EMPLOYER & EMPLOYEE VIEWS OF THE PERSONAL GRIEVANCE PROCESS
A qualitative study

April 2010
SUMMARY

This qualitative study involving 47 interviews was carried out by Department of Labour researchers in March and April 2010 to support a review of the personal grievance system being carried out by the Department of Labour. The research was intended to supplement submissions received during the review by eliciting the views of employees and employers who had settled a possible personal grievance case outside of the Employment Relations Authority (either in mediation or privately) and employees who considered but did not proceed with a personal grievance.

Findings

Participants’ circumstances

The employees and employers interviewed were focused on somewhat different circumstances: employers on having to respond to weak or vexatious claims and employees on the barriers they faced in initiating a grievance.

Barriers

There were barriers for employees in pursuing a claim and for employers in responding to one, and many of these barriers were the same – stress and the fear of costs, both of which were exacerbated by the thought of a drawn-out process.

Perceptions of the process

A range of views were expressed by both parties on the questions raised by the Personal Grievance Review Discussion Document: this range included some commonality between employers’ and employees’ views and some divergence within each group. Having a personal grievance system available to all employees was considered important by all but two themes emerged strongly: employees considered there were major inequities in power with the employer able to pursue various courses of action with much greater financial resources; and employers felt they could be compelled to participate in a process of unknown dimensions irrespective of the merit of the employees’ case, with no prospect of compensation for the costs they faced. Fear of having made a procedural error contributed greatly to employers’ decisions to settle at mediation regardless of their dissatisfaction with the settlement.

Information, advice & representation

Few employees or employers made decisions about dealing with an employment relationship problem without legal advice, or went to mediation without representation. Participants were satisfied with the quality of advice received but the role of representatives was an issue because of the cost; thus there was interest in limiting the use of lawyers in the process. However the net effect of lawyers in the process was not clear. Further, restraining the use of lawyers in the process may place a further barrier to engagement in the process.

Eligibility

Both employees and employers considered the process should be accessible to all employees (except those on a trial period exclusion). There were mixed views amongst both employees and employers on the 90 day limitation period for notifying an employer of making a claim.
and the three year limitation period for lodging a claim with the Employment Relations Authority or the Employment Court, although employers commonly requested that both periods be shortened.

**Remedies**

Participants’ views on remedies that the Employment Relations Authority might deliver were largely based on the common experience that the employment relationship was over when a personal grievance claim was taken. Both employees and employers considered compensation for lost income was an acceptable remedy but compensation for hurt and humiliation was seen as more contentious by employers. Obliging employers to address workplace issues was of interest to employees. Reinstatement was seen by both parties as generally unfeasible, and as such it should not be the primary remedy in law, but should be retained as a remedy.

**Conclusion**

The research has provided indicative evidence that there are some employees and employers for whom the current system is not efficient and effective, and further, that the objectives of Part 9 of the Act are ill suited to some peoples’ actual experience of employment relationship problems.

The improvements sought by employees and employers centre on the provision of accessible and independent information that addresses their particular circumstances, provides some clarity around the case they have, and perhaps provides an initial judgement. In relation to this last point, it was notable that the employment relationship was generally effectively over when most of the participants went to mediation. There was therefore a call for a more appropriate way of addressing such grievance cases, in the first instance, with an inquisitorial rather than a mediative approach.
# TABLE OF CONTENTS

**SUMMARY** .................................................................................................................. 2  

1  **INTRODUCTION** .................................................................................................. 5  
  1.1 Background ........................................................................................................... 5  
  1.2 The research method ............................................................................................ 5  
  1.3 Overview of the literature on the personal grievance system .............................. 7  

2  **FINDINGS** ............................................................................................................. 9  
  2.1 Circumstances of the respondents ........................................................................ 9  
  2.2 Costs of involvement in the process .................................................................... 14  
  2.3 Duration of the process ....................................................................................... 16  
  2.4 Balance between parties ..................................................................................... 18  
  2.5 Information, advice & representatives .................................................................. 23  
  2.6 Eligibility ............................................................................................................... 27  
  2.7 Remedies ............................................................................................................... 30  
  2.8 Barriers to raising or defending a personal grievance ......................................... 34  
  2.9 Small and medium enterprises and the personal grievance system .................... 35  
  2.10 Changes to the personal grievance system ......................................................... 37  

3  **DISCUSSION** ......................................................................................................... 43  

4  **CONCLUSION** ....................................................................................................... 46  

REFERENCES ..................................................................................................................... 47
1 INTRODUCTION

1.1 Background

This research was undertaken to support a review of the personal grievance system (Part 9 of the Employment Relations Act 2000) being carried out by the Department of Labour in 2010. The Minister of Labour, Hon. Kate Wilkinson, requested that the Department conduct the review to consider whether the personal grievance system established under the Employment Relations Act 2000 ("the Employment Relations Act"):

• strikes a fair balance between employer flexibility and employee protection
• does not impose unnecessary costs or obligations for employers or employees
• supports improvements in workplace productivity
• is efficient and effective, and
• has met its objectives (as set out in the Employment Relations Act 2000)
• and, where improvements are required, the nature and extent of the issues involved, and the steps that might be taken to address these (including whether any amendments to the legislation are necessary or desirable).

A Personal Grievance Discussion Document ("Discussion Document") was released for public consultation by the Department of Labour in March 2010. In addition to seeking submissions, the Department has carried out this supplementary qualitative research project with employees and employers about their experiences with the personal grievance system. This qualitative research was intended to elicit the views of:

• Employees from a range of workplaces who
  o took some steps towards taking a personal grievance but did not proceed
  o took a personal grievance to mediation only
• Employers who had settled a personal grievance outside of the Employment Relations Authority (either in mediation or outside of it), particularly those employers in small and medium enterprises (SMEs).

1.2 The research method

A qualitative approach to this research was used to explore employers’ and employees’ experiences of the grievance process. Data was collected through semi-structured interviews based on the questions in the Personal Grievance Review Discussion Document.

---

1 Part 9 of the Employment Relations Act 2000 provides procedures and mechanisms for resolving personal grievances and employment relationship problems between employers and employees, and the principles and assumptions underpinning the employment relationship problem resolution system.

2 ‘The process’ refers to the employment relationship problem resolution system, that is, all possible types of employment relationship problems (such as personal grievances) that may be resolved by the parties themselves, or through recourse to mediation, the Employment Relations Authority or the Employment Court. A personal
Forty-seven people were interviewed from throughout New Zealand: 24 employees, 21 employers and two employers’ representatives were interviewed face to face (40 in total) or over the telephone (7 in total) by Department of Labour researchers during March and April 2010.

The people interviewed were chosen for several reasons: it was important for the Review to include the perspectives of people who have not engaged with the formal grievance process when resolving employment relationship problems; secondly, it was considered that employers in small firms and employees generally were less likely than others to respond to the Discussion Document. In addition, the research available (in New Zealand and in other countries) suggests that differences exist for SMEs compared to larger firms in their experience of resolving employment relationship problems, and in their satisfaction with the processes available (for example, Saridakis et al 2008, Woodhams 2007).

Extensive notes or audio recordings were made at interviews. The notes and transcripts from the interviews were coded against the research questions in the Discussion Document using NVivo qualitative analysis software. The coded data was analysed with reference to the participants’ circumstances; findings for any one person or group were compared against those of the entire data set. In writing the report the qualitative data was related to the research questions and any literature on the topic.

The purpose of this qualitative study was to describe the experiences and views of the personal grievance process for a sample of employees and employers. The research was not aimed at achieving a representative sample in order to generalise statistical relationships to the broader population of employees and employers.

The sample

Participants in the research responded to advertisements in Department of Labour newsletters or were invited to participate by the Department of Labour’s mediation services, employers’ associations and the Council of Trade Unions. Employers interviewed included those who owned businesses and those who managed them (and thus were themselves employees).

The sample incorporated employees and employers from firms with a range of size and sector characteristics, and were located throughout New Zealand.

<table>
<thead>
<tr>
<th>Firm size</th>
<th>Number of employees</th>
<th>Number of employers</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Large (50+)</td>
<td>16</td>
<td>5</td>
<td>21</td>
</tr>
<tr>
<td>Medium (20-49)</td>
<td>-</td>
<td>5</td>
<td>5</td>
</tr>
<tr>
<td>Small (&lt;20)</td>
<td>8</td>
<td>11</td>
<td>19</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>24</strong></td>
<td><strong>21</strong></td>
<td><strong>45</strong></td>
</tr>
</tbody>
</table>

grievance is a specific type of employment relationship problem as defined in the legislation. The personal grievance system refers to the system prescribed in the legislation for resolving a personal grievance (including through the employment institutions).

Both employers and employees were involved in a wide range of industries:

### Table 2: Industry sector of participants*

<table>
<thead>
<tr>
<th>Industry</th>
<th>Number of employees</th>
<th>Number of employers</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Accommodation Cafe &amp; Restaurants</td>
<td>1</td>
<td>-</td>
<td>1</td>
</tr>
<tr>
<td>Administrative &amp; Support Services</td>
<td>1</td>
<td>-</td>
<td>1</td>
</tr>
<tr>
<td>Agriculture &amp; Horticulture</td>
<td>-</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Construction</td>
<td>1</td>
<td>3</td>
<td>4</td>
</tr>
<tr>
<td>Cultural &amp; Recreational Service</td>
<td>-</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Education</td>
<td>3</td>
<td>-</td>
<td>3</td>
</tr>
<tr>
<td>Financial &amp; Insurance</td>
<td>2</td>
<td>2</td>
<td>4</td>
</tr>
<tr>
<td>Government Administration</td>
<td>9</td>
<td>-</td>
<td>9</td>
</tr>
<tr>
<td>Health &amp; Community Services</td>
<td>2</td>
<td>5</td>
<td>7</td>
</tr>
<tr>
<td>Manufacturing</td>
<td>-</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Personal &amp; Other Services</td>
<td>1</td>
<td>3</td>
<td>4</td>
</tr>
<tr>
<td>Property &amp; Business Services</td>
<td>-</td>
<td>4</td>
<td>4</td>
</tr>
<tr>
<td>Retail Trade</td>
<td>3</td>
<td>1</td>
<td>4</td>
</tr>
<tr>
<td>Wholesale Trade</td>
<td>1</td>
<td>-</td>
<td>1</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>24</strong></td>
<td><strong>21</strong></td>
<td><strong>45</strong></td>
</tr>
</tbody>
</table>

*The two employers’ representatives interviewed are omitted from this table.

Note: That as shown in the table above, there were no employers (managers) from the public sector in the research, however there were nine employees from the public sector interviewed. This contributed to a slight mismatch between the experiences of the groups that participated in the research. While many of the employers interviewed discussed experiences of the personal grievance system in relation to managing employee performance, misconduct, job abandonment and redundancy, employees interviewed were largely discussing situations of personality differences, poor managerial behaviour, and poor management processes and practices.

### 1.3 Overview of the literature on the personal grievance system

Empirical New Zealand research on the personal grievance system is minimal, however, the evidence available enables some comment.

Costs for employers of resolving (potential) personal grievances are generally in the thousands rather than the tens of thousands (including settlement) for disputes settled in mediation or outside of formal avenues of redress. Costs increase if a case goes to the Employment Relations Authority or the Employment Court (Department of Labour 2007b, Woodhams 2007, Woodhams & Martin 2007). It is not clear how many employers make cash settlements at mediation in circumstances when employees would not have been successful if they had proceeded with a claim to the Employment Relations Authority.

