Reducing The Costs Of Personal Grievances

Background

It’s critical that New Zealanders have access to relationship breakdowns in the workplace are a stressful time for everyone involved. Employers sometimes need to act swiftly and decisively when dealing with a relationship breakdown in order to avoid lasting damage to the business or creating a toxic atmosphere for the rest of the office. Firing an employee is often a decision businesses make very reluctantly, given doing so can lower the morale of the workplace, can give the employer a bad reputation, and because employee turnover is generally costly.

To make matters worse, once the deed is done, there is always a risk the employee could raise a personal grievance that they were unjustifiably dismissed or had been put at a disadvantage by some unjustifiable action by the employer.

A disgruntled employee, or former employee, may refer to a wide range of actions as “unjustifiable” in order to strong-arm an employer into a pay-out or reinstatement. Minor procedural deficits, such as an employer providing limited opportunity to respond to a well-founded accusation of serious misconduct, are often raised as personal grievances. Employers’ refusals to intervene in petty arguments between staff also frequently form the bases for complaints.

Current policy enables an individual with an axe to grind to prevail over common sense.

Consider the case of a small construction company who had an employee who was fired after not turning up to work for eight days. When the employer called the employee to follow up on the absence, the employee yelled at the employer. The employee, who had only been employed for a month, received $5,520 in compensation and wages. The employer reflected that he had been too fast to hire the employee, and that it should serve as a warning to other businesses: “I’m a small business, I’m a single dad with kids to care for. I’ve run this company for 10 years, but it’s not like a company which has millions of dollars sitting in the bank to pay out to people.”

In another case, an employee was reinstated after being fired for refusing to do a background check. The employee was asked to consent to a background check before receiving an offer of employment. However, the employee never signed the consent form but had signed the offer of employment and the employment agreement. The employee therefore claimed that the recruitment process was over and his employment was now unconditional. The case highlights the importance of completing the steps in a recruitment process in the proper order.

Other situations that often attract personal grievances include:

- Employees who are put on performance management can attract personal grievances or claims of constructive dismissal (where an employee resigns but claims they had no choice over the matter).
- Employees who fall out with their colleagues may raise personal grievances over the employer not intervening in the way they would like.
- Big organisations with human resource advisors and in-house lawyers are often able to avoid the minor errors in contracts, scheduling, investigations and redundancy processes that routinely lead to headaches for small business owners. But even large employers can struggle to protect against complaints about management styles and the handling of interpersonal disputes.

It can impose significant legal costs on businesses and impact their reputation, for which there is no redress. It is not so much that employers fear that they will lose their case, it is that even the threat of raising a personal grievance can throw an entire business off kilter.

The consequence of costly personal grievances is that it is workers who ultimately suffer. When it is costly or downright impossible to fire an employee, businesses are going to be more hesitant to take on new workers and give people a shot.

**ACT Will:**

- Enforce a requirement that the Employment Relations Authority deliver its written determination within a month of the investigation meeting concluding.
- Remove eligibility for remedies if an employee’s behaviour contributed to the personal grievance for unjustifiable dismissal or unjustifiable disadvantage.
- Remove the ability for the Employment Relations Authority to unilaterally reinstate an employee.

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1. [https://www.nzherald.co.nz/nz/era-rules-in-builders-favour-after-he-was-sacked-for-yelling-at-his-boss/27C15UVH5XKXAXXSK0NPWSF0SQ/](https://www.nzherald.co.nz/nz/era-rules-in-builders-favour-after-he-was-sacked-for-yelling-at-his-boss/27C15UVH5XKXAXXSK0NPWSF0SQ/)
2. [https://www.raineycollins.co.nz/your-resources/articles/article-14-9-22-4](https://www.raineycollins.co.nz/your-resources/articles/article-14-9-22-4)
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The Employment Relations Authority is too slow

The Employment Relations Authority (ERA) is meant to be a tribunal process to solve employment relationship problems, without having to face the more formal Employment Court. The ERA hears matters such as personal grievances, unpaid wages, and disputes about meeting the terms of an employment agreement.

The ERA holds ‘investigation meetings’, rather than court hearings. The ERA’s decision on a matter is called a ‘determination’, and is legally binding. At the end of the investigation meeting, the Authority Member may make an oral determination or give an oral indication of what the determination is likely to be. The final written determination will be issued by email or post to both parties or their representatives.

Legislation currently requires that the ERA must deliver its written determination within three months. Such a timeframe is already ridiculously drawn-out, given the District Courts deal with more legally and factually complex matters every day of the week up and down the country, yet still manage to issue instant decisions. In fact, it used to be the case that the ERA would deliver on-the-spot determinations, which makes the three month wait time hard to fathom.

