

# ACTUS WORKPLACE LAWYERS

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## What is the “ordinary and customary turnover of labour”?

In recent times, three important decisions have been handed down by the Full Federal Court dealing with the “ordinary and customary turnover of labour” redundancy pay exclusion in section 119 of the *Fair Work Act 2009*. The decisions highlight various circumstances where the exclusion may apply, and those where the exclusion cannot be relied upon.

In [Berkeley Challenge Pty Ltd v United Voice](#) [2020] FCAFC 113, the Full Court of the Federal Court dealt with an appeal against two decisions of single judges of the Federal Court relating to entities within the Spotless Group. In the two cases, the judges had decided that the exclusion did not apply and the employees were entitled to redundancy pay. In dismissing the appeal, the Full Court placed substantial weight on whether the employees would have had a reasonable expectation that their employment was finite and depended upon the continuation of a relevant commercial contract between the employer and its client. The Court held that the employees would not have had such a reasonable expectation.

In [CEPU v Delta FM](#) [2021] 308 IR 94, the Full Court dealt with whether the “ordinary and customary turnover of labour” exclusion applied to a group of employees of the Compass Group who provided maintenance services during the construction phase of the Wheatstone project – an onshore facility that produces liquefied natural gas in the Pilbara region of Western Australia. The maintenance contracts between Compass and its client continued for a total of five years up until the completion of the construction phase of the project. The Court placed substantial weight on relevant provisions in the employees’ employment contracts that highlighted the finite nature of the employees’ employment. The employment contracts contained the following provision:

*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.*

The Full Court decided that the “ordinary and customary turnover of labour” exclusion applied, and the employees were not entitled to redundancy pay.

In a later case relating to a different group of employees of the Compass Group, the Full Court reached the opposite conclusion. In [United Workers Union v Compass Group Healthcare Hospitality Services Pty Ltd](#) [2023] FCAFC 92, the Full Court dealt with whether the “ordinary and customary turnover of labour” exclusion applied to a group of 31 catering, cleaning and laundry employees who were engaged to provide services at aged care facilities. The Court held that the “ordinary and customary turnover of labour” exclusion was not applicable because the employees would not have been “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”. The Court concluded that “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”.

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