Federal Court of Australia

United Workers Union v Compass Group Healthcare Hospitality Services Pty Ltd [2023] FCAFC 92

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| Appeal from: |  |
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| File number: |  |
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| Judgment of: | **RARES, O'SULLIVAN AND FEUTRILL JJ** |
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| Date of judgment: | 16 June 2023 |
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| Catchwords: | **INDUSTRIAL LAW** – entitlement to redundancy pay under s 119(1)(a) of *Fair Work Act 2009* (Cth) – where employer provided employees to work at employer’s clients’ sites under contracts to provide labour services to client for renewable term – where employment contracts referred to employer’s contract with client without mentioning duration – where many employees worked at sites continuously through renewals of employer’s client contracts – where employer terminated employees because client terminated employer’s contract – whether employees’ terminations “due to the ordinary and customary turnover of labour” within meaning of s 119(1)(a) – whether reasonable person in position of employer and employees would have understood or expected jobs were of permanent or ongoing nature – whether employees entitled to redundancy pay under s 119(1)(a) – Held: appeal allowed |
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| Legislation: | *Fair Work Act 2009* (Cth) ss 12, 44(1), 119, 121(1)(a), (2), 123(1), (2), 389, 546(1), 565(1)  *Fair Work Regulations 2009* (Cth) reg 1.05 |
|  |  |
| Cases cited: | *Amcor Ltd v Construction, Forestry, Mining and Energy Union* (2005) 222 CLR 241  *Berkeley Challenge Pty Ltd v United Voice* (2020) 279 FCR 249  *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Delta FM Australia Pty Ltd* (2021) 308 IR 94  *Concut Pty Ltd v Worrell* (2000) 176 ALR 693  *Fair Work Ombudsman v Spotless Services Australia Ltd* [2019] FCA 9  *Federal Commissioner of Taxation v Sara Lee Household & Body Care (Australia) Pty Ltd* (2000) 201 CLR 520  *Treasury Wine Estates Vintners Ltd v Pearson* (2019) 268 FCR 12  *Warren v Coombes* (1979) 142 CLR 531 |
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| Division: | Fair Work Division |
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| Registry: | South Australia |
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| National Practice Area: | Employment and Industrial Relations |
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| Number of paragraphs: | 66 |
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| Date of hearing: | 9 May 2023 |
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| Counsel for the appellant: | Mr C Dowling SC with Mr P Dean |
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| Solicitor for the appellant: | United Workers Union |
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| Counsel for the respondents: | Mr R Dalton KC with Ms R Joseph |
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| Solicitor for the respondents: | Corrs Chambers Westgarth |
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ORDERS

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|  | | SAD 189 of 2022 |
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| BETWEEN: | UNITED WORKERS UNION  Appellant | |
| AND: | COMPASS GROUP HEALTHCARE HOSPITALITY SERVICES PTY LTD  First Respondent  COMPASS GROUP (AUSTRALIA) PTY LTD  Second Respondent | |

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| --- | --- |
| order made by: | RARES, O'SULLIVAN AND FEUTRILL JJ |
| DATE OF ORDER: | 16 June 2023 |

THE COURT ORDERS THAT:

1. The parties confer and, on or before 21 June 2023, file draft orders to give effect to the Court’s reasons for judgment delivered today and, in the event of any disagreement, draft orders with marking up to signify any disputed matter and written submissions limited to one page each.

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

REASONS FOR JUDGMENT

THE COURT:

# Introduction

1. An employer must pay redundancy pay, pursuant to the national employment standard in s 119(1)(a) of the *Fair Work Act 2009* (Cth), to an employee whose employment is terminated at the employer’s initiative because the employer no longer requires the job of that employee to be done by anyone “except where this is due to the ordinary and customary turnover of labour” (**the exception**).
2. In this appeal, the United Workers **Union** challenges the decision of a deputy president of the South Australian Employment **Tribunal**, that each of the respondents, Compass Group Healthcare **Hospitality** Services Pty Ltd and **Compass** Group (Australia) Pty Ltd (collectively **Medirest**), had not contravened s 119(1)(a). His Honour found that Medirest was not obliged to pay redundancy pay when it terminated the employment of the **31 employees** the subject of this appeal, as at 30 June 2018, on the expiry of its long term working relationship (that had begun in December 2001) with **Eldercare** Inc under contracts to supply their services at aged care facilities.
3. Despite its name, the Tribunal is an eligible State or Territory court from which an appeal to this Court lies under s 565(1) of the Act within the meaning of the definition in par (d) of such a court in s 12 and reg 1.05 of the *Fair Work Regulations 2009* (Cth): cf *Treasury Wine Estates Vintners Ltd v Pearson* (2019) 268 FCR 12.
4. The Union had applied to the Tribunal for orders that the relevant Medirest company pay each respective employee his or her redundancy pay and impose pecuniary penalties for its contraventions of s 119(1)(a) under s 546(1) of the Act. On about 16 April 2018, at the time of giving them notice of termination of their employment effective on 30 June 2018, most or all of the 31 employees had worked for Hospitality or Compass for between 2 and 13 years and some had transferred their employment from Eldercare when one of the Medirest companies became responsible for provision of their catering, cleaning or laundry services at one of Eldercare’s facilities.
5. In three previous appeals, two Full Courts have examined the exception: *Berkeley Challenge Pty Ltd v United Voice* (2020) 279 FCR 249 (involving two of those appeals) and *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Delta FM Australia Pty Ltd* (2021) 308 IR 94. In *Delta FM* 308 IR at 103 [43], Rares, O’Callaghan and Wheelahan JJ applied Rares J’s summary of the test of what “the ordinary and customary turnover of labour” is, in his reasons in *Berkeley* 279 FCR at 260 [32] concurring with the analysis of Collier and Rangiah JJ (306–307 [207]–[208], 309 [214]), namely whether:

a reasonable person in the position of both parties to the contract of employment would have understood or expected, from its inception or nature or as the length of the employee’s service grew, that the job was not of a permanent or an ongoing nature, but would come to an end within a reasonably foreseeable timeframe.

1. The Full Court in *Berkeley* 279 FCR 249 dealt with two appeals by members of the Spotless group of companies. Rosie **McArdle**, **Compass group**’s executive director – people and safety described the Spotless group in her evidence as Compass group’s only competitor in every sector of the services market in which it operates at scale. The appeal in *Delta FM* 308 IR 94 dealt with a member of the Compass group. Each of the three appeals, like this, concerned the issue of whether an employer had an obligation to pay its employees redundancy pay under s 119(1)(a) when the relevant employer terminated their employment after its contractual arrangements to supply services, including those of the employees, to a client were not renewed or came to an end.
2. The trial judge decided that the terminations of the 31 employees were made under the exception in s 119(1)(a) and were due to the ordinary and customary turnover of labour in “the kind of business which [Medirest] is engaged in, and not the industry or industries for which it provides contracted services”. His Honour appears to have put to one side the *ratio decidendi* of *Berkeley* 279 FCR at 260 [32], 306–307 [207]–[208], 309 [214] and *Delta FM* 308 IR at 103 [43] in the following part of his reasons:

Returning to *Berkeley*, it is superficially curious that the Court embarked upon an evaluation of reasonable expectation as to continued employment, when what needed to be determined was whether the termination of employment was due to [the ordinary and customary turnover of labour]. Again, **superficially, it might be thought that whether a termination was due to [the ordinary and customary turnover of labour] was simply a finding to be made having regard to an employer’s business practices.**

(emphasis added)

1. As the Union asserted in its notice of appeal, that approach was not open to the trial judge. For the reasons below, we are of opinion that his Honour erred and should have found that, pursuant to s 44(1) of the Act, Medirest contravened the national employment standard in s 119(1)(a) by failing to pay each, or those, of the 31 employees, who had been in the continuous service of Medirest for at least one year before the termination of his or her employment and was not a casual employee or otherwise excluded under the Act, redundancy pay on termination.

