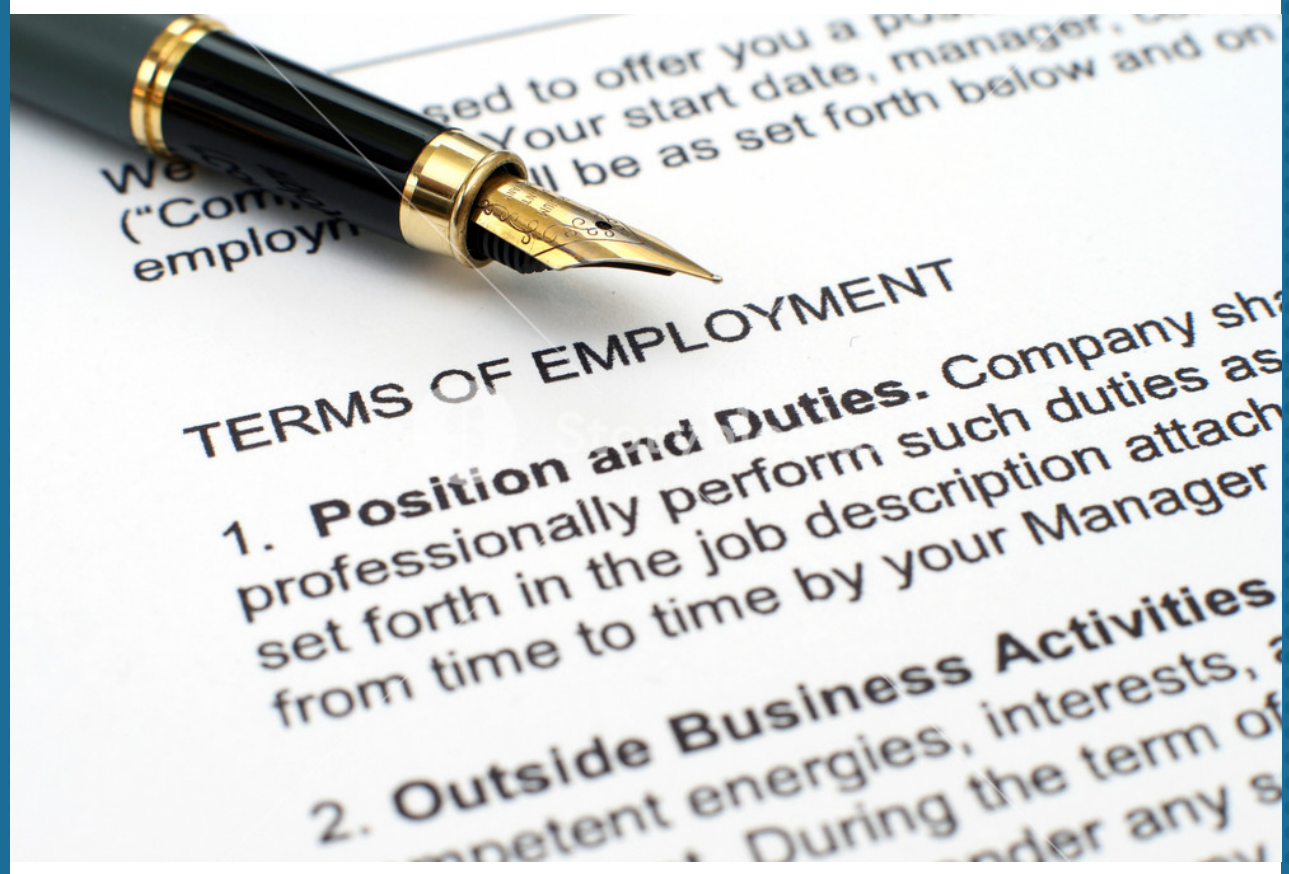
November Edition

Hi

Welcome to our Vision in the Workplace

Our November edition of Vision includes:

- Maximum Term Contract leaves referee on the Bench; and
- Fair Work Commission Shuts Down Employer's Plan to Cut Redundancy Payout.



