justice for employees who genuinely seek access to this remedy type.	0 Does not impede access to justice for employees. Proportionate remedy reductions remain.
Workability and ease of implementation	0	- Requires legislation change.	- Requires legislation change.	- Requires legislation change.	- - Requires legislation change. Could result in a shift in threshold to which the Authority/Court determines contributory behaviour due to the consequence of the finding.	- Requires legislation change.	- Requires legislation change.

Overall assessment	0	0 to + Overall low impact on employer and employee behaviour. But slightly better than status quo as it may disincentivise low merit claims in cases where employees engage in obstructive behaviour and reduce costs for employers without impeding on employees' access to justice.	0 to + Overall low impact on employer and employee behaviour. Impacts of this option are challenging to predict as largely depends on the Authority and Court's interpretation and application of the change. Could have a 'signalling' effect to employers to act against employees if they engage in wrongdoing. Does not impede employees' access to justice.	- This behavioural threshold is lower than the status quo, so likely to have an overall medium impact on behaviours. Signals that serious misconduct is not appropriate in the workplace and will result in no remedies being awarded by the Authority and Court which is a reduction in employees' access to justice.	- - While this option may reduce employee perceptions of 'windfall gains' and reduce costs for employers, we consider that it will significantly impede access to justice and lead to disproportionate outcomes, even in cases where they have experienced a loss of dignity due to their employer's egregious behaviour. This is likely to lead to unjust outcomes for some employees, especially considering this is often the largest remedy.	0 to + This remedy is rarely awarded by the Authority and Court and is generally not awarded in situations where the employment relationship is fundamentally broken. We consider the practical impact of this option is likely to be low. It will likely help to reduce employer concerns about reinstatement of employees.	+ We consider this option will clarify the Authority's ability to make reductions of more than 50% when appropriate, while maintaining employee's access to proportionate remedies. It has the benefit of being simple and easy to understand and implement.

Key for qualitative judgements:

++	much better than the status quo
+	better than the status quo
0	about the same as the status quo
-	worse than the status quo
- -	much worse than the status quo

What option is likely to best address the problem, meet the policy objectives, and deliver the highest net benefits?

MBIE's recommended package:

103. As indicated in Section 1, we consider that a review of and improvements to the wider dispute resolution system settings are likely to be more impactful on changing behaviours than changing the remedy settings. The wider dispute resolution system could include a broad range of levers, including non-regulatory solutions (e.g. information and education, and service delivery improvements) that could address the problem and reduce incentives for employees to make low merit claims. However, we have not assessed this as an option in this RIS, as we do not know what the review would recommend. Such a review could result in a range of recommended interventions that target different parts of the system, so it is not likely to be 'one' option, rather a suite of possible options.

104. While we consider that more wide-reaching reforms to the personal grievance and dispute resolution system are required to address the problem, we consider that the status quo does not adequately meet the '*disincentivise employees from making low merit claims'* objective, and some of the options considered could move the system closer to this objective without significantly impeding upon the other objective.

105. Our analysis of options is grounded in the two competing objectives ('*disincentivising low merit claims'* while '*maintaining access to justice*') and the above five criteria. In our analysis, we are constrained by our limited evidence base, our inability to predict the Authority's and the Court's rulings (as we do not possess all the facts in the cases determined), and the scope of the work (i.e. limited focus on remedy settings).

106. Given the above factors, we consider the below package of options adequately balances the two objectives. This package would allow employers to respond to low merit claims more confidently and take appropriate action against employees who misbehave, without significantly impeding employees' access to justice:

Option 1.a: Require the Authority to consider if the employee's behaviour obstructed the employer's ability to meet their 'fair and reasonable' obligations, and

Option 1.b: Increase the threshold for procedural error in cases where the employer's actions against the employee are considered fair, and

Option 2.c: Remove eligibility to reinstatement when there is any contributory employee behaviour, and

Option 3: Clarify that the Authority can make remedy reductions up to 100%.

Recommended interventions at '*step 1 – establishing a personal grievance*'

107. When it comes to addressing some of the issues raised around employer procedural requirements, **we recommend progressing options 1.a and 1.b.**

108. **Option 1.a** strengthens the existing good faith obligations on employees and codifies what the Authority and Court largely already do, ensuring that obstructive employee behaviour is consistently considered at the right step (i.e. applied as part of establishing a personal grievance). This may help to address perceptions among some

employers that employees can influence whether they can run a thorough enough process or not.

