



SUBMISSION

ON THE

The Review of Part 9 The Employment Relations Act 2000: Personal Grievance

March 2010

For more information please contact name surname gensec@ppta.org.nz (04) 913 4229

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* Kevin Bunker, General Secretary

2. Name of your business or organisation (if applicable): **New Zealand Post Primary Teachers' Association Te Wehengarua**

3. Postal address

PO Box 2119 Wellington

4. Email address: gensec@ppta.org.nz

5. Telephone number(s) **DDI 04 913 4229 04 384 9964**

6. Relevant activities you or your business/organisation are involved with **Union for secondary teachers**

7. Size of business/organisation **18,000**

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. **Department of Labour**

* 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?

1. Yes

- a) The PPTA Field Service deals with personal grievances on a regular basis.
- b) The PPTA Field Service represents secondary teachers' who are members of the PPTA.
- c) 500+

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?)

2. Most personal grievances are able to be resolved with the intervention of the PPTA Field Service on the school site. If resolution is not possible assistance from the mediation service will be sought. At the end of 2009 the assistance of the Employment Relations Authority was sought and a teacher was reinstated to their former position in the case of a demotion following disciplinary action.

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?

3a. The average cost between \$3,000 to \$5,000 to settle a personal grievance is far too low. The impact on a teacher of losing their teaching position can be quite catastrophic and can have a devastating impact on a family. As will also be elaborated on later on the employer of a teacher is required to make a mandatory report to the New Zealand Teachers Council and a teacher then faces an investigation from that statutory body.

3b. This is lower than in other civil or legal disputes.

3c. In cases there will not be any costs awarded but in cases of unjustifiable actions or dismissals should be in the vicinity of \$10-20,000.

3d. No we will take a personal grievance case if we believe it has merit irrespective of cost.

3e and f. The PPTA Field Service works hard to ensure most employment relationship problems are resolved in the workplace. This means it only takes more complex or difficult cases to mediation or the Employment Relations Authority. There is no incentive for the union to take un-winnable or frivolous cases but it is noticeable in cases where an employer uses a lawyer that the cases can take on an unduly legalistic approach and are more expensive in both time and resources expended for all concerned.

The Department comments that in SMEs union membership tends to be lower so union delegates do not have the ability to intervene at a low level. The Government should work with unions and employers to encourage union membership in these small to medium workplaces. This would help ensure both employers and employees are able to have their employment relationship problems dealt with at an early stage and in an affordable manner.

Our members tend to be employed in larger workplaces that are unionised. The PPTA Field Service helps secondary teacher members to resolve their work place problems at an early stage. Very few cases are even taken to mediation.

The most infamous education law cases have been taken by teachers who were not union members or who did not seek union involvement. These include:

Rongotai College BOT v Castle CA 152/97 Wellington 29 June, 1998

Sutherland v the BOT Marlborough Girls' College [1999] 1 ERNZ 665

Hobday v Timaru Girls HS BOT Employment Court, Christchurch GED 16/94

McKean v BOT of Whakaaranga School [2007] ERNZ1

Lewis v Howick College BOT [2010] NZEMPC 4

Healey v Mercury Bay Area School BOT Employment Court, Auckland AC 21/05 AR6 17/03

Richardson v Board of Governors of Wesley College [1999] 2 ERNZ 1999

In the recent case of Lewis v Howick College BOT [2010] NZEMPC 4. Colgan CJ commenting on this case and that of McKean v BOT Whakaaranga School commented at paragraphs [122-123]

[122] "This is the second recent teacher employment case in which this court has been moved to comment on the procedural domination of lawyers, legal issues and legalism at the expense of professional education input. Although these circumstances are quite different from those in the other case in which I have referred, the phenomena are the same.

Whether as a consequence of indemnifiers' caution or for other reasons, both cases illustrate the potential for dealings between parties to teaching employment relationships to become prematurely and unduly legalistic...

[123] As in the other case referred to, in this the individual teacher was not a member of the relevant union at critical times. As noted in the earlier case also, the involvement of either the New Zealand Education Institute ("NZEI") or the PPTA allows for detached professional assistance and counsel for parties. So too does the beneficial input of the New Zealand School Trustees Association in such difficult matters. It is regrettable that the inclusion of such bodies was not allowed for or was unable to take place in this case..."

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?

4. No.

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?

5. Not applicable.

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?

