DECISION

Fair Work Act 2009
s.394—Unfair dismissal

Bonnie Dale

v

Sunshine Coast Health Network Ltd.
(U2023/5941)

COMMISSIONER SIMPSON BRISBANE, 23 NOVEMBER 2023

Application for an unfair dismissal remedy – Jurisdictional Objection that employment ended with the effluxion of time – Objection upheld – Application dismissed.

[1] On 3 July 2023, Ms Bonnie Dale (**Ms Dale/the Applicant**) applied to the Fair Work Commission (**the Commission**) under s.394 of the *Fair Work Act 2009* (**the Act**) for an unfair dismissal remedy, alleging she was unfairly dismissed from her employment with Sunshine Coast Health Network Ltd (**the Respondent**).

[2] I listed the matter for a directions hearing by telephone on 24 August 2023. The matter was listed for Hearing by Microsoft Teams on 12 October 2023.

[3] At the Hearing permission was granted for the Respondent to be represented by Mr Nick Tindley of FCB Workplace Law.

[4] The Applicant set out in some detail the basis of her claim in the originating Form F2 application and provided with her application a range of supporting documents. The Applicant also relied on her own witness statement,[1] and the Outline of Submissions filed on 21 September 2023 in relation to both the merits of the claim and the Respondent's jurisdictional objection. The Applicant filed documents marked A-1 to A-102 and made closing oral submissions. The Applicant gave evidence at the hearing that the remedy she sought was compensation, and she did not seek reinstatement. The Applicant gave evidence that she had not sought other employment since her employment ended on 30 June 2023. The Applicant gave evidence to the effect that she has had to devote considerable time in understanding the complexity of the jurisdictional issues in preparing for the hearing. The Applicant also said it was difficult for her to consider working for other entities that had contractual relationships with the Respondent in the Bundaberg area whilst she was engaged in litigation with the Respondent.

[5] The Respondent relied on the witness statement of Julie Sturgess of 7 September 2023[2] and reply statement Julie Sturgess of 5 October 2023.[3] The Respondent also relied on its Outline of Submissions filed on 7 September 2023, Reply Submissions filed on 5 October 2023 and its closing oral submissions.

[6] The Applicant was advised on 19 April 2023 by correspondence from the Respondent that her employment would be ending effective from 30 June 2023. The application was filed on 3 July 2023, within 21 days of the date of the dismissal taking effect. The Respondent is not a small business employer but raised a jurisdictional objection of no dismissal to the application due to the maximum term contract the Applicant was engaged under, and in the alternative a further jurisdictional objection that if the Commission were to find that the Applicant's employment was terminated at the initiative of the Respondent contrary its primary objection, then in those circumstances the termination was a genuine redundancy.

SUBMISSIONS AND EVIDENCE

Background

[7] The Respondent submitted that due to an organisation-wide restructure, the Applicant's position would require qualifications and experience not previously part of the role. The Respondent submitted that in March 2023, it commenced a consultation process with the Applicant whereby she was advised her role would no longer be required and would be replaced by a new, wider scoped role of the same title. The Applicant submitted that the Respondent did not properly consult with her and that this was a redundancy but not a genuine redundancy.

[8] The Applicant was invited to submit an expression of interest for a range of alternative available roles and did so for the updated role of 'Manager Wide Bay and Maternal and Child Health' on 5 April 2023. She was interviewed on 12 April 2023 and informed on 19 April 2023 that she was not successful in obtaining the new role. The Respondent submitted that as the Applicant did not have the required skills, knowledge or qualifications required for the updated position, and she had not applied for alternative roles, the Applicant's contract was not extended and would naturally cease at its end date of 30 June 2023.

JURISDICTION

[9] The Respondent's principal submission is that the employment was not terminated as per s 386(1)(a), that the Termination was not for reason for redundancy, and that the contract simply ceased at the expiry of the Term ('the **Term**').

