FEDERAL COURT OF AUSTRALIA

Fair Work Ombudsman v Spotless Services Australia Ltd [2019] FCA 9

File number:	WAD 636 of 2017
Judge:	**COLVIN J**
Date of judgment:	16 January 2019
Catchwords:	**INDUSTRIAL LAW -** application for declaration that the respondent breached s 119(1)(a) of the *Fair Work Act 2009* (Cth) - where employer terminated the employment of employees after losing a customer contract for services - where employer did not pay redundancy payments to the terminated employees - where employer sought to rely on 'ordinary and customary turnover of labour' exception in s 119(1)(a) - whether terminations were due to 'ordinary and customary turnover of labour' - whether exception should be construed by reference to industrial law decisions prior to enactment of s 119(1)(a) - whether previous decision to the effect that previous case law was of limited value in statutory construction should not be followed - declaration of contravention of s 119(1)(a) by failing to pay redundancy upon termination of employment **INDUSTRIAL LAW -** whether decision to dismiss employees gave rise to an obligation to notify Centrelink of the dismissals under s 530(1) of the Act - consideration of statutory construction of phrases 'reasons of economic, technological, structural or similar nature' and 'genuine operational reasons' - no contravention of s 530(1)
Legislation:	*Fair Work Act 2009* (Cth) ss 3, 41, 43(1)(a), 44(1), 59, 61, 117, 118, 119, 120, 121, 122, 123, 530(1), Parts 2-1 and 2-2
Cases cited:	*Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41; (2009) 239 CLR 27 *Alphapharm Pty Ltd v H Lundbeck A/S* [2014] HCA 42; (2014) 254 CLR 247 *Amcor Ltd v Construction, Forestry, Mining and Energy Union* [2005] HCA 10; (2005) 222 CLR 241 *Australian Securities Commission v Marlborough Gold Mines Ltd* [1993] HCA 15; (1993) 177 CLR 485 *Bourke v Corporation of the Diocesan Synod of North Queensland operating St Mark's College as a Charitable Trust* [2007] AIRC 564

C.A.L. No 14 Pty Ltd v Motor Accidents Insurance Board; C.A.L. No 14 Pty Ltd v Scott [2009] HCA 47; (2009) 239 CLR 390

Carr v State of Western Australia [2007] HCA 47; (2007) 232 CLR 138

Carter v Village Cinemas Australia Pty Ltd [2007] AIRCFB 35

Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross [2012] HCA 56; (2012) 248 CLR 378

CIC Insurance Ltd v Bankstown Football Club Ltd [1997] HCA 2; (1997) 187 CLR 384

Collector of Customs v Agfa-Gevaert Ltd [1996] HCA 36; (1996) 186 CLR 389

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

Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd [2012] FWA 3945; (2012) 220 IR 287

Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation [1981] HCA 26; (1981) 147 CLR 297

Duncan v Altshul Printers Pty Ltd [2007] AIRC 286

Electrolux Home Products Pty Ltd v Australian Workers' Union [2004] HCA 40; (2004) 221 CLR 309

Farah Constructions Pty Ltd v Say-Dee Pty Ltd [2007] HCA 22; (2007) 230 CLR 89

Fashion Fair Pty Ltd v Department of Industrial Relations (Inspector Rouse) (1999) 92 IR 271

Federal Commissioner of Taxation v Consolidated Media Holdings Ltd [2012] HCA 55; (2012) 250 CLR 503

Gett v Tabet [2009] NSWCA 76

Hicks v Minister for Immigration & Multicultural & Indigenous Affairs [2003] FCA 757

Independent Commission Against Corruption v Cunneen [2015] HCA 14; (2015) 256 CLR 1

International Finance Trust Co Ltd v New South Wales Crime Commission [2009] HCA 49; (2009) 240 CLR 319

K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd [1985] HCA 48; (1985) 157 CLR 309

Lacey v Attorney-General (Qld) [2011] HCA 10; (2011) 242 CLR 573

Minister for Employment and Workplace Relations v Gribbles Radiology Pty Ltd [2005] HCA 9; (2005) 222 CLR 194

Network Ten Pty Ltd v TCN Channel Nine Pty Ltd [2004] HCA 14; (2004) 218 CLR 273

	Nominal Defendant v GLG Australia Pty Ltd [2006] HCA 11; (2006) 228 CLR 529
	Northern Territory v Collins [2008] HCA 49; (2008) 235 CLR 619
	Project Blue Sky Inc v Australian Broadcasting Authority [1998] HCA 28; (1998) 194 CLR 355
	Rawolle v Don Mathieson & Staff Glass Pty Ltd [2007] AIRC 446
	Re Application for Redundancy Awards (1994) 53 IR 419
	Shop, Distributive & Allied Employees Association (NSW) v Countdown Stores (1983) 7 IR 273
	Smith v Macmahon Holdings Pty Ltd [2007] AIRC 336
	Sperac v Global Television Services Pty Ltd [2007] AIRC 441
	SZTAL v Minister for Immigration and Border Protection [2017] HCA 34
	Taylor v The Owners - Strata Plan No 11564 [2014] HCA 9; (2014) 253 CLR 531
	Termination, Change and Redundancy Case (1984) 8 IR 34
	Termination, Change and Redundancy Case (Supplementary Decision) (1984) 9 IR 115
	Tian Zhen Zheng v Cai [2009] HCA 52; (2009) 239 CLR 446
	Transport Workers' Union v Veolia Environmental Service (Australia) Pty Ltd [2013] NSWIRComm 22
	United Voice v Berkeley Challenge Pty Ltd [2018] FCA 224
	XYZ v Commonwealth [2006] HCA 25; (2006) 227 CLR 532
Date of hearing:	22, 23 & 25 October 2018
Registry:	Western Australia
Division:	Fair Work Division
National Practice Area:	Employment & Industrial Relations
Category:	Catchwords
Number of paragraphs:	228
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Solicitor for the Respondent: Herbert Smith Freehills

ORDERS

WAD 636 of 2017

BETWEEN:	**FAIR WORK OMBUDSMAN** Applicant
AND:	**SPOTLESS SERVICES AUSTRALIA LTD (ACN 005 309 320)** Respondent

JUDGE:	**COLVIN J**
DATE OF ORDER:	**16 JANUARY 2019**

THE COURT DECLARES THAT:

1. The respondent contravened s 119 of the *Fair Work Act 2009* (Cth) by failing to pay redundancy pay to each of Mr Expedito Campilan, Ms Kathrine Wright and Mr Simon (Richard) Ramble upon termination of their employment in June 2015.

THE COURT ORDERS THAT:

2. The claim that the respondent contravened s 530 of the *Fair Work Act* is dismissed.
3. There be a further case management hearing on a date to be fixed upon request by the applicant at which time orders will be made concerning the claim by the applicant that the respondent do pay a pecuniary penalty in an amount to be fixed for its contravention of the *Fair Work Act* by failing to pay redundancy pay to each of Mr Expedito Campilan, Ms Kathrine Wright and Mr Simon (Richard) Ramble upon termination of their employment in June 2015.
4. There be liberty to apply as to any further orders to give effect to or consequent upon the matters determined by the reasons delivered on 16 January 2019.

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

REASONS FOR JUDGMENT

COLVIN J:

1 In June 2015, the services of employees of Spotless Services Australia Ltd (**Spotless**) who had been working at Perth International Airport for a number of years were terminated. The employees were not paid redundancy pay when terminated and Spotless did not notify Centrelink of the terminations.

Section 119(1)(a): redundancy pay

2 Under s 119(1)(a) of the *Fair Work Act 2009* (Cth), an employee is entitled to redundancy pay if employment is terminated at the employer's initiative because the employer no longer requires the job to be done by anyone. There is an exception where the redundancy 'is due to the ordinary and customary turnover of labour'. Spotless says that the exception applied to the Perth International Airport employees and therefore there was no entitlement to redundancy pay. It says its contracts with its own customers are for a fixed term and it engages employees to do the work necessary to provide the services to be performed under each customer contract. If a customer contract is not renewed then the jobs being done by 'contract requirement employees' come to an end. Where possible the employees are redeployed to new positions in the group of companies of which Spotless forms part (**Spotless Group**). However, irrespective of whether there is redeployment, the job being done for the purposes of a particular contract comes to an end when the contract comes to an end. On that basis, Spotless claims that it is a normal feature of the business of Spotless for the jobs of its employees to be terminated when the customer no longer requires the services of Spotless. In those circumstances and by that reasoning, Spotless contends that the termination of the jobs of its employees when its customer contract for the provision of services at Perth International Airport was not renewed was part of the 'ordinary and customary turnover of labour' in its business and the terminations came within the words of exception to s 119(1)(a).

3 The Ombudsman says that what is customary and ordinary requires a consideration of whether the termination reflects a long-standing practice of the employer. It contends that a focus upon whether termination is a normal feature of the business of the employer does not reflect the text of the provision (or the case law concerning the phrase 'ordinary and customary turnover of labour'). It says that the alleged practice whereby the employment of all 'contract requirement employees' is terminated when a contract with a customer is not renewed is a new practice

adopted unilaterally by Spotless by seeking to characterise such terminations without making redundancy payments as a normal feature of its business. Prior to the change in practice it did pay redundancy which reflected a practice of treating employees as part of a general pool of labour to be deployed to perform the same work to meet requirements under other customer contracts and then only terminating them if they were surplus to the overall employee requirements of the business. As such, it was not a normal feature of the business of Spotless that the employment of so-called contract requirement employees was terminated if a customer contract was not renewed.

Section 530(1): notification to Centrelink

4 Under s 530(1), if an employer decides to dismiss 15 or more employees for reasons that include 'reasons of economic, technological, structural or similar nature' then the employer must give a notice to Centrelink. Spotless says no evidence has been led concerning the reasons for the termination of the employees in this case. Therefore, it has not been shown that its reasons for dismissal of the employees included reasons of the kind described in s 530(1).

5 The Ombudsman says that the employees were terminated because of a commercial decision not to seek to renew its customer contracts at Perth International Airport. The Ombudsman says that a decision made by reason of cyclical or structural conditions in the economy or choices made to achieve efficiency in the conduct of a business fall within the language of the provision.

Summary of decision

6 The Ombudsman seeks declarations that Spotless has contravened s 119 and s 530 as well as pecuniary penalties. The matter proceeded to a final hearing on liability only with a separate hearing as to penalty to be held only if required.

7 For the following reasons, the declaration sought in respect of the contravention of s 119 should be granted and there should be a separate hearing as to penalty. The claims concerning the alleged contravention of s 530 should be dismissed.

Relevant principles of statutory construction

8 The case for Spotless concerning redundancy pay depends upon it demonstrating that the phrase 'ordinary and customary turnover of labour' should be interpreted by reference to the way it submits the phrase was used in various industrial law determinations prior to the enactment of s 119(1)(a) of the *Fair Work Act*. It says that the recent decision of Reeves J in

United Voice v Berkeley Challenge Pty Ltd [2018] FCA 224 to the effect that the previous decisions concerning the term 'ordinary and customary turnover of labour' were of limited value in construing the provision was plainly wrong and should not be followed. The claim concerning the alleged contravention of s 530(1) requires a view to be reached as to the proper construction of the provision. Accordingly, I begin by considering the relevant principles of statutory construction, particularly those concerned with matters of context.

9 In construing a statute, the task is to ascertain the contextual meaning of the words used: *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34 at [14]. Statutes speak as an entire instrument so it is necessary to consider the words in the context of the instrument as a whole and to construe them so as to ensure consistency between all provisions: *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355 at [69] and *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* [1981] HCA 26; (1981) 147 CLR 297 at 320. The relevant context also includes legislative history and extrinsic materials: *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* [2012] HCA 55; (2012) 250 CLR 503 at [39]. It also includes pre-existing law: *Alphapharm Pty Ltd v H Lundbeck A/S* [2014] HCA 42; (2014) 254 CLR 247 at [42]. In an appropriate case where examination of contextual materials discloses an evident mischief that the statute was intended to remedy then the statute is to be read in that context: *CIC Insurance Ltd v Bankstown Football Club Ltd* [1997] HCA 2; (1997) 187 CLR 384 at 408.

10 Statutory construction involves choosing from the range of possible meanings which Parliament should be taken to have intended: *Independent Commission Against Corruption v Cunneen* [2015] HCA 14; (2015) 256 CLR 1 at [57]. Further, the range of meanings is itself to be informed by matters of context from the outset and not just when ambiguity is thought to arise: *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* [1985] HCA 48; (1985) 157 CLR 309 at 315 and *SZTAL* at [14].

11 The context of the language used in the statutory instrument or the legislative history may aid the construction by narrowing the semantic breadth or linguistic ambiguity that may otherwise attach to the words used if considered out of context.