Survey data and the number of applications made to the mediation services do not indicate a trend of increasing numbers of personal grievance claims (Department of Labour 2007b, Woodhams 2007, Woodhams & Martin 2007). It is clear that the impact of the
unemployment benefit stand down requirements do not drive any significant number of personal grievances (Woodhams 2007). While the volume and effects of contingency fee arrangements are not clear, such arrangements do not appear to drive an increase in the number of cases (Woodhams 2007).

While employers may perceive that the personal grievance system places an emphasis on process over substance that is unfair to employers, the limited evidence available suggests otherwise (Woodhams 2007). Further, British research shows that having and following grievance and disciplinary processes benefits employers who must respond to an Employment Tribunal claim (Saridakis et al 2008).

Research in New Zealand and Australia and Great Britain suggests that differences exist for SMEs in their experience of resolving employment relationship problems, and in their attitude to the processes available. However, it is not clear if they experience worse outcomes, including financial outcomes, when resolving these problems compared to larger firms (Dix et al 2008, Hayward et al 2004, Freyens and Oslington 2005, Robbins & Voll 2005, Saridakis et al 2008, Southey 2008).

Overall the limited research evidence suggests a majority of employers are satisfied when the process and outcomes of the entire personal grievance system are considered; including disputes resolved within the workplace and those that go to the Employment Court (Department of Labour 2007a, Kalafatelas & Hickey 2008, McAndrew et al 2004, Woodhams 2007).

4 Updated data from the Ministry of Social Development in 2010 confirms that very few people avoid the stand down period on the unemployment benefit because they are taking a personal grievance.
2 FINDINGS

This section of the report describes the circumstances reported by participants, then gives their views on the applicable questions raised in the Discussion Document. It is important to note that the employees interviewed are largely people who decided not to pursue a personal grievance\(^5\) or who settled at mediation or privately, and the employers interviewed are those who went to mediation or settled a grievance privately. With one exception the participants had not been to the Employment Relations Authority in relation to the case they were discussing.

2.1 Circumstances of the respondents

Participants in the research were asked to describe the circumstances of their involvement with the personal grievance system, prior to being asked more specific questions about their views of the system drawn from the Discussion Document.

The circumstances discussed with participants had arisen within the previous two years. Employees involved in the research had been at the workplaces concerned for a range of time periods: some for months, but most over a year and some for many years. One employee had been in the workplace for 20 years prior to the circumstances which gave rise to her grievance. Employers who spoke about specific cases (rather than more generally about their experiences with the system) described circumstances in which employees had worked for them for comparatively short periods of time ranging from three weeks to 18 months. This difference in the circumstances described by employees and employers may reflect the non-random nature of the sample.

Most of the employees who participated in the research were full time permanent employees; a few were on casual or fixed term contracts – which, in these cases, contributed to the grievance arising.

The nature of the issues

As noted, the issues for the employees and employers who participated in the research were generally quite different, although there was some overlap with (alleged) misconduct cases.

Employees participating in the research discussed their experiences of the personal grievance system in relation to:

- personal differences with managers, which lead in some cases to suspension, dismissal or resignation
- redundancies that employees felt were not genuine but influenced by personality clashes
- alleged serious misconduct - for example, theft
- unfair disadvantage - in which the employee considered their employer had changed their employment terms and conditions unilaterally

\(^5\) That is, they may have raised the matter with their employer, but did not go to mediation or lodge a claim with the Employment Relations Authority.
• breaches of the Employment Relations Act, in these cases related to fixed term or casual employment status.
• The circumstances in which employers became involved with the grievance process related to:
• managing underperformance, in particular employees resigning when performance issues were initially raised
• misconduct - this included theft from the employer, using work equipment for personal use, running a separate business in the employer's time, and professional misconduct
• abandonment of employment - in some instances this also involved an employee’s health issues
• situations of genuine redundancy and situations where redundancy was fabricated as a means of dismissal for poor performance
• personality clashes between employees leading to resignation.

Status of the grievance

The status of the grievance or potential grievance situation of the interviewees is shown below.

Where people went to mediation, in most cases a settlement was agreed upon. In all but one of the mediation settlements discussed by either employers or employees interviewed, the employment relationship was terminated by agreement (or remained terminated).

Table 3: Status of participants’ grievance situation*

<table>
<thead>
<tr>
<th>Case not pursued</th>
<th>Number of employees</th>
<th>Number of employers</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Awaiting mediation</td>
<td>2</td>
<td>-</td>
<td>2</td>
</tr>
<tr>
<td>Been to mediation &amp; Employment Relations Authority</td>
<td>1</td>
<td>-</td>
<td>1</td>
</tr>
<tr>
<td>Been to mediation &amp; not settled</td>
<td>1</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>Settled at mediation</td>
<td>9</td>
<td>10</td>
<td>19</td>
</tr>
<tr>
<td>Settled privately</td>
<td>1</td>
<td>3</td>
<td>4</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>24</strong></td>
<td><strong>15</strong></td>
<td><strong>39</strong></td>
</tr>
</tbody>
</table>

*Note: That 6 employers discussed more general situations and are thus not included in the table above.

Satisfaction with the outcome

Employees

Most of the employees who settled their case at mediation were positive about the mediation experience and the outcome. This satisfaction related to feeling vindicated in their complaint, receiving a settlement sufficient to live on while they found another job, and having the case over with.

The outcome was all in my favour, which was good. Basically I resigned effective immediately and they paid me out. .... At the end of the day I didn't want to leave. I wanted another manager and I would have been fine... But knowing that
that wasn’t going to happen, I ... had to get out ... of that environment and move on, but I needed to ensure I had enough money behind me. So long as I got a decent payout and, considering the fact that I thought it was unfair that I had to leave because of something they’d done, I thought bugger it, they can pay. ... I got the outcome that I not necessarily wanted but that I needed to move on, and that was good.

**Employee, settled at mediation**

Dissatisfaction arose from feeling they had unduly compromised when settling at mediation.

_I was disappointed with the dollar value proposed - no holiday pay and no legal fees - but I did not want to risk going to the employment court (sic), with the possible death (of the elderly employer) or the business folding in the interim._

**Employee, settled at mediation**

Or, that at mediation, they were dependent on the willingness of the other party to agree to what they wanted, rather than the mediator ‘finding the truth’ and providing a judgement.

_During that mediation process the mediator would come in with the different offers (the employer) was making. It made it really difficult, not being able to talk to (the employer) directly to get an understanding of why these different offers (were being made)... offers would come and I would agree, (the mediator) would go back or I would agree ... as long as my contract’s sorted, and they’d come back and say no, but there was no renegotiating with it. It was ‘no, it’s not on the table anymore.’ So (it) felt there was no negotiation really, it was just ‘you accept what we’ve actually decided.’ I felt no satisfaction that anything was resolved because I was still without a contract._

**Employee, settled at mediation**

An employee who settled privately with her employer outside of mediation had mixed feelings about the process – it was emotionally and financially costly (as she was unemployed for some time afterwards), but the employment relationship was over and the settlement – cash and an apology – was ‘as much as one could hope for.’

When asked whether they would in hindsight have done anything differently, some employees who had not pursued claims felt they would not in the same circumstances do anything differently as the barriers to making a claim remained; others felt they should have gone through with it, or that they would at least in the future be more willing to confront an employer and face unpleasantness in the workplace. Notably, employees who went to mediation felt that they would take this action again even if they were not entirely satisfied with the process or outcome.

**Employers**

Satisfaction with the process and outcome ranged amongst employers but they were on the whole considerably less satisfied than employees.

Of those who had been to mediation, some employers were displeased that they had had to provide a cash settlement to an employee whom they thought had a meritless claim, but
considered that the mediator had done the best possible job given the constraints of the mediation system (that is, the mediator could not determine the outcome).

Others were more satisfied with the outcome (termination of the employment relationship) despite having to provide a cash settlement to the employee, but were not satisfied with the mediation process. Again, this was not necessarily considered to be the fault of the mediator but of the mediation process.

I didn’t feel as though I had a fair hearing. ... there were lots of accusations coming from the other side of the table and we just had to sit and listen to those. And then when we responded to those (the employee) said, 'I want time out' so that was the pattern for the whole day. Our side of the story was never fully heard and I felt that was an injustice. ... I think one of the key things for the mediators is to make sure that the person doesn’t have too many opportunities like that to just walk out.

Employer, settled at mediation

Some though felt that mediation process was ‘inherently’ partisan, and the mediator favoured the employee.

At mediation, I had been imagining the employee would have to pay me back, but it was increasingly partisan in the employee’s favour. At the end of the day what started as a conciliatory approach from the employee had hardened to a very defiant approach, and I felt the mediator contributed to this. The whole tone of the hearing (sic) was based on the employer being wrong. Form dominates substance and in mediation they need to look holistically at the situation, to if there have been warnings and a chance. Inherently mediation is geared to employees.

Employer, settled at mediation

In general employers who settled at mediation were not satisfied with the outcome.

The outcome for me is totally unsatisfactory because ... the employee can say exactly what they want, and if you’re going to disprove it you have to actually end up going to the Authority or to Court, and everybody’s advice is try and get rid of it today, it’s never going to be cheaper than today, so you go there trying to settle the thing for the least money. You’re not going there to sort out the problem actually.

Employer, settled at mediation

Employers who had settled outside of mediation were not notably more satisfied than those who had a mediated settlement as they also had paid out employees, if only for a period in lieu of notice, in circumstances where they felt they should not have had to (such as employee theft). However, these employers felt they had taken the most efficient route to dealing with the issue and in terms of total costs they might otherwise have faced, they were probably better off financially.

I did not go to the mediation service because of the time, energy and cost involved – a waste of my time. In some circumstances it might have been appropriate but not these (serious misconduct). At the end of the day we take
responsibility for our staff so the first time there was trouble we thought this is our responsibility to sort out, the second time we thought about mediation again but so much damage had been done we just wanted her out.

Employer, settled outside of mediation

Not settling at mediation was also problematic. There was one employer interviewed who went to mediation and did not settle. This left her in the unsatisfactory position of waiting to hear whether she would have to go to the Employment Relations Authority.

Overall, employers who commented felt they would be more disengaged from the grievance process in future, for example, they would settle outside of mediation more quickly, or pay a representative to handle the matter; others said they would get more advice earlier in the process – including before employing someone. Some employers, though, said they would not pay a settlement at mediation in future but would ‘stand their ground’ and be heard at the Employment Relations Authority.

Effects of involvement in the process

Participants were asked about the effects of having been involved in the grievance process. Personal stress was noted by both employers and employees. This was driven by the uncertainty of outcome, feeling personally attacked, or that the process was unfair and could not be made fair to them (reasons for this are discussed on page 17).

Some of the employees interviewed described panic attacks and nausea when going to work, being on medication for stress and insomnia, taking sick leave and seeking counselling. One employee was hospitalised during the grievance process for heart problems he considers to have been stress related.


I don’t think any research on personal grievances could be done without looking at that emotional cost, because that would be worse than any lawyer’s costs, because it just … it consumes you. It just became something you would wake up in the middle of the night worrying about … I was going to the doctor to get stuff to help me sleep. I was getting really emotionally stressed and drained. I remember after having my performance being called into question, at that point I was really at breaking point.

