



## BRIEFING

### Personal grievances: Second order policy issues for an income threshold

<b>Date:</b>	8 October 2024	<b>Priority:</b>	High
<b>Security classification:</b>	In Confidence	<b>Tracking number:</b>	2425-2851

Action sought		
	Action sought	Deadline
Hon Brooke van Velden <b>Minister for Workplace Relations and Safety</b>	<b>Agree</b> to secondary policy settings for a threshold for unjustified dismissal personal grievances.	15 October 2024

Contact for telephone discussion (if required)				
Name	Position	Telephone		1st contact
Beth Goodwin	Manager, Employment Relations Policy	04 901 2009	Privacy of natural persons	✓
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Withdrawn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



# BRIEFING

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### Purpose

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To seek your decisions on secondary policy settings for an income threshold for unjustified dismissal personal grievances.

### Executive summary

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You have previously agreed to an unjustified dismissal threshold based on income, set at \$200,000 with an automatic exclusion of employees who earn over the threshold, with a contracting-in mechanism; and with no minimum severance payments for dismissed employees [2425-0867 refers]. You have also indicated that you wish the law to apply to existing employment agreements from day one.

In working through potential transitional arrangements, we have identified that some clauses in existing employment agreements would limit the flexibility of employers to dismiss employees earning over the threshold. Currently, some agreements include steps that must be followed when dismissing an employee, or going through a process that could lead to dismissal (e.g. performance management or disciplinary action). After the threshold is in place, employers would still be required to meet the steps agreed to in the employment agreement. This will have the effect of shifting disputes from whether a dismissal is unjustified under the Employment Relations Act 2000 (the Act), to whether the dismissal was consistent with their employment agreement.

MBIE considers that these pre-existing clauses in employment agreements will increase the level of uncertainty (and cost) for parties when the threshold is initially introduced. The key risk is that employers consider they can easily dismiss high-income employees; but that their existing employment agreements contain additional requirements that they must meet. This could lead to employees successfully challenging the process surrounding the dismissal, creating uncertainty and discouraging use of the threshold. You could choose to allow this risk to run: apply the threshold to existing agreements and rely on employers and employees to navigate the uncertainty.

If you want to mitigate the risk, you could decide that the threshold will apply to new or varied employment agreements agreed to after the legislation commencement; and any existing employment agreements are not affected by the threshold. This would maximise certainty for parties but would mean that coverage of the law change would only build up over time. Alternatively, you could seek to nullify these pre-existing arrangements. This would maximise the impact of the threshold, but this would undermine existing employment agreements, be complex to draft, and some legal risk of challenge on the scope of the nullification would remain.

You have also previously agreed that other work-related complaints under the Act will remain available to employees earning over the threshold, such as human rights-based complaints, privacy complaints, and breach of minimum standards.

Irrespective of the transitional arrangements you decide, there are detailed decisions required to enable us to issue drafting instructions that give effect to the policy intent. We recommend that, in relation to employees over the threshold, you agree to:

- remove the requirement for employers to provide access to information and opportunities to comment on proposals that might result in termination;
- remove the requirement to provide a statement of reasons for dismissal; and
- Confidential advice to Government

Confidential advice to Government

You also need to choose whether to take a narrow or wide approach to the definition of income. A narrow approach includes predictable income (only base salary) and prioritises simplicity and certainty by removing variable forms of income (e.g. bonuses). Alternatively, all elements of remuneration could be captured to capture all high-income earners (including bonuses, incentive payments, allowances, and other benefits). However, this would lead to greater complexity in determining income and potential uncertainty of coverage. We recommend a narrow approach for greater certainty.

There are choices on the interaction of the threshold and part-time employment. You could adopt an annual approach, where the test is whether the employee’s annual income is over the threshold. Alternatively, you could adopt a full-time equivalent approach; so the threshold for an employee working 20 hours a week would be \$100,000. We recommend an annual approach, as it is the simplest to understand and is consistent with other systems that consider an employee’s income.

To ensure the threshold continues to target employees with a significant influence on the organisation, we propose updating the threshold over time (indexing). We propose the threshold is indexed to *upward* movements in average weekly earnings, as this ensures a consistent proportion of employees are captured over time. Alternatives are possible, including inflation or the Labour Cost Index, but we consider that these do not align with the purpose of the threshold.

## Recommended action

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

### *Transitional arrangements*

- a **Note** that some existing employment agreements will have clauses that limit the flexibility of employers to dismiss employees earning over the threshold, for example where they include steps that must be followed prior to a dismissal.

*Noted*

- b **Select** one of the following:

Option 1: Threshold applies to all agreements (but pre-existing arrangements continue to apply)	Option 2: Threshold only applies to new or varied employment agreements (recommended)	Option 3: Nullify pre-existing arrangements that relate to the dismissal
<i>Agree</i>	<i>Agree</i>	<i>Agree</i>

*Reducing the risk of a challenge to the process leading up to the dismissal*

c **Agree** to remove the following procedural requirements for employees over the threshold to reduce the risk of an employee challenging the process leading up to a dismissal (both recommended):

- i. Remove the requirement on employers to provide access to information and opportunities to comment on proposals that might result in termination, and

*Agree / Disagree*

- ii. Remove the duty to provide statement of reasons for dismissal.

