

newzealand.govt.nz

Department of Labour
TE TARI MAHI



REVIEW OF THE EMPLOYMENT RELATIONS ACT 2000: PART 9 PERSONAL GRIEVANCES

Summary of submissions
April 2010

TABLE OF CONTENTS

Executive Summary	3
Introduction	6
Submitter involvement in personal grievances	9
Part C: Operation of the personal grievance system	
1. The cost of problem resolution	10
2. Varying quality (and effect) of employment advocates	18
3. Balance of fairness in the personal grievance system	23
4. Ensuring access to justice	32
5. Negative impact of the responsiveness and timeliness of services	36
6. Employment relationship problems appear to impact disproportionately on small and medium-sized enterprises (SMEs)	39
7. Eligibility – raising a personal grievance	42
8. Effectiveness of remedies	47
Assistance to resolve problems at an early stage	50
General questions	54
Appendix 1: Submission questions	57
Appendix 2: List of submitters	61

Executive Summary

The call for public submissions on personal grievances was designed to elicit views and personal experiences of the operation of the personal grievance system.

The submissions provide a “subjective” view of the personal grievance system and findings from the submissions analysis will be supplemented by other more “objective” research conducted by the Department of Labour, providing more empirical evidence on the operation of the personal grievance system.

Public Consultation – discussion paper

The Department of Labour sought to understand the extent to which stated problems around personal grievances are genuine or are based on perception. Perceptions of the system and processes can have a real influence on people’s behaviour and the way they interpret the system and processes related to personal grievances. Perceptions can be based on a number of factors including the interests represented by submitters, personal experience of the grievance process and knowledge of the rights and obligations in the law.

The Department of Labour received 219 submissions, with the majority of submissions providing an employer perspective (employers, employer associations and industry groups).

This report summarises the submissions received, identifies key themes raised by submitters and sets out their preferred options for any change to the personal grievance system.

Most submitters focused on issues related to costs, representation, balance of fairness in the system and the test of justification (section 103A of the Employment Relations Act).

Analysis of submissions

Based on our analysis of submissions and other research, the Department of Labour considers that the balance of fairness provided in the current law is about right. However, there are pervasive and enduring concerns expressed by many employers that the system is weighted against them because they believe that their processes (and any minor errors in their processes) are considered by the employment institutions to be more important than the substance of a case. Hence, many employers hold that procedural flaws may render an otherwise justifiable action unjustified.

Many employers who have had personal experience of defending a personal grievance claim (and ‘lost’) do not consider that justice was done; do not understand why process is important in determining whether an employer has acted in a ‘fair and reasonable’ manner; and any weight given by the Employment Relations Authority or the Employment Court to culpable contributory conduct on the part of the employee appears to have little impact on the employer’s overall assessment of the process. Media coverage of cases, in general, by glossing over why a procedural fairness of the flaw may have been critical, or by ignoring contributory costs, tends to reinforce the view that a decision against an employer was unfair.

Many employers who have not had personal experience of the personal grievance system (past mediation) nevertheless hold strong views about the system, its costs and the likelihood of successfully defending a personal grievance allegation. Such views were often cited as the reason for choosing to ‘pay out’ an employee privately or at mediation.

The Department of Labour considers that the pervasive nature of such criticisms, albeit not supported by the research findings, by most academics or by many professional practitioners in the system, work to undermine it. Its credibility, its effectiveness and purpose are all undermined. Most importantly, it is possible that some employers are paying out employees unnecessarily as the allegation might not stand, if defended.

Any steps to address these problems must also take account of countervailing views, the findings of the research, and the serious business of (potentially) making changes in a well-established and important part of employment law.

Key themes:

- a many submitters said costs were unreasonable, in particular for small businesses
- b concerns were linked to costs associated with representation, unmeritorious claims and adverse outcomes
- c opposition was voiced to the no-win-no-fee advocates, in particular from employers and legal professionals but there was equally a view that the quality of advocacy was a characteristic of the individual representative, rather than of the method of payment
- d criticism of unethical practices was targeted at a range of employment advocacy providers and there was support for some form of regulation from across all groups
- e the law is not generally considered complex although many employers find it creates uncertainty, it is difficult and unclear
- f principles of natural justice were well supported throughout the submissions, although many employer submitters commented that there should be less focus on process and more emphasis on substance of personal grievance
- g the current test of justification received widespread support but many submitters advocated an amendment to explicitly recognise an employer may apply a range of reasonable responses in managing a problem
- h barriers arising from a lack of knowledge and/or advice were common concerns in the submissions for both employers and employees and were considered to be of greater significance for some groups in the community than others
- i delays were associated as much with the behaviour and availability of representatives and parties to the dispute as with the waiting times associated with the institutions
- j a majority of employers and employer representatives felt that trial periods had reduced the risk of personal grievances for SME employers and supported an extension in the legislation while employees and union were opposed to this.
- k most submitters did not support different eligibility rules applying to different types of employees because they considered that the law should apply equally to all employees
- l most employers and employer representatives considered that the 90-day limitation period was not adequate or appropriate nor did they consider the three year limitation period was appropriate
- m employer submitters were more likely to suggest that reinstatement is removed as the primary remedy, but felt that it should still be an available remedy and

were concerned that the current range of remedies were not effective at rebuilding employment relationships

- n most suggestions for making remedies more effective were around financial remedies, including having limits on the amount that can be awarded or increasing awards to reflect the real impact on employees
- o many submitters were satisfied with the status quo and the current “effective service” offered by the Department’s mediation services and identified a constructive role for mediation in early resolution of conflict, and
- p the role of mediation in filtering out meritless claims and in assisting parties to identify the issues and the risks of a claim, in advance of mediation, was a theme throughout the submissions.

Conclusion

The objectives of the personal grievance review were to consider a number of factors.

Upon analysing the submissions, we found that it:

- a strikes a fair balance between employer flexibility and employee protection: disinterested people or groups feel the system is fair. Those with an interest in the outcome of a personal grievance claim (employers and employees) both feel that it is weighted against them in different ways
- b does not impose unnecessary costs or obligations for employers or employees: both employers and employees felt the system imposed costs (direct and indirect). When compared to other dispute resolution systems in New Zealand or overseas, direct costs are relatively moderate. Some employers see these costs as being ordinary business costs. Most submitters would like to see costs reduced
- c supports improvements in workplace productivity: that employment relationship problems including personal grievances adversely affect workplace productivity, and
- d has met its objectives (as set out in the Employment Relations Act 2000): broadly, submitters felt the personal grievance system is meeting its objectives, although they also presented ideas about how it can be improved.

Introduction

- 1 The Government is undertaking a review of the personal grievance system as established under the Employment Relations Act 2000 ("the Act").
- 2 The objectives of the review are to consider whether the personal grievance system:
 - 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).

In addition:

- where improvements are required, the nature and extent of the issues involved, and
 - the steps that might be taken to address these (including, potentially, whether any amendments to the legislation are necessary or desirable).
- 3 The focus of this review is on the operation and associated processes of the system. The review does not consider the following matters: the grounds on which a personal grievance may be raised, discrimination, provisions relating to the raising of a complaint under the Human Rights Act 1993, and provisions relating to the functions of the Labour Inspectorate.

Summary report - Public consultation discussion paper on personal grievances

- 4 The aim of the discussion paper was to better understand how widespread the issues brought to the Minister of Labour and the Department of Labour's attention are and the experience people have of the employment institutions through which personal grievances are pursued and resolved. Clarifying the extent to which problems in this area are based on experience or are perceptions of problems is a key objective of the review.
- 5 The discussion paper sought views on the personal grievance system by making a general call for written submissions from the public between 2 March and 31 March 2010 and asking questions about the key issues.
- 6 This report summarises the submissions received, identifies key themes raised by submitters and sets out their preferred options for any change.

Summary of submitters

7 The Department of Labour received 219 written submissions as detailed in the tables below.

Table 1: Submitters by type

Submitter Type	Percentage of submitters
Employer	55
Employee	4
Employer representative/industry organisations	8
Union/Employee representative	5
Legal services (lawyers, Community Law Centre)	13
Human Resources/Employment relations advisor	5
Employment advocate	4
Academics	2
Family and friends	1
Other (e.g. Small Business Advisory Group, Political Party)	3
Total	100

8 The following table shows a breakdown of employer by business size including both private and public organisations.

Table 2: Submitters by employer size

Business size	Percentage of employer submitters
Small (1-19 employees)	33
Medium (20-49 employees)	12
Large (50+ employees)	55
Total	100

- 9 The following table shows a breakdown of the industries the submitters represent. Employer representatives, such as Business New Zealand and employee representatives such as the New Zealand Council of Trade Unions, which do not represent employers or employees in a specific industry have been included in the category "other services". The industry groups are based on the Statistics NZ ANZS1C level1 code for industry type.

Table 3: Submitters by industry

Industry	Number of submitters
Manufacturing	20
Electricity, gas, water and waste services	6
Retail trade	27
Accommodation and food services	5
Transport, postal and warehousing	11
Information media and telecommunications	6
Professional, scientific and technical services (including academics)	46
Administrative and support services	6
Public administration and safety	4
Education and training	11
Health care and social assistance	15
Other services (including other sectors) ¹	38
Not elsewhere included	1
Not listed by submitter	23
Total	219

¹ "Other services" includes representative bodies such as employer associations, unions and industry groups. The following sectors have also been included in "other services" as they had few submitters: Agriculture, forestry and fishing; Mining; Construction; Wholesale trade; Financial and insurance services; Rental, hiring and estate services; and Arts and recreation services.

Submitter involvement in personal grievances

- 10 The majority of submitters (186) commented that they had been involved in a personal grievance, with most of these occurring within the past year. Over half of the submitters involved in a personal grievance were from an employer background, followed by representatives and employees. Submitters were also involved in personal grievances in other capacities such as a family member, friend, support person or advisor².
- 11 Most submitters have been involved in more than 10 personal grievances over the past 20-30 years. However, of these submitters many have been involved in several (or hundreds) of personal grievances by virtue of their role such as being a representative or a human resource or employment relations advisor. Many firms with 50+ employees indicated they had been involved in a large number of personal grievances. The most common type of personal grievances were unjustifiable dismissal, unjustifiable action, sexual harassment and redundancy.
- 12 The majority of submitters have experience of the Department's mediation services and the Employment Relations Authority (the Authority) and a few have experience of the Employment Court and the Court of Appeal³. Some representatives or advisors said they assisted clients through mediation but they were advised to seek legal representation beyond this. Private mediation/arbitration of personal grievances was not often utilised by submitters, with most submitters addressing the employment problem through the personal grievance system.
- 13 Submitters involved in personal grievances generally resolved them through mediation. While financial settlement was most common, resolution involved both monetary and non-monetary (e.g. apology, reinstatement) outcomes. Submitters said that determinations made by the Authority were more in favour of the employer than the employee. Some employer submitters felt that the Authority had given a better outcome than they expected. For example, one employer decided to defend a case at the Authority even though they expected to lose because of perceived Authority bias, but instead they were successful.
- 14 Regardless of the outcome, many submitters indicated that there are huge costs, particularly legal costs, involved in resolving the problem.

² "Advisor" as identified through the submissions could be an internal or external human resource/employment relations advisor or academic.

³ Six submitters (mostly large employers and representatives) said they have been involved in a personal grievance case at the Court of Appeal.

Operation of the personal grievance system

15 This section addresses submitters responses to the eight issues as identified under Part C of the discussion paper: Operation of the personal grievance system.

1. The cost of problem resolution

16 The costs employers and employees incur in relation to a personal grievance may include the costs of representation, lost income, workplace productivity, and personal and family costs. This section addresses submissions on three key areas:

- a submitters' views on the reasonableness of costs
- b submitters' views on the comparison with other legal disputes processes, and
- c submitters' views on reducing costs.

Summary of submissions

Submitters' views on the reasonableness of costs

Summary

The costs of personal grievances were described in terms of compensation awards, representation costs, and personal or social costs arising from both the process and the outcome of personal grievances. While many submitters said these costs were unreasonable, in particular for small businesses, often the concerns were linked to costs associated with unmerited claims and adverse outcomes. Evidence was provided by submitters who held that costs were reasonable within a New Zealand and international context and integral to upholding rights and responsibilities in law.

17 The discussion paper noted the average cost of settling a personal grievance was \$5000 and employer submitters held the view that this was unreasonable. Many indicated that the reasonableness of costs depended on the outcome of the case. As one employer said "all costs are too high unless the employer is wrong" and another said the costs were "reasonable if the employer is wrong and not reasonable if the employer is right." The Small Business Advisory Group (SBAG) noted that the costs to small business were disproportionately high compared with costs for a large business. They said there was a perception that employees took advantage of the business's lack of resources to take personal grievances, quoting one employer who said: "They will settle for an amount slightly lower than the cost of proceeding as they are aware a small and medium-sized businesses (SMEs) cannot afford the time on top of this."

18 Employers, employees, unions, legal firms, associations and academics considered the costs reasonable or low. One submission from an academic said that the settlement of personal grievances in New Zealand was low compared with other countries, citing a 2005 the Australian Chamber of Commerce and Industry estimate that the average cost of settlement for employers was \$A10,000 (ACCI, *Unfair Dismissal Laws*, August 2005). He also quotes statistics from the United Kingdom that indicate, on the current exchange rate, the average compensation award for unfair dismissal is about NZ\$16,000 (without compensation for injury to feelings) and the median award is around NZ\$8,500 (Tribunals Service, *Employment Tribunal and EAT Statistics (GB) 1 April 2008 to 31 March 2009*). A number of submitters said the weight of costs fell more heavily on employees than employers. Unions and employees said that in most cases employers are in a much

better position to absorb the costs than employers and that the system therefore favoured employers.

