Comments by

BusinessNZ

THE VOICE OF BUSINESS

to the

Ministry of Business Innovation and Employment

on

Issues with the Employment Relations Act Disputes Management System

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BUSINESS NEW ZEALAND COMMENTS ON EMPLOYMENT DISPUTES PROCESS CONSULTATION

1. Introduction

1.1. A functioning and efficient employment disputes resolution process is essential for maintaining trust, fairness, and confidence in the workplace, for employers and employees alike.

1.2. But the current system is experiencing significant delays, rising costs for both employees and employers and is being exploited or gamed by some employment practitioners. This is leading to rising loss of confidence in the system, for employers and employees alike. [1]

1.3. The adage *"justice delayed is justice denied"* resonates here.

1.4. A series of recent changes to employment law have also added to the burden by necessitating interpretation of the new provisions, something that can only be done by contesting them. Even more changes are on the way, with new leave and modern slavery legislation currently passing through Parliament.[2]

1.5. Ultimately a combination of more resources and different approaches are required to address these issues.

2. What are employers concerned about?

2.1. Recent surveys by the EMA provide valuable insights as to how business perceives the dispute resolution system. An obvious conclusion from this work is that there are significant obstacles in the present system to the obtaining of easy and timely access to the disputes system, and unacceptably long delays in the delivery of decisions and thus justice. Equally obvious are the resource constraints that limit the number of cases that can be processed.

Dismissals

2.2. The majority of personal grievance cases before the ERA and subsequently before the courts relate to unjustified dismissal. A concern for employers is the risk of losing these cases based on minor technical slips, even when the employee's behaviour clearly warranted dismissal.

[1] A summary of the current system and its caseload is attached at Appendix 1

[2] New health and safety legislation (per the Health and Safety at Work Amendment Bill 2026) was passed on 1 July 2026 but this is not within the jurisdiction of the employment institutions, rather it falls under the aegis of the District and High Courts

2.3. Employers also experience difficulty distinguishing between the approaches required to deal with instances of non or poor performance and misconduct. These are different concepts and the responses to each therefore must be treated accordingly. [3]

2.4. Separately there are common concerns around the complexity of managing redundancies arising from the restructuring or sale of businesses, leading to excessive requirements for consultation and consequent impacts on the value of the businesses being sold or restructured.

High numbers of disputes

2.5. The significant escalation in numbers of disputes in recent times is leading to systemic pressures, delays to outcomes, and escalating costs. This leads employers to feel that they must manage disputes extremely carefully to avoid procedural mistakes, thus adding to the complexity they face.

Increased Complexity and Resources

2.6. Changes to employment law are occurring more frequently and are becoming far more fundamental in nature. For instance, long standing issues with the Holidays Act 2003 have led to the development of new legislation based on an entirely different premise to the existing approach, which has been in place since the 1940s. The rapid emergence of the platform economy, the introduction of pay equity legislation and the recasting of Health and Safety obligations are other notable examples. All have added to a general lowering of understanding of obligations and consequently to an increase in challenges to parties' views of the correct approach to be taken.

Earlier Formal Escalation

2.7. Perhaps as a result of these significant changes, there appears to be a trend of employees moving more quickly toward formal processes, rather than the ideal of attempting to resolve issues directly with their manager or HR. Employers say this contributes to adversarial interactions, reduced trust, and unnecessary escalation of manageable issues. Recent EMA survey results appear to bear this out.

Rising Costs and Settlement Expectations

2.8. Evidence also suggests that settlement expectations have increased, legal and representation fees have risen sharply, and even minor matters now

[3] See Appendix 2 for a graphic representation of the relationship between performance and conduct and the respective responses to poor instances of both.

carry an expectation of financial compensation. Many employers feel the system encourages settlement rather than resolution.

2.9. Employers frequently report instances of employee representatives setting unrealistic expectations around compensation or charging fees that are arguably disproportionate to the scale and complexity of the issue. This concern has been expressed of both lawyers and lay advocates, albeit that, with respect to lawyers, the concerns seem mainly related to sole practitioners rather than larger firms.

2.10. Some employers have reported advocates opening with extremely high settlement demands or quoting fixed-fee packages that exceeded typical legal costs.

2.11. Such approaches risk encouraging a "pay to get the monkey off my back" mentality where financial pressure rather than fairness or justice shapes outcomes. Such situations may also lead to ongoing resentment, further diminishing trust and confidence in the system, lowering motivation and reducing productivity.

Increasing use of AI

2.12. There have been an increasing number of reports of litigant employees and/or their representatives using AI tools such as ChatGPT or Copilot to draft letters, research entitlements and make claims. Experiences to date are that AI-generated content can be overly long or can misrepresent the legal context. Consequences have included unrealistic expectations leading to delays in issue resolution, because time is required to correct misunderstandings and inaccuracies.

