



DECISION

Fair Work Act 2009
s.365—General protections

Warren George Francis

v

Volunteer Marine Rescue Assoc Qld Inc
(C2023/4256)

COMMISSIONER HUNT

BRISBANE, 16 APRIL 2024

Application to deal with contraventions involving dismissal – succession of outer-limit employment contracts – jurisdictional objection - employment issue arose – consideration of employment relationship.

[1] On 18 July 2023, Mr Warren George Francis made an application to the Fair Work Commission (the Commission) under s.365 of the *Fair Work Act 2009* (the Act) to deal with a general protections dispute involving dismissal. Mr Francis stated that he had been dismissed from his employment with Volunteer Marine Rescue Assoc Qld Inc (the Respondent) on 30 June 2023.

[2] In its *Form F8A – Response to general protections application*, the Respondent objected to the application on the basis that Mr Warren was not dismissed on the employer’s initiative pursuant to s.386(1) of the Act.

[3] Following the Full Court of the Federal Court decision of *Coles Supply Chain Pty Ltd v Milford*,¹ the Commission must determine whether Mr Francis was dismissed before it can exercise powers under s.368 of the Act to deal with a dispute about whether Mr Francis was dismissed in contravention of the general protections provision.

Background

[4] Mr Francis resides in far North Queensland. He was a volunteer with the Burdekin Volunteer Marine Rescue (Burdekin VMR), together with being a volunteer with the State Emergency Service (SES). Mr Vince Papale, Vice President of the Respondent, is also a member of the Burdekin VMR.

[5] In 2018, the Commissioner for Queensland Fire and Emergency Services commissioned a review known as the Blue Water Review (the Review). The remit of the review was to examine and identify key issues in the provision of marine search and rescue services by the two volunteer organisations, the Australian Volunteer Coastguard Association (AVCGA) and Volunteer Marine Rescue Association Queensland (VMRAQ).

[6] The outcome of the Review was that the Respondent was to become part of a new body, known as Marine Rescue Queensland.² At the time of his interview for the position of State Training Officer with the Respondent, Mr Francis was advised that all positions within the Respondent would eventually become part of Marine Rescue Queensland.

[7] Mr Francis commenced employment with the Respondent on 5 January 2021 as a State Training Officer, pursuant to the terms outlined in the letter dated 9 December 2020 (the 2020 Contract).³

[8] The 2020 Contract stipulated, at clause 3.2, the following in respect to Mr Francis' employment contract period:

“Employment Contract Period: Unless terminated earlier by either party according to the provisions laid out below, the contract as a State Training Officer starts on 5th January 2021 for a period of six (6) months to 2nd July 2021, after these times the employer and employee may elect to renew the contract, along with the terms of such renewal, by negotiation.”

[9] At clause 4.3, the following was included:

“4.3 In the event of your contract being extended, your remuneration will be reviewed annually and may be increased at the employer's discretion.”

[10] On 23 June 2021, Mr Francis was issued with an offer of employment letter for a 12-month term for the period 5 July 2021 to 30 June 2022. The following was stated:

“1.1 Your engagement date as a contracted employee State Training Officer will be from 5th July 2021 to 30th June 2022, subject to funding in the 2021-22 Service Agreement contract with the Queensland Fire and Emergency Services.”

[11] Additional terms within the 23 June 2021 contract state:

“Employment Contract Period: Unless terminated earlier by either party according to the provisions laid out below, the contract as a State Training Officer starts on 5th July 2021 2021 for a period of twelve (12) months to 30th June 2022, after these times the employer and employee may elect to renew the contract, along with the terms of such renewal, by negotiation.”

[12] Mr Francis continued to work for the Respondent after 30 June 2022.

[13] A letter from Mr Keith Williams, General Manager of the Respondent was prepared on 28 September 2022. It states the following:

“Dear Warren

Offer of employment

I am pleased to offer you a renewal of your contract of employment in the position of State Training Officer with Volunteer Marine Rescue Assoc Qld (VMRAQ).

The term of renewal will be for 12 months, commencing 1st July 2022.

Your remuneration will be \$84,000 per annum.

All other terms and conditions of your engagement will be as set out in your original letter of engagement of 23rd June 2021.

To accept this offer of employment please return a signed and dated copy of this letter to me at your earliest convenience.”

[14] The letter dated 28 September 2022 was sent by email to Mr Francis on 6 October 2022. Mr Francis replied, “Thanks mate, I’ll sign it when I get home.”

[15] On 4 October 2022, a back payment of \$1,076.95 was made to Mr Francis on account of the increased salary from \$80,000 to \$84,000 for the period 1 July 2022 to 4 October 2022.

[16] Mr Francis didn’t return the signed offer of employment until 5 December 2022.

[17] On 25 January 2023, Mr Francis was told, by telephone, that he was suspended on full pay pending an investigation of an allegation that Mr Francis had threatened violence against Mr Papale. Mr Francis’ suspension was confirmed in a letter, dated 3 February 2023 (the Suspension Letter). The Suspension Letter is extracted in full at paragraph [27] below.

