



AIDE MEMOIRE

Further advice on eligibility for remedies for personal grievances

Date:	5 September 2024	Priority:	Medium
Security classification:	In Confidence	Tracking number:	2425-0618

Action sought		
	Action sought	Deadline
Hon Brooke van Velden Minister for Workplace Relations and Safety	Discuss the options presented in the A3s at the meeting with officials on Tuesday 10 September 2024.	10 September 2024

Contact for telephone discussion (if required)				
Name	Position	Telephone		1st contact
Beth Goodwin	Manager, Employment Relations Policy	04 901 1611	Privacy of natural persons	✓
Rachael Fleming	Senior Policy Advisor, Employment Relations Policy	04 897 6592	-	

The following departments/agencies have been consulted

- Minister's office to complete:
- | | | |
|--|---|------------------------------------|
| <input type="checkbox"/> Noted | <input type="checkbox"/> Approved | <input type="checkbox"/> Declined |
| <input type="checkbox"/> Overtaken by Events | <input type="checkbox"/> Needs change | <input type="checkbox"/> Seen |
| | <input type="checkbox"/> See Minister's Notes | <input type="checkbox"/> Withdrawn |

Comments



AIDE MEMOIRE

Further advice on eligibility for remedies for personal grievances

Date:	5 September 2024	Priority:	Medium
Security classification:	In Confidence	Tracking number:	2425-0618

Purpose

To provide you with a set of A3s that outline a suite of potential options to address the New Zealand National – ACT New Zealand Coalition Agreement commitment (the Coalition commitment) to consider removing remedies for at-fault employees.

Recommendation

The Ministry of Business, Innovation and Employment (MBIE) recommends that you:

a **Note** that the attached set of A3s outline a suite of potential options related to the New Zealand National – ACT New Zealand Coalition Agreement commitment to consider removing remedies for at-fault employees.

Noted

b **Note** that officials will meet with you on Tuesday 10 September 2024 to discuss the content of the A3s.

Noted

c **Note** that following our discussion, we will provide you with a subsequent short briefing seeking decisions.

Noted

Beth Goodwin
Manager, Employment Relations Policy
Labour, Science and Enterprise, MBIE

5 / 9 / 2024

Hon Brooke van Velden
Minister for Workplace Relations and Safety

___ / ___ / 2024

Background

1. On 21 June, we provided you with initial advice on the Coalition commitment [2324-3491 refers].
2. On 24 June, we met with you to discuss the advice. At this meeting, you raised two concerns; that employers are incentivised to settle personal grievances to avoid costly litigation, and inconsistencies in remedy reductions.
3. You agreed that we carry out targeted stakeholder engagement (alongside the Coalition commitment to consider introducing a high-income threshold for personal grievances) to help fill gaps in our knowledge regarding the impact of the current settings and to work through some of the key policy design choices for removing eligibility for remedies.

We have developed a set of A3s that outline potential options

4. Following targeted stakeholder engagement, we have developed a set of A3s that provide advice on a suite of potential options to achieve the Coalition commitment. They are summarised below. At our meeting, we suggest we focus on Annexes Four, Six and Seven.
 - **Annex One** summarises the key drivers of employee and employer behaviour. Stakeholders across the spectrum confirmed those drivers create a *strong incentive to settle* their employment relationship disputes even in situations where the case is 'low merit'.¹ Out of the four key drivers identified, two are within the scope of the coalition agreement, which centres on the process for determining remedies.
 - **Annex Two** summarises the suite of potential options, which sit across the three steps the Employment Relations Authority (Authority) takes:
 - Step one – establishing whether a personal grievance exists.
 - Step two – deciding to award remedies.
 - Step three – reducing remedies where there is contributory employee behaviour.
 - **Annex Three** contains options that would address concerns about the scrutiny during step one of whether an employer's actions were fair and reasonable. The intent of the options is to explicitly consider whether an employee obstructed the employer from meeting their fair and reasonable requirements, and to place a greater focus on fairness of outcome, rather than whether there was a procedural error.
 - **Annex Four** outlines the key choices you have regarding removing eligibility for remedies. These are: what the behavioural threshold should be for removing eligibility for remedies and which remedies the behavioural threshold should apply to. There are a range of option combinations available to you depending on your objectives.
 - **Annex Five** contains options to address concerns about contributory behaviour not adequately being reflected in the levels of remedy reductions. Case law from 2016 lowered the level of remedy reductions applied to contributory behaviour. The intent of these options is to reverse this case law and increase the level of remedy reductions.
 - **Annex Six** illustrates some of the combinations of options available to you and demonstrates how they perform against the competing objectives of *reducing incentives to raise low merit claims* and *maintaining access to justice*. The illustrative option packages

