Submission to the Independent Inquiry into Insecure Work in Australia

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1 Introduction

Job Watch Inc (**JobWatch**) welcomes this opportunity to make a submission to the Independent Inquiry into Insecure Work in Australia (**this Inquiry**).

JobWatch strongly supports the Inquiry and it is hoped that the consultation and subsequent report will highlight the issues faced by workers in precarious working conditions and point to ways of giving these workers further protection.

The focus of our submission is on providing case studies which are designed to highlight the following:

- The prevalence of precarious employment arrangements;
- The fact that workers in insecure employment arrangements will often be reluctant to enforce their rights;
- The limitations of existing labour laws in relation to labour hire workers; and
- The limitations of existing labour laws in relation to employees on repeated fixed term contracts with the same employer.

The case studies provided in this submission are those of actual but de-identified callers to JobWatch's telephone information service and/or legal practice.

2 About JobWatch

2.1 Core Activities

JobWatch is an employment rights community legal centre which is committed to improving the lives of workers, particularly the most disadvantaged. It is an independent, not-for-profit organisation which is a member of the Federation of Community Legal Centres (Victoria).

JobWatch was established in 1980 and is the only service of its type in Victoria. The centre is jointly funded by the Victorian and Federal Governments to do the following:

(a) Provide information and referral to Victorian workers via a free and confidential telephone information service;

(b) Engage in community legal education through a variety of publications and interactive seminars aimed at workers, students, lawyers, community groups and other organisations;

(c) Represent and advise disadvantaged workers; and

(d) Conduct law reform work with a view to promoting workplace justice and equity for all Victorian workers.

2.2 Database of JobWatch's callers: key characteristics

JobWatch is well-placed to contribute to this Inquiry. Since 1999, we have maintained a comprehensive database of our callers. To date we have collected over **148,000** records (we start a new record for each new caller or for callers who have rung us before but who are calling about a new matter. One record may canvass multiple workplace problems, including, for example, unfair dismissal, discrimination, bullying and underpayment of wages). Our database allows us to report on our callers' experiences and enables us to track any changes in demographic trends.

Of relevance to this Inquiry, our records indicate the following:

(a) The vast majority of our callers are not union members;

(b) A significant proportion of our callers does not know which industrial instrument provides the terms and conditions of their employment; and

(c) Since 1999, JobWatch has recorded the details of **28,200** callers who have identified themselves as casuals, fixed term contractors or independent contractors. That is, approximately 20% of our callers are engaged in precarious employment arrangements.

3 Workers at risk of insecure work

3.1 JobWatch's experience: prevalence of insecure work across all occupations

One might expect that workers with little bargaining power in the employee / employer relationship (including young workers, older workers, low skilled workers, inexperienced workers, overseas students and workers from migrant backgrounds) would be those contacting JobWatch in respect of their insecure work arrangements. Whilst this is largely the case, we also receive many calls from workers in positions which would have once been relatively secure, including academic staff in universities, teachers, health professionals, administrative staff in government departments, cooks in hospitals and canteen staff in state schools. Accordingly, in our experience, workers across all industries, all occupations and at all levels and are at risk of insecure work.

3.2 Case studies from JobWatch's database to highlight the prevalence of insecure work across all occupations

Tammy: I've been employed since 2004 on renewed contracts as a research scientist at one of the universities. I have always been rated as "good" or "very good" in my performance appraisals but last September I was rated as "satisfactory", pending the outcome of a funding application which I submitted at the start of the year. The grant was awarded but when my performance was reviewed 2 days ago my boss was still only prepared to rate me as "satisfactory." I asked her whether she was punishing me for having raised an issue with HR last year, when I asked for time off in lieu for having worked overtime. She denied that she was holding that against me, but he then said she would again review my performance next month, subject to the results of an article which I've been drafting. She is constantly shifting the goal posts and I'm concerned that if I have "satisfactory" as my performance assessment my employment contract won't be renewed. This is impacting on my health.