Maximum Term Contract leaves referee on the Bench

A General Protections claim before the Fair Work Commission (**"FWC"**) has been "*stopped in its tracks*" before it even started. The FWC held that a National Rugby League (**"NRL"**) referee was not dismissed, but rather, his "maximum-term" 12-month contract expired. It is for this reason that the FWC had no jurisdiction over the matter as the dismissal was not at the initiative of the NRL.

The Decision

FWC Deputy President Bryce Cross held that the NRL engaged the referee " *under a series of maximum term contracts based on*" its "*genuine operational requirements*", and that the contracts' terms reflected the genuine agreement of the parties that the employment relationship would end when each contract expired.

The referee's contention that there were vitiating factors of the contract being contrary to public policy and the employer's conduct or representations provided a proper legal foundation to prevent it relying on its terms, were ultimately rejected by the FWC.

The referee stated that he, "*had no choice in the dismissal*". However, given the nature of his engagement with the NRL and the express terms of his latest contract, the contract had simply expired. Therefore, there was no jurisdiction for the FWC and the case was dismissed. Notwithstanding the decision in this matter, there are many cases in this area of law that do provide a basis for an unfair dismissal or general protections claim and it is

important to get the arrangements correct before the employment commences, before the contract expires, and before the renewal of the contract (if any).

Relevant Case Law

However, the 2017 decision of *Justice v Lunn*, it has generally been accepted that an employer does not face unfair dismissal exposure when a maximum term contract is not renewed, as the cessation of employment has not been at the initiative of the employer, but rather simply at the expiration of the contract.

Therefore, generally, employers who had allowed an employee's employment to end upon the expiry of a maximum term contract were not considered to have dismissed an employee and were not exposed to the risk of a claim being brought by an employee against them**.**

The decision of *Khayam v Navitas English Pty Ltd* also had significant implications on how maximum term employment contracts interact with unfair dismissal and general protections provisions of the *Fair Work Act 2009* (Cth).

The FWC has held that a four-step assessment process should be conducted to determine whether there has been a termination at the initiative of the employer and an employee is able to bring a claim after their maximum contract term has expired:

1. ***Where the employment relationship*** is made up of a sequence of time-limited (ie fixed term or maximum term) contracts of employment, the critical question is whether the parties genuinely agreed that their employment relationship would come to an end upon the expiry date, not just the employment contract.

2. ***Where the parties agreed*** that their 'time-limited' contract will expire on a certain date, but have not agreed on the termination of their employment relationship, the termination of employment upon reaching the expiry date may still be a termination of the employment relationship at the initiative of the employer (in which case a claim can be pursued).

3. ***Where the terms*** of the time-limited contract reflect a genuine agreement that the employment relationship will not continue after a specified date and it comes to an end on that date, then, absent a vitiating or other factor, the employment relationship is terminated by agreement and not at the initiative of the employer.

4. ***Such factors include where*** :
   - the contract was entered into by the employee as a result of a misrepresentation by the employer, misleading or unconscionable conduct by the employer, or under duress or coercion;
   - the contract was a sham contract, illegal or contrary to public policy;
   - the contract was varied or replaced and the time limit no longer applied;
   - the contract was entered into for administrative convenience only;
   - the employer made representations to the employee that their employment would continue, subject to conduct and performance, notwithstanding the expiry date of the contract; and/or
   - the terms of the contract were inconsistent with the terms of an applicable award or enterprise agreement.

The Takeaway

If you are an employer who engages maximum term employees and you do not intend on renewing their contract, you will need to ask yourself whether your contracts, engagement and dismissal of employees may be subject to a claim before the FWC.

We recognise that is a particularly difficult area of the law to navigate for our clients, as always, if you have any further questions about maximum term contacts, please do not hesitate to contact Nick Stevens, Luke Maroney or Daphne Klianis .

Fair Work Commission Shuts Down Employer's Plan to Cut Redundancy Payout

Savco Vegetation Services Pty Ltd (" **the Company**") has failed to persuade the Fair Work Commission (**"FWC"**) that helping a worker secure a job warranted not paying a worker their redundancy entitlement.

