

A-Z Guide

PERSONAL GRIEVANCES



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Use this guide to understand

- What personal grievances are and the process around managing them
- The rules relating to employee's raising personal grievances
- The choice of procedures open to employees in terms of the Employment Relations Act 2000 and Human Rights Act 1993 to resolve grievances
- The types of remedies associated with personal grievance claims

What is a Personal Grievance

A personal grievance is an employment relationship problem and is defined by the Employment Relations Act 2000.

A personal grievance is a claim that one of your employees or former employees may have against you because of a claim that he or she had been:

- Unjustifiably dismissed; and/or
- Disadvantaged by an unjustifiable action by the employer; and/or
- Discriminated against; and/or
- Sexually harassed; and/or
- Racially harassed; and/or
- Subjected to duress; and/or
- Affected by the employer not complying with the employer's duties under Part 6A; and/or
- Disadvantaged by an employment agreement not being in accordance with: agreed hours of work, availability provision, cancellation of shifts, secondary employment provision or adverse treatment because of an employee's refusal to perform certain work, or notice period cancellation of shifts; and/or
- Adverse conduct for a prohibited health and safety reason, or a contravention on the prohibition relating to coercion or inducement under the Health and Safety at Work Act 2015.

Section 103 of the Employment Relations Act 2000 provides for the full list of personal grievances.

The process for resolving a personal grievance is prescribed by the Act. That process begins with the dispute resolution procedure that you are required by the Act to include in your employment agreements.

Dealing with personal grievances can be a complex issue; the situation is often highly emotive and clarifying the real issues behind the grievance can be complicated by this.

Understanding the law is the first step in being prepared to handle personal grievances when, and if, they are raised. This **A-Z Guide** sets out the relevant provisions of the Employment Relations Act 2000 and provides some guidance on how these apply.

Procedure

Raising a grievance



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The raising of a personal grievance with an employer does not necessarily mean the filing of a Statement of Problem with the Employment Relations Authority in the prescribed form, although it may do.

Personal grievances are most commonly raised after the employment relationship has ended. Very often, the first an employer knows of a grievance in these circumstances, is when the employer receives formal notice of a personal grievance by the service upon it of a Statement of Problem.



Personal Grievances

However, employees may raise a personal grievance at any time during an employment relationship.

Regardless of how you are first advised of an employee's personal grievance, that notification or advice must occur within 90 days of the date on which the action alleged to amount to the grievance occurred or came to the notice of the employee, whichever is the later. Following an amendment in 2023 however, personal grievances relating to **sexual harassment** must be raised within **12 months** of the date on which the action alleged to amount to the grievance occurred or came to the notice of the employee, whichever is the later.

The Act uses the term "raise" to describe the obligations of employees in respect of personal grievances. This means that the employee raising the grievance has made or has taken reasonable steps to make you (or your representative) aware that he or she has an alleged personal grievance that he or she wants you to address.

The raising of a personal grievance is not required to be written advice or notice; it may be oral.

Exceptions

A personal grievance cannot be raised outside the 90-day limit and a personal grievance for sexual harassment cannot be raised outside the 12-month limit unless the employer consents, or the Authority agrees there are exceptional circumstances. What constitutes exceptional circumstances is at the Authority's discretion. However, there are four specific circumstances under the Act which will generally be found to constitute exceptional circumstances.

The first is where the employee has been affected or traumatised by the matter to such an extent that they were unable to consider raising a grievance in time. The second is where the employee made reasonable arrangements to have the grievance raised by a representative, but that representative unreasonably failed to raise the grievance in time. The third is where the employee's employment agreement does not include an explanation concerning the resolution of employment relationship problems as required under the Act. The last is where the employer has failed to comply with its requirement to provide a statement of reasons for dismissal when this has been requested by the employee.

Refer to the **A-Z Guide on Individual Employment Agreements** for more information on what the Act stipulates must be included in employment agreements.

Statement of problem

The Act requires every employment relationship problem that a party to an employment relationship wishes to have the Employment Relations Authority resolve, be submitted to it in the prescribed form.

The prescribed form is Form 1 Application to Employment Relations Authority. It is found in Schedule 1 of the Employment Relations Authority Regulations 2000.

An employee may raise a personal grievance with you by completing Form 1 and submitting it to the Authority.

On submission to the Authority, a copy of the form will be served on you.

Statement in reply



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If you are served a statement of problem you have **14 days** to submit to the Authority a statement in reply. A statement in reply must be submitted to the Authority and the employee or former employee (or their representative) in the prescribed form.

The prescribed form is Form 3 Statement in Reply. It is found in Schedule 1 of the Employment Relations Authority Regulations 2000.

Employees' representatives frequently write letters to employers raising employees' personal grievances giving employers 14 days in which to respond. This time limit is unenforceable as it is not prescribed by the Act.

Any other time limit contained in these types of letters relating to personal grievances that is outside the provisions of the Employment Relations Act 2000 is unenforceable.



Statement of reasons for dismissal

If you have dismissed an employee and the employee requests the reasons for that dismissal within 60 days of that dismissal, you must provide the employee (or the employee's representative) with a statement in writing that provides the reasons for their dismissal.