[18] Mr Francis was informed on 14 June 2023, that following an investigation, the allegations could not be established (Outcome Letter). The Outcome Letter is extracted in full at paragraph [32] below.

[19] Two days following receipt of the Outcome Letter, Mr Francis was informed, in writing, that the Respondent would not extend his contract beyond the expiry of the term. The letter is extracted in full below.

“Dear Warren

RE: Expiry of your fixed term contract

As you know, your employment terms with VMR are set out in a letter dated 28th September 2022. In accordance with those terms, your employment is due to expire on 30 June 2023.

Unfortunately, VMR has decided not to extend your contract beyond expiry of the term. Accordingly, your employment will end on Friday 30 June 2023.

We thank you for your contribution to VMR and wish you well in the future.

Please contact me if you have any queries.

Yours Sincerely,

Keith Williams
General Manager
Marine Rescue QLD”

[20] The Respondent contended that Mr Francis’ employment ceased as a result of an effluxion of time. Mr Francis refuted the Respondent’s position, arguing that in reading the correspondence of 14 and 16 June 2023, in the context of the facts, the Respondent dismissed Mr Francis for the purposes of s.386 of the Act.

Legislative provisions

[21] Section 365 of the Act provides as follows:

“365 Application for the FWC to deal with a dismissal dispute

If:

- (a) a person has been dismissed; and
- (b) the person, or an industrial association that is entitled to represent the industrial interests of the person, alleges that the person was dismissed in contravention of this Part;

the person, or the industrial association, may apply to the FWC for the FWC to deal with the dispute.”

[22] The meaning of “dismissed” is provided at s.386 of the Act:

“386 Meaning of dismissed

- (1) A person has been dismissed if:
 - (a) the person’s employment with his or her employer has been terminated on the employer’s initiative; or
 - (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.
- (2) However, 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; or

- (b) the person was an employee:
 - (i) to whom a training arrangement applied; and
 - (ii) whose employment was for a specified period of time or was, for any reason, limited to the duration of the training arrangement;and the employment has terminated at the end of the training arrangement; or
- (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."

[23] This decision deals only with the jurisdictional objection to be determined; that is, was Mr Francis dismissed from his employment?

Hearing

[24] The matter was listed for hearing on 23 October 2023 by video using Microsoft Teams. Mr Francis was granted leave to be represented by Mr S Grant, Counsel instructed by Mr Wade Butterworth of Susan Moriarty and Associates. The Respondent was granted leave to be represented by Mr J Wells and Mr A Nicolaidis of Mills Oakley.

[25] The parties had not wished for any witnesses to give evidence, however I informed the parties that I considered it necessary for Mr Francis and Mr Williams to give evidence and be cross-examined.

Evidence of Mr Francis

[26] Mr Francis' evidence is that when he continued to work beyond 30 June 2022, and having signed the third contract on 5 December 2022, it was with the expectation that his position would continue as it had before.

[27] On 25 January 2023, he received a telephone call from Mr Williams, advising that the Respondent had received a complaint about his conduct, and he was being suspended pending an investigation. On 3 February 2023, Mr Francis received an email from Mr Williams outlining the terms of the suspension, attaching a suspension letter dated 2 February 2023 as follows:

“Dear Warren,

Re: Requirement to not attend work during an investigation

In circumstances where serious allegations are made against an employee or where an employee breaches VMRAQ policy or procedure, the employee may be instructed not to attend work pending an investigation. I refer to our recent phone conversation in which I stated to you that a serious allegation has been made alleging that you made a threat of violence against another member of the association.

The purpose of this letter is to advise you that in the immediate short term you are suspending from your work duties as a State Training Officer of Volunteer Marine Rescue Association QLD Inc.

Your responsibilities:

- You are not to undertake any duties in relation to your work until further notice
- You are not to operate your company provided vehicle until further notice, except as necessary to maintain and secure the vehicle, unless permission is granted by the general manager
- You are not incur any financial expense on behalf of the association not approved by the general manager
- You are not to represent yourself as an employee of the Association until the matter is resolved
- Cooperate with the individuals conducting the investigation and to provide further information as requested to assist with the process

Should you reasonably be aware that the above is not possible, please contact either myself or Dr Graham Kingston to discuss the matter and develop a way forward.

Our responsibilities:

- To afford you the presumption of innocence
- To afford you natural justice and procedural fairness
- To protect your privacy as far as reasonably possible
- To remit your normal salary to you whilst a resolution to this situation is developed

We undertake to engage relevant independent expertise in the near future to investigate the allegations in an impartial manner. You will of course be afforded an opportunity to engage in that process. I stress that no decisions have been made nor any action taken at time of writing this matter. If you do not believe this to be the case, please contact either myself or Dr Graham Kingston to discuss the matter.

Yours Faithfully.

Keith Williams

General Manager
Marine Rescue QLD”

[28] On 8 March 2023, Mr Francis received a further letter from Mr Williams, as follows:

“Dear Warren,

You are aware that an allegation has been made against you in relation to conduct. This does not mean that the allegation has been in any way substantiated and it is the view of VMRAQ that you are entitled to the presumption of innocence.