Con: I have been employed by the same employer as a sessional teacher of VCE subjects for the last 7 years. This means that I don't get paid during the holidays, nor do I receive any paid sick or carer's leave. My sessional hours are subject to change at any time and my contract states that my employer can terminate my sessional engagement and the employment with 48 hours notice which they will give "wherever reasonably practicable." On the day of my first scheduled class for 2011, I was notified that my pay (for the same number of hours) was to be reduced by 26%. I was shocked, to say the least. The previous October, all VCE sessional teachers had been asked if they intended to teach in 2011 and I had indicated that I wished to stay. Nothing was said to me then, or subsequently, about the proposed change of pay. I believe I am regarded as a competent and cooperative teacher by my colleagues and I have been very committed to my employer over the last 7 years, but sadly I feel that my employer has tried to exploit me and my colleagues. Surely it was foreseeable that waiting until the first week of classes before informing staff about the proposed reduction would result in considerable hardship and hurt. It is difficult to avoid the conclusion that the timing of the decision being communicated was intentional and that my employer was relying on the desperation of teachers, faced with little likelihood of finding alternative employment at this late stage, accepting the *fait accompli* presented to them.

Mary: I have been employed as a personal care attendant by the same employer on a

casual basis for almost 11 years. Throughout this time I have always had regular work and I have one client (a care recipient), in particular, with whom I have worked since I started. She is currently my only client. I enjoy working with this client but her chain smoking in my presence concerns me as I am an asthmatic. I recently approached my employer in good faith to discuss my concerns. I was told not to return to work with the client until further notice. As she is my only client, I feel that my employment has effectively been terminated. I am in my late 50s and I think it will be difficult for me to find another job.

Daniela: I have been employed as a nurse in a specialist school for almost 15 years. Throughout this time I have had a series of fixed term contracts, which have varied in length depending on student enrolments. I've had 4 days off work because of depression in the last 12 months. At my last performance review, my boss commented on my "excessive time off" because of illness. Now I've been told my contract won't be renewed for the coming year but other nursing staff with far less experience are being kept on.

Sonika: I have been employed for almost 4 years as a canteen assistant in a public primary school. Since I started there, I have worked 2 days a week. I am paid casual rates and I don't get any paid annual leave or personal leave. Each year, I have been given fixed term contracts which last for 48 weeks at a time (with four weeks in between contracts when I haven't been paid). In the past I have never had to re-apply for my position: I would automatically receive a new contract. This time, instead, I have been told that my services will not be required in 2012 and accordingly my contract will not be renewed. The canteen will continue to operate: the school has employed two new people to run it in 2012.

Michael: I am a researcher in one of the universities. I have been employed there for over 10 years on consecutive fixed term contracts which used to be for 12 months at a time. In the past, these contracts would be automatically renewed but last year, for the first time, I was told that due to funding shortages; my contract would only be renewed for 6 months. When that time expired, my contract was extended for a further 2 months. I find the uncertainty highly stressful. If this contract is not renewed, I think it will be very difficult to find another comparable job as I have very specialized experience in one field of academia. I won't receive any payout as I would if I had been employed on a permanent basis.

Tracy: I am a business process analyst working in the finance industry. To date, I have been employed on fixed term contracts which have been renewed twice by the same employer. I was expecting my employer to renew my current contract but I've been told that my employer's budget won't allow them to keep me. I think the real reason they're not renewing my contract is because I'm pregnant and this contract is due to expire 2 months before I'm due to give birth.

Bob: I've been employed as a full-time casual audio engineer with a large company for over 2.5 years. I recently applied to become permanent but my application was refused. I'm so angry about it that I've resigned.

Brian: I have been employed on a casual part-time basis with the same employer in the hospitality industry for over 6 years. Along with a number of my colleagues, I circulated a petition complaining of bullying recently and I lodged a complaint with WORKSAFE who has contacted my employer. Since this happened, 3.5 weeks ago, I have not been given any work. I asked my boss (the bully) why I wasn't being offered work but I was told that "things are quiet," which I think is untrue.

4 Limitations of existing labour laws

4.1 Workers who are protected by the *Fair Work Act 2009* and/or anti-discrimination legislation but who are nevertheless reluctant to lodge a complaint: JobWatch's Experience

It is true that the *Fair Work Act 2009 (Cth)* provides some important protections from unfair treatment to workers in precarious employment situations. For example, regular and systematic casual employees with a reasonable expectation of ongoing employment are protected from unfair dismissal. Furthermore, all workers (including independent contractors) are protected from adverse action and discrimination, and all employees are entitled to lodge a complaint with the Fair Work Ombudsman if they do not receive the correct pay or other entitlements.

