[2024] FWC 1815

The attached document replaces the document previously issued with the above code on 11 July 2024.

The following corrections have been made:

1. Delete the existing paragraph [30] and replace it with a new paragraph [30] (including with additional footnotes/endnotes).

2. Renumber remaining footnotes/endnotes arising from the additional footnotes/endnotes in the new paragraph [30] (per Correction [1] above).

3. Paragraph [47] – delete the words "separately or parallel to s.386(1)(a)" in the second last line of the paragraph, and replace with the words "separately or in parallel with s.386(2)".

Associate to Deputy President Boyce
Dated: 12 July 2024

# DECISION

*Fair Work Act 2009*
s.365 - Application to deal with contraventions involving dismissal

**Ms Sami Doku**
**v**
**BlaQ Aboriginal Corporation**
(C2024/2182)

DEPUTY PRESIDENT BOYCE SYDNEY, 11 JULY 2024

*Application to deal with contraventions involving dismissal – jurisdictional objection – whether the Applicant was dismissed at employer's initiative - maximum term employment contracts - first contract replaced by second contract - second contract valid and enforceable – contractual terms clear as to contract end date - decision of Justice Raper in Alouani-Roby v National Rugby League Limited followed and preferred to decision of Full Bench majority in Khayam v Navitas English Pty Ltd - s.386(2)(a) of the Fair Work Act 2009 applies to a maximum term employment contract even if such a contract provides for early termination, as long as the contract terminates on its specified end date - s.386(2)(a) exclusion applies in this case - s.386(1)(a) not applicable where s.386(2)(a) applies - s.386(3) not applicable to s.386(2)(a) where a dismissal is alleged under Part 3-1 of the Fair Work Act 2009 - no 'dismissal' in this case - application dismissed.*

**Overview**

**[1]** On 4 April 2024, Ms Sami Doku (**Applicant**), filed a general protections involving dismissal application (**Application**) under s.365 of the *Fair Work Act 2009* (**FW Act**).

**[2]** The Applicant alleges that she was dismissed by BlaQ Aboriginal Corporation (**Respondent**) in contravention of Part 3-1 of the FW Act, because she made a complaint or inquiry in relation to her employment, and/or exercised various workplace rights, and/or holds mental health issues that constitute a 'disability'. This disability is said by the Applicant to, at least in part, go towards explaining her poor work attendance record, and substandard work performance history.[1]

**[3]** The Respondent has raised a jurisdictional objection to the Application, namely, that the Applicant was not 'dismissed' by the Respondent within the meaning of s.386 of the FW Act. The Respondent says that the Applicant's employment came to an end pursuant to the terms of her written employment contract.[2] It further says that even if the Applicant was dismissed, the Applicant did not exercise the workplace rights she alleges, and was not dismissed because of any issues associated with her disability (or for discriminatory reasons). Indeed, the Respondent says that any reason for the Applicant's dismissal does not involve a contravention of Part 3-1 of the FW Act.

**Procedural history**

**[4]** The Application was allocated to my Chambers on 6 May 2024. Directions were issued on 7 May 2024 for the filing of submissions and evidence. The parties complied with those Directions.

**[5]** A hearing was conducted on 18 June 2024. At the hearing, the Applicant was represented (with permission) by Ms *Martika Trpenovska*, Lawyer, assisted by Ms *Yuvashri Harish*, Lawyer, Inner City Legal Centre, and the Respondent was represented (with permission) by Ms *Sara Mansour*, Lawyer, assisted by Ms *Mariam Noorzai*, Lawyer, Employsure Law.

**[6]** Post the hearing, the parties filed supplementary written submissions on 4 and 5 July 2024.

**Factual findings**

**[7]** I make the factual findings that follow for the purposes of these proceedings.

**[8]** The Respondent describes itself as the peak organisation for Aboriginal and Torres Strait Islander Lesbian, Gay, Bisexual, Transgender, Queer + Sistergirl and Brotherboy (**LGBTQ+SB**) people and communities in New South Wales. It is a social and community services provider that prides itself on being committed to empowering the Aboriginal and Torres Strait Islander LGBTQ+SB community through innovation, inclusion, understanding and advocacy. Whilst no substantive evidence was relied upon in respect of the manner in which the Respondent receives operational or related income or funding, I proceed on the basis that the Respondent, as a community based organisation, is heavily reliant upon income or money allocations, primarily arising from yearly government funding, project delivery, grants, donations, or alike.

**[9]** The Applicant commenced employment with the Respondent in November 2022 on a fixed or maximum term contract as a Training and Programs Facilitator (**First Contract**). The First Contract was initially for the six month period 21 November 2022 to 19 May 2023.[3]

**[10]** In March 2023, and prior to the end date of the First Contract, the Applicant was offered (and accepted) a 12-month maximum term contract with an end date of 14 March 2024, as a Community Engagement Officer, for the period 15 March 2023 to 14 March 2024 (**Second Contract**). The Applicant executed (or signed) the Second Contract on 27 March 2023 (being a date two weeks post its commencement date of 15 March 2023).[4] I equally note that the Second Contract arose as a result of the Applicant moving from the role of Training and Programs Facilitator, to the different role of Community Engagement Officer, and that the First Contract was replaced (or displaced) by the Second Contract prior to the end date of the First Contract.

**[11]** The relevant terms of the Second Contract read:

> 1. Interpretation/Definitions

1.2 "Commencement Date" means the commencement date of this Agreement and your employment and is specified at Item 2 of Schedule 1 [15 March 2023].

1.4 "End Date" means the date that this Agreement and your employment will end, and is specified at Item 3 of Schedule 1 [14 March 2024].

2. Fixed term Employment with BlaQ

2.1 The terms of this agreement and your employment will commence on the Commencement Date and conclude on the End Date, unless terminated earlier.

2.2 Subject to the rights of earlier termination provided in this agreement, your employment will end on the End Date.

2.3 The identifiable need for this fixed-term Employment Agreement position is due to the operation of BlaQ being conditional upon the receipt of external and/or annual funding.

2.4 In accepting the terms of this agreement, you expressly acknowledge and understand that:

2.4.1 the employment is not ongoing and the maximum period of employment will be until the End Date; and

2.4.2 you have no expectation of ongoing employment beyond the End Date.

5. Termination of Employment

5.1 BlaQ may terminate this agreement and the employment immediately and without notice if you:

5.1.1 engage in willful or deliberate behaviour that is inconsistent with the continuation of the employment;

5.1.2 are in breach of any of the terms and conditions of the employment;

5.1.3 engage in conduct that causes a serious and imminent risk to the health and safety of a person or the reputation, viability or profitability of the BlaQ's business;

5.1.4 are seriously negligent in the performance of you duties;

5.1.5 commit a serious or persistent breach of this Agreement;

5.1.6 refuse to carry out lawful and reasonable directions;

5.1.7 are intoxicated or under the influence of any illicit drug at work;

5.1.8 commit an act, whether at work or otherwise, which brings BlaQ into disrepute;

5.1.9 are charged with/convicted of an offence punishable by imprisonment; or

5.1.10 otherwise engage in conduct that warrants summary termination.

5.2 Except in the case of summary dismissal or during a period of probation, either BlaQ or you may terminate this agreement and the employment earlier than the End Date, for any reason, by giving the other party notice in writing …

5.3 BlaQ may, at its sole discretion, pay any period of notice in lieu.

6. Conditions of employment

6.1 Your employment terms and conditions are pursuant to:

6.1.1 The conditions set out in this Agreement;

6.1.2 The Award, as varied from time to time; and

6.1.3 Applicable legislation, including the National Employment Standards in the *Fair Work Act 2009* (Cth).

10. Policies

10.1 You must comply with all Policies issued by BlaQ as varied from time to time, including, but not limited to, the Code of Conduct.

