DECISION

Fair Work Act 2009
s.604 - Appeal of decisions

Compass Group (Australia) Pty Ltd
v
National Union of Workers; United Firefighters' Union of Australia
(C2015/6206)

VICE PRESIDENT WATSON
DEPUTY PRESIDENT KOVACIC
COMMISSIONER WILSON

PERTH, 1 DECEMBER 2015

Appeal against decision [[2015] FWC 6055] of Commissioner Roe at Melbourne on 3 September 2015 in matter numbers C2014/6798 and C2014/6819 – Permission to appeal – Interpretation of Enterprise Agreements – meaning of standard TCR case redundancy provisions - Whether terminations due to ordinary and customary turnover of labour – Fair Work Act 2009, ss.739 and 604.

Introduction

[1] This decision concerns an application by Compass Group (Australia) Pty Ltd (Compass) for permission to appeal and an appeal against the decision of Commissioner Roe handed down on 3 September 2015. The decision of the Commissioner arose from a dispute over the application of the redundancy provisions of the *Compass Group (ESS RMV Fire and Rescue) Enterprise Agreement 2013* and the *Compass Group (ESS Riverina Murray Valley) Enterprise Agreement 2011* (the Agreements).

[2] The issue determined by the Commissioner concerned redundancy entitlements for employees terminated by the Compass Group in October and December 2014. Relying on an exception to the obligation to make redundancy payments in the Agreements, Compass did not make redundancy payments. The National Union of Workers (NUW) and the United Firefighters' Union of Australia (UFUA) challenged that decision under the Dispute Settlement Clause of the Agreements. The Commissioner determined that the redundancy payments were payable.

[3] In the hearing of the appeal in this matter Mr I Neil SC and Mr P Wheelahan of counsel appeared with Mr B Popple on behalf of Compass. Mr E White of counsel appeared on behalf of the unions, with Mr J Murphy of the UFUA and Mr A Snowball of the NUW.

Background

[4] It was accepted by the parties in the proceedings before the Commissioner that:

- The Compass Group held contracts with the Department of Defence for the provision of Garrison Support Services in the Riverina Murray Valley region (RMV) for many years.

- Compass Group successfully tendered for a replacement contract for the same or similar work in respect to catering and hospitality work.

- Compass Group did not tender for a replacement contract for the same or similar work in respect to fire rescue services and stores and transport services.

- The Department of Defence made a number of changes to the specifications in the 2014 tender process including changes to the geographic coverage of some of the work.

- Compass held contracts for the stores and transport services from April 2005 until 31 October 2014 and contracts for the fire and rescue services from May 2006 until 31 December 2014.

- The contracts were renewed or extended on a number of occasions during that period.

- The dispute settlement clauses of the Agreements enabled the Commissioner to determine the dispute by arbitration.

- The relevant clauses were materially the same in each of the Agreements.

- The redundancy clauses in the Agreements state that redundancy pay is provided for in the NES.

- Both redundancy clauses contain a definition of redundancy largely indistinguishable from that in the NES.

- Both redundancy clauses include an exemption from redundancy pay where redundancy is due to the ordinary and customary turnover of labour.

- The relevant employees were made redundant in 2014.

- The issue in dispute was whether the redundancies arose from the ordinary and customary turnover of labour.

[5] Taking the clause of the Fire and Rescue Agreement as an example, the relevant clause under consideration is as follows:

> "**3.4.1 Definition**
>
> Redundancy pay is provided for in the NES. An Employee is entitled to be paid redundancy pay if the Employee's employment is terminated at the Employer's initiative because the Employer no longer requires the job done by the Employee to be

done by anyone, except where this is due to the ordinary and customary turnover of labour."

[6] This clause is in similar terms to the standard redundancy provision that arose from the Termination, Change and Redundancy Test Case in 1982 and has been adopted in awards, legislation and enterprise agreements since that time. It is accepted that the meaning of the clause is to be derived from the meaning intended by the Full Bench in the TCR case as the adoption of standard wording in the Agreement indicates that the mutual intention of the parties is that the clause should be interpreted in such a manner. It is also relevant to observe that Compass does not generally make redundancy payments when employees are terminated after loss of contracts and this position has been upheld by the Fair Work Ombudsman. Compass relies on the exception in the clauses for this position and has continued to have it inserted into enterprise agreements over a number of years.