Contract ceased at the expiry of the Term

[10] The Respondent submitted that the employment relationship between the parties was based on an agreement for maximum-term employment ('the **Contract**'). The Respondent referred to clauses 2.5 and 2.6 of the Contract. The Respondent submitted Clause 2.5 of the of the Contract states that the Applicant "acknowledge[s] at the end of the Term:

> a) [her] employment with the Employer will cease unless an Extended Term is agreed to, or a new contract of employment is offered to [her];
>
> b) [she has] no legal or other entitlement to being offered an Extended Term or new contract of employment under this Agreement;

> c) in the absence of the Term being extended or a new contract of employment being offered by the Employer, [her] employment will automatically cease on the Termination Date due to effluxion of time and as such there is no entitlement to notice of termination; and
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> d) where [her] employment ceases in accordance with clause 2.5(c) above, it does not mean that [her] position is redundant nor create[s] an entitlement to a redundancy payment.
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[11] The Respondent submitted that Clause 2.6 of the Contract states that the Respondent may, "in its complete discretion:

> a) extend the Term of this Agreement by agreement in writing with you at any time (**Extended Term**). Where an Extended Term is agreed to, the terms of the employment as in this Agreement will continue until the Agreement is terminated in accordance with clause 22, or the Extended Term expires, whichever is the earliest; or
>
> b) offer you a new contract of employment for a new maximum term following the expiration of the Term in this Agreement. Where the Employer intends to offer you a new contract of employment, it will endeavour to provide you with an offer in writing at least 14 days prior to the Termination Date (wherever practical to do so). If the Employer does not intend on making a further offer of employment to you, your employment will cease on the Termination Date and there is no requirement on the Employer to provide you with notice of termination due to the Term expiring as a consequence of effluxion of time."

[12] The Respondent submitted that the main question before the Commission is "Did the Contract reflect a genuine agreement between the employer and the employee that the employment relationship would not continue after a specified date (being 30 June 2023)?"

[13] The Respondent submitted that current circumstances, considered in light of the proper construction of the Contract and the Applicant's employment history with the Respondent, do not indicate that there was an agreement that the employment relationship would continue beyond 30 June 2023.

[14] The Respondent's submitted that the Applicant's employment history (comprised of distinct, time limited contracts which were renewed or offered as new and separate contracts at or near the end of the term) indicates that the Contract was not terminated at the Respondent's initiative.

[15] The Respondent submitted that, unless the Contract is terminated as per the termination clause of the Contract and the termination occurs during the Term of the Contract, the Contract continues until the end of the Term (being 30 June 2023) and then will terminate due to effluxion of time as per clause 2.5(c).

[16] The Respondent submitted that the Contract automatically ceased by operation of clause 2.5(c) since the Respondent decided not to extend the Term or offer a new contract of employment ('the **Decision**'). The Respondent submitted that it specifically communicated to the Applicant that the employment would cease at the expiry of the Term, and that no reliance was made on the termination clause of the Contract.

[17] The Respondent submitted that it was not obliged to extend the Term of the Contract or offer the Applicant a new employment contract. The Respondent referred to the case of *Saeid Khayam v Navitas English Pty Ltd*[4] to state that the decision not to offer any further contract of employment is not relevant to the question of whether there was a termination of employment at the initiative of the employer, it is separate and distinct from the agreement to end the employment relationship on a particular date.

[18] The Respondent also rejected the contention that its decision to not do so amounts to redundancy or repudiation of the Contract. The Respondent submitted that it's Decision does not amount to the selection of a redundancy date.

Alternative Argument – Genuine Redundancy

[19] In the alternative where the Commission concludes that the Applicant was terminated at the Respondent's initiative, the Respondent submitted that the Commission should conclude that the termination occurred because of a genuine redundancy.

[20] The Respondent submitted that the Applicant was not covered by a Modern Award or an Enterprise Agreement, and as such the Respondent was not obliged to consult with the Applicant. In any case, the Respondent submitted that consultation with the Applicant occurred prior to the Decision.