# The Statutory Scheme

1. Relevantly, the Act provides:

**44 Contravening the National Employment Standards**

(1) An employer must not contravene a provision of the National Employment Standards.

…

**119 Redundancy pay**

*Entitlement to redundancy pay*

(1) 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**; or

(b) because of the insolvency or bankruptcy of the employer.

*Amount of redundancy pay*

(2) The amount of the redundancy pay equals the total amount payable to the employee for the redundancy pay period worked out using the following table at the employee’s base rate of pay for his or her ordinary hours of work:

|  |  |  |
| --- | --- | --- |
| **Redundancy pay period** | | |
|  | **Employee’s period of continuous service with the employer on termination** | **Redundancy pay period** |
| 1 | At least 1 year but less than 2 years | 4 weeks |
| 2 | At least 2 years but less than 3 years | 6 weeks |
| 3 | At least 3 years but less than 4 years | 7 weeks |
| 4 | At least 4 years but less than 5 years | 8 weeks |
| 5 | At least 5 years but less than 6 years | 10 weeks |
| 6 | At least 6 years but less than 7 years | 11 weeks |
| 7 | At least 7 years but less than 8 years | 13 weeks |
| 8 | At least 8 years but less than 9 years | 14 weeks |
| 9 | At least 9 years but less than 10 years | 16 weeks |
| 10 | At least 10 years | 12 weeks |

(3) A reference in this section to continuous service with the employer does not include periods of employment as a casual employee of the employer.

…

**121 Exclusions from obligation to pay redundancy pay**

(1) Section 119 does not apply to the termination of an employee's employment if, immediately before the time of the termination, or at the time when the person was given notice of the termination as described in subsection 117(1) (whichever happened first):

(a) the employee's period of continuous service with the employer (other than periods of employment as a casual employee of the employer) is less than 12 months; or

…

(2) A modern award may include a term specifying other situations in which section 119 does not apply to the termination of an employee’s employment.

…

**123 Limits on scope of this Division**

*Employees not covered by this Division*

(1) This Division 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;

…

(2) Paragraph (1)(a) does not prevent this Division from applying to an employee if a substantial reason for employing the employee as described in that paragraph was to avoid the application of this Division.

(emphasis added)

# Background

1. There were three forms of contract in evidence under which Hospitality or Compass employed one or more of the 31 employees. Those were, *first*, the version under which Compass employed Kerry **Aylett** from 5 March 2008 when she transferred from Eldercare’s employment (the **2008 form**), *secondly*,the version into which Kristy-Lee **Lane** and Hospitality entered on 2 December 2016 (the **2016 form**) and, *thirdly*, the version into which Michelle **Lockyer** and Hospitality entered on 1 March 2018 (the **2018 form**). Each of Ms Lane’s 2016 form and Ms Lockyer’s 2018 form recorded in cl 2 that her “start date”, as an existing employee, when she entered that version of her contract with Hospitality, was 9 October 2006 and 15 April 2008 respectively. Thus, each of Ms Aylett, Ms Lane and Ms Lockyer had been employed for over 10 years by the time of her termination.

## Ms Aylett’s contracts of employment

1. Ms Aylett began employment with Eldercare at its Cottage Grove premises on 28 December 2005 as a permanent part-time level 1 catering assistant. On 5 March 2008, she transferred her employment to Compass, as the 2008 form recorded, and, thereafter, worked for it in the same role continuously until 30 June 2018. In September 2018, Eldercare reemployed Ms Aylett.
2. The clauses in the 2008 form are unnumbered but it provided relevantly as follows:
3. Compass could require her to work in another work classification within her skills and competencies and to transfer to another location;
4. her conditions would be in accordance with the Health Services **Award**, but its terms were not to be part of the contract;
5. she had to report to the site manager, carry out the duties in an annexed position description and as directed within her level of competence and comply with all policies and procedures applicable to work at the site;
6. under the heading ‘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 may be 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.

(emphasis added)

1. during her employment with Compass she could not undertake other employment in direct or indirect competition with it;
2. under the heading ‘Site Access’:

Compass Group operates on sites by virtue of a contract between our client and Compass Group. Under the terms of this contract, our client may, from time to time, and at their sole discretion, withdraw access to the site to Compass Group employees.

Where such action is taken by the client, **Compass Group will take all reasonable efforts to redeploy the employee to another location at which the Company provides the same or similar services, subject to the availability of positions for which you are qualified, able to fill and your acceptance of the Site’s terms and conditions**.

Where site access is withdrawn as a result of your refusal or neglect of duty or other serious misconduct this may lead to disciplinary action, which may include termination of employment.

(emphasis added)

1. her leave entitlements would be in accordance with the Award “and relevant legislation”;
2. she could terminate her employment by giving four weeks’ notice and the employer could do so on notice using a formula set out in the 2008 form that depended on her age and years of service and:

The notice provisions may not apply in circumstances that relate to the succession, assignment or transmission of the business of the Company.

## Ms Lane’s contracts of employment

1. Ms Lane said that, on 9 October 2006, she was employed by Medirest (without identifying whether by Compass or Hospitality) initially at Masonic Homes’ Somerton Park nursing home as a casual catering attendant. After about six months, at her request so as to be able to work more hours, she transferred to work at Masonic Homes’ Ridgehaven facility and worked there for about three years. At some point Ms Lane became a level 2 laundry attendant. In about 2009, she requested work for yet more hours and transferred to work at Eldercare’s Kirkholme facility where she worked for seven years. She gave unchallenged evidence that, at the time of that transfer, nothing was said to her about what arrangements Medirest had with Eldercare. After Eldercare decided to close the Kirkholme facility, Medirest transferred her to Eldercare’s Trowbridge House facility where she worked for about one year.
2. On 2 December 2016, Ms Lane and Hospitality entered into the 2016 form which relevantly provided that:

* Under the heading ‘Start date’ in cl 2:

This contract of employment will commence on 15/12/2016

|  |
| --- |
| If you are an existing employee or an employee transferring employment between Compass Group related companies **your original start date of [09/10/2006] in the Compass Group will continue to apply**. |

(bold emphasis added; underline emphasis in original)

* her job title was “Attendant – Laundry” and she was employed full time under the classification level 2 guest service grade 2 at Eldercare Trowbirdge House and:

During your employment, you may be required to work in another classification of work that is within your skills and competencies and the Company may transfer you to another work location which is reasonable. If your position or work location changes (other than on a temporary basis) you will be issued with a new contract. (cl 3)

* her conditions of employment would be in accordance with the Hospitality Industry (General) **Award 2010**, including transitional provisions, and the contract (being the 2016 form) (cl 4);
* she had to report to a named manager in relation to the performance of her duties, which were in her position description, to carry out those and any other duties within her competence and to comply with and implement all policies and procedures applicable to work at the facility (cl 5);
* Under the heading ‘Continuing employment’, cl 9 provided:

The Company operates on sites under contracts between the Company and its clients. **Your continuing employment is subject to the operational requirements of the Company’s business, which is directly affected by the needs of our clients. You understand that continuous employment and wages, working hours or other conditions of employment cannot be guaranteed.**

As a result of changes in operational requirements, there may no longer be a position for you at your current site. **If that occurs, you may be given the opportunity, or required, to transfer to another location on different wages or other terms and conditions of employment.** Any such changes will be discussed with you and, if agreement is reached, you will be given a new contract of employment.

