

Extract from the MBIE Workplace Relations and Safety Policy Weekly Report for the period from 24 January 2025 – 30 January 2024

30 January 2024

1.1 Changes to personal grievance remedy settings – supplementary decision required

Contact: Beth Goodwin, Manager Employment Relations Policy, Privacy of natural persons

A question has arisen as we wrote the drafting instructions for your personal grievance remedies changes, and we seek your decision on your preferred approach.

Background

This matter relates to Cabinet’s agreed change to: “remove eligibility to compensation for humiliation, loss of dignity, and injury to the feelings of the employee when the Employment Relations Authority or Employment Court determines that there is ‘any contributory employee behaviour’ that contributed to the issue that gave rise to the personal grievance” [ECO-24-MIN-0268 refers].

There is an equivalent decision to remove eligibility for reinstatement. The policy intent of these changes is to reduce windfall gains (actual and perceived) which may be incentivising some employees to raise low merit personal grievance claims. In such cases, employees will still be eligible for reimbursement for lost wages and costs, provided that their behaviour does not amount to serious misconduct.

There is another type of financial compensation that can be awarded by the Authority or Court as a personal grievance remedy, as follows:

Section 123(1)(c)(ii) - loss of any benefit, whether or not of a monetary kind, which the employee might reasonably have been expected to obtain if the personal grievance had not arisen.

The Authority rarely awards compensation under this ‘loss of any benefit’ remedy¹, and when it does, to date it has almost always coupled it with compensation for hurt and humiliation. Expected benefits referred to in the awards to date include lifestyle leave, vehicle allowance, lost KiwiSaver contributions, and training fees.

For employees who engage in serious misconduct, the Cabinet decision was clear they will no longer be eligible for any remedies at all, i.e. compensation for ‘loss of any benefit’ was already ruled out. For lesser contributory behaviour from the employee, the current approach is that the ‘loss of any benefit’ remedy will remain available, together with the ‘lost wages’ remedy, although the Authority / Court can reduce the amount of each to reflect the contributory behaviour.

As this remedy is limited to compensation for the loss of any benefit “which the

¹ In the period between January 2021 to February 2024, only 3 percent of cases with an established personal grievance included an award for loss of benefit under section 123(1)(c)(ii) (amounting to 17 out of 548 cases). Out of these 17 cases, the Authority found that the employee contributed to the personal grievance in 3 of them and reduced the remedies accordingly.

employee might reasonably have expected to obtain if the personal grievance has not arisen”, we consider it unlikely that this remedy is currently contributing to perceptions of windfall gains or contributing to incentives for employees to make low merit claims. During MBIE’s targeted stakeholder consultation, this was not raised as an issue, nor was the cost to employers of paying this remedy to employees.

However, we’ve identified the continued availability of the ‘loss of any benefit’ remedy creates a risk, and so we seek your direction.

Free and frank opinions

Free and frank opinions

The Court of Appeal has set a precedent which we think would limit the Authority and Court’s ability to apply this remedy, stating that: “the provision is intended to reach potential future service-related benefits, and no doubt include long service leave, redundancy and golden handshakes in various forms for which the worker has not already qualified but which he or she might reasonably have expected to have obtained with further service.”²

Free and frank opinions

You have an opportunity to make a supplementary decision

You can decide between the following options:

Option A: do nothing – i.e. retain eligibility to compensation for the ‘loss of any benefit’ remedy where there is any contributory behaviour; or

Option B: remove eligibility to compensation for the ‘loss of any benefit’ where there is any contributory behaviour.

Option A: do nothing (i.e. retain eligibility)

If you choose option A, the remedy of ‘loss of any benefit’ would remain available to the Authority / Court in cases of contributory behaviour. We consider this remedy to be quite similar to the ‘lost wages’ remedy, as both are aimed at tangible employment benefits/entitlements that the employee would have received if not for the action amounting to the personal grievance, compared to the more abstract compensation for hurt and humiliation. So you could choose this option if you prefer to treat the similar remedies consistently.

We would monitor whether the risk we’ve identified actually arises, and if it does, you could choose at that stage to remove the remedy.

² Telecom South Ltd v Post Office Union (Inc) – [1992] 1 NZLR 275

Option B: remove eligibility

If you choose option B, eligibility for this remedy would be removed, as for hurt and humiliation and reinstatement. **Free and frank opinions**

We consider this option is within scope of your authority from Cabinet to: "make further decisions, consistent with the policy in the paper under ECO-24-SUB-0268, on any issues that may arise during the drafting and parliamentary processes". We would then outline your decision to Cabinet in your LEG paper when you seek to introduce the Bill.

Next steps

If you choose Option A, no further action is required. If you choose Option B, we will communicate this to PCO for them to incorporate into their drafting of the relevant Employment Relations Amendment Bill provisions.

If you prefer to take a different approach, we're happy to discuss that.

<p>Option A: agree to retain eligibility for compensation for the loss of any benefit where there is any contributory behaviour (i.e. do nothing)</p> <p><i>Agree / Disagree / Discuss</i></p>	<p>OR</p>	<p>Option B: agree to remove eligibility for compensation for the loss of any benefit, where there is any contributory behaviour</p> <p><i>Agree / Disagree / Discuss</i></p>
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