[21] The Respondent rejected the Applicant's contention that it would have been reasonable to redeploy the Applicant to another role within the organisation. The Respondent submitted that the Applicant only expressed interest in one particular role, and that it would have been unreasonable for the Respondent to deploy the Applicant to that role since she lacked the experience and qualifications necessary for the role.

Applicant's submissions regarding jurisdiction

Repudiation of contract

[22] The Applicant submitted the Respondent repudiated her 2021-23 contract by failing to do a redundancy termination "earlier" than the contract expiration date as required by clause 2.2. Clause 2.2 provides:

> "2.2 Your employment under this Agreement will commence on the Contract Commencement Date stated in Schedule A and will continue for the maximum term stated in Schedule A ('Term') ending on the Termination Date, unless terminated earlier in accordance with clauses 2.9 or 22 ."

[23] It was submitted by the Applicant that after notifying her that her position was made redundant, the Respondent chose the date of redundancy termination as 30 June, which is not 'earlier' than the contract expiration date of 30 June. In doing so, the Applicant submitted the Respondent repudiated her contract. The plain and ordinary meaning of "earlier" is "before the due, usual, or expected time". Similarly, Schedule A provides:

> "Termination Date: 30 June 2023 unless terminated sooner in accordance with clauses 2.9 or 22 of this Agreement."

[24] The Applicant submitted that the Respondent had the power in clause 22.6 to terminate for "genuine redundancy reasons". Furthermore, it was submitted that clause 2.5(d) precludes the co-occurrence of a clause 22.6 redundancy with the contract expiration in stating that you are not redundant, or entitled to redundancy pay, merely because your contract expires. These clauses should be construed according to their plain, ordinary meaning.[5]

Evidence of an objective interpretation of the contract

[25] The Applicant submitted evidence of a reasonable, objective interpretation of the clauses above can be drawn from a previous redundancy carried out by the Respondent in April 2021. At that time, twelve positions were made redundant, just months prior to the termination end date of the 2018-2021 contracts (containing the same clauses as above). The Respondent paid the effected employees' redundancy pay, and did not attempt to avoid their obligations by conflating the redundancy, with the cessation of contract.

Exercise of contractual power in bad faith

[26] The Applicant submitted that the Respondent acted in bad faith in placing their financial gain ahead of employees' economic loss. The Applicant submitted in the Employee FAQ document on 29 March the Respondent said they would forward date three months into the future the redundancy termination date to coincide with the contract expiration on 30 June. In the letter of termination on 19 April, the Respondent confirmed this intent. The Applicant contended that in construing the particular clauses referred to above, in the particular facts of this case, where 61 of the 80 employees were told their positions were redundant, the Respondent was obligated to exercise their power to terminate for redundancy reasons in good faith.[6] The Applicant submitted that the aggregate of all redundancy and long service leave entitlements avoided by the selection of the 30 June would be a significant sum of money. The Applicant submitted that avoidance of their obligations was a deliberate, calculated decision.

Termination was "at the initiative" of the employer

[27] The Applicant submitted the causal connection between the redundancy and her termination are obvious in the letters to her from the CEO, the consultation documents, and events in March and April. Further, the Applicant submitted the redundancy was the "principal contributing factor" leading to the termination of her employment on 30 June 2023.[7] The Applicant submitted this satisfies the requirements of s.386(1)(a) and s.119(1)(a).[8] The Applicant contended it is logically incoherent and misleading to rely on an effluxion of time to tell employees they have no entitlements when the effluxion of time has not yet occurred, and choosing the effluxion of time date was a deliberate considered act of the Respondent. On this

point, the Applicant submitted *Navitas* at [75](3) affirmed the decision of *Mahony v White*,[9] that a termination may be done at the initiative of the employer even if it is not done by the employer. More recently, in *Alouani v NRL* the Full Bench said:[10]

> "The fact that both the time frame in which the contract will end, and the triggering action, are provided for in the contract, does not necessarily mean that the contract ends according to its terms if the employer takes the action to trigger the end of the contract."