If an alternate position is offered and not accepted by you, or **if there are no suitable alternative positions available for you**, the Company may terminate your employment by giving you notice (or payment in lieu) in accordance with this contract.

Termination of employment due to a change or loss of contract between the Company and a client is a usual reason for a change in the Company’s workforce and **is part of the ordinary and customary turnover of labour within the Company**.

Under contractual terms between the Company and its client, a client may, at their sole discretion, withdraw your site access. In such circumstances, wherever practicable, the Company may relocate you to another site on similar terms and conditions or subject to such variations as are agreed, in writing, with you. However, where site access is withdrawn as a result of your refusal or neglect of duty, or serious misconduct, this may lead to disciplinary action or termination of your employment.

(emphasis added)

* she or Hospitality could terminate her employment on a similar basis as in the 2008 form (cl 10);
* as a full time employee, her ordinary hours of work were 76 hours per fortnight and she would work on a job roster that could be altered by mutual agreement or by Hospitality giving at least seven days’ notice (cl 11);
* her leave entitlements would be in accordance with the Award 2010, the national employment standards “and relevant legislation”. She could be required to take annual leave “during a close-down of the operations of the business, or part of the business” or if she had more than eight weeks accrued annual leave and:

|  |
| --- |
| If you are transferring employment between Compass Group related companies, **your existing leave accruals will be transferred**.  Any period of leave previously approved, in writing, by a related company will be deemed to have been approved by the new Company.  **Service with Compass Group related companies will count as service for the purposes of accrual of long service leave.** |

(bold emphasis added; underlined original emphasis)

(cl 12)

* she had to comply with Hospitality’s policies and procedures in its employee handbook (cl 13);
* during her employment with Hospitality, she could not undertake other employment in direct or indirect competition with it (cl 14); and
* she had to obtain and produce at her expense a new satisfactory police certificate every three years (cl 16).

## Ms Lockyer’s contracts of employment

1. Ms Lockyer began employment as a casual domestic cleaner with Eldercare at its Allambi aged care facility in mid 2005. In early 2008, Eldercare informed its domestic and hospitality staff there that Compass was going to provide those services in the future and that none of the staff would lose their jobs with Eldercare, but then would work for Compass as from 15 April 2008. After a short time working as a Compass casual employee, Ms Lockyer agreed to become a permanent part-time employee.
2. On 3 May 2010, Ms Lockyer and Compass entered into a standard form contract entitled “contract of employment – Medirest site based Award/Agreement employees” that, like the 2008 form, was unnumbered and relevantly contained similar provisions except that:
3. her start date with Compass of 15 April 2008 “will continue to be recognised” (cl 2);
4. her position “will be initially classified as Guest Service (Grade 2)”;
5. the conditions of her employment were to be in accordance with the Award 2010 but its terms did not form part of their contract; and
6. her leave entitlements would be in accordance with the Award 2010 and relevant legislation and her existing leave accruals, if any, would continue to apply (cl 12).
7. On 28 November 2016, Ms Lockyer and one of the Medirest companies signed a variation to her part time hours which, although it was not in evidence, can safely be inferred to have been in the same form as the 2016 form, with which it was contemporaneous.
8. On 25 September 2017, Eldercare and Medirest issued a **joint statement** informing all their staff that Eldercare had decided to implement a new service model and would resume providing catering, cleaning and laundry services “in house” so that “As a result, the **business partnership** between Eldercare and Medirest will not continue beyond 30 June 2018” (emphasis added). The joint statement told the employees that “Medirest staff will have many opportunities **to remain part of the Eldercare team**” (emphasis added) and recruitment would begin in early 2018. The joint statement recorded:

**Both Medirest and Eldercare are proud of what we have achieved during our long-running partnership** and we thank staff for the great work they have performed and teamwork they have demonstrated. Over the next nine months, our primary considerations will continue to be for the residents we serve and the wellbeing of our Eldercare and Medirest teams. We will continue to work together to show the strength of our business partnership and to demonstrate our commitment to ensuring a seamless transition.

(emphasis added)

1. In this context, on 1 March 2018, Ms Lockyer and Hospitality entered into the 2018 form. This contained many identical terms to the 2016 form except, relevantly, the following:

* the contract commenced on 1 March 2018, but as an existing employee or one transferring from another Compass group related company, her original start date of 15 April 2008 “will continue to apply” (cl 2);
* her job title was “Attendant – Laundry”, she was employed on a part time basis under the classification level 2 guest service grade 2 and her site was Eldercare Allambi;
* under the heading ‘Continuing employment’, cl 9 provided (no doubt with the previously announced date of 30 June 2018, when Medirest would cease providing services to Eldercare, in mind):

**The Company operates under a commercial contract to provide hospitality services to its client at the Site.** **This contract is not ongoing and will expire. Your employment will end at the conclusion of that contract** (unless terminated earlier in accordance with the termination provisions of this contract of employment). **You cannot have, and the Company does not represent in any way that you will have or may have, any expectation of ongoing employment beyond the expiration of the contract at the Site.**

**Termination of employment due to the end of, or change to, a contract between the Company and its client is a usual reason for a change in the Company’s workforce and is part of the ordinary and customary turnover of labour within the Company.**

Under contractual terms between the Company and its client, the client may, at their sole discretion, withdraw your site access at any time. In such circumstances, at the time your access to the work site is no longer permitted by the client, your employment with the Company will end at the conclusion of the notice period required to be given.

In the event that your employment is terminated due to the end of, or change to the client contract or due to the withdrawal of site access by the client, **the Company will seek to redeploy you to an available position at another site**. This may involve a different classification of work and different wages and terms and conditions of employment. If you accept an offer of employment at a new site, you will be given a new contract of employment. If you do not accept the alternate position that has been offered, or **if there are no suitable alternative positions available for you**, the Company may terminate your employment by giving you notice (or payment in lieu) in accordance with this contract.

Your continuing employment is also subject to the operational demands and requirements of the client. Where operational requirements necessitate a Christmas/New Year closure or site shutdown and there is no other available work for you at another work location, you may be given notice of a requirement to take annual leave or be stood down without pay from your employment. Such period of leave without pay will count as service for the purposes of accruing personal/carer’s leave, annual leave and long service leave.

(emphasis added)

* she or Hospitality could terminate her employment on a similar basis as in the 2008 form (cl 10); and
* her hours of work as a part time employee were to be rostered in accordance with the Award 2010 with a minimum of 16 hours per fortnight (cl 11).