- 19 The New Zealand Council of Trade Unions (NZCTU) addressed the cost of employment relationship problems across the workforce as a whole quoting a 2007 Department of Labour study to argue that costs were "tiny". They compared this with recruitment costs which they said would be ten times higher. The study said:
 - a there were 1.5 problems per 100 employees, with personal grievances being a small subset of that number, and
 - b the direct cost of problems was 0.4% of total private sector wages, and the indirect cost was 0.6%.
- 20 While the reasonableness of costs was very much in the eye of the beholder, the view was also expressed that such costs were part of being in business. The Employment Law Institute commented that if parties are to have rights and responsibilities then when things go wrong there will be some costs associated with enforcement. Furthermore, they said "it is important to keep costs in perspective – there are correspondingly large costs in **not** resolving employment relationship problems".
- 21 Submissions addressed different types of costs including compensation payments, costs of representation and personal costs:
 - a Compensatory awards were considered unreasonably high by many employers. Some submitters considered the size of the business should be taken into account with "tiered compensation" recognising that small business had few resources than larger firms. Other submitters suggested compensation awards for procedural deficiencies should be less than for substantive deficiencies. For instance, one employer suggested that process faults should be valued at \$500 compared with faults in substance for which \$3,000 would be more reasonable.
 - b Other submitters were concerned that compensation awards were too low. One law firm said "it's barely a disincentive for employers to comply with the law when they're looking at paying someone \$3,000 to go away quietly." The Police Manager's Guild noted that compensation did not award workers for the distress caused but "workers are forced to agree to these averages at mediation because this is a reflection of what is ordered by the Authority and the Court if litigated." Submitters suggested that increasing compensatory payments to workers would incentivise employers to address deficits in managerial skills in order to avoid litigation costs.
 - c A number of law firms made submissions on legal costs awards which they considered too low. They advocated much higher, or full, costs awards for successful parties. The Law Society submission noted the gulf between a one day hearing at the Authority of between \$5,000 and \$8,000 when the awards routinely sat between \$2,000 and \$3,000. Minter Ellison suggested higher costs awards would deter unmerited claims which should be defended by employers who might otherwise make a commercial decision to settle before costs escalate.
 - d All groups who had been involved in personal grievances described the personal and social costs of grievances. These costs included: the wider impact on the workplace, including reduced productivity and morale; and the flow-on effects

for families and communities touched by the dispute. These indirect costs were attributed to arise from a number of factors including:

- i direct financial costs of representation and monies paid in damages
- ii delays in the management of the grievance in the workplace and the processes of the institutions, and
- iii uncertainty of outcome and a lack of confidence in the system delivering a fair outcome.

22 SBAG spoke about the costs of time, personal stress, disruption to the workplace and risk to the business's survival. Two other examples illustrate the experience for both employers and employees:

- a One employer said: "All employers know that if an employee takes a PG against them, regardless of the substance or lack of substance it will cost them in terms of the financial cost of representation, direct settlement at mediation, recruitment, training/orientation, time, effort, loss of productivity. In addition, there can be loss of staff morale, reputation and stress".
- b A partner of a worker who had been involved in a personal grievance said: "There is a terrible fear of both the financial cost and the emotional cost not to mention the very public awareness of having to go through this process. It is both embarrassing and stressful and can have a detrimental affect on a family as a whole. The terrible delays add to the stress and can tear a family apart. I personally have felt suicidal at times and have suffered sleepless nights and restlessness. I have not been able to concentrate and often feel isolated and lonely".

Submitters' views on the costs of employment disputes compared with other legal disputes processes

Summary

Most submitters said that the costs associated with employment disputes were lower than those associated with other legal disputes. The access to early dispute resolution was identified as a key contributor to the low cost of employment disputes.

23 The majority of submitters said that the costs of an employment dispute were lower than might be expected in other civil or legal disputes, although the Human Rights Commission and the Disputes Tribunal were two examples of processes that were considered similar or cheaper to access. One submitter identified low cost mediation services as a factor contributing to the low cost of employment relations problem resolution. Business New Zealand suggested that the dollar limitation ceiling placed on claims filed with the Disputes Tribunal could provide a useful approach for mediation services.

24 Other submitters were concerned at making a comparative assessment. They highlighted that:

- a in other legal disputes additional tools were available to parties including interlocutory remedies, such as strike out and/or security for costs which enable unmerited claims to be filtered out at an early stage
- b all legal actions involved cost and it was difficult to reduce those costs other than by speedy and effective resolution of disputes

- c the costs relating to lost wages is guided by the Employment Relations Act (s 128 of the Employment Relations Act) and for compensation by the Authority or the Employment Court and this effectively establishes what is 'reasonable' in the employment decisions, and
- d commercial judgements are made in all fields about what is a "reasonable" cost on the basis of an assessment of risk to the business weighing up the value of prolonging a dispute, losing a case, or settling "out of court".

Submitters' views on reducing costs

- 25 Submitters identified that costs could act as a disincentive to employees taking claims or a disincentive to employers failing to manage employees fairly.
- 26 Proposals from those wanting to see costs operate as a disincentive to employees taking personal grievances, in particular, what are perceived as unmerited claims, included:
 - a ensuring higher or full cost recovery in the Authority so employers can defend unmerited claims and to act as a deterrent to employees taking unmerited claims
 - b imposing higher filing fees (one employer suggested \$250 and another \$500) to ensure that it was not too easy to lodge a personal grievance
 - c imposing a penalty for unmerited claims, and
 - d introducing caps on both wages reimbursement (a common suggestion was for one month) and for compensatory payments.
- 27 Submitters wanting to see costs reduced by incentivising employers to manage employees in a fair and reasonable manner proposed:
 - a increasing the amount of damages payments to accurately reflect the real loss for employees
 - b more emphasis on early resolution of problems through:
 - i accessible information on the approach of the dismissal processes, specialist institutions and problem resolution costs
 - ii an advice line or other mechanism for employers and employees to get free advice, and
 - iii investment in management capability around dispute resolution.
- 28 Objections to the cost of legal representation were apparent from employers and some employees with comments that these costs acted as a deterrent to defending or taking cases. One employer referred to solicitors' rates as a "turn-off" and an employment consultant suggested that legal costs ensure "truth is the victim in most cases". While unions, employers, and employees involved lawyers in personal grievances there was a range of proposals to limit legal costs from across all groups. This included:
 - a ensuring costs that can be awarded in the Authority remain modest to prevent escalation of legal costs
 - b banning various types of representative, including:
 - i free services

- ii no-win-no-fee advocates
 - iii solicitors and lawyers, and
 - iv representation in the early phases of dispute resolution, such as mediation.
 - c extending the availability of low cost options, for instance, increasing legal aid and funding to community law centres and providing support for unions to represent employees in personal grievances
 - d enhancing early and/or informal intervention in problems, such as
 - i legislating to make mediation compulsory, to reduce deviating to the Authority with its associated costs
 - ii introducing a mediation/arbitration model (perceived by some to reduce the costs of the Authority but by others to exacerbate the numbers of parties appealing to the Authority)
 - iii enabling the striking out of frivolous claims before mediation
 - iv compulsory phone facilitation prior to mediation
 - v requirement that parties meet to seek resolution and meet other criteria before mediation is provided, and
 - e supporting employers and employees to be informed and skilled to represent themselves through
 - i free advocacy through the Department of Labour/mediation services, and
 - ii accessible information and other related support.
- 29 Other suggestions for reducing costs include:
- a reducing the timeframe for submitting a personal grievance from 90 days to 30 days, primarily to limit the number of claims, and
 - b filtering out of unmerited claims at an early stage by empowering mediators to make decisions on unmerited cases or enhancing decision-making by mediators.
- 30 Costs clearly played a big part in the decisions made by submitters in taking and defending cases, although some submitters were clear that it was the principle or the merits of the case that dictated how it would be managed. Most employers said that a decision was made on the benefits of settling a dispute early over the costs of proceeding with litigation. This resulted in a strong perception by submitters that money was being paid to employees because of the risks associated with defending cases, regardless of its merits. While this was referred to by some employers as "blackmail", others described weighing up the costs and benefits as a "normal business decision".

Discussion and analysis

- 31 The main themes in relation to costs of personal grievances are that:
- a The costs of personal grievances are too high creating a burden for small businesses, particularly SMEs and encouraging unmerited claims against employers.

- b The costs relating to personal grievances are too low so that employees are not fairly recompensed when they are unjustifiably dismissed nor are employers encouraged to manage their employees fairly.
 - c The costs of representation are a significant factor in the overall costs of personal grievances.
 - d The costs are low relative to costs of resolving non-employment disputes and when compared to costs in other countries.
- 32 The costs of personal grievances include personal and social costs, compensatory awards and representation costs. Both employees and employers described the impact of these costs as significant. The question is also whether these costs are appropriate and therefore, reasonable. A number of factors need to be considered in such an assessment:
- a Any process that supports employers and employees to resolve problems that are based on legal rights and responsibilities will entail the costs of entering into that process and costs associated with any decision arising out of that process.
 - b The reasonableness of the cost may reflect comparisons with other dispute resolution systems in New Zealand and international comparisons.
 - c There are costs associated with not resolving employment relationship problems, including productivity loss and turnover in the workplace.
- 33 Many employer submitters say that the costs are too high and encourage pay-outs to employees to prevent litigation, regardless of the merits of the case. These pay-outs are attributed in part to the fear of the costs associated with defending a case. While this was considered normal business practice by some it was symptomatic of an unfair system for others.
- 34 Disincentives to employees to take unmerited personal grievance claims included raising the filing fees for employees, enabling employers to recover full costs for defending such a claim, imposing penalties for claims determined to be unmerited, and/or filtering out unmerited claims at an early stage of the process. Some relevant considerations are:
- a Increasing filing fees may well inhibit employees making claims but equally this penalises those with justified claims and generally limits access to justice. Department of Labour data indicates that less than two percent (1.8%) of claims over a three year period (2007 – 2009) were labelled unmerited or ‘vexatious’ by the Authority or Court.
 - b Enabling parties to recoup considerably higher, or full, costs for successfully defending an unmerited claim would give confidence to employers to proceed with litigation rather than delivering a pay-out to make the problem “go away”. It is relevant, however, that the Authority and the Court currently have discretion to award higher costs to a party who has to defend an unmerited claim or who faces an unmerited defence to a claim. Indemnity costs can also be awarded in rare circumstances (*Bradbury v Westbank Banking Group* [2009] NZCA 234).
 - c Filtering out unmerited claims to reduce costs would still require time and costs associated with making a decision on the validity of the claim and is more complex in that it could potentially involve changes to the way that the

institutions currently operate, whether this is mediation services or the Employment Relations Authority.

- d One option not raised by submitters is the notion of penalising lawyers or other paid representatives who help defend unmerited claims, or provide an *unmerited defense*. In Australia, in certain circumstances, Fair Work Australia can make a cost order against a lawyer or paid agent.
- 35 Other submitters proposed reducing the overall costs of personal grievances by enhancing management capability, which would in turn reduce the number of actions taken by employees. Some submitters did not agree there were large numbers of unmerited claims indicating instead that employers lacked capability in managing grievances and the low levels of compensation did little to incentivise these employers to raise the standards. Proposals to raise compensation levels through statute needs to be balanced against the current role of the Authority and the Courts in setting appropriate levels of compensation that then guide mediation and private settlements.
- 36 Early resolution of grievances is preferable because it will tend to support productive employment relationships and low cost efficient management of the business. However, any costs associated with in-house resolution of problems are likely to reflect a combination of factors beyond simple statutory solutions including:
- a the cost of any legal advice
 - b the average settlements likely should the case go to the Authority
 - c any statutory guidance, such as lost wages (s 128 of the Employment Relations Act), and
 - d what the parties agree is reasonable, or do-able, in negotiation.
- 37 The costs of representation are a feature of most submissions and while some submitters say legal representation is important to be assured of making the right decision and achieving the best outcome, others indicated that there is little choice. A contributing factor to parties engaging representatives was their lack of knowledge of their rights and obligations in handling a personal grievance and a lack of understanding about the system.
- 38 Enhanced obligations to support early resolution of problems included statutory options, such as mandatory mediation and enhanced arbitration. The statutory options would change the current nature of mediation as a highly flexible and largely voluntary process and potentially transform the approach to mediation where parties can talk in an open and confidential environment that fosters mutually agreed outcomes.
- 39 Non-statutory options included a requirement for the parties to meet and attempt to resolve the problems prior to mediation and an obligation to disclose the nature of representation in advance of mediation. These options address concern that there is insufficient work done by parties before they attend a formal mediation. Without recourse to legislative amendments parties could be supported with the following options:
- a phone facilitation by mediation services prior to formal meetings, that canvass efforts to resolve the problem prior to attending mediation with associated advice in the event that no efforts have been made or the nature of representation of each party to ensure transparency

- b emphasising the importance of attendance at mediation by ensuring parties seeking to avoid mediation are not given preference in the system in either the Authority or mediation services, and
- c ensuring parties unwittingly filing at the Authority without prior mediation are referred to the mediation services without the cost of a filing fee.

2. Varying quality (and effect) of employment advocates

- 40 The objectives of the Employment Relations Act 2000 support a low level approach to problem resolution, including the provision of dispute resolution services that do not require legal representation and recognition of the importance of good faith in all aspects of the employment relationship. The role of representatives is a factor in the effectiveness of the legislation with respect to these objectives. This section addresses experiences and perceptions about the role of representatives, focusing in particular on the following areas:
- a the type of representation experienced by submitters
 - b submitters' experience in relation to representatives, and
 - c proposals to improve the quality of representation.

Summary of submissions

Submitters' views on the quality of employment advocates

Summary

Submitters were generally happy with their representatives for personal grievances, although they were less happy with the opposing party's representation. No-win-no-fee advocates were seen by some submitters as encouraging the pursuit of unmerited claims and the settlement of claims at a low and unfair level. However, across all submitter groups the quality of advocacy was more often linked to the quality of the individual as opposed to the method of payment by the employee. There was widespread support for some form of standardisation and monitoring of advocacy and an increased emphasis on early dispute resolution to reduce the costs of representation overall.

Submitters' experience of different types of representation

- 41 Most submitters had experienced some form of representation in the course of trying to resolve a grievance, whether these representatives were legal practitioners, employment consultants, unions or employer representative organisations. Some submitters offered "no-win-no-fee" services and others had engaged with these representatives in some capacity. Only a handful of submitters self-represented or accessed only in-house services and so, while they were happy with the outcome, the numbers were too small to be informative.
- 42 Many submitters found the experience "stressful" or "upsetting" regardless of the nature of the representation and often the quality of the advocacy was directly linked to a positive outcome but in most instances where parties were represented, their experience of the representatives they engaged, was a positive one. For example, they talked of the employment advocates being "very professional and reasonable" or offering "good advice"; legal practitioners being "well-advised" and "excellent".
- 43 There was less consistency when submitters spoke about the opposing party's advocate. Some employer submitters expressed concern about no-win-no-fee advocates. For example, one person said they "tend to be aggressive and bullying" and another said they were "blackmailed". However, criticism was also directed at legal practitioners, who one employer said would "wring out the case and boost their fees" and another remarked that "the involvement of lawyers on either side turns the process away from practical problem solving, it is sometimes better when a good non-lawyer advocate is involved". A community-based law professional

commented that it was “stressful as the barrister had no experience with handling PG issues/procedures”, noting the procedure was drawn out, the process adversarial, the outcome unsuccessful for both parties and the “legal costs to both sides were huge”.

