# FEDERAL COURT OF AUSTRALIA

## United Voice v Berkeley Challenge Pty Limited [2018] FCA 224

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| File number: | QUD 217 of 2016 |
| Judge: | **REEVES J** |
| Date of judgment: | 2 March 2018 |
| Catchwords: | **INDUSTRIAL LAW** – application for compensation under s 545 of the *Fair Work Act 2009* (Cth) (FWA) due to alleged breaches of the National Employment Standard – where the employer terminated the employment of various employees after losing a client contract for services which those employees performed – where the employer provided a notice letter to the employees advising them of the loss of client contract – whether this notice letter was a valid notice of termination under s 117 of the FWA – where the employer did not pay redundancy payments to the terminated employees – where the employer sought to rely on the "ordinary and customary turnover of labour" exception in s 119(1)(a) of the FWA – the meaning of this exception and whether it applied in the circumstances |
| Legislation: | *Acts Interpretation Act 1901* (Cth)<br>*Fair Work (Registered Organisations) Act 2009* (Cth)<br>*Fair Work Act 2009* (Cth)<br>*Federal Court of Australia Act 1976* (Cth)<br>*Workplace Relations Act 1996* (Cth)<br>*Employment Protection Act 1982* (NSW) |
| Cases cited: | *AB v State of Western Australia* (2011) 244 CLR 390; [2011] HCA 42<br>*Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)* (2009) 239 CLR 27; [2009] HCA 41<br>*Alphapharm Pty Limited v H Lundbeck A/S* (2014) 254 CLR 247; [2014] HCA 42<br>*Amcor Limited v Construction, Forestry, Mining and Energy Union* (2005) 222 CLR 241; [2005] HCA 10<br>*Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2011) 191 FCR 212; [2011] FCAFC 14<br>*Burton Group Ltd v Smith* [1977] IRLR 351<br>*Carr v State of Western Australia* (2007) 232 CLR 138; |

[2007] HCA 47

*Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378; [2012] HCA 56

*Commissioner of Taxation of the Commonwealth of Australia v Consolidated Media Holdings Ltd* (2012) 250 CLR 503; [2012] HCA 55

*Compass Group (Aust) Pty Ltd v National Union of Workers* (2015) 253 IR 32; [2015] FWCFB 8040

*Construction, Forestry, Mining and Energy Union v Mammoet Australia Pty Ltd* (2013) 248 CLR 619; [2013] HCA 36

*Dagger v Shepherd* [1946] KB 215

*FBIS International Protective Services (Aust) v Maritime Union of Australia* (2015) 232 FCR 1; [2015] FCAFC 90

*IW v City of Perth* (1997) 191 CLR 1

*National Union of Workers v Compass Group Pty Ltd* [2015] FWC 6055

*Newcrest Mining Ltd v Thornton* (2012) 248 CLR 555; [2012] HCA 60

*Nojin v Commonwealth* (2012) 208 FCR 1; [2012] FCAFC 192

*Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; [1998] HCA 28

*Richardson v ACT Health and Community Care Service* (2000) 100 FCR 1; [2000] FCA 654

*Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252; [2010] HCA 23

*Shop, Distributive & Allied Employees' Assn (N.S.W.) v Countdown Stores* (1983) 7 IR 273

*Termination, Change and Redundancy Case* (1984) 8 IR 34

*Termination, Change and Redundancy Case* (1984) 9 IR 115

*Thiess v Collector of Customs* (2014) 250 CLR 664; [2014] HCA 12

*Transport Workers Union v Veolia Environmental Service (Aust) Pty Ltd* [2013] NSWIRComm 22

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| Date of hearing: | 13-14 March 2017 |
| Registry: | Queensland |
| Division: | Fair Work Division |
| National Practice Area: | Employment and Industrial Relations |
| Category: | Catchwords |
| Number of paragraphs: | 84 |
| Counsel for the Applicant: | CW Dowling and T Borgeest |
| Solicitor for the Applicant: | Hall Payne |
| Counsel for the Respondent: | F Parry QC and A Galbraith |
| Solicitor for the Respondent: | Rigby Cooke Lawyers |

# ORDERS

**QUD 217 of 2016**

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| **BETWEEN:** | **UNITED VOICE**<br>Applicant |
| **AND:** | **BERKELEY CHALLENGE PTY LIMITED**<br>Respondent |

| | |
|---|---|
| **JUDGE:** | **REEVES J** |
| **DATE OF ORDER:** | **2 MARCH 2018** |

**THE COURT ORDERS THAT:**

1. Within 21 days the parties file orders in an agreed form to give effect to these reasons.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

# REASONS FOR JUDGMENT

## REEVES J:

### INTRODUCTION

1 In early October 2014, Berkeley Challenge Pty Limited, the respondent, terminated the employment of most of the employees it employed at the Sunshine Coast Plaza Shopping Centre (Sunshine Plaza) on the Sunshine Coast in Queensland. It did so because the Spotless Group of Companies, of which it was a member, was unsuccessful in its tender to continue to provide security, cleaning and related services (the contract services) to the principal at the Sunshine Plaza, Lend Lease Property Management Pty Ltd.

2 United Voice, the applicant, is a registered organisation under the *Fair Work (Registered Organisations) Act 2009* (Cth). It represents a number of the employees who had their employment terminated (the affected employees). In this proceeding, it claimed that Berkeley did not provide valid notices of termination to the affected employees and that a number of those employees were entitled to redundancy payments which Berkeley did not pay them.

### THE FACTUAL CONTEXT

#### From 1994 to 2014 Berkeley and Spotless provide the contract services at Sunshine Plaza

3 Berkeley first began providing the contract services at the Sunshine Plaza in 1994 when the shopping centre first opened. From that time until 2014, the contract services were provided under a series of contracts with Lend Lease, usually of between two to four years in duration.

4 In 1999, Berkeley was acquired by the Spotless Group of Companies, the ultimate holding company of which is Spotless Group Holdings Ltd. From about that point forward, a company within that Group became the party that contracted with Lend Lease to provide the contract services. Nonetheless, Berkeley continued to employ the staff necessary to provide those services.

5 In or about January 2014, Lend Lease invited tenders for a new contract to provide the contract services. Spotless submitted a tender, however, it was unsuccessful. As a consequence, on or about 29 August 2014, Lend Lease gave notice to Spotless that it was

required to exit the Sunshine Plaza by the close of business on 30 September 2014. This date was later extended to close of business on 7 October 2014.

**The Notice Letter of 1 September 2014 and the notices posted on noticeboards**

6 As a consequence of these events, on or about 1 September 2014, Spotless (apparently acting on behalf of Berkeley) forwarded to the affected employees a letter entitled "Notification of Loss of Contract" (the Notice Letter). At about the same time, members of Spotless' management team held meetings with various of the affected employees to advise them that Spotless had been unsuccessful in its tender. The Notice Letter read as follows:

> **NOTIFICATION OF LOSS OF CONTRACT**
>
> The purpose of this letter is to confirm the outcome of a recent tender review undertaken by Lend Lease (the Client) and what this means for you.
>
> As a result, notification has been received to Spotless (the employer) that we were unsuccessful during this tender process and have subsequently been given notice to exit the contract at completion of business on Tuesday 30th September 2014. Every effort will be made to place you in another role within the business to ensure your continued employment with Spotless. I urge you to review the current vacancies within our business and discussions will be held with you over the coming weeks for a suitable placement. Should no suitable placement be found, your employment will be terminated in accordance with your contract of employment. However, the incoming contractor has contacted me and asked for us to pass on an employment pack, as they are very keen to receive applications from our existing staff.
>
> I would like to take this opportunity to personally thank you for your valuable contribution during our tenure at Sunshine Plaza which has extended almost 20 years. As always, please do not hesitate to contact your Manager if you have any questions.

7 Further, in early September 2014, shortly after Spotless was notified of the abovementioned extension of the exit date of the contract to 7 October 2014, Ms Fleming, an Operations Manager employed by Spotless, arranged to post notices in the staff lunch room and in the security office at the Sunshine Plaza alerting the employees at the Plaza to that change.

**The terminations of the affected employees on 7 October 2014**

8 On or about 7 October 2014, Spotless (again apparently acting on behalf of Berkeley) provided to most of the affected employees a document that was headed "Employment Termination Form". There is some dispute as to whether two different versions of this form were utilised. Nonetheless, it is not disputed that the employment of the affected employees was terminated as at the close of business on 7 October 2014.