In addition to the *Fair Work Act*, there are also legislated state and federal anti-

discrimination protections which are designed to protect all employees and independent contractors, including workers engaged in insecure forms of work.

However, the reality is that many abuses of the employment relationship still go unchecked. There is an enforcement gap, with many vulnerable people unaware of their rights. Even once they are informed about their rights, many workers are unwilling to enforce them, because of a range of factors, including, for example, a perception that:

- They will be at a disadvantage compared with the employer if they do not have private legal representation, which they cannot afford;
- They won't have enough proof to succeed with an application for relief;
- Their former employer will fabricate allegations against them;
- They will be branded a "trouble maker" and will then find it difficult to secure alternative work;
- A formal complaint will impact negatively on other aspects of their lives (eg they will have problems with their Australian work or study visas, or their employment will be terminated, which they are not willing to risk).

4.2 Case studies from JobWatch's database to highlight how workers in insecure employment arrangements may be reluctant about enforcing their rights

Ronald: I am calling on behalf of a group of friends, all of whom are current or former visa holders. They have been employed as console operators at a very busy service station for about 4 years. The have been significantly underpaid and their employer has routinely deducted from their wages the cost of the fuel whenever a customer would drive off without paying. Because of the precariousness of their situation they were unwilling to complain before, but now that many of them have been granted permanent residency they feel they should speak up.

Rhonda: I have been employed as a full-time casual through a labour hire company for the last 14 months. Recently my hours were cut from full-time to part-time without any notice or consultation. This was just after I had sustained an injury at work which everyone knew about, even though I hadn't lodged a WorkCover claim (for fear of losing my full-time hours, ironically). I was upset about the cut in hours but I felt that I had no choice in the matter.

Then I had to have a week off work as I was ill with the flu. I notified the agency and my host employer, and I provided a medical certificate for the week. My host employer subsequently said they didn't want me back because I was taking too many days off. No performance or conduct issues were ever raised and I was replaced by the host employer with two other casuals. The agency has told me that they will only offer me other work if I promise not to be ill.

Linda: I have been employed for three months as an administration officer on a part-time casual basis. My husband works for the same employer but he is a full-timer. Our employer is a medium sized company. My boss told me today they're letting me go as they "don't like couples working together." My husband is nervous about me taking any action over this for fear that he might lose his job.

Penny: I am an apprentice horticulturalist and I have been with my employer for over two years. I have been subjected to sexual harassment but I didn't complain at the time because I didn't want to lose my job. Now I have been advised that my employment is to be terminated because I have had too much time off work sick.

Phil: I have been employed as a school services officer, on a series of renewed fixed term contracts for over six years. I have a phobia of mice but I have been forced to work in a classroom with pet mice. I asked for the mice to be removed but my employer refused and my colleagues belittled and made fun of me, to the point where I felt bullied and harassed. I haven't complained about the bullying or the discrimination. I am concerned that my current contract won't be renewed or extended when it expires (shortly).

Dillon: I am 18 months into a pastry chef apprenticeship. I hurt my ankle (not a workplace injury) and needed a couple of days off work, for which I provided a medical certificate. My boss told me off for my absence and didn't pay me for the days I was sick. He said the next time I'm sick he expects me to go to work and do computer work. I've been going in to work with a plastic shield around my ankle for fear of losing my job.

4.3 Labour hire workers who are not expressly protected by the unfair dismissal laws: JobWatch's Experience

JobWatch receives many calls from workers who are either employed, or sometimes engaged as independent contractors, by labour hire agencies which then place them with host employers for what often turns out to be a lengthy period of time.