12 In addition, consideration of the language used in context may enable a purpose to be discerned that may be applied to aid in the choice between competing constructions. Indeed, the purpose of the statute may appear from an express statement in the legislation itself. Other contextual matters may also aid in discerning purpose. The application of the rules of statutory

interpretation will properly involve the identification of a statutory purpose from these sources, recognising that it must be a purpose that 'resides' in the 'text and structure' of the legislation: *Lacey v Attorney-General (Qld)* [2011] HCA 10; (2011) 242 CLR 573 at [44].

13 However, care must be taken to ensure that the purpose identified is specific enough to be used to resolve the ambiguity: *Nominal Defendant v GLG Australia Pty Ltd* [2006] HCA 11; (2006) 228 CLR 529. Further, it is not for the Court to conjure a purpose that is more specific than the context discloses and then use that purpose to construe the legislation: *Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross* [2012] HCA 56; (2012) 248 CLR 378 at [26] and *Minister for Employment and Workplace Relations v Gribbles Radiology Pty Ltd* [2005] HCA 9; (2005) 222 CLR 194 at [21].

14 It is possible that there may be no available indication of a specific purpose that aids the construction: *Carr v State of Western Australia* [2007] HCA 47; (2007) 232 CLR 138 at [6]. In that case, the focus must be upon the textual meaning.

15 Consideration of contextual matters should not deflect the Court from what is a 'text-based activity': *Alphapharm Pty Ltd v H Lundbeck A/S* at [42]. Hence the warnings that matters of context should not be used to displace the clear meaning of the text: *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41; (2009) 239 CLR 27 at [47]. Ultimately, 'the fundamental duty of the Court is to give meaning to the legislative command according to the terms in which it has been expressed': *Northern Territory v Collins* [2008] HCA 49; (2008) 235 CLR 619 at [16]. 'Understanding context has utility if, and so far as, it assists in fixing the meaning of the statutory text. Legislative history and extrinsic materials cannot displace the meaning of the statutory text': *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* at [39].

16 So, there is a significance to be given to the ordinary or grammatical meaning in the sense that there must be a reason to depart from that meaning which is afforded by a consideration of context: *SZTAL* at [14] and [38]. The language used is the surest guide to legislative intention: *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* at [47]. It follows that possible meanings which are less obvious or strained must be justified with some care by matters of context if they are to be determined to be the statutory meaning of the words.

17 Also, matters of context can only take the Court so far when it comes to construing the language used. The words used impose a limit beyond which the process of construction may not be

taken, even in the name of advancing the evident purpose. Whilst the process of construction may even lead a Court to read a statutory provision as if it contained additional words or omitted words, it cannot fill gaps or make an insertion that is too much at variance with the language used: *Taylor v The Owners - Strata Plan No 11564* [2014] HCA 9; (2014) 253 CLR 531 at [38]

18 Inconvenience or improbability of result may be a reason why one construction is to be preferred over another: *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* at 320-321 and *Network Ten Pty Ltd v TCN Channel Nine Pty Ltd* [2004] HCA 14; (2004) 218 CLR 273 at [11].

19 In considering the text used, there are many instances where it is misleading to construe a composite phrase simply by combining the dictionary meanings of its component parts: *XYZ v Commonwealth* [2006] HCA 25; (2006) 227 CLR 532 at [19]. Where the issue concerns the meaning of a compendious phrase then the expression must be construed as a whole within the sentence in which it is expressed: *Collector of Customs v Agfa-Gevaert Ltd* [1996] HCA 36; (1996) 186 CLR 389.

20 Finally, and more fundamentally, it is to be noted that the application of established rules of construction so as to give effect in an objective way to the manifestation of the intention of the legislature through the particular words used is an important expression of the constitutional relationship between the arms of government: *Tian Zhen Zheng v Cai* [2009] HCA 52; (2009) 239 CLR 446 at [28]. The task of statutory construction should be approached accordingly. Relatedly, considerations of fairness mean that those who must obey legislation are entitled to expect that the laws will be accessible and are generally entitled to rely upon the ordinary sense of the words chosen by Parliament without 'counterintuitive judicial gloss' and this is a reason for affording importance or significance to the ordinary meaning of the words used. So, 'the court should not strain to give a meaning to statutes which is artificial or departs markedly from their ordinary meaning simply in order to preserve their constitutional validity': *International Finance Trust Co Ltd v New South Wales Crime Commission* [2009] HCA 49; (2009) 240 CLR 319 at [42].

21 For reasons I have given, the pre-existing law in the form of decided industrial cases may form part of the context to be considered in resolving the construction questions in this case. However, it is important to be clear about the way the pre-existing law may be used. It provides an historical context in which to read the words, particularly to consider what was intended by

using words in the Act that echo a phrase deployed as part of the pre-existing law. It may also assist in understanding the purpose of the excluding words in s 119(1)(a) which may then be used to choose between competing constructions.

22 However where, as here, there is no contextual matter manifesting an intention to simply codify the rights conferred by the pre-existing law in the form of the industrial law decisions, the construction task is more subtle than simply asking whether the words bear the meaning they were given in the pre-existing law. The words are placed in a new legislative context. It is necessary to consider the context established by those provisions with some care. It is also possible that the statutory words were placed in a particular context that was intended to build on the pre-existing law by resolving ambiguity that was present or by qualifying or adjusting the way the words are to be understood.

Section 119(1)(a) and its statutory context

23 The Act provides for terms and conditions of employment that apply broadly though not exhaustively throughout Australia. Its object is expressed in s 3 which begins in the following terms:

> The object of this Act is to provide a balanced framework for cooperative and productive workplace relations that promotes economic prosperity and social inclusion for all Australians by:
>
> (a) providing workplace relations laws that are fair to working Australians, are flexible for businesses, promote productivity and economic growth for Australia's future economic prosperity and take into account Australia's international labour obligations;

24 A number of further means by which the stated object is to be attained are stated in the following provisions in s 3. They include, '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)) and 'ensuring that the guaranteed safety net of fair, relevant and enforceable minimum wages and conditions can no longer be undermined by the making of statutory individual agreements of any kind' (s 3(c)).

25 The National Employment Standards (**Standards**) are 'minimum terms and conditions' that apply to all employees covered by the Act: s 41. They are set out in Part 2-2: s 43(1)(a) and s 59. Their detail is in Divisions 3 to 12 of Part 2-2: s 59. The Standards 'underpin what can be included in modern awards and enterprise agreements': s 59. They cannot be excluded or displaced by modern awards or enterprise agreements: Part 2-1 and s 61(1).

26 An employer must not contravene the Standards: s 44(1).

27 One of the 10 Standards relates to the matter of 'notice of termination and redundancy pay': s 61(2)(i). It is dealt with in Division 11 of Part 2-2, being s 117 to s 123.

28 Section 117 requires written notice of termination to be given that states a notice period that conforms to the minimum period of notice specified in a table in s 117(3). A modern award or enterprise agreement may specify a period of notice: s 118.

29 As I have noted, an obligation to pay redundancy pay is expressed in s 119(1)(a) subject to the exception that the termination 'is due to the ordinary and customary turnover of labour'. Redundancy pay must also be paid where employment is terminated due to insolvency: s 119(1)(b). The amount of redundancy pay depends upon years of continuous service and is specified in a table: s 119(2).

30 Where an employer obtains other acceptable employment for the employee or cannot pay the redundancy amount then the employer can apply to reduce the redundancy pay to a specified amount that the Fair Work Commission considers appropriate: s 120.

31 Section 121(1) provides that s 119 'does not apply' if the continuous service is less than 12 months or the employer is a small business employer. Section 121(2) provides that a modern award may include a term specifying other situations in which s 119 'does not apply'.

32 There is no entitlement to redundancy pay if there is a transfer of employment that recognises past service: s 122(2). Section 122(3) provides that an employee is not entitled to redundancy pay if the employee rejects an offer of employment with a second employer that is on substantially similar terms and conditions. There is provision for the Fair Work Commission to order a redundancy payment if s 122(3) operates unfairly to the employee: s 122(4).

33 Section 123(1) provides that Division 11 does not apply to any of the following employees:

> (a) an employee employed for a specified period of time, for a specified task, or for the duration of a specified season;
>
> (b) an employee whose employment is terminated because of serious misconduct;
>
> (c) a casual employee;
>
> (d) an employee (other than an apprentice) to whom a training arrangement applies and whose employment is for a specified period of time or is, for any reason, limited to the duration of the training arrangement;
>
> (e) an employee prescribed by the regulations as an employee to whom this Division does not apply.

34 There is an anti-avoidance provision that applies so that the exclusion in s 123(1) does not extend to a case where a substantial reason for employing an employee as described in that sub-section was 'to avoid the application of this Division': s 123(2).

35 As to redundancy pay, the provisions conferring the right to redundancy pay do not apply to:

> (a) an employee who is an apprentice; or
>
> (b) an employee to whom an industry-specific redundancy scheme in a modern award applies; or
>
> (c) an employee to whom a redundancy scheme in an enterprise agreement applies if:
>
> (i) the scheme is an industry-specific redundancy scheme that is incorporated by reference … ; and
>
> (ii) the employee is covered by the industry-specific redundancy scheme in the modern award; or
>
> (d) an employee prescribed by the regulations …

Relevant legislative purpose evident from the legislative text

36 Some general statements may be made about the purpose manifest from the overall scheme of the Act and the express statements of object and purpose.

37 First, the Act is to provide a safety net of minimum terms and conditions of employment that cannot be undermined.

38 Second, the Act is not expressed as a reform that removes or reduces minimum terms and conditions of employment afforded by the law as it existed at the time of enactment. Nor is it expressed as a codification or improvement of existing minimum standards. Rather, its object is to ensure 'fair, relevant and enforceable' minimum terms and conditions. Save that there might be said to be unfairness to employees in a general sense if minimum standards were reduced by the Act (such as by confining the circumstances in which there may be an entitlement to redundancy pay), it is difficult to discern any specific object concerning the relativity between minimum standards as they existed before the Act was enacted and those expressed through the Standards. Nevertheless, it would appear to be unlikely that the Act would deploy established terminology in the field of industrial law concerning an established standard as to particular workplace conditions (such as redundancy pay) where it was intended to change the standard. A purpose of establishing minimum terms and conditions may be expected to be advanced by using existing terminology where such conditions were to be adopted by the Act.

39 Third, the Act has detailed provisions that provide for compliance and enforcement and establishes a Fair Work Ombudsman and a Fair Work Commission with substantial powers to supervise compliance and ensure enforcement of the Standards. The rights and protections afforded by the Act do not depend upon the employee independently resorting to claims. The Act puts in place a substantial structure to support the making of claims. Nevertheless, the *Fair Work Act* confers statutory entitlements upon employees that cannot be undermined and to that extent is protective of the interests of employees. It would be contrary to this purpose if a particular condition was interpreted in a manner that, in effect, conferred power upon an employer by adopting a particular business practice to decide whether its employees would receive the benefit of a particular minimum entitlement (such as redundancy pay).

40 Fourth, the Act has objects that include the promotion of productivity and economic growth and flexibility for business. An interpretation that inhibited the ability of a business to adopt employment practices that best suited the nature of its business activities would be inconsistent with this object.

41 Fifth, the terms of Division 11 manifest an intention to provide a qualified right to redundancy pay. It is qualified by the presently contentious language in s 119(1)(a). It is also qualified by the exclusions expressed in s 121 (employees for less than 12 months and employees of small business and those the subject of a modern award with specific provisions). Importantly, it is further qualified because Division 11 does not apply to the employees described in s 123. They include employees 'employed for a specified period of time, for a specified task, or for the duration of a specified season', employees terminated for misconduct and casual employees.

The pre-existing law

42 The phrase 'ordinary and customary turnover of labour' appears to have first been used in relation to severance or redundancy pay by the President of the Industrial Commission of New South Wales in *Shop, Distributive & Allied Employees Association (NSW) v Countdown Stores* (1983) 7 IR 273 (***Crocker***). At that time, the *Employment Protection Act 1982* (NSW) required notice of intention to terminate an employee to be given to the Industrial Registrar. The Registrar was then required to report to the President concerning the termination. The Commission could inquire into the matters the subject of a report. The Commission, after consideration of a report, could make orders concerning a number of matters one of which was 'requiring the payment of severance payments to the employee concerned'. The *Crocker* decision considered whether there should be a single overall prescription or standard for

redundancy pay. It was an inquiry undertaken at a time of recession when there was considerable economic distress both for employers and employees. In that context, Fisher P considered the various reasons why there may be a turnover of labour. As the statement has been influential in the subsequent determinations concerning redundancy pay, I set out the relevant passage in full. His Honour said:

> 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. 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. (See *Australian Workers' Union v. Victorian Employers Federation* (Print D6429).)
>
> 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. All these employees are dismissed, almost invariably upon notice. If redundancy or severance payments applied generally to them a significant charge would apply to the turnover of labour generally. This would involve a major shift in the principles normally applied by this and other industrial tribunals to retrenchment situations. 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.
>
> 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. The discussion and two tabulations appearing on p. 282 of this judgment illustrate the very wide difference in scope and application involved in these considerations.

