PSA submission to the Workforce and Education Select Committee

Employment Relations Amendment Bill

August 2025

For a better working life
New Zealand Public Service Association
Te Pūkenga Here Tikanga Mahi

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About the PSA

1. The New Zealand Public Service Association Te Pūkenga Here Tikanga Mahi (the PSA) is the largest trade union in New Zealand with over 95,000 members. We are a democratic organisation representing people working in the public service, the wider public services (including Te Whatu Ora and other crown agents, and other crown entities), state owned enterprises, local government, tertiary education institutions and non-governmental organisations working in the health, social services and community sectors.

2. The PSA has been advocating for secure work and strong, innovative and effective public and community services since our establishment in 1913. People working in public and community services join the PSA to negotiate their terms of employment collectively, to have a voice within their workplace and to have an independent public voice on the quality of public and community services and how they're delivered.

3. The PSA is an affiliate of the New Zealand Council of Trade Unions Te Kauae Kaimahi (CTU), Public Services International (PSI) and Uni Global. We endorse the CTU's submission on this bill.

PSA recommendations

4. We strongly oppose all of the changes proposed in the Bill and recommend that the Committee:
    - Report back to the House that the Bill should not progress.
    - Refer the unintended impact on pay transparency to the Minister for further advice from officials.

PSA response to the Bill

5. We strongly oppose all changes proposed in the Bill. The proposed changes effectively give employers the ability to:

    - Fire at will workers who are unjustifiably dismissed and earn over a certain amount.
    - Fire at will workers who seek redress for unfair treatment and may have contributed to the situation.
    - Fire at will workers who are employees by redesignating them as contractors.
    - Fire at will new staff by removing their protection from 90-day trials by being offered collective agreement terms when they start.

6. The changes taken in total will undermine the Act's objects of building productive employment relationships, through the promotion of good faith in all aspects of the employment environment and of the employment relationship including through acknowledging and addressing the inherent inequality of power in employment relationships.

7. The changes overbalance the scales to the benefit of the party who already has most power in the employment relationship – the employer. Some changes are so severe that they

cannot be consistent with s 3(a)(ii) of the Act which provides that the inherent inequality in bargaining power in employment relationships must be recognised.

8. For 25 years the Employment Relations Act 2000 has had broad cross-party support and provided a stable framework employers and workers can rely on. While we are of the view that the Act as it stands does not go far enough to create a fair balance between the power of employers and the rights of workers, there is general consensus that the Act has struck a broad balance and has been a support for industrial peace and stability in the economy.

9. These changes are of such a radical nature that they will inevitably cause undesirable disruption. It will be workers and business that will pay the legal costs involved with the test cases responding to these changes to what is already a stable framework. Disputes that would otherwise be resolved within the Act's provisions and our employment institutions will be subject to novel and untested legal claims.

The Bill enables employers to fire workers at will. Good employers don't need this

10. The change to the definition of employee, reducing workers' access to remedies in personal grievances and removing access of higher paid workers to the personal grievance provisions of the Act for unjustified dismissal creates an environment where employers can effectively fire workers at will.

11. This will empower bad employers to behave poorly towards vulnerable workers as the consequences of doing so are severely reduced and in many instances prohibited entirely.

12. The proposed changes will make it significantly harder for unjustly treated workers to pursue justice. Even if a worker is able to establish a valid claim, there will be significant barriers to remedies.

It will make cases more time consuming and difficult for all

13. A significant barrier to justice is the removal of remedies for workers whose behaviour is said to amount to serious misconduct. Serious misconduct is very often a requirement for an employer to move ahead with a dismissal. This means the Authority and Court are likely to be faced with the additional burden of deciding the preliminary matter of whether serious misconduct also occurred, before deciding the other substantive merits of the case. This will mean almost all dismissal cases become more complicated, time consuming and costly to resolve as parties argue over the finding of serious misconduct before even considering the justification of the dismissal.

14. If the bill passes, contribution will be essential to establishing whether there are any remedies and so this will become a far greater topic of dispute between the parties. It is too easy for some part of a worker's action or inaction to be portrayed in a negative light, particularly where *any* contribution is all that is needed to entirely remove certain remedies. Almost every dispute before the Authority will deal with arguments around contribution in a far more detailed and time-consuming manner than they did before, and this too will increase time and cost.