## The nature of the Compass group’s and its Medirest subsidiaries’ businesses

1. Leanne **Graham** was general manager for Medirest’s seniors living business between March 2017 and January 2019. That business included the services that Medirest provided to Eldercare, among others, through the work of the 31 employees.
2. Ms McArdle and, to a more limited extent, Ms Graham, gave evidence about their subjective understandings of the way in which Compass group provided services to its clients under contracts. Ms McArdle explained that Compass group companies employed staff to service specific contracts, such as the hospitality services agreement made on 6 March 2013 between Hospitality and Eldercare for provision of resident meals, catering, cleaning and laundry services (the **Eldercare services**) for a five year term between 1 April 2013 and 31 March 2018 at 16 sites in South Australia, including those at which Medirest employed the 31 employees at the time in April 2018 of giving them notice of the termination of their employment as from 30 June 2018 (the **2013 Eldercare contract**). Ms McArdle set out a schedule that summarised the employment history of each of the 31 employees with Medirest.
3. The 2013 Eldercare contract provided that:
   1. Eldercare had the right to renew that contract twice for an additional term of two years each, on giving 180 days’ notice (cl 2);
   2. if Hospitality decided to employ staff whom Eldercare had employed immediately prior to 1 April 2013, Eldercare had to indemnify Hospitality in respect of any matter arising out of its employment of those staff, including present and future entitlements and:

For the purpose of this clause, staff entitlements include any entitlements (including annual leave, long service leave, sick leave or personal carers leave as and when applicable) **that have accrued to an employee of [Eldercare], where their employment ceases with [Eldercare] and immediately commences with [Hospitality]**.

(emphasis added)

(cl 11.1)

* 1. Hospitality agreed to be responsible for any redundancy payments that may be payable under its employment contracts with staff employed at the 16 Eldercare premises except, relevantly, where the redundancy occurred as a result of Eldercare terminating that contract (cl 11.2).

1. Ms McArdle said that an inherent feature of Compass group’s service contracts of the kind that it had had, through subsidiaries, with Eldercare over their 18 year association for the provision of the Eldercare services was that such contracts regularly came to an end. She deposed that, under its business model:

34. … **Inevitably, this means that the employment of our employees is terminated at some point. Compass Group works hard to redeploy 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 Compass Group’s business means that often this is not possible.

35. **Where employees cannot be successfully redeployed to another reporting contract held by Compass Group, their employment is terminated.** Hundreds of employees end their employment with Compass Group each year due to this reason. With one qualification, the policy and practice of Compass Group is and has been not to make redundancy payments to employees whose employment is terminated because the reporting contract on which they had been employed has come to an end and not been renewed or replaced. This is because Compass Group treats such terminations of employment as being due to the ordinary or customary turnover of labour. I have not found within Compass Group’s business records any indication that it ever followed any other practice. The one qualification relates to employment in the off-shore (that is, maritime) sector, where for historical reasons the conventional expectation is that redundancy payments are made when a reporting contract comes to an end because the vessel or platform to which it relates leaves Australian waters or an offshore project reaches completion. That qualification has no application within the Respondents.

….

38. The ordinary and customary turnover of labour exception is referred to in almost all of Compass Group’s enterprise agreements.

(emphasis added)

1. Ms McArdle gave the following evidence in cross-examination:

MR DEAN: Compass group can’t know for how long it will need a role to be performed and by role I mean that work for that client. **It can’t know how long it will need that to be performed, because it can’t know how long it will have contractual arrangements on foot with that client.** - - - That’s probably correct.

…

But it certainly can’t know, can I suggest to you, the outer length of the time that that role would be required. Because **at the point at which Compass hires people to service those in-unit roles or to perform those in-unit roles, it can’t know whether the contract will be renewed or extended**. - - - That’s – **that’s correct**.

So in that sense, the outer limit of the employment relationship is indefinite? - - - **Sometimes or mostly, but not always.**

(emphasis added)

1. Ms McArdle said that it was not unusual for Compass group subsidiaries to have renewed their client contracts under which the relevant subsidiary continued to provide services, like the Eldercare services, for periods of 10 or 15 years. Importantly, she testified that she had no specific knowledge that any of the employees of Medirest who were engaged in performing the 2013 Eldercare contract was ever told of the duration of that contract.
2. Ms Graham annexed to her affidavit six examples of prior contracts that subsidiaries of Compass group had made with Eldercare between December 2001 and March 2007 for the provision of some or all of the Eldercare services at six different sites. Only the last of those contracts, made on 26 March 2007 between Medirest (Australia) Pty Ltd and Eldercare, had a clause similar to cll 11.1 and 11.2 of the 2013 Eldercare contract. Each of those six contracts was for a term of three years with Eldercare having an option to renew it for a further term of two years on three months’ notice.

# The Trial Judge’s Reasons

1. His Honour appeared to have understood that only the 2013 Eldercare contract was relevant despite the fact that most of the 31 employees (or the 33 or 32 whose employment originally was in issue) had worked for Medirest more than five years by the time of the termination of their employment. That is because he said:

Although some of the represented employees had varying histories working for Compass, it was accepted by the parties that for the purposes of the claim it was the Eldercare contract with Compass for the period between 2013 and 2018 which was relevant.

1. The trial judge set out features of each of the 2008, 2016 and 2018 forms and noted Medirest’s submissions that the terms of each generally reflected provisions in the employment contracts considered in *Delta FM* 308 IR 94. As his Honour noted, Ms Aylett, Ms Lane and Ms Lockyer were not cross-examined, while Ms Graham and Ms McArdle were cross-examined. The trial judge summarised some of those witnesses’ evidence in his reasons.
2. Importantly, he noted that Ms Graham had said that Medirest’s standard employment practices did not involve informing an employee of the duration of the contract that Compass group had in respect of the work for its client for which he or she was employed and that those contracts were commercial-in-confidence. Ms Graham asserted that site managers for each client knew when the term of the contract applicable to that location would end “**and if employees needed to know such end date, then it was provided**” (emphasis added) and that she also did so if she were asked at a site when she visited.
3. His Honour noted that Ms McArdle’s evidence included her assertions that Compass group treated its termination of employees when a client’s contract came to an end “as due to the ordinary and customary turnover of labour”, that it was rare for terminated employees to make claims for redundancy pay “and generally they understand that they are employed for the purpose of Compass fulfilling a particular service requirement to a client”.
4. His Honour said:

The facts and circumstances of this case, leaving aside subjective understandings which I find are not relevant, were not much in dispute. I accept the evidence in substance of all the witnesses who provided evidence to the Court.

1. The trial judge found that the 31 employees were employed by Medirest to perform work necessary for it to discharge its obligations under the 2013 Eldercare contract. He found that Medirest’s termination of the employment of its employees at the end of a service contract with a client was an established business practice of Compass group reflective of the kind of business that it operated of providing such services to clients for a fixed period. He distinguished the reasoning in *Berkeley* 279 FCR 249 on the basis that, there, the employment contracts on their face provided ongoing and permanent employment. He recognised that an employer cannot claim that the termination practice that it may adopt constitute the ordinary and customary termination of labour. The trial judge cited what Collier and Rangiah JJ had said in *Berkeley* 279 FCR at 273 [94] and 275–276 [103] where they approved Colvin J’s reasoning at first instance (in *Fair Work Ombudsman v Spotless Services Australia Pty Ltd* [2019] FCA 9) in one of the two appeals that that Full Court was considering and what Rares J said in his concurring reasons (at 256–257 [18]–[19], [21]–[22]). The trial judge then referred to the Full Court’s reasons in *Delta FM* 308 IR at 103–104 [45]–[47] and then said:

140 I agree with the respondent that the facts and circumstances of this case, including the terms of the employment contracts, are far more aligned with those considered by the Full Court in *Delta*, than those considered by the Court in *Berkeley*.

