

Department of Labour
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Personal Grievance Determinations in the Employment Relations Authority

17 July – 18 August 2006

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EXECUTIVE SUMMARY

This report analyses the characteristics of personal grievances determined by the Employment Relations Authority. The characteristics considered in this report include the type of personal grievance claimed, length of service, representation of parties before the Authority, outcomes of determinations, and awards made by the Authority.

This report is based on 33 determinations¹ about personal grievances issued during the five weeks between 17 July and 18 August 2006. In one determination there were two applicants. In a number of cases more than one personal grievance was claimed (for example an unjustified dismissal and unjustified disadvantage claimed). In total, applicants in the 33 determinations claimed 43 separate personal grievances.

Because this report is based on determinations from a limited timeframe, the results in the report are indicative of that selection of determinations only and not necessarily representative of personal grievance determinations in the Authority in general. In particular, the total number of determinations is small and it would be unwise to make sweeping generalisations. The Department will review the usefulness and feasibility of broader research into Authority determinations, including linking to Court challenges.

In analysing whether a determination or claim was determined in favour of the employer or employee, determinations were considered to be in favour of the employee when they had all claims found in favour of them, when they had one of two claims found in favour of them, and when they had non-personal grievance remedies awarded. We have separately calculated determinations where employee conduct led to a reduction in final payout.²

The main findings from the personal grievance determinations analysed during the research period were:

- Types of personal grievance claims: The most common type of personal grievance claimed was an unjustified dismissal claim. Unjustified dismissal was also the most common personal grievance claimed at Mediation.
- Representation: 97% of employees and 88% of employers had representation when they appeared before the Authority. The most common type of representation for both parties was a lawyer. Lawyers were also the most common type of representation at Mediation. However, the level of representation was lower at Mediation: 89% for applicants (usually employees) and 61% for respondents (usually employers).
- Length of employment: The most common length of employment before the action giving rise to the personal grievance occurred was between one and four years. This is similar to the findings in the mediation survey.

¹ In one case there were two applicants (who were awarded separate remedies). For the purposes of this report, the two applicants' claims are treated as separate determinations.