¹ This includes situations where there might be vague evidence of a problem; where the employee's contributory behaviour is significant, or where the employee has raised a claim purely to seek a settlement from the employer.

are presented along a continuum that attempts to strike a balance of employer and employee interests.

- **Annex Seven** provides example scenarios to help ground the options in real life and outlines the potential impact(s) of the options.

Next Steps

5. Officials are scheduled to meet with you on Tuesday 10 September 2024 to discuss the options in the A3s. We are keen for you to indicate whether there are any other objectives you think should be considered or prioritised.
6. We will provide you with a subsequent briefing shortly after to seek your decisions on options.
7. Note that if your preference is to progress a behavioural threshold for removing remedies that is not included in this advice (a variation of option 3 in Annex Four), and/or you want officials to design a framework for increasing remedy reductions (option 4b in Annex Five), we will need to provide further advice seeking decisions on the detailed policy design of these options.
8. If this is the case, there is a chance this will delay seeking Cabinet decisions to December 2024 or possibly early 2025 (as opposed to November 2024 as currently scheduled). We now think this would probably delay the introduction of the Bill, as it wouldn't allow PCO enough time to complete drafting.

Annex One: Summary of the key drivers of behaviour

The Government considers that the current personal grievance settings encourage low merit claims. Below are the key drivers of behaviour that influence this. **Those in the orange boxes are within the scope of the Coalition commitment.** Blue boxes are out of scope.



Key drivers of behaviour



What we heard during stakeholder engagement



Our knowledge

Prospect of success

The chances of the Authority establishing a personal grievance.

- The procedural requirements on employers are onerous and scrutiny of them is high.
- Failure to follow proper process could leave some employers pinged for low merit claims, even in cases where the dismissal was justified.
- The prospect of winning the case is difficult to predict which sometimes incentivises parties to settle.

These perceptions arise from subjective assessments gathered during stakeholder engagement.

Prospect of remedies and reductions

The chances of the Authority awarding remedies and reducing them where there is contributory employee behaviour.

- Some remedies are too high and incentivising some employees to raise low merit claims due to a perception of windfall gains.
- Contributory employee behaviour is not sufficiently considered and reductions are too low in some cases.
- Remedies are too low in some cases.
- There is no mechanism to guarantee that a low merit claim would not result in the employer paying remedies.
- Access to remedies is considered important by stakeholders.

The judiciary has awarded larger remedies in recent years due to concerns around payments being too small. Data also shows that the percentage reductions in remedies awarded by the Authority in recent years has decreased (*In line with a 2016 Employment Court case that stated 50% reductions are for exceptional cases only*).

Wider dispute resolution settings

The time, money and stress required to progress a personal grievance.

- Costs are significant (e.g. legal representation, Authority tariffs, time away from the business, potential productivity losses and reputational risks) and far outweigh any remedies awarded.
- Some non-legal advocate business models incentivise the raising of low merit claims.
- Parties are incentivised to settle to avoid further litigation and costs.

Over time we have observed that the wider system settings are a significant driver of behaviour and can create perverse incentives, reinforcing the need for employers to settle low merit claims.

Other motivations

This includes wider financial considerations and risks.

