

CASENOTE: Alouani-Roby v NRL [2022] FWCFB 171

The Applicant, Mr Alouani-Roby (also '**Employee**') was engaged by the National Rugby League Ltd ('**Employer**') as a match official, on a series of maximum term contracts commencing in January 2015. In November 2020 the final of these contracts expired, and the Employee made an application to the Fair Work Commission ('**Commission**') seeking relief under Part 3-1, which is the general protections part of the Fair Work Act ('**FW Act**').

1. Application – first instance*Hearing*

Deputy President Cross of the Commission heard the first-instance application. Given the structure of contracts, the main issue was whether the ending of the employment was a 'termination' under the FW Act.

Cross DP concluded that it was clear the parties had comprehensively committed the terms of the employment relationship to the written form of the contract, and that it was a maximum term contract commencing on 1 December 2019 and concluding on 30 November 2020, and found:

- the parties entered into a genuine agreement that the Employee's engagement would not continue past 30 November 2020;
- the Deputy President considered section 386;¹ finding no dismissal within the meaning of the section;
- the Deputy President rejected the Applicant's submissions to the effect that the Respondent engaged in a process aimed at ending the employment relationship before the last contract;
- in relation to the question of whether the Appellant's contract was vitiated by one of the relevant factors set out in Khayam v Navitas,² the Deputy President found that the First Respondent had a legitimate purpose in using maximum term contracts for the engagement of its match officials and that such contracts did not contain objectionable terms as defined in section 12 of the FW Act; and
- based upon each of the above, the Deputy President dismissed the application for want of jurisdiction.

2. Appeal

Mr Alouani-Roby ('**Appellant**') sought permission to appeal to a full bench of the Commission. Unusually, a four-member full bench comprising Catanzariti VP, Asbury and Bell DPP and Mirabella C heard the application for appeal.

In a joint decision, the Court allowed the application for permission to appeal under section 604 of the FW Act, and dismissed the appeal. This note concentrates on the questions relating to dismissal, and section 386 of the FW Act. The reasons were (in summary):

¹ The Deputy President mistakenly referred to 'section 368(2)(a)' which is not a relevant section in the FW Act.

² Khayam v Navitas English [2017] FWCFB 5162.

- (i) the main ground for seeking permission to appeal was the Appellant's allegation of public interest in integrity of sport and the operation of section 386. Whilst the Employer-Respondent opposed permission, this was granted by the full bench;
- (ii) the Appellant argued that the Deputy President was in error in reaching a conclusion that the employment contract and the employment relationship were coterminous, by examining only the employment contract;
- (iii) the full bench considered the Appellant's submission that a termination 'on the employer's initiative' in section 386(1) has no relation to the existence of a valid maximum term contract. Rather the correct approach to the construction involves a consideration of propositions relating to the circumstances of termination and whether the parties intended a 'genuine agreement', and not that such agreement should operate as a limit of the period of employment of the Employee;
- (iv) the Appellant argued that the Deputy President erred by misconstruing the proper effect of the decision of the High Court in Workpac v Rossato³ on the statutory test at section 386(1)(a) of the FW Act in the context of the Full Bench decision in Khayam v Navitas. In this regard it is submitted that the Deputy President erred by finding that a valid maximum term contract is sufficient to constitute a genuine agreement

The Respondent submitted that the Appellant's employment relationship ceased on 30 November 2020 and the central question is whether the employment relationship ended by the effluxion of time as a result of the expiry of the Appellant's maximum term contract or by the Respondents' actions.

On this basis, the relevant question is whether the termination was enlivened by the actions of the Employer under the contract; by contrast, if a contract of employment ends by operation of law (without any act by the employer), then there will be no termination of employment within the meaning of section 386(1)(a).

The Full Bench took the view that the Deputy President did not err in construing the employment contract or the dismissal. The Full Bench dismissed the appeal.

Significance of the decision

The significance of this decision lies in the role of section 386 of the FW Act. There is no discretion, even where the Commission is satisfied that it is probable that adverse action has been taken, to make a finding of 'dismissal' absent certain jurisdictional facts. The conclusion of dismissal is a necessary threshold for unfair dismissal; and one of the main iterations of 'adverse action' for general protections. In each case, the jurisdictional finding provides for limits, upon the Commission's jurisdiction.

The main reason and difficulty for the litigants in this case lies with Khayam v Navitas. The role of that Full Bench decision (in particular, in relation to the facts of this case) introduced the notion of 'genuineness' into the question of jurisdiction in section 386 of the FW Act. Subsequent full benches have sought to construe that decision, and impose limits or interpretations on that 'genuineness'. It's my view that Khayam v Navitas is not good law.

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20 October 2022

³ WorkPac Pty Ltd v Rossato [2021] HCA 23.