



BRIEFING

Advice on the transitional provision for the personal grievance income threshold

Date:	15 January 2025	Priority:	Medium
Security classification:	In Confidence	Tracking number:	BRIEFING-REQ-0007323

Action sought		
	Action sought	Deadline
Hon Brooke van Velden Minister for Workplace Relations and Safety	Confirm the 12-month transitional provision for the income threshold for unjustified dismissal personal grievances	23 January 2025

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:**
- | | |
|---|--|
| <input type="checkbox"/> Approved | <input type="checkbox"/> Declined |
| <input type="checkbox"/> Noted | <input type="checkbox"/> Needs change |
| <input type="checkbox"/> Seen | <input type="checkbox"/> Overtaken by Events |
| <input type="checkbox"/> See Minister's Notes | <input type="checkbox"/> Withdrawn |

Comments



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Purpose

To provide further advice on the 12-month transitional provision applying to the income threshold for unjustified dismissal personal grievances.

Executive summary

Cabinet agreed in principle to a 12-month transitional period to the income threshold, for employees on “existing employment agreements”. We recommend that you define when an employee is no longer considered to be on an ‘existing employment agreement’. Those circumstances could include when an employee moves to a new employer, or a new role with the same employer, or when they have varied their terms and conditions. The transitional arrangement has other implications which we think can be adequately addressed by existing law.

Recommended action

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

- a **Confirm** the 12-month transitional provision for the income threshold for unjustified dismissal personal grievances.

Confirm

- a **Agree** that employers and employees can agree to vary their existing employment agreements to specify that the income threshold for unjustified dismissal personal grievances applies *before* the end of the 12-month transitional period.

Agree / Disagree

- b **Decide** in which circumstances an employee is no longer considered to be on an existing employment agreement in the context of transitional period for the threshold (*choose one*).

Option One	Option Two (recommended)	Option Three
An employee is no longer on an existing employment agreement when they have agreed to: <ul style="list-style-type: none"> a new employer, or a new role, or vary their terms and condition. 	An employee is no longer on an existing employment agreement when they have agreed to: <ul style="list-style-type: none"> a new employer, or a new role. 	An employee is no longer on an existing employment when they have agreed to: <ul style="list-style-type: none"> a new employer.
<i>Agree / Disagree</i>	<i>Agree / Disagree</i>	<i>Agree / Disagree</i>

- c If you choose Option One or Two in recommendation b above, **agree** that employees who move to a new role as a result of a restructure will be exempted from the meaning of ‘new role’, i.e. the full transitional period would apply to them.

Agree / Disagree

- d **Indicate** if you need further advice on the following implications of the 12-month transitional provision:

- Employers could still have a personal grievance raised against them for disclosing an unjustified reason(s) for wanting to dismiss an existing employee during the transitional period.
- Employers and employees who refuse to engage in negotiations during the transitional period could be challenged for breaching their duty of good faith.
- If negotiations are not concluded and the employment agreement has not been varied at the end of the transitional period, then the threshold applies.
- An employee who was unjustifiably dismissed during the transitional period could raise a personal grievance claim after the commencement of the threshold, if raised within a 90-day period.
- Potential increase in urgent requests for dispute resolution services.

Yes / No

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

Hon Brooke van Velden
Minister for Workplace Relations and Safety

15 / 01 / 2025

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Cabinet agreed in principle to a 12-month transitional provision

1. On 20 November 2024, the Cabinet Economic Policy Committee (ECO) agreed to introduce an income threshold of \$180,000, above which an employee could not raise an unjustified dismissal personal grievance.
2. As part of that decision, ECO “*agreed in principle that the threshold applies to existing employment agreements between employers and high-income employees, with a 12-month transitional provision, subject to the Minister for Workplace Relations and Safety receiving further advice and taking decisions in accordance with paragraph 11 below*”. Paragraph 11 of the same Minute “*authorised the Minister for Workplace Relations and Safety to take further decisions, including on any transitional provisions, consistent with the above policy that arise during the drafting and Parliamentary process*”. [ECO-24-MIN-0265].
3. This in-principle decision will mean that the income threshold applies to:
 - **new employment agreements** after the legislation commences, and
 - **existing employment agreements** 12 months after commencement.
4. This paper seeks your agreement to confirm the transitional provision and outlines its implications. Once you have confirmed the transitional provision, we will send drafting instructions to Parliamentary Counsel Office (PCO).

