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Article Information

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Unauthorised employee absences: Full bench abandons automatic termination

Michelle Cox, Associate, and Chris Hartigan, Partner, discuss the decision and its impact on employers engaging in enterprise bargaining.

Michelle Cox, Associate, and Chris Hartigan, Partner, *discuss the decision and its impact on employers engaging in enterprise bargaining. In a recent decision of the full bench, the Fair Work Commission has decided to delete the abandonment of employment clauses in six modern awards, and is now seeking submissions from interested parties in relation to a replacement clause.*

Background

The issue came to light following a decision of the same full bench in *Boguslaw Bienias v Iplex Pipelines Australia Pty Limited* (2017) 266 IR 11 (***Iplex***), in which it confirmed that clause 21 of the *Manufacturing and Associated Industries and Occupations Award 2010* (**the Manufacturing Award**) could not have the effect of automatically terminating an employee's employment, even where the clause had the effect of deeming an employee to have abandoned his or her employment, because it would be contrary to the law for it to have that effect. The full bench held that it was necessary for the employer to take the "further step" of terminating the employee's employment.

As a result, the employee in *Iplex* was held to have been dismissed at the initiative of the employer, and permitted to run an unfair dismissal claim.

Clause 21 of the Manufacturing Award will now be deleted, along with similar clause in five other modern awards (the *Business Equipment Award 2010*, the *Contract Call Centres Award 2010*, the *Graphic Arts, Printing and Publishing Award 2010*, the *Nursery Award 2010*, and the *Wool Storage, Sampling and Testing Award 2010*, together with the Manufacturing Award, the "**Affected Awards**") **Replacement clause proposed by the AMWU.**

The Fair Work Commission is now seeking submissions by 20 February 2018 as to the drafting of a clause to replace the abandonment of employment clauses in the Affected Awards. The AMWU has proposed a replacement clause which:

- Provides for employees to lose pay for unauthorised absences;
- Prevents an employer from terminating an employee's employment if the employee is entitled to be on leave under the NES, the Award, or any other agreement, including that the employer would be prohibited from advising a labour hire business that the worker no longer wanted labour from the worker;
- Requires the employer to use "all available methods" (which would presumably include private and work email accounts, home phone, mobile phone, text message, personal attendance at the employee's home, social media, and carrier pigeon) to contact the worker and provide them with an opportunity to give an explanation to the business for their absence; and
- Prohibits the employer from terminating the employee's employment until a period of three months has passed since the beginning of the employee's absence. The effect of this would likely be that if an employee was absent from work without explanation for any period less than three months, the employer would not be entitled to rely on the employee's absence to terminate the employee's employment.

The common law position

At common law, abandonment of a contract occurs when the parties implicitly agree to disavow the contract, and not be bound by its terms. In employment law, if an employee "abandons" their employment, this may give rise to a right of the employer to dismiss the employee for serious misconduct. This generally requires the company to attempt to get in contact

with the employee, and seek an explanation for their absence. In the absence of the employee providing a satisfactory explanation to the employer or indicating that they have not abandoned their employment, the employer will generally be entitled to dismiss the employee.

The proposal by the AMWU detracts significantly from the common law position, in that employers would not be permitted to dismiss an employee for an unexplained absence unless that absence exceeded three months' duration. In addition, it creates a potentially insurmountable hurdle, by requiring the employer to use "all available methods" to attempt to contact the employee before taking steps to terminate his/her employment. Failure to comply with the requirements of a modern award in respect of termination of employment would put the employer at significant risk of a successful unfair dismissal claim.

The full bench noted that it does not "necessarily endorse" the proposal of the AMWU. Further, there is clearly some value in providing guidance to both employers and employees in terms of what an employer can be expected to tolerate in terms of unauthorised absences, particularly in industries which traditionally have a high turnover of labour (as is the case in several of the industries to which the Affected Awards apply).

Employers covered by the Affected Awards will be entitled to rely on the abandonment of employment clauses (including the deeming provisions therein) which are to be deleted until a replacement clause is given effect by the Fair Work Commission.