Submitters’ experience in relation to representatives

No-win-no-fee advocacy services

- 44 Discussion about no-win-no-fee advocates presented a complex picture of this form of representation. Many employers expressed fears of increased litigation in the event their employees engaged such advocates although they had no direct experience of these representatives. Other submitters relayed negative experiences with no-win-no-fee advocates during negotiations.
- 45 Umbrella organisations for legal practitioners and employers voiced a number of concerns saying:
 - a these advocates focused on monetary outcomes rather than the best solution, including a shift in emphasis to “exit packages”
 - b that employees carried no risk when engaging no-win-no-fee advocates and were therefore more likely to mount an unmerited claim and put pressure on employers to make a pay-out to avoid litigation.
- 46 Legal representatives who criticised no-win-no-fee advocates did this on the basis of the quality of the advocacy and suggested there was some dishonesty in the way they presented their services. One law firm said there were too many “cowboys” and “unethical advocates who are unskilled and are simply sapping money off already injured employees”. Another said this form of representation was not strictly speaking risk-free for employees who were often required to pay something even if there was not a successful outcome.
- 47 Two suggestions proposed lifting the standards and consistency of representation:
 - a some form of authorisation, regulation, or Code of Practice and/or a professional body that fixes standards and manages complaints
 - b the ability for the Authority or the Employment Court to award costs against a representative, personally, if they have incurred costs unnecessarily.
- 48 Submitters supporting no-win-no-fee advocates argued that levels of service and professionalism related to the particular practitioner as opposed to the type of payment arrangements entered into with a client. Mediators, legal practitioners, academics and employment advocates said that it could not be assumed that there was a relationship between the type of representative and the quality of representation. Further it was argued that variable representation was a feature of any area of dispute resolution. Some of the advocates contested the view that no-win-no-fee arrangements encouraged unmerited claims or presented a more aggressive style of advocacy. They argued:
 - a the Employment Law Institute said that its members were governed by a Code of Conduct to address conduct and professionalism and this supported ethical behaviour and not unmerited claims
 - b one advocate, who worked periodically on a contingency basis, said that some solicitors also operated in such a capacity and the only difference was the fees for the solicitor were a lot higher

- c some submitters argued that unmerited cases were not the preserve of the no-win-no-fee advocates but could equally be mounted by legal practitioners
- d there was a strong incentive for no-win-no-fee advocates to settle claims to prevent large costs being incurred by proceeding to the Authority and this supported low cost prompt resolution of cases, and
- e often workers take cases, not because of the money, but to clear their name from the stigma of having a dismissal on their record, to get a reference or bring some closure to a dispute. For low paid workers, without union representation, no-win-no-fee advocates provided a viable alternative.

Other types of representation

- 49 Submissions were also received from organisations providing free services for members or clients and those not accessing any external support but depending on their own skills or in-house resources. This included organisations that did not charge at all for services, such as unions, community-based services such as community law centres and a workers' rights service. Supporting the current scope for representation, the following points were made:
- a attracting a wide range of representatives should be seen as supporting access to justice and is similar to approaches in other jurisdictions
 - b limiting the range of representatives could result in employees being disadvantaged by facing an "uneven playing field" in any dispute resolution process where the employer engages a representative, and
 - c the NZCTU noted that union representation provides an efficient and effective way to resolve workplace disputes because most problems are sorted out before mediation and the Authority, where the costs escalate for all concerned.

Submitters' proposals to improve the quality of representation

- 50 Submissions recommending improvements to the quality of advocacy focused on changing the types of representation available; shifting the focus of dispute resolution away from the more costly institutions, where paid representation is more common; and, putting some checks and balances in the system to foster ethical behaviour. Proposals for more punitive action to deter unmerited claims, often associated with poor advocacy decisions, is addressed in the costs section (see para 26).
- 51 At one end of the spectrum submitters proposed banning professional legal representation or no-win-no-fee advocates from the personal grievance process although many submitters had positive experiences of each type of legal representation. Of those proposing limits to the role of legal advocacy, some specified that such limits should be imposed only at the early stages of dispute resolution, for instance at mediation. There was also a view that parties sometimes sought to match their opponent's type of representation and this could result in an unnecessary escalation of costs. They advocated that parties be required to disclose the nature of their representation in advance of any meeting so costs were not unnecessarily wasted on what could be considered over-representation.
- 52 Shifting the focus of dispute resolution to the early stages of conflict to avoid unnecessary costs was supported by employer and union submitters. Many people said that representation in the institutions was required for a successful outcome or as one submitter said "to manage risk". However, it was argued that

representatives can steer problem-solving away from common sense negotiations and towards costly litigation. One large employer said "representatives often 'hijack' mediation which hurts process and cause[s] sub-optimal outcomes for all parties". Some submitters suggested there should be assistance provided to parties to represent their own case including:

- a publicising information on process and compensatory awards
- b enhancing the skills of parties and the advice available to parties, and
- c early intervention support from mediation services (see paras 178-179).

53 Submissions from law practitioners, unions, employment advocates and community-based legal services supported creating standards across the advocacy "industry". Submitters suggested this would enhance accountability and confidence in representatives not governed by a current set of standards. Proposals suggest "regulation", "authorisation" or "registration" so that there are transparent ethical requirements and a means to monitor standards and address complaints. Community Law Canterbury said "advocates who wish to appear at employment mediation or before the Authority should complete training in mediation, and a minimum qualification in employment law. There should be registration and a code of practice...including quality standards, a process for addressing poor performance and unreasonable fees."

54 Legal services for low paid workers are provided by community organisations such as the Workers' Rights Service that represents workers free of charge or for a donation. They expressed concern about any additional costs of licensing or registration that could jeopardise their services.

Discussion and analysis

55 Most submitters were satisfied with the representation they received for personal grievances but many had strong views about their opponent's choice of representative. There was opposition voiced to the use of no-win-no-fee advocates, in particular, from employers and legal practitioners but there was equally a view that the quality of advocacy was a characteristic of the individual representative, rather than of the method of payment. Some submitters suggested barring no-win-no-fee advocates, however this was a minority view and any attempt to do so would have a number of negative consequences, including:

- a placing restrictions on the right to representation, which is fundamental to natural justice
- b restricting access to justice by limiting the range of low cost options available to workers
- c creating inequities given that some solicitors operate in this capacity currently and would not be barred, and
- d creating restraints on businesses' freedom to structure their fees for clients.

56 Criticism of unethical practices was targeted at a range of employment advocacy providers and there was support for some form of regulation from across all groups. The promotion of organisations, principles and practices could establish standard and as long as this was not mandatory services for low paid workers would not be excluded from operating Requirements of advocates might include:

- a promoting professional behaviour to clients, other practitioners and institutions

- b recognising, managing and disclosing conflicts of interest (perceived and actual)
- c providing professional development, e.g. training, qualifications, expertise, and
- d ensuring fair and reasonable fees.

3. Balance of fairness in the personal grievance system

57 This section addresses perceptions of bias in the personal grievance system. Questions 6 and 7 in the discussion paper are divided into five key areas consisting of submitters views on:

- a the fairness of the system
- b the system's complexity
- c process versus substance
- d minor irregularities in processes, and
- e the 'objective' test.

Summary of Submissions

Submitters' views on the fairness of the system

Summary

Perceptions of the fairness of the personal grievance system were based on a number of factors including the interests represented by submitters, personal experience of the grievance process and knowledge of the rights and obligations in the law. Employers mainly expressed the view that the system was unfair and biased in favour of employees, many drawing on their experiences of personal grievances. Some employers felt the system was biased against them, but did not have personal experience of the system, choosing instead to settle the matter privately outside of it. Employees and employee representatives considered the system fairly balanced, with some indicating a bias in favour of employers. Academics and law firms generally, based on the case law, considered the system to be fair overall.

58 While some submitters held the view that the system favoured either employers or employees, many submitters from all groups said the system was fair. Law firms, employees and employee representative groups, public sector agencies, academics and some employers held this view. The Employment Law Institute said that perceptions of bias across the continuum may in fact demonstrate that the system is not biased toward either side. One submitter offered two benchmarks against which the New Zealand law could be deemed fairly balanced from International Labour Organisation Convention 158, which specifies that

- a the employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking (Article 4), and
- b a worker who considers that his employment has been justifiably terminated shall be entitled to appeal against that termination to an impartial body, such as a court, labour tribunal, arbitration committee or arbitrator (Article 8).

59 Union submissions supported the current law as a fair balance between employers' and employees' interests. The NZCTU noted that:

"the employment relations framework in New Zealand does not allow worker[s] the right to strike over personal grievance issues...The absence therefore of this fundamental right places significant weight on the robustness of the personal grievance system".

- 60 One Union submission noted the importance of safeguards in law to ensure the fair resolution of disputes for workers because of the inherent inequality of power in the employment relationship (s 3 of the Employment Relations Act). Other submissions emphasised the importance of protecting employees' interests, recognising their financial dependence on employment, the personal costs of education and their personal reputations. The Service and Food Workers Union expressed concern at the misrepresentation of cases in the media. It cited cases in which long serving employees were found to be justifiably dismissed for cases of "relatively trivial conduct", suggesting the balance was not tilted in favour of the employee but that the reverse may be the case.
- 61 A number of submissions expressed the view that any bias in the personal grievance process was in the employer's favour. One Union submission said that any unfairness related to the low frequency at which reinstatement was ordered and the low remedies for workers who lost their jobs. University of Victoria law professor, Gordon Anderson, noted that bias in favour of the employer reflected firstly, "an assumed social consensus that employers as owners have a right to manage their business and that decisions relating to employers should be based on the employer's business needs"; and secondly, "that the standard for decision making is that of an objective employer (as compared to a disinterested observer or even an objective employee for example)".
- 62 Most employers and employer representatives submitted that the system was not fair and that it was biased in favour of employees, especially where small businesses were concerned. Employers and employer representatives said the law did not take account of the context of the employment environment and placed too much emphasis on process. One employers' organisation submitted that the law "acknowledges the importance that employment has in an employee's life but wrongly has that as a singular focus ignoring the investment and life-long effort put in to creating and running a business." Spotless Services described the requirements of the law as "very loose, vague, and situation dependent forcing employers to be over cautious and potentially think that any concern may be a grievance".

Submitters' views on the system's complexity

Summary

Most submitters from across all groups did not consider the law to be complex. While some submissions from employers and employer representatives described the application of fair process as complicated and difficult, most concerns were directed at the lack of clarity and uncertainty of outcome and some at the lack of knowledge and accessible information about the law.

- 63 Most representatives did not find the system of personal grievances complex, in fact, some considered the lack of complexity made it too accessible for employees. One submitter noted that employment law presented no greater challenge than tax law, limited liability or family trust law. The NZCTU observed that the system was designed to be open and flexible with recognition that access to information and mediation was more important than adherence to "rigid formal procedures" (s 101 of the Employment Relations Act).
- 64 The law for many submitters lacked clarity. It was variously described by employers as "complex", "pedantic", "loose" and "vague". Submitters from small businesses expressed concern about the difficulty of following a fair and reasonable

process and this was echoed by large businesses and employer representatives on behalf of small businesses. An employers' organisation described the process as a "lottery" and a submission from a large employer reflected a number of employers' submissions when it commented: "You never know that you did it right until the Employment Court deems it so!" The lack of clarity was evident where employers were unsure whether the test of justification applied to them or what their obligations were to their employees when problems arose. This was reflected in comments such as "I don't think this applies to me" and "if as an employer you know that an employee has done something bad you should be able to arrange a meeting and put it on the table".

- 65 Many employer submissions expressed concern at the uncertainty and described the stressful experiences and the unexpected and disappointing outcomes that followed their involvement in a personal grievance hearing.

"The fact that I had a paper trail of many similar situations, each with warnings and explicit examples of appropriate responses, was nullified, as I had not followed the form of paid stand down time to ponder his responses." (Small Business Advisory Group submission)

- 66 Across all submitter groups there were many suggestions for improving awareness, including information, access to free and independent advice and a code of practice to enhance clarity and certainty around the application of the law.

Submitters' views on process versus substance

Summary

Most employer submissions considered that process "trumped" substance and the law was consequently unfair. At the same time many submissions highlighted the importance of natural justice, including those submitters critical of what they consider to be an emphasis on process over substance. Other groups did not agree that process was considered to be more important than substance, recognising that both are required to be considered. They argued that the processes of the employer need to be scrutinised because it is the employer's actions at issue in investigating a personal grievance claim. These submitters held that a belief that 'process trumps substance' showed a lack of understanding about the approach of the employment institutions, and ignored the discretion the institutions use to factor into their decisions the culpable contributory conduct of an employee.

- 67 While some employers said that natural justice was unfair, submitters in all groups voiced support for ensuring that natural justice remained central to the handling of a personal grievance. One submitter noted a broad consensus over three decades in New Zealand that employees should not be deprived of their employment without good reason and the principles of natural justice being observed.

- 68 Submissions from representatives expressed a commitment to the principles of natural justice and outlined key components including:

- a notice to the worker of the specific allegation
- b an opportunity for the employee to refute the allegation
- c an unbiased consideration of the employee's explanation, and
- d the right to a representative.

