

EMPLOYEES' VOICES HEARD – EMPLOYEES ENTITLED TO REDUNDANCY PAYMENTS FOLLOWING TERMINATION

23 MARCH 2018 | EMPLOYER'S LIABILITY

Employees commenced proceedings against their employer, alleging that a notification of loss of contract does not constitute a valid notice of termination and that they are entitled to redundancy payments. To satisfy the exception to redundancy payments, the Court found that an employer must demonstrate that its labour turnover is “*common, or usual, and a matter of long continued practice.*”

IN ISSUE

- Features of a valid notice of termination.
- Application of the exception to make redundancy payments.

THE BACKGROUND

From 1994 to 2014, Berkeley Challenge Pty Limited (the Respondent), a member of the Spotless Group of Companies (Spotless), provided contract cleaning and security services to Lend Lease Property Management Pty Ltd (Lend Lease) at the Sunshine Coast Plaza Shopping Centre (the Centre). Following an unsuccessful re-tender by Spotless, Lend Lease advised Spotless that it needed to exit the Centre by 30 September 2014.

Spotless, on the Respondent's behalf, provided the Respondent's employees who were affected by the unsuccessful tender process (the Affected Employees) with a “*Notification of Loss of Contract*” (the Notice Letter) which stated that:

- Spotless needed to exit the Centre by 30 September 2014.
- Every effort would be made to ensure the Affected Employees “*continued employment with Spotless*”.
- If the Affected Employees could not be suitably placed in a role, then their employment would be terminated.

On 7 October 2014, Spotless ceased its operations at the Centre and a number of the Affected Employees had their employment terminated. United Voice (the Applicant), on behalf of the Affected Employees, commenced proceedings, claiming that the Respondent failed to provide the Affected Employees with valid notices of termination and redundancy pay.

Issues considered at Trial

The Federal Court of Australia (the Court) considered whether:

- the Notice Letter constituted a valid notice of termination: section 117(1) of the *Fair Work Act 2009* (Cth) (the FW Act).
- the exception to pay redundancy “*where this is due to the ordinary and customary turnover of labour*” applied: section 119(1)(a) of the FW Act.

Such provisions fall within the National Employment Standards.

DECISION AT TRIAL

The Court examined the features of a valid notice of termination pursuant to the FW Act and stated that “*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 Court agreed with the Applicant’s submission that the Notice Letter was simply “*a notification of Spotless’ loss of contact*” at the Centre, as it failed to provide the Affected Employees “*with notice that their employment was being terminated, and...notice of the day of that termination*”.

The Court then carefully considered the meaning and construction of the redundancy pay exception. The Court found that the exception only applies where an employer terminates an employee’s employment and renders their job redundant if “*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.*” The Applicant submitted that the exception did not apply to the Affected Employees because the Respondent had an ongoing contractual relationship to provide services at the Centre for 20 years, with some of the Affected Employees being employed by the Respondent for between four and 21 years. This demonstrated that the terminations and associated redundancies were uncommon and extraordinary for the Respondent and “*not a matter of long-continued practice.*”

The Court found that the Affected Employees were entitled to compensation pursuant to section 545 of the FW Act because the Respondent contravened sections 117 and 119 of the FW Act.

IMPLICATIONS FOR YOU

Before terminating an employee, an employer should always:

- provide the employee with written notice of termination which clearly states that the employee’s employment is being terminated with such termination taking effect on a particular date – this avoids any ambiguity.
- consider whether the employee is entitled to redundancy payments – an employer should not assume that the exception applies.

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

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