



GREG REIFFEL CONSULTING

HUMAN RESOURCES & INDUSTRIAL RELATIONS

Employee Relations Newsletter

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Quote of the edition

"If you can't fix it with duct tape, you haven't used enough". Unknown - (case-in-point "The Martian", starring Matt Damon).

My availability for the foreseeable future

I am currently undertaking a full-time role that will fulfil my time Monday to Friday. Where you may require my assistance this will be limited to weekends and public holidays or, where urgent, after normal hours of work.

Interesting articles

At the conclusion of this newsletter is a (long) list of articles that have piqued my interest (good for browsing).

Full Bench Redefines "Fixed Term employment"

Saeid Khayam v Navitas English Pty Ltd t/a Navitas English [2017] FWCFB 5162 (C2017/2976). Hatcher, VP. Saunders, C. Colman, DP (dissenting).

This full bench decision was the result of an appeal of a decision by Hunt, C which found in favour of the applicant. The FB (albeit one member dissenting) quashed Hunt C's decision effectively setting a new precedent for fixed term contracts of employment.

The 70 page decision reviewed the history of what constituted "fixed term" (and a number of other issues) and effectively set in place strict "rules" on what does and does not constitute a fixed term contract. It also reinforces the difference between an "employment contract" and "employment relationship". That is, the latter can survive the former. This very important when it comes to fixed term contracts that the employee is not employed beyond the end date without a "replacement" contract.

What I have extrapolated from this decision is that "fixed term" contracts:

- Must be made "legally". Practical tip, include a clause that the employee has had a chance to seek legal advice.
- Must have a definite start date and a definite end date. Terms such as "up to six months" (also known as "outer limit contracts) cannot be used.
- Must not contain a termination clause that allows either party to (for eg) give notice which is prior to the end date; notwithstanding the employee may request and the employer may agree

to end the contract (the other way round does not apply unless the employer can prove that the change was genuinely agreed).

- Can have a termination clause that allows the employer to terminate on performance, misconduct, unable to undertake the duties, etc reasons.
- The fixed term employee should receive near the expiration date of the contract, either:
 - A new contract (the type and period as agreed); or
 - A letter advising that the contract will not be extended.
- Termination date MUST not be exceeded unless both parties have signed a replacement document PRIOR to the termination date.
- Must be for a genuine reason (ie not for the sole reason of avoiding unfair dismissal laws), such as “the position is currently funded to xxxx”.

Also, verbal “winks and nods” (ie “don’t worry, you will have job after the contract ends”) are not only poor practice, but offers of employment should only be made in accordance with formal policy. Such verbal offers, however vague, can sabotage the intent of the fixed term.

The decision

The FB, in determining that all previous decisions were out-of-date and referred to previous Acts, set out the following:

- (1) The analysis of whether there has been a termination at the initiative of the employer for the purpose of s 386(1)(a) is to be conducted by reference to termination of the employment *relationship*, not by reference to the termination of the contract of employment operative immediately before the cessation of the employment. This distinction is important in the case of an employment relationship made up of a sequence of time-limited contracts of employment, where the termination has occurred at the end of the term of the last of those contracts. In that situation, the analysis may, depending on the facts, require consideration of the circumstances of the entire employment relationship, not merely the terms of the final employment contract.
- (2) The expression “termination at the initiative of the employer” is a reference to a termination that is brought about by an employer and which is not agreed to by the employee. In circumstances where the employment relationship is not left voluntarily by the employee, the focus of the inquiry is whether an action on the part of the employer was the principal contributing factor which results, directly or consequentially, in the termination of the employment.
- (3) Termination of employment may be done at the initiative of the employer even though it was not done by the employer. In circumstances where the parties to a time-limited contract have agreed that their contract will expire on a specified date but have not agreed on the termination of their employment relationship, it may be the case that the termination of employment is effected by the expiry of the contract, but that does not exclude the possibility that the termination of employment relationship occurred at the initiative of the employer - that is, as a result of some decision or act on the part of the employer that brought about that outcome.
- (4) Where the terms of an operative time-limited contract reflect a genuine agreement on the part of the employer and employee that the employment relationship will not continue after a specified date and the employment relationship comes to an end on the specified date, then, absent a vitiating or other factor of the type to which we refer in (5) below, the employment relationship will have been terminated by reason of the agreement between the parties and there will be no termination at the initiative of the employer. Further, in those circumstances a

decision by the employer not to offer any further contract of employment will not be relevant to the question of whether there was a termination of employment at the initiative of the employment. The decision not to offer further employment is separate and distinct from the earlier agreement between the parties to end the employment relationship on a particular date.