Employee, settled privately

After the grievance was settled or a decision taken not to pursue it, some employees no longer had a job (and were on a sickness or unemployment benefit), but others had new jobs. It is not possible to comment on the effect of having made a grievance claim on this outcome, as it seems likely there were other factors involved such as not being able to find another job with suitable part time hours. There were, though, employees who considered that the process had damaged their reputation.

Employers too noted the stress and humiliation of the mediation process.

There’s no proof required, that’s what annoys me and frustrates me about it. There’s no proof required. It simply is ‘he said and she said’, and the mediators are always saying, ’Now, you have to sit there and not say a word, let it wash over you.’ And my solicitor said, ‘you’ve got to have your Teflon coat on today.’ A
lot of small business owners aren’t used to that situation because they didn’t get to be where they are by saying nothing but, in any case, I absolutely said nothing the whole process ..., not a word. And it’s very frustrating. If you were an employee you would say it was humiliating the things that they’ve said about the company and about the process that didn’t happen. But, of course, you don’t have that right.

Employer, settled at mediation

Employers also commented on the effect on their own reputations, particularly as settlements made (outside of and within mediation) were confidential, which could create uncertainty for other staff about what the employer ‘had done.’

Further, employers remarked on the loss of productivity because of their own lack of focus on anything other than the grievance, and the effect on other staff in the workplace, and in some cases, the effects on clients. As noted some employers commented that the experience had left them reluctant to employ staff, or that they would now use fixed term contracts. One said that he would in future simply pay people out regardless of the merit of their case and not engage with the grievance process, including going to mediation.

2.2 Costs of involvement in the process

The published research in New Zealand shows that the costs for employers of resolving employment relationship problems (including personal grievances and potential personal grievances) are generally in the thousands rather than the tens of thousands (including the costs of representation, hearings and settlement) (Woodhams 2007). Costs increase if a case goes to the Employment Relations Authority or the Employment Court. As awards for employers’ costs made in the Employment Relations Authority are reputedly lower than actual costs (Lloyd & Smith 2010) it would appear to be cheaper for employers to settle cases outside of the institutions established under the Employment Relations Act 2000, regardless of the merits of the employee’s grievance. It is not clear how many employers make cash settlements in circumstances when employees would not be successful if they had proceeded with a grievance claim.

In this research, respondents were asked about their experiences and expectations of the costs of the personal grievance process, the effect of these costs on their decision making, and suggestions for reducing costs.

Actual costs faced

Of the employees who had either settled privately with their employer or had a mediated settlement, costs ranged from nothing (‘except parking’) because they had had union support or because they had had their lawyers’ fees paid as part of the mediated settlement to between $600 and $4,500 in legal fees. Employees who had not gone to mediation had also in some instances incurred legal fees, and others had medical expenses associated with the stress, or were now without a job. Employees did not include the costs of their time in their estimates of actual costs.

The costs for employers who settled with an employee (irrespective of whether they had settled privately or had a mediated settlement) included a cash settlement to the employee, their own legal fees, and, often, the employee’s legal fees also. In addition there was the cost to their business of their time, and possibly that of another manager’s at any meetings,
including mediation. An employer who had not settled at mediation and was waiting to hear whether the former employee would go to the Employment Relations Authority, had paid ‘$8,000 in direct costs so far, excluding my time.’

Noting that the employment relationship was effectively over by the time a case was mediated, cash settlements often involved the equivalent of three months pay to the employee, but in some cases the amount settled on at mediation seemed arbitrary to employers, ‘it was a figure plucked out of the air, probably related to his outstanding drug debt.’

**Effect of cost expectations**

Many employees interviewed were not aware of or concerned about the costs involved in taking a personal grievance. Some didn’t think there would be any costs, or knew there was not necessarily any cost (in going to mediation).

There were also employees who sought legal advice and were told they could expect costs of perhaps $10,000-$20,000 in legal fees for advice and representation should they fail to settle at mediation. This possibility deterred these employees (some of whom no longer had a job) from proceeding even to mediation. In addition to potential legal fees, employees still in the workplace were fearful of losing their employment, or finding it difficult to get another job because of their involvement in a personal grievance.

Some employees suspected settlements were not particularly high and may not offset costs.

> I was aware that it would be around the thousands to do it and sometimes the pay-off not’s good enough really ... so I think (the cost) is high, it’s probably too high for most people.

---

**Employee, settled outside of mediation**

Employers who had not ever been to the Employment Relations Authority generally thought it might cost about $10,000 in legal fees and senior managers’ time if a case was heard by the Authority. A number of employers interviewed had settled cases at or outside of mediation because of apprehension about the costs and time involved with going to the Employment Relations Authority. Although employers did not appreciate paying a settlement to employees with what they considered to be a meritless grievance, the cash settlement was not necessarily the most significant cost of the process.

> Where things come unstuck, in my view, is where lawyers are involved, because they want to get all legalistic and procedural, which has got nothing to do with the issue, but it’s just a way of them justifying exorbitant fees. One of (the) annoying things that’s happening at the moment ... more and more, is that when lawyers are involved in personal grievances, they claim as part of the remedies that they want the legal fees, so where you could have a settlement for $3,000 to $5,000 that comes up to $8,000 to $10,000 because the claimant and the lawyer are dead keen on getting the legal fees paid, and that’s really annoying where there’s supposed to be a system where you don’t need to have lawyers.

---

**Employers’ representative**
Employers emphasised that the major costs they faced were the costs of legal advice and representation, their own time (‘this can’t be delegated’), and that of other staff including, for example, administrative staff called in to take notes ‘at endless meetings.’ In addition, if the employee was still in the workplace they would be disengaged and unproductive and possibly affecting other staff members or clients. In some cases there were also specific costs associated with dealing with clients affected by staff misconduct. Finally, while almost all employers interviewed who spoke of specific cases considered that the employee concerned did not have a legitimate grievance, a number of these employers were nonetheless not confident they would be vindicated at an Employment Relations Authority hearing, considering it to be a ‘lottery’ hinging on procedural matters.

Suggestions to reduce costs

Both employers and employees recognised that costs were exacerbated by legal fees and there were suggestions that legal involvement in the process should be reduced. There was strong support from employers, and some employees, for an earlier intervention than mediation, in which the parties would be advised whether there was a case. Employers also suggested penalties for employees who pressed ahead with a claim against this advice. Suggestions for changes are discussed in more depth on page 37.

2.3 Duration of the process

Participants were asked how long they thought it would take for a personal grievance to be resolved or how long it had taken and what effect this duration had on their decision making about making or responding to a grievance claim.

Employees who had not proceeded with a claim did not have a uniform view of the anticipated duration. Some had ‘no idea,’ while others thought it ‘would not be long winded’ but others thought it might take up to three months, six months or a year. Some employees were guessing, and others had had legal or union advice on the duration. In general these people were thinking of a claim being heard by the Employment Relations Authority rather than going to mediation.

Employees who had a claim settled at mediation or privately generally found this process quicker than they had anticipated, taking between two weeks and two months, with one exception:

_I thought it would be over by Christmas - two months tops - but the employer dragged it on. ... until February._

_employee, settled at mediation_

Prevarication by the employer was also cited as the cause of delay by the one employee who had been to the Employment Relations Authority.

_It’s been unreasonably protracted... We’ve been stonewalled at every opportunity, daring us to take it further at every step, a tactic to draw it out, for example, their lawyer asking for more time to prepare._

_employee, awaiting Authority decision_

Employers also thought the process to get to an Employment Relations Authority hearing would take between six and 12 months, and had similarly received legal advice that the
process would be ‘long and drawn out.’ The actual time period involved in going to mediation ranged widely for employers, between two weeks and seven months. In the latter case the delay was increased by accessing mediation in a rural area.

(The case) took seven months to get to mediation – a ridiculous length of time. I contacted the mediation service and they said sheer numbers were causing delay; also they only come to the nearest city to me (an hour away) every week or month.

Employer, did not settle at mediation

As with employees, some employers suffered delay caused by the unavailability of the other party, rather than the unavailability of the mediation service. Some employers noted particular issues with sick leave causing ‘significant delay, months at a time.’ The annoyance of the delay and any costs incurred were exacerbated for some employers by having to pay employees on leave while waiting for mediation.

Employers, as the respondents in personal grievance cases, had no certainty around whether a potential grievance would get to mediation or to the Employment Relations Authority, making it impossible to know the duration of the process beforehand.

It’s been hanging around and we don’t know whether they’re going to go any further or not.

Employer, did not settle at mediation

In addition, prior to a grievance, the disciplinary process may have been ongoing for some time.

You follow the disciplinary process, it might have eight steps in it, you take the first step and they address perhaps some of their performance problems, then you are back at the beginning. (One case) took a year with meetings every week – very stressful and time consuming.

Employer, settled privately

The possible duration of the process had mixed effects on both employees and employers. Some employees were deterred from embarking on a grievance claim at all by the thought their lives would be ‘in stasis for six to nine months.’ There were both employers and employees who settled at mediation, despite not being happy with the settlement, because of the potential duration of the process if it went to the Employment Relations Authority.

We don’t have the time to be thinking about something like this when it can be cleared up within a matter of weeks other than going through the whole process of ... it could’ve been six to 12 months before this is over and we still would’ve come out with the same outcome, except it would’ve cost us a lot more money (legal fees).

Employer, settled at mediation

However, for both parties the deterrent effect of the possible duration of a grievance acted in combination with other factors in their decision making. Employee’s reluctance to make a
claim was based on their view of the cost, the duration, the reputational effects, and the degree of ease they had in getting a different job. Employers’ reluctance to wait for an Authority hearing was combined with other factors such as the cost, the uncertainty of outcome at the Authority, and the effect on the workplace.

Suggestions to reduce the duration of the process were linked with changes to address other issues, and are discussed on page 37.

**2.4 Balance between parties**

Previous New Zealand research (Woodhams 2007) suggests that both employers and employees believe that the personal grievance system favours the other party. Many employers fear that a judgement of inadequate processes will expose them to large liabilities, while employees fear the presumed superior resources of their employer will give the employer an advantage. There is no empirical research from New Zealand available that allows these perceptions to be countered or confirmed.\(^6\)

In this research respondents were asked whether they considered that the personal grievance system provides a fair balance between the parties.

*Employees*

Both employees who had decided not to proceed (including not initiating mediation) and employees who had been to mediation considered not so much that the process favoured employers but that employers held much greater power. This was considered to be so because – variously - employers had insurance against such events, they ‘couldn’t care less’ and their reputation did not suffer if they were involved in a personal grievance as an employee’s did. Employers’ resources enabled them to employ major law firms to represent them at mediation – an action considered by the few who did not have legal representation to be against the intent of the Employment Relations Act.

Employers were considered to be secure in their job during the process, unlike the employee, and thus could pursue various courses of action (unavailable to an employee) such as making positions redundant to avoid addressing issues raised by an employee. As they were still in the workplace, employers had access to records that an employee no longer in the workplace did not. Further, an employee’s former colleagues, still in the workplace, would probably tend to support the employer. An employer could engage in prevarication, for example sending a representative without the power to settle to mediation.