10.2 To avoid doubt, the policies and any obligations on BlaQ do not form part of this employment Agreement and are not binding on BlaQ. They do however constitute a reasonable direction to you.

20. General

20.1 This Agreement is governed by the law in force in New South Wales and the Commonwealth of Australia.

20.2 This Agreement constitutes the entire agreement between the Parties in respect of your employment. It supersedes all prior discussions, negotiations, understandings and agreements.

20.3 This document and the terms and conditions of your employment can be varied only by written agreement.

> 20.4 The terms of this document are separate, distinct and severable so that the unenforceability of any term in no way affects the enforceability of another term.
>
> 21. Acceptance
>
> 21.1 To accept the terms and conditions of this agreement, please sign below and return a signed copy to BlaQ within seven days. If no signed agreement is received by the Chairperson within the seven day period, this agreement will be automatically void."

**[12]** The Respondent first identified repeated performance concerns with the Applicant (regarding lateness and failure to follow procedure) in November 2023, which continued into the months that followed.[5]

**[13]** On 15 February 2024, following a letter of allegations and a disciplinary interview, the Applicant was issued with a written warning.[6] I note that the Applicant admitted to the allegations that were made against her during the disciplinary process, hence the basis upon which such allegations were found by the Respondent to have been proven.

**[14]** The Respondent's issues and concerns around the Applicant's performance and reliability continued after 15 February 2024. It was on the basis of these issues and concerns that the Respondent determined that the Applicant would not be offered a contract renewal or extension post the End Date (14 March 2024) of the Second Contract.[7]

**[15]** On 27 February 2024, the Applicant emailed the then BlaQ CEO, Ms Jessica Bouyamourn, requesting, amongst other things, to arrange a time to discuss what a further employment contract (post the End Date of the Second Contract) might look like before she goes on leave.[8] The Respondent advised the Applicant (in response to this email) that it had been determined not to offer the Applicant a further employment contract or ongoing employment upon the expiration of the Second Contract. This was communicated to the Applicant via email, attaching correspondence dated 7 March 2024 (**7 March Letter**).[9] The Applicant's email inquiry of 27 February 2024 highlights that she was well aware (at that time) that her employment under the Second Contract was coming to an end pursuant to the End Date of the Second Contract unless further agreement could be reached. She was told in no uncertain terms by the Respondent that there would be no such agreement, and that the Respondent would be relying upon the terms of the Second Contract in bringing their employment relationship to an end.

**[16]** The Applicant remained employed by the Respondent until the expiration (or End Date) of the Second Contract (14 March 2024),[10] at which time the Second Contract, and the employment relationship between the parties, ended.

**[17]** In late April 2024, the Respondent advertised for a Community Advocacy Coordinator role. This role is similar to the role performed by the Applicant (as a Community Engagement Officer) under the Second Contract. This type of community focussed role is one of the core services provided by the Respondent to the community on an ongoing basis.[11] The Respondent accepts that it did not offer, and would not have offered, the Applicant the Community

Advocacy Coordinator role due to the performance and reliability concerns that arose during the Applicant's engagement under the Second Contract as a Community Engagement Officer.

**[18]** The Applicant's evidence is that:

a) she 'thought' that her employment would be continuing based upon her discussions and interactions with Ms Bouyamourn; and

b) she requested that the Respondent give her at least one month's notice if the Respondent determines that it will not be continuing or otherwise extending her employment past the End Date of the Second Contract. Ms Bouyamourn did not say 'no' to this request, and did not say 'yes' either. Rather, the Applicant considers that Ms Bouyamourn tacitly agreed to her request for one month's notice via a non-verbal gesture (or head nod), or through her body language.[12]

**[19]** Ms Bouyamourn's evidence (on behalf of the Respondent) is that:

"Sami [the Applicant] signed, agreed and understood the terms of the [Second Contract].

Sami was never promised that her contract would be renewed or that she would be offered ongoing employment.

Sami was not dismissed; she was never told she was dismissed. Her fixed term employment [under the Second Contract] merely expired and ended on its end date [in accordance with the relevant terms of the Second Contract]".[13]

**[20]** Ms Bouyamourn's evidence is also that she never communicated or said to the Applicant, or otherwise agreed, expressly, or via her non-verbal gestures or body language, that:

a) the Second Contract would be updated, replaced, renewed or extended;

b) the Applicant would have ongoing employment with the Respondent; or

c) that the Applicant would be provided with notice (or one month's notice) if the End Date to the Second Contract was to be observed, and the employment relationship was to be brought to an end on the End Date of the Second Contract.

**[21]** Having regard to the terms of the Second Contract (at clauses 2, 6 and 20), and the evidence of the Applicant and Ms Bouyamourn, I find that there is no evidence to support the Applicant's contentions as to 'representations' or 'agreements' around:

a) the Second Contract being extended, renewed, or otherwise replaced for ongoing employment, beyond its End Date of 14 March 2024; or

b) the Applicant being promised notice (or one month's notice) if the Respondent determined (in its absolute discretion) that the Second Contract is to simply come to an end on its specified End Date of 14 March 2024. The short point is that the interpretation

by the Applicant of Ms Bouyamourn's non-verbal gestures and body language does not meet the relevant legal (or ordinary common law) tests as to offer and acceptance, and resulting agreement.

**[22]** The foregoing findings are fortified by clause 20.3 of the Second Contract, which provides that any changes to the Second Contract, or "your [the Applicant's] employment" (i.e. encompassing the employment relationship), can occur "only by written agreement".

**[23]** For completeness, I find that the Applicant's contentions as to 'misrepresentation' in relation to the Second Contract, and/or the Applicant's on-going or continued employment with the Respondent, are unsustainable on the evidence. In this regard:

a) to the extent that there is a contest as to what was said or done, it is a contest on the evidence. I do not accept that the evidence of Ms Bouyamourn, including her evidence as to the content of her discussions with the Applicant, was in any way undermined during her cross-examination at the hearing. It follows that I accept the evidence of Ms Bouyamourn as set out or summarised at paragraphs [19] and [20] of this decision. All in all, I am not persuaded (on the evidence relied upon by the Applicant) that the Respondent, either orally or in writing, made representations to, or agreements with, the Applicant of the kind or type that she asserts;

b) the operation of entire agreement term, at clause 20.2 of the Second Contract, make any pre or post entry (into the Second Contract) representations, expectations or understandings (expressly made, or arising from performance), that are inconsistent with the terms of the Second Contract, unenforceable (and thus irrelevant); and

c) the terms of the Second Contract (at clause 2) expressly state (in a clear, unambiguous, and upfront manner) that the Respondent provides no commitment to contract renewal, extension, or ongoing employment.

**'Dismissal' under s.365 of the FW Act**

**[24]** Section 365 is contained under Part 3-1 of the FW Act, and reads:

"**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."

