

Contributory conduct in 2024 – change signalled by Government, but is it needed?

In November 2023, the newly elected government outlined the priorities for its three-year Parliamentary term in two coalition agreements – one between the National Party and the New Zealand First Party, and another between the National Party and the ACT Party

While both agreements set out a number of policies aimed at improving workplace relations, the National-ACT agreement in particular made several policy commitments intended to simplify the resolution of employment disputes – at least for employers.

Relevant to this article is National and ACT's commitment to "consider simplifying personal grievances and in particular removing the eligibility for remedies if the employee is at fault".

In March 2024, Hon Brooke van Velden, Minister for Workplace Relations and Safety, expanded on motivation behind the policy. She claimed that the current legal framework encourages employees to raise a grievance "even where their behaviour has contributed to the employment relations problem." She added that "vexatious employees ... can impose significant legal costs on businesses and impact their reputation."

Many practitioners reading this may be casting their minds back to their own encounters with vexatious employees. It is true that vexatious claims can be devastating to businesses, both from a financial and reputational perspective. However, not all employees who have contributed in some way to their predicament are vexatious, and nor are all employers in the same predicament squeaky clean.

Almost a year into the government's electoral term, we are yet to see any movement in relation to this particular policy. At this stage we can therefore only speculate as to how the policy would operate in practice, including how being "at fault" would be determined, and what would occur where both parties played some part on the breakdown of the relationship (which is often the case).

In any event, we would posit that such a law change is not required given the law in this space is relatively settled and clear, and already allows the employment institutions to reduce, to nothing if appropriate, remedies payable to an employee for contributory conduct. There is the statutory ability in s 124 of the Employment Relations Act (ERA) to reduce remedies for contribution, and the scope of that power has been examined by Court on a number of occasions.

The current approach as set out in *Xtreme Dining t/a Think Steel v Dewar* [2016] NZEmpC 136

In *Xtreme Dining t/a Think Steel v Dewar* [2016] NZEmpC 136, a full bench of the Employment Court cemented the Authority and Court's power to "extinguish" remedies payable to an employee, where the circumstances justify it.

The Court confirmed that it and the Authority have the ability to make no award for remedies under s 123, despite the existence of a personal grievance, where the employee's conduct is "so egregious" so as to warrant such a decision in accordance with equity and good conscience.

Background

In 2015, the Authority found Mr Dewar had been unjustifiably dismissed after his employer, Xtreme Dining, failed to run a full and fair investigation prior to dismissal, and unreasonably concluded Mr Dewar had engaged in serious misconduct. Mr Dewar was awarded lost wages and compensation for hurt and humiliation. The Authority then reduced Mr Dewar's awarded for

Contributory conduct in 2024 – change signalled by Government, but is it needed? (Continued)

compensation from \$12,000 to \$10,000, in recognition of his contributory conduct.

In 2017, Xtreme Dining brought a non-de novo challenge in the Court in relation to the remedies awarded by the Authority. One of several arguments Xtreme Dining advanced was that the Authority did not go far enough in reducing Mr Dewar's award for contribution.

The general approach to s 124

In considering this argument, the Court took the opportunity to clarify the general application and effect of s 124 ERA. Section 124 empowers the Authority and Court to reduce any remedy it awards where the employee contributed to the situation which gave rise to their personal grievance:

124 Remedy reduced if contributing behaviour by employee

Where the Authority or the court determines that an employee has a personal grievance, the Authority or the court must, in deciding both the nature and the extent of the remedies to be provided in respect of that personal grievance,—

(a) consider the extent to which the actions of the employee contributed towards the situation that gave rise to the personal grievance; and

(b) if those actions so require, reduce the remedies that would otherwise have been awarded accordingly.

The Court noted that consideration of s 124 does not come into play until:

1. a personal grievance is established, and, if so;
2. applicable remedies are fixed under s 123.

Fixing of remedies comes first, and then consideration of contribution; not the other way around.

The Court then turned to consider s 124 itself, which requires the Authority or Court to consider the extent to

which the employee's actions contributed to the situation that gave rise to the personal grievance, and, if required, reduce the remedies accordingly.

The Court emphasised the importance of proportionality in this exercise. An employee may be at fault, but such fault may not be so significant so as to justify their dismissal or disadvantage. The employee's conduct must be "culpable" or "blameworthy", and causally connected with the situation that gave rise to their grievance.

Complete extinction for contributory conduct?