The perceived imbalance of power contributed to employees’ decision not to pursue a case. The following quote encapsulates the issues many of the employees described:

---

\(^6\) Freyens and Oslington (2005) have studied the direct estimates of firing costs for Australia. This work distinguished between the costs of retrenchment and the cost of dismissals, and did ‘not find much evidence’ of variation by firm size... suggesting that unfair dismissal provisions do not impose a higher burden on small business.\(^7\) In another Australian study, Southey (2008) found that business size was associated with arbitration outcome: employees in firms of fewer than 50 staff were relatively unsuccessful in defending unfair dismissal claims. Southey considered this finding indicative of arbitrators’ empathy for the informal practices of small businesses.
The employer was not prepared to negotiate or financially compensate me for the dismissal – their approach was don't give the employee anything and they won’t be able to afford to fight it... Ideally I would have been able to go to the Employment Relations Authority. ... I know you are not required to have a lawyer – I could have represented myself but my employer had a crown prosecutor representing them – there is an equity issue. I decided not to fight it because I had in my role seen that the employer had an expansive record at the Employment Relations Authority and mediation, and that settlements tended not be favourable to employees. The employer dragged things out as long as possible (one case had been going for three years) and they would sooner spend money on lawyers than to pay an award. ... I didn’t go to mediation because I knew the employer wouldn’t act with good faith and you can’t do much about that. The employer had an extensive history (at mediation) and was irrational and illogical, for example they would send people to represent them at mediation who didn’t have the authority to settle and the mediator let that happen.

Employee, did not pursue

Employers

All employers acknowledged that a personal grievance system is necessary. However most employers interviewed considered that the personal grievance process was balanced in favour of the employee. The reasons for this view were that it is very easy for an employee to raise a grievance, the grounds on which they might do so do not have to be robust, the employer is obliged to respond; if the employer chooses to challenge the claim and is vindicated during the process, the employee lacks accountability for their actions in proceeding with a weak or vexatious claim, and the employer will not be (adequately) compensated for the time consuming and costly process they have been obliged to engage in.

Again, note that the employers interviewed were largely focused on the process prior to and at mediation, rather than cases being heard by the Employment Relations Authority. As stated in the discussion about satisfaction with the outcome they experienced (on page 11) a few employers considered that the mediator involved in a specific case had been partisan in favour of the employee, but others felt they had had a fair hearing at mediation, however, the process was inappropriate as the mediator was not in a position to determine the outcome.

(In relation to) mediation, which is where everybody goes and where you try and resolve the issue, there’s a real lack of any proof, if you like, it seems to me, of what’s being said is true and correct, and the whole emphasis from my solicitor’s perspective and my colleagues’ perspective that I deal with and talk to about these things, is that it’s never cheaper than today so you should get it resolved, and you’re expecting to pay some money out even if you think the case is entirely spurious.

Employer, settled at mediation

In responding to a weak or vexatious claim, employers might incur costs even if the employee abandoned the claim before mediation.
I had an employee recently... and he had personal trouble. He wanted time (off work) to sort his problems and I said yes. One week later I got a letter from Work & Income saying x was suffering from workplace stress (and was applying for a benefit). I called Work & Income and they said they couldn’t discuss it. I explained the situation to them. He just wanted money – he’d abandoned the job. I had to employ a lawyer and it cost me $1,200-1,500. I didn’t pay the employee. And then he wanted his job back.... The whole thing was a charade, an exercise in exploitation.

Employer

There were employers who considered they were currently unable to address issues such as employee misconduct without the threat of a personal grievance.

I should be able to ask employees to address issues without blackmail over the grievance process. The process should have enough teeth for this.

Employer, settled at mediation

However there were also some employers interviewed who felt that the process itself did not favour a particular party, onerous though it was for employers.

I think the system and the processes are incredibly onerous on the employer, and then there’s a lot of time and effort spent and lost on the process, but I don’t actually believe that the employer is disadvantaged by it.

Employer

And one employer considered the employee to be at a disadvantage, for the same reasons employees did.

Employees seem disadvantaged in the process, and the way it shows up is they behave badly during the process. They miss opportunities, they misunderstand stuff... I think that the employer is far more likely to be able to afford the specialist advice to get themselves through the process than the employee is... If I get into strife with an employee, five grand for a lawyer is a small percentage of (my turnover). Five grand for an employee who’s pulling down 35-40 grand a year is a huge chunk of change... It’s my belief that the balance of justice is about right in terms of accessibility of remedy - and the likelihood of one party being more poorly behaved than the other is, I think, fairly evenly distributed.

Employer – large organisation

Both parties

Employees and employers commented on the lack of openness (good faith) engendered by the process.

Personal relationships are very important but the redundancy process under the Act says they get a letter inviting them to meet us to discuss possible restructure – and you can’t discuss it with them. If you do discuss it, then when the restructure happens they come back with a personal grievance on the grounds of threats made. I understand that, for example, workers need an opportunity to get legal advice. But, for example, with (x), it became apparent he could not do the job, and we needed to restructure. Ideally we could have said, ‘x, the role is
changing, here’s 3 months to find a job’, but there’s no way (under the current process) you can do it other than to give the person a letter – it’s embarrassing and it treats people disrespectfully.

Employer

In addition, once an issue was being mediated there were both employers and employees who felt that the context of a situation was not necessarily heard.

The emphasis given to process and substance

Participants considered that the current disciplinary and grievance process was in place so that people were informed, and knew what to expect. However, there were employers who considered the current process had an excessive number of stages, providing many opportunities for procedural errors upon which a grievance could rest.

Employers with varying degrees of human resources and legal experience queried whether it was possible to follow the process one hundred percent as it appeared fraught with possible mistakes.

Further, while it was taking place the employee in question would probably not be working (either because they were suspended, dismissed, on some type of leave or were at work but disengaged) thus the procedure was also costly.

The process is too pedantic. We had to dot our i’s and cross our t’s, have meetings, provide improvement opportunities etc, meanwhile she was lying and not doing her job.

Employer

Correctly following the process was less of an issue at mediation because the mediator had no power to determine a case.

I had followed form to the letter but was still forced down the avenue of paying out. My processes were discussed in mediation; her substantive issues were denied or dismissed ... Because the employee took the attitude that she’d been wronged there was no way to prevent her taking it further, to the Employment Relations Authority, resolution couldn’t be achieved at mediation because she didn’t agree. I’d have been no worse off if I’d walked up to her and told her ‘you’re f’n useless, piss off.’

Employer, settled at mediation

However, despite feeling they were morally in the right, some employers’ apprehension that they might have made a procedural error contributed to their decisions not to insist on going to the Employment Relations Authority.

Many of the employees interviewed had no experience of disciplinary and grievance procedures and this was a factor in their getting legal advice and representation. Some employees with union representation felt no particular need to be familiar with disciplinary
and grievance procedures as that ‘was what the union was for.’ However, it was considered important that there was a defined process for the parties to follow.

It’s important for employers to go through an appropriate and consistent process – a minimum standard for everyone. If there is a belief that it is process oriented then maybe things could be done … but there must be a process; it shouldn’t be at anyone’s discretion. (The process) seems adversarial to me so you need very clear rules and expectations about what is permitted and what is not – it must be transparent and the same for everyone.

Employee

Is the system too difficult to understand?

Participants were asked whether the personal grievance system was complex and difficult to understand. Employees who did not pursue a claim felt it probably would be complex if they engaged with it. Employees who pursued a claim found the process complex.

You could spend a lot of time doing your homework and research – and it was a still a baffling process. I’m a pretty highly educated person. I’ve got a degree and I can read policies and procedures and laws and stuff, but it’s still …unless you’ve done it before it seems pretty overwhelming if you’re not really sure what happens, what the likely outcomes might be.

Employee, settled privately

Some employees noted the lack of clarity they felt reading the Employment Relations Act or their collective agreement when trying to work out the grievance process; others did not concern themselves with the process and relied on a representative’s support to navigate through the process.

Employers had various views on the complexity of the system. There were employers, particularly in SMEs, who thought the system was too complicated to easily follow, particularly as they would seldom encounter it:

It is difficult and complex to go through… I would like to know what a valid reason is for sacking someone? I was told I needed to keep notes but I don’t have time for that.

Employer

Employers in SMEs appeared more inclined to feel that that their lack of familiarity with the process would lead to them neglecting some vital aspect of procedure. One employer with experience of both large and small organisations said:

Certainly the main difference for me with working through these things in a large organisation and now (in a small firm), is that working at (a large organisation) personal grievances were coming up all the time so … you were very familiar with the process and what you were doing. Now it’s like ‘oh God, what am I meant to do, what’s the next step’ and there’s always that fear if we get any of these stages wrong, it’s just that perception that if you forget to like do one thing, however minor it is, that you’ll get had up on that later, even though you’ve done your best with the process overall.

Employer, SME
Some employers and employees felt it was complex for those approaching it for the first time, and thereafter merely time consuming. There were also employers who thought the system was not so much complex as suffering from a range of deficiencies:

- it allows for endless delays
- it allows claimants to rest their case on legal technicalities which vary with individual circumstances rather than addressing substantive issues
- mediation encourages settlements ‘of the average position between the parties’ positions’ regardless of what is morally right
- it is conflict based and little preventative work is done

Because there’s a power relationship, the employees tend to take it ... and live with stuff that’s uncomfortable, or when they do have a genuine problem, approach it with such aggressiveness because the narratives in our society about how employers are, how these processes work, are so kind of conflict ridden that any staff member who thinks they’ve got a problem with their employer and is willing to address it has to sort of gird their loins and come at it at full tilt. I’ve had that happen and it’s hard not to respond defensively to that.

Employer

Participants’ suggestions for improving the balance between parties and addressing the emphasis given to procedural as opposed to substantive matters are discussed on page 37.

2.5 Information, advice & representatives

The Employment Relations Authority and the Department of Labour’s mediation services were established under the Employment Relations Act 2000 with the intention of reducing the need for representatives in the personal grievance process and to emphasise low-level resolution, where parties are responsible for working together in good faith to resolve an employment relationship problem, such as a personal grievance. However, at any stage of the process for resolving such a problem, either or both parties may choose to engage a representative to assist or advise them on issues. Research in New Zealand shows that most employers and applicants seek advice, generally from a lawyer (Woodhams 2007).

Getting information and advice

Participants were asked about sources of information and advice they had used, and their satisfaction with these.

Most of the employers interviewed had sought legal advice, either from independent lawyers or lawyers working for employers’ associations. A few employers in SMEs had sought advice from their accountants.

Although most of the employers interviewed were confident that they had acted correctly in the circumstances that led up to the (potential) grievance, there was a widely held view that in going to mediation (and certainly beyond it) a lawyer was, if not essential, then strongly advisable. This was because getting the process absolutely correct in every circumstance seemed unachievable, regardless of how much the employer felt they might know about the process.
As an employer, if you put a step wrong you’re history basically, so I was aware that ... to protect the organisation first and foremost, but also myself, that I needed to get legal advice to make sure that I did things in the way that were fair and just so that I wasn’t doing anything that was unfair to the person who was accusing me of all this. But I also thought I don’t want any repercussions on the organisation, so I thought well, the best thing is things are obviously going nasty here, get a lawyer involved ’cos it’s not going ... I don’t have expertise in that area.

Employer

We probably spend $10,000 to $15,000 a year ... getting advice to make sure we do it right. ... It’s so complicated that every time we have the conversation there’s a different slant on it. It doesn’t seem possible for me to learn how to do this myself without guidance, and I’m reasonably able and we’ve engaged (with the process)... I’m a smart person and I’m still not able to learn it for myself.

Employer

Employees used a wider variety of sources of information than employers, which appeared to be related to the cost of the advice and the point they were at in the grievance process. When issues first arose, a few had talked to workplace human resources staff and looked at the workplace intranet for information (in larger workplaces), some had looked for information on the Department of Labour’s website, others had asked their union for advice, and some (non-union members) had sought advice from a lawyer. For those not in a union, the cost of legal advice and the perceived seriousness of their position appeared to be the biggest influences on whether employees sought legal advice.