[28] The Applicant submitted that in *Bampton v Viterra* [2015] SASCFC 87 at [183], the Full Court of the Supreme Court of South Australia, in considering a redundancy policy, said:

> "The definition of redundancy in the Redundancy Policy should, on its proper construction be seen as a composite or unified concept whereby the company makes a definite decision that it no longer requires the job an employee has been doing to be done by anyone leading to termination of the employee's employment."

[29] The Applicant submitted that Section 119 of the FW Act embodies the same singular concept: termination at the initiative of the employer because of redundancy.

Frustration of the FW Act

[30] The Applicant submitted that to construe her contract as permitting an effluxion of time to obfuscate a redundancy termination, would give effect to the Respondent's intention to frustrate the operation of the FW Act. It was submitted the Respondent avoided NES redundancy and long service leave obligations (ss.119 and 113), and, having decided 61 positions were redundant, failed to report the decision to dismiss more than 15 employees to Centrelink (s.530). Nor did the Respondent request a variation to redundancy pay (s.120). The Applicant submitted this is a vitiating factor.[11]

Misrepresentation

[31] The Applicant submitted the Respondent misled her during the term of her employment about her contract and her entitlements. The Respondent misrepresented her entitlement to NES redundancy pay in the Employee FAQ document on 29 March and her termination letter of 19 April by characterising the contract as a "specified period" contract and saying that the s.123 exclusion applied. The Applicant submitted that in 2017 the Full Bench in *Navitas* at [96] held that maximum term contracts (where either party can terminate at any time with notice) are not "specified term" contracts and the s.386(2)(a) exclusion (identical to the s.123(1)(a) and s.534 exclusions) does not apply. The Applicant submitted with HR expertise from HR Assured in place since November 2022, the Respondent would have known this, and intentionally misled employees, and this is a vitiating factor.[12]

Continuous employment relationship

[32] The Applicant submitted given the Respondent denied her entitlement to long service leave, her seven-and-half year employment relationship is relevant.[13] The Applicant submitted that her full-time employment commenced on 7 January 2016 and continued uninterrupted, over five contracts and four promotions until 30 June 2023. Contract renewal occurred mere

days or weeks prior to expiration and was a perfunctory process for administrative convenience. The Applicant submitted that the Respondent's assertion in paragraph 2 and 6 of their F3 that maximum-term contracts were necessary to align employment with funding is not true. The Applicant submitted her employment never hinged on Commonwealth funding. The Applicant submitted the fact that both her 2018-21 and 2021-23 employment contracts provide the Respondent with the power in clause 22.7 to terminate because Commonwealth funding ceases, bellies the Respondent's claim that a maximum-term is necessary in the event funding ceases. Furthermore, the Applicant submitted that based on publicly available financial reports, in 2021-22 the Respondent had $28.5 million cash in the bank on $55 million in revenue. The grant underspend was $4.5 million in 2015-16, and grew each successive year to $6.6 million, $11.6 million, $10.5 million, $17.3 million, $20.8 million, and finally, $28.5 million in 2021-22. The Applicant submitted that the Respondent had no legitimate reason for using maximum-term contracts.[14]

Genuine redundancy - was the role abolished?

[33] The Applicant submitted that her position with the Respondent was Manager Wide Bay and Maternal and Child Health and she was told in the letters of 22 March and 19 April this position was redundant. The Applicant submitted that the Respondent made three dishonest statements with regard to this position in paragraphs 9 to 11 of their F3. The Applicant further submitted the Respondent said:

- the position of Manager Wide Bay and Maternal and Child Health still exists;
- it now required clinical qualifications; and
- she submitted an EOI for that updated position. Dealing with each of these statements in turn:
    - the Manager Wide Bay and Maternal and Child Health position was not in the new organisational structure, there was no position description for it on the Sharepoint site, nor was it mentioned to her at any time;
    - if there is no updated position description, how can qualifications for that updated position be known; and
    - she did not submit an EOI for the that position. On the 5 April, relying on the consultation documents and representations, she submitted an EOI for the new position of Senior Manager Regional Programs Wide Bay. The position description for role of Senior Manager Regional Programs Wide Bay state in the selection criteria:

      "Tertiary qualifications in health sciences or business development and/or 5 years + professional experience in the health sector."