**[25]** Aside from consent arbitration, the Commission's only role in a general protections involving dismissal application made under s.365 of the FW Act is to conduct a conference between the relevant parties (so as to assist them in attempting to resolve the dismissal dispute by agreement), or issue a certificate if a resolution is unable to be agreed (a certificate is a prerequisite to being able to progress a claim onto an eligible court for judicial determination). That said, the power to conduct such a conference and issue a certificate is provided for under the FW Act, and the Commission has no jurisdiction to conduct a conference, or issue a certificate post that conference (where resolution is unable to be reached), unless a 'valid' (or within jurisdiction) general protections involving dismissal application has been filed. It is for the Commission itself to resolve any disputes or issues as to its own jurisdiction.[14]

**[26]** The meaning of the term "dismissed" under s.365(a) of the FW Act is defined in accordance with the meaning of that term under s.12 and s.386 of the FW Act, and applicable case law authorities in respect of same.[15]

**Sections 386(1) and (2)(a) of the FW Act**

**[27]** Sections 386(1) and (2)(a) are contained in Part 3-2 of the FW Act. They read:

> "(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;"

**[28]** The phrase "terminated on the employer's initiative" under s.386(1)(a) of the Act is treated as a termination in which the action of the employer is the principal contributing factor (directly or consequentially) that leads to (or has the objective probable result of leading to) the termination of an employee's employment. That is, had the employer not taken the action that it did, the employee would have remained employed.[16]

**[29]** Post the decision in *Khayam v Navitas English Pty Ltd t/a Navitas English*[17] (**Navitas**), the Full Bench majority in *NSW Trains v James*[18] determined that the expression "*employment … has been terminated*" (in s.386(1)(a) of the FW Act) refers to termination of the employment relationship and/or termination of the contract of employment.[19]

**[30]** The majority in *Navitas* overturned the conclusion of the Full Bench of the Australian Industrial Relations Commission in *Department of Justice v Lunn*[20] (**Lunn**) as it concerned the circumstances of an employee employed pursuant to a time-limited (maximum term or outer

limit) contract (or contracts). However, consistent with High Court decisions that post-date *Navitas*,[21] the Full Bench decision in *Lunn* set out the following summation of the relevant law as it concerns ordinary contractual principles based upon the (now) universally accepted objective theory of contract, and its direct application to employment contracts:

> "29. A particular consequence of the fact that the law of employment in the modern era rests on contract is that, with some qualifications and subject to any statutory provisions to the contrary, ordinary contractual principles apply in relation to employment contracts. A fundamental feature of the general law of contract, applicable in relation to the contracts of employment, is that the intention of the parties is determined objectively and, indeed, evidence of the subjective intention of the parties is not admissible in construing a contract. Subjective intention is relevant in determining whether the parties to a written document intended to create binding legal rights and obligations but it is not determinative and the objective test will prevail where, to all outward appearances, there was an intention to create legal relations.
>
> 30. The High Court has repeatedly emphasised the importance of what is sometimes referred to as the objective theory of contract and, in particular, maintaining the rules of the common law upholding obligations undertaken in written contracts. The appellant correctly points to the decision in *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd* as a recent and apposite example. Gleeson CJ, McHugh, Kirby, Hayne and Callinan JJ referred to the debate as to whether the loan agreements in that case "were wholly oral, as the respondents alleged, or wholly written, as Equuscorp and Rural Finance contended" and continued:
>
> > 'It is, and always has been, common ground that each of the respondents executed a written loan agreement on 30 June 1989. The respondents alleged that the "operative agreement" was not contained in that writing. It was said that the relevant agreement was reached earlier and was wholly oral. Yet it was not said that the written agreement should be rectified. It was not said that a defence of *non est factum* was available. It was not said that the written agreement was executed by mistake, or that its execution was procured by misrepresentation as to its contents or effect. (The misrepresentation alleged was as to what had been said in the conversations, not what the document was or provided.)
> >
> > *The respondents each having executed a loan agreement, each is bound by it. Having executed the document, and not having been induced to do so by fraud, mistake, or misrepresentation, the respondents cannot now be heard to say that they are not bound by the agreement recorded in it. The parol evidence rule, the limited operation of the defence of non est factum and the development of the equitable remedy of rectification, all proceed from the premise that a party executing a written agreement is bound by it. Yet fundamental to the respondents' case that the operative agreements between the parties were wholly oral, and reached earlier than the execution of the written agreements, was the proposition that the written agreements subsequently executed not only may be ignored, they must be. That is not so. Having executed the agreement, each respondent is bound by it unless able to rely on a defence of non est factum, or able to have it rectified. The respondents attempted neither*.

> There are reasons why the law adopts this position. First, it accords with the "general test of objectivity [that] is of pervasive influence in the law of contract". The legal rights and obligations of the parties turn upon what their words and conduct would be reasonably understood to convey, not upon actual beliefs or intentions.
>
> Secondly, in the nature of things, oral agreements will sometimes be disputable. Resolving such disputation is commonly difficult, time-consuming, expensive and problematic. Where parties enter into a written agreement, the Court will generally hold them to the obligations which they have assumed by that agreement. At least, it will do so unless relief is afforded by the operation of statute or some other legal or equitable principle applicable to the case. Different questions may arise where the execution of the written agreement is contested; but that is not the case here. In a time of growing international trade with parties in legal systems having the same or even stronger deference to the obligations of written agreements (and frequently communicating in different languages and from the standpoint of different cultures) *this is not a time to ignore the rules of the common law upholding obligations undertaken in written agreements. It is a time to maintain those rules. They are not unbending. They allow for exceptions. But the exceptions must be proved according to established categories. The obligations of written agreements between parties cannot simply be ignored or brushed aside*.
>
> The conclusion that the respondents are bound by the written loan agreements may leave open the possibility that an earlier consensus reached by the parties was in each case a collateral agreement (made in consideration of the parties later executing the written agreement), but that has never been the respondents' case. In another case it may leave open the possibility that the contract is partly oral and partly in writing. But that cannot be so here. The oral limited recourse terms alleged by the respondents contradict the terms of the written loan agreement. *If there was an earlier, oral, consensus, it was discharged and the parties' agreement recorded in the writing they executed. It is the written loan agreement which governed the relationship between Rural Finance and each respondent*.' (emphasis added, footnotes omitted)

> 31. Thus, under the general law, in contexts where binding contracts are the norm (and employment, like commerce generally, is such a context), executed written contracts are taken to be binding according to their terms unless one of the well established categories of exception is established (and we note that these were not listed exhaustively in the passage from *Equuscorp* we have just set out). The established categories of exception do not include an amorphous assessment that there exist "strong countervailing factors" indicating that the agreement between the parties is something other than what appears in an executed written contract."[22]

**[31]** In *Navitas*, the employer's contention that "the exclusion in s.386(2)(a) applied to Mr Khayam, and accordingly the appeal should be dismissed on that basis",[23] was rejected by the

Full Bench majority (Hatcher VP (as he then was), and Saunders DP).[24] However, the contention was upheld by Colman DP (dissenting).[25]

**[32]** In *Alouani-Roby v National Rugby League Limited*[26], a case dealing with an employee engaged pursuant to a series of maximum term contracts, Deputy President Cross gave the following summary of the manner in which the High Court in *WorkPac Pty Ltd v Rossato*[27] determined that employment contracts are to be construed, enforced and applied:

> "The High Court held that a casual employee is an employee who has not been given a firm advance commitment to ongoing work by the employer in the contract of employment. On the facts in *WorkPac*, the High Court found that Mr Rossato's contract of employment did not contain a firm advance commitment to ongoing work. In the course of their reasons, the plurality applied the following propositions as steps to reach this conclusion:
>
> > (a) The character of a legal relationship between parties - including the type of employment relationship between an employer and employee - is 'determined only by reference to the legal rights and obligations which constitute that relationship.' This involves construing the terms of the contract according to their plain and ordinary meaning to determine the nature of the relationship between the parties. The parties' 'binding contractual promises' are the 'reliable indicators of the true character of the employment relationship' and 'the function of the courts [is] to enforce [such] legal obligations.'
> >
> > (b) Where the parties have comprehensively committed the terms of the employment relationship to a written contract and have adhered to those terms, the characterisation of the relationship must be determined by reference to the written contract. It is also relevant to have regard to the terms of any enterprise agreement which regulates the employment relationship between the parties in determining the correct characterisation of the relationship. The express terms must be given effect unless contrary to statute.
> >
> > (c) Nothing in the [FW] Act regulating the employment relationship 'inhibits the freedom of the parties to enter into a contract' and 'so far as casual employment is concerned, the [FW] Act leaves the making of such an arrangement to be agreed between the parties.' The proper construction of a contract of employment does not involve straining legal language and concepts 'in order to moderate the perceived unfairness resulting from a disparity of bargaining power between the parties so as to adjust their bargain.' Even the doctrines of unconscionability or undue influence do not operate to address any perceived unfairness arising from such disparity.
> >
> > (d) In determining the correct legal characterisation of the employment relationship, the court's function in construing the written employment contract is 'not to act as an industrial arbiter whose function is to synthesise a new concord out of industrial differences' or 'to reshape or recast a contractual relationship in order to reflect a quasi-legislative judgment as to the just settlement of an industrial dispute.'

