Article Information

Author: Ben Motro
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Notice of termination and ordinary and customary turnover of labour

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In March this year, the Federal Court clarified the requirements for valid notice of termination of employment. The Federal Court also highlighted the limited scope of the "ordinary and customary turnover of labour" exception to the requirement to pay redundancy pay under the Fair Work Act.
Ben Motro, Special Counsel, and Emily Setter, Law Clerk, explore the implications of this decision.

Background

In *United Voice v Berkeley Challenge Pty Limited* [2018] FCA 224, the employer, Berkeley Challenge Pty Limited (**Berkeley**), terminated the employment of most of its permanent cleaning and security employees who worked at the Sunshine Coast Plaza Shopping Centre. These employees worked at the shopping centre pursuant to a contract between Berkeley's related entity and Lend Lease. After Berkeley was acquired by the Spotless Group, a different group entity contracted directly with Lend Lease (although Berkeley continued to be the employer of labour provided under this contract).

Berkeley terminated the employees' employment because the Spotless Group was unsuccessful in re-tendering for the cleaning, security and related services contract that it had held between 1994 and 2014. Over the twenty year period, Berkeley had employed all the employees necessary to provide the contract services and the employees who were terminated had been employed by Berkeley for that purpose for between four and twenty-one years.

The two relevant issues to be decided by the Federal Court were:

1. whether Berkeley had provided notice of termination which satisfied section 117 of the *Fair Work Act*; and
2. whether Berkeley's could rely upon the *ordinary and customary turnover of labour* exception to the requirement to pay redundancy pay under section 119 of the Act.

The Notice

United Voice argued that the notice letter which Spotless (on behalf of Berkeley) provided the employees did not meet the requirement under section 117 that (in the Commission's words) "*the employer concerned must give a notice which makes it unambiguously clear to the employee that his/her employment is to be terminated with effect from a certain day in the future*".

The letter provided to the employees was headed "Notice to exit the contract" and stated that the purpose of the letter "is to confirm the outcome of a recent tender review undertaken by Lend Lease…and what this means for you". It also identified termination of employment as a future contingency if "no suitable placement is found" but did not nominate a particular day when the termination of employment would take effect. Importantly, while the letter mentioned the date upon which Spotless had to exit its contract with Lend Lease, this date was not linked to an actual termination of the affected employees' employment.

The Court held that the letter Berkeley asserted constituted written notice of termination, was in reality a notification of Spotless' loss of contract, rather than a notice of termination of employment.That is, the letter did not unambiguously

notify the affected employees that their employment would be terminated but rather expressed termination as something that will occur in the future.

Accordingly, Berkeley was held to have contravened sections 44(1) and 117(1) of the Act by having terminated the employment of its employees without giving a valid notice of termination of employment (or payment in lieu of notice), as required by section 117(1) of the Act.

Ordinary and Customary Turnover of Labour?

In relation to the second issue before the court, Berkeley contended that it was entitled to rely upon the ordinary and customary turnover of labour exception to the requirement to pay redundancy pay under section 119 of the Act.

Berkeley argued that the loss and gain of client contracts and the fluctuation in the number of employees were normal features of the industry in which the Spotless Group was engaged. Berkeley also referred to the practice of recruiting employees to work on specific client contracts and indicated that it was a normal practice for Spotless to terminate the employment of such employees where there were no available opportunities for redeployment.

The employees in question were engaged under ongoing employment contracts which were not expressly dependent upon the contract with Lend Lease continuing. Additionally, those ongoing contracts did not reflect a custom or practice that employees would not be entitled to redundancy pay in the event that the services contract was not renewed.

The Court considered that the 'ordinary and customary turnover exception' is available for an employer where labour turnover is "*… both common, or usual, and a matter of long-continued practice*".

The Court held that Berkeley had failed to discharge its onus in demonstrating that the decision to terminate, with respect to ***Berkeley's*** labour turnover, was common or usual and a matter of long continued practice. That is, Berkeley did not produce evidence which provided "insight as to what the labour turnover frequency and practices were within Berkeley…" nor how it dealt with job redundancies (including labour turnover and frequency). Evidence produced by the Spotless Group generally about how common it was to turnover labour within that Group was found to have been insufficient.

The Court found that the terminations were "uncommon and extraordinary" for Berkeley itself, and not a matter of long-continued practice, in light of the 20 year contractual relationship with Lend Lease, and that the affected employees had between four and 21 years of service. The Court therefore found that each of the employees was entitled to have received redundancy pay.

Implications

This case provides an important reminder of the need for notice of termination to be drafted such that they are unambiguously clear and provide a certain date of termination. Where an employer wants to retain flexibility in respect of the termination date, it risks being found to have not given proper notice of termination.

Additionally, the case highlights the need for employers to provide clear evidence that supports an exception to redundancy pay obligations, concerning its labour turnover and frequency. In particular, where labour is provided by an employer which is part of a group, specific evidence will be required by that employer regarding how its deals with job redundancies, and not simply rely upon evidence regarding the group's practice in general.

Should you have any questions concerning how the decision may affect your business, please contact a member of Piper Alderman's Employment Relations team.