Delays and Procedural Stalling

2.13. Another common concern is that (particularly lay) advocates often slow down processes. Examples include advocates being unavailable for long periods, excessive or irrelevant information requests, and tactics arguably aimed at prolonging a dispute. These delays increase uncertainty, cost, and stress for grievants and respondents alike and can undermine timely resolution.

2.14. Concerns have also been expressed, particularly by lawyers, over inconsistent application of rules when it comes to meeting deadlines, supplying documents or seeking extensions of time.

Escalation and Financial Demands

2.15. Survey evidence indicates that advocate involvement often leads to rapid escalation. Instead of attempting to solve issues collaboratively, advocates can (and seemingly do) push matters toward mediation, grievances, or formal action. Responding employers feel this undermines relationship-based problem-solving and increases pressure to settle financially, even in cases where the employer believes they acted fairly.

2.16. Another facet of early escalation is some advocates tending to not apply for mediation and going straight to lodging a Statement of Problem with the Employment Relations Authority. Such actions tend to "ramp up" pressure on employers, whose representatives typically must then attempt to get the matter referred to mediation prior to submitting a Statement in Reply. Anecdotal evidence suggests that the Authority is not consistent in how it responds to such requests.

Unprofessional employment advocates

2.17. A very common concern relates to the professionalism of advocates, particularly in the context of the so called "no-win-no-fee" model. Many employers suspect that the escalation concerns identified in para 5.13 above stem from unscrupulous advocates seeking earning opportunities by "shouldering the employee's burden" in return for a fee. This is driving strong calls for the introduction of professional standards for employment advocates.

2.18. Consistent with this view, many employers report experiences of employment advocates behaving in ways that escalate conflict rather than resolve it. Aggressive communication, misleading advice, unprofessional conduct, and strategies that prioritise the advocate's financial interest over constructive outcomes have all been cited as examples of unprofessional conduct.

2.19. Concerns have also been expressed at the perception of lay advocates being treated more leniently on matters of courtroom etiquette filing deadlines and standards of evidence and cross examination. This serves to highlight the standards to which qualified lawyers are held and helps fuel concerns of double standards from the judicial authorities.

Lack of Regulation and Qualifications

2.20. "No win, no fee" employment advocates typically offer to represent employees in personal grievances without charging unless they succeed. They are coming under increasing scrutiny in NZ (and elsewhere). Many employers feel that some form of regulation would help protect vulnerable employees from being misled about their prospects or pressured into financial arrangements that primarily benefit the advocate.

2.21. Advocates often are not lawyers. "Lay" advocates often have little or no legal training, yet they act as representatives in legal processes such as mediations or Employment Relations Authority (ERA) hearings. Unlike lawyers, lay advocates are not subject to the Lawyers and Conveyancers Act or the rules of the New Zealand Law Society, meaning no code of ethics, continuing education, or disciplinary framework applies. [4]

Vexatious or Inflated Claims

2.22. Some advocates have also been accused of:

- Encouraging clients to pursue marginal or exaggerated claims to secure a quick settlement.
- Using the cost and risk of legal proceedings to pressure employers into settling rather than defending even weak cases.
- Filing poorly prepared or unsubstantiated cases, wasting ERA or mediation services' time.

2.23. Many, if not most, employment cases take place in mediation, the statutory terms of which prohibit the later use of any material or information provided or disclosed during the mediation process. Under this "cone of silence", advocates have been known to use overbearing or aggressive behaviour to leverage settlements from inexperienced business managers and owners.

Power Imbalances and Exploitation of Vulnerable Clients

2.24. Employees seeking help are often recently dismissed, under emotional stress, and without resources or knowledge of their rights. Often, they are also misled by marketing that implies guaranteed success or hides the financial risks. Employers have expressed concerns that advocates tend to exploit this by taking advantage of clients' desperation for compensation as well as settling for low amounts to collect quick fees.

3. What are the implications for New Zealand?

3.1. Feedback from employers suggests a dispute-resolution system that is harder and slower to navigate, and increasingly shaped by cost pressures, behavioural shifts, and new technologies.

3.2. Ideally, disputes should be resolved at the lowest possible level, the lowest being the workplace in which the dispute arises. However, the evidence is that workplace issues are escalating to formal stages earlier, taking longer to resolve, and costing organisations more - both financially and in the time that managers must spend handling them.