15. We also know that even the most diligent of workers can behave in out of character ways when they are terrified of losing their livelihoods. This will put immense pressure on workers involved in disciplinary processes.

16. The removal of reinstatement as a remedy where a worker has been found to contribute to the situation, in even the most minute way, is misguided. The use of reinstatement as a remedy is already very limited, with reinstatement only being ordered in 16 cases at the Employment Relations Authority in 2024, according to its Annual Report. There is no need to limit this further, and removal of the remedy will again mean more detailed arguments and

evidence for the Employment Relations Authority and Court to have to hear. This will needlessly clog the system and increase cost to all involved.

The change to contribution punishes any amount of contribution by a worker, while rewarding or ignoring the employer's contribution

17. The law around contribution already enables the Employment Relations Authority and Court to sufficiently address contribution and poor behaviour from a worker.

18. When an employer takes an action against a worker, it must do so properly and fairly. Where it does not, its unjust action against a worker is recognised by an award to the worker for the poor treatment by the employer. Under this Bill where the worker has contributed to the situation that gave rise to the grievance, the Authority will be prohibited from reinstating or compensating the worker. The proposed change removes meaningful remedies for unjust employer actions.

19. The current law already provides for proportionate deduction to remedies which take into account worker behaviour. What is being proposed is a system where a proportionate assessment ceases to apply. It is motivated by a disingenuous assertion from this government through its Minister for Workplace Relations and Safety, that the system has "incentivised workers to try their luck at raising a personal grievance in the hope that they will get a financial payout".[1] This is simply untrue.

20. Tools already exist and are used by the Authority to address poor behaviour. There are a number of cases in both the Authority and Court where 100% contribution on the part of a dismissed worker has been found and so no remedies awarded.[2]

21. The Minister has ignored this fact and is utterly reshaping the employment law landscape, stripping rights from workers claiming to fix what is clearly a non-existent problem.

22. This year in *Stewart v Open Country Dairy Limited* [2025] NZERA 330, Employment Relations Authority Chief Dr Andrew Dallas determined:

> "While I have found Mr Stewart was unjustifiably dismissed, as set out above, this is solely on a procedural basis. Mr Stewart's substantive actions were overwhelmingly contrary to his express and implied obligations to OCDL, justified his dismissal and, as such, militate against the sound and principled exercise of my discretion in his favour. Consequently, I decline to grant Mr Stewart any remedies under s 123 of the Act…he, through his actions, is the architect of his own misfortune and that is, indeed, very regrettable for him…I find Mr Stewart's contribution towards the situation giving rise to his personal grievance warrants a proportionate reduction of one hundred percent (100%) to his reimbursement of lost wages remedy under s 128(2). On a proper construction, there is nothing in the statutory language of s 124 that prevents this being a possible outcome of its application to s 128(2) …Mr Stewart is awarded, and will receive, no remedies for his personal grievance for unjustified dismissal."[3]

23. We also note the fact that Authority determinations and Court decisions are public, and where outrageous behaviour has occurred are often subject to media reporting with workers being named in that reporting. The reality of this is that if any worker was to 'try their

[2] See Shaw v Bay of Plenty District Health Board [2022] NZEmpC 10, [2022] ERNZ 74 or Smith v Electrical Training Co Ltd [2019] NZERA 420

[3] *Stewart v Open Country Dairy Limited* [2025] NZERA 330 paragraphs [80] – [88]

luck', they would not achieve remedies and would be publicly exposed by having their unreasonable conduct in the public arena, where any future employer can see and draw their own conclusions on. [4]

24. This reality is acknowledged in *MW v Spiga Ltd* the leading case on name suppression in the employment jurisdiction. Where it was accepted that there is 'an "often"-used practice of mediators drawing to an employee's attention the risks associated with progressing with their claim beyond mediation, including the likelihood that they will be named and that this may damage their future job prospects'.[5] This encourages early resolution of employment relationship issues.

25. The system is already very heavily weighted against workers seeking justice for unfair dismissal, and contributory worker conduct is already addressed by the current law.