Several employees joined a union when the employment relationship deteriorated, and others considered it:

In a way I feel obliged to join a union as the only way people can be answered, I don’t want to but it has been a serious consideration for me – as an individual I don’t have the weight, although when I approach my employer I expect a good faith response.

Employee currently pursuing grievance

Employees who went to mediation had independent legal representation; some had legal representation or advocacy through a union. None of the people interviewed had used a contingency fee lawyer.

When in the process do people get advice?

Participants in the research sought advice on their employment relationship problem at various points in the development of the problem. For employees, in some of the cases of serious misconduct, there had often been no period of problem development, and employees first sought advice when given verbal or written warnings. However, in other such cases there had been prior issues that went unaddressed. In the example below, prior to the misconduct incident which initiated the potential grievance, the employee had been asking the employer for help for some months:

I was getting pretty exhausted and doing too much work, was getting very stressed, asked for help, never got any. It got to a point ... where I was crying on
the phone to my regional manager saying that I was exhausted and I needed some help. Still nothing was done. I ended up having to go to a doctor to get things to help my stress. I also became very depressed. I forwarded this on to my regional manager, still nothing was done.

Employee, settled at mediation

Where the potential grievance centred on personality differences or workplace bullying, employees generally tried to engage employers with the situation first. It was a common experience amongst such participants for the situation to go on for some months prior to the employee seeking independent advice. Employees also sought information from the Department of Labour website or in some cases through employee assistance programmes. Employees in these situations tended not to seek legal advice either independently or through a union until the workplace situation had changed from one of personality differences or bullying to a situation where they had been suspended or made redundant (but considered it was not a situation of genuine redundancy).

In one case an employee who went to mediation with the support of her union, sought independent legal advice after mediation, prior to settling with her employer, because she was not satisfied that the employer’s offer excluded making the changes she sought to her employment agreement.

I did go to a solicitor during that time I went back to work (after mediation) to try and see if I could get my contract sorted and a job description to protect me, and the answer came back, ‘they’ll just make you redundant. They’re going to make some (employees) redundant and now your neck is on the block’– they (had) pretty much made that clear. ‘The best thing you can now do is take the money and just move on.’

Employee, settled after mediation

Experience with the personal grievance system appeared to influence when employers sought advice. More experienced employers obtained advice earlier in the process, while employers with no previous experience of personal grievances (who were in this research employers in smaller firms) tended to get advice either when the employee notified them they were going to make a personal grievance claim, or at the time of serious misconduct.

Experience of the representative in relation to process, outcome and cost

Participants’ were generally satisfied with the representative they had used, but less positive about the other party’s representative. There was criticism from employees of employers’ lawyers for using delaying tactics, and from employers about the quality of employees’ lawyers in relation to misrepresentation of the facts and encouraging employees to pursue weak or vexatious cases.

(In) the last mediation case ... the mediator backed us to the hilt and ... the employee said that we’d done a reasonable job and everything was fine, it was (their) lawyer that had spat the dummy .... But the mediator backed us and I backed myself. By that point we (knew we had) really good systems and we didn’t have a case to answer and I certainly wasn’t paying out money for hurt and
humiliation that hadn’t existed. As far as I was concerned it was just a gravy train for (their lawyer).

Employer

Some employers and employees felt that involving lawyers in the process tended to intensify people’s positions and escalate demands during negotiation. One employers’ association adviser considered that while it was necessary for representatives to be prepared for mediation or the Employment Relations Authority, many lawyers were preparing too well.

In my view, they often prepare too well, they think they’re under the old mediation service from … I can’t remember now, 20 years ago when it was actually really like a court case. You came in with all your precedents and everything else. And then there are all those union officials and advocates who don’t, they just come in and wing it and they haven’t prepared at all really, and that wastes a lot of time. Somewhere in the middle is the perfect sort of mix, but I can’t say we always get that.

Employers’ representative

However, there were also employees who sought legal advice and were deterred by lawyers from proceeding, and employers whose lawyers said further legal advice was unnecessary in their particular case.

A number of employers (but not all) were notably positive about the union support provided to employees in personal grievance cases, considering the union to be helpful in defusing situations and suggesting reasonable solutions.

Going through disciplinary processes with the (union) in the room is much easier than doing it with employees who’ve just brought along their best friend, or lawyer (or) even (a lawyer) who’s got some kind of commission angle going on. It’s much, much easier because the employee is getting advice from somebody they trust about the process. And our experience is that - of course, that we’re a moderate and kindly employer - and our experience has been that the (union) actually helps explain to the employee ‘that actually, although you’re really uptight about it, this is the way this works, these guys are doing it ok.’

Employer

Employees’ views on union support were mixed with some considering the union provided good support (‘I would have been absolutely sunk without the union’) and others that they had not been helpful (‘I’ve been paying my fees for how long and they aren’t really helping me out’).

Suggestions for improving the quality of advice or representation

Participants considered that the characteristics of quality in a representative were knowledge, being kept informed, getting full and frank advice, and doing as the client instructed. Participants had no suggestions about improving the quality of advice from lawyers, rather some were interested in reducing the involvement of lawyers. A number of participants were interested in getting more personalised advice (not just information about the process) from the mediation service or some other independent source prior to embarking on mediation.
Lawyers don’t want to make a judgement on the case so they put it back on the client. The employer is seeking advice to know whether the issue is actually sufficiently substantive that they could take action - hence it would be useful if the mediation service provided advice on this issue early on.

**Employer, settled outside of mediation**

### 2.6 Eligibility

All employees except one group are entitled to raise a personal grievance against their employer. The exception is employees who have been unjustifiably dismissed during a 90 day trial period (available only to employers in firms of 19 or fewer employees).

**Should different eligibility rules apply to different types of employees?**

Participants were asked whether different eligibility rules should apply to the personal grievance process. Possibilities raised with participants were excluding high earning employees, or extending the current trial period beyond 90 days and/or including firms with more than 19 employees.

There was no interest from either employers (many of whom were also employees) or employees in excluding high earning employees from the process. Participants considered this would be inequitable and would introduce further complexity to the process.

> I think everyone should have the opportunity (to access the system) because we all pay our taxes at the end of the day. It’s taken me all my years to get to this level of earnings. I haven’t always had the ability to be able to earn that well. So, to be penalised for that I don’t think is fair, and the Department of Labour is for everyone.

**Employee, settled at mediation**

Rather, it was suggested that if the system did not work in some way for senior staff or high earners, then this aspect of the system should be amended.

> The devil’s in the detail. It doesn’t seem to be a good idea. If something is wrong with the existing process, why should, for example, people earning over a certain amount be excluded. Pay may not be a good proxy for seniority – if personal grievances don’t work for senior staff, change the process.

**Employee**

In relation to trial periods, there were both employers and employees who were concerned about dismissal without reason during a trial period. Some considered that employers should improve their processes if necessary rather than rely on trial periods excluding employees from the grievance process.

> I am concerned by dismissal without a reason. How do you describe non performance? You need measures. You can discuss and improve performance if there are descriptions and the person has clear evidence of what needs to be done. So the trial period is tricky. I prefer to have clear processes.

**Employer who has used trial periods**
I don’t support extending the trial period provisions beyond 90 days. I don’t support extending it for medium-sized businesses. I think there is an onus on businesses with their greater resources to be better educated and pay more attention and actually deal with that.

Employer, large firm

In this research, no employers eligible to do so had dismissed anyone on a trial period, but there were a number of employers who thought trial periods were effective. Some thought the ability to use trial periods ‘should logically’ be extended to all firms. Employers’ views differed on whether 90 days was an appropriate period for the trial period - although none suggested it be shorter.

An eligibility criterion suggested by employers was that eligibility to raise a grievance be based on the merit of the employee’s case. This is discussed further on page 37.

Is the 90 day limitation period for raising a personal grievance with an employer appropriate?

Participants were asked whether the 90 day limitation for raising a personal grievance with an employer was an appropriate period of time. Both employees and employers had mixed views on this.

Some employees felt 90 days was not enough time. Employee ill health was one reason for this; particularly, but not only, mental health. There were also circumstances in the work place that meant some employees were unaware of when the 90 days might have started.

Ninety days is not enough; I haven’t had an (effective) employer for two years. I’ve been through three managers, none have engaged (with my grievance) for whatever reasons – I was told ‘we’re restructuring,’ or ‘I’m not going to be your boss soon.’ Now they say I had only 90 days.

Employee, currently pursuing a claim

There were employees who felt that less time, perhaps half of that currently available, was sufficient to make decisions and get advice. However some of those employees who felt the time available was more than enough for them personally recognised that some people may need up to 90 days which was thus considered an appropriate period of time. A number of employees also recognised that businesses needed to know when the possibility of a claim might be over.

(Ninety days) seems like a good timeframe that balances the parties’ interests. People need time to make that decision. It’s an important decision but you need to do it reasonably quickly. Any more than three months and you take the risk of fabrication or exaggeration. At six months you might not be so accurate – and businesses need to move on.

Employee, did not proceed with claim

There was a range of views amongst employers interviewed also. Some considered that the 90 day duration was part of the problem with the process, and that the need for business certainty meant a shorter period was more appropriate – 30 days was commonly considered to be more appropriate. Other employers considered the 90 day period was appropriate, and in particular, recognised the effect of stress on employees’ decision making. There was also
a view that if workplaces had the appropriate processes in place, in some ways the length of the period did not matter.

One employers’ representative felt that the 90 day time constraint gave lawyers an incentive to file a claim.

> What puts the incentive in for filing personal grievances is the time constraint - ie, ’if I don’t front with it within a certain time I’m going to lose the opportunity to file.’ So that in itself creates a threshold, if you like, for making (lawyers) feel ’if I’m going to represent this person properly I need to file a personal grievance just in case we don’t resolve.’

**Employers’ representative**

However it was recognised that the current process does not oblige people to do this.

> (We get) a union writing (to us) and saying we’ve got a problem which could become a personal grievance. They’ve met the requirements of the Act, they’ve drawn it to the employer’s attention within 90 days that there is a problem, but they’re still saying let’s talk about this.

**Employers’ representative**

It should be noted that some participants, both employers and employees, were not clear as to when the 90 days began, nor about the implications of an employee advising an employer that they were going to make a personal grievance claim, as opposed to being advised by the Employment Relations Authority that someone had ‘made a claim.’

> My lawyer – an acquaintance who said she would act for me for free – sent the employer letters saying I was taking a personal grievance. (My former employer) responded by saying that what went on was normal verbal chat. The lawyer said that as (the employer) was digging his toes in I’d have to start paying because it would take a while. I couldn’t afford it and it was then past the 90 days to actually make a claim.

**Employee, did not proceed**

**Is the three year limitation period appropriate?**

Many of the employers and employees who participated in the research were not aware that no action may be commenced in the Employment Relations Authority or the Employment Court in relation to a personal grievance more than three years after the date on which the personal grievance was raised. However, several employers were waiting to hear whether possible cases would proceed. One small business owner had been waiting for months to hear whether she would have to attend an Employment Relations Authority hearing.