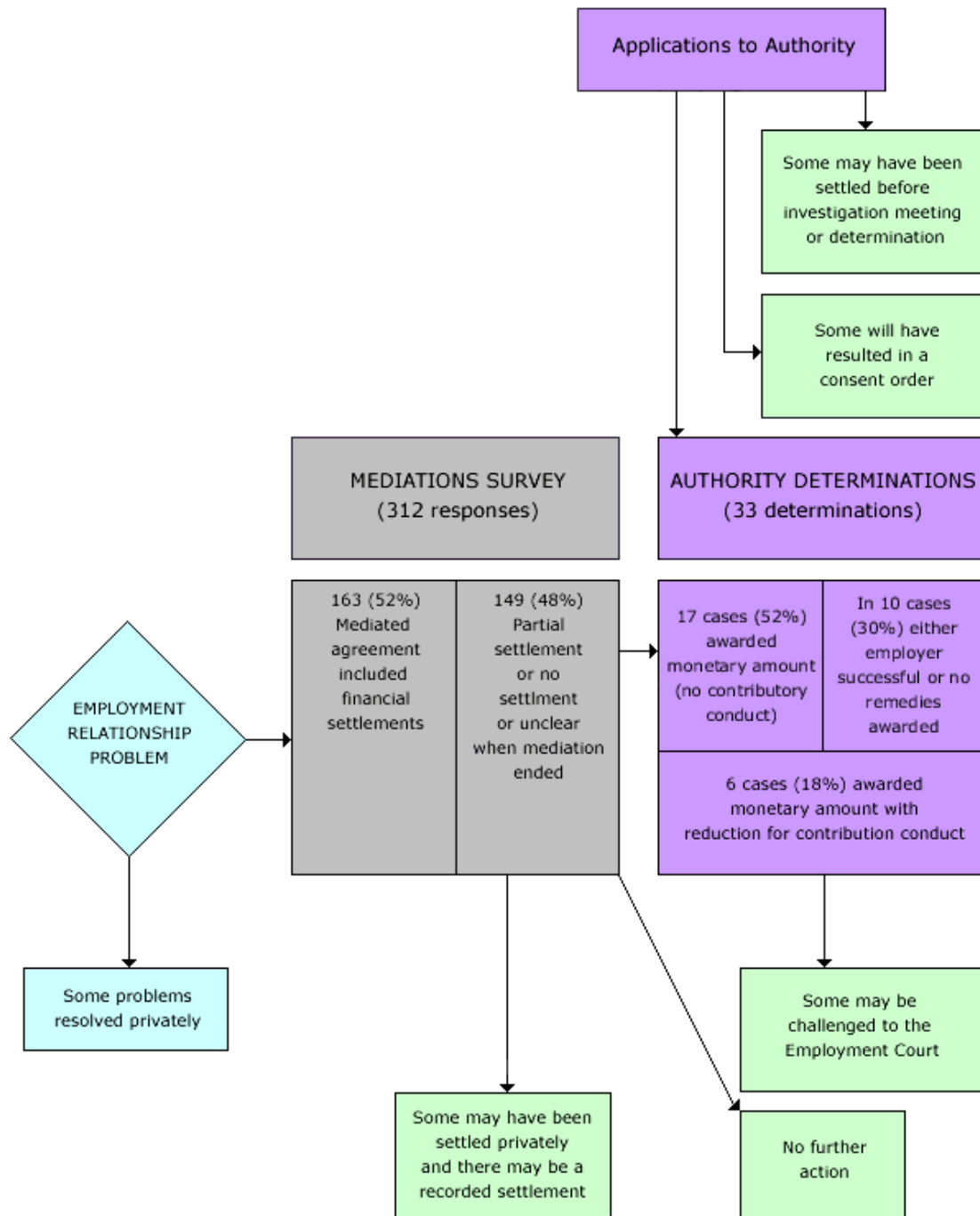
² This is explained further in the body of the report.

- Outcome of determinations: 52% of determinations found in favour of the employee, 24% found in favour of the employer, and 24% found in favour of the employee but either no remedies were awarded or remedies were reduced because of contributory conduct. These figures need to be considered in light of the fact only substantive personal grievances were considered in this survey, so for example, personal grievance cases which were struck out or dismissed at an interim stage have not been included.
- Compensation awarded: Compensation was awarded without any reduction for contributory conduct in 45% of the determinations. Compensation was awarded in a further 18% of the determinations with some reduction for contributory conduct. The most common amount of compensation awarded (taking reductions for contributory conduct into account) was between \$2,000 and \$5,000.
- Reimbursement awarded: Reimbursement of lost wages was awarded in 24% of the determinations without any reduction for contributory conduct. In a further 18% of cases, reimbursement of lost wages was awarded with some reduction for contributory conduct. Reimbursement of lost wages varied up to 52 weeks.
- Costs were awarded in 36% of cases, varying in amounts up to \$5,000.
- Remedies awarded by the Authority can be contrasted with the most common financial settlement in mediation, which is between \$2,000 and \$5,000. The comparison between monies awarded in the Authority and settlements in Mediation is limited by the fact that it is not known what the financial settlement in mediation comprised of and there is flexibility in what can be agreed between parties at mediation, while the Authority is bound by statute when awarding personal grievance remedies. Also, half of the reimbursement awards made by the Authority refer only to the number of weeks reimbursement was awarded for (not the wage amount). Therefore, total monetary amounts for monies awarded are not available for all personal grievance determinations in the Authority.

Figure 1 shows the progress of employment disputes through the institutions during the research period.³

³ This figure includes information from mediation research. See Personal Grievance Mediations Conducted at the Department of Labour – a snapshot, June 2007.

