Employment Relations Authority
TE RATONGA AHUMANA TAIMAHI

Annual Report 2023

Te Kāwanatanga o Aotearoa
New Zealand Government

Employment Relations Authority
TE RATONGA AHUMANA TAIMAHI

More information

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ISSN 2816-1408 (Print) ISSN 2816-1416 (Online)

May 2024

Employment Relations Authority
TE RATONGA AHUMANA TAIMAHI

13 May 2024

Hon Brooke van Velden, MP
Minister for Workplace Relations and Safety
Parliament Buildings
WELLINGTON

Dear Minister,

I am pleased to present to you the second annual report of the Employment Relations Authority Te Ratonga Ahumana Taimahi.

Yours sincerely

Dr Andrew Dallas
Chief of the Authority

Contents

Introduction from the Chief

I am pleased to introduce our second annual report. In contrast to our inaugural report published in May 2023, this edition only covers a single calendar year: 1 January 2023 to 31 December 2023. However, some statistics from 2021-2022 are provided here for comparison purposes as they serve to demonstrate trends.

A note on statistics

The Authority is very conscious of timeliness. That said, there will always be occasions, based on the circumstances of a particular matter, that a tension will exist between timeliness and doing justice between the parties. In 2023, 41 per cent of the Authority's determinations were issued within one month and 88 per cent were issued within 3 months of the date of the investigation meeting or the provision of the last information.[1] The latter figure is the same as for 2022. Pleasingly, in the first quarter of 2024 this timeliness metric has improved to 92 per cent and we are on track for an overall quantitative improvement this year.

As highlighted further on in this report, collective bargaining facilitation has become a significant part of our work over the last three years. In 2023, the Authority facilitated eight bargaining disputes, which resulted in the issuance of six recommendations.[2] This is suggestive that high inflation, in particular, has added to the difficulties that some bargaining parties have been experiencing.

As with last year, and notwithstanding the availability of unrestricted rights of challenge to Authority determinations, only 17 per cent of Authority determinations were challenged. Of those 17 per cent, less still resulted in a substantive judgment of the Employment Court, which points to, at least in part, a "strategic", rather than purely legal, motivation for challenge.

National engagement forums

In November 2023, as part of our community engagement, the Authority commenced holding biannual national engagement forums with organisations and entities interested in our work. This includes Community Law Centres o Aotearoa, the New Zealand Law Society (NZLS), New Zealand Bar Association (NZBA), Employment Law Institute of New Zealand (ELINZ), Citizens Advice, Te Kāhui Tika Tangata Human Rights Commission, Business New Zealand, the New Zealand Council of Trade Unions Te Kauae Kaimahi, Human Resources New Zealand (HRNZ) and the Labour Inspectorate. A further forum was recently held in April 2024. Members also directly engage with communities of interest by presenting at events organised by the NZLS, ELINZ, the NZBA, HRNZ and at the Annual Industrial and Employment Relations Summit.

Continuing engagement with Australian Fair Work Commission

During 2023, we continued to strengthen our international engagement with comparable employment dispute resolution bodies, and we also hosted a visit by the Fair Work Commission in March. With a common labour market and the significant, and ongoing, integration of a number of New Zealand businesses into the Australian economy, it is clear there is much we can learn from each other.

Regulation of advocates

As part of our improving participation strategy known as "Six Pillars", which was highlighted in our inaugural annual report, the Authority remains committed to advancing the case for the regulation of advocates. In our view the lack of regulation is manifest market failure and a significant consumer protection issue. We believe competent, transparent, and accountable representation is the right of every participant in the employment dispute resolution system. I note the Fair Work Commission has recently embarked on a similar course.

[1] Employment Relations Act 2000, s 174C.
[2] Employment Relations Act 2000, s 50H.

Changes to jurisdiction

With the election of the Coalition Government, there have been two major changes to the Authority's jurisdiction. First, the Employment Relations Act 2000 has been amended to enable employers with 20 or more employees to include a 90-day trial period in a new employee's employment agreement.[3] Second, the Fair Pay Agreements Act 2022 was repealed.[4] Of note, other recent changes to our jurisdiction, namely the extension of time to raise a personal grievance for sexual harassment[5] and joining a controlling third party to a personal grievance[6] are yet to result in significant increases in applications to the Authority.

Launch of Tribunals Aotearoa

In March 2023, Tribunals Aotearoa was launched at a function at the Museum of New Zealand Te Papa Tongarewa. The event was attended by the Chief Justice, other judges, members of various tribunals, guests from the Fair Work Commission and officials from the Ministry of Business, Innovation and Employment (MBIE) and the Ministry of Justice. Tribunals Aotearoa, which grew out of a conversation between a few tribunal leaders in 2021, is a collaboration of 36 of the main civil, administrative, disciplinary, and professional/licencing bodies around common interests and issues relevant to the work of tribunals. I currently serve on the executive and hold the position of Treasurer. Tribunals Aotearoa is also the New Zealand Chapter of the Council of Australasian Tribunals (COAT) which the Authority has been involved with since our establishment in 2000.

Photo: Dr Andrew Dallas, Chief of the Authority, speaking at the launch of Tribunals Aotearoa at the Museum of New Zealand Te Papa Tongarewa on 30 March 2023.

[3] Employment Relations (Trial Periods) Amendment Act 2023.
[4] Fair Pay Agreements Act Repeal Act 2023.
[5] Employment Relations Act, s 114(7)(a).
[6] Employment Relations Act, s 103B.

Final word

Finally, I would like to acknowledge three colleagues. Member Eleanor Robinson fulfilled the role of Chief Delegate from August 2019 until December 2023. Eleanor did a superb job, acting always with integrity and professionalism. Member Michael Loftus, who retired in early 2024, had served as a Member of the Authority from 2010, first in Christchurch and subsequently in Wellington. During his tenure, Mike investigated notable cases[7] and facilitated a number of collective bargaining disputes, including in the public health sector, with distinction. Member Alastair Dumbleton, former Chief of both the Employment Tribunal and the Employment Relations Authority[8], "retired" from the Authority in November 2013 but agreed to be reappointed between November 2021 and March 2024 to assist us with our COVID-19 backlog. Alastair's knowledge and experience in employment dispute resolution is not surpassed in Aotearoa, and we are very grateful for the generosity with which he shared it. I wish Mike and Alastair all the very best for the future.