In many instances, the only contact the employees have with the labour hire agency is that the agency issues pay slips, pays wages by electronic transfer, pays superannuation entitlements (if any) and furnishes the employee with a PAYG certificate at the end of the financial year. That is, the agencies, who on the face of it are the employers, are often in reality no more than paymasters. On the other hand, the relationship that the workers have with the host employers is more akin to that of employee/employer, in that the workers:

- Often undertake induction and training as to the host employer's policies and procedures;
- Work exclusively for the host employer;
- Have their work allocated and controlled by the host employer, not the labour hire agency;
- Report to management staff of the host employer;
- Wear a uniform of the host employer and use materials and facilities of the host employer;
- Do not work during any period when the host employer may shut down (eg over Christmas);
- Record their hours using the host employer's time recording system; and
- Make applications for leave or absences from work directly to the host employer without regard to the agency.

When the host employer suddenly decides it no longer wants to retain the worker, it simply notifies to agency to stop sending the worker. The circumstances may be unfair but the worker is lead to believe that if s/he lodges an unfair dismissal claim against the host employer, that company will respond by objecting to FWA's jurisdiction on the basis that it is not the employer. Alternatively, if the worker lodges an unfair dismissal claim against the labour hire agency, it is likely to object on the basis that - if the worker is an employee of the agency - it has not dismissed the employee as the employee is still on their books, or – if

the worker is an independent contractor engaged by the agency – it is not the worker's employer.

Workers in these situations are particularly vulnerable and are, in our view, in need of stronger labour law protections.

The notion of joint employment, which is recognised in the United States, has not yet been established in an Australian court and remains contentious. In *Morgan v. Kittochside Nominees Pty Ltd* (PR918793, Munro J., Coleman DP, Gay C, 13 June 2002), a Full Bench of the AIRC expressed a view (*obiter dicta*) at [75] that: *"no* substantial *barrier should exist to accepting that a joint employment relationship might be found and given effect for certain purposes under the Act."* In the previous paragraph ([74]), the Full Bench had noted that the *"doctrine of joint employment, or of joint employers, is well-established in labour law in the United States."* The Full Bench then cited a passage in which the standard of joint employment was put in the following way:

> *[W]here two or more employers exert significant control over the same employees - where from the evidence it can be shown that they share or co-determine those matters governing essential terms and conditions of employment - they constitute `joint employers' within the meaning of the NLRA. [NLBR v. Browning-Ferris Indus., 691 F. 2d 1117 (wd Cir. 1982); see also, TIJ, Inc., 271 NLRB 798 (1984).*

More recently, in 2009, in *Orlikowski v IPA Personnel P/L* [2009] AIRC 565, at [42] and [43], Lacy SDP said the following of joint employment in Australia:

> ***[42]*** *It is necessary to consider IPA and AQIS' contentions that joint employment is unknown to Australian law. The facts in this case suggest the arrangement between IPA and AQIS may have been one of "payrolling". IPA's only contact with Mr. Orlikowski was through recruitment and payslips. The concept of joint employment is generally accepted in the United States of America. While labour hire services facilitate flexibility the process has the potential to undermine collective bargaining, occupational health and safety, vicarious liability, accountability, job security and workplace harmony. There is an increasing incidence in the use of labour hire providers in Australia and it presents significant issues in termination of employment matters. First and foremost the issue normally involves discernment of which of the putative or potential employers is the actual employer. The fundamental question is whether two, otherwise unrelated, legal entities share or co-determine those matters governing essential terms and conditions of employment which depend on the control one employer exercises, or potentially exercises, over the labour relations*

policy of another. If not, it is necessary to determine who the employer is and who is responsible for the termination of employment.

[43] *In 2002 a Full Bench of the Commission noted that there had been no definitive ruling by a court on the doctrine of joint employment in Australia. This remains the case, although the doctrine has gained some acceptance in the Australian Industrial Relations Commission, and in the Western Australian and New South Wales Industrial Relations Commissions. Whether or not there is acceptance of the doctrine of joint employment in Australia provides no immediate relief however for either of the parties potentially liable in this case, in light of the conclusions I have reached.*

At JobWatch, we are of the view that labour hire arrangements should not be permitted to undermine the protections otherwise afforded to employees under the FW Act. It should not be possible for the agency to avoid any responsibility under the FW Act by disowning the actions of the host employer. Equally, it should not be possible for the host, who has controlled the relationship with the worker and has taken the benefit of the worker's labour, to hide behind a labour hire arrangement and thereby evade its responsibilities under the FW Act.