Figure 1



During the research period, the survey indicated that in about half of the employment disputes mediated by the mediation service an agreement was reached that included some financial settlement. In the other half of the mediations there was with either no settlement, partial settlement or it was not clear at the end of the mediation whether a settlement would be reached.⁴

⁴ Care should be taken when making conclusions based on this research. The very small sample size means that findings can only be indicative.

In the research period, there were 33 determinations and 43 separate personal grievance claims in those determinations. In 52% of the cases, the employee was awarded compensation, reimbursement of lost wages, or another monetary amount, without any reduction for contributory conduct. In a further 18% of cases, the employee was awarded remedies, but with some reduction for contributory conduct. In 30% of determinations, either the employer was successful or there were no remedies awarded.⁵

⁵ In one determination, the employee was not awarded any remedies, but was awarded costs.

INTRODUCTION AND OBJECTIVES

Introduction

This report aims to provide the Department of Labour with an initial understanding of the characteristics of Employment Relations Authority determinations involving personal grievances. This report also compares findings from the analysis of Authority determinations with the findings of the Mediation Survey.⁶

Objective

The overall objective of this research is to provide a better understanding of the characteristics of determinations issued by the Authority involving personal grievances claims and the variables that may influence determinations such as the impact of representatives, the type of claim and the length of employment.

Method

The method used for this research was to analyse all determinations concerning personal grievances made by the Employment Relations Authority for period 17 July – 18 August 2006 (“the research period”). This is the same period as for the mediation survey.

The Department’s legal researchers provided Workplace Policy with all the determinations issued by the Employment Relations Authority for the specified period. Information from all determinations concerning personal grievances made during the research period was entered into an Access database.

Only determinations related to substantive personal grievances have been included. This means that determinations involving disputes, consent orders, compliance orders, or practice and procedure issues have not been included. Also, cases where an employee had brought a personal grievance but the Authority was determining a preliminary issue, rather than a substantive personal grievance, have not been included. For example, cases involving an interim reinstatement claim, the issue of whether a personal grievance was brought within 90 days, or the issue of whether the Authority had jurisdiction to hear the personal grievance (eg whether there was accord and satisfaction) were excluded.

Costs awarded have been included where they were determined as part of the substantive personal grievance determination, as well as where they were decided later as a separate determination.⁷

A total of 33 determinations,⁸ and 43 separate personal grievance claims were analysed. (Some cases had more than one personal grievance claim, for example a claim for unjustified dismissal and unjustified disadvantage).

⁶ Personal Grievance Mediations Conducted at the Department of Labour – a snapshot, June 2007.

⁷ All costs determinations related to the personal grievances from the research period and decided before 31 May 2007 are included in this survey.

Limitations

Authority determinations do not necessarily include all the information captured by the mediation survey. Authority determinations routinely include information such as representatives, but generally only contain what the Authority considers necessary to make the determination (for example, determinations do not necessarily record the age or ethnicity of applicants or how many employees are in the employer's organisation). Therefore, there are some areas where we do not have data to compare with outcomes reached at mediation.

The research period was only five weeks. This length of time provides only a snapshot of the type of personal grievances and outcomes reached in the Authority. It would be ideal to capture this information on an on-going basis so that more comprehensive analysis can be carried out.

⁸ In one case there were two applicants (who were awarded separate remedies). For the purposes of this report, the two applicants' claims are treated as separate determinations.

RESULTS

Number of determinations and claims

33 Authority determinations were analysed for this report. In total, applicants in the 33 determinations claimed 43 separate personal grievances.

Types of personal grievance claims

Over the research period, the following types of personal grievance claims were considered in Authority determinations:

- unjustified dismissal;
- unjustified disadvantage; and
- sexual harassment.

The most common type of personal grievance claim was an unjustified dismissal, (almost 70% of personal grievance claims). 28% of claims were for an alleged unjustified disadvantage and 2% of claims were for alleged sexual harassment. The most common ground for an unjustified dismissal claim was misconduct (26% of personal grievance claims).

