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FEBRUARY 2018

A VISION IN THE WORKPLACE

In our February 2018 edition of *Vision in the Workplace* we examine the implications of a recent decision that exposes employers to unfair dismissal claims from workers under maximum term contracts. We also consider a decision made by a Fair Work Commission Full Bench that broadens the coverage of the *Miscellaneous Award 2010* to low-paid workers. Finally, we examine whether Uber drivers will continue to be classified as independent contractors for the foreseeable future in Australia.

WORKERS ON MAXIMUM TERM CONTRACTS NOW HAVE ACCESS TO UNFAIR DISMISSAL

A recent case before the Fair Work Commission Full Bench (**FWCFB**) has given greater scope to workers under maximum term contracts to seek recourse in the unfair dismissal jurisdiction (***Navitas***). [1]

Prior to this decision, the expiry of a maximum term contract at its specified date did not result in the employee being "dismissed". This legal principle underpinned the advantage and widespread use of maximum term contracts, which was affirmed by *Department of Justice v Lunn* (2006) 158 IR 410 (***Lunn***).

However, several recent cases questioned the validity of *Lunn.*

Most notably, in *Navitas* the FWCFB reviewed the legal foundations of *Lunn* and held that Commissioner Hunt had failed to clearly or correctly state the correct method to interpret the expression "*at the initiative of the employer"* in the *Workplace Relations Act 1996* (Cth) or its application to the circumstances of a maximum term contract. Therefore, the FWCFB held *Lunn* does not affect the interpretation of section 386(1) of the *Fair Work Act (2009)* (**FW Act**).

The Full Bench offered guidance on how s 386(1)(a), which deals with the meaning of "dismissal" and when employment has been terminated at the employer's initiative, should be interpreted in the context of non-renewal of maximum term contracts:

1. Whether the expiry of a maximum term contract constitutes dismissal is determined by reference to the employment *relationship,* rather than the *termination* of the contract.

    - This distinction is particularly relevant to an employment relationship made up of a sequence of maximum term contracts as the analysis may require a consideration of the "entire employment relationship". The purpose of which is to determine whether there was an action by the employer that was the principal contributing factor resulting in the termination of the contract.

2. If the terms of the agreement reflect a genuine agreement that the employment relationship will end with the expiry of the employment contract, then generally there will be no termination at the initiative if the employer.

    - A decision in these circumstances to **not** offer another contract of employment will **not** be relevant to the question of whether there was a "dismissal".

3. The expiry of the contract may have impacted the termination of employment, but this does **not** exclude

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the possibility that the termination was at the employer's initiative.

- If the contract does not reflect an agreement that the employment relationship will end with the expiry of the contract the decision to **not** offer a further contract will be considered in assessing whether the employee was dismissed at the employer's initiative.

4. Maximum term contracts do **not** qualify as "*contracts for a specified period of time*" under the FW Act (this is restricted to true fixed term contracts), because they include rights for the parties to terminate the contract (and employment) with notice during the term of the contract.

   - Prior to *Navitas*, maximum term contracts were classified as contracts for a "*specific period of time*" which enlivened the exclusion from unfair dismissal remedy under s 386(2)(a) FW Act.

5. If one or more of the following vitiating factors apply to an employment contract then the employee will be able to access an unfair dismissal claim:

   - the contract is rendered unlawful (for example, by misrepresentation, mistake or coercion);
   - the contract is contrary to law or public policy (for example, designed to avoid rights or obligations under the FW Act;
   - the contract was varied in such a manner that the time limit no longer applies;
   - the employer may have made representations (such as asserting that continued employment is performance-related), which result in the time limitation being unenforceable;
   - where a Modern Award or enterprise agreement regulates fixed-term employment, those terms may override the employment contract to the extent of any inconsistency.

Navitas has potentially significant and developing implications for businesses who engage employees on maximum term contracts as those employees now have broader scope to pursue unfair dismissal claims. The majority have referred the matter to Commissioner Hunt for re-determination of the unfair dismissal claim.

If you require a review of your employment contracts, or have any questions arising from this article please contact Nick Stevens, Megan Cant or Isabella Paganin.

[1] *Saeid Khayam v Navitas English Pty Ltd t/a Navitas English [2017] FWCFB 5162 (8 December 2017)*

RECENT DECISION: *INCREASED UNION POWER AND BROADER COVERAGE OF MODERN AWARDS*

Standing to Appeal

A recent Fair Work Commission Full Bench (**FWCFB**) decision has held that United Voice (**the Union**) has the right to appeal decisions that affect enterprise bargaining, despite not being a bargaining representative. [1]

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The FWCFB held that the Union satisfied the legal criteria for a "*person aggrieved*" by the FWC's recent approval of the *AAA Pet Resort Enterprise Agreement* [2017] FWCA 4283 (**the Agreement**). The FWCFB considered the following points relevant to its decision:

1. The Union had an interest in the decision, above the interest of an ordinary member of the public;

2. The Union's rules permitted it to enrol employees as members; and

3. The Union was a bargaining representative for another related company.

The Union stated that this decision will provide them with greater "*standing to appeal against other FWC judgments where it has a broader interest in the matter*". The increased union access to appeal enterprise agreements will likely lead to increased levels of union involvement in enterprise bargaining in Australia.

