



COVERSHEET

Minister	Hon Brooke van Velden	Portfolio	Workplace Relations and Safety
Title of Cabinet papers	Introducing an Income Threshold for Unjustified Dismissal Strengthening consideration and accountability for the employee's behaviour in the personal grievance process	Date to be published	By 31 January 2025

List of documents that have been proactively released

Date	Title	Author
November 2024	Introducing an Income Threshold for Unjustified Dismissal	Office of the Minister for Workplace Relations and Safety
20 November 2024	Introducing an Income Threshold for Unjustified Dismissal ECO-24-MIN-0265 Minute	Cabinet Office
12 November 2024	Regulatory Impact Statement: Introducing an income threshold for unjustified dismissal	MBIE
November 2024	Strengthening consideration and accountability for the employee's behaviour in the personal grievance process	Office of the Minister for Workplace Relations and Safety
20 November 2024	Strengthening consideration and accountability for the employee's behaviour in the personal grievance process ECO-24-MIN-0268 Minute	Cabinet Office
7 November 2024	Regulatory Impact Statement: Strengthening consideration and accountability for the employee's behaviour in personal grievance process	MBIE

Information redacted

YES / NO (please select)

Any information redacted in this document is redacted in accordance with MBIE's policy on Proactive Release and is labelled with the reason for redaction. This may include information that would be redacted if this information was requested under Official Information Act 1982. Where this is the case, the reasons for withholding information are listed below. Where information has been withheld, no public interest has been identified that would outweigh the reasons for withholding it.

Some information has been withheld for the reasons of Confidential advice to Government.

In Confidence

Office of the Minister for Workplace Relations and Safety

Cabinet Economic Policy Committee

Introducing an income threshold for unjustified dismissal

Proposal

- 1 I seek Cabinet's agreement to amend the *Employment Relations Act 2000* (the Act) to introduce an income threshold for unjustified dismissal personal grievances.

Relation to government priorities

- 2 The proposals in this paper address the ACT New Zealand – New Zealand National Party Coalition Agreement (the Coalition Agreement) commitment to simplify personal grievances, including setting an income threshold above which a personal grievance could not be pursued.

Executive Summary

- 3 New Zealand's employment laws and regulations can impact the flexibility of the labour market, which can in turn have consequences for the country's productivity growth. Sometimes there is a trade-off between flexibility and minimum standards, to ensure workers with low bargaining power have access to minimum standards and protections. However, constraining labour market flexibility is more difficult to justify when workers have high bargaining power and where the consequences of labour market rigidity could have a more direct impact on productivity growth.
- 4 Constraining labour market flexibility is a particular problem in relation to high-income employees. These employees generally have a major impact on organisational performance. A poor performing manager or executive can negatively impact the performance of the business, and increase the risk of business failure.
- 5 High incomes reflect, in part, the value that an employee could potentially or has already contributed to the business. Yet it could eventuate that for a range of reasons, further down the line, that worker might not turn out to be the best fit or candidate for the business or role. When businesses fail or underperform, the consequences are suffered by all workers. Having an efficient dismissal process for high-income employees can address this issue.
- 6 I propose providing flexibility for employers to follow a simpler dismissal process for high-income employees by introducing an income threshold for unjustified dismissal personal grievances. The threshold would initially be set at \$200,000, so that employees above the threshold would be automatically excluded from raising an unjustified dismissal claim. Employers and employees will be able to negotiate back into unjustified dismissal protection if they wish to do so, or negotiate their own dismissal procedures.

- 7 This proposal will provide for greater labour market flexibility, enabling businesses to ensure they have the best fit of skills and abilities for the organisation, for which they are willing to pay a premium for.

The costs and benefits of unjustified dismissal settings are different for high-income employees