109. We do not consider there to be any risk of impeding access to justice associated with this option. We consider that it marginally supports the *'reduce incentives for low merit claims'* objective without impeding the '*maintaining access to justice*' objective.

110. **Option 1.b** slightly relaxes the threshold of procedural error that could result in a personal grievance being established against the employer. It shifts the focus to whether the employer's procedural defects resulted in the employee being treated 'unfairly', rather than judging the size of the employer's procedural defects. This may help to address perceptions among some employers that the level of scrutiny on the employer's process is currently too high.

111. The impact of this option depends heavily on how the Authority and Court interpret and apply the test. Ultimately, we do not consider that this option is likely to have much of an impact on both objectives. However, it could have a 'signalling' effect on employers, potentially giving them more confidence to act against employees who have engaged in serious misconduct, and focus on running a process based on fairness and natural justice rights (as intended in the section 103A test of justification).

Recommended intervention at '*step 2 –awarding remedies''*

112. For establishing a threshold of ineligibility to a remedy, **we recommend option 2.c**. The key trade-off with this option is reducing costs for employers and addressing their fears of reinstatement, against maintaining access to justice for the very few employees who are awarded reinstatement when there is some level of contributory behaviour. We consider that the risk of removing access to justice for these few employees is outweighed by the benefit that this option offers to employers. On balance, we consider that it supports the first objective without meaningfully impeding on the second objective.

Recommended intervention at '*step 3 - reducing remedies'*

113. For strengthening the consideration of contributory employee behaviour in remedy reductions, **we recommend option 3**. It has the benefit of being simple to implement and understand. By overturning the 2016 *Xtreme Dining* case, we consider that this option will address stakeholder concerns about the soft ceiling of 50 percent remedy reductions whilst maintaining the Authority and Court's full discretion to make proportionate remedy reductions that reflect the level of contributory employee behaviour. We consider that it marginally supports the first objective without impeding the second objective.

114. Together, our recommended package of options will increase certainty for employers, employees, and the Authority and Court. It will signal that personal grievance settings are designed to consider behaviour on both sides of the employment relationship, underpinned by the Act's principle of good faith.

The Minister's agreed package

115. The Minister's preferred package of options is for all six options (outside the status quo) evaluated in this RIS. This includes the four options recommended above, plus two additional options at '*step 2 – awarding remedies'*, which establishes two additional thresholds of ineligibility to receive hurt and humiliation compensation (option 2.b) and to any remedy (option 2.a). Below, we outline why we do not recommend these options.

On balance, we do not recommend option 2.a

116. We consider that serious misconduct is a well-developed but broad concept in case law and is a relatively high threshold of behaviour. We therefore consider that removing eligibility to all remedies where there is serious misconduct could be justifiable in some

cases, and supports the first objective of reducing incentives for low merit claims. It would reassure employers that when an employee has acted in a destructive or fundamentally inappropriate manner, if a personal grievance is established, the employer will not have to pay remedies.

117. However, reducing costs for employers comes at the expense of impeding access to justice for employees by removing eligibility to proportionate remedies altogether. In addition, by having a personal grievance established, it means that there is more than minor procedural or substantial wrongdoing on the employer's side, and not having any remedy removes a deterrent against the employer engaging in this wrongdoing. So, on balance, we do not recommend option 2.a, as we consider that the risk of creating unjust outcomes for some employees outweighs the benefit of reducing costs for employers.

118. In addition, we have seen cases where the Authority is sometimes making determinations that lower levels of contributory employee behaviour (e.g. low levels of dishonesty or sustained disharmony with co-workers) amount to serious misconduct in both dismissal and unjustified disadvantage claims. While we are unable to quantify the number of cases where this has occurred, we consider a complete removal of eligibility to any/all remedies at this stage to be too wide and untargeted.

We do not recommend option 2b

119. As outlined above, this option could remove perceptions of 'windfall gains' and is likely to strongly reduce the incentives for employees to raise low merit claims. However, we consider these benefits are strongly outweighed by the risk of significantly impeding access to justice in some cases. As outlined in the example scenario in Annex One, this option will result in unjust outcomes where any employee wrongdoing would remove eligibility to this remedy, even in cases where they have experienced extreme hurt by the employer. Consequently, any harm caused by the employer will not be reflected in the employee's remedies.

