MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

BRIEFING

Initial advice on setting a high-income threshold for personal grievances

Date:	13 May 2024	**Priority:**	Low
Security classification:	In Confidence	**Tracking number:**	2324-3227

Action sought		
	Action sought	**Deadline**
Hon Brooke van Velden **Minister for Workplace Relations and Safety**	**Instruct** officials to either: • continue policy work, including targeted consultation, or • stop policy work. **Agree** to meet with officials to discuss next steps.	31 May 2024

Contact for telephone discussion (if required)				
Name	**Position**	**Telephone**		**1st contact**
Beth Goodwin	Manager, Employment Relations Policy	04 901 1611	Privacy of natural persons	✓
Ben Loughrey-Webb	Principal Policy Advisor, Employment Relations Policy	04 896 5028	–	
Justine Khayat	Policy Advisor, Employment Relations Policy	–	–	

The following departments/agencies have been consulted
-

Minister's office to complete:

☐ Approved ☐ Declined
☐ Noted ☐ Needs change
☐ Seen ☐ Overtaken by Events
☐ See Minister's Notes ☐ Withdrawn

Comments

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Date:	13 May 2024	**Priority:**	Low
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Purpose

To provide initial advice on setting an income threshold above which a personal grievance could not be pursued and to seek your direction on whether to continue policy work, including targeted engagement.

Executive summary

The New Zealand National – ACT New Zealand Coalition Agreement committed to considering setting an income threshold above which a personal grievance could not be pursued.

There is a good case to continue policy work on an income threshold for unjustified dismissal personal grievances, as the relative costs and benefits of unjustified dismissal settings are different for high-income earners. The compliance costs associated with unjustified dismissal personal grievances may make employers reluctant to dismiss lower performing employees, and the cost of maintaining a lower performing, but highly paid, employee is relatively larger. The benefits of unjustified dismissal legislation are likely smaller for higher earning employees, as they generally have greater bargaining power, and are better protected against the negative impacts of job loss.

There are gaps in our knowledge base which materially impact our analysis. These relate to how high-income earners navigate employment relationship problems, the existing practice of not raising unjustified dismissal claims in exchange for severance packages, the potential impact on Māori and te Tiriti considerations for the work, and the impact of reducing unjustified dismissal protection on management practices. We recommend you instruct officials to undertake targeted engagement to help fill these gaps.

A challenge will be to identify policy settings which improve the existing trade-offs. We recommend narrowing the policy scope to only explore exempting high-income earners from unjustified dismissal claims, and not other claims (e.g. discrimination and harassment). There are several further significant policy choices. In particular, the choice of whether an exemption applies to all employees over the threshold or enables employers and employees to negotiate an exclusion, as well as whether there would be mandatory severance pay requirements. We propose to seek feedback on these policy choices through targeted engagement.

We recommend you instruct officials to continue policy work, including undertaking targeted engagement. We will report back on the outcomes of that engagement in July, with final advice on policy choices in September.

Recommended action

The Ministry of Business, Innovation and Employment recommends that you:

a **Note** that the New Zealand National – ACT New Zealand Coalition Agreement committed to considering setting an income threshold above which a personal grievance could not be pursued

Noted

b **Note** that there is a good case to continue policy work on this commitment, as the negative impacts of unjustified dismissal legislation are likely greater for high-income earners, and the positive impacts lower

Noted

c **Note** there are gaps in our knowledge base and targeted engagement would help build our understanding

Noted

We seek your guidance on whether to continue policy work

EITHER

d **Instruct** officials to continue policy work on setting an income threshold above which a personal grievance could not be pursued (recommended)

Agree / Disagree

e **Agree** that further policy work only considers excluding employees from unjustified dismissals, not other grounds for personal grievances (recommended)

Agree / Disagree

f **Instruct** officials to develop a targeted engagement plan, in consultation with your office (recommended)

Agree / Disagree

OR

g **Instruct** officials to stop policy work on setting an income threshold above which a personal grievance could not be pursued

Agree / Disagree

Next steps

h **Agree** to meet with officials to discuss this briefing and next steps.