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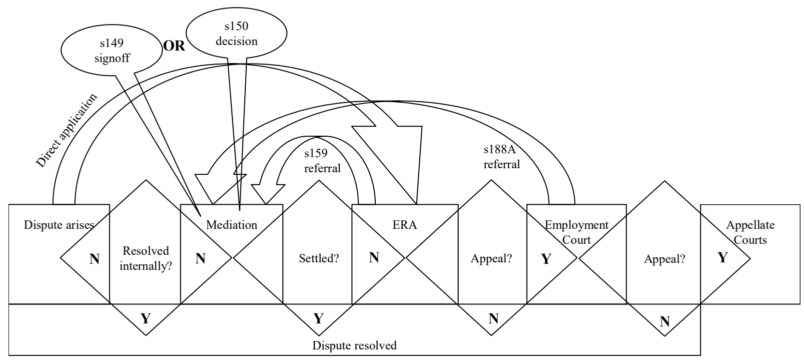
[4] In June 2026, the NZQA announced the creation of the Level 5 *New Zealand Certificate of Employment Advocacy*, but this has yet to be offered by any education institutions.

3.3. The time, energy and cost that must be dedicated to resolving issues in this environment arguably are to the detriment of New Zealand's need to increase productivity and reduce its domestic and international debt burdens.

3.4. The diagram below illustrates the multiple points of interaction that must be managed as parties navigate through the system. Each point is the source of pressures and hence the concerns being expressed.



Every point of interaction in the system should be examined for opportunities to improve system efficiency and access to justice.

3.5. Businesses are also facing rising expectations from employees and representatives, greater procedural demands, and emerging challenges such as AI-generated correspondence and more sensitive claims; all place pressure on existing HR and leadership capability and create distractions from focusing on business performance.

4. What could be changed?

4.1. The issues raised by employers suggest a need for changes to the disputes resolution system to

- Achieve resolution quickly at the lowest possible level
- Discourage or remove opportunities for exploitation of the system,

4.2. The New Zealand Law Society, ERA Members, and employment law practitioners have all expressed concern about the current situation, as have employment relations and human resources practitioners and employer organisations such as the BusinessNZ Network.

4.3. A more structured yet more efficient regulatory environment would be preferred, to protect both employees and the fairness of the employment relations framework.

4.4. Taking all the above into account, we suggest six areas of the system in which changes could achieve these objectives.

- Increase system resources
- Simplify performance management and dismissal processes (including those relating to redundancy)
- Use mediation more effectively
- Introduce a "fast track" to the ERA process
- Introduce a code of ethics for "lay" advocates (i.e. non practising lawyers)
- Apply procedural rules consistently to lawyers and lay advocates alike.

4.5. All focus on increasing the number of cases that can be finalised within a reasonable time frame whilst preserving underlying obligations of good faith and fair process.

Increase system resources

4.6. The statistics set out in Appendix 1 clearly indicate a system that is overloaded. Simplifying processes and changing criteria will not of themselves alleviate this situation. Indeed, the looser the criteria used to govern dispute management, the more likely it is that instances of capricious of vindictive behaviours may emerge. Arguably, this possibility is greater in organisations with little or no internal HR/ERE expertise and/or limited or unaffordable access to external advice. This is the reality of case many, if not most, small businesses.

4.7. Ultimately justice is best served when it is timely and based on generally accepted fair criteria. This in turn requires that the system be equipped to deal with the majority of cases in a timely manner.

Options for improvement

- Establishing a separate forum for fast tracing cases of a technical or administrative nature and for small businesses that lack internal legal/HR expertise.

- Increasing the number of mediators, Authority members and Employment Court judges in the short to medium term would enable the current backlog of cases to be reduced.

- Increasing the number of locations in which resources are based.

- In the longer term, numbers should be indexed to an assessment of claim numbers and their type (also making use of system improvements such as fast tracking).

Simplify performance management and dismissal processes

4.8. Currently, dismissing an employee requires a fair process and a "good reason" (just cause). There are three recognised "good reasons" for dismissing an employee. They are redundancy, poor performance and serious misconduct (involuntary).

4.9. There are two other means of terminating employment, namely resignation and retirement. While these are nominally voluntary in nature, they are also the primary source of claims for constructive dismissal on the basis that the resignation or retirement was the result of coercive pressure from the employers

4.10. In dealing with redundancy the courts have established a complex set of requirements that business complain are excessive and ultimately damaging to the ability of businesses to respond to rapidly changing market conditions.

4.11. Complaints centre mainly on the extent to which employers must consult with employees and their representatives, including unions. There have been many instances when employers have endured many months of legal challenges to proposals for change that are essential to business survival.

4.12. We suggest *statutorily codifying minimum requirements* for such situations that give a clear pathway to businesses employees for understanding the need for change, providing an ability to contribute to making change successful and expediting decisions. These would constitute a "safe harbour" for employers in manging these processes and provide certainty to employers in terms of expectations and entitlements.

4.13. When it comes to termination on the basis of poor performance, the procedural elements of termination are founded on the principle of natural justice. Based on case law, a sound process has as a minimum the following sequential steps: [5]

- *Identify and Document:* Pinpoint the performance gaps using clear, objective data rather than vague impressions.

- *Formal Notification:* Invite the employee in writing to a formal performance meeting. State clearly that the meeting could lead to a formal warning or a PIP. Offer them the right to bring a support person or representative.