Dr Andrew Dallas
Chief of the Authority
May 2024

[7] For example, *Howe-Thornley v The Salad Bowl Ltd* [2013] NZERA Christchurch 25 and *Weller v New Zealand Aluminium Smelters Ltd* [2013] NZERA Christchurch 75.

[8] Alastair served as Chief of the Employment Tribunal between August 1995 and October 2000 and Chief of the Authority on two occasions: first as inaugural Chief between October 2000 and December 2003 and again between March 2011 and November 2013.

The Employment Relations Authority Te Ratonga Ahumana Taimahi

The Employment Relations Authority Te Ratonga Ahumana Taimahi (Authority) was established under the Employment Relations Act 2000 (the Act). The Authority is an investigative tribunal that resolves employment relationship problems by establishing the facts and making determinations according to the substantial merits of the case, without regard to technicalities.

General functions of the Authority

While the Act places considerable emphasis on the primacy of mediation, to promote dispute resolution at the lowest possible level, it also recognises there will be some matters that will require adjudicative intervention by the Authority. This conceptualisation has been recognised by New Zealand's senior courts - the Court of Appeal and the Supreme Court. The New Zealand Law Commission has observed that the Employment Mediation Service and the Authority form "part of an integrated dispute resolution process".[9]

The general function of the Authority is to assist employers and employees (and their representatives) to achieve and maintain successful employment relationships, by resolving problems that arise. The Authority's role is one part of the Act's dispute resolution continuum.

As part of these functions, Members usually sit alone in the exercise of the statutory function of investigating and determining those matters for which it has jurisdiction. Support services, including Authority Officers and legal researchers, are provided by MBIE.

The Authority is a unique investigative tribunal. In order to properly exercise jurisdiction, it has been afforded extensive powers, including to:

- call for evidence from the parties or any other person;
- require any person to attend an investigation meeting to give evidence;
- interview any person at any time;
- fully examine any witness;
- decide whether an investigation meeting is held in public or private; and
- follow whatever procedure it considers appropriate.

The Authority can take into account such evidence and information as in equity and good conscience it thinks fit, whether strictly legal evidence or not. It can resolve the employment relationship problem, however described, find that a personal grievance is of a type other than alleged; and make, in relation to any employment agreement, any order that the District or High Court could make about contracts under any rule or enactment (now, except freezing and search orders).

The Authority also has powers under the Act to facilitate collective bargaining and to fix terms and conditions for collective agreements, including for pay equity settlements under the Equal Pay Amendment Act 2020. The Authority also performs similar functions under the Screen Industry Workers Act 2022.

[9] Law Commission *Tribunal Reform* (NZLC SP20) 2008 at 48.

The Members of the Authority

The Chief and Members of the Employment Relations Authority are appointed by the Governor-General on the recommendation of the Minister for Workplace Relations and Safety

In addition to their legal qualifications, the current Members collectively hold over 400 years of accumulated knowledge in employment relations derived from working for employers, unions, government and in private legal practice.

CHIEF OF THE EMPLOYMENT RELATIONS AUTHORITY

Dr Andrew Dallas (Chief 2019–, Member 2015–)

MEMBERS

Rowan Anderson (2022–) (W)

Robin Arthur (2013–) A

Antoinette Baker (2022–) (C)

David Beck (2020–) (C)

Sarah Blick (2022–) (A)

Philip Cheyne (2020–) (C)

Nicola Craig (2015–) (A)

Helen Doyle (2001–) (C)

Alastair Dumbleton (2022–2024) (A)

Claire English (2021–) (W)

Peter Fuiava (2021–) (A)

Andrew Gane (2022–) (A)

Sarah Kennedy-Martin (2021–) (W)

Shane Kinley (2022–) (W)

Rachel Larmer (2010–) (A)

Alex Leulu (2022–) (A)

Michael Loftus (2010–2024) (W)

Jeremy Lynch (2023–) (A)

Geoffrey O'Sullivan (2019–) (W)

Eleanor Robinson (2010–) (A)

Natasha Szeto (2022–) (W)

Davinnia Tan (2023–) (W)

Marija Urlich (2020–) (A)

Peter van Keulen (2015–) (C)

Lucia Vincent (2022–) (C)

Note 1. (A) indicates the Member is based in the Auckland office, (W) indicates Wellington and (C) indicates Christchurch.

Note 2. During 2023, Members Eleanor Robinson, Peter van Keulen and Nicola Craig acted as Chief Delegate.

Authority locations

The Employment Relations Authority has regional offices in Auckland, Wellington and Christchurch. Members of the Authority also travel to hold investigation meetings in towns across the motu (land)

AUCKLAND

TĀMAKI MAKAURAU

Email

aucklandera@era.govt.nz

Mail

PO Box 105 117
Auckland 1143

Phone

09 970 1550

Location

Level 3
167B Victoria Street West
Auckland

The Auckland office covers:

- Northland;
- Auckland;
- Waikato;
- Coromandel;
- Bay of Plenty;
- East Coast; and
- Central Plateau.

WELLINGTON

TE WHANGANUI-A-TARA

Email

wellingtonera@era.govt.nz

Mail

PO Box 2458
Wellington 6140

Phone

04 915 9550

Location

Mezzanine Floor
50 Customhouse Quay
Wellington

The Wellington office covers:

- Wellington;
- Wairarapa
- Manawatu-Whanganui;
- Hawke's Bay; and
- Taranaki.

CHRISTCHURCH

ŌTAUTAHI

Email

christchurchera@era.govt.nz

Mail

PO Box 13 892
Christchurch 8140

Phone

03 964 7850

Location

Level 1
Taylor Shaw House
53 Victoria Street
Christchurch

The Christchurch office covers the:

- South Island;
- Stewart Island; and
- Chatham Islands.