In the 33 determinations, there were 43 separate personal grievance claims. Table 1 examines the 43 alleged personal grievances. For unjustified dismissal claims, the table shows the grounds on which the unjustified dismissal was claimed: constructive dismissal, abandonment, misconduct, poor performance, redundancy, and other.

These figures are comparable to those in the mediation survey. In that survey unjustified dismissal claims (including constructive dismissals) accounted for 63% of claims. (However, it should be noted that this figure does not include claims at the Mediation Service classified as "redundancy" ("redundancy" claims accounted for 13.1% of claims). These redundancy claims may have involved claims that the employee was unjustifiably dismissed on the grounds of redundancy). Therefore, this figure may be conservative.

Table 1: Type of alleged personal grievance (17 July – 18 August 2006)

Type of personal grievance	Number	Percentage
Unjustified dismissal – constructive dismissal	5	12%
Unjustified dismissal - abandonment	2	5%
Unjustified dismissal – misconduct	11	26%
Unjustified dismissal – poor performance	3	7%
Unjustified dismissal - redundancy	5	12%
Unjustified dismissal - other	4	9%
UNJUSTIFIED DISMISSAL -SUBTOTAL	30	71%
Unjustified disadvantage	12	28%
Sexual harassment	1	2%
OTHER PERSONAL GRIEVANCES - SUBTOTAL		30%
TOTAL NUMBER OF CLAIMS	43	100%⁹

Comment

Personal grievance claims can be made on a number of grounds. Possible personal grievance claims are that:¹⁰

- the employee has been unjustifiably dismissed;
- the employee's employment or condition(s) of employment has been affected to the employee's disadvantage by some unjustifiable action by the employer;
- the employee has been discriminated against in their employment;
- the employee has been sexually harassed in their employment;
- the employee has been racially harassed in their employment; and
- the employee has been subjected to duress in their employment in relation to membership or non-membership of a union or employees organisation.

The only personal grievances claimed in the Authority during the research period were for unjustified dismissal, unjustified disadvantage, and sexual harassment. In contrast, alleged personal grievances at mediation additionally included discrimination, harassment, and duress.

Representation

97% of employees and 88% of employers had representation at the Employment Relations Authority for personal grievances during the research period.

The number of people who use representatives at the Authority is greater than those who used representation in mediation. This is particularly noticeable with respondents at the mediation service (who tend to be employers). 61% of respondents used a representative at mediation. (89% of applicants used a representative at mediation).

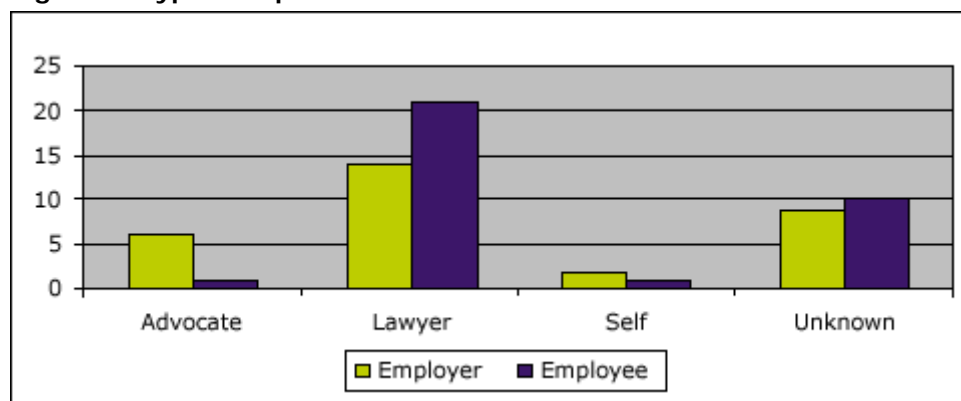
The main type of representative for both employees and employers at the Authority were lawyers. Only a small proportion represented themselves. There was no appearance for the employer in two cases. Figure 2 shows the types of representatives for both employers and employees.