[34] The Applicant submitted that she met the criteria and that is clear from her resume and cover letter. The Applicant contended the exact same role of Senior Manager Regional Programs Wide Bay was publicly advertised (by Eden Ritchie) on 10 August 2023. The Applicant submitted that evidently, this is the Respondent's second attempt to fill the role via public advertisement. The Applicant submitted that it is impossible to make any practical comparison between the old role and the new role (which may or may not exist), when the Respondent is so fluid with the truth.

Genuine redundancy - would redeployment have been reasonable?

[35] The Applicant submitted that given the Respondent's false statements in paragraphs 9 to 11 of their F3, it is impossible to know what role she was interviewed for on 12 April, or whether the interview was, in fact, merely a performative exercise for a decision that had already been made. The Applicant submitted that based on the Respondent's false statement in paragraph 5 of their F3, that her first role in 2016 was that of Manager Wide Bay and Maternal and Child Health, it seems they have not even read her resume. Further evidence of capricious decision making was apparent when two of the three Healthy Aging Coordinator roles, which required candidates be "Registered Health Practitioners", were given to staff who did not have clinical qualifications.

Oral evidence and submissions

[36] The Applicant worked under a contract between 2018 and 2021 that was signed by her on 20 June 2018. The Applicant accepted that contract concluded on 30 June 2021. The Applicant accepted that between January and June 2021 she had been communicating with the Respondent about whether a further contract would be offered, and she confirmed that she knew the contract was expiring on 30 June 2021. The Applicant accepted that she was ultimately offered a new contract to operate from 1 July 2021 to 30 June 2023.

[37] The Applicant accepted that she read the 2021 to 2023 contract, and the Applicant accepted she did not engage with the Respondent about the terms of the contract or have any queries about what the terms of the contract meant. The Applicant said she believed she received the contract, read through it, signed it and sent it back the next day. The Applicant said it was almost identical to the previous contract. The Applicant agreed with the proposition put to her that she understood the terms of the contract and agreed to enter into it, including that it would end on 30 June 2023 unless terminated earlier.

[38] It was put to the Applicant that she was advised that there would not be a new contract and the Applicant said that she had expected that the contract would end in accordance with its terms.

[39] The Applicant agreed she was advised in March 2023 of the restructure, and said it was at a staff meeting at 9am by Teams. The Applicant agreed she received a subsequent letter about the restructure. The Applicant said there were whole of staff meetings every Wednesday at 9am. The Applicant agreed that she was advised of an email address to raise issues about the process. The Applicant agreed the email address was the one she referred to at paragraph 87 of her statement.

[40] It was put to the Applicant that it is Ms Sturgess' evidence that the email address received 191 queries that were received and responded to. The Applicant said those responses were via a FAQ document.

[41] The Applicant said she was invited to express an interest in other positions in order to have an opportunity to apply for them. The Applicant agreed she referred to 13 roles in her evidence and she decided to only express an interest in one of those roles being the Senior Manager Regional Programs Wide Bay. The Applicant did not accept that it was a very

different role to the one she was performing. The Applicant said she thought it was substantially the same.

[42] The Applicant was referred to the Position Description of the Role she held, and also the Position Description for the was role she applied for. It was put to the Applicant that the key responsibilities for the old role were different to the new role. The Applicant did not agree. The Applicant's evidence was to the effect that whilst one was more detailed the key responsibilities were very similar.

[43] Ms Sturgess also gave oral evidence concerning the position description for the role the Applicant performed and the role she expressed an interest. In relation to the issue of key responsibilities Ms Sturgess said that the position descriptions were different in that the responsibility in the new role is broader and it talks about developing complex models of care around complex health problems, and activity work plans can outline that and there is a difference between developing a work plan at a high level and implementing that.

