

ALERT

29 JUNE 2012

High-income threshold for unfair dismissals increased

The high-income threshold for determining eligibility to make unfair dismissal claims will rise from \$118,100 to **\$123,300** from 1 July this year. The high-income threshold amount is calculated and indexed annually; it will change again in 2013.

In assessing whether an employee is earning above this threshold, include in any calculation: wages; amounts applied or dealt with in any way on the employee's behalf or as the employee directs (eg superannuation top-ups, salary sacrifice); the agreed monetary value of non-monetary benefits (eg personal use of a company car, mobile phone or laptop). Do not include: payments where the amount cannot be determined in advance (eg commissions, bonuses, overtime (except guaranteed overtime)); reimbursements; and employer contributions to superannuation.

The threshold increase affects a number of different provisions under the Act, including:

- an Award-free or agreement-free employee's eligibility to claim unfair dismissal;

- the maximum amount of compensation that Fair Work Australia (**FWA**) can order an employer to pay to an employee deemed to have been unfairly dismissed; and
- the level to which an employer can guarantee an employee's earnings (rendering the provisions of the applicable modern Award no longer applicable).

Eligibility for unfair dismissal claims

An employee who is not covered by a modern Award or enterprise agreement, whose annual rate of earnings exceeds the high-income threshold, is excluded from making an unfair dismissal claim under the Fair Work Act. Whereas an employee who earns in excess of the threshold *will not* be precluded from lodging an unfair dismissal claim if that employee is covered by an Award or enterprise agreement.

Maximum compensation

The provisions allow FWA to offer compensation as a remedy (rather than the preferred remedy of reinstatement) where reinstatement is



found to be inappropriate. Employers should note that, as of 1 July 2012, the maximum compensation available for an unfair dismissal will also increase to **\$61,650** (half of the high-income threshold).

Guarantee of annual earnings

A guarantee of annual earnings is a written undertaking by an employer to pay the employee more than the high-income threshold for a future period of twelve months or more, which means the employee is not subject to the application of any relevant modern Award. Employers elect this option to avoid compliance with any of the prescriptive provisions of any relevant modern Award (however, the employee will still be able to seek a remedy under the unfair dismissal provisions of the Fair Work Act).

Conclusion

Given various complexities in this area, we recommend advice be sought whenever a claim is made by an employee who is paid an amount that may exceed the current high-income threshold.

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