

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

Objectives

The Minister of Labour, Hon Kate Wilkinson, has asked the Department of Labour to conduct a review of the personal grievance system as established under Part 9 of the Employment Relations Act 2000 ("the Act").

The objectives of the review are to consider whether the personal grievance system:

1. strikes a fair balance between employer flexibility and employee protection
2. does not impose unnecessary costs or obligations for employers or employees
3. supports improvements in workplace productivity
4. is efficient and effective, and
5. has met its objectives (as set out in the Employment Relations Act 2000).

In addition:

6. where improvements are required, the nature and extent of the issues involved, and
7. the steps that might be taken to address these (including, potentially, whether any amendments to the legislation are necessary or desirable).

The Department will provide a report to the Minister of Labour in May 2010 on the findings of the review and options for addressing any problems.

Background

Personal Grievance System as established under Part 9 of the Employment Relations Act 2000

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

The employment relationship problem resolution system refers to all possible types of employment relationship problems (such as personal grievances) that may be resolved by the parties themselves, or through recourse to mediation, the Employment Relations Authority or the Employment Court ("the employment institutions"). An employment relationship problem does not include a problem associated with the fixing of new terms and conditions of employment.

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

Objectives of Part 9

The objectives of Part 9 of the Act are to:

- a) recognise that in resolving employment relationship problems, access to both information and mediation services is more important than adherence to rigid formal procedures
- b) recognise that employment relationship problems are more likely to be resolved quickly and successfully if the problems are first raised and discussed directly between the parties to the relationship
- c) continue to give special attention to personal grievances, and to facilitate the raising of personal grievances with employers
- d) recognise the importance of reinstatement as a primary remedy, and
- e) ensure that the role of the Employment Relations Authority and the Employment Court in resolving employment relationship problems is to determine the rights and obligations of the parties rather than to fix terms and conditions.

Recent amendments to the Act in relation to personal grievances

In 2004, the “test of justification” was introduced into the Act as a means for deciding whether an employer’s action, including dismissal of an employee, was justified. The test requires that the employer’s actions and how they went about these actions must reflect what a fair and reasonable employer would have done in the circumstances. This must be assessed on an objective basis. Other changes from 2004 included technical amendments that were made in relation to discrimination (s106) and choice of procedures (s112).

Review of the operation of the personal grievance system

The Department wishes to understand the extent to which “problems” that have been identified by key stakeholders and the public in the personal grievance system, are based on direct experience or are perceptions; and how these might be addressed (in both instances).

Other sections of the Act (Part 10 “Institutions”) are critical in a consideration of the personal grievance system because they establish the employment institutions through which personal grievances are pursued and resolved (mediation services, the Employment Relations Authority and the Employment Court). The review will also consider related issues that have arisen in respect to employment institutions.

The Department will analyse submissions and information collected (including a literature review on commentary and research on issues related to the personal grievance system, an international scan of different legislation and systems, a media scan of commentary and reporting of matters related to personal

grievances, and internal datasets), define the problems associated with the personal grievance system and assess options for addressing problems. The Department will develop a report for the Minister of Labour that provides options for addressing identified problems.

The scope of the review

In scope

The review of the personal grievance system will consider the following issue areas related to the operation of the personal grievance system:

- a) the cost of problem resolution
- b) varying quality (and effect) of employment advocates
- c) balance of fairness in the personal grievance system
- d) ensuring access to justice
- e) negative impact of the responsiveness and timeliness of services
- f) employment relationship problems appear to impact on disproportionately on small and medium sized enterprises
- g) eligibility for raising a personal grievance, and
- h) effectiveness of remedies.

To avoid doubt, the review will consider issues to do with the processes of dismissal within the context of the issue areas listed above.

Possible options for consideration

Possible options for change could range from awareness raising and information provision to regulation and legislative changes. The Department seeks and welcomes comments on additional matters, ideas for possible options as well as the areas of focus presented in the scope of the review.