- 8 A personal grievance is a complaint that employees can raise against their employer, which can escalate through the employment dispute resolution system if it is not dealt with (i.e. mediation, the Employment Relations Authority (the Authority), and the Employment Court (the Court)). One basis for a personal grievance is unjustified dismissal.¹
- 9 Any employee may raise a personal grievance, except for those employed on a valid 90-day trial period. While unjustified dismissal provisions may provide some necessary protection for workers with low bargaining power, the same argument cannot be applied for high income employees.
- 10 High-income employees have a large impact on organisational performance and often play a major role in determining the success or failure of an organisation. This means having a poor performer, or someone who doesn't fit the current demands of the role, can come at a particularly large cost for employers.
- 11 Meeting unjustified dismissal requirements can incur significant costs for employers. They must invest time and financial resources into following a fair process, and risk major costs if the dismissal is challenged. Possibly in response to the expensive formal process, not many cases of high-income employees proceed to the Authority. Instead, there appears to be a willingness and ability for both parties to negotiate settlements that avoid the costs and reputational impact of having a public dispute through the Authority.
- 12 I have heard that a number of senior executives and employers already agree to 'no-fault termination' or 'face don't fit' clauses. These clauses allow employers to dismiss senior executives without a performance management process or ability to raise an unjustified dismissal, in exchange for a severance agreement.² I have heard that these clauses work well, allowing for dismissals to happen within days or weeks, whilst adequately compensating employees for the job loss.
- 13 However, if these clauses were legally challenged, the dismissal would almost certainly be deemed unjustified. This creates uncertainty for employers and employees negotiating and exercising these 'exit' clauses.
- 14 All in all, the benefits of unjustified dismissal protection for high-income employees are lower than for other employees. High-income employees generally have good

¹ The Act establishes a number of reasons an employee may raise a personal grievance: unjustified dismissal, unjustified disadvantage, discrimination, sexual and racial harassment, duress over union membership, and an employer's failure to comply with specified employment obligations.

² Such agreements generally include a severance payment and 'leave with dignity' provisions. Stakeholders indicated that these are generally six to twelve months salary. The 'leave with dignity' provisions can cover a range of matters, for example how an exit will be communicated and providing a reference for future employment.

levels of bargaining power, meaning they can negotiate terms and conditions that suit their interest, which may include employment protections or higher compensation to recognise increased risk. High-income employees are also likely to have greater resources to manage a loss of income following a dismissal.

I propose an income threshold for unjustified dismissal protection to strike a better balance between high-income employees and employers

- 15 I propose to provide greater flexibility and certainty in the dismissal process for high-income employees by introducing a threshold that:
- 15.1 applies to unjustified dismissal and some specified legal provisions, but not to other personal grievance grounds;
 - 15.2 is initially set at \$200,000 per annum; and
 - 15.3 automatically excludes employees above the threshold from raising an unjustified dismissal, with the ability to contract back into unjustified dismissal protection and specified legal provisions, or to agree on their own terms and conditions relating to dismissals.
- 16 When the threshold comes into force, I propose that the threshold apply to existing employment agreements between employers and high-income employees. This will ensure employers receive an immediate benefit from the threshold.
- 17 I outline consequential technical proposals in **Annex One**.

Removing access to unjustified dismissals is intended to provide more flexibility to employers to dismiss high-income employees

- 18 The threshold is intended to provide more flexibility regarding dismissal processes for high-income employees, including efficient dismissal processes.
- 19 To achieve this, I propose the income threshold apply only to unjustified dismissal personal grievances and **Confidential advice to Government**.
- 20 There are a range of other personal grievance grounds, such as discrimination, racial and sexual harassment, and failure to meet specific employment obligations (e.g. protected disclosures). This policy is not intended to allow unacceptable behaviour such as discrimination and harassment, so I propose retaining these protections for high-income employees. High-income employees will still have access to mediation, the Authority, and the Court.
- 21 I do not propose requiring minimum severance provisions, as it undermines the freedom to contract. There may also be unintended consequences. For example, it becomes the expected payment rather than the minimum payment, or employers have to pay the severance payment even where there is an 'at-fault' dismissal (e.g. they are dismissed for serious misconduct).

The initial threshold will apply to those earning over \$200,000

- 22 I propose that the initial income threshold be set at \$200,000 annual income, which will be updated every year according to upward changes in average weekly earnings (see **Annex One** for more detail).³ This threshold is intended to target employees who have a significant impact on organisation performance and have high bargaining power. While there is no ‘bright line’ which differentiates employees with these characteristics from other employees, incomes are a useful proxy, and I consider that using a dollar figure alone as the threshold is transparent, certain, and easy to apply.
- 23 I consider that \$200,000 is a fair balance; using 2024 data, only 2.42 percent of all wage and salary employees earn over this amount. These are employees at the top of the labour market who earn significantly more than the average employee. Australia currently has a high-income threshold for unfair dismissals, which is currently approximately \$193,000 (in New Zealand dollars).

