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Article Information

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Service: Employment & Labour

Pushing unfair dismissal to the outer-limits: Is Saeid Khayam v Navitas a game changer?

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For more than a decade, the full bench decision in *Department of Justice v Lunn* [2006] AIRCFB 756, 158 IR 410 (***Lunn***) has been accepted as authority for the proposition that where an employee's employment ends because a fixed-term or outer-limit contract expires, the cessation of employment does not constitute dismissal at the initiative of the employer. This applied equally to fixed term contracts and outer-limit contracts (which, unlike true fixed term contracts, reserve the right of the parties to terminate before the end date), and regardless of whether the contract was one of a series of contracts offered to the employee by the employer or otherwise, unless the arrangement was a sham.

However, a recent decision of the full bench of the Fair Work Commission, *Saeid Khayam v Navitas English Pty Ltd t/a Navitas English* [2017] FWCFB 5162 (***Navitas***) has indicated that there may be an exception to this rule where employees are engaged on a series of outer-limit contracts over a period of time. In such circumstances, if an employee's outer-limit contract expires and they are not offered a further contract, the employee may be considered to have been "dismissed" for the purposes of section 386(1) of the *Fair Work Act 2009* (Cth) (**FW Act**) and therefore be entitled to bring an unfair dismissal claim alleging they have been unfairly dismissed. It is not yet clear how broadly this exception will be interpreted by the Commission. Curiously, the full bench distinguishes between fixed term and outer-limit contracts for the purposes of this exception.

Decision at first instance

In *Navitas*, the Applicant had been employed on a series of outer-limit contracts, and a decision was made by the employer not to offer the Applicant a further contract when the most recent of those contracts expired. Commissioner Hunt dismissed the application on the basis that she was bound by the full bench authority in *Lunn*, and consequently that the employee had not been dismissed at the initiative of the employer.

Decision of the majority on appeal

On appeal, the majority (VP Hatcher and Commissioner Saunders) found that the decision in Lunn was incorrectly decided. The majority confirmed that where an employment relationship is governed by a time-limited contract, and the employment relationship terminates as a result of the expiry of that contract, then absent any vitiating factors, the employment will have terminated by agreement, and not at the initiative of the employer. However, the full bench held that such vitiating factors include where "the use of a time limited contract was illegal or contrary to public policy (use of successive short-term contracts may be relevant to this consideration)" (emphasis added).

It remains unclear in what circumstances time limited contracts will be considered "illegal or contrary to public policy", and to what extent this is impacted by the use of a series of time-limited contracts.

Other possible vitiating factors identified by the full bench include:

(a) misrepresentation, mistake, unconscionable conduct, duress and/or coercion;

(b) standard-form contracts used for administrative convenience which do not reflect the reality or the totality of the terms of the employment relationship;
(c) Where the employer engages in conduct or makes representations which prevent the employer from relying on the terms of the contract as the means by which the employment relationship has been terminated; and/or
(d) Where the terms of the contract are inconsistent with an applicable award or enterprise agreement.

Taken on face value, the analysis of the majority appears inconsistent with section 386(2) of the FW Act, which provides that a person is not "dismissed" if they are employed on a contract of employment for a specified time and the employment ends at the expiry of that period. However, the majority determined that the legislative reference to "a contract of employment for a specified time" does not apply to outer-limit contracts, but rather the intention of the legislature was that this only applied to true "fixed term" contracts (that is, contracts for a specified time which do not allow the parties to terminate before the end date by giving notice).

The majority therefore upheld the appeal, and referred the matter back to Commissioner Hunt for a determination as to whether the Applicant's employment had been terminated at the initiative of the employer and, if so, to hear the substantive unfair dismissal application.
DP Colman, who issued a separate judgement, agreed with the majority that Lunn was incorrectly decided, but held that absent *"another contract, a broken promise, an industrial instrument that has been contravened"*, if an employee's employment ends as a result of the expiry of an outer-limit contract, the employee will not have been dismissed at the initiative of the employer.

Watch this space....

The majority has suggested that where an employee is engaged on a series or outer-limit contracts, and the employer determines not to offer the employee another contract when the most recent contract expires, this may constitute dismissal at the initiative of the employer where the use of a series of outer limit contracts is "illegal or contrary to public policy".
It remains to be seen how broadly the exception outlined by the majority is interpreted by the Commission. The first test of this is likely to be the decision of Commissioner Hunt, who is now tasked with determining whether the Applicant in Navitas was "dismissed" at the initiative of the employer.