- 69 Business New Zealand advocated an approach based on the principles of natural justice while at the same time avoiding "slavish adherence to a minutely detailed process derived from law". The NZCTU noted that the procedural requirements were common to most processes where natural justice was a recognised component and served, in practice, to prevent the escalation of personal grievances.
- 70 The debate among submitters on this issue primarily focused on the weight that should be given to these principles in assessing the fairness of the actions and the consequences for employers found to be in breach of the principles. On the one hand these basic requirements were considered important if an investigation were to be deemed fair and on the other hand submitters considered they should be given less weight on certain grounds. These grounds included:
- a where the action is substantively justified
 - b if the employer followed a process *they* considered appropriate, and
 - c if the breach of natural justice was not sufficiently severe.
- 71 One submission from an academic, summed up the countervailing view provided by several commentators:
- a "As to the requirement for a fair and reasonable process... the Court does not look minutely and pedantically to see whether the employer has acted fairly and reasonably to a standard of perfection. Rather, the assessment is one of overall fairness and reasonableness in all the circumstances of the parties and of the case..."
 - b "... a process that is fundamentally, pervasively, and manifestly unfair must and will clearly have that result [be found to be unjustifiable] under s 103A of the Employment Relations Act. In such circumstances, it is likely that the unfairness and unreasonableness of the employer's process will, in turn, have led to it not making a fair and reasonable decision to dismiss on the merits of the allegations against the employee. None of this is novel or remarkable. It is well known and well established employment law..."
- 72 A number of submitters said that the ability of the employment institutions to factor into their decisions the contributory conduct of the employee was not well-understood, or tended to be overlooked. Such powers were deliberately provided for in the law. These submitters pointed out that the employment institutions must:
- a reflect in remedies the employee's culpable contributory conduct (s 124 of the Employment Relations Act)
 - b consider the practicability of reinstatement in employment as the primary remedy for unjustified dismissal, and
 - c reflect a mixed result in an award of costs.

Submitters' views on minor irregularities in process

Summary

Employer submitters generally held to the view that minor process irregularities resulted in fair dismissals being deemed unjustified. This was accompanied by the perception of employers and employer representatives that ticking the boxes of fair process was more important than the substantive issues. Some employers identified that a gap existed between the requirements of the law and the reality of dealing with personal grievances.

Unions and many advocates presented a contrary perspective that while minor irregularities are often the subject of complaint by employers this was not supported by the approach of the Employment Relations Authority or Employment Court, as evidenced in their statements or decisions.

- 73 Concern about the weight given to process in personal grievances was widespread among employers, in particular, the chance of minor irregularities resulting in an employer being found to have acted unjustifiably. Small Business Advisory Group (SBAG) described a “definite perception that form (ticking all the procedural boxes) is more important than substance.” One employer quoted by SBAG said that in two cases the employees had been “fraudulent and both got away with a tiny part of the process not being followed”. This sentiment was reflected in the comment of one submitter who said “process is king – and this is where the employer struggles”.
- 74 One employers’ organisation said that required standards of behaviour had been “elevated to a level which is almost a counsel of perfection.” The consequence of the “weight given to process deficiencies”, according to Business New Zealand, was that many employers lost cases unnecessarily. In looking to the impact of process on outcomes, it expressed the view that only patent breaches of natural justice should entitle an employee to compensation and such breaches should not turn an otherwise justified dismissal into one that is unjustified.
- 75 Some submissions supported the current law, particularly the requirement that the employer follow a fair procedure overall and these submitters recognised that decisions of the Court did not support the argument that minor shortcomings could render a dismissal unjustified. One submission from an academic, said that:
- “Some minor or inconsequential flaw or even flaws that are part of a process that is nevertheless fair and reasonable overall, will not cause a dismissal that is otherwise justifiable in substance to be declared unjustifiable.”*
- 76 However, while this reality was acknowledged by some submitters, they still considered their own experience conflicted with the view of the Courts. One submission from a public sector organisation noted:
- “There is often more emphasis placed on examining whether an employer has followed an exact process rather than whether the employer has followed a fair procedure overall, and the decision is substantively justified. This appears to be contrary to the Court of Appeal’s view...”*
- 77 This gulf between experience and decisions of the Court may in part be explained by the point in the dispute at which issues of procedural fairness are first raised and considered by many employers. The New Zealand Manufacturers’ and Exporters’ Association submitted that in the early stages of trying to settle a grievance the focus was almost entirely on procedural matters. It noted this emphasis was apparent during the risk assessment of a case at mediation. While many employers are represented at mediation, this may be the first time an employer has been taken through a review of their actions in making a decision as opposed to focusing on the wrong doing of the employee who has been dismissed or disciplined.
- 78 The view that minor irregularities in process will lead to an unjustifiable dismissal and compensation awards was strongly countered in submissions from employees, employee representatives, law firms and academics. This was described by one submitter as “employment folklore” arising out of “misleading political claims”. Many submissions emphasised that substance and process were not mutually

exclusive. One submission was representative of these views when it noted that the assessment of a grievance in law was one of "overall fairness and reasonableness in all the circumstances of the parties and of the case." Unfair process may lead to an employer not making a fair and reasonable decision to dismiss. The NZCTU captured this view in its comment: "Proper process leads to proper decisions and contrary to myth observing the rules of natural justice is straightforward in most cases." The Police Managers' Guild said it was:

"vital to engage in a fair process when undertaking investigations into allegations which could lead to a decision which results in a worker losing his/her employment, in the Guild's case in one of its members, losing their career with Police. The Guild insists that the process of all investigations be fair so as to ensure that a correct and fair decision is arrived at."

- 79 While strong perceptions prevail about the impact of process on the outcome of a personal grievance, three key issues were identified by submitters in relation to the effect of minor irregularities of process on the outcome:
- a The Employment Court has constantly emphasised that minor procedural shortcomings will not render an employer's decision unjustifiable.
 - b The Employment Relations Authority and the Employment Court are required to take into account the practicability of reinstatement (s 125 of the Employment Relations Act) and the contributory conduct of an employee (the latter of which may reduce compensation by up to 100%). This provides a mechanism to address situations where the employer's decision was substantively merited.
 - c The individual employer's resources are to be taken into account when determining whether a fair process has been followed, addressing some of the concern about the demands on small businesses to meet what submitters described as "onerous" requirements of fair process with few of the resources available to large businesses and organisations.
- 80 Many submissions supported the approach provided by the current test and were concerned at the impact of any change on vulnerable employees, others sought changes to embed the current balance more effectively.

Submitters' views on the 'objective' test

Summary

Submissions on the objective test presented a range of views. Some submitters considered that s 103 of the Employment Relations Act provided a well-balanced test for assessing an employer's actions. Many employers argued there was uncertainty with the current law and it should be amended. A few called for its repeal or replacement with a new test.

- 81 Employers, employer representatives, law firms, and some academics advocated a change to the current law, primarily captured as a change from the words "*what a reasonable employer would have done*" to "*what a reasonable employer could have done*." These submitters argued:
- a this would increase the options available to the employer in any set of circumstances by allowing for more than one course of action to be open to an employer acting fairly and reasonably, and

- b it would prevent the Employment Relations Authority or Court from “imposing their view” on what action the employer should take, in what was described as “second guessing” the employer.
- 82 While some submitters opposing the current law advocated repeal, others were concerned that this would make no or little difference, to the current case law and made recommendations to amend the law. Business New Zealand said it was concerned about the growing precedence of process over substance prior to the enactment of s 103 of the Employment Relations Act and proposed the following replacement provision:
- “for the purposes of subsections 103(a) and 103 (b), the question of whether a dismissal or an action was justifiable must be determined on an objective basis by taking account of the options available to the employer following consideration of the available evidence, including any prior knowledge the employee may have had of the consequences of the action or actions complained of and/or the impact of that action or those actions on the employment relationship”.*
- 83 Submitters who advocated retaining the current test in law, argued that it was a reflection of three decades of evolution in employment law briefly disrupted by the decision referred to as “Oram”: *W&H Newspapers v Oram [2001] 3 NZLR 29*. That decision determined a dismissal should be judged on the basis of the employer’s subjective assessment of its options. Submitters argued that:
- a there was wide discretion available to the employer through *Oram*, such that “the employer’s decision became unchallengeable except in the most egregious cases – a position that would largely destroy personal grievance protection”
 - b the current test of justification as widespread in common law, making employment law the exception if any change were to take place, and
 - c changes would create confusion and costs around test litigation.
- 84 Supporters of the current test argued that it did not limit the range of fair and reasonable options for employers. They argued the flexibility sought for by employers in the law was located in the words “in all the circumstances”, and in the application of remedies. As stated by Judge Travis in *Arthur D Reilley and co v Jessica Sharon [2008] WC 08/8*:
- “The flexibility in considering the actions of an employer, which has failed to follow its own policy, has been enhanced by the introduction of section 103A. The section requires the consideration of all the employer’s actions, and whether the way the employer acted was what a fair and reasonable employer would have done in all the circumstances.”*

Discussion and analysis

- 85 The main themes coming out of submissions around ‘balance of fairness’ are that:
- a while there is an overall sense of fairness in the system, many employers are concerned that the system is biased against them
 - b the law is not generally considered complex although many employers find it creates uncertainty, it is difficult and unclear
 - c there is strong support for the principles of natural justice although many employers and employer representatives considered that too much weight was given to process, and

- d the current test of justification received widespread support but many submitters advocated an amendment to provide for a "range of reasonable responses".
- 86 Submissions from employers suggest the personal grievance system is not fair and that it is biased towards employees. Other submitters across all groups said that the system provides a fair balance between the interests of employers and employees. There are contextual issues to consider in relation to the current regime, including the current employment relations framework and international benchmarks:
- a the object of the Employment Relations Act 2000, which is to promote good faith in all aspects of the employment relationship, acknowledging the inherent inequality of power in employment relationships,
 - b the object of Part 9 of the Employment Relations Act 2000 which recognises that in resolving employment relationship problems access to both information and mediation services is more important than adherence to rigid and formal procedures, and
 - c International Labour Organisation Convention 158, which, while not ratified by New Zealand, provides a benchmark for fair practice of the management of employment problems, stating that the employment of a worker shall not be terminated unless there is a valid reason for such termination and they shall be entitled to appeal against that termination to an impartial body.
- 87 Most employers and employer representatives said the system was biased in favour of employees resulting in employers taking an overly cautious approach when dealing with problems in the workplace. These concerns were particularly acute among small business submitters. The perceived bias is based on a belief by submitters that there is undue emphasis on procedural fairness compared with issues of substance; that there is not a range of reasonable responses available to an employer but one correct response only; and that the Employment Relations Authority and the Courts wrongly substitute their own judgement for that of the employer.
- 88 Submissions from employers often draw on experiences of personal grievances to illustrate perceived bias. This sense of injustice of the system is reinforced by high profile cases that are not always reported in an even-handed way (for example, contributory costs are often ignored in reporting costs awarded). The perceived bias is generally based on the belief that a minor irregularity in process has rendered an otherwise justified action unjustified. There appears to be a lack of knowledge of the personal grievance system among some parties, who find their behaviour under scrutiny for the first time when entering the system, in particular:
- a the personal grievance system is a process of review of the conduct of the employer when taking action against an employee
 - b if the employer's actions are found wanting the dismissal may be unjustified and remedies may be appropriate, and
 - c if the employee's behaviour has contributed the remedies may be reduced to recognise their fault.
- 89 The pervasiveness of these concerns among employers is important to consider because the way employers view the system affects their decisions about how to

handle personal grievance claims. Choosing to 'pay out' an employee rather than defend a claim may be a normal business decision. However, if it is the result of a lack of confidence in the fairness of the system, it may disadvantage employers and undermine the purpose, effectiveness and credibility of the system.

- 90 The argument that the balance in law was fair, or favoured employers, was strongly voiced by submitters and supplemented by case law. The following key points are reiterated:
- a the Employment Court has repeatedly emphasised that minor irregularities in process will not lead to a finding that a dismissal is unjustifiable if the overall process is fair (*Lewis v Howick College Board of Trustees [2010] NZEMPC 4*)
 - b the statutory test requires a balanced assessment of both procedure and substance and not a focus on procedure alone (*Chief Executive of UNITEC Institute of Technology v Henderson [2007] 4 NZELR 418*)
 - c the law seeks to protect against unjust outcomes through a requirement that remedies are reduced to recognise contributory conduct by an employee, up to the level of 100% contribution. Further the Employment Relations Authority and the Court are bound to take into account the impracticability of any claim for reinstatement, and
 - d the resource limitations of an employer, such as is the case for many small businesses, are to be taken into account when determining if a fair process has been followed, countering the argument that the law is "one size fits all".
- 91 Any system by which an employee can challenge an employer's actions is naturally going to be regarded with some level of suspicion by employers. If employers are confident that they will be treated fairly by the system, they may feel less reluctant to participate in it. Most submitters did not consider the system to be complex but many employers found it difficult, the process requirements unclear, and the outcomes uncertain. There is an apparent need for much clearer pathways for employers and much more information and knowledge of the system so that they are prepared in future and so that they, and their employees, are equipped to manage conflict when it arises.

4. Ensuring access to justice

92 The Employment Relations Act 2000 recognises that information and support assists the prompt resolution of problems and more successful employment relationships. However, access to justice also depends upon the level of capability of parties involved in a personal grievance, such as the ability to pay for representation and to access the necessary information and advice. This section focuses on the barriers to raising or defending a personal grievance and how these barriers can be reduced.

Summary of submissions

Submitters' views on the barriers to raising or defending a personal grievance

Summary

Most submitters, who identified there were barriers, said that these were particularly marked for some communities such as low-waged workers, youth and migrants. Many submitters said that costs were a factor to either defending or raising a personal grievance. Costs were described as either 'direct' such as seeking representation or 'indirect', such as preparation time and loss of productivity. The impact on the individual in their workplace, family or community, was also highlighted as a barrier, for instance, the effect on health through stress. Solutions looked particularly at raising awareness and supporting early resolution of conflict where costs could be minimised.

93 Many submitters did not respond to this section and those who did were evenly divided between those who identified that barriers existed for parties and those who said there were no barriers. Some submitters identified the lack of barriers as an issue on the grounds that it encouraged employees to raise a grievance.

94 Most submitters who identified there were barriers, said that costs were a factor. Submitters described two types of costs: direct costs such as representation and damages; and, indirect costs, such as preparation time and loss of productivity. Essential HR Limited surveyed 31 clients about barriers and reported that of the 35% that decided not to pursue a grievance raised with them 100% made their decision because of cost, 87% because of the time involved and 50% due to concern for productivity.

95 Union submitters indicated that the costs of pursuing a grievance were disproportionate to the remedies sought and awarded. One union said that when employees were dismissed they were invariably short of money before the process began. The NZCTU said that there was anecdotal evidence that significant legal debts were common among employees who had taken personal grievances to the Courts. They argued that the cost barriers were particularly marked for vulnerable employees because settlement levels were low and there was no alternative course of action, such as common law pursuit of damages or the right to strike.

