

**APPEAL AGAINST THE DECISION TO TERMINATE EMPLOYMENT ON 30 APRIL
2019**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2020 WAIRC 00188

CORAM : PUBLIC SERVICE APPEAL BOARD
COMMISSIONER T EMMANUEL - CHAIR
MR D HILL - BOARD MEMBER
MS L BRICK - BOARD MEMBER

HEARD : MONDAY, 24 FEBRUARY 2020

DELIVERED : TUESDAY, 31 MARCH 2020

FILE NO. : PSAB 10 OF 2019

BETWEEN : RACHEL CATHERINE TOWNES-VIGH
Appellant

AND

NORTH METROPOLITAN HEALTH SERVICE
Respondent

CatchWords : Public Service Appeal Board – Jurisdiction of the Public Service Appeal Board – Commissioner’s Instruction 23 – Fixed term contract – Appellant was not dismissed

Legislation : Section 80I(d) of the *Industrial Relations Act 1979* (WA)
Part 11 Div 4 of the *Health Services Act 2016* (WA)

Result : Appeal dismissed

Representation:

Appellant : In person

Respondent : Ms G Rosendorff (as agent)

Cases referred to in reasons:

Brocklehurst v Director General, Ministry of Justice (1994) 74 WAIG 2024
Civil Service Association of Western Australia Incorporated v Public Service Commission (1993) 73 WAIG 3003
Department of Justice v Lunn (2006) 158 IR 410
Thabano v CEO, Chemcentre Resources and Chemistry Precinct [2014] WAIRC 00537

Gallotti v Argyle Diamond Mines Pty Ltd [2003] WASCA 166; (2003) 83 WAIG 3053

Gallotti v Argyle Diamond Mines Pty Ltd Trading as Argyle Diamonds [2002] WAIRC 06828;
(2002) 82 WAIG 3011

Jacobs v Commissioner of Police [2018] WAIRC 00375

Khayam v Navitas English Pty Ltd t/a Navitas English [2017] FWCFB 5162

Loh v Ms Elizabeth Macleod Chief Executive East Metropolitan Health Service [2017] WAIRC
00991; (2017) 97 WAIG 1871

Metropolitan (Perth) Passenger Transport Trust v Gersdorf (1981) 61 WAIG 611

Oliver v Malcolm Goff, Managing Director, Challenger TAFE [2006] WAIRC 05224

Reasons for Decision

- 1 These are the unanimous reasons of the Public Service Appeal Board (**Board**).
- 2 Ms Townes-Vigh was employed by North Metropolitan Health Service (**Health Service**) on a series of fixed term contracts to work in contracts management.
- 3 After her final contract ended on 30 April 2019, Ms Townes-Vigh filed an appeal under s 80I(d) of the *Industrial Relations Act 1979* (WA) (**IR Act**) against what she says is the Health Service's decision to dismiss her. In essence, Ms Townes-Vigh believes she was unfairly dismissed because the Health Service did not offer her a further fixed term contract or offer her a permanent position.
- 4 The Health Service says Ms Townes-Vigh was not dismissed. It argues she was employed on a fixed term contract that came to an end by the effluxion of time. Accordingly, there was no dismissal and the Board does not have jurisdiction to hear and determine Ms Townes-Vigh's appeal.

What must the Board decide?

- 5 The Board must decide whether it has jurisdiction to hear and determine Ms Townes-Vigh's appeal. To do this, the Board must decide whether Ms Townes-Vigh was dismissed.