**The relevant details of the affected employees**

9 The relevant details of the 21 affected employees are recorded in the statement of agreed facts. Those details, together with a calculation of their notice and redundancy entitlements, are as follows:

| Family name | Given name(s) | Age | Period of service | Award | Classification | Notice | Re-employed | Redundancy pay period |
|---|---|---|---|---|---|---|---|---|
| Bush | Anthony | 57 | At least 5 years but less than 6 years | Security | Level 3 | 5 weeks | | 10 weeks |
| Clark | Martha | 64 | At least 10 years but less than 11 years | Cleaning | Level 1 | 5 weeks | Yes | |
| Ferris | Noelle Bebe | 51 | At least 6 years but less than 7 years | Cleaning | Level 1 | 5 weeks | Yes | 11 weeks |
| Gardner | Matthew | 38 | At least 7 years but less than 8 years | Cleaning | Level 2 | 4 weeks | | 13 weeks |
| Greaves | Peter | 49 | At least 7 years but less than 8 years | Cleaning | Level 3 | 5 weeks | Yes | 13 weeks |
| Guse | Brendan | 37 | At least 4 years but less than 5 years | Security | Level 3 | 3 weeks | Yes | 8 weeks |
| Hilton | Brenda | 53 | At least 12 years but less than 13 years | Cleaning | Level 1 | 5 weeks | Yes | |
| Malcolm | Ross | 55 | At least 17 years but less than 18 years | Cleaning | Level 2 | 5 weeks | Yes | |
| Meehan | Leonard | 63 | At least 4 years but less than 5 years | Cleaning | Level 2 | 5 weeks | | 16 weeks |
| Morland | John | 50 | At least 9 years but less than 10 years | Cleaning | Level 2 | 5 weeks | Yes | |
| O'Dwyer | Michael George | 44 | At least 6 years but less than 7 years | Security | Level 3 | 4 weeks | | 11 weeks |
| Patorniti | Paul | 57 | At least 12 years but less than 13 years | Security | Level 3 | 5 weeks | | 12 weeks |
| Peck | Rex Andrew | 55 | At least 6 years but less than 7 years | Cleaning | Level 2 | 5 weeks | Yes | |

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|---|---|---|---|---|---|---|---|---|
| Pitt | Joseph | 62 | At least 20 years but less than 21 years | Cleaning | Level 1 | 5 weeks | Yes | |
| Pomeroy | Terrence | 61 | At least 10 years but less than 11 years | Cleaning | Level 1 | 5 weeks | | 12 weeks |
| Preo | Laurie | 41 | At least 8 years but less than 9 years | Security | Level 3 | 4 weeks | | 16 weeks |
| Sanderson | Angela | 40 | At least 9 years but less than 10 years | Cleaning | Level 1 | 4 weeks | Yes | |
| Sanderson | Bradley | 41 | At least 9 years but less than 10 years | Cleaning | Level 1 | 4 weeks | | 16 weeks |
| Van Noordennen | Marcus | 32 | At least 6 years but less than 7 years | Cleaning | Level 1 | 4 weeks | | 11 weeks |
| Vlok | Angelique | 26 | At least 3 years but less than 4 years | Security | Level 1 | 3 weeks | | 7 weeks |
| Woods | Stephen | 56 | At least 19 years but less than 20 years | Cleaning | Level 1 | 5 weeks | Yes | 12 weeks |

**THE RELIEF SOUGHT**

10 In its originating application, United Voice sought orders under s 546(1) of the *Fair Work Act 2009* (Cth) (the FWA) that Berkeley should pay pecuniary penalties for its alleged contraventions of ss 44, 117 and 119 of the FWA. It also sought compensation under s 545(1) and (2)(b) of the FWA in relation to the losses the employees claimed to have suffered due to Berkeley's alleged failure to provide valid notices of termination, in contravention of s 117 and 44(1); and because of Berkeley's alleged failure to pay redundancy payments, in contravention of ss 119 and 44(1) of the FWA. Finally, United Voice sought an order under s 51A(1)(a) of the *Federal Court of Australia Act 1976* (Cth) for the payment of prejudgment interest on any compensation that is awarded under s 545(1).

**THE RELEVANT LEGISLATIVE PROVISIONS**

11 Section 44(1) provides:

> An employer must not contravene a provision of the National Employment Standards.
>
> (Note omitted)

12 Section 117 of the FWA sets out a part of one of the National Employment Standards. It provides:

**117 Requirement for notice of termination or payment in lieu**

*Notice specifying day of termination*

(1) An employer must not terminate an employee's employment unless the employer has given the employee written notice of the day of the termination (which cannot be before the day the notice is given).

*Amount of notice or payment in lieu of notice*

(2) The employer must not terminate the employee's employment unless:

(a) the time between giving the notice and the day of the termination is at least the period (the ***minimum period of notice***) worked out under subsection (3); or

(b) the employer has paid to the employee (or to another person on the employee's behalf) payment in lieu of notice of at least the amount the employer would have been liable to pay to the employee (or to another person on the employee's behalf) at the full rate of pay for the hours the employee would have worked had the employment continued until the end of the minimum period of notice.

(3) Work out the minimum period of notice as follows:

(a) first, work out the period using the following table:

| **Period** | | |
|---|---|---|
| | **Employee's period of continuous service with the employer at the end of the day the notice is given** | **Period** |
| 1 | Not more than 1 year | 1 week |
| 2 | More than 1 year but not more than 3 years | 2 weeks |
| 3 | More than 3 years but not more than 5 years | 3 weeks |
| 4 | More than 5 years | 4 weeks |

(b) then increase the period by 1 week if the employee is over 45 years old and has completed at least 2 years of continuous service with the employer at the end of the day the notice is given.

(Notes omitted)

13 Section 119 of the FWA sets out the remaining part of the same National Employment Standard. It provides:

**119 Redundancy pay**

*Entitlement to redundancy pay*

(1) An employee is entitled to be paid redundancy pay by the employer if the employee's employment is terminated:

(a) at the employer's initiative because the employer no longer requires the job done by the employee to be done by anyone, except where this is due to the ordinary and customary turnover of labour; or

(b) because of the insolvency or bankruptcy of the employer.

Note: Sections 121, 122 and 123 describe situations in which the employee does not have this entitlement.

*Amount of redundancy pay*

(2) The amount of the redundancy pay equals the total amount payable to the employee for the redundancy pay period worked out using the following table at the employee's base rate of pay for his or her ordinary hours of work:

| **Redundancy pay period** | | |
|---|---|---|
| | **Employee's period of continuous service with the employer on termination** | **Redundancy pay period** |
| 1 | At least 1 year but less than 2 years | 4 weeks |
| 2 | At least 2 years but less than 3 years | 6 weeks |
| 3 | At least 3 years but less than 4 years | 7 weeks |
| 4 | At least 4 years but less than 5 years | 8 weeks |
| 5 | At least 5 years but less than 6 years | 10 weeks |
| 6 | At least 6 years but less than 7 years | 11 weeks |
| 7 | At least 7 years but less than 8 years | 13 weeks |
| 8 | At least 8 years but less than 9 years | 14 weeks |
| 9 | At least 9 years but less than 10 years | 16 weeks |
| 10 | At least 10 years | 12 weeks |

14 Sections 545 and 546 of the FWA provide for the orders that can be made when the above provisions have been contravened. They relevantly provide:

**545 Orders that can be made by particular courts**

*Federal Court and Federal Circuit Court*

(1) The Federal Court or the Federal Circuit Court may make any order the court considers appropriate if the court is satisfied that a person has contravened, or proposes to contravene, a civil remedy provision.

(Notes omitted)

(2) Without limiting subsection (1), orders the Federal Court or Federal Circuit Court may make include the following:

(a) an order granting an injunction, or interim injunction, to prevent, stop or remedy the effects of a contravention;

(b) an order awarding compensation for loss that a person has suffered because of the contravention;

(c) an order for reinstatement of a person.

**546 Pecuniary penalty orders**

(1) The Federal Court, the Federal Circuit Court or an eligible State or Territory court may, on application, order a person to pay a pecuniary penalty that the court considers is appropriate if the court is satisfied that the person has contravened a civil remedy provision.

(Notes omitted)

## THE NATIONAL EMPLOYMENT STANDARDS

15 Both ss 117 and 119 appear within Chapter 2 of the FWA. That chapter "deals with terms and conditions of employment of national system employees", the main ones of which "come from the National Employment Standards, modern awards, enterprise agreements and workplace determinations" (s 41). The National Employment Standards are prescribed by Part 2-2 of Chapter 2. Those Standards are intended to advance one of the main objects of the FWA which, as stated in s 3, is "ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the National Employment Standards, modern awards and national minimum wage orders" (s 3(b)). Accordingly, they set the "minimum standards that apply to the employment of employees which cannot be displaced" (s 61(1)). Neither a modern award, nor an enterprise agreement, can exclude the Standards, or any provisions of them, and any term that does is of no effect (ss 55 and 56). Approximately 70% of employed Australians and around 85% of all employees are covered by the FWA (Productivity Commission, *Workplace Relations Framework* (Productivity Commission Inquiry Report No. 76, 30 November 2015), Volume 1, p 78).

16 The National Employment Standards were introduced as a separate set of national standards in the FWA when it was passed in the Federal Parliament in 2009. They were the product of a policy document entitled "Forward with Fairness" which the incoming Australian Labor Party government had campaigned on during the 2007 election (Stewart A, Forsyth A, Irving M, Johnstone R and McCrystal S, *Creighton & Stewart's Labour Law* (6th ed, The Federation Press, 2016), paras 12.10–12.12). Nonetheless, as the authors of *Creighton & Stewart's Labour Law* point out (at para 12.13), those standards "did not really contain anything new". That was so because many of them had been included in the Standard set out in Part 7 of the *Workplace Relations Act 1996* (Cth) and others were developed and adopted in "test case standards", in industrial instruments and/or in State industrial law. I will return to this "test case standards" aspect later in these reasons.