We recommend you confirm Cabinet’s in-principle decision, and make further policy decisions to clarify it

5. We consider Cabinet’s in-principle decision is workable, with the clarifications we have recommended below. We recommend you confirm the decision.
6. The transitional provision allows employees on existing employment agreements to retain their ability to raise an unjustified dismissal personal grievance for an additional period of 12 months. Parties can use this period to negotiate new terms and conditions before the commencement of the income threshold (eg severance pay, dismissal process) if they wish.
7. We consider that the policy intent of the transitional provision is to increase the *certainty* of whether and when the income threshold applies, and to give employers and existing employees the *opportunity to negotiate* whether and how the income threshold applies.
8. This section outlines the additional policy design decisions required to ensure the workability of the transitional period. Example scenarios are included in boxes for illustration.

Clarify that existing employment agreements can be varied to specify that the income threshold applies before the end of the 12-month transitional period

9. Consistent with our understanding of Cabinet’s intent, we recommend that employers and employees on existing employment agreements may agree to vary their employment agreement to state that the income threshold applies before the end of the 12-month transitional period.

George is a General Manager at firm A and is earning over the income threshold when the legislation commences. One month after the start of the transitional period, George and his employer agree to vary his employment agreement to state that the income threshold applies before the end of the transitional period, in return for four months’ salary as severance pay.

10. We consider that this will help create certainty, as this will allow employees to opt in to the income threshold prior to it automatically applying. It provides an opportunity for parties to understand whether it applies to them, and to negotiate bespoke terms prior to it applying.

Clarify the definition of 'existing employment agreement' in the context of transitional period for the income threshold

11. The concept of 'existing employment agreements', as used in the ECO in-principle decision is not defined in the *Employment Relations Act 2000* or in case law. This will create uncertainty for employers and employees who seek to vary their existing employment agreement during the 12-month transitional period, as to whether the agreement has been varied enough to be considered a 'new' agreement (and therefore have the income threshold apply).
12. We suggest that you clarify, for drafting purposes, in which circumstances the transitional period will not apply to an employee. We have identified four categories of changes to employment agreements that may occur during the 12-month transitional period, and discuss them each in turn, before summarising our advice in paragraphs 24 to 28.

New employer

13. This type of change covers employees on an existing employment agreement who agree to move to a new employer during the transitional period.

George, who was a General Manager at firm A when the income threshold legislation commenced, resigns, and enters a new employment agreement at firm B three months into the transitional period.

14. In this scenario, we consider that the employee who decides to enter a new employment agreement with another employer (ie different from the one they had at the commencement of the income threshold legislation) should not be covered by the transitional period in relation to the new employment. This would mean that the threshold would automatically apply to the employee when they change employer. We consider this was clearly intended by Cabinet. We also consider it to be appropriate because the employee would have had the opportunity to negotiate appropriate terms and conditions while taking into consideration the threshold.

New role

15. This refers to an employee who stays with the same employer but agrees to move to a different role during the transitional period.

Example 1 – Permanent new role

George, who was a General Manager at firm A when the income threshold legislation commenced, accepts a promotion to Chief Investment Officer (still at firm A) two months into the transitional period.

16. We recommend that an employee who agrees to move to a different role, but keeps the same employer, whether the role change is upward, downward or laterally, should not be covered by the transitional period. This means that the threshold would automatically apply to the employee when they move to the new role. We consider this to be appropriate because the employee would have had the opportunity to accept or decline the offer, and therefore negotiate appropriate terms and conditions. In our view, it is more akin to the concept of new employment, than existing employment.

Example 2 – Temporary new role

George's substantive role is General Manager at firm A, and two months into the transition period he agrees to act as Chief Investment Officer (still at firm A) for a period of six months and receives an acting-up allowance for that time.

17. We suggest that the transitional period should cover employees who are varying their contract for a limited amount of time – that is, the income threshold would not apply to them until 12 months after the legislation commences. We consider an employee who accepts a temporary role, with the intention of going back to their substantive position, is not given a sufficient opportunity to negotiate the terms and impact of the threshold. It is not a ‘new role’, it is temporary.

Example 3 – New role after restructure

George’s role at firm A has been disestablished and he accepts a new role offered by firm A that is substantially the same as his previous one.

18. We propose that an employee who has agreed to a new role in the context of a restructure should be covered by the transitional period. We consider that employees in these circumstances did not choose to leave their existing position – the effective choice for the employee is new role or redundancy, and their ability to negotiate the terms and conditions is likely limited.