Agree / Disagree



Beth Goodwin
Manager, Employment Relations Policy
Labour, Science and Enterprise, MBIE

13 / 05 / 2024

Hon Brooke van Velden
Minister for Workplace Relations and Safety

..... / ..... / .....

The Coalition Agreement includes considering simplifying personal grievances, including setting a high-income threshold

1. The New Zealand National – ACT New Zealand Coalition Agreement committed to considering simplifying personal grievances and in particular removing the eligibility for remedies if the employee is at fault, and setting an income threshold above which a personal grievance could not be pursued.

2. Your office indicated that you wish to focus on the specific proposals referred to in the commitment as a priority. We are progressing two workstreams, one on the income threshold, and the other on eligibility for remedies.

3. This advice provides initial analysis on the income threshold and seeks your decision on next steps for the work. We will provide you with initial advice on removing remedies in late May.

The Employment Relations Act 2000 (the Act) outlines the eligibility and reasons for a personal grievance

4. All employees may raise a personal grievance against their employer. The only exception is employees who are employed on a valid trial period, who cannot raise an unjustified dismissal personal grievance claim.

5. The Act establishes a number of reasons an employee may raise a personal grievance: unjustified dismissal, unjustified disadvantage,[1] discrimination,[2] sexual and racial harassment, duress over membership of a union or other employee organisation, and an employer's failure to comply with specified employment obligations.[3] **Annex A** includes more detailed information about personal grievances.

6. An income threshold has previously been considered via a Member's Bill in 2017, which drew on Australia's income threshold for unfair dismissal. More information on the Bill and Australia's policy is included in **Annex B**.

Unjustified dismissal personal grievances are the most common type of personal grievance claim

7. The most common type of personal grievance claim is unjustified dismissal, with nearly 80 percent of Employment Relations Authority (the Authority) determinations addressing unjustified dismissal claims.[4] Unjustified dismissal settings restrict the ability for employers to dismiss employees and therefore has a direct impact on labour market flexibility, whereas other grounds (e.g. discrimination and harassment) do not have such an impact. The following sections focus on unjustified dismissal settings.

8. Employers may only dismiss an employee for a good reason, which includes misconduct, performance issues, redundancy, incompatibility, and incapacity.

9. As well as having a good reason for dismissal, employers must follow a fair and reasonable process, underpinned by the requirement in the Act to act in good faith. This generally

[1] This can include: being given a warning, suspension, or demotion without good reason, had hours of work or pay changed without consultation, been underpaid, been misled by their employer, not had the opportunity to respond to allegations against them, not had a safe workplace, or not been informed about proposals which may affect their employment.
[2] The Act restates the prohibited grounds in the Human Rights Act 1993 and adds two further grounds for discrimination: health and safety and union membership.
[3] This includes failures related to continuity of employment for employees affected by restructuring, breaches regarding hours and shifts, retaliation in relation to health and safety or protected disclosure, protection of employee's employment whilst in Reserve Forces service or training, or Easter Sunday rules.
[4] Of the 1,037 personal grievance determinations from 2019-2023, 813 were for unjustified dismissal, and 511 for unjustified disadvantage (determinations can cover more than one issue). By comparison, only 25 claims were for discrimination and 27 for sexual harassment.

includes investigating the matter, communicating concerns to the employee, providing an opportunity for the employee and employer to respond genuinely to the complaint, considering mitigating factors, and alternatives. This process can require a significant investment in time and effort for employers.

10. An employee may bring a personal grievance for unjustified dismissal if they believe that the employer did not have a good reason to dismiss them, or that the process was unfair.

Unjustified dismissal settings are a key employment protection for many employees …

11. The benefits of unjustified dismissal settings are to ensure that an employer has a genuine reason to dismiss an employee, or a genuine reason for restructuring positions, and to follow a proper process. For dismissal due to poor performance, this includes providing feedback to the employee and enabling the employee to improve. For a restructuring, this involves considering, among other things, redeployment.

