DECISION

Fair Work Act 2009
s.604 - Appeal of decisions

Saeid Khayam
v
Navitas English Pty Ltd t/a Navitas English
(C2017/2976)

VICE PRESIDENT HATCHER
DEPUTY PRESIDENT COLMAN
COMMISSIONER SAUNDERS

SYDNEY, 8 DECEMBER 2017

Appeal against decision [2017] FWC 1524 of Commissioner Hunt at Brisbane on 22 May 2017 in matter number U2016/8466.

DECISION OF VICE PRESIDENT HATCHER AND COMMISSIONER SAUNDERS

Introduction and factual background

[1] Mr Saeid Khayam has applied for permission to appeal and appealed a decision of Commissioner Hunt issued on 22 May 2017[1] (Decision). The Decision concerned Mr Khayam's application for an unfair dismissal remedy pursuant to s 394 of the *Fair Work Act 2009* (FW Act) with respect to his former employment with Navitas English Pty Ltd t/a Navitas English (Navitas). Mr Khayam had been employed by Navitas on a series of time-limited contracts. At the end of the term of the last of those contracts, Navitas determined not to offer Mr Khayam a further contract due to concerns it had regarding his performance. Mr Khayam contended that this constituted a dismissal within the meaning of s 386(1)(a) of the FW Act in that his employment had been terminated at the initiative of the employer. Navitas contended that there had been no dismissal, and that Mr Khayam's employment contract had terminated simply through the effluxion of time. The Commissioner found that in those circumstances, and based upon the decision of a Full Bench of the Australian Industrial Relations Commission (AIRC) in *Department of Justice v Lunn*[2] (*Lunn*), there had been no dismissal at the initiative of the employer for the purposes of s 386(1)(a) of the FW Act. Further the Commissioner found that, if the contract was one for a specified period of time, then for the purposes of s 386(2)(a) of the FW Act the anti-avoidance provision in s 386(3) did not apply in the circumstances.

[2] Mr Khayam challenged the Decision of the Commissioner on two grounds – firstly, that the Commissioner erred in relying upon the decision in *Lunn,* which he contended was incorrectly decided or, alternatively, was not applicable to the provisions of the FW Act, and

[1] [2017] FWC 1524

[2] [2006] AIRC 756, 158 IR 410

secondly that the Commissioner erred in finding that the anti-avoidance provision in s 386(3) was not engaged. His appeal was initially heard before a differently constituted Full Bench in relation to the issue of permission to appeal only on 12 July 2017. In a decision issued on 16 August 2017[3] (PTA decision) that Full Bench granted permission to appeal with respect to the first ground only. The PTA decision relevantly stated (footnotes omitted):

> "[30] The decision in *Lunn* is a well-established Full Bench authority. A Full Bench of the Commission is not bound by the principle of *stare decisis* to follow the decision of another Full Bench, however as a matter of policy and sound administration, it generally does so, in the absence of cogent reasons for taking another course. The reconsideration of a Full Bench authority is a serious step that is rarely taken.
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> [31] However, we have concluded that Mr Khayam has raised an arguable case of error concerning the application of *Lunn* to the provisions of the FW Act. In this regard we note that decision concerns the unfair dismissal provisions in the *Workplace Relations Act 1996 (Cth)*, and that the applicability of the reasoning in the decision, as it pertains to the FW Act, has not been the subject of analysis by a Full Bench.
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> [32] In our opinion, the question raised by the first ground of appeal concerns a matter of importance and general application, namely the approach that is to be taken to the interpretation of s.386(1) of the FW Act.
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> [33] In our view, it is in the public interest that permission to appeal be granted in relation to the first ground of appeal."

[3] The full hearing concerning that ground of appeal was then allocated to this Full Bench.

[4] Given that the appeal raised an issue of importance and general application concerning s 386(1)(a) of the FW Act, we invited the Commonwealth Minister for Employment, and the Australian Council of Trade Unions (ACTU), the Australian Industry Group (Ai Group) and the Australian Chamber of Commerce and Industry (ACCI), as the recognised peak councils, to make submissions in the matter. The peak councils filed written submissions and also appeared at the hearing of the appeal on 12 September 2017, however the Minister did not file any submissions or otherwise participate in the matter.

[5] The factual background to this matter is set out in the Decision and the PTA decision and may be summarised briefly as follows. Mr Khayam was employed by Navitas as a casual employee to perform teaching services from 2005 to 2012. On 14 April 2012 Mr Khayam was offered, by letter of offer, employment as a "*fixed-term teacher*" until 30 June 2013. The letter provided that either party could terminate the employment by giving 4 weeks' written notice. Mr Khayam accepted that offer. After the completion of that period of employment, Mr Khayam was offered and accepted employment on substantially the same terms for the period from 1 July 2013 to 30 June 2014. In June 2014, Mr Khayam was initially told his contract would not be "renewed" because his administrative work had been unsatisfactory. However after further discussions Mr Khayam was then offered, and accepted, another employment contract for the period 1 July 2014 to 30 June 2016. The letter of offer for this last period of employment relevantly stated:

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[3] [2017] FWCFB 4092

"Dear Saeid,

I am pleased to offer you fixed-term, Full-Time employment as a Teacher with Navitas English Pty Ltd from 1st July 2014 to 20 June 2016 (The Expiry Date). Your employment will terminate automatically on the Expiry Date, unless it is terminated earlier by either party.

…

Either party may terminate this contract of employment at any time by providing 4 weeks' written notice, or in the case of Navitas English, by providing 4 weeks' pay in lieu of Notice. If you fail to give 4 weeks written notice of your termination Navitas English may withhold monies due to you on termination, the withheld amount being equivalent to your normal pay for the shortfall period. However, Navitas English may end your employment at any time and without notice because of any serious misconduct by you; if you are charged with any criminal offence which in the reasonable opinion of Navitas English brings you or Navitas English into disrepute; if you are continually or significantly absent or demonstrate incompetence with regard to the performance of your duties during this appointment; or if you are continually or significantly neglectful of your duties during this appointment…"

[6] The enterprise agreements which applied to Navitas over the period of Mr Khayam's periods of fixed-term employment, namely *The ACL Enterprise Agreement 2010-2012* and *The Navitas English Enterprise Agreement 2013-2015* (2013 Agreement) specifically authorised the engagement of employees on a fixed-term basis. Clause 11 of the 2013 Agreement relevantly provided:

"**11. Contracts of employment**

11.1 Fixed-term contracts may be used for programs where funding is assured, for filling temporary positions, or to replace employees on leave.

. . .

11.3 Employees engaged under this Agreement may be employed on an Ongoing, Fixed-term, or Casual basis. Employees may be employed full-time or part-time.

11.4 Navitas English will determine in its absolute discretion, having regard to the following eligibility criteria, whether to offer or renew Fixed-term contracts, Ongoing employment and Casual employment and assessing the merits of performance reviews:

- The needs of the employer, the operational environment and the sustainability of its programs:
- Qualifications and skills which correspond to the requirements of the position;
- Significant demonstrated contribution by the employee to the operations, standing and ongoing development of the employer as a centre of excellence;
- Demonstrated ability of the employee to work as part of a team, sound interpersonal skills and cross-cultural awareness;
- Relevant experience, including with the employer;

- Meeting the accountabilities as outlined in the appropriate position description statement.

. . .

11.7 If Navitas English cannot offer a new fixed-term contract to an employee on a fixed-term contract for operational reasons the employee will be given the maximum notice possible."

[7] On 31 May 2016 Mr Khayam was informed that he would not be offered a further fixed-term contract based on an assessment of his performance and disciplinary record. His employment consequently ended on 30 June 2016.

Statutory framework

[8] Part 3-2, *Unfair Dismissal*, of the FW Act contains the statutory scheme concerning access to remedies for unfair dismissal. Section 385 provides that a person has been "*unfairly dismissed*" if the Commission is satisfied as to four specified matters, the first of which is that "*the person has been dismissed*". Section 386 defines when a person has been dismissed as follows:

> **386 Meaning of dismissed**
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> (1) A person has been *dismissed* if:
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> (a) the person's employment with his or her employer has been terminated on the employer's initiative; or
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> (b) the person has resigned from his or her employment, but was forced to do so because of conduct, or a course of conduct, engaged in by his or her employer.
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> (2) However, a person has not been *dismissed* if:
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> (a) the person was employed under a contract of employment for a specified period of time, for a specified task, or for the duration of a specified season, and the employment has terminated at the end of the period, on completion of the task, or at the end of the season; or
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> (b) the person was an employee:
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> (i) to whom a training arrangement applied; and
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> (ii) whose employment was for a specified period of time or was, for any reason, limited to the duration of the training arrangement;
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> and the employment has terminated at the end of the training arrangement; or
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> (c) the person was demoted in employment but:

(i) the demotion does not involve a significant reduction in his or her remuneration or duties; and

(ii) he or she remains employed with the employer that effected the demotion.

(3) Subsection (2) does not apply to a person employed under a contract of a kind referred to in paragraph (2)(a) if a substantial purpose of the employment of the person under a contract of that kind is, or was at the time of the person's employment, to avoid the employer's obligations under this Part.

The Decision

[9] In her consideration of the question of whether Mr Khayam had been dismissed within the meaning of s 386 of the FW Act, the Commissioner at the outset stated two conclusions. The first was that the terms of the final employment contract between Mr Khayam and Navitas were clear and unambiguous, and clearly stated that it would end on 30 June 2016 unless terminated earlier by either party, and were not subject to any contingency in their operation.[4] The second was that clause 11 of the 2013 Agreement did not operate so as to require Navitas to take some positive act to bring the final contract to an end beyond the mere step of communicating to Mr Khayam with as much notice as possible that he would not be offered a further contract.[5]

[10] The Commissioner then turned directly to Navitas' case, finding by virtue of the Full Bench decision in *Lunn*, the termination of Mr Khayam's employment could not be characterised, under s 386(1)(a), as one that occurred at its initiative. The Commissioner noted that the decision had "come under criticism in recent years"[6], and she particularly referred to the views expressed concerning *Lunn* in the decision of the Commission (Hatcher VP) in *Jin v Rail Corporation New South Wales*.[7] The Commissioner expressed her concurrence with those views, and went on to also express her view that *Lunn* had taken too narrow an approach as to what constituted a "sham" contract, with her view being it "would more commonly be one where there is one party exerting influence over the other party to conceal the true relationship between the parties"[8] rather than an arrangement whereby the parties collude to conceal the true nature of the relationship between them.[9] Her conclusion as to whether there was a dismissal within the meaning of s 386(1)(a) was as follows:

"[133] It is no doubt inherently unfair that an employee with 11 years' service on consecutive maximum-term contracts can have their employment end at a stated period of time due to the employer's concerns relevant to the employee's performance, without the employee having the opportunity to challenge the concerns.

[134] Mr Khayam's performance was measured by Navitas in early 2016, and Navitas made a determination at its discretion, without input from Mr Khayam that he was no

[4] Decision at [96]

[5] Decision at [105]-[109]

[6] Decision at [111]

[7] [2015] FWC 4248

[8] Decision at [117]

[9] Decision at [110]-[117]

> longer suitable for the role. He was not offered work beyond the term of his expiring contract. If the work was no longer available, it might be more palatable. However, the work is being done by another teacher. Quite simply, Navitas no longer wished for Mr Khayam to perform the work beyond 30 June 2016.
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> [135] By virtue of the maximum-term contract entered into between Navitas and Mr Khayam, he held fewer rights than a regular and systematic casual employee with at least six months' service and a reasonable expectation of on-going work.
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> [136] In the same way Hatcher VP in *Jin* was bound by the Full Bench authority in *Lunn,* so too am I, and accordingly I must find that in accordance with the authority in *Lunn*, there has not been a dismissal at the initiative of Navitas. Relevant to s.386(1)(a), the employment came to an end due to the effluxion of time."

[11] The Commissioner also, in the alternative, considered whether, if the final contract was one to which s 386(2)(a) applied, the anti-avoidance provision in s 386(3) applied. The Commissioner undertook this alternative analysis because it was arguable that the Explanatory Memorandum for the *Fair Work Bill* indicated that "outer limit" or "maximum term" contracts were fixed term contracts encompassed by the exclusion in s 382(2)(a).[10] This is an issue to which we will return. The Commissioner's conclusion was that s 386(3) did not apply to Mr Khayam's final contract.[11] Because permission to appeal was not granted in relation to Mr Khayam's appeal from this conclusion, it is not necessary to explore the Commissioner's reasoning in that respect. The final conclusions expressed by the Commissioner were as follows:

> "[137] No doubt there is unfairness to Mr Khayam in not being offered a new maximum-term contract due to the unilateral views held by Navitas as to Mr Khayam's work performance. That is not, however, the matter to be determined by the Commission in this matter. In any event, the 2013 Agreement allows for Navitas to exercise its discretion to award a further contract or not.
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> [138] Having found that there was not a dismissal at the initiative of Navitas, I must dismiss the application. The application is dismissed."

The decision in *Lunn*

[12] The reasoning in the Decision concerning whether Mr Khayam was dismissed within the meaning of s 386(1)(a) makes it clear that the Commissioner felt compelled to reach the conclusion that his employment was not terminated at the initiative of Navitas because she considered herself bound by *Lunn*, a decision made under the *Workplace Relations Act 1996* (WR Act). The Commissioner equally made it clear that she had serious reservations as to whether *Lunn* was correctly decided or at least should be regarded as determinative of the proper interpretation and application of s 386(1)(a) of the FW Act. It is therefore necessary, and convenient at this point, to deal with the reasoning and conclusion in that decision.

[13] *Lunn* concerned an application for a remedy concerning the termination of the employment of an employee in a government department in the Northern Territory. The

[10] Decision at [118]-[119]

[11] Decision at [130]-[131], [136]

employee had worked for the department under five temporary employment contracts from the period 28 May 1998 until 15 April 2005. There was a period of some months in 2001 when the employee was under no written contract but nonetheless her employment continued, and at least one of the contracts was never signed by the employee. The circumstances of the termination of the employment were described by the Commissioner who heard the matter at first instance as follows:

> "[6] Towards the middle of 2004, Ms Lunn's relationship with her supervisor Mr Shields deteriorated, culminating in allegations being made on both sides about the other's behaviour. In order to attempt to resolve these difficulties it was suggested in November 2004 that mediation conducted by the Employment Assistance Service should occur.
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> [7] In December 2004 the applicant was told by Mr Shields that at the expiry of the contract she had entered into in March 2003 she would be offered a contract for three months only. Eventually on 18 January 2005 a contract was signed by the applicant specifying a period commencing on 16 January 2005 and ending on 15 April 2005 unless terminated sooner.
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> [8] In a meeting on 24 March 2005 the applicant was informed that she would not be offered a new contract. She was told that she would be paid all of her entitlements to 15 April 2005 but that she was not required (or obliged) to attend for work. She was told that it would be preferable for her to pack up her personal belongings and take them but was later told that if she had anything she wished to finish off an office would be found for her away from her usual workplace.
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> [9] It was common ground that employees in the Department were almost without exception engaged on temporary contracts but that subject to the availability of work and funding and in the absence of any performance issues such contracts were renewed. There was an expectation on the part of solicitors that their contracts would be renewed and the evidence in the case of Ms Lunn was that in the absence of the conduct issues alleged against her, she would have been offered a new contract."[12]

[14] The Commissioner found that the contract of employment at the time of the alleged termination of employment was the three month contract which commenced on 16 January 2005, and that the termination of employment occurred not at the end of the three month period, but on 24 March 2005 when the employee was told that she was not required to attend for work any further but would be paid until the end of the term of the contract. On that basis the Commissioner determined that the employment did not terminate due to the expiry of the contract, and had been terminated at the initiative of the employer.[13]

[15] The department appealed this decision. The Full Bench which heard the appeal began by noting that the employee's final employment contract was not a "*contract of employment for a specified period of time*" falling within the exclusion in s 170CBA(1)(a) from the termination of employment scheme in Pt VIA Div 3 of the WR Act as it was at that time. The Full Bench said in this respect (footnote omitted):

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[12] PR972497, 19 May 2002

[13] Ibid at [34]-[38]

> "[9] The WR Act has, for some time, excluded the jurisdiction of the Commission under s.170CE where the employee was *"engaged under a contract of a employment for a specified period of time"*: see s.170CBA(1)(a). It has been held that a contract with a nominated end date does not meet that description if it provides for a broad or unconditional right of termination during its term. In such circumstances, the description of such a contract as an 'outer limit' contract usefully distinguishes it from a contract for a "specified period of time" to which s.170CBA(1)(a) applies. There is no dispute that the Final Contract, executed on or about 16 January 2005, was an 'outer limit' contract thus described."

