"Outer Limit" Fixed Term Contracts – An Unfair Dismissal Update

There have been a few recent unfair dismissal decisions concerning the issue of whether an employee who had been engaged under a maximum-term contract (or "outer-limit" fixed term contract) was dismissed at the initiative of an employer if the employer did not offer a further period of employment to the employee when the contract term expired.

For the sake of clarification, an "outer limit" fixed term contract or a maximum term contract is an employment contract with an expiry date but still includes a clause allowing either party to terminate with notice. They have been treated as a different species to "specified term contracts" which the Commission has said in *Andersen v Umbakumba Community Council* (1994) 126 ALR 121 is a contract with an expiry date but does not include any provision allowing for earlier termination. Those on 'specified term contracts' are excluded from bringing a claim by s.386(2) of the *Fair Work Act 2009* (the Act). According to the reasoning in *Andersen,* that exclusion does not apply to 'outer limit' contracts despite there being no such limitation in s.386(2).

The most recent of these "outer limit" fixed term contract decisions is *Khayam v Navitas English Pty Ltd t/as Navitas English*. In *Khayam* the Applicant had applied under s.394 the Act of the for an unfair dismissal remedy with respect to his alleged dismissal by Navitas English Pty Ltd T/A Navitas English (Navitas).

Navitas raised a jurisdictional objection to the Fair Work Commission (the Commission) dealing with the application, submitting that Mr Khayam had been employed under a series of 'outer limit' or 'maximum term' contracts, and on the latest contract expiring, his employment simply ended. Navitas submitted there had been no dismissal at its initiative.

In her reasoning, Commissioner Hunt discussed earlier unfair dismissal decisions that had raised questions about the application of previous Full Bench authority (namely *Department of Justice v Lunn* [2006] 158 IR 410) decided under the relevant provisions of the *Workplace Relations Act 1996* in the context of the current legislative framework.

It is necessary to set out some history here.

Relevantly, in *Lunn* the Full Bench of the Commission stated at [27 to [29]:

> "[the] practice of engaging almost all staff on successive 'outer limit' contracts may be viewed by some as industrially contentious. However, subject to legislative constraints, employers are entitled to structure their affairs, including the contracts they offer to employees, in the way that they think best suits their interests."
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> "There is nothing in the WR Act that prevents an employer from offering a series of 'outer limit' contracts to an employee. Moreover, even if it were shown that the purpose of the policy was to avoid the Commission's unfair dismissal jurisdiction (and we hasten to add that there was no evidence to that effect and the proposition was denied by counsel for the Department who advanced a plausible explanation for the practice) this would still not render such contracts a "sham" in the sense that,

viewed objectively, the parties to those contracts had a common intention that they would not create binding legal rights and obligations according to their terms."

In his criticism of the decision in *Lunn*, Vice President Hatcher stated in *Jin v Rail Corporation New South Wales* [2015] FWC 4248, three matters which he said give rise to serious doubt on his part as to whether *Lunn* should continue to be followed in relation to "outer limit" fixed term contracts. They are as follows:

1. If the meaning assigned to "dismissed" in s.386(1) of the Act was constructed in the manner contended by *Lunn* then the exclusion at s.386(2) (which, as referred to above, applies to "specified term contracts") would be rendered otiose.

2. *Lunn* proceeds on the basis that the relevant question is whether the contract of employment and not the employment relationship was terminated on the initiative of the employer and there is significant doubt in his view as to whether "termination of employment" in s.386(1)(a) should be read as referring to the contract of employment and not the employment relationship.

3. The approach in *Lunn* creates insuperable problems in relation to unfair dismissal cases involving casual employees as a long-term regular casual who completes a particular day's engagement and is thereafter not engaged by the employer can never be regarded as having been dismissed, since this must be treated as an agreed termination of employment occurring at the end of the contract period as a result of the effluxion of time.

Nevertheless, the Vice President considered that he was bound by *Lunn* and upheld the employer's jurisdictional objection.

In *Khayam,* Commissioner Hunt concurred with the sentiments expressed by Hatcher VP in *Jin*. She also had further things to say about *Lunn* including that:

1. The construction of what constitutes a sham in *Lunn* is very narrow; and

2. If Mr Khayam's contract was caught by s.386(2) of the Act (what I have referred to as "specified term contracts") then it would have been open to scrutiny under s.386(3) of the Act (that is, an assessment as to whether a substantial purpose of entering into the contract was to avoid Navitas' obligations under the Act's unfair dismissal laws).

Importantly, in *Khayam*, the Commissioner found that even if Mr Khayam's contract was caught by s.386(2) of the Act she did not consider that a substantial purpose of Navitas offering maximum-term contracts to Mr Khayam and other employees was to avoid its unfair dismissal obligations.

The Applicant in *Khayam* has very recently filed an appeal in respect of Commissioner Hunt's decision . There are a number of reasons why the reasoning set out in *Jin* and *Khayam* criticising *Lunn* can be itself be criticised, however as the matter is on the appeal I'll reserve my comments for now.

Given these two recent single member decisions it will be very interesting to see whether the approach in *Lunn* will be overturned and / or whether the reasoning in *Andersen* remains good law.

Watch this space!

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