> I tried to organise a meeting and she refused to come in. I waited months for her support person to be available just to give her the letter saying we were considering redundancy. .... At mediation the employee asked for $12,500 and we said no. I offered $3,000 at mediation which they rejected. After mediation we offered $5,000 - I wanted to start the New Year without this over me. We didn’t hear back for seven months, then they said they were taking me to the Employment Relations Authority. In January (2010) my lawyer received a letter
from her lawyer saying she was taking a personal grievance (in the Employment Relations Authority) for wrongful dismissal. Every day I get the mail I think ‘is this the letter?’ It’s like being a criminal. You can’t move on or spend money on your business.

Employer, didn’t settle at mediation

Employers who commented on the limitation period considered it too long, questioning the relationship to the 90 days employees had to raise a claim with the employer, and the veracity of people’s recall so long after an event. It was also considered that this time period would– if used – pose problems for business accounting.

Some employees also questioned the length of time in terms of people ‘losing the currency of the situation.’ However, others considered it should be left as it was, as shortening the period was considered to benefit only employers and not both parties. Another view was that the time limitation period for raising or lodging a personal grievance should be consistent with that placed on other civil matters.⁷

2.7 Remedies

Under section 123 of the Employment Relations Act, where the Authority determines that an employee has a personal grievance it may award any of a number of remedies, mainly:

- Reinstatement
- reimbursement of lost wages or other money lost by employee as a result of the personal grievance
- compensation for humiliation, loss of dignity and injury to feelings
- compensation for loss of benefit.

Reinstatement is infrequently claimed by applicants and infrequently awarded. For example, in an analysis of all determinations concerning personal grievances made by the Employment Relations Authority during the period 17 July – 18 August 2006, reinstatement was awarded twice out of a total of 33 Authority determinations (Department of Labour 2007b).

In relation to mediation settlements, a survey of mediators carried out in 2006 (Woodhams & Martin 2007) (reporting on levels of settlement for a range of employment relationship problems resolved through Department of Labour mediation) found the median settlement cost was between $2,000-$5,000, and a quarter of all mediations resulted in no payout to the employee.⁸

The effectiveness of current remedies

Participants in this research were asked what they had wanted from the process, how effective they thought current remedies were, and for suggestions to improve the current range of remedies available.

---

⁷ Limitation periods apply to many types of claims. The limitation period differs for various claims, but for many claims the time limit is six years from the date the claim arose.

⁸ Thirty one mediators filled in 312 questionnaires between 17th July and 18th August 2006. The approximate number of disputes related to potential personal grievances mediated during this period was 261.
Employers’ views reflected their experiences of mediation rather than remedies determined by the Employment Relations Authority; similarly the employees involved had to think about the remedies they would have been interested in if they had made a claim.

Employees in the research, particularly those who had not pursued a claim, emphasised the importance of apologies and addressing workplace issues. In most cases the latter remedy would not be for their benefit (as almost all employees had left the workplace in which issues arose), but because the behaviour of the manager or employer at issue was considered unacceptable.

I wouldn’t have been doing this for damages but to shine a light on professionally and personally deplorable practice. I wanted it acknowledged that it’s not appropriate for a senior manager to behave this way – or for the organisation to explain why it was appropriate.

Employee, did not proceed

I wanted the employers to admit that their demands on me were too much. I would have liked it stated for the record that they need to give their staff a full 24 hours off without contacting them, to acknowledge the boundaries with employees’ hours in their job description, for example, that you can take a week’s holiday after a year of ridiculous hours. I only wanted that: a better grievance and disciplinary process in the workplace and my holiday pay.

Employee, did not proceed

It was considered by some employees who had settled at mediation that such settlements did not address workplace issues.

I think in the actual workplace itself with the employers, they need to be held responsible for their actions at work. They need to have the Department of Labour outline and monitor if situations like this arise. I think that an independent person should have just come in straight away, checked it out and pulled them aside and said, ‘Well, look, you know, you’re doing some things wrong here. Just get the contract sorted.’

Employee, settled at mediation

Some employees who had chosen not to pursue a claim would have been interested in receiving financial compensation because of the loss of income involved in being out of work, and in a case of workplace bullying, for the humiliation involved.

I was thinking of compensation for humiliation. He had got me to the state where I couldn’t write – and it’s my profession. I felt absolutely useless at my job – and incompetent.

Employee, did not proceed

There were also employees who noted that financial compensation was likely to be of short term benefit only, and would not be sufficient to mitigate the loss of a job, or the career consequences of having made a personal grievance claim.
What’s money going to do? ... It’s a feel good thing for a short time but the long
term consequences (of taking a grievance)?

Employee, did not proceed

However, all of the employees in this research who had been dismissed by their employer agreed at mediation to financial compensation. An employee who had been dismissed for misconduct had made a claim primarily to have her actions vindicated, but accepted financial compensation for loss of wages, as she had been unable to find another part time job with suitable hours.

I wasn’t there for the money. I wanted to prove I wasn’t wrong. I felt sorry for
him with a new business too. I felt horrible doing it.

Employee, settled at mediation

Another such employee considered that financial compensation would be an effective remedy as he was ‘out of work now (with) no reference for the work of the last three and a half years.’

One employee who settled outside of mediation considered that the remedies commonly in use were all that could realistically be expected.

Let’s be honest, the relationship has gone and it’s not going to come back. So
money and an apology is pretty much all you can hope for.

Employee, settled outside of mediation

Employers were less concerned about the components of the financial remedies than whether there was a legitimate grievance to address. Some employers considered that compensation for emotional harm was ‘a waste of time’ and that financial compensation should simply be ‘a cash settlement.’ The circumstances in which the grievance arose were salient - compensation for hurt and humiliation were not seen by employers as necessarily applicable in all situations, and others were puzzled about how the amount of compensation for emotional harm was calculated.

You can’t have an environment where people are treated rudely and there should
be a penalty for such mistreatment of employees. The bigger picture is there isn’t
any money and it’s not real to give someone six months salary. Hurt and
humiliation hits everyone made redundant. The employer is under massive stress
as well – it’s not non-emotional to make people redundant.

Employer

Reinstatement as the primary remedy

As part of the discussion of remedies available under the current process, participants in the research were asked their views on reinstatement as the primary remedy. This was a topic that almost all those interviewed had a view on, irrespective of their circumstances. The range of opinions expressed was common to both employers and employees. It was widely held that by the time an employment relationship problem had become a personal grievance the relationship was lost, trust was likely to have been destroyed (‘you can’t stand to look at them’), and it would be impossible for the employee to be back in the same workplace – unless perhaps it was in a very large workplace, and even then it was likely to be ‘unfeasible.’
You could never go back to a job after those extreme difficulties, no way in hell, and (if I were an) employer I wouldn’t want them back, they’d get the worse jobs, told there was no work.

**Employee, did not proceed with a personal grievance claim**

Employers felt the negative effect on workplace culture would in general be intolerable.

(We would) resist it because I believe it leads to a poisoned chalice within the workplace. That’s my opinion of it. It sets a mood amongst the rest of the employees – ‘well, this guy’s had this happen and he’s been reinstated and we can get away with certain things too.’

**Employer**

There were also situations where employers felt it would be totally impossible to reinstate an employee – for example where a supervisor had been dismissed for violence to staff.

_How am I supposed to run a business – the staff won’t work under him – he threatens them with violence._

**Employer**

And some employers would not consider it – ‘if she’d been reinstated I would have closed the business.’

There were both employers and employees who acknowledged that reinstatement was a necessary remedy to have, but also that it would rarely be practicable.

_It would be an extraordinary job where having taken a personal grievance wouldn’t affect your ability to go back to that workplace. At an abstract level I can see it is justice – you’ve lost your job you can have it back - but in real life – no._

**Employee**

Although employees also expressed the view that reinstatement was problematic, and most did not want it, one employee had sought reinstatement for reputational reasons, and this was agreed to at mediation.

_I wanted reinstatement because of my reputation – to show that they were out of order. I felt totally vindicated by the outcome._

**Employee**

There were employees who had begun mediation thinking that reinstatement was their preferred option but decided after discussion with their lawyer and/or mediator that it was not feasible.

_Before the whole negotiation thing started (at mediation), (the mediator) said to me, ‘What do you want out of this?’ and at that stage I said, ‘I want to go back to work but these are my conditions.’ So that was of course the first path we went down, and when that didn’t work she said, ‘Right, what do you want to do now? So she sort of ... she made sure we tried for what I wanted first, and obviously_
what the employer wanted first, and then we went down each avenue until we got something that we were all happy with.

Employee, settled at mediation

There were also employees who were obliged to request reinstatement even though they did not want it in order to obtain union assistance.

(The union) weren’t going to take my case further if I was just going to leave the job, they’re like ‘oh bla bla bla we’re forking out all this union money to clear your name but you’re not going to come back and work for us bla bla bla’. ... so I just told them that I want (reinstatement) so they would help me out.

Employee, awaiting mediation

It was clear to some employers that employees might insincerely request reinstatement as a first stance in a negotiating position. This was irritating to employers who considered it a breach of good faith in the process, aimed at increasing the cash settlement that would be reached at mediation.

It was thought by an employers’ representative that the prospect of reinstatement as a remedy encouraged employers to behave prudently when considering dismissal, although it was seldom a workable outcome.

The net effect it’s had on us is that you’ve got to think really carefully when you recommend dismissal.

Employers’ representative

One employer suggested reinstatement would be more realistic if an impartial third party could offer a rapid response early in employment relationship problems.

2.8 Barriers to raising or defending a personal grievance

There were several barriers to employees raising a personal grievance and to employers in defending one – and many of these barriers were common to both groups.

A number of employees were deterred from making a personal grievance claim by the perceived effects on their reputation and the consequent effects of getting another a job.

Cost was also a barrier in relation to equity of legal representation and fear of being unemployed. This contributed to some employees’ feeling that the balance of power lay with employers.

The emotional stress involved was a strong deterrent, and related to this, ill health put off some.
I had been communicating (with the employer) by email and explained it was easier for me to do that. I wasn’t in a state to deal with mediation, my (mental health was affected by) the stress, and a doctor and my mental health team said I shouldn’t be in contact with my employers until I was better. On the fourth week (of absence) they told me if I did not turn up to a mediation meeting within 24 hours I would be considered to have abandoned my job. .... I walked away from it due to my medical state. I couldn’t attend the meeting and needed more time.

Employee, did not pursue

Other employees, particularly those with union support (and thus no legal fees), and those who had lost their jobs already, felt that they there were no barriers to pursuing a claim – ‘I’ve got nothing to lose, I’ve already lost my job.’

For employers, the time, money, and energy required - and the resultant stress and effects on productivity in the workplace - were prominent concerns. These were compounded by not knowing whether an issue was sufficiently substantive to dismiss someone over.

For rural employers and employees the cost and duration issues were exacerbated by poor access to mediation and Employment Relations Authority hearings.

An employers’ representative considered it ‘would it be good to have the Employment Relations Authority hearings confidential – as it is a deterrent for many employers and employees progressing to this level if early work fails.’ However there were both employers and employees who wanted less confidentiality in the process (that is, at mediated settlements), as they felt they had nothing to hide. Further, some employers objected to confidentiality clauses in mediated settlements as they ‘disadvantaged future employers.’

Are there greater barriers faced by particular groups

Participants felt that certain groups faced greater barriers than others to involvement in the personal grievance process. These groups were people in poor health, those who had no representative and those with little knowledge of employment rights. Perhaps somewhat exceptionally, one employee commented that with an older employer (over 80 years) – ‘you have the risk that they will die during the process or close their business - so there is a risk you will get nothing. Cut and run may be better, else it’s a lose/lose outcome.’ Both employers and employees who lived ruraly were also thought to be at a disadvantage because of the time involved in travelling to meetings and waiting for access to mediation. Employers who were frequently away from the workplace also felt themselves to be at a disadvantage. The difficulties faced by SMEs are discussed below.