[16] The Full Bench immediately thereafter stated (footnote omitted):

> "[10] When a contract for a specified period or an 'outer limit' contract reaches the nominated end date, the contract terminates through the effluxion of time and there is no termination of employment at the initiative of the employer."

[17] The (omitted) footnote cited the High Court decision of *Victoria v The Commonwealth*[14] as authority for the proposition stated. This decision is discussed further below. The Full Bench found (by reasoning which is not presently relevant) that the Commissioner had erred in concluding that the employment had terminated on 24 March 2005 and that the employment had in fact ended upon the expiry of the term of the final contract. The Full Bench then considered an argument that the department's practice of engaging the employee (and other staff) was a "sham" and that the true arrangement was an ongoing contract of employment which had been repudiated by the department.[15] The Full Bench referred to the decision of the Industrial Relations Court (Marshall J) in *D'Lima v Princess Margaret Hospital*[16] and then went on to say (footnotes omitted):

> "[25] The expressions "employment relationship" and "employment contract" are sometimes used interchangeably, as if they are exactly synonymous. They are not exactly synonymous.
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> [26] The common law of employment in the modern era rests upon contract. In *Byrne v Australian Airlines* McHugh and Gummow JJ observed:
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> > "The evolution in the common law as to the relationship of employment has been seen as a classic illustration of the shift from status (that of master and servant) to that of contract (between employer and employee)."
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> [27] Whatever may have been the position in the past, under the modern law, there can be no employment relationship without there also being a contract of employment in existence between the parties to the employment relationship. However, as the Full Court of the Federal Court in *Brackenridge v Toyota Motor Corporation Australia Ltd* made clear, the termination of a contract of employment does not necessarily result in the termination of the employment relationship between the parties to that contract of employment: if the parties enter, or are taken to have entered, a new contract of employment of employment, the employment relationship continues

[14] [1996] HCA 56, (1996) 187 CLR 416

[15] [2006] AIRC 756, 158 IR 410 at [21]-[23]

[16] [1995] IRCA 407, (1995) 64 IR 19

notwithstanding the termination of the prior contract of employment. Thus, a *"continuous employment relationship"* is not inconsistent with a series of back-to-back fixed term or 'outer limit' contracts, each of which takes effect according to its terms. On the other hand, as noted by Dixon J in *Automatic Fire Sprinklers Pty Ltd v Watson,* it is possible for a contract of employment, and thus an entitlement to wages, to survive a termination of the employment relationship.

[28] Prior to 1996, s.170CB of the WR Act required the expression *"termination of employment at the initiative of the employer"* in s.170CE to be interpreted by reference to the meaning of the expression *"termination of employment"* in the Termination of Employment Convention. In that Convention the expression *"termination of employment"* refers to termination of the employment *relationship* rather than termination of an employment contract. In 1996 s.170CB was amended and, since that time, the expression *"termination of employment at the initiative of the employer"* in s.170CE has its ordinary meaning and refers to termination of a contract of employment. Thus, in this case we are concerned with whether there was a termination of Ms Lunn's contract of employment at the initiative of the employer and not with whether there was a termination of the employment relationship.

[29] A particular consequence of the fact that the law of employment in the modern era rests on contract is that, with some qualifications and subject to any statutory provisions to the contrary, ordinary contractual principles apply in relation to employment contracts. A fundamental feature of the general law of contract, applicable in relation to the contracts of employment, is that the intention of the parties is determined objectively and, indeed, evidence of the subjective intention of the parties is not admissible in construing a contract. Subjective intention is relevant in determining whether the parties to a written document intended to create binding legal rights and obligations but it is not determinative and the objective test will prevail where, to all outward appearances, there was an intention to create legal relations."

[18] The Full Bench then made reference to the importance of the "objective theory of contract" and "maintaining the rules of the common law upholding obligations undertaken in written contracts", and referred to the earlier AIRC Full Bench decision in *Marsh v Macquarie University*[17] as one in which a similar argument that an employee engaged under a series of fixed-term contracts was in fact a continuing employee whose employment was terminated when she was not offered a further contract had been rejected.[18] In response to the "sham" contract argument, the Full Bench referred to High Court and Federal Court authority for the proposition that a "sham" contract was one "that gives the appearance of creating binding legal rights and obligations ... [but] did not in truth have that effect".[19] The Full Bench then said:

"[37] Further, as suggested by the passage in *Equuscorp,* it may be open to an employee to demonstrate that the true contract with the employer was partly oral and partly written - and that although the written part of the contract specified an end date, the parties had orally agreed that the contract would be renewed - or that there was a collateral agreement to the same effect. In such circumstances there may well be

[17] PR963299, 30 September 2005

[18] [2006] AIRC 756, 158 IR 410 at [31]-[32]

[19] Ibid at [33]-[37]

a *"termination of employment at the initiative of the employer"* if the employer insisted that the employment had come to an end through the expiry of the written contract (or the written part) because this would involve the employer breaching the oral term or the collateral agreement as the case may be.

[38] The Department correctly noted in its written submissions that in *D'Lima* Marshall J did *not* purport to apply some special rule to contracts of employment whereby written agreements not amounting to a sham or a pretence not intended to create legal relations (and not coming within one of the other established categories of exception) can be ignored. The decision in *D'Lima* might be explained on the basis that it was one of those rare cases where the written "contracts" were a sham or pretence in accordance with conventional principles, however his Honour did not use the term "sham" or "pretence" and did not conduct an analysis of the sort required by *Sharrment*. Given the subsequent decision of the High Court in *Equuscorp* the decision in *D'Lima* must now be treated with caution. Certainly, the expression *"strong countervailing factors"* in the judgment of Marshall J in *D'Lima* should not be elevated to an independent test or treated as some form of jurisdictional talisman that obviates the need to consider whether, in the particular circumstances, a signed contract was objectively intended to create binding legal rights and obligations according to its terms consistent with the well established principles of contract law.

[39] The present case illustrates the problem of treating *"strong countervailing factors"* as some sort of independent test pursuant to which a written contract can be disregarded or a series of written contracts treated as a "sham". The *"strong countervailing factors"* relied upon by the Commissioner was the Department's practice of engaging all or almost all staff on a series of temporary contracts (see paragraph [30] of the Commissioner's reasons set out above).

[40] The mere fact that all or almost all of the Department's staff were engaged on temporary contracts and that there was a strong expectation that contracts would be renewed upon their expiry simply does not permit a conclusion that, determined objectively, there was a *common intention* (that is, the objective intention of both the Department and the relevant employee) that the contracts were not to create the legal rights and obligations which they give the appearance of creating. We have reservations as to whether the evidence before the Commissioner permitted a finding that the practice of engaging staff on serial temporary contracts *"was dictated by some unknown policy considerations and not the operational needs of the Department."* However, even assuming this to be so, the existence of such a policy, if anything, supports a conclusion that, viewed objectively, the Department entered 'outer limit' contracts with its staff as a deliberate implementation of the policy and thus, at very least, the Department intended the contracts to have legal effect according to their terms. Without more, a *"common intention that the... documents [were] not to create the legal rights and obligations which they [gave] the appearance of creating"* could not be established."

. . .

[42] The Department's practice of engaging almost all staff on successive 'outer limit' contracts may be viewed by some as industrially contentious. However, subject to legislative constraints, employers are entitled to structure their affairs, including the contracts they offer to employees, in the way that they think best suits their interests.

> There is nothing in the WR Act that prevents an employer from offering a series of 'outer limit' contracts to an employee. Moreover, even if it were shown that the purpose of the policy was to avoid the Commission's unfair dismissal jurisdiction (and we hasten to add that there was no evidence to that effect and the proposition was denied by counsel for the Department who advanced a plausible explanation for the practice) this would still not render such contracts a "sham" in the sense that, viewed objectively, the parties to those contracts had a common intention that they would not create binding legal rights and obligations according to their terms.
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> [43] In summary, we reject the Commissioner's finding that the series of contracts prior to the Final Contract in this case was a "sham" arrangement."

[19] The Full Bench concluded by granting permission to appeal, upholding the appeal and dismissing the employee's application.

Submissions

Mr Khayam

[20] Mr Khayam submitted that, to the extent *Lunn* stood for the proposition that the question of whether there had been a termination at the initiative of the employer was to be answered purely by an examination of the terms of the employment contract (unless the contract was a sham in the strict sense), it could not be followed in the context of the FW Act or was wrongly decided, for the following reasons:

(1) The ordinary language of s 386(1)(a) directed attention to what initiated the termination of the employment relationship as a whole, and was not limited to the mechanism by which a particular contract was brought to an end.

(2) The expression "termination at the employer's initiative had its genesis in the Convention concerning Termination of Employment at the Initiative of the Employer, and had been interpreted by the Full Court of the Industrial Relations Court of Australia in *Mohazab v Dick Smith Electronics Pty Ltd*[20] to be concerned with what initiated the termination of the employment relationship. The continuing applicability of *Mohazab* was affirmed in paragraph 1528 of the Explanatory Memorandum for the *Fair Work Bill* and by the Federal Court Full Court decision in *Mahony v White*.[21]

(3) The approach in *Lunn* could not be reconciled with the provisions of the FW Act. If a termination of employment at the end of a contract of employment for a specified period (or task or season) could never constitute a termination of employment at the initiative of the employer under s 386(1)(a), the exclusion on s 386(2)(a) would be rendered otiose.

(4) For the same reason the application of *Lunn* would also render s 386(3), which operated as an anti-avoidance provision with respect to any terminaton of employment falling within s 386(2)(a), ineffective and with no work to do.

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[20] [1995] IRCA 625, 62 IR 200

[21] [2016] FCAFC 160, 226 IR 221

(5) The application of *Lunn* would also create difficulties for the application of the unfair dismissal jurisdiction to casual employees. Section 384(2)(a) made apparent that casual employees were to have access to unfair dismissal remedies in certain circumstances, but because casual employees were engaged pursuant to a separate contract for each engagement, any termination of employment at the end of any single engagement could not, under *Lunn*, constitute a termination at the initiative of the employer.

(6) The reliance in *Lunn* upon the High Court decision in *Victoria v The Commonwealth*[22] was misplaced, because it concerned a different statutory regime and the passage relied upon was concerned only with where the reason for the termination of employment was the expiry of the employee's term of appointment.

(7) The concept of a "sham" contract was given a wider meaning by s 357 of the FW Act, and extended it to a situation where one party misrepresented its true nature to the other party.

(8) The earlier authorities, including *D'Lima v Board of Management, Princess Margaret Hospital for Children*[23], supported a broader approach requiring consideration of whether there were factors which demonstrated that, notwithstanding the existence of a contract with a purported end date, the employer actually acted to bring to an end an ongoing relationship.

[21] Mr Khayam submitted that the application of the proper approach would lead to the conclusion that Mr Khayam's employment was terminated at the initiative of Navitas. He stated that he had a continuous and ongoing employment relationship from 2005 to 2016 extending across a series of appointment documents and periods in which there was no written contract in place; the casual and maximum-term contracts applicable to him were imposed upon him by Navitas and he had no meaningful opportunity to negotiate or influence their terms. Furthermore, Navitas made a deliberate and considered decision to bring Mr Khayam's long-term employment to an end based upon an assessment of his performance and disciplinary record; the decision included that he would not be engaged on a casual or any other basis in future; the applicable enterprise agreement required Navitas to make a determination based on specified criteria as to whether to renew fixed-term or casual employment; and the work previously performed by Mr Khayam continued to be performed and did not come to an end with the expiry of the term of the final contract.

Navitas

[22] Navitas submitted that the ordinary meaning of "initiative" in the context of s 386(1)(a) meant that the relevant question was whether, in the circumstances of the case, an "introductory act or step" was taken by the employer to bring the employment relationship to an end. If *Lunn* was regarded as good law and applied, the question was answered on the basis that it was only the terms of the employment contract which brought the employment relationship to an end. However if *Lunn* was no longer regarded as good law, it might be

[22] [1996] HCA 56, (1996) 187 CLR 416

[23] [1995] IRCA 407, 64 IR 19

necessary to look beyond the terms of the employment contract and forensically examine the facts of each particular case.

[23] Where, Navitas submitted, the employment contract has clear end date, there is no performance management, investigation, conduct-related review or performance-based process, and the employment comes to an end on the specified end date, there is no "introductory act or step" on the part of the employer or any "moving mind" that decides that the employee is not to be employed anymore. In that circumstance there would be no termination at the employer's initiative. However the positions will be more complex where there have been multiple sequential contracts with end dates on each occasion; in that scenario the level of inquiry as to whether the employer has undertaken some introductory act or step will be greater. While *Lunn* would provide a simple answer in this situation, a departure from *Lunn* would create an unsatisfactory and opaque approach requiring a forensic examination of whether there had been any conduct on the part of the employer which constituted it exercising initiative to bring the employment relationship to an end.

[24] Navitas further submitted that, even if it was determined that *Lunn* should not continue to be applied to s 386(1)(a), this did not avail Mr Khayam, because the exclusion in s 386(2)(a) applied. The decision in *Andersen v Umbakumba Community Council*[24], in which it was held that an employment contract which specified a maximum term or "outer limit" for the employment but provided for an unqualified right to terminate the employment during the terms was not employment "*under a contract of employment for a specified period of time*" was no longer good law because:

(1) the FW Act had omitted the statutory note which appeared below the corresponding provision in the preceding legislation and drew attention to *Andersen* and decisions to like effect;

(2) the addition of the words "*and the employment has terminated at the end of the period, on completion of the task, or at the end of the season*" were not present in the preceding provision (or the earlier provision considered in *Andersen*), and had changed the meaning of the exclusion; and

(3) paragraph 1532 of the Explanatory Memorandum to the *Fair Work Bill* made it clear that the fact that an employment contract allowed for termination prior to the end of a maximum term did not alter the application of the exclusion.

[25] Any continued application of *Andersen*, Navitas submitted, would be contrary to the clearly expressed intention of Parliament. The exclusion in s 386(2)(a) applied to Mr Khayam, and accordingly the appeal should be dismissed on that basis.

Australian Council of Trade Unions

[26] The ACTU generally supported the submission of Mr Khayam, and additionally submitted that:

[24] [1994] IRCA 55, 56 IR 102

- to the extent that *Lunn* held that the expression "*termination of employment at the initiative of the employer*" referred to termination of a contract of employment, it was inconsistent with previous authority and wrongly decided;

- there was nothing in the text of s 386(1)(a) to suggest that it should be read as only referring to the contract of employment and not the broader employment relationship; and

- Pt 3-2 was remedial or beneficial legislation and accordingly should be given a fair, large and liberal construction rather than a literal or technical construction.

Australian Industry Group

[27] The Ai Group submitted that *Lunn*, insofar as it held that the termination of employment in that case at the expiry of a maximum term contract was not a termination at the initiative of the employer, was consistent with previous authority including *Victoria v The Commonwealth*[25], *Fisher v Edith Cowan University*[26] and *Qantas Airways Limited v Fetz*.[27] However *Lunn* did not go so far as to state that there were absolutely no circumstances where such a termination could not constitute a termination at the initiative of the employer, and recognised that where such a contract was a sham the position would be different. There were no relevant differences in the drafting of the FW Act as compared to the WR Act and the *Industrial Relations Act 1988* (IR Act) that justified disturbance to the meaning of the expression "*termination at the initiative of the employer*", and paragraph 1528 of the Explanatory Memorandum made it clear that it was not intended to depart from the existing case law concerning the meaning of that expression. Section 386(2)(a) preserved a longstanding exclusion which had never been linked to the meaning of the expression "*termination at the initiative of the employer*", and it served a clarificatory function which was not rendered otiose by the application of the approach in *Lunn* to s 386(1)(a). The proposition that s 386(1)(a) was to be approached on the basis of an analysis as to what, as a matter of practical reality, brought about the end of the employment relationship was too broad and inconsistent with most relevant authorities.

[28] In relation to s 386(2)(a), the Ai Group supported the submission of Navitas. It additionally submitted that s.386(2)(a) was drafted in different terms to s 123(1)(a), which excluded "*an employee employed for a specified period of time, for a specified task, or for the duration of a specified season*" from the requirements of Pt 2-2 Div 11 concerning notice of termination and redundancy pay. The former emphasised the contract of employment whereas the latter referred to the employment.