There should, therefore, be express recognition in the FW Act of the fact that, for the purposes of unfair dismissal, two separate entities may be deemed to be joint employers in circumstances where they share or co-determine matters governing employment. This should extend to situations where labour hire workers are engaged as independent contractors on sham arrangements (where they really ought to be employees) and are placed with host employers who control their work.

As described above, however, it is often the case that the agency merely plays the role of paymaster, not exercising any real control over their employees who are placed with host employers. Hence, in these circumstances, the host should, for the purpose of unfair dismissal matters, be recognised as the true employer, regardless of whether the worker is employed by the agency or is engaged as an independent contractor with the agency on a sham arrangement.

It is not enough that FWA already has the power to look at the "*inherent character*" and "*real substance of*" the relationship as objectively determined (*Damevski v. Giudice* (2003) 202 ALR *494* (Merkel J), [144] and [172]) and that it will not be constrained by labels which the parties apply to the relationship. Most workers will not be familiar with the jurisprudence on this point and will assume that they cannot apply for an unfair dismissal remedy against a

host employer. Accordingly, the FW Act should be amended so as to expressly recognise the possibility that host employers will, in certain circumstances, be deemed to be the true employers for unfair dismissal purposes.

4.4 Case studies from JobWatch's database highlighting the limitations faced by labour hire workers

Janine: I was employed on a casual basis by a labour hire agency and I was placed with a large host employer as an administration assistant working full-time hours. I worked there for over 12 months. During that time I came to think of the host as my employer for a number of reasons, namely:

- I was offered the job with the host by one of the host's managers, when I attended an interview there;
- I worked at the host's premises 5 days a week and took all my directions from the host's management staff;
- I wore the host's uniform;
- My duties provided an integral part of the host's business operations;
- Any issues about leave, working conditions and duties were dealt with through the host.

Recently, I was phoned by someone at the agency to inform me that I was no longer required by the host. I was very upset and the agency representative said they intended to offer me other work, but it's now been several weeks that I haven't heard from the agency. I think the host wanted me to leave because I had lodged an internal bullying complaint and/or because I was due to commence some unpaid leave to attend a funeral.

Arnand: Eight months ago I was engaged as an independent contractor by a labour hire agency. They offered me work as a security guard with one of their clients, my host employer. I study part-time and I worked at this job part-time. I issued invoices to get paid but I really thought the two companies were both my employers. I was interviewed for this job by the agency at the premises of the host. At the interview, I was told that I would only work for the host. I was sent an email from the agency telling me not to tell anyone, if asked, that I was a contractor. I was specifically instructed to tell people that I was employed by the host, making no reference to the agency. About a month later, the agency sent an e mail to

all the host's guards, including me. The purpose of this email was to remind guards of uniform and appearance requirements as well instructing guards to name the host as the employer if asked. I think the two companies feared that the sham contracting arrangement in which they had engaged with respect to my employment would soon be discovered and hence my placement was brought to an abrupt end, without reason. I was also significantly underpaid if I should have been paid as an employee rather than as an IC on a flat rate.

Anna: I was engaged as a cleaner on an independent contractor arrangement with a labour hire agency almost three years ago. The agency has a cleaning contract with a host company. I have worked at that host company on a full-time basis (approximately 40 hours per week) since I started with the agency. I am paid by the agency but I wear the host company's uniform and my work is controlled by the host. I recently emailed the agency to advise them that I'm pregnant and I would like two short ten minute breaks per day to have something to eat or go to the toilet. I did not get a response from the agency so I approached my supervisor at the host and again asked for the breaks. When the agency responded it was to tell me not to go back to work until I provided a medical clearance. I protested over the phone but I was told that as I'm a contractor, the host can get rid of me at any time. I promptly sent the agency a medical certificate confirming that I was fit to continue performing my job but I did not hear back from anyone at either the agency or the host for over a month, despite countless emails and phone calls on my part. Eventually I was sent a "list of cleaning duties" by the agency, which I was told I had to have approved by my doctor before I could return to work. The list contained duties which I have never performed and are completely irrelevant to my role.

