

## Article Information

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# Revisiting the limits of unfair dismissal claims: when is a contract expiry a dismissal?

***The recent decision of *Nasr v Mondelez Australia Pty Ltd* highlights the importance of the specific factual scenario when considering the expiry of a time-limited contract as part of an unfair dismissal claim. Although the employee's unfair dismissal application was ultimately dismissed the decision demonstrates the risks associated with multiple time-limited contracts.***

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### Legislative Background

A person who has been “dismissed” may access unfair dismissal remedies under section 394(1) of the Fair Work Act (**FW Act**). Section 386(1) explains that a person has been “dismissed” if their employment was “terminated on the employer’s initiative”.

A time-limited contract specifies the date on which the employment expires without either party being required to give notice, and may provide the right to terminate before this date with or without notice.

### The Navitas Case

Before the Fair Work Commission’s decision in *Khayam v Navitas English Pty Ltd* [2017] FWCFB 5162, it was generally accepted that where an individual’s employment terminated due to the expiration of a time-limited contract, the cessation of employment could not constitute dismissal on the employer’s initiative for the purposes of an unfair dismissal claim. However, *Navitas* overturned this traditional understanding.

The FWC in *Navitas* concluded that the key issue to be determined is the termination of the employment *relationship* rather than the mere words of the employment contract. The FWC stressed the importance of this distinction in cases where there were a series of time-limited contracts of employment. Piper Alderman published an insight concerning this case in 2018:

<https://piperalderman.com.au/insight/pushing-unfair-dismissal-to-the-outer-limits-is-saeid-khayam-v-navitas-a-game-change/>.

In *Navitas*, the FWC explained that where an employment *relationship* is governed by a time-limited contract, and the employment relationship terminates as a result of the expiry of that contract, then absent any vitiating factors, the employment will have terminated by agreement, and not at the initiative of the employer.

Vitiating factors are things that can affect the validity of a contract, and the FWC noted that vitiating factors can include:

- where the use of time-limited contracts are illegal or contrary to public policy;
- misrepresentation, mistake, unconscionable conduct, duress and/or coercion;
- standard-form contracts used for administrative convenience which do not reflect the reality or the totality of the terms of the employment relationship;
- where the employer engages in conduct or makes representations which prevent the employer from relying on the terms of the contract as the means by which the employment relationship has been terminated; and/or
- where the terms of the contract are inconsistent with an applicable award or enterprise agreement.

In the case of successive time-limited contracts that are almost “automatically” renewed, the last two or three vitiating

factors listed above are likely to be the most relevant.

In *Nasr v Mondelez Australia Pty Ltd* [2021] FWC 2802, the FWC had to determine whether an employee engaged on several time-limited contracts was dismissed on the employer's initiative for the purposes of an unfair dismissal claim.

### **Nasr v Mondelez Background Facts**

Mondelez Australia Pty Ltd employed Michael Nasr on eight sequential time-limited contracts from 2 July 2018 to 31 December 2020. Nasr was employed as a packer. The time-limited contracts ranged from a duration of one to 12 months. Following the expiration of the eighth contract, Nasr's employment with Mondelez ceased due to a projected reduction in volume of goods produced by Mondelez at the Scoresby plant where Nasr worked. The reduction in volume of goods was due to technological improvements in line operations, meaning the overall manning requirements for the department were reduced.

Nasr applied to the FWC for an unfair dismissal remedy, claiming that Mondelez unfairly terminated his employment. Mondelez argued that Nasr's employment ceased due to the effluxion of time upon the expiry of his contract, rather than on the initiative of Mondelez.

### **Nasr v Mondelez Decision**

Deputy President Young considered the *Navitas* principles in determining the fundamental issue of whether Nasr's employment was terminated on Mondelez's initiative.

Several aspects of the employment relationship were considered. First, the FWC found that each of the contracts, including the eighth, contained clear and unambiguous terms and clearly stated its end date. It was also found that Nasr read and signed the contracts with the complete understanding that the employment was for a maximum period and there was no guarantee of future employment.

Additionally, Deputy President Young rejected Nasr's argument that his employment carried on "*largely seamlessly over 2 and a half years*" and that the contracts rolled over in a "*perfunctory way*". She also rejected Nasr's submission that his eighth (and final) contract was a "*rehash of what went before*" and that he could have reasonably thought he would be offered a further period of employment. In reaching her decision, Deputy President Young accepted Mondelez's submission that Nasr's Area Manager, Mr Anjum Shahzad, met with Nasr to explain and reiterate that his employment would cease at the expiration of the contract.

The FWC found that no applicable vitiating factors, as identified in *Navitas*, were present in this case. Deputy President Young concluded that Mondelez engaged Nasr on a series of time-limited contracts based upon genuine operational reasons, including the employer's changing nature of departments and shifts. She noted that this was supported by the changing nature of the work performed pursuant to the eight contracts. New contracts were not merely rolled out. She agreed with Mondelez, and found that the contracts represented genuine agreements that the employment relationship would terminate upon the expiration of the relevant contract. The contracts were also not inconsistent with the applicable Enterprise Agreements in place at Mondelez.

Ultimately, the FWC concluded that the employment relationship ended upon the expiration of the time-limited contract and not at Mondelez's initiative. The unfair dismissal application was dismissed.

### **Conclusion**

The decision in *Nasr v Mondelez* demonstrates that if the terms of a time-limited contract are unambiguous, there is a genuine operational need for such a contract, and there are no other vitiating factors, the expiration of a time-limited contract will not, in and of itself, constitute a termination on the initiative of the employer. In determining whether such circumstances do equate to a dismissal for the purposes of an unfair dismissal claim, the FWC will be required to consider the specific facts of the case.

Should your organisation wish to review its arrangements for engaging employees for a fixed period of time, contact a member of Piper Alderman's Employment Relations team for assistance.