Agreed background

- 6 In this matter, there are few facts in dispute between the parties. All material facts are agreed. The parties differ about what they say the Board should make of those facts.
- 7 Ms Townes-Vigh was employed as a government officer by the Health Service on a series of contracts from 4 August 2014 to 30 April 2019. There was no break in employment between any of the contracts.
- 8 Although the parties, the contracts themselves and the relevant industrial agreement refer to 'fixed term contracts', the parties agree that in fact the contracts were 'outer limit' contracts which provided for a maximum term of employment, with an ability for either party to end the contract by giving notice. For the parties' ease of reference, the Board will refer to Ms Townes-Vigh's contracts as fixed term contracts.
- 9 In September 2018, Ms Townes-Vigh wrote to the Health Service and requested that she be converted to a permanent employee under *Commissioner's Instruction No. 23 – Conversion and appointment of fixed term contract and casual employees to permanency (Commissioner's Instruction)*. In March 2019, the Health Service agreed to review Ms Townes-Vigh's fixed term employment and informed her that it 'anticipates a decision will be made by 31 December 2019'.
- 10 Ms Townes-Vigh's final fixed term contract came to an end on 30 April 2019. She was told by letter dated 29 April 2019 that she would not be offered a further contract because 'a registrable employee has commenced a placement in the position and it is anticipated that consistent with Public Sector requirements that this employee will be permanently placed in the Senior Contract Manager role if the role is identified as being affordable and permanent as a result of the restructure that is occurring across NMHS Corporate.'

Evidence and submissions

Ms Townes-Vigh's evidence and submissions

- 11 Ms Townes-Vigh gave evidence that she hoped the Health Service would offer her permanent employment or a further fixed term contract. When she started work with the Health Service, she was told that the role she was doing would likely be made permanent in future. At one point in 2018, the role was advertised as a permanent role but the recruitment process was stopped before anyone was appointed to the role.

- 12 Ms Townes-Vigh referred to a letter she received dated 11 March 2019. It states:

COMMISSIONER'S INSTRUCTION NO 23: CONVERSION AND APPOINTMENT OF FIXED TERM CONTRACT AND CASUAL EMPLOYEES TO PERMANENCY – COMMENCEMENT OF REVIEW

The Public Sector Commissioner issued *Commissioner's Instruction No. 23: Conversion and appointment of fixed term contract and casual employees to permanency* (Instruction) which was effective on 10 August 2018. The Instruction requires North Metropolitan Health Service (NMHS) to review the fixed term contract and casual employment arrangements of employees employed on and from the date the Instruction took effect.

In accordance with clause 1.4 of the Instruction, NMHS notify [sic] you of the intention to commence this review on 11 April 2019. NMHS will undertake the review in accordance with the Instruction which is available on-line at the Public Sector Commission website (www.publicsector.wa.gov.au) and on the NMHS "HealthPoint" intranet site under Working@NMHS / Information for Managers & Employees / NMHS Permanency Review.

Paper copies of the Instruction will be made available on request and at presentations. You may also request an electronic version by emailing CI23.NMHS@health.wa.gov.au.

You will be advised of the interim findings and a proposed determination as soon as the review of your circumstances has been undertaken. Updates will be provided as information becomes available. Across NMHS these reviews will be undertaken on a rolling schedule of work units. An indicative timetable will be provided highlighting when your work area will be reviewed.

NMHS anticipates that a decision will be made by 31 December 2019.

You have the right to make a submission to support the review at the beginning of the process. You will have the opportunity to make a submission to support your claim for permanency following the review. It is our recommendation that you await advice of the interim findings.

Should you choose to make an early submission to support our review of your fixed term employment, you or your representative may do so within 30 working days of receiving this letter. Your submission should address the criteria in clause 2.1 of the Instruction and be sent to CI23.NMHS@health.wa.gov.au or via post addressed to CI 23 Project Team, QEII Medical Centre, R Block, Level 4 Nedlands WA 6009.

- 13 Ms Townes-Vigh says this letter gave her the impression that she would remain employed until the review was finished.
- 14 Ms Townes-Vigh gave evidence that because she did not agree to the end of the employment relationship, she was therefore dismissed. Ms Townes-Vigh also gave evidence about her length of service without any performance issues. When pressed by the Board about why she says she was dismissed, and asked to explain when and how her employment ended, Ms Townes-Vigh gave evidence that the letter she received on 29 April 2019 amounted to a dismissal.

- 15 In cross-examination, Ms Townes-Vigh conceded that there was no guarantee of employment beyond the expiry date of her fixed term contract but she said ‘there was an obligation.’ At various times during her testimony, Ms Townes-Vigh agreed that she had hope, rather than an expectation, about ongoing employment. While she was never promised or told that she would be permanently appointed to the role, she thought she would have a chance to apply.
- 16 Finally, Ms Townes-Vigh said she believes she was dismissed because the role involved working on a project that would continue until 2037. The extension of her argument seems to be that her employment could not end with effluxion of time because the project she worked on was ongoing.