⁹ Column may not add due to rounding of figures to 0 decimal places.

¹⁰ Employment Relations Act 2000, s103.

At mediation, for both applicants and respondents, the most common form of representation was also a lawyer.

Figure 2: Type of representation



Comment

It is interesting to note the higher level of representation at the Authority. This is consistent with mediation being a lower-level dispute resolution mechanism. However, the level of representation at the Authority is very high, especially given that the Employment Relations Act 2000 states that the Authority is intended to be an investigative rather than a judicial body.

Given that only 2 employers and 1 employee chose not to have any form of representation, it is difficult to make any conclusions about the impact of representation on the outcome of Authority determinations. For this reason, correlation analysis has not been carried out in these areas.

A correlation analysis was undertaken in the Mediation survey to explore whether there were any relationships of significance between the variables. The analysis in the mediation report found there was no significant relationship between whether the applicant was represented and the likelihood of settlement. However, it found there was a significant relationship between the type of representation and the amount of settlement, with applicants represented by a lawyer receiving compensation that was higher than those represented by employment advocates or unions. However, it was noted that the level of settlement was likely to be affected by the level of an applicant’s salary or wages.

Capturing this type of information on an on-going basis would provide a better understanding of any impact of representatives on outcomes.

Outcomes: in favour of employer or employee?

Analysis was carried out to establish how many determinations were found in favour of an employee and how many determinations found in favour of employers.¹¹

¹¹ The determination that involves claims by two employees is treated as “two determinations” for the purpose of these statistics.

Determinations were considered to be in favour of the employee when:

- all claims made were found in favour of the employee;
- one of two claims made were found in favour of the employee (for example, three determinations had claims of an unjustified dismissal and an unjustified disadvantage, but the Authority only found in favour of the unjustified disadvantage claim); and
- a non-personal grievance remedy was awarded (for example, in one case, the Authority found there was an unjustified disadvantage and also a breach of contract and awarded damages for the breach of contract).

We have separately calculated determinations where employee conduct led to a reduction in final payout.

24% of the 33 cases were held to be in favour of employers, 52% were held to be in favour of employees, and in 24% of cases the Authority found in favour of the employee but either remedies were reduced because of contributory conduct or no remedies were awarded.

Table 2 shows whether individual claims were decided in favour of the employer (35% of the 43 claims) the employee (47% of the 43 claims), or were the claim was decided in favour of employee but contributory conduct meant there was a reduction in remedies (19% of the 43 claims). NB: In two of the contributory conduct cases, no remedies were awarded.

There was also one case where payment of notice was awarded in favour of the employee, but the employee's personal grievance claim was unsuccessful. 40% of the unjustified dismissal claims were decided in favour of the employee, 33% in favour of the employer, and 27% in favour of the employee, but contributory conduct resulted in a reduction of remedies. 58% of the unjustified disadvantage claims were decided in favour of the employee, and 42% in favour of the employer. There is, therefore, not a significant difference in success rates depending on which claim is brought. In any case, the small sample size makes it difficult to come to any real conclusions about the impact of the type of claim on success rates.

Table 2

Type of Claim	In favour of Employee	In favour of Employer	Contributory conduct meant reduction in remedies	TOTAL
Unjustified dismissal	12 (40%)	10 (33%) ¹²	8 (27%)	30
Unjustified disadvantage	7 (58%)	5 (42%)	0 (0%)	12
Sexual harassment	1 (100%)	0 (0%)	0 (0%)	1
TOTAL	20 (47%)	15 (35%)	8 (19%)	43 Claims¹³

¹² This figure includes one case where the Authority found there was no unjustified dismissal, but awarded monies for an insufficient notice period.

¹³ Column may not add due to rounding of figures to 0 decimal places.

