

Review Response Form

Part 9 of the Employment Relations Act 2000: Personal Grievances

Please ensure you complete this form and return it by fax, email or post no later than 5pm, on 31 March 2010.

Please email your completed response to ERconsultation@dol.govt.nz (preferred) or post it to:

Review of Personal Grievances
Workplace Policy Group
Department of Labour
PO Box 3705
Wellington

Please see <http://www.dol.govt.nz/consultation> for further information.

If you are completing the questionnaire electronically, please feel free to expand the length of the spaces provided for your answers and to attach any supporting documents. If you are completing it on paper, please feel free to add other pages but make clear which question your answer refers to. Specific examples of what you think is working well, or could be improved would be welcome.

Personal / organisational information

1. Your full name: John Walley – Chief Executive

2. Name of your business or organisation (if applicable):

New Zealand Manufacturers and Exporters Association

3. Postal address: PO Box 13152, Armagh, Christchurch 8141

4. Email address: johnwalley@clear.net.nz

5. Telephone number(s): 03 353 2542 / 021 809 631

6. Relevant activities you or your business/organisation are involved with:

The Association is New Zealand's only focused and independent voice for manufacturers and exporters.

Visit our website for details – www.mea.org.nz and www.realeconomy.co.nz

7. Size of business/organisation:

The Association is New Zealand's only focused and independent voice for manufacturers and exporters. Members make over \$2.7 billion in sales per year, with an export value of around \$1.3 billion.

The Association also includes in its membership affiliate organisations such as the Wood Processors Association, Plastics New Zealand, the Engineering Printing & Manufacturing Union Inc, HERA (Heavy Engineering Research Association), The Engineering Taranaki Consortium and Capenz (Centre of Applied Engineering New Zealand). Our views are a result of the drive of our membership that is restricted to manufacturers and exporters.

8. Are you comfortable with the contents of your submission being a matter of public record i.e. this submission may be requested under the Official Information Act 1982 (personal details will be automatically removed)?

Yes

9. How did you find out about this consultation? For example: public notices in the newspaper, the Department of Labour website, employer/employee networks and associations, friends and family, business advisors, other websites, media such as radio or television.

Media

* Please note that your name and contact information will remain confidential to the Department of Labour to the extent that the law allows. The Department of Labour is the intended recipient and holder of the information and can be contacted at PO Box 3705, Wellington, New Zealand. In accordance with Privacy Principle 7, you have the right to access and correct any personal information you provide.

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?
- c) How many personal grievances have you been involved in?

Yes.

- a) The most recent was in November 2009.
- b) Employer.
- c) Too many. Some examples are attached.

Question 2:

If you have been involved in a personal grievance case, which employment institutions were involved? (For example, mediation services, the Employment Relations Authority or the 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?)

- Mediation Services
- Employment Relations Authority
- Refer attached case studies, some based on my own, and others based on our members' experience.

Question 3:

Costs in regards to employers:

- a) Do you think the average cost of settling an employment relationship problem such as a personal grievance of \$5,000 (or \$3,000 - \$4000 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 costs for resolving a personal grievance 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?

- a) This is entirely unreasonable and is a manifestation of a simple cost benefit exercise. If you look at the details around Case 3, attached, the option is: settle at mediation or face the certain costs of at least a day in the Employment Relations Authority. It easy to calculate that that cost is going to lie in the \$3,000 - \$5,000 region and claiming costs, if the employer wins, is not likely to be a very productive outcome.
- b) The costs are not higher than other legal disputes as there are early exit alternatives, those early exits tend to be priced at the cost of the next stage.
- c) The lower the cost the better, but the matter is not really about costs, it has more to do with the ability to recover costs once the outcome is known and the exposure to costs in the process. Given that the employee may be represented by a lawyer on contingency and in the event the employee loses, cost recoveries are minimal. For the employer legal costs are real as is their time out of the business, staff hours, preparing for and attending disputes – all have a direct cost.
- d) It's not the average cost of settling the grievance that matters it is the estimated cost of settling the next stage. If preparing for mediation costs \$1,000 in legal fees and takes a day of management time, that sets the threshold prior to mediation, and similarly after mediation the costs of time before the Employment Authority would be the calculation for settlement at the mediation. Over-laid by the feeling of confidence with regard to the particular dispute balanced by the expectation of recovery on any award for cost by the Employment Authority.
- e) The practice of contingent fees should be eliminated or at least be explicit. Prior to entering mediation the parties should be required formally declare that there are no contingent payments dependent on the outcome. If not eliminated the details of any contingent payment or arrangement should be declared. On the same basis, prior to entering mediation the parties should also formally declare they are able to pay any costs likely to be awarded by the Employment Authority should mediation fail and matter proceed to the Authority. If contingent payments are allowed they should be deducted from any award for costs.
- f) No other comments.