There is no evidence or justification for this Bill

26. We note the Minister has failed to provide any case reference or other evidence to substantiate her claims that workers are gaming the system or trying their luck. These law changes entirely lack balance, focus only on the conduct of workers and introduce an unjust and oppressive employment landscape.

27. The regulatory impact statement analysing the extent of low-merit claims or claims where workers conduct has an impact, states:

> "It is very difficult to quantify the amount of personal grievance claims which are low merit in nature. There are essentially no measures which represent the number of low

[4] Eva Gallot, Stuff "Man loses personal grievance claim against company he never worked for" January 7, 2025
[5] *MW v Spiga Ltd [2024] NZEmpC 147* at [172]

merit claims made, so we are primarily reliant on stakeholder feedback for understanding the nature and scale of the problem."[6]

28. What little evidence the Ministry could find suggests "MBIE mediators indicated that around two to four percent of employment relationship problems that come to mediation were 'frivolous or opportunistic' in nature".[7]

29. We note this gives no indication then of how many of the 2 to 4 percent of cases at mediation which are frivolous or vexatious then progress to the Employment Relations Authority. We note settlement rates at mediation have historically ranged from 70-80%,[8] and it is unclear again how many of those remaining 20-30% actually end up in the Employment Relations Authority.

30. There were 4580 mediations in the 2023-2024 period, and 411 and 434 investigation meetings in the Employment Relations Authority. If 2 to 4 percent of those investigation meetings are 'frivolous or vexatious' between 8 -17 cases per year of this type would have reached the Authority.[9]

31. Even reaching this low figure requires makes many assumptions. For example, there is not any distinction drawn between frivolous or vexatious claims brought by employers or workers. It is important to note that employers are equally capable of taking vexatious claims, displaying awful behaviour and putting workers to significant cost in pursuit of an unmeritorious claim.[10]

[6] Regulatory Impact Statement page 11
[7] Regulatory impact statement page 12
[8] Dr Grant Morris 'The new normal: the radical changes to delivery of employment mediation' Employment Law Conference 2025 materials page 88
[9] MBIE 2023/24 annual report
[10] Nelson v Katavich [2016] NZEmpC 48

32. There is no clear evidence to suggest this is a widespread issue, and what evidence there is suggests if anything, it is vanishingly small.

33. There is no evidence to suggest the minute number of claims that are frivolous or vexatious will be reduced by stripping all workers of the right to justice where they have been treated unjustly.

34. In *Nelson v Katavich* the employer Mr Katavich acted appallingly during employment and then during litigation, Mrs Nelson to the expense of pursuing a claim against him when there was no merit to his defending it, and he was deliberately obstructive at every step of the litigation[11]:

> "Contrary to all notions of good faith, Mr Katavich then set about creating two other fictitious allegations of serious misconduct which he also knew were unfounded. He was not interested in hearing or considering Ms Nelson's response to the allegations. He treated her with disdain by not even turning up to the disciplinary meeting. He proceeded to terminate Ms Nelson's employment but in truth that decision had been predetermined following the barbecue. His subsequent actions resulting in Ms Nelson's dismissal were played out as a farce... I can confidently say that rarely, if ever, has this Court been confronted with such a protracted array of post-dismissal actions and threatened actions aimed at coercing a dismissed employee into abandoning their employment claim. There can be no other explanation for Mr Katavich's sustained campaign of intimidatory conduct. His actions cannot be condoned in any way. They amount to the worst form of bullying. They were designed to cause maximum hurt and humiliation to a former employee who was seeking to pursue her statutory remedies following an unjustifiable dismissal."[12]

[11] Nelson v Katavich [2016] NZEmpC 48 [3] – [5] and [114] (d)
[12] Nelson v Katavich [2016] NZEmpC 48 [112] and [116]

35. The Minister has made no consideration of how such employer conduct which, unlike her anti worker claims, can be evidenced, may be addressed. She has disingenuously painted this issue as solely one of undeserving workers trying their luck with disingenuous claims against employers.

36. Even if there were evidence supporting this claim, which there is not, it is unclear how these destructive changes address the issue of frivolous or vexatious claims being brought, as such claims are not successful in the Authority or the Court.