In order to resolve the matter, VMRAQ has engaged Bion Partners to conduct a Work Place Investigation. I write today to inform you that Bryana Stanley from Bion Partners will shortly be reaching out to you via teleconference to conduct an interview. As part of your duties you are to undertake this interview at a mutually agreeable time.

Once this phase is concluded and a report provided to us, we will be in touch with next steps.

Yours Faithfully,

Keith Williams
General Manager
Marine Rescue QLD”

[29] On the same day, Mr Francis received a telephone call from Mr Gary Howe, Unit Training Coordinator for Bowen Volunteer Marine Rescue. Mr Howe informed him that he had met with the State Training Coordinator and Mr Alan Drabble, who had been described as taking over Mr Francis’ role in the Torres Strait. Mr Francis became concerned that he would not be allowed to return to his position.

[30] On or around 24 April 2023, Ms Stanley sent a letter to Mr Francis requiring his attendance at an interview on 28 April 2023. The letter informed Mr Francis of an allegation that he had threatened violence against Mr Papale. Mr Francis noted that his access to the Respondent’s online training platform was removed on 26 April 2023.

[31] Instead of attending the interview, Mr Francis was permitted to respond to the allegations in writing, which he did by way of a written statement on 2 May 2023. Mr Francis noted that he had been alleged to have made a statement to Ms Chantelle Tappenden, purportedly threatening Mr Papale. He denied ever making a threat and stated that he had Mr John Winn, Local Controller for SES in the Burdekin region in the vehicle with him at the time he had a telephone conversation with Ms Tappenden. He implored Mr Winn be interviewed to verify his account of the conversation.

[32] On 14 June 2023, Mr Francis received the following letter from Mr Williams:

“Dear Warren

Re: Outcome of investigation

As you know, VMR recently conducted an investigation into an incident alleged to have occurred on 25 January 2023.

The investigation has concluded. Based on the findings, VMR has not established that the incident occurred as alleged; accordingly, no further action will be taken.

Notwithstanding that conclusion, VMR takes the opportunity to remind you of its expectations, moving forward.

The investigation has been resolved on the basis that:

- A conversation took place between you and Ms Tappenden;
- VMR is not in a position to positively establish what was said. Your response denied the allegations, but did not provide an alternate version;
- The balance of your response reflected relationship concerns between you and Ms Tappenden, so as to challenge her credibility in making the allegations.

Clearly, had the allegations been established, there would have been a sound basis for disciplinary action. VMR could not countenance or tolerate conduct of a threatening nature, whether verbal or physical. This is why VMR investigated the matter.

Additionally, VMR considers that this investigation has revealed a level of tension between you and Ms Tappenden which is highly undesirable. While the allegations have not been substantiated, VMR also does not consider that the complaint was made in bad faith or improperly. VMR wishes to make it clear that any form of reprisal against Ms Tappenden would not be acceptable.

VMR trusts this letter clearly outlines its expectations moving forward.

If you hold any further concerns or wish to discuss the matter further, please contact either myself or Dr Graham Kingston.

Yours sincerely

Keith Williams
General Manager
Marine Rescue QLD”

[33] Two days later, on 16 June 2023, he received the letter from Mr Williams at [19] informing him his employment was due to expire on 30 June 2023 and would not be extended.

[34] An advertisement for a “Marine Industry Training Professional” position with the Respondent was published on 30 June 2023 on the employment website SEEK. Mr Francis contended that is the role which he performed, not disputed by the Respondent.

Evidence given during the hearing

[35] In evidence given during the hearing, Mr Francis stated that he understood that he would continue in the role until such time as the transition to Marine Rescue Queensland eventuated.

[36] He stated that he didn't consider himself to be under duress to sign the third contract when he eventually did in early December 2022. He said that he had no reason not to sign the letter.

Mr Francis' Outline of Submissions

[37] Mr Francis submitted the facts demonstrate that the actions of the Respondent were the principal contributing factors that led to the termination of the employment relationship with him.

[38] In relation to the 2022 Contract, Mr Francis noted no reference was made to any new funding agreement or that the continuation of employment was subject to such finding. Mr Francis was simply advised his salary had been increased.

[39] Mr Francis submitted that the question of whether the Commission has jurisdiction in this matter turns on the interpretation of s.386(1)(a) of the Act. The leading case on the application of s.386(1)(a) is *Khayam v Navitas English Pty Ltd (Khayam)*,⁴ as endorsed by the principal case the Respondent relies on, *Alouani-Roby v National Rugby League*.⁵

[40] In *Khayam*, the appellant had been employed by Navitas English on a series of time-limited contracts. The final contract contained a clause that recorded the parties' agreement that the 'employment would terminate automatically on the Expiry Date, unless it was terminated earlier by either party'. At the end of the term of the last of those contracts, the appellant wanted to enter into a further contract, but the respondent decided not to offer the appellant a further contract due to concerns it had regarding his performance.