12. In many situations, ensuring there are genuine reasons and a proper process is the only protection an employee has. For example, employees with low bargaining power are unlikely to have redundancy compensation in their employment agreement.

13. Unjustified dismissal protection is therefore likely to be making employers follow a proper process in situations that could lead to job loss. This is intended to ensure employers' decisions are fair and reasonable.

… but increase costs for employers, potentially making employers reluctant to dismiss employees

14. Unjustified dismissal personal grievances increase costs for employers, with some examples outlined below:

    a. Employers must invest time and financial resources in following a fair and reasonable process before dismissing an employee. What is fair and reasonable is often dependent on the specifics of the case.

    b. If a dismissal is challenged, costs involved in progressing through the dispute resolution process (mediation, Authority, and the Employment Court (the Court)). For employers, costs include time spent away from the business, cost of recruiting replacement staff, financial costs (e.g. hiring lawyers or replacement staff), and impact on workplace morale and productivity.

    c. Costs involved in settling a claim or the cost of remedies (reinstatement, reimbursement of lost wages, and compensation for humiliation, loss of dignity, or injury to the employee's feelings).

    d. Employers and employees may negotiate severance payments to reduce the likelihood of legal action.

15. These costs are uncertain for employers, as it is unclear at the start of a process how long each step will take, whether the dismissal will be challenged, and the costs that arise through the challenge process (including the outcome of the Authority and/or Court's determination, and any remedies).

16. To avoid the costs of following a proper dismissal process and risk of an unjustified dismissal claim, employers may be reluctant to performance manage an employee through to dismissal, or to restructure positions within the organisation in case employees have to be made redundant.

17. Allowing underperforming employees to remain in place or to continue with an inappropriate business structure may create other costs, such as lower productivity.

There is a good case to consider a high-income threshold, but there are gaps in our knowledge base

Managers have a significant impact on firm performance

18. The focus of this analysis is on higher-paid employees. At the top end of the spectrum, senior managers are likely to have a greater ability to affect the performance of a firm. If they are not performing in a way that is considered optimal, the consequences for the firm could be significant.

19. Domestic and international literature on the role of managers in firm performance affirms that management practices are a key factor in determining firm productivity and export performance. New Zealand performs poorly on international measures of management quality, including on the measures which are correlated with productivity.[5]

20. However, New Zealand's existing flexible labour market and low management quality scores suggests that there are more important factors in shaping management practices than unjustified dismissal settings. This limits the impact any changes to unjustified dismissal settings could have on management practices.

21. There is less research on the impact of highly paid non-managers, though generally employees who are paid more have greater productivity and can be expected to have a larger impact on firm performance.

22. Given these high potential costs, it is necessary to consider the value of the protections provided by the personal grievance regime, particularly whether the benefits of the unjustified dismissal provisions for senior managers are greater than those costs.

Research indicates that high-income earners have greater bargaining power

23. First, we consider bargaining power. Greater bargaining power indicates a more equal negotiation between employee and employer, mitigating concerns that the outcome of negotiations is inequitable and reducing the need for employee protections.

24. MBIE has undertaken a range of work considering bargaining power. Whilst not specifically focussed on high-income earners, MBIE's research generally points to low bargaining power being more prevalent amongst low-income earners, a finding consistent with international studies.[6] This suggests that high-income earners have greater bargaining power.

Some employers and senior managers may already be 'contracting out' of unjustified dismissals

25. As evidence of that bargaining power, MBIE understands that some senior managers and executives already agree "face-doesn't-fit" clauses in their initial employment agreement. These clauses provide for a severance package in exchange for refraining from making unjustified dismissal personal grievance claims.[7] We do not know the prevalence of these clauses, or the outcomes where these clauses exists and there is a relationship breakdown.