6a and 6b. The Association believes that the test of justification set out in s 103 A of the Employment Relations Act (2000) is a fair one that seeks to balance the duties and rights of both employers and employees.

Recently CJ Colgan in *Lewis v Howick College BOT* [2010] NZEMPLC 4 made general comments about the need for care in the case of professional persons such as teachers who must also meet occupational licensing requirements in order to work in their chosen profession. He stated:

"As in the cases of other professional employees whose very livelihoods are affected by a dismissal from employment, the consequences for a school teacher of dismissal for misconduct or incompetence and especially, as in this case, a summary dismissal for serious misconduct, affect not only that employment relationship. Whereas many other dismissed employees have opportunities to seek alternative employment within their fields of experience and for which they are qualified, teachers (and others) must also be professional registered to practise. Dismissals of teachers (and a range of lesser sanctions in employment) trigger automatically a vocational or professional registration investigation. As with many other professions there is little, if any, opportunity for employment in New Zealand without registration. An employer dismissing a teacher is bound by law to advise the Teacher Registration Council. As in this case, it can be expected that there will be a level of inquiry into the teacher's fitness to be registered in light of the circumstances of the dismissal and other relevant considerations. So

the effect of the dismissal of a teacher is especially significant. Put simply, allegations of misconduct or incompetence place teachers (and other similarly registered occupations) in double jeopardy of their livelihoods.

Accordingly, employers of teachers must act to a high standard when their decisions can have these consequences. So, too, independent courts and tribunals considering the justification of dismissals of teachers must be conscious of that consequence and the corresponding need to examine such cases with great care".

Thus for our members who are dismissed or resign after being advised of concerns about their conduct or competence that is not the end of the matter. Teachers can face lengthy dealings with the various disciplinary bodies of the Teachers Council and may even have to pay a significant contribution to the costs of any prosecution brought against them.

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?

7a: The Association does not believe that the current personal grievance system is too complex or difficult to understand.

7b and 7b i): The test of justification is an appropriate one and should not be changed. It is in the interests of both employers and employees that both process and substance are taken into consideration. The current test ensures that occurs. For example an employee who is treated abysmally during the discipline process is likely to feel aggrieved even if they have acted in a manner that viewed objectively warranted dismissal. If the process is fair an employee is less likely to feel aggrieved and/or take a personal grievance.

The more objective test provides safeguards for both the employer and employee in that the employer is forced to ask themselves taking into account all the circumstances would a fair and reasonable employer make the decision that I am going to make? If the answer is yes and the process followed is the correct one a personal grievance is unlikely to be taken or successful. The test also helps ensure employees are treated fairly irrespective of the particular workplace they work in.

7b ii): The current law allows minor irregularities in a disciplinary process to be given less emphasis than the actual substance of a personal grievance claim.

The current objective test for justifiable dismissal is appropriate and does not create uncertainty. This is evident from the relatively small number of personal grievance cases that proceed to either the Employment Relations Authority or Employment Court.

7c: The Association does not believe the current test of justification should change.

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?

8 a): For PPTA members there are no barriers to raising a personal grievance. The PPTA's Field Service works with employers to help ensure that workplace problems are resolved in a timely manner. The Association is responsible for ensuring members subscriptions are used wisely and it would only proceed with a case that it believed would benefit the membership generally or uphold the rights of a particular member. One of the objects of the PPTA constitution is to uphold and maintain the just claims of its members individually and collectively.

8 b): Yes the Association believes these are barriers to these groups and the Association would welcome more information being made available by the Department of Labour to both employers and employees.

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

9. Not applicable.

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

10. Increased union membership in a workplace would help ensure that union members industrial problems are able to be dealt with at an early stage helping to ensure they do not escalate.

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?

11. Our experience of the mediation service over the last few years does not indicate that any major delays have occurred in raising or defending a personal grievance. The area where delay is most likely to occur is Auckland due to the high volume of cases the mediation service deals with. Likewise we have not experienced any delays with the Employment Relations Authority. We do not have any recent experience of the Employment Court. While not common we have had the odd employer that has refused to attend a mediation forcing proceedings to be filed in the Employment Relations Authority and mediation being directed by the Authority. This could be avoided if the mediation service was able to compel the attendance of both parties.

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?

12. The Association believes that the current system enables employment relationship problems to be resolved in a timely manner. It does not believe any changes are required to the Employment Relations Authority processes. It would also urge caution in respect of the greater use of technology. Technology should only be used if both parties believe it is appropriate. An employment relationship problem that proceeds to formal mediation or the Employment Relations Authority often involves highly emotive issues that are better dealt with face to face.