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[5] See the Employment New Zealand website; Formal ways to manage a performance issue.

- *Establish Clear Targets:* Establish and agree a PIP document that details what standard is expected, how it will be measured, what support (e.g., training, mentoring) will be provided, and a reasonable timeframe to improve (often 4 to 8 weeks depending on the role).

- *Regular Review Meetings:* Hold scheduled check-ins (e.g., weekly or fortnightly) to provide objective feedback and log progress in writing.

- *Final Outcome Assessment:* At the conclusion of the PIP, review the total performance. If targets are unmet, the employer can proceed to a formal warning or termination, provided the outcome was clearly flagged as a possibility from the beginning.

4.14. These steps are based on the principles of good faith and procedural fairness. Section 103A of the [Employment Relations Act 2000]. sets the core legal test as whether the employer's actions match what a fair and reasonable employer could do in all circumstances.

4.15. Simplifying employee dismissal while upholding natural justice suggests a need to *shift the focus away from rigid procedural steps towards `fundamental fairness.* At present only minor procedural defects may be discounted.

4.16. A common complaint from both large and small businesses is that performance management often bogs down around what defines a "reasonable opportunity" to improve.

4.17. And in many cases the timeframe is extended unnecessarily by the support offered and provided, when in fact this is just "padding out" the time taken to conclude that an employee is not capable of performing to the extent required

4.18. Here we suggest, *introducing a clear statutory framework or template* that defines default Performance Improvement Plan (PIP) durations (e.g., a standard 4-week or 6-week block) based on the complexity of the role.

4.19. Under this approach the employee still receives clear, documented targets, adequate support, and regular review meetings. The simplification removes the threat of costly legal debates over whether the timeframe provided was "reasonable".

4.20. A growing trend towards self-representation has created its own issues, particularly in cases where the litigant employee has insufficient knowledge and/or experience to take and manage a case that aligns with what is legally possible. In addition to statutory timeframes, consideration should be given to *developing "Starter Kits"* for both employers and employers. These would provide guidance on what claims are possible and the steps to be taken in both making and responding to claims.[6]

4.21. On the other hand, workplace misconduct cases often stall when parties disagree on how much time is needed to prepare a defence. *Setting clear (preferably statutory) time boundaries* gives employers a defined path forward, preventing stalling tactics. At the same time, it ensures the employee has an open, predictable window to seek representation and prepare their response. Again, the provision of a "Starter Kit" to guide employees in their preparatory work and assist employers in preparing responses would be useful.

4.22. The table below sets out the current differences more clearly.

Poor Performance	**Serious Misconduct**
A worker who is acting in good faith but lacks the capability, skill, or efficiency to meet the explicit demands of their role.	Actions that deeply destroy the central trust and confidence between employer and employee (e.g., theft, violence, fraud, serious safety breaches).
Gradual process. Requires structured coaching, warnings, and a sustained opportunity over weeks or months to reach acceptable goals.	Immediate action is required while the event is fresh, though the employee must still be given adequate time to respond.
Results in termination with contractually agreed notice or notice pay, and only after warnings or PIPs fail to resolve the gap.	Can result in summary dismissal (termination on the spot without notice or notice pay) if the behaviour is proven via a fair process.
Heavily focused on remediation, providing structured support, training, clear benchmarks, and tracking progress.	Heavily focused on fact-finding, evidence gathering, and determining whether the employee committed the alleged act.
Remedies for poor performance dismissals are only reduced if the employee actively obstructed the employer's management	The 2026 Amendment Act dictates that if an employee's behaviour amounts to serious misconduct, their right to personal grievance remedies is entirely eliminated.

[6] For a fuller discussion of this option see *A yellow Brick Road? Paving the way for lay litigants in the Employment Court*, Chief Judge Christiona Inglis, October 2025.

Options for improvement

- Legislate a simple process that establishes a safe harbour for employers in determining the appropriate approach to redundancy, performance and misconduct
- Provide "Starter Kits" to employees and employers that set out how to raise and manage disputes (for employees) and how to respond (employers).
- Legislate default minimum timeframes in legislation for different types of disciplinary or performance management actions (i.e. a reasonable time for an employee to review information before a misconduct meeting or period before reviewing progress under a PIP).

Use mediation more effectively

4.23. The vast majority of employment relationship problems that escalate past the ideal forum of internal resolution are the subject of mediation under the auspices of Part 10 of the Employment Relations Act 2000. Nearly 70% of cases settle and are made binding by the signing of written terms of settlement by a mediator or authorised to do so under the auspices of s149 of the Employment Relations Act 2000.

4.24. Each year thousands of agreed terms of settlements reached outside of a mediation are sent to MBIE for a mediator to sign. Before signing can occur, the mediator must contact each party and ensure they understand the effect of the mediator signing the agreed terms of settlement.