Australian Chamber of Commerce and Industry

[29] The ACCI submitted that time limited contracts of employment, including maximum term contracts, existed for legitimate reasons, and the FW Act did not intend to alter the "common law position" (including that established in *Victoria v The Commonwealth*[28]) that the termination of employment at the end of the term of a time limited contract did not enliven

[25] [1996] HCA 56, (1996) 187 CLR 416

[26] [1997] IRCA 98, (1997) 72 IR 464

[27] Print Q1482, 9 June 1998

[28] [1996] HCA 56, (1996) 187 CLR 416

the unfair dismissal protections. The ACCI referred to paragraph 1532 of the Explanatory Memorandum in support of this submission, and submitted that *Lunn* broadly preserved the established common law position. The FW Act intended that unfair dismissal remedies would only be available in the context of a maximum term contract if brought to an end before the specified end date or where the contract was entered into for the purpose of avoiding the unfair dismissal jurisdiction (and thus saved by s 386(3)). If the FW Act was to be understood as operating otherwise, significant uncertainty would arise regarding the use of these contracts as their purpose and intent would be undermined. In relation to s 386(2)(a), the ACCI supported the submission of the respondent.

Mr Khayam in reply

[30] In response to Navitas' submission that he was caught by the s 386(2)(a) exclusion, Mr Khayam submitted that the Explanatory Memorandum could not give a meaning to the expression "*contract of employment for a specified period of time*" inconsistent with the ordinary meaning of the words used and the meaning attributed by judicial decisions for decades. If the legislature had intended to overturn the well-established line of authority, the Explanatory Memorandum would have expressly indicated this. Further, the Explanatory Memorandum did not grapple with the complexity of the approach in *Andersen* and similar cases, which did not say that *any* right to terminate an employment contract before expiry (such as for breach, or by the employer's resignation) meant that the contract was not for a specified period. The addition of the words "*and the employment has terminated at the end of the period, on completion of the task, or at the end of the season*" could not operate to alter the meaning of the expression "*contract of employment for a specified period of time*", and the method and mode of termination did not arise for consideration unless the contract was of that type. The removal of the statutory note, which was only a feature of the legislation from 2003 to 2009, provided an inadequate foundation to conclude that any change of meaning was intended, and there was no indication that Parliament intended to widen the scope of the exclusion.

Consideration

Section 386(1)(a)

[31] The primary question which arises for consideration in the appeal is whether the interpretation and application of s 386(1)(a) should continue to be guided by the AIRC Full Bench decision in *Lunn*. At the outset it is necessary therefore to determine what propositions *Lunn* can be characterised as standing for. As earlier noted, there was considerable disagreement in the parties' submissions about this. We consider that *Lunn* can be regarded as standing for at least the following propositions:

(1) the expression "*termination of employment at the initiative of the employer*" in s 170CB of the WR Act as it then was bore its "ordinary meaning" and referred to the termination of a contract of employment, not the termination of the employment relationship[29];

[29] [2006] AIRC 756, 158 IR 410 at [28]

(2) the High Court decision in *Victoria v The Commonwealth*[30] was authority for the proposition that when a time-limited contract reached its nominated end date, the contract terminated through the effluxion of time and there was no termination at the initiative of the employer for the purpose of the WR Act[31];

(3) in the application of s 170CB, time-limited employment contracts were to be given effect according to their terms, unless "one of the well-established categories of exception is established" (which appear to include by reference to the passage quoted in *Lunn* from the High Court decision in *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd*[32] whether the agreement is capable of rectification by a court, whether the agreement was signed by a party under a misapprehension about its character or otherwise executed by mistake, or whether the execution of the agreement was procured by misrepresentation as to its contents or effect), or the contract is a sham[33]; and

(4) a sham contract is one which the parties intend should not have the legal effect which it appears to have, and there was no independent test of "strong countervailing factors" as suggested in the decision of the Industrial Relations Court of Australia (Marshall J) in *D'Lima v Board of Management, Princess Margaret Hospital for Children*.[34]

[32] The correctness of these propositions in the context of the statutory unfair dismissal regime in the WR Act which was the subject of consideration in *Lunn* requires closer examination.

[33] The first comprehensive federal termination of employment scheme was introduced by way of amendments to the IR Act (renamed as the WR Act in 1996 by the *Workplace Relations and Other Legislation Amendment Act 1996*) effected by the *Industrial Relations Reform Act 1993*. The constitutional basis of the scheme established in Pt VIA Div 3 was the external affairs power, and thus s 170CA(1) provided that the object of the Division was to give effect to the Termination of Employment Convention (Convention) and the Termination of Employment Recommendation 1982 adopted by the International Labour Organisation (Recommendation). Section 170CB provided that an expression used in the Pt VIA Div 3, which contained the new scheme, had the same meaning as in the Convention. Thus, the expression "*termination of employment*", where used in the Division, took its meaning from the Convention, which defined it to mean "*termination at the initiative of the employer*". A number of decisions of the Industrial Relations Court interpreted this expression to mean termination of the employment relationship, not termination of the employment contract. In *Siagian v Sanel Pty Ltd*[35] the Court (Wilcox CJ) found that the expression did not mean the same thing as termination of the contract of employment. In his Honour's analysis, he first discussed a number of decisions, including the High Court decision in *Automatic Fire Sprinklers Pty Ltd v Watson*[36], which supported or at least did not preclude the possibility that

[30] [1996] HCA 56, 187 CLR 416

[31] [2006] AIRC 756, 158 IR 410 at [10]

[32] [2004] HAC 55, 218 CLR 471 at [32]

[33] [2006] AIRC 756, 158 IR 410 at [30]-[33]

[34] [1995] IRCA 407, 64 IR 19

[35] [1994] IRCA 1, 122 ALR

[36] [1946] HCA 25, 72 CLR 435

at common law the employment relationship and the contract of employment might not be co-terminous.[37] His Honour then turned directly to the interpretation of the expression taken in its legislative context, and identified a number of difficulties in confining the expression "*termination of employment*" to a situation where there had been a termination of the employee's contract of employment. The first was that it would limit the operation of Division 3 in an "arbitrary and technical way" by excluding from relief employees who terminated their contracts of employment by accepting their employer's breach. The second was that it was difficult to reconcile with the existence of the remedy of reinstatement. The third was that where the employer breached the contract of employment by unlawfully dismissing the employee, but the employee had not accepted the breach as a termination of the contract, the employee could not obtain relief. The fourth was as follows:

> "Finally, it is important to bear in mind the context in which the words "termination of ... employment" are used. The statute is concerned with the practical matter of industrial relations. An unfair dismissal can give rise to an industrial relations problem whether or not it is accepted by the employee as a termination of the contract of employment. Few dismissed employees would be equipped to analyse their contractual situation."[38]

[34] Wilcox CJ then stated the following conclusion:

> "Bearing all these matters in mind, and given that the courts have sometimes recognised the possibility of a difference between a termination of employment and a termination of the contract of employment, it seems preferable to treat the words "termination of ... employment" in Division 3 of Part VIA of the Industrial Relations Act as including any act that brings to an end the employer-employee relationship, whether or not the act, or any acceptance of it, also brings to an end the contract of employment."[39]

[35] In *Strachan v Liquorland (Australia) Pty Ltd*[40] the Court (Moore J) dealt with the issue of whether a demotion in employment constituted a termination of employment under the Division, and determined having regard to the terms of the Convention and the Recommendation that it did not. This approach was followed by the Industrial Relations Court Full Court (Wilcox CJ, von Doussa and Marshall JJ) in *Brackenridge v Toyota Motor Corporation Australia Ltd*.[41] The Court said:

> "As will appear when we turn to the contractual claims made in this case, we are of the opinion that the decision by Toyota to demote Ms Brackenridge involved a termination of her contract of employment as a chef supervisor. However, for the purpose of Division 3 of Part VIA of the Industrial Relations Act, the relevant question is not whether there was a termination of the contract of employment but whether the applicant suffered "termination of his or her employment": see s 170EA(1) of the Act. There is a conceptual difference between the two situations: see *Siagian v Sanel Pty Limited* [1994] IRCA 2; (1994) 1 IRCR 1 at 13-20. Ordinarily, the conceptual difference does not matter: dismissal will ordinarily terminate both the particular

[37] Ibid at 196-200

[38] [1994] IRCA 1, 122 ALR 333

[39] Ibid

[40] [1996] IRCA 48

[41] (1996) 142 ALR 99

> contract of employment and the employment relationship. In this case, however, Ms Brackenridge continued to be employed by Toyota after 3 February 1995. The employment relationship continued albeit under a new contract of employment.
>
> Recognising this, counsel for Ms Brackenridge put her case at trial on the basis that her demotion constituted a "termination of employment" within the meaning of Division 3. We agree with the trial judge that it did not."[42]

[36] The Court then referred to and quoted from *Strachan*, analysed the Convention and the preparatory work for it, and concluded consistently with *Strachan* that the Convention was not intended to refer to situations where there was no actual loss of employment.[43]

[37] In *Mohazab v Dick Smith Electronics Pty Ltd*[44] a Full Court of the Industrial Relations Court also stated, consistent with *Siagian*, that the expression "*termination of the employment*" was to be understood as referring to the termination of the employment relationship:

> "Viewed as a whole, the Convention is plainly intended to protect workers from termination by the employer unless there is a valid reason for termination. It addresses the termination of the employment relationship by the employer. It accords with the purpose of the Convention to treat the expression "termination at the initiative of the employer" as a reference to a termination that is brought about by an employer and which is not agreed to by the employee. Consistent with the ordinary meaning of the expression in the Convention, a termination of employment at the initiative of the employer may be treated as a termination in which the action of the employer is the principal contributing factor which leads to the termination of the employment relationship. We proceed on the basis that the termination of the employment relationship is what is comprehended by the expression termination of employment: *Siagen v Sanel*..."
>
> . . .
>
> In these proceedings it is unnecessary and undesirable to endeavour to formulate an exhaustive description of what is termination at the initiative of the employer but plainly an important feature is that the act of the employer results directly or consequentially in the termination of the employment and the employment relationship is not voluntarily left by the employee. That is, had the employer not taken the action it did, the employee would have remained in the employment relationship.[45]

[38] Pt VIA Div 3 was extensively amended by the *Workplace Relations and Other Legislation Amendment Act 1996* (WROLA Act). By these amendments, the constitutional basis for the unfair dismissal part of the termination of employment scheme (in Subdiv B) was changed to reliance, primarily, on the corporations power. The provisions referring to the Convention and the Recommendation in ss 170CA and 170CB were removed. Section 170CD now defined the expressions "*termination or termination of employment*" to mean "*termination of employment at the initiative of the employer*". Only expressions used in Subdivs C, D and E were now to be given the same meaning as the Convention. A Full Bench

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[42] Ibid at 101

[43] Ibid at 101-104

[44] [1995] IRCA 625, 62 IR 200

[45] Ibid at 205-6

of the AIRC in *Bluesuits Pty Ltd v Graham*[46] drew from this the "unmistakeable" inference that terms in Subdiv B did not necessarily have the same meaning as in the Convention.

[39] This proposition was first taken further by the AIRC (Polites SDP) in the 1999 decision in *Boo Hwa Chan v Christmas Island Administration*[47], in which the *obiter* view was expressed that there had been a material change to the legislative position since *Brackenridge* had been decided, such that a demotion in employment could constitute a termination of employment for the purpose of Subdiv B.[48] In this respect the decision of a Full Court of the Supreme Court of South Australia in *Advertiser Newspapers P/L v Industrial Relations Commission of South Australia and Grivell*[49], which concerned whether a demotion constituted a dismissal for the purpose of the *Industrial and Employee Relations Act 1994* (SA), was preferred over *Brackenridge*.

[40] The position of whether a demotion constituted a termination of employment was subsequently addressed by an amendment to the WR Act effected by the *Workplace Relations Amendment (Termination of Employment) Act 2001*, which added s 170CD(1B) to the WR Act as follows:

> (1B) For the purposes of this Division, *termination* or *termination of employment* does not include demotion in employment if:
>
> (a) the demotion does not involve a significant reduction in the remuneration or duties of the demoted employee; and
>
> (b) the demoted employee remains employed with the employer who effected the demotion.

[41] It is not clear what prompted this amendment or whether it was responsive to *Boo Hwa Chan*. In any event, the effect of the amendment considered in the light of the earlier amendments effected by the WROLA Act was considered at length in the AIRC Full Bench decision in *Charlton v Eastern Australian Airlines Pty Limited*.[50] The Full Bench determined that where an employee was subject to a demotion involving a significant reduction in remuneration not authorised by the contract of employment or an applicable industrial instrument, there was a repudiation of the contract of employment which constituted a termination of employment notwithstanding that the employee may have continued in employment in the lower position.[51] The Full Bench said:

> "[32] Consistent with the decision in *Boo Hwa Chan*, a termination of employment occurs when a contract of employment is terminated. This necessarily occurs when the employment relationship comes to an end. However, it can also occur even though the employment relationship continues. Where a contract of employment has been terminated, but the employment relationship continues, this will be because a new contract of employment has come into existence. Therefore, whether the appellant's

[46] (1999) 101 IR 28

[47] [1999] AIRC 1371, Print S1443 (2 December 1999)

[48] Ibid at [7], [12]-[13]

[49] [1999] SASC 300

[50] [2006] AIRC 393, PR972773 (7 July 2006)

[51] Ibid at [34]

> demotion involved his employment being "terminated by the employer" within the meaning of s.170CE turns on whether his contract of employment was terminated notwithstanding the continuing employment relationship. This question is answered by reference to general law principles relating to the termination of contracts of employment, unconstrained by the Convention."

[42] Elsewhere in the decision, the Full Bench said that the expressions "*termination*" and "*termination of employment*" used in Div 3, unconstrained by the Convention, referred to "a termination of the contract of employment or a termination of the employment relationship and therefore extend to a demotion that involves a termination of a contract of employment even if the employment relationship continues pursuant to a new contract of employment." No reasoning process for these propositions was disclosed in the decision, except that *Boo Hwa Chan* and *Grivell* were cited as authority for them.

[43] In *Lunn*, *Charlton* was simply cited in a footnote as authority for the proposition stated in paragraph [28] (earlier quoted) that, since the WROLA Act amendments, "the expression *"termination of employment at the initiative of the employer"* in s 170CE has its ordinary meaning and refers to termination of a contract of employment". It must be said, with respect, that it is difficult to glean that bald proposition from the reasoning in *Charlton*. A differently constituted AIRC Full Bench stated the opposite conclusion in *Searle v Moly Mines Limited*[52] without referring to *Lunn*. It said that "*It is clear that the statutory test relates to termination of the employment relationship, not termination of the contract of employment*", and after referring to the High Court decision in *Byrne and Frew v Australian Airlines Ltd*[53] said:

> "[23] In the case of wrongful dismissal, as the passage shows, the employment is terminated by the employer even though the contract continues until the employee accepts the repudiation, thereby bringing the contract to an end. In applying the statutory test it is the termination of the employment relationship which is important."

[44] The Full Bench went on to say:

> "[39] We have already indicated that the statutory test relates to the termination of the employment relationship. The application of the common law principles relating to termination of the contract of employment may not yield the correct answer in any given case... Those principles may not be irrelevant to the inquiry, but in this case they proved to be a distraction from the question posed by the statute."

[45] That *Lunn* did not correctly state the position applying under the WR Act was made absolutely clear by the High Court decision in *Visscher v Giudice*.[54] Briefly speaking, *Visscher* concerned a ship's officer who was initially employed as a Third Mate, but in September 2001 was offered by his employer and accepted a permanent promotion to the position of Chief Officer. Shortly afterwards, the employer purported to rescind the promotion. Mr Visscher informed the employer, in writing, that he did not accept the rescission. Until January 2004, Mr Visscher continued to be assigned work, and paid, as a Chief Officer. In January 2004, Mr Visscher was informed that on his next voyage he would

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[52] [2008] AIRCFB 1088

[53] [1995] HCA 24, 185 CLR 410, 61 IR 32

[54] [2009] HCA 34, 239 CLR 361, 187 IR 96

be required to work as a Second Mate. In February 2004 Mr Visscher wrote to his employer by email stating that he considered that he had been demoted, that this constituted a constructive termination of the contract of employment, and accordingly that he considered his employment as having been terminated by the employer. The employer's response was that Mr Visscher had not been demoted because he had been employed as a Third Mate and that it would treat his email as a resignation. Mr Visscher then applied to the AIRC for relief in respect of the termination of his employment under s 170CE of the WR Act on the ground that the termination was harsh, unjust and unreasonable. A single member of the AIRC dismissed his application on the basis that his employment had not been terminated at the initiative of the employer, and this was upheld on appeal by a Full Bench of the AIRC.