I propose the threshold automatically apply to all employees earning over the threshold, with a contracting-in mechanism

- 24 I propose that employees earning over the threshold are automatically excluded from raising an unjustified dismissal claim. I also propose a contracting-in mechanism, where employers and employees can agree in their employment agreement that an unjustified dismissal personal grievance claim can be raised.
- 25 This strikes a fair balance between maximising coverage of the threshold, and allowing flexibility for employers and employees where they consider the inclusion of unjustified dismissal protections useful for both parties. This may be the case, for example, where employers are trying to attract talent from overseas, where a finding of misconduct or poor performance has implications for occupational licensing, or where employees place a high value on employment security (e.g. those with high fixed costs, such as mortgages).
- 26 Employers and high-income employees will have the flexibility to negotiate terms that work for them; for example, some employees may negotiate longer severance payments, or agree to a lower salary in exchange for unjustified dismissal protections.
- 27 In addition, employers and employees over the threshold would be free to negotiate bespoke dispute resolution clauses in their employment agreements. For example, employers and employees could agree that, before a dismissal occurs, they must attend compulsory private arbitration.
- 28 Some existing employment agreements will already include dispute resolution clauses, which will continue to be binding on the employer after the threshold is in place. If the employer does not follow those agreed processes before dismissal, an employee could raise a breach of contract claim through the Authority and Court (but not an unjustified dismissal claim). I will work with my officials to ensure guidance is clear about the potential impact of existing clauses.

³ Average Weekly Earnings is a commonly used measure of wage growth produced by Statistics NZ from the Quarterly Employment Survey.

These changes do not override specific clauses in existing employment agreements

- 29 If this change is progressed, legal avenues to challenge disputes will still be available to employees (e.g. claims of discrimination or a breach of contract claim that the requirements in their employment agreement were not met). This may cause some initial uncertainty for employers regarding the interaction between this policy change and individual contract clauses, though this can be mitigated through the provision of guidance by the Ministry of Business, Innovation and Employment (MBIE) (see implementation section).
- 30 I consider that though there may be some initial uncertainty, this will dissipate over time as employers and employees understand the impact of the threshold and negotiate suitable agreements to mitigate these impacts. For example, I expect employers will become aware of the potential legal risks outlined in paragraph 29 and negotiate employment agreements which allow them to make use of the threshold; and workers will (collectively or individually) negotiate terms and conditions that either contract-in dismissal processes or compensate for any perceived increased risk or employment insecurity.

Implementation

- 31 MBIE is the administering agency for the Act. For implementation, MBIE will:
- 31.1 update its content on the Employment New Zealand and MBIE web pages;
 - 31.2 provide updated information, guidance, and training to its frontline staff; and
 - 31.3 engage with stakeholders to update them on the legislative changes through its usual engagement and communication channels.
- 32 These initiatives will be undertaken within MBIE’s existing baseline funding.

Financial Implications

- 33 There are no financial implications associated with the proposals in this paper.

Cost-of-living Implications

- 34 There are no direct cost-of-living implications associated with the proposals in this paper.

Legislative Implications

- 35 Legislation will be required to amend the Act to include these changes.
- 36 The 2024 Legislation Programme includes an Employment Relations Amendment Bill, with a category seven priority – policy development to continue in or beyond 2024.
- 37 If Cabinet approve these proposals, I propose to issue drafting instructions for this change to be included in the Employment Relations Amendment Bill.

Impact Analysis

Regulatory Impact Statement

- 38 A Quality Assurance Panel with representatives from the Ministry of Business, Innovation and Employment has reviewed the Regulatory Impact Statement for *Introducing an income threshold for unjustified dismissal*. The Panel considers that the information and analysis summarised in the Regulatory Impact Statement meets the criteria necessary for Ministers to make informed decisions on the proposals in this paper. The Panel notes anecdotal evidence is based on targeted consultation and considers that these limitations have been made clear and are supplemented with additional evidence where possible.

Climate Implications of Policy Assessment

- 39 The Climate Implications of Policy Assessment (CIPA) team has been consulted and confirms that the CIPA requirements do not apply to this proposal as the threshold for significance is not met.

Population Implications

- 40 European, male, and older workers are disproportionately more likely to earn high incomes.⁴

Human Rights

- 41 The proposed settings are likely to be consistent with the New Zealand Bill of Rights Act 1990 (NZBORA). Under my proposed settings, high-income employees will not be able to raise an unjustified dismissal claim. However, high-income employees will have access to wider employment and human rights protections. The Employment Relations Amendment Bill will be assessed by the Ministry of Justice for consistency with NZBORA before introduction.
- 42 If any rights are engaged, I consider the policy justified given the policy objective of providing employers with access to simplified dismissal processes for employees with a significant impact on organisational performance and who have high bargaining power.
- 43 I consider that the proposals in this paper are unlikely to raise Treaty of Waitangi interests.