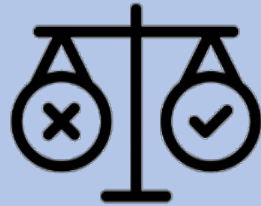
- Employers consider whether settling one low merit claim could invite more low merit claims to be made against them (i.e. setting a precedent).
- Parties sometimes choose to progress or defend a claim based on principle (i.e. they believe they're 'in the right').
- Parties consider individual and business financial risks – especially during economic downturn.

Feedback from Employment Services reinforces that these motivations influence behaviour.

Annex Two: Summary of the options

You could address some of the key drivers of behaviour outlined in Annex One with one or some of the following options, which take place at different steps of the Authority's determination process.

Step one: Establishing a personal grievance



Step two: Deciding to award remedies



Step three: Reducing remedies



If you consider that the level of scrutiny of the employer's 'fair and reasonable' obligations is too high

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

Impact level = low, as it slightly builds on the status quo.

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

Impact level = low to medium, as it places greater focus on fairness of outcome.

If you consider that remedies are incentivising some employees to raise low merit claims and the threshold for not awarding any remedies is too high

Option 2: Introduce a threshold of employee behaviour for removing eligibility for some or all remedies.*

**There are multiple variations of this option outlined in Annex Four.*

Impact level = low to very high, depending on your choice.

If you consider that contributory employee behaviour is not adequately reflected in the level of remedy reductions

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

Impact level = low, as it is expected to gradually restore the level and spread of remedy reductions to pre-2016 Xtreme Dining case levels.

Option 3b: Introduce a two-tier framework of contributory employee behaviour for the Authority to make remedy reductions.

Impact level = low to medium, as it could increase remedy reductions, potentially beyond the pre-2016 Xtreme Dining case levels.

Options have been weighted against the following competing objectives:

Disincentivise low merit claims	This includes situations where there might be vague evidence of a problem, where the employee's contributory behaviour is significant, or where the employee has raised a claim to seek a settlement from the employer.
Maintain access to justice	This maintains basic protections for employees by allowing them to access remedies when treated unfairly by employers.

Annex Three: Options under step one – Establishing a personal grievance



If you consider...

... the level of scrutiny of the employer's 'fair and reasonable' obligations to be too high, the following options will help. You could choose both.

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'.

Analysis of Option 1a

Current state

- In step one, the Authority decides whether the employer has followed a 'fair and reasonable' process before dismissing an employee, including whether the employee was given a 'reasonable opportunity' to respond to the employer's concerns.
- Stakeholders confirmed that obstructive employee behaviour can frustrate the employer's process.
- Stakeholders had different views as to whether the Authority takes obstructive employee behaviour into account when establishing a personal grievance.

What the option does

- Requires the Authority to explicitly consider whether the employee obstructed the employer from meeting their 'fair and reasonable' requirements in step one.
- Brings some focus in step one on how the employee behaved during the employer's disciplinary process.

Potential impacts of the option

- Ensures that obstructive employee behaviour is considered in every case.
- Signals the importance of considering employee behaviour in step one to employers, employees and the Authority.
- Reinforces a balance between employer and employee behaviour at step one.

Overall, we consider the impacts of this option to be minor as it builds on the status quo. It will require scrutiny on employee behaviour at step one and increase flexibility for employers.

Analysis of Option 1b

Current state

- In step one, the Authority must not establish a personal grievance solely due to defects in the employer's process, so long as the defects are 'minor' and did not result in the employee being treated 'unfairly'.
- This clause intends to reassure employers that they will be treated fairly when defending a personal grievance claim, and that minor or technical process defects will not result in otherwise justifiable fair action being deemed unjustified.
- Some stakeholders believed that too much scrutiny is placed on the employer's process, rather than the employee's contributory behaviour.

What the option does

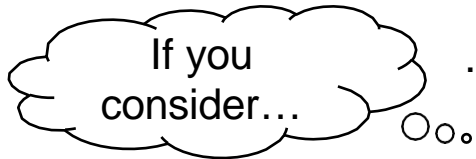
- This option could be achieved by removing the test of 'minor' from section 103A(5)(a), so the only test would be whether the procedural defect resulted in the employee being treated unfairly.