[46] The Federal Court Full Court rejected an application for judicial review of the AIRC decisions.[55] Buchanan J, with whom Ryan and Madgwick JJ agreed, determined that the rescission of the promotion in 2001 was effective to terminate Mr Visscher's contract of employment as Chief Officer, but that the employment relationship had thereafter continued on the basis that Mr Visscher was engaged as a Third Mate, and this had not been brought to an end in 2004 at the employer's initiative. In reaching this conclusion, Buchanan J referred to *Siagian* and *Brackenridge* as demonstrating the distinction between the contract of employment and the employment relationship and that the statutory scheme in the WR Act was concerned with the termination of the latter and not the former.[56]

[47] The High Court majority (Heydon, Crennan, Kiefel and Bell JJ), who upheld an appeal against the Full Court's decision, likewise emphasised that the termination of the employment relationship and the termination of the contract of employment were not the same thing. The majority said (footnotes omitted):

> "[53] The reasons of Buchanan J elide the concepts of termination of an employment relationship and the discharge of a contract of employment. The concepts are different. It does not follow from the fact that a wrongful dismissal is effective to bring the employment relationship to an end that it thereby discharges the contract of employment. In *Byrne v Australian Airlines Ltd* it was said that:
>
> > 'It does not appear to have been doubted in this country that a wrongful dismissal terminates the employment relationship notwithstanding that the contract of employment may continue until the employee accepts the repudiation constituted by the wrongful dismissal and puts an end to the contract. That was accepted by both the majority and minority in *Automatic Fire Sprinklers Pty Ltd v Watson* ...'.
>
> And in one of the passages from *Automatic Fire Sprinklers Pty Ltd v Watson* to which reference was made in *Byrne v Australian Airlines Ltd*, Latham CJ said:
>
> > 'An employer terminates the employment of a servant when he dismisses him, though, as I say hereafter, such a dismissal does not put an end to the contract between the parties. An argument that a dismissal because wrongful was a nullity was raised and rejected in both *Williamson's Case* and *Lucy's Case*.'

[55] (2007) 170 IR 419

[56] Ibid at [48]-[52]

And Dixon J said:

> '... there is nothing in the general law preventing the wrongful dismissal of a servant operating to discharge him from service, notwithstanding that he declines to accept the dismissal as absolving him from further performance but keeps the contract open and remains ready and willing to serve.'

As was said in *Byrne*, the position was not always so clear in England. For a time the opinion was maintained that contracts of employment are sui generis, in that certain forms of repudiation are effective automatically to terminate them without the need for their acceptance. But, as has been observed, the theory was later rejected in favour of the "elective theory of termination". Such an approach accepts as correct the general principle in contract law that acceptance by the innocent party of a repudiation is necessary to terminate a contract.

[54] This is not to say that in a case of dismissal there will ordinarily be anything to be gained by employees refusing to accept the repudiation. Even if they keep the contract of employment on foot, they cannot receive remuneration after the dismissal, because the right to receive it is dependent upon services having been performed. Further, historically the courts would not grant specific performance of a contract of personal service, save in exceptional cases. This was largely because of perceived difficulties in supervision and because the courts were unwilling to compel employers to tolerate an individual employee whom they considered incompatible. In *Automatic Fire Sprinklers Pty Ltd v Watson*, Latham CJ said:

> '... the wrongful dismissal determines the relationship of master and servant created by the contract, even though the servant may not have accepted his dismissal as entitling him to regard the contract as discharged. Any other view would in effect grant specific performance of a contract of personal service, a remedy which the courts have always refused in such a case ...'.

[55] It was said in *Byrne* that, for all practical purposes, the contract of employment will be at an end upon dismissal. In the case of a wrongful dismissal, the possible continuation of it will rarely be of significance. In principle, however, it remains the case that an unaccepted repudiation does not terminate a contract. In the circumstances of this case this assumes importance. To view it as automatically discharged would be to elevate a problem concerning remedies to a substantive principle concerning the termination of contracts.

[56] This is not a case involving dismissal, with a consequent destruction of the employment relationship...".

[48] The majority concluded that Mr Visscher's rejection of the purported rescission of his promotion in September 2001 meant that his contract of employment as a Chief Officer remained on foot as at February 2004. The majority concluded as follows (emphasis added):

> "[81] Teekay's notice of rescission did not automatically bring the contract appointing Mr Visscher a Chief Officer to an end. It was necessary that Mr Visscher accept the repudiation before the contract could be terminated. Nothing said in *Automatic Fire Sprinklers Pty Ltd v Watson* suggests any different contractual principle as applying to

> a contract of employment. In order to decide whether Teekay had repudiated Mr Visscher's contract of employment in January and February 2004 it was necessary for the AIRC to determine the true contractual position between the parties at that time. It was necessary then to determine whether what was said by Teekay at that time amounted to a repudiation such that the *termination of the employment relationship* could be said to be at its initiative; or whether it amounted to a demotion within the meaning of s 170CD(1B). The correct legal starting point was not that Teekay had rescinded the agreement. Neither the Commissioner nor the Full Bench of the AIRC asked the correct question, as to the contract under which the parties continued after September 2001. This was an error going to jurisdiction."

[49] In summary the majority, having carefully drawn the distinction between termination of the employment relationship and termination of the contract of employment, identified the issue arising under the WR Act as whether there was a termination of the employment relationship at the initiative of the employer (or a demotion as defined in s 170CD(1B)). In the subsequent High Court decision in *Commonwealth Bank of Australia v Barker*[57], *Visscher* was cited authority for the proposition that "There is a distinction, relevant in cases of wrongful dismissal, between the employment relationship and the contract of employment, such that the contract may persist when the relationship is at an end".[58]

[50] Thus it is clear, contrary to the first proposition stated in *Lunn* to which we have earlier referred, that a termination of the employment relationship might constitute a termination at the initiative of the employer under the WR Act notwithstanding that the contract of employment remains on foot. That is, under the WR Act, termination at the initiative of the employer did not, on its ordinary meaning, refer to termination of the contract of employment. The first proposition in *Lunn* to which we have earlier referred was therefore not a correct statement of the law under the WR Act, and as a result the Full Bench's analysis in *Lunn* proceeded on the wrong premise that it was necessary to analyse whether the final employment contract was terminated at the initiative of the employer, not whether the employment relationship was terminated at the initiative of the employer. The correct position remained as stated in *Mohazab*, namely that a termination of employment at the initiative of the employer occurs where the action of the employer is the principal contributing factor which leads to the termination of the employment relationship.

[51] We now turn to the second proposition stated in *Lunn* to which we have earlier referred. *Victoria v The Commonwealth*[59] concerned a challenge to the validity, on constitutional grounds, to a number of amendments to the *Industrial Relations Act 1988* enacted by the *Industrial Relations Reform Act 1993* and the *Industrial Relations Amendment Act (No 2) 1994*, including the termination of employment scheme established by the former amending Act in Pt VIA Div 3. The challenge in this respect included that ss 170DB, 170DC, 170DE(1) and 170DF were invalid based on the proposition stated in *Re Australian Education Union*[60] that the Commonwealth could not legislate to prevent a State from exercising its right to determine the number and identity of the persons it wished to employ, the term of appointment of such persons and the number and identity of the persons it wished to dismiss

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[57] [2014] HCA 32, (2014) 253 CLR 169, 244 IR 425

[58] Ibid at [3] per French CJ, Bell and Keane JJ

[59] [1996] HCA 56, 187 CLR 416

[60] [1995] HCA 71, 184 CLR 188

with or without notice on redundancy grounds.[61] The impugned provisions contained prohibitions on termination in certain circumstances or on certain grounds. In the majority judgment of Brennan CJ and Toohey, Gaudron, McHugh and Gummow JJ, the provisions were characterised as follows:

> "Thus, the prohibitions presently in issue are the restrictions on termination without notice, or, payment in lieu (which prohibition does not apply in the case of serious misconduct) (s 170DB(1)); the prohibition on termination for reasons related to conduct or performance unless the employee has first been given a chance "to defend himself or herself against the allegations made" (which prohibition does not apply if the employer could not reasonably be expected to provide that opportunity) (s 170DC); the prohibition on termination other than for a valid reason, or valid reasons, connected with the employee's capacity or conduct or the employer's operational requirements (s 170DE(1)); and the prohibition on termination for the reasons set out in s 170DF(1)(a)-(e) inclusive. In general terms, those reasons consist of temporary absence because of illness or injury, union membership, participation in union activities, non-membership of a union, standing for election to or holding a union position, and complaining or participating in proceedings against the employer for alleged breach of its legal obligations."[62]

[52] One aspect of the challenge to the provisions was that they impaired the right of the States to determine the term of appointment of their employees. The majority dealt with this contention in the following way:

> "It is also necessary to consider whether, in terms, the prohibitions in ss 170DB, 170DC, 170DE(1) and 170DF impair the right of the States to determine "the term of appointment (of those whom they wish to employ)" (112). The relevant words of each prohibition are that "(a)n employer must not terminate an employee's employment". In the case of s 170DC, the prohibition is elaborated by reference to a specific reason and, in the case of ss 170DE(1) and 170DF, by reference to specific reasons. As a matter of ordinary language, an employer does not terminate an employee's employment when his or her term of employment expires. Rather, employment comes to an end by agreement, or, where the term is fixed by award or statute, by operation of law.
>
> There is nothing in the Act to suggest that the words "(a)n employer must not terminate an employee's employment" are to be construed other than in accordance with their ordinary meaning. So construed, they do not apply to the situation where employment comes to an end because its term has expired. To put the matter another way, the prohibitions are concerned with termination for reasons unconnected with the term of employment. And that is manifestly clear when regard is had to ss 170DC, 170DE(1) and 170DF. The prohibitions effected by those sections are directed, respectively, to termination for a specified reason and termination for one or more specified reasons, none of which includes the expiry of the employee's term of appointment."[63]

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[61] [1996] HCA 56, (1996) 187 CLR 416 at 518

[62] Ibid at 519

[63] Ibid at 519-520

[53] It is clear that the above analysis was concerned only with the construction of the specific provisions under challenge, and did not involve any express consideration of the expression "*termination of employment at the initiative of the employer*" which, as earlier explained, was at that time the definition of "*termination of employment*" contained in the Convention and imported into the IR Act by s 170CB. The majority concluded that the impugned provisions, on their proper construction, were not concerned with the term of appointment of those whom they wished to employ for the twofold reason that the ordinary meaning of the expression "*an employer must not terminate an employee's employment*" did not encompass termination of employment on the expiration of the term of the employment *and* the prohibited reasons for termination in the provisions did not include reasons connected with the term of the employment.

[54] That twofold reasoning is not directly applicable to the expression "*termination of employment at the initiative of the employer*" which by subsequent amending legislation was incorporated directly into the WR Act. By the time *Lunn* was decided, that expression was used in s 170CD(1) to define "*termination*" and "*termination of employment*" for the purpose of Pt VIA Div 3, including the unfair dismissal scheme in Subdiv B. That was however subject to s 170CBA(1)(a) which excluded "*an employee engaged under a contract of employment for a specified period of time*" from the operation of, relevantly, Subdiv B. It will be necessary to discuss this provision in greater detail later, but it is sufficient to say for present purposes that s 170CBA(1)(a), because it at least has the effect of excluding employees whose employment terminates at the end of a contract for a specified period of time from the breadth of the expression "*termination of employment at the initiative of the employer*" for the purpose of (relevantly) Subdiv B, makes impossible the automatic application of the reasoning in *Victoria v The Commonwealth* to that statutory expression. That calls into question the correctness of the second proposition from *Lunn* earlier identified, at least as to the unqualified way in which it was stated.

[55] The 1997 decision of the Full Court of the Industrial Relations Court in *Fisher v Edith Cowan University*[64] identified circumstances in which a termination of employment occurring at the end of a time-limited contract of employment could nonetheless constitute a termination of employment at the initiative of the employer for the purpose of Pt VIA Div 3 of the WR Act, and did not regard *Victoria v The Commonwealth* as standing for any contrary proposition. The circumstances so identified suggest that the third and further propositions in *Lunn* earlier set out (as well as the second proposition) do not represent a correct or at least a complete statement of the position pertaining under the WR Act.

[56] The particular matter before the Full Court concerned an application by an academic for relief from termination of employment in circumstances where the academic had been employed pursuant to three successive annual contracts, and the employment terminated at the end of the third contract after the academic was unsuccessful in a merit selection for a three-year appointment to the same role. The case was initially heard by Ritter JR, who held that there had been a termination at the employer's initiative. The employer applied to the Industrial Relations Court for a review of Ritter JR's decision. Madgwick J heard the application for review and, in his decision[65], summarised the Judicial Registrar's reasons and

[64] (1997) 72 IR 464

[65] *Fisher v Edith Cowan University* (1996) 70 IR 206

conclusion and then reached the opposite conclusion, namely there had been no termination of employment at the initiative of the employer[66]:

> "Ritter JR considered the matter thoroughly. Quite properly, the Union in effect founded its argument on his reasons for decision. The judicial registrar's conclusions (from pp 50-53 of his typescript reasons) may be summarised as follows:
>
> (a) The question is whether the termination of the employment relationship was at the initiative of the employer.
>
> (b) Here, the employer had "decided not to continue the employment relationship" by failing to appoint Ms Fisher to the position she applied for.
>
> (c) The employment relationship commenced when Ms Fisher first accepted the offer of an appointment on 31 December 1992 and ceased on 31 December 1995. However, it could and would have continued but for the employer's decision, conveyed to Ms Fisher by the letter of 31 October 1995, to offer the outside applicant a contract from 1 January 1996.
>
> (d) Hence, that decision was the "critical action" which "led to" the termination of the employment: see *APESMA v David Graphics Pty Ltd* (1994) 1 IRCR 193; ; 57 IR 282 and *Mohazab v Dick Smith Electronics (No 2)* (1995) 62 IR 200 .
>
> (e) Ms Fisher did not leave the employment relationship voluntarily.
>
> (f) No decision of the Court required a contrary finding. The decisions in *D'Lima v Princess Margaret Hospital for Children* (1995) 64 IR 19 and *Minister for Health v Ferry* (1996) 65 IR 374 assisted by analogy, and there was no majority view to the contrary in *Christie v Qantas* (1996) 68 IR 248.
>
> (g) The employment relationship "involved more than the final contract of employment"; there was a continuing requirement for the work to be done and the relationship could have continued.
>
> (h) To regard what occurred here as termination of the employment at the initiative of the employer was more in keeping with the general and beneficial purposes of the Termination of Employment Division of the Act both as those purposes are explicit and as they have been seen in such cases as *Aitken v CMETSWU* (1995) 63 IR 1 at 6; ; *Grout v Gunnedah Shire Council* (1994) 1 IRCR 143 at 160; ; 57 IR 243 at 259 and Burazin v Blacktown City Guardian (unreported, Industrial Relations Court of Australia, Madgwick J, No 660 of 1995, 15 December 1995).
>
> Earlier in his reasons, the registrar had, among other things, considered in detail a number of cases to arrive at the central conclusion that:

[66] Ibid at 209-211

> (i) "A termination of employment at the initiative of the employer (which is what 'termination of employment' means in the Termination of Employment Convention — see Art 3 of Pt 1) may be treated as a termination that is brought about by an employer and which is not agreed to by the employee … [that is] a termination in which the action of the employer is the principal contributing factor which leads to the termination of the employment relationship: *Mohazab v Dick Smith Electronics* at 205". (Quite apart from the authoritative nature of that Full Court formulation, there can in my respectful opinion be no reasonable quarrel with it.)
>
> (ii) The controversy about whether there is or can be a distinction between a relationship of employer and employee and the contract of employment out of which such a relationship grew should, after *Byrne v Australian Airlines Ltd* (1995) 69 ALJR 797 at 803; ; 61 IR 32 at 40 be regarded as settled in favour of the view of Wilcox CJ in *Siagian v Sanel Pty Ltd* (1994) 1 IRCR 1; 54 IR 185 that:
>
> > 'termination of employment means termination of a relationship of employer and employee and is not confined to a case where an employee's contract of service has been terminated: *Mohazab* at 205 and *Grout v Gunnedah Shire Council* (1995) 62 IR 150 at 156 .'
>
> In relation to the second conclusion, I assume that it is correct. But the essence of the difference between the registrar's approach in this case and mine is the use to which the legal proposition constituted by that conclusion can be put.
>
> The nub of the registrar's position is twofold: that an employment relationship between Ms Fisher and the University would have continued, apart from a positive decision not to appoint her under a new contract of employment, and that such decision was the "principal contributing factor", the "critical action", which led to the termination of the employment relationship.
>
> I disagree with both aspects of this approach.
>
> . . .
>
> ...But here the question is: by whose act or decision, primarily, was the employment terminated?
>
> To my mind, the answer is that 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. The decision of the employer not to make a fresh, "contiguous, fixed-term appointment" of the employee did not and could not affect that fact: had the decision been to re-appoint Ms Fisher, that would, in the instant circumstances, for the purposes of the *Industrial Relations Act*, have simply created *another* employment (and contractual) relationship."