*Agree / Disagree*

d Confidential advice to Government



*Agree / Disagree*

e Confidential advice to Government



*Agree / Disagree*

f **Note** that changes proposed in rec c and d will be contracted back if employees decide to contract-in to dismissal personal grievance protection

*Noted*

*Definition of income for the purposes of the threshold*

g **Select** an approach to define the income for the purposes of the threshold

A narrow approach to capture the base salary provided (recommended)	A wide approach to capture all elements of income
<i>Agree</i>	<i>Agree</i>

*Application of the threshold to part-time employees*

h **Note** that there are two options for the interaction of the threshold with part-time employment:

- a. An annual income approach, where an employee’s annual income is considered. If an employee’s salary is at or above \$200,000, the threshold would apply regardless of full- or part-time status, or
- b. A full-time equivalent basis. For example, the threshold for a part-time employee working 20 hours a week would be \$100,000.

*Noted*

i **Select** an approach to the threshold and part-time employees

Annual income based (recommended)	Full-time equivalent-based
<i>Agree</i>	<i>Agree</i>

*Updating the threshold over time*

j **Agree** to update the income threshold of \$200,000 annually (recommended)

*Agree / Disagree*

k **Select** the measure to update the threshold

Labour Cost Index	Average weekly earnings (recommended)	Inflation
<i>Agree</i>	<i>Agree</i>	<i>Agree</i>

l If you agree to average weekly earnings in rec k, **agree** to the technical details of how to measure average weekly earnings: based on FTEs, seasonally adjusted, and aligning the measure of earnings with your decision in rec g.

*Agree / Disagree*

m **Select** whether the threshold is updated according to upward and downward changes, or only upward changes

Upward and downward	Upward (recommended)
<i>Agree</i>	<i>Agree</i>



Beth Goodwin  
**Manager, Employment Relations team**  
Labour, Science and Enterprise, MBIE

Hon Brooke van Velden  
**Minister for Workplace Relations and  
Safety**

8 / 10 / 2024

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## **We seek your decisions on second order policy issues**

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1. In August 2024, you agreed to the following key policy settings for introducing a threshold for unjustified dismissal personal grievances:
  - a. a threshold based on income only;
  - b. set at \$200,000;
  - c. with an automatic exclusion of employees who earn over the threshold, with a contracting-in mechanism; and
  - d. with no minimum severance payments for dismissed employees [2425-0867 refers].
2. This briefing raises some risks that we have identified through developing the transitional arrangements. In particular, some employment agreements will have additional requirements regarding dismissal processes, which would have to be adhered to if an employer wishes to dismiss an employee over the threshold. You have choices about how to mitigate these risks.
3. This briefing also seeks your decision on consequential technical options.

## **The transitional arrangements could raise risks of creating uncertainty**

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4. In our discussion on the previous advice on the income threshold, you indicated that you wanted the threshold to apply to all employment agreements once the legislation commences. Depending on how the threshold applies, more or less uncertainty for employers and employees could be created.
5. You agreed that the threshold exclude employees from raising an unjustified dismissal claim, and not other personal grievance grounds (discrimination, harassment, etc.) [2324-3227 refers]. This section provides further information on the sorts of claims high-income earners over the threshold could raise, before providing advice on the transitional provisions.

### *Other legal avenues to raise work-related complaints will remain available*

6. Section 113 of the Employment Relations Act 2000 (the Act) states that the only way for an employee to challenge their dismissal, or any aspect of the dismissal, is by raising an unjustified dismissal personal grievance.
7. While challenging a dismissal will no longer be an option, employees earning over the threshold will still have access to other legal avenues to raise work-related complaints that do not challenge the dismissal. The default is that they will continue to be available to employees above the threshold, including:
  - a. Personal grievances grounds (other than unjustified dismissal), such as duress for union membership or retaliation against an employee who made a protected disclosure;

Jen is a General Manager earning \$250,000 working in a tech electronics business. She considers that she is subject to ongoing bullying in her employment and has raised this with her employer. Her manager later dismisses her.

Jen raises a personal grievance claim in relation to the bullying, arguing the employer did not take reasonable steps to address the bullying. The grievance is in relation to the bullying claims, and not the dismissal.

Sarah is a lawyer earning \$215,000 working in a private firm. Sarah has a strong stutter and is having issues communicating with clients. Her manager dismisses her.

Sarah raises a personal grievance for discrimination because she was unlawfully discriminated against by being dismissed for her stutter. The grievance is in relation to the discrimination, and not the dismissal.

- b. Other actions under the Act, for example a party can raise a breach of contract and seek a penalty as remedy;
- c. Actions under other Acts, such as the Human Rights Act 1993.

Carol is a Chief Financial Officer at a legal firm. She is dismissed for poor performance.