43 It was concluded that severance pay upon retrenchment should be considered in three cases, namely 'collective retrenchment on economic grounds due to the present recession', 'retrenchment due to technological change' and 'retrenchments due to company reconstruction,

mergers and takeovers'. This conclusion was reached on the basis that the remedy of severance pay 'will need to undergo the same evolutionary development as other forms of industrial amenity and compensation'. The focus of the decision was on dismissals made on a collective basis. It was terminations of that kind that were identified as instances where there should be redundancy pay. Even so, the identified categories were expected to evolve to include others.

44 Notably, the distinction between the three identified categories and 'ordinary and customary turnover of labour' was not sharply defined. However, it was said that payment for severance 'would appear to be inappropriate' where employment is undertaken in a context that 'contemplates intermittency' and therefore pay rates and conditions reflect that fact. Dismissals for misconduct and 'other forms of unhelpful conduct' were put into a different category.

45 It was also reasoned that to apply redundancy to dismissal from employment 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 other causes removed from recession would give rise to a 'significant charge' on the turnover of labour. This was not to say that redundancy pay may not apply to such circumstances in the future as part of the evolution. It was to recognise that to move, at that time, to a general recognition of an entitlement to redundancy pay in such instances would place a significant and unexpected impost on employers at the time of a recession.

46 It is to be noted that the term 'ordinary and customary turnover of labour' was deployed in a way that would embrace the three circumstances where an entitlement to redundancy pay was identified. It was used to refer to the wide range of circumstances in which redundancy was known to occur in the workplace. It was certainly not deployed to identify an exceptional category of cases where redundancy pay was not appropriate. Indeed it contemplated that future decisions would identify other instances where there would be an entitlement to redundancy pay. The basis for the decision was that generally speaking redundancy was ordinary and customary. In some types of employment there were additional payments made in recognition of the intermittent nature of the employment. In others there were not. However, the circumstances at the time justified redundancy pay being required only in the three circumstances identified.

47 Next came the *Termination, Change and Redundancy Case* (1984) 8 IR 34. It was brought in the federal industrial jurisdiction. The Australian Conciliation and Arbitration Commission heard a test case 'of mammoth proportions' concerning redundancy pay entitlements. It

concluded that the decision it reached would 'apply to redundancy, whatever be the cause': at 75. The Commission described its conclusion as to the scope of redundancy in the following terms:

> Our reasoning in these proceedings, other decisions of this Commission and various decisions of other industrial authorities, are also inconsistent with the general severance pay prescription being granted where termination is as a consequence of misconduct, where employees have been engaged for a specific job or contract, to seasonal and/or casual employees, or in cases where provision is contained in the calculation of the wage rates for the itinerant nature of the work. In addition, we are of the opinion that where termination is within the context of an employee's retirement, an employee should not be entitled to more than he/she would have earned if he/she had proceeded to normal retirement.
>
> Furthermore, we believe that an employee should not be entitled to severance pay immediately but that some period of time should elapse before any entitlement accrues. The length of this period is a matter for judgment and has been variously determined as twelve months, two years or five years. …

48 The Commission also made clear that it did not envisage severance payments being made 'in cases of succession, assignment or transmission of a business': at 75. The parties were invited to bring in minutes to reflect the decision.

49 The employers then sought to re-open the decision. In the alternative, they submitted that the Commission should modify its decision by, amongst other things, undertaking a review of the position with respect to exemptions. The Commission ruled that it would not re-open its decision at large, but it would consider the modifications that had been suggested.

50 The employers then submitted, amongst other things, that the 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'.

51 As to this submission, the Commission said that it had decided that 'there should not be any fundamental distinction, in principle, based on the causes of redundancy': *Termination, Change and Redundancy Case (Supplementary Decision)* (1984) 9 IR 115 at 128. It then said:

> 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.
>
> In the circumstances, 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.

52 The course followed by the Commission is somewhat problematic for two reasons. First, as it acknowledged, the form of words 'due to the ordinary and customary turnover of labour' lack the degree of clarity required to capture the intention of the Commission. Second, it appears that the Commission was adopting the formulation of Fisher P and applying it in a different way. Fisher P had used it to describe the many respects in which redundancy is known to occur and therefore is 'ordinary and customary'. The Commission was deploying the same phrase to capture more limited circumstances that would operate as an exception to a general entitlement to redundancy pay. Notably, the Commission rejected the claim by employers that the exception should be expressed in the much more ample terms of 'general turnover of labour or a seasonal downturn within the industry or reclassification or alteration of working conditions'.

53 The result of the Commission's decision was that the phrase 'ordinary and customary turnover of labour' was used to describe an exception to a general entitlement to redundancy. Importantly, the Commission did not otherwise reverse its earlier decision. In that context, the reference to the intention of the Commission that redundancy pay provisions not 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' must be considered in the context of the more detailed reasons in the substantive decision (quoted above).

54 The language used in the substantive determination by the Commission identified the following categories to which the general right to redundancy pay would not apply:

(1) termination for misconduct;

(2) where the employee was engaged for a specific job or contract;

(3) seasonal and/or casual employees;

(4) where provision is contained in the wages paid for the itinerant nature of the work;

(5) where employment had been for less than 12 months; and

(6) succession, assignment or transmission of a business.

55 When the more shorthand language 'reasons relating to his/her performance, or … due to a normal feature of a business' was used in the supplementary decision it must be understood in the context of the substantive determination. There is no sense in which the context is suggesting that an employer may *make it* a normal course of its particular business that it terminates employees without paying redundancy in certain circumstances. Rather, there must be a feature of a business that means that the employment is not ongoing. So, an employer who adopted the practice of entering into contracts with employees for a particular term even though the nature of work was ongoing would not be brought within the exception. In such a case, it would not be a normal or inherent feature of such a business that the employment would have a limited duration.

56 To read the Commission's decision as allowing any business to adopt a practice of not paying redundancy and thereby bring itself outside the operation of the determination would be to give the words 'normal feature of a business' an operation of an expanded kind that was plainly inconsistent with the context in which those words were used and the nature of the issue being adjudicated at that point in the process.

57 It appears that the words 'ordinary or customary' were deployed to capture instances where the employment was of such a character that it was evident that it would not to be ongoing work of indefinite duration because the nature of the work or the kind of business activity being conducted by the employer was such that the work to be performed would come to an end even though the business would be ongoing.

58 However, the Commission's reasons do not engage with the problem at hand, namely where the task the employee is undertaking is ongoing, but the terms upon which the employer is engaged to undertake the task are for a fixed term at which time the employer's engagement is to be reviewed (by tender or negotiation) and the employer's customer may not renew the contract. In such cases, the employer may secure new contracts where employees are required to undertake the same type of work. However, the transitions between contracts produce lumpy changes in the number of employees required. In such cases, it is not the nature of the work to be done that means that it will come to an end within a specified period. Rather, it is the nature of the contract made between the employer and the employer's customer to undertake the work that means that the employment may come to an end.

59 Many businesses provide services for the term of a contract. The work required to perform the contract comes to an end when the contract comes to an end. Yet, the employees do not come

and go with each contract. The business secures new contracts and the employment contracts are ongoing. This is the case even where an employee may be deployed to work full-time to undertake the work necessary to perform the obligations under a single contract with a particular customer of the employer. When that contract ends, the employee simply moves to the work required for a different contract as the work for the previous contract is complete.

60 The present case is concerned with instances where a large number of employees are required to perform the obligations under particular contracts and the end of each contract produces a transition whereby a considerable number of employees may no longer be required to undertake work for a particular contract and there may not be a new contract to which they can be deployed immediately. In such cases, even if the business of the employer involves providing services under a portfolio of contracts to which it is seeking to add over time and the employer is reallocating particular employees to the work required under different contracts in the portfolio where possible, there is still the prospect that an employee may not be able to be deployed when a contract comes to an end. In such instances, there is a prospect of termination for redundancy that might be viewed as a function of the nature of the business. On the other hand, an employee may be deployed from contract to contract or continue to work as the contract with the customer is renewed. Such deployment may be relatively common. An employee may be deployed from contract to contract in this way a number of times and then be terminated. The *Termination, Change and Redundancy Case* did not consider the extent to which such cases may fall within the ordinary and customary turnover exception.

61 In 1994, the Industrial Relations Commission of New South Wales was invited to revisit the issue of redundancy pay on the basis that the decision in *Crocker* contemplated evolutionary development in respect of redundancy pay and, by that time, the provision made by that decision was 'manifestly insufficient' both in amount and by reason of being confined to certain terminations in particular types of circumstances: *Re Application for Redundancy Awards* (1994) 53 IR 419 (***Clerks Case***). Part of the claim made was that the excluded category referred to as 'the ordinary and customary turnover of labour' should be deleted.

62 In the course of its reasons, the Commission recorded the following submission by the Labour Council:

> The exclusion for ordinary and customary turnover of labour has been the source of much disputation and adjudication within the Commission. At least three cases highlight the often difficult task of defining what is ordinary or conventional or customary turnover of labour (see *Soul Pattinson (Manufacturing) Pty Limited and*

> *Wassell* ([1987] AR 274; 18 IR 175); *Crooks, Michell, Peacock, Stewart Pty Limited v Watkins* ((1984) 9 IR 182) and *Norwest Beef Industries v Holdsworth* ((1986) 15 IR 373). These cases demonstrate that the impact and the consequences of retrenchment have little to distinguish themselves from the impact and consequences of retrenchments due to the inclusionary factors identified in the early *Crocker* Case.

63 As to that part of the claim the Commission concluded:

> Terminations in the context of the general turnover of labour are the norm; they are expected: there is no basis for thinking that some 'settled expectation' has been lost. The occurrence of the likely or expected event should not bring with it an unnecessary and unwarranted additional burden on the employer and a windfall gain for the employee.
>
> The application of this category has not been without difficulty and has needed resolution from time to time by judgment. This is not a reason for the abolition of the category: the cases on the issue have served to resolve the particular matters and stand as signposts to parties in relation to prospective matters. We retain this exclusionary category.

64 Therefore, the case does not engage with the problem at hand.

65 In *Fashion Fair Pty Ltd v Department of Industrial Relations (Inspector Rouse)* (1999) 92 IR 271, the Industrial Commission of New South Wales considered an appeal in a case concerned with redundancy pay under an award that exempted cases where an employee was dismissed 'due to the ordinary and customary turnover of labour'. The employee worked at a Fashion Fair store in Maitland, one of 20 such stores in New South Wales. The lease of the premises came to an end. Fashion Fair determined that the store was not viable at the rent proposed for a continuation of the lease of the premises. The lease was not renewed and the store was closed.

66 The Commission observed that the concept of the ordinary and customary turnover of labour had been considered in a number of cases subsequent to those to which I have already referred. It then said that:

> It has frequently been observed that whether an entitlement to redundancy or severance pay accrues upon termination depends upon whether there was a 'settled' expectation of continued employment or whether the employees were aware that their employment was for a specified period or task.

67 A number of authorities were cited to support that observation. It was said that it was necessary to examine the circumstances of each case and the cause of the dismissal and any loss of contract to determine if the dismissal was truly part of the ordinary and customary turnover of labour. It was found that the decision to withdraw from Maitland was due to a number of factors, 'including the failure of … negotiations with the lessor, … assessment of other premises

in the area and the effect of new competition'. It was found that it was company restructuring that resulted in the loss of employment where there had existed 'a reasonably held and settled expectation of continuing employment' and those matters took the case outside of the ordinary and customary turnover of labour.

68 In 2005, the High Court considered a case in which claims were made that employees had entitlements to redundancy pay under the terms of an industrial agreement: *Amcor Ltd v Construction, Forestry, Mining and Energy Union* [2005] HCA 10; (2005) 222 CLR 241. The agreement stated that 'should a position become redundant and an employee subsequently retrenched' there was an entitlement to payments. It was necessary to consider what was meant by redundancy when used in an industrial law context. As to matters presently relevant, Gleeson CJ and McHugh J said at [12]:

> In the industrial context, redundancy of position is not a concept of clearly defined and inflexible meaning. Whether cases of succession to a business following corporate restructuring are regarded as justifying an award of redundancy payments is dealt with 'on the particular merits of the case rather than by way of broad prescription' [citing *Crocker*]. Here, however, it is necessary to apply an agreement that contains a 'broad prescription', and the task is to decide how that broad prescription operates in the particular circumstances.