[41] Mr Francis noted that the relevant principles for interpreting s.386(1)(a) of the Act are distilled in paragraph [75] of *Khayam*. The first principle is:

"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."

[42] In relation to this matter, Mr Francis argued that it is clear that the contracts each indicated the existence of an ongoing employment relationship through the definition of "Employment Contract Period". This is distinct from the findings in *Alouani-Roby*.

[43] The second principle is:

"...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."

[44] In this matter, the only relevant conduct is that of the Respondent; Mr Francis had expected that his position would continue and eventually would become part of Marine Rescue Queensland.

[45] The third principle provides that:

“...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 relation 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”.

[46] Mr Francis asserted that this is relevant in the context that:

- (a) the Respondent did not lift the suspension or direct Mr Francis to return to work;
- (b) despite the suspension commencing January 2023, no investigation commenced until over six weeks later, and Mr Francis was not interviewed for a further seven weeks after that, before a determination is ostensibly made in June 2023;
- (c) another person had commenced in a training role for the Respondent in March 2023, being a role the same as Mr Francis'; and
- (d) Mr Francis' ability to access the training platform relevant to his duties was removed in late April 2023.

[47] Mr Francis noted that the fourth principle is as follows:

“...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.”

[48] Mr Francis submitted that the facts are clear that it is the conduct of the Respondent as outlined above that terminates the employment relationship between it and Mr Francis. Clause 3.2 of each contract identifies the ongoing nature of the employment relationship.

[49] The fifth principle includes consideration of:

- (a) “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 of entering into such contracts (*D'Lima/Fisher*).”

Mr Francis stated that the Respondent had raised that its contract with him were purposive and aligned to funding from the State Government. He stated that

while this is not the case for two of the contracts, the Respondent's submission in this regard ignores the transition of the Respondent and its roles into Marine Rescue Queensland. Mr Francis also stated that the advertisement of his position on 30 June 2023 makes it clear that funding continues.

- (b) "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)".

Mr Francis submitted that his contracts are clearly ones which operate for administrative convenience in the context of the Respondent and its roles transitioning into Marine Rescue Queensland.

[50] As the Respondent had stated that all its employees were on outer-limit contracts, and there was no dispute in relation to this, Mr Francis submitted that s.386(2)(a) of the Act does not apply.

[51] Ultimately, Mr Francis submitted that the Respondent acted in a way that has ended the employment relationship, demonstrated by the extended period taken for the investigation, the employment of another person in the training role in Far North Queensland, and the advertisement of Mr Francis's position (indicating funding remains available for the role), in circumstances where the Respondent is not reliant on funding as funding is provided yearly toward the transition to Marine Services Queensland.

[52] Therefore, Mr Francis submitted that the jurisdictional prerequisite in s.365 of the Act is met, and the Commission must deal with the application pursuant to s.368.

Evidence of Mr Williams

[53] Mr Williams has worked with the Respondent since 1997, some roles as volunteers and others as paid positions. Since 2013, he has been the General Manager.

[54] The Respondent is a not-for-profit organisation, receiving funding from the Queensland Government typically on an annual basis. There is no guarantee of funding from one year to the next. On occasion, funding has been determined on a six-monthly basis in times of economic uncertainty.

[55] The current Service Agreement applies from 1 July 2023 to 30 June 2024. Mr Williams attached a copy of the Service Agreement to his statement, which I have had regard to.

[56] Mr Williams explained that the Service Agreement distributes funding to VMR by allocating certain funds to certain 'cost centres'. There is no guarantee that funds will be allocated to a certain cost centre, as it varies year to year.

[57] In the current Service Agreement, there are nine specific cost centres, mirrored from the previous Service Agreement:

- Operational grants;
- Administration and operational support (which is the fund used to employ staff/employees);
- Training;
- Keeping vessels in Survey;
- Insurance coverage;
- Funding of fuel;
- Vessel maintenance and engine servicing;
- Direct squadron relief supplement; and
- ICT systems support payment.

[58] Mr Williams explained that funding allocated to one cost centre cannot be used for another purpose. In other words, the funding is not discretionary, and must be used for the purpose to which it has been allocated in the Service Agreement.

[59] The Respondent's most recent financial statement for the year ending on 30 June 2022 was attached to Mr Williams' statement, which I have had regard to. The Respondent has approximately \$3.03 million in cash and cash equivalent reserves.

[60] Mr Williams stated that the cash reserve is allocated to Capital Management Funding for Squadrons. This was a cost centre that funding was provided for in prior Service Agreements, but has since been discontinued. The amount allocated to this cost centre will not increase, as funding has ceased. It will only decrease, as squadrons dip into the funds for the specific purpose.

[61] The cost centre is allocated to capital contributions to new marine vessels. Put in another way, it is a fund set aside for squadrons who need to upgrade or purchase new marine vessels. When a squadron seeks access to funds, an application is made, and if successful, funds are then released for that purpose. Over time, policy was developed to expand the purposes for when this fund could be accessed. This was because acquiring new marine vessels is costly (for example, a new vessel can cost up to \$1.5 million).