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) What was your experience of the representative in relation to
 - i) process
 - ii) outcome and
 - iii) cost?

- a) It is important to know if a party to a grievance is represented on a contingency basis, but it is very difficult to establish. Even when asked directly the 'neither confirm nor deny' reaction is universal. We would like to see contingent arrangements eliminated. If not eliminated the details of any contingent arrangement should be declared before mediation can commence.
- b) We cannot make any comment in relation to this question.

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?

The practice of fees payable contingent on the outcome should be stopped, limited or at least required to be disclosed as part of the normal process. Explicit formal declarations should be required from all concerned and undertakings on the ability to pay any cost awarded by the Authority should be lodged with the Authority prior to any mediation.

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?

- a) The system itself provides a fair and balanced process. My/our experience with the process used by the Employment Relations Authority is excellent. The timeline enquiry approach as opposed to brief of evidence and cross-examination approach does seem well suited to employment disputes. The big problem is the focus on process as opposed to the substantive nature of the employment difficulty.

When considering the question of whether there is a balance of duties and rights between the employer and the employee, it's probably worth taking an extreme view. An employee might be manifestly guilty to serious misconduct and has their employment immediately terminated. But if the employer has not followed, to the letter, the required process in all regards, with the correct documentation then it is likely that the matter will settle at mediation between \$3,000 - \$5,000 unless the employer takes a principled stance and spends the best part of \$10,000 - \$12,000 only to receive a partial award for costs from the Authority and the difficulty of collection. That does not look very fair and reasonable.

On the other hand, we could see an employee that might be victimised or subject to discrimination from an employer that follows precise process, sticks to his argument and has the option of settling at mediation, if it does not settle there then it would be determined by the Employment Authority.

More generally the difficulties sit as matters of degree and judgement, a fertile ground for disputes, grievance and legal bills. The process does need a bit of balance between process and substantive matters – the Authority goes there but mediation needs more focus on substance.

- b) More balance could be introduced to the process around evidence of the performance of the employee and employer in question as to their general track record of employment. Track record is an indication of past behaviour – this could be covered by the requirement to disclose such matters as a precondition of mediation.

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? If it creates uncertainty, can you please describe the areas that create uncertainty?
For example:
 - i) what are your views on whether sufficient or too much emphasis is given to process rather than substance in a case?
 - ii) do you think minor irregularities in process 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 of justification 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?

- a) The personal grievance system is straight forward for those who are professionally associated with such processes. HR managers, employment specialists, lawyers and the like. They are characterised as complex by those who interact with the system infrequently. The complexity flows from the fact that employers, particularly small employers, live in the substantive world where the early settlement phases of the personal grievance system focuses almost entirely on procedural matters, that is where the difficulties arise. For example, an employee asked to attend a meeting where serious matters that could result in their dismissal will be discussed, the employee might subsequently claim that his impression was that it wasn't really serious, or that he didn't take it seriously. The discussion is about what was in someone's mind at the time which is hard to pick.
- b) At the early stages of the grievance system there is too much emphasis on process. If matters proceed, the Employment Authority then carefully examines the substantive nature of the problem, but often at mediation the comment might be 'you might have a substantive case but your process was not very good', so your risks are between here and here which is a standard mediation process.