26. It is not settled that the Authority or Court would consider such clauses legal and enforceable if the dismissal were challenged by the employee. Whether the clause is valid might depend on the facts of a particular case.

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[5] Lynda Sanderson (2019), *The Evolution of Management Practices in New Zealand*.
[6] For example, see Corey Allen and David Maré (2022), *Who benefits from firm success? Heterogeneous rent-sharing in New Zealand*. MBIE's Chief Economist Unit is also considering the role of monopsony power in the New Zealand labour market, which refers to the extent that employers can set the wages of employees.
[7] In particular, we draw on submissions on the *Employment Relations (Allowing Higher Earners to Contract Out of Personal Grievance Provisions) Amendment Bill*, discussed later in the briefing.

Insights from mediators suggest high-income earners use mediation to record settlements, but the details of the settlement are agreed prior to mediation

27. Neither MBIE, the Authority, nor the Court regularly capture the income of participants in the employment dispute resolution system.[8] Insights from MBIE's mediation service suggests that those earning over $150,000 primarily use mediation for the purpose of recording their settlements, but the details of the settlement are handled by their lawyers prior to mediation. Mediators note that such earners are usually well counselled by their lawyers and are willing to settle for money because they find the reputational risks of going through the legal system too great. Mediators note that most issues with high-income earners arise during restructure processes or because of relationship issues.

High-income earners may be better able to mitigate the negative impacts of job loss

28. One of the rationales for unjustified dismissal legislation is to mitigate the negative impacts of job loss. The negative impacts include financial stress, hardship, poorer health, and re-employment challenges (including wage scarring[9] and a shift to lower quality work).

29. Broadly, New Zealand evidence finds that financial resilience increases with income. There are a small number of households with high incomes who would struggle to cover a fall of income (particularly where there are high housing costs), indicating job loss could have a significant negative impact.[10] However, high-income earners are more likely to have redundancy payments in their employment agreements, which help to mitigate the immediate loss of income.

30. The negative health impacts of job loss are well-studied and significant.[11] There is less research on the experiences of high-income earners, though it confirms that job loss can have significant negative impacts.

31. Potential worse outcomes upon re-employment are another concern. In its 2017 assessment, the OECD noted that New Zealand had relatively fast re-employment rates but had high levels of wage scarring.[12] New Zealand research on wage scarring did not analyse the impact by previous income, but the impacts are larger for better educated and older workers, characteristics associated with higher incomes.[13]

Removing access to unjustified dismissal claims may not align with a tikanga Māori approach to employment relationships

32. Recent case law regarding tikanga and employment relationships may be relevant to this proposal. In *GF v Comptroller of the New Zealand Customs* [2023] NZEmpC 101, the Employment Court found that the New Zealand Customs Service failed to act as a fair and reasonable employer. This was in part due to its failure to adhere to the tikanga values it had incorporated into its employment relationships with its employees, as well as the "heightened" good employer obligations of the public service. While this appears to have quite specific circumstances, it is an evolving area of the law and further work would be needed to consider what, if any, implications this case law has for wider policy changes.

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[8] We have identified five cases between 2019 to 2023 of employees earning over $150,000 raising a personal grievance for unjustified dismissal from the Authority. However, given we cannot identify cases where the employee lost (as no compensation would be ordered), or cases where the employee won but the employee's salary was not mentioned, we cannot draw any conclusions from this.

[9] Reduced wages upon re-employment.

[10] Te Aru Ahunga Ora Retirement Commission (2021), *New Zealand Financial Capability Survey 2021.*

[11] For example, see Dean Hyslop et al. (2021), *Involuntary job loss: welfare effects, earnings impacts and policy options*.

[12] OECD (2017), *Back to Work: New Zealand Improving the Re-employment Prospects of Displaced Workers.*

[13] Dean Hyslop (2019), *The Impacts of Job displacement on workers by education level*.