Carol raises a discrimination claim under the *Human Rights Act 1993*, claiming that her performance was fine, and this is actually discrimination based on her pregnancy and upcoming parental leave.

- d. A breach of contract claim, which could be raised in the Employment Relations Authority (the Authority) or Employment Court (the Court). Case law confirms that an employee can claim common law damages for breach of contract.<sup>1</sup> Sections 161 and 187 of the Act provides exclusive jurisdiction for the Authority and the Court to consider interpretation, application and operation of employment agreements (this will include potential breaches of agreements);

Breach of contract claims differ from personal grievances in a number of ways; notably that the limitation for raising a claim is significantly longer (6 years, compared to 90 days for most personal grievances) and the remedies that can be claimed are different. Common law remedies include compensatory, aggravated and exemplary damages, injunctions and declarations. Generally speaking, contractual damages are intended to put the wronged party in the position they would otherwise have been in had the relevant breach not occurred.

- 8. **Annex One** below sets out an indicative list of what potential legal avenues remain option to employees earning above the threshold.

*The Act requires that employment agreements include a plain language explanation of the services available for dispute resolution*

- 9. The Act requires that individual and collective agreements include a plain language explanation of the services available for resolving employment relationship problems, including a reference to the time limitations on raising personal grievances.
- 10. Some agreements simply state that an employee may raise a personal grievance for unjustified dismissal. Some agreements will go further and set out a prescribed and detailed process the parties will follow when there is an employment relationship problem, which may reflect what the law requires, or go above it. For example, an agreement may state that, if a competency issue is raised, the employer must raise their concerns with the employee, place appropriate assistance around the employee, and provide an opportunity to improve.

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<sup>1</sup> *Attorney-General v Gilbert* [2002] ERNZ 31.

11. An example of a dispute resolution clause we have found in a collective agreement (published online) is attached in **Annex Two**.
12. Even where an employer's procedures are not included or incorporated into the employment agreement, they will still likely be required to follow them due to the implied term of fair dealing and the statutory obligation of good faith.
13. Legal professional privilege

Patrice is an actuary at an insurance company. His employment agreement states that:

1. If a dispute arises, the employer and employee will attend arbitration before a decision on whether to terminate the employee will occur.
  - a. The company's disciplinary policy states that if a disciplinary matter arises, Patrice must be advised of the specific issue, be advised of the corrective action required to improve conduct, and that an investigation will be undertaken to assess the seriousness of the issue.
2. Patrice has the right to access MBIE's mediation services and raise an unjustified dismissal personal grievance through the Authority and the Court (this gives effect to the requirement to explain the services available for resolving employment relationship problems)

Legal professional privilege

14. While the Government receives copies of collective agreements, it does not collect individual employment agreements. This means we do not know the proportion of agreements that meet the bare minimum, compared to those setting out more detailed and prescriptive processes.

*The impact of pre-existing contractual arrangements will vary across high-income earners and employers*

15. While the current proposal for the threshold will mean an employee can't bring a personal grievance for unjustified dismissal, it won't extinguish other contractual requirements related to dismissal (such as setting a process which the employer must follow). Employers who wish to dismiss employees earning above the threshold will need to observe pre-existing arrangements or requirements embedded in employment agreements. If they do not, a successful legal challenge for breach of contract may be raised.
16. These pre-existing arrangements may limit the immediate impact of the threshold. The initial impact will vary across high-income earners, depending on their existing employment agreements:
  - Some agreements will limit the impact of the threshold, for example, where their employment agreement commits to raising employment relationship problems and significant internal dispute resolution processes.



- Some agreements will not have significant pre-existing arrangements and allow for flexibility regarding dismissals.
  - Some agreements will already include no-fault dismissal clauses, so the legislation will enable what is already in place.
17. This issue would arise if the threshold comes into effect immediately and applies to all employment relationships over the threshold. This contrasts to 90-day trials, which must be expressly negotiated into an employment agreement before the employment begins. This means an employer can ensure that the terms of the employment agreement align with, and do not undermine the intent of, the 90-day trial period.

*There are options which would change the level of uncertainty when the threshold is introduced*