Health Service’s evidence and submissions

- 17 Ms Rose Richardson is a Human Resources Consultant for the Health Service. She gave evidence about Ms Townes-Vigh’s fixed term contracts. Ten contracts were tendered into evidence. Ms Townes-Vigh confirmed that they were copies of her employment contracts.
- 18 All of the contracts refer several times to the contract being for a fixed period. They all include this acknowledgment: ‘In signing this agreement you acknowledge that you have been contracted to this position for the above period only. Upon expiration of this fixed term contract there is no obligation on either party to enter into any further employment arrangement.’
- 19 Ms Richardson gave evidence that Ms Townes-Vigh had various fixed term contracts, the last two of which were at a lower pay level.
- 20 The Health Service argued that in every contract the parties expressly agreed that employment would end on a set date. The letter that it sent to Ms Townes-Vigh on 29 April 2019 did no more than confirm that Ms Townes-Vigh’s employment would end on 30 April 2019 because of the parties’ prior agreement. The content of the letter dated 11 March 2019 was sent to every employee. The Health Service was not required to keep Ms Townes-Vigh employed until the review was complete. After 30 April 2019, the Health Service had no obligation to offer Ms Townes-Vigh a new contract, and it did not.
- 21 The Health Service relies on *Oliver v Malcolm Goff, Managing Director, Challenger TAFE* [2006] WAIRC 05224, *Gallotti v Argyle Diamond Mines Pty Ltd* [2002] WAIRC 06828; (2002) 82 WAIG 3011 (**Gallotti (1)**); and *Gallotti v Argyle Diamond Mines Pty Ltd* [2003] WASCA 166; (2003) 83 WAIG 3053 (**Gallotti (2)**). It says these decisions confirm that the failure to offer a subsequent fixed term contract does not constitute a dismissal and that a contract coming to an end by the effluxion of time cannot be characterised as a dismissal.

Consideration

Jurisdiction of the Board

- 22 The Board does not have general jurisdiction to enquire into and deal with all industrial matters on application by an individual. For government officers employed by health services, generally the Board’s jurisdiction is conferred by 80I of the IR Act and Part 11 Div 4 of the *Health Services Act 2016* (WA), as discussed in *Loh v Ms Elizabeth Macleod Chief Executive East Metropolitan Health Service* [2017] WAIRC 00991; (2017) 97 WAIG 1871 from [79] to [91].

- 23 Section 80I(1)(d) of the IR Act refers to the Board’s jurisdiction to adjust an employer’s decision to dismiss a government officer. It says:

80I. Board’s jurisdiction

Subject to the *Public Sector Management Act 1994* section 52, the *Health Services Act 2016* section 118 and subsection (3) of this section, a Board has jurisdiction to hear and determine —

...

- (d) an appeal, other than an appeal under the *Public Sector Management Act 1994* section 78(1) or the *Health Services Act 2016* section 172(2), by a government officer that the government officer be dismissed,

...

and to adjust all such matters as are referred to in paragraphs (a), (b), (c) and (d).

- 24 The Board is not considering whether Ms Townes-Vigh should be made or should have been made permanent. To invoke the Board’s jurisdiction, Ms Townes-Vigh must show that she has been dismissed.

What constitutes a dismissal?