Performance of the Authority

Statistics of the Authority's performance

Applications received

Applications received by Authority office

NUMBER OF APPLICATIONS RECEIVED BY OFFICE			
Office	**2021**	**2022**	**2023**
Auckland	1,208	1,100	1,298
Wellington	398	362	357
Christchurch	508	508	462
TOTAL	**2,114**	**1,970**	**2,117**

Matters referred to mediation

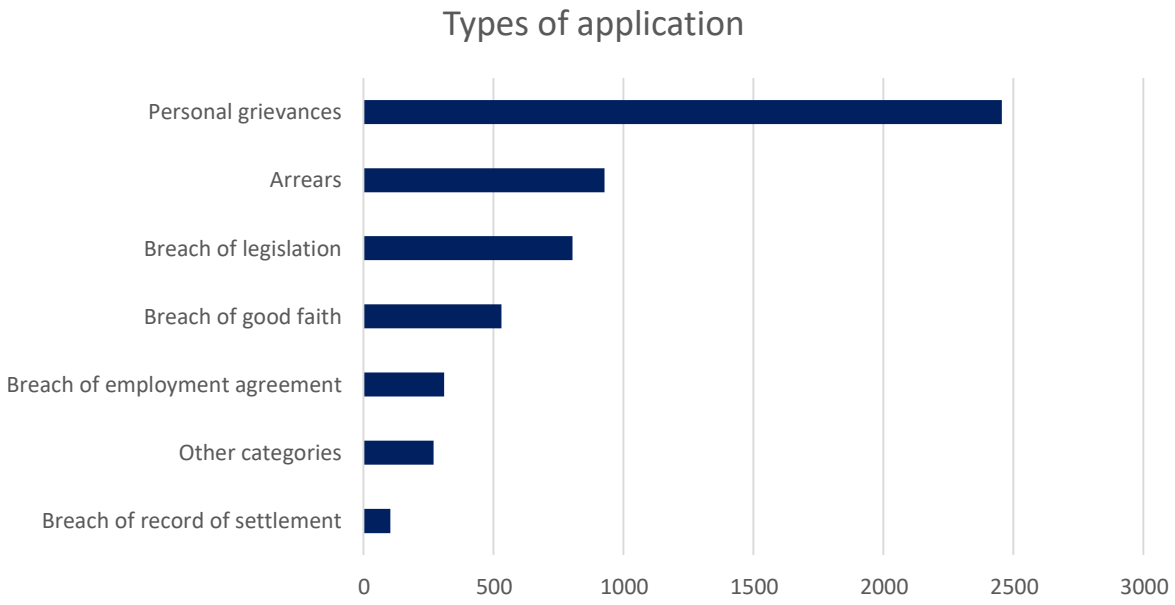
Number of applications referred or directed to the Employment Mediation Service of the Ministry of Business, Innovation and Employment

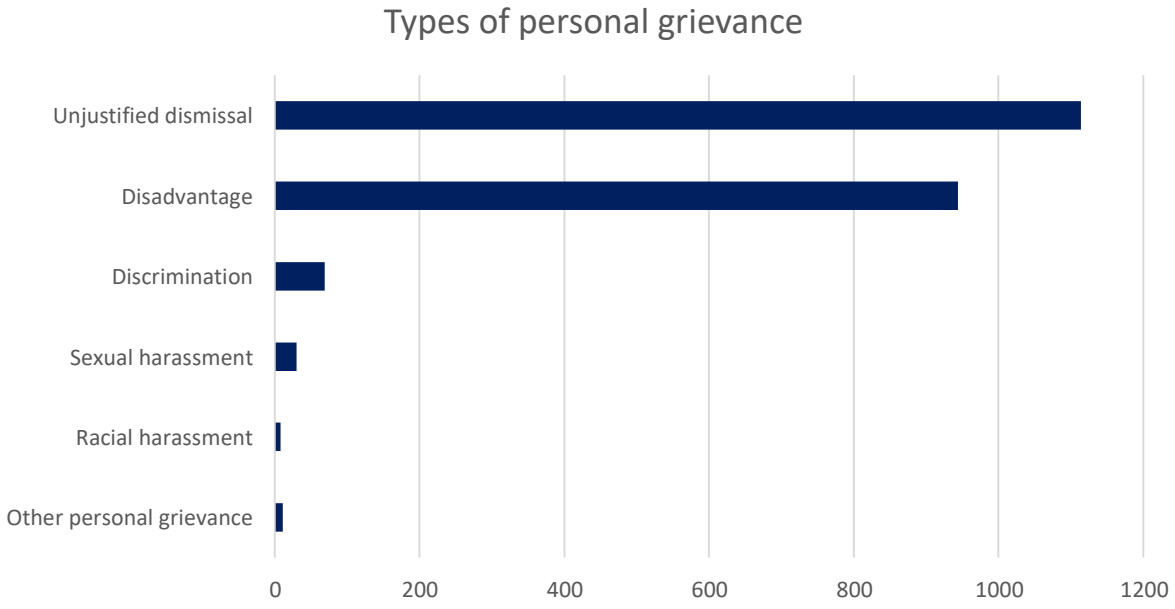
NUMBER OF MATTERS REFERRED TO MEDIATION		
2021	**2022**	**2023**
1,341	1,170	1,352

Note 1. The Authority has a duty to consider mediation under s 159 of the Act. If the parties have not yet attended mediation before the application is lodged with the Authority, it is very likely to be referred or directed to mediation.

Types of application

Number of applications by dispute type (most applications involve more than one dispute type, many involve several)





Note 1. The 1114 unjustified dismissal claims included 280 constructive dismissal claims.
Note 2. No sexual harassment claims have yet been made under the 12-month timeframe now available under s 114 of the Act due to the Employment Relations (Extended Time for Personal Grievance for Sexual Harassment) Amendment Act 2023.
Note 3. Other personal grievances under s 103(1) include: being treated adversely on the grounds of being affected by family violence; being subject to duress regarding union membership (or non-membership); the employer has failed to comply with specified legislation in the Act or the Health and Safety at Work Act 2015; the employer has retaliated against the employee in breach of the Protected Disclosures (Protection of Whistleblowers) Act 2022.
Note 4. Twenty four personal grievance applications included controlling third party claims under s 103B of the Act.

