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Federal Court decision – Outer limit contracts and unfair dismissal laws

Over the years there have been conflicting decisions of Courts and tribunals regarding whether an employee who is terminated upon the expiry of an outer limit contract (also known as a maximum term contract) has access to the unfair dismissal laws.

In the relevant cases, two key issues have typically been involved:

1. Has the employment been terminated *"on the employer's initiative"* (as referred to in s 386(1)(a) of the Fair Work Act)?

2. Is the employment contract a *"contract of employment for a specified period of time"* for the purposes of the exclusion from the unfair dismissal laws in s 386(2)(a) of the Fair Work Act?

Some of the authorities relating to the first issue have been far from certain. For example, in *Khayam, Saeid v Navitas English Pty Ltd T/A Navitas English* [2017] FWCFB 5162 (***Navitas***), the majority of a Full Bench of the Fair Work Commission (FWC) identified a lengthy list of principles for determining whether the termination of employment of an employee at the expiry of an outer limit contract would be at the initiative of the employer. Essentially, the Full Bench decided that a fact-based inquiry needs to be undertaken to analyse whether the termination was at the initiative of the employer and hence whether the employee has access to the unfair dismissal laws.

With regard to the second issue, the majority in *Navitas* rejected the proposition that an outer limit contract that gave parties the right to terminate the contract on a specified period of notice was a contract of employment for a specified period of time.

A recent Federal Court decision has changed the status of the law on the second issue and will be welcomed by employers.

In *Alouani-Roby v National Rugby League Ltd* [2024] FCA 12, Justice Raper of the Federal Court of Australia held that the exclusion in s 386(2)(a) for contracts of employment for a specified period of time applies to outer limit contracts that are terminated on the expiry of the contract:

> *I accept that the contrary argument is that the phrase "contract of employment for a specified period of time" is replicated in the FW Act and that the phrase had previously been construed as not applying to contracts which were essentially outer limit contracts which allowed for early termination: see Cooper v Darwin Rugby League Inc (1994) 57 IR 238 at 241; Andersen v Umbakumba Community Council (1994) 126 ALR 121 at 125–6. However, the phrase must be construed in the context of the current, differently crafted, legislative provision as a whole. That context is instructive and supports the view that the legislature intended that the provision have a different effect than how its predecessor provisions had been interpreted. A construction of the provision on its terms supports the NRL's interpretation without need for recourse to the extrinsic material. I accept the NRL's argument that s 386(2)(a) applies to outer limit contracts which allow for early*

> *termination but only applies where the employee's employment has been terminated at the end of the specified period of time".*

Raper J's decision conflicts with a majority decision of a Full Bench of the Fair Work Commission (FWC) in *Khayam, Saeid v Navitas English Pty Ltd T/A Navitas English* [2017] FWCFB 5162. In this decision, Hatcher VP and Saunders C concluded that the relevant contract of employment between Mr Khayam and Navitas was not a contract of employment for a specified period of time because it gave both parties the right to terminate the contract on four weeks' written notice. Coleman DP dissented.

A recent decision of Riordan C of the FWC in *CFMEU v Svitzer Australia Pty Ltd* [2024] FWC 655 referred to Raper J's decision and the recent change in the law:

> *[179] The MUA submitted that Mr Campbell's originating contract was not a contract for a specified period of time because it could also be extended in writing or concluded early by the giving of notice. However, the law in relation to these types of contracts has recently changed. Previously, the decision of the majority in Navitas would have provided some benefit for the Applicant. However, a recent decision of Raper J, in Alouani-Roby v National Rugby League Ltd [2024] FCA 12 (Alouani-Roby), has changed the application of section 386(2).*

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