4.5 Employees on rolling fixed term contracts: JobWatch's Experience

Each year we receive a significant number of calls from individuals who are employed on what we will refer to here as "fixed term contracts" (even though we understand that mostly they are really "hybrid" or "outer limit" contracts, which contain terms allowing for termination during the life of the contract). Many of our callers have been on a series of back-to-back fixed term contracts for over two years. Not infrequently, they have been employed in this way (on contiguous fixed term arrangements) for much longer than that. The categories on our database for length of employment are:

- 3 months or less;

- 3 - 6 months;
- 6 - 12 months;
- 12 months - 2 years;
- 2 - 5 years;
- 6 – 10 years;
- 11 – 15 years;
- 16+ years.

We note that, for the purposes of the unfair dismissal laws, s386 of the FW Act deals with the meaning of "*dismissed*". Section 386 states that:

> "(2) *...a person has not been dismissed if:*
>
> *(a) "the person was employed under a contract of employment for a specified period of time..."*
>
> Section 386(3) goes on to state that:
>
> "*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.*"

Paragraph 1531 of the FW Act's Explanatory Memorandum states:

> "*Subclause 386(2) sets out circumstances in which a person is taken not to have been dismissed. These are where:*
>
> • *the person was employed for a specified period of time, for a specified task, or for the duration of a specified season, and the employment has terminated at the end of the period, task or season"* (underlining added).

Paragraph 1532 of the Explanatory Memorandum further states:

> "*Paragraph 386(2)(a) reflects the common law position that termination in these circumstances would not be a dismissal. The fact that an employment contract may allow for earlier termination would not alter the application of this provision as the employment has terminated at the end of the period, task or season. However, if a person engaged on this sort of contract is terminated prior to the end time specified in the contract, they may seek an unfair dismissal remedy if they satisfy*

the other requirements."

As noted by Commissioner Deegan in *Drummond v Canberra Institute of Technology* [2010] FWA 3534, at [51]:

> *"[t]he intention of the legislature appears to be to retain the common law position that a contract which ends with the effluxion of time does not terminate at the initiative of the employer. The only change to the operation of the relevant provisions that is intended is to provide that an employee employed under a contract for a specified period of time, whose employment is terminated other than at the expiration of that contract, may make an application under the unfair dismissal provisions of the legislation."*

Accordingly, even where an employee might have been employed on a series of back to back short fixed term contracts for years on end, if the contract reaches its expiry date and is no longer renewed or extended, the employee will not, it seems, be protected by the unfair dismissal laws.

Moreover, if the employee believes that the fixed term contract arrangement is a sham, it appears that s/he will find it very difficult to establish, as per s386(3) of the FW Act, that a substantial purpose of the contract was to avoid the employer's obligations.

Whilst in *D'Lima v Princess Margaret Hospital* (1994) 64 IR 19, Marshall J recognised that an employee who had been on a series of short fixed term contracts had a legitimate expectation of ongoing employment and did in reality have a continuous employment relationship with her employer, it appears that no other employees have succeeded in establishing that they were on fixed term contracts merely for avoidance purposes. For example, in *Drummond v Canberra Institute of Technology* (cited above), the employee relied heavily on *D'Lima,* but Commissioner Deegan dismissed the possibility of a sham and distinguished the facts of that case from the facts before him:

> At [53] "*...for the entire period of the applicant's employment with the respondent from 2003 to 2009 there was always a written employment contract which governed that employment. In D'Lima the applicant had been employed by the respondent for periods when no written contract governed her employment. Clearly the applicant in the D'Lima case may have had a legitimate expectation of ongoing employment at the cessation of each contract. The applicant in the matter before me was well aware that his employment could end with the expiration of each contract. A number of statements made by the applicant during submissions by the applicant clearly*

indicated that he was aware his employment could end at the expiry of his contracts. Clearly in this case there is an absence of "strong countervailing factors" [indicating a continuous employment relationship]."

At JobWatch, we consider that the FW Act should be amended so that employees who are on fixed term contracts for longer than 24 months are automatically converted to permanent employment unless the employer refuses the conversion on reasonable grounds. Factors to be taken into account in deciding whether there are reasonable grounds for refusing the conversion would need to be outlined in the FW Act. This would need to be a civil penalty provision in order for it to have any real weight.