33. Legal professional privilege

34. The design of an income threshold may raise taonga-based interests.[14] Unjustified dismissal legislation is intended to ensure employers follow a proper process when dismissing an employee, and provides an opportunity to restore the relationship, which is likely to broadly align with tikanga Māori approaches.[15] A tikanga approach to dispute resolution may be considered a taonga by iwi Māori. Removing access to unjustified dismissal claims may therefore affect taonga-based interests, so the Crown may need to consider this in the policy design process.

35. In relation to equity interests,[16] Māori are under-represented in high-income earners and the impact on Māori access to personal grievances is likely to be small. Consideration will need to be given to the impact of potential job loss on whānau and communities with few Māori high-income earners, alongside the potential positive impacts of a threshold.

36. Further work is required to determine whether Māori interests would be affected by a high-income threshold for personal grievances.

We propose undertaking targeted engagement to build our knowledge base

37. To summarise our conclusions from the above discussion: the relative costs and benefits of unjustified dismissal settings do appear to be different when considering only high-income earners compared to the wider workforce.

38. On the costs side, the risk is that unjustified dismissal claims discourage firms from dismissing high paid employees who are seen to be underperforming. The impact of senior managers on firm performance is significant, so there are likely to be significant costs associated with allowing underperforming employees to remain in place or to continue with an inappropriate business structure.

39. The benefits of unjustified dismissal legislation for high-income earners are also likely to be lower. It appears high-income earners have a lower need for unjustified dismissal legislation, as they have greater bargaining power and are better protected from the negative impacts of job loss.

40. Overall, this suggests a good case to continue policy work on the income threshold policy. There are a number of gaps in our understanding which materially affect our analysis. We recommend undertaking targeted engagement to improve our understanding, including on:

    a. understanding the interaction between unjustified dismissal legislation and management practices,

[14] Taonga interests include how a policy could affect Māori rights or interests in accessing, using, protecting, or making decisions about taonga (treasures).
[15] For example, through requirements to provide a genuine opportunity to improve and to consider alternatives. For a discussion on tikanga approaches to employment relationships, see Chief Judge Christina Inglis (2021), *The Lens Through Which We Look: What of Tikanga and Judicial Diversity?*. See also Ani Bennett and Shelley Kopu (2020), *Applying the duty of good faith in practice, in a way consistent with Te Ao Maori, Treaty and employment law obligations*.
[16] Equity interests include how the living standards and wellbeing of people who are Māori are improved or could be affected by the policy.

b. when employee bargaining power is sufficient to enable a genuine negotiation with employers,

c. how employers and high-income earners navigate employment relationship problems and interact with existing employment services, including the prevalence and impact of "face-don't-fit" clauses,

d. the impact of dismissing high-income earners, both for employees and employers, and

e. te Tiriti considerations for the work.

41. Engagement could include employer associations, unions, employment lawyers, professional associations, iwi, and various peak bodies (e.g. human resources).

We propose seeking feedback on key policy design choices through targeted engagement

42. Whilst the relative costs and benefits of unjustified dismissal legislation appear to be different for high-income earners, the key policy challenge will be to find settings which strike a better balance.

Would a threshold exclude high-income earners from all personal grievances or only unjustified dismissals?

43. The first choice is whether the exclusion covers only unjustified dismissals, or some or all of the other grievance grounds.

44. You could exclude only unjustified dismissals, with all employees able to raise claims for other grounds (e.g. harassment, discrimination, and union membership). Excluding only unjustified dismissal aligns with the problem definition, which is focussed on dismissing underperforming, but highly paid, employees. Excluding only unjustified dismissal aligns with Australia's policy settings, where high-income earners can raise 'general protections' claims (e.g. discrimination and harassment, see **Annex B**).

45. Alternatively, you could consider excluding all personal grievances. Discrimination and harassment claims can be taken through either the employment or human rights system (but not both), so the interaction with the human rights system will have to be carefully considered if this approach was adopted.