[57] The decision of Madgwick J was the subject of an appeal to the Full Court. In its decision the Full Court first identified that where provisions in an industrial instrument given force by the WR Act which regulate or prevent the use of "fixed-term employment contracts" are applicable, such provisions:

> "...would be part of the material on which a finding of fact may be made that an employment relationship exists beyond the term fixed by an employment contract made between an employer and an employee bound by the award. (See: *Byrne* per Brennan CJ, Dawson, Toohey JJ at p442.) In such a case the statutory remedies provided by Div 3 would apply to a termination of an employment relationship governed by the award, if the termination is effected by reliance by the employer, contrary to the terms of the award, on the expiration of the period for employment specified in the contract as the occurrence that has terminated the employment relationship. In such a circumstance the employee would not be restricted to the remedies provided by the Act for the breach of an award, it being clear in its terms that Div 3 provides a right to apply for a remedy in such a circumstance."[67]

[58] Next, the Court referred to circumstances which might affect the operation of a fixed-term employment contract:

> "There may also be termination of the employment at the initiative of the employer and not pursuant to the mutual will of the parties if the terms of a fixed period contract have been varied in the course of performance of the contract, or the contract has been abandoned and replaced by another agreement, or the employer has engaged in conduct or representations which estop the employer from relying upon the terms of the contract as the means by which the employment relationship has been terminated. In those circumstances an employee may show that reliance by the employer upon the purported effluxion of a period of time for employment is, in fact, termination of the employment at the employer's initiative."[68]

[59] The Full Court affirmed the conclusion that there had not been a termination on the initiative of the employer on the basis of the limited evidence that had been adduced before the Court, and said:

> "In the present case it appeared to be accepted that the employment relationship was as set out in the terms of the employment contract, and, therefore, it was open to his Honour to conclude that the termination of employment had been effected by the expiration of the period specified in the contract and not at the initiative of the University.
>
> His Honour noted that the case had to be decided on the particular circumstances put before him and determined that on those facts it could not be concluded that there had been a termination of employment at the initiative of the University.
>
> His Honour was aware that on different facts a contrary conclusion could have been reached. His Honour referred to a fixed term contract that was "unreal, unconscientious or oppressive as against an employee of any special vulnerability" as an example of termination of employment at the expiration of a fixed term as termination at the employer's initiative, and also acknowledged that such a conclusion may follow in a case in which it was shown that fixed term contracts were not regarded as appropriate in the relevant field of employment and where there was

[67] Ibid at 470

[68] Ibid at 471

> continuation of the employee's position after termination of the employee's employment. It follows that the particular facts of other cases, possibly including cases of academic appointments made by successive short term contracts of employment, may support a determination that a termination of employment was at the initiative of the employer."[69]

[60] The Full Court also referred to the difficulty that, at the hearing at first instance, the parties approached the preliminary question of whether there was a termination of employment at the initiative of the employer as involving only a question of law and not also a question of fact:

> "Had the question been defined it would have indicated that it involved both a question of law, whether the ending of a fixed term contract at the expiration of the term could amount to a termination at the initiative of the employer, and a question of fact, whether the circumstances of the case amounted to a termination at the initiative of the employer. If such a question had been defined and Ms Fisher's case put accordingly, facts such as the continuation of the employment position after the expiration of the period of Ms Fisher's contract and Ms Fisher's expectation that she would continue in the position, would have been relevant to that case."[70]

[61] The Full Court also made reference in the course of its reasoning to the decision of the Industrial Relations Court (Marshall J), referred to in *Lunn*, in *D'Lima v Board of Management, Princess Margaret Hospital for Children*.[71] In that case, the applicant had been a cleaner employed by the respondent hospital for a period of about a year and a half pursuant to a series of fixed term employment contracts each for a period of about four weeks.[72] Her employment terminated at the end of the term of the last contract, for the reason that the employer was dissatisfied with her performance.[73] The applicant's evidence before the Court included the following propositions, which were not the subject of any effective challenge by the respondent:

> "12. While the forms showed that my employment would end on a certain date it was often the case that at the end of the period I would continue to work as usual and some days after the end of the last period 'Charlie' would come again and ask me to sign a new form which was back-dated to the end of my last contract.
>
> 13. At the hospital there are very large number of employees, especially in the Cleaning Department, who are contract employees.
>
> 14. We all knew that the practice was that even if your contract came to an end you just continued to work unless you received a letter from the hospital saying that you were no longer required.
>
> 15. I saw that happen to a number of people. We all understood that you kept working unless you were told otherwise despite your contracts coming to an end. It was known

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[69] Ibid at 472

[70] Ibid at 473

[71] [1995] IRCA 407, 64 IR 19

[72] Ibid at 24-25

[73] Ibid at 26

> amongst the other employees that who got their contract extended and who didn't get their contract extended was a decision that was made completely by Management, especially by Freeda [sic] Dyson."

[62] The Court determined that there had been a termination at the initiative of the employer:

> "I likewise reject the submission of Mr Hooker that the dismissal of Ms D'Lima was not a termination of employment at the initiative of the employer. The fact of the matter was that Ms D'Lima was continuously employed from 18 June 1993 to 11 December 1994 on which latter date her employment was terminated by the hospital. The practice of signing of further contracts for alleged periods of temporary employment appears to have been one of mere administrative convenience and cannot compel the Court to ignore the weight of strong countervailing factors indicating a continuous employment relationship. Mr Hooker described the relationship as "relatively" continuous. I find no basis for the use of the adjective "relatively" in that context. As Ms D'Lima said in unchallenged evidence on the review:
>
> > '... I had continuous employment ... except for my father's death [on] which I approached Ms Dyson and asked her to grant me leave.'"

[63] The Full Court in *Fisher* characterised *D'Lima* as a case where "it was held that the evidence established that the employment contract was not restricted to the terms of a written document".[74] That appears to be a reference to the fact that the substance of the employment relationship in *D'Lima* was established by work practices external to the written contracts. There was no suggestion in *Fisher* that *D'Lima* was wrongly decided.

[64] Although *Lunn* discussed the decision in *D'Lima* (in a way which suggested it was wrongly decided), no reference was made to the Full Court decision in *Fisher*.

[65] For the above reasons, we do not consider that *Lunn* stated in a correct or complete way the proper approach to the interpretation of the expression "*termination of employment at the initiative of the employer*" in s 170CD(1) of the WR Act and its application to the circumstances of an employee employed pursuant to a time-limited contract or contracts. It should not therefore be treated as determinative of the interpretation of s 386(1) of the FW Act and its application to the same circumstances. We will therefore consider s 386(1)(a) unencumbered by the reasoning and conclusions in *Lunn*.

[66] There are a number of clear textual indicators that the definition of "*dismissed*" in s 386(1)(a) is not to be read as excluding in all circumstances a termination of employment that occurs at the end of a time-limited contract of employment. First, s 386(1)(a) retains, albeit with some modified drafting to fit the textual context, the formulation of termination of employment at the initiative of the employer previously used to define termination of employment in the IR Act (via the Convention) and subsequently in s 170CD(1) of the WR Act. As explained above, that formulation had been the subject of judicial consideration in decisions of the Industrial Relations Court of Australia, most notably by the Full Court in *Mohazab*. The principle of statutory interpretation that where Parliament repeats words which have been judicially construed, it is taken to have intended the words to bear the meaning

[74] (1997) 72 IR 464 at 472

already judicially attributed to them[75], we consider to be applicable here. That s 386(1)(a) should be interpreted consistent with the approach in *Mohazab* was confirmed by the Federal Court Full Court in *Mahony v White*.[76] *Mahony* concerned two cases in each of which the employer took steps to bring about the termination of the employment of an employee performing educational functions in circumstances where it considered that child protection legislation prohibited the employment from continuing. The Full Court quoted the same passages from *Mohazab* as we have above, and relevantly stated (footnotes omitted):

> "[21] It was in this state of the law that the Full Court of the Industrial Relations Court of Australia decided *Mohazab v Dick Smith Electronics Pty Ltd (No 2)* (1995) 62 IR 200. There the question was whether the termination of the employment of the employee concerned had been at the initiative of the employer. The employee had signed a letter of resignation, but that had been done in circumstances where he had been given a choice by his employer either to resign or to have the police called in to investigate what, according to the employer, was the theft of an item of stock. The Full Court held that the employee's resignation had been at the initiative of the employer and had, therefore, been a termination within the meaning of the Convention and the legislation. The effect of this judgment was that, notwithstanding the use of the active voice in the legislation, a termination that had not been done *by* the employer might nonetheless have been, and in that case it had been, done *at the initiative* of the employer and thus covered by the statutory prohibitions.
>
> . . .
>
> [23] Although their Honours were concerned, as they had to be, with meanings conveyed by the terms of the Convention, the formula "at the initiative of the employer" has been retained in the FW Act (albeit not in that precise grammatical arrangement). This judgment remains good authority as to the connotation of that formula.
>
> [24] In each of the cases now before the Full Court, the termination of the employment of the employee concerned was the deliberate, considered, act of the CEO. Even if the CEO were under a statutory obligation of the kind which, on its submission, arose under s 9(1) of the Child Protection Act, compliance with that obligation required it, rather than Mr Mahony or Mr O'Connell, to take the initiative in bringing the relevant employment to an end. It was, in the words of the Full Court in *Mohazab*, "the act of the employer [which resulted] ... in the termination of the employment."

[67] Second, the exception to the s 386(1) definition in s 386(2)(a) for persons "*...employed under a contract of employment for a specified period...*" whose "*...employment has terminated at the end of the period...*" would be otiose if a termination of employment of that nature was incapable of constituting a termination of employment at the initiative of the employer under s.386(1)(a). Although it is possible for the relevant part of s 386(2)(a) to be read as having been included for more abundant caution, the better approach is that it was intended to have a substantive purpose, namely to exclude from the Commission's jurisdiction categories of termination of employment which were otherwise capable of being comprehended by the general definition in s.386(1).

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[75] *Re Alcan Australia Ltd; Ex parte FIMEE* (1994) 181 CLR 96 at 106

[76] [2016] FCAFC 160, 226 IR 221

[68] It might be added that the logic of the approach taken in *Lunn* would also apply to the other categories of termination referred to in s.386(2)(a), namely termination of employment of a person employed under a contract for a specified task upon the completion of the task and of a person employed under a contract for the duration of a season at the end of the season. That is an approach which would like render the inclusion of those categories of termination in the provision otiose.

[69] Third, it would further follow that s 386(3) would also be rendered otiose if a termination of the employment of a person employed under a contract for a specified period at the end of that period, as well as the other two categories of termination encompassed by the exclusion in s 386(2)(a), were incapable of constituting a termination of employment at the initiative of the employer within the primary definition on s 386(1)(a). Section 386(3) operates to negate the exclusion in s 386(2)(a) if the specified conditions are met, but does not affect the operation of s 386(1). It can be inferred that s 386(3), which is in the nature of an anti-avoidance provision, was intended to have practical effect by the legislature and was intended to ameliorate the force of the exclusion in s 386(2)(a) by rendering at least some terminations of employment encompassed by s 386(2)(a) to be dismissals for the purpose of Pt 3-2.

[70] Fourth, s 384(2)(a) gives a clear indication that casual employees who have been employed on a regular and systematic basis and during that service have had a reasonable expectation of continuing employment on a regular and systematic basis are intended to be included in the unfair dismissal scheme in Pt 3-2. Section 382(a) requires that, in order for a person to be "*protected from unfair dismissal*" for the purpose of the Part, the person must have completed a period of employment with the employer of at least the "*minimum employment period*". The "*minimum employment period*" is defined in s 383 to mean one year in the case of a small business employer and 6 months in the case of all other employers. Section 384(1) provides that an employee's "*period of employment*" with an employer is the period of continuous service the employee has completed with that employer. Section 384(2)(a) then provides:

> (2) However:
>
> > (a) a period of service as a casual employee does not count towards the employee's period of employment unless:
> >
> > > (i) the employment as a casual employee was on a regular and systematic basis; and
> > >
> > > (ii) during the period of service as a casual employee, the employee had a reasonable expectation of continuing employment by the employer on a regular and systematic basis; ...

[71] It is reasonably apparent that, notwithstanding that it is expressed as an exclusionary provision, the purpose of s 384(2)(a) is to confirm that casual employees of the type referred to are included in the operation of Pt 3-2 and are able to make an application for an unfair dismissal remedy. However there is a difficulty in that, conventionally, casual employment is taken to be constructed of daily or shorter contracts of employment (although this is not a universal indicium of casual employment and in some cases the existence of a longer-term

contract of employment may be inferred).[77] Where a casual employee is taken to be engaged under a sequence of daily contracts, then if a casual completes their engagement on a particular day and is never thereafter engaged by the employer, contractually the employment has come to an end by agreement due to the effluxion of the contractual term rather than by any act by the employer to terminate the contract. If that situation was incapable of being characterised as a dismissal under s 386(1)(a) it would substantially or entirely defeat the operation of s 386(2)(a).

[72] However it should be made clear that the mere fact that an employer has decided not to offer a new contract of employment at the end of a time-limited contract which represents a genuine agreement by the parties that the employment relationship should come to an end not later than a specified date will not by itself constitute a termination at the initiative of the employer. This point may be illustrated by the decision of the Industrial Relations Court Full Court in *Griffin v Australian Postal Corporation*.[78] That decision concerned a claim by an employee that he had been unlawfully terminated when his employment with Australia Post ceased on his 65th birthday. Australia Post argued that the termination was not at its initiative, and relied on an award which stated that an officer could be employed to the age of 65 and, in the alternative, on two determinations made by it under relevant legislation which permitted it to determine the terms and conditions of employment of its employees. Those determinations had the effect of imposing as a term of the employee's employment the requirement that upon attaining the age of 65 years the employee would cease to be an officer of Australia Post. There was no dispute that Australia Post had the ability to offer further, albeit temporary, employment to an employee after their 65th birthday. The majority (Spender and von Doussa JJ, Marshall J dissenting) held that the employee's employment was not terminated at his employer's initiative. Instead, they concluded that his employment came to an end by operation of law, namely by force of the age term imposed on his employment by the award and determinations, or alternatively by the determinations.

[73] Justice Spender also found (at 373) that a refusal to re-employ an employee after the employee's employment had ended was not a termination at the initiative of the employer.[79] In so finding, Spender and von Doussa JJ also referred to the following observations of McHugh J in *Qantas Airways Ltd v Christie*[80]:

> "... After the age of 60, Mr Christie was unable to remain in the employment relationship because the terms of the 1974, 1981, and 1991 letters were incorporated into his contract by virtue of para 19 of the original conditions of employment…
>
> . . .
>
> Upon reaching 60, Mr Christie had no legal right to continue in the employment of Qantas. His employment ended when he attained the age of 60 because he and Qantas had agreed that it would end when he reached that age. All the benefits of his employment ended at that age because he agreed they would end at that age. Qantas' refusal to employ him past that age was not a termination of employment but a refusal to re-employ an employee after the employee's employment has ended…"

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[77] *4 yearly review of modern awards – Casual employment and Part-time employment* [2017] FWCFB 3541 at [16]-[51]

[78] (1998) 155 ALR 369

[79] Ibid at 373

[80] [1998] HCA 18, (1998) 193 CLR 280 at [65], [67]

[74] Justice Spender agreed with the observations of McHugh J. Justice von Doussa referred to the contrary view expressed by Kirby J to that of McHugh J in *Christie* and to the fact that the other members of the High Court did not express a preference for one or other of the differing approaches expressed by McHugh J and Kirby J, before expressing the view that Gummow J's observations supported the approach of McHugh J rather than the approach of Kirby J. *Griffin* (and *Fisher*) demonstrate that where the employment relationship has come to an end on a specified date by genuine agreement of the employer and employee, any decision by the employer not to offer further employment is to be treated as separate and distinct from the termination of employment.[81] However where the employment contract has a defined contractual term but does not exhibit an agreement that the employment *relationship* will come to an end when the term expires (as in the *D'Lima* situation of a series of short-term standard-form contracts), a decision by the employer not to offer a further contract may become a relevant consideration as to whether there has been a termination at the initiative of the employer.