37. What we are certain of is that under this Bill, meritorious claims will fail.

The changes exacerbate the imbalance in access to justice for unfair dismissal, already very heavily weighted against workers

38. When we consider the high cost of taking a case, it is clear how foolish it would be for a worker to 'try their luck'. The Minister's line of reasoning entirely ignores the significant legal costs, time and stress taking a case through to the Employment Relations Authority or the Court requires. It is notable that Chief Judge Inglis stated it is a "sobering reality that the cost of pursuing legal rights in employment matters has become eye-wateringly daunting, if not prohibitive, for many".[13]

39. Dismissed workers are unemployed and inevitably unable to pay the significant costs involved in seeking advice, and taking a dispute they are in a precarious financial position. Often their right to fair treatment in employment has been breached and frequently they are unable to pursue redress for this. Through this Bill the Government is illustrating just how

[13] Chief Judge Christina Inglis "A brave new technological world: Opportunities for gain and pain…" (Dinner speech at New Zealand Labour Law Society Conference, 24 November 2017) at 1.

far out of touch it is with the realities of employment and the working lives of the vast majority of New Zealanders

40. Most of us depend on our employment for our livelihoods. This Ministers' rationale for these changes shows how grossly out of step she is with common sense. The rhetoric also perpetuates a fiction by the Minister that business is somehow at a disadvantage when the opposite is the true; workers are far more vulnerable to unjust employer conduct.

41. Chief Judge Inglis noted in 2017 that, "The generally applied daily rate for costs purposes in the Employment Relations Authority is $4,500 per first day of hearing. It would take a person on the minimum wage 7.5 weeks to pay for one day in the Authority".[14] On today's minimum wage, it would take approximately 6 weeks for a worker on minimum wage to pay the costs awarded against them should they lose. This does not even account for their own legal costs which will likely be many thousands of dollars, if not tens of thousands of dollars. The system already contains balances to reduce vexatious litigants which the Minister purports need to be addressed.

42. A system where an employer can engage in bad faith behaviour and face no consequences can only lead to an upsurge in such behaviour. Bad employer conduct will be the result.

The changes mandate a forensic approach to worker behaviour

43. No change typifies this reversal of focus from both parties' behaviour to a forensic examination of what the worker did to make the employer treat them unfairly, as clearly as the change to consider obstruction. The changes mean, where the Court or Authority

[14] Inglis "A brave new technological world: Opportunities for gain and pain…", above n 215, at 2.

considers an employer conducted an investigation unjustly, it must consider whether obstruction by the worker can be blamed for this.

44. This again is a solution in search of a problem. If a worker has obstructed an employer from investigating fairly, the Authority can and already does consider this. It is not uncommon for an employer have to make a decision on a disciplinary outcome in the absence of any feedback; this is acceptable to the Authority and Court.[15] Workers who are obstructive to the investigation process are not rewarded for this, and need to consider their own good faith obligations under section 4 of the Act to be responsive and communicative to their employer if they do chose to disengage from an investigation into their conduct.

45. There is no need to mandate consideration of obstruction, as any time it occurs it would of course be brought to the attention of the Authority by the employer during the investigation meeting. Given this, the change is simply mandating the Authority or Court check to see if the worker can be blamed for the improper process to which their employer subjected them. It is emblematic of the change in focus from the conduct of both parties to overly focus on the conduct of the worker. It is entirely unbalanced and misguided.

Permission to run a flawed process

46. The changes also allow for serious defects in the investigation process followed by an employer, as long as the Court finds this didn't result in unfair treatment. This change is ill-considered and circular. How can an employer determine what fair treatment is when it has not conducted a proper process to establish what treatment is warranted?

[15] By way of example see *Lyons v Rotorua Lakes Council* [2025] NZERA 467

47. Workers are at risk of having to go through an entirely unjust, degrading and overly invasive process and having no recourse for whatever outrageous treatment an employer may subject them to, so long as the ultimate decision is considered fair at a later date by the Authority. This removes the requirement for an employer to conduct a fair process. It appears that employers are not required to hear a worker's explanation for what they did, so long as they issue a fair sanction. This is corrosive of basic employment concepts of fair treatment and productive working relationships. It discourages employers acting with humanity towards workers, even those who have made mistakes and front up to them.