> (e) In determining the character of a legal relationship between parties, it is not relevant to have regard to:
>
> > (i) 'unenforceable expectations or understandings that might be said to reflect the manner in which the parties performed the agreement;' or
> >
> > (ii) the nature of the relationship between the parties based on the 'real substance', 'practical reality' or the 'true nature of the relationship,' because such 'an outcome does not accord with elementary notions of freedom of contract' and 'involve[s] the very kind of obscurantism that has been said to be alien to the judicial function.'
>
> (f) To the extent that unspoken mutual undertakings or shared unenforceable expectations or understandings are capable of potentially giving rise to an implied term or a subsequent variation to the written contract, they cannot contradict or be inconsistent with express terms of the contract."[28]

**[33]** On appeal, in *Alouani-Roby v National Rugby League Limited*[29] (**Alouani-Roby FB Decision**), the Full Bench upheld the decision of Deputy President Cross, and stated:

> "[125] The employment relationship and the employment contract are interrelated. The contract of employment creates the basis of and underpins, the employment relationship. As McHugh and Gummow JJ observed in *Byrne v Australian Airlines Ltd*:
>
> > "The evolution in the common law as to the relationship of employment has been seen as a classic illustration of the shift from status (that of master and servant) to that of contract (between employer and employee)."
>
> [126] And in *WorkPac v Rossato* the plurality cited the judgement of French CJ, Bell and Keane JJ in *Commonwealth Bank v Barker* who said:
>
> > "The employment relationship in Australia operates within a legal framework defined by statute and by common law principles, informing the construction and content of the contract of employment."
>
> [127] Also, as Katzman J observed in *Broadlex*: "The employment relationship is inherently a contractual one. Consequently, there can be no employment relationship without a contract of employment."
>
> [128] The Full Bench in *Khayam v Navitas* did not determine that the contract of employment is irrelevant to the question posed by s.386(1)(a) and nor did it establish a principle that the circumstances of the entire employment relationship trump the terms of an employment contract in all cases. Rather, it emphasised that there may be cases where, notwithstanding that employment has ended at the same time as the end date in a time-limited contract, and ostensibly in accordance with the terms of the contract, it will be necessary to analyse the entire employment relationship to determine whether an employee has been dismissed within the meaning of s.386(1)(a).

[129] Further, the Full Bench in *Khayam v Navitas* did not assert in the first principle [at paragraph [75] of its decision] that in all cases, the question of whether a person has been dismissed, is answered by focusing only on the employment relationship and whether it has ended, in isolation from whether there has been a termination of the contract of employment. The paragraphs preceding the principle in paragraph [75](1) deal with propositions that the definition of "dismissed" in s.386(1) is not to be read as excluding in all circumstances, a termination of employment that occurs at the end of a time limited contract of employment, and that the mere fact that an employer has decided not to offer a new contract of employment at the end of a time limited contract, which represents a genuine agreement by parties that employment should come to an end not later than a specified date, will not by itself, constitute termination of employment."

[130] This is also evident from the fact that the first principle in [75](1) is expressed with an important qualification, that where the employment relationship is made up of a sequence of time-limited contracts, analysing whether there has been a dismissal for the purposes of s. 386(1)(a) of the FW Act, may, depending on the facts, require consideration of the circumstances of the entire employment relationship rather than the terms of the last of those employment contracts. Subsequent principles set out by the Full Bench make clear that this broader analysis will not be appropriate in all cases and there will be cases where the circumstances of the entire employment relationship do not establish anything other than a genuine agreement, constituted by a time limited contract, that employment will not continue after a specified date.

[131] For the purposes of analysing whether there has been a dismissal, within the meaning in s.386(1)(a), consideration of the entire employment relationship as posited by the Full Bench in *Khayam v Navitas*, includes consideration of the contract of employment in operation at the time of the employment ending and may also include consideration of other employment contracts during the entire employment relationship (or series or employment relationships as posited by Katzman J in *Broadlex*). As we have noted, the contract of employment is fundamental to, and underpins, the employment relationship. In addition to the terms of the contract, consideration of the entire employment relationship may, depending on the facts, require examination of a range of matters encompassed in the principles set out in paragraph [75] by the Full Bench in that case, including: the field of employment in which the contract operates; the terms of any industrial instruments including awards and enterprise agreements applicable to the relevant employment; all contracts in a series of time limited contracts; the context in which the contract of employment and the employment relationship operated; conduct of the parties during the relationship and the circumstance in which the employment ended. Consideration may also be required as to whether there are vitiating factors so that there is no legally effective time limit on the employment.

[132] To state the obvious, the issue for determination in the present appeal is whether the Appellant was dismissed within the meaning in s.386(1)(a), and not whether the Respondents engaged in conduct, which if established at hearing, would constitute adverse action. The Respondents' conduct is relevant in this appeal, only to consideration of whether it was the principal contributing factor which resulted, directly

> or consequentially, in the termination of the Appellant's employment or insofar as it relates to matters encompassed within the principles in *Khayam v Navitas.*
>
> [133] A finding as to whether a person has been dismissed within the meaning in s.386(1) is a jurisdictional pre-requisite to the person making a general protections application involving dismissal, under s.365 of the FW Act. The Commission is not empowered to determine whether a person has been dismissed, based on a view that it would be fair or just for the person to be eligible to seek a particular remedy. Neither is the Commission empowered to find that that because a person claims to have been subjected to adverse action, the person should be permitted to make a claim for a remedy for which dismissal is a jurisdictional pre-requisite, in circumstances where the person has not been dismissed. There is no discretion, even where the Commission is satisfied that it is probable that adverse action has been taken, to extend remedies for dismissal to persons who have not been dismissed. Furthermore, a person who is employed on a time limited contract that reflects a genuine agreement that the employment relationship will not continue after a specified date, cannot seek to effectively set aside the contract by altering his or her position, and asserting that employment is not ending voluntarily, simply to access a remedy under the FW Act that requires that the person was dismissed."[30] (citations omitted)

**[34]** An application for judicial review of the *Alouani-Roby FB Decision* was dismissed by Justice Raper in the Federal Court (**Alouani-Roby FC Decision**).[31] Significantly, however, her Honour (in *obiter*) disagreed with (or rejected) the reasoning of the majority decision in *Navitas* concerning the operation of s.386(2)(a) of the FW Act.[32] Relevantly, Justice Raper stated:

> "I accept that the contrary argument is that the phrase "contract of employment for a specified period of time" is replicated in the FW Act and that the phrase had previously been construed as not applying to contracts which were essentially outer limit contracts which allowed for early termination: see *Cooper v Darwin Rugby League Inc* (1994) 57 IR 238 at 241; *Andersen v Umbakumba Community Council* (1994) 126 ALR 121 at 125-126. However, the phrase must be construed in the context of the current, differently crafted, legislative provision as a whole. That context is instructive and supports the view that the legislature intended that the provision have a different effect than how its predecessor provisions had been interpreted. A construction of the provision on its terms supports the NRL's interpretation without need for recourse to the extrinsic material. I accept the NRL's argument that s 386(2)(a) applies to outer limit contracts which allow for early termination but only applies where the employee's employment has been terminated at the end of the specified period of time."[33]