120. This change could risk impeding access to justice for claims which are not unjustified dismissal or disadvantage claims. For example, if someone who raised a personal grievance for discrimination or sexual harassment and they contributed in any way to the situation which led to the grievance, they could be denied any hurt and humiliation compensation, which is likely to be the primary remedy sought. We expect these situations would be extremely rare, but not impossible under the proposed settings, and could depend on interpretation by the Authority and/or Court.

What are the marginal costs and benefits of the option?

MBIE's recommended package:

Affected groups	**Comment**	**Impact** *High, medium or low*	**Evidence Certainty**. *High, medium or low, and reasoning*
Additional costs of MBIE's recommended package compared to taking no action			
Regulated groups - Employers	One-off compliance cost to interpret changes.	Low	Low – depends on behaviours.
Regulated groups - Employees	Some employees who genuinely seek reinstatement will no longer be eligible to this remedy. One-off access to justice costs for these employees. With reinstatement off the table, there could be a slightly reduced incentive for	Low	Low – case law data shows very few contributory cases where reinstatement is awarded.

	employees to raise a claim, and if they do, they will have less bargaining power, which could lead to an increased incentive to settle and lower settlements offered by employers.		
Regulators – MBIE's Employment Services	One-off implementation costs e.g. communicating changes etc.	Low	High – based on engagement with Employment Services.
The Authority and Court	One-off initial compliance cost to interpret law changes.	Low	Medium – the Authority and Court is required to interpret and apply legislation.
Total monetised costs	N/A	N/A	N/A
Non-monetised costs *(High, medium or low)*	Most costs fall on employees and the Authority and Court.	Low	Medium
Additional benefits of MBIE's recommended package compared to taking no action			
Regulated groups - Employers	Reduced costs (in settlement negotiations) as the threat of reinstatement is removed. Increased certainty about reinstatement and obstructive employee behaviour.	Low	Low – based on stakeholder views that some employers fear reinstatement the most.
Regulated groups - Employees	Increased certainty about good faith obligations, eligibility to reinstatement, and proportionate remedy reductions.	Low	Low – peoples' understanding of their rights depends on a range of factors other than legislative settings.
Regulators – MBIE's Employment Services	No expected additional benefit.	Low	High – based on engagement with Employment Services.
The Authority and Court	No expected additional benefit.	Low	High – the Authority and Court is required to interpret and apply legislation.
Total monetised benefits	N/A	N/A	N/A
Non-monetised benefits *(High, medium or low)*	Most benefits fall on employers.	Low	Medium

The Minister's agreed package

Affected groups	**Comment**	**Impact** *High, medium or low*	**Evidence Certainty**. *High, medium or low, and reasoning*
Additional costs of the Minister's agreed package compared to taking no action			
Regulated groups - Employers	One-off compliance cost to interpret changes.	Low	Low – depends on behaviours.
Regulated groups - Employees	Access to proportionate remedies removed in some cases. There are particular costs associated with losing eligibility for compensation for humiliation, loss of dignity and injured feelings for any contributory behaviour.	High	Medium – Around 16% of cases have contributory behaviour. Hurt and humiliation is the biggest remedy and is awarded in most cases. Removing it will result in large remedy reductions to the vast majority of these cases.
Regulators – MBIE's Employment Services	Minor implementation costs e.g. communicating changes etc. Potential disincentive to raise personal grievances which could eventually decrease the numbers who access mediation. Could be countered by more employers being willing to progress the grievance.	Low	Medium – certainty about implementation costs based on engagement with Employment Services. But assumptions about incentives are highly uncertain.
The Authority and Court	One-off initial compliance cost to interpret law changes. Potential disincentive to raise personal grievances which could decrease the numbers who access mediation. Could be countered by more employers being willing to progress the grievance.	Low	Low – the Authority and Court are required to interpret and apply legislation. Assumptions about incentives are uncertain.
Total monetised costs	N/A	N/A	N/A
Non-monetised costs *(High, medium or low)*	Most costs fall on employees with some on the Authority and Court.	High	High
Additional benefits of the Minister's agreed package compared to taking no action			
Regulated groups - Employers	Potentially substantial reduced costs for employers who take disciplinary action against employees and/or face personal grievances, both in settlement negotiations and in situations where cases progress to the Authority.	High	Medium – depends on behaviour including how employers value increased certainty around the

