

New - Fixed Term Contracts Expose Employers to Unfair Dismissal

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In a decision that upends a decade of legal precedent, the Full Bench of the Fair Work Commission has opened the door for employees engaged under fixed or specified-term contracts to bring unfair dismissal claims at the end of their contract term.

It has long been accepted that:

- employers are free to structure their affairs, including the contracts they offer to employees, in the way that they think best suits their interests
- this freedom has led to the proliferation of fixed-term or maximum-term contracts
- where these types of employment agreements expire at the conclusion of their term, employees are not eligible to bring unfair dismissal claims because the expiry of the agreement does not result in a *'termination of employment at the employer's initiative'*

However, in the recent decision of *Khayam v Navitas English Pty Ltd*:

- a dark cloud has emerged over the above held principles
- a distinction was drawn between:
 - (a) the termination of an employee's employment
 - (b) the mere termination of an employment contract
- the employee had been employed by their employer for over 11 years pursuant to a number of successive (and different) maximum-term contracts
- prior to the expiry of the most-recent contract, the employer advised the employee that it would not renew the contract due to performance issues (a threat it had previously made but never enforced)
- due to the circumstances of the employment relationship, the Fair Work Commission held that the mere conclusion of a contract's term did not automatically terminate the employment relationship
- the Fair Work Commission though affirmed that where a true fixed-term contract (ie, one without a right of the parties to terminate for convenience) expires at the end of its term, the employee will not be entitled to pursue an unfair dismissal claim

As the effects of the decision can be tricky to apply properly in practice, employers need to:

- identify if any maximum term or fixed term contracts are being used
- whether the terms of same are truly reflective of such agreements (ie, that the agreement is not a fixed term contract in name only)
- be mindful of the risks associated with renewing, replacing, varying or ending (by expiry, termination or otherwise) such agreements
- be mindful of the distinction between, and the effects of, an employment agreement

ending vs the employment relationship ending