18. You have choices on how to manage this issue.
19. **Option 1 - Apply the threshold to all existing employment agreements:** You could allow the risk to run, and have the threshold apply to all existing employment agreements, including those agreements which include provisions that limit the impact of the threshold. At our meeting with you in September, you indicated your preference for this option. As noted above, this would lead to an inconsistent impact of the threshold across employers and employees depending on the terms of their employment agreement.
20. Employers and employees would need to assess their employment agreements and internal policies to understand what procedural requirements are required when dismissing an employee earning over the threshold. This is likely to lead to uncertainty and potential legal challenge.
21. Over time, we expect this to dissipate as employees and employers negotiate new provisions (e.g. when changing job or negotiating a new collective agreement). The immediate ability for employers and employees to negotiate new arrangements will vary:
- Employees and employers covered by collective agreements will likely have to wait until the renewal of the collective agreement to bargain for process requirements or contracting-in dismissal protection. Unions are likely to have sufficient bargaining power to negotiate such arrangements with the employer.
  - New employees who are recruited for a role on an individual employment agreement will negotiate arrangements in light of the threshold. The outcomes will depend on the preferences of the employee and employer and their relative bargaining power.
  - For those on existing individual employment agreements, the relative bargaining power will depend on the pre-existing arrangements in the agreement. If they benefit the employer, the employee is unlikely to have great bargaining power to negotiate new provisions. If they benefit the employee, the employee has greater bargaining power, and the impact of the threshold may be limited.
22. **Option 2 - Apply the threshold to new or varied employment agreements (MBIE recommends):** Alternatively, you could have the threshold only apply to new employment agreements (or variations to agreements) agreed to after the legislation commences. For existing employee agreements agreed to before commencement, a varied employment agreement would be required to state whether the employee is covered by the threshold and would have to be agreed to by both parties.
23. This would ensure consistency of impact and mean that an employer and employee's legal rights are not dependant on provisions negotiated prior to, and without knowledge of, the law coming into effect. New or varied employment agreements would also be negotiated with the knowledge of the impact of the threshold and allow employers and employees to agree to terms that provide greater certainty about the threshold's impact.

24. This would lower the immediate impact of the threshold, as high-income earners in existing employment would not be affected by the threshold. It would also lead to an inconsistent impact, as only those new to the job or to the organisation would be subject to the threshold by default, whereas existing employment agreements would have to agree to opt-out of unjustified dismissal protection.
25. This would likely be a more complex option to draft than Option 1, and we would seek your decisions on any technical choices arising through drafting.
26. **Option 3 - nullify pre-existing arrangements:** You could maximise the impact of the threshold by nullifying pre-existing contractual requirements in relation to dismissal in employment agreements.
27. This would make the impact of the threshold more consistent across high-income earners, as the intent is to nullify all pre-existing arrangements relating to dismissal. We anticipate that the scope of the nullification would be challenged by employees dismissed in reliance of the threshold via a breach of contract claim, with the argument that the nullification does not apply to the part of the contract they claim was breached.
28. However, this option would undermine existing employment agreements, where terms and conditions reflect deliberate choices and trade-offs between the parties; though many may be 'boiler plate' clauses included as a standard part of the agreement.
29. This option is likely to require complex drafting and may extend the time needed to draft the Bill beyond the three months currently scheduled. This would risk the timeframes for the Employment Relations Amendment Bill.
30. **International relations, Legal professional privilege**
31. Given the significant risks, we do not recommend this option.
32. A summary of the options is included in Table 2 below:

*Table 2: Transitional options*

Options	Benefits	Risks
Option 1: Threshold applies to all existing employment agreements, which includes pre-existing arrangements	<ul style="list-style-type: none"> <li>• Preserves contractual arrangements between employers and employees.</li> <li>• Allows arrangements to be renegotiated over time.</li> </ul>	<ul style="list-style-type: none"> <li>• Delays the effect of the threshold, as some employers who have agreed to pre-existing arrangements may not be able to rely on the threshold.</li> <li>• Impact would be inconsistent, depending on the content of pre-existing arrangements.</li> <li>• Complexity for employers who will have to comply with various pre-existing contractual arrangements.</li> </ul>
Option 2: Threshold applies to new or varied employment agreements only (recommended)	<ul style="list-style-type: none"> <li>• Greater certainty of the law.</li> <li>• This would make the impact of the threshold consistent, as it only applies to new or varied employment</li> </ul>	<ul style="list-style-type: none"> <li>• This would delay the impact of the threshold.</li> </ul>

	agreements.	
Option 3: Nullify pre-existing arrangements	<ul style="list-style-type: none"> <li>Maximise the impact of the threshold for commencement.</li> </ul>	<ul style="list-style-type: none"> <li>Undermines existing employment agreements.</li> <li>Legal risk of challenge to the nullification.</li> <li>International relations, Legal professional privilege</li> </ul>

33. MBIE's recommended option is to apply the threshold to new or varied employment agreements (Option 2) as it is the simplest for businesses to implement and provides the greatest certainty to employers and employees.

## **You have choices about how to give effect to the policy intent**

34. You agreed to exclude those earning above the threshold from raising an unjustified dismissal claim, alongside a contracting-in mechanism [2324-3227 and 2425-0867 refers].
35. A key benefit for employers of the threshold is that it provides flexibility to dismiss high-income earners by not requiring employers to follow standard processes required by the Act. To fulfil the intent of the contracting-in provision, employers and employees require the ability to contract back into the standard processes.
36. We propose further legislative amendments to ensure employers do not have to follow the standard processes required by the Act for employees earning above the threshold, whilst providing flexibility to contract back into these processes.

### *Removing the obligation to provide access to relevant information and an opportunity to comment on decisions that would adversely affect employment*

37. The Act<sup>2</sup> requires employers, before making a decision that could adversely affect an employee's employment, to provide:
- access to relevant information about the decision; and
  - an opportunity to comment on the information to their employer before the decision is made.
38. This creates process requirements for employers and, if these are not followed, raises the risk of successful legal challenge.<sup>3</sup> We therefore recommend removing this requirement for employees above the threshold, but allow it to be contracted back into if agreed to by employers and employees.