96 The impact on the individual in their workplace, family or community was highlighted as a barrier in many submissions. Stress and the associated health risks were common examples of this. Submissions talked about the impact on the reputation for employees - the "stigma" of being involved in a personal grievance in a small district, or for senior staff. A number of community law centres and unions noted the imbalance of power in the workplace was a barrier to raising a grievance. Illustrating this, employee submitters referred to the "fear of retribution" or "victimisation" and the "gossip pressure to buckle" at work when a grievance was

taken while still in employment. Small Business Advisory Group also noted that it was harder to lay a personal grievance while still at work. Other impacts included:

- a a sense of loyalty to the employer
 - b perceived loss of face or reputation, especially in a small labour market, and
 - c a perceived threat to future prospects, such as training and opportunities.
- 97 Current legislation provided a source of barriers for some submitters. This included the right to reinstatement as a primary remedy, the lack of accessibility to the Employment Relations Authority, and the trial period provision. The Public Service Association (PSA) noted the trial period “restriction was unfair and unreasonable” and that they were not aware of evidence that personal grievances were an issue in this period for small or larger workplaces.
- 98 Barriers in relation to knowledge and advice were common in the submissions. One employee said that a lack of knowledge and skill was a barrier to an unrepresented person faced with an experienced lawyer on the other side. One academic, submitted that the lack of access to affordable representation in a workforce with low levels of unionisation was compounded by the lack of accessible information on informal means of settling problems. He noted that this was often because individual agreements did not comply with the requirement to contain a plain language explanation of the services available for problem resolution.
- 99 Barriers around access to knowledge, support and remedies were considered by most submitters to be of greater significance for some groups in the community than others. These groups included “non-standard” and low waged workers, youth, migrants, people who spoke English as a second language, workers with disabilities, women, and Māori. The personal grievance legislation itself was not seen as posing a barrier for most submitters if they had some form of adequate advice.
- 100 Barriers to defending claims focused on the early phases of conflict resolution. The Schools Trustees Association said the lack of good faith in communicating the nature of a grievance to an employer presented a barrier to early resolution, citing examples of employers becoming aware of a grievance for the first time when contacted by the mediation service. However, employer submitters tended to be concerned at the pressure to resolve, and therefore not defend, a grievance before they incurred the costs associated with litigation (direct and indirect). This was commonly referred to as a “commercial decision” to settle cases and not necessarily judged positively or negatively. Two specific reactions were:
- a that employers lacked confidence in the system or at least in the outcomes from the system, for instance, one large employer said the cost of defending a claim can be a barrier “regardless of how frivolous the claim may be”, and
 - b that employers’ fear of the outcome, according to Business New Zealand, led some employers “not to participate in a personal grievance claim and let the matter run its course without their intervention”. (They suggested research into how many cases are not defended and for what reason.)

Submitters' suggestions for reducing the barriers

- 101 Barriers to raising or defending a grievance because of inadequate or poor advice and a lack of information could be addressed through improved information and assistance for parties, in particular, for small businesses. Suggestions include:
 - a providing free advice, especially for small businesses (for example, through use of mediation services)
 - b a Code of Practice to clarify s 103A of the Employment Relations Act 2000
 - c education for employers in hiring practices and performance management, and
 - d enhanced requirements for information to be provided in employment agreements about problem resolution.
- 102 Raising the barriers to embarking on a grievance was often suggested by employers as a way of deterring employees from pursuing frivolous claims, including:
 - a limits placed on who accesses the system (such as "vulnerable" employees or employees earning over \$100,000)
 - b limits placed on the use of representatives at mediation and the Authority
 - c raising the costs of the system to parties, including:
 - i higher costs against unsuccessful parties
 - ii higher filing fees for employees
 - iii penalties for unmerited claims, and
 - d reducing the time allowed for an employee to raise a personal grievance with an employer from the current 90-day period to 30 days (see paras 140-143)
- 103 Addressing barriers posed by the institutions, such as:
 - a more timely provision of hearings at the Employment Relations Authority
 - b more cost effective access to mediation services and the Authority, for example through limitations of use of representatives at mediation
 - c enhanced mediation services, such as:
 - i problem solving discussions prior to mediation
 - ii mandatory mediation
 - iii arbitration, for instance for claims below \$15,000, and
 - iv enabling mediators to communicate with the Authority prior to a hearing, for instance, by making a recommendation.
- 104 Removing the cost barriers involved in defending the perceived unmerited claims by:
 - a enabling full cost recovery by the successful party
 - b penalising legal representatives for taking unmerited claims
 - c filtering out unmerited claims early in the process, and
 - d granting the Authority the power to strike out frivolous cases.
- 105 Supporting quality advice and behaviour by parties by:
 - a enabling penalties for breaching process and good faith, and

- b regulation of advocates.

Discussion and analysis

- 106 Availability of information is a feature of the proposals for improving the system throughout this report. Legislative amendments could assist, for instance, by providing for a requirement to incorporate additional problem-solving steps into an employment agreement. Alternatively a Code of Practice or promotional material would be a less prescriptive approach to enhancing parties' understanding of the requirements of dispute resolution.
- 107 Limits on access to a personal grievance through salary caps, or constraints on representation could reduce cost barriers but consideration also needs to be given to:
- a the restrictions on access to justice for specific groups of employees in the event of a salary cap
 - b the potential to shift the costs to another jurisdiction for high paid employees seeking alternative routes to defend a claim
 - c restrictions on access to justice for employees or employers lacking the knowledge, skills or time to represent their own case, and
 - d the potential for an uneven playing field where some parties may have access to support resources (such as in-house human resources) where others do not.
- 108 The role of mediation services in reducing costs was canvassed in a number of ways. Firstly, by enhancing the mediator powers to make recommendations to the Authority, or giving a final and binding decision. Secondly, by creating a more proactive role for mediators in the filtering and facilitation of problems in advance of a mediation meeting. Decision-making by mediators is addressed in the responsiveness section of this paper (see pages 51 - 54). In relation to other ways to reduce the barriers through mediation:
- a a mediator recommendation to the Authority on the merits of a case may provide some assurances to parties that these concerns will be addressed proactively and early in the progress of the problem within the system. However, consideration needs to be given to the potential for such a change to alter:
 - i the current role of mediation as voluntary, flexible and confidential, and
 - ii the tendency for parties to place more effort on preparing a case for litigation as opposed to problem solving an early exit from the system, thus increasing the costs for employees, employers and government
 - b low level filtering and facilitation prior to a formal mediation meeting can be addressed through internal policies, albeit with resource implications for mediation services.

5. Negative impact of the responsiveness and timeliness of services

109 The prompt resolution of problems is identified in the Employment Relations Act as important to successful employment relationships (s 143 of the Employment Relations Act). This can be undermined by delays caused by employers, employees, representatives or the institutions. This section considers submitters' views on the impact of these delays and ideas for improving responsiveness by providing support for early resolution of problems and through changes to both mediation services and the Employment Relations Authority.

Summary of submissions

Submitters' views on the responsiveness and timeliness of the services

Summary

Delays are identified by submitters as an issue in the resolution of grievances, however, many do not see the delays as unreasonable and solutions are often associated with resourcing issues rather than poor performance of the practitioners in the system. While some of the delays target the institutions, submissions noted the tactical or fraught nature of dispute resolution, which invariably entails delays by both sides, intended and unintended. Most suggestions to enhance responsiveness were focused on greater resourcing of the institutions along with tighter timeframes for meetings and decisions.

110 Many submitters either did not respond to this question or said that there were no delays or the delays were not unexpected or unreasonable. Those who did not respond may well have absented on the basis that they did not experience delays. Less than half the submitters said there were delays in the process and of those, a third had difficulty with accessing mediation services (primarily a problem associated with Auckland and the rural locations), and a third had delays waiting for an Authority hearing. Some submitters said they experienced delays waiting for Authority decisions, whilst others said that the delays were due to the behaviour, or availability, of the other party or the representative.

111 Employees, employers and representatives referred to the emotional and financial stress caused by delays. Costs were sometimes associated with parties refusing to attend mediation resulting in escalating the problem to the Authority. Employee submitters referred to "public humiliation" and the financial insecurity of being without a job on top of the costs of representation. One employee wrote: "*process delays create a great deal of psychological impact – social isolation, relationship stress, self-doubt, low self esteem (of being unemployed and being run down by your employer) through to suicidal thoughts. Belief in fair treatment is what drives people to take a PG*". Employer submitters focused on the impact on morale and productivity in the workplace, particularly where the employment relationship was ongoing. They highlighted problems associated with organisational restructures and replacement of staff pending an outcome of a dismissal case.

Submitters' views on the responsiveness and timeliness of the services

112 Many submitters did not respond with suggestions about ways to improve responsiveness. Some submitters said they had no problem with the current system or no suggestions to make. Where submitters made suggestions, the greatest number of suggestions was around increasing the resources of the institutions. The main proposals included:

- a increasing the number of mediators

- b increasing the number of Authority members and resources
 - c providing training for mediators and Authority members
 - d enhanced early intervention mediation
 - e a new model for national mediation service delivery, and
 - f enhanced information, training, and guidance for parties to resolve problems early and avoid the need for third party intervention.
- 113 Other suggestions focused on creating a more efficient system. Some submitters wanted to place time constraints on parties accessing mediation and thereby limit the number of grievances in the system and others wanted to limit the use of representatives at mediation. Other ideas included:
- a shorter timeframes for Authority hearings and decisions
 - b enhanced technology, such as telephone mediations and electronic filing of claims
 - c the filtering of small claims or unmerited claims at mediation, and
 - d greater use of arbitration at mediation, with the option of an appealable decision.

Submitters' views on final and binding decisions from mediation services

- 114 Many submitters did not have a view of the role of mediation services in making final and binding decisions. However, some submitters supported this idea with one employee describing it as an "excellent improvement" and SBAG saying it would be "excellent as it will provide a definite conclusion" and better than going to Court.
- 115 A number of variations on decision-making were proposed including:
- a Support for mediator's making final and binding decisions contingent on the parties agreeing to a decision being made. (This is little different from the position of the 10 submitters supporting the current regime given that mediators can in fact make a decision under s 150 of the Employment Relations Act if both parties agree.)
 - b A system for low level claims similar to the arbitration model of the Disputes Tribunal.
 - c A mediator *recommendation*, as opposed to a decision, that sits "on the table" for a set period of time for parties to agree, prior to a decision by the applicant to proceed to the Authority.
- 116 A number of submitters opposed the idea of mediators making final and binding decisions, as supported it. Of those opposing final and binding decisions, submitters specifically said that they did not support it because this was not the mediators' role and they were not, therefore, sufficiently skilled to make determinations. Other submissions noted ethical concerns about decisions being made by a mediator, who has just mediated the case. Opposition to mediator decision-making was also based on support for the principle of a mediation process as opposed to an arbitration system. One employer submission, for instance, supported a free and open dialogue between parties seeking a mutually satisfactory outcome, noting that this would not be possible in a shift to arbitration. Others were concerned that it would cause an escalation of litigation, and associated costs,

as parties sought to appeal decisions when agreement might have been reached at mediation.

Discussion and analysis

- 117 There are apparent delays in the system, both with respect to mediation services and the Authority. However, these delays were associated as much with the behaviour and availability of representatives and parties to the dispute as with the waiting times associated with the institutions. Solutions logically involved increasing resources and options available early in the dispute resolution process to limit the number of cases in the system or tighten up the efficiency of the current system. The suggestion that mediators be given additional powers to make decisions did not receive overwhelming support based largely on recognition of the value of mediation but also on the capabilities of mediators who are infrequently asked to deliver decisions under s 150 of the Employment Relations Act.
- 118 While some suggestions were made for legislative change, such as the filtering of unmerited claims and a more comprehensive arbitration model for mediation services, these have been addressed elsewhere in this report. A number of suggestions were made that could enhance the efficiency of the system through administration of services without recourse to statutory levers, including the use of technology, and information and guidance for employers and employees.

6. Employment relationship problems appear to impact disproportionately on small and medium-sized enterprises

119 Resolving employment relationship problems appears to have a greater proportional effect on small and medium-sized enterprises (SMEs) than on larger workplaces. This section asked submitters whether the government could do more to assist SMEs to resolve employment relationship problems. It also asked whether the recent introduction of trial periods had reduced personal grievances.

Summary of submissions

Submitters views on support for small and medium-sized enterprises

Summary

Submitters from across all groups favoured increasing education and guidance to employers and employees. Suggestions focused on options that would reduce the likelihood of a personal grievance arising in the workplace. The majority of employers and employer representatives said that trial periods had reduced the risk of personal grievances and they supported increasing the scope of the current law. Other submitters, including employee representatives, were opposed to any changes on the basis of opposition to the principle of trial periods or because there was insufficient evidence of its effectiveness.

120 The majority of submissions on this question made recommendations on what further support the government, or other parties, could provide to workplaces, particularly SMEs. Many of these suggestions were also raised in responses to other parts of the discussion paper. Some submitters also queried whether the government had a role in providing support or should create different policy settings for SMEs.

121 Most of the submitters who commented on this question, were in favour of government support. The most common reasons given were based on the differences in SMEs' capability and resources when compared with larger workplaces. Other reasons included that government support, particularly if it focused on early invention, would help to prevent problems and that it would have economic benefits, such as increased productivity.

122 However, quite a few submitters thought that the government should not be creating different rules for businesses based on their size. This was mostly seen as being unfair on employees as it created a system where employees have different rights based on the size of their workplace.

123 The most common suggestions for further government support for SMEs were:

- a increased or improved guidance and education for employers and employees on all aspects of employment relationships (provided by the Department of Labour or by third parties)
- b simplifying the processes for SMEs around recruiting, personal grievances and dismissals
- c an advice or help line for SMEs, particularly one that could provide free legal advice (through the Department of Labour or a third party)
- d information about how to access human resource support or providing SMEs with free legal or human resource-related advice

- e a code of employment practice
- f promoting and raising awareness of the materials and support already available, including the benefits of belonging to employer organisations and unions
- g reducing frivolous or unmerited claims (for instance, filtering out these claims prior the Employment Relations Authority meeting and imposing penalties for claimants who pursue frivolous cases)
- h amending legislation relating to the test of justification (s 103A of the Employment Relations Act) or trial periods
- i a website and/or online tools, including templates for employers to use, and
- j legal aid for SMEs.

