

Term contracts: What you need to know

January 22, 2018

A recent decision of a Full Bench of the Fair Work Commission (**FWC**) has opened the door to employees on maximum term contracts bringing unfair dismissal claims by overturning the principle that the expiry of a term contract is not a termination at the initiative of the employer.

What are maximum term contracts?

Maximum term or outer limits contracts are commonly used by employers in Australia because they allow for the employment of an employee for a particular period of time, with the flexibility to terminate the contract prior to the expiry of the term by the giving of notice. The use of maximum term contracts is particularly popular for project-based work or situations where external factors may impact on an employer's ability to employ staff (for example, if employment is contingent on the employer securing government funding or successfully retendering for work).

What's significant about this decision?

Before this decision, it was widely accepted that the expiry of a maximum term contract on its nominated end date meant that the employee had not been dismissed because the termination of the employee's employment was not at the initiative of the employer. Rather, the employee's employment came to an end automatically at the end of the agreed term due to the passing or effluxion of time. As a result, if an employee's employment ended at the expiry of their maximum term contract, there was no dismissal or termination at the initiative of the employer, and the employee was ineligible to bring an unfair dismissal claim under the *Fair Work Act 2009* (Cth) (**FW Act**).

The FWC has now held that allowing a maximum term contract to expire does not exempt an employer from an unfair dismissal claim. The FWC has set out a new test to be applied when determining whether a maximum term employee is eligible to bring an unfair dismissal claim following the expiry of their contract. This means that employers will now need to consider on a case by case basis whether maximum term employees are protected from unfair dismissal.

What did the Commission decide?

In this case, an employee was employed on a series of maximum term contracts. At the end of the term of the last of those contracts, his employer decided not to offer the employee a further contract due to concerns that it held about the employee's performance. The employee contended that this constituted a dismissal in that his employment had been terminated at the initiative of his employer. His employer rejected his contention and instead argued that his employment had terminated simply through the effluxion of time.

The majority of the FWC Full Bench formulated a five point test to be applied to assess whether an employee can bring an unfair dismissal following the expiry of their term contract:

1. Has the entire employment relationship (and not just the term contract) ended?

2. If the employee has not voluntarily left the employment relationship, has an action by the employer been the principal contributing factor that has resulted, directly or consequentially, in the termination of the employment? One of the matters to be considered in this regard is any decision by the employer not to offer a further contract.
3. Have the parties to the contract agreed on both the contract ending at the expiry of its term as well as the employment relationship terminating? Even if the parties have agreed in advance to terminate the employment on expiry of the contractual term, that agreement does not exclude the possibility that the termination of the employment relationship was at the initiative of the employer.
4. Is there a genuine contractual agreement that the employment relationship will end on a specified date and has the employment come to an end on that date? If it has, then the employment relationship will have terminated as a consequence of the agreement between the parties and there will be no termination at the initiative of the employer.
5. Are there any other relevant factors that need to be considered beyond the terms of the contract? For example, are there any vitiating factors (like unconscionable conduct or duress), is the contract illegal or contrary to public policy (such as the contract being entered to avoid the FW Act protections against unfair dismissal), has the contract been superseded by another agreement between the parties or are there other terms which supplement the written terms of the contract, have any representations been made to the employee during the term of the contract, is the contract inconsistent with an applicable award or enterprise agreement?

What should employers do now?

Employers should review their current arrangements for engaging maximum term employees (particularly if they use rolling contracts) and seek legal advice about the provisions of their current template contracts to see what changes can be made to better protect the organisation from the risk of a successful unfair dismissal claim.

The conduct of employers will be a significant factor when assessing an employee's ability to bring an unfair dismissal claim. It is essential that employers have in place systems to ensure that no conduct engaged in, or representations made, when offering employment, during the term of the contract or in connection with the end of the contract adversely affect them (for example, providing appropriate training to hiring managers).

Given that more maximum term employees will have access to unfair dismissal, employers will need to take greater care to ensure that any performance or conduct matters that they are relying on to not offer a further period of employment have been raised with the relevant employee in a manner that is procedurally and substantively fair so that they are well positioned to defend any unfair dismissal claims that are made.

For advice regarding the specific circumstances of your organisation or assistance reviewing your term contracts, please contact our Employment and Safety team.