### *Removing the requirement to provide a statement of reasons for dismissal*

39. The Act<sup>4</sup> requires employers to provide a statement of the reasons for dismissal within 14 days of the dismissal, if requested by the employee. If the employer fails to provide a written statement, the employee can claim a breach of statutory obligations under the Act.
40. We recommend removing the obligation to provide a statement of reasons for dismissal to accelerate the dismissal process for employer and to avoid the risk of employees challenging the reason for dismissal. If employers and employees contract back into unjustified dismissal protection, we propose that this requirement would apply.

<sup>2</sup> Section 4(1A) c) of the Act

<sup>3</sup> The legal challenge would likely be a claim that the employer breached their statutory good faith obligations under the Act.

<sup>4</sup> Section 120 of the Act



## **You have choices on what is determined to be ‘income’ for the purposes of the threshold**

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45. A detailed design question is what counts as ‘income’ for the purposes of the income threshold.
46. We consider that a good definition would result in high-income employees being captured by the threshold as intended, provide certainty for employers and employees on who is covered by the threshold, be simple to understand, and minimise perverse incentives.
47. An employee’s income can include different elements, including predictable income such as base salary and KiwiSaver contributions, through to unpredictable income such as bonuses and Employee Share Schemes, as well as non-financial benefits such as vehicle use.
48. There are two approaches to defining income: a narrow test that covers base income only, or a wider test that includes all of the elements of pay. There are three key differences between the approaches:

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<sup>5</sup> *Evans v JNJ Management* [2022] NZEmpC 16, and *Ward v Edenvale Home Trust Board* [2022] NZERA 82

- a. *Impact*: Some high-income earners may have a significant portion of their remuneration as incentive payments (e.g. bonuses or shares). Taking a wide approach would capture these employees and increase the coverage of the threshold, but we do not have the data to estimate the impact.
  - b. *Certainty*: Taking a narrow approach would prioritise certainty; as the income is predictable, both employer and employee could be certain whether the threshold has been met, and whether an unjustified dismissal could be raised.
  - c. *Complexity*: Taking a narrow approach would also allow a simple determination of income, as the Act requires that an employment agreement include “the wages or salary payable to the employee”.<sup>6</sup> Adopting a wide approach to defining income would require assessments of the value of benefits (e.g. shares in an Employee Share Scheme or vehicle use), and calculations to assess variable income (like those in the Holidays Act 2003).
  - d. *Gaming*: All options contain a risk of gaming at the margins of the threshold. Under a narrow approach, employees who earn an amount near the threshold are incentivised to negotiate non ‘base-pay’ benefits to retain unjustified dismissal protection. This is counterbalanced by employers’ incentive to have the employee over the threshold. Under the wide approach, employers could provide a discretionary payment to an employee to lift them above the threshold, and then dismiss them. In targeted engagement, some employee groups noted employees may be discouraged from taking overtime to avoid meeting the threshold.
49. MBIE recommends the narrow approach to provide certainty for all parties including the courts, to reduce unintended consequences such as refusing to work hours that attract overtime or penal payments and to avoid the complex calculations of a wide approach.
50. If you choose a wide approach, we will need to provide technical advice on assessing the value of benefits and calculating variable income during the drafting process. This will increase complexity and may extend drafting time and delay the introduction of the Employment Relations Amendment Bill.

## **You have choices on how the threshold applies to part-time employees**

51. A second detailed designed question is how the threshold interacts with part-time employment. There are two options:
- a. Annual income: The threshold is set at \$200,000 annually. If an employee’s salary is at or above this level, the threshold would apply regardless of full- or part-time status, or
  - b. Full-time equivalent (FTE): The threshold is set at \$200,000 on an FTE basis. The threshold for a part-time employee working 0.5 FTE would be \$100,000.

Katie applies for a GP position with a salary of \$250,000 but only wants to work 0.5 FTE. The employer agrees and hires Katie at 0.5 FTE. Katie’s annual income is \$125,000, but her FTE salary is \$250,000.

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<sup>6</sup> Section 65(2)(v) of the Act.

Options	Benefits	Risks	Does Katie earn over the threshold?
Annual income	<ul style="list-style-type: none"> <li><i>Consistency:</i> Consistent with other systems, which consider an employee's income (e.g: income tax, accident compensation, Working for Families, and the Australian high-income threshold).</li> </ul>	<ul style="list-style-type: none"> <li><i>Coverage:</i> Slightly narrower coverage</li> </ul>	No, Katie earns less than \$200,000 annually, so Katie is not covered by the threshold.
FTE	<ul style="list-style-type: none"> <li><i>Coverage:</i> slightly wider coverage.</li> <li><i>Targeting:</i> Part-time employees on high salary are likely to have high bargaining power.</li> </ul>	<ul style="list-style-type: none"> <li><i>Complexity:</i> This option is the hardest option to communicate, as the threshold would be \$200,000 for a full FTE, and less for part-timers.</li> <li><i>Targeting:</i> This wouldn't reflect part-time employees' likely proportionately lower impact on organisational performance.</li> </ul>	Yes, Katie's salary is more than \$200,000 on an FTE basis, so Katie is covered by the threshold.