Location of hearings

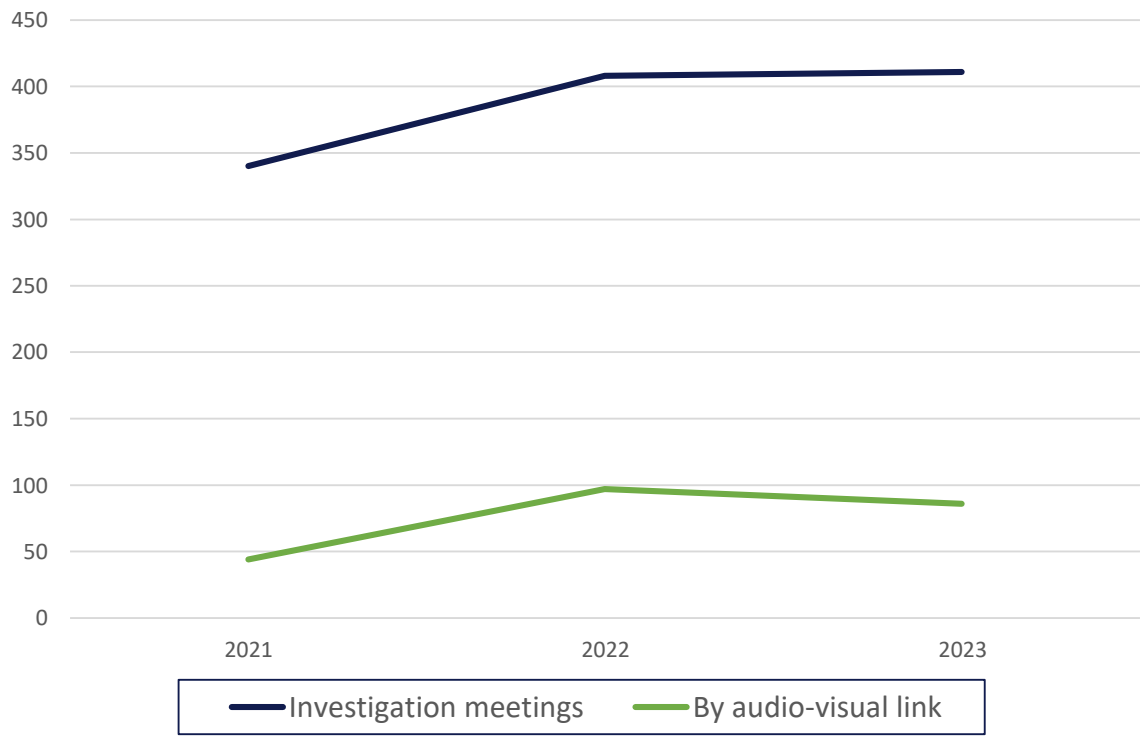
Towns across Aotearoa New Zealand where investigation meetings were held

LOCATION OF HEARINGS			
Location	**2021**	**2022**	**2023**
Alexandra	1		
Ashburton	1	1	2
Auckland	142	181	171
Balclutha			1
Blenheim	2	2	8
Christchurch	84	72	71
Dunedin	5	6	7
Gisborne	1	3	4
Gore		1	
Greymouth		1	1
Hamilton	7	8	16
Hāwera	1		
Hokitika			1
Invercargill	7	2	7
Kaikohe	1		
Kaikōura			1
Kerikeri	1	4	3
Manukau		1	
Masterton	1	1	1
Napier	9	11	11
Nelson	7	9	9
New Plymouth	3	4	2
Ōamaru			1
Ōtaki	1		
Palmerston North	4	9	9
Queenstown	4	3	2

Location	2021	2022	2023
Rotorua	1	4	5
Taupō			1
Tauranga	3	8	9
Timaru	3	2	3
Tokoroa		1	
Wānaka	2		1
Wellington	46	67	56
Whakatāne	1	1	1
Whanganui	1	2	3
Whangārei	1	3	4
TOTAL	**340**	**408**	**411**

Hearings involving audio-visual links

Number of hearings that utilised audio-visual technology



Representation of parties

Parties are able to choose whether to be represented in the Authority. If a party is represented, they can be represented by a lawyer or an advocate. In some minimum standards cases, an employee can also be represented by the Labour Inspectorate.

REPRESENTATION OF EMPLOYEES (%)			
Representation	**2021**	**2022**	**2023**
Legal	40%	40%	40%
Advocate	38%	42%	38%
Self-represented	15%	13%	15%
No appearance	2%	2%	2%
Labour Inspectorate	5%	3%	5%

REPRESENTATION OF EMPLOYERS (%)			
Representation	**2021**	**2022**	**2023**
Legal	62%	59%	56%
Advocate	11%	13%	13%
Self-represented	17%	17%	18%
No appearance	10%	11%	13%

AGGREGATE TOTAL (%)			
Representation	**2021**	**2022**	**2023**
Legal	51%	50%	48%
Advocate	24%	27%	25%
Self-represented	16%	15%	17%
No appearance	6%	6%	8%
Labour Inspectorate	3%	2%	2%

Determinations issued

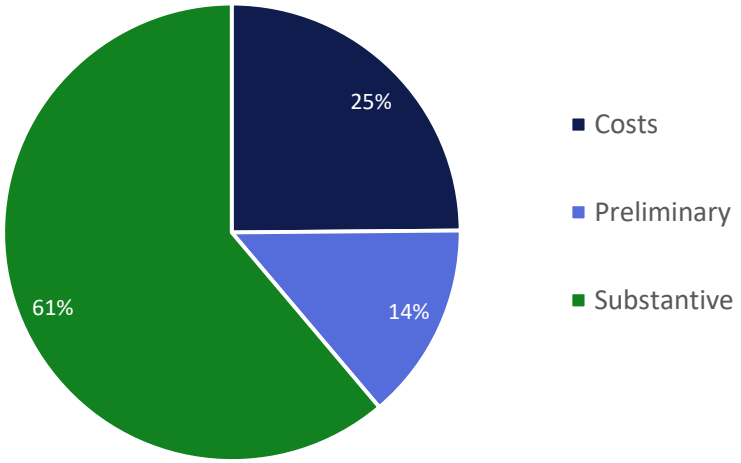
Number of determinations issued by Authority office

NUMBER OF DETERMINATIONS			
Office	**2021**	**2022**	**2023**
Auckland	294	356	410
Wellington	107	168	188
Christchurch	180	165	182
TOTAL	**581**	**689**	**780**