However if the time-limited contract does not in truth represent an agreement that the employment relationship will end at a particular time, the decision not to offer a further contract will be one of the factual matters to be considered in determining whether an action on the part of the employer was the principal contributing factor which results, directly or consequentially, in the termination of the employment.

- (5) In some cases it will be necessary to go further than just examining the terms of any contract in which the parties have ostensibly agreed to terminate the employment relationship at a particular time. It is not necessary or appropriate that we attempt to identify exhaustively...the following are likely to be relevant and may in some cases be determinative:
- (a) The time-limited contract itself may be vitiated by one of the recognised categories by which the law excuses parties from performance of a contract. The categories potentially relevant in an employment context include the following:
 - The employee entered into the contract as a result of misrepresentation or misleading conduct by the employer;
 - The employee entered into the contract as a result of a serious mistake about its contents or subject matter;
 - There has been unconscionable conduct associated with the making of the contract, which may relevantly include that the employer took advantage of a disability affecting the employee such as lack of education, lack of information, lack of independent advice or illiteracy;
 - The employment contract was entered into by the employee under duress or coercion (which might include the types of coercion prohibited in ss 343(1)(a), 348 and 355) resulting from illegitimate pressure on the part of the employer;
 - The employee lacked the legal capacity to make the contract; or
 - The contract was a sham in the sense that it was not intended by the parties to give legal effect to its apparent terms or in the broader sense dealt with in Pt 3-1 Div 6 of the FW Act.
 - (b) The time-limited employment contract may be illegal or contrary to public policy (for example, it contains relevantly objectionable terms as defined in s 12 of the FW Act or has the purpose of frustrating the policy or operation of the FW Act or preventing access to the Commission's unfair dismissal jurisdiction 82). Whether the employment was constituted by successive short term contracts or the use of time-limited contracts was appropriate in the relevant field of employment may be some of the considerations relevant to an examination of the employer's purpose for entering into such contracts.
 - (c) The contract may have been varied, replaced or abandoned by way of a separate agreement, whether in writing and/or orally, such that its ostensible time limit no longer applies.
 - (d) The employment contract may not be limited to the terms of a written document and may, for example, be one of a series of standard-form contracts which operated for administrative convenience and did not represent the reality or the totality of the terms of the employment relationship.

- (e) During the term of the employment relationship the employer may have engaged in conduct or made representations (for example, representing to the employee that the employment will continue subject to conduct and performance notwithstanding a contractual time limit on the employment) which provide a proper legal foundation to prevent the employer from relying upon the terms of the contract as the means by which the employment relationship has been terminated.
- (f) The terms of the contract time-limiting the employment may be inconsistent with the terms of an award or enterprise agreement given effect by the FW Act which prohibit or regulate fixed-term employment, in which case the terms of the award or agreement will prevail over

The FB adding:

A contract of employment to run throughout a nominated number of days, weeks, or years would be a contract of employment for a specified period of time. If the terms of the contract of employment, instead of identifying in this manner the period of time during which it is to run, provides that it is to run until some future event, the timing of the happening of which is uncertain when the contract is made, the contract will be for an indeterminate period of time. It is significant that the rights to terminate the contract of employment arising under cl 21(c) and 21(d) are not conditioned on a breach of any term of the contract. The rights are unqualified. Different considerations may apply where a contract of employment for a period of time fixed by clearly stated dates of commencement and cessation contains a term which permits either side to terminate the contract on breach by the other side. In such a case, it is possible that the contract would be characterised as contract of employment for a specified period of time notwithstanding the possibility that on breach of its term by one side or the other it may sooner come to an end.

It may be noted that the interpretation ...of the expression “contract of employment for a specified period of time” was ultimately based on the ordinary meaning of the words used in that expression. Further the reason made it clear that it was only where an unqualified right to terminate existed that a time-limited contract of employment would not be one for a specified period of time, and that if there was simply a right to terminate for breach the position would not necessarily be the same.