[75] Having regard to these propositions and the court decisions to which we have earlier referred, we consider that s 386(1)(a) should be interpreted and applied as follows:

(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) As stated in *Mohazab*, 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) In *Mahony v White* the Full Court stated that a 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.

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[81] See also *Peacock v Commonwealth of Australia* (1998) 88 FCR 110 per Wilcox J; *ALHMWU v Commonwealth of Australia* (1994) 55 IR 18 at 19 per Moore J

(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 (*Griffin/Fisher*). However if the time-limited contract does not in truth represent an agreement that the employment relationship will end at a particular time (as, for example, in *D'Lima*), 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 all relevant matters, but the authorities to which we have earlier referred indicate that 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.

If any of the above applies there will be no legally effective time-limit on the employment (*Fisher*).

(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 (*D'Lima/Fisher*).

(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 (*Fisher*).

(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 (*Fisher/D'Lima*).

(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 (*Fisher*).

(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 contract (*Fisher*).

[76] Because the Commissioner in the Decision considered herself bound to follow the Full Bench decision in *Lunn* despite her reservations about its correctness (an approach about which there can be no criticism), her consideration of whether Mr Khayam was dismissed

[82] See M Irving, *The Contract of Employment*, [4.23] at p.178, *Qantas Airways Ltd v Gubbins* (1992) IR 292 at 295

within the meaning of s 386(1)(a) was artificially constrained and did not take into account all the relevant circumstances. This constituted appealable error.

Section 386(2)(a)

[77] As earlier stated, Navitas made a submission that notwithstanding any appealable error made in respect of the interpretation and application of s 386(1)(a), the Decision of the Commission should be affirmed because the exclusion in s 386(2)(a) applied. That submission is based on the proposition that, notwithstanding that the final contract between Mr Khayam and Navitas conferred on the employer an unqualified right to dismiss the employee at any time before the expiry of the term for any reason, it was nonetheless a "*contract of employment for a specified period of time*" for the purposes of s 386(2)(a). Although the submission was not a matter specifically encompassed by the limited grant of permission to appeal in the PTA decision, we consider that in substance it constitutes a notice of contention which it is necessary for us to consider.

[78] An exception with respect to contracts for employment for a specified period of time long predates the FW Act, and was originally derived from Article 2 of the Convention. Under the initial termination of employment scheme in the IR Act, s 170CC authorised the making of regulations excluding employees from the operation of specified provisions in Div VIA subject to specified conditions, including that the exclusion was permitted by paragraph 2, 4 or 5 of Article 2 of the Convention. Reg 30B of the *Industrial Relations Regulations 1996* was made in exercise of this power and relevantly provided that "*employees engaged under a contract of employment for a specified period of time*" were excluded from the operation of Subdivs B, C, D and E of Div 3 of Pt VIA (reg 30B(1)(a)), except where the employee was engaged under a contract of that kind "*if a main purpose of the employee's engagement under a contract of that kind is to avoid the employer's obligations under Subdivision B, C, D or E of Division 3 of Part VIA of the Act*" (reg 30B(2)).

[79] The scope of this exclusion was considered by the Industrial Relations Court (Northrop J) in *Cooper v Darwin Rugby League Inc*[83] in the context of an employment contract which stated that the period of the employment was three years except in the case of misconduct, but also permitted the employment to be terminated on one month's notice. The Court said:

> "The terms of the contract are not elegantly expressed. The clause headed "Employment period" suggests the period of employment is for three years from 10 December 1992, but there is a qualification, namely that the employment could be terminated, presumably by the respondent, at any time "in the case of misconduct", presumably by the applicant.
>
> The clause headed "Notice of Termination" appears to give either party the right to terminate the employment on notice at any time during the three year period. This conclusion follows from the fact that the clause excludes termination in the case of misconduct where the employer terminates the employment "in accordance with the clause relating to the employment Period in" the contract, but provides for termination of either party by notice. In the context, this must relate to notice given within the three year period. There is no reason to suggest that this clause is limited by

[83] (1994) 57 IR 238

> implication to apply to any extension of the employment period after 10 December 1995. In my opinion, the contract of employment is for a specified time but can be terminated before the expiration of that period by either party on notice or by the respondent, as employer, for the misconduct of the applicant, as employee. On this construction of the contract of employment, the applicant is not a worker engaged under a contract of employment for a specified period of time within the meaning of paragraph 2 of Article 2 of the Termination of Employment convention and thus is not excluded, for the purpose of s170CC of the Act, from the operation of Subdivisions B, C, D and E of Division 3 of Part VIA of the Act."

[80] The Court went on to express, in the alternative, the view that even if the contract could be characterised as a "*contract of employment for a specified period of time*", the exclusion in reg 30B(1)(a) would not apply because the employment was terminated before the end of the specified period (emphasis added):

> "Of more importance generally is the fact that, even if the contract of employment was such a contract, the respondent, possibly, was not entitled to the immunity conferred by s177CC of the Act. One thing is clear. The employment of the applicant was terminated by the unilateral act of the respondent. The employment was not terminated by agreement of the employer and employee. It was not terminated by effluxion of the period of time specified in the contract of employment. In these circumstances, it is only fair that the issue of whether the termination was lawful or not depends upon all of the facts leading up to the unilateral termination of employment by the respondent. The Court has not considered those facts. *There is much to be said for the view that the exclusion of the operation of the provisions of the Act specified by regulation made under s177CC arises only where the term specified by the contract of employment has ended by effluxion of time.* The relevant provisions cannot apply where the employment is terminated by agreement or by the unilateral action of an employee. In these events, the employer has no remedy and the exclusion provisions cannot apply. In all circumstances, the motion is refused."

[81] A few days after the decision in *Cooper* was delivered, the same approach to what constituted a "*contract of employment for a specified period of time*" under reg 30B(1)(a) was taken by the Court (von Doussa J) in *Andersen v Umbakumba Community Council*.[84] That matter concerned an employee who was subject to an employment contract which provided for a maximum term of employment for two years but also gave either party an unqualified right to terminate the employment on two weeks' notice or, in the case of the employer, on the payment of two weeks' salary in lieu of notice. The Court began its analysis by stating that the expression "*contract of employment for a specified period of time*" was to be given the meaning it bore in the Convention and referred to the rules applicable to the interpretation of an international convention enacted into Australian domestic law[85], but then said:

> "In the present case no reference was made by the parties to these rules of interpretation, or to any extrinsic material that might throw light on the precise limits of the expression under consideration. In other cases it may become necessary to have regard to materials of the kinds referred to in Art 31, para 2 and Art 32 of the Vienna Convention, but in the present case I consider that the contract of employment

[84] (1994) 126 ALR 121, 56 IR 102

[85] Ibid at 124-125

between the parties is so plainly not a contract for a specified period of time that I have not done so.

In the expression, 'specified' is the past participle of the verb 'to specify'. The ordinary meaning in the English language of 'to specify' is to mention, speak of, or name (something) definitely or explicitly; to set down or state categorically or particularly; to relate in detail: *Shorter Oxford English Dictionary*, 3rd ed. In the context of Art 2, para 2(a) of the Termination of Employment Convention 'specified' identifies a period of time or a task the scope and parameters of which are stated definitely. A 'specified period of time' is a period of time that has certainty about it. A contract of employment for a specified period of time would be one where the time of commencement and the time of completion are unambiguously identified by a term of the contract, either by the contract stating definite dates, or by stating the time or criterion by which one or other end of the period of time is fixed, and by stating the duration of the contract of employment. As the period of time is defined in this way, it is apt to refer to a contract of employment for a specified period of time as a contract of employment for a fixed term, although this is not the description used in the regulation.

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.

. . .

In the present case cl 3 and Sch 1 of the employment agreement clearly state both a commencement date for the employment and a cessation date, but in light of the right on either party to the contract arising under cl 21(c) to bring the employment to an end on two weeks' notice, and the right of the employer under cl 21(d) to bring the employment to end without notice on payment of two weeks salary, the cessation date merely records the outer limit of a period beyond which the contract of employment will not run (unless a new agreement is entered into pursuant to cl 29). Within the period stated in Sch 1 the period of the contract of employment is indeterminate. At any point during the two year period identified by the commencement and cessation dates neither side could know with any certainty when the period of the contract of employment might come to an end.

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. In this case, however, the unqualified rights to terminate without reason under cl 21(c) and cl 21(d) make it clear, in my opinion, that the contract cannot be so characterised."

[82] It may be noted that the interpretation adopted in *Andersen* 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.

[83] The approach in *Andersen* and *Cooper* was followed in subsequent Industrial Relations Court decisions such as *D'Lima*[86] and *Dadey v Edith Cowan University*[87], and was later referred to with approval by the Federal Court Full Court in *Barratt v Howard*.[88] In 1997 reg 30B(1)(a) was amended (by Statutory Rule No 101 of 1997) to add the following note:

> "[NOTE: The expression `employee engaged under a contract of employment for a specified period of time' used in paragraph 30B(1)(a) has been addressed in a number of cases before the Industrial Relations Court of Australia, including, in particular, *Cooper v Darwin Rugby League Inc* (1994) 57 IR 238, *Andersen v Umbakumba Community Council* (1994) 136 ALR 121, *D'Lima v Board of Management, Princess Margaret Hospital of Children* (1995-1996) 64 IR 19 and *Fisher v Edith Cowan University* (unreported judgement of Madgwick J, 12 November 1996, No. WI 1061 of 1996).]"

[84] The Explanatory Statement accompanying the amending statutory rule is instructive. It relevantly stated:

> "Section 170CC of the *Workplace Relations Act 1996* (the Act) provides that the regulations may exclude specified classes of employees from the operation of the termination of employment provisions in Division 3 of Part VIA of the Act.
>
> Regulation 30B of the existing regulations excludes a number of specified classes of employees from the operation of the termination provisions. In particular, paragraph 30B(1)(a) of the existing regulations excludes 'an employee engaged under a contract of employment for a specified period of time' from Subdivisions B, C, D, E and F of Division 3 of Part VIA of the Act.
>
> Regulation 3.1 assists in interpreting the expression 'an employee engaged under a contract of employment for a specified period of time' by inserting a note which refers to a number of cases before the Industrial Relations Court of Australia, which have addressed the expression.
>
> 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.

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[86] [1995] IRCA 407, (1995) 64 IR 19 at 25

[87] (1996) 70 IR 295 at 296-297

[88] [2000] FCA 190, 96 FCR 428 at [70], see also *Bruce v AWB Ltd* [2000] FCA 1281 at [7]

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 series of specified period contracts are entered into merely for administrative convenience then the Court has looked beyond the contract terms to the reality of the employment relationship. In *D'Lima v Board of Management, Princess Margaret Hospital of Children* (1995-96) 64 IR 19 for example, an employee was engaged on a series of short term contracts, each for a specified period of time. There was no break in the continuity of contracts except for a period of leave. A continuous employment relationship was found to exist, and the employee was not excluded on the basis of being an employee engaged under a contract of employment for a specified period of time.

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 the *Fisher* case the employee was employed under three fixed term contracts. Prior to the expiration of the final contract the position was advertised. The applicant applied for the position but was not successful in obtaining it. The particular context of the employment was seen to be relevant in that it was not a case where the use of a fixed term contract had been unreal, unconscientious or oppressive as against an employee of special vulnerability. In reaching this conclusion it was relevant that the use of fixed term contracts was accepted and regulated in the award provisions covering the employment of the employee at the university."

[85] The discussion of *Cooper* in the Explanatory Statement is notable because it expressly refers directly to the passage in the decision quoted in paragraph [80] above in which the Court expressed the view that reg 30B(1)(a) did not apply to a termination of employment caused by a unilateral act of the employer rather than by the effluxion of time - that is, it did not apply to a termination which occurred prior to the expiry of a contract for a specified period. The maker of the statutory rule therefore evinced an intention that reg 30B(1)(a) be interpreted in a manner consistent with *Cooper* in that respect. (The references to the decision in *D'Lima* and *Fisher* are also noteworthy having regard to our earlier consideration concerning s 386(1)(a).)

[86] As a result of the *Workplace Relations Amendment (Fair Termination) Act 2003*, the exclusion that had been contained in reg 30B(1)(a) became part of the WR Act, as s.170CBA(1)(a). There was no change to the language used in the exclusion. The note which

had previously accompanied reg 30B(1)(a) now followed s 170CBA(1)(a), and remained in the WR Act until the enactment of the FW Act.

[87] When, after 1996 the unfair dismissal jurisdiction was transferred from the Industrial Relations Court to the AIRC as a result of the *Workplace Relations and Other Legislation Amendment Act 1996*, the AIRC consistently applied the approach taken in *Andersen* and *Cooper* that the expression "*contract of employment for a specified period of time*" as it appeared in s 170CBA(1)(a) did not encompass a time-limited contract which conferred an unqualified right of termination prior to its expiry.[89] To that extent the expression therefore had a judicially-determined, well-settled interpretation at the time the FW Act was enacted. However, notwithstanding the note that followed reg 30B(1)(a) and subsequently s 170CBA(1)(a), there were divided views as to whether to follow the view expressed in *Cooper* that the exclusion was not to be understood as applicable when the termination of employment occurred by the unilateral act of the employer before the end of the "*specified period of time*".[90]

[88] It was against that background that s 386(2) was enacted. 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*". This expression is of course identical to that used in the former reg 30B(1)(a) and then s 170CBA(1)(a) (later renumbered as s 386). The second requirement, which was not contained in the preceding legislation, provides that the exclusion only applies where the employment has terminated at the end of the specified period.

[89] Navitas' submission that the addition of the second requirement amounts to a recasting of the entire provision, such that the earlier judicial interpretation of the expression "*contract of employment for a specified period of time*" can be ignored, finds little support in the text of the provision. The obvious inference to be drawn from retention of an expression with such a well-settled interpretation is that the legislature intended it to have the same meaning, namely that it did not include an employment contract which had a maximum or outer time limit but contained an unqualified right to terminate the employment beforehand. If the legislature intended to change the meaning, it would reasonably be expected that a different expression would have been used. The text of the second requirement in s 386(2)(a) is certainly new, but it only makes express the implication drawn from reg 30B(1)(a) in *Cooper*, and as earlier discussed apparently adopted in the subsequent statutory note, that the exclusion was not to apply where the employment was terminated by the unilateral act of the employer before the end of the specified period. There is nothing in the text of the second requirement which can be read as effecting an alteration in the meaning of the language used to express the first

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[89] See for example the AIRC Full Bench decisions in *Ledington v University of Sunshine Coast* (2003) 127 IR 152 at [34] and *SPC Ardmona Operations Ltd v Esam* (2005) 141 IR 338 at [68]-[69]

[90] The view in *Cooper* was followed in *Chinnappan v Queensland University of Technology* [1995] IRCA 327, *Hughes v Monash University* Print R4303 [1999] AIRC 407 (27 April 1999) at [34] and (apparently) *Re Higher Education Industry – General Staff – Award 2010* (2010) 194 IR 409 at [14]-[15], but not in *Nikulin v University of Newcastle* Print R6875 [1999] AIRC 1554 (7 July 1999) at [33]-[34], *Coy v CB's Entertainment Network* Print Q4373 [1998] AIRC 1090 (31 July 1998), *Daba v University of Technology, Sydney* (1999) 92 IR 185 at 186-7, *Trigar v Griffith University* PR936233 [2003] AIRC 1205 (29 September 2003) or *Banchit v St Mina's Global Restaurants Pty Ltd* PR940477 [2003] AIRC 1416 (14 November 2003)

requirement, and Navitas' submissions (nor those of the Ai Group or the ACCI) did not explain how any contrary textual conclusion could be reached.

[90] Navitas' submission in substance is founded on the proposition that the deletion of the statutory note and paragraph 1532 of the Explanatory Memorandum should dictate a reinterpretation of the expression "*contract of employment for a specified period of time*" in s.386(2)(a) and a departure from *Andersen* and *Cooper*. That submission cannot be accepted.