69 Later, at [14] their Honours said:

> Redundancy of position is not a legal or industrial term of art, although there are many cases which examine the concept of redundancy, usually for the purpose of distinguishing it from other causes of retrenchment [citing, amongst other cases, the *Termination, Change and Redundancy Case*].

70 Gummow, Hayne and Heydon JJ dealt with the legislative background as part of the matters that were relevant when it came to construing the agreement. Their Honours identified three features of the legislative background at [41]:

> Three features of the legislative background to the Agreement must be noticed. First, there is the background provided by the introduction, by the Commission's predecessor (the Australian Conciliation and Arbitration Commission), of awards prescribing the entitlements of employees upon redundancy. Applicable standards were identified in the *Termination, Change and Redundancy Case [No 1]*... Secondly, some account must be taken of the provisions of Div 3 of Pt VIA of the Act regulating the minimum entitlements of employees on termination of employment. Those provisions evidently reflect general standards of the kind identified in the *Termination, Change and Redundancy Case*. Thirdly, the Act provides (s 170MB) that certified agreements made about industrial disputes or industrial situations are to bind not only the particular employer with whom the agreement is made but also successor employers.

71 Their Honours then considered the decision in the *Termination, Change and Redundancy Case* and said at [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". That is, the Commission regarded termination of employment by a particular employer as not sufficient to engage the redundancy obligations, even if that employer was ceasing any participation in the particular business. The focus of the provision was upon the work undertaken by the employee (the "job"), not upon the identity of either the employee or the employer. The relevant inquiry was whether employment in a particular kind of work then being undertaken was to come to an end. If that employment was to come to an end, it was necessary to consider why that was to happen. Was it because the employer no longer wanted the job, then being done by the employee, done by anyone? Or was it "due to the ordinary and customary turnover of labour"…? And, as the Commission's evident concerns about drafting show, these alternatives were not, and are not to be, understood as exhausting the cases that might have to be considered.

72 The exploration in the above passage of the Commission's decision identifies the relevant enquiry as to whether there has been redundancy as being concerned with whether the work being done was expected to come to an end. If so, there needs to be a consideration as to whether the end of the 'job' was due to the ordinary and customary turnover of labour. However, no view was proffered about what those words might mean. Nor was there any explication of the shorthand summary used by the Commission, namely 'termination due to a normal feature of a business'. For reasons I have given, those words were not used by the Commission to focus attention upon the peculiar termination practices of the particular business of the employer, but rather appeared to refer to an inherent feature of *a business* (that is the kind of business conducted by the employer) that would mean that an employee would not expect there to be ongoing employment. If termination after a period of time was a likely and foreseeable characteristic of employment by such a business (and therefore part of what the employee took on when agreeing to undertake the particular employment) then redundancy was inherent in the nature of the employment and in that sense was ordinary and customary. It was not a matter of agreeing a limited term of employment. It was not a question of what practice the employer may choose to adopt. Rather, the job itself was of a kind where it was not to be ongoing.

73 Significantly, there is nothing in the joint reasons given by Gummow, Hayne and Heydon JJ to support the view that an aspect of the business of the employer that would not be evident to an employee from the nature of the employment could mean that termination because the employer no longer wanted the work to be done could lead to termination without redundancy pay. It is not surprising that the reasons do not address that aspect of the scope of the concept of redundancy because the contentious question in *Amcor* was whether the succession in employment available in the unusual circumstances of that case meant that there was no redundancy. In circumstances where the issue of the scope and meaning of the words 'due to ordinary and customary turnover of labour' was not addressed, no conclusion could be drawn as to that issue from the joint reasons.

74 However, what is apparent from the joint reasons is that they acknowledge the established significance in the area of redundancy pay of the qualifying words 'due to the ordinary and customary turnover of labour'. Further, the qualification applies to redundancy in employment being a concept concerned with the loss of a job, not the termination of employment of an employee. An entitlement to redundancy pay is to compensate for the termination of employment that was otherwise indefinite (and therefore, speaking generally, was to be expected to be terminated only for wrongful conduct, incapacity or by resignation). An employee who does the right thing and can still do the job may expect to have ongoing employment and does not expect to be terminated.

75 The significance of the phrase and its established position in industrial law jurisprudence concerning redundancy pay is also recognised in the reasons of Kirby J at [108]-[110].

76 In *Compass Group (Australia) Pty Ltd v National Union of Workers* [2015] FWCFB 8040; (2015) 253 IR 32, the Full Bench of the Fair Work Commission considered a claim concerning the application of the redundancy provisions under enterprise agreements made in 2011 and 2013. It was common ground in the proceedings that the redundancy clauses in the agreements contained a definition of redundancy that was largely indistinguishable from that contained in the Standards and they included an exemption from redundancy pay where redundancy is due to the ordinary and customary turnover of labour (referred to as the Exception): at [4].

77 The Commission reviewed a number of earlier decisions and concluded that there was no basis in those decisions for excluding dismissals arising from loss of contracts from the concept of ordinary and customary turnover of labour: at [20].

78 As to the words of exemption, the Commission 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.

79 The Commission appears to have based this statement upon the reasons of the High Court in *Amcor*. However, for reasons I have given, the High Court in *Amcor* was not concerned with explicating the meaning of the phrase 'ordinary and customary turnover of labour'. In their joint reasons, Gummow, Hayne and Heydon JJ were simply restating what had been said by the Commission in the *Termination, Change and Redundancy Case*. The decision in that case did not focus attention upon the business circumstances of the employer. Rather, it focussed attention upon the nature of the job. The distinction is fundamental and is evident in the decisions to which I have referred.

80 The relevant distinction is properly exposed by considering a case, like the present, where a business needs labour to provide the services required to perform the obligations under a contract between the employer and a particular customer. In such instances, the prospect that the work may come to an end when the contract comes to an end and when that might be are not matters inherent in the nature of the work or matters that may necessarily be evident to a prospective employee from the nature of the business being conducted. Possibly, the employer may make it known with clarity that the nature of the work is that it is for the duration of a particular contract or is from contract to contract. However, that position may change if the employment continues without any new terms being agreed when the customer's contract is renewed or the employee is reallocated to another contract. The employees may not even know that the contract has been renewed and may simply continue what appears to be indefinite employment. Alternatively, these possibilities may be generally known or expected amongst employees because of the kind of business and what is customary for a business of that type. This position may be reinforced by a practice of terminating employment of all employees at the end of a contract without any opportunity to work in the same role for the purposes of another customer contract secured by the employer. The position may not be the same for all employees with some moved on to new contracts and remaining in employment by the company in an indefinite way.

81 However, business circumstances that are only communicated to the employee when the employer comes to terminate the employment on the basis that the customer has not renewed the contract, or the employer has chosen not to seek to renew the contract with the customer, or the employer has chosen not to reallocate or redeploy the employee to undertake the same work to provide the services required to perform a contract with another customer are in a different category. In such instances, the employee is engaged in circumstances where it appears that work will be ongoing (and agrees to terms on that basis), but when terminated is confronted with a claim that the redundancy pay that would normally apply where the employer no longer requires that particular work to be undertaken is not due because of the way the employer has decided to operate its business.

82 Indeed, the evidence advanced in *Compass Group* exposed the importance of the distinction. It referred to some cases where the employment was for the purposes of a contract with a customer that may be rolled over or extended but only upon Compass Group securing a further contract to provide the same services. In other instances, 'the contract is only for a specific task of limited duration - for example, to provide catering and accommodation services to construction workers on a major construction project'. In the latter case, it was inevitable that employment would be terminated at some point: at [32].

83 Ultimately, there were findings at [33] that:

> … it was the common practice of Compass to terminate the employment of employees when a contract is lost, especially Department of Defence contracts. It was also common for employees to be redeployed where this was possible. The notion of employing employees for a particular contract implies a link between the contract and the employment. It carries with it the understanding that loss of the contract could well lead to termination of the employment. Indeed this was expressly stated in many of the relevant contracts.

84 It was also found that Compass had a long-standing practice not to make redundancy payments: at [34]. It was also found that such a practice was to be brought to account in construing the meaning of the exemption for ordinary and customary turnover of labour expressed in the terms of the standard redundancy clauses in Compass enterprise agreements: at [34].

85 It was in the above context that the terminations of employment were found to have arisen 'from the loss of the Department of Defence contracts and in the context of Compass' business, this was due to the customary and ordinary turnover of labour': at [35].

86 Therefore, the result in the case depended upon findings as to matters that would have made it apparent to an employee of Compass from the outset that the particular work was not and could not be ongoing.

87 I note that *Compass Group* was a decision made after the enactment of the Act. As a result, the views expressed in that decision may be considered not to form part of the pre-existing law for the purposes of undertaking the task of construing s 119(1)(a) of the *Fair Work Act*. However, it did involve an application of what was considered to be previously established principles concerning redundancy pay to the facts in that case.

88 In can be seen that the case law before the enactment of s 119(1)(a) had developed a well-established jurisprudence concerning the circumstances in which payments for redundancy may be required by an employer. The state of that law was such that it focussed upon the nature of the job to be done and whether that work was still required to be undertaken by any employee. It recognised a general right to redundancy pay where the terminated employment had been ongoing and for an indefinite term such that there was a degree of security that might be expected to be associated with the employment. Amongst other qualifications, it was a right that was subject to the exception that it was not payable where employment was brought to an end as part of the ordinary and customary turnover of labour. The exception was said to apply where the termination was a normal feature of the business and also where termination after a period was to be expected by the employee. Properly understood, these two descriptions are not competing. The exception applies where it was evident that the nature of the work to be done was not ongoing. It might be evident from the nature of the job itself that it was not ongoing, such as where the task to be undertaken was inherently itinerant or for a specific project. Or it might be evident because it was a normal feature of a particular kind of business that the work would not be ongoing, such as where the business involved securing a workforce to perform services under a particular contract and it was the usual practice that all employees would no longer be required at the end of the contract. It was a concept that was considered to invite a factual inquiry in the particular circumstances of the case that was concerned with the extent to which there was an expectation, in the ordinary course, that the employment would be ongoing. In undertaking that inquiry consideration would be given to whether it was a normal feature of a business that the employment would be terminated rather than be ongoing.

89 Therefore, the use of the phrase 'ordinary and customary turnover of labour' had acquired a particular meaning within the pre-existing law. The existence of that body of industrial law

decisions was part of the context in which s 119(1)(a) came to be enacted using precisely the same terminology as had been developed and applied in the decided cases.

Decisions concerning s 119(1)(a) of the Act

90 In *Transport Workers' Union v Veolia Environmental Service (Australia) Pty Ltd* [2013] NSWIRComm 22, Haylen J, then a judge of the Industrial Court of New South Wales, considered a claim in which orders were sought requiring redundancy payments to an employee of Veolia. It was a claim under s 119 of the Act. The decisions prior to the enactment of the Act were reviewed by his Honour and were summarised at [74] in the following way:

> Despite the lack of precision, the decided cases have tended to define the term by reference to a known or understood lack of continuity of work. In some case[s] the work will be intermittent but in others it will be a task taking some time to complete but all would understand that when the task is completed the job is finished. Where there is no finite task, length of employment will be regularly indicative of ongoing employment as opposed to regularly turned over employment. The cyclical nature of the employment has also been a relevant factor.

91 For Veolia it was argued that its services were provided to local councils under term contracts and it was common for those contracts to be lost to competitors. As to reliance by Veolia upon the turnover of contracts it was said that fact alone cannot be determinative of the issue whether there was customary turnover of labour. Rather, what was required was 'an analysis of the intermittency of work as opposed to a settled and reasonable expectation of continued employment'. It was noted that 'many businesses lose contracts but have permanent/salaried employees' and the loss of contracts may have no consequence whatsoever for the workforce: at [76].

92 It was accepted for Veolia that, as to redundancy payments:

> A contract that was for a specified term without any provision for renewal or a contract to perform work until a specific task was completed would not qualify.

93 However, on the facts, the contract entered into with the employee did not have those characteristics. Further, the employee 'was entitled to have a settled expectation that his employment would be continuing and he had no reason to believe that simply because a Council contract was not renewed' that he would lose his position with Veolia if he was working under that contract: at [82]. The decision adopts the terminology of 'reasonable or settled expectation of continuing employment' which may be found in many of the cases in the field and was applied in *Fashion Fair*.

94 It can be seen that Haylen J applied the cases before the enactment of s 119 of the Act when considering whether the words of exclusion in s 119(1)(a) applied.