[7] It is not in dispute that the employment of the employees has been terminated because the employer no longer requires the job done by the employees to be done by anyone. The issue between the parties is whether the exception in the clause applies – specifically, whether the termination of employment "is due to the ordinary and customary turnover of labour". We will refer to this phrase as "the Exception" in the course of this decision.

The Decision under Appeal

[8] In his decision the Commissioner analysed the TCR decisions and various decisions before and after those decisions to extract a test to be applied to the circumstances of this case. The test he extracted from the cases was expressed as follows:

> **"[33]** To determine if a redundancy is for reason of "ordinary and customary turnover of labour" it will be relevant to consider:
>
> - Was the "employee dismissed for reasons relating to his/her performance, or where termination is due to a normal feature of a business?"
> - Had a reasonable or settled expectation of continuing employment been established? The length of employment and the nature of the contracts and the history will be relevant.
> - Is there intermittency in employment because of the nature of the business? Is this reflected in the casual, seasonal, or fixed term or fixed task nature of the employment arrangement?
> - What is the reason for the loss of business? The history of the employer's contracts and the reasons for them ending will be relevant. Was the end of the contract the occasion for rather than the cause of the dismissal? Does employment generally end at the conclusion of the particular task or contract?"

[9] The Commissioner then considered each of these issues and concluded as follows:

> "**Conclusion and Determination**
>
> **[79]** I have found that:
>
> - The general nature of the Compass business and its practice of redeploying close to half of its in-unit employees at the end of a contract does not support a

conclusion that the terminations were a normal feature of the business and due to the ordinary and customary turnover of labour.

- The fact that the employment of the particular employees selected extended for more than six years in each case and continued through more than one extension of the Defence RMV contract is an indicator that the termination of these particular employees was not due to the ordinary and customary turnover of labour. Of course this does not apply to employees with shorter periods of service.

- The failure to bid for a further stores and transport contract was primarily but not exclusively a commercial decision. The ending of the contract was the occasion for the dismissal of the employees not the reason for the dismissal. This is an indicator that the stores and transport employees were not dismissed due to the ordinary and customary turnover of labour.

- The failure to bid for a further fire services contract was not primarily a commercial decision but due to the decision of the Department of Defence to change its requirements. If the duration of the employees' employment is clearly tied to the duration of the particular defence contract, this is an indicator that the terminations were due to a normal feature of the business.

- The employment contracts and advice given to these particular employees did not clearly tie the duration of the employment to the duration of a particular defence contract. I am not satisfied that employees were aware or should have been aware that their employment would be automatically or naturally terminated at the end of a particular defence contract. There were some AWAs or ITEAs and there were a small minority of employment contracts which did use clear language that the duration of the employment would end when the particular named contract ended. However, the employees who signed these documents also signed other documents during the period of their employment which did not include such a clear specification. I am not satisfied that these employees were aware or should have been aware that their employment would be automatically or naturally terminated at the end of a particular defence contract.

- The employees selected in this case knew that the contract with Defence was the reason they were engaged. They believed that if they performed well it was likely that the Defence contract would be retained. This was reinforced by their experience of continuing employment and extensions of the Defence contract. They were apprehensive when the time for new contract tenders approached. However, this is no different to the situation of an employee in a food manufacturing company where the product space in Coles and Woolworths is under review. I am not satisfied that the employment of these employees was intermittent or limited to the fixed term of a particular contract.

- The employees selected in this case had a reasonably settled expectation of continuing employment.

> **[80]** Taking all these matters into consideration I am satisfied that the particular employees selected were not terminated due to the ordinary and customary turnover of labour. The resolution of the dispute as it relates to these particular employees is that finding and a determination that they should be paid redundancy or severance payments based upon their years of service as per the NES scale."

The Nature of the Appeal

[10] The resolution of the dispute required the Commissioner to interpret and apply the terms of the Agreement. The relevant clause required an assessment of general circumstances, and the formation of an overall judgment as to whether the terminations were due to the ordinary and customary turnover of labour. In that sense the decision should be viewed as a discretionary decision within the terms described by the High Court in *Coal and Allied v AIRC*.[1] In that case Gleeson CJ, Gaudron and Hayne JJ said[2]:

> ""Discretion" is a notion that "signifies a number of different legal concepts". In general terms, it refers to a decision-making process in which "no one [consideration] and no combination of [considerations] is necessarily determinative of the result." Rather, the decision-maker is allowed some latitude as to the choice of the decision to be made. The latitude may be considerable as, for example, where the relevant considerations are confined only by the subject-matter and object of the legislation which confers the discretion. On the other hand, it may be quite narrow where, for example, the decision-maker is required to make a particular decision if he or she forms a particular opinion or value judgment." (references omitted)

[11] Discretionary decisions are subject to review on the grounds expressed by the High Court in *House v The King*[3]:

> "The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred."