46. Legal professional privilege

Legal professional privilege

[17] Legal professional privilege The European Union free trade agreement has the strongest relevant commitments, which are to implement the International Labour Organisation (ILO) conventions that New Zealand has ratified, respect and promote and realise the fundamental principles set out in the ILO Declaration on Fundamental Principles and Rights at Work, and not to weaken or reduce the levels of protection afforded by our labour law in order to encourage trade or investment.

Legal professional privilege

47. Legal professional privilege

48. Alternatively, you could choose to not rule out the other personal grievance grounds at this stage, and instead direct us to seek feedback on this question as part of our targeted consultation. You could then reconsider the question at the next stage.

49. The remainder of this section sets out policy choices on which we do not seek decisions from you at this stage, other than your agreement that we should seek stakeholder input on these in targeted consultation, to inform our subsequent advice to you.

Who does the threshold apply to and how does it do so?

50. A key question is who the threshold is intended to target, e.g. senior managers and executives, middle-managers, or all high-income employees?

51. A threshold could be designed in two ways. Firstly, an income-based threshold could be adopted. The level of the threshold would significantly impact coverage, with 5.1 percent of New Zealand wage and salary earners receiving over $150,000 annually, and 2.2 percent earning over $200,000.

52. A lower threshold would capture more non-managers, those with lower bargaining power and those who would be more negatively impacted by job loss. A higher threshold could exclude senior managers in lower-paying firms or sectors and would have distributional effects, for example affecting small or regional firms in different ways.

53. Alternatively, a threshold could be specifically linked to particular occupations or job descriptions. This approach is likely to generate uncertainty, as employees may challenge whether they are covered by the definition of the occupation. It may also be open to manipulation, if more jobs are classified in a way to exempt them from coverage of personal grievances.

Are employees automatically excluded or do they contract out of the exclusion?

54. All employees who meet the threshold could be excluded, or the policy could allow employers and employees to ‘contract out’ of personal grievances (comparable to trial periods).

55. Contracting out would allow for negotiation and agreement between the employer and employee. This could help to mitigate concerns about the negative impacts of not being covered by personal grievances, as it would increase employee awareness of the clause and allow for negotiation of other benefits to compensate employees (e.g. salary or a severance package).

56. Allowing contracting out may limit the effect of the policy. It would also increase costs for employers through the negotiation process, and potentially lead to employees challenging the validity of the contracting out clause following a dismissal.

Would there be minimum notice periods and severance payments for dismissed employees?

57. Mandatory minimum severance payments or notice periods could also be considered, helping to mitigate some of the negative impacts of job loss.

58. Mandatory minimum notice periods or severance payments would add costs to the dismissal, providing a disincentive to dismissing the employee. However, they would provide a more certain cost for employers than the costs associated with a potential unjustified dismissal claim.

There would be second order policy questions

59. There would also be second order policy questions which depend on the choices listed above, for example:

    a. *How and when would an exclusion be agreed to if it did not apply to all employees above the threshold?*

       There are choices on when an exclusion could be agreed to. For example, it could only be agreed to at the start of an employment relationship, it could be negotiated at any time during the relationship, or only when employers are seeking to dismiss an employee. There could be additional requirements, for example for the employee to seek legal advice prior to signing an agreement.

    b. *Could claims be raised through other legal avenues?*

       Currently, section 113 of the Act mandates that personal grievances are the only way to challenge a dismissal, though a discrimination claim may be raised through human rights institutions. This setting could be maintained, meaning high-income earners could not challenge their employer through any other legal avenues. Alternatively, high-income earners could be allowed to challenge their employer through alternative routes (e.g. the District Court, High Court, etc.).

60. Technical questions are also likely to arise, for example the definition of wages and salary if an income threshold is preferred.

We seek your guidance on next steps for the work

61. Having undertaken initial analysis, we seek your guidance on next steps. The Coalition Agreement committed to consider a threshold, providing you with a choice on whether to continue or stop policy work.