[91] Section 13(1) of the *Acts Interpretation Act 1901*, which currently provides that all material in an Act from and including the first section to the end of the last section or schedule is part of the Act, was added by the *Acts Interpretation Amendment Act 2011* and took effect on 27 December 2011. Prior to that amendment, s 13(3) of the *Acts Interpretation Act* relevantly provided: "*No marginal note, footnote or endnote to an Act, and no heading to a section of an Act, shall be taken to be part of the Act*". The statutory note that was contained in the WR Act therefore did not actually form part of the text of that Act. Nor did the statutory notes contained in the FW Act form part of the text of that Act at the time of its enactment, and because of s 40A of the FW Act that remains the case today.[91] Accordingly the non-inclusion of the previous note in the FW Act cannot be characterised as a non re-enactment of it. A note not forming part of an Act may legitimately be used as an aid to the construction of a "doubtful or ambiguous" provision of an Act, but it cannot govern the interpretation of an Act or be used to contradict its text.[92] There is no authority that we are aware of which suggests that the omission of a note in relation to the re-enactment of a statutory provision can be used to infer an intention to change the meaning of an otherwise unchanged expression which has a well-settled meaning. In any event, we do not consider that the inference sought to be drawn from the omission by Navitas necessarily arises. Alternative inferences are available - for example, that, at least as far as the decision in *Cooper* is concerned, the addition of the words "*and the employment has terminated at the end of the period, on completion of the task, or at the end of the season*" made the note unnecessary.

[92] The passage from the Explanatory Memorandum relied upon by Navitas reads as follows (emphasis added):

> "1532. Paragraph 386(2)(a) reflects the common law position that termination in these circumstances would not be a dismissal. *The fact that an employment contract may allow for earlier termination would not alter the application of this provision as the employment has terminated at the end of the period, task or season.* However, if a person engaged on this sort of contract is terminated prior to the end time specified in the contract, they may seek an unfair dismissal remedy if they satisfy the other requirements."

[93] It may be accepted that the emphasised sentence in the above passage may, on one reading, be understood as meaning that s 386(2)(a) is intended to apply notwithstanding that a time-limited contract of employment allows for a right of termination exercisable prior to the expiry of the time limit. However the passage does not demonstrate any unambiguous intention to widen the scope of the exclusion as compared to the preceding legislative exclusion upon which it is so clearly based, nor does make it clear whether it is merely maintaining the previous position whereby the capacity to terminate a time-limited contract

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[91] See *Centennial Northern Mining Services Pty Ltd v CFMEU* [2015] FCAFC 100 at [30]
[92] *The Ombudsman v Moroney* (1983) 1 NSWLR 317 at 324-5, *Fair Work Ombudsman v Wongtas Pty Ltd* [2011] FCA 633, 195 FCR 55 at [47]

early for breach did not take the contract outside the scope of the exclusion or whether it was intended to extend the exclusion to encompass time-limited contracts with an unqualified right of early termination.

[94] In any event, Navitas (and the peak councils which supported its position) have not demonstrated a proper basis upon which this passage in the Explanatory Memorandum can be used to instruct the proper interpretation of s 386(2)(a). Under s 15AB(1) of the *Acts Interpretation Act 1901*, consideration may be given to an explanatory memorandum for the following purposes:

> (a) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act; or
>
> (b) to determine the meaning of the provision when:
>
> (i) the provision is ambiguous or obscure; or
>
> (ii) the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act leads to a result that is manifestly absurd or is unreasonable.

[95] Navitas seeks to use the Explanatory Memorandum to guide the meaning of the expression "*contract of employment for a specified period of time*" in s 386(2)(a). We do not consider that this expression is ambiguous or obscure. It has a well-established meaning, determined in judicial decisions, that has been derived from the ordinary meaning of the language used. Navitas does not seek to confirm that ordinary meaning, but to overturn it. It was not submitted, and we do not otherwise consider it to be the case, that the established ordinary meaning leads to a result that is manifestly absurd or unreasonable. It reflects the position which prevailed under the IR Act and the WR Act without any identifiable difficulty. In substance, Navitas seeks, impermissibly, to use the passage from the Explanatory Memorandum to displace the actual words used in the statute. As was stated by Mason CJ and Wilson and Dawson JJ in the High Court decision in *Re Bolton; Ex parte Bean*[93], even where there is legitimate recourse under s 15AB to the use of extrinsic material (in that case, a second reading speech) to aid the interpretation of a statute, "The words of a Minister must not be substituted for the text of the law... The function of the Court is to give effect to the will of Parliament as expressed in the law."[94]

[96] The final contract of employment between Mr Khayam and Navitas, embodied in the letter of offer set out in paragraph [5] above, provided for an unqualified right for either party to terminate the contract on four weeks' written notice or for Navitas to terminate on the provision of four weeks' pay in lieu of notice. The contract was therefore not a contract of employment for a specified period, and the exclusion in s 386(2)(a) did not apply.

Conclusion and orders

[97] For the reasons given, the appeal is upheld and the Decision will be quashed.

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[93] [1987] HCA 12, 162 CLR 514

[94] Ibid at [4]

[98] It remains necessary for the question of whether Mr Khayam was dismissed by Navitas within the meaning of s 386(1)(a) to be re-determined. We consider the preferable course is for the matter to be referred back to the Commissioner to determine this question rather than determining it ourselves. This is for three reasons. The first is that the Commissioner has heard the evidence concerning this question and is better placed to assess that evidence than us. Second, it is possible that the parties may wish to adduce further evidence bearing on the question having regard to our reasons for decision. Third, in the event that the Commissioner determines that there was a dismissal, the matter may then conveniently move forward to a hearing and determination of the merits of Mr Khayam's application.

[99] Accordingly we order as follows:

(1) The appeal is upheld.

(2) The Decision ([2017] FWC 1524) is quashed.

(3) The matter (U2016/8466) is referred back to Commissioner Hunt for re-determination in accordance with our reasons for decision.

DECISION OF DEPUTY PRESIDENT COLMAN

[100] 'Outer limit contracts' are a common mode of employment in Australia. The expression is not a term of art. It is generally understood as referring to contracts that specify a particular term of employment but provide for the possibility of a party terminating the contract before the term expires.

[101] The appellant in this matter, Mr Khayam, was employed on a series of outer limit contracts by Navitas English Pty Ltd (Navitas). At the expiry of the last of these contracts, Navitas did not offer Mr Khayam another contract, for reasons related to its assessment of his performance. Mr Khayam applied under s 394 of the FW Act for an unfair dismissal remedy. Navitas maintained that it did not dismiss Mr Khayam and that his employment ended upon the expiry of the contract, by effluxion of time.

[102] Section 386(1) of the FW Act provides that a person is dismissed only if the person's employment '*has been terminated on the employer's initiative.*' If a person has not been dismissed, no action for unfair dismissal is available (s 385(a)).

[103] At first instance, Commissioner Hunt accepted Navitas' contention that it had not dismissed Mr Khayam. She considered herself bound to apply the decision of the Full Bench of the Australian Industrial Relations Commission in *Department of Justice v Lunn.*[95] In that case, the Full Bench concluded that, when an outer limit contract reaches its nominated end date, the contract '*terminates through the effluxion of time and there is no termination of employment at the initiative of the employer*'.[96]

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[95] [2006] AIRC 756, 158 IR 410

[96] Ibid at [10]

[104] Although she had reservations about the correctness of *Lunn* and its applicability to the FW Act, the Commissioner stated:

> "[136] In the same way Hatcher VP in *Jin* was bound by the Full Bench authority in *Lunn,* so too am I, and accordingly I must find that in accordance with the authority in *Lunn*, there has not been a dismissal at the initiative of Navitas. Relevant to s.386(1)(a), the employment came to an end due to the effluxion of time."

[105] *Lunn* concerned an unfair dismissal application brought under the WR Act, however the relevant provisions were very similar to s 386(1) of the FW Act. Under s 170CE of the WR Act, an employee whose employment had been terminated by the employer could make an application to the Commission for relief. Termination of employment was defined in s 170CB(1) as 'termination at the initiative of the employer'.

[106] Mr Khayam sought permission to appeal the decision of Commissioner Hunt. A differently constituted Full Bench granted permission to appeal,[97] noting that the applicability of the reasoning in *Lunn* to the FW Act had not been the subject of analysis by a Full Bench, and that the appeal concerned a matter of importance and general application enlivening the public interest.[98] The substantive appeal was heard on 12 September 2017.

[107] Mr Khayam's notice of appeal advanced two grounds, however permission to appeal was granted only in relation to the first. This contended that the Commissioner erred in finding that Mr Khayam was not dismissed for the purposes of ss 385(a) and 386(1)(a). Mr Khayam submitted that *Lunn* was either wrong when it was decided or is not applicable to the FW Act. He further contended that the Commissioner should have approached s 386(1) by asking what, as a matter of practical reality, brought about the end of the employment relationship. Mr Khayam submitted that, had the correct approach been adopted, the Commissioner should have found that Navitas brought the employment relationship to an end, in circumstances where it decided not to continue the employment due to alleged performance issues.

The decision in Lunn

[108] *Lunn* decided that 'termination of employment at the initiative of the employer', for the purposes of the WR Act, meant termination of the contract of employment, not the employment relationship. This conclusion rested on a contractual analysis of s 170CE(1) of the WR Act. The Full Bench contrasted that provision with its predecessor in the *Industrial Relations Act 1988* (IR Act), and observed:

> "[28] Prior to 1996, s.170CB of the WR Act required the expression *"termination of employment at the initiative of the employer"* in s.170CE to be interpreted by reference to the meaning of the expression *"termination of employment"* in the Termination of Employment Convention. **In that Convention the expression *"termination of employment"* refers to termination of the employment *relationship* rather than termination of an employment contract.** In 1996 s.170CB was amended and, since that time, the expression *"termination of employment at the initiative of the employer"* in s.170CE has its ordinary meaning and refers to termination of a contract

[97] [2017] FWCFB 4092

[98] [31] to [33]

> of employment. Thus, in this case we are concerned with whether there was a termination of Ms Lunn's contract of employment at the initiative of the employer and not with whether there was a termination of the employment relationship". (Emphasis added)

[109] 'Termination of employment' in the Convention does not in fact refer to termination of the 'employment relationship'. The latter expression does not appear in the Convention. The second sentence in the passage above was perhaps intended to be a characterisation of what the Convention means by 'termination of employment.' In this regard, an earlier decision of the Full Court of the Industrial Relations Court of Australia in *Mohazab v Dick Smith Electronics Pty Ltd*[99] had found as follows:

> "It accords with the purpose of the Convention to treat the expression 'termination at the initiative of the employer' as a reference to a termination that is brought about at the initiative of the employer which is not agreed to by the employee. Consistent with the **ordinary meaning of the expression in the Convention**, a termination of employment at the initiative of the employer may be treated as a termination in which the action of the employer is the principal contributing factor which leads to the termination of the employment relationship." (Emphasis added)

[110] Although the Full Court's analysis of the expression '*ordinary meaning of the expression'* is framed with reference to the Convention, I do not consider that the ordinary meaning they identify is affected by the Convention. It is rather the plain meaning of the expression that the Court identified, and that plain meaning is found in the Convention.

[111] *Lunn* would therefore appear to have drawn too stark a contrast at [28] between the meaning of 'termination of employment' prior to 1996, which was linked to the Convention by s.170CB of the IR Act, and after 1996, when the expression was defined in s 170CD of the WR Act.[100] There is no special indication in the Convention that termination of employment means termination of the employment relationship. Rather, the ordinary meaning of the expression is that it is not confined to termination of the contract of employment.

[112] Other decisions under the WR Act applied the approach in *Mohazab* and focused on the question of whether the employer had terminated the employment relationship. In *Searle v Moly Mines,*[101] the Full Bench of the AIRC considered a case of an alleged abandonment of employment, in circumstances where the employee had, unbeknown to the employer, been on certificated sick leave at the time she received the employer's termination letter confirming her abandonment. The employee had relied on medical staff to forward her certificates to the employer, which they did not do. The Commissioner at first instance applied common law principles relating to termination of contract in determining that the employee had abandoned her employment. The Full Bench decided that such principles '*may not yield the correct answer in any given case*', and in the matter before it they had proved to be a '*distraction*' from the question posed by the Act.[102] In considering the relevant test (this time in s 642(1) of the WR Act, as amended by the *WorkChoices* legislation) the Full Bench stated that it was the

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[99] [1995] IRCA 625, 62 IR 200 at 205, 206

[100] The definition of termination of employment in s.170CD of the WR Act was essentially the same as the definition of that expression in article 3 of the Convention.

[101] [2008] AIRCFB 1088, Giudice J, O'Callaghan SDP and Cribb C

[102] At [39]

'termination of the employment relationship which is important'.[103] The Full Bench found that the employer's letter of termination had terminated the employment relationship.

[113] Authorities before and since *Lunn* have distinguished between the contract of employment and the employment relationship, notably the decisions of the High Court in *Byrne and Frew v Australian Airlines Ltd,*[104] *Visscher v Giudice,*[105] and *Commonwealth Bank of Australia v Barker.*[106] In *Byrne and Frew*, the Court noted that a wrongful dismissal could terminate the employment relationship although the contract of employment might continue until the employee accepted any repudiation that might have arisen from wrongful dismissal.[107] Similar passages can be found in *Barker*[108] and *Automatic Fire Sprinklers Pty Ltd v Watson.*[109] And in *Visscher*, the High Court stated that termination of the employment relationship and the termination of the contract of employment are two different concepts.[110]

[114] In my opinion, the conclusion at [28] in *Lunn* that '*termination of employment at the initiative of the employer'* in s 170CE of the WR Act referred only to termination of the contract of employment was not correct. 'Termination of employment' referred to termination of the employment relationship.

The 'employment relationship'

[115] The 'employment relationship' is a relationship *of employment*: it is not simply any relationship that has some connection to employment. 'Employment' means the 'state of being employed' or the 'state of having paid work'.[111] The employment relationship is formed and substantially governed by the contract of employment. It may also be affected by statute and industrial instruments such as awards and enterprise agreements. It is useful to consider how the distinction between the employment relationship and the contract of employment can manifest itself in circumstances of termination of employment.

[116] Commonly, the contract of employment and the employment relationship will end at the same time as one another, and in the same manner, either at the initiative of the employer or the employee, or by agreement. As the Full Court of the Industrial Relations Court noted in *Brackenridge v Toyota Motor Corporation Australia Limited*, ordinarily the conceptual difference between the contract of employment and the employment relationship does not matter; dismissal will ordinarily terminate both the particular contract of employment and the employment relationship.[112]

[117] A second, not uncommon situation is where the employment relationship ends, but the contract of employment endures. This is what can occur in cases of wrongful dismissal, where the employment ends, but the employee does not accept repudiation of the contract, and it

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[103] At [23]

[104] (1995) 185 CLR 410, at 427 per Brennan CJ, Dawson and Toohey JJ

[105] (2009) 239 CLR 361 per Heydon, Crennan, Kiefel and Bell JJ at 379

[106] (2014) 253 CLR 169 per French CJ, Bell and Keane JJ, at 170

[107] At 427

[108] (2014) 253 CLR 169 at [3]

[109] (1946) 72 CLR 435 at 471

[110] At 379

[111] Macquarie Dictionary, 5th Edition

[112] (1996) 142 ALR 99

remains in existence. The High Court decisions in *Automatic Fire Sprinklers, Byrne and Frew, Barker* and *Visscher* contemplate this situation.

[118] A third theoretical postulation might be that the contract of employment ends but the employment relationship continues. *Lunn* was quite clear that '*there can be no employment relationship without there also being a contract of employment in existence between the parties to the employment relationship'*.[113] It is very difficult to see how the employment relationship could exist in a contractual void. There might be rare cases where statute deems employment to survive the termination of the contract of employment. But even here there is likely to be some form of implied contractual foundation to the ongoing relationship.

[119] The contention in *Lunn* and in the present appeal was not that the employment relationship had survived the termination of the outer limit contract: both Ms Lunn and Mr Khayam were told in advance of their contracts' termination that they would not be offered a further contract, and it was acknowledged that the contract and the employment relationship ended on the same day. Rather, the contention was that while the outer limit contract terminated in accordance with the agreement of the parties, the employment relationship ended contemporaneously but at the initiative of the employer.

[120] During a period of employment governed by an outer limit contract, legally significant events might occur that could affect the analysis of how the employment relationship might end, despite the terms of the contract. The employer and employee might enter into a different contract, or vary the existing contract to include a relevant new term. A provision in an enterprise agreement might be triggered, requiring the conversion of the employee to permanent employment. The employer might represent or promise to the employee that the relationship will continue beyond the outer limit of the contract, conferring on the employee certain rights in law or equity concerning the employment. However, in many cases the situation will simply be that an employer and an employee have agreed to a contract with an expiry date, the contract has run its course, and the employment relationship has terminated precisely in the manner that the parties intended. That there may have been a sequence of such contracts does not of itself alter anything. Nor does the fact that the employer might have considered the employee's performance in deliberating upon whether to enter into a new contract (and relationship).