2023 DETERMINATIONS BY OFFICE BY MONTH				
Month	**Auckland**	**Wellington**	**Christchurch**	**Total**
January	28	11	9	48
February	27	14	6	47
March	35	16	14	65
April	28	12	12	52
May	26	19	25	70
June	34	15	15	64
July	29	14	18	61
August	45	17	23	85
September	43	20	10	73
October	42	15	18	75
November	40	18	17	75
December	33	17	15	65
TOTAL	**410**	**188**	**182**	**780**

Types of determination

Percentage of preliminary, substantive and costs determinations



Facilitations and recommendations

Number of collective bargaining facilitations and recommendations

	2021	2022	2023
Facilitations	6	11	8
Recommendations	1	8	6

Reinstatement

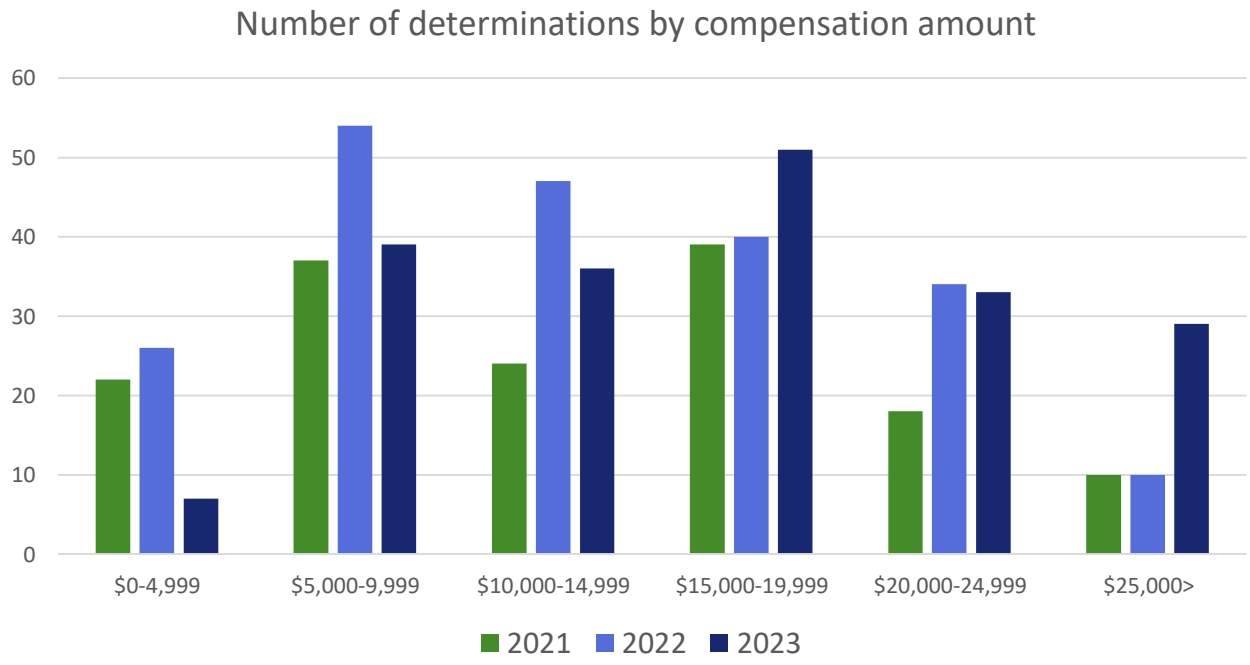
Number of interim and permanent reinstatement determinations

INTERIM REINSTATEMENT			
	2021	**2022**	**2023**
Successful	8	5	5
Unsuccessful	20	9	8
TOTAL	**28**	**14**	**13**

PERMANENT REINSTATEMENT			
	2021	**2022**	**2023**
Successful	3	2	1
Unsuccessful	11	8	15
TOTAL	**7**	**14**	**16**

Compensation

Average compensation awarded for successful personal grievances under s 123(1)(c)(i) of the Employment Relations Act 2000

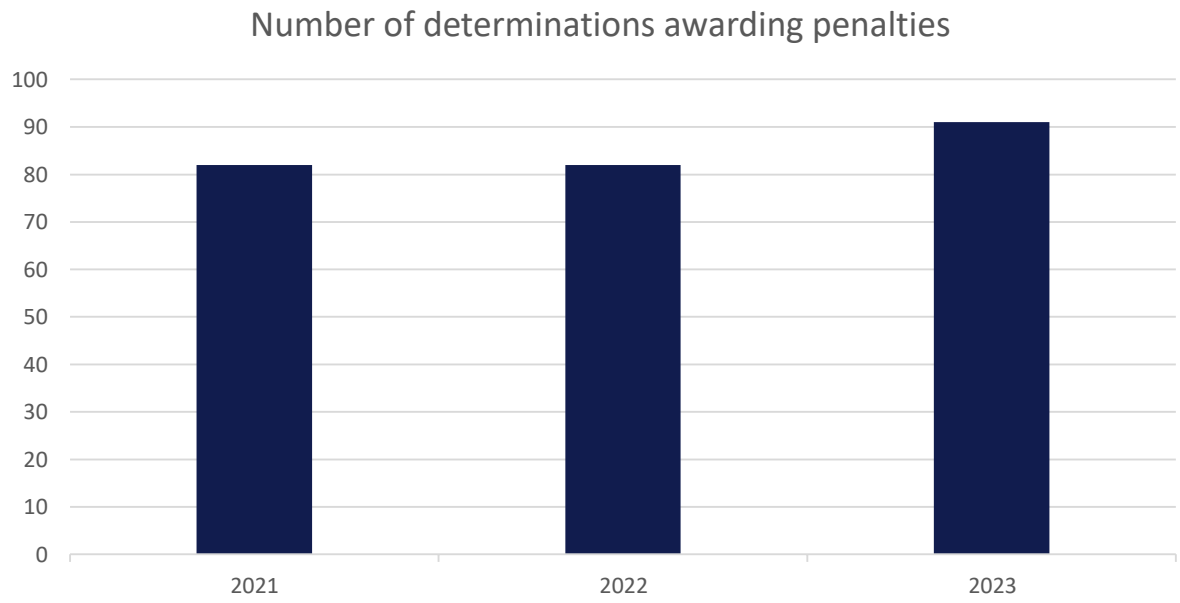


Note 1. One hundred and ninety-five applicants were awarded compensation as a remedy for a successful personal grievance in 2023.