95 Most recently, in *United Voice v Berkeley Challenge Pty Ltd*, Reeves J considered the meaning of the phrase 'ordinary and customary turnover of labour' as used in s 119(1)(a). Berkeley Challenge is a related entity to Spotless. It was unsuccessful in its tender to continue to provide security, cleaning and related services for the Sunshine Coast Plaza Shopping Centre. Claims were made on behalf of employees who were terminated that included claims that a number of employees were entitled to redundancy payments.

96 The contracts of employment were found to be contracts which provided for permanent employment and which did not specify a term of expiry. They did not state that their employment was subject to the continuance of the contract to provide services for Sunshine Plaza. They did not reflect any custom that affected employees would not be paid redundancy pay if the contract were to be lost: at [37].

97 Evidence was given for Berkeley that most employees were 'contract requirement employees' a term used within the Spotless Group to identify employees within the business who were performing functions that were tied to the requirements for service delivery under a particular contract: at [42]. Upon termination of a contract reasonable steps were taken to redeploy contract requirement employees to other contracts, but those who were not redeployed were terminated. It was said to be an inherent feature of the business model within the Spotless Group that when a contract came to an end and there was a failure to secure a new contract then that often resulted in the termination of employees attached to specific clients: at [43]. The evidence was given in a form that related to the whole of the Spotless Group rather than Berkeley in particular.

98 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 was normal practice to terminate the employment of employees if a client contract was lost and redeployment was not possible and it generally did not make redundancy payments in those circumstances: at [50].

99 An argument that s 119(1) should be approached as a remedial provision and should be given a construction that was beneficial to employees was rejected. It was found at [53] that the provision was in that category of case that strikes a balance between competing interests and

the problem of construction arose because there was uncertainty as how far the provision goes in seeking to achieve that balance (applying *Carr v State of Western Australia* at [5]).

100 Reeves J concluded that the previous decisions concerning the phrase ordinary and customary turnover of labour were of 'limited value' when construing the terms of the words of exception included in s 119(1)(a) and that the additional language used in the *Fair Work Act* provisions concerned with redundancy pay had a very important role to play. His Honour then concluded that the words of exception were to be confined 'to a narrow set of circumstances': at [73].

101 For convenience of reference, I set out the terms of s 119(1)(a):

> 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.

102 His Honour reasoned that the words 'due to' introduced a causal relationship between the termination and the set of labour turnover conditions to which the words of exception apply: at [74]. The words of exception were construed to mean the aggregate of employee replacements that is for the employer of a kind that is common or usual and a matter of long-continued practice: at [76]. His Honour summarised the position by saying that the exception applies 'if a particular employer decides to terminate a particular employee's 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': at [77].

103 The result was to give the phrase 'ordinary and customary turnover of labour' when used in s 119(1)(a) an application that depended upon the extent to which the employer had a long established practice of deciding to terminate a particular job in particular circumstances.

Submission that the decision in *Berkley Challenge* is plainly wrong

104 For Spotless it was submitted that the decision in *Berkley Challenge* was plainly wrong and should not be followed. The error was said to lie in wrongly discounting the relevance of previous decisions. It was said to give rise to unreasonable and impractical outcomes. By requiring that the practice of termination be shown to be a long continuing practice of the particular employer it was said that a well-established employer would not be liable to pay redundancy pay, but a new entrant with the same business model would have to do so. This

would place the new entrant at an economic disadvantage in having to bear additional costs for a period of time despite the fact that it was apparent to all concerned that the employment would not be ongoing. Then at some indefinable point the employer could cease paying redundancy pay. It was unclear as to how this would be applied to particular employees who had commenced employment before the required point of long-continuing practice had been reached. It was submitted that these outcomes were contrary to the express objects of the *Fair Work Act* and was a construction that should have been rejected by reason of its unreasonable and impracticable application.

105 It is well established that a judge of this Court should follow an earlier decision of another judge unless of the view that it is plainly wrong: *Hicks v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCA 757 at [75] and *Australian Securities Commission v Marlborough Gold Mines Ltd* [1993] HCA 15; (1993) 177 CLR 485 at 492. There is a judicial duty to do so: *C.A.L. No 14 Pty Ltd v Motor Accidents Insurance Board; C.A.L. No 14 Pty Ltd v Scott* [2009] HCA 47; (2009) 239 CLR 390 at [49]. It is a duty that arises unless a judge is 'convinced' that the earlier decision is plainly or clearly wrong: *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22; (2007) 230 CLR 89 at [135].

106 A decision may be plainly or clearly wrong even though the error is not of a kind that may be described as 'patent or obvious or easily perceived'. Rather, the words plainly or clearly 'bespeak the quality of the error or the level of conviction of error that must be perceived': *Gett v Tabet* [2009] NSWCA 76 at [283]. There must be a strong conviction that the earlier decision 'was erroneous and not merely the choice of an approach which was open, but no longer preferred' and the nature of the error must be able to be 'demonstrated with a degree of clarity by the application of correct legal analysis': at [294]. These requirements are sometimes expressed as a need to demonstrate that there are 'compelling reasons' not to follow an earlier decision on the basis that it is wrong.

107 There are also discretionary factors that should be considered before departing from earlier authority. They require consideration of the principles of certainty, predictability and transparency. For such reasons, it is unlikely that a single judge would be persuaded to depart from long-standing authority that has been frequently applied.

108 The reasoning of Reeves J rested upon two significant propositions. First, the previous decisions as to ordinary and customary turnover were of limited value because Parliament had chosen to express the relevant concepts in some detail in Division 11 of Part 2-2 of the *Fair*

Work Act. In this regard the terms of s 123 were considered to be particularly significant. Second, s 119(1) was concerned with what was ordinary and customary as a matter of long-standing practice of the particular employer.

The relevance of the previous decisions

109 As I have explained, the words 'ordinary and customary turnover of labour' were developed and applied in a series of determinations made in accordance with applicable industrial law to express an exception to a general entitlement to redundancy pay. Redundancy pay was to be paid for loss of a job that had been expected to be ongoing, not where there was a dismissal for misconduct or other circumstances that explained the termination, such as poor performance or because the employment was on a casual basis.

110 The phrase 'ordinary and customary turnover of labour' was understood to invite a factual inquiry as to the circumstances of the particular case. It was used to qualify a general right to redundancy pay in circumstances where the employment always carried with it regular turnover or, put another way, there was no reasonable expectation of ongoing employment. Various rationales for the exclusion could be discerned from the decided cases. It might be said that there would be a form of double payment if redundancy pay was required upon the termination of work which had an intermittent character and employees were remunerated to reflect that prospect. It might be said that there was no unfairness or harm associated with the termination of employment in a manner that was known from the outset because the burden that arose in the case of redundancy was the unexpected character of the termination and the need for an employee who expected to have ongoing employment to face the prospect of an extended period of being out of work. The language gave rise to some difficulty in application in particular cases but the meaning of the phrase was established.

111 When the *Fair Work Act* entitlement to redundancy pay was expressed, it adopted the same language of exception in respect of a provision dealing with precisely the same subject matter.

112 Significantly, when the same words were used in s 119(1)(a) no statutory definition of the terminology was introduced. Further, the words were introduced to have the same role as they did under the pre-existing law, namely to express a general exception to the circumstances in which there would be an entitlement to redundancy pay. The words were adopted as part of a statutory provision which, though not expressed to be a codification of previous legal rights, expressed in statutory terms the conditions of employment that were to apply to employees throughout Australia and which might be expected to deal with matters that had been the

subject of earlier employment law. In that context, to the extent that there was to be a substantial deviation from the pre-existing law captured by a particular formulation of words then it might reasonably be expected that there would either be a new definition expressed to apply to those words or the adoption of different language. Neither course was adopted when the words 'ordinary or customary turnover of labour' were used in s 119(1)(a).

113 Accordingly, the adoption of the same language to perform the same function in the operation of a law about the same subject matter meant that the pre-existing law was an important contextual consideration to be brought to account when construing the same words in their statutory context in the *Fair Work Act*.

114 As noted by Gummow, Hayne and Heydon JJ in *Electrolux Home Products Pty Ltd v Australian Workers' Union* [2004] HCA 40; (2004) 221 CLR 309 at [162]: 'The field of industrial relations legislation in Australia is not one where the Parliament may readily be taken to have legislated without awareness of the interpretation placed by this Court on pivotal definitions'. The same applies where, as here, the phrase used is one that has a well-established usage as a matter of industrial law in the very same context where it is deployed in the legislation that is subsequently enacted.

115 It was separately argued for Spotless that before the enactment of the *Fair Work Act* the redundancy entitlements of employees were the exclusive preserve of certified agreements and state and federal industrial awards. Those instruments have statutory effect and therefore it was said that they formed part of the legislative history to be taken into account as a matter of context. This reasoning provides further support for the significance of the pre-existing usage of the words of exception when it came to construe them as deployed in s 119(1)(a).

116 Further reliance was placed by Spotless on the terms of the Explanatory Memorandum for the *Fair Work Bill* which stated that redundancy provisions 'are currently awards-based entitlements, which will be legislated to provide more comprehensive protection for employees and extend redundancy to award-free employees'. This is another contextual indication that the legislature had in mind the adoption of concepts that applied under the pre-existing law.

117 In all those circumstances, having regard to the principles of statutory construction to be applied, there are compelling reasons why it is not correct to view the pre-existing law concerning the expression 'ordinary and customary turnover of labour' to be of limited value in construing the language used in s 119(1)(a). Rather, those decisions and what they reveal about

the way the terminology had been used and what it was intended to capture are important contextual matters to consider when it comes to construing the same language deployed for the same purpose in s 119(1)(a).

118 As to whether there was any indication in the language used in Division 11 that the phrase ordinary and customary turnover of labour was to be given a meaning that was to be determined independently of the previous decisions, Reeves J drew attention to the terms of s 123. As I have noted, it states that Division 11 does not apply to certain types of employees. One category of employees to which Division 11 (and therefore s 119(1)(a)) does not apply is 'an employee employed for a specified time, for a specified task, or for the duration of a specified season'. Another category is 'a casual employee'. These provisions were said to appear to confine the words of exception to a narrower category than was indicated by the earlier decisions. The precise extent to which that might be so was a matter that Reeves J found did not need be determined in the particular case: at [73].

119 It may be accepted that the form of s 123 in providing that Division 11 does not apply to certain employees reflects a view that but for such a provision the Division would apply to such employees. However, for the following reasons recording the categories of employees listed in s 123 as employees to whom the redundancy pay provisions do not apply reflects the earlier industrial law decisions rather than contradicts them.

120 As I have explained, the determinations by which the right to redundancy pay was established considered all of the circumstances which account for the turnover of labour. They identified dismissals of employees for wrongdoing or poor performance as not giving rise to any entitlement to redundancy pay. Further, they treated casual employees and apprentices and those whose duration of employment had not yet reached 12 months as being in a different category to employees generally. In such cases, there was to be no entitlement to redundancy pay even though it might also be said in some cases that, in a sense, the termination of employment was because the job was no longer required to be performed.

121 So, under the earlier determinations concerning redundancy pay there were three broad aspects to considering whether the entitlement arose. First, one excluded certain identified cases where the reason for termination meant there was no entitlement to redundancy pay for various identifiable reasons developed as a matter of fairness in all the circumstances. These included termination for misconduct or by reason of the itinerant nature of the work or where the term of employment has been less than 12 months. Next, one recognised there was otherwise a

general entitlement to redundancy pay, but subject to an exception for instances where the turnover of labour is ordinary and customary. Then, one considered the particular facts to determine whether the type of employment was of a kind where it is ordinary and customary for there to be a turnover of labour.

122 The expression of the exclusions in s 121 is consistent with the above structure. Further, the categories of exclusions reflect cases identified in the determinations to which I have referred. Therefore, the existence of those exclusions does not manifest an intention to deploy the words 'ordinary and customary turnover of labour' in a way that is inconsistent with the way the same words were developed and deployed under the pre-existing law.

123 The fact that a person employed for a specified period, task or season will not be entitled to redundancy pay does not mean that the words of exception in s 119(1)(a) must have a narrower field of operation than they did under the pre-existing law. A person may not be employed for a specified period, task or season and yet, on the particular facts, may be a person who, when employed, has no expectation of ongoing employment by reason of 'ordinary and customary turnover of labour'. The work may be of kind that it can be seen that it will not be ongoing even though it is not agreed to be for a specified period, task or season. Indeed, a person who is employed to undertake the work required to perform a specific contract between the employer and its customer may have that character. In such cases, the parties may not expressly agree that the employment is to come to an end, but it will be evident from the nature of the employment that this will be the case. Whether that is so will depend upon the facts in each case.

124 Therefore, the terms of s 123 were not a reason for concluding that the words 'ordinary and customary turnover of labour' were intended to be used in a sense that that was not to be informed by the context of usage as part of the pre-existing law.