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

13. The Association's view is it should be up to the parties in a mediation to decide whether they want a final and binding decision from the Department's mediation services. Section 150 of the Employment Relations Act (2000) already allows the parties to a mediation to confer the power to decide the matter on the mediator. Any decision made by a mediator in these circumstances is final and binding.

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.

14b. The Association is opposed to the use of trial periods.

The legislation enabling employers who employ 19 or fewer employees to enter into a 90 day trial period with a new employee only came into force on 1 March 2009. This law came into force so that an employer was able to determine if an employee was suitable for a position without the risk of an employee being able to take a claim for unjustifiable dismissal if the employment relationship did not work out. Previously the legislation only allowed for the parties to an employment agreement to enter into a probationary period under section 67 of the Employment Relations Act 2000 and the law relating to dismissals applied.

The Association believes all workers should be able to take a personal grievance irrespective of the size of their workplace or the salary they receive.

No data is presented by the Department of Labour as to whether this amended legislation has reduced the incidence of personal grievances for small and medium sized employees. Without that information the Association would be opposed to either the extension of the 90 day trial period or extending the personal grievance free period to medium sized employers with between 20-49 employees. Workers rights should not be restricted any more than they have been already.

It also begs the question why would an employee give up a permanent position only to move to one where they could be dismissed at will?

The Association is concerned that any extension to the current law could potentially cause recruitment issues for smaller rural schools and Wharekura that already have recruitment issues.

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?

15. No. All employees irrespective of salary should be entitled to take a personal grievance.

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?

16. The Association considers the 90 day limitation for raising a personal grievance appropriate.

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?

17. Yes. The Association sees no reason to amend section 114(6) of the Employment Relations Act (2000).

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?

18. One of the objectives of the Employment Relations Authority is to build productive employment relationships through the parties acting in good faith towards one another.

Reinstatement should remain the primary remedy as it has the potential to place the parties in the position they were in prior to the personal grievance arising. At mediation it can occur through agreement. However the discretion to award reinstatement as a primary remedy should not be removed from the statutory bodies that are called on to decide a matter.

The Association is not aware of any recent personal grievance cases in the school sector where reinstatement has been ordered because it is generally not practicable due to the fact there has been a complete breakdown in the employment relationship.

The practicability of reinstatement was first considered by the Court of Appeal in the education sector case of NZ Education Institute v Board of Trustees of Auckland Normal School [1994] 2 ERNZ 414 where the Court upheld the Labour Court's decision not to reinstate the unjustifiably dismissed Deputy Principal because it was not practicable due to the serious long standing problems between the parties.

A recent case Lewis v Howick College Board of Trustees [2010] NZEMPC 4 held that despite being successful in his personal grievance for unjustifiable dismissal reinstatement was not practicable because of the previous poor relationship between the parties.

The Chief Judge stated:

"His reinstatement to the staff of Howick College is a holy grail for Mr Lewis. That is opposed trenchantly by the Board. It says that reinstatement of Mr Lewis to the role of economics teacher at Howick College would not be practicable." The Court agreed that Mr Lewis's reinstatement was not practicable.

In 1994 the PPTA took a case to the Employment Tribunal in respect of a woodwork teacher who in 1992 had been in conflict with his principal. After the principal publicly said he did not trust him the teacher called him a derogatory name and walked out of the school.

Disciplinary action followed and he was dismissed from his teaching position. The Board chose not to appoint another teacher permanently to the woodwork position. The Tribunal decided it was not impracticable for the teacher to be reappointed over two years later to his former position. In that case the final warning was reissued for a period of 12 months. No financial compensation was awarded.

Our only other involvement with reinstatement was the Authority decision issued in January this year that reinstated a teacher to their former position in the case of demotion following disciplinary action. Again the final warning issued stayed in place. No financial compensation was awarded.

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?

19. At mediation all possible remedies are available and it is up to the parties to agree which ones to use to resolve their case. The remedies that are able to be awarded by the Employment Relations Authority and Employment Court are appropriate.

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

20. Not applicable.

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?

21. The Association does not want to see change to the current personal grievance system. At the end of this submission are attached three case studies that demonstrate how mediation has allowed the parties in a work place dispute to resolve their difficulties.

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?

22. No.

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?