52. There are interactions between these options and the definition of income. If a narrow approach to income is adopted, either an annual income or FTE option could be determined with information from the employment agreement. If a wide approach to income is adopted, a calculation to determine average hours would be required for the FTE option, adding further complexity to the drafting.
53. We recommend an annual income approach (option 1), as we consider it would be the simplest to communicate and understand and be consistent with other systems that deal with an employee's income.

## **We recommend the income threshold is updated according to upward changes in average weekly earnings**

54. You agreed to set the income threshold at \$200,000 [2425-0867 refers]. A high income is a proxy for those with significant impact on firm performance, high bargaining power, and resilience to job loss.
55. It will be important this is indexed so it can rise over time (as in the case of Australia). We recommend indexing it to average weekly earnings, using the FTE measure, seasonally-adjusted. We also recommend aligning the choice on ordinary time or total earnings with your decision on the definition of income. We considered other options (described further in **Annex Four**), but average weekly earnings is consistent with the policy rationale for the threshold and historically has maintained a consistent share of the population within it.
56. We also considered whether the level should rise and fall, or only rise. We recommend that it only rises. The options are also described further in **Annex Four**.

## Next steps

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57. Following agreement to options in this paper, the next steps are to seek Cabinet's agreement. We have already begun drafting the Cabinet paper and Regulatory Impact Statement to support you at the Cabinet Economic Policy Committee (ECO).
58. We expect to provide you with a draft Cabinet paper, alongside the paper on removing eligibility for remedies, on 17 October 2024 for your approval to begin Ministerial consultation.
59. We are aiming for a 20 November ECO committee to provide sufficient drafting time for the Employment Relations Amendment Bill.

## Annexes

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**Annex One:** List of legal avenues

**Annex Two:** Example of a dispute resolution clause in collective agreements

**Annex Three:** International obligations

**Annex Four:** Detailed advice on updating the threshold

## Annex One: List of legal avenues

Personal grievances grounds <sup>7</sup>	
Type of claim	Available to employees earning over the threshold
Unjustified dismissal	X
Confidential advice to Government	
Discrimination against prohibited ground	✓
Sexual harassment	✓
Racial harassment	✓
Duress due to membership or non-membership of a union or an employee's organisation	✓
Treated unfairly because they were believed to be affected by family violence	✓
Subject to adverse conduct for a prohibited health and safety reason	✓
Retaliatory action taken against them after making a protected disclosure of information (whistleblowing)	✓
Other actions under the ER Act	
Dispute about the interpretation, application or operation of an employment agreement	✓
Underpayment of wages	✓
Unfair bargaining	✓
Penalties for breach of an employment agreement	✓
Actions under other Acts	
Discrimination under the <i>Human Rights Act 1993</i>	✓
Sexual harassment under the <i>Human Rights Act 1993</i>	✓
Racial harassment under the <i>Human Rights Act 1993</i>	✓
Breach of the <i>Parental Leave and Employment Protection Act 1987</i>	✓
Breach of the <i>Privacy Act 2020</i>	✓
Breach of the <i>Minimum Wage Act 1983</i>	✓
Breach of the <i>Wages Protection Act 1983</i>	✓
Breach of the <i>Holidays Act 2003</i>	✓
General Contract law (common law)	
Breach of employment agreement	✓

<sup>7</sup> There are two additional grounds: Obligations relating to continuity of employment were not met when restructuring; which provides protection for specified categories of employees (for example cleaners) when their employment is assigned to a new employer. The other ground is being treated unfairly for lawfully refusing to work in certain circumstances. This relates to restrictions on 'zero hours contracts'. We do not consider that these grounds would likely be relevant to high-income earners



## Annex Two: Example of a dispute resolution clause in collective agreements

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### Example 1: Senior Medical and Dental Officers collective agreement

*Some minor editorial changes have been made for readability. The italicised text outlines our commentary on the impact of the clause in relation to the threshold.*

#### **57 Resolution of Employment Relationship Problems**

This clause sets out how employment relationship problems are to be resolved.

##### **57.1 Definitions**

*This clause provides a plain language explanation of the services available for resolving employment relationship problems, this clause will be restricted for employees earning above the threshold.*

An “employment relationship problem” includes:

- a personal grievance
- a dispute
- any other problem relating to or arising out of the employment relationship but does not include any problem with the determination of new terms and conditions of employment.

A “personal grievance” means a claim that an employee:

- has been unjustifiably dismissed; or *[this clause will no longer apply to employees earning over the threshold]*
- has had their employment, or their conditions of employment, affected to their disadvantage by some unjustifiable action by the employer; or
- has been discriminated against, sexually harassed, racially harassed, subjected to duress in relation to membership or non-membership of a union.

