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BREAKING NEWS
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Fair Work Commission changes direction on maximum term contracts.

A Full Bench of the Fair Work Commission has today upheld an appeal in an unfair dismissal matter that will have broad ranging implications for the application of maximum term contracts across all industries.

As a result of the Full Bench decision, employers **cannot** assume that allowing a maximum term contract to simply 'expire' will prevent the employer from being subject to a successful unfair dismissal claim.

What is a 'maximum term contract'?

The phrase 'maximum term contract' refers to those contracts made between employers and employees for a stated period (e.g. 12 months), but which provides the employer with an ability to terminate the employment with notice prior to the expiration of the fixed period.

In practice, most contracts executed between employers and employees for a 'specified period' or 'specified season' are actually maximum term contracts. This is because it is very common for these types of contracts to contain termination clauses which permit termination with notice prior to the expiration of the specified period or season.

The historical treatment of maximum term contracts

Ever since the Australian Industrial Relations Commission case of Department of *Justice v Lunn* (2006) 158 IR 410, it has been widely accepted that unfair dismissal exposure does not arise when a maximum term contract is not renewed. This is because the cessation of the employment has not been caused by a termination at the initiative of the employer.

Rather, the employment is considered to have ceased due to the expiry of the contract, or what the Commission refers to as *"the effluxion of time."*

For this reason, until today, employers who ended an employee's employment upon the expiry of a maximum term contract were not considered to have *"dismissed"* an employee and did not face unfair dismissal exposure.

FWC overturns Lunn

In *Khayam* v *Navitas English Pty Ltd* [2017] FWCFB 5162, a 2-1 majority of the Fair Work Commission has held that allowing a maximum term contract to expire does **not** exempt an employer from an unfair dismissal claim.

Instead, the *Navitas* majority decision requires the following 5 point assessment to be conducted to determine whether an employee can bring an unfair dismissal claim after their maximum term contract has expired:

1 Determine whether the *employment relationship* has been ceased, not just an employment contract.

2 In circumstances where a termination is not voluntarily agreed to by the employee, the Commission will focus on whether an action on the part of the employer was the *principal contributing* factor which results in the termination of the employment.

3 Even if the parties have agreed in advance to terminate the employment on a particular date, this does not exclude the possibility that the termination of the employment relationship occurred at the initiative of the employer.

4 Where the terms of a maximum term contract reflect a *genuine agreement* on the part of both parties that the *employment relationship* will not continue after a specified date, then, absent a 'vitiating factor' (see below), the employment relationship will not have been terminated by the employer, but by the agreement of the parties.

Only in these cases will the employer be exempted from an unfair dismissal claim.

5 In some cases, even if there is an agreement to terminate the relationship on a particular date, the following vitiating factors will mean that an unfair dismissal claim is still available to an employee, that is where one or more of the following apply:

(a) the contract is entered into as a result of misrepresentations, misleading conduct, duress, coercion or some other unconscionable conduct;

(b) the contract is illegal or is entered into for the purpose of avoiding the unfair dismissal laws;

(c) the contract has been varied, replaced or abandoned following some further agreement between the parties;

(d) the contract does not represent all the terms of the relationship between the parties;

(e) the employer has done or said something during the employment relationship (such as representing to the employee that the employment would continue subject to conduct and performance regardless of a contractual time limit on employment) which would prevent the employer from being able to rely on the terms of the actual contract as to whether the employment relationship has been terminated; or

(f) the contract is inconsistent with provisions of an award or enterprise agreement which regulate the employment.

ABLA represented Navitas in the case and is continuing to take an active role in the development of this area of unfair dismissal laws.

What do employers do now?

The first step employers need to take is to determine whether they are engaging employees on maximum term contracts.

If the answer to this question is yes, a number of follow up queries arise:

1. Are you intending on renewing the contract?
2. If not, do the current employment arrangements fall within the category of contracts that are exempt from unfair dismissal laws?
3. Do any of the 'vitiating factors' cited by the Commission at point 5 above apply? In particular, why was a maximum term contract entered into? Was it to avoid unfair dismissal liability?
4. If there is a prospect that the unfair dismissal laws apply to your maximum term engagement, what performance, conduct or organisational reasons justify not renewing the contract? Have these matters been raised with the relevant employees?

Employers may also wish to consider whether a different form of fixed term contract better suits their business' needs.

The changes in this area of law are likely to see some near-term pain for some employers. Should you be considering ceasing the employment of any employees who are engaged on maximum term contracts, it is important to seek advice specific to your circumstances. Please feel free to contact our specialist team.

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