[62] Squadrons could therefore access this fund for similar purposes, for example:

- Fits out of existing vessels; or
- For squadrons in remote areas, upgrades to motor vehicles to haul marine vessels.

[63] This was a more synthesised approach to distribution of the fund, which better aligned with the Respondent's operations, and the needs of the squadrons. Accordingly, the funds in the reserve are earmarked for these specific purposes. There is no discretion for those funds to be allocated elsewhere.

[64] Mr Williams further noted that the Respondent currently employs five employees. All employees are engaged on outer-limit term contracts, like Mr Francis. Mr Williams' employment contract is also an outer-limit term contract, expiring on 30 June 2024. Mr Williams explained there are a number of reasons why employees are engaged this way, such as:

- the Respondent's funding is linked to Government grants;
- the Respondent cannot guarantee the amount of funding;
- funding can vary from one financial year to the next;
- nor can funding in particular cost centres be guaranteed; and
- the Respondent will be wound up in the next few years.

[65] The employment contracts expressly refer to the fact that the employment is linked to the grant of funding, and that employment is subject to funding.

[66] In respect to Mr Francis' employment, the initial term was linked to the six-month funding agreement at the time. Mr Francis was then offered a further term, from 5 July 2021 to 30 June 2022, by letter dated 23 June 2021.

[67] Mr Francis then agreed to a further term from 1 July 2022 for a period of 12 months. The letter was signed by Mr Francis on 5 December 2022.

Evidence given during the hearing

[68] In evidence given during the hearing, Mr Williams stated it was an administrative oversight in getting the third contract to Mr Francis so late. There had not been any verbal discussions. Mr Williams resides in Brisbane and Mr Francis in Ayr. Mr Williams conceded that the contract should have been issued more promptly to Mr Francis.

[69] Mr Williams is unsure when Marine Queensland Rescue will be enlivened.

[70] Mr Williams agreed that when the third contract was issued to Mr Francis in September 2022, there were no performance issues.

[71] In respect of the 2023 – 2024 funding agreement, Mr Williams stated that there had been good faith negotiations occurring prior to July 2023. He stated that it was unlikely there would have been any surprises. The funding agreement was signed by the Respondent on 10 July 2023 and the funding had moved to be provided by the Queensland Police Service, instead of the Queensland Fire and Emergency Services.

[72] In cross-examination, Mr Williams agreed that he continued to be employed by the Respondent from 1 July 2023, notwithstanding the Respondent didn't sign the latest contract until 10 July 2023, and it was countersigned by the Queensland Police Service on 25 August 2023.

[73] Mr Williams stated that the State Executive made the decision not to extend the contract to Mr Francis. A vote was taken. Mr Williams is not a member of the State Executive but does attend meetings. He did not participate in the vote. The members are:

- Dr Graham Kingston;
- Mr Papale;
- Mr Ian Ivory; and
- Mr Gary Voss.

[74] In cross-examination, the following was put to Mr Williams:⁶

Mr Grant: Okay. Now, it's the case, though, that as at that time, you had funding available for an ongoing training position, didn't you?

Mr Williams: Yes, in good faith there would have been discussions about the service agreement, so that might have been our best understanding but as you saw, it wasn't signed until August.

Mr Grant: But there was an ongoing role, such – the same as Mr Francis's role, wasn't there?

Mr Williams: That's the best of our understanding at the time.

Respondent's Outline of Submissions

[75] The Respondent submitted that Mr Francis was not dismissed, and his employment ended on expiry of the agreed term of employment by effluxion of time.

[76] The Respondent referred to *Alouani-Roby v National Rugby Leave*⁷ as the authority for the approach to 'outer limit' contracts, in the context of an employee claiming to have been dismissed on the occasion of a contract term expiring. The Respondent stated that it is not contentious that:

- (a) an employee is dismissed only if the employment was terminated at the employer's initiative;
- (b) if the employment ends due to the effluxion of time, on a date agreed between the employer and the employee when the contract was put in place, no act of the employer is either necessary or operative to bring the employment to an end when its term expires;⁸ and
- (c) the result does not change simply because there has been more than one single 'outer limit' contract which has, in accordance with its terms, expired. Successive 'outer limit' contracts each expire on their own terms, and none involves the employee being dismissed.⁹

[77] However, the Respondent stated that this is distinguishable from a scenario where an employee on a fixed contract is terminated early at the initiative of the employer, which would clearly be a termination at the employer's initiative.

[78] Decisions that have found that an employee was dismissed despite the existence of an 'outer limits' contract are not contrary to these principles, in the submission of the Respondent. The Respondent argued they are instances of the written terms not accurately reflecting the parties' agreement. The Respondent noted that in *D'Lima*, it was held that "the evidence established that the employment contract was not restricted to the terms of a written document",¹⁰ given that:

- (a) the applicant in that matter was engaged on a succession of one-month contracts;
- (b) there was no correlation between the work and the stated contract term;
- (c) the applicant routinely worked without regard to the status of the contracts and the expiry date; and
- (d) this was endemic across the workplace.