**[35]** The reasoning that led to the majority conclusion in *Navitas* in relation to s.386(2)(a) of the FW Act was directly considered by Justice Raper in the *Alouani-Roby FC Decision*, and rejected.[34] Specifically, I interpret and apply Justice Raper's findings, as follows:

a) a contract for a "specified period of time" is not to be treated with caution or otherwise undermined at law by the mere fact that it includes a term enabling for termination of the contract (at any time) during or within its specified or fixed term. Rather, it remains a contract for a "specified period of time" within the meaning of s.386(2)(a) of the FW Act (notwithstanding that it might also be interchangeably

labelled or characterised as an outer limit or maximum term contract, or not a true fixed term contract); and

b) the straightforward exclusion in s.386(2)(a) applies to a contract for a "specified period of time" (again, notwithstanding that the contract includes a term enabling termination of the contract (at any time) during or within its specified or fixed term), in circumstances where the contract "has terminated at the end of the period". In other words, the express terms of a contract must be given effect to, unless contrary to statute.[35] Past conduct (including a series of previous contract renewals in the same terms), or arrangements made for administrative consistency and/or efficiency, do not provide a legitimate basis for going behind the terms of the relevant contract (or applying anything other than normal, or ordinary, contractual principles).[36]

**[36]** The *Alouani-Roby FC Decision* has since been acknowledged and followed by members of this Commission in terms of s.386(2)(a) of the FW Act applying (irrespective of what was said by the majority in *Navitas*) to outer limit or maximum terms contracts which allow for early termination where the employee's employment has ended at the end of the period of time specified in the written contract.[37] As Wilson C stated in *Garriock v Australian Taekwondo Ltd*[38]:

"30. At the conclusion of the hearing conducted by me on 15 January 2024 I raised with both parties that neither had addressed the decision of a Full Bench majority in *Khayam v Navitas English Pty Ltd* (*Navitas*). Directions were given for both parties to file submissions in relation to the reasoning in the Full Bench's decision and its application to this case.

31. Following the issue of these Directions Counsel for the Applicant, Mr Tierney, advised that the Federal Court of Australia had recently issued a judgement rejecting the majority's reasoning in *Navitas*. The judgement in question is *Alouani-Roby v National Rugby League Ltd* (Alouani-Roby) handed down by Justice Raper on 18 January 2024.

32. The majority in *Navitas* found that earlier reasoning of the Australian Industrial Relations Commission decided under the *Workplace Relations Act 1996* had incorrectly stated the "termination of employment at the initiative the employer … and its application to the circumstances of an employee employed pursuant to a time-limited contract or contracts". Further the majority found that "s.386(3) would also be rendered otiose if a termination of the employment of a person employed under a contract for a specified period at the end of that period, as well as the other two categories of termination encompassed by the exclusion in s.386(2)(a), were incapable of constituting a termination of employment at the initiative of the employer within the primary definition on s.386(1)(a). Section 386(3) operates to negate the exclusion in s.386(2)(a) [in] the specified conditions."

33. *Navitas* accepted that an employer which decided not to offer a new contract of employment at the end of a time limited contract which represented a genuine agreement by the parties that the employment relationship should come to an end not later than a

specified date will not by itself constitute a termination of the initiative the employer. However, with respect to s.386(2)(a) the majority found that:

> " … In respect of time-limited contracts, s 386(2)(a) contains two requirements that must be met in order for the exclusion to apply. The first is that the person must have been employed under a 'contract of employment for a specified period of time'. … The second requirement, which was not contained in the preceding legislation, provides that the exclusion only applies where the employment has terminated at the end of the specified period."

34. After consideration of the means by which s 386(2)(a) was enacted the majority in *Navitas* found that the Applicant's final contract of employment "provided for an unqualified right for either party to terminate the contract on four weeks' written notice or for Navitas to terminate on the provision of four weeks' pay in lieu of notice. The contract was therefore not a contract of employment for a specified period, and the exclusion in s 386(2)(a) did not apply".

35. The Court found in *Alouani-Roby*, when considering an alternative argument to a primary position put by the respondents first that "[i]f one were to interpret the provision, as not applying to maximum term contracts which contained early termination clauses, this result appears to be directly contrary to the intent of the provision" with the result that "s.386(2)(a) applies to outer limit contracts which allow for early termination but only applies where the employee's employment has been terminated at the end of the specified period of time". Both parties in this matter submitted that the reasoning in *Alouani-Roby* is binding on the Commission and should be applied by me to this case. I accept the submission and as a result find that Ms Garriock's 2020 Contract was time-limited and that absent other factors s.386(2)(a) operates to preclude a finding that Ms Garriock was "dismissed" within the meaning of the [FW] Act if it was the case that the 2020 Contract simply ended owing to an effluxion of time."[39]

**[37]** Including for the reasons that follow, I equally consider it appropriate to adopt and follow the reasoning set out in the *obiter* remarks of Raper J in the *Alouani-Roby FC Decision* in this case. To the extent that the *Alouani-Roby FC Decision* is contrary to the majority decision in *Navitas* about the operation and application of s.386(2)(a) of the FW Act to an employment relationship governed by a written outer limit or maximum term employment contract containing an early termination clause on specified grounds, I apply the *Alouani-Roby FC Decision*.

**[38]** In my view, the starting point begins with the following straightforward principles:

a) the employment relationship is both referrable and deferrable to the terms of the applicable employment contract;

b) "unless some law provides otherwise, parties are free to contract as they see fit" (see *Murphy v Chapple*[40](**Chapple**), per Jagot, Banks-Smith and Jackson JJ, at [31]). The provisions of the FW Act operate against the background of the fundamental

doctrines of the common law, with one of those doctrines being the 'freedom to contract';[41] and

c) it is the function of courts and tribunals to enforce legal obligations under a contract, and the express terms of a contract must be given effect to unless contrary to statute (see High Court decisions in *WorkPac*[42], *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd*[43] (**Personnel Contracting**) , and *ZG Operations Australia Pty Ltd v Jamsek* (**Jamsek**)).[44]

**[39]** Cases such as *WorkPac*, *Personnel Contracting*, *Jamsek*, and *Chapple*, are not simply cases that concern topics such as casual employment, or the existence of an employment (or independent contractor and principal) relationship. Rather, they stand for, and set out, the core principles that must be applied by courts and tribunals to the application and enforcement of the terms of employment contracts at large, including as they apply to or govern an employment relationship. As Gageler and Gleeson JJ state in *Personnel Contracting*:

> "[59] … Where no party seeks to challenge the efficacy of the contract as the charter of the parties' rights and duties, on the basis that it is either a sham or otherwise ineffective under the general law or statute, there is no occasion to seek to determine the character of the parties' relationship by a wide-ranging review of the entire history of the parties' dealings. Such a review is neither necessary nor appropriate because the task of the court is to enforce the parties' rights and obligations, not to form a view as to what a fair adjustment of the parties' rights might require.
>
> [60] In this respect, the principles governing the interpretation of a contract of employment are no different from those that govern the interpretation of contracts generally. The view to the contrary, which has been taken in the United Kingdom, cannot stand with the statements of the law in *Chaplin* and *Narich*."[45]
>
> …
>
> "124. The proposition that a written contract of employment must be interpreted according to ordinary contractual principles is not in doubt. Gleeson CJ referred to the application of those ordinary principles of interpretation to a written contract of employment, and no more, when he succinctly stated in *Connelly v Wells*:
>
> > "Where the relationship between two persons is founded in contract, the character of the relationship depends upon the meaning and effect of the contract. In the absence of a suggestion that a contract was varied after it was originally made, its meaning and effect must be determined as at the time it was entered into. If the contract is in writing, then the court which is considering the nature of the relationship between the parties is directed to an examination of the terms of the written agreement in the light of the circumstances surrounding its making."[46]

**[40]** These "ordinary contractual principles" and "ordinary principles of interpretation", as referred to by Gageler and Gleeson JJ,[47] require that the express terms of a contract must be given effect to, unless contrary to statute.[48] Apart from anything else, this ensures that a contract

that means one thing the day that it is signed, does not mean something different a month or a year later, by reason of subsequent events.[49]

**[41]** From a statutory construction perspective, the ordinary meaning of phrases found in s.386(2)(a) of the FW Act, such as "specified period of time" and "the end of the period", contain no ambiguity. As Justice Raper has stated, these phrases and words require no recourse to extrinsic material.[50]

**[42]** There is no basis to read down or alter the plain meaning of the foregoing phrases simply because a contract for a specified period of time may provide for termination to occur by either party (with or without notice) during or within a specified term, in circumstances where such a termination term has not been utilised. Indeed, as a matter of commercial and common sense, the fact that a contract, howsoever described or labelled as a fixed term, specified term, outer limit, or maximum term contract (on a rolling series or otherwise), contains a term that brings a contract to an end (prior to the end of its term) on the basis of (for example) operational requirements, incapacity, misconduct or unsatisfactory work performance, ought not become a release valve by which s.386(2)(a) is not to be applied, but the test under s.386(1)(a) is to be considered or applied (i.e. where the contract ends on its end date).