Submitters' views on trial periods

- 124 Many submitters commented on whether the trial period provisions should be changed. A few submitters said that there should be no change or that the current provisions are sufficient. Many submitters did not have direct experience of trial periods (e.g. large employers).
- 125 Employers generally considered that trial periods had helped by reducing the number of personal grievances and reducing the risks around employing new people. A few submitters said that trial periods had not helped or reduced personal grievances, for instance, two submitters claimed that employees were now taking personal grievances on other grounds, such as unjustified disadvantage.
- 126 Some submitters pointed out that the number of personal grievances would logically reduce because trial periods excluded some people from raising a grievance and others said that it was too early to tell what impact trial periods have had. Submissions from unions and some academics were opposed to the trial period provisions.
- 127 A couple of submitters said that there was low awareness about trial periods and how they worked. One submitter, for instance, said that trial periods were too complex and another that it was hard to dismiss someone on a trial period.
- 128 Of those submitters that recommended changes, the most common changes were to the size of the workplaces covered or the duration of the trial period. These views were expressed by employers and employer representatives, and included:
- a extending trial periods to all employers, regardless of their size
 - b extending trial periods to employers with 20-49 employees
 - c increasing the trial period, for instance, to six months, and
 - d including personal grievances for unjustified disadvantage in the trial period.

Discussion and analysis

- 129 While some submitters questioned the role of the state intervening in the management of a business, most submitters supported much more information, access to advice and awareness of the system of personal grievances. For many employers the trial periods had worked effectively and the most popular proposal was an extension of this to larger workplaces. Employees, unions and some other submitters were concerned at the lack of concrete evidence of the impact of the trial periods and generally opposed the policy. Legislative proposals to support

SMEs, including changes to the test of justification, are raised elsewhere in this report.

7. Eligibility – raising a personal grievance

- 130 This section covers submitters' views on whether one set of rules should apply to all employees. The section covers submitters' views on:
- a whether different eligibility rules should apply to different employees
 - b the adequacy or appropriateness of the 90-day limitation period for raising a personal grievance, and
 - c the appropriateness of the three-year limitation period for lodging a personal grievance with the Authority or Court.

Summary of submissions

Submitters' views on whether different eligibility rules should apply to different types of employees

Summary

Most submitters did not support different eligibility rules applying to different types of employees because they considered that the law should apply equally to all employees. The most common grounds advocated for changes to eligibility rules were earnings, seniority and service. The majority of submitters opposed introducing a salary cap limitation.

- 131 The majority of submitters who commented on this question did not support different eligibility rules applying to different types of employees. Submitters from all groups said that the law should apply equally to all employees. One submitter captured the sentiment of many, saying "*all employees should have the same access to justice*" or "*all people should be equal under the law*".
- 132 A few submitters commented that it would be a breach of natural justice to remove an employee's right to take a personal grievance:
- "There is no justification for any difference of eligibility applying to different types of employees. The right to raise a personal grievance is a fundamental principle of natural justice."*
- 133 Other reasons for not supporting applying different eligibility rules were that:
- a it would be discriminatory to apply different rules for different types of employees
 - b people of all ages, salary levels or work experience can still be treated unfairly in the workplace
 - c there is no merit in applying different rules, and
 - d it would only complicate matters for employers because it would be difficult for them to manage different rules for different groups.
- 134 A minority of submitters considered that different eligibility rules should apply to different groups of employees. These views were commonly expressed by employers and employer representatives. Some of the options for limiting eligibility are:
- a the employee's earnings (a number of submitters recommended a cap of \$100,000)

- b the employee's position in the company (for instance, a CEO and a Board could negotiate their own outcomes), and
- c the employee's length of service (submitters suggested periods of between three months to a year).

Salary caps

135 Submitters were asked for their views on limiting the ability of employees earning over a specific salary amount from raising a personal grievance (a salary cap limitation). The majority of submitters opposed introducing a salary cap limitation.

136 Submitters gave the following reasons for opposing a salary cap limitation:

- a it would be unfair and unjust (echoing submitters' general views on introducing different eligibility requirements)
- b it was unnecessary as there was no evidence of a problem, arguing that most high paid employees settle at mediation
- c the impact of being unjustifiably dismissed was the same regardless of an employee's earnings
- d high paid employees are less likely to take a personal grievance because their reputations are more likely to be damaged by the process, reducing their chances of gaining employment with another employer
- e such a limitation could be used to dismiss senior employees for no good reason
- f high paid employees may be the most vulnerable to unjustified dismissals (for example, if they work to a Board of Directors), and
- g any cap (unless it is set very high) is likely to capture employees who are not intended to be covered.

137 A few submitters noted that one consequence of introducing a salary cap limitation would be that high paid employees resort to challenging their dismissal under common law. This would increase the costs of litigation because damages would be set under a higher rate than personal grievances and a longer limitation period would apply (six years).

138 A minority of submitters supported introducing a salary cap limitation for the following reasons:

- a it would recognise that senior employees have more bargaining power than lower paid employees (for example, senior employees are better placed to negotiate their exit packages)
- b it would provide more certainty on the legal status of exit packages
- c it would encourage accountability by senior employees, and
- d the costs of a personal grievance were too high for some employers, particularly SMEs when a high paid employee was involved. A couple of submitters noted that SMEs could be adversely impacted by the financial costs of a personal grievance case if a large amount was awarded to the employee.

139 A few submitters considered that the proposal should be modelled on the Australian system which excludes designated levels of employees from accessing the personal grievance process.

Submitters' views on the adequacy and/or appropriateness of the 90-day limitation period for raising a personal grievance

Summary

Most employers and employer representatives considered that the 90-day limitation period was not adequate or appropriate. They considered that it was better for both parties if issues were raised as quickly as possible to the actual event. Employers considered that the 90 day period risks damaging the employment relationships and also increased costs. Employee representatives and academics considered the 90 day period to be both adequate and appropriate because it allowed employees time to resolve issues in the workplace, seek advice and consider all of the impacts of raising a personal grievance. The most common suggestion for an adequate and/or appropriate period for raising a personal grievance was 30 days.

- 140 The majority of submitters considered that the 90-day limitation period was neither adequate or appropriate. The most common reasons given were that:
- a 90 days is a long period for employers to be uncertain about whether a personal grievance would be raised against them
 - b it has a negative impact on the integrity of evidence including the availability of witnesses. The delay prejudices employers, in particular, as they may face increasing practical problems in defending the claim
 - c it is better for both parties if issues are raised as quickly as possible after the event, and
 - d the 90-day period risks damaging the employment relationships and increases costs.
- 141 Submitters who considered the 90-day period to be both appropriate and adequate commented that:
- a it allows employees time to seek advice on the merits of their case and consider all of the impacts of raising a personal grievance
 - b it encourages employees to try and resolve the issue in the workplace
 - c where an employee is dismissed for redundancy, it allows time for more information to come to light that may mean the dismissal was unjustified, and
 - d employers have a longer period in which to bring common law claims against employees (six years).
- 142 A few submitters considered that the 90-day limitation was not enforced strictly enough. They considered that exceptional circumstances applications are too frequently granted to allow personal grievance applications to be made out of time.
- 143 The most common suggestion for an adequate and/or appropriate period for raising a personal grievance was 30 days.

Submitters' views on the appropriateness of the three year limitation period for lodging a personal grievance with the Employment Relations Authority and Employment Court

Summary

Most employers and employer representatives considered that the three year limitation period was not appropriate. They considered that it did not promote speedy or efficient

resolution of employment relationship problems. Employee representatives and academics considered the three-year period to be appropriate given that the time limit for civil claims was six years. The most common suggestion for an appropriate period for lodging a personal grievance with the Authority and Court was one year.

- 144 The majority of submitters considered that the three-year limitation period for lodging a personal grievance with the Authority and Court was not appropriate. Submitters' views both for and against the three-year limitation period were similar to their views for and against the 90-day limitation period.
- 145 Submitters who recommended shortening the three year limitation period noted that:
- a the three-year period is at odds with one of the objectives of the system which is the speedy resolution of employment relationship problems
 - b it erodes the likelihood of a full and fair hearing if three years can elapse between notice being given to an employer of a personal grievance claim (which is often not particularised) and a clear statement of problem being filed in the Authority
 - c employers may feel that the claim is not important if it is not quickly pursued by the employee, and
 - d it is problematic for the employer when the employee seeks reinstatement after three years.
- 146 A few submitters considered three years to be too short when compared with the six-year limitation period in civil cases. They noted that employees may delay lodging a personal grievance for financial or health reasons or if they are unable to obtain suitable representation.
- 147 The most common suggestion for an appropriate period for lodging a personal grievance with the Authority and Court was one year. A couple of submitters noted that any shortening of the three-year period will deny resolution of legitimate personal grievances.

Discussion and analysis

- 148 Submissions on eligibility for employees raising a grievance mostly supported the concept that all employees should have equal access to justice regardless of age, income or experience. While some argued that a salary cap would reduce costs to SMEs and encourage accountability of senior employees excluded from the system, others argued that the costs would be increased as high paid employees sought recourse under common law.
- 149 Limitations on eligibility need to take into account that common law claims have a longer six-year period of limitation, which is available to the employer in any claim against an employee, Further, costs associated with damages could escalate if cases are transferred to the civil courts, given a longer limitation period of six years in common law.
- 150 The current 90-day limitation period for raising a grievance and three year period for lodging a claim in the Authority or the Court was not supported by employers or their representatives. While employers considered these periods of time impractical and inconsistent with speedy resolution of workplace problems, other submitters argued that it protected employees wishing to pursue legitimate claims. Arguments

that time constraints would discourage opportunistic claims need to be balanced with the need to ensure adequate access to justice for employees who may be unjustifiably treated. While there is a strong perception that opportunistic claims are common it is not evident that frivolous claims are a significant feature of the personal grievance system.

- 151 A reduction in time for raising a grievance was advocated on the basis of international experience, such as the United Kingdom and Australia. It is useful to draw on international experience which has a range of limits on accessing employment institutions for grievances. New Zealand currently reflects the United Kingdom and Canada with its 90-day provision but this is greater than Australia's recent Fair Work Act that provides for 14 days.

8. Effectiveness of remedies

152 If an employee pursues a personal grievance through the Employment Relations Authority or Employment Court, a range of remedies can be granted. Reinstatement is recognised as the primary remedy in the Employment Relations Act 2000. This section of the discussion paper asked submitters for their views on reinstatement as the primary remedy. It also asked for submitters' views on the effectiveness of the current remedies available and suggestions for improvements.

Summary of submissions

Submitters' views on the effectiveness of remedies

Summary

Submitters' views diverged on reinstatement as a primary remedy with employers and employers' representatives generally opposed to its status as a primary remedy although supportive of reinstatement as an available remedy in the legislation. Other submitters, including unions, considered reinstatement to be an important and fair remedy that could restore employees to the position they were in before a dismissal. While many considered the current range of remedies to be adequate others said they were ineffective at rebuilding employment relationships, overly focused on a financial settlement, or too low to be effective.

Suggestions for making remedies more effective included two divergent views: setting a ceiling on compensatory awards; and increasing awards. There was also interest from all groups of submitters in making greater use of non-financial remedies, including education, counselling, job search assistance or training.

Submitters' views on reinstatement as the primary remedy

153 Many employer submissions generally considered that reinstatement should be removed as the primary remedy, but most said it should still be retained as a remedy. They said reinstatement was seen as not being an effective or practical option, noting:

- a the process of taking a personal grievance was likely to cause ill-feeling between the parties
- b it was rarely sought or granted, and
- c employees were believed to use reinstatement as leverage to get employers to settle.

154 Other submitters, including employees, employee representatives said that reinstatement should remain as the primary remedy. They said:

- a reinstatement was important as the only way to genuinely restore an employee who is unjustifiably dismissed to the same position they were in before the dismissal
- b it was an important remedy where an employee is unable to find alternative employment
- c removing reinstatement as the primary remedy would remove the focus on rebuilding relationships and increase the focus on financial remedies rather than resolving employment relationship problems, and
- d it would encourage unjustified dismissals.

- 155 Some submitters considered that reinstatement should only be the primary remedy in particular circumstances, based on dimensions such as the size of the workplace, the type of grievance or the length of time taken to resolve the personal grievance.

Submitters' view on circumstances when reinstatement is not appropriate

- 156 The most common circumstances when reinstatement was considered to not be appropriate were:
- a when the employment relationship had irretrievably broken down and there was a loss of trust between the parties
 - b if reinstatement was not practicable, for instance where the grievance had created ill-feelings between the parties, if other staff members did not wish the claimant to return to the workplace or the employee had been replaced
 - c when a lot of time had elapsed before the Authority or Court hearing as it made it harder to reinstate
 - d where a dismissal was justified on substantive reasons but an incorrect process was followed, and
 - e for particular types of dismissal, such as redundancy, serious misconduct and sexual harassment.
- 157 A few submitters commented that the Authority and the Court were best placed for assessing whether reinstatement is appropriate.

Submitters' experiences with reinstatement

- 158 Some employer submitters commented on their experiences with an actual reinstatement or where an employee had attempted to be reinstated. Some reinstatements had positive outcomes such as the resolution of the actual problems that led to the grievance or a relationship that was restored and had flourished. Other reinstatements were seen as having a negative outcome. Employers said reinstatement had caused bad relationships in the workplace; the reinstated employee had not changed their behaviour; and the reinstated employee faced resistance from managers or other employees that subsequently caused them to resign. In a few cases, the parties had agreed to a financial settlement instead of reinstatement or the Authority had not granted reinstatement.

Submitters' view on the effectiveness of current remedies

- 159 The majority of submitters who answered this question thought that the current remedies were ineffective at rebuilding employment relationships. They cited an undue focus on financial remedies as opposed to problem solving and the ill-feeling generated between the parties in the process of dealing with the conflict.
- 160 Many submitters thought that the current range of remedies were effective, adequate or appropriate. However, some submitters said that the amounts currently awarded were too low to fully reflect the negative impacts the problem had on claimants and did not provide an incentive for employers to improve their behaviour. Conversely, some felt that the amounts awarded were too high and encouraged unmerited claims. Other employer submitters felt that financial remedies were punitive and generally biased against them.
- 161 A small number of submitters thought that there should be more information on what remedies are available and the amounts that are awarded. This was seen as a

way to educate employers and employees and to assist the management of expectations.