2.9 Small and medium enterprises and the personal grievance system

New Zealand and some other countries (for example, Australia and Germany) distinguish between small businesses and others in the application of unfair dismissal laws. This distinction is made on the grounds that the processes used to resolve unfair dismissal claims are comparatively more burdensome to small businesses and that unfair dismissal laws inhibit job growth in the small business sector. However, some countries (for example, Canada, Great Britain and Sweden) do not make such distinctions.
In New Zealand, Woodhams’ & Martin’s (2007) survey of mediation cases found that the proportion of applicants for mediation who came from small and particularly medium sized firms was higher than the proportion of such firms in the population. Similarly, Woodhams’ survey of employers (2007) found that employees are more likely to experience an employment relationship problem if they work for a small business compared to a large one. These findings are echoed in British research in which applications to the employment tribunal are disproportionally from smaller firms (Peters et al 2010, Hayward et al 2004, Saridakis et al 2008).

In this research, a number of employers commented on the differences between facing the personal grievance process as the employer of a large compared to a small organisation. In terms of responding to a claim, SMEs were considered to be at a disadvantage because they had no human resources staff, little experience of employment relationship problem resolution, and were more likely to have scant financial resources than employers in larger firms. This combination of factors meant that the process was comparatively more burdensome for SMEs. In addition, SMEs had no option but to confront any employment relationship problems.

“There’s nowhere to hide in an SME. In larger places deadwood employees that should have been cut off early are even promoted to get rid of them and make them someone else’s problem.”

Employer

Several employees considered that employers in SMEs probably ‘got away with more’ because of the more personal relationships between employer and employees, lack of employee union representation and poor human resources processes used in SMEs. Although poor processes were not considered to be unique to SMEs, employees who had been working in SMEs at the time of their potential grievance, thought SMEs were less able to manage the process well.

“I think owner operators get very emotionally involved which has an impact on staff relations – they try to be friends and a boss and if something affects the friendship it becomes very difficult – you (as an employee) are seen as being mean for saying anything (for example, about conditions). There is no professionalism, they get emotional.”

Employee, did not pursue claim

Suggestions to assist SMEs

Employers rather than employees made suggestions about what would assist SMEs in managing employee grievance processes. These suggestions centred on providing circumstance-specific information to employers.

“(Have an) early information service … bring in someone to tell (SMEs) if (they’re) doing the right thing and whether dismissal is justified etc. A ready response, tailored information service to check with … This would also give a record of advice so that if things escalate, they can be seen to be a reasonable employer.”

Employers’ representative

Further to this suggestion, one employer wanted to see employers in SMEs having ‘mandatory plain English information that encourages people to be more proactive around
problem resolution.’ It would need to be mandatory because ‘this is (not) a group of people who will stick their hands up. ... People who most need those courses don’t go to them, because it doesn’t occur to them they need it. ... they’re not going to be active participants in seeking out that stuff.’

This latter view was supported by an employer in a small and medium enterprise who had settled a potential grievance claim outside of mediation.

> I just would have thought, if this was such an issue, we would’ve had a booklet from somebody, whether it be Department of Labour, the government, somebody but ... the only information that we get would be from the Inland Revenue.

**Employer**

However, having all the requisite policies and procedures did not necessarily alleviate all difficulties.

> For a small business... it’s unbelievable the paperwork that we’ve got to go through, and we think we’re all covered with everything, but there’s always a tiny ... we’ve got that many policy and procedure manuals. One of the things that came up in (the grievance) process was our employee said there was so much of it, she couldn’t possibly take it all in and she hadn’t been given time to read it, so I don’t know.

**Employer**

### 2.10 Changes to the personal grievance system

Although some employees considered the process did not require any changes, in discussing their experiences and views, most employees and employers made a number of suggestions for changing the current personal grievance system and many of these suggestions were common to both groups. Suggested changes were directed at the period before the personal grievance process began and during all phases of the process. Changes were aimed at improving employment relationships, addressing workplace issues, and, in relation to the process itself, reducing the duration, costs and the incidence of claims.

#### Extending the scope of mediation services

Under the Employment Relations Act 2000, mediation services are not limited to formal mediation between the parties (mediation 'events'). However, there are limited resources for preventative and educative work, with most effort committed to resolving actual disputes. Participants were asked for their views on the usefulness of extending the scope of mediation services on a planned rather than ad hoc basis.

#### Earlier intervention by mediation services

There were both employers and employees who had initially been interested in resolving their issues and maintaining the employment relationship, but who had instead ended the employment relationship as part of a mediated settlement. These participants were interested in earlier intervention by mediation services. However both employees and employers also identified potential difficulties with early intervention. An employer suggested that employees might still have the same negative reaction that he had observed whenever there was an initial discussion with an employee.
Could work - depends on the circumstances. My advocate says ‘have meetings with staff early, before things are too out of line’ but with troublemakers, the minute you have an initial discussion they get upset, make life difficult and you’re in the dismissal process.

Employer

Similarly, an employers’ representative thought some workplaces were ‘too unionised for that to work really well.’ That is, that employees would not attend any early intervention without union support and thus the escalation of the process would begin.

An employee observed that processes were already in place for early resolution but his manager had ignored them.

The employer failed to follow disciplinary and grievance processes that exist in the workplace. I think if they had gone through the proper process, earlier involvement of mediation would not be necessary – there are steps in place to deal with such issues but they didn’t take them. And the suspension happened very quickly.

Employee

Another employee had also been surprised by the speed of her job loss, but considered that if there had been an opportunity, early intervention by mediation services would have been useful:

I never suggested mediation, (because I) was in denial. The employer said there would be a review of business objectives and I didn’t know what he meant. Early intervention would be useful. I did think we needed to sit down and talk. I felt procedures were used against me very fast.

Employee

Another had been interested in involving the mediation service early but was deterred by the reaction from her managers.

I did say to the group manager I was willing to have a conversation with the (manager concerned), and everyone said don’t talk to her... I would have been interested in early mediation but was put off by reactions from her managers.

Employee, didn’t proceed

Mediation services applying a systemic approach to problem resolution

There were employers who recognised that there were issues with the way grievance and disciplinary systems were practiced and experienced in workplaces (for example, the imperfect knowledge of the process, the desire for a more transparent process where one could be more open in discussion without fear of penalty, and the defensiveness of both parties which led to rapid escalation of the process). However, most employers (note that all of the employers were in the private sector and half of them were in small firms) did not express a great deal of interest in mediation services taking a systemic approach to

Mediators become aware of patterns of problems and at times facilitate workplace teams to improve procedures. These approaches are developed in response to requests by businesses looking for a more proactive involvement by
problem resolution. This was perhaps because many of them were dealing with issues of employee misconduct and simply wanted the employment relationship to cease. The idea of mediation services applying a systemic approach to problem resolution was more strongly supported by employees, particularly those who had experienced systemic issues in workplaces. For example, a number of public sector employees in this research had found challenging workplace issues such as bullying were resolved only by one party leaving the workforce.

**Getting a final and binding decision from the Department’s mediation services**

There were both employers and employees who suggested mediators could be more directional, and some employers thought the mediator should have the power to halt weak or vexatious cases (during mediation). Further to this suggestion, some employers suggested mediation should instead be like the Disputes Tribunal, with the mediator looking for proof of people’s claims and making a binding decision. Participants who supported this approach nonetheless wanted the option of appealing the mediator’s decision.

*Drop the mediation service and expand the Employment Relations Authority or give the mediator the power to say 'this case is inherently wrong or unjust' and although the aggrieved party could go to the Employment Relations Authority they would be exposed to the costs of the other party.*

**Employer, settled at mediation**

**Having an independent judgement on the quality of a case prior to a claim proceeding**

Many employers commented on the need for a step prior to mediation. This was suggested for two reasons: because ‘it should not be possible to just get notice of a personal grievance without prior discussion’ as ‘often the first indication to the employer is a personal grievance letter from the lawyer,’ and because there should be some indication of whether an employee ‘had a case’ prior to an employer having to respond.

Both employers and employees also supported the idea of a pre-mediation ‘hearing.’ This might take the form of

*Access to a mediator early on who could identify an inappropriate personal grievance or poor employer practice and call it as such. In many ways the service could prevent ‘the dance of mediation’ for many inappropriate personal grievances – by a clear early view of the circumstances by an impartial mediator.*

**Employers’ representative**

Once there had been ‘an initial review of (whether) there’s a case to answer before you have to spend any money’, employees who proceeded with a claim should face penalties if their claim was not upheld.

---

the mediation service. Exploring a systematic approach to identifying patterns and trends in complaints, with feedback and options for resolution, could support reduced conflict and more productive workplaces.
... if it’s chucked out at that level then (the employee) should have to actually go into some sort of legal court process that costs them money so that they really consider that they have a case ... before they just waste your time.

Employer

However it was suggested by that such an independent authority would address only employers’ problems with the personal grievance system.

That would filter out a lot of vexatious claims. But would it address the imbalance in the other direction where people are scared to bring a complaint to the employer?

Employee

A similar suggestion - which may address some of employees’ barriers to the process - was an independent body which would provide a mechanism for employees and employers to go to for advice and/or support. This body could also support employees and employers coming to an arrangement for a dismissal. Such an independent body would have the power to suggest a fair solution with more formal procedures being available if the suggestions were unacceptable. If the dispute continued then this body could send a report to the Employment Relations Authority, giving their views on natural justice.

Other ways in which mediation services could help organisations prevent and resolve problems

Some employees felt there should be more emphasis on preventive mechanisms that would enable employees interested in a process to address workplace issues where they did not seek an outcome for themselves.

Other services to address employment relationship problems at an early stage

Information

There were both employees and employers who expressed some interest in having more information and advice on the grievance process. However there were reservations about how effective it would be for this information to be provided to people in a general manner. Participants were most interested in advice that would address their particular circumstances and that did not have the same costs as consulting a lawyer. In particular, employers wanted clarity around what constituted serious misconduct that an employee could be dismissed for, summarily or otherwise, and employees wanted clarity on whether their circumstances constituted a grievance.

An online employment problem resolution tool

Although participants were open to the idea of an online tool to assist with employment problem resolution, participants questioned how such a tool would operate and which issues it would address. As participants’ need was for a response to the particular circumstances of a cases, they questioned whether an online tool would be able to do that effectively.

The Department of Labour ... do have excellent website tools around holidays and employment relations but, for personal grievances, every single case is different. A million people in New Zealand with a problem are going to have a million
different reasons. It’s going to be very difficult to streamline it into a series of questions on a website tool.

Employee

Remedies

As described on page 32, there was support from both employers and employees to remove the primary status of reinstatement. To a lesser extent there was support from some employers to remove the remedy of compensation for humiliation, loss of dignity and injury to feelings. The absence of comment on the level of compensation perhaps reflects the sample groups’ experiences of the process, that is, most were not familiar with the settlements awarded by the Employment Relations Authority.

Some employees and some employers’ representatives wanted to see more restorative justice, for example, a remedy that addressed workplace issues that had given rise to their grievance. Further to this, employees who had experienced workplace bullying (none of whom proceeded with a grievance on these grounds alone) were particularly keen to see organisations deal with the person(s) responsible.