- 25 It is clear from the authorities that a dismissal involves being sent away or removed from office, employment or position: *Metropolitan (Perth) Passenger Transport Trust v Gersdorf* (1981) 61 WAIG 611; *Gallotti (1)* at [55] – [62].
- 26 The Board is bound by *Gallotti (2)* and EM Heenan J’s reasoning at [5]: ‘There is ample authority for the proposition that the cessation of the relationship of employer and employee by the effluxion of an agreed term of employment is not a “dismissal” and at [7]: ‘There will not be a dismissal where the term of a contract of employment expires’.
- 27 In *Jacobs v Commissioner of Police* [2018] WAIRC 00375 at [9], Commissioner Matthews considered that the Commission is not bound by *Gallotti (2)* where there are factors which genuinely and on their face reasonably invite consideration of circumstances beyond the four corners of the contract of employment.
- 28 In *Khayam v Navitas English Pty Ltd t/a Navitas English* [2017] FWCFB 5162, Mr Khayam argued that he was dismissed because although his fixed term employment contract came to end by the effluxion of time, the employer ended the employment relationship by choosing not to offer him a further contract of employment. The Fair Work Commission Full Bench considered that to determine whether a dismissal had occurred, the language of *Fair Work Act 2009* (Cth) required consideration of whether the employer terminated the employment relationship, not just the employment contract. This departed from the earlier reasoning in *Department of Justice v Lunn* (2006) 158 IR 410.
- 29 The Fair Work Commission Full Bench in *Khayam v Navitas English Pty Ltd t/a Navitas English* concluded:

[135] Considering all of the circumstances in this appeal, the evidence before the Commission simply does not establish that Navitas terminated the employment relationship between it and Mr Khayam. It did something altogether different; it decided not to enter into a new employment relationship. What brought the employment relationship between Mr Khayam and Navitas to an end was the expiry of the last outer limit contract by the effluxion of time, as the parties had agreed.

- 30 In *Jacobs v Commissioner of Police*, Matthews C considered at [15] that the meanings of 'dismissal' in WAIRC and Fair Work Commission contexts are similar enough that the Commission can have regard to *Khayam v Navitas English Pty Ltd t/a Navitas English*. He considered that in both jurisdictions, a key question is whether the actions of the employer resulted in the termination of the employment relationship. So, in the case of an employment relationship made up of a series of time limited contracts of employment, where the termination has occurred at the end of the term of the last of those contracts, the circumstances of the entire employment relationship (not just the employment contract) may be considered 'where there are factors which genuinely, and on their face, reasonably invite consideration of factors beyond the four corners of the contract of employment' (at [9]).

Are there factors that reasonably invite the Board to look beyond Ms Townes-Vigh's contracts of employment?

- 31 Ms Townes-Vigh asks that the Board look beyond the four corners of her contracts of employment because she had a reasonable expectation of ongoing employment. She says this is because she had been employed on a series of fixed term contracts, she had been told by the Health Service that her position would be advertised as a permanent position, and the Health Service was in the process of reviewing her request for permanency under the Commissioner's Instruction.
- 32 The Health Service says there is no ambiguity in the provisions in Ms Townes-Vigh's contracts of employment. The wording of the contracts does not give rise to an expectation of ongoing employment beyond the end date.
- 33 In *Civil Service Association of Western Australia Incorporated v Public Service Commission* (1993) 73 WAIG 3003, the Public Service Arbitrator considered the question of whether Ms Archer had been dismissed in circumstances where her fixed term contract was not renewed, and her request to be made a permanent employee in accordance with a Public Service Commission circular to Chief Executive Officers was not granted.
- 34 Fielding C concluded that:

I have already indicated in previous proceedings that neither the Applicant nor Ms Archer can claim that she was dismissed, let alone unfairly dismissed, by the Respondent from her employment. She was not dismissed. Rather, her contract of employment came to an end by the effluxion of time. It was not terminated by the Respondent or, indeed, by anyone else. The Applicant may claim that she was unfairly refused further employment by the Respondent (see: Section 7(1) definition of "industrial matter" paragraph (c); and see too: *The Board of Management, Princess Margaret Hospital for Children v. The Hospital Salaried Officers Association of Western Australia (Union of Workers)* (1975) 55 WAIG 543 at 545 and *Terrigal Memorial Country Club Ltd v. The Federated Liquor and Allied Industries Employees' Union of Australia (NSW Branch)* (1993) AILR 61). However, apart from reliance on the provisions of the Circular, it is difficult to see how there is any merit in such a claim. From the outset she was informed that her position was a temporary one. Although the Chief Executive Officer of the Department was prepared to give her permanent status at Level 1, but not at Level 5, I accept that at no time did he or anyone else represent to Ms Archer that she would in fact be granted permanency. Rather, I find the position to be that she was at all material times aware that there were difficulties with her claim for permanency. Moreover, she was unequivocally engaged for a period of three years only and that was reconfirmed when she took up duties as an Industrial Officer. I am satisfied that nothing was said or done by or on behalf of the Respondent, apart from publishing the Circular to suggest to Ms Archer that her employment would be ongoing once her permanent, or otherwise, contract had expired. (3004)