[121] In *Victoria v Commonwealth,*[114] the High Court considered the Victorian government's constitutional challenge to the *Industrial Relations Reform Act 1993*. Among other things, the relevant provisions stated that an employer (including the State of Victoria) *'must not terminate an employee's employment'* unless there was a valid reason. It was contended that these and other provisions offended the principle in re *Australian Education Union,*[115] namely that the Commonwealth cannot pass legislation to prevent a State from determining the number and identity of persons whom it wishes to employ or dismiss, as well as their term of appointment. The Court noted that '*as a matter of ordinary language, an employer does not terminate an employee's employment when his or her term of employment expires. Rather, employment comes to an end by agreement, or, where the term is fixed by award or statute, by operation of law.*'[116]

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[113] At [27]

[114] 187 CLR 416

[115] (1995) 184 CLR 188

[116] At 520, per Brennan CJ, Toohey, Gaudron, McHugh, and Gummow JJ

[122] In this passage the High Court was not specifically considering the meaning of the expression 'termination of employment at the initiative of the employer'.[117] It was however considering whether the expiry of a 'term' of employment involves a termination of employment by the employer. The passage above describes what will occur in cases where the employment ends at the conclusion of an outer limit contract, absent other significant factors.

Section 386(1) of the FW Act

[123] Against this background, it is necessary to consider s 386(1) of the FW Act. This provides that a person has been dismissed if '*the person's employment with his or her employer has been terminated on the employer's initiative'*, or if there has been a resignation meeting certain requirements.

[124] The use of the term 'employment' in s 386(1) can be contrasted with the reference to 'contract of employment' in the following subsection. The use of these two different expressions in successive provisions points to a distinction. There is no textual or other basis to read termination of 'employment' in s 386(1) as a reference to termination of the contract of employment. It is quite evident in my view that the FW Act does not define dismissal by reference to the contract of employment alone. Section 386(1) and (2) reflect the conceptual distinction referred to earlier. This conclusion is reinforced by paragraph 1528 of the Explanatory Memorandum, which states that s 386(1) is intended to capture the case law relating to the meaning of 'termination at the initiative of the employer', and express reference is made to *Mohazab.*

[125] Whilst analytically relevant to the question of whether there has been a dismissal, I would note that the facts of *Mohazab,* which concerned forced resignation, seem remote from the consensual use of time-limited contracts. Mr Mohazab was called to an interview and asked to respond to allegations of misconduct. He was told that unless he resigned, the company would ask the police to charge him with an offence. He was then escorted from the premises, and waited in the car park while his employer prepared a letter of resignation. He was then presented with the letter of resignation, which he signed.[118]

[126] In any event, I consider that the plain language of s 386(1) of the FW Act, confirmed by recourse to the Explanatory Memorandum as the *Acts Interpretation Act 1901* in this case permits, requires consideration of whether the employer terminated the employment relationship, and that this in turn requires examination of whether an action of the employer was the principal contributing factor that led to its termination.

[127] As was noted in *Jin v Rail Corporation New South Wales,*[119] such a construction of s 386(1) would appear to be harmonious with the apparent legislative intention that certain casual employees have access to unfair dismissal remedies. Section 384(2)(a) deems service of casual employees whose employment has been on a regular and systematic basis to 'count' as service for the purposes of the minimum period of employment a person must serve before

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[117] Section 170CB of the IR Act as amended stated that an expression had the same meaning as in the Convention, and the Convention defined termination of employment as 'termination of employment at the initiative of the employer'.

[118] Today of course, this scenario would likely fall within the extended definition of 'dismissed' in s 386(1)(b), which concerns forced resignations.

[119] [2015] FWC 4248

bringing an unfair dismissal claim (s 383).[120] However, typically, each separate engagement of a casual employee stands alone and there is no termination of employment by the employer at the conclusion of each of them. The basis on which a casual employee might be considered to have been dismissed by the employer in the typical case is obscure. The conclusion that s 386(1) is concerned with the termination of the employment relationship, rather than just the contract of employment, is more compatible with a construction of Part 3-2 that enables certain casuals to bring unfair dismissal claims, although in my view there remain difficulties with such a construction.[121]

[128] The correct approach to interpreting s 386(1) is akin to the one that prevailed under the WR Act. In applying s 386(1) to a case involving outer limit contracts, all of the circumstances should be considered to determine whether the employer terminated the employment relationship. It is necessary to consider the outer limit contract (including whether it is valid or may have been vitiated in some way), the possible relevance of statute and industrial instruments, and promises or representations that might have been made to the employee by the employer during the employment. In short, there may be more to the employment relationship than the outer limit contract. However, in the absence of other significant factors, the employment will have come to an end by the effluxion of time in accordance with the agreement of the parties. The High Court's observation in *Victoria v Commonwealth* will be apposite, even if it is not a binding statement of law in relation to the interpretation of s 386(1): '*as a matter of ordinary language, an employer does not terminate an employee's employment when his or her term of employment expires.'*

[129] Although *Lunn* formulated a general principle that I consider was not accurate, the Full Bench made an observation which is as relevant to the FW Act today as it was to the WR Act then:

> "The Department's practice of engaging almost all staff on successive 'outer limit' contracts may be viewed by some as industrially contentious. However, subject to legislative constraints, employers are entitled to structure their affairs, including the contracts they offer to employees, in the way that they think best suits their interests. There is nothing in the WR Act that prevents an employer from offering a series of 'outer limit' contracts to an employee."[122]

Application of s 386(1) to Mr Khayam

[130] Mr Khayam contends that the principal contributing factor that led to the termination of his employment relationship with Navitas was the employer's decision not to offer him another contract.

[131] Mr Khayam worked for Navitas as a casual employee between 2005 and 2012. From 2012 to 2016, he was employed on successive outer limit contracts. The final contract contained a clause that recorded the parties' agreement that the *'employment will terminate*

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[120] On one view, this provision does no more than allow casual employees who convert to permanent employment to 'count' eligible service as a casual towards the minimum period of employment.

[121] One of the jurisdictional facts which the Commission must decide before considering the merits of any unfair dismissal application is that the application was made within 21 days after the dismissal took effect, or such other period as the Commission allows.[121] The FW Act requires that the date of dismissal must be identified with certainty. Casuals who are simply not re-engaged may have difficulty identifying such a date.

[122] At [42]

automatically on the Expiry Date, unless it is terminated earlier by either party'. Mr Khayam wanted to enter into a further contract. Navitas did not. It had decided that, when the contract expired, it would not offer another contract to Mr Khayam because of its concerns about his performance. The contract reached its expiry date and Mr Khayam's employment with Navitas ended on that day, as Mr Khayam and Navitas had agreed.

[132] Mr Khayam did not contend that the outer limit contract was vitiated, varied or replaced. No other contracts or contractual terms were said to be relevant.

[133] The *Navitas English Enterprise Agreement 2013-2015* covered Mr Khayam's employment. Clause 11.1 contemplated the use of 'fixed term' contracts. Clause 11.4 stated that Navitas '*will determine in its absolute discretion'* whether to '*offer or renew'* fixed term contracts.[123]

[134] Mr Khayam did not establish that Navitas made any representation to him concerning ongoing employment beyond the end date in the contract. He contended that he was '*led to believe'* that a typical progression involved moving from casual to fixed term contracts and then to an ongoing role.[124] However, he could not identify who led him to this belief, when any representation was made, or precisely what the representation was.[125] Further, his evidence showed an understanding that there was no assurance of ongoing employment at all.[126] Mr Khayam also relied on a Navitas policy document concerning progression to ongoing employment for teaching staff; however this document states that the availability of any ongoing contracts will be based on the operational needs and requirements of Navitas.[127] As to any representation that might have been said to have occurred prior to 16 June 2014, I note that the final contract contained a provision stating that it '*supersedes any previous offer, agreement, representation, discussion or understanding regarding your proposed employment with Navitas*'. In my view, the only clear representation that Navitas made to Mr Khayam concerning the future of the employment relationship was that it would end on the expiry of the outer limit contract.

[135] Considering all of the circumstances in this appeal, the evidence before the Commission simply does not establish that Navitas terminated the employment relationship between it and Mr Khayam. It did something altogether different; it decided not to enter into a new employment relationship. What brought the employment relationship between Mr Khayam and Navitas to an end was the expiry of the last outer limit contract by the effluxion of time, as the parties had agreed.

Section 386(2)

[136] Navitas advanced a contention on appeal that, regardless of any error the Commissioner might have made in relation to s 386(1), Mr Khayam was employed on a contract for a 'specified period' for the purpose of s 386(2). The Commissioner made no

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[123] There was some consideration at first instance about whether Mr Khayam's contract fell within the definition of 'fixed term contract' for the purposes of the enterprise agreement, which stated that '*fixed-term employment has a start date and a finish date, and occurs for a specified period ...*'. In my view the contract clearly did fall within this definition.

[124] Paragraph 10, Statement of Mr Khayam, AB 220

[125] See for example PN 143, 144

[126] See for example PN 200-202, and Witness Statement of Mr Khayam, paragraph 40

[127] Third witness statement of Mr Khayam, paragraph 4 (AB437) and Annexure 20

findings in this regard. She found rather that, if Mr Khayam had been employed on a contract for a specified period as contemplated by s 386(2), the 'anti-avoidance' provision in s 386(3) was not enlivened.

[137] In light of my conclusion above, it is not necessary to determine this argument. However, the matter was the subject of extensive argument, and I consider it appropriate to record my view of it.

[138] Section 386(2) states that a person has not been dismissed if:

> "(a) the person was employed under a contract of employment for a specified period of time, for a specified task, or for the duration of a specified season, and the employment has terminated at the end of the period, on completion of the task, or at the end of the season."

[139] Relevantly, the section has two limbs: the person must have been employed under a contract for a 'specified period of time'; and the employment must have terminated at the end of the period. Section 386(2)(a) does not state that the reason for the termination of the employment at the end of the period must be the expiry of the contract. But in my view it is clear that the section assumes this will be so; it was simply not necessary for the section to refer to the reason. Section 386(2)(a) is not relevant in the rare case were a person's specified term contract expires and the employment ends, but there is some *other* reason why the employment ends (perhaps because the employer breached a separate contract, or a provision in an enterprise agreement requiring conversion to ongoing employment). The circumstances described in s 386(2)(a) contemplate that the employment will terminate at the end of the period because the end date has been reached, and there is no other reason for the employment ending.

[140] It is necessary to consider the relationship of s 386(2) to s 386(1). In my view, s 386(2)(a) is not an *exception* to s 386(1). Rather, it confirms that s 386(1) does not apply in certain circumstances. Section 386(2) commences with the word 'however', but in context the word connotes contrast with, not derogation from, what has preceded it. The contrast is simply that, whereas the preceding section deals with what *is* a dismissal, s 386(2) is concerned with some situations that do *not* constitute a dismissal. Section 386(1) delineates on the statutory map the territory that constitutes 'dismissal'; section 386(2) identifies some of the area which lies outside that territory.

[141] In an ordinary case where a contract for a specified term (or task, or season) ends, and there is nothing more to the relationship, there will quite clearly be no 'dismissal' under s 386(1). The function of s 386(2) is to confirm that this is the case. This does not make s 386(2) otiose. It would only be otiose if it were intended to be an exception, because an exception is not needed. Rather, s 386(2) serves a useful function by drawing attention to modes of engagement that are very common in the Australian economy, and putting beyond doubt that these circumstances (in and of themselves, and without more) do not involve a dismissal.

[142] However, where a contract for a specified period ends, and the employment ends at the same time, but there *is* more to the employment relationship (another contract, a broken promise, an industrial instrument that has been contravened) there might be a termination at the initiative of the employer, as discussed above. If there is a dismissal, s 386(2)(a) will not

apply to reverse this outcome. Its second limb will not be satisfied, because the employment did not end as a result of the expiry of the contract.

[143] Then one comes to s 386(3), which says that s 386(2) does not apply to a person employed under a contract for a specified period if '*a substantial purpose of the employment of the person under a contract of that kind is, or was at the time of the person's employment, to avoid the employer's obligations under this Part'* (namely Part 3-2, which concerns unfair dismissal). In applying s 386(1) and considering whether there has been a dismissal, it is necessary to have regard to s 386(3). However, as was noted in the Full Bench decision on permission to appeal, s 386(3) is problematic, because it states that it operates by reference to an employer's purpose of avoiding its unfair dismissal 'obligations'. There are no such obligations, other than not to contravene an unfair dismissal order if one is made.[128]

[144] There was argument on appeal as to the meaning in s 386(2)(a) of the words 'contract of employment for a specified period of time'. Over the years, this expression in both the IR and WR Acts acquired an established meaning. A contract was not for a 'specified period' if it allowed for termination during its term (other than for breach of contract or misconduct). However, under the IR Act and the WR Act, the wording of the provision did not require that the employment terminate at the end of the specified period. Thus, somewhat perversely, it was possible that an employer might invoke the provision even where an employee on a contract for a specified period was terminated by the employer before the end date of the specified period.

[145] This is what occurred in the case of *Andersen v Umbakumba Community Council,*[129] which related to Regulation 30B(1)(a) made under the IR Act. The employer objected to the employee's claim for unfair dismissal on the basis that the contract set a 'specified period' of 2 years – even though the employer had dismissed the employee before the 2 years expired. The Industrial Relations Court of Australia (Von Doussa J) found that a contract for a 'specified period of time' was one that had certainty about it, where the start and end dates were 'unambiguously identified'. His Honour referred to such a contract as 'a contract of employment for a fixed term'.[130] *Cooper v Darwin Rugby League Inc*[131] was another decision of the Industrial Relations Court of Australia (Northrup J) where the same conclusion was reached. As in *Umbakumba*, the employer had terminated the contract before its specified period had elapsed.

[146] Under the FW Act, the situation that gave rise to the proceedings in *Umbakumba* and *Cooper* would clearly be a dismissal under s 386(1). It would not entail a contract of employment for a 'specified period of time' under s 386(2), because the employment did not terminate at the end of the specified period. However, the introduction into s 386(2) of the FW Act of the words '*and the employment has terminated at the end of the period*' also give the words '*contract of employment for a specified period*' a different context from the one that existed under the IR Act and WR Act. The emphasis is now on the contemporaneous expiry of the contract and the employment. There is no reason to read 'specified' in the narrower sense of 'fixed', because the 'specified period' itself is 'fixed', aligned now with the

[128] Unlike the IR Act, Part 3-2 of the FW Act does not prohibit unfair dismissal; it provides a remedy to a person who has been unfairly dismissed.

[129] (1994) 126 ALR 121

[130] At 106

[131] 57 IR 238

termination of the employment. In this different context, I consider that the term 'specified' in s 386(2) of the FW Act carries the meaning of 'identified clearly' or 'mentioned or named specifically.'[132]

[147] An employee who has served out the term of a contract for a 'specified period' containing no general termination provision, and whose employment ended on the last day of that period and because the period ended, has not been dismissed under s 386(1). This is also a situation meeting the description of s 386(2)(a). If the scenario is changed only by including a general termination provision in the relevant contract - one that was clearly never acted upon - the result is the same. In my view, the circumstances of the present case fall within s 386(2)(a).

Disposition of the appeal

[148] As the Commissioner considered herself bound to follow the Full Bench decision in *Lunn*, and its conclusion that termination of employment at the initiative of the employer relates to the contract of employment and not the employment relationship, her consideration of whether Mr Khayam had been dismissed for the purposes of s 386(1)(a) did not take into account all of the relevant circumstances. Although the Commissioner's adherence to Full Bench authority was entirely orthodox, her decision was affected by appealable error.

[149] Nevertheless, despite the error, the Commissioner reached the correct conclusion. Mr Khayam was not dismissed for the purposes of sections 385(a) and 386(1)(a) of the FW Act.

[150] Accordingly, ground 1 of the notice of appeal fails. The appeal should be dismissed.

VICE PRESIDENT

Appearances:

M. Gibian of counsel with *M. Wright* on behalf of Mr Saeid Khayam.
N. Ward and *S. Mostafavi* on behalf of Navitas English Pty Ltd.
E. Palmer on behalf of the Australian Council of Trade Unions.
S. Smith on behalf of the Australian Industry Group.
A. Matheson on behalf of the Australian Chamber of Commerce and Industry.

Hearing details:

2017.
Sydney:
12 September.

[132] Oxford Dictionary, Online Edition 2017 and Macquarie Dictionary, 5th Edition

Final written submissions:

Supplementary submissions for the Respondent, dated 19 September 2017.
Supplementary submissions for the Appellant, dated 25 September 2017.

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