48. Again, this turns to the focus entirely away from anything an employer may have done wrong and focuses disproportionately on what a worker has done wrong. This is not rebalancing the system, it is tilting it entirely towards already powerful employers.

49. At the moment, the obligations on employers are simply to run a fair and process lacking major flaws. The law presently makes consideration of an the resources available to an employer, for example a small 3 person scaffolding company is not held to the same standard as a government department.[16] The case law is clear that "an employer considering allegations of misconduct by an employee is not required to conduct a criminal or civil trial or to employ a judicial process".[17] Employers must undertake a process that reflects basic, common sense expectations anyone would have of natural justice. These changes pervert this.

[16] Employment Relations Act 2000 section 103A (3) (a)
[17] *The Warehouse ltd v Cooper* [2000] 2 ERNZ 351

The changes reflect a conscious disregard for the physical and emotional damage caused by unjust dismissal

50. Further, these changes entirely ignore the huge emotional impact and damage done through unjust dismissals by painting compensation for hurt and humiliation payments as 'payouts' for workers who tried their luck. There is clear medical evidence supporting the harm done to workers through the financial stress and emotional harm caused by unjust dismissals.

51. The types of harm caused can be significant. Relationships can break down and come under stress,[18] families share in the stress,[19] people can become isolated from the social network they had at work[20], they can suffer a great loss of self-esteem and purpose,[21] clinical diagnoses of anxiety and depression are common, the stress can exacerbate underlying health conditions and so physically harm people. The damage done is significant. An employment dispute is often one of the most difficult things a person goes through in their life.

52. The effect of the Minister's changes remove access to justice.

53. We note only 200 hundred applicants were awarded compensation for hurt and humiliation in 2024, out of nearly 800 determinations issued that year.[22]

54. The Minister's unsupported and anti-worker rhetoric has been used as justification for a set of changes that encourage and protect the worst actions of employers. This is entirely out of

[18] *Densem v Clemence Drilling Contractors Ltd* [2019] NZERA 378
[19] Ibid.
[20] *Telecom New Zealand Ltd v Nutter* [2004] 1 ERNZ 315
[21] *Catanach-Hessell v Butchers Mistress 2021 Ltd* [2023] NZERA 342
[22] Employment Relations Authority Annual Report 2024 pages 16 and 20

step with the Act's objects of building productive employment relationships, through the promotion of good faith in all aspects of the employment environment.

The changes effectively remove the remedy of reinstatement

55. For many workers when something has gone wrong in their employment, all they want is a return to the work they enjoy and to simply get on with it. The power to order reinstatement where a worker has been unfairly dismissed is a necessary human right for the restoration of their dignity to be allowed to simply return to work and earn their living.

56. Already we see this power to reinstate a dismissed worker used very judiciously, with permanent reinstatement only being ordered five times in 2024, one time in 2023 and only two times in 2022 by the Employment Relations Authority. These figures come from the hundreds of cases that concerned dismissal.[23] Already it is very difficult to get an unfairly dismissed worker reinstated.

57. These changes will restrict reinstatement so that it is effectively removed as a remedy. Where there is any contribution by the worker, reinstatement cannot be ordered. This will mean reinstatement is all but abolished. It means employers can dismiss workers at will, and no matter how unfair this decision has been the employer will be exposed only to the minimal award of lost wages. It means this is a fire-at-will scheme. Once a worker is out of the workplace, no matter how unfair this was it will be effectively impossible to return them to their work.

The changes will result in increased uncertainty

[23] Employment Relations Authority Annual Report 2024 page 19.

58. Simply removing workers' rights does not mean they will not assert them. The Employment Relations Act 2000 and its supporting framework was designed to provide for quick and efficient resolution of workplace disputes. The changes proposed will move a large number of workers and the businesses that employ them outside of this system, creating uncertainty and significant legal risk and cost as workers seek more complex litigation to resolve disputes.

59. It will also create a significant amount of uncertainty and risk for businesses and workers, as our currently settled system is understandable and clear advice can be given. By enacting such radical changes, certainty is lost.

60. A business whose workers are thriving and whose employment relationships are stable is going to thrive and be stable itself.

Removing basic rights from higher paid workers us unjust and will impact on us all

61. The right to be consulted if an employer is considering a decision which could lead to the end of employment is removed for workers earning over $180,000. The good faith obligation to consult these workers on change management proposals is removed.