In *Cooper v Darwin Rugby League Inc* (1994) 57 IR 238 the contract was for a specified period of time, but allowed for the termination on one month's notice by either party before the expiration of the specified time. In that case the employment was terminated by the unilateral act of the employer and not by the effluxion of the period of time set out in the contract. In these circumstances the Court held that the regulation did not exclude the employee from the termination of employment provisions.

Andersen v Umbakumba Community Council (1994) 126 ALR 121 establishes that a contract for a specified period of time requires some certainty, and must be one where the date of commencement and completion are unambiguously identified by a term of the contract. Where the cessation date merely records the outer limit of the contract and there is an unqualified right for either party to terminate, the contract is not one for a specified period of time. A right to terminate that is conditioned by a breach of a term of the contract would not be an unqualified right to terminate.

Where a contract clearly sets out the specified period of the contract and the contract terminates when the specified period expires, the termination is not a termination at the initiative of the employer. In *Fisher v Edith Cowan University* (unreported decision of Madgwick J, 12 November 1996, No WI 1061 of 1996) a termination was held to be not at the initiative of the employer as the employment terminated as and when it did by reason of the agreement of the parties, made a year earlier, that it should so terminate.

In respect of time-limited contracts, s 386(2)(a) contains two requirements that must be met in order for the exclusion to apply. The first is that the person must have been employed under a "contract of employment for a specified period of time". The second requirement, provides that the exclusion only applies where the employment has terminated at the end of the specified period.

Commentary

The question of "fixed term" contracts has always been strictly interpreted by the courts. This decision has examined all precedents and applied it to the current Fair Work Act 2009 and will therefore become the "gold standard" for determining such matters.

I have consistently advised against "fixed term" contracts, preferring casual contracts where there can be no commitment to ongoing employment (subject to it not being subject to the regular and systematic/more than 12 months provision).

Also the use of "casual" contracts as a way of probationary employment is self-defeating; as an employee who has successfully impressed the employer to be offered more secure employment will be rewarded with a 25 per cent pay decrease.

Until next time....

Greg Reiffel
Principal Consultant

Interesting articles

It's been an interesting couple of weeks...

New rules for sponsoring overseas workers

http://www.mondaq.com/article.asp?articleid=701708&email_access=on&chk=1345817&q=644109

Contracts of employment using pictures, not words...

http://www.mondaq.com/article.asp?articleid=701424&email_access=on&chk=1345533&q=644109

Category 1 OH&S breach NSW (It's only a matter of time before it comes to Victoria):

http://www.mondaq.com/article.asp?articleid=696628&email_access=on&chk=1340737&q=644109

“Passing wind” in the office, but is it bullying?

http://www.mondaq.com/article.asp?articleid=695652&email_access=on&chk=1339761&q=644109

Freedom to tweet – no power to terminate public servant for anonymous political communication

http://www.mondaq.com/article.asp?articleid=697596&email_access=on&chk=1341705&q=644109

Whistleblower protection reform is imminent - businesses take note

http://www.mondaq.com/article.asp?articleid=697684&email_access=on&chk=1341793&q=644109

13 years and 8 months service mean nothing when breach OH&S “cardinal rules” (unfair dismissal rejected):

http://www.mondaq.com/article.asp?articleid=698178&email_access=on&chk=1342287&q=644109

Are you unpaid internships lawful?

<https://www.fairwork.gov.au/pay/unpaid-work/work-experience-and-internships>

Legal representation in the FWC:

http://www.mondaq.com/article.asp?articleid=699226&email_access=on&chk=1343335&q=644109

Single touch payroll (ATO):

http://www.mondaq.com/article.asp?articleid=702788&email_access=on&chk=1346897&q=644109

Recruitment risk – employer ordered to pay \$10,000 in damages to a job candidate for discrimination based on mental illness

http://www.mondaq.com/article.asp?articleid=700344&email_access=on&chk=1344453&q=644109

4 things you need to know about paying a salary under an award

http://www.mondaq.com/article.asp?articleid=703282&email_access=on&chk=1347391&q=644109

When is swearing in the workplace a basis for dismissal?

http://www.mondaq.com/article.asp?articleid=703288&email_access=on&chk=1347397&q=644109

Navigating the murky waters of employee bonuses and incentive payments

https://www.hrmonline.com.au/section/legal/navigating-bonuses-incentive-payments/?utm_source=HRM&utm_medium=e-news&utm_campaign=HRM+announcement