Out of scope

The review will not be considering the following matters: the grounds on which a personal grievance may be raised; discrimination provisions in relation to the raising of a complaint under the Human Rights Act 1993; and sections relating to the functions of the Labour Inspectorate (sections 129 – 142) in the Act.

Method and process

The review will be led by the Department of Labour. The following sources will inform the review and the final report to the Minister of Labour in May 2010:

- a) discussion paper (public consultation)
- b) consultation with targeted stakeholders, and
- c) literature review including an international scan.

Discussion paper

The Department has prepared a discussion paper for public consultation. The discussion paper outlines four key areas:

- 1) the different systems that have existed in New Zealand's recent past for assisting employers and employees to resolve disputes and the philosophical basis for our current regime
- 2) a summary of the relevant sections of the Employment Relations Act 2000
- 3) the operation of the personal grievance system that has attracted commentary in recent years, either in the media, anecdotally, or directly with the Department of Labour by stakeholders and/or social partners, and
- 4) ideas for additional assistance to resolve employment problems at an early stage and avoid the need for more formal third party processes.

A questionnaire provided at the conclusion of the discussion paper serves as a guide to submissions.

Consultation with targeted stakeholders

As part of the review, the Minister must ensure that the persons and organisations (including representatives of employees and employers), that the Minister thinks appropriate, are consulted in the preparation of the final report. The Department will seek submissions from identified stakeholders (with the agreement of the Minister of Labour).

Literature review

The Department will conduct a literature review on commentary and issues related to personal grievances, Departmental administrative data sets, and other available sources to gain a better sense of the breadth and depth of issues related to the personal grievance system.

As part of the literature review, the Department will also conduct a review of different approaches to personal grievance systems and resolution processes conducted within various jurisdictions including Australia, the United Kingdom, Canada, the United States of America, the European Union and Scandinavia. This will help in understanding how international legislation operates and practice in this area of employment.

Wider consultation

Consultation will be carried out with identified key stakeholders and the public who either have an interest, a view or experience of the personal grievance system. Consultation will be conducted through direct contact with stakeholders and through publishing the discussion paper.

The public consultation aspect of the review will seek to illicit views from people with direct and indirect experience of personal grievances. The review recognises that people's indirect experience of the system (how one understands the system works) can also affect their decisions and behaviours, either as an employer or as an employee.

Key stakeholders for consultation will include:

- Business New Zealand
- New Zealand Council of Trade Unions

- New Zealand Law Society (including both the 'Employment Law Committee' and 'Commercial and Business Law' Committee)
- the Small Business Advisory Group
- Human Resources Institute of New Zealand
- Employers and Manufacturers Association
- Human Rights Commission
- Pacific Business Trust
- Employment Relations Authority
- National Advisory Council on the Employment of Women
- any other organisation or person are considered to be a stakeholder or to have relevant expertise in the area
- relevant government agencies, and
- any organisation or person the Minister of Labour considers should be consulted.

Departmental report

The report of the review will identify:

- a) views from key stakeholders and the public on the impact of personal grievances in their respective areas, including the degree to which the objectives of the personal grievance system as established under Part 9 have been achieved
- b) issues with the operation of the personal grievance system and related matters, such as the process for resolving personal grievances, balance of fairness to parties and costs related to raising and defending a personal grievance
- c) options for addressing any identified issues and likely implications of implementing any options (costs, benefits and risks)
- d) whether specific provisions and the definition of the personal grievance system are still relevant and desirable, and
- e) if necessary, recommendations for improving the operation and functionality of the personal grievance system, taking into consideration the principles underlying natural justice, the Government's broader social and economic objectives and international trends.

Timeframes

March 2010
<ul style="list-style-type: none"> • public announcement of the review and associated timeframes • the discussion document distributed and submissions sought • submissions close 31 March 2010
May 2010
<ul style="list-style-type: none"> • a final report of the review will be provided to the Minister of Labour

The review will be publicly notified and the discussion paper will be publicly available.

Resources

All costs for this review will be met within the Department of Labour's baseline funding. It will draw on the knowledge resources and expertise contained within the Department, identified key stakeholders and the public.