Potential impacts of the option

- Places a greater focus on the fairness of the outcome, rather than whether there was a procedural error.
- Increases flexibility in employers' processes in cases where there is significant contributory employee behaviour.
- Means that significant process defects would not result in a personal grievance being established, so long as the employee was still treated 'fairly'.

Overall, this option places a greater focus on fairness of the outcome rather than whether there was an error in the employer's process. We consider this may reduce the overall likelihood of the Authority establishing a personal grievance, given that potentially major defects in process will not (in themselves) result in a personal grievance.

Annex Four: Options under step two – Deciding to award remedies




...that remedies may be incentivising some employees to raise low merit claims driven by a perception of windfall gains, and the threshold for awarding no remedies is currently too high, the following options will help.

Option 2: Introduce a behavioural threshold of employee behaviour for removing eligibility for some or all remedies. You can choose to mix and match different thresholds with different remedies.

You have two key choices:

Q What should the behavioural threshold for removing eligibility for remedies be?
The lower you set the threshold, the higher the impact on the objectives will be.

Q Which remedies should the behavioural threshold apply to?

Strength of threshold	Behavioural threshold	Examples	Impact of the choice	Strength of impact	Remedies	Impact of the choice
High threshold	(a) Disgraceful outrageous or particularly egregious misconduct (status quo)	<ul style="list-style-type: none"> The 2016 <i>Xtreme Dining</i> case set this threshold for awarding no remedies. Theft and dishonesty were key in this case. 	No to low impact. This reflects the status quo, i.e. currently no remedies are awarded when this threshold is met. Data shows this occurred in 2 out of 548 cases that the employer won over a 3-year period.	Low impact	(H) Any remedies: <ul style="list-style-type: none"> Reinstatement Reimbursement of lost wages Compensation for hurt and humiliation 	High (H) <ul style="list-style-type: none"> Aligns with Coalition commitment and status quo. Has the highest impact.
The lower the behavioural threshold...	(b) Serious misconduct + the employer's actions were fair	<ul style="list-style-type: none"> E.g. Violence, theft and fraud + the Authority determines that the employer's action against the employee were fair. 	Medium impact. A broad range of behaviours are likely to be captured under this threshold. But there is an added safeguard for employees that the employer's actions against them are "fair", i.e. their dismissal was justified. Data shows this threshold was met in 10% of cases with contributory employee conduct over a 3-year period (9 out of 90 cases).	...the stronger the disincentive to raise low merit claims BUT the more it impedes employees' access to remedies.	(M) Compensation for hurt and humiliation only 	Medium (M) <ul style="list-style-type: none"> Reduces perceptions of windfall gains. Reduces largest average remedy. Outcomes will differ depending on the individual (not everyone receives large compensation payments).
	(c) Serious misconduct	<ul style="list-style-type: none"> Behaviour that justifies a summary dismissal. E.g. Violence, theft and fraud. 	High impact. Case law currently captures a broad range of behaviours under this threshold, so this will likely remove eligibility for all or some remedies for many types of significant behaviours.		(L) Reinstatement only	Low (L) <ul style="list-style-type: none"> Reduces employer concerns that the employee returns to the workplace. Removes the threat of reinstatement during settlement negotiations.
	(d) Any contributory behaviour	<ul style="list-style-type: none"> <i>Ranging from minor behaviours</i> e.g. Unproductive behaviour, repeated instances of lateness, misuse of company resources, under-performance. <i>To more serious behaviours</i> e.g. Violence, theft, and fraud. 	Very high impact. Any employee wrongdoing, no matter how minor, will remove eligibility for all or some remedies. Significantly impedes access to justice for employees and risks undermining the personal grievance system. Data shows contributory employee behaviour occurred in 16.4% of cases that the employee won over a 3-year period (90 out of 548 cases).		High impact	



In Australia, compensation for hurt and humiliation is not available for unjustified dismissal grievances.