17 There are 10 National Employment Standards prescribed within Part 2-2 of Chapter 2. They apply to a range of matters, including: maximum weekly hours; parental leave; annual leave; and public holidays (s 61(2)). Division 11, which includes ss 117 and 119, contains the prescribed standard for Notice of termination and redundancy pay. Those two sections therefore assist to set one of the minimum standards of employment, or the termination thereof, for the vast majority of employees in Australia.

**THE ISSUES TO BE DETERMINED**

18 Before identifying the issues in dispute in this matter, it is convenient to identify the main issues that are not in contention. First, it is not in contention that the affected employees had, by 7 October 2014, completed periods of continuous service with Berkeley as stated in the Table in [9] above and had also attained the ages specified in that Table. Secondly, it is not in contention that the employment of the affected employees was terminated and they were not paid anything in lieu of notice, and nor were they paid any redundancy pay. However, it is agreed they were paid all of their other accrued statutory and award entitlements. Thirdly, it is not in contention that 11 of the affected employees were employed by the incoming contractor at the Sunshine Plaza and therefore continued to work there after their employment with Berkeley was terminated. Those employees are identified by the word "yes" in the "Re-employed" column in the Table at [9] above. Fourthly, it is not in contention that seven of the affected employees were not entitled to redundancy pay under the FWA. Those employees are identified by the absence of any entry in the "Redundancy Pay Period" column in the Table at [9] above. Finally, it is not in contention that the affected employees' employment was terminated at Berkeley's initiative because it no longer required their jobs to be done by anyone and that s 119(1) of the FWA therefore applied to them.

19 Accordingly, two issues remain to be determined:

(a) whether the Notice Letter constituted a valid notice of termination under s 117(1) of the FWA; and

(b) whether the exception provided in s 119(1)(a) of the FWA: "where this is due to the ordinary and customary turnover of labour", applied to Berkeley's decision to terminate the employment of the affected employees.

**TWO EXERCISES IN STATUTORY CONSTRUCTION**

20 Each of these issues involves an exercise in statutory construction. The principles relevant to such an exercise are well-established. For example, in *Thiess v Collector of Customs* (2014) 250 CLR 664; [2014] HCA 12 (*Thiess*), the High Court (French CJ, Hayne, Kiefel, Gageler and Keane JJ) said:

> 22 Statutory construction involves attribution of meaning to statutory text. As recently reiterated :
>
> > "'This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the [statutory] text'. So must the task of statutory construction end. The statutory text must be considered in its context. That context includes legislative history and extrinsic materials. Understanding context has utility if, and in so far as, it assists in fixing the meaning of the statutory text."
>
> 23 Objective discernment of statutory purpose is integral to contextual construction. The requirement of s 15AA of the *Acts Interpretation Act 1901* (Cth) that "the interpretation that would best achieve the purpose or object of [an] Act (whether or not that purpose or object is expressly stated …) is to be preferred to each other interpretation" is in that respect a particular statutory reflection of a general systemic principle. For:
>
> > "it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning."
>
> (Footnotes omitted)

21 On the use that may be made of the historical background to legislation, in *Alphapharm Pty Limited v H Lundbeck A/S* (2014) 254 CLR 247; [2014] HCA 42, the Court said (at [42]):

> The pre-existing law and the legislative history should not deflect the Court from its duty to resolve an issue of statutory construction, which is a text-based activity. However, both parties recognised that the task of statutory construction in this case required some appreciation of the pre-existing law and the legislative history of relevant provisions. Undoubtedly, questions of policy can inform the Court's task of statutory construction.
>
> (Citations omitted)

See also *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, [1998] HCA 28 (*Project Blue Sky*) at [69]; *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)* (2009) 239 CLR 27, [2009] HCA 41 at [47]; *Newcrest Mining Ltd v Thornton* (2012) 248 CLR 555, [2012] HCA 60 at [70]; *Commissioner of Taxation of the Commonwealth of Australia v Consolidated Media Holdings Ltd* (2012) 250 CLR 503, [2012] HCA 55 at [39] (quoted in *Thiess* at [22], see

above at [20]); *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378, [2012] HCA 56 at [23]–[26].

## THE TERMINATION ISSUE

### Introduction

22 The first exercise in statutory construction concerns the provisions of s 117(1), in particular the words "[a]n employer must not terminate an employee's employment unless the employer has given the employee **written notice of the day of the termination**" (emphasis added) (see above at [12]).

### The contentions on the termination issue

23 Berkeley contended that the affected employees were given valid written notices of termination under s 117(1) of the FWA when they were provided with copies of the Notice Letter. It claimed that notice had to be considered in its proper context, including the lengthy tender process commencing in early 2014, of which the affected employees were aware, and the information imparted at the meetings that occurred in early September 2014, during which members of Spotless' management team told the affected employees that it had been unsuccessful in its tender. To address the difference between the date stated in the Notice Letter (30 September 2014) and their agreed date of termination of 7 October 2014, Berkeley claimed that the former date was extended to the latter on or about 3 September 2014 when notices were posted on noticeboards at the Sunshine Plaza notifying all employees that the exit date of the Sunshine Plaza contract had been extended (see at [7] above).

24 United Voice contended that the Notice Letter was a notification of Spotless' loss of contract, not a notice of termination of the affected employees' employment which complied with the requirements of s 117. In response to Berkeley's contention that the date in the Notice Letter had been extended to 7 October 2014, it submitted that posting notices on noticeboards failed to cure the deficiencies in that letter and did not, in any event, satisfy the requirements for delivering a notice under s 28A of the *Acts Interpretation Act 1901* (Cth).

### The requirements for a valid notice of termination of employment under s 117(1)

25 A notice of termination of employment is analogous to a notice to quit a tenancy. Both are usually highly significant events in the lives of the employees or tenants concerned and, in both situations, the landlord or employer is acting unilaterally in the exercise of a contractual right to put an end to the existing contractual relationship. Accordingly, I consider the same

principles are relevant to both, namely that the notice must be expressed in "plain unambiguous words" and it must terminate the relationship at a certain point in time (see *Dagger v Shepherd* [1946] KB 215 at 220 concerning a notice to quit a tenancy). Applied to the words of s 117(1): "notice of the day of the termination", this means that, in order to validly terminate an employee's employment, the employer concerned must give a notice which makes it unambiguously clear to the employee that his/her employment is to be terminated with effect from a certain day in the future. The latter is conveyed by the concluding words of s 117(1) in parenthesis, "which cannot be before the day the notice is given".

**The Notice Letter was not a valid notice of termination of employment**

26 The above then sets out what s 117(1) of the FWA prescribes for a valid notice of termination of employment. Next, it is necessary to examine the contents of the Notice Letter in this matter to determine whether it complied with these prescriptions for validity. However, before examining that letter, it is convenient to note two things. First, this analysis of the Notice Letter must proceed objectively (see *Burton Group Ltd v Smith* [1977] IRLR 351 and McCarry GJ, *Termination of Employment Contracts by Notice* (1986) 60 ALJ 78). It follows that the subjective intentions, or views, of those involved, gained from the surrounding circumstances, about what the Notice Letter contained, or conveyed, are irrelevant. For this reason, I reject Berkeley's contentions that I should have regard to those matters. Secondly, it is appropriate to note a factual matter pertinent to this issue that will take on a greater significance in the next issue. It is that the Notice Letter was under the letterhead of Spotless, not that of the employer, Berkeley. However, since it is an agreed fact that Berkeley was the employer and that it provided the Notice Letter to the affected employees, I will proceed on the assumption that Spotless provided it on behalf of Berkeley.

27 For the following reasons, I do not consider that the Notice Letter met the prescriptions for validity outlined above. First, I agree with United Voice that, properly analysed, the Notice Letter was, in reality, a notification of Spotless' loss of the contract at Sunshine Plaza; it was not a notice of the termination of the affected employees' employment with Berkeley. That is apparent, among other things, from its heading "Notification of loss of contract". When that heading is read in conjunction with the first and second paragraphs of the letter, it becomes quite apparent that, in reverse order: the "contract" referred to in that heading is Spotless' contract with Lend Lease; the "loss" referred to is Spotless' failure to win the tender for that

contract; and the "notification" referred to is the "Notice to exit the contract" given to Spotless by Lend Lease. None of these expressions refers to the affected employees' contracts of employment, much less the termination thereof.

28 Furthermore, of the four express references to "employment" in the body of the Notice Letter, none is expressed in terms which unambiguously notifies the affected employees that their employment was being terminated. All of those references appear in the second paragraph of the letter. The first refers to "your continued employment with Spotless". The next two references appear in the same sentence: "should no suitable placement be found, your employment will be terminated in accordance with your contract of employment". The fourth, and final, refers to "an employment pack" which Spotless had been asked to pass on from the incoming contractor.