125 For those reasons, I am respectfully of the view that there are compelling reasons as to why Reeves J was wrong in finding that s 123 was a reason why the earlier decisions were of limited relevance when it came to the construction of the words of exception in s 119(1)(a). It was not suggested that there were discretionary reasons why, even so, the decision should be followed. Therefore, I regret to say I am strongly of the conviction that the decision of Reeves J should not be followed to the extent that it depends upon disregarding the pre-existing law when construing the words of exception in s 119(1)(a).

Ordinary and customary as a matter of long-standing practice of the employer

126 The next matter concerns whether Reeves J was correct in concluding that the words 'ordinary and customary' meant what is ordinary and customary for the business of the employer as a matter of long-standing practice. The reasoning of his Honour in that regard proceeded from the premise that there was limited value in the earlier decisions under the pre-existing law. On that basis, his Honour focussed on the language of the provision. His Honour's reasoning based upon that language addressed the terminology as a matter of ordinary language within the context of s 119(1)(a). If there were no other broader contextual matters this was the correct approach. His Honour's reasoning has not been demonstrated to be plainly wrong as a matter of construction of the language in s 119(1)(a) when considered without regard to the context. However, for reasons I have given that premise was not correct and it is necessary to approach the statutory construction task informed by the context of the pre-existing usage of the words of expectation.

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

127 Spotless contended that the words 'except where this is due to the ordinary and customary turnover of labour' should be interpreted to mean redundancies that are due to a normal feature of an employer's business. This contention involves a subtle move away from the language used in the *Termination, Change and Redundancy Case* as quoted by Gummow, Hayne and Heydon JJ in *Amcor*. The phrase actually used by the Commission was that 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'. It did not refer to a normal feature of the employer's business.

128 The reference to the business circumstances of the employer was the way the Full Bench of the Fair Work Commission viewed the language in the *Compass Group* case.

129 For reasons I have given, the phrase 'ordinary and customary turnover of labour' as used in the pre-existing law referred to a termination that was to be expected by the employee in the particular circumstances of the case. It may be expected because it was a normal aspect of a business of the kind conducted by the employer that would be evident to the employee. The 'normal feature of a business' was a reference to a feature inherent in the nature of the particular kind of business, not a feature that was made normal for the particular business by its own practices in terminating employees.

130 As Reeves J stated, the form of s 119(1)(a) requires a causal link between a termination which occurs 'because the employer no longer requires the job done by the employee to be done by anyone' and the ordinary and customary turnover of labour. The use of the word 'this' in the words of exception means termination for redundancy which is due to the ordinary and customary turnover of labour. So, s 119(1)(a) focusses upon the reasons for the termination.

131 The phrase 'turnover of labour' is a general description of the coming and going of labour. The expression 'general turnover of labour' was used by Fisher P in the *Crocker* decision to refer to the many reasons why it has been 'customary' for employees' services to be dispensed with.

132 The expression 'ordinary and customary turnover of labour' must refer to a narrower category than general turnover. It is dealing with the specific case where the termination of employees for redundancy is both 'ordinary and customary'. The semantic range of the two words overlap. Both are used to indicate that which is common or usual. However, they identify slightly different respects in which something (in this case the termination of employment) is expected or part of the every day. The adjective *ordinary* is applied to indicate that an object is commonly observed or is the kind of thing that is standard or usual. The adjective *customary* is applied to indicate that an activity is habitual or a matter of usual practice. Inherent in the notion that an activity is customary is a recognition that it is a behaviour that is long-standing and has an ongoing consistency.

133 So, in context the terminology connotes a termination where the employer no longer requires the job to be performed because termination in the particular case is common or usual, both in the sense that it is commonly observed and in the sense that it is habitual or of long-standing practice. Because it has that character it is expected. There is no loss or harm to an employee whose job is terminated in such circumstances. That which is inherent in the nature of the work and, in a sense, inevitable, comes to pass.

134 For reasons submitted by Spotless, there are difficulties if the reference to customary turnover of labour is read as referring to what is customary for a particular business. A new business does not yet have a common way of doing things, it has not developed habits or usual, long-standing practices. How would the exception apply to a relatively new business?

135 The answer to that conundrum does not lie in giving the word 'customary' a meaning denuded of any requirement for a consistent common or usual practice that might be described as habitual or long-standing. Rather, that aspect of the terminology indicates that the exception

is concerned with instances where it is generally habitual or a matter of long-standing practice for the particular kind of employment to be terminated rather than ongoing. In a particular case, it may be able to be demonstrated that the kind of businesses that have to put together a significant labour force to meet the requirements of a particular contract with a customer have that character. The nature of the contracts with customers and the lumpy changes in required employees may mean that for such businesses termination of certain types of employment at the end of the contract with the customer is common or usual for such a business.

136 However, given that s 119(1)(a) is enacting a minimum standard, it would be inconsistent with the evident purpose of the provision if an employer could by its own unique practice create that kind of expectation. If that were so, an employer could simply announce to its employees 'when your job is no longer required to be performed for the business your employment will be terminated without redundancy pay, that is our common and usual practice so you should expect that to occur' and thereby bring about their own exemption. Further, neither s 119(1)(a) nor the pre-existing law refer to an exception where termination for redundancy is due to the ordinary and customary practice *of the employer*.

137 Rather, informed by the context of the earlier decisions where the terminology was developed and applied, the phrase 'ordinary and customary turnover of labour' is describing termination that is a common and usual outcome for anyone working in a job of that kind. It is both commonly observed and a matter that is habitual or of long-standing practice such that it is to be expected that for anyone in that type of job, the employment will not be ongoing. Where the termination is because it is common and usual for the type of job to be brought to an end rather than for it to be ongoing (for so long as there is no misconduct or poor performance or inability to undertake the work) then the exception applies.

138 It is not a term that applies where there is simply an identifiable risk that the employment may come to an end. All ongoing employment is attendant with such risks and yet is considered to be indefinite. The risks include insolvency of the business of the employer, technological change, a reduction in customers of the employer's business and the restructure that may follow a takeover or amalgamation. In some cases, the fact that an employer depends upon securing new contracts in order to be able to continue to offer employment will be such a risk. It will be a question of fact in each case whether termination is so inherent in the nature of the job for a particular employee that it cannot be described as ongoing or indefinite employment. In such

a case when the termination occurs it will be an outcome that is part of the ordinary and customary turnover of labour.

Application to case advanced by Spotless

139 In its closing submissions, Spotless advanced its case on the basis that when its contracts to supply services at Perth International Airport expired its practice was that 'contract requirement employees' were terminated as part of its ordinary and customary turnover of labour. It advanced the following contentions:

(1) the loss of service contracts with its customers was a regular and ordinary part of the business of Spotless;

(2) from the perspective of Spotless, employees are hired for a specific service contract;

(3) what is important for the application of s 119(1)(a) is how the employees are regarded by Spotless as their employer - are they thought by Spotless to be employed for the purposes of a particular contract;

(4) Spotless supports and facilitates 'contract requirement employees' redeployment at the end of service contracts, but only where that is possible;

(5) as a matter of priority Spotless sought to redeploy the employees on the loss of the Perth International Airport contract; and

(6) the fact that employees could not be redeployed meant that the operations of Spotless Group as a whole could not absorb the cost of those employees because there would be no utility in having excess workers.

140 Spotless sought to establish the above propositions from the evidence. Real issues arise as to whether a number of those matters could be established. However, at this point, I assume in favour of Spotless that they could be.

141 Significantly, Spotless did not seek to demonstrate that, by reason of the nature of the work they were employed to do, the circumstances in which they came to be employed or the circumstances in which their employment continued, each employee had, or ought to have had, an expectation that it was the kind of job that would come to an end when the contract that Spotless had with its customer came to an end.

142 Instead, Spotless sought to rely upon its own policy and practices. It contended that it was enough that the practice of Spotless was such that it viewed all 'contract requirement

employees' as coming and going with each customer contract. It did not seek to demonstrate that those policies and practices were known to the employees when they undertook their employment. It did not seek to demonstrate that the termination of the employees occurred because the nature of their employment was such that it was common or usual for their employment to be terminated when the contract came to an end. It was for Spotless to establish matters that would bring it within the words of exception. Given the nature of the case it advanced and the view I have expressed as to the meaning of the exception to s 119(1)(a), it failed to do so.

143 It was not in issue that the employees were terminated in circumstances of redundancy. Therefore, the contravention by Spotless of s 119(1)(a) has been established.

Factual findings

144 Although in the way the case for Spotless was ultimately advanced it is not necessary for factual findings to be made, against the prospect that the matter is taken on appeal and other matters are considered relevant to a determination as to whether there was a contravention of s 119(1)(a) I make the following findings of fact.

145 Spotless is part of a group of companies. The Spotless Group has a very large number of employees. The primary business activity of the companies in the group is the supply of facilities services on a contract basis. It provides services in a number of different sectors reflecting the activities of its clients, both actual and potential. Even so, there is overlap between the sectors as to the jobs that are required to be performed in order to deliver the services under the contracts with customers of the Spotless Group. So, employees who work under one contract may be expected to be able to undertake work of a similar nature in the provision of services under another contract, including a contract in a different sector.

146 The Spotless Group is managed as a single entity. It has a large group of casual employees who are deployed where required to undertake work required for particular contracts. It also has permanent employees who undertake work in relation to a particular contract.

147 Contracts with customers are usually secured by companies in the Spotless Group through a competitive process involving a tender, bid or negotiation. The length of contracts varies. In some sectors the contracts are, on average, for a longer term. They are usually for a term of years. In some cases the contract is for the purposes of a particular construction contract. However, in most cases the services supplied under the contract are required by the customer

on an ongoing basis. So, at the end of any contract there is an opportunity for the company to secure a renewal for a further term.

148 If a contract is renewed then, all other things being equal, permanent employees who have been providing the services required by the customer will continue to do so. Further, the Spotless Group has a policy of seeking to redeploy its employees to work on other contracts when a contract with a particular customer is not renewed.

149 It is entirely a matter for each company in the Spotless Group to determine who will undertake the work required to perform the contracts with its customers. So, Spotless and the Spotless Group as a whole each have an interest in keeping its experienced employees by redeploying them to other contracts as well as the power to do so.

150 The evidence was to the effect that Spotless wanted to keep its employees and where possible to allocate them to a different contract where a particular contract came to an end. There were advantages to Spotless in doing so and the deployment of employees to new contracts when a customer contract was not renewed would create an expectation amongst employees that such deployment would occur.

151 As noted below, Spotless Group was a very large entity with customer contracts being won and lost on a regular basis. It was only when there could not be a reallocation that employees were at risk of redundancy. That was a risk associated with the state of opportunities on new and continuing contracts from time to time.

152 Spotless did not have a practice of terminating the employment of all employees upon each customer contract coming to an end.

153 A considerable proportion of customer contracts throughout the Spotless Group are not renewed at the end of their term. So, the end of work for a particular customer is a relatively common occurrence. In the business and industry sector (being the sector applicable to the contracts with the Perth International Airport) about a quarter of the contracts come to an end without renewal each year. So, loss of contracts is a regular part of the business of companies in the Spotless Group. Similarly, securing new contracts is a regular part of their business.

154 Within the Spotless Group, customers who are undertaking a job required to perform a particular contract are known as 'contract requirement employees'. There was no evidence that this was a term used in regular communications with those employees. It is not usual for

contract requirement employees to be moved from working under one contract to another during the course of the contract.

155 The contracts entered into by Spotless with employees do not indicate that the contracts will come to an end when the contract with a particular customer comes to an end. In the course of the proceedings, the Spotless Group produced 1,062 agreements with its employees recording the terms and conditions of the employment of 839 employees who had been paid redundancy pay in the period 1 January 2015 to 31 July 2015. For most of those employees there was no reference to the customer contract and there were terms providing that the employee could be directed to work at another location, on other duties for other Spotless Group companies and no express term relating to redundancy or severance pay. A considerable number contained a term that provided for severance or redundancy pay. Only five contained a term that severance or redundancy pay was not payable on the expiry of a specified term (noting that they were, despite such a provision, actually paid redundancy pay). A further seven referred to the exception for ordinary and customary turnover of labour but did so when referring to the entitlement to redundancy pay under the Standards.

156 Prior to 7 October 2014, the Spotless Group had a standard procedure entitled 'managing redundancy arising out of loss of contract'. It began by stating that: 'Where a loss of contract occurs, this can result in many positions being put in jeopardy'. It described four stages to follow. Stage One was 'Notification'. Amongst other things, it said:

> The main message to convey to employees that the contract will be closing:
>
> - Spotless' preferred option in all cases is to redeploy staff within the company;
> - We will be looking for vacancies within all Spotless Business Divisions and related entities;
> - If no alternative redeployment options are available and redundancy is applicable all employees will be paid their legal entitlements.