[79] The Respondent stated that it was therefore held that the contracts were for “mere administrative convenience” and were at odds with unchallenged evidence that the applicant in that matter had continuous employment. Consequently, the outcome of this case depended on particular findings of fact.

[80] In relation to Mr Francis’ contracts, the Respondent agreed that Mr Francis was initially employed on 5 January 2021 for a 6-month period pursuant to terms set out in a letter of 9 December 2020. This contract did not anticipate extension of employment other than by a positive act of renewal. This occurred in June 2021, where a further term from 5 July 2021 to 30 June 2022 was agreed. The Respondent noted that the letter effecting this renewal expressly identified the fact that the role was subject to funding. Mr Francis was then provided a further term of 12 months to 30 June 2023, and unless extended by agreement, the employment would end on that date.

[81] The Respondent submitted that the letter sent to Mr Francis on 16 June 2023, informing him the Respondent had not decided to extend his contract had no legal effect. The Respondent submitted this letter provided information only and had no effect on the operation of the contract, nor was it required in order to bring the contact to an end.

[82] In the Respondent’s submission, there is no basis to undermine the use of outer limit contracts to underpin Mr Francis’ employment. The Respondent argued that both the necessity of funding to support the role, and the fact that the role may not remain viable, were expressed to Mr Francis during the employment term. The Respondent also pointed to the fact that, as stated by Mr Williams, the Respondent is a not-for-profit organisation and its funding is periodically determined, and that funding granted for specified purposes cannot be used for general operating expenses. Finally, the Respondent highlighted that all of its employees, including Mr Williams, are engaged on outer-limit contracts.

[83] Accordingly, the Respondent submitted that it cannot be concluded that the terms were not purposive and generally aligned to guaranteed funding, nor that they were merely for administrative convenience. Instead, the contract reflected a genuine agreement that the employment would not continue after 30 June 2023, and the application should therefore be dismissed.

Respondent’s Submissions in Reply

[84] In its reply submissions, the Respondent does not take issue with the authorities cited by Mr Francis. However, the Respondent contended that Mr Francis misapplied them to the arrangements between the parties in three critical respects.

[85] The first being that Mr Francis appears to assert (or misunderstands that the Respondent asserts) that there must be some link between the expiry of the employment contract and the rationale for why there is an outer-limit contract.

[86] Mr Francis seems to consider it significant that his role is still in existence. Evidence of the Respondent's funding arrangements is relevant to explain why outer-limit contracts have been used by the Respondent, not to condition or limit the circumstances when the employment contract would expire on its own terms.

[87] The Respondent submitted that once it is apparent that the outer-limit term arrangement in the employment contract was not for administrative convenience (as in *D'Lima*, where there was no rationale for term contracts), the contract term took effect as agreed. It did not operate only when funding was not available. One cannot read the end date specified in the contract as applicable only in specified circumstances.

[88] Whether or not funding was referred to in the contract does not, according to the Respondent, change the existence of that fact as indicative of a purpose. The Respondent asserted that Mr Francis accepts that he knew this from inception.

[89] The Respondent contended that Mr Francis attempts to qualify his recognition of the funding situation by referring to his 'understanding' that there was 'no exception' funding would be withdrawn. The Respondent submitted that Mr Francis' 'understanding' is not relevant:

- to inform what the parties agreed – the expiry date was always unconditionally expressed;¹¹ nor
- to resolve whether the expiry dates were agreed for a legitimate reason, or merely for administrative convenience. Whether or not there was 'no expectation' funding would be withdrawn, funding was granted annually and was subject to discretion beyond the Respondent's control. The Respondent was entitled to set up employment arrangements which anticipated that eventuality.

[90] The second difficulty with Mr Francis' submissions is that it misunderstands what the cases are saying, when the submissions refer to the employment being 'brought about' by the employer by some act or decision.

[91] Mr Francis relies on certain events as demonstrating that the Respondent 'brought about' the dismissal. However, the Respondent argued that the fallacy of the argument is apparent when one interrogates what would have happened under the employment contract if none of those things had occurred.

[92] The Respondent submitted that in relation to each of the matters referred to, the contract would still have expired on 30 June 2023. Not one of those matters changed what happened under the contract; this is not a situation where conduct of the Respondent brought forward the expiry date, or otherwise triggered some other event under the contract. Mr Francis served the whole of the contract period, as he would have if none of those things had occurred.

[93] These may be contributing reasons why the employment was not extended; but that does not speak to whether there was a dismissal.

[94] The Respondent submitted it is simply incoherent with the facts to assert, as Mr Francis does in his evidence, that the letters of 14 and 16 June 2023 had any impact on Mr Francis' contract term. The letter of 16 June 2023 merely confirms the effect of the employment contract, when no further term was being offered.

[95] This reveals that Mr Francis' real grievance is that he was not offered another or further term. The Respondent submitted that is not a dismissal.

[96] The third error, according to the Respondent, is in relation to Mr Francis' submission that his contracts indicated the existence of an ongoing employment relationship. Whether factually that is or is not correct, it provides no assistance to the question of whether he was dismissed, or his contract expired.

