



BRIEFING

Decisions on eligibility for remedies for personal grievances

Date:	24 September 2024	Priority:	Medium
Security classification:	In Confidence	Tracking number:	2425-2607

Action sought		
	Action sought	Deadline
Hon Brooke van Velden Minister for Workplace Relations and Safety	Confirm your preferred options.	27 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	04 896 5028	-	

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 Withdrawn |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



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Purpose

We seek your agreement on options to address the ACT– National Coalition Agreement commitment to consider removing eligibility for remedies for at-fault employees.

Executive summary

On 10 September 2024, we met with you to discuss the suite of options available to you to address the ACT– National Coalition Agreement commitment (the Coalition commitment) to consider removing remedies for at-fault employees [2425-0618 refers].

At this meeting you indicated your preferred package of options as:

- **Option 1a** – *Require the Employment Relations Authority (the Authority) to consider if the employee’s behaviour obstructed the employer’s ability to meet their fair and reasonable obligations, and*
- **Option 1b** – *Increase the threshold for procedural error in cases where the employer’s actions against the employee are considered fair, and*
- **Option 2c/H** – *Remove eligibility for all remedies when the employee behaviour amounts to ‘serious misconduct’, and*
- **Option 2d/M** – *Remove eligibility to compensation for humiliation, loss of dignity, and injured feelings when there is any contributory employee behaviour, and*
- **Option 2d/L** – *Remove eligibility to reinstatement when there is any contributory employee behaviour, and*
- **Option 3a** – *Clarify that the Authority can make remedy reductions up to 100 per cent where it determines it appropriate to do so.*

Together, your preferred package of options will shift the balance of the judiciary’s consideration of employer and employee behaviour in personal grievance settings towards prioritising reducing incentives for low merit claims and reducing costs to employers. For most options we agree this creates a better balance, and our Regulatory Impact Statement (RIS) recommendation is likely to mirror your chosen option. The one topic where our RIS is likely to differ from your preferred option is option 2d/M, Free and frank opinions

Following agreement to options in this paper, the next step is to seek Cabinet’s agreement. We seek your decision on whether to seek Cabinet’s agreement to the two policies in the Coalition commitment together as a package of proposals (MBIE’s preference), or in separate papers.

Recommended action

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

- a **Note** that on 10 September 2024, we met with you to discuss the A3s on options to implement the Coalition commitment and this briefing seeks your confirmation of your preferred options as indicated at this meeting [2425-0618 refers]

Noted

- b **Select** one or more option at step one of the Authority's determination process (establishing a personal grievance) (*your preferred options are bolded*):

Option 1a: Require the Authority to consider if the employee's behaviour obstructed the employer's ability to meet their fair and reasonable obligations Agree / Disagree	AND/OR	Option 1b: Increase the threshold of procedural error for employers in cases where the employer's actions against the employee are considered fair by removing "minor" from section 103A(5)(a) of the Act Agree / Disagree
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- c **Select** one or more options at step two of the Authority's process (awarding remedies) as below (*your preferred options are bolded*):

- i. **Agree** that for contributory employee behaviour that is determined to be *disgraceful, outrageous or particularly egregious misconduct*, the following remedies would be unavailable:

All remedies (status quo) Agree / Disagree	OR	Compensation for humiliation, loss of dignity, injured feelings (only) Agree / Disagree	AND/OR	Reinstatement (only) Agree / Disagree
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- ii. **Agree** that for contributory employee behaviour that is determined to be *serious misconduct* and *the Authority determines the employer's actions against the employee did not result in the employee being treated unfairly*, the following remedies would be unavailable:

All remedies (status quo) Agree / Disagree	OR	Compensation for humiliation, loss of dignity, injured feelings (only) Agree / Disagree	AND/OR	Reinstatement (only) Agree / Disagree
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- iii. **Agree that for** contributory employee behaviour that is determined to be *serious misconduct*, the following remedies would be unavailable (*your preferred option is bolded*):

All remedies (status quo) Agree / Disagree	OR	Compensation for humiliation, loss of dignity, injured feelings (only) Agree / Disagree	AND/OR	Reinstatement (only) Agree / Disagree
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- iv. **Agree** that for contributory employee behaviour that is determined to be *any contributory behaviour*, the following remedies would be unavailable (*your preferred options are bolded*):

All remedies (status quo) <i>Agree / Disagree</i>	OR	Compensation for humiliation, loss of dignity, injured feelings (only) Agree / Disagree	AND/ OR	Reinstatement (only) Agree / Disagree
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- d **Select** one option at step three of the Authority's determination process (reducing remedies) (*your preferred option is bolded*):