You could instruct officials to continue policy work including targeted engagement

62. We recommend you instruct officials to continue work, including:

    a. developing a targeted engagement plan (building on the questions and organisations referred to in paragraphs 40 and 41, and the key policy design choices listed above), in consultation with your office,

    b. undertaking targeted engagement, and

    c. providing advice summarising the engagement and seeking your decision on whether to introduce a threshold, and on the key design choices.

63. We plan to report back to you on the outcomes of the engagement in July, with final advice on policy choices in September. This would be completed in time for you to decide whether to include the proposal in the Employment Relations Amendment Bill, currently scheduled for introduction in 2025. The key implication of further policy work is that it requires policy resources which could otherwise be used on your other priorities.

64. If you agree to continue policy work, you have choices on the phasing of this work alongside the other personal grievance commitment to consider removing eligibility for remedies for at-fault employees. We expect to provide you with initial advice on that policy in late May. For

example, at that stage you could direct us to concentrate on one commitment or the other, if you so prefer.

Or you could decide not to progress policy work

65. Alternatively, if you do not consider there is a good case for change, you could instruct officials not to progress policy work on an income threshold. This would release policy resources to other priorities.

66. If you stop policy work, you may wish to inform your Cabinet colleagues of your decision.

Next steps

67. We recommend you meet with officials to discuss this briefing and we will work with your office to put it on the agenda of an upcoming regular officials meeting.

68. We will provide you with initial advice on the proposal to remove eligibility for remedies from at-fault employees in late May.

Annexes

Annex A: Detailed description of personal grievance settings

Annex B: Member's Bill and Australia's high-income threshold

Annex A: Detailed description of personal grievance settings

The Employment Relations Act 2000 outlines the eligibility and the reasons for a personal grievance

69. Any employee may raise a personal grievance against their employer. The only exception is employees who are employed on a valid trial period. Those employees may not raise a personal grievance claim on the grounds of unjustified dismissal, though other personal grievances may be sought.

70. 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 membership of a union or other employee organisation, and an employer's failure to comply with specified employment obligations. Further detail on these grounds is given in footnotes 1-3 on page 3.

71. The Act establishes an 'objective test' to determine whether a dismissal or action is justified. The test is whether the employer's action(s), or how the employer acted, is what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

72. The Act establishes a system of procedures and employment institutions designed to support employers and employees to resolve employment relationship problems (including personal grievances) and, if possible, preserve the employment relationship.

The Act establishes institutions to resolve personal grievances, with some claims also having access to human rights processes

73. If employees and employers are unable to resolve the grievance, the Act establishes a tiered framework of dispute resolution that can be accessed through an escalation process:

    a. Mediation: Mediation services are the primary resolution mechanism to enable parties to resolve problems quickly and preserve the employment relationship. The Act embodies a general presumption that mediation will be the first avenue for dispute resolution before any determination-making forum is sought.

    b. Employment Relations Authority: The Authority is an investigative body that has the role of resolving employment relationship problems that cannot be solved through mediation, by establishing the facts and making a determination according to the substantial merits of the case, without regard to technicalities. The Authority also ensures recorded settlements are complied with.

    c. Employment Court: The Court has exclusive jurisdiction (and corresponding powers) to deal with a range of employment related issues, including hearing a matter previously determined by the Authority.

74. Employees are generally required to raise a personal grievance with their employer within 90 days of when the grievance arose (except for sexual harassment, which has a limit of 12 months). The Authority may hear a personal grievance lodged after the time limit in exceptional circumstances but must direct the parties to mediation first. There is a three-year limitation on commencing proceedings in the Authority or the Court.

75. If the claim relates to discrimination, employees may progress their grievance either through human rights or employment institutions. Human rights institutions include:

    a. Dispute Resolution Services: The Human Rights Commission provides early resolution and mediation services.

    b. Human Rights Review Tribunal: An independent body that can review decisions about human rights.