- c) The test should be - stand back and look at the process. When reviewing process, the process in its entirety should be considered, not each minor step that may or may not have complied with an ideal process. Standing back: did the employer run a fair process? Standing back: are the employer and employee behaving reasonably given their circumstances?

We need to move away from 'acted as a fair and reasonable employer' and look to the specific circumstances.

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?

a) There appear to be few barriers to raising personal grievances judging by the matters that are brought to mediation, or settled prior to mediation. Some early preconditions / hurdles would help.

b) Require the Labour Department to:

- Approve an application to mediate.
- Require a declaration as to ability to meet costs should they be awarded.
- Require a declaration as to any contingent agreements or payments.

Question 9:

What are the barriers to defending a personal grievance case?

Defence for personal grievance revolves around pragmatism not principles. Sometimes matters are raised long after the event; recollection can be difficult or even the people involved in the matters associated with the grievance might well have moved on – these matters are best dealt with quickly and it is hard to see why the timeframes cannot be substantially shortened.

Question 10:

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

Whatever barriers exist in the defence of personal grievances, the system requires them to be dealt with. On the other hand, if there are few barriers to raising the personal grievance perhaps there should be some sort of access to mediation gate for somebody who wishes to enter the mediation process.

In other words, an employee seeking to raise a personal grievance would have to argue their position, say with the Labour Department, to gain approval to go to mediation – this approval would be based on the substantive matters around the grievance. For example, the circumstances described by the employee and a response from the employer, and the employers and employees track record regarding employment matters.

Question 11:

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

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

No

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?

None

Question 13:

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

No problems; fine.

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.

- a) Ensuring that the system takes an overall view; that it steps back and looks at process as a whole that substantive issues are brought in early on (as indicated above with Labour Department involvement), coupled with the pre-approval to mediate, would help simplify the early stage of the process and make mediation, given it happens, a more natural mind-set.
- b) Our members do report a more positive feeling in regard to the 90 day grievance free period and many would like to see this extending to cover all companies regardless of size.

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. a salary cap?

There should be limitations for personal grievance based on salary or seniority. Company managers reporting to the CEO, or the CEO themselves should be subject to contract law and specifically excluded from employment law and personal grievances.

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?

The 90 day limitation period should be reduced to 28 days, on the basis that it's better when things are dealt when they are recent rather than ancient memories.

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?

Examining personal grievances when they are recent memories that involve employees and their colleagues is difficult enough when the memories are current. Delays for the full three years make an effective process almost impossible; staff and managers leave, and companies and systems change. It is hard to see why it was ever set at three years. This period should be substantially reduced to a maximum of six months.

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?

Reinstatement as a primary remedy is really hard to understand, and demonstrates a certain lack of contact with reality. Given we have arrived at the level of a personal grievance that has had to be mediated, or brought before the Authority or the Employment Court, is there really a relationship left; employment or otherwise?

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?

If the Labour Department was involved, as the primary contact for employees in any personal grievance issue, patterns would soon emerge in relation to the individuals and companies concerned. These patterns could be used to flex the system response. On occasion employers will not be building positive employment practices, on occasion the employee will, and on some occasions it will be a result of the interaction of both sides – it is hard to see how reinstatement would help anywhere.

That said, we have reports of the mediation service being used productively prior to reinstatement being necessary. Employers are identifying a problem with an employee and inviting the employee (on occasion it is a contractual commitment at the time of employment) to attend mediation. Mediation at this point has the advantage of focusing on the substantive matter that might give rise to a grievance down the track but puts the discussion of the issues in a safe place. The mediated outcome is generally lower cost and more effective, possibly moving towards improving the employment relationship. No lawyers, no discussion on the minutiae of process, just the parties, the substantive matter and a mediator. This should happen more often.

Question 20:

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

The comment we made on exclusion or access to mediation, say via the Labour Department in the first instance.