4.25. Similarly, there is no current definition of a mediator, or regulation of them under the Act. Parties looking to settle between themselves may not know how to find an appropriate mediator.

4.26. That said, it is necessary to take account of why s149 currently restricts the signing of mediated terms of settlement to MBIE authorised mediators.

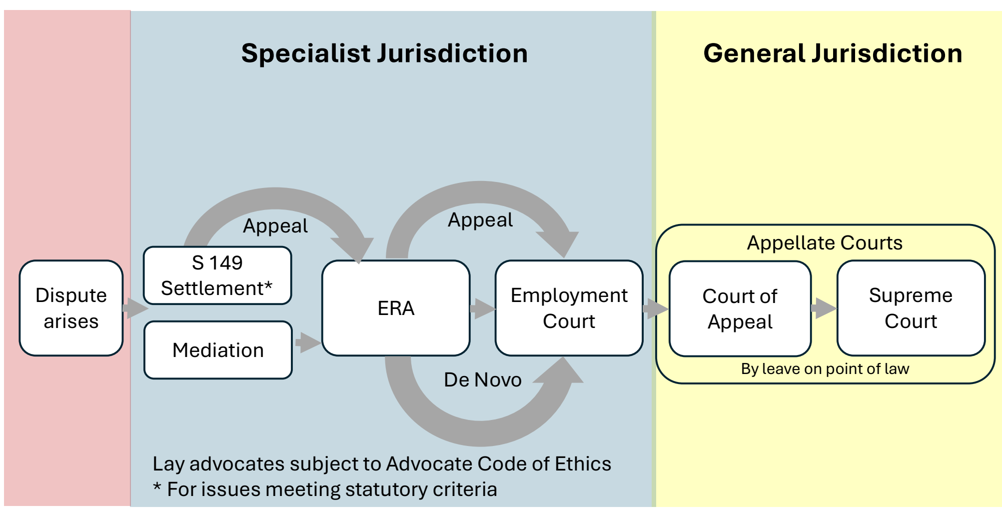
4.27. Parliament recognised that a certified settlement is final and binding, cannot be cancelled under the Contract and Commercial Law Act 2017, and bars parties from bringing the underlying dispute before the Employment Relations Authority (ERA) or Employment Court. Because this effectively strips away a right to further access the courts, Parliament basically refused to let private parties or unauthorized third parties sign off a settlement.

4.28. Hansard and policy notes emphasise that the mediator is not just a witness. By law, they must personally explain the severe statutory impacts of the signature and extract an explicit affirmation from both sides before executing it. In essence, the signature of an officially designated MBIE mediator acts as a crown-backed guarantee that an objective statutory process was executed. The Supreme Court has upheld that view in *TUV v Chief of New Zealand Defence Force [2022] NZSC 69*.

4.29. This situation creates uncertainty as to the status of the agreed terms of settlement where they are signed by the parties, but not by an authorised mediator. A key aspect of this uncertainty is whether or not it is possible to bring the underlying dispute before the ERA when the settlement was not signed by an authorised mediator. This uncertainty occurs both while waiting for the mediator to sign, and where one party essentially changes their mind and does not affirm their request for the mediator to sign the agreed terms of settlement.

4.30. Simply removing the s149 requirement to have terms of settlement signed by an MBIE approved mediator may create more problems than it solves, including increasing the number of opportunities to escalate a dispute beyond the mediation level.

4.31. However, this could be at least partially overcome by permitting a limited right of appeal as depicted in the diagram below.



4.32. It needs to be recognised that permitting a right of appeal would not assist easing the burden of cases overall. It is however an option that should at least be considered.

4.33. In addition to the issue of who can sign settlements, employers have expressed concerns about access to mediation outside the main centres. The South Island in particular has reported difficulties in accessing MBIE approved mediators. Allowing all mediators to sigh settlements may also assist in increasing regional access to mediation services. Greater use of online approach to mediation would also assist in this regard.

Options for improvement

- Establish statutory criteria to define a mediator as a person appointed by disputing parties to assist them in resolving the dispute.
- Permit parties to a settlement to appeal on limited grounds (e.g. the non-fulfilment of the agreement)
- Enable all mediators to sign terms of settlement,
- Encourage greater use of online mediation
- Establish a (voluntary) public register of mediators