Comment

It is important to note that only substantive personal grievances were considered in this survey. This means that personal grievance cases which were struck out or dismissed an interim stage of bringing a personal grievance (eg deciding whether a personal grievance was brought within 90 days), for example, have not been included. If these types of cases were included the results may have been quite different.

Length of employment

Length of employment is not routinely recorded in Authority determinations. The statistics in this paper have been produced by capturing start and finish dates where they appear in the determinations. These dates are not completely accurate since the determination will often only record, for example, that the employee started work in January 05 and was dismissed in March 05. From the available data about length of employment before the action giving rise to a personal grievance, the most common length of employment is between 1 and 4 years. This is very similar to that of the Mediation Service. Figure 3 shows only the disputes where length of employment was noted in the determination (30 out of 33 determinations).

Figure 3: Length of Employment

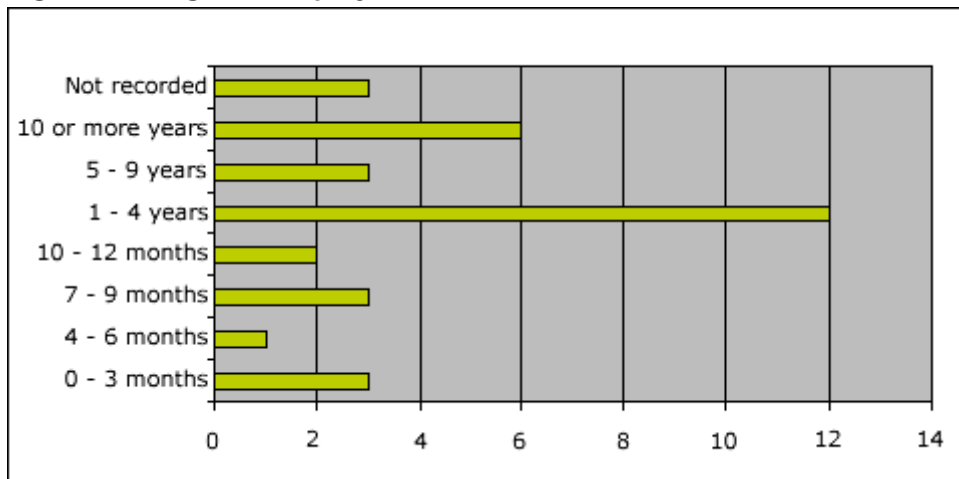


Table 3 examines length of service by whether the claim was decided in favour of the employer or employee. Where the employee’s length of service was less than one year, 92% of claims were found in favour of the employee, and 8% in favour of the employer. Where the employee’s length of service was between one and five years, 60% of claims were found in favour of the employee, and 40% in favour of the employer. 50% of claims made when the employee’s length of service was over five years were found in favour of the employee. These statistics should be viewed bearing in mind the small sample size.

Table 3

Length of Service	In favour of employee	In favour of employer	TOTAL
Less than 1 year	11 (92%)	1 (8%)	12
1-5 years	9 (60%)	6 (40%)	15
5 years +	6 (50%)	6 (50%)	12
Unknown	2 (50%)	2 (50%)	4
TOTAL	28	15	43 Claims

Table 4 shows length of service by the type of claim. The percentage of claims that were unjustified dismissal claims varied across the different length of services. (75% for less than one year, 73% for 1-5 years, 58% for 5+ years). For disadvantage claims, 17% were for less than one year's service, 27% were for 1-5 years and 42% were for 5+ years.

Table 4

Length of Service	Dismissal	Disadvantage	Sexual Harassment	TOTAL
Less than 1 year	9 (75%)	2 (17%)	1 (8%)	12
1-5 years	11 (73%)	4 (27%)	0 (0%)	15
5 years +	7 (58%)	5 (42%)	0 (0%)	12
Unknown	3 (75%)	1 (25%)	0 (0%)	4
TOTAL	30	12	1	43 Claims

Comment

The small sample size precludes strong conclusions, but it is possible there is a tendency for unjustified dismissal to occur earlier in the employment relationship and unjustified disadvantage later.

