

ALERT

IMPORTANT DEVELOPMENT FOR FIXED-TERM EMPLOYMENT

Does your business or organisation employ any staff on fixed-term employment contracts? If so, you should be aware that the Full Bench of the Fair Work Commission recently issued a decision which increases the exposure of your business or organisation to unfair dismissal claims from these staff.

Background

Mr Khayam was employed by Navitas English Pty Ltd (**Navitas**) as a Teacher. He worked on a casual basis from 2005 to 2012. In April 2012, Mr Khayam was offered employment as a Teacher for a fixed-term until 30 June 2013. The letter of offer provided that either party could terminate the employment at any time by giving 4 weeks' written notice. Mr Khayam accepted that offer. After the completion of that period of employment, Mr Khayam was offered and accepted employment on substantially the same terms for the period from 1 July 2013 to 30 June 2014. In June 2014, Mr Khayam was then offered, and accepted, another employment contract for the period 1 July 2014 to 30 June 2016. In May 2016, Mr Khayam was informed that he would not be offered a further fixed-term contract based on an assessment of his performance and disciplinary record. His employment consequently ended when his contract expired on 30 June 2016.

Unfair Dismissal Claim

Mr Khayam lodged an unfair dismissal claim against Navitas. The claim was opposed by the employer on the basis that it had not dismissed Mr Khayam. That is, for there to be an unfair dismissal, Mr Khayam must have been dismissed. The Company argued Mr Khayam's employment had not been terminated at its initiative. Rather, Mr Khayam's employment automatically ended by the effluxion of time when his employment contract ended on 30 June 2016.

At first instance, the Fair Work Commission found in favour of Navitas. It held that previous cases had clearly established that an employee who is subject to a fixed-term contract is precluded from lodging an unfair dismissal claim against their employer if the employment ends as a result of the expiration of the contract.

However, on appeal the Full Bench of the Fair Work Commission quashed that decision. The Full bench held that whether a fixed-term employee has been dismissed for the purposes of the unfair dismissal laws should be determined "by reference to termination of the employment relationship, not by reference to the termination of the contract of employment". Further, the Full Bench held that "in circumstances where the employment relationship is not left voluntarily by the employee, the focus of the inquiry is whether an action on the part of the employer was the principal contributing factor which results, directly or consequentially, in the termination of the employment".

Importantly, the Full Bench indicated that the above only applies to fixed-term contracts which contain provisions which expressly allow either or both parties to terminate the employment at any time during the fixed-term on specified notice. This type of contract is commonly referred to as an "outer-limit" contract. The outcome will be different if the employee is subject to a "true" fixed-term contract where there is no provision for either or both parties to terminate the employment prior to the expiration of the fixed-term by providing notice.

Implications for Employers

If your business or organisation employs staff on fixed-term contracts which expressly allow either or both parties to terminate the employment at any time on specified notice, those employees may be entitled to lodge unfair dismissal claims if their employment ends when their contracts expire. Therefore your business or organisation should exercise great caution when entering into such contracts in the future, and when deciding not to renew or extend any such contracts which may be in place. If the business decides not to renew or extend such a contract due to the employee's performance or conduct, the employer should consider implementing measures before the expiration of the contract which will put it in a better position to defend any unfair dismissal claim which may be brought by the employee.

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Disclaimer

The statements herein are not intended to amount to advice and should not be relied upon without first obtaining specific advice applicable to your situation.

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