New terms and conditions

19. This category includes any change to an employee’s terms and conditions, such as a pay increase, or shifting from a collective agreement to an individual agreement, agreed to by both parties but without being a new role or new employer.

Example 1 – Variation of leave entitlements

George and his employer agree to increase his holiday leave from four to five weeks per year. The employer provides a new employment agreement for George to sign, as terms and conditions of his employment have changed.

Example 2 – Variation of location and hours worked

George’s parents are sick. One month into the transitional period, George asks to relocate to Auckland to be closer to his family and asks to start working a 9-day fortnight. He and his employer change his employment agreement to reflect that. George also delegates one of his responsibilities (that he could no longer fulfil from Auckland) to his direct report.

20. Unlike the other categories, we perceive a risk of uncertainty of obligations for employers and employees who may not know whether the changes made to the existing employment agreements amount to a new employment agreement, and may not have considered whether the threshold applies.
21. We consider that an employee whose terms and conditions (of the same role with the same employer) are varied, is not likely to have had a sufficient opportunity to negotiate appropriate terms and conditions in light of the threshold. Therefore, we recommend that employees who undergo this type of change are not considered to have a ‘new employment agreement’, and thus should be covered by the transitional period. This excludes those who have agreed to vary their employment agreement explicitly to have the threshold apply to them during the transitional period (refer to paragraph 9 and 10).

New terms and conditions that were not expressly agreed by the parties

22. This category includes any change to an employee’s terms and conditions, such as a pay increase, which was unilaterally decided by one party.

Example 1

George receives an automatic pay increase six months into the transitional period as part of firm A's annual remuneration review.

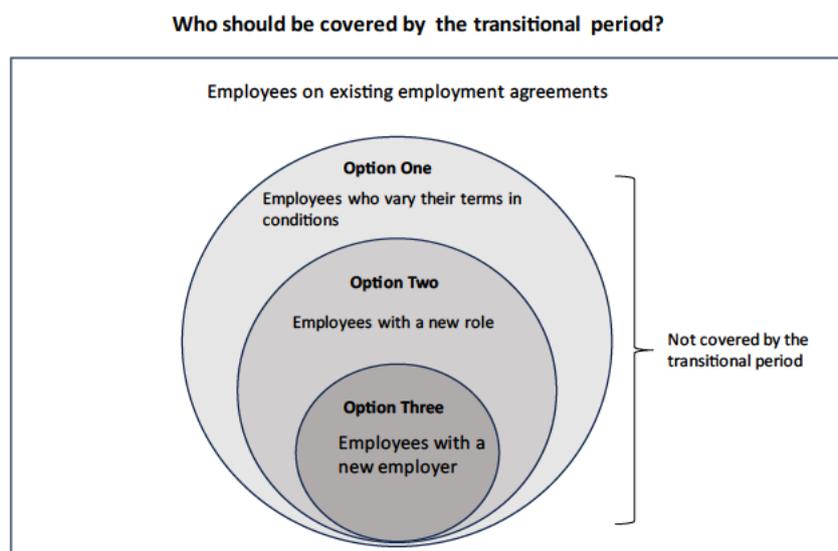
Example 2

Janine is another General Manager at firm A, and she also receives an automatic pay increase six months into the transitional period, as part of the annual remuneration review. This increase pushes her income above the \$180,000 income threshold for the first time.

23. We do not consider that either scenario would constitute a variation of terms and conditions in the context of the transitional period, as the employee has not been given an opportunity to agree to the change of terms – the basic contractual elements of offer and acceptance aren't present. We consider this can only be considered to be an "existing employment agreement", so the transitional period will apply.

Summary of options to define existing employment agreements in the context of the transitional provision

24. In summary, you can define what constitutes an 'existing employment agreement' in the context of the threshold by deciding who should be covered by the transitional period (as outlined in the sections above).
25. Depending on the option you choose, the transitional period will cover all employees on an existing employment agreement, except those employees who have:
- a new employer, or a new role within the same employer, or who have agreed to vary the terms and conditions of their employment agreement (**Option One**); or
 - a new employer, or have a new role within the same employer (**Option Two**); or
 - a new employer (**Option Three**).



26. We recommend **Option Two**, that employees who join a new employer, or who agree to a new role with their existing employer, are not covered by the transitional provision, and thus the income threshold will apply to them as soon as they accept the new role. We consider that this would provide certainty as to whether the income threshold applies while ensuring

employers and employees have had an adequate opportunity to negotiate terms in their agreement.