Annex Five: Options under step three – Reducing remedies

If you consider...

...that contributory employee behaviour is not adequately reflected in the level of remedy reductions, the following options will help.

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



Option 3b: Introduce a two-tier framework of contributory employee behaviour for the Authority to make remedy reductions:

- Tier 1 – which specifies behaviours that require $\geq 50\%$ reductions.
- Tier 2 – which specifies behaviours that require $< 50\%$ reductions.

Current state

- Some stakeholders raised concerns that contributory employee behaviour is not adequately reflected in remedy reductions.
- The 2016 Employment Court *Xtreme Dining* case established a 50% ceiling on remedy reductions to be applied in exceptional circumstances. This constrained the Authority from making reductions between 50% and 100%. The *Xtreme Dining* case also established a threshold of disgraceful, outrageous or particularly egregious behaviour for awarding no remedies.
- Data shows that average reductions in 2023/24 were around 20%, compared to average reductions being around 35% 10 years ago.

Analysis of Option 3a

What the option does

- Clarifies that the Authority can use the full spectrum (0% to 100%) of remedy reductions.
- Effectively overturns the 50% ceiling set in the *Xtreme Dining* case.
- Sends a signal to the Authority to increase reductions in a range of behavioural circumstances.

Potential impacts of the option

- Provides more scope for the Authority to penalise high levels of employee contributory behaviour.
- Over time, case law will clarify the situations when 60%, 70% or 80% reductions are warranted.
- Likely to increase the range of reductions. Would possibly increase the average reduction.

Overall, we consider this to be a technical clarification in the legislation which will reverse current case law and lead to higher remedy reductions over time while maintaining proportionality in reflecting different levels of contributory employee behaviour.

Analysis of Option 3b

What the option does

- Requires the Authority to reduce remedies by at least 50% in response to high levels of misconduct (e.g. theft, dishonesty, etc.) and reduce remedies by less than 50% for lower levels of contributory behaviour (e.g. lateness, poor performance, etc.).
- Sends a signal to the Authority to increase reductions in a range of behavioural circumstances.

Note – The threshold in the framework doesn't have to be set at 50%, but it provides the best chance of overturning the Xtreme Dining precedent of 50%.

Potential impacts of the option

- Likely to increase the average reductions applied over time.
- Where there's significant employee contributory behaviour, this will reduce costs to employers by lowering the remedies they have to pay.
- May create perverse incentives for employers to exaggerate or mislabel an employee's behaviour to attract higher remedy reductions.