I would prefer that the perpetrator should have to do something – don’t punish the person who’s been abused. A public apology, yes, but (someone) behaving like this over years - surely they should lose their jobs?

Employee, did not proceed

While personal confidentiality at mediation was important to some employees, a suggestion made by some employees and employers included removing confidentiality clauses in mediation settlements as they were ‘unfair to subsequent employers’ and ‘did not support organisations’ learning.’

Employers also suggested reducing the financial incentive to take a grievance by having a limit on compensation. Further, as noted, there were employers who wanted employees who pressed ahead with claims they had been advised were weak or vexatious (by more ‘directional’ mediators) to face penalties if they were unsuccessful in the Employment Relations Authority.

Addressing the role of representatives

Both employers and employees wanted to address the cost effects of lawyers’ involvement in the process (although, as has been noted, lawyers’ advice was responsible for a number of employees deciding not to pursue claims, and a number of employers settling at mediation).

In addition to the suggestions discussed above, it was suggested by some that the original intention of low level resolution (without lawyers) should be reinforced – at mediation at least. An employer further suggested that the Department of Labour (or Department of Labour contracted) advocates should be used in the process, removing lawyers’ financial incentives to encourage weak or vexatious claims, and draw out the process. One employer recommended:
Ask what a bunch of 14 year olds would do – they’d say two warnings and you’re out on the second one. The process is overcooked.

**Employer, settled outside of mediation**

Some employees suggested that if people with few financial resources could not gain better (personalised support) from the process such as suggested above, then legal aid should be more easily available for personal grievance claims, including when going to mediation.

**Other changes**

Thinking about how the process could be improved to provide a better balance between the parties’ interests, employers were also keen on simplifying the dismissal process, for example, reducing the number of steps in the disciplinary process to one verbal and one written warning.

Both employees and employers wanted to limit costs and stress by preventing the other party from delaying the process in the hope the claimant or respondent would give up. This could be achieved through penalties applied by the mediator or Employment Relations Authority.
3 DISCUSSION

The nature of the non-random sample of this study means that many of the employees and employers interviewed were focused on somewhat different circumstances: employers on having to respond to weak or vexatious claims and employees on the barriers they faced in initiating a grievance. Perhaps related to this sample, employers expressed greater dissatisfaction with the process than employees. Employers’ dissatisfaction was associated with their experiences of feeling obliged to settle at mediation despite considering that the employee had a meritless claim. Employee’s dissatisfaction was associated with feeling it was too difficult to go through the grievance process; those who went to mediation were largely satisfied.

Employment relationship problems negatively affected workplace productivity, consuming resources and affecting other staff. It is difficult to assess, though, how the current grievance system affects workplace productivity. It might be considered, for example, that settling at mediation and forgoing the opportunity to go to the Authority supports productivity by shortening the grievance process.

Barriers

There were barriers for employees in pursuing a claim and for employers in responding to one, and many of these barriers were the same – stress and the fear of costs, both of which were exacerbated by the thought of a drawn out process.

The process was stressful for both parties, however, employees tended to discuss the effects of stress more intensively, perhaps because they faced loss of work (and income), and a comparative lack of security and control compared to employers.

The cost of a possible Employment Relations Authority hearing (expected to be in the range of $10,000-$20,000) was a significant factor in decision-making for some employees but all employers. The possibility of having significant legal expenses if a grievance got to an Employment Relations Authority hearing was an influence on employees’ decision-making not to make a claim at all or to settle at mediation; however the fear of costs was often combined with other factors such as the fear of damage to their reputation, a desire to move on from the problem, or ill health. Employers were also deterred by legal expenses from going to the Employment Relations Authority, and instead settled at mediation or privately with an employee, even if they felt the employee’s case was unjustified and that the employee would not be successful at an Employment Relations Authority hearing. Both employers’ and employees’ expectations of costs were centred on lawyers’ fees (not, in the employers’ case, a possible settlement to an employee).

Perceptions of the potential duration of a personal grievance were also largely centred on a case not being settled at mediation and going to the Employment Relations Authority. Both parties expected that waiting for an Authority hearing would be a long process (12-18 months). Employers faced the particular uncertainty of whether an employee who had notified them they intended to make claim would actually do so. As with the fear of costs, fear of a drawn out process deterred some employees from initiating a claim, and it
encouraged both employees and, more particularly, employers to settle at mediation even if the settlement offered scant satisfaction.

Experience of mediation

Although most participants in the research felt the mediators did a satisfactory job within the parameters of the role, mediation was not necessarily an appropriate forum for many of the cases discussed. The employment relationship was, in general, over when parties went to mediation or soon afterwards, and a number of the participants had gone to mediation seeking what the Employment Relations Authority is intended to provide – an inquisitorial hearing, followed by a decision.

Perceptions of the process

Supporting previous New Zealand research on perceptions of the process (Woodhams 2007), there were employers who considered the process favoured the employee, and employees who considered that employers had more power outside of the process. In general, when thinking about whether the system was fairly balanced between employers’ and employees’ interests, employers and employees focused on quite different aspects of the process. Of those who were dissatisfied with the balance, employers felt they could be compelled to participate in a process of unknown dimensions irrespective of the merit of the employees’ case, with no prospect of compensation for the costs they faced. Employees considered there were major inequities in power with the employer able to pursue various courses of action with much greater financial resources (for example, restructuring the workplace, hiring lawyers, engaging in delaying tactics).

It was acknowledged by both employers and employees that there was a need for a consistent process to be followed so that people knew what to expect and could be informed. Employees’ lack of familiarity with the process was a factor in getting legal advice and representation prior to mediation, while employers felt that it was not possible to be completely conversant with all necessary procedure in all possible circumstances. The processes followed by either party did not necessarily figure largely at mediation, but fear of making a procedural error contributed greatly to employers’ decisions to settle at mediation regardless of their dissatisfaction with the settlement.

There was also concern expressed by both parties that the current personal grievance process did not support good faith in employment relationships because when an employer approached an employee about an issue such as poor performance, or an employee had an issue with an employer’s behaviour or actions, they were not able to be open ‘in good faith’ without the threat of a personal grievance in the former case or being ‘restructured out of a job’ in the latter.

Information, advice & representation

Few employees or employers made decisions about dealing with an employment relationship problem without legal advice, or went to mediation without representation. The role of representatives was an issue because of the cost of pursuing or even investigating pursuing a claim; thus there was interest in limiting the use of lawyers in the process. However, a number of employees were deterred from pursuing a claim by lawyers’ or union officials’ advice and a number of employers settled at or outside of mediation on lawyers’ advice. Thus the net effect of lawyers in the process was not clear. It must also be noted that many employees and employers relied on legal advice and in many cases legal representation;
restraining the use of lawyers in the process may place a further barrier to engagement in the process. Participants were generally happy with the quality of advice received – although few employees had anything to compare it with. The effect of contingency fee lawyers - an issue previously raised in New Zealand (Department of Labour 2007a, Woodhams 2007) – is unexplored in this research as no employee had used one.

Eligibility

Both employees and employers considered the process should be accessible to all employees. There was no support from participants for excluding employees based on salary or seniority. There were mixed views from employers on the trial period exclusion: it was felt by some that it could logically be extended to all firms, and by others that firms should have sufficient processes to deal with issues without the need of a trial period exclusion. The length of the trial period was also debated, though no one suggested it be shorter.

There were similarly mixed views on the 90 day limitation period for notifying an employer of making a claim and the three year limitation period for lodging a claim with the Employment Relations Authority or the Employment Court. While some employees interviewed felt they could decide on their actions in a shorter period of time, there was a view that any shortening of the periods would advantage employers rather than employees. There was also some confusion as to when these periods started in the process.

Remedies

Participants’ views on remedies that the Employment Relations Authority might deliver were focused on the reality that the employment relationship was generally over when a personal grievance claim was taken. Compensation for lost income set at a level that gave former employees a reasonable length of time to find another job was an acceptable remedy for employees ‘with a case to answer,’ but compensation for hurt and humiliation was seen as more contentious by employers as the circumstances in which it might be awarded were seen as more arbitrary. However, as has been shown in British research (Peters et al 2010) apologies are important to employees, and it is possible that these are effectively expressed through compensation for hurt and humiliation. Obliging employers to address workplace issues was also of interest to employees. Reinstatement was seen by both parties as generally unfeasible but an important remedy to retain.

Changes to the process

Participants were interested in having more information about the personal grievance process, however the need was for information tailored to the circumstances of the case, and there were some reservations that a suggested online tool would be able to deliver this. A more systemic approach by mediation services might improve workplace processes but most participants were focused on the process for dealing with cases where the employment relationship was over. Mediation was not necessarily the most appropriate forum for this. Thus there was interest in a type of ’pre hearing’ being introduced in which a judgement would be made by an independent authority on the quality of a case with penalties for employees who proceeded and were unsuccessful. There were both employers and employees interested in receiving a binding decision from mediators (that could be appealed) but the current mediation process was not thought a suitable method for this, as such a process would need to be more like that of the Employment Relations Authority.
4 CONCLUSION

This research was focused on eliciting the views of employees and employers who had settled a personal grievance outside of the Employment Relations Authority (either in mediation or privately), and employees who considered but did not proceed with a personal grievance. The research drew on a non-random sample of people with these particular experiences of the process.

A range of views were expressed by both parties on the questions raised by the Personal Grievance Review Discussion Document: this range included some commonality between employers’ and employees’ views and some divergence within each group. Having a personal grievance system available to all employees was considered important by all but two themes emerged strongly: employees face barriers to taking a grievance, and employers, in being obliged to respond to any and all grievances, may end up settling with an employee at mediation rather than challenging their case at the Employment Relations Authority. The influences on both of these unsatisfactory decisions had much in common: fear of legal costs incurred in going to the Authority, and a desire to end the stress and uncertainty of the situation.

It was clear from the research that there are some employers and employees for whom the current system has not achieved a fair balance between employer flexibility and employee protection, and that the system does impose unnecessary costs or obligations on some employees and employers. The research has provided indicative evidence that there are both employees and employers for whom the current system is not efficient and effective, and further, that the objectives of Part 9 of the Act are ill-suited to some peoples’ actual experience of employment relationships. However, the proportion of employees and employers so affected is not apparent from this qualitative study. Nor were the overall effects of the personal grievance system on workplace productivity clear.

The improvements sought by employees and employers, as described in this research, centre on the provision of accessible and independent information that addresses their particular circumstances, provides some clarity around the case they have, and perhaps provides an initial judgement. In relation to this last point, it was notable that the employment relationship was generally effectively over when most of the participants went to mediation. There was therefore a call for a more appropriate way of addressing such grievance cases, in the first instance, with an inquisitorial rather than a mediative approach.
REFERENCES


Department of Labour (2007a) Report on findings from focus groups: Inquiries into experiences in resolving employment disputes outside the Employment Relations Act 2000 dispute resolution framework

Department of Labour (2007b) Personal Grievance Determinations in the Employment Relations Authority 17 July – 18 August 2006


Oslington P and Freyens B (2005) Dismissal costs and their impact on employment: evidence from Australian small and medium enterprises. MPRA Paper No. 961 Available online at http://mpra.ub.uni-muenchen.de/961/


Lloyd A & Smith B (2010) Is the system broken and does it need to be fixed? NZ Lawyer 1 April 2010


Woodhams (2007) Employment relationship problems: costs, benefits and choices, Department of Labour
Woodhams B & Martin M (2007) Personal grievance mediations conducted at the Department of Labour: a snapshot, Department of Labour