...

##### **57.3 Raising Employment Relationship Problems**

*This clause sets out the process parties will follow when there is an employment relationship problem, this will also apply to employees dismissed while earning above the threshold under Option 1 and 2 (until the collective agreement is renewed), but not under Option 3.*

Any employment relationship problem, should in the first instance be raised by the employer with the employee or the employee with the employer as soon as possible.

The employee and/or the employer are entitled to seek advice and assistance from their chosen representative in raising and/or discussing the problem.

If the employee wishes to raise the employment relationship problem with the employer in writing or the matter is not resolved when the employee raises the problem with the employer, the employee should submit to the employer written notice of the personal grievance, dispute or problem, covering the following points:

- details of their grievance, dispute or problem;
- why he/she feels aggrieved; and
- what solution he/she seeks to resolve the grievance, dispute or problem.

The employee and the employer shall meet to discuss and attempt in good faith, to resolve the employment relationship problem.

## **Annex Three: International obligations**

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*This section is legally privileged.*

Legal professional privilege



## **Annex Four: Detailed advice on updating the threshold**

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1. Using 2023 data, the proposed threshold covers approximately 2.15 percent of wage and salary earners. As wages generally increase over time, a static threshold would gradually capture more wage and salary earners. This can be illustrated with historical data:
  - a. In 2004, a threshold of \$99,000 would have covered 2.15 percent of wage and salary earners (the same proportion of earners as the proposed threshold).
  - b. By 2023, a \$99,000 threshold would cover 16 percent of wage and salary earners. This is half of the proposed threshold and would not meet the policy rationale of covering employees with significant impact on organisational performance, bargaining power, and resilience to job loss.
2. We therefore recommend that the threshold is updated over time (or 'indexed', in the technical language).

### *Average weekly earnings align with the purpose of the income threshold*

3. The key question is what measure to update the income threshold with. We are looking for a measure which is consistent with the purpose of the threshold, captures a similar proportion of employees over time, and is simple to administer.
4. There are broadly two approaches to updating the income threshold. The first is to use inflation via the Consumer Price Index, which measures changes in the price of the goods and services New Zealand households buy. However, inflation relates to purchasing power rather than wages and salary.
5. The second approach is to update the threshold using changes in wages and salaries. There are two key measures for wage growth:
  - a. The Labour Cost Index, which measures changes in salary and wage rates for a fixed quantity and quality of work<sup>8</sup> and is intended to measure the cost an employer pays for the same amount of work completed to the same standard. It generally increases at a slower rate than other wage and salary measures. The Labour Cost Index measures the price of a fixed quantity and quality of work, rather than the actual wages paid by employers; or
  - b. Average or median wages, which measures the wage bill for employers and can be split into average hourly and weekly wages, and can be measured using the number of employees, or total number of full-time equivalents.
6. Updating the threshold over time in line with average weekly earnings best aligns with the purpose of the income threshold. The threshold is based on the income received from the employer; and average weekly earnings measures the income actually received from an employer. The median measure is intended to measure of the income of the 'typical' worker, and not be affected by changes at the top of the income distribution, who this policy is intended to target.
7. An alternative option is to legislate that the threshold is set at a level to capture the top 2.15 percent of wage and salary earners. This would require developing a novel measure to

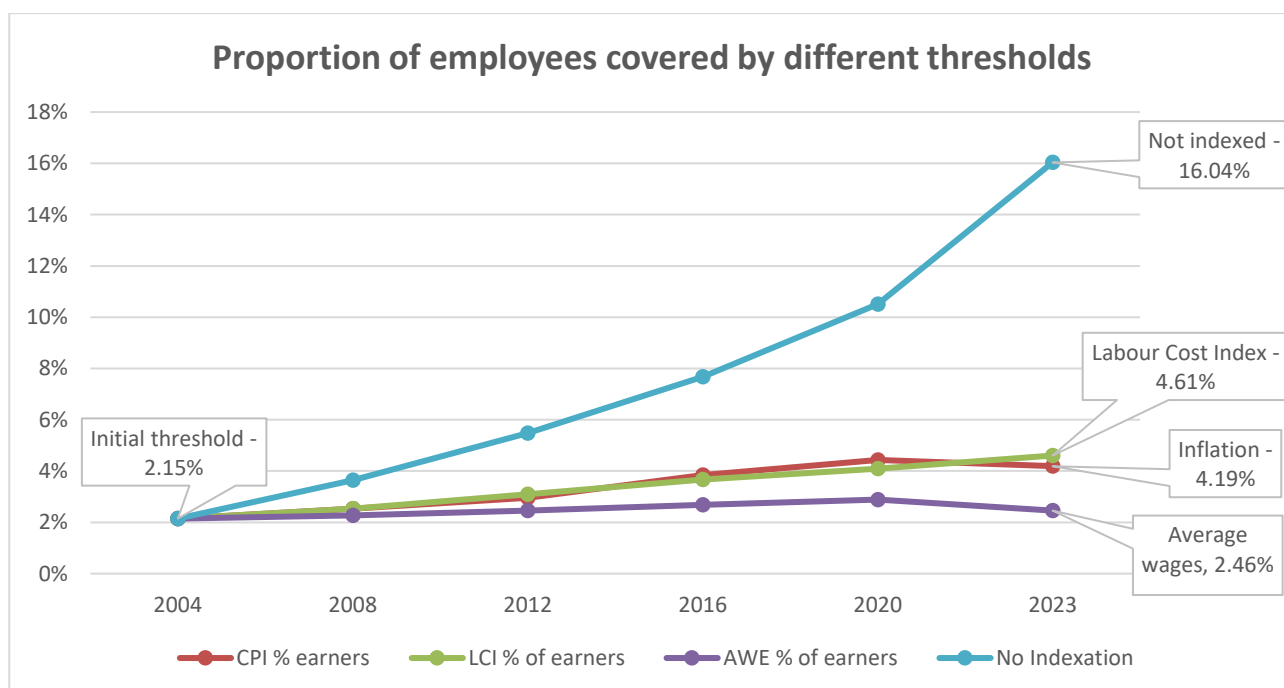
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<sup>8</sup> This means the Labour Cost Index excludes improvements in the quality of labour, such as productivity improvements, promotions, or changes in hours worked.