	Potential for slightly increased threshold for procedural error in limited cases.		thresholds for remedies, and willingness to progress to the Authority.
Regulated groups - Employees	Potentially increased certainty about good faith obligations, eligibility to reinstatement, and proportionate remedy reductions.	Low	Low – peoples understanding of their rights depends on a range of factors other than legislative settings.
Regulators – MBIE's Employment Services	Potential disincentive to raise personal grievances which could decrease the numbers accessing mediation. Could be countered by more employers being willing to progress the grievance to mediation.	Low	Low - Assumptions about incentives are uncertain.
The Authority and Court	Potential disincentive to raise personal grievances which could decrease the numbers accessing mediation. This could be countered by more employers being willing to progress the grievance to the Authority, and/or parties seeking to challenge the Authority's findings on contributory behaviour with the Court due to the greater consequence of this finding.	Low	Low – the Authority and Court are required to interpret and apply legislation. Assumptions about incentives are uncertain.
Total monetised benefits	N/A	N/A	N/A
Non-monetised benefits *(High, medium or low)*	Most benefits fall on employers.	Medium	Medium

Section 3: Delivering an option

How will the new arrangements be implemented?

121. The package of changes will need to be implemented through amendments to the Act. The intention is that these changes will be introduced in 2025, alongside the proposal to introduce an income threshold and changes to contracting settings. The aim is to have the legislation passed into law by end of 2025.

122. MBIE is responsible for administrating the Act. It provides information for businesses, unions, and employees through its website, contact centre, and provides other customer services on an ongoing basis.

123. Part of the implementation will involve reviewing and, where applicable, updating web content on the Employment New Zealand and MBIE web pages. It will also include providing updated information and guidance to MBIE Employment Services

Operational units, the Labour Inspectorate, Dispute Resolution, Triage & Allocation, and the Service Centre.

124. MBIE proactively prepares and executes stakeholder engagement and communication plans for any significant law change. Such engagement is directed to external parties who may be affected by the legislative changes, such as employers, employees, unions, and other relevant professional bodies. This initiative will include the above changes to legislation and will be undertaken within MBIE's existing baseline funding. It will be completed by the time the legislation commences.

125. The legislative change could potentially shift the nature of conversations between employers and employees, resulting in a change in the advice provided to employers and employees from Employment Services operational units. As a result, additional training and amendments to training documentation, internal policies and procedures may be required for MBIE Employment Service operational units.

How will the new arrangements be monitored, evaluated, and reviewed?

126. A review of the MBIE Employment Services case management systems used to capture data, information, and to enable insights analysis could be required to ensure that ongoing internal services meet the legislative change requirements. It also may be required to ensure accurate information can be provided for Ministerial servicing requirements, official correspondence, Official Information Act requests, and future work outputs.

127. MBIE can monitor determinations of the Authority and Court in relation to remedy reductions and how they go about interpreting and applying the 'serious misconduct' threshold. Over time, this will provide evidence on the outcomes that the changes are producing (if any). This includes the number of instances that serious misconduct and contributory behaviour is established and eligibility for some or all remedies is removed.

128. Current work to better measure regulator performance, including the impact of MBIE as the employment regulator, will enable the Minister for Workplace Relations and Safety to monitor the number of mediations settled and resolutions reached through MBIE's Early Resolution Service.

List of Appendices

Appendix One: Scenario of what could happen if eligibility to hurt and humiliation compensation is removed for any contributor behaviour (option 2.b).

Annex One: Scenario of what could happen if eligibility to hurt and humiliation compensation is removed for any contributory behaviour (option 2.b)

Employee is late to work multiple times. One day, they receive a text message from their employer advising them they have been dismissed effective immediately. The employer does not discuss their concerns about lateness with the employee and posts on the employee's social media page accusing them of 'being lazy and having no work ethic'. The Authority establishes a personal grievance and determines that the employer pre-meditated the dismissal decision.

In that case, we estimate the result would be as follows:

Estimated remedies awarded by the Authority[39] (status quo)	**Estimated remedy reduction applied by the Authority (status quo)**	**Outcome under option 2a**
$2,345.38 in lost wages	10 per cent remedy reduction for lateness Revised remedy: $2,110.84 in lost wages	10 per cent reduction to lost wages only Revised remedy: $2,110.84 in lost wages
$12,000 in compensation for hurt and humiliation	10 per cent remedy reduction for lateness Revised remedy: $10,800 in compensation for hurt and humiliation	Not eligible for remedies due to contributory behaviour Revised remedy: $0
Total = $14,345.38	Total = $12,910.84	Total = $2,110.84 i.e. approx. ***85 per cent*** *remedy reduction*

[39] This example is grounded in an actual case, but we have worsened the employer behaviour for illustrative purposes.