The Company applied to the FWC to reduce the worker's redundancy pay from eight weeks to nil on the basis it was a "*strong moving force towards*" creating an "*available opportunity*" for the worker to be hired by a new employer. FWC Commissioner Ian Cambridge disagreed.

The Facts

The Company lost a large Essential Energy contract to a direct competitor, ETS Vegetation Management (**"ETS"**). As a result of this, the employer no longer required a substantial segment of its workforce and contacted ETS to transition its employers over to ETS.

The Company directed workers to apply for available ETS positions via the SEEK job search website and its termination letter to workers included a reference to "*company assisted employment with new Tender holders*".

It is on this basis that the Company believed it was entitled to reduce redundancy payments to the transitioning workers.

Legal Issue

Employees are entitled to redundancy pay from their employer if their role is no longer required to be performed. Redundancy pay is determined by an employee's period of continuous service and an employee's base rate of pay for his or her ordinary hours of work as per s 119 of the *Fair Work Act 2009* (Cth) (**"the Act"**).

However, s 120 of the Act allows an employer to apply to the FWC to reduce redundancy pay if the employer obtains other acceptable employment for the employee. The amount of the redundancy payment may be reduced to nil where the FWC considers it appropriate.

The Union's Case

The Communications, Electrical and Plumbing Union of Australia (**"the Union"**) argued on behalf of one of the transitioning workers who secured a job with ETS, heavily criticising the Company's application to not pay redundancy payments.

The Union argued that the worker has secured the new position on his own merit, "*through his own efforts of answering the SEEK advertisement and following a competitive interview process*". Therefore, the Union argued that the worker ought to be paid his redundancy entitlements.

Furthermore, the Union contended that the new position with ETS was not acceptable alternative employment. The new position paid $5.17 an hour less, was subject to a six-month probationary period, and the location of work and rostering changed significantly to the worker's detriment.

The Decision

The FWC dismissed the Company's application as being "*without jurisdictional foundation*".

This was because the entitlement to be paid redundancy was not because of s.119 of the FW Act but instead, was an entitlement provided by the terms of the relevant Enterprise Agreement. Consequently, the FWC held that it could not determine the application under section 120 of the Act. But given the agreement also provides a mechanism for the FWC to amend redundancy payments if the employer obtains acceptable alternative employment, therefore decided to determine the merits of the question to avoid further litigation.

First Issue

The first issue was whether the Company had in fact obtained employment for its redundant employees. That is, had it operated as the primary means to which alternative employment was secured by former employees? Evidence provided by ETS to the FWC did not confirm that the Company had negotiated and secured assurances from ETS regarding the employment of its redundant employees. The General Manager of ETS indicated that an arrangement had been made between the Company and ETS, however the redundant employees were not guaranteed a position. Instead, they were subject to "*a competitive recruitment process*". Because if this, the FWC held that, "the facilitation and assistance for a potential employment [fell] far short of satisfaction that the employer had obtained other acceptable employment."

Second Issue

The second issue was whether the alternate employment was objectively acceptable in accordance with s 119 of the Act. Evidence and submissions by the Company and ETS did not establish that the Company had obtained other acceptable employment for the respondent employees. In fact, the FWC found that there were a number of significant shortfalls in respect to the terms and conditions of employment with ETS, such as lower hourly rate of pay, less attractive rostering, a six-month probationary period and loss of non-transferable benefits derived from a length of service with the Company.

The Takeaway

Employers can apply to reduce redundancy payments at the discretion of the FWC if an employer obtains other acceptable employment for the employee. Notwithstanding this, as this case clearly demonstrated, the Company making the application must have a jurisdictional basis for the application, be the primary means to securing alternative employment, and the alternative employment must be acceptable.

If you have any further questions about either making an application to the FWC to reduce redundancy pay, or challenging such an application, please do not hesitate to contact Nick Stevens, Luke Maroney or Daphne Klianis.

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