23. The Association believes the mediation service should be increased in size to enable it to be able to handle more cases. We would not like to see any reduction in the mediation services currently available in the main centres. The mediation service needs to ensure only top quality mediators are appointed as it has been our experience that some mediators are better than others. Technology should only be used in cases where the parties agree it should be.

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

24. If the number of mediators was increased this would allow greater flexibility. Technology should only be used if all the parties are in agreement.

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

25. The Association would use mediation services in relation to health and safety matters relating to its members.

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?

26. The Association would support the mediation services applying a systemic approach to problem resolution in schools by identifying trends, providing feedback and options for addressing issues. The mediation service should work with the Ministry of Education's Group Manager Schooling Policy to identify those schools that are at risk and have a high staff turnover.

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?

27. As above – in health and safety, through the provision of information, on worksites and with schools that have been identified as experiencing difficulties. Mediation whether through the PPTA Field Service and more formally through the mediation service have proven to be the most successful way of resolving employment relationship problems in schools.

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

28. The Association supports early intervention mediation services.

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

29. An online employment resolution tool should be an option available to those parties who want to use it. It should not replace or cause any reduction in the face-to-face mediations that take part in the main centres.

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

30. Increased union membership has proven beneficial to solving workplace problems. That has certainly been the experience of our union and the Departments data also reflects this.

Case study # 1

This personal grievance, settled at mediation, arose from a serious breakdown of relations between the principal and a teacher at a secondary school. The employer, the School Board of Trustees issued a formal warning against the teacher who responded by making a complaint of bullying against the principal and refused on health and safety grounds to be in any situation where she would be alone with him until her complaint was addressed.

JN was a longstanding teacher at the school and when the new principal arrived had at first enjoyed a cordial and friendly relationship with him. However small incidents of what the principal considered to be insubordination and non compliance and JN considered to be professional interference and eventually bullying escalated into a seriously damaged relationship, and finally in a warning from the Board of Trustees. The union believed the warning to be unfair and unwarranted and attempted to resolve the situation with the Board through correspondence, phone conversations and a meeting to no avail.

Accordingly the union filed for mediation assistance and following a day of mediation, and subsequent individual meetings between the mediator and the principal and the mediator and the teacher, the parties were assisted in formulating a memorandum of understanding. This not only resolved the immediate issues by a withdrawal of both the warning against the teacher and the complaint against the principal, but also established agreement and understanding for future interactions, and clarified expectations and processes of communication to ensure similar conflicts would not arise. These were successful and the working relationship was re-established and continued successfully until the teacher's retirement some time later.

Case study # 2

Jonathan had worked in the management structure of his school for some years. He had been a teacher for over thirty years and had worked his way up through the hierarchy. A

new Principal arrived who decided to restructure the management team. He said he wanted younger and more energetic people on his management team. As Jonathan was 60 years old, he was aware that he did not fit well into the Principal's vision. The Principal then began a restructure process that breached the collective employment agreement of the teaching staff. The outcome of the flawed restructure was that Jonathan's position was removed and his duties given to one of the younger members of staff.

Jonathan took a personal grievance with support from his union that settled at mediation. Jonathan decided not to return to his restructured position and to take early retirement.

The employer made a payment at the end of the mediation, which from the union's point of view was a small amount to pay compared with the redundancy costs that would have been incurred if Jonathan had been made redundant.

The mediation process was efficient in that all the employee's issues were resolved in a way that went some way toward redressing the harm caused by the employer's unjustifiable actions.

Case study # 3

Tony was employed to teach part-time on a permanent basis, until being informed by his principal that he would no longer be employed to teach in the same capacity in the following year, but would have his hours cut by half. He was offered no compensation for this. Tony's union lodged a personal grievance on his behalf.

Due to a large number of cases before the Auckland employment relations mediation service at that time, there was some delay before a date could be set down for the mediation. However, at mediation, the mediator was highly skilled and helpful in getting the parties to resolution.

Tony's matter was settled after a full day of mediation. A payment was made by the employer and the parties agreed to sever their relationship.

Neither of the last two case studies were ideal for the teacher, as each found himself in an employment relationship dispute with his employer that ended up with both teachers offering their resignations. Neither was it ideal for the employers as they had to part with money and they both lost hard working and loyal staff members. All parties were required to take time off work to attend the mediations and in one of the above examples the Board was represented by a lawyer so the Board would have been liable for her costs also. However the personal grievances were resolved and litigation was avoided.