Option 3a: Clarify that the Authority can make remedy reductions up to 100 per cent where it determines it appropriate to do so Agree / Disagree	OR	Option 3b: Introduce a framework of contributory behaviours to be considered when determining remedy reductions equal to or greater than 50 per cent, and less than 50 per cent Agree / Disagree
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- e **Note** that option 3b, if chosen, would require further detailed policy design work and decisions, which would impact the timing for introducing the Bill

Noted

Next steps

- f **Agree** to seek Cabinet's approval to introduce your chosen package of options in response to the Coalition commitment to remove eligibility for remedies when the employee is at fault

Agree / Disagree

- g **Indicate** whether you want to present your personal grievance proposals (the income threshold and removal of remedies) to Cabinet as:

One Cabinet paper covering both personal grievances commitments (recommended) Agree / Disagree	OR	Two Cabinet papers, one for each personal grievance commitment Agree / Disagree
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- h **Agree** that MBIE consult with the agencies listed in Annex One on the draft Cabinet paper.

Agree / Disagree / Discuss



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

24 / 9 / 2024

Hon Brooke van Velden
Minister for Workplace Relations and Safety

___ / ___ / 2024

Background

1. On 5 September 2024, we provided you with a set of A3s which outlined a suite of potential options to address the Coalition commitment to consider removing remedies for at-fault employees (or employees with contributory behaviour) [2425-0618 refers].
2. On 10 September 2024, we met with you to discuss the problem, objectives and options presented in the A3s. At this meeting, you indicated your preferred package of options as outlined in the executive summary.
3. This briefing provides a summary of the key impacts and risks associated with your preferred package of options and seeks your decisions. It does not repeat the content of the A3s, so should be read in conjunction with them. Note we provided an updated version of this briefing on 24 September, reformatting recommendation c as requested by your office. The substance remains unchanged.

Overall impacts of your preferred package of options

4. Broadly, personal grievance settings are designed to balance consideration of behaviour on both sides of the employment relationship, underpinned by the requirement for both employers and employees to act in good faith.
5. It is inherently challenging to predict the kinds of behavioural responses your preferred package of options will have, as they depend on changes in employer and employee perceptions. The impacts will also depend on how the Authority and Employment Court (the Court) interpret and apply these changes. We acknowledge this uncertainty and have focused our assessment of the options against the competing objectives of disincentivising low merit claims¹ and maintaining access to justice. We also draw on the experiences and insights of our Employment Services colleagues.
6. We consider that changes to the wider dispute resolution system settings would have the strongest impacts on employer and employee behaviour. A key theme gathered through stakeholder feedback was that the time and money required, as well as the stress involved, in progressing a personal grievance through the system is creating a strong incentive to settle, even in cases where the claim is considered low merit.
7. Your preferred package of options represents a suite of targeted changes to settings at each stage set out in the *Employment Relations Act 2000* (the Act) that requires the Authority and Court to consider employer and/or employee behaviour. It will shift the balance of the judiciary's consideration of employer and employee behaviour in personal grievance settings more towards prioritising reducing incentives for low merit claims and reducing costs to employers.

Impacts of the options at step one – establishing a personal grievance (section 103A of the Act)

8. If you consider that the level of scrutiny on the employer's fair and reasonable obligations is currently too high, the options under *step one – establishing a personal grievance* would go some way toward addressing these concerns. At the meeting on 10 September, you indicated a preference to progress both options:

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.

- **Option 1a:** Require the Authority to consider if the employee's behaviour obstructed the employer's ability to meet their fair and reasonable obligations, and
 - **Option 1b:** Increase the threshold for procedural error in cases where the employer's actions against the employee are considered fair by removing 'minor' from section 103A(5)(a) of the Act.
9. Together, these options are expected to have an **overall low impact on employer and employee behaviours**. We consider that the benefit they add is that they will help to rebalance the consideration of behaviour on both sides of the employment relationship at step one. They mostly signal the importance of assessing whether the employer met their fair and reasonable obligations in the context of any obstructive employee behaviour and will reassure employers that this is considered in every case. This may help to address perceptions among some employers that the level of scrutiny on the employer's process is currently too high.
10. This more explicit scrutiny of employee behaviour at step one 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.
11. The fair and reasonable employer obligations in section 103A place an onus on the employer to prove that the action(s) taken against the employee were what a fair and reasonable employer could have done. Whether the employer's action(s) are fair and reasonable is a combination of substantive and procedural justification. The impact of option 1b is therefore more challenging to predict and **will depend on the judiciary's interpretation** of the change.
12. There is a small risk that this option could result in **unintended consequences for employees**, where an employer's procedural error is significant but a personal grievance is not established. However, it is difficult to imagine a case where the employer's procedural errors were so significant but still results in the employee being treated fairly. It is therefore unlikely that option 1b will disincentivise employers to meet their fair and reasonable obligations.