If you receive a request for a statement of the reasons for dismissal then you must comply with that request within **14 days** of receiving it.

Unless this request states it that it does, it does not constitute the raising of a personal grievance.

Choice of Procedures

There is considerable overlap between the Human Rights Act 1993 and the Employment Relations Act 2000 in respect of employment, but the disputes resolution processes under each regime is substantially different.

An employee must choose one of the two regimes in which to advance a complaint of discrimination; an employer is protected from potential double jeopardy where circumstances could give rise to a complaint of unlawful discrimination under the Human Rights Act 1993 and a personal grievance under the Employment Relations Act 2000.

Unlawful discrimination under the Human Rights Act 1993 should be contrasted with a personal grievance based on discrimination under the Employment Relations Act 2000. Under the former, the complainant may claim that he or she was subject to discrimination on the basis of disability either pre-employment or during employment. Under the latter, the complainant can only claim that they were subject to discrimination once they have become an employee.

Comparatively, an employee cannot challenge his or her dismissal under the Human Rights Act 1993; the Employment Relations Act 2000 provides that the only way to challenge a dismissal is as a personal grievance for unjustified dismissal.

It is possible, arguably, for an instance of unlawful discrimination in employment to be challenged in both jurisdictions. In *O'Dea v BHP NZ Steel Ltd* (1997) 3 HRNZ 683, the Complaints Review Tribunal (now the Human Rights Review Tribunal) held that under section 22(1)(c) of the Human Rights Act 1993, a claim in detriment was independent of, or an alternative to, a claim in unlawful dismissal by reason of a prohibited ground of discrimination.

The Human Rights Act 1993 and the Employment Relations Act 2000 both contain similar choice of procedures provisions. Where any circumstances arise that may give rise to a personal grievance that could also give rise to a complaint under the Human Rights Act 1993 such as:

- Discrimination on any of the 13 prohibited grounds; and
- Sexual harassment; and
- Racial harassment

The complainant must decide whether they want to make a complaint under the Human Rights Act 1993 or apply to the Employment Relations Authority to resolve their grievance. The complainant cannot pursue their claims in both jurisdictions.

The provisions make it clear as to when the choice of procedures are made. Once proceedings in relation to a complaint are



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commenced by the Human Rights Commission, the complainant is barred from making or continuing their complaint under the Employment Relations Act 2000. Alternatively, once the complainant has applied to the Authority for the resolution of their grievance, the complainant is barred from making a complaint to the Human Rights Commission.

Refer to the **A-Z Guides on Discrimination in Employment, Disability, Racial Harassment, Sexual Harassment and Human Rights** for more specific information.



Resolution Process

Time limits

The fact that a personal grievance has been filed in the Employment Relations Authority does not prevent the parties seeking mediation on the matter; the Authority most often directs parties to mediation before setting down a time for an investigation meeting, if it has not already been attempted.

If a personal grievance is not commenced within either the Authority or Employment Court within 3 years after it has been raised with an employer it is no longer able to be commenced; the Act places a 3-year limitation on personal grievance proceedings.

This does not mean that once a personal grievance is commenced in the Authority or Court that it must be prosecuted within 3 years; the Act appears to place no time limit on the prosecution of any proceedings under Part 9 of the Act.

Plain language employment relationship problem resolution clauses

If an employee raises a personal grievance with you, then the first step is to consider the process for the resolution of employment relationship problems that is provided in the employee's employment agreement. This clause is required in all employment agreements under the Employment Relations Act 2000.

Mediation

Either the Ministry's Mediation Services or any private mediation service can be used to help resolve employment relationship problems such as personal grievances.

If the parties cannot resolve the grievance for themselves through mediation, the parties may agree that a mediator employed by the Ministry's Mediation Service may make a binding decision and/or settlement. A private mediator may assist in the resolution of the grievance but cannot make binding settlements or decisions under the Act.

A settlement or decision made by a Mediation Service mediator, once signed by the mediator, is final and binding. A full and binding settlement or decision may be enforced in the Employment Relations Authority and Employment Court. If the parties do not want the mediator to make the decision, the matter can be taken to the Authority.

Refer to the **A-Z Guides** on **Employment Relations Authority, Full and Final Settlements** and **Mediation** for more information.

Arbitration

The Ministry does not provide arbitration services but the Act permits parties submitting employment relationship problems to arbitration where they agree. However, the submitting of a problem to arbitration does not preclude either of the parties from seeking mediation or applying to the Authority or Court under Part 9 of the Act.



Investigation meetings

Personal grievances that are not resolved by mediation or arbitration may progress to the Employment Relations Authority for investigation. The Authority can investigate, establish facts and make determinations about a wide range of employment relationship problems (except bargaining and the fixing of new terms and conditions of employment). A party to a matter before the Authority may elect to have the matter heard by the Court. The Authority may refer questions of law and may order cases to be removed to the Court, either on its own account or on the application of any party. The Court may be asked to grant special leave for removal if the Authority declines the same application.



