Q. If an existing staff member takes up a significantly different role with the University, will this mean that a new 6 month “minimum employment period” will operate, during which the staff member will not have access to the FWC unfair dismissal jurisdiction?

A. No. All continuous service will count towards the minimum employment period, even where there has been a significant change in duties. This will include casual service if this has been regular and systematic and if the staff member had a reasonable expectation of being offered further employment.

Section 384(1) of the *Fair Work Act 2009* precludes an employee from lodging an unfair dismissal claim unless they have served the “minimum employment period”. For large employers, such as universities, this period is 6 months.

The section defines “employment” as “continuous service”. It then excludes casual employment from the period of continuous service if the casual employment was not regular and systematic and the employee did not have a reasonable expectation of continuing employment. The “reasonable expectation” test is to be applied during the period of casual service, not at the point of termination.

The Fair Work Commission has held that the term “employment” is clearly referring to the employment relationship and not the technicalities of the employment contract.¹ This is an important point of distinction between these provisions and those in the previous federal legislation. Under the *Workplace Relations Act*, a new “qualifying period” would operate if the employment contract had fundamentally changed, even thought the employment relationship was continuous.

This means that if, for example, a University employs someone as a member of general/professional staff and they then move into an academic staff position, this will not be considered to be a new employment relationship. Note that this would not preclude the University from applying its academic probationary process to the staff member; the University would need to keep in mind, however, that if the staff member would have access to the unfair dismissal jurisdiction if they were terminated during the probation period, or not confirmed (as long as the total period of service was greater than 6 months). The University would need to ensure that it had a valid reason for termination, based on the staff member’s capacity or conduct, and that the staff member had been given an opportunity to respond to matters of concern.

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¹ *Ponce v DJT Staff Management Services Pty Ltd t/as Daly’s Traffic* [2010] FWA 2078