Note 2. In 2023, the lowest compensation award was $500 and the highest $55,000.

Penalties

Penalties awarded for breaches of employment legislation

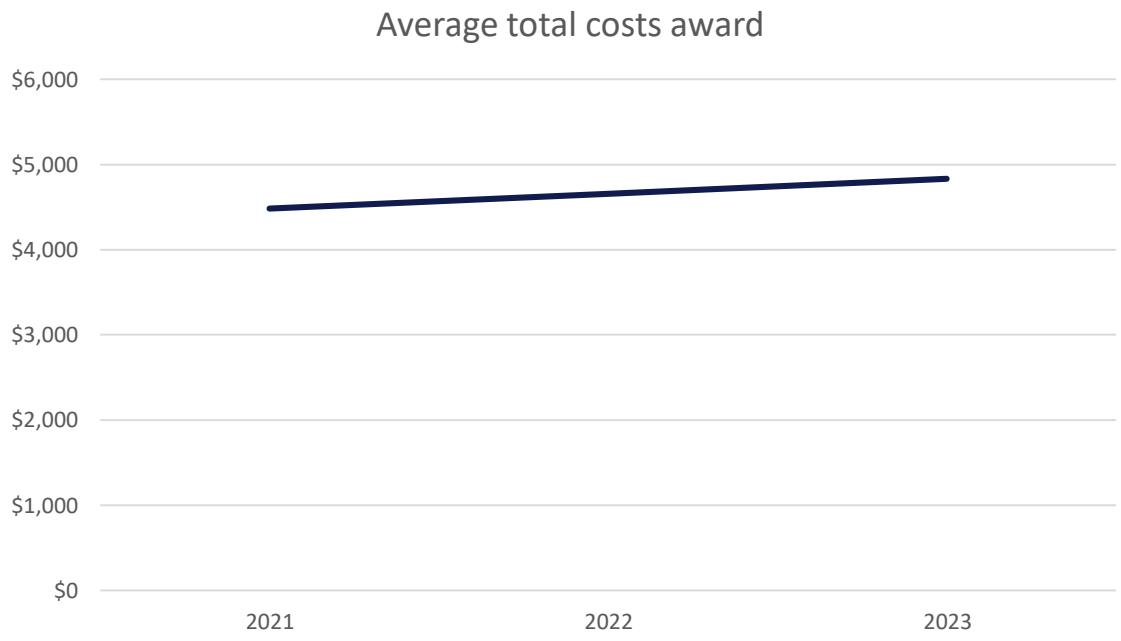


Note 1. In 2023, the lowest penalty award was $100 for a breach of the terms of a record of settlement. The highest penalty award was $153,000 for multiple breaches of minimum employment standards.

Note 2. Penalties were most commonly issued for breaches of the Employment Relations Act 2000 (failure to keep wage and time records, breaches of records of settlement, breach of employment agreement); the Holidays Act 2003 (failure to keep holiday and leave records, failure to pay annual leave or public holiday entitlements); the Minimum Wage Act 1983 and Wages Protection Act 1983.

Costs

Contribution to costs awarded to the successful party



Note 1. The Authority uses a notional tariff as a starting point to awarding costs:

- $4,500 for the first day of an investigation meeting; and
- $3,500 for each additional day of an investigation meeting.

The notional starting point can be adjusted to reflect the circumstances of the particular case.

Note 2. The Authority's practice note on costs is available at: https://www.era.govt.nz/assets/Uploads/practice-direction-of-the-employment-relations-authority.pdf

Improving participation

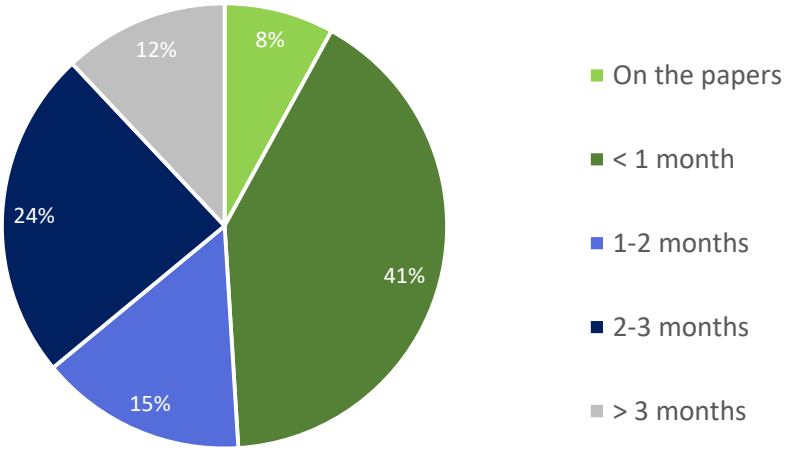
Number of determinations that noted a party was the recipient of legal aid or was represented by a Community Law Centre

DETERMINATIONS INDICATING ACCESS TO JUSTICE			
	2021	**2022**	**2023**
Legal aid	3	14	19
Community Law (representation)	1	5	-
Community Law (advice/preparation)	4	4	6

Timeliness of determinations

Percentage of determinations issued within 3 months of the investigation meeting or provision of final material

The Authority issues an overwhelming majority of determinations within 3 months of the date of the investigation meeting or the date on which the Authority received the last evidence or information from the parties.



Challenges in the Employment Court

Percentage of Authority matters challenged in the Employment Court

PERCENTAGE OF MATTERS CHALLENGED			
	2021	**2022**	**2023**
Percentage of matters challenged	17%	17%	17%

Summary of key Authority determinations in 2023

***RAIL AND MARITIME TRANSPORT UNION INC V KIWIRAIL LTD* [2023] NZERA 17**

Sick leave – Relevant daily pay – Average daily pay – Transport allowance

At issue was whether the employer, when calculating sick leave, should have included payment of the employees' daily transport allowance.

The collective agreement between the employer and the union provided for a transport allowance for those that worked at night and/or were called back to work between work periods. The daily allowance was $6.38 in the first year and $6.64 in the second year of the collective agreement. It was payable to employees who lived more than two kilometres from the workplace and did not have a vehicle provided by the employer.