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The Authority will apply a test of justification to the actions of the employer when deciding personal grievances. This test is to determine, on an objective basis, by considering whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

In applying this test, the Authority must consider four relevant factors. The first is whether, with regards to the resources available to the employer, the employer conducted a fair investigation into the matter. The second is whether the employer raised its concerns with the employee around the matter. The third is whether the employer gave the employee a reasonable opportunity to respond to any concerns that the employer raised. The last factor is whether the employer genuinely considered the employees explanation regarding this matter.

Investigation meetings to hear personal grievance claims are formal. Parties may cross-examine one another and be cross-examined by the Authority Member presiding. The Authority may call witnesses to assist it in its investigation.

The Authority is not a court of record, which means that while the Member may take notes of events no formal record of the proceeding is made and retained. The Authority Member has discretion as to whether or not the parties appearing before it are sworn.

At the conclusion of its investigation the Authority will issue a written determination and may award costs. That determination is binding and enforceable in the Authority, the District Court and the Employment Court.

Determinations of the Authority may be challenged in the Employment Court.

Refer to the **A-Z Guide** on the **Employment Relations Authority** for more information.

Remedies

If a personal grievance proceeds to the Authority, the Authority may order remedies where it determines that the claim has been made out. The remedies available depend on the nature of the personal grievance. Only the remedy of compensation is common to all personal grievance claims.

Reinstatement

The Authority may order reinstatement where it is practicable and reasonable to do so. If ordered, you must reinstate the employee immediately or on the specified date, even if you are appealing. Interim reinstatement may be ordered pending a hearing.

Reimbursement

Reimbursement for lost remuneration is wages or salary. Only those wages or salary lost as a result of the personal grievance is reimbursable. The Authority has discretion whether to award 3 months lost remuneration (or less) or actual lost remuneration from the time of the grievance up until its investigation meeting. It can reduce reimbursement awards for contribution if it determines that the person making the personal grievance claim contributed to the situation that gave rise to the grievance. It can also choose to not award any reimbursement for lost remuneration if the employee does not attempt to mitigate their losses by searching for new employment.



Compensation

Compensation may be awarded for humiliation, loss of dignity and injury to feelings, and/or for loss of any benefit which arising out of employment like company cars, phones or health insurance. Again, if the employee's behaviour contributed to the grievance, the Authority may reduce the compensation awarded.



Responding to a Personal Grievance Claim

If an employee raises a personal grievance with you or your representative that they would like you to address, how you respond will depend on whether or not that employee is still in your employment.

If the employee is still employed then your first response should be to establish all the details of the claim. Then you might consider presenting your side of the situation to that employee. Before doing that you should consider offering the employee the opportunity of gaining a support person or representative to be present at that time.

It is recommended that file notes be made of any meetings between you and your employees in these situations. These meetings should be informal, un-confrontational and as constructive as possible.

If the personal grievance claim is unable to be resolved between you then you may wish to request mediation to assist you. If the employee requests that you attend mediation it would be unwise for you to refuse.

Many employment relationship problems are settled in mediation and the Authority disapproves of parties refusing to attempt this low level dispute resolution process. Mediation involves presentation by each of the parties of their side of the situation to the mediator; it affords each side a good opportunity to hear the complaint in full, often for the first time.

If a settlement is not reached through mediation, and the matter is likely to be filed (if it hasn't been already) in the Employment Relations Authority, then this is the time to seek professional advice if you haven't already.

The Act provides protection for settlements so long as they meet the procedural guidelines provided by the Act. If a settlement is reached between the parties by any means, only any person who is authorised by the Chief Executive of the Ministry (and this automatically includes mediators employed by the Ministry's Mediation Service) may sign the settlement in order to bring it under the protections of the Act. It is this protection that results in a truly full and final settlement.

While it is possible to present your case in the Authority yourself, some advice about your situation and how best to present your view can be very important. Further, where it is possible to settle matters before they progress to the Authority, this is usually more expedient.

If the person raising the personal grievance is no longer your employee then it is more likely that the raising of the grievance has occurred through their representative's letter or alternatively, through formal notice of the grievance from the Authority. It is important to respond appropriately to the former employee's representative; keeping the channels of communication open and courteous will assist the settlement of the grievance regardless of how that occurs.

If there is any information you are lacking then it could be requested before you meet with your advisors.

EMA Advice consultants can assist you with all matters relating to the handling of a personal grievance claim. If you require representation at mediation and/or the Authority, they are able to provide that in addition to assistance with all aspects of presentation of your case.

Refer to the **A-Z Guide on Full and Final Settlements** for more information.



Conclusion

Having a personal grievance claim raised against you or your organisation can be a daunting event. Knowing the procedures and institutions provided by the Employment Relations Act 2000 for resolving grievances will reassure you; the object of the Act in this Part is to promote and provide low-level and flexible procedures that support the employment relationship in the hope that the parties themselves may find the best solutions to problems.

Remember

- Always call AdviceLine on 0800 300 362 to check you have the latest guide. Never hesitate to ask AdviceLine for help in interpreting and applying this guide to your situation.
- Use our AdviceLine employment advisors as a sounding board to test your views.
- Get one of our consultants to draft an agreement template that's tailor-made for your business.

This guide is not comprehensive and should not be used as a substitute for professional advice.

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