[44] It was put to Ms Sturgess that on 22 March 2023 she told about 60 employees their roles were no longer required. Ms Sturgess said she notified staff that the Respondent was undergoing a restructure and there were changes to roles and depending on the changes their role may change and they could apply for the new roles and depending on that they may or may not have a role. Ms Sturgess agreed that on 22 March she encouraged staff to look at the new structure and the new position descriptions. Ms Sturgess agreed that she encouraged staff to submit an expression of interest for the new positions. Ms Sturgess agreed she asked staff to address the objective selection criteria. Ms Sturgess was referred to the selection criteria for the new role that the Applicant had submitted an EOI for. Ms Sturgess agreed the term "and/or" means one or the other or both. It was put to Ms Sturgess that health science is a public health degree and not a clinical qualification. Ms Sturgess responded that it is both, and agreed there is a degree of latitude about what that qualification means.

[45] It is apparent from the evidence that the Applicant expressed an interest in the new role of Senior Manager Regional Programs Wide Bay and attended a meeting on 12 April 2023 to discuss the role with a Mr Elliott and Ms Sturgess. The Applicant was subsequently advised that it was determined even with reasonable retraining and development provided, the Applicant lacked the necessary skills and experience to perform the inherent requirements of the new position. Much of the Applicant's cross examination of Ms Sturgess went to the issue of whether the Applicant was in fact qualified to perform the Senior Manager Regional Programs Wide Bay role.

[46] Ms Sturgess gave evidence that the new positions created under the restructure were to commence from 1 July 2023, which was the day following the last day of the Applicant's maximum term contract. Ms Sturgess said the positions that existed before the commencement of the new structure continued to be performed as they had been performed up until the commencement of the new structure on 1 July 2023.

[47] Ms Sturgess accepted that there would be a reduction in the number of staff as a result of the restructure, and this needed to be done on the basis of the restructure. Ms Sturgess did not appear to dispute that on 22 March a decision was made that would have the effect that many roles would not transition into the new structure from 1 July 2023.

[48] Ms Sturgess was asked about a representation made to staff in a FAQ document dated 22 March 2023 which appeared to mischaracterise the effect of section 123 of the Act in relation to maximum term contracts. It was apparent that Ms Sturgess did not appreciate the distinction between maximum term contracts and specified term contracts.

[49] Ms Sturgess accepted that she did not make any redeployment offer to the Applicant. Ms Sturgess gave evidence that the reality of the interview with the Applicant demonstrated a surface level of understanding, the Applicant did not demonstrate a clear understanding of the complexity of the work required, and that lack of understanding is borne out not just with that role but with many roles in the organisation, and the failure of the organisation to deliver on the commissioning and services required of the organisation by the Commonwealth. Ms Sturgess said underspends in the tens of millions of dollars each year demonstrated an inability by leadership to deliver on the commissioning of services, resulting in the community not getting services. Ms Sturgess said this indicated the organisation did not have people with the right skills and knowledge to do what it was required to.

[50] Paragraph 75 in the Full Bench decision in the matter of *Saeid Khayam v Navitas English Pty Ltd t/a Navitas English* [2017] FWCFB 5162 was referred to by both parties in their submissions. It is helpful to set out that paragraph of the Full Bench decision where the Full Bench said as follows:

> "[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:
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> (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.
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> (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.
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> (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.

(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:
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> - the employee entered into the contract as a result of misrepresentation or misleading conduct by the employer;
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> - 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). 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*)."