141 The Court in *Berkeley* embarked upon an evaluation of the work done by the relevant employees and the context of that work, having regard to its ongoing nature and that there were no indications in documents or otherwise that the work would not be ongoing.

142 **In this case, as in *Delta*, the relevant employees were engaged for the purpose of the contract which Compass had with Eldercare. The contract was for a period of five years and then came to an end, such that the relevant employees were no longer required to carry out work for Compass to discharge its obligations to provide services to Eldercare.**

143 The employment contracts sufficiently identify that continuing employment is dependent on Compass having ongoing contractual obligations to provide services, and thus the need to engage employees.

144 **It is the objective circumstances which are to be considered in relation to the reasonable expectations of ongoing employment, or otherwise.** Subjective understandings are not relevant. In any event, I note that in her affidavit Ms Lane says that when she found out that Compass had lost the contract with Eldercare, she expected she would be moved again as had happened before, but that did not happen. That evidence of Ms Lane suggests that she was aware that her employment would come to an end if the contract between Compass and Eldercare came to an end.

145 Whatever may be the subjective beliefs of the relevant employees, effectively “represented” by the evidence of Ms Lane, Ms Lockyer and Ms Aylett, they are to be seen alongside their contracts of employment.

146 I do not accept the applicant’s submission that the relevant employees should be characterised as having ongoing employment because the contract between Compass and Eldercare may have been extended, and therefore it was not a contract of finite duration. **There was no certainty of the contract being extended, and it was extended only for two months or so to assist with transition.**

147 I also do not accept the applicant’s submission that it is relevant to consider the ongoing and perhaps expanding need for services in the aged care industry. In my view, the comments by the Court in *Berkeley* in particular, but also in *Delta*, are directed at the kind of business which Compass is engaged in, and not the industry or industries for which it provides contracted services.

148 I have some sympathy for the submission that the employment contracts of the relevant employees do not in any detailed way explicitly tie the employment contracts to the contract between Compass and Eldercare, such as by identifying the duration of that contract. **However, having regard to the evidence of Ms McArdle and Ms Brown [*scil*: Graham], Compass was willing to provide sufficient information if employees wished to know when their employment may come to an end.**

149 As referred to above, the case which Compass presents in relation to the application of the exception in s 119 of the *Fair Work Act* has been accepted in other cases. I give weight to the other decisions referred to by Compass, but it is necessary to decide this case by reference to established and applicable principles and the facts of this case, including the employment contracts. In my view, **the approach of the Court in *Delta* is applicable to the facts of this case and leads to an outcome that the application does not succeed**.

150 I accept that it is for the respondent to prove that the exception in s 119 of the *Fair Work Act* applies. In my view, the respondent has discharged that onus, and the relevant employees are not entitled to redundancy payments.

(emphasis added)

# Medirest’s submissions

1. Medirest argued that the trial judge was correct to have dismissed the Union’s application for the reasons he gave. It accepted that, as the Full Court had held in *Delta FM* 308 IR at 103 [43], the applicable test was that stated by Rares J in *Berkeley* 279 FCR at 260 [32]. It contended that the test did not require a finding that the duration of the employee’s employment be inherently finite. It submitted that its and the 31 employees’ positions were substantially the same as the employer and employees in *Delta FM* 308 IR at 102–103 [42]. Medirest contended that, accordingly, the trial judge had been entitled to act as the Full Court had when it found it unnecessary to engage in a factual inquiry into alleged normal, habitual or longstanding practices concerning termination with respect to particular jobs or a particular kind of employment. Medirest submitted that, based on *Delta FM* 308 IR at 103 [42], this was because “the terms of the contracts of employment constitute the metes and bounds of what the parties must be taken relevantly to have understood or expected”.
2. Medirest argued that each of the 2008, 2016 and 2018 forms made clear that the employee’s job was limited to the duration of Medirest’s contract to provide services at one of the Eldercare facilities’ site. It contended that the terms of the employment contracts were relevantly indistinguishable from the clauses that were decisive in *Delta FM* 308 IR 94.
3. Medirest submitted that the same result followed if it were necessary to engage in the wider analysis in *Berkeley* 279 FCR 249, rather than that confined to the employment contracts themselves, as in *Delta FM* 308 IR 94. It asserted that its normal business practices were relevant in order to deal with the issue of what particular kind of business the employer operated, citing *Berkeley* 279 FCR at 311 [227]. Medirest argued that the evidence supported the trial judge’s finding that it had a normal practice of labour turnover at the conclusion of a service contract, which engaged the exception. Medirest accepted that the nature of the jobs of cleaners, kitchen hands and laundry attendants was not inherently finite but pointed to Collier and Rangiah JJ’s statement in *Berkeley* 279 FCR at 311 [230] that, if the terms of the employment contract stated explicitly that the job would not be ongoing, then that may remove any ambiguity.
4. Medirest argued that those employees, such as Ms Lockyer who signed the 2018 form, were employed on its terms that explicitly provided for their employment to be of finite duration so that they had no right to redundancy pay. It contended that the latest version of the written employment contracts of the 31 employees governed any questions of whether the job was finite and the employees’ entitlement, if any, to redundancy pay. It submitted that Ms McArdle’s evidence established that Compass group operated in a competitive industry of providing employees to clients under fixed term contracts to work in roles, such as those of the 31 employees, for the duration of the term of the employer’s contract with its client. It followed, so Medirest’s argument ran, that the ordinary and customary turnover of labour in the industry in which both it and Compass group operated involved employees whose employment was tied, and thus limited, to the duration of the contract between the Compass group employer and its client, so that there was no entitlement to redundancy pay because the exception in s 119(1)(a) applied.
5. Medirest argued that its characterisation of the employment relationship, as conditioned by the duration of its contracts with its clients, provided commercial certainty for all parties. Further, it contended, the employees knew that the contract term was not indefinite because the terms in each of the 2008, 2016 and 2018 forms stated that the employer was a contractor, the employee’s employment “is subject to the operational requirements of the Company’s business, which is directly affected by the needs of our clients” and that “continuous employment … cannot be guaranteed” (as stated in cl 9 of the 2016 form). Medirest submitted that the nature of the 31 employees’ jobs was to do work for it, not Eldercare, and that, thus, the job was not, and both parties to each employment relationship knew that it was not, of indefinite duration but rather its term was limited to the duration of Medirest’s contract with its client, being Eldercare.
6. Medirest argued that it would be commercially unrealistic to require its employment contracts to include the date on which its client contract terminated because, in the ordinary course, it hoped that the client would renew or reengage it at the end of the contractual term, albeit that there was no certainty that this would occur. It contended that, because of what the 2008, 2016 and 2018 forms told them, its employees could not have had a reasonable expectation of indefinite or ongoing employment. Rather, Medirest submitted, the employees would have had an expectation that their employment was going to come to an end at the time it lost the contract with its client and that this was as a result of the ordinary and customary turnover of labour.