157 The procedure went on to state that no severance pay was payable if employment was accepted with the incoming contractor or the client directly. It also stated that employees can be offered the option of 'joining Staffing Services [which] operates in all states throughout Australia as an internal 'employment agency'. All employees will be engaged as casuals and there is no guarantee of minimum hours each week and no severance pay is payable'. The procedure went on to state that the employee would have the option to accept the role or accept the redundancy.

158 Stage Three as described in the procedure was headed 'Confirm Employment Termination'. It began:

> Where no alternative role has been identified internally or with the incoming contractor an employee's employment is terminated due to position redundancy.
>
> A final redundancy notification letter and a statement of the employees entitlements is to be provided to the employee affected prior to the end date of the contract.

159 I note that termination for position redundancy only arises where there was no internal position identified and no choice to continue with the incoming contractor. The procedure does not state that employment is terminated for redundancy in all cases upon the end of the contract with the customer. The procedure (together with the contract terms referred to above) shows that the Spotless Group was treating its employees as engaged to undertake a particular job. They were to be moved to new contracts where possible and only made redundant if this could not be arranged.

160 The procedure also included the following:

> NOTE: If more than 15 employees are to be made redundant notification must be sent to Centrelink. Consult with Corporate HR regarding this.

161 The procedure was implemented by the Spotless Group and was the basis upon which advice was given to managers in relation to the management of the loss of contract process. The reason why redeployment was the primary focus was to retain labour and skills, retain human capital and minimise exposure to severance pay.

162 On or about 7 October 2014, the General Manager of Human Resources for the Spotless Group issued a memorandum which said, amongst other things:

> This memo is to advise you of upcoming changes to the way in which Spotless employs many of its staff in Australia.
>
> Effective 5 November 2014, Spotless will be implementing a policy of employees in Australia, where there employment is directly related to provision of services to a Spotless client, being employed on a maximum term contract which is reflective of the contract term with the client.
>
> …
>
> Currently, the employment structure of staff is not aligned with the nature of our business in the most employees are employed on a permanent ongoing contract of employment when the work they are performing is for delivery of services to our customer; which is subject to a fixed term service contract with that customer.
>
> Subsequently, when a service contract comes to an end, the Company is required to find suitable alternative employment or be subject to payment of redundancy pay. This obligation is relaxed through the use of maximum term contracts.

163 Under the heading '**Not paying redundancy pay? Is that legal?**' the memorandum referred to s 119 and the exception for customary and ordinary turnover of labour. It stated that was a term 'used to reflect employment situations where an employer's ability to retain labour is contingent on variables such as the maintenance of a contract with its client'. This statement was incorrect for reasons I have given. The exception was to deal with cases where there was an expectation that the employment would not be ongoing. There was also reference to the terms of s 123 which excluded cases where an employee is employed for a specified period, task or season. The agreements made by Spotless with its permanent employees were not expressed to be for a period, task or season.

164 The document also stated that there would be no change to the employment contracts of existing staff. The policy would only apply to new employees hired after 5 November 2014.

165 The content of the memorandum shows that for employees hired before 5 November 2014 there was no practice that they were to be terminated when the services contract with a customer came to an end. Rather, the employment was ongoing and was only brought to an end if there was an inability to redeploy to a new contract. Therefore, there was a risk that the employment would not be ongoing if there was no redeployment possible. However, it was not inherent in the nature of the job or usual for employment to be terminated with the loss of a contract. It is not necessary to decide whether the memorandum operated as an admission against interest. It is sufficient that it was a business record prepared by the most senior manager for human resources in the Spotless Group. In the absence of other evidence, it is to be expected that it records the practice at the time being a matter known to those responsible for providing advice to all companies in the group as to employment practices within the group.

166 From about March 2014, the Operations Manager for the Business & Industry Sector of the Spotless Group, Ms Jerome, and a Mr Griffin, sought advice from Mr Potter who was then the National Human Resources Manager about the steps to be taken in respect of the conclusion of the contracts at Perth International Airport. Mr Griffin reported to the General Manager of Human Resources.

167 At no time did Mr Potter advise Ms Jerome or Mr Griffin that there was no obligation to pay severance pay on the basis of the ordinary and customary turnover of labour exception. Acting on that advice, steps were taken to redeploy permanent employees and information was published to employees on a bulletin board regarding redundancy scales.

168 The closure of the contracts at Perth International Airport took place in a number of stages. Most employees were redeployed to undertake other work within the Spotless Group.

169 No Perth International Airport employees were paid redundancy pay after 5 November 2014. They were told that there had been a change in the law and redundancy pay was not payable where the termination of employment was due to the ordinary and customary turnover of labour.

170 Mr Potter gave evidence seeking to identify by reference to records of the Spotless Group that a large number of employees had been terminated as a direct consequence of the conclusion of client contracts within the Spotless Group and that this had been the case in the period 1 January 2013 to December 2017. The analysis assumed that all employees whose employment came to an end on or after the day on which the service contract with the customer came to an end had their employment terminated as a direct consequence of the conclusion of that service contract. In its closing submissions, Spotless did not contend for the correctness of that assumption. This approach was adopted with some prudence. I do not accept the validity of the assumption which was advanced without any knowledge of the particular circumstances and depended for its validity upon Mr Potter's evidence that the records maintained by the Spotless Group were inaccurate. Even accepting that the records are inaccurate that is not a basis upon which to reach an affirmative view as to why employees left.

171 Instead, Spotless undertook an analysis based upon the records themselves which was presented for the first time in closing. It sought to demonstrate that the various annotations used in the records could be divided into four categories, one of which was that the employment of an employee was terminated at the initiative of Spotless. On that basis, it was said that after allowing for the fact that many employees were casual, a considerable number of employees were terminated at the initiative of Spotless. It was submitted that the termination of those employees (described as the turnover of labour) when a contract came to an end was an event that was ordinary and customary.

172 As to this evidence, I prefer the evidence as to the practice of the Spotless Group that is recorded in the contemporaneous business records in the form of the procedure and the memorandum issued on 4 October 2014. It shows a practice whereby permanent employees were sought to be redeployed within the Spotless Group. There was evidence that the tasks to be performed in order to provide the services under different contracts required many of the same jobs to be performed. The practice of redeploying employees wherever possible is consistent with this

evidence. As is the evidence of the interest of the Spotless Group in maintaining the employment of its permanent employees who could undertake those jobs. Further, the Spotless Group is a large commercial enterprise with many contracts turning over such that there would be opportunities to relocate employees.

173 As I have noted, Mr Potter himself questioned the accuracy of the descriptions stated in the records of the Spotless Group as to why employees left employment. It is difficult to see why this evidence should be put to one side and the records accepted at face value. Finally, the evidence as to how the records were extracted to support the analysis undertaken by Mr Potter showed that there was no consistent arrangement for keeping those records. They were maintained in different systems that had been kept by the different companies and reflected the fact that some companies had joined the Spotless Group through acquisition. There were demonstrated to be inconsistencies and inaccuracies in the data. Therefore, the data is not a reliable basis upon which to draw conclusions as to the actual practice followed when contracts came to an end. It is notable that Spotless did not seek to lead evidence as to that practice from those who were involved in the day to day activities when contracts came to an end. These were matters especially within the knowledge of Spotless.

174 To the extent that Mr Potter gave evidence to the effect that the Spotless Group has adopted a practice that extended prior to November 2014 that redundancy pay was not payable upon termination of contract requirement employees and notices of termination are given upon termination of each customer contract, I do not accept the evidence. It was inconsistent with the documentary evidence and it was effectively challenged in cross-examination. The evidence about the extent to which redundancy payments were in fact made by the Spotless Group was contrary to the evidence of Mr Potter. I do not accept his assertion that payment of redundancy under a relevant industrial instrument may explain the redundancy payments. Spotless had access to the information by which such an assertion may be demonstrated to be the case but it did not lead any evidence to that effect. Mr Potter specifically acknowledged that he could not attest to what employees were told at the time they were engaged. His evidence was directly inconsistent with the redundancy payments that were made as part of the first stage of redundancies at Perth International Airport and the evidence (which I accept, see below) that employees at the Perth International Airport were told as part of the first stage that they would be paid redundancy pay if they could not secure other employment.

175 As to the three employees who gave evidence concerning their termination, I make the following findings.

Mr Campilan

176 Mr Expedito Campilan was employed by Spotless or a related entity of Spotless from on or around 16 August 1982 to 24 July 2015. He was employed as an Administration Manager or Accounts Manager. His duties included accounting duties, payment of suppliers, accounts payable and receivable and payroll.

177 In November 1993 he was transferred to Perth International Airport in the position of Accountant. The letter from his employer did not refer to redundancy. It did not refer to the employment being for a term or that it would come to an end when a particular services contract came to an end. From then, he was located at Perth International Airport.

178 In 2002, Mr Campilan received a letter from Spotless congratulating him on achieving 20 years of service with the Spotless Group. His annual salary was regularly reviewed.

179 In 2012 he received a letter from Spotless Group Limited congratulating him on achieving 30 years of service with Spotless.

180 When the first stage of terminations at Perth International Airport occurred Mr Campilan read a notice about redundancy entitlements that was published on a bulletin board in June 2014. His employment was not terminated at that time.

181 By 2015, he came to be employed on a permanent part-time basis. When those arrangements were being made he sent an email to Ms Jerome (then the WA State Manager) in which he said:

> Before I start filling in the Change of Employment Status form to Part-time, can I please clarify with you how redundancy would affect me when if and when it applies to me. I've worked more years than the cap years for redundancy (12 weeks cap for over ??? years) so would this mean it would not affect the calculation of I become part-time?
>
> What are my options if the answer is otherwise?

182 Ms Jerome responded:

> Firstly we would look to redeploy, if redundancy were to happen you would get whatever you would be legally entitled to
>
> I believe that being either part time or full time won't make a difference, it's about years of service, AL not used, notice periods
>
> I can't exactly say however, I've put the fair work link below if this helps

183 On 9 February 2015, Mr Campilan was notified formally of changes to his employment from full-time to part-time. The letter stated that all other conditions of his employment remained unaltered.

184 On 8 June 2015, Mr Campilan received a letter from Spotless stating: 'As you may be aware, the contract between Spotless and Perth International Airport for the provision of Catering services will terminate on 25th June 2015'. It said that Spotless would make every effort to identify alternative employment opportunities within the Spotless Group. It concluded by stating:

> Please be aware, this letter does not constitute notice of employment termination. Should no alternative employment opportunities be identified with either Spotless or the incoming contractor your employment will be terminated as a consequence of ordinary and customary turnover of labour on 24th July 2015, as you will be on annual leave until that date.

185 When Mr Campilan received the letter he had never heard the term 'ordinary and customary turnover of labour' before.

186 The employment of Mr Campilan was terminated for reasons of redundancy. His employment was terminated with effect from 24 July 2015 without any redundancy pay. On 1 December 2017, he was paid $10,126.80 by Spotless without admitting any liability. If he is entitled to redundancy pay then that is the correct amount.

187 During the course of his employment, Mr Campilan was never told that his employment was linked to a specific contract or was for a fixed period. He was not told that his employment would be terminated if any particular contract was terminated by the client, lost or not renewed.

Ms Wright

188 Ms Kathrine Wright was employed by Spotless from around February 2011 to 30 June 2015. She commenced as a supervisor in a restaurant at Perth International Airport operated by Spotless under a service contract. She worked at the restaurant until around January 2015. She then worked as a Retail Manager for short periods at various locations including Fremantle and Murdoch TAFE cafes, various schools, corporate functions and then back at Perth International Airport. She was employed on a full-time basis and was paid a salary.

189 The letter of engagement of Ms Wright by Spotless said that the contract will 'continue until it is terminated in accordance with the termination provisions in this contract or replaced by a new contract'. It said that Ms Wright may be required to perform work for any company in the

Spotless Group and such a transfer would not be a termination. It provided that her duties and responsibilities may be changed. It stated that her position would be located at Perth International Airport but that the location may change in accordance with the business needs of Spotless.

190 Otherwise, under the heading 'Termination of Employment' the letter provided that the employment may be terminated in accordance with the Hospitality Industry (General) Award 2010. It also provided for termination for misconduct. There was no reference to redundancy.

191 On 2 December 2011, Ms Wright received a new letter of engagement for the position of Retail Manager. It too provided that Ms Wright may be required to provide services to any company in the Spotless Group. It stated that Ms Wright would be located at Perth International Airport 'where you will perform the core of your duties'. It did not refer any award and provided for termination on one month's notice or without notice in the event of serious misconduct.