62. This undermines good faith and removes basic procedural protections that require an employer to treat a worker with respect and decency. This undercuts the entire employment law framework, and in doing so erodes it.

63. With the Government already having expanded the use of 90-day trial periods to all workers, the PSA is gravely concerned the injury of introducing fire at will for workers earning over $180,000 will also pave the way for employers to fire all workers at will.

64. This introduction of fire-at-will for workers paid more than $180,000 will impact some of our most important health professionals and public servants. It will create a culture of fear amongst them. We rely on these often senior, experienced and highly skilled workers to be able to speak honestly and frankly. Now they can be fired without recourse if they displease their employer in any way. It will have a chilling effect on those whose advice we value so highly and yet the Government is unconcerned about this. It is vital for our democracy that this advice is able to be freely and frankly given.

The changes have significant cumulative effects for all workers

65. The combined effect of these changes mean fire-at-will is the reality for all workers. If you are a worker not earning over $180,000, on a 90-day trial, or working as a contractor, then you are deprived of real recourse to being fired unfairly due to these changes to the personal grievance regime.

66. The focus is entirely turned onto any misstep a worker may have made while being unlawfully fired, and if it is found they put a foot wrong, no matter how poorly they were treated, there are effectively no remedies for them. If a worker contributed to being unlawfully dismissed or there is a finding of serious misconduct, they cannot get their old job back and they cannot get compensation for the emotional harm done to them. They cannot get compensation for any other financial loss suffered, and any wages owed may be reduced by up to 100%. There will be many instances where a worker is found to have been treated unlawfully and unfairly but will receive no remedy for this. This will effectively promote the worst employer behaviour.

The Bill undermines pay transparency and collective bargaining

67. The changes proposed by the Bill allow employers to not offer new workers in unionised workplaces the terms of the collective agreement. This means these workers will not have access to full information about pay rates at the point at which they are negotiating their starting salary. Lack of pay transparency is likely to result in lower pay rates for workers, and particularly those more likely to be offered lower rates, including women.

68. As this impact is not mentioned in the explanatory note or MBIE's regulatory impact statement, we assume that in removing the 30-day rule the Government was not intending to undermine pay transparency, for which it has recently shown some support. We recommend that the Committee refer this issue to the Minister so that she can seek advice from officials about how to counter this unintended and undesirable consequence.

69. These changes also deliberately disregard our international commitments by undermining collective bargaining. The right to collective bargaining is a fundamental labour right enshrined in International Labour Organisation (ILO) conventions, in particular ILO Convention No. 87 *Freedom of Association and Protection of the Right to Organise* (1948) and ILO Convention No. 98 *The Right to Organise and Collective Bargaining* (1949). Together, these conventions form the cornerstone of international labour standards on collective bargaining.

The Bill gives employers the ability to fire workers at will by having final say on whether someone is an employer or contractor, regardless of the true nature of the relationship

70. The Bill gives employers, rather than the Courts or Parliament, the final say over whether someone is a contractor or worker in a way that prohibits an examination of the true nature of the relationship. The employer can choose whether its workers have access to statutory

entitlements including the minimum wage, payment with money, sick and annual leave, public holidays, and protections such as the right to take a personal grievance (as reduced as that is by this Bill).

71. The Government's proposed change to the worker / contractor test restricts the Court's ability to inquire into the true nature of the relationship. It increases the ability to have 'sham' contracts, as businesses will be able to require new workers to sign agreements that state they are contractors. As long as the agreement states the worker is an independent contractor; does not prevent them from working for anyone else; permits the worker to choose when to work the hours or allows them to sub-contract to another person (vetted by the business); the contract will remain in place if they decline extra work; and they have had the opportunity to seek advice before signing the agreement; then they will be deemed a contractor without standard employment entitlements and it will be extremely difficult to prove otherwise.

72. The PSA has no doubt that the Minister's "contractor" scheme, which makes it very easy for businesses to strip workers of the most basic employment rights, will impact most heavily on the most vulnerable workers, particularly those with variable work hours and will increase discrimination for Māori, Pasifika, young and women workers. It will impact all of us, our children and our families and friends.

For further information about this submission, please contact:

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