Introduce a "fast track" to the ERA process

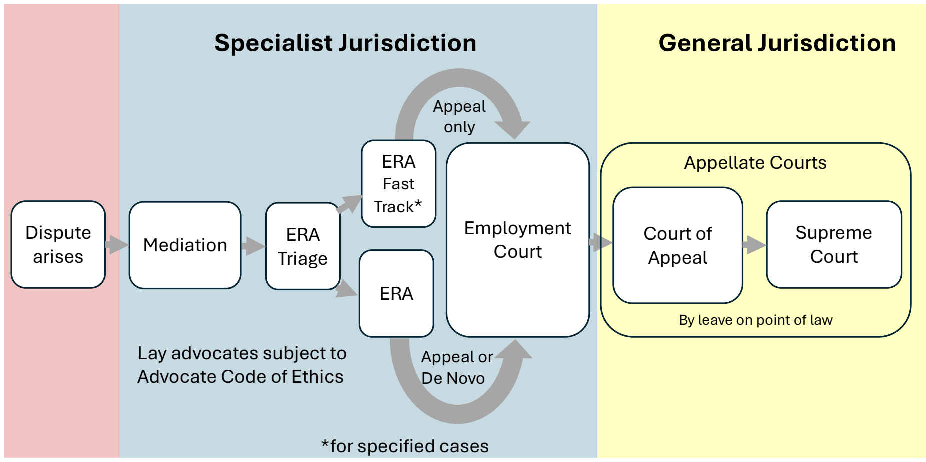
4.34. Currently delays between the lodging of a Personal Grievance and a hearing are effectively denying both grievants and respondents a fair process and, ultimately, access to justice.

4.35. This problem is exacerbated by the resources available to business to manage cases internally. Larger businesses usually have experienced HR/ER practitioners who can usually navigate the dispute management system with minimal outside assistance. The cost of this is borne withing operating overheads. Small businesses on the other hand are usually dependent on external resources, which incur additional and sometimes prohibitive extra costs.

4.36. This disparity needs recognition. We suggest ethe *establishment of a separate "fast track" tribunal style body* that enables the likes of small businesses to access affordable dispute management outcomes.

4.37. Establishing a separate tribunal style like body would also assist in resolving the second aspect of the ERA bottleneck, that of cases involving simple interpterion of a statute or contract. At present, all claims to the ERA simply enter a queue; it is relatively rare for urgency to be granted to a case. However, when they reach the front of the queue many cases are quickly dealt with because they are relatively straightforward, requiring no more than the "correct" application of the law, e.g. instances of incorrect payment against statutory criteria. Other cases are more demanding, particularly those relating to the application of natural justice, due process and good faith.

4.38. Separating cases into these categories and introducing a more streamlined approach to the "transactional" cases may assist in reducing the overall turnover of cases without the need for significant extra resources. The diagram below illustrates how this may differ from the present practice (para 2.1).



4.39. Dealing with the concern over the lodging of Statements of Problem in the Employment Relations Authority as a first step (rather than first attending mediation) could be managed by the Authority declining to accept a Statement of Problem until a mediated settlement has at least been attempted.

4.40. That said, the significant backlog experienced at present will not be solved only by of new judicial fora or altering the triaging and processing of cases. Consideration also needs to be given to increasing the number of ERA members at least in the short to medium term.

Options for improvement

- Define "fast trackable" disputes
- Establish a separate tributary style body to deal with fast tracked cases including technical interpretation and cases in small businesses
- Limit hearing times for fast trackable disputes, with preference for issues to be settled "on the papers"
- Prohibit lodging Statements of Problem in the ERA before mediation has occurred.

Introduce a code of ethics for "lay" advocates (i.e. non practising lawyers)

4.41. In New Zealand, the rules governing employment advocates differ fundamentally depending on whether the advocate is a qualified lawyer or a non-lawyer (lay) advocate.

4.42. Unlike lawyers, non-lawyer advocates are not bound by an independent statutory professional body or a compulsory code of conduct. Instead, their conduct and compliance with court deadlines are regulated strictly through the statutes, regulations, and practice directions of the specific institutions they appear before.

4.43. Any advocate who is a practicing lawyer is governed by the Lawyers and Conveyancers Act 2006 and the Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

4.44. Under these rules, a lawyer's overriding duty is as an officer of the court. This absolute duty of honesty, integrity, and professionalism applies equally when appearing before the Employment Relations Authority (ERA), the Employment Court, or appellate courts. If they act unprofessionally, they face disciplinary action via the New Zealand Law Society.

4.45. However, non-lawyer advocates have no standalone professional regulatory body. Instead, their personal conduct is bound by the specific rules of the forum in which they are appearing.

4.46. In the ERA, Practice Note 3 (Representatives' Duties) states that representatives have twin duties to assist their client and to assist the Authority. They must be "polite and constructive" with Authority Officers, Members, and opposing representatives.

4.47. In the Employment Court, advocate conduct is governed by the Employment Court Regulations 2000. As in the ERA, if an advocate acts disruptively, misleadingly, or in contempt, the Court can refuse to hear them, bar them from representing the party, or issue a formal warning.

4.48. In the Appellate Courts, non-lawyer advocates have no automatic right of audience. Under the Court of Appeal (Civil) Rules 2005 and the Supreme Court Rules, a lay advocate must seek special leave to appear. If granted, they are expected to uphold the same behavioural and procedural standards as an officer of the court.