192 Under the heading 'Redundancy' the letter stated that if employment was terminated Ms Wright would be entitled to a retrenchment benefit calculated according to her period of service with a total payment not to exceed 52 weeks, but that no severance payment would be payable where there was an offer of suitable alternative employment within Spotless or with a prospective employer on no less favourable terms.

193 Ms Wright also read the information about redundancy that was posted on the bulletin board.

194 On 9 July 2014, Ms Wright was sent a letter which referred to the contract with Perth International Airport terminating on 31 July 2014. This was part of the first phase of the termination of the service contracts. The letter was in similar terms to the letter received by Mr Campilan except that it concluded as follows:

> Should no alternative employment options be identified with either Spotless or the incoming contractor your employment will be terminated as a result of redundancy on 31 July 2014.

195 In the result, Ms Wright was deployed to work for other customers of Spotless on a short term basis. Then on 22 May 2015 Ms Wright received a letter in similar terms to that which was received by Mr Campilan in June 2015. It too referred to termination as a consequence of ordinary and customary turnover of labour. It was an expression that she had not heard before.

196 The employment of Ms Wright was terminated for reasons of redundancy. Her employment was terminated with effect from 30 June 2015 without any redundancy pay. On 16 February

2017, she was paid $16,228.50 which included an amount for redundancy pay. The amount was paid by Spotless without admitting any liability. If she is entitled to redundancy pay then the correct amount is $9,265.92. It was not submitted that the amount paid did not include the correct amount for redundancy.

197 During the course of her employment, Ms Wright was never told that her employment was linked to a specific contract or was for a fixed period. She was not told that her employment would be terminated if any particular contract was terminated by the client, lost or not renewed.

Mr Ramble

198 Mr Simon (Richard) Ramble was employed in October 2010 as an Outlet Manager to work at Perth International Airport. In his letter of engagement it was stated that he may be required to provide services to any company in the Spotless Group. The employment was for an indefinite term (until terminated). The letter said that the position was located at Perth International Airport but the location may change in accordance with the business needs of Spotless. There was no reference to redundancy pay. The letter provided for termination on notice or without notice in the event of serious misconduct.

199 In October 2011 Mr Ramble was appointed as Airside Retail Manager. He was given a new letter of engagement in similar terms to his earlier letter.

200 On 22 May 2015, Mr Ramble received a letter in similar terms to that which was received by Mr Campilan in June 2015 and Ms Wright on 22 May 2015.

201 During the course of his employment, Mr Ramble was never told that his employment was linked to a specific contract or was for a fixed period. He was not told that his employment would be terminated if his employer lost a client contract or it was not renewed.

202 At a meeting in about early June 2015 attended by a number of staff Mr Ramble was told by Ms Jerome and a Mr Guy that employees would not be receiving a redundancy payment due to a change in the law. They were asked why other employees received redundancies under the previous phase of terminations. Ms Jerome stated that in between that time the law had changed.

203 On 5 December 2017, he was paid $9,620.93 by Spotless without admitting any liability. If he is entitled to redundancy pay then that is the correct amount.

Failure to notify Centrelink

204 It was agreed that on or around 22 May 2015, Spotless gave notices of termination to some 34 employees (in addition to Mr Ramble and Ms Wright). The terminations took effect in June 2015. At the time, each of the employees was full-time, part-time or casual. Spotless did not provide notification to the Chief Executive Officer of the Commonwealth Services Delivery Agency (**Centrelink**) of the decision to terminate their employment.

205 As I have noted, s 530(1) provides that in certain circumstances there should be notification to Centrelink if an employer decides to dismiss 15 or more employees. The section states:

> If an employer decides to dismiss 15 or more employees for reasons of an economic, technological, structural or similar nature, or for reasons including such reasons, the employer must give a written notice about the proposed dismissals to the Chief Executive Officer of the Commonwealth Services Delivery Agency (Centrelink).

206 Section 530(4) provides:

> The employer must not dismiss an employee in accordance with the decision unless the employer has complied with this section.

207 Section 530(5) provides:

> The orders that may be made … in relation to a contravention of subsection (4) of this section:
>
> (a) include an order requiring the employer not to dismiss the employees in accordance with the decision, except as permitted by the order; but
>
> (b) do not include an order granting an injunction.

208 For Spotless it was submitted that there was no evidence that the decision by Spotless to terminate the employment of the employees identified by the Ombudsman was for reasons of an economic, technological, structural or similar nature.

209 The evidence shows that the dismissal of the employees occurred because Spotless chose not to continue to participate in negotiations to secure a renewal of its service contracts for services to be provided at Perth International Airport. It participated in such negotiations on an exclusive basis for a period of time, but then withdrew. It may be readily inferred that it did so because it was of the view that there was insufficient prospect of terms that were commercially acceptable to Spotless being agreed. After that, there was a request for proposal process in which Spotless did not participate.

210 There is no evidence that the decision not to seek renewal of the service contracts was due to broader economic circumstances. Nor is there any evidence that the decision was made as part of a decision to restructure the business of the Spotless Group or as part of a reorganisation undertaken to secure efficiencies in the overall operation of the business. On the evidence the terminations were the consequence of an assessment by Spotless that it could not secure favourable contractual terms with a particular client.

211 Section 530 appears to give effect to Article 14 of the Termination of Employment Convention 1982 (**Convention**) which was included as Schedule 4 to the *Workplace Relations Act 1996* (Cth). Section 170DD of that former legislation was in similar terms to s 530(1). A provision to the same effect was enacted in s 530 when the *Fair Work Act* was introduced.

212 The same form of words is also used in s 531 which provides that the Fair Work Commission may make an order under s 532(1) if it is satisfied that 'an employer has decided to dismiss 15 or more employees for reasons of an economic, technological, structural or similar nature, or for reasons including such reasons' and the employer has not notified the relevant registered employee associations and the employer could reasonably be expected to know that the employee was a member of such an association. Section 531 appears to give effect to Article 13 of the Convention which states in rule 1:

> When the employer contemplates terminations for reasons of an economic, technological, structural or similar nature, the employer shall:
>
> (a) provide the workers' representatives concerned in good time with relevant information including the reasons for the terminations contemplated, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out;
>
> (b) give, in accordance with national law and practice, the workers' representatives concerned, as early as possible, an opportunity for consultation on measures to be taken to avert or to minimise the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment.

213 It is to be expected that the same operative phrase is intended to have the same meaning in both provisions.

214 Similar language was also used in s 643 of the *Workplace Relations Act*. It dealt with the circumstances in which an employee who had been terminated may apply to the Commission for relief in respect of the termination on the ground that the termination was harsh, unjust or unreasonable. A limitation upon the circumstances in which such an application may be

brought was introduced by s 643(8) which provided that such an application must not be made on such grounds where 'the employee's employment was terminated for genuine operational reasons or for reasons that include genuine operational reasons'.

215 The phrase 'genuine operational reasons' was defined in s 643(9) as:

> reasons of an economic, technological, structural or similar nature relating to the employer's undertaking, establishment, service or business, or to part of the employer's undertaking, establishment, service or business.

216 In *Carter v Village Cinemas Australia Pty Ltd* [2007] AIRCFB 35, the Full Bench of the Commission considered the scope of the phrase 'genuine operational reasons'. Village Cinemas closed its Doncaster cinema complex when it received a notice to vacate. The manager of the Complex was advised of the position and informed that his services would be terminated as a result. It was found that the closure of the cinema was at least one of the operational reasons that led to the termination of the employment. It was held that whether the employer could have done something other than terminating the employment will generally be irrelevant in deciding whether the termination was for genuine operational reasons.

217 Thereafter, in many cases the Commission determined that various circumstances that were internal to the business were 'genuine operational reasons': see, for example: *Duncan v Altshul Printers Pty Ltd* [2007] AIRC 286 at [16] and [33]-[34]; *Smith v Macmahon Holdings Pty Ltd* [2007] AIRC 336 at [50]; *Sperac v Global Television Services Pty Ltd* [2007] AIRC 441 at [14]-[16]; *Rawolle v Don Mathieson & Staff Glass Pty Ltd* [2007] AIRC 446 and *Bourke v Corporation of the Diocesan Synod of North Queensland operating St Mark's College as a Charitable Trust* [2007] AIRC 564 at [69] and [75]. In that context, the reference to economic and structural reasons was construed to include matters such as a review of the business leading to a restructure of positions, the realignment of work functions and a desire to secure greater flexibility in employment arrangements. It was not necessary to demonstrate that there was an external factor that was pressing the need for change.

218 However, the context in which the phrase 'reasons of an economic, technological, structural or similar nature' was used was the definition of 'genuine operational reasons' and the words were used to refer to such matters 'relating to the employer's undertaking, establishment, service or business'. Significantly, the same terminology is not used in s 531 and s 532 of the *Fair Work Act*.

219 In *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd* [2012] FWA 3945; (2012) 220 IR 287, it was held by Commissioner Roe that a decision by BHP to close a mine on the basis that it was uneconomic and dismiss more than 15 employees was for 'reasons of an economic, technological, structural or similar nature or for reasons including those reasons': at [50].

220 It is important to construe the phrase, rather than simply adopting dictionary definitions for each of the three words without regard to their immediate context. As a matter of ordinary language the phrase 'reasons of an economic, technological, structural or similar nature' as used in s 531 and s 532 is not apt to include any decision made for commercial reasons to terminate more than 15 employees. When used together, the words 'economic, technological and structural' indicate a response to external forces that may act upon individual businesses that may be the cause of a decision to dismiss employees. A decision not to enter into a particular contract with a particular customer is not of that character.

221 The term 'economic' considered alone may be used to refer to any commercial decision made by a business, but there are two difficulties with giving the term such a broad operation in s 531 and s 532. First, it would embrace the other two terms and make them redundant. Second, as it would embrace any business decision made for commercial reasons (being a description that applies to most if not all business decisions) it would leave no real function to be served by the qualifying words. In effect, there would be an obligation to notify Centrelink whenever 15 or more employees were terminated for the same reason.

222 Where there is an external economic, technological or structural factor that is one of the reasons for a decision to dismiss a considerable number of employees then it is to be expected that there is the prospect that employees may have difficulty finding similar work because other employers who might offer such work may be expected to be facing the same external pressures. In such cases, Centrelink would have an interest in understanding that such events are occurring so that it can ensure that assistance is available for redeployment to other industries and types of employment or for retraining and reskilling. It may be able to target those efforts to a particular group. These are reasons why there may be a requirement for informing Centrelink where there are external factors operating that have caused the dismissal of a considerable number of employees, but not in all cases where there is an internal business decision to reduce the number of employees in a business. On the other hand, it is also possible that the requirement may exist to ensure that Centrelink is aware whenever there is a large

group of employees likely to be seeking assistance at a particular time irrespective of whether the cause is external or internal. However, if that were the reason then you would expect that there would be an unqualified obligation to notify whenever there were are large number of employees to be dismissed by an employer at a particular time, whatever the reason may be.

223 Similar reasons may explain the requirement to notify any relevant registered employee associations. There may be some indication to that effect in the words used in Article 13 of the Convention as to what is to occur once there has been notification which are that there is to be 'consultation on measures to be taken to avert or to minimise the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned'.

224 However, I note also that when it comes to using the Convention as a contextual aid to construction, there must be due regard to the terms of Article 4 which states:

> The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.

225 So, the Convention does not contemplate the termination of an employee for internal reasons unless there is a valid reason connected with the capacity or conduct of the worker or 'operational requirements'. The same terminology is not used in Article 13 indicating that it is dealing with different circumstances to 'operational requirements'.

226 For the Ombudsman it was submitted that in the context of a business 'an economic decision is susceptible to mean both a decision made by reason of cyclical or structural conditions in the economy or frugality, careful use of resources and efficiency in the conduct of a business'. However, for reasons I have given, the difficulty with applying the phrase to both external reasons as well as internal commercial reasons reflecting ordinary business purposes is that the qualifying words would then be relatively meaningless. They would apply to almost any reason that would motivate a commercial enterprise to dismiss a group of employees. Principally for that textual reason, I am inclined to the view that the language of s 530(1) should be construed as referring to external factors operating on a business. Otherwise, the provision would be given an operation that could have been achieved by referring to any commercial reason for the terminations.

227 I note that even if a broader construction was to be adopted such that economic reasons included matters such as the restructure of a business to improve efficiency or save costs, such an interpretation would not extend to the present case. On the evidence, the termination occurred

because Spotless chose not to pursue the opportunity to enter into a contract with a particular customer and was unable to deploy the employees to undertake work under other contracts in accordance with its usual practice.

228 It follows that it has not been shown that there has been a contravention of s 530(1) of the *Fair Work Act* by Spotless.

I certify that the preceding two hundred and twenty-eight (228) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Colvin.

Associate:

Dated: 16 January 2019