Submitters' suggestions for improving remedies

- 162 Suggestions for improvement focused on financial remedies. These included:
- a setting maximum remedies available, including a cap based on salary or service
 - b having minimum remedies
 - c regulating increased remedies for hurt and humiliation
 - d removing awards for hurt and humiliation and only providing compensation for lost wages or opportunities
 - e having more consistency around the amounts awarded, and
 - f costs awards that reflect actual costs of representation and non monetary costs, such as productivity.
- 163 A number of submitters were also interested in greater use of non-financial remedies. These included education courses for employers to prevent problems in the future, providing support for employees such as job search assistance, training and counselling. A few submitters thought that an apology should be a remedy available at the Authority (a remedy incorporated into many mediation settlements).
- 164 There was also support for greater transparency on the decisions made about appropriate remedies. Proposals to support this included a recommendation that the Authority be empowered to produce practice notes and that guidelines are issues on the awards made and the basis for reinstatement being successful.

Discussion and analysis

- 165 The Employment Relations Act 2000 places emphasis on the importance of reinstatement as a remedy (s 101 of the Employment Relations Act) and the requirement for the practicability of reinstatement in any specific instance to be taken into account (s 125 (2) of the Employment Relations Act). However, there is strong employer opposition to reinstatement as a primary remedy, although many supported it as one available remedy. Other submitters considered it as the only way to genuinely restore a situation for an employee who is unjustifiably dismissed and to discourage employers from conducting unjustified dismissals. The reality is that reinstatement is not commonly awarded as a remedy because it is often not sought by the employee, or practicable for the employer. The impact of such a change may not be significant if reinstatement remains as one available remedy although the current focus on fostering productive employment relationships is arguably diluted.
- 166 Many submitters proposed increasing or reducing financial remedies available, including through statutory amendment. Currently, decisions about remedies are guided by law and many submissions considered this the appropriate process and did not advocate change. The lack of clarity for a large number of submitters about the basis for remedies suggests that guidance in the form practice notes issued by the Authority and well-publicised material on current law may go some way to addressing this concern.

ASSISTANCE TO RESOLVE PROBLEMS AT AN EARLY STAGE

- 167 The aim of the Employment Relations Act 2000 is to ensure mediation services are provided in ways that are most likely to resolve the problem. There are many ways by which the quality and timeliness of services could be improved. This section addresses submitters views on:
- a the flexibility of current services
 - b the possibilities for early intervention
 - c the provision of on-line tools, and
 - d a more systemic approach to addressing workplace problems through mediation services.

Summary of submissions

Submitters' views on the flexibility and adaptability of mediation

Summary

The Department of Labour's mediation services was considered a good and flexible system for dispute resolution with recommendations focusing on enhanced early resolution of problems and national consistency of delivery. Suggestions were generally aimed at greater choice and availability rather than alterations to current practice.

- 168 Many submitters did not respond to Part D in the discussion paper on mediation services but those who did were generally supportive of the current mediation services describing it as "adequate", "excellent" and "flexible". One submitter described mediation services as "a user friendly, easy to use service, even before a grievance is formally raised."
- 169 Suggestions were made to increase the powers of mediators (as referred to in earlier sections) but many suggestions were also made about practice and accessibility, including:
- a greater flexibility of venues to service rural areas and hours of work to support small businesses
 - b earlier involvement of mediators in problem resolution to support rapport-building, evaluation of cases and settlement "at source", including mediation in local areas and at worksites. SCA Hygiene Australasia, for instance, suggested employment coaching: "He/she would hear from both sides, seek information and then coach both sides to try alternative approaches before it goes to Mediation", and
 - c use of phone mediations, as in the United Kingdom, and technology for parties less comfortable with face-to-face formal meetings, for example, SBAG quoted an employee saying "my employee was really nasty and it wasn't good being in the same room".
- 170 While many submitters were satisfied with the standard of mediation, described by one employer as "outstanding", others made recommendations in relation to their professional status. Arbitrators and Mediators Institute of New Zealand (AMINZ) suggested warranting mediators and making lists available of trained mediators and advocates, and Dispute Resolution Services recommended membership of a professional body such as AMINZ (it is to be noted that current Department of Labour mediators are members of a professional body, LEADR).

- 171 Changes to the structure of the mediation services included:
- i two submissions that recommended a chief mediator to assist consistency, quality of mediators and appropriate allocation of cases
 - ii another submission promoted a national service, separated from the prosecutorial services of the Department of Labour (e.g. the labour inspectorate) to ensure there is no perception of conflict between the services
 - iii specialised mediators (such as Maori or sector and industry specialisation) who could be selected for their specialist expertise

Submitters' views on early intervention mediation services

172 Of the 219 submitters, the majority supported early intervention mediation services. Almost half of the submissions supported the concept either from a principled position that employment relationship problems are more quickly and successfully resolved the earlier the problem is addressed, or from a sense that more support could be provided to ensure early resolution of disputes. One legal adviser said "I think this would be the most significant change that could be made". These submitters said that it could save time and money and support productivity as long as both parties agreed to the intervention.

173 A few submitters expressed a contrary view, with some saying it was not necessary and that it was unrealistic because of resources, and others said that it was ideologically unpalatable.

Submitters' views on an online employment problem resolution tool

174 The majority of the 219 submitters did not address this question. However, many submitters said they supported and/or would use an online tool for problem resolution with a minority saying that it would depend on factors such as the content and the user-friendliness of the tool. Some submitters said they would not use such a tool, mainly citing the importance of face-to-face communication in solving disputes but others expressed concern at the tool detracting from current services provided by the Department of Labour, such as mediation or education services. One union said "it would be of more value for the Department of Labour to provide education programmes to address management skills/knowledge deficit".

Submitters' views on the use of mediation in health and safety

175 A minority of submitters said they would use mediation services for health and safety matters, some said that they would not and a few said they would consider it. Most people did not respond to this question. A number of submitters said they did not need this service, for instance, one employer submission said that they have access to Department of Labour experts when required but they considered a "fact-based approach more appropriate" than using mediation services. Two academic submissions reflected a number of comments when they said that it was inappropriate because health and safety involved breaches of criminal law where the concern is whether the environment met health and safety requirements or whether an injury could form the basis of a prosecution. Others were supportive of mediation supplementing enforcement in the criminal courts by addressing difficult problems that can be resolved through early intervention.

Submitters' views on systemic approaches to problem resolution

- 176 Providing a systemic approach to working with businesses to identify patterns and trends and to provide feedback and options was supported by many submitters. Some supported the elements of the paper which referred to mediators providing patterns, trends and feedback and others were enthusiastic about any support that could be offered, in particular, to small businesses. However, many of the submitters that supported this approach were concerned about both capability and capacity issues, namely:
- a that it did not detract from current mediation resources, particularly resource-stretched rural areas, and
 - b that mediators were sufficiently trained in commercial realities and in the human resources field to manage the extended role.
- 177 Opposition to the proactive approach by mediation services was voiced by some submitters. One concern was that mediators would be interfering in the market, as one employer said "this whole process leaves it open for the state to tell a business how it should be run". Other submitters made the following points in opposition to the proactive approach suggested:
- a the impartial role of mediators could be jeopardised and the effectiveness of current mediation reduced as a consequence of any shift in focus (as one submitter suggested "adding functions may 'cloud' the image and functions of the mediation service")
 - b it would detract from the current work and resources of mediation, and
 - c mediators are not skilled to do this kind of work.

Discussion and analysis

- 178 Many submitters were satisfied with the status quo and the current "effective service" offered. However, a wide range of types of intervention were also suggested by submitters from coaching to arbitration. Early dispute resolution was recognised by most submitters as valuable for all parties. Submissions identified different types of support that could assist parties resolve the problem before mediation and without recourse to costly advocacy. Ideas included advice, information (including multi-language publications), education events, online tools and even "a simple 10 step/point guide to be stuck on the wall of every employer" to ensure accurate information about processes.
- 179 Many submitters identified a constructive role for mediation in early resolution of conflict. There was strong support from employer submitters for mediations to occur at worksites, or in close proximity to workplaces and some suggested greater availability of mediators outside normal working hours. However, it was recognised in the submissions that to be effective in this way mediators would need to be available at short notice and that this would require increased resourcing of mediation services.
- 180 The role of mediation in filtering out unmerited claims and in assisting parties to identify the issues and the risks of a claim, in advance of mediation, was a theme throughout the submissions. Using statutory levers such as appealable decisions (s 150 of the Employment Relations Act), with cost awards against for the unsuccessful party, is raised elsewhere in this report. Non-statutory methods suggested by submitters to achieve this include:

- a pre-mediation assessment and advice
 - b an online tool and questionnaires relating to specific disputes
 - c telephone mediation, and
 - d on-site advice and support to parties in advance of raising a personal grievance.
- 181 Most submissions supported the current delivery of mediation through the Department of Labour. However, some submissions proposed new models of delivery, such as an independent service, private mediation and publicised lists of mediators. These options need to be weighed up against the costs to parties of funding private mediation when already personal grievance costs are considered generally too high and the potential for the neutrality of a public service to be undermined by services paid for by one or other party.
- 182 Some submitters also suggested that the Department of Labour revert to a national mediation service with a chief mediator, in order to enhance nationally-coordinated and professionally-led services. The current arrangement provides for a national service delivered regionally with the ability to move resources around the country as required. Professional leadership is provided by a national practice team and mediators are managed locally. This is designed to enable both professional leadership and efficient management of staff involved in mediation services.

GENERAL QUESTIONS

183 Three general questions at the end of Part C: Operation of the Personal Grievance System, sought views from submitters in relation to:

- a changes to the employment relations legislation that could make a difference to productivity
- b three key changes to the personal grievance system, and
- c any other issues in relation to the personal grievance system.

Improving productivity – changes to the employment relations legislation

184 A number of submitters suggested changes to other aspects of the Employment Relations Act 2000 or other Acts such as the Holidays Act 2003 for improving productivity that are outside of the scope of the personal grievance. Below is a list of the most common suggestions for change:

Employment Relations Act 2000

- a amend provisions relating to collective bargaining
- b restrict union access to workplaces
- c amend or repeal Part 6A (continuity of employment)
- d raise management capability
- e enable parties to an employment agreement to contract out of provisions
- f more flexibility around meal and rest breaks, and
- g provide more support and information provision for employers on how to hire and fire employees.

Holidays Act 2003

- a review the Holidays Act 2003, and
- b remove the calculation of relevant daily pay.

Other suggestions and comments

- a raising the minimum wage
- b changes to ACC, and
- c “legislation is not related to improving productivity”.

185 Changes to the personal grievance system and process regarding productivity were also suggested, most of which have already been addressed in the earlier sections of this report and are also listed under the following question.

Submitters’ suggestions for main areas of change in the personal grievance system

186 Many submitters felt the system was working well but had views on key changes that could make the personal grievance system operate more effectively and efficiently (most of which have been discussed in this report already). Below is a list of the most common suggestions for change:

Costs

- a limit representation at early stage of resolution process

- b introduce a filtering system to remove unmerited/weak personal grievances earlier in the process, and
- c introduce a range of penalties to address non-compliance, encourage enforcement of settlements, disincentivise frivolous/vexatious personal grievances, unscrupulous behaviour by parties/representatives.

Representation

- a introduce standards for representatives.

Balance of fairness and test of justification (section 103A)

- a change test of justification for personal grievances to make it clearer, create more certainty and less emphasis on process over substance
- b develop a Code of Practice for dismissals
- c simplify the process for dismissal, and
- d better guidance material on matters related to personal grievance for employers, e.g. an outline of the steps for a redundancy process; what is a "fair and reasonable" employer.

Access to justice

- a awareness raising and information provision of the personal grievance system and process; and on employers' and employees' rights, responsibilities and obligations.

Timeliness and responsiveness of services

- a provision of more resources to mediation services and Employment Relations Authority to ease their workload
- b improve timeframes for obtaining an investigation meeting at the Employment Relations Authority and a determination, and
- c review the effectiveness of the Employment Relations Authority.

Support for SMEs

- a increase support and training for SME employers on their rights and responsibilities, and the personal grievance system, and
- b extending the duration of trial periods and/or extending trial periods to larger sized businesses.

Eligibility

- a reduce the three year limitation period for lodging a personal grievance in the Employment Relations Authority, and
- b reduce the 90 day limitation period for raising a personal grievance with the employer.

Remedies

- a remove reinstatement as primary remedy, and
- b review financial remedies, e.g. caps on compensation, remove compensation awards.

Mediation services

- a improve capability and accessibility to mediators
- b increase the power and role of mediators
- c compulsory mediation, and
- d increase focus on early intervention and self-resolution.

Other

- a address other issues related to personal grievances e.g. restraint of trade, injunctions and fixed term employment agreements.

Other issues raised by submitters

187 Many of the comments raised under this question have already been addressed in other parts of this report. However, a summary of the “other” common issues raised by submitters in relation to the current personal grievance system include:

- a concerns regarding the waiving of the 13 week stand-down period for people to receive an unemployment benefit whilst pursuing a personal grievance. This was seen by employer submitters as a potential ‘incentive’ for people to raise a personal grievance
- b New Zealand should base its personal grievance system similar to that of Australia and Canada
- c any removal or restriction on the right to take a personal grievance could breach international obligations
- d any changes should be based on actual rather than perceived problems
- e more research should be conducted, for example:
 - i impact of employment issues on family and friends
 - ii analysis on what happens in the Employment Relations Authority and Employment Court and employees’ experiences of mediation services, the Employment Relations Authority and Employment Court, and
 - iii key issues of procedural fairness and remedies.

APPENDIX 1: SUBMISSION QUESTIONS

Part C: Operation of the Personal Grievance system

Question 1: Have you been involved in a personal grievance?

- a If so, when was your most recent experience of a personal grievance?
- b Were you an employee, employer, a representative for an employee or employer, or involved in some other capacity in the personal grievance process?

How many personal grievances have you been involved in?

Question 2: If you have been involved in a personal grievance case, can you describe how far the case went in the problem resolution process? (for example, mediation services, the Employment Relations Authority or Employment Court?)