Impacts of the options at step two – awarding remedies (section 123 of the Act)

13. If you consider that remedies may be incentivising some employees to raise 'low merit' claims and the threshold for awarding no remedies is currently too high, the options under step two – awarding remedies would address these concerns. At the meeting on 10 September, you indicated your initial preference to progress the following combination of options:
- **Option 2c/H** – Remove eligibility for all remedies when the employee behaviour amounts to 'serious misconduct', and
 - **Option 2d/M** – Remove eligibility to compensation for humiliation, loss of dignity, and injured feelings when there is any contributory employee behaviour, and
 - **Option 2d/L** – Remove eligibility to reinstatement when there is any contributory employee behaviour.
14. We consider that together, these options are likely to have the **most significant impacts on employer and employee behaviours**.

Impacts of option 2c/H: to remove eligibility for all remedies when the employee behaviour amounts to ‘serious misconduct’

15. In some cases, employers assert serious misconduct as the reason for justifying the dismissal of an employee. In case law, serious misconduct is a broad and commonly used term. 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’*² 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.
16. However, there are emerging indications from our Employment Services colleagues that 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 claims³. This option therefore risks creating a **limited number of unjust outcomes** where the employee would not be eligible to any remedies in these types of cases. This has only recently been brought to our attention, so we will look into it further and work to ensure that how we use the concept of serious misconduct mitigates the chance of unjust outcomes.
17. This option will **reassure employers** that when an employee has acted in a destructive or fundamentally inappropriate manner, if a personal grievance is established, the employer will likely not be liable to pay the employee any remedies. It will also **reduce employees’ access to justice** but is arguably justifiable given the employee’s serious misconduct. This behavioural threshold is lower than the status quo 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 judiciary. It is likely that there will continue to be dispute 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.
18. We consider that employee representative groups are likely to oppose this option because of the access to justice implications.

Impacts of option 2d/M: to remove eligibility to compensation for humiliation, loss of dignity and injured feelings where there is ‘any contributory behaviour’

19. This option could remove perceptions of ‘windfall gains’ and reduce incentives to raise low merit claims. It will align with the Australian settings where compensation for hurt and humiliation is not available for unjustified dismissal grievances. However, this option would **significantly impede access to justice** in some cases as any employee wrongdoing, no

² *Eagle Airways Ltd v Lang EmpC Auckland AEC5/95, 20 February 1995.*

³ 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.

matter how minor, would remove eligibility to this remedy, even in cases where they have experienced a loss of dignity. This is **likely to lead to unjust outcomes**, as if an employee behaves slightly wrongly, any harm caused by the employer will not be reflected in the employee's remedies.

20. An unlikely but possible scenario is described below:

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.

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

Estimated remedies awarded by the Authority⁴ (status quo)	Estimated remedy reduction applied by the Authority (status quo)	Outcome under option 2d/M
\$2,345.38 in lost wages	10 per cent remedy reduction for lateness \$2,110.84 in lost wages	10 per cent reduction to lost wages only \$2,110.84 in lost wages
\$12,000 in compensation for hurt and humiliation	10 per cent remedy reduction for lateness \$10,800 in compensation for hurt and humiliation	\$0
Total = \$14,345.38	Total = \$12,910.84	Total = \$2,110.84 i.e. approx. 85 per cent remedy reduction

22. This option presents a risk that over time, the **Authority will adapt its rulings** to work around being faced with scenarios of not awarding compensation for humiliation, loss of dignity and injured feelings and/or not being able to proportionately reduce remedies to reflect the level of contributory employee behaviour. In other words, the Authority could increase the threshold for determining contributory behaviour due to the increased consequence of making this finding. In turn, this could create a greater incentive for more litigation to challenge the Authority's decision.

23. Free and frank opinions [redacted]
[redacted]
[redacted]
[redacted]
[redacted] This view is likely to be reflected in MBIE's RIS.

⁴ This example is grounded in an actual case, but we have worsened the employer behaviour for illustrative purposes.