[51] The Applicant maintained on her reading of her employment contract that the parties are prohibited from conflating a redundancy termination date with the expiration of the contract, and therefore the termination did not occur according to the terms of the contract. The Applicant maintained the decision was deliberate to make the commencement of the new structure the day after the expiring of her contract, hence avoiding redundancy pay and was not in good faith. The Applicant also referred to what she described as the misrepresentation concerning section 123 of the Act. The Applicant also submitted the large number of persons

that would no longer be required from 1 July 2023 is a relevant factor in supporting the Applicant's submission. The Applicant further submitted that the lengthy period between the announcement of the restructure and its implementation also supports the Applicant's argument that on the balance of probability this is a redundancy scenario with the intention of frustrating the Act. The Applicant submits that the Respondent's letter of 19 April 2023 is evidence of its intention to frustrate the Act and repudiate the contract. The Applicant submits that the events between 22 March 2023 and 19 April 2023 have every feature of a redundancy even though the Respondent is maintaining the employment ended by the effluxion of time. The Applicant submitted the Respondent's claim that the employment ended with the effluxion of time is not genuine and it is an obfuscation of the true position.

[52] The Applicant has also argued there is little meaningful difference between her old position and the new position she expressed interest in and was unsuccessful in being appointed to. The Applicant submitted Ms Sturgess' evidence points to her view about the difference between the two roles as being subjective rather than objective.

[53] The Respondent submitted that the time for assessing whether a contract has been entered into for the purpose of frustrating the Act is the time the contract was entered into because that is when the intention of the contract is relevant. The Respondent submitted that is not the argument made by the Applicant in this case, but that it was some 20 months or longer after the contract was entered into that the Respondent has allegedly sought to frustrate the policy or operation of the Act. The Respondent submitted that is not the case at all, however even if the Respondent had done what the Applicant asserted for the reason asserted by the Applicant that does not offend the principal at paragraph 75 subparagraph 5(b) of the *Navitas* decision.

[54] The Respondent submitted both parties had rights and obligations under the terms of the contract. The Respondent submitted that the Applicant appears to argue the Respondent should be confined as to which rights it can exercise under the contract, and that is not a limitation that should or could be placed on the Respondent. The Respondent said it was put against it that it selected 30 June 2023 because it did not want to pay redundancy pay. The Respondent submitted that there was no reference to redundancy because there was no redundancy, and it was a change in the operations of the Respondent and what it would be doing after 30 June 2023 when contracts of some employees would come to an end. The Respondent referred to the unchallenged evidence of Ms Sturgess that the Respondent required the work to continue until the new operating model was implemented, and on that basis it cannot reasonably be argued that the Respondent enlivened clause 22 of the contract to terminate for redundancy by any of its conduct. The Respondent submitted all it did was act in accordance with the contract and it cannot be suggested that the contract ceased for any reason other than the effluxion of time.

[55] The Respondent submitted in relation to each of what could be vitiating factors as set out in paragraph 75 subparagraph 5 in *Navitas*, none of those matters can be said to be present. On that basis the Respondent submitted its primary objection in relation to jurisdiction should be upheld. The Respondent appeared to accept in submissions that the communication around the operation of section 123 of the Act may have been inaccurate, however section 119 of the Act is what determines entitlement to redundancy pay and the same terminology is used in section 386, and whilst section 123 may have been the wrong reference point, the ultimate

outcome is the same because the termination is not at the initiative of the employer. The Respondent submitted the principles in *Navitas* support the Respondent's case that this is a termination because of the effluxion of time.

[56] In relation to the objection in the alternative, the Respondent submitted that the evidence of Ms Sturgess was that the different delivery model meant there was a need to change the skill sets to deliver the services that were needed, and that was not a criticism of the Applicant but a criticism of the model. The Respondent said the new role was a very different role, both in terms of the position description but also the expectations and requirements of the role. The Respondent relied on the evidence of Ms Sturgess outlining a very different requirement of the role. The Respondent submitted on that basis section 389(1)(a) is satisfied. It was asserted that the Applicant was not covered by an industrial instrument. In any event even if the Applicant is covered by a Modern Award, it seems reasonably clear from the evidence that the consultation process entered into would meet the consultation requirements contained in Modern Awards. The Respondent submitted it was not reasonable for the Applicant to have been redeployed into the role that the Applicant had expressed interest in as the Respondent had a clear view that the Applicant did not have the skills to undertake that role. The Respondent submitted it may have been reasonable to redeploy the Applicant into another role however it couldn't as she had no interest in any other roles, and the expression of interest process was to identify who wanted to go into which roles and the Applicant limited herself to one role.