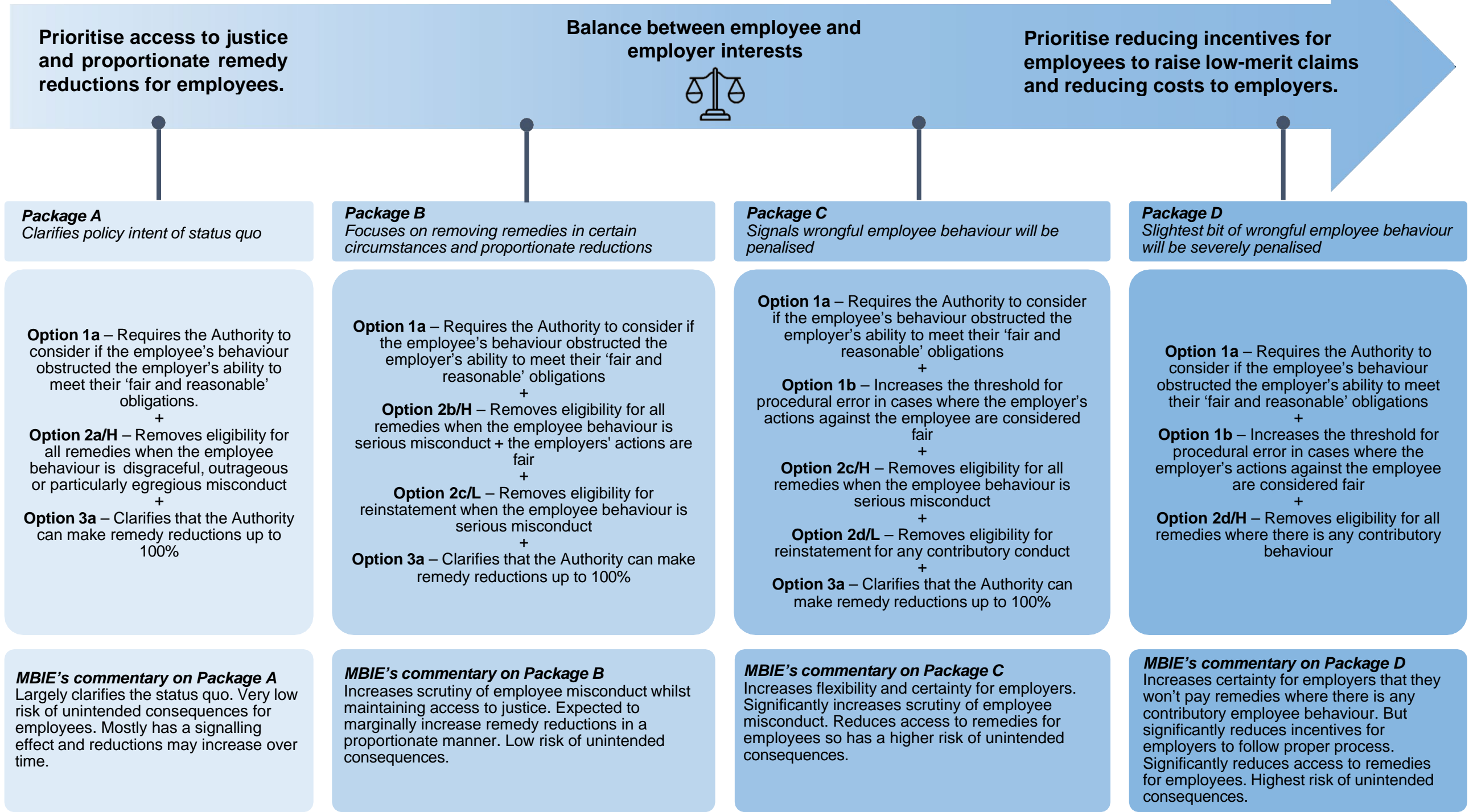
Overall, we consider this two-tier framework will reverse case law and lead to higher remedy reductions over time while maintaining proportionality but presents significant design challenges.



In Australia, remedies can be reduced by any appropriate amount where there is employee misconduct.

Annex Six: Weighting option packages against objectives







Options are weighted against the competing objectives of *reducing incentives to raise low merit claims* and *maintaining access to justice*. You can choose to mix and match options depending on how far you want to shift the dial. Below are some illustrative packages that sit along the continuum.



As you shift settings along the continuum, the more you increase flexibility for employers to manage their workforce but the more you risk removing protections for employees.

Annex Seven: Scenarios and practical application of the options

Scenario A: Employee engages in minor contributory behaviour, employer does not follow proper process

					
Samantha is a nail technician. She has a regular client base and often receives positive feedback from clients.	One client is dissatisfied with her nails and asks to speak to Samantha's manager. The client makes a complaint to the manager that she is unhappy with how her nails look and asks for a refund.	Following the complaint, Samantha's manager suspends her for 3 days without pay.	When the manager arrives at work the next day, Samantha has already before him and is already doing a client's nails. The manager questions why Samantha is at work when she is suspended, and Samantha argues that she disagreed with the suspension and showed up because she needed the money.	In response, the manager dismisses Samantha on the spot.	Samantha believes that her suspension and subsequent dismissal was unjustified and raises a personal grievance.

Possible outcome at the Authority under the status quo:

A personal grievance is likely to be established due to an inadequate process being followed by the manager (e.g. no investigation, no warning). Based on current case law, Samantha is likely to receive remedies but a minor reduction of around 10% would apply.

What could happen under various options:

Option 1a: No change from status quo.