[97] The distinction between the employment contract and the employment relationship has been widely considered over many years. But what is clear is that, in a case about outer-limit contracts, the distinction is not material as:

- it is clear that both the contract and the relationship are terminated; and
- the live question is 'was it by the employer?'

[98] The Respondent submitted that the answer to that is "no", unless the Commission can go behind the expiry date clearly agreed by the parties, and for a purpose which is not in dispute (even if Mr Francis has sought to minimise the significance of the expiry date due to "no expectation").

[99] In fact, in every case where a term contract is upheld and a finding is made that there is no dismissal, employment will have continued from one contract to the next. Mr Francis conflates that reality with a different question, i.e. whether the employment was ongoing, and not conditioned by the agreed expiry date (as in *D'Lima*, based on very specific facts).

[100] Accordingly, the Respondent submitted the application should be dismissed.

Consideration

[101] Section 386 of the Act provides that a person has been dismissed in several circumstances, including when their "employment" has been "terminated on the employer's initiative". Such a situation refers to a termination that is brought about by an employer and which is not agreed to by the employee.¹²

[102] When analysing whether there has been a "termination at the initiative of the employer" for the purpose of s.386(1)(a) of the Act, it is necessary for the analysis to be conducted by reference to termination of the employment relationship. It is not conducted by reference to the termination of the contract of employment in operation immediately before the cessation of the employment.¹³

[103] A “termination at the initiative of the employer” is when two criteria are satisfied:

- the employer’s action “directly and consequentially” results in the termination of employment; and
- had the employer not taken this action, the employee would have remained employed.¹⁴

[104] The employment relationship between Mr Francis and the Respondent commenced from 5 January 2021 and was the product of three outer-limit employment contracts. The first two employment contracts were issued to Mr Francis in advance of the terms commencing. The last of the three employment contracts was issued to Mr Francis three months after the third term commenced and counter-signed by Mr Francis more than five months after the third term commenced.

[105] Each of the three employment contracts provide the parties with a right to terminate the employment by the provision of notice equal to that within s.117(3) of the Act. The contracts were therefore not a contract of employment for a specified period, and the exclusion in s.386(2)(a) does not apply.

Consideration of s.386(1)(a)

[106] I am bound to give proper consideration of the majority decision in *Navitas*. I will do so by breaking up each of the elements in paragraph [75] of the majority decision, in italics below, applying the facts in Mr Francis’ circumstances:

(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.*

[107] As I have earlier noted, the employment relationship existed between Mr Francis and the Respondent from January 2021. Notably, where the second employment contract expired ‘on paper’ on 30 June 2022, the employment relationship continued to thrive for months before an extension was offered, and even longer until it was formally accepted.

[108] There is no evidence before the Commission as to what was said and done between the parties on 1 July 2022, as Mr Williams stated that he didn’t converse with Mr Francis terribly much as they were separated by geography. It would seem that Mr Francis simply attended for work on 1 July 2022 and thereafter until he was offered an extension in early October 2022 (dated late September 2022), and formally executed it in December 2022.

(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.*

[109] Having regard to the employment relationship that existed between Mr Francis and the Respondent, I consider that Mr Francis did consider he would continue to be offered, and he would accept employment contract extensions until such time as Queensland Marine Rescue was enlivened, and he would then continue his employment under the new structure. I consider that Mr Francis’ expectations were reasonable and also understood by the Respondent.

[110] Where much emphasis was placed by the Respondent on the relevant employment terms being subject to appropriate funding, what the second contract did, by introducing a link to funding, was to simply tie the 5 July 2021 to 30 June 2022 employment term to funding within the 2021 – 2022 funding agreement. When the second contract was offered and accepted, the Respondent had a fair idea, it would seem, that funding was available to cover the cost of the role for the entire period, and in any event the term was completed.

[111] When the third and final employment contract was issued to Mr Francis in late September 2022, to cover the period up until 30 June 2023, no reference was made to the term being subject to funding for the period 2022–2023. If it ought to be implied that the reference to “*All other terms and conditions of your engagement will be as set out in your original letter of engagement of 23rd June 2021*” should be read to refer to the Respondent receiving funding in the 2022-23 Service Agreement, by late September 2022, this was a moot point, as the Respondent was confident of its funding to cover the entire period.

[112] The reason for not providing a fourth employment contract to cover the period from 1 July 2023 had nothing to do with the Respondent not being confident of funding for the 2023-2024 period; this is clear from the advertisement the Respondent placed on Seek to cover the role Mr Francis had been performing. The reason was simply that the Respondent did not wish for Mr Francis to continue performing the duties he had been performing for two and half years.

[113] Further, there was no reference in the September 2022 offer that any consideration beyond the term period of 30 June 2023 would be relevant to the Respondent’s funding of the role.

[114] Relevant to the employment relationship between the parties, I am satisfied that Mr Francis did not leave the relationship voluntarily. Rather, it was the action of the Respondent in deciding against offering a further employment contract, for which it was confident of the funding for the role, that resulted directly 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.