CONCLUSION

[57] It is clear that the Applicant was on a maximum term contract, which came to an end on 30 June 2023 and was not renewed. It is clear that the language in clauses 2.5 and 2.6 in the 2021 to 2023 contract contemplated 30 June 2023 being the end of the employment relationship, and not the employment contract. This is the circumstance described in paragraph 75(4) of the Full Bench decision in *Navitas*, where the Full Bench found that, absent a vitiating factor, such language will result in the employment relationship ending by reason of the agreement, and not at the initiative of the employer. In this regard, the matter becomes quite simple. The Applicant's employment was governed by a maximum term contract with the Respondent which ceased on 30 June 2023 if not renewed. Clauses of the contract specifically referred to the Respondent's discretion to not renew the contract, which is what happened here. Despite this, the Respondent appears to have made an effort to provide the Applicant an opportunity to apply for other roles that her skills, experience and qualifications matched, despite her current role no longer being available to her on implementation of a new organisational structure with effect from 1 July 2023. The Applicant made a deliberate decision to express interest in only one position.

[58] The nub of the Applicant's case in relation to the first jurisdictional issue is that the selection of the date of 1 July 2023 for the implementation of the restructure was a contrivance to avoid its obligation to pay redundancy pay. The facts are that the 2021 to 2023 contract which on the evidence was clearly a genuine contractual agreement made between the parties in 2021, nominated the agreed maximum term date for the expiration of the contract to be approximately two years later on 30 June 2023.

[59] The evidence does not support the Applicant's submissions that the termination did not occur according to the terms of the contract. The evidence also does not support a conclusion that the Respondent intended to frustrate the Act, and that the Respondent repudiated the contract. The evidence supports the conclusion that the Respondent was failing to deliver the outcomes it was required to deliver under its agreement with the Commonwealth and this necessitated a restructure. The evidence also does not support a conclusion that the Respondent's actions offended any of the principles at paragraph 75 subparagraph 5 of the *Navitas* decision. The employment relationship ended with the effluxion of time in accordance with the terms of the employment contract. The Respondent's primary jurisdictional objection is upheld and on that basis, the Commission has no jurisdiction to consider the matter any further and the Applicant's application is dismissed. An order to this effect will be issued separately and concurrently with this decision.

[60] Whilst it is unnecessary to consider the Respondent jurisdictional objection in the alternative, for completeness, if I am wrong to conclude that there was no termination at the initiative of the Respondent, I would have upheld the objection in the alternative, as I would have been satisfied on the evidence that the Respondent met each of the requirements in section 389.

COMMISSIONER

Appearances:

Ms Bonnie Dale on her own behalf.

Mr Nick Tindley of FCB Workplace Law for the Respondent

Hearing details:

2023
By Microsoft Teams Video
12 October

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[1] Exhibit 1.

[2] Exhibit 2.

[3] Exhibit 3.

[4] [2017] FWCFB 5162.

[5] [2021] HCA 56 [61] – [63].

[6] Irving, The Contract of Employment, 2nd Edition.

[7] Mohazab v Dick Smith Electronic Pty Ltd [1995] IRCA 645 [205].

[8] *Saeid Khayam v Navitas English Pty Ltd* [2017] FWCFB 5162 [75](2) and [75](3).

[9] [2016] FCAFC 160.

[10] Alouani-Roby v National Rugby League [2022] FWCFB 171 [121].

[11] *Saeid Khayam v Navitas English Pty Ltd* [2017] FWCFB 5162 [75](5)(b).

[12] Ibid [75](5)(e).

[13] Ibid [75](1).

[14] Ibid [75](5)(b).