# Consideration

1. Employment relationships are not usually purely contractual in the sense that many employment relationships involve a contract of service that operates in the context that applies here, where Medirest was a national system employer and the 31 employees were national system employees to whom the provisions of the *Fair Work Act* and, possibly, a modern award or enterprise agreement, applied. Moreover, the relationship between employer and employee is one class of accepted fiduciary relationships: *Concut Pty Ltd v Worrell* (2000) 176 ALR 693 at 697–698 [17] per Gleeson CJ, Gaudron and Gummow JJ. In addition, over time, while the relationship subsists, the employee may be promoted, his or her wage, salary or conditions may change and the location at which he or she works can vary. It may be necessary to characterise whether those changes to the employment constitute a new contract or a variation to the existing one using the principles that Gleeson CJ, Gaudron, McHugh and Hayne JJ identified in *Federal Commissioner of Taxation v Sara Lee Household & Body Care (Australia) Pty Ltd* (2000) 201 CLR 520 at 533–534 [22]; *Concut* 176 ALR at 698–699 [18]–[19].
2. Here, prior to 25 September 2017 when Medirest and Eldercare made the joint statement, the employment relationship that Medirest had with the 31 employees was not one that the parties intended would involve displacing them from accrued rights and liabilities when contracts in the 2008 and 2016 form came to an end. That was reflected in the opening statement in the 2008 form that Ms Aylett had transferred her employment to Compass (see [11] above), and in the recognition in cl 2 of the 2016 form for Ms Lane (see [14] above) and cl 2 of the 2018 form for Ms Lockyer (see [16] above) that each of their start dates in 2006 and 2008 respectively “will continue to apply”. In addition, cl 12 of each of the 2016 and 2018 forms reaffirmed that “Service with Compass Group related companies will count as service for the purposes of accrual of long service leave”. The parties acted on the basis that the employment relationship was ongoing and indefinite (albeit that the parties recognised that Medirest’s contractual relationship with Eldercare may come to an end at some future time) and entered into new contracts of employment under which the employees continued performing their existing jobs or a new one. The express provision that the employee’s start date in the Compass group “will continue to apply” recognised the industrial reality that those were employees who had accrued entitlements and were working for an indefinite time.
3. The situation of the employees in *Delta FM* 308 IR 94 was not comparable to that of the 31 employees. That is because there the Full Court found that all the parties knew that the employees’ jobs would end when the construction of the particular onshore facility on which they were engaged was completed. The Full Court found that the parties to those contracts of employment would have understood that the jobs were not permanent or ongoing but inevitably would come to an end at the completion of the construction work: *Delta FM* 308 IR at 104 [47]. Ordinarily, the period of time during which the construction of a building or facility occurs is finite, although the exact date of its completion may not be known, since factors such as weather, strikes, delays in supply of materials, unexpected issues with the site or work, variations and the like, can be expected to make that date somewhat uncertain. Nonetheless, when a person is employed to do construction work on such a project, ordinarily, both employer and employee will understand that the employee’s job is limited to that project and that it will terminate due to the ordinary and customary turnover of labour when completion occurs.
4. Here, the jobs of the 31 employees involved working at an aged care facility providing services of the kind that such a facility would need to have performed while-ever it continued to operate. Of course, each of the employees would have been aware that there was a possibility that the particular Medirest company employing him or her may cease to carry on business. The 2008 form stated that “your employment is subject to operational demands, requirements of the client and tenure of the contract which the Company has with its clients”. The 2016 form stated that “Your continuing employment is subject to the operational requirements of the Company’s business, which is directly affected by the needs of our clients”. Both forms then stated that “continuous employment … cannot be guaranteed”. However, none of those or the related statements in either the 2008 or 2016 forms conveyed that the job was finite or for a particular duration. Neither form said anything about the nature or length of the employer’s contract with the “client” or conveyed that the employment would come to an end in a reasonably foreseeable timeframe.
5. As the trial judge found, Ms Graham accepted that Compass group’s standard employment process did not involve its employees being told about the duration of its subsidiary’s client contract for which it employed them (see [29] above). This finding is also consistent with Ms McArdle’s acknowledgement in her cross-examination, set out at [24] above, namely, that Compass group itself does not know whether a client contract will be renewed or extended when it hires employees.
6. As we noted at [5] above, in *Delta FM* 308 IR at 103 [43], Rares, O’Callaghan and Wheelahan JJ approved Rares J’s distillation of the test as to whether termination will fall within the exception in his concurring reasons in *Berkeley* 279 FCR at 260 [32] where he explained more fully:

The purpose of the exception in s 119(1)(a) is to protect an employer from having to make redundancy payments **in circumstances where a reasonable person in the position of both parties to the contract of employment would have understood or expected, from its inception or nature or as the length of the employee’s service grew, that the job was not of a permanent or an ongoing nature, but would come to an end within a reasonably foreseeable timeframe**. In other words, in order to fall within the exception in s 119(1)(a), **the employment, or job, must be of such a nature that a reasonable person in the position of both those offering or seeking the particular job (or who were aware of all of the circumstances in which the employee had remained in the employer’s workforce for sufficiently long) would be aware and expect that it would come to an end in the ordinary course. That expectation arises objectively because, in the regular or usual order of things, and the accepted custom of the industry, trade, or employment market, when the employer terminates the employee’s job and he or she is not replaced, the employee will have no right to payment of redundancy pay**.

(emphasis added)

1. The trial judge’s reasoning that the redundancy terminations of the 31 employees occurred because of the ordinary and customary turnover of labour, as to bring Medirest within the exception in s 119(1)(a) of the Act, was erroneous. His Honour proceeded on a misunderstanding of the operation of the exception, as is evident from his characterisation (at [104] and [142] of his reasons) that, despite what he described as the “superficially curious” approach of the binding *ratio decidendi* in *Berkeley* 279 FCR 249 and *Delta FM* 308 IR 94, instead the trial judge followed (at [142]) his erroneous thought (at [104] of those reasons) that the question required “simply a finding to be made having regard to an employer’s business practices”. Thus, in [142] of his reasons, his Honour found that the 31 employees “were engaged for the purpose of the contract which [Medirest] had with Eldercare”, being the 2013 Eldercare contract. That reasoning focussed on the subjective purpose of Medirest. *First*, it ignored the employees’ lack of knowledge of the existence or material provisions of the 2013 Eldercare contract (or, as Ms Graham and Ms McArdle accepted, any specific information about the duration of their employment), namely when it began, how long it would last and the nature of the ongoing employment relationship. *Secondly*, it failed to give the words before and in the exception in s 119(1)(a) their natural and ordinary meaning by treating the section as providing that an employer had no obligation to pay redundancy pay if it asserted that it had terminated its employee’s employment in accordance with its own “business practices”. His Honour found that, somehow, despite many of the 31 employees being employed long before Medirest and Eldercare entered into the 2013 Eldercare contract (as the 2008 and 2016 forms of Ms Aylett and Ms Lane acknowledged), those employees had been engaged only in 2013 for a definite term that would end on 31 March 2018.
2. *Thirdly*, his Honour’s reasoning, which Medirest’s submissions supported on the appeal, was in the teeth of the facts and also of what Rares J held in *Berkeley* 279 FCR at 258 [24]–[26], consistently with the reasons of Collier and Rangiah JJ (at 306–307 [207]–[208], 309 [214]) of:

24     The appellants’ arguments sought to identify the particular commercial circumstances of the Spotless group as the governing criterion for ascertaining whether, in any employment situation in which a member of the group found itself when it decided to terminate an employee’s employment, the ordinary and customary turnover of labour exception relieved it from the statutory obligation to pay redundancy. They asserted that the Spotless group’s business was, as the appellants said, to win and lose contracts on a regular basis.