29 From these references, it can be seen that the first deals with the exact opposite of termination of employment, namely "continued" employment with Spotless. The fourth also relates to continuing employment but, in that instance, with the incoming contractor. This difference clearly does not convert that reference to a notice of termination of employment. And, while the second and third references raised the possibility of a termination of employment, those references expressed that termination as a future contingency. That is, that event was described as something that will occur in the future if "no suitable placement is found".

30 For these reasons, on an objective assessment of its contents, I do not consider the Notice Letter made it unambiguously clear to the affected employees that their employment with Berkeley was being terminated.

31 Secondly, even if the Notice Letter did give such a notice of termination of their employment, I do not consider that it nominated a day in the future when that termination was to take effect. The only mention in the letter of a concept similar to a day of termination was the date upon which Spotless said it had to "exit" its contract with Lend Lease. Nowhere in the Notice Letter was that date linked with the affected employees' employment with Berkeley in the sense that their employment was to be terminated from that date. This is particularly so with the statement three sentences after the mention of the 30 September exit date to the effect that "your employment will be terminated". That statement does not refer back to the earlier mentioned date but, instead, states that the termination referred to will be undertaken "in accordance with your contract of employment". It therefore implies that that contractual process will be followed at some time in the future, if that becomes necessary.

32 For these reasons, I do not consider the Notice Letter gave the affected employees notice that their employment was being terminated, and nor do I consider it gave notice of the day of that termination, in compliance with s 117(1) of the FWA. That being so, it is unnecessary to consider whether that non-existent day of that non-existent termination was extended by the notice placed on the noticeboards at Sunshine Plaza, as Berkeley contended it was.

**Conclusions – contraventions occurred and compensation is payable**

33 It follows that Berkeley contravened ss 44(1) and 117(1) of the FWA on 7 October 2014 when it terminated the affected employees' employment without giving them a valid notice of termination of their employment under s 117(1) of the FWA. The former section was contravened because, as is explained above, s 117 is a provision of the National Employment Standards.

34 Each of the affected employees is therefore entitled to compensation under s 545(2) of the FWA for the loss they suffered because of those contraventions. That compensation should be calculated for each of the affected employees in accordance with the information contained in the agreed facts and the provisions of s 117(3) of the FWA. In addition, pre-judgment interest should be added to that compensation since 7 October 2014 in accordance with the provisions of s 51A of the *Federal Court of Australia Act 1976* (Cth).

**THE REDUNDANCY ISSUE**

**Introduction and some further factual context**

35 As mentioned above, there is no issue that the employment of the affected employees was terminated on 7 October 2014 and that was done at Berkeley's initiative because it no longer required their jobs to be done by anyone. The only area of dispute with respect to this redundancy issue is, therefore, whether the exception in s 119(1)(a): "except where this is due to the ordinary and customary turnover of labour" (which I will, for convenience, refer to hereafter as "the Exception"), applied to absolve Berkeley of the obligation to pay them redundancy pay.

36 Before I set out some pertinent details of the evidence concerning the terms of employment of the affected employees and the business activities of the Spotless Group, it is worth returning to the matter I mentioned above because it will have a significant bearing on the outcome of this issue. That issue concerns the admitted fact that Berkeley was the employer of all of the affected employees as at 7 October 2014, when their employment was

terminated. According to Mr Potter, a National Human Resources Manager within the Spotless Group, this state of affairs arose because "when the Spotless Group acquired [Berkeley], the employing entity of employees (sic) remained [Berkeley]. Employees who were employed post-acquisition of [Berkeley] by Spotless have also been employed by [Berkeley]". Mr Potter also said that when Berkeley became part of the Spotless Group, it was one of 26 employing entities in that Group. It necessarily follows that, for the purposes of both ss 117 and 119, Berkeley was the "employer" and it is Berkeley's decisions and business activities to which reference must be made in determining whether the Exception applied to the termination of the affected employees. Furthermore, to succeed in gaining the benefit of the Exception in s 119(1)(a), it is Berkeley, as the employer, that bears the onus of establishing that its initiative to terminate the employment of the affected employees' and render their jobs redundant was due to that Exception.

**The affected employees' terms of employment**

37 There was a number of letters of offer of employment in evidence setting out the terms and conditions of employment of the affected employees. From those letters, it is apparent that the affected employees were engaged by Berkeley under contracts which provided for permanent employment and which did not specify a term of expiry. Further, they did not contain a term specifying that their employment was subject to, or dependent upon, the continuance of the contract with Lend Lease at the Sunshine Plaza, nor did they reflect any custom that, in the event that contract were to be lost, the affected employees would be deprived of their entitlements to redundancy pay.

38 As well, on this aspect, most of the affected employees made a statement in which they said that they had an expectation of continuing employment with Berkeley because of, among other things: the length of their employment; their views that their work was performed to a high quality evidenced by their claims that no issues had been raised with them about their performance; and their claims that they had not been told by Berkeley that their employment "was dependent on [it] retaining the contract for security services between it and [Lend Lease]". Further, Mr Potter was cross-examined on the letter of offer of employment addressed to Mr Guse and he accepted that "based on [a] pure read (sic) of [that letter] it is not accurate to say that he [Mr Guse] should understand he is tied to a contract between a Spotless company and Lend Lease or someone else at the [Sunshine] Plaza".

39 To counter this evidence, Berkeley pointed to the express term of the letters of offer of employment mentioned above which provided that, as the employer, it may direct an employee to transfer to other locations to perform work. As well, it relied on the memorandum addressed to Mr Woods in 1995 (another of the affected employees employed at the Sunshine Plaza), which stated that "all staff positions and hours of work are subject to current contractual arrangements with [Lend Lease] and may change with any alteration in Sunshine Plaza trading hours or loss of contract". However, United Voice pointed out that there was no evidence Mr Woods had received this memorandum and, in any event, it does not state that his employment will be terminated if the Lend Lease contract were lost.

**The evidence about the Spotless Group's business**

40 As I have already mentioned above, Mr Potter is employed within the Spotless Group as a National Human Resources Manager. In his evidence, he described the business of the Spotless Group, the "fiercely" competitive industry in which it operated and the frequency with which Spotless won and lost client contracts, as follows:

> As the primary function of the Spotless Group is as a contract service provider, the Spotless Group's income is wholly derived from client contracts. The vast majority of the Spotless Group's revenue is generated from facility services contracts and as far as I am aware this has been the case for at least the last 15 years.
>
> The contract facility services market in which the Spotless Group mainly operates, and has operated for many years, is fiercely competitive. The competition for new contracts and the retention of existing contracts in the industry is intense. There are numerous companies servicing the market including other large international and Australian contracting service companies such as Sodexo, Broadspectrum, ISS, Compass and Delaware North.
>
> …
>
> At any point in time, the Spotless Group is in the process of tendering or bidding for new contracts, mobilising new sites as new contracts are won, and demobilising sites and contracts following the loss of a client contract after a competitive tender process or natural conclusion of a client contract (for example due to the end of a construction project). In some circumstances, contracts are lost prior to their expiry date due to site closures, or the client decides to no longer outsource the services of the contract.

41 Resulting from the frequency with which it turned over contracts, Mr Potter gave the following evidence about the fluctuation of employees within the Spotless Group:

> The number of employees the Spotless Group employs constantly fluctuates based on the contracts the contracts available for employees to work on. In Australia as at 6 January 2017, the Spotless Group currently employs around 28,215 employees. This includes 8,718 full time employees, 2,722 part-time employees, and 16,775 casual employees. As at 26 September 2014, before the Sunshine Plaza Contract ended, the

> Spotless Group employed around 24,543 employees including 7418 full time employees, 3035 part-time employees, and 14,090 casual employees.

42 In contrast to the terms of employment of Berkeley's employees described above (at [37]), Mr Potter claimed that most employees within the Spotless Group were employed on "specific client contracts" which he described as "contract requirement employees" as follows:

> Except for some employees, which are identified below, the Spotless Group recruit employees solely to work on a specific client contract. That is, the jobs and functions performed by these employees relate directly to client service delivery and as such their employment is "tied" to a particular client contract. I refer to these employees as "contract requirement" employees. In my review of payroll reports and excluding the Laundries business (as it is different in nature to the Spotless operations in facility services contracts as described above), 93% of the Spotless Group workforce is currently classed as "contract requirement" employees and this percentage has not changed significantly over the last 3 years.
>
> …
>
> The main reason for these significant headcount fluctuations is that the Spotless Group's "contract requirement" employee numbers constantly change as client contracts end and new client contracts are won, negotiated and mobilised. This is a natural part of the operation of the Spotless Group's business.