**[43]** Nor is there any need (or requirement) to inquire into or consider why a specific maximum term (with a stated commencement and end date) has been included in a contract, for example, by turning to issues such as funding arrangements, public policy considerations, or the practical reality of the employment relationship.[51] Given that parties are free to contract as they see fit, such a term needs no particular reason or justification for its inclusion in an employment contract. The only question under s.386(2)(a) becomes one of first principles, i.e. is there a valid contract that contains a specified end date, and did the contract end on that end date? To quote Latham CJ of the High Court in *Wilton v Farnworth*[52]:

> "In the absence of fraud or some other of the special circumstances of the character mentioned [i.e. duress, misrepresentation, non-disclosure, coercion, undue influence, lunacy, mistake, or abuse of a confidential relationship], a man cannot escape the consequences of signing a document by saying, and proving, that he did not understand it. Unless he was prepared to take the chance of being bound by the terms of the document, whatever they might be, it was for him to protect himself by abstaining from signing the document until he understood it and was satisfied with it. Any weakening of these principles would make chaos of every-day business transactions."[53]

**[44]** Both parties accept that contrary to the majority decision in *Navitas*, Justice Raper in the *Alouani-Roby FC Decision* held that s.386(2)(a) of the FW Act applies to outer limit or maximum term employment contracts which provide for early termination, but only where the employment ends on the relevant end date specified in the outer limit or maximum term employment contract.[54]

**[45]** That said, the Applicant submits that despite the *Alouani-Roby FC Decision*, a dismissal under s.386(1)(a) can still occur where employment ends on the end date specified in an outer limit or maximum term employment contract, where there are vitiating factors present as set out in *Navitas* (at [75]).[55] I do not agree. The vitiating factors referred to in *Navitas* (at [75]) concern an analysis to be conducted under s.386(1)(a) of the FW Act, where s.386(2)(a) does

not apply. Where s.386(2)(a) does apply, the only issues that arise for determination flow from the resolution of contentions (if made) concerning ordinary contractual principles (i.e. going to matters such as fraud, sham, duress (i.e. 'illegitimate' pressure), misrepresentation, non-disclosure, coercion, undue influence, lunacy, mistake, or abuse of a confidential relationship).

**Does s.386(3) of the FW Act apply to a 'dismissal' under s.365 of the FW Act?**

**[46]** Section 386(3) of the FW Act sets out the circumstances in which s.386(2)(a) does not apply. It reads:

> "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."

**[47]** Section 386(3) places the word "substantial" prior to "purpose". The term "substantial" directs itself to matters of 'real' substance, that are large, weighty, big or considerable, greater than the less.[56] The term "purpose" requires evidence going to a particular purpose, such as motivations and reasons, and involves evidence going to subjective considerations (not subjective intent, but including the state of mind of the relevant person/s, or what the person actually knew and believed at the time they were offered and then entered into the contract),[57] although all the relevant circumstances, including objective elements, will be considered to determine whether a relevant 'purpose' exists.[58] The short point is that an employer would need knowledge of, or be reckless to, what is being avoided, before accusations of engaging in anti-avoidance have a foundation to be made, and there is no reverse onus to assist in making out such an accusation (with its inherent seriousness). The fact that anti-avoidance is a purpose in entering into a contract of a kind referred to in s.386(2)(a) is not the test, i.e. anti-avoidance must be a 'substantial' purpose in entering into such a contract. Further, I do not accept that s.386(3) is a provision that searches for an exception to s.386(2), so that s.386(1)(a) may or must have some work to do in particular factual scenarios involving a maximum term or outer limit contract. Section 386(3) has an anti-avoidance purpose, such that it only has work to do where avoidance is actually established on the evidence. If s.386(2) applies, any requirement to turn consider s.386(1)(a), separately or in parallel with s.386(2), falls away, unless there is avoidance to which s.386(3) applies.

**[48]** Section 12 of the FW Act states "In this Act: *dismissed*: see section 386". However, s.386(3) only applies to "this Part", being Part 3-2 (Unfair Dismissals) of the FW Act.[59] It clearly has a specific purpose in respect of the meaning of the term "dismissed" under Part 3-2 of the FW Act, and not otherwise. There is no basis (let alone a sound basis) to extend its operation to the meaning of the term "dismissed" for the purposes of s.365 of the FW Act (contained under Part 3-1). Despite the fact that a determination as to a dismissal is a jurisdictional fact that must be relevantly established under s.385(a) and s.365 of the FW Act, nothing in the FW Act (including the "in this Act" definition of "dismissed" under s.12, or any section of Part 3-1 of the FW Act), modifies s.386, such that s.386(3) would be applicable or relevant to a dismissal for the purposes of s.365 (being a gateway to a civil penalty claim). In other words, I do not accept that there is any basis for a construction of the definition of "dismissed" under s.12 of the FW Act, such that s.386 is effectively cut and pasted as a provision of Part 3-1 of the Act, with the words "this Part" being (or becoming) a reference to

"Part 3-1" of the FW Act. This does not mean that s.386(3) has not got work to do, it simply has no work to do for the purposes of Part 3-1 (including s.365) of the FW Act.

**[49]** It is unnecessary for me to consider whether similar anti-avoidance claims can be brought in any event (before a court) under the vast array of causes of action available under Part 3-1 of the Act by virtue of the broad definition of "workplace right" and the extended definition of "adverse action" under s.342(2) of the FW Act, including as to sham arrangements (generally) and purported misrepresentation/s (i.e. including in the court's ancillary jurisdiction, advanced together with a statutory claim, and/or irrespective of whether or not adverse action in the form of dismissal has occurred).

**Consideration**

**[50]** There is no basis upon which the terms "Commencement date" and "End date" under the Second Contract are to be construed as being other than what they say they are, i.e. the Second Contract starts on its stated Commencement Date, and comes to an end on its stated End Date. The express terms of the Second Contract must be given effect to, unless contrary to statute.[60] In this case, no question arises as to the terms of the Extended Contract being contrary to statute, or contrary to the terms of the modern award[61] that applied to the Applicant's employment with the Respondent.

**[51]** In *Navitas*, the Full Bench made the point that the mere fact that a fixed term, specified term, outer limit, or maximum term contract comes to an end in accordance with its specified end date does not in and of itself constitute a dismissal (termination at the initiative of the employer).[62] Further, a contract coming to an end, as compared to a failure to offer a further contract or ongoing employment, are not the same thing, such that the latter is not to be aggregated, or otherwise confused with or linked to, the former when determining whether or not a dismissal has occurred.