Remedies awarded by Authority

Under section 123 of the Employment Relations Act, where the Authority determines that an employee has a personal grievance it may award any of a number of remedies, mainly:

- reinstatement;
- reimbursement of lost wages or other money lost by employee as a result of the personal grievance;
- compensation for humiliation, loss of dignity and injury to feelings;
- compensation for loss of benefit

The main remedies awarded during the research period were: compensation for humiliation etc (awarded without any reduction for contributory conduct in 45% of the determinations and awarded in a further 18% of determinations with some reduction for contributory conduct); and reimbursement of lost wages or other money lost by the employee as a result of the grievance (awarded in 24% of the determinations with no reduction for contributory conduct and awarded in a further 18% of cases with some reduction for contributory conduct).

Reinstatement was awarded in two cases.

In some cases the Authority additionally made awards other than those personal grievance remedies (for example, arrears of wages).

Compensation

Table 5 sets out awards for compensation for humiliation etc awarded under s123(1)(c)(i) of the Employment Relations Act. The most common amount of compensation awarded over the research period was between \$2,000 and \$4,999 (after taking into account any reductions for contributory conduct). In some of the determinations made during the research period, the Authority found there was a personal grievance but contributory conduct by the employee affected the remedies awarded. (Contributory conduct is where the conduct of the employee contributed towards the situation that gave rise to the personal grievance). Table 5 sets out the compensation awarded to the employee, after taking into account contributory conduct where applicable. Table 6 explains the cases where contributory conduct was taken into account.

Table 5: Compensation for humiliation etc

Amount	Number of awards	Percentage (of awards made for compensation)
\$1-\$499	-	0%
\$500 - \$999	-	0%
\$1,000-\$1,999	1	5%
\$2,000 -\$4,999	9	43%
\$5,000 - \$9,999	5	24%
\$10,000 -\$29,999	6	29%
TOTAL	21	100%¹⁴

Compensation for humiliation etc (s123(1)(c)(i) of the Employment Relations Act 2000 (NB: the awards shown take into account any reduction for contributory conduct).

Table 6: Compensation where contributory conduct taken into account

Amount of contributory conduct	Amount of compensation awarded before being reduced for contributory conduct	Amount after contributory conduct
20%	\$3,000	\$2,400
20%	\$3,000	\$2,400
25%	\$4,000	\$3,000
40%	\$10,000	\$6,000
50%	\$2,000	\$1,000
50%	\$4,000	\$2,000

Compensation awards reduced by contributory conduct

In a further two cases, the Authority found there was 100% contributory conduct. The employees in these determinations were, therefore, awarded no compensation.

¹⁴ Column may not add due to rounding of figures.

Reimbursement of lost wages

Table 7 sets out awards for reimbursement of lost wages made under s123(1)(b) of the Employment Relations Act. This report analyses the length reimbursement of lost wages is awarded for, rather than the actual monetary amount awarded. This is because the monetary amount awarded will depend on the income level of the employee and how much the employee earned over the relevant period.

In some of these cases the reimbursement was reduced because of contributory conduct of the employee. For example, the Authority awarded an employee reimbursement of lost wages for 2 weeks, but found the employee’s contributory conduct was 50%, so reduced the remedy of reimbursement of lost wages to be for 1 week only. These cases are detailed in Table 8.

Table 7: Reimbursement of lost wages

Weeks	Number	Percentage of total cases
Nil	2	13%
1 - 4 weeks	4	25%
5 – 8 weeks	2	13%
9 - 13 weeks	6	38%
14 – 26 weeks	0	0%
26 – 51 weeks	0	0%
52 weeks +	1	6%
Number of weeks not stipulated but monetary amount stated	1	6%
TOTAL	16	100%¹⁵

Reimbursement of lost wages (s123(1)(b) of the Employment Relations Act 2000 (NB the awards shown take into account any reduction for contributory conduct).