27. As mentioned above, we consider that Option One is risky, as employees may not realise that by agreeing to vary their terms and conditions, they will no longer be covered by the transitional period. We consider that this option would reduce the certainty as to whether the threshold applies to employees. We suggest it would also depart from a common understanding of where the boundary might lie between 'new' and 'existing' employment – a minor change in terms and conditions is probably not considered to be 'new employment' by most employers or employees.
28. In Option Three, employees who have new roles within the same employer would be covered by the transitional period. We consider that this option does not meet the policy intent because employees in these circumstances will have had the opportunity to negotiate the application of the threshold when accepting a new role.

The transitional provision has other implications, but we consider that existing law gives certainty

29. The transitional provision presents other potential implications. We describe these below, but we are not proposing any policy options, as we consider the current legislation and case law provides sufficient certainty on the likely outcome.
30. We consider that informing employers and employees through guidance on MBIE's website is sufficient to provide certainty for employers and employees.
31. If you would like to consider changing the outcome of any of these, we can provide further advice.

Potential scenarios which could occur under the transitional provision

Employers could have a personal grievance raised against them for disclosing an unjustified reason(s) for wanting to dismiss an existing employee during the transitional period.

George's employer admits during negotiations that while George is performing adequately, they would like the threshold to apply before the end of the transitional period because they know someone who would be better suited for the role.

32. In this instance, the employee could raise a personal grievance for unjustified disadvantage because they still have personal grievance protection until the end of the transitional period. Employers will need to engage with their employees the same way they did before the transitional period and use a justified reason to dismiss their employees. In the example above, the employer intends to dismiss their employee because they would prefer someone else for the role, which is not a justifiable reason.

Employees or employers who refuse to engage in negotiations during the transitional period could be challenged for breach of their duty of good faith.

George receives an email from his employer asking to renegotiate the terms of his contract before the end of the transitional period. George's employment agreement currently includes rigorous process requirements leading up to the dismissal that his employer must comply with (eg warning, mandatory meetings, and arbitration). George responds to his employer that he does not intend to engage in any conversation in relation to the income threshold.

33. In this scenario, the employee's behaviour could give rise to a breach of good faith. Parties will need to remain active, constructive, responsive and communicative in situations relating

to a variation of an individual or collective employment agreement during the transitional period.

If the employment agreement has not been varied at the end of the transitional period, then the income threshold begins to apply, and the employee cannot raise an unjustified dismissal claim.

George started negotiating his severance package one month before the end of the transitional period. George wanted five months salary in severance pay but his employer was only offering three months of salary. The transitional period is now over, and no agreement has been reached between parties.

34. In this example, the employee would automatically lose their right to unjustified dismissal protection at the end of the transitional period. The same principle would apply in the context of collective bargaining.

An employee who was unjustifiably dismissed during the transitional period could raise a personal grievance claim after the commencement of the income threshold legislation.

35. Section 33 of the Legislation Act sets out that the repeal or amendment of legislation does not affect the completion of a matter that relates to an existing right and legal position, nor does it affect the commencement of a proceeding that relates to an existing legal position.

Example 1 – Dismissal during the transitional period

George considers he has been unjustifiably dismissed 10 days before the end of the transitional period.

36. An employee must raise a personal grievance with their employer within 90 days of the issue arising. In this particular example, the employee could raise an unjustified dismissal claim up to 80 days after the transitional period ends. As explained above, the commencement of the threshold will not prevent legal actions in relation to events that occurred during the transitional period.

Example 2 – Dismissal after the transitional period

George's employer raises performance concerns with George ten months into the transitional period. George disagrees with his employer, and there is a dispute between the parties. George is dismissed a few days after the end of the transitional period.

37. In this instance, the employee could not challenge their employer for an unjustified dismissal because the dismissal occurred after the end of the transitional period.

Impact on dispute resolution services

38. If negotiations during the transitional period stall between the parties, or if there are other issues, assistance from MBIE's Employment Mediation Services may be requested under urgency. Dispute resolution services, including the Employment Relations Authority, will need to decide how to prioritise these matters.

Next steps

39. Following your decisions on the choices in this briefing, MBIE will provide drafting instructions to PCO.
40. We will keep you updated on the progress of the drafting of the Employment Relations Amendment Bill.