**[52]** In the facts and circumstances of this case, and having regard to the findings I have made earlier in this decision, I find as follows:

a) the Second Contract was an offer open to be accepted or rejected by the Applicant;

b) the Second Contract was duly executed (and accepted) by the Applicant. The fact that the Second Contract was executed some 14 days after its Commencement Date is of no moment. Contracts can be executed before or after their commencement date, and have retrospective effect. Simply because this occurred in the context of an ongoing employment relationship does not give rise to a finding or conclusion, or support an inference, that the Second Contract is not enforceable as to its End Date, or that the employment relationship was (at any relevant time between 15 March 2023 and 14 March 2024) not coexistent with, or otherwise deferable to, the terms of the Second Contract;[63]

c) there is no evidence before me to indicate that that the parties to the Second Contract did not intend to give legal effect to its terms, including as to its End Date;

d) the Second Contracted contained an agreed End Date. It ended by effluxion of time, in accordance with its stated (and agreed) End Date, on 14 March 2024. It expressly provides for no promise or guarantee (whatsoever) of further or ongoing employment;

e) the disciplinary process that occurred in the months or weeks leading up to 14 March 2024, and the written warning that was issued to the Applicant in February 2024, do not alter the fact that the Second Contract ended by effluxion of time on 14 March 2024. This is especially so having regard to the terms at clauses 2, 6 and 20 of the Second Contract. The fact that a written notice to attend a disciplinary interview may contain a statement to the effect of 'depending upon your responses, you may be disciplined or have your employment terminated' is hardly extraordinary. In and of itself, such a statement merely serves to put an employee on notice of possible disciplinary process outcomes. It is not a basis upon which an adverse inference should be made, or an admission be found, as to an employer's actions or intentions. Rather, it is the actual outcome of a relevant disciplinary process that is relevant or important, not a statement putting an employee on notice of possible outcomes prior to their response being received. In this case, the Applicant was not dismissed as a result of a disciplinary process, she was only issued with a written warning;

f) there is no evidence before me to support a finding that the Second Contract was a sham, or was otherwise entered into, or tarnished, by fraud, duress, misrepresentation, non-disclosure, coercion, undue influence, lunacy, mistake or abuse of a confidential relationship;

g) there is no evidence before me to support a finding that the entering into, continuance of, or ending of, the Second Contract involved or encompassed any misrepresentation. To the extent that the Applicant relied upon any of her assertions as to misrepresentation made after she signed the Second Contract, such reliance is contrary to the express terms of the Second Contract. At common law, a valid entire agreement clause will dispose of issues related to such reliance, and a requirement for all variations to be in writing has the same effect;[64]

h) the words of the 7 March Letter do not constitute notice of termination. Rather, the Applicant was simply being advised that the Second Contract would not be renewed, replaced or extended beyond its End Date.[65] This is wholly consistent with the express terms of the Second Contract, which must be given effect to, unless contrary to statute;[66]

i) the fact that the Respondent chose not to renew, extend or replace the Second Contract, or offer the Applicant with ongoing employment, was a choice the Respondent was entitled to unilaterally make in operating and managing its business affairs. It was a choice (or act) separate to, or to be differentiated from, the employment relationship ending on 14 March 2024 (in accordance with the terms of the Second Contract). It is not a matter that warrants consideration for the purposes of either s.386(1)(a), or s.386(2)(a), of the FW Act. In the facts and circumstances of this case, it is not a matter to be considered by reference to the disciplinary process that occurred in the months or weeks leading up to 14 March

2024, or written warning that was issued to the Applicant. It would be highly unusual, even uncommercial, if an employer did not determine that a contract renewal, replacement or extension should not be based upon an employee's performance or reliability (i.e. whether or not such matters were, or were not, previously addressed during the employment and/or prior to the End Date of the contract); and

j) the Applicant did not contend, or otherwise did not advance any probative evidence to enable a finding to be made, that the Second Contract:

i. was varied, replaced, or abandoned by way of a separate agreement;

ii. may not be limited to its terms;

iii. is contrary to statute, or the terms of the modern award that covered the Applicant in her employment with the Respondent;[67]

iv. was entered into as a result of misrepresentation or misleading conduct (e.g. fraud);

v. was entered into as a result of a serious mistake about its contents or subject matter;

vi. concerned unconscionable conduct associated with its making or performance;

vii. was entered into by the Applicant under duress or coercion; or

viii. was a 'sham' (in the proper legal sense of that term).[68]

**[53]** I find that in this case there is no fact or circumstance warranting a departure from the position that a maximum term or outer limit contract may expire by effluxion of time, and that it is that legal event that brings the employment relationship between the parties to an end. Further, I find that in the facts and circumstances of this case, there is no separate question as to whether it was the initiative of the employer that brought that expiry about. This is a s.386(2)(a) case, not a s.386(1)(a) case. In my view, this is consistent with the reasons of Raper J in the *Alouani-Roby FC Decision*. It is also consistent with the 'outcome' of the case in *Glenn Charles Baughen v Bawinanga Aboriginal Corporation*[69] (upheld on appeal by the Full Bench in *Glenn Charles Baughen v Bawinanga Aboriginal Corporation*[70]).

**[54]** My ultimate finding is that the Applicant's employment came to an end on 14 March 2024 pursuant to the express terms of the Second Contract. It follows that I equally find that s.386(2)(a) of the FW Act applies, and that the Applicant was not "dismissed" within the meaning of s.386 of the FW Act. Given this finding, it is unnecessary for me to deal with this matter any further.

**Conclusion**

**[55]** For the reason set out in this decision, based upon the evidence tendered at the hearing, the submissions of the parties, and the various findings made throughout this decision, I uphold the Respondent's jurisdictional objection. It is therefore necessary that the Application filed by the Applicant on 4 April 2024 be dismissed on the basis that it is without jurisdiction to proceed. I will make an Order to this effect, to be issued contemporaneously with this decision.


DEPUTY PRESIDENT

*Appearances*:

The Applicant (Ms *Sami Doku*) was represented (with permission) by Ms *Martika Trpenovska*, Lawyer, assisted by Ms *Yuvashri Harish*, Lawyer, Inner City Legal Centre.

The Respondent (BlaQ Aboriginal Corporation) was represented (with permission) by Ms *Sara Mansour*, Lawyer, assisted by Ms *Mariam Noorzai*, Lawyer, Employsure Law.

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[1] Form F8, 4 April 2024, at Items 3.2 to 3.4.
[2] The employment contract in this case was made in March 2023 (i.e. before the commencement of the legislative changes under the *Fair Work Act 2009* (**FW Act**), that apply to fixed term contracts entered into on or after 6 December 2023, per Division 5 of Part 2-9 of the FW Act, ss. 333E-333L).
[3] I accept that the reference to 19 May 2022 was a typographical error, and should instead read 19 May 2023: Transcript, PN344-PN345.
[4] Exhibit R2, Annexure 'A'.
[5] Transcript, PN112-PN118, PN143, and PN210-PN212.
[6] Exhibit R1, PN121.
[7] Transcript, PN179 and PN182-PN185.
[8] Exhibit R2, Annexure 'B'.
[9] Ibid, Annexure 'C'.
[10] Exhibit R2.
[11] Transcript, PN187-PN193, PN198.
[12] Ibid, PN234-PN237, PN244, PN265-PN267, PN302.
[13] Ibid.