Application to mediate

Whatever barriers exist in the defence of personal grievances the system requires them to be dealt with. On the other hand, if there are few barriers to raising the personal grievance they may well be raised on a 'nothing to lose' basis.

We would like to see some sort of access to mediation control early on, that looks at the substantive as opposed to procedural issues. If someone wishes to enter the mediation process and raise a personal grievance they would have to argue their position with, say the Labour Department, to obtain an approval to enter mediation. Matters that the Labour Department would consider on such an application are: the circumstances described by the employee and a response from the employer, and the employers and employees track record in employment matters.

Senior Cut-Off

Often when discussing employment matters at the senior level they are subtle and rely on matters of judgement rather than clear issues of did do or didn't do. So avoiding the necessity to fight such claims, other than in the high court would reduce the distractions firms face around such matters.

At the other end of the system, the requirement to have mediation approved by the Labour Department means that the matter has been reviewed by experienced individuals and to keep out the claims of little merit.

Note: Anyone refused such approval should be able to take their matter directly to the Employment Court. Such an approach should reduce the number of spurious matters dealt with in mediation.

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?

- Senior (CEO or direct CEO reports) and salary cut off.
- Application to enter mediation controlled by the Labour Department, on the basis described above.
- More use of the mediation service while the employment relationship exists.
- Reduction of the time period where a notified grievance can be pursued.

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?

None.

Part D: Assistance to resolve problems at an early stage

Question 23:

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

Other than the 'application to access' mediation step (discussed above), we found the mediation service to be adequate.

Question 24:

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

Refer Question 23.

Question 25:

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

We do not see a role for mediation services in Health and Safety.

Question 26:

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

This could be helpful in specific instances but probably not on a general basis.

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?

As noted above adding an 'approval to mediate' step would be helpful.

Question 28:

What are your views on early intervention mediation services?

See Question 27.

Question 29:

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

We would support on-line employment problem resolution and it could be applied to the approval for mediation idea outlined above.

Question 30:

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

Learning around dispute resolution, conflict resolution, and mediation techniques should be promoted through industry associations and the like, but we should be limiting/reducing funding out of Government.

Additional Comment

We have a number of experiences reported and discussed with the Association, trying to pick common themes:

Smaller companies struggle with the procedural correctness, they believe dismissal is justified but fear they will not follow the required procedures to the letter. As a result they suffer tension between wanting to act and the fear of getting it wrong. This often boils over to the point where whatever action is taken is not measured and careful.

Case One

A small employer dismisses the CEO because the Board fears the company will not last long under the guidance of that CEO. Many mistakes were made in the employment and termination process but fundamentally the CEO was not performing. Settled at mediation at the cost of a day for two Board members and cash to \$40k that was completely inappropriate, but faced with prospect of time and cost going through the Employment Authority and Employment Court process, settlement was a pragmatic, not principled outcome.

Solution:

- Contract, not employment law, should apply for senior roles and higher salaries.
- Any fees contingent on outcome should be excluded from cost awards.

Case Two

A senior sales manager resigns and claims constructive dismissal and outlandish compensation including equity in the company. The Employment Authority found the claim to be entirely without merit. This after one day in mediation, three days in the Employment Authority, the costs associated with the process, 15 management days, time on documentation and legal costs and no ability to recover costs from the employee.

Solution:

- Contract, not employment law, should apply for senior roles.
- It should be possible to claim and be awarded all costs.
- Approval to mediate should be subject to ability and commitment to pay costs awarded.
- Any fees contingent on outcome should be excluded from cost awards.

Case Three

An employee is dismissed for serious misconduct for disrupting the employer's computer system. Case was settled in mediation for \$4k plus legal costs. The employer followed good process and the substantive case was clear. However, facing a day in the Employment Authority, preparation and the involvement of other staff the lowest cost option was selected.

Solution:

- It should be possible to claim and be awarded all costs.
- Approval to mediate should be subject to ability and commitment to pay costs awarded.
- Any fees contingent on outcome should be excluded from cost awards.