The Court then embarked on an analysis of whether s 124 gave the ability to reduce remedies by 100%, or effectively extinguish remedies.

With reference to previous case law out of New Zealand and the United Kingdom, the Court concluded it could not have been Parliament's intention for s 124 to require the fixing of remedies, if that could then be followed by a decision that those remedies should not be awarded at all.

The Court found the more logical way to deal with such egregious contributory conduct by an employee is to not fix any remedies under s 123 in the first place. In making this finding the Court endorsed dicta from *Wilmshurst v McGuire* (t/a California Sun & Beauty Studio) [1999] 2 ERNZ 128 (EmpC):

... If the employee has behaved in a way that is strongly causative of the situation that gave rise to the personal grievance, and that behaviour was reprehensible in a way that is relevant to the employment relationship and was known to the employer before dismissing the employee, so that it can be said that but for the employees bad behaviour the employer probably would not have considered dismissing the employee, then the Tribunal may be justified in awarding no compensation for injury to the employees feelings or reputation or for humiliation.

Contributory conduct in 2024 – change signalled by Government, but is it needed? (Continued)

Further, the Court found that the equity and good conscious jurisdiction, drawn from s 189 ERA, enables the Authority or Court to conclude, where the employee's conduct is so "egregious" or "outrageous" so as to justify no award, that no remedy should be awarded under s 123, despite the employee having established a personal grievance. The Court noted that such an exercise would be rare, albeit within the Court and Authority's ambit of powers.

Cases following *Xtreme Dining*

The clarification provided by *Xtreme Dining* has set a precedent for the Court and Authority to decline to award remedies in cases where the employee's relevant conduct is egregious.

Shaw v Bay of Plenty District Health Board [2022] NZEmpC 10, [2022] ERNZ 74 is a recent example out of the Court which identifies the circumstances as falling within the "rare category" created by *Xtreme Dining*. The case involved a health professional dismissed for breaching patient privacy. The Court found that her dismissal was justified, but moved to consider whether the employee was entitled to remedies in the event its conclusion was incorrect. The employee had collected and retained patient records for several years and ultimately used them for her own purposes. The Court categorised this misconduct as so significant as to disentitle her to remedies.

The Authority has also made use of *Xtreme Dining* in awarding no remedies for an established grievance. In *Smith v Electrical Training Co Ltd [2019] NZERA 420*, the Authority found defects in the employer's dismissal of an electrical apprentice for failing to adhere to wiring standards. Among other failings, the Authority found the employer failed to conduct a full investigation into the allegations, and found the employee's behaviour had amounted to serious misconduct, despite his behaviour falling within the lesser threshold of misconduct in the company policy. However, in light of the employee's knowledge of the potential consequences for not following wiring standards (including causing a fire

within an apartment building), and the employer's previous attempts to resolve performance issues, the Authority found it would be "unconscionable for the Authority to reward [the employee's behaviour]". Referring to *Xtreme Dining*, no remedies were awarded.

The current approach vs possible reform

Without further detail on the government's intention to consider removing personal grievance remedies for employees "at fault", it is not clear what the Government is looking to achieve that is not already achievable using the current approach established in *Xtreme Dining*.

Perhaps there is a view that removal of remedies should occur in more cases than the current approach elicits. In light of other employment law reform undertaken by the current government to date (including the reintroduction of trial periods for all employees), and other proposed reform (including the inability for employees earning over a certain income to raise a personal grievance), perhaps it is unlikely that legislative change here would require the same high standard of "egregious" or "outrageous" conduct for the removal of remedies eligibility.

The government may instead consider a standard of proportionality, where the removal of remedies eligibility occurs if the employee's misconduct is proportionate to the employer's unjustified actions. However, determining whether the employer and employees' actions are proportionate could be a difficult task for the Authority or Court to embark on in light of the inherent inequality in power with the employment relationship – a disparity that the operative section of the ERA expressly acknowledges and works to keep in check. The removal of remedies eligibility as a result of any misconduct on the employee's part, regardless of its severity or its proportionality to the employer's actions, is another approach which would appear to be in conflict with the ERA's objective.

Contributory conduct in 2024 – change signalled by Government, but is it needed? (Continued)

We will wait to see what proposed legislative change looks like, and, if the bar is to be shifted, how far that shift will be.

This article has also been published in LexisNexis' Employment Law Bulletin, Issue 5 of 2024.

Want to know more?

If you have any questions please contact our specialist [Employment team](#)