[115] I am of the view that the parties had not agreed on the termination of the employment relationship by 30 June 2023. On the evidence before the Commission, it was the State Executive who voted against extending the contract to Mr Francis, with the effect being that the employment contract, but not the employment relationship, was to come to an end on 30 June 2023. Mr Francis had a reasonable and understandable expectation that the employment relationship would continue.

(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.*

[116] Having regard to my earlier comments, I am satisfied that the time-limited third contract, offered to Mr Francis nearly three months after its purported commencement date, did not in truth represent an agreement that the employment *relationship* will end at a particular date.

(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). 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).

[117] I questioned the parties as to why the last employment contract was not issued until late September 2022/early October 2022, some months after its purported commencement date. Mr Francis did not assert that he had no other option but to sign the employment contract. That is, it was not pressed that there had not been genuine agreement.

[118] Mr Francis incorrectly asserted that the only change was an increase to his remuneration, however that is not what the last employment contract provided for; it did provide for an outer-limit term.

[119] I consider the Respondent had a suitable reason to offer to its employees, including Mr Francis, outer-limit contracts. This is so because it is reliant on yearly funding. On the evidence before the Commission, that funding is generally, in good faith, confirmed prior to 1 July each year, even if it is not formally agreed until July or later each year.

[120] I am satisfied that there was no serious mistake about the contents or subject matter of the third employment contract offered in September 2022. Mr Francis does not have a disability. There has not been any unconscionable conduct associated with the making of the contract. Mr Francis does not assert that he was under any duress or coercion to enter into the contract. Mr Francis did not lack the legal capacity to make the contract. The contract was not a sham. The contract was not issued to frustrate the Commission's unfair dismissal jurisdiction.

[121] I consider that the Respondent engaged in conduct that notwithstanding a contractual time limit on the third employment contract, the employment relationship would continue. I am fortified in that view by the conduct of the Respondent throughout July, August and September 2022, continuing to employ Mr Francis despite an expired second employment contract. It became business as usual, and when Mr Francis finally executed the third employment contract in December 2022, I do not consider the parties genuinely expected the employment *relationship* would end on 30 June 2023, except in the scenario where funding was not provided for the role.

[122] As distinct from the Full Bench decision in *Alouani-Roby* at [139] where it was found that the respondent in that matter acted passively and let the one-year contract expire, in the matter before me, the Respondent took steps to sever the employment relationship when it communicated to Mr Francis on 16 June 2023 there would be no extension beyond 30 June 2023. Interestingly, the employment contracts offered to Mr Francis and accepted by him stated that *after* each of the outer-limit terms [of 30 June 2022 and 30 June 2023], the employer and employee may elect to renew the contract, by negotiation. In my view, and as evidenced by the Respondent's conduct in July, August and September 2022, the employment relationship would likely continue, unless the Respondent did something otherwise to communicate that it wished to sever the employment relationship.

[123] There is no consideration required as to the effect of any enterprise agreement,¹⁵ as an enterprise agreement does not cover the parties.

Conclusion

[124] I am satisfied that Mr Francis was dismissed by the Respondent within the meaning of s.386(1) of the Act. Accordingly, the Respondent’s jurisdictional objection is dismissed.

[125] I will convene a conference between the parties to determine if the matter can be resolved. If the matter is unable to be resolved, a certificate will be issued pursuant to s.368(3) of the Act.



COMMISSIONER

Appearances:

S Grant, Counsel, instructed by Mr W Butterworth of Susan Moriarty and Associates, with permission, for Mr Francis.

J Wells and *A Nicolaidis* of Mills Oakley, with permission, for the Respondent.

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¹ [2020] FCAFC 152.

² Digital Court Book, p.72 at [6].

³ Digital Court Book, p.239 titled “KW-3”.

⁴ (2017) 273 IR 441; [\[2017\] FWCFB 5162](#).

⁵ (2022) 318 IR 389; [\[2022\] FWCFB 171](#).

⁶ Transcript PN236 – 237.

⁷ [\[2022\] FWCFB 171](#).

⁸ Ibid at [121] and [166].

⁹ Ibid at [121].

¹⁰ *D’Lima v Princess Margaret Hospital for Children* (1996) 64 IR 19; cited in *Fisher v Edith Cowan University* (1996) 72 IR 464 at 472; and *Alouani-Roby v National Rugby League* [\[2022\] FWC 171](#) at [111].

¹¹ *Condelfa Constructions Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337, 352; and *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165, 179.

¹² *Khayam v Navitas English Pty Ltd t/a Navitas English* [\[2017\] FWC 5162](#) at [75]; see also *Mohazab v Dick Smith Electronics Pty Ltd (No 2)* (1995) 62 IR 200.

¹³ *Khayam v Navitas English Pty Ltd t/a Navitas English* [\[2017\] FWC 5162](#) at [75].

¹⁴ *Mohazab v Dick Smith Electronics Pty Ltd (No 2)* (1995) 62 IR 200.

¹⁵ *NSW Trains v James* [\[2022\] FWC 55](#).