determine the threshold. Given the robustness of the existing Statistics NZ surveys, which are already used for indexing a range of different policies<sup>9</sup>, we do not recommend this option.

*Average weekly earnings would capture a consistent proportion of wage and salary earners*

8. As well as being conceptually related to the purpose of the threshold, the measure should capture a similar proportion of employees over time.
9. As above, this can be illustrated using historical data. Using the \$99,000 initial threshold in 2004, the different measures would lead to significantly different thresholds in 2023 (rounded to the closest \$1,000):
  - a. Consumer Price Index: \$160,000.
  - b. Labour Cost Index: \$155,000.
  - c. Average Weekly Earnings: \$192,000.
10. These different measures would lead to different proportions of employees being over the threshold:



11. Overall, we recommend updating the threshold over time using average weekly earnings, as it is most closely related to the purpose of the threshold, covers a similar proportion of employees over time, and is simple to administer.

*There are some technical choices on the specific average weekly earnings measure*

- a. *Ordinary time or total earnings:* There is a choice between including only ordinary time earnings, or all earnings (which includes ordinary and overtime). We recommend the choice of measure aligns with your decision on the definition of income. The differences between the two are minor: over the past 20 years, average growth for total earnings is 3.59 percent, compared to 3.66 percent for ordinary earnings.

<sup>9</sup> For example, Paid Parental Leave is indexed to upward changes in average ordinary time weekly earnings, and main benefits under the Social Security Act 2018 are indexed to upwards changes in the Consumer Price Index.

- b. *Employees or full-time equivalents (FTE)*: Average weekly earnings can be determined by the number of employees, or the number of FTEs. We recommend FTE, as we expect those earning over the threshold to be full-time, and the measure excludes changes to hours worked. The average annual growth on the FTE measure is 3.59 percent, compared to 3.80 percent for employees. The FTE measure better capture of a similar proportion of employees.
- c. *Seasonal adjusting*: Average weekly earnings can be 'seasonally adjusted', which removes the seasonal effects (i.e. higher earnings over summer) to reveal non-seasonal features. We recommend adopting seasonal adjustments, as those employees over the threshold will not be seasonal workers. The average growth rate is the same between the measures (3.59 percent).

*We propose that the threshold is only updated in response to upward movements in the indexation measure*

12. You have a choice on whether the threshold is only updated when:
  - a. There is an upward or downward change in the measure. This means the threshold could decrease in some years. Over the past twenty years, there have been no periods of deflation, no decreases in the Labour Cost Index, and average wages went down in one year (2019/20), or
  - b. When there is upward change in the measure. Where there is a decrease in the measure, the threshold would remain unchanged. This means the threshold could only increase or remain stable over time (recommended on balance).
13. This choice is finely balanced. Decreases are likely to only happen in a recession; where the impact of a high-income earner on firm performance may be particularly impactful in a tight economic environment, but an employee's bargaining power and resilience to job loss is likely lower (given a likely reduction in other employment opportunities).
14. The threshold could decrease and cover some employees who had not expected to be over it, and therefore may not have had the opportunity to negotiate appropriate mitigations into their employment agreements. This group is likely less able to negotiate mitigations, given the likely context are those already in employment during a recessionary period. For context, if the threshold had decreased in response to a reduction in average weekly earnings in 2020, an additional ~1400 employees would have been covered by the lower threshold.<sup>10</sup>
15. On the other hand, allowing upward and downward changes would best capture a similar proportion of employees over time.
16. On balance, we consider that covering employees who had not expected to be over the threshold during recessionary periods could risk poor outcomes, so recommend updating the threshold in response to *upward* increases only.

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<sup>10</sup> Using the measure of total earnings and full-time equivalents. The threshold would have reduced from \$159,000 to \$158,000.