Table 8: Reimbursement of lost wages where contributory conduct taken into account

Amount of contributory conduct	Number of weeks reimbursement awarded before being reduced for contributory conduct	Number of weeks reimbursement awarded after being reduced for contributory conduct
20%	8 weeks	6.4 weeks
20%	8 weeks	6.4 weeks
25%	12 weeks	9 weeks
40%	20 weeks	10 weeks
50%	2 weeks	1 week
50%	8 weeks	4 weeks

Reimbursement awards reduced by contributory conduct

In a further two cases, the Authority found there was 100% contributory conduct. The employees in these determinations were, therefore, awarded no reimbursement of lost wages.

¹⁵ Column may not add due to rounding of figures.

Costs

Of the personal grievance cases over the research period, 36% of cases (12 out of 33) had costs determined by the Authority (either as part of the substantive determination or in a later separate determination). In one case, the Authority held that costs were to lie where they fell. Table 9 sets out the costs awarded in favour of employees. Table 10 sets out costs awarded in favour of employers. The Authority takes into account the length of the Authority's investigation meeting in each particular case.

If the Authority does not determine costs in the substantive personal grievance, it will reserve costs. The Authority usually encourages parties to discuss and resolve costs between themselves. If they are unable to do so, they will return to the Authority and the Authority will issue costs in a separate determination.

All costs awarded in relation to the personal grievances in the research period were under \$5,000.

At mediation, the largest proportion of legal costs were between \$1,000 and \$2,000. Almost all legal costs agreed were below \$5,000.

Table 9: Cases with costs awarded in favour of employee

Amount	Length of Authority Investigation Meeting				
	<One day	One day	Two days	Three days +	Number of days not stipulated
\$0-\$999	1				
\$1,000 -\$1,999	2	1			
\$2,000 - \$5,000	3	2			

Table 10: Cases with costs awarded in favour of employer

Amount	Length of Authority Investigation Meeting				
	<One day	One day	Two days	Three days +	Number of days not stipulated
\$0-\$999					
\$1,000 -\$1,999					
\$2,000 - \$5,000	1	1			

In one of the cases where costs were awarded in favour of the employer, the Authority also awarded disbursements of \$200.

Other awards

Other awards made by the Authority in respect of the personal grievance cases within the research period are shown in table 11. In two of the cases, reinstatement was awarded. Other non-personal grievance awards were for disbursements, arrears of wages and/or holiday pay, damages for a breach of contract, and payment for a notice period.

Table 11

Disbursements	6
Arrears of wages and/or holiday pay	5
Breach of contract damages	1
Reinstatement	2
Notice period	2

In the mediation survey there was some type of financial settlement in about half of the mediations during the research period. 47% of financial settlements were between \$2,000 and \$5,000.

Comment

Some care must be taken when comparing settlements at mediation and compensation awarded at the Authority. At the Authority a clear distinction is made between the different remedies: eg compensation for humiliation, compensation for lost benefit, and reimbursement of lost wages. It may be that in some mediated settlements, the parties come to an agreement on one global amount that could include compensation for various factors. At the Authority, personal grievance remedies are strictly limited to those prescribed in statute. Also, half of the reimbursement awards made by the Authority refer only to the number of weeks reimbursement was awarded for (not the wage amount). Therefore, total monetary amounts for monies awarded are not available for all personal grievance determinations in the Authority.

Mediation is more flexible and can include anything agreed to by parties. For example, eight mediated settlements included an agreement not to speak ill of each other.

Further research into the costs of dispute resolution may be able to provide more information on this area.

The Department maintains statistics on costs and compensation awarded for personal grievance cases on a six monthly and yearly basis which provide a more accurate indication of volumes of levels awarded. These statistics are available at <http://www.ers.govt.nz/publications/ccat.html>.