4.49. In terms of qualifications, the NZ Qualifications Authority (NZQA) recently announced the creation of a new qualification designed to support high-quality employment advocacy practice and strengthen public confidence.

4.50. The New Zealand Certificate in Employment Advocacy (Level 5)[7], is a qualification developed following engagement with employment advocacy

[7] The new employment advocacy qualification [**Ref: 5675**] and standards [**Refs 41115-41118**] can be found on the NZQA website.

professionals and sector representatives. It is designed to support employment advocates to build the practical legal knowledge, ethical frameworks, and advocacy skills needed to guide people through employment dispute processes with confidence, professionalism, and integrity.

4.51. Requiring non lawyer advocates to acquire this qualification should be considered as an option for improving the standard and consistency of employment advocacy in the future.

Options for improvement

4.52. Many of the concerns expressed in relation to the behaviours and disparities in application of rules can be addressed by requiring existing rules to be universally enforced. Lawyers are already bound by these rules; applying them universally could be achieved by codifying them to make them applicable to all persons appearing as employee representatives in all dispute resolution fora.

4.53. Achieving this may require creation or designation of a body to enunciate and enforce this approach. A complaint against the conduct of an advocate requires investigation and the application of the relevant criteria before an appropriate response can be developed and applied.

4.54. This makes in possibly inappropriate for the Authority of Court to be that body, as the alleged conduct will occur in the context of a case already before that institution. To do otherwise risks creating a "trial within a trial".

4.55. While the Authority and Court can and should be encouraged to exercise their powers more rigorously, the issue of sanctions really needs to be managed independent of the Authority and Courts, as is already the case for lawyers.

4.56. This need not be a membership-based body as is the case with the NZ Law Society with respect to lawyers. It simply needs to be a body that has the power to investigate complaints and apply sanctions. One body that may be suitable to take on this role is LEADR (Lawyers Engaged in Alternative Dispute Resolution). Its members are by definition legally trained and therefore suitably competent to carry out the required functions.

4.57. Other changes may be necessary to ensure that, despite obligations to comply with ethical conduct rules that employee representatives are discouraged from using the "cone of silence" that hangs over mediation proceedings to shield unethical behaviour from scrutiny.

4.58. Currently, s148 of the Employment Relations Act 2000 protects against disclosure of all information presented and matters discussed in mediation.

4.59. To address this, suggested additional changes are;

- Requiring non lawyer advocates to hold the New Zealand Certificate in Employment Advocacy.
- Creation or designation of an independent body to develop an Advocates' Code of Ethics, investigate alleged breaches of the Code and apply appropriate sanctions to any breaches.
- Removal of the protections in s148 of the Employment Relations Act insofar as the information relates to the conduct of an advocate.
- Mandatory disclosures about success fees and contractual terms to address concerns that the mediation may be of greater benefit to the advocate than their client.

Apply procedural rules consistently to lawyers and lay advocates alike.

4.60. When it comes to timelines (discovery, evidence bundles, submissions, and applying for extensions), the law treats lawyer and non-lawyer advocates exactly the same. Both are fully bound by the orders issued by the relevant body.

4.61. That said, because the ERA is an investigative body rather than a traditional court, it operates with more procedural flexibility. Deadlines are established through Member's Directions or timetables issued at a case management conference. The ERA does not have a rigid, default discovery process. Instead, it uses its investigative powers under section 160 of the Employment Relations Act 2000 to direct parties to provide specific documents or issue witness summonses. If an advocate misses a deadline or fails to provide documents, the ERA can issue an order for compliance under section 137. If the non-compliance continues, the ERA can award fine-like penalties under section 135, draw adverse inferences against the defaulting party, or order the non-compliant party to pay elevated legal costs.

4.62. On the other hand, the Employment Court functions more in alignment with the High Court, meaning procedural rules are strictly enforced. Deadlines for filings, extensions, and submissions are strictly dictated by the Employment Court Regulations 2000 and the Employment Court Practice Directions. Discovery is governed broadly by Regulations 56 to 61 of the Employment Court Regulations 2000, which dictate the formal process for the disclosure of documents, objections, and applications for verification orders.

4.63. Extensions must be formally applied for in writing before a deadline expires, showing clear, justified reasons. Under the District Court Rules 2014 or High Court Rules 2016 (which the Employment Court can reference for guidance where its own regulations are silent), failure to comply with court timetables can result in the Court striking out a statement of defence, dismissing the claim entirely, barring evidence from being presented, or issuing severe personal or party costs.

4.64. However, once an employment matter escalates to the Court of Appeal or Supreme Court, the strict civilian court frameworks take over entirely. The Court of Appeal (Civil) Rules 2005 or the Supreme Court Rules 2004 dictate absolute limits for case management, case bundles, and written submissions. These courts are historically strict regarding deadlines and extensions of time are rarely granted without exceptional circumstances. Failure to file case management documents or security for costs within the statutory timeframes can lead to the appeal being deemed abandoned automatically.