Use of External Resources

- 44 No external resources were used in the development of these policy proposals.

Consultation

- 45 The following departments were consulted: Department of the Prime Minister and Cabinet, Ministry of Disabled People – Whaikaha, Ministry of Education, Ministry

⁴ Data from Census 2018 of employees earning over \$150,000. This was the highest income bracket in that census.

for Ethnic Communities, Ministry of Foreign Affairs and Trade, Ministry of Health, Inland Revenue, Ministry of Justice, Ministry for Pacific Peoples, Ministry for Regulation, Te Kawa Mataaho Public Service Commission, Te Puni Kōkiri, the Treasury, and the Ministry for Women.

- 46 MBIE officials undertook targeted engagement with employer and employee representatives, employment law practitioners, and technical experts.

Communications

- 47 Subject to Cabinet's approval of the proposals in this paper I intend to announce that the Act will be amended to set an income threshold above which an unjustified dismissal personal grievance cannot be pursued.

Proactive Release

- 48 This paper will be proactively released (subject to redactions in line with the *Official Information Act 1982*) within 30 business days of final Cabinet decisions.

Recommendations

The Minister for Workplace Relations and Safety recommends that the Committee:

- 1 **note** that the ACT New Zealand – New Zealand National Party Coalition Agreement committed to consider simplifying personal grievances, in particular setting an income threshold above which a personal grievance could not be pursued;
- 2 **agree** to introduce an income threshold for unjustified dismissal personal grievances;
- 3 **agree** that the income threshold be initially set at \$200,000 per annum;
- 4 **agree** that employees earning over the threshold are automatically excluded from raising an unjustified dismissal;
- 5 **agree** that employees earning over the threshold can agree with their employer to contract into unjustified dismissal personal grievances;
- 6 **agree** that the threshold applies to existing employment agreements between employers and high-income employees;
- 7 **agree** that the threshold include the technical design features set out in Annex One;
- 8 **agree** to delegate authority to the Minister for Workplace Relations and Safety to make decisions on the in-principle proposals set out in Annex One;
- 9 **agree** that the policy changes be given effect through the Employment Relations Amendment Bill, which holds a category seven priority;
- 10 **invite** the Minister for Workplace Relations and Safety to issue drafting instructions to the Parliamentary Counsel Office;

- 11 **authorise** the Minister for Workplace Relations and Safety to make decisions, consistent with the policy in this paper, on any issues that arise during the drafting and Parliamentary process, including any transitional provisions.

Hon Brooke van Velden

Minister for Workplace Relations and Safety

Annex one: Technical design features

Table of proposed technical decision features to support key policy proposals:

Technical setting	Rationale
<p>Remove the following requirements on employers:</p> <ul style="list-style-type: none"> to provide an employee with information and an opportunity to comment on decisions that could adversely affect the employee’s employment; to provide a statement of the reasons for dismissal within 14 days of the dismissal, if requested by the employee. 	<p>Removes process requirements for employers to follow prior to, or following, a dismissal.</p>
<p>(In principle proposal) [REDACTED] Confidential advice to Government [REDACTED] [REDACTED]</p>	<p>Confidential advice to Government [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]</p>
<p>(In principle proposal) Confidential advice to [REDACTED] [REDACTED] [REDACTED] [REDACTED]</p>	<p>Confidential advice to Government [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]</p>
<p>The above provisions (provide access to information and an opportunity to comment, to provide a statement of dismissal, [REDACTED] Confidentiality of advice) will re-apply if an employer and employee agree to contract back into unjustified dismissal protection.</p>	<p>Consistent with the rationale of contracting-in to allow flexibility for employers and employees to negotiate their own dismissal requirements, including opting back into existing legislative requirements.</p>
<p>Income is defined as an employee’s base pay received from their employer (e.g. regular salary).⁵</p>	<p>Provides certainty on whether the threshold applies to the employee and avoids legal complexity in determining income.</p>
<p>Income is determined on an annual basis. The threshold would not be adjusted for part-time employment.⁶</p>	<p>Simple to understand and consistent with other systems that consider income.</p>
<p>The threshold is updated annually using upward (but not downward) changes in average weekly earnings⁷.</p>	<p>Ensures the threshold captures a similar proportion of workers over time.</p>

⁵ This excludes unpredictable income or benefits (e.g. incentive payments, vehicle use).

⁶ So there would not be, for example, a \$100,000 threshold for an employee working 20 hours per week.

⁷ Using the technical measure of average weekly earnings (ordinary time, full-time equivalents, and seasonally adjusted).