Such a provision would not only extend protections of the unfair dismissal laws to many long-serving employees who are currently excluded. It would also allow these employees to enjoy the minimum entitlements set out in the National Employment Standards (NES) such as notice of termination and redundancy entitlements. Such a provision would, in our view, minimise the disadvantage and insecurity that is associated with contiguous fixed term arrangements and accordingly, it would be one way of achieving greater social inclusion.

4.6 Case studies from JobWatch's database highlighting the limitations faced by employees on a series of fixed term contracts (or on continuous renewals of a fixed term contract)

Shannon: I have been employed as an accountant by a large employer in the education sector on a series of fixed term contracts for over 6 years. My current contract is due to expire soon and although no-one has raised any performance or conduct issues with me, I've got a feeling that I'm not going to be kept on. The contract doesn't seem to state how long before the contract's expiry date my employer needs to confirm whether I'm staying or going.

Peter: I have been employed in an administrator position by one of the universities for just under eight years on a series of fixed term contracts. My current contract is for a period of three years, with one week's notice of termination to be given by either party in case of termination. I suspect I'm going to be told that they can't renew the contract this time because of funding issues. I used to be covered by the university's collective agreement, which provided for redundancy entitlements, but apparently that doesn't apply to me

anymore and my fixed term contract is silent on the issue of redundancy. If I had been a permanent employee and my position was made redundant I would be entitled to 13 weeks' redundancy pay and 5 weeks' notice (I'm over 45).

Jemima: I was employed for over 10 years as a supervisor in a private college. Throughout that time I was employed on fixed term contracts, each of which lasted for a trimester at a time. My last contract was not renewed and I haven't been able to get a straight answer about the reasons behind this. I suspect it might have something to do with the fact that a couple of years ago I had a relationship with my boss. That ended amicably but recently I married someone else and now I'm wondering whether that's behind the termination of my employment.

Roberta: I am a teacher and until recently I was employed on a number of consecutive fixed term 12-month contracts for a total of four years. I went on maternity leave during my last contract and the contract was due to expire whilst I would still be on leave. For some reason my name was taken off an email list which was used by the school to notify teachers of meetings and other important matters. Consequently, I was not officially advised that it was time to apply for the new contracts and I did not find out about the deadline until the day before the applications were due. My application was said to be not as good as the others so my contract hasn't been renewed.

Gerald: I've been employed in the higher education sector on a series of fixed term contracts by the same employer for 22 yrs. I'm currently on a 3 year contract. I've been unwell for the last year and I had a considerable amount of time off, all of which has been covered by medical certificates. I recently notified my employer that I was ready to return to work but I was advised that my position has been given to my 2nd in charge. I have been offered a different position which is on same salary but basically I view it as a demotion.

5 Recommendations

Our recommendations are as follows:

1. The FW Act should be amended so as to give express recognition of the fact that,

for the purposes of unfair dismissal, two separate entities in a labour hire scenario may be deemed to be joint employers in circumstances where they share or co-determine matters governing employment. This should extend to situations where labour hire workers are engaged as independent contractors on sham arrangements (where they really ought to be employees) and are placed with host employers who control their work.

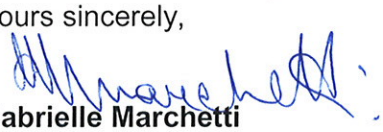
2. The FW Act should be amended so as to expressly recognise the possibility that in a labour hire scenario (where joint employment does not apply) a host employer will, in certain circumstances, be deemed to be the true employer for the purposes of unfair dismissal.

3. The FW Act should be amended so that employees who are on fixed term contracts for longer than 24 months are automatically converted to permanent employment unless the employer refuses the conversion on reasonable grounds. Factors to be taken into account in deciding whether there are reasonable grounds for refusing the conversion would need to be outlined. This would need to be a civil penalty provision.

JobWatch would welcome the opportunity to discuss any aspect of this submission further.

Please contact Gabrielle Marchetti of JobWatch's Legal Practice on (03) 9662 9458 if you have any queries.

Yours sincerely,



Gabrielle Marchetti
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Per:
Job Watch Inc