Option 1b: No change from status quo.






Option 2d/H:

- Threshold of '*any contributory behaviour*'.
- Applies to all remedies.

Samantha would receive no remedies.

Option 3a and 3b: No change from status quo, small remedy reduction still applies.

Scenario B: Both employer and employee engage in wrongful conduct

				
Jane is a dental nurse working at a dental clinic.	She has good relations with all the dentists apart from one, the head dentist, who has made some disparaging comments about her in front of patients. She has mostly ignored such comments, but the issue has been building up. She has raised the issue of the head dentist's comments but so far, the employer has not intervened.	During a procedure, the head dentist questions Jane's competence in full view of the patient. Jane has had enough, starts shouting and swearing and walks out of the procedure, telling him to ' <i>get another nurse in</i> ', but another nurse is not available.	After the procedure, the employer pulls Jane into a disciplinary meeting seeking an explanation for walking out during the procedure. Jane is apologetic but explains that she couldn't stay in the operating room after those comments. The employer dismisses Jane, saying her behaviour amounts to serious misconduct and impacted the health and safety of the patient as they had to remain under anaesthesia for longer because another nurse was not available to help.	Jane believes that the dismissal was unjustified and raises a personal grievance, seeking reinstatement, reimbursement of lost wages and compensation for humiliation and hurt feelings.

Possible outcome at the Authority under the status quo:

A personal grievance is likely to be established due to an insufficient process followed leading to the dismissal. Based on current case law, a remedy reduction close to 50% may apply, but likely no more than that.

What could happen under various options:

Option 1a: No change from status quo.

Option 1b: No change from status quo.

Option 2a/H:

- Threshold of '*disgraceful, outrageous or particularly egregious*'.
- Applies to all remedies.

No change from status quo as behaviour unlikely to meet threshold.




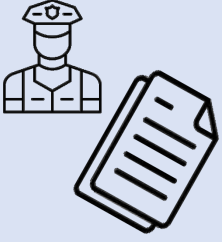
Option 2c/H:

- Threshold of '*serious misconduct*'.
- Applies to all remedies.

Jane receives no remedies.

Options 3a and 3b: Highly likely that a significant reduction of more than 50% would apply.

Scenario C: Employee engages in serious misconduct, employer follows incomplete process leading to dismissal

			
Parker is a security guard who travels around many commercial premises daily in his security company's car. A driver's licence is required for the role. Parker is required to report any events which puts his licence at risk, or any incidents involving the company car.	One day, he is caught by the police traveling at 85km/hr in a 50 zone in the company car. He now has enough demerit points to lose his licence. Not wanting his employer to find out, Parker applies for an interim licence, which is rejected by the police due to no employer sponsorship.	The police then inform Parker via letter that they will suspend his licence in 10 days' time. As he was driving the company's car, Parker's employer also finds out. After Parker drops off the company car, he is pulled into a meeting, and his employer asks him why he did not inform them about his impending licence suspension. Parker apologises and asks to be sponsored for an interim licence. The employer rejects his proposal and dismisses Parker, saying his behaviour was serious misconduct.	Parker believes that his former employer treated him unfairly during the dismissal process and raises a personal grievance, seeking reimbursement of lost wages and compensation for humiliation and hurt feelings.

Possible outcome at the Authority under the status quo:

A personal grievance is likely to be established due to an insufficient process followed. Based on current case law, a remedy reduction under 50% may apply.

What could happen under various options:

Option 1a: No change from status quo.

Option 1b: No change from status quo – defects likely too significant for Parker to be deemed to have treated 'fairly'.

Option 2c/H:

- Threshold of '*serious misconduct*'.
- Applies to all remedies.

Parker receives no remedies.

Option 2b/H:

- Threshold of '*serious misconduct*' + "*employer treated employer fairly*".
- Applies to all remedies.

Parker is likely to be eligible for remedies as he was not treated 'fairly' in the employer's process.

Options 3a and 3b: Highly likely that a significant reduction of more than 50% would apply.