

## ACT's trifecta of Christmas gifts for employers

**Employers must have made it onto Santa's nice list this year, with the coalition government proposing several changes to the Employment Relations Act 2000 that will limit employees' ability to raise personal grievances and the remedies available.**

### Protected exit discussions

The first of three proposed changes comes from ACT MP Laura Trask's member's Bill, which was drawn in early November. If passed as drafted, the Bill will allow employers to propose an exit agreement to an employee with certainty that their proposal is made on a protected (without prejudice) basis.

Crucially, this would prevent the employee from raising a personal grievance in respect of the employee's proposed exit. Currently, if an employer suggests that an employee leaves, the employee can claim they have been constructively dismissed. This is a risk even where the employer commences a 'without prejudice' exit discussion but the privilege of that discussion does not attach – for example because the employee does not agree to the discussion being without prejudice, or does not understand the implications.

If the Bill is passed as drafted, employers would still need to meet specified requirements to ensure any exit proposal is protected by privilege. Importantly, any proposed exit agreement will need to reference the specific statutory provisions that apply, and include a specified compensatory sum in exchange for the termination of the employee's employment. Falling short of these requirements could leave the employer exposed to the same risk of a constructive dismissal claim that exists now.

### No unjustifiable dismissal claims for "high income" employees

Another significant change signaled by ACT Deputy Leader and Minister for Workplace Relations and Safety, Brooke Van Velden, was announced on 29 November 2024. Come 2025, the coalition government intends to introduce a Bill that will prevent employees earning \$180,000 or more per annum from raising a personal grievance for unjustifiable dismissal. The threshold is based on the employee's base salary, and excludes incentive payments or benefits. The figure aligns with New Zealand's current top income tax rates, and will be adjusted annually to match increases in average weekly earnings.

According to the Minister, this change will provide employers with flexibility to remove and replace employees in senior roles without having to meet the usual obligations of a fair and reasonable employer. However, employees will still be able to raise other types of personal grievance, contractual, and statutory claims. We expect that employees impacted by this change will get creative with any legal action brought in relation to their termination and the events leading up to it, including through personal grievances for unjustifiable disadvantage, breach of good faith claims, discrimination, and breach of contract claims. In light of the Minister's intention behind the Bill, and the contrasting objective of the Employment Relations Act 2000 to address the inequality of power between employers and employees, it will be interesting to see how the employment institutions assess such claims as they arise.

Another caveat to this upcoming change is that employers and employees will remain free to opt back in to the dismissal protection framework. This may look like expressly agreeing to opt into the status quo for unjustifiable dismissal available to those earning below \$180,000 per annum. Alternatively, it may look like the parties agreeing to their own dismissal procedure under their employment agreement. Whatever the case may

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## ACT's trifecta of Christmas gifts for employers (Continued)

be, it will be important for those above the income threshold to have a clear dismissal process set out in their employment agreement, if they can successfully negotiate one. This may be easier said than done for highly contestable roles where a number of suitable candidates are being considered for the role.

### Restricted remedies for employees at fault

The last change announced on 4 December 2024 will require the employment institutions to give more consideration to the employee's behaviour in the context of awarding remedies for a successful personal grievance claim.

The Employment Relations Act 2000 already allows the employment institutions to make reductions to remedies where the employee contributes to their personal grievance. However, in the Minister's view, the institutions are failing to achieve the right balance between remedies awarded to employees and reductions to those remedies for their own contribution to their grievance.

Key aspects of the government's proposed change include:

- awarding no remedy at all for an employee whose behavior amounts to serious misconduct;
- removing employee eligibility to be reinstated to their role or for compensation for hurt and humiliation when that employee's behavior has contributed to the issue;
- reducing remedies by up to 100 percent where the employee contributed to a situation which gave rise to a personal grievance;
- requiring the Employment Relations Authority and Employment Court to consider if the employee's behaviour obstructed the employer's ability to meet their obligations of being fair and reasonable; and

- increasing the threshold for procedural error in instances where an employer has acted fairly toward the employee.

How each of these proposals will take shape as legislation is not yet clear, and several questions are likely to arise. For example, what amounts to "serious misconduct" and eliminates an employee's entitlement to remedies? Will this be determined with reference to the employer's own definition set out in the employer's policies and/or employment agreement? Will a statutory definition be included? Or will it be up to the employment institutions to decide?

What is clear, however, is that this proposed change looks to shift the balance between employer obligations and employee conduct in favour of the employer, shifting the goal posts for what is required of a fair and reasonable employer in the context of an employee who has contributed to their own misfortune.

### Summary

All three proposed changes will be welcomed by many employers, though all raise questions as to their consistency with New Zealand's wider employment law framework. We will be watching this space eagerly as we head into 2025, and will provide further updates on any changes or clarifications as they arise.

### Want to know more?

If you have any questions about the proposed changes to personal grievances please contact our specialist [Employment Team](#)