The Act establishes remedies, including reinstatement, remuneration, and compensation

76. Where it has been determined that an employee has a personal grievance, one or more of the following remedies may be awarded:

    a. reinstatement of the employee in the employee's former position or in a position no less advantageous to the employee,

    b. the reimbursement of wages or other money lost as a result of the grievance (up to a maximum of three months ordinary pay), and/or

    c. compensation for humiliation, loss of dignity, and injury to the feelings of the employee, or the loss of expected benefit.

77. The Authority or the Court may reduce the remedies awarded if the employee's behaviour contributed to the situation that gave rise to the grievance.

Annex B: Member's Bill and Australia's high-income threshold

78. An income threshold was considered in 2017 via a National Party member's Bill (the Bill). The Bill proposed to allow employers and potential employees who are negotiating an employment agreement, involving a salary of more than $150,000, to contract out of personal grievance provisions. The member sponsoring the Bill noted the intent was to only allow contracting out of unjustified dismissal, not other protections such as harassment or discrimination.[18] The Bill was considered by a select committee but was voted down at Second Reading following a change of government. The Bill drew on Australia's exclusion of high-income earners from unfair dismissal legislation, which is described below.

High-income earners who are not covered by a modern award or an enterprise agreement are excluded from unfair dismissal protection

79. Workers under the Australian national workplace system are covered by minimum workplace entitlements through legislated National Employment Standards and industrial instruments, including modern awards and enterprise agreements, with most workers covered by unfair dismissal protection. If an employee is not part of the national system, the industrial relations system in their state covers them. Unfair dismissal protection provides an avenue to seek suitable resolutions when an employee's dismissal was harsh, unjust, unreasonable, or not a case of genuine redundancy.

80. To be covered by unfair dismissal protection, an employee must have completed a minimum period of employment of at least 6 months, or 12 months if it's a small business. An employee will not receive unfair dismissal protection if they:

    a. earn more than the high-income threshold (currently $167,500); and

    b. are not covered by a modern award or an enterprise agreement.

81. This means employees earning over $167,500 can only raise an unfair dismissal claim if they are covered by a modern award or an enterprise agreement.

82. Modern awards are industry and occupation-based industrial instruments that can build upon, but cannot exclude, the National Employment Standards. Examples of modern awards include: the General Retail Industry Award, and the Security Service Industry Award.

83. An enterprise agreement is a collective agreement that covers a business and will override the modern award applicable to that business. Like modern awards, enterprise agreements cannot exclude the National Employment Standards, or provide for a lower base rate of pay than the relevant modern award.

84. No official statistics exist on how many employees are not covered by unfair dismissal protection because they earn above the high-income threshold. It is challenging to estimate, as it depends on whether the individual worker is a national system employee and whether they are covered by an award or enterprise agreement.

85. To help us broadly understand the threshold's impact, the Australian Department of Employment and Workplace Relations provided a rough estimate that the income threshold excludes around 6-7 percent of workers from unfair dismissal protection. This is based on Australian Taxation Office individual taxable income statistics data from 2020-21. However, this data does not account for a worker's industrial instrument.

[18] See Scott Simpson's first reading speech on the *Employment Relations (Allowing Higher Earners to Contract Out of Personal Grievance Provisions) Amendment Bill*.

High-income earners may raise 'general protections' claims

86. The Australian income threshold does not exclude high-income earners from raising work-related complaints such as discrimination, sexual harassment or using workplace rights (e.g. health and safety or union membership).

87. The high-income threshold is currently set at $167,500 and is adjusted annually on 1 July in accordance with the weekly ordinary time earnings published by the Australian Statistician.

88. Whether an employee reaches the high-income threshold is determined by a calculation of their earnings. Earnings do not include payments that cannot be determined in advance, such as commissions, incentive-based payments, bonuses, or overtime. It also excludes reimbursement and superannuation. The employee's earnings are based on the wages and the agreed value of non-monetary benefits such as a car, phone, or laptop. The employee's annual rate of earnings is to be assessed at the time of the dismissal.