43 Mr Potter described what usually occurred when the Spotless Group lost a client contract, in the following terms:

> It is an inherent feature of the Spotless Group's business model that client contracts end. Client contracts are generally only for a specified period and clients often conduct a competitive retender for the service performed by the Spotless Group at the expiry of the contract. The Spotless Group is not always successful in the competitive retender processes. Inevitably, this often results in the termination of employment of the Spotless Group employees attached to specific client contracts.
>
> The Spotless Group takes reasonable steps to redeploy employees to other client contracts if it loses a client contract. However, the nature of the Spotless Group's business as a contract service provider often means retaining staff after a client contract is finished is not possible. Hundreds of employees end their employment with the Spotless Group each year due to this reason.
>
> …
>
> Where employees are not successfully redeployed to another client contract or to another position within the Spotless Group or they accept employment with the incoming contractor, their employment with the Spotless Group terminates.
>
> Based on my review in November 2016 of payroll reports and Client Contract Reports, across the Spotless Group in Australia, excluding in the Laundries and the ITU sector, for the financial year to date ending in June 2017, 115 employees have had their employment with the Company terminated as a direct result of the loss of a client contract. This is 88% of the 131 of "contract requirement" employees associated with those contracts which were lost.

44 On the question of redundancy pay, Mr Potter described the "general approach" of the Spotless Group as follows:

> The general approach in the Spotless Group is that no redundancy is payable upon a termination of employment due to loss of contract as the longstanding ordinary and customary turnover of labour (OCTL) exception is relied on.

45 Before leaving this outline of the evidence adduced by Berkeley in this matter, it is important to note this. Compared to the detailed evidence above about the Spotless Group's business activities, neither Mr Potter, nor any of the other witnesses called by Berkeley, gave any similar evidence about Berkeley's business activities or the turnover of its employees. The relevant evidence of Mr Potter on these matters is already outlined above (see at [36]). The only other evidence that remotely touched on these matters came from Ms Bennett, a Queensland State Manager employed within Spotless. In her witness statement, Ms Bennett described Berkeley's contract with Lend Lease as follows:

> [Berkeley's] contract with Lend Lease was a full integrated services contract to provide security services and cleaning services at the Sunshine Plaza (Sunshine Plaza Contract). There were 7 service lines: general cleaning, grounds (including landscaping), maintenance, 24 hours a day 7 days a week security, pest control, hygiene and specialist cleaning (for example clock tower, sails, lights that run under the boardwalk, fountain and river clean).

**The contentions on the exception in s 119(1)(a)**

46 United Voice submitted that the statutory entitlement to redundancy pay was a remedial provision and that it should therefore be construed beneficially. With respect to the words of the Exception, it submitted that a turnover of labour was "ordinary" if it was a standard or commonplace occurrence, and it was "customary" if it was notorious, in the sense that it was a feature that was so well understood and anticipated by all persons concerned. For the latter submission, it drew on an analogy with the implication of contractual terms based on "custom". Noting that Berkeley had been engaged in providing the contract services at Sunshine Plaza for more than 20 years, United Voice submitted that there was nothing ordinary or customary about the "turnover" of labour that occurred when the affected employees' employment was terminated.

47 United Voice also submitted that the expectations of the affected employees about the permanency of their employment was a relevant consideration. In this respect, it submitted that none of the affected employees understood their employment to be "precarious, intermittent, or subject to termination … upon the non-renewal" of the contracts to provide the contract services to Lend Lease.

48 In response to Berkeley's contentions (see at [49] below) about the previous State and Federal Industrial Commission decisions concerning the expression "ordinary and customary turnover of labour", including the decision of Fisher J in the New South Wales Commission in *Shop, Distributive & Allied Employees' Assn (N.S.W.) v Countdown Stores* (1983) 7 IR 273 (*Countdown Stores*) and the subsequent original and supplementary decisions of the Federal Commission in the *Termination, Change and Redundancy Case* (1984) 8 IR 34 and (1984) 9 IR 115 (the *TCR case*), United Voice submitted no use could properly be made of those decisions. Alternatively, it contended that Berkeley had misconstrued the effect of many of them and, in any event, it contended some of those decisions were wrongly decided, in particular, the decision of the Full Bench of the Fair Work Commission in *Compass Group (Aust) Pty Ltd v National Union of Workers* (2015) 253 IR 32; [2015] FWCFB 8040 (*Compass Group FB*). It relied instead on the approach taken by Commissioner Roe at first instance in *National Union of Workers v Compass Group Pty Ltd* [2015] FWC 6055 (*Compass Group 1st inst*) and by Haylen J in *Transport Workers Union v Veolia Environmental Service (Aust) Pty Ltd* [2013] NSWIRComm 22.

49 As will be obvious from what has already been said above, Berkeley relied upon the Exception in s 119(1)(a). It contended that the meaning of the Exception could be gleaned from its historical origins in the decision of Fisher J in *Countdown Stores* and the two decisions in the *TCR case*; as illuminated by the High Court decision in *Amcor Limited v Construction, Forestry, Mining and Energy Union* (2005) 222 CLR 241; [2005] HCA 10 (*Amcor*) and also, to some extent, by the Full Court decision in *FBIS International Protective Services (Aust) v Maritime Union of Australia* (2015) 232 FCR 1; [2015] FCAFC 90 (*FBIS International*). It also relied upon the decision of the Full Bench of the Fair Work Commission in *Compass Group FB* and upon a number of State Industrial Commission decisions to similar effect.

50 Berkeley contended that the loss and gain of client contracts and the fluctuation of employee numbers were normal features of the business in which the Spotless Group was engaged. It contended that the Spotless Group derived its income wholly from client contracts and the contract facility services industry was "fiercely competitive". It contended that at any one time Spotless was "in the process of tendering or bidding for new contracts, mobilising new sites as new contracts [were] won, and demobilising sites and contracts following the loss of a client contract". It also contended that Spotless Group's employees were recruited to work on specific client contracts. Consequently, it contended that, if a client contract were lost, it

was normal practice for Spotless to terminate the employment of those employees, if redeployment was not possible. It also pointed out that it did not generally make redundancy payments in those circumstances.

**The meaning of the exception in s 119(1)(a)**

51 In considering the meaning of the words of the Exception in s 119(1)(a), it is convenient to begin with the question of purpose. If the object of this redundancy issue was the construction of the text of s 119(1) insofar as it defines an employee's entitlement to redundancy pay, the authorities to which I have referred above (at [20]–[21]) show that purpose is an important consideration. However, I do not consider that principle applies with the same force with the construction exercise required for this redundancy issue. That is so because this issue is solely directed to the construction of the Exception in s 119(1)(a), not the entitlement to redundancy pay prescribed earlier in that section. In saying this, I am not ignoring the fact that, even in construing an exception, the purposive approach to construction may be relevant in the sense that an exception should not be construed so broadly as to undermine the purpose of the benefit to which it applies. The Full Court made this point in *Nojin v Commonwealth* (2012) 208 FCR 1; [2012] FCAFC 192 at [183] where it adopted the observations of Finkelstein J in *Richardson v ACT Health and Community Care Service* (2000) 100 FCR 1; [2000] FCA 654 at [23]–[24] as follows:

> 23 [I]t is as well to direct some comments to the approach that a court should adopt when dealing with legislation such as the *Discrimination Act*. This type of enactment is concerned with human rights and should be given a construction that furthers its fundamental purpose of eliminating discrimination and advancing equality. No strict construction is required. If the grammatical meaning of the words used does not further the objects of the enactment, then a strict approach to construction must be shunned.
>
> 24 As regards the exceptions, however, a different approach is desirable. An expansive interpretation is often likely to circumvent or threaten the underlying object of the legislation. It follows that a strict, and not a liberal, approach is usually required. This will ensure that the overall dominant purpose of the Act is put into effect.

52 Nonetheless, in this instance, as I will attempt to explain later, I consider the text of the Exception in s 119(1)(a) is so prescriptive and confined that there is little room for any such undermining to occur. Similar considerations arise with the related concept of applying a beneficial construction to s 119(1), as urged by United Voice in its submissions. There is support for this approach with respect to the FWA because it has been included in that class of protective and remedial legislation to which a liberal or beneficial construction may be

applied: see *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* (2011) 191 FCR 212; [2011] FCAFC 14 at [17] citing *IW v City of Perth* (1997) 191 CLR 1 at 58. See also *AB v State of Western Australia* (2011) 244 CLR 390; [2011] HCA 42.

53 However, I consider that approach, too, must be rejected in this instance. That is so because I consider s 119(1) falls into that category of statutory provisions which "strikes a balance between competing interests, and the problem of interpretation is that there is uncertainty as to how far the provision goes in seeking to achieve the underlying purpose or object of the Act" (see *Carr v State of Western Australia* (2007) 232 CLR 138; [2007] HCA 47 (*Carr*) at [5] per Gleeson CJ and *Construction, Forestry, Mining and Energy Union v Mammoet Australia Pty Ltd* (2013) 248 CLR 619; [2013] HCA 36 at [40] per Crennan, Kiefel, Bell, Gaegler and Keane JJ). In that situation "it is the text, construed according to such principles of interpretation as provide rational assistance in the circumstances of the particular case, that is controlling" (see *Carr* at [6] per Gleeson CJ). To similar effect see *Victims Compensation Fund Corporation v Brown* (2003) 201 ALR 260; [2003] HCA 54 at [33] per Heydon J (with whom McHugh ACJ, Gummow, Kirby and Hayne JJ agreed).