The union argued the allowance should have been included in sick leave payments as, if the employee had worked on that day, they would have been paid the allowance. The employer disagreed, claiming that ss 9 and 9A of the Holidays Act 2003 did not require allowances to be included in calculations of relevant daily pay and average daily pay. As the employee would not be travelling on the day they took sick leave, the employer considered it should not have to pay the travel allowance.

The Authority found that the employer was required to include the transport allowance when calculating sick leave. In making this determination, the Authority considered:

- The collective agreement stipulated that relevant daily pay had "the meaning given to it by the Holidays Act 2003" and included allowances "paid in accordance with the provisions of this collective agreement with the exception of strict reimbursing allowances" (at [27]).
- The travel allowance was not a strict reimbursing allowance. The employees were paid the travel allowance whether or not they incurred any expense (at [36]).
- The travel allowance was instead a conditional payment, which must be included in the calculation of relevant daily pay (at [41], [50]).
- As the allowance was not a reimbursement, it did not come within the exceptions to gross earnings in s 14 of the Holidays Act 2003. Therefore, it must also be included in the calculation of average daily pay (at [55]).

***ROCK V DJ INVESTMENTS 2019 LTD* [2023] NZERA 98**

Casual employment – Personal grievance – Unjustified dismissal

A key issue in the case was whether the employee was a casual or permanent employee. Her employment status was important to her personal grievance for unjustified dismissal.

The employee worked in a small retail clothing shop owned by the employer. The employee brought a personal grievance against the employer for unjustified dismissal. The employer's initial justification for the dismissal was that the employee was on a 90-day trial period. However, the employer later claimed that the dismissal was justified because the employee was on a casual employment agreement. The employer argued that because the employee was on a casual contract, they could have no ongoing expectation of receiving work, and therefore no grounds to claim unjustified dismissal.

The Authority determined that the employee was on a permanent rather than casual contract. In the absence of a statutory definition for casual employment, the Authority defined it as "working on an as and when required daily basis" (at [23]). It then looked at whether an as and when required daily basis would make sense for the type of work. The Authority determined that for a small retail shop with consistent opening hours, such as the one in this case, a casual arrangement would not make sense because the employer would need to have a level of certainty that someone is always present and serving (at [25]). The Authority suggested a catering company working irregular events was a business which may genuinely require casual employees (at [25]).

The Authority went on to provide further reasons for the employee being permanent rather than casual:

- Rosters were put up on a wall calendar a month in advance, but then were varied closer to the day (at [24]).
- The employee worked for 12 consecutive weeks for over 20 hours per week with only two weeks as an exception. This had the regularity of permanent part time work (at [26]).
- The employee held a set of keys. This would be unlikely for an employee who had no guarantee of ongoing work (at [27]).
- Although holiday pay being paid as you go suggested casual employment, it was not determinative. This form of holiday pay is used for other forms of employment agreement that are not casual (at [30]).

The Authority suggested that even if the employment had been of an 'as and when required' basis, a notice period would still have been appropriate if there was a forward planned roster. The Authority determined a fair and reasonable employer would have given notice for the dismissal and would have considered restructuring before dismissing the employee (at [23], [31]).

The Authority ordered the employer to pay $18,112.50 in lost wages, and $18,000 in compensation in addition to costs (at [57]).

***FONTERRA BRANDS (NEW ZEALAND) LTD V LANIGAN* [2023] NZERA 197**

Dispute – Fingerprint scanning technology

At issue was whether the employer could require its employees to clock in and clock out using fingerprint scanning technology.

The employer bought and introduced a time keeping and attendance system that used fingerprint scanning technology. In doing so, the employer said it sought to collect accurate data to inform payment of wages and entitlements. The employee was one of about 30 maintenance workers at one of the employer's workplaces who refused to use the technology. The employee considered the employer was intruding upon his privacy by requiring his biometric information. The employee argued the employer would have to vary the collective agreement before it could do so.

The employer asked the Authority to resolve the dispute. The Authority declared that the employer could lawfully and reasonably instruct the employees to use the fingerprint scanning technology for the purposes of recording time and attendance at work (at [92]).

The Authority noted that:

- Employees were required to follow lawful and reasonable instructions of their employers. This was an implied term of every employment agreement (at [24]).
- Approximately 8000 employees were already using the technology. Only these 30 employees were not (at [8]).
- The fingerprint scanning technology system used offered the protection of encryption. The risk of the security measures being defeated seemed "very slight" (at [49]–[50]).
- The collection of the data complied with information privacy principle 1 in the Privacy Act 2020, because the personal information was being collected for a lawful purpose, and was necessary for that purpose (at [52]–[56]).
- The collective agreement did not mention timekeeping or attendance technology or any limitations on the use of it. The Authority found that a variation was not necessary when the employer was giving lawful and reasonable instructions because "consent was not a precondition for giving an instruction" (at [68], [70]).
- The ability of employers to give lawful and reasonable instructions was limited by the need for consultation and good faith behaviour. In this case, the employer had allowed the employees to express their views on the fingerprint scanning technology and had adequately considered those views (at [75], [79], [83]).
- The employer had good business reasons to use the fingerprint scanning technology (at [86]).

***LENOEL V WAIKATO WINDOWARE LTD* [2023] NZERA 481**

Personal grievance – Unjustified dismissal – 90-Day Trial Period – Validity

At issue was whether the employer was entitled to rely upon the 90-day trial period in the employment agreement when it dismissed an employee.

The employer was a small company that made curtains and outdoor shades. The employee expressed interest in a curtain track assembler role. After an interview, the director of the employer telephoned the employee to offer her a position. The director emailed an employment agreement, which included a 90-day trial provision, to the employee. However, the employee did not read the agreement. The director did not verbally advise the employee of the 90-day trial. The agreement was not accompanied by a letter or email telling her about her right to seek independent legal advice. The employee signed the agreement on her first morning.

The director was not happy with the employee's work. He said she made a lot of mistakes, took extended breaks, was regularly late for work, claimed time she had not worked and made excuses. There was a dispute between the parties over whether the employee had accessed the internet on the office computer and then deleted its history. The director decided the employee had breached his trust and the employment relationship had broken down. He dismissed the employee, relying on the 90-day trial period in the agreement and s 67B of the Act.