35 In *Brocklehurst v Director General, Ministry of Justice* (1994) 74 WAIG 2024, where the appellant had conceded this point and the parties do not appear to have argued it, the Board commented at 2026:

We observe also that a failure to offer re-employment does not amount to a dismissal. When an employee accepts employment for a fixed term the employee must be taken to have consented to the position that the contract comes to an end on a specified day (see *Ex Parte Wurth; re Tully* (1954) NSW(SR) 47 at pp 59-60, 62-63; and see also *Ex Parte; Public Service Commissioner*; Unreported; Full Court of the Supreme Court of WA; 24/5/94; Rowland J at p 8). A decision not to offer a contract of employment does not constitute a “decision” that can be reviewed by the Public Service Appeal Board. (See *Ex Parte; Public Service Commissioner*; Unreported; Full Court of the Supreme Court of WA; 24/5/94 and see also *CSA v Public Service Commission* (1993) 73 WAIG 3003.

36 In *Thabano v CEO, Chemcentre Resources and Chemistry Precinct* [2014] WAIRC 00537, the Board, relying on *Brocklehurst v Director General, Ministry of Justice* and *Gallotti (2)* concluded that a failure or refusal to permanently appoint is not a decision to dismiss [26]. The Board stated at [28]:

‘there was a decision not to renew the contract, however that is not a matter within the Board’s jurisdiction.’

37 In this matter, the Board considers that the following factors weigh against Ms Townes-Vigh’s argument that she was dismissed:

- every one of the contracts clearly stated that it was for a fixed term and the parties agreed that ‘upon expiration of this fixed term contract there is no obligation on either party to enter into any further employment arrangement’;
- no one promised Ms Townes-Vigh that she would be permanently appointed;
- Ms Townes-Vigh thought that she would need to apply for the permanent position when it was advertised and there was no guarantee she would be the successful candidate;
- Ms Townes-Vigh was being reviewed for permanency, but that process was not expected to finish during the term of her final contract; and
- there was no evidence that the Health Service had said or done anything that could reasonably lead to an expectation of ongoing employment.

38 In the circumstances of this matter, the failure to offer a subsequent contract is not a dismissal and nor is the contract coming to an end by effluxion of time. Unlike in *Jacobs v Commissioner of Police*, in this matter, even going beyond the four corners of the final fixed term contract, the Board is not persuaded that Ms Townes-Vigh was dismissed. Here, the failure to offer a subsequent contract is not a dismissal and nor is the contract coming to an end by effluxion of time.

39 Ms Townes-Vigh was employed on a series of fixed term contracts, with four different position numbers, five different position names and two different salary levels. Every contract was clear that employment was for a fixed term only. In every contract, the parties expressly agreed that the employment would end when the term came to an end. The letter dated 29 April 2019 did not remove or send Ms Townes-Vigh away from her office, employment or position. It merely confirmed that employment would end on 30 April 2019 in accordance

with the parties' agreement, and that the Health Service would not offer Ms Townes-Vigh a further contract, as it was entitled to do.

- 40 Even though Ms Townes-Vigh wanted her employment to continue beyond the end of the final fixed term contract, on the evidence the Board cannot find that Ms Townes-Vigh was removed or sent away from employment. Rather, the Board finds that employment ended in accordance with what Ms Townes-Vigh and the Health Service agreed in February 2019 when they entered into the final fixed term contract. It was the effluxion of time in accordance with the parties' agreement, and not any action on the part of the Health Service, that resulted in the contract and the employment relationship ending. The Board must find that Ms Townes-Vigh was not dismissed.

Conclusion

- 41 The Board must dismiss this appeal for want of jurisdiction.