54 Section 119 is in that category because, in my view, it seeks to balance the competing interests of employees in the redundancy pay entitlement expressed in the body of the provision with the interests of employers where the exceptional circumstance described in the Exception is said to arise. In this respect, the protective purpose of the former pay entitlement is relatively straightforward. It has already been discussed above when considering the National Employment Standards (see at [15]–[18]). However, the exceptional circumstance to which the Exception is directed is more difficult to discern.

55 Berkeley contended that that exceptional circumstance emerged from the historical origins to the redundancy pay entitlements as reflected in decisions such as the *Countdown Stores* case and the *TCR case* as illuminated in *Amcor*, *FBIS International* and the two *Compass Group* decisions. It is therefore necessary to consider those decisions in some detail. The first three, the *Countdown Stores* decision and the two *TCR case* decisions (particularly the latter two), formed part of the "test case standards" process which I mentioned earlier in these reasons (see at [15]). The authors of *Creighton and Stewart's Labour Law* have described that process in the following terms (at para 12.02):

> … throughout the 1970s and 1980s, and into the 1990s, the federal industrial tribunal

> used a series of test cases instigated by unions to develop national standards dealing with a number of key terms and conditions of employment such as parental leave, termination of employment and carer's leave. Technically, these test cases consisted of applications to vary one or more selected federal awards. Having heard submissions from a broad range of interests parties – including State and federal governments, employer and worker organisations, and NGOs – the tribunal would hand down a decision which could then be 'flowed-on' throughout the federal system, and into the various State systems …

56 The expression "ordinary and customary turnover of labour" appears to have been introduced into the industrial relations system in Australia as a precursor to that process in the *Countdown Stores* decision. That decision concerned the *Employment Protection Act 1982* (NSW) which came into effect in that State in late 1982. In the decision, the objects and purposes of that Act were described in the following terms (at 274):

> [It] provide[s] that employers give the Industrial Registrar at least seven days notice before giving notice of dismissal to employees; requires the Industrial Registrar to notify the relevant unions of these notices; empowers the Industrial Commission to make orders in relation to such dismissals for the purposes of reaching amicable settlements, and confers jurisdiction on the Industrial Commission to make orders in relation to any such dismissals including orders for severance payments, gratuities, superannuation, benefits, preference for re-employment and retraining.

57 After a large number of employers gave notices to the Industrial Registrar as outlined above, a set of proceedings came before the New South Wales Industrial Commission, of which Fisher J was the President. Fisher J began his decision by discussing the details of the proceedings, the objects and purposes of the *Employment Protection Act 1982* (NSW) (as outlined above) and the opening contentions made by the various parties. His Honour then made the following general observations which included the expression "ordinary and customary turnover of labour" (at 278):

> I am not aware of any system which loads **an ordinary and customary turnover of labour** with a significant costs burden in relation to severance as such, or where the object of remedial legislation cannot be fairly described within the three classifications of retrenchment to which I have referred. I would therefore require to be affirmatively persuaded by clear language that it is the intention of this statute to impose upon almost all dismissals, regardless of cause, a costs burden in the midst of the worst economic recession in the last 50 years.
>
> (Emphasis added)

As will become apparent when I come to discuss the *TCR case* below, the early 1980s economic recession in Australia also had a significant impact on those two decisions.

58 The three classifications of retrenchment to which his Honour referred above appeared to be the dismissal of unsatisfactory employees, the termination of employees employed on an

"intermittency" basis and dismissing employees through market-related causes unconnected with the economic recession. Those three classifications were outlined in the immediately preceding paragraphs of the decision, as follows (at 277):

> **[Unsatisfactory employees]**
>
> There is of course in industry and always has been a general turnover of labour. It has been customary for employees' services to be dispensed with because it is the view of management that they are in some way less than satisfactory employees, not appropriately skilled, not appropriately motivated, unreliable or exhibiting other forms of unhelpful conduct in an industrial context, but not amounting to misconduct.
>
> **["Intermittency" employees]**
>
> Many employees, particularly in the building construction, contracting and sub-contracting industries are employed on terms which contemplate intermittency in employment. Provisions for compensating for holidays and annual leave by making an allowance in the calculation of hourly or weekly rates of pay are often made. Many awards contain a specific factor to compensate for "following the job", ie., for intermittency in employment when one job cuts out and another has to be obtained. Payments on severance would appear to be inappropriate to these circumstances and may contain an element of double counting …
>
> **[Market-related dismissals]**
>
> Similarly employees have at the height of economic prosperity been dismissed because of seasonal shifts in markets, loss of contracts or changes in contracts not relating to recession, changes in model or product, shifts in marketing emphasis and many other day to day causes removed from the present recession and its mounting toll of unemployment.

59 His Honour went on to contrast these three types of retrenchment with those which were unrelated to employee behaviour or to market-related factors as follows (at 277):

> These types of dismissals contrast with dismissals which do not arise in any way from the behaviour of the employee or from ordinary changes in the incidents of employment, but where the employee is dismissed on a collective basis along with others and where the reason for the dismissals lies in the force of adverse economic circumstances, restricting employment opportunities and resulting in collective redundancies. Dismissals arising out of technological change or out of major company restructuring have similar characteristics.

It would appear that Fisher J included these types of dismissals as a part of the third classification above.

60 The original *Termination, Change and Redundancy Case* (1984) 8 IR 34 was delivered by the Australian Conciliation and Arbitration Commission on 2 August 1984, approximately one year after the *Countdown Stores* decision. At 74, the Commission referred to the *Countdown Stores* decision and drew the following conclusions about it:

> The decision of Mr Justice Fisher was made in the context of the *Employment*

> *Protection Act* which requires notice and/or reasons for termination to be given to the Registrar in certain instances ...
>
> [T]he decision of Mr Justice Fisher applies only to terminations due to economic grounds. Terminations due to "seasonal shifts in markets, loss of contracts or changes in contracts not relating to recession, changes in model or product, shifts in marketing emphasis" and the like are not included and cases involving "retrenchments due to technological change" and "retrenchments due to company reconstruction, mergers and takeovers" are expected to be dealt with "on the particular merits of the case rather than by way of broad prescription". Further, the decision would not automatically apply in industries which contemplate intermittency in employment where the rate includes a specific factor to compensate for following the job.
>
> The legislation also provides for an employer to request the Commission to take into account "the financial and other resources of the employer concerned" and the "probable effect the order, if made, will have in relation to the employer".

61 These conclusions contrast with the position the Commission came to earlier in its decision where it rejected the proposition that redundancy should be restricted to cases brought about by "technological change or other circumstances within the control of the employer" and expressed the view that "there should [not] be any fundamental distinction, in principle, based on the causes of redundancy". Specifically, the Commission said, at 61–62:

> In view of this ingrained feature of existing redundancy provisions, we believe it would be too restrictive to limit our prescriptions to cases where redundancy is brought about by technological change or other circumstances within the control of the employer. Further, we believe that there are difficulties in attempting to isolate the influence of different factors acting on the number and nature of jobs and that to introduce definitional uncertainty into the resolution of redundancy disputes would have unfortunate consequences for industrial relations and the individual employees concerned. Moreover, the reason for the granting of additional notice to employees and the purpose of redundancy payments apply equally to redundant employees whatever be the cause of their termination. Employees, no matter what the reason for the redundancy, equally experience the inconvenience of hardship associated with searching for another job and/or the loss of compensation for non-transferable credits that have been built up such as sick leave and long service leave. In particular, to make a distinction granting severance pay only in cases of technological change, notwithstanding the equality of hardship on employees in all redundancy situations, would be to penalise an employer for introducing technological change. This would not be consistent with the attitude to technological change adopted in these proceedings by the ACTU, the views expressed by the various inquiries into technological change to which we were referred, or the terms of the Summit Communique. In these circumstances, we do not believe that there should be any fundamental distinction, in principle, based on the causes of redundancy.