Broader coverage of Modern Awards?

In its decision, the FWCFB also turned the 2010 advice of the Fair Work Ombudsman (**FWO**) on its head. The FWO previously held firm that the coverage of the *Miscellaneous Award 2010* (**the Modern Award**) "*will not apply to employees who due to the nature of their work have traditionally not been covered by awards*" (**the Exclusion**), and concluded that animal attendants and dog groomers were not covered by the Modern Award. However, the FWCFB found the pet and grooming employees to be covered by the Modern Award.

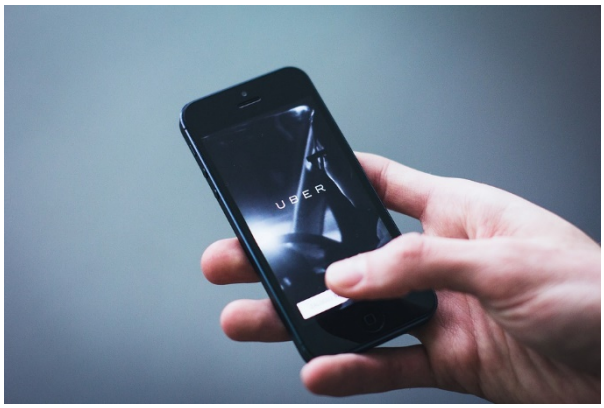
The FWCFB found that the Miscellaneous Award "*was intended to capture low paid workers not covered by another award*", while the Exclusion applied only to employees, such as managerial and professionally qualified staff, who were traditionally award free because of their seniority.

The Union stated that this decision reinforces the "*intent of having a 'catch-all' award safety net for lower-paid employees who fall outside of other modern awards*".

The effect of this decision will be widespread as it means that lower paid employee's in the federal system will be entitled to the pay and conditions of the Modern Award, which are more favourable than that of the national minimum wage.

If you have any questions relating to enterprise bargaining and/or assessing the coverage of Modern Awards please do not hesitate to ask Nick Stevens, Megan Cant or Isabella Paganin.

[1] *United Voice v Gold Coast Kennels Discretionary Trust t/a AAA Pet Resort [2018] FWCFB 128 (12 January 2018)*



Uber drivers are employees…for now

A recent decision of the Fair Work Commission (**FWC**) held that Uber drivers are correctly classified as independent contractors, not employees, and are subsequently not entitled to the unfair dismissal protections within the *Fair Work Act 2009* Cth (**FW Act**).

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Mr Michail Kaseris (**the Applicant**) alleged that he was unfairly dismissed from Rasier Pacific V.O.F (**Uber**) on 11 August 2017.

Rather than decide whether the dismissal was harsh, unjust or unreasonable, the FWC had to first determine whether the Applicant was an employee to be able to access the unfair dismissal jurisdiction.

Uber argued the relationship with the Applicant was missing the wage-work bargain, which is integral to an employment relationship. It also argued that it did not owe any legal obligation to the Applicant other than to provide access to the app and to repay cancellation fees to riders. Deputy President Gostencnik of the FWC upheld Uber's argument that the unfair dismissal application failed on this point alone.

Deputy President Gostencnik held that the relationship between the Applicant and Uber lacked the "*fundamental elements of the employment relationship*", being:

1. The Applicant was not required to perform any work/services for the benefit of Uber. There was no contractual obligation for the Applicant to provide this service and he had the autonomy to choose how much/little work he performed; and

2. Uber did not make any payment to the Applicant, rather, the Applicant is charged a service fee by Uber for the use of its software.

Deputy President Gostencnik concluded from the above undisputed evidence that the "*the work-wages bargain is plainly absent*." This led the FWC to rule that the Applicant was not classified as an employee for the purposes of s. 382 of the FW Act. The Application was dismissed.

Watch this space

Deputy President Gostencnik noted in his judgement that the 'traditional' notions of employment are "*outmoded in some senses and are no longer reflective of our current economic circumstances*." More specifically, the tests to satisfy an employment relationship fail to account for factors such as revenue generation/sharing, bargaining power and the extent to which parties are bound to each other in relation to alternative vocations and competitors.

"*Perhaps the legislature will develop laws to refine traditional notions of employment or broaden protection to participants in the digital economy*."

Deputy President Gostencnik observed that the "traditional" tests of employment will remain standing in the meantime.

If you have any further questions regarding whether to classify workers as independent contractors or employees please do not hesitate to contact Nick Stevens, Megan Cant or Isabella Paganin.

[1] *Mr Michail Kaseris v Rasier Pacific V.O.F [2017] FWC 6610 (21 December 2017)*