25     However, **the Spotless group’s overall perceptions of how it ran its business cannot control what reasonable persons in the position of any member company in the group and any particular employee of that company would expect to be the nature and duration of that employment relationship or job**. As Gleeson CJ, McHugh, Kirby, Hayne and Callinan JJ said in *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd*(2004) 218 CLR 471 at [34]:

the “general test of objectivity [that] is of pervasive influence in the law of contract” (*Australian Broadcasting Corporation v XIVth Commonwealth Games Ltd*(1988) 18 NSWLR 540 at 549, per Gleeson CJ). **The legal rights and obligations of the** **parties turn upon what their words and conduct would be reasonably** **understood to convey, not upon actual beliefs or intentions** (*Gissing v Gissing*[1971] AC 886 at 906, per Lord Diplock; *Ashington Piggeries* *Ltd v Christopher Hill Ltd*[1972] AC 441 at 502, per Lord Diplock).

(Emphasis added.)

26     **Something that is ordinary and customary and affects the incidents of a job must be known to the actual or prospective parties to the contract of employment.** Hence, the distinction that Fisher P identified between terminations of employment due to the ordinary and customary turnover of labour, which almost invariably occurred on the employer giving the employee a reasonable period of notice, and those terminating a career or settled expectation of continued employment, which attracted the right to payment on redundancy.

(emphasis added)

1. Moreover, Collier and Rangiah JJ held (at 309 [214]):

“Ordinary and customary turnover of labour” 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 longstanding practice.

1. *Fourthly*, the trial judge failed to analyse the employment relationship of the 31 employees, on the basis of the parties’ submissions that focused on the positions of Ms Aylett, Ms Lane and Ms Lockyer and the 2008, 2016 and 2018 forms. As we have noted at [27] above, his Honour said that “it was **accepted by the parties** that for the purposes of the claim” (emphasis added) the 2013 Eldercare contract “was relevant”. However, he did not elaborate as to what issue it was relevant. His Honour recorded the Union’s submission (at [75] of his reasons) that the employees’ contracts “are not expressed to be subject to the Compass contract**s** [*sic*] with Eldercare, and the duration of the employment contracts is not expressly tied to the Compass contract**s** [*sic*]”. We infer that his Honour understood the 2013 Eldercare contract to be relevant to Medirest’s decision to terminate the employees’ employment, as it plainly was. However, the trial judge did not deal with the nature of the employment relationship over the whole period covered by the evidence despite his finding that none of the employees was aware of the 2013 Eldercare contract (or earlier ones) and did not know its (or the earlier ones’) duration. The trial judge’s failure to make any findings about the period prior to the commencement of the 2013 Eldercare contract and how, if at all, that bore on the correct characterisation of the employment relationship requires us to do so. Because the trial judge accepted in substance the evidence of all of the witnesses, the Court is in as good a position as he was to decide on the proper inference to be drawn from the undisputed facts: *Warren v Coombes* (1979) 142 CLR 531 at 551 per Gibbs ACJ, Jacobs and Murphy JJ.
2. Instead of analysing whether a reasonable person in the position of both parties would have understood or expected that the 31 employees’ jobs were not of a permanent or ongoing nature, as the two Full Court decisions to which we have referred required, the trial judge said that he focussed on, *first*, their employment contracts being specifically and only for the performance of Medirest’s obligations under the 2013 Eldercare contract and, *secondly*, Compass group’s subjective understandings of its policies and practices. Even if his Honour focussed on the three forms of employees’ contracts that were in evidence, it is difficult to understand how either of the 2008 or 2016 forms could be understood to have incorporated the duration of the 2013 Eldercare contract as defining a limited duration of the relevant employee’s employment. Obviously, something must have happened after Ms Aylett began her job in 2008 to make the 2013 Eldercare contract relevant at all to the definition of the duration of her employment that had begun five years before that contract came into existence. Neither the 2008 nor the 2016 form mentioned any contract that the relevant Medirest employer had with Eldercare or specified the duration of the job. As the trial judge recognised in [148] of his reasons, neither the 2008 nor the 2016 form “in any detailed way explicitly tie[d] the employment contracts” to the 2013 Eldercare contract or identified its less than certain duration, since it could be extended if one or both options for a two year additional term was or were exercised or, we might add, Medirest secured a new contract with Eldercare.
3. His Honour found implicitly (at [148] and [146]) that the 31 employees had no idea of the limited duration of their jobs. That was because he found that Medirest “was willing to provide sufficient information **if employees wished to know** when their employment may come to an end” (emphasis added) and that (prior to the joint statement) there was no certainty as to whether the 2013 Eldercare contract might be extended. In other words, Medirest had not told the employees anything more than that their jobs might not last forever, which is a risk inherent in all employment.
4. That finding also ignored the context in which Ms McArdle’s evidence established that, of 27 of the 31 employees, whose history she could trace when she made her affidavit, at least 18 of them had worked for one of the Medirest companies since 2008. That evidence established that one of those employees had done so since November 2004 and eight others had begun their employment in 2006 to 2007. During the hearing of the appeal, the parties agreed that 16 of the 31 employees had 10 years’ service at the time of their terminations, one had 14 years, one had 11, and another, 12 years while the others had between 2 and 9 years of service. Thus, termination due to redundancy was not an apparent feature of employment at the Eldercare facilities which the Medirest companies had serviced in the period since 2001, when companies in Compass group first began providing hospitality services at Eldercare facilities.
5. *Fifthly*, the trial judge concluded (at [149]) that “the approach of the Court in *Delta* is applicable to the facts of this case”. That reinforces the conclusion that his Honour did not apply the test that the two binding Full Court decisions determined, but simply compared the terms of the employees’ contracts in this proceeding and those in *Delta FM* 308 IR 94 without addressing the wider factual evaluation that was essential before a determination could be made as to whether the terminations of the 31 employees fell within the exception.
6. It may be accepted that, as Medirest argued, the four employees who signed the 2018 form, including Ms Lockyer, identified in Ms McArdle’s affidavit were employed under that contract for an expressly limited time with the certainty that their employment would end shortly thereafter. That followed since they had known of this from 25 September 2017, when they became aware of the joint statement. One of those four employees was a casual, Karen Buckney. Hospitality had engaged her on 9 July 2014. On 16 April 2018, she had been given her notice of termination as at 30 June 2018 even though she entered into the 2018 contract two months later on 14 June 2018. However, because she was a casual employee, she had no right to redundancy pay by force of s 119(3). However, the entry of the other three employees into the contracts on the 2018 form, as a further contract in their ongoing employment relationship, could not conclude the enquiry required under s 119(1)(a) to ascertain whether Medirest could rely on the exception to deny them redundancy pay. One of those three employees was Tracey Zacheria. She had only begun her job on 23 March 2018 and so did not have any entitlement to redundancy pay under s 119(1)(a) because she did not have at least one years’ continuous service as required in ss 119(2) and 121(1)(a). The employment relationship of the other two employees who signed the 2018 form, Ms Lockyer and Agnes **McGrattan**, commenced in 2008.
7. Obviously, once Eldercare and Medirest made the joint statement on 25 September 2017, all of the 31 employees knew that their employer no longer required their job to be done by anyone after 30 June 2018. But that fact alone could not determine whether their terminations were due to the ordinary and customary turnover of labour within the meaning of s 119(1)(a) of the Act. In particular, although Ms Lockyer and Ms McGrattan had entered into the 2018 form, each did so with actual knowledge that her subsequent employment would be for a very short period. However, that circumstance did not detract from the fact that their employment relationship with Medirest by then had lasted about 10 years. The remaining employees had at least one, and most had many more, years’ of continuous service with their employer within the meaning of ss 119(1)(a) and (2).
8. Whether the termination of an employee’s employment will fall within the exception in s 119(1)(a) requires consideration of the whole of the context of the employment relationship, including the nature of the job and any express contractual terms. Sometimes, the contract of employment, and the context in which it is made, will make it clear that the job is for a finite term that will end “due to the ordinary and customary turnover of labour”, such as in *Delta FM* 308 IR 93. But that was not so here.
9. We reject Medirest’s submission, which it repeated on the appeal and that the trial judge accepted, that the way in which Compass group overall, including Medirest, and the group’s competitors operated determined whether the terminations of the 31 employees were due to the ordinary and customary turnover of labour.
10. The question of whether a termination falls within the exception cannot be determined conclusively by how the employer chooses to conduct its business. Nor can the employer define its practice in a contract of employment so as to avoid its obligations under the national employment standards in the Act, including under s 119(1)(a) (see too: s 123(2)). Rather, the question is as framed by the two Full Court decisions, namely, whether a reasonable person in the position of both parties would be aware and expect that, in the ordinary course, the employment would come to an end within a reasonably foreseeable timeframe and was not of a permanent or indefinite nature. Thus, for the purpose of determining whether any of the 31 employees, who was not a casual and had worked continuously for Medirest for at least one year immediately beforehand, was entitled to redundancy pay the question was whether the termination of their “continuous service” occurred due to the ordinary and customary turnover of labour.
11. None of those employees or anyone else, including either of the Medirest companies, had experienced or observed since the inception of Compass group’s relationship with Eldercare in 2001 terminations of employees, including those who worked at Eldercare’s facilities, of the kind on which Medirest now relies.
12. Here, the facts, including the length of continuous service of many of the 31 employees, demonstrated that their jobs were of a permanent or ongoing nature. Until the making of the joint statement on 25 September 2017, a reasonable person in the position of both parties would not have understood that there was any likely or predictable time at which those longstanding jobs, necessary to the conduct of Eldercare’s ongoing aged care facilities and at which most of the 31 employees had worked in continuous service for many years, would be terminated. As Gummow, Hayne and Heydon JJ explained in *Amcor Ltd v Construction, Forestry, Mining and Energy Union* (2005) 222 CLR 241 at 256 [44]:

**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”?

(emphasis added; footnote omitted)

1. The job of each of the 31 employees was not working for a labour hire company on a fixed or finite term basis. It was a job working for a business providing necessary and ongoing services at aged care facilities on an apparently indefinite basis. Collier and Rangiah JJ held in *Berkeley* 279 FCR at 311 [227] that evidence of the normal features and practices of an employer’s business (including as part of those in a corporate group) may be relevant to informing a court on the question of whether a termination falls within the exception. However, as they held, “an employer cannot claim that termination practices constitute ‘ordinary and customary turnover of labour’ simply because [those are] the practices it adopts. Such an outcome would be contrary to the purposes of the [*Fair Work Act*] and outside the scope of ‘ordinary and customary turnover of labour’ as traditionally understood”. Their Honours approved (at 309 [218]) what Colvin J had held in *Spotless* [2019] FCA 9 at [129], namely:

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.**

(emphasis added)

1. And as Collier and Rangiah JJ said (at 311 [228]), uncommunicated or hidden policies of an employer cannot inform the legitimate expectations of employees (or, we might add, a reasonable person in the position of both parties to an employment contract or relationship) as to whether or not work (or a job) is ongoing. Until the joint statement occurred on 25 September 2017, as the trial judge’s finding at [148] of his reasons made clear, the 31 employees did not know and had not ever been told about the duration of Compass group’s contracts with Eldercare.
2. We reject Medirest’s argument that it would be commercially unrealistic for its employment contracts to include the date on which its relevant client contract would terminate. If the Compass group wished to rely on the ordinary and customary turnover of labour to relieve itself of the obligation to pay redundancy pay to employees, it is difficult to understand any commercial justification for withholding from its workforce the information vital to them in understanding and planning for their future, being the date that the employer expected in the ordinary course that it would no longer require their jobs to be performed by anyone.
3. One reason why Compass group did not, and also might not want to, tell its workforce in jobs like those of the 31 employees at Eldercare’s facilities (and unlike those in situations like in *Delta FM* 308 IR 94 where an end to the construction project was obvious and inevitable) is that, on its evidence before his Honour, Compass group hoped to keep renewing its client contracts for which it would want and need to retain the existing workforce. Common sense suggests that this is why the 2008 and 2016 forms left the expected end of the employment indefinite and created the expectation of ongoing employment unless, *first*, the client contract was not extended or renewed and, *secondly*, both forms suggested that if employment at the current site were to cease, the employer would or might offer the employee employment elsewhere. During the course of argument of the appeal, Medirest explained that such a provision or action by an employer to offer alternative work could be seen as consistent with the employer’s need to establish the genuineness of a redundancy under s 389 of the *Fair Work Act* in certain circumstances.
4. Since Ms McArdle and Ms Graham gave evidence that the 31 employees were not told, at any time before the joint statement was made on 25 September 2017, of the date at which their work, or Medirest’s contract with its client, would end, a reasonable person in the position of Medirest and the 31 employees would not have understood that their, mostly long term, jobs were of a limited or finite duration. Moreover, over the previous 17 years of Compass group’s (and Medirest’s) relationship with Eldercare, there was no evidence that any employment contract was terminated when any of the contracts with Eldercare ended or were renewed.
5. The terminations on 30 June 2018 were not due to the ordinary and customary turnover of labour. Medirest was liable to pay those of the 31 employees, who had been in continuous service for at least one year and was not a casual, redundancy pay in accordance with s 119.

# Conclusion

1. For these reasons, the appeal must be allowed. We will direct the parties to bring in draft orders that provide for the order made by the Tribunal on 4 November 2022 to be set aside, and for declarations consistent with these reasons that the respective Medirest company contravened s 119(1)(a) of the Act by not paying the particular employees redundancy pay that will be set out in accordance with each employee’s entitlement under s 119(2) and remitting the matter to the Tribunal to deal with the Union’s application for penalties according to law.

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| I certify that the preceding sixty-six (66) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Rares, O'Sullivan and Feutrill. |

Associate:

Dated: 16 June 2023