The Authority noted that as "trial periods restrict what would otherwise be an employee's right to challenge their dismissal as unjustifiable, the requirements must be strictly met" (at [16]). The Authority found that the employer had not given the employee specific advice that she was entitled to seek legal advice. And that even if she had been, it was questionable that she would have had sufficient time to do so (at [18]–[19]). The Authority found the 90-day trial was invalid (at [21]).

The Authority held the employee was unjustifiably dismissed because the employer did not complete a fair process before the dismissal (at [66]–[67]). It ordered the employer to pay the employee $10,500 compensation and $6,615 in lost wages, after reducing those figures by 30 per cent to reflect the employee's contribution to the situation that led to her dismissal (at [73]–[74]).

***NEW ZEALAND PUBLIC SERVICE ASSOC TE PŪKENGA HERE TIKANGA MAHI INC V CHIEF OF DEFENCE FORCE* [2023] NZERA 558**

Collective bargaining – Breach of good faith – Passing on terms of a collective agreement

Union membership – Unlawful preference towards non-union members

At issue was:

- Whether the employer gave an unlawful preference to non-union members when it backdated a pay increase for non-union members, but not for union members; and if so, whether the Authority should order the employer to backdate the pay increase for union members.
- Whether the employer breached good faith under s 4 of the Act when it passed on a pay increase under a collective agreement (CA) to non-union members; and if so, whether the employer should be penalised.

In 2020 and 2021 the employer and the union were undergoing collective bargaining after the previous collective employment agreement (CEA) expired in 2019. Before a new CA was settled, the employer carried out a remuneration review. Based on the review, the employer decided to increase pay for some civilian non-union members, effective 1 July 2021, but not for union members.

In November 2021, the employer and the union agreed on a new collective agreement. The employer provided pay increases to union members from the date the CA took effect. The union sought to have the pay increases under the CA backdated to when the non-union employees received a pay increase. The employer declined. The

employer said it offered the union the same increase provided to non-union-members in an earlier pay increase in 2020 and the union chose to continue bargaining, rather than accept the increase. The employer said as a result the employer was contractually bound to the agreed date for pay increases in 2021 (at [31]–[33]).

The union claimed by not backdating the pay increases the employer breached the prohibition on preference in s 9 of the Act (at [29]). The union claimed that the employer also breached the duty of good faith in s 4 of the Act by passing on the union's negotiated pay increases to non-union employees (at [48]–[53]).

The Authority agreed that by paying non-union members more for a period of time, the employer breached the prohibition against preference based on union membership status (at [34]–[37]). The Authority ordered the employer to backdate the pay increases for specified union members to 1 July 2021, with interest (at [42], [83], [84]).

The Authority said it could not consider a claim for breach of good faith solely under s 4 of the Act, when s 59B of the Act specifically addressed breaches of good faith relating to passing on. In coming to that determination, the Authority applied the Court of Appeal decision *Christchurch City Council v Southern Local Government Officers Union Inc* [2007] NZCA 11, [2007] 2 NZLR 614 (at [44]–[46]).

The Authority found the employer's actions did not meet the test for a breach good faith under s 59B(2). The Authority accepted the employer passed on a term of the CA with the intention of undermining the CEA, as required under s 59B(2)(a) (at [72]–[76]). However, the Authority said passing on the term did not have the effect of undermining the CA, as required under s 59B(2)(b) (at [78]–[80]).

The Authority determined there was no basis for penalising the employer for a breach of good faith.

***PERRY V THE WAREHOUSE GROUP LTD* [2023] NZERA 773**

Personal grievance – Leave to raise personal grievances out of time – Unjustified disadvantage – Constructive dismissal – Burnout

At issue was whether the employee raised personal grievances within 90 days and, if so, whether the employer unjustifiably disadvantaged and/or constructively dismissed the employee.

The employee worked in the Education Sales team of a nationwide retailer. The employee complained to his employer during his employment that:

- His sales targets were inconsistent (at [14]–[17]).
- The loss of support staff following a restructure impacted his ability to perform his role (at [18]–[20]).
- He should have been consulted before changes to his business card, uniform and email address after the employer aligned itself more closely with another brand within the parent company's suite of retail brands (at [21]–[22]).
- He felt pressure to cross-sell products of the related brand, though he refused to do so (at [23]–[24]).

The employee told his managers he was burnt out. The company took some steps to assist him, recommending he utilise EAP and giving him sick leave "off the books". Months later, the employee resigned and raised personal grievances.

The Authority found that the employee's unjustified disadvantage grievances were raised outside of the 90 days stipulated in s 114 of the Act. The Authority found that the employer could not have been reasonably expected to treat the employee's complaints as personal grievances (at [59]). The Authority further declined to give the employee leave to raise the personal grievances out of time, as it did not find that exceptional circumstances had existed (at [63]). The constructive dismissal claim was raised within 90 days.

The Authority found the employer had constructively dismissed the employee. Although the employee had resigned, he had done so in response to a breach of duty by the employer. The Authority found "a fair and reasonable employer with [the employer's] resources would have taken more formal and proactive steps to understand [the employee's] mental health situation at the time" (at [70]). The Authority ordered the employer to pay the employee $25,000 in compensation, three months' lost wages and five days' lifestyle leave (at [85]).

Website visitors and social media

Website visitors

Website views and individual users

WEBPAGE VIEWS			
Website	**2021**	**2022**	**2023**
Employment Relations Authority (total) era.govt.nz	217,589	220,550	283,125
Employment Law Determinations Database https://determinations.era.govt.nz/determinations	290,236	332,811	211,982
Employment New Zealand (total) employment.govt.nz	12,113,400	11,215,238	8,916,204

INDIVIDUAL USERS			
Website	**2021**	**2022**	**2023**
Employment Relations Authority (total) era.govt.nz	40,413	38,282	55,388
Employment Law Determinations Database https://determinations.era.govt.nz/determinations	19,809	20,714	26,357
Employment New Zealand (total) employment.govt.nz	3,555,058	3,559,265	2,863,133

Social media

Follow the Authority on LinkedIn

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