Receiving a written determination is of great interest to both employees and employers, given the ERA has the power to award a range of remedies, including reinstatement of position, compensation and penalties. The ERA has become unacceptably slow in delivering determinations:

- Despite being bound by a legislated timeframe of three months, the Employment Relations Authority took 732 days – over two years – to deliver a determination in 2022.
- The maximum number of days for delivering a determination has exceeded 450 days for every year since 2019. In total, the proportion of determinations delivered outside the legislated timeframes has increased from 9% in 2020 to 13% in 2023.
- The average number of days to deliver a determination is also rising, from 54 days in 2019 to 75.7 days in 2023.
- In fact, the performance of the Employment Relations Authority is getting worse: the number of applications it receives has decreased, and it is taking longer to deliver determinations, yet Employment Relations Authority Member remuneration has increased by 47 percent.

Waiting on an ERA decision is damaging for all parties involved. It stops both employers and employees being able to move on with their lives, and contributes to financial uncertainty too, particularly for employees.

ACT would require all ERA decisions to be delivered within a month of the investigation meeting concluding. Such an expectation is entirely reasonable given the ability for comparable judicial institutions to be able to cope with issuing instant decisions. And ACT will ensure that ERA members who fail to meet this expectation will be fired (after going through a fair performance management process).

Reducing the costs of unfounded personal grievances

It is easy to understand why employees would pursue a personal grievance, even when they were the ones clearly in the wrong. Even in situations where the reason the employee got fired is squarely the employee’s fault, the door is open for them to receive some remedies if the employer did not follow the correct process.

At the moment, employment law simply states that remedies would be reduced if the actions of the employee contributed towards the situation that gave rise to the personal grievance. At first glance, this might seem like a good thing. After all, it is at least acknowledging that the employee’s actions leading up to their dismissal should matter when awarding the employee remedies.

In practice, what it means is that employees who might already know that they deserved to be fired would still have a shot at making some money off their employer, by tripping them up on procedural matters. Even the threat of raising a personal grievance can be enough to force some employers to simply offer the employee a pay-out before being dragged through formal processes. In fact, in larger organisations employers may even be pre-emptive and offer the pay-out as part of an informal dismissal.

ACT would remove eligibility for remedies if the employee’s behaviour is at fault. Doing so would simply rebalance the playing field so that both employer and employee behaviour are treated equally.

5. https://www.parliament.nz/resource/en-NZ/WQ_18608_2023/5a8e024f5dbf7f9f7f7f1f7f8f7f8f7f
6. https://www.parliament.nz/resource/en-NZ/WQ_18607_2023/5a8e024f5dbf7f9f7f7f1f7f8f7f8f7f
7. https://www.parliament.nz/resource/en-NZ/WQ_18607_2023/5a8e024f5dbf7f9f7f7f1f7f8f7f8f7f
8. https://www.parliament.nz/resource/en-NZ/WQ_18607_2023/5a8e024f5dbf7f9f7f7f1f7f8f7f8f7f
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Stop trying to force an employment relationship

Finally, ACT would remove the ability for the ERA to reinstate an employee. If a matter has made it to the ERA, chances are the employment relationship is irreparable. Forcing the employer to retain an aggrieved employee is almost certainly not in the best interests of the employer, nor is it necessarily healthy for wider workplace relations.

In a stunning example of getting a taste of its own medicine, not even MBIE, the administer of employment law, is immune from the implications. In a recent case, a personal grievance was raised by a team leader at MBIE for unjustified dismissal.

The case involves complaints against the dismissed employee, as well as counter complaints that the employee made against her manager. Whether or not the dismissed employee was in the wrong, and whether all steps in the process for dismissal were satisfied, it is clear that the relationship breakdown between the dismissed employee, her direct reports, and her manager and employer, was significant. MBIE opposed reinstatement because it would be inappropriate for the dismissed employee to return to the same team structure, and did not have the technical expertise to fill other people leader positions within the large department.

The ERA basically concluded that the employee should be reinstated, despite the fact MBIE claimed the employee did not have the technical expertise to fill other positions, and did not have any vacancies available for similar positions.7

This issue has been a political football between National and Labour, who disagree on whether or not reinstatement should be the primary remedy for a personal grievance.8 Labour argues that reinstatement should be the primary remedy, meaning the ERA should award it whenever it is reasonable and practicable. National argue that the ERA should be given discretion over whether to award it.

Only ACT recognises that the ERA should have no power to force together a clearly broken employment relationship. Remedies that the ERA can award should still include lost wages and compensation, but reinstatement needs to be the employer’s decision.