[14] See the decision of the Full Federal Court in *Coles Supply Chain v Milford* [2020] FCAFC 152, at [74]-[75], and *Lipa Pharmaceuticals Ltd v Mariam Jarouche* [2023] FWCFB 101, at [23].
[15] In relation to the application of s.386 of the FW Act to general protections involving dismissal claims, see *Coles Supply Chain v Milford* (2020) 300 IR 146, and *Fair Work Ombudsman v Austrend International* (2018) 273 IR 439. See also the discussion in *Morris v Allied Express Transport* [2016] FCCA 1589, at [116] and [117], and *Searle v Moly Mines Limited* [2008] AIRCFB 1088; (2008) 174 IR 21, at [17].
[16] *Mohazab v Dick Smith Electronics* (2005) 62 IR 200, at 205 to 206. See also: *O'Meara v Stanley Works Pty Ltd* [2006] AIRC 496, at [19] to [23]; *Mahony v White* [2016] FCAFC 160, at [23]; *Khayam v Navitas English Pty Ltd* [2017] FWCFB 5162, at [75]; *Rheinberger v Huxley Marketing Pty Ltd* (1996) 67 IR 154, at 160; *Khayam v Navitas English Pty Ltd t/a Navitas English* [2017] FWCFB 5162; (2017) 273 IR 441.
[17] *Khayam v Navitas English Pty Ltd t/a Navitas English* [2017] FWCFB 5162; (2017) 273 IR 441.
[18] [2022] FWCFB 55; (2022) 316 IR 1.
[19] Ibid, at [45].
[20] *Department of Justice v Lunn* (2006) 158 IR 410.
[21] *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1; (2022) 275 CLR 265; *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2; *WorkPac Pty Ltd v Rossato* [2021] HCA 23; (2021) 271 CLR 456.
[22] Ibid.
[23] [2017] FWCFB 5162; (2017) 273 IR 441, at [25] and [77].
[24] Ibid, at [90], and [93]-[96].
[25] Ibid, at [147].
[26] *Alouani-Roby v National Rugby League Limited* [2021] FWC 6282; (2022) 318 IR 389.
[27] [2021] HCA 23; (2021) 271 CLR 456.
[28] Ibid, at [50].
[29] *Alouani-Roby v National Rugby League Limited* [2022] FWCFB 171; (2022) 318 IR 389.
[30] Ibid, at [125]-[133].
[31] *Alouani-Roby v National Rugby League Limited* [2024] FCA 12; (2024) 328 IR 226.
[32] Ibid, at [89]-[101].
[33] Ibid, at [97], see also at [101].
[34] Ibid, at [89]-[101].
[35] See *WorkPac Pty Ltd v Rossato* [2021] HCA 23; (2021) 271 CLR 456, at 479-80, [65].
[36] *Marsh v Macquarie University* (2005) 147 IR 401, at [17].
[37] *Gamage v Darwin International Hotels Pty Ltd* [2024] FWC 1036, at [44] (first sentence); *Garriock v Australian Taekwondo Ltd* [2024] FWC 350. Note also, decision of O'Riordan C in *Construction, Forestry and Maritime Employees Union v Svitzer Australia Pty Ltd* [2024] FWC 655, at [179]-[180] and [183]; and decision of Yilmaz C in *Erwin Wibowo v Equifax Australasia Group Services Pty Limited* [2024] FWC 1591, at [19]-[31], where the Commissioner accepts the reasoning of Raper J in respect of s.386(2)(a) (at [19]), but nonetheless goes on to determine the matter by reference to s.386(1)(a) of the FW Act and the majority decision in *Khayam v Navitas English Pty Ltd t/a Navitas English* [2017] FWCFB 5162; (2017) 273 IR 441, at [75].
[38] [2024] FWC 350.
[39] The ultimate finding that the Applicant was "dismissed" ([2024] FWC 350, at [56]), does not concern the "2020 Contract", but the "2023 Contract", which Wilson C found was binding and was terminated at the initiative of the Respondent within its specified term. The 'outcome' of the case in *Garriock v Australian Taekwondo Ltd* is thus not to the point.
[40] [2022] FCAFC 165.
[41] Ibid.
[42] [2021] HCA 23; (2021) 271 CLR 456
[43] [2022] HCA 1; (2022) 275 CLR 265.
[44] [2022] HCA 2.
[45] [2022] HCA 1; (2022) 275 CLR 265, at [59]-[60], per Kiefel CJ, and Keane and Edelman JJ.
[46] Ibid, at [124], per Gageler and Gleeson JJ, citing *Connelly v Wells* (1994) 55 IR 73, per Gleeson CJ, at 74 (who in turn cited *Narich Pty Ltd v Commissioner of Pay-roll Tax* [1983] 2 NSWLR 597, at 601).
[47] Ibid.
[48] See *WorkPac Pty Ltd v Rossato* [2021] HCA 23; (2021) 271 CLR 456, at 479-80, [65]. The reference to contrary to "statute" would include such terms being contrary to a relevant industrial instrument made under statute.

[49] *James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583, at 603. Cited by Gordon J in *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1; (2022) 275 CLR 265, at [176] (footnote [291]). See also *Smith v Hughes* (1871) LR 6 QB 597, at 607.

[50] *Alouani-Roby v National Rugby League Limited* [2024] FCA 12; (2024) 328 IR 226, at [97] and [101]. Compare *Khayam v Navitas English Pty Ltd t/a Navitas English* [2017] FWCFB 5162; (2017) 273 IR 441, at [84]-[96].

[51] *WorkPac Pty Ltd v Rossato* [2021] HCA 23; (2021) 271 CLR 456, at [117].

[52] (1948) 76 CLR 646.

[53] Ibid, at 649. Endorsed in *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165, at [38]-[47].

[54] Applicant's Supplementary Submissions, 4 July 2024, at [10]. Respondent's Supplementary Submissions, 5 July 2024, at [3]-[4].

[55] Ibid, at [14], and [34]-[35].

[56] *Palser v Grinling* [1948] AC 291.

[57] "Knowledge" and "Belief" are not synonymous: *Anderson v Lynch* (1982) 17 NTR 21.

[58] Competition law: *Dowling v Dalgety Australia Ltd* (1992) 34 FCR 109; 106 ALR 75; *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* (1989) 167 CLR 177.

[59] *Khayam v Navitas English Pty Ltd t/a Navitas English* [2017] FWCFB 4092 (permission to appeal decision), at [35]-[57] (permission to appeal denied based upon the correctness of the factual findings of the first instance decision in [2017] FWC 1524); *Khayam v Navitas English Pty Ltd t/a Navitas English* [2017] FWCFB 5162; (2017) 273 IR 441, at [143]; *Fair Work Bill 2009 Explanatory Memorandum*, at [1536].

[60] *WorkPac Pty Ltd v Rossato* [2021] HCA 23; (2021) 271 CLR 456, at 479-80 [65].

[61] *Social, Community, Home Care and Disability Services Industry Award 2010*, Level 4, Pay Point 1, Full Time.

[62] *Khayam v Navitas English Pty Ltd t/a Navitas English* [2017] FWCFB 5162; (2017) 273 IR 441, at [72].

[63] Including as to the Second Contract's retrospective effect in the two weeks prior to execution. The Applicant does not assert that terms and conditions beneficial to her under the Second Contract do not apply from 15 March 2023.

[64] *Inntrepreneur Pub Co. vs East Crown Ltd* [2000] 2 Lloyds Rep 611; *Hope v RCA Photophone of Australia Pty Ltd* [1937] HCA 90; 59 CLR 348.

[65] *Department of Justice v Lunn* (2006) 158 IR 410, at 416-418, [13]-[17].

[66] See *WorkPac Pty Ltd v Rossato* [2021] HCA 23; (2021) 271 CLR 456, at 479-80, [65].

[67] *Social, Community, Home Care and Disability Services Industry Award 2010*.

[68] See, for example, *Department of Justice v Lunn* (2006) 158 IR 410, at [33]-[36].

[69] [2022] FWC 1499, at [58]-[60].

[70] [2022] FWCFB 146, at [68], [70] and [73], albeit the reasoning (at [48], [52], [54]-[55]) is based upon a determination under s.386(1)(a) of the FW Act, and the application of the majority decision in *Khayam v Navitas English Pty Ltd t/a Navitas English* [2017] FWCFB 5162; (2017) 273 IR 441.