Impacts of option 2d/L: to remove eligibility to reinstatement where there is ‘any contributory behaviour’

24. Reinstatement is rarely awarded by the Authority⁵ and is generally not awarded in situations where the employment relationship is fundamentally broken. Consequently, the **practical impact of this option is likely to be low**. 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 reduce these employer perceptions and increase their bargaining power during settlement negotiations. On the other hand it could **reduce access to justice for employees** who seek reinstatement at the Authority (as opposed to those who may use it as a bargaining chip).

Impacts of the option at step three – reducing remedies (section 124 of the Act)

25. If you consider that contributory employee behaviour is not adequately reflected in the level of remedy reductions, the options under step three – reducing remedies, would address this concern. At the meeting on 10 September, you indicated your initial preference to progress the following option:

- **Option 3a** – to clarify that the Authority can make remedy reductions up to 100 per cent where it determines it appropriate to do so.

26. This option would **overturn** the 2016 *Xtreme Dining* case⁶ and **clarify** that the Authority has the full spectrum of remedy reductions (up to 100 per cent) available to them. This option has the benefit of being simple and maintaining the judiciary’s full discretion to make proportionate remedy reductions that reflect the level of contributory employee behaviour. It will increase certainty for employers and employees, and it is likely that over time, the range of remedy reductions being applied will increase. While this option is likely to reduce incentives to raise low merit claims, there is a risk that it could shift the judiciary’s remedy reductions to a level so high that it risks reducing employees’ access to justice.

Te Tiriti O Waitangi/Treaty of Waitangi implications

27. The Treaty of Waitangi/Te Titiri O Waitangi implications referred to in the advice on introducing a threshold for unjustified dismissal personal grievances also apply to the options in this briefing [2425-0867 refers]. In summary, we consider the proposal to remove eligibility for remedies where the employee is ‘at fault’ is unlikely to raise Treaty of Waitangi/te Tiriti o Waitangi interests.

28. Tikanga may 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]. As we noted in the 10 September meeting, 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.

⁵ The Authority awarded permanent reinstatement 3 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.

⁶ *Xtreme Dining Ltd t/a Think Steel v Dewar* [2016] NZEmpC 136. 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.

Next steps

29. Following agreement to options in this paper, the next steps for both amending remedies and introducing an income threshold for unjustified dismissals is to seek Cabinet's agreement. We will deliver a draft Cabinet paper to you on 17 October. We seek your decision on whether to seek Cabinet's agreement to the two policies in the same paper, or in separate papers.
30. Combining the options in a single paper allows them to be presented as a package with a single overarching story, without repetition. It may also be more efficient, for example by only requiring a single consideration at Cabinet Committee and Cabinet.
31. The key downside is that, if one proposal is slowed down (e.g. due to requests for information during ministerial consultation), both proposals are delayed. We are aiming for a 20 November Cabinet committee, and there are three further committee dates in December, but our experience is that it is more challenging to get time on Cabinet's agenda in December.
32. Alternatively, you could have two separate papers. This likely entails some repetition of information in the Cabinet papers, but mitigates the risk of delaying both policies.
33. Either way, delaying seeking Cabinet decisions on one or both policies to early 2025 would place pressure on drafting timeframes for the Parliamentary Counsel Office and would likely delay introduction of the Bill.
34. We seek your agreement to consult on the draft Cabinet paper with the suggested list of agencies in Annex One. A rationale for consulting with each of the agencies is included in Annex One.

Annex

Annex One: Suggested list of agencies to consult on the draft Cabinet paper

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Agency	Rationale for consultation
Inland Revenue*	Draft Cabinet paper includes statements on the tax implications of the proposed income threshold.
Ministry of Justice	Draft Cabinet paper includes statements on the human rights implications of the proposed package of changes. Proposals relating to remedies will impact what the Authority and Court considers employee behaviour when making personal grievance determinations.
Ministry of Foreign Affairs & Trade*	Draft Cabinet paper includes statements on the implications of the proposed package of changes for compliance with international obligations.
Te Puni Kōkiri*	The Cabinet paper template requires statements on the population implications of the proposed exclusion.
Ministry for Pacific Peoples	
Ministry for Ethnic Communities	
Whaikaha – Ministry of Disabled People	
Ministry for Women	
Te Kawa Mataaho Public Service Commission	Proposed package of changes will impact large public sector government funded workforces.
Ministry of Health	
Ministry for Education	
Department of the Prime Minister and Cabinet (DPMC)	All cabinet papers are sent to DPMC.
Treasury	All cabinet papers are sent to Treasury.
Ministry for Regulation	Manages the RIS process.

*Consulted with during the development of the advice on either or both remedies and income threshold.