62 The supplementary decision in the *Termination, Change and Redundancy Case* (1984) 9 IR 115 came about partly because, after the original decision, the Commission "received a multitude of complaints from employers … and … a suggestion that [it] should revise or reconsider the decision in principle" which it had made (at 115). The Commission refused to

reopen its decision to reconsider it at large, but it did agree to give consideration to some of the modifications that the employers had raised with it (at 116). One of those modifications related to the redundancy pay issue. On that issue, the employers contended that "redundancy provisions should not apply to termination of employment 'associated with the general turnover of labour or a seasonal downturn within the industry or reclassification or alteration of working conditions'" (at 128). It was in response to those contentions that the Commission adopted, with qualifications, Fisher J's expression the "ordinary and customary turnover of labour". It said "we are prepared to provide that the redundancy provisions shall not apply where the termination of employment is 'due to the ordinary and customary turnover of labour' but we will not include the other categories referred to by the employers" (at 128). The Commission explained its reasoning for this conclusion in the following terms:

> In our decision at 55-6 we made reference to a number of definitions of redundancy and our draft order was based on the definition of the Chief Justice, Bray J. in the South Australian Supreme Court. Further, at 61 of the decision we decided that there should not be any fundamental distinction, in principle, based on the causes of redundancy. Nevertheless, it was not our intention that the redundancy provisions should apply to the "ordinary and customary turnover of labour"; an expression used by Mr Justice Fisher in his decision related to the *Employment Protection Act* in New South Wales ((1983) 7 I.R. 273).
>
> However, notwithstanding the helpful submissions of the parties in these proceedings, we have some difficulty in finding a suitable expression to make our intention clear. There is no doubt that we did not intend the redundancy provisions to apply where an employee is dismissed for reasons relating to his/her performance, **or where termination is due to a normal feature of a business**. Furthermore, there is an overlap between the definition of redundancy for the purposes of any award and the categories of employees exempted from severance pay. To some extent the same can be said for the provisions relating to the introduction of change.
>
> (Emphasis added)

63 As Berkeley pointed out, this background to the introduction of redundancy pay entitlements in Australia was later adverted to by the High Court in *Amcor*. *Amcor* was decided in 2005. It involved the construction of a clause of an industrial agreement certified under the *Workplace Relations Act 1996* (Cth). That clause provided that: "should a position become redundant and an employee subsequently be retrenched", the employee was entitled to certain payments. The question before the High Court was whether "following a corporate reorganisation described as a demerger, certain employees became entitled to redundancy payments under the provisions of" the aforementioned clause. The question arose in circumstances where the employees concerned "worked in the same jobs, under the same terms and conditions, following the demerger, but, in consequence of the corporate

restructuring, their employer changed" (see *Amcor* at [1] per Gleeson CJ and McHugh J). It will be immediately apparent that the High Court was therefore not required in *Amcor* to consider the meaning of the words "ordinary and customary turnover of labour".

64 Nonetheless, at [42]–[44] under the heading "The legislative background — awards and redundancy", Gummow, Hayne and Heydon JJ recorded the role that the *TCR case* had played with respect to the introduction of redundancy pay entitlements as follows:

> 42 In 1981, the Australian Council of Trade Unions made claims that led, ultimately, to the making of awards providing terms governing the termination of employment, providing for consultation about major changes likely to have significant effects on employees, and providing for terms governing what was to happen in cases of redundancy. The Commission first published reasons determining issues of principle. Having heard further submissions from the parties, the Commission then published a supplementary decision in which it settled the form of order to be made.
>
> 43 The Commission said, in its supplementary decision, that it had "some difficulty in finding a suitable expression" to make its intention clear about what constituted "redundancy". In its earlier decision, it had referred to a number of definitions of redundancy. Chief among those was the decision by Bray CJ in *R v Industrial Commission (SA); Ex parte Adelaide Milk Supply Co-operative Ltd* which was understood as emphasising that redundancy refers "to a job becoming redundant and not to a worker becoming redundant".
>
> 44 For present purposes, what is important is that the Commission appears to have been seeking a form of words that would accommodate two features. First, as was said in the Commission's supplementary decision, it "did not intend the redundancy provisions to apply where an employee is dismissed for reasons relating to his/her performance, **or where termination is due to a normal feature of a business**". Secondly, the Commission did not intend redundancy provisions to be engaged by the transmission of a business. In its earlier decision, the Commission had emphasised that it did "not envisage severance payments being made in cases of succession, assignment or transmission of a business" …
>
> (Emphasis added; footnotes omitted)

Berkeley placed particular reliance on the words "due to a normal feature of a business" (emphasised at [62] and [64(44)] above) which both the High Court and, before it, the Commission had referred to.

65 One of the other decisions to which Berkeley referred on this aspect was the Full Court decision in *FBIS International*. The issue in contention in that matter revolved around the meaning of the word "obtains" in s 120(1)(b)(i) of the FWA. However, despite the fact that that section is in Division 11 of Part 2-2 of the FWA, the Court did not consider the meaning

of s 119. Nonetheless, it did refer, in general terms, to the *TCR case* at [8]–[10]. I do not consider that reference took the matter any further than *Amcor* above.

66 Finally, I should mention the two decisions involving the Compass Group to which both Berkeley and United Voice referred in their submissions. Those decisions directly concerned a clause of two enterprise agreements. Significantly for present purposes, that clause was expressed in substantially identical terms to s 119(1) as follows: "An Employee is entitled to be paid redundancy pay if the Employee's employment is terminated at the Employer's initiative because the Employer no longer requires the job done by the Employee to be done by anyone, except where this is due to the ordinary and customary turnover of labour". It is also worth noting that the Compass Group, the employer concerned in those two decisions, provided similar services to those that the Spotless Group provided to Lend Lease in this matter. Furthermore, it did so using a contracting services business model similar to that employed by the Spotless Group.

67 At first instance (*Compass Group 1st inst*), Commissioner Roe analysed Fisher J's decision in the *Countdown Stores* case and the decisions in the *TCR case* and came to the following conclusions about the interaction between those two decisions (at [20]–[22]):

> [20] A proper reading of the TCR decisions does not suggest that the Full Bench adopted the analysis of Justice Fisher quoted above. Quite the contrary the Full Bench specifically did not restrict severance or redundancy pay to cases of collective dismissal due to adverse economic circumstances, technological change or major company restructuring. For this reason there is no clear link between the expression "ordinary and customary turnover of labour" as adopted by the TCR decision and terminations due to "seasonal shifts in markets, loss of contracts or changes in contracts not relating to recession, changes in model or product, shifts in marketing emphasis and many other day to day causes removed from the present recession and its mounting toll of unemployment." The concept of "intermittency in employment" or "following the job" is however, directly relevant to the concept of "ordinary and customary turnover of labour."
>
> [21] I am satisfied that the Full Bench [in the *TCR case*] adopted the expression "ordinary and customary turnover of labour" to encapsulate situations where an "employee is dismissed for reasons relating to his/her performance, **or where termination is due to a normal feature of a business**." A normal feature of a business is a reference to businesses where there is intermittency in employment because of the nature of the business. These are businesses where employment, or part of it, is seasonal, casual, or linked to the duration of a particular contract or task. These are situations where the employee has no reasonable or settled expectation of continuous or continuing employment. This will often be reflected in the casual, seasonal, or fixed term or fixed task nature of the employment arrangement.
>
> [22] I am satisfied that the Full Bench did not generally exclude those employed

> by contracting firms from coverage under redundancy provisions by the "ordinary and customary turnover of labour" exemption. The Australian economy has changed and contracting firms have greatly expanded in the decades since the TCR decisions. There is no basis for concluding that the Full Bench intended to encourage a particular employment model by providing contracting firms with the competitive advantage of lower labour costs by excluding them from redundancy provisions.

(Emphasis added)

68 Compass Group was granted permission by a Full Bench of the Fair Work Commission to appeal Commissioner Roe's decision which resulted in the Compass Group Full Bench decision (*Compass Group FB*). The Full Bench also analysed Fisher J's decision and the decisions in the *TCR case*. After setting out Commissioner Roe's conclusions above, the Full Bench concluded:

> [20] We are respectfully unable to agree with the Commissioner on this issue. The TCR Full Bench expressly stated that it did not intend for redundancy provisions to apply to the "ordinary and customary turnover of labour." In doing so, the TCR Full Bench drew on the decision of Justice Fisher and the concept he developed of excluding terminations arising from the ordinary and customary turnover of labour. **There is no basis in these decisions for excluding dismissals arising from loss of contracts from the concept where this is a normal feature of the business**.
>
> [21] The Full Bench was providing for a new general right of redundancy pay. It was seeking to reflect approaches to redundancy pay arising from previous decisions. Redundancies that arise because of economic circumstances, technological change or company restructure involve a common element of unexpected termination. Termination of employment where an employee has been engaged for a job or contract is in a different category. The TCR Full Bench expressly stated this. It adopted the wording of an Exception developed from previous cases. In the first decision it referred to the decision of Justice Fisher and mentioned employees engaged for contracts. In the second decision it again referred to the decision of Justice Fisher and drew on his formulation of the Exception. **Justice Fisher expressly refers to loss of contracts as encompassed within the concept ordinary and customary turnover of labour**.

(Emphasis added)

69 After quoting from the decisions of Gummow, Hayne and Heydon JJ and from Kirby J in *Amcor* and referring to a number of single member decisions of the Commission and a decision of the Industrial Court of New South Wales, the Full Bench concluded that the issue of whether the Exception applied fell to be determined as a question of fact depending on the normal features of the employers' business and the circumstances of each termination. In particular, it said (at [27]):

> In order to determine whether the Exception applies in a given case it is necessary to consider the normal features of the business and then determine whether the relevant

> terminations are properly described as falling within the ordinary and customary turnover of labour in that business. This is a question of fact, to be determined on the basis of the circumstances of each termination and each business. It necessarily focuses on the business circumstances of the employer.

70 The major point of difference, therefore, between the first instance decision in *Compass Group* and the Full Bench decision was whether a loss of contract was excluded from, or included in, the concept of "a normal feature of a business". Both decisions accepted that a termination of employment which was due to such a feature fell within the Exception, at least as it was expressed in the clause of the enterprise agreement in question.