What was the outcome?

(If you have been involved in more than one case can you describe the institutions involved and the outcome from the most recent case?)

1. The cost of problem resolution

Question 3:

Costs in regards to employers:

- a Do you think the average cost of settling a personal grievance of \$5,000 (or \$3,000 in the instance of an SME) is reasonable?
- b In your experience are these costs higher or lower than other civil or legal disputes?
- c If you think the costs are not reasonable what would be a reasonable cost?

Costs in regards to both employers and employees:

- d To what extent (if any) does the average cost of settling a personal grievance have on your decision whether or not to make/defend an allegation of a personal grievance through the Employment Relations Authority?
- e Do you have any suggestions for how the cost of either defending or raising a personal grievance can be reduced?
- f Are there any other comments you would like to make in regards to costs, financial or otherwise?

2. Varying quality (and effect) of employment advocates

Question 4: Have you received representation in a personal grievance case?

- a If so, can you describe the type of representation used e.g. "no win, no fee" employment advocate, barrister or solicitor, union advocate, employer representative or other type of employment advocate? If other, can you please specify?
- b b) What was your experience of the representative in relation to i) process ii) outcome and iii) cost?

Question 5: If you have any concerns about the quality or representation in personal grievance cases, how would you suggest the quality of representation in personal grievance cases could be improved?

3. Balance of fairness in the personal grievance system

Question 6:

- a Do you think the personal grievance system provides a fair balance between employers' and employees' interests? For example, does the law fairly balance the duties and rights of employers and employees?
- b Is the balance of fairness about right under the current personal grievance system? If the balance is not fair, how could it be improved to provide a better balance?

Question 7:

- a Do you consider the personal grievance system to be too complex and difficult to understand? If so, can you describe what parts of the system create complexity?
- b The Act contains an objective test for justifiable dismissal. Do you think the current test is appropriate or does it create uncertainty?
For example:
 - i. what are your views on whether sufficient or too much emphasis is given to process rather than substance?
 - ii. do you think minor irregularities in procedure should be given less emphasis than the actual substance of the personal grievance claim?
- c What test would you consider appropriate if the current test were to change? For example: what would you consider to be a fair process for addressing an employment relationship problem, such as a personal grievance?

4. Ensuring access to justice

Question 8: Do you consider there are barriers to raising or defending a personal grievance? If yes,

- a What are the barriers to raising a personal grievance case?
- b Are there greater barriers faced by particular groups? For example: women, youth, migrants, part time or casual employees?

Question 9: What are the barriers to defending a personal grievance case?

Question 10: Do you have any suggestions for how any barriers to either defending or raising a personal grievance case can be reduced?

5. Negative impact of the responsiveness and timeliness of services

Question 11: Have you experienced delays in raising or defending a personal grievance?

If yes, where have these delays occurred in the personal grievance system and what effect has this had on you?

Question 12: Do you have suggestions on ways to improve the responsiveness and timeliness of a) the Department's mediation services, b) the Employment Relations Authority or c) the Employment Court for resolving employment relationship problems?

Question 13: What are your views on getting a final and binding decision from the Department's mediation services during mediation?

6. *Employment Relationship problems appear to impact disproportionately on small or medium sized enterprises (SMEs)*

Question 14: SMEs can experience greater challenges in resolving workplace problems due to a number of factors, such as a lack of specialist human resources and/or lack of union presence.

- a Is there more that the Government can do to assist SMEs in resolving employment relationship problems such as personal grievances? What would help?
- b Has the use of trial periods by employers reduced the incidence of personal grievances they have experienced? Please explain.

7. *Eligibility – raising a personal grievance*

Question 15: Should different eligibility rules apply to different types of employees when raising a personal grievance? If yes, can you please describe what these might be? For example:

- a What are your views on limiting the ability of employees earning over a specific salary amount from raising a personal grievance for unjustified dismissal under the Act, e.g. salary caps?

Question 16: Do you consider the 90 day limitation period for raising a personal grievance with an employer is adequate and/or appropriate?

- a If not, what would you consider is an adequate and/or appropriate period of time to raising a personal grievance with an employer?

Question 17: Do you consider the three year limitation period for lodging a personal grievance in the Employment Relations Authority and the Employment Court is appropriate?

- a If not, what would you consider is an appropriate period of time for lodging a personal grievance in the Employment Relations Authority and the Employment Court after it has been raised with the employer?

8. *Effectiveness of remedies*

Question 18: What are your views on reinstatement as a primary remedy? Are there circumstances in which “reinstatement” is not appropriate as a primary remedy? If possible, can you tell us about any experiences you have had regarding “reinstatement” as a primary remedy?

Question 19: Remedies are intended to rebuild productive employment relationships and help people learn from mistakes.

- a What are your views on the effectiveness of current remedies available for personal grievance cases?
- b Do you have any suggestions on how to improve the current range of remedies available for personal grievance cases?

9. *Additional questions*

Question 20: What changes to the current employment relations legislation would make the most difference to productivity in your workplace? Why?

Question 21: If some areas of the current personal grievance system were to change, what would be the three main areas you would like to change? If possible, can you provide examples of the change you would like to see?

Question 22: Do you have any other further comments that you would like to raise on issues or proposals for improvements to the current personal grievance system that have not been discussed above?

Part D – Assistance to Resolve Problems at an Early Stage

1. Options to improve the capacity and capability of mediation services

Question 23: In what ways could mediation be made more flexible to suit the needs of the parties?

Question 24: In what way could mediation services be adapted to meet your needs when working with specific groups?

Question 25: Would you use mediation services in relation to health and safety matters?

2. Extending the scope of mediation services

Question 26: To what extent would you support mediation services applying a systemic approach to problem resolution in your workplace by identifying trends, providing feedback and options for addressing issues?

Question 27: If Department of Labour were to provide new mediation services, what could these services be?

- a How helpful would these services be?
- b Can you think of other ways in which mediation services could provide organisations with help to prevent and resolve problems in the workplace?

3. Early intervention in individual disputes

Question 28: What are your views on early intervention mediation services?

Question 29: Would you use an online employment problem resolution tool if this were available?

Question 30: What other services would be helpful to you in avoiding and/or resolving employment relationship problems at an early stage?

APPENDIX 2: LIST OF SUBMITTERS

Number	Name	Submitter type
1	Individual	Employer
2	Individual	Employer
3	Individual	Employer
4	Service and Food Workers Union	Union
5	Individual	Employer
6	Individual	Legal services group
7	Individual	Legal services group
8	Individual	Employer
9	Individual	Employer
10	Individual	Employer
11	Individual	Employer
12	Avis Rent a Car NZ	Employer
13	Individual	Employer
14	Individual	Employee
15	Individual	Family and friends
16	Individual	HR/Employment Relations Advisor
17	Individual	Legal services group
18	The NZ Refining Company Ltd	Employer
19	Hospitality Services Ltd, trading as Millennium Hotels and Resorts	Employer
20	Individual	Employer
21	Individual	Employer
22	Individual	Employer
23	Individual	Employer
24	Individual	Employer
25	Individual	Legal Services Group
26	Individual	HR/Employment Relations Advisor
27	Individual	HR/Employment Relations Advisor
28	Individual	Employer
29	Individual	HR/Employment Relations Advisor
30	Individual	Employer
31	Individual	Other
32	Individual	Employer

33	Police Manager's Guild	Union
34	Individual	Employer
35	Individual	HR/Employment Relations Advisor
36	Whitireia Community Law Centre	Legal services group
37	Individual	Employee
38	Individual	Family and friends
39	Individual	Employer
40	Individual	Employer
41	Individual	Employer
42	Individual	Employment advocate
43	Individual	Legal services group
44	Individual	Employee
45	Individual	Employer
46	Individual	Employee
47	Individual	Employer
48	Individual	Employee
49	Service and Food Workers' Union	Union
50	Individual	Employer
51	Individual	Employment advocate
52	Individual	Employer
53	Individual	HR/Employment Relations Advisor
54	Individual	HR/Employment Relations Advisor
55	Individual	Employment advocate
56	Individual	Employer
57	Individual	Employer
58	Individual	Employer
59	Individual	Employer
60	Individual	Employer
61	Individual	Employer
62	Barnardos	Employer
63	Individual	Employer
64	Individual	Employer
65	Individual	Employer
66	Individual	Employer

67	Individual	Academic
68	Individual	Employer
69	Individual	Employer
70	Individual	Employer
71	Individual	Employer
72	Individual	Employer
73	Individual	Employer
74	Individual	Employer
75	Individual	Employee
76	Rail and Maritime Transport Union	Union
77	Individual	Employer
78	Te Kohanga Reo National Trust	Employer
79	Individual	Employer
80	Individual	Employer
81	Smith & Caughey Ltd	Employer
82	SBAG	Other
83	Individual	Employer
84	New Zealand Fire Service	Employer
85	Individual	Legal services group
86	Individual	Employer
87	Individual	Employer
88	Individual	Employer
89	Individual	Employer
90	National Road Carriers	Employer Association
91	Individual	Employer
92	Individual	Employer
93	Employment Law Institute	Legal services group
94	Individual	Employer
95	EMA Northern	Employer Association
96	Individual	Employer
97	Individual	Employer Advocate
98	Individual	Employer
99	Individual	HR/employment Relations advisor
100	Individual	Employer

101	Individual	Employer
102	Individual	Employer
103	Individual	Employment advocate
104	Individual	Employer
105	Auckland University	Employer
106	Mana Coach Services Ltd	Employer
107	Fletcher Building	Employer
108	New Zealand Resident Doctors' Association, the Association of Professional and Executive Employees, and the New Zealand Medical Laboratory Workers' Union	Union
109	Wairarapa Community Law Centre	Legal services group
110	Individual	Legal services group
111	Individual	Academic
112	Individual	Employment Advocate
113	Individual	Employer
114	Individual	Employer
115	Individual	Employer
116	Individual	Employer
117	Individual	Employer
118	Individual	Employer
119	NZ Business Round table	Employer Association
120	Manawatu Community Law Centre	Legal services group
121	Solid Energy NZ Ltd	Employer
122	Individual	Employer
123	Individual	Other
124	Stevedoring and Ports NZ Inc	Employer Association
125	Night 'n Day Foodstores Limited (on behalf of 24 companies)	Employer
126	NZ Post Primary Teachers' Association	Union
127	Independent Schools Education Association (ISEA)	Union
128	Individual	Academic
129	Individual	Employee
130	Centre for Research on Work,	Employer

	Educational and Business Ltd (Web)	
131	Individual	Employer
132	Dunedin Community Law Centre	Legal services group
133	Individual	Employer
134	Bell Gully	Legal services group
135	Family Planning Association	Employer
136	Strait Shipping	Employer
137	IAG NZ Ltd	Employer
138	New Zealand Hotel Council (NZHC)	Employer Association
139	St John	Employer
140	Clubs New Zealand	Employer
141	Fonterra Co-operative Group Ltd and Fonterra Brands (NZ) Ltd and Fonterra Brands (Tip Top) Ltd	Employer
142	Manawatu College	Employer
143	Plastics NZ	Employer Association
144	Victoria University of Wellington	Employer
145	New Zealand Automobile Association Inc	Employer
146	Whitireia Community Law Centre	Legal services group
147	Public Service Association	Union
148	National Association of Retail Grocers and Supermarkets of NZ	Employer Association
149	Individual	Other
150	The Warehouse Ltd	Employer
151	Individual	Employer
152	Meat Industry Association	Employer Association
153	Individual	Legal services group
154	Individual	HR/Employment relations advisor
155	Turners and Growers Ltd	Employer
156	Tertiary Education Union	Union
157	Individual	Employment advocate
158	Workers' Right Service	Employment advocate
159	NZ Vice-Chancellors' Committee	Employer Association
160	McDonald's Restaurant (NZ) Ltd	Employer

161	Tegel Foods Ltd	Employer
162	New Zealand Associates Ltd	Employer
163	Talleys Group Ltd	Employer
164	Telecom New Zealand Ltd	Employer
165	The Farmers Trading Company Ltd	Employer
166	New Zealand Work and Labour Market Institute - Auckland University	Academic
167	Russell McVeagh	Legal services group
168	Individual	Legal services group
169	Lyttelton Port of Christchurch	Employer
170	Individual	Legal services group
171	Business NZ	Employer association
172	Individual	HR/Employment relations advisor
173	HRV Franchise Advisory Council	Employer association
174	Individual	Legal services group
175	New Zealand Manufacturers and Exporters Association	Employer association
176	Otago Southland Employers Association Inc	Employer association
177	New Zealand Council of Trade Unions	Union
178	Minter Ellison Rudd Watts	Legal services group
179	Individual	Employer
180	Individual	Employee
181	Tairāwhiti Community Law Centre	Legal services group
182	Individual	Employer
183	ANZ National Bank Limited	Employer
184	Individual	Employer
185	Midland Region DHB	Union
186	Super Cheap Auto Group Ltd	Employer
187	Recruitment and Consulting Services Association	Employer
188	Individual	Legal services group
189	Individual	HR/Employment relations advisor
190	University of Canterbury	Employer

191	District Health Boards NZ Inc	Employer
192	Spotless Services (NZ) Limited	Employer
193	Vodafone NZ	Employer
194	Simpson Grierson	Legal services group
195	Heinz Wattie's Ltd	Employer
196	NZ Nurses Organisation	Union
197	NZ Post	Employer
198	Individual	Employer
199	Individual	Employer advocate
200	EMA Central	Employer association
201	Russell McVeagh	Legal services group
202	New Zealand Law Society (Canterbury Westland Branch)	Legal services group
203	Sky City Entertainment Group	Employer
204	Individual	Employee
205	Hospitality Association of New Zealand	Employer association
206	Transfield Services (New Zealand) Limited	Employer
207	NZ Retailers Association	Employer association
208	Progressive Enterprises Limited	Employer
209	Individual	Legal services group
210	Ministry of Social Development	Employer
211	Sileni Estates Ltd	Employer
212	Air NZ	Employer
213	Ports of Auckland	Employer
214	Community Law Canterbury	Legal services group
215	New Zealand School Trustees Association	Employer association
216	Alloy Yachts International Ltd	Employer
217	Federated Farmers of New Zealand	Employer association
218	Penguin Wholesalers Whangarei Limited	Employer
219	The Arbitrators and Mediators Institute of New Zealand Inc	Other