

ALERT

18 JUNE 2013

'High-income threshold' for unfair dismissals increased

From 1 July 2013, the 'high income threshold' will rise from \$123,300 to \$129,300. The high income threshold is critical because it:

- determines the eligibility of employees who are not covered by a modern award or enterprise agreement to make an unfair dismissal claim;
- determines the maximum amount of compensation payable for unfair dismissals; and
- prescribes the minimum rate that an employer must 'guarantee' to effect a 'guarantee of annual earnings'.

Eligibility to claim unfair dismissal

Under the *Fair Work Act 2009* (Cth) (**Act**), certain employees are excluded from making unfair dismissal claims. Relevantly, employees:

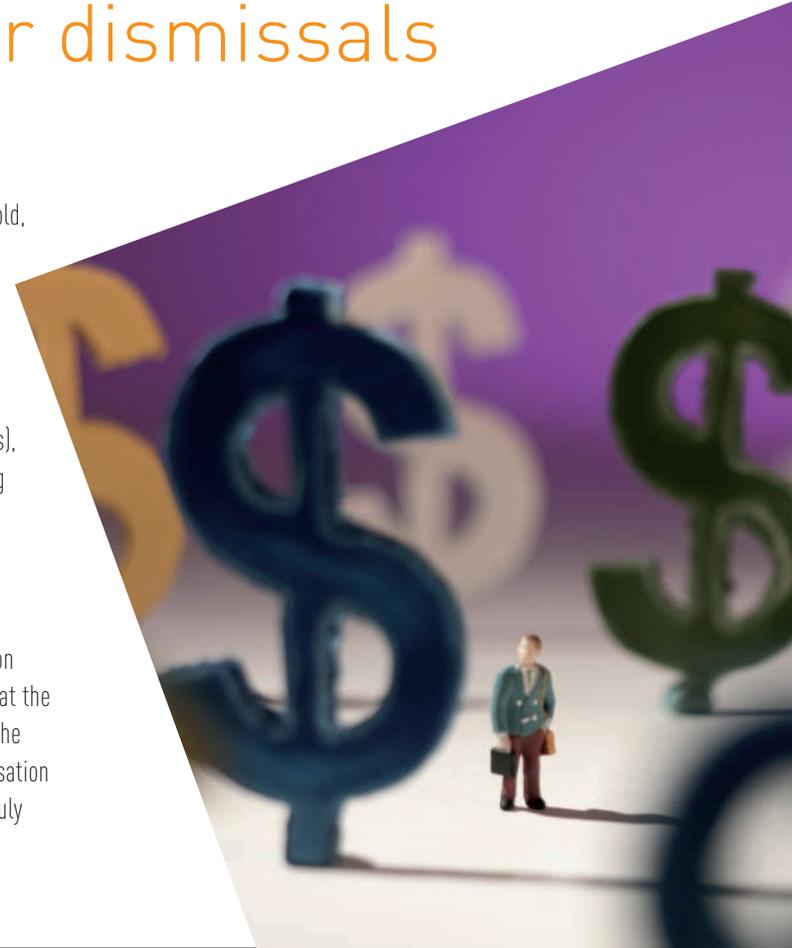
- not covered by a modern Award or enterprise agreement; AND
- whose annual rate of earnings exceeds the high income threshold,

will be ineligible from bringing a claim for unfair dismissal.

In assessing whether an employee is earning above this threshold, the Fair Work Commission (**Commission**) must take into account the employee's wages, any money that is paid on their behalf (such as salary sacrifice amounts) and the agreed value of non-monetary benefits (such as personal use of a company car or mobile phone). However, it does not include payments that cannot be set in advance (such as commissions or bonuses), reimbursements (which includes meal allowances and travelling allowances), or statutory employer superannuation guarantee contributions.

Maximum compensation

Where reinstatement is held to be inappropriate, the Commission may order compensation as a remedy. Compensation is capped at the lower of either half the high income threshold, or 6 months of the dismissed employee's wages. The maximum amount of compensation payable to a dismissed employee will rise to **\$64,650** as of 1 July this year.



Guarantee of annual earnings

An employer may, by arrangement, enter into a guarantee of annual earnings with an employee, which effectively ousts the provisions of a modern award. To be effective, the employer must, by written undertaking, guarantee to pay the employee more than the high income threshold for a future period of 12 months or more.

This means an employer can avoid compliance with any of the prescriptive provisions of any relevant modern award by paying an employee above the high income threshold (although if dismissed, the employee is not prohibited (by way of their high income) from seeking a remedy under the unfair dismissal provisions).

For employers

In assessing whether a former employee can bring an unfair dismissal claim, it is essential that employers understand how to calculate an employee's 'earnings'. 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.

Employers should also be aware that the increase in the threshold may mean there are employees within your workplace who are now eligible to claim unfair dismissal from 1 July.

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