

FWO flags review of abandonment clauses in Awards

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The Fair Work Commission has indicated that it will conduct a review of abandonment clauses contained in six modern awards, following the decision of the Full Bench of the Fair Work Commission in [Benias v Iplex Pipelines Australia Pty Ltd \[2017\] FWCFB 38](#).

In the decision, the Full Bench overturned the decision of Senior Deputy President O'Callaghan ([2016] FWC 6624), who dismissed an employee's unfair dismissal claim on the basis that the termination was not at the initiative of the employer.

The facts

Section 386 of the *Fair Work Act 2009* defines a dismissal as a termination of employment 'on the employer's initiative'. The Act provides that where an employee's employment is not terminated on the employer's initiative (i.e. a voluntary resignation), that employee is unable to pursue a remedy for Unfair Dismissal.

The employee in question had failed to show up for his shifts for a fortnight without explanation, leading the employer to conclude that the employee had abandoned his employment. The employer relied upon a clause in the *Manufacturing and Associated Industries and Occupations Award 2010* ('the Manufacturing Award'), which provides:

"21.1 The absence of an employee from work for a continuous period exceeding three working days without the consent of the employer and without notification to the employer is prima facie evidence that the employee has abandoned their employment.

21.2 If within a period of 14 days from their last attendance at work or the date of their last absence in respect of which notification has been given or consent has been granted an employee has not established to the satisfaction of their employer that they were absent for reasonable cause, the employee is deemed to have abandoned their employment.

21.3 Termination of employment by abandonment in accordance with clause 21—Abandonment of employment operates as from the date of the last attendance at work or the last day's absence in respect of which consent was granted, or the date of the last absence in respect of which notification was given to the employer, whichever is the later."

(Similar clauses are currently present in five other modern awards)

Findings on abandonment at first instance



At first instance, the Senior Deputy President concluded that the clause entitled an employer to consider any employee absent from work for a continuous period of more than three days without proper explanation, to have abandoned their employment and thereby to have brought their employment to an end. Further, the Senior Deputy President found that the obligation to rebut the presumption of abandonment lay with the employee. In the absence of such a rebuttal, the termination was deemed to be at the initiative of the employee. The Senior Deputy President held that the employee's conduct satisfied the threshold for abandonment under the clause, and dismissed the application on jurisdictional grounds

Findings on abandonment on appeal

On appeal, the Full Bench found that the abandonment clause in the award did not provide for the automatic termination of employment in the case of unexplained absence. Rather, the clause provided that an unexplained absence was only evidence of abandonment, and that this evidence could be used as a basis for the employer to terminate the employment. In other words, the abandonment merely provided a basis for an employer to terminate an absent employee's employment.

The Full Bench also determined that any alternative interpretation of the award clause would render the term impermissible and ineffective pursuant to the *Fair Work Act 2009*.

The Full Bench concluded that the termination was at the initiative of the employer, meaning that the Fair Work Commission did have the jurisdiction to hear the employee's claim. It referred the matter back to the Senior Deputy President for rehearing and redetermination.

The effects of the decision

The Commission's finding means any employer dealing with an employee who is absent from work without explanation must take the active step of terminating the employment because of the unexplained absence.

The Full Bench which heard the appeal will conduct a review of abandonment clauses, as part of Fair Work Commission's four yearly reviews of the modern awards.

Abandonment clauses are found within the following six modern awards: the *Manufacturing and Associated Industries and Occupations Award 2010*, 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*. Any employers subject to these awards should closely follow the outcome of the review.

Strategies for dealing with employee abandonment



Until the Fair Work Commission reports on its review, employers can properly empower themselves to deal with staff absenteeism, including by:

1. Implementing or bolstering policies in relation to employee absences, including provisions requiring employees to provide appropriate evidence of absences extending beyond one working day, and keeping employers informed about absences extending beyond one week.
2. Inserting a term into employment contracts providing that any unexplained absence beyond a particular timeframe (e.g. four working days), will constitute a breach of contract. Such a clause will support an argument that it is the employee's conduct which terminates the employment, and help avoid a finding similar to that made by the Full Bench.
3. Issuing a direction to an employee who is absent without explanation which requires him or her to explain the reason for the absence, and/or to show cause why the employer his/her employment should not be terminated for abandonment in accordance with the contractual term.

More Information

Please call the leading employment lawyers in Parramatta, the **Matthews Folbigg Workplace Solutions** team on **02 9635 7966** to speak with one of our employment lawyers.