71 For present purposes, none of these decisions is binding authority. The decisions in *Amcor* and *FBIS International* could have been, but neither dealt with the Exception in s 119(1)(a), nor made any observations in *obiter* that may have assisted in its construction. Nonetheless, all of these decisions do illustrate the history to the introduction of redundancy pay entitlements in this country and they do disclose the parameters of the debate about the situations to which the Exception was intended to apply. That said, none of this history could truly be described as legislative history in the sense described by the High Court (see at [21] above). That is so because s 119 marks the first occasion upon which a redundancy pay entitlement has appeared in the FWA, or in one of its legislative predecessors. Notably, there was, for example, no similar provision in the Standard in Part 7 of the *Workplace Relations Act 1996* (Cth). Consequently, prior to 2009, redundancy pay entitlements were dealt with under Federal and State industrial instruments, including enterprise agreements and awards.

72 Context, particularly statutory context, makes this last distinction important in this matter. This point is probably best demonstrated by the "intermittency" employment that Commissioner Roe considered in *Compass Group 1st inst* was a "normal feature of a business" and therefore within the terms of the Exception. The Commissioner instanced "situations where the employee has no reasonable or settled expectation of continuous or continuing employment … reflected in the casual, seasonal, or fixed term or fixed task nature of the employment arrangement". If the Commissioner, or indeed the Full Bench in *Compass Group FB*, had been construing the Exception in s 119(1)(a) of the FWA, rather than in a clause of an enterprise agreement, he would have been obliged (as I am) to take account of the statutory context to s 119(1)(a) reflected by the following provisions of Division 11 of Part 2-2, which excluded many of the examples he thought fell within the Exception:

(a) s 123(1)(c), which excludes casual employees; and

(b) s 123(1)(a), which excludes employees employed for a "specified period of time" or employed for a "specified task" or employed for the "duration of a specified season".

Furthermore, with respect to the latter exclusion, and given his comments about contracting firms (see *Compass Group 1st inst* at [22], set out at [67] above), the Commission may well have had regard to, what might be described as, the anti-avoidance provision contained in s 123(2) as follows:

> Paragraph (1)(a) does not prevent this Division from applying to an employee if a substantial reason for employing the employee as described in that paragraph was to avoid the application of this Division.

73 These examples of the statutory context to the Exception as it appears in s 119(1)(a) of the FWA serve to demonstrate two things: the limited value of the decisions I have reviewed above when construing the meaning of the Exception; and the very important role that statutory context has in this particular construction exercise. The latter is accentuated in this instance by the principle of statutory construction that the words of a statutory provision must be given some meaning and effect (see *Project Blue Sky Inc* at [71] and *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252; [2010] HCA 23 at [39]). It follows that the express exclusions mentioned above, together with a number of others contained in Division 11 of Part 2-2 which I have not mentioned, appear to act to confine the Exception in s 119(1)(a) to a narrow set of circumstances. However, as it turns out, it is unnecessary for me to explore those confines because this matter can be disposed of on the text of the Exception and the evidence adduced by the parties, matters to which I will now turn.

74 There are two phrases in the Exception which I consider are pivotal. They are: "this is due to"; and "turnover of labour". The words "this is due to" are pivotal because they indicate what it is that the Exception relates to. Contrary to the submissions of both parties, I do not consider the word "this" is directed to the termination *per se*. Rather, I consider it is directed to the situation where an employer decides to terminate an employee's employment and also decides that it no longer requires the employee's job to be done by anyone. It is the attachment of the latter decision to the termination that gives rise to the redundancy pay entitlement under s 119 and it is to that feature of the termination that the Exception in s 119(1)(a) applies. Furthermore, the words "due to" introduce a causal relationship between such a termination and the set of labour turnover conditions to which the Exception applies.

75 Next, the words "turnover of labour" are pivotal because they define the set of labour turnover conditions mentioned immediately above. Individually, those words mean

(*Macquarie Dictionary* (6th ed, Macquarie Dictionary Publishers Pty Ltd, 2013)): "turnover" "*n.* **...** **2.** the aggregate of worker replacements in a given period in a given business or industry. **3.** the ratio of the labour turnover to the average number of employees in a given period …"; and "labour" "*n.* **1.** bodily toil for the sake of gain or economic production. **2.** the workers or class of workers engaged in this. … **4.** a work or task done or to be done …".

76 Together those words therefore describe the aggregate of the employer's employee replacements. The particular focus of that aggregation is then defined by the adjectives "ordinary" and "customary". The word "ordinary" means (*Macquarie Dictionary*): "*adj*. **1.** such as is commonly met with; of the usual kind. … **3.** customary; normal: *for all ordinary purposes*." The word "customary" means (*Macquarie Dictionary*): "*adj*. **1.** according to or depending on custom; usual; habitual. **2.** of or established by custom rather than law. **3.** *Law* defined by long-continued practices: *the customary service due from land in a manor*." Those adjectives are expressed conjunctively in the Exception. Thus, together they mean that the aggregate of employee replacements (the turnover of labour) is for the employer of a kind that is both common, or usual (ordinary), and a matter of long-continued practice (customary).

77 So, to sum up, the Exception applies if a particular employer decides to terminate a particular employees' employment and to render that employee's job redundant in circumstances where the redundancy component of that decision is for that employer, with respect to its labour turnover, both common, or usual, and a matter of long-continued practice. In that confined set of circumstances, the employer concerned does not have to pay the employee concerned any redundancy pay. As I have already mentioned above, it is unnecessary, in this matter, to explore the interaction between the various exclusions in Division 11 Part 2-2 and this meaning of the Exception.

78 In this matter, the critical question therefore reduces to this: has Berkeley, as the employer of the affected employees, discharged its onus to show that its decision to terminate their employment and, at the same time, to render their jobs redundant was, for it, common or usual and a matter of long-continued practice? I should interpose to note that, because this question is entirely focused on Berkeley's decision to undertake the terminations and to make the jobs redundant and the circumstances in which it made that decision, any expectations the affected employees held about those matters are irrelevant. I therefore reject United Voice's contentions to the contrary.

**Berkeley did not discharge its onus on the Exception**

79 The great difficulty for Berkeley in answering this question is that there was very little, if any, evidence from Berkeley about those aspects of its decision. As I have outlined above, there was extensive evidence from Mr Potter and other personnel within the Spotless Group about how common it was to turnover labour within that Group and about the practices followed concerning job redundancies when a company within that Group lost a contract. However, while Berkeley was one of 26 employing entities within the Spotless Group, none of that evidence provided any insight as to what the labour turnover frequency and practices were within Berkeley or, indeed, within any of those 26 employing entities, much less how it, or they, individually dealt with job redundancies. While it is clear from that evidence that, as an employing entity within the Spotless Group, the main reason why Berkeley terminated the affected employees' employment was because Spotless lost its contract with Lend Lease, that evidence does not say anything about Berkeley's additional decision to render their jobs redundant vis-à-vis its labour turnover practices or frequency.

80 Moreover, what evidence there was would appear to stand against a conclusion that Berkeley, itself, dealt with job redundancies in the manner described above. That evidence shows that, by the time Spotless lost its contract with Lend Lease, the contractual relationship with Lend Lease had existed continually for more than 20 years, that throughout that period Berkeley had employed all the employees necessary to provide the contract services and that the affected employees had been employed by Berkeley for that purpose for between four and 21 years. This evidence therefore appears to show the opposite of the circumstances in which the Exception applies. That is, it appears to show that the terminations and the connected job redundancies were, for Berkeley, as the employer, uncommon and extraordinary and not a matter of long-continued practice.

81 I do not therefore consider Berkeley has discharged its onus to show that the Exception in s 119(1)(a) applied to the terminations of the employment of the affected employees. Since that exception did not apply, those affected employees were entitled to be paid the redundancy pay entitlements prescribed by that section.

**Conclusion – contraventions and compensation**

82 For these reasons, I consider Berkeley contravened each of ss 44 and 119 of the FWA by not paying the affected employees their redundancy pay entitlements under s 119. Each of the affected employees is therefore entitled to compensation under s 545(2) of the FWA for the

loss they suffered because of those contraventions. That compensation should be calculated for each of the affected employees in accordance with the information contained in the agreed facts and the provisions of s 119(2) of the FWA. In addition, pre-judgment interest should be added to that compensation since 7 October 2014 in accordance with the provisions of s 51A of the *Federal Court of Australia Act 1976* (Cth).

**OVERALL CONCLUSION**

83 For the reasons set out above, I have concluded that Berkeley has contravened each of ss 44 (twice), 117 and 119 of the FWA. Additionally, I have concluded that the affected employees are variously entitled to compensation under s 545(2) to be calculated as described at [34] and [82] above.

84 Accordingly, I will order the parties to calculate and agree upon the amounts to which each of the affected employees is entitled as a result of these conclusions and an appropriate form of orders to reflect them. Separately, I will hear the parties on the quantum of the penalties to be applied for the above described contraventions.

I certify that the preceding eighty-four (84) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Reeves.

Associate:

Dated: 2 March 2018