

WHAT IS 'ORDINARY AND CUSTOMARY TURNOVER' WHEN IT COMES TO EMPLOYEES?

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Picture this: A cleaning business successfully obtains a contract to provide cleaning services to a large CBD building. At the end of the term of the contract, the property management company advises that it will not be renewing the contract with the cleaning company as a competitor has been successful in the open tender. As a result, some, if not all, of the employees of the cleaning company are likely to lose their jobs. All the employees of the cleaning company were aware that they had been employed for the purposes of the cleaning contract. Sound familiar?

The question that often comes up with these types of scenarios is whether the employer needs to make redundancy payments to the employees. A common gripe of employers is that contracts are clearly expressed to only operate for a specific contract or period yet the employees may still have an expectation of redundancy pay.

At the heart of the answer is the meaning of 'ordinary and customary turnover of labour' (OCTL) and the corresponding exception to the obligation to pay redundancy pay.

The position is now much clearer, particularly for contracting and labour hire companies following a decision of the Full Bench of the Fair Work Commission. The decision overturns a previous decision of the Fair Work Commission that effectively made it more difficult for contracting and labour hire companies to rely on the exception.

WHAT IS OCTL?

Where an employee is dismissed because their job is no longer required, the employee is of course redundant and the Fair Work Act 2009 (Cth) provides that an employee is entitled to redundancy pay unless the dismissal is due to the ordinary and customary turnover of labour.

As helpful as this is, the case law has established that whether or not a dismissal is due to OCTL depends on the circumstances of each case. It requires an assessment of the normal features of the business and the reasonable expectations of each employee about the duration and security of their employment.

If an employee could be said to have had a settled expectation of ongoing employment with their employer, then it is unlikely that the employer can rely on the OCTL exception.

WHAT HAPPENED?

The original decision (*National Union of Workers and another v Compass Group (Australia) Pty Ltd* [2015] FWC 6055) dealt with a dispute brought by the NUW and UFU against Compass Group Pty Ltd in respect of Compass'

decision not to pay redundancy to employees (relying on an OCTL clause in its enterprise agreements) when it decided not to re-tender for a long standing contract it held with the Department of Defence.

The Commission found that in respect of the eight employees in question, none of their dismissals were due to OCTL and that Compass should provide them with redundancy payments.

As a labour hire company with an OCTL clause in its enterprise agreement, Compass subsequently appealed the decision.

On appeal (*Compass Group (Australia) Pty Ltd v National Union of Workers and another* [2015] FWCFB 8040), the Full Bench overturned the original decision.

In concluding that the OCTL exception did apply in the circumstances of the case, the Full Bench found:

1. it was common practice for Compass to dismiss employees following the loss of a contract, particularly Defence contracts
2. the idea of an employee being employed to work on a specific contract implies a link between the contract and the employment and the loss of the contract could give rise to dismissal. In the present case, this was expressly referred to in many of the relevant employment contracts.
3. it was a longstanding practice of Compass to apply the OCTL exception. The Commission considered that as no variations to the terms of Compass' enterprise agreements were sought, Compass' interpretation of the applicability of the OCTL exception was the common intention of the parties to the enterprise agreements.

The decision of the Full Bench should provide some comfort to employers that they can rely on the OCTL exception in certain circumstances.

However, this will really depend on the nature of the business and the employment arrangements in place. If applied correctly, the OCTL exception can work to provide employers requiring staff for short term contracting arrangements the flexibility to manage their business needs.

WHAT CAN BE LEARNED FROM THIS CASE?

Like many aspects of employment law, each situation may be considered differently depending on the facts. However, the good news is that if your business does require employees on short term or specific task contracts, or is a labour hire business, then there are some key points to consider that may assist in determining whether the OCTL exception applies.

These include:

- what is the reason for the redundancy? e.g. loss of contract
- is tendering for contracts (and obtaining and losing contracts), as well as hiring and firing employees depending on those contracts, a feature of the industry?
- how long have the employees been employed?
- have employees have been informed (in employment documents or otherwise) that the employer sources its work by way of contracts and that such contracts are not guaranteed indefinitely?

- is it standard practice for the business to dismiss employees as a result of losing a contract?
- does the employer routinely redeploy employees to alternative contracts either during the life of a contract or after its expiry?
- have the employees been transferred to work on different contracts?
- have the employees been made any promises about the security/longevity of their employment?

Get these aspects right and employers could avoid making the mistake of applying the exception inappropriately. Get it wrong and face serious consequences, such as:

- disputes arising under the terms of an applicable industrial instrument
- claims for payment of redundancy entitlements through the Fair Work Ombudsman or the Courts
- claims for breach of relevant industrial instruments or the National Employment Standards, with potential penalties of up to AUD54,000 per breach.

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