4.65. Of importance here is that, as a general rule, if an advocate (especially a non-lawyer lay advocate) fails to meet a deadline or acts improperly, the legal liability falls entirely on the client. The courts will penalise the party itself with costs, struck-out claims, or lost cases, leaving the client with few options for recourse other than suing the advocate privately for breach of contract.

Options for improvement

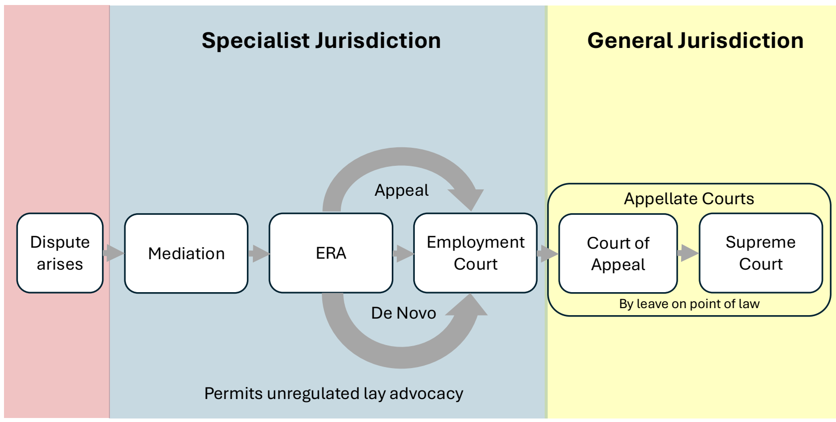
- Codify practice, court and statutory standards of conduct as applying to all persons appearing as representatives of clients in dispute resolution fora.

- Within the ambit of equity and good conscience, require the Authority and Employment Court to impartially administer requirements of expected practices.

Appendix 1

The Current System

The New Zealand disputes resolution system comprises three main elements: the Mediation system, the Employment Relations Authority and the Courts.



The Mediation Service, the Employment Relations Authority and the Employment Court all source their authority and jurisdiction from Part 10 of the *Employment Relations Act 2000*. The appellate courts derive their mandates primarily from the *Senior Courts Act 2016* and the *Criminal Procedure Act 2011*.[8]

Cases in the system

Mediation Service

Public records indicate that the Mediation Service conducted 5130 mediations in 2024/25 an increase of 12% compared to the previous year. Furthermore, full-day mediations increased by 25% over a three-year period, resulting in a 7-week average backlog by late 2025. That said, mediations were generally very successful, with 67% of mediations successfully resulting in a resolved settlement agreement. Once the mediation session begins, the dispute is typically finalized or settled within 1 day.

[8] The *Senior Courts Act 2016* acts as the "master statute" governing NZ's top tier judiciary. It establishes the jurisdiction, panel allocations, and operational parameters for both the Supreme Court and the Court of Appeal. The *Criminal Procedure Act 2011* dictates how, when, and on what grounds criminal convictions, sentences, or pre-trial rulings can be appealed from trial courts up through the appellate system.

Employment Relations Authority (ERA)

The ERA reported receiving 3070 formal applications in the 2025 year, an increase of over 11% on the previous year and 31% since 2023. The ERA officially issued 852 determinations over the 2025 period, equating to around 27% of applications received. A severe caseload bottleneck means that a standard application takes 12 to 14 months to proceed from filing to a formal investigative meeting and final determination, even though over 95% of cases receive a determination within 3 months of a hearing. Personal grievances (predominantly unjustified or constructive dismissal) remain the primary problems lodged, followed closely by legislative breaches and unpaid wage claims. 40% of claimants were represented by non-legal advocates while around 18% were self-represented.

Employment Court

Court records show there were 233 new cases filed in the Employment Court in the 2024/25 year, an increase of 33% over the 157 cases the previous year. Due to the spike in filings, the number of active cases remaining on the Court's books grew from 171 to 228 active cases. The Court successfully cleared and disposed of 213 cases over the same period. Roughly 22% of all ERA determinations are now being formally challenged in the Employment Court, rising from 17% in previous years. Challenging an ERA decision requires an additional 12 to 18 months from the date the challenge is lodged due to the tight judicial schedule and significantly more complex evidential requirements.

Reasons for disputes

Data about the kinds of disputes in mediation is scarce given that mediation proceedings and outcomes are confidential to the parties and cannot be used later in evidence. However, the 2025 Annual Report of the Employment Relations Authority breaks down cases in some detail, and this is instructive in terms of the proportionality of the various types of cases.

77% of all cases lodged before the ERA were personal grievances, and of the personal grievances, 54% related to unjustified dismissal. Nearly 25% of the unjustified dismissal claims related to constructive dismissal.

Appendix 2

Responding to poor performance and conduct