Employment Contract Taken To Task by Full Bench of the Fair Work Commission

By Alice DeBoos and Chloe Mitchell

Project contract goes out to tender. Contract is awarded. Contractor hires employees for contract work. Project comes to an end and contractor employees are terminated.

It’s the circle of contractor life and a scenario we are all familiar with.

So what happens if a terminated contractor employee makes an unfair dismissal application in the Fair Work Commission?

We can almost hear the cries of Specified Period! and Specified Task! and, yes, these are the terms that will generally stand in the way of the employees in this scenario being able to make an application for unfair dismissal. However, is more required from employers than mere words and assumption?

In relation to a specified task employment contract, a Full Bench of the Fair Work Commission has indicated that it thinks so.

Jurisdictional barriers to unfair dismissal

One of the key threshold issues in an unfair dismissal application is that a person must have been ‘dismissed’ as defined by the Fair Work Act 2009 (Cth).

A person will not have been ‘dismissed’ if 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, task or season.

So, what did the Full Bench decide?

In the first decision1 the Commission found that an employee, Ms Kirsten Dale, had not been ‘dismissed’ from her employment. It was held that Ms Dale’s employment ended according to a specific task contract when her project role was no longer required and, therefore, she did not have standing to make an unfair dismissal application.

On appeal2 the Full Bench overturned the original jurisdictional determination and concluded that Ms Dale had not been dismissed by her employer upon completion of any specific task set out in her employment contract.

In reaching its conclusion, the Full Bench found:

- an employment contract to perform work of a generic nature (in this case, administration) for a third party client until the client no longer required that work does not constitute an employment contract for a specified task

- the employment task cannot be defined simply by reference to the currency of a commercial labour hire arrangement between the employer and client

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1 [2015] FWC 4970
2 [2015] FWCFB 922
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- there was nothing in Ms Dale's employment contract that specified a task to be performed or provided that the scope of the employment contract was according to any such task
- the completion date clause in the employment contract stating that termination would automatically occur upon Ms Dale's demobilisation from the project site was not referable to the completion of any particular task or piece of work
- a position or role in an employment contract is not the same thing as a task
- the abolition of Ms Dale's role resulting from the client's decision to restructure its workforce did not constitute completion of a task as the work she had been performing continued to be performed by other employees on the project site
- Ms Dale's employment contract also contained an unconditional right of termination (i.e. with notice) which is inconsistent with certainty of employment until the completion of the specific task and supported the conclusion that the employment contract was not for a specified task.

Despite Ms Dale overcoming the jurisdictional hurdle, the Full Bench ultimately found that the dismissal was not harsh, unjust or unreasonable in the circumstances and dismissed her substantive application.

But the employee lost her unfair dismissal case ... why does this even matter?

This decision matters because working to project estimates and the avoidance of unexpected (and unnecessary) costs matters.

As employees are increasingly making claims in relation to termination of employment, employers should aim to take advantage of any mechanisms that can snuff out matters in their early stages for a clear want of jurisdiction. The most obvious mechanism in this situation is the employment contract.

Even though Ms Dale did not win her unfair dismissal case, there would have still been a significant cost to the employer in defending the claim.

Of course, this decision will apply differently to different employers, employment contracts and circumstances. However, in view of this decision, there are some key questions employers should ask themselves in preparing and reviewing specific task contracts, including:

- is a specific task contract the appropriate contract in the circumstances - ie taking into consideration the nature of the role and the project?
- are you relying on a 'position' or 'role' being the 'specific task'?
- can the task be adequately and precisely articulated in an employment contract?
- are standard phrases relating to performance of other duties or at other locations of work appropriate in the circumstances?
- is termination under the contract (and in practice) directly related to the completion of a specific task?
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