[12] If the decision is not properly considered a discretionary decision we are required to determine whether the decision is correct.

Grounds of Appeal

[13] The Grounds of Appeal allege a number of errors in the decision of the Commissioner. The approach of the Commissioner, as well as the resultant application of the test, is alleged to be in error. In its written outline of submissions Compass alleges that:

> "**[10]** The Commissioner misdirected himself in law as to the proper construction and application of the Exception.
>
> **[11]** The Commissioner should have accepted and applied the following principles from the TCR Decisions:
>
> (a) It was not intended that the redundancy provisions should apply to terminations of employment due to the 'ordinary and customary turnover of labour'.
>
> (b) The Exception applies where, as the Commissioner should have found in this case, the termination is due to a normal feature of the employer's business.
>
> (c) The Exception also applies where, as in this case, there is 'loss of contracts or changes in contracts not relating to recession'.
>
> [**12]** The Commissioner should have made the following findings of fact on the unchallenged and uncontradicted evidence:
>
> (a) Over the last 12 months 54% of Compass' employees were dismissed at the conclusion of the contract on which they were working.
>
> (b) In relation to contracts in the defence sector over the years 1999 to the date of the hearing, 67% of Compass' employees were dismissed at the conclusion of their contracts.
>
> (c) Compass' standard practice was to dismiss employees at the conclusion of the contracts on which they were working ***(Standard Practice).***
>
> (d) Redeployment to another contract, when it occurred, was an exception to the standard practice.
>
> (e) The employees the subject of the dispute ***(Employees)*** were employed to perform work with respect to Compass' contract with the Department of Defence to provide garrison support services in the Riverina Murray Valley Region ***(RMV Contract).***
>
> (f) All services under the RMV Contract (other than fire-fighting services) terminated on 31 October 2014, with fire-fighting services ceasing on 31 December 2014. Due to the loss of the RMV Contract, and in accordance with Compass' Standard Practice, the Employees' employment was terminated.
>
> (g) The loss of the RMV Contract was not due to recession.

> **[13]** Upon a correct application of the principles to these findings, and having regard to the unchallenged and un-contradicted evidence, the Commissioner should have found that:
>
> > (a) More often than not, Compass' employees were dismissed at the conclusion of the contract on which they were working.
> >
> > (b) Having regard to (a), dismissals in that circumstance where a normal feature of Compass' business.
> >
> > (b) Dismissal in accordance with the Standard Practice was due to the ordinary and customary turnover of labour within the meaning of the Exception.
> >
> > (c) There was a loss or change to the relevant RMV Contract that was not related to a recession.
>
> **[14]** Accordingly, it should have been determined that the termination of employment of the Employees was due to the ordinary and customary turnover of labour within the meaning of the Exception." (footnotes omitted)

[14] The unions respondent to the appeal contend that the decision involves an unexceptional application of unexceptional principles, there is no error in the Commissioner's analysis and the key findings of the Commissioner are correct.

Permission to Appeal

[15] As the decision concerns a disputed interpretation of the interpretation of the standard redundancy provisions in the TCR test case, these provisions are in widespread operation in agreements and legislation and it does not appear that the relevant provisions have been subject to Full Bench consideration since the time of their adoption, we consider that it is in the public interest that we grant permission to appeal. Full Bench considerations of the Exception have not gone to its meaning, but instead have related to its application, for example whether, as a matter of construction, it applies to a particular enterprise agreement, per *Construction, Forestry, Mining and Energy Union and others v Spotless Facility Services Pty Ltd*[4]; or whether the facts of a particular dismissal sit within the Exception, per *Tempo Services Ltd v Klooger*[5].

The Origins and Meaning of the Exception

[16] The TCR case was a test case for award provisions dealing with various aspects of terminations of employment including redundancy pay. The Full Bench issued two decisions in 1984 determining various issues of principle and the terms of standard award clauses. In the first decision the Full Bench said that in determining the circumstances in which severance pay should be granted it should pay regard to the most recent decisions of the Commission and other industrial tribunals[6]. The Bench said that it had paid particular regard to a number of specified decisions including the decision of Justice Fisher of the NSW Industrial Commission in a case concerning the NSW Employment Protection Act[7]. The Full Bench then said[8]:

> "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."

[17] In the second decision the Full Bench said:[9]

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

[18] The Exception adopted by the Full Bench arose directly from the decision of Justice Fisher and used the same terminology as he first proposed. The relevant passage from his decision was as follows[10]:

> "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."

[19] In this case the Commissioner said the following in relation to this history:

"**[20]** A proper reading of the TCR decisions does not suggest that the Full Bench adopted the analysis of Justice Fisher quoted above. Quite the contrary the Full Bench specifically did not restrict severance or redundancy pay to cases of collective dismissal due to adverse economic circumstances, technological change or major company restructuring. For this reason there is no clear link between the expression "ordinary and customary turnover of labour" as adopted by the TCR decision and terminations due to "seasonal shifts in markets, loss of contracts or changes in contracts not relating to recession, changes in model or product, shifts in marketing emphasis and many other day to day causes removed from the present recession and its mounting toll of unemployment." The concept of "intermittency in employment" or "following the job" is however, directly relevant to the concept of "ordinary and customary turnover of labour."

[21] I am satisfied that the Full Bench adopted the expression "ordinary and customary turnover of labour" to encapsulate situations where an "employee is dismissed for reasons relating to his/her performance, or where termination is due to a normal feature of a business." A normal feature of a business is a reference to

> businesses where there is intermittency in employment because of the nature of the business. These are businesses where employment, or part of it, is seasonal, casual, or linked to the duration of a particular contract or task. These are situations where the employee has no reasonable or settled expectation of continuous or continuing employment. This will often be reflected in the casual, seasonal, or fixed term or fixed task nature of the employment arrangement.
>
> **[22]** I am satisfied that the Full Bench did not generally exclude those employed by contracting firms from coverage under redundancy provisions by the "ordinary and customary turnover of labour" exemption. The Australian economy has changed and contracting firms have greatly expanded in the decades since the TCR decisions. There is no basis for concluding that the Full Bench intended to encourage a particular employment model by providing contracting firms with the competitive advantage of lower labour costs by excluding them from redundancy provisions."

[20] We are respectfully unable to agree with the Commissioner on this issue. The TCR Full Bench expressly stated that it did not intend for redundancy provisions to apply to the "ordinary and customary turnover of labour." In doing so, the TCR Full Bench drew on the decision of Justice Fisher and the concept he developed of excluding terminations arising from the ordinary and customary turnover of labour. There is no basis in these decisions for excluding dismissals arising from loss of contracts from the concept where this is a normal feature of the business.

[21] The Full Bench was providing for a new general right of redundancy pay. It was seeking to reflect approaches to redundancy pay arising from previous decisions. Redundancies that arise because of economic circumstances, technological change or company restructure involve a common element of unexpected termination. Termination of employment where an employee has been engaged for a job or contract is in a different category. The TCR Full Bench expressly stated this. It adopted the wording of an Exception developed from previous cases. In the first decision it referred to the decision of Justice Fisher and mentioned employees engaged for contracts. In the second decision it again referred to the decision of Justice Fisher and drew on his formulation of the Exception. Justice Fisher expressly refers to loss of contracts as encompassed within the concept ordinary and customary turnover of labour.

[22] Gummow, Hayne and Heydon JJ of the High Court, in the matter of *Amcor Limited v Construction, Forestry, Mining and Energy Union & ors* (Amcor) noted the means by which the TCR Full Bench developed the standard term, contained in the form of order published at the time of its supplementary decision:

> "The Commission said, in its supplementary decision, that it had "some difficulty in finding a suitable expression" to make its intention clear about what constituted "redundancy". In its earlier decision, it had referred to a number of definitions of redundancy. Chief among those was the decision by Bray CJ in *R v Industrial Commission (SA); Ex parte Adelaide Milk Supply Co-operative Ltd* which was understood as emphasising that redundancy refers "to a job becoming redundant and not to a worker becoming redundant".
>
> 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."[11] (references omitted)

[23] In the same matter, Kirby J reinforced the presence of an Exception for reason of the "ordinary and customary turnover of labour", finding that its formulation originated from the earlier reasoning of the Industrial Commission of NSW. He also highlighted the importance of an analysis of all the particular circumstances of a matter, including what is intended in any applicable agreement:

> "I acknowledge that the language of cl 55.1.1 of the Agreement is in some respects different from the model or template provision originally proposed by the industrial tribunal for cases of redundancy. To that extent, it might suggest that the parties to the Agreement decided to strike out on their own and that they should be held to their Agreement according to its terms. On the other hand, that Agreement had to operate in the environment of the Act with its specific provisions for redundancy. This suggests that the parties would not have intended a meaning of "redundancy" different from the meaning of the notion in the Act under which the Agreement had been certified. The former federal industrial tribunal, in its principal decisions on redundancy, made it clear that: "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.""[12] (references omitted)

[24] The importance of the questions to be asked at the time it is determined that employment has come to an end is not to be underestimated, with the product of such inquiry demanding that each case will depend on its own circumstances. For example, the Full Bench, in the matter of *Construction, Forestry, Mining and Energy Union and others v Spotless Facility Services Pty Ltd* noted that the inquiry in *Amcor* turned on the contextual consideration of a transmission of business, which in turn led to a finding that the disputed positions were not redundant.[13]

[25] We have considered a number of single member decisions regarding the Exception.[14] In our view these decisions do not suggest that the approach outlined above is incorrect.

[26] We also note the reasoning of the Industrial Court of NSW in the matter of *Transport Workers' Union (NSW) v Veolia Environmental Service (Australia) Pty Ltd*,[15] which gave practical application to the circumstantial inquiry we have referred to. In that matter, being a civil penalty action under the *Fair Work Act 2009* Haylen J:

- Followed earlier reasoning of the NSW Court and Commission that establishing whether a termination did not take place in the ordinary and customary turnover of labour is a question of fact, which requires regard to be had to "the normal features of the business wherein the employee worked", as well as whether it was customary to dismiss employees regardless of their service history upon the loss of contracts;[16]

- Considered that other decided cases on the question of "ordinary and customary turnover of labour" have examined whether there is a known or understood lack of continuity of work;[17] and

- Distinguished the circumstances of the employee who was the subject of the case from the proposition put forward by his former employer that, with the end of its contract, his employment would end as well. Instead, the employee had performed work at other contract sites as well as the one for which the contract had been lost; and it was not customary for employees to be dismissed upon the loss of a contract. He was not a seasonal or casual employee and his rate of pay was not loaded for those factors, or the intermittency of his employment. In all, he had "a settled expectation of continuing employment and that expectation increased with the length of his employment and his engagement on other contract work held by the respondent".[18]

[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.

[28] The erroneous construction adopted by the Commissioner affected the general approach summarised in paragraph [33] of his decision quoted above. For this reason we are of the view that the Commissioner acted on an incorrect principle and his discretion miscarried at that point. It is appropriate that we allow the appeal on that ground because much of the ensuing analysis proceeds on an incorrect footing and has regard to irrelevant considerations.

[29] We have decided that the question of whether the terminations fell within the Exception should be re-determined by this Full Bench.

Were the Terminations due to the Ordinary and Customary Turnover of Labour?

[30] Compass submits that the following findings of fact should be made based on unchallenged and uncontradicted evidence led before the Commissioner:

"(a) Over the last 12 months 54% of Compass' employees were dismissed at the conclusion of the contract on which they were working.[19]

(b) In relation to contracts in the defence sector over the years 1999 to the date of the hearing, 67% of Compass' employees were dismissed at the conclusion of their contracts.[20]

(c) Compass' standard practice was to dismiss employees at the conclusion of the contracts on which they were working ***(Standard Practice).***[21]

(d) Redeployment to another contract, when it occurred, was an exception to the standard practice.

(e) The employees the subject of the dispute ***(Employees)*** were employed to perform work with respect to Compass' contract with the Department of Defence to provide garrison support services in the Riverina Murray Valley Region ***(RMV Contract).***[22]

(f) All services under the RMV Contract (other than fire-fighting services) terminated on 31 October 2014, with fire-fighting services ceasing on 31 December 2014. Due to the loss of the RMV Contract, and in accordance with Compass' Standard Practice, the Employees' employment was terminated.[23]

(g) The loss of the RMV Contract was not due to recession.[24]"

[31] The unions do not take issue with these findings and submit that they are consistent with the decision of the Commissioner. They further contend that whilst employees may have been employed to perform work with respect to the Compass Contract with the Department of Defence, their employment obligations pursuant to the contract signed by them provided for broader employment.

[32] Ms Catherine Holmes, the National Workplace Relations Manager of Compass gave the following evidence:

"8 In Australia, Compass Group operates at over 500 client sites. This number changes regularly as client contracts come to an end and new client contracts are won, negotiated and mobilised.

9 Compass Group is a contracting business. Our primary function is to provide services to clients pursuant to a contract. Overwhelmingly, the income of Compass Group is derived from client contracts and Compass Group predominantly employs people to service specific contracts. The market in which we operate is very competitive. There are numerous companies servicing the market including other large international and Australian companies, for example, Sodexo, Transfield, ISS and Spotless. Competition for new client contracts is intense. Understandably, our clients seek to capitalise on this competitive tension and regularly conduct competitive tender processes to get the best possible service at the best available price.

…

14 Compass Group is constantly in a process of tendering or bidding for new contracts, mobilising new sites as new contracts are won and demobilising sites/contracts following the loss of a client contract after a competitive tender process (**black loss**) or natural conclusion of a client contract eg due to the end of a construction project (**white loss**). In some circumstances, contracts are lost prior to their expiry date due to site closures, or the client decides to no longer outsource the services.

15 Currently, across all "brands" Compass Group has approximately 376 client contracts. Generally, the average length of a contract is approximately 3 to 3 ½ years and Compass Group operates on the assumption that approximately one third of contracts will expire in any given year. Compass Group was successful in securing 51 new contracts in 2014, compared with 77 in 2013 and 47 in 2012. The number of contracts that were lost by Compass Group or that expired was 88 in 2014, 98 in 2013 and 41 in 2012.

…

19 It is an inherent feature of our business model that contracts with clients regularly come to an end. Clients are often required to conduct a new competitive tender for the service performed rather than just roll over a contract and Compass Group is not always successful. In other cases, 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. Inevitably, this means that the employment of our employees is terminated at some point. We pride ourselves on the efforts we make to redeploy our employees to other client contracts. Where this is possible, it builds trust and loyalty, retains key skills and knowledge within Compass Group and provides career opportunity. Unfortunately, however, the nature of our business means that often this is not possible.

20 Where employees cannot be successfully redeployed to another client contract held by Compass Group, their employment is terminated. Hundreds of employees end their employment with Compass Group each year due to this reason. Compass Group does not make redundancy payments in these circumstances. It has been Compass Group's consistent position throughout my employment that termination of employment due to the end of a client contract is part of the ordinary and customary turnover of labour within our business. That position is overwhelmingly accepted by our employees who understand that they are employed to service a particular client contract for as long as that contract is held. It is rare, in the 7 years I have been employed, for employees to make claims for redundancy pay and when they do employees are usually satisfied when we point out the ordinary and customary turnover of labour exception in the National Employment Standards and the provisions of their employment contracts. As I explain at paragraphs 43 to 48, the Fair Work Ombudsman (**FWO**) has previously agreed with this position and confirmed that terminations of employment in such circumstances are due to the usual and customary turnover of labour and redundancy payments are not payable. We ensure this very common exception is included in our enterprise agreements.

21 At the time of making this statement, across all of its brands in Australia, Compass Group currently employs over 11,600 employees. The number of Compass

Group employees constantly fluctuates depending on the number and types of contracts Compass Group has in place.

…

27 If Compass Group is awarded the contract, there are often very short mobilisation timeframes which typically require that recruitment advertising commences immediately, both internally to existing Compass Group employees and within the external labour market. External applicants are recruited and, where necessary, site visits occur to interview the employees of the incumbent contractor (if there is one) and put them through the same recruitment processes as external candidates, such as medicals, inductions and other site entry requirements.

28 New contract management appointments are made and employment contracts are offered to employees based on the wages and conditions in the bid model. Where employees of an incumbent contractor are hired they are engaged by Compass Group on new terms and conditions and we do not recognise their service with the former contractor. Any entitlements are paid to them by the previous contractor, being their then-current employer. This is because Compass Group does not 'take over' contracts from the former contractor and there is no 'transfer of business'. Compass Group will only recognise prior service when we win a new contract to provide services which were previously provided by the client in-house. In this situation there is a 'transfer of business' and Compass Group agrees contractually to recognise the service of our new client's employees who subsequently take up employment with us. Leave entitlements are not paid out and instead transfer to Compass Group.

29 When the contract is mobilised, rosters are prepared and filled and finally the service delivery commences to the client on the contract commencement date.

30 Where a contract with a client ends, Compass Group gives each in-unit employee servicing the contract with a termination letter providing written notice (or payment in lieu) of the end of the employment due to the end of a client contract if they cannot be successfully redeployed to a role within another contract. We provide employees with as much notice as possible and do our best to locate redeployment opportunities. Compass Group has consistently maintained that it has no legal obligation to make redundancy payments to employees whose employment is terminated at the conclusion of a customer contact, as the 'ordinary and customary turnover of labour' exception applies. As I have stated earlier, this position is very rarely challenged and has been accepted by the FWO.

31 Following the issuing of termination letters, Compass Group then attempts to:

(a) facilitate redeployment to a different contract within Compass Group; or

(b) assist employees to obtain employment with any new service provider that holds a new contract for the same or similar services previously contracted to Compass Group.

We do this firstly in an effort to retain trained and experienced employees to service other Compass Group contracts, and also to avoid unfair dismissal claims (there is no

genuine redundancy if it would have been reasonable to redeploy someone elsewhere within Compass Group).

32 We cannot provide any guarantees that we can offer displaced employees further employment within Compass Group, as our redeployment efforts depend on the availability of other roles to service other client contracts, for which the employee may or may not be qualified and that are in the same geographical region or that the employee is willing to relocate at their own expense to perform. Sometimes our clients have site-specific requirements which must be met (such as medicals), which may also frustrate our redeployment efforts.

33 Where Compass Group is able to offer an employee work on another client contract, our consistent practice is to issue a new contract of employment to the employee. The contract may be on completely different terms and conditions, and the employee is free to accept or reject the offer. No one is merely informed of their new site and directed to attend work there under their existing contract of employment. That is not consistent with our business model. Again, this position is simply never challenged by our employees. In my experience of seeing this occur on a great many occasions, our employees understand that their employment with us is inextricably connected to a particular client contract.

34 Since the move to a sector-specific employment model, redeployment sometimes involves a change in the employing entity for the employee. Service with all companies within Compass Group is recognised and leave entitlements are carried over. An advantage of operating a sizable national business is that we are able to give preference to our internal employees and are not always required to undertake external recruitment for a new contract. This certainly assists us to secure new client contracts as the client is comfortable that our mobilisation risks are well managed. Some employees indicate that they are not interested in being presented with redeployment opportunities and end their employment at the end of the client contract.

35 I know, in my role as National Workplace Relations Manager, that all employees who accept an offer of employment elsewhere within Compass Group receive new employment contracts. Even if employees are taking on a new role for the same client contract, a new offer of employment is made on fresh terms and conditions.

36 Over the last 12 months within Compass Group, 46% of permanent employees who were working on a client contract which ended were successful in being redeployed within Compass Group to work on different client contracts. On the other hand, 54% had their employment terminated at the end of the contract. Some of the employees who are not redeployed within Compass Group may take up work with the new contractor (if there is one), but this is not always the case. In relation to contracts that Compass Group has held in the defence sector over the years (1999 to date), only 33% of employees have been able to be redeployed elsewhere within Compass Group at the conclusion of the contract. As such, Compass Group's standard practice is to dismiss employees at the conclusion of contracts, even long-term defence contracts.

37 The only situation in which Compass Group routinely makes redundancy payments to its employees is where the employees' loss of employment is directly

> caused by Compass Group rather than the client. This might occur, for example, if Compass Group decides to restructure or exit a contract for financial reasons or to introduce a new food or other technology which results in fewer employees being required (as opposed to when a contract terminates, 'downmans' or is varied in scope at the initiative of the client, or concludes in accordance with its terms)."

[33] Based on the material before us, we are of the view 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. Although the contracts are worded differently, they often contain a clause similar to the following:

> "Term of Employment:
>
> As the Company is a contractor, your employment is subject to operational demands, requirements of the client and tenure of the contract which the Company has with its clients. Continuous employment, salary, working hours and/or conditions cannot be guaranteed during quiet periods in the business, eg semester breaks, sporting calendars and/or if village numbers fluctuate (less or more).
>
> As a result of changes in operational demands, requirements of the client and tenure of the contract, you may be given the opportunity or required to transfer to another location. If this occurs, your salary, terms and conditions maybe varied. These changes will be discussed with you and confirmed in writing. Please be aware that if the alternate position offered is not accepted by you then the Company may be unable to continue to employ you further in which case your employment will be terminated by the Company giving notice in accordance with the provisions of this contract.
>
> This offer of employment is made on the basis that you may be required to work at different sites, depending on the Company and the Client's needs."

[34] Compass had a long standing practice not to make redundancy payments at the conclusion of contracts pursuant to the Exception. If this position was sought to be altered, one would have thought that a variation to the terms of the standard redundancy clauses in Compass enterprise agreements would have been made. No such variations were made. This suggests that the mutual intention of the parties to the agreements was to apply Compass' interpretation of the standard redundancy pay wording.

[35] In all of the circumstances, it is in our view appropriate to make the findings contended for by Compass. More specifically, we have concluded that the terminations of employment arose from the loss of the Department of Defence contracts and in the context of Compass' business, this was due to the ordinary and customary turnover of labour.

Conclusions

[36] For the above reasons we grant permission to appeal, allow the appeal and quash the decision of Commissioner Roe.

[37] We determine the dispute under the Dispute Settlement clauses of the Agreements by concluding that the terminations fell within the Exception to the entitlement to Redundancy Pay in the Agreements and no entitlement to redundancy pay arose.

VICE PRESIDENT

Appearances:

Mr I Neil, SC and *Mr P Wheelahan* of counsel with *Mr B Popple* on behalf of Compass.

Mr E White of counsel on behalf of the NUW and the UFUA, with *Mr J Murphy* of the UFUA and *Mr A Snowball* of the NUW.

Hearing details:

2015.
Melbourne.
11 November.

Final written submissions:

Compass on 19 October 2015.
The NUW and the UFUA on 4 November 2015.

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[1] *Coal and Allied v AIRC* [2000] HCA 47; 203 CLR 194; 74 ALJR 1348; 99 IR 309; 174 ALR 585 (31 August 2000).

[2] *Coal and Allied v AIRC* [2000] HCA 47; 203 CLR 194; 74 ALJR 1348; 99 IR 309; 174 ALR 585 (31 August 2000) at [19].

[3] *House v The King* (1936) 55 CLR 499 at [504]-[505] per Dixon, Evatt and McTiernan JJ.

[4] [2015] FWCFB 1162.

[5] (2004) 136 IR 358.

[6] (1984) 8 IR 34.

[7] (1983) 7 IR 273.

[8] (1984) 8 IR 34.

[9] (1984) 9 IR 115.

[10] (1983) 7 IR 273.

[11] [2005] HCA 10; (2005) 222 CLR 241, p.256, per Gummow, Hayne and Heydon JJ.

[12] Ibid, p.275, per Kirby J.

[13] [2015] FWCFB 1162.

[14] *KMC Constructors Pty Ltd v The Amalgamated Metal Workers' Union and another* Dec 156/87 M Print G6958 [1987] AIRC 92 (1 April 1987); *Tempo Services Ltd v TM Klooger and Ors* (2004) 136 IR 358; *Australian Liquor, Hospitality and Miscellaneous Workers' Union re Nationwide/AWU and LHMU Australian Defence Forces Services Consent Award 1992* PR904940; *Kilsby v MSS Security Pty Ltd T/A MSS Security* [2014] FWC 7475; *Garcia and Ors v Limro Pty Ltd* PR933625.

[15] [2013] NSWIRComm 22.

[16] Ibid, at [68], with reference to *Fashion Fair Pty Ltd v The Department of Industrial Relations (Inspector Rouse)* (1999) 92 IR 271.

[17] Ibid, at [74].

[18] Ibid, at [83].

[19] Statement of Ms Catherine Holmes at AB761 at [36].

[20] Statement of Ms Holmes at AB761 at [36].

[21] Statement of Mr John Farthing at AB709 at [92]; statement of Ms Holmes at AB761 at [36].

[22] See the statement of Mr Farthing at AB677 at [11]–[16].

[23] Statement of Mr Farthing at AB684 at paragraphs [16] and [92].

[24] Statement of Mr Farthing at AB687 at paragraphs [25] and [35].