Australian Federation of Employers & Industries

Title of matter:	4 yearly review of modern awards
Section:	156
Matter number:	AM2016/35
Item:	Abandonment of Employment – Common Issue
Document:	Submission in relation to the 'Reasonable inquiries about certain absences' draft clause
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BEFORE THE FAIR WORK COMMISSION

Fair Work Act 2009

Title of matter: 4 yearly review of modern awards

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Item: Abandonment of Employment – Common Issue

Document: Submission of Australian Federation of Employers & Industries (AFEI) in relation to the 'Reasonable inquiries about certain absences' draft clause released on 7 August 2018.

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1. On 7 August 2018 the Commission released for comment a single draft clause which, if adopted by variation into the various awards, will require an employer to take certain steps in response to an employee's unexplained and unauthorised absence of 3 or more consecutive working days.

2. For the purposes of the assessment of any proposed award term (including the draft clause), a pertinent consideration is that obligations imposed by awards are enforceable[1] and contravention can give rise to penal consequences, notably pecuniary penalties.[2]

[1] Fair Work Act s.45

[2] Fair Work Act ss. 537-559

3. As at the date of this submission, the maximum penalty for contravention of an award (if not a serious contravention) is 60 penalty units,[3] but a corporate employer is liable to penalty of five times the maximum amount.[4]

4. If the awards are varied in the terms of the draft clause, the resulting provision could have penalty consequences, and so the Commission should be cautious in its approach to the proposed variation and should expect to be shown a sound and persuasive case in its support.

5. In the exercise of its award powers, the Commission should be cautious to avoid an outcome that is not fair or balanced or which could – without sufficient cause – contribute to the regulatory burden upon employers.

6. A cautious approach to the draft clause is both prudent and appropriate because:

- The Commission must ensure that its awards *'provide a <u>fair</u> and relevant minimum safety net of terms and conditions...'* [5]
  (underlining for emphasis)
- The *Fair Work Act* envisages *'a <u>balanced</u> framework for cooperative and productive workplace relations...'* [6] (underlining for emphasis)
- The likely impact upon the regulatory burden