

## 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](mailto: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

**Louise Evans, Government & Advisory Group Manager**

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

**New Zealand Retailers Association**

3. Postal address

**PO Box 12 086  
Wellington 6144**

4. Email address

**levans@retail.org.nz**

5. Telephone number(s)

**Louise Evans DDI 04 473 2051 or NZRA National Office 04 472 3733**

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

**The New Zealand Retailers Association is the largest Association representing the retail industry in New Zealand.**

**The Association's services to its 6,000 members include the provision of employment advice and assistance to resolve employment issues.**

7. Size of business/organisation

**Our 6,000 members include the major supermarket and general merchandise chains, specialised chains, traditional department stores and thousands of owner operators spread throughout the country.**

**Our membership also includes a number of specialised trade groups representing manufacturers, distributors and retailers in the plumbing materials, metal fastener, pet, equestrian, jewellery, bicycle and sporting goods sectors.**

**Retail sales currently total some \$65b per annum and the industry employs approximately 325,000 people (20% of the workforce) in over 49,000 outlets spread throughout the country.**

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.

**Various communications including reference from Minister of Labour at a meeting with the NZRA and direct email from DOL.**

\* 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?

**The Association is regularly involved in personal grievance cases in an advisory capacity and has assisted members by attending ERS mediation.**

- a) **With 6,000 members we are usually advising on several claims of personal**

**grievance at any given time.**

- b) The Association acts in the capacity of advisor or representative to the employer.**
- c) In an advisory capacity, too many to count. In terms of personal attendance at mediation, previously up to 10 per year, currently only one or two due largely to a staffing /policy change.**

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?)

**The following is an example which went through mediation and the Authority: The employer in this example is both a manufacturer and has a retail shop and café. This is a large employer who follows good employment practices and seeks advice when there is any doubt about the process to be followed.**

**A young male applicant arrived at the employers premises and asked for work. The employer was not impressed with either his appearance or his attempt at completing an application form, and duly told him that there was no permanent work available. He was offered two days casual work in the kitchen the following Monday and Tuesday which was expected to be a busy period. The young man insisted that he wanted permanent work but grudgingly accepted the offer of casual work.**

**On the first day of his casual employment he was asked to work in the kitchen and because it was very busy that day the employer was not able to organise an employment agreement until later that morning. When he was handed the agreement and asked to take it away and get advice, the employee complained that the agreement was casual and that he expected permanent work. The employer repeated that the only work that was available was casual work and that was what he was told earlier.**

**The employee left the workplace at that point and took a personal grievance for unfair dismissal.**

**The case was not resolved at mediation, the employee insisting that he was promised permanent work. The employer was quite clear that there were no vacancies for permanent work and the offer of casual work was accepted. The matter proceeded to the Employment Relations Authority where the case was decided in favour of the employee on the grounds that the obligation rests with the employer to ensure that the terms of employment are clear and accepted. This employee spent only a few hours at the employers' premises. This case cost the employer many thousands of dollars. They could have settled the matter at mediation by paying "go away" money, but they held to their principles and the belief that honesty was the best policy and that the Authority would see through the opportunist claim.**

**As it transpired, the Authority concluded that the employee had been humiliated and was deserving of a large compensation payment.**

**The employer in this case was so clear about the events that took place and what was promised and agreed, that they chose to fight the case at the Authority rather than pay a few thousand dollars "go away" money.**

**Regretfully our advice in these matters is not noble but realistic and that is to pay a few thousand dollars even though it is not deserved or justified, rather than face the many thousand dollars cost of an Authority hearing and the possibility of compensation and the applicant's costs.**

**Many advocates in this system feel the same shame that we do when we knowingly advise them to pay up rather than risk losing on a technicality.**

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) The average cost is far too high when you take into account the many cases brought that have little or no merit but are settled by the employer rather than fought. It is often cheaper to be right and pay them to 'go away' than to fight to prove you are right. With the current emphasis on precise process rather than substance it is even more likely an employer will pay to close an unsavoury chapter even if they feel they did do everything right.**

**There is considerable cost to an employer, in time and monetary terms, in research and preparation to deflect a case even with absolutely no merit.**

**b) We cannot comment on the cost of civil or legal disputes.**

**c) The reasonable cost of resolution should relate to the merit of the case, not how much of a bully the employee's representative is or how little time an employer can afford to have themselves or their focus away from core business. We have seen cases of proven, videoed employee theft from the employer, where the employer's decision to dismiss was found to be unjustified because of a minor detail in a generally fair process. (In a particular instance the employee was not given the opportunity to preview the video footage, only to view it and comment within the same meeting.)**

**d) As already indicated, the cost and emphasis on process are two of the key factors for an employer in determining whether to defend a case or to offer a settlement. The other prime cost is time.**

**For an employee we see little evidence of cost being a factor at all. The current system favours opportunist claimants who use 'no win, no fee' representatives (thus incurring no cost to themselves), and who, by using the threat of large**

**costs and compensation payments handed out by the Authority, demand compensation payments from the employer at mediation.**

**e) i) Change the balance in the measure of wrongdoing from process to substance.**

**ii) Consider some level of test to satisfy to avoid frivolous claims. We see this as perhaps a pre-assessment by a DOL mediator.**

**iii) Empower mediators to sum up their picture of the situation and advise a party (in their considered opinion) if they either have no case, or have got it wrong and need to make amends. Alternatively mediators could be empowered to make decisions at mediation, after the parties fail to resolve the matter themselves. A finding by the Mediator would result in reasonable costs being awarded to the successful party, but no compensation or lost wages would result; the applicant would have to take the matter to the authority for compensation or lost wages to be awarded. A frivolous or opportunist claimant would be given a clear message that their case was unlikely to succeed at the next level and would probably not continue the matter. On the other hand a genuine claimant would be able to consider taking the matter to the Authority if they believed that their claim was justified, and with the benefit of the Mediators opinion. We believe this process, along with the Trial Period legislation, would deter frivolous or opportunist claims.**

**f) i) Make genuine, no cost, help (eg phone advice) available to employees considering taking a grievance. The 0800 ERS info line currently will not provide advice or offer an interpretation. The employee consults a lawyer, at cost, and then sees a PG against the employer as a way to pay the lawyer's bill, or approaches an advocate offering 'no win, no fee' support. Both situations encourage pursuit of a grievance for the wrong reasons.**

**ii) Cost recovery is unequal where a case proceeds to Employment Court. – A 'winning' employee typically gets costs recovered whereas a 'winning' employer gets only a portion.**

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) Where cases are not resolved at mediation and the employee pursues the case with the Authority or Court, we advise our members (employers) to engage the services of a solicitor.**

**b) i) This generally results in a professional examination of process and clear focus on any failings on both sides**

**ii) The outcome is variously a swing back to the employer's favour or a recognition of a process failing. Once a lawyer is involved our members are more likely to succeed, but**

**iii) The cost is greatly escalated, even to win. –Hence the decision by many to settle at mediation more cheaply and get on with business.**

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?

**A code of ethics for advocates would help. Lawyers are bound by strong ethics and professionalism codes but we do not see this in the 'no win, no fee' advocates. If a case has little or no merit, will the advocate advise the claimant of this or will they see it as another situation from which to make money? Advocates (and union reps) also frequently employ bullying and scaremongering tactics.**

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) As already discussed, the law currently places far too much emphasis on process than substance. The system has high expectations on the expertise and ability of the employer. Large employers have access to resources and experts but small employers have a similar knowledge level to the employee. There is an unfair balance on the small employer at least.**  
**b) Again, a change of focus from process to substance, and a change to the justification test from 'would' to 'could'.**

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) No, it's not too complex, but may appear too daunting to both an employee and a small employer.**  
**b) Yes, the current test creates uncertainty. As an employer, no matter how much care is taken, you won't know if you have it perfectly correct until the Court says you should have done something differently. We have to shape our 'best practice' advice based on court decisions.**  
**This submission has already made clear our view that the emphasis on process is top heavy. Substance and general fairness should be of more importance. Fair**

**process should still be required but one step wrong should not mean unjustified dismissal.**

**c) As in 6 b) above, a change from 'would' to 'could'.**

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?

**There are no barriers to raising a PG. Anyone can do it, even when their claim has no merit.**

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

**Time and resources dedicated to proving you followed fair process and were justified in your decision. The cost of this time and the cost of accessing professional help.**

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

**As in our response 3 e) ii) Consider some level of test to satisfy to avoid frivolous claims, and 3 e) iii), empower mediators to sum up their picture of the situation and advise a party/ parties of their considered, or the alternative suggestion of empowerment to make a binding decision. This would lead to more cases being resolved at mediation.**

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 (only those created by representative availability). Occasionally a delay in smaller towns where mediation 'visits' at specified times of the month.**

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?

**a) Mediation service timeliness is fine but easier access to voluntary urgent mediation would prevent some cases from getting out of hand. An earlier intervention or might prevent the relationship from collapsing.**

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

**This has already been the subject of our recommendations in this submission. We are in favour of it.**

**Reported decisions (depersonalised if necessary) would lead to greater clarity for all.**

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) A genuine advice line to help them assess their situation and decide whether they should be defending or making amends.**

**b) The Association recently conducted a wages survey, and asked members to indicate their experience with the Trial Period provisions for small employers. Of those who responded (789 responses) 66% indicated that they have included the Trial Period in their agreements. 80 respondents indicated that they had dismissed an employee under the Trial Period provision during the 10 months since its introduction, which is 10% of the total. This shows that the use of the Trial Period provision to dismiss staff has been modest at best and certainly not as widespread or excessive as was predicted by some. When asked to indicate if the Trial Period had encouraged employers to hire more staff, the responses were mixed. Within the whole group who had hired staff during the year 43% believed that they were encouraged to hire more because of the Trial Period opportunity. Of those who used the Trial Period provision 54% indicated that they were inclined to hire more because of the Trial. Of those who actually used the Trial provision to dismiss, 73% were inclined to hire more staff because of it.**

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?

**a) We see no fairness in limiting the ability to raise a grievance purely by virtue of salary. A simple test of merit (by a mediator perhaps) would be much more to the point and prevent unfounded claims.**

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?

**a) 90 days would be the longest it should be. If someone is genuinely aggrieved and not getting any satisfaction you would expect them to be taking action earlier rather than later. In cases where an employee chooses to resign, 90 days might be long enough for them to realise it's harder than they thought to get another job, distort their own memories of their reasons for resigning, and decide the employer's pocket might be the way to solve some financial issues.**

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?

**a) Three years is far too long. Staff will have changed and witnesses moved on. Again, if an employee is truly aggrieved, why would they wait so long? Another 90 days might be fair, certainly no longer than one year.**

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 not always feasible, particularly if some time (maybe 90 days) has passed. There will not be a job to come back to and other relationships may also be damaged. – Ex colleagues reactions will factor in too, potentially affecting the efficiency of the workplace.**

**In situations where we have suggested our members invite the employee to return to work, the employee has said, "No way," and promptly applied to mediation. As a first remedy, the employee doesn't often want it anyway.**

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?

**a) Employees typically want only money – and are often encouraged by their representatives that the bag is deep. Reinstatement is not usually feasible or wanted. 'Humiliation and injury to feelings' is not a measurable or equitable factor. Lost wages is fair for an unjustified dismissal. Costs are not equitably awarded.**

**b) Remove reinstatement as a primary remedy. Remove compensation for 'humiliation and injury to feelings'. Employees could get a component of retraining or recruitment support funding from an errant employer rather than straight cash compensation. This would still hit the employer in the pocket, helping them learn but would discourage cash hunters with no merit to their case. Claims brought by employees which are ruled (at mediation by our newly**

**empowered mediators) frivolous and without substance, should result in an award of costs to the employer.**

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

**An extension of the 90-day trial to larger, if not all, businesses. This will encourage employment and reduce the risk of expensive but non-meritorious claims. It is our experience that among our members the number of personal grievance claims has reduced since the introduction of the 90 day trial period.**

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?

- 1. A refocus on substance rather than process.**
- 2. A test or assessment of PGs by the mediator when initial application is made to mediation to eliminate totally frivolous claims.**
- 3. Remove compensation for 'humiliation and injury to feelings' as a remedy**

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**

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

**Easier, quicker access to urgent mediation assistance. If DOL mediation was available earlier in more situation – before lawyers/advocates come to the table – resolution will generally be achieved faster, more amicably and certainly more cheaply. (Even if this comes at a small price.)**

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

**Mediators should be available in enough numbers to assist employers at an early stage, but certainly before the employee has resigned or the employer has dismissed the employee. Often it is the lack of a genuine mediation facility that causes the matter to escalate to a grievance or dispute.**

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

**Thankfully Health and Safety is not usually a problem area in retail, this being a low risk area. Any concerns are usually easily enough resolved by discussion.**

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?

**Providing they were options only, yes. We cannot see a 'one size fits all' solution tool working.**

**Reporting of actual situations and resolutions would help, as per our response in Q13.**

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?

**a) We have already discussed an assessment and considered opinion or ruling by mediators. This would be extremely helpful.**

**Telephone access to mediators would also be a useful tool in decision making.**

**b) Again, as already discussed in this submission, a genuine advice line –with real advice, rather than a helpline which only restates what the law is and what mediation facilities are available.**

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

**The Association is in favour of early intervention - see Q23**

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

**See Q26 - Unlikely. We cannot see a 'one size fits all' solution tool working. A searchable record of actual situations and resolutions would be preferable.**

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

**Funding assistance for organisations like ourselves to provide relevant, low-cost employment training to our members.**

**Easier access to cost-efficient, plain English training for small employers might help to avoid the bad decisions which seem to end up shaping our employment law. Small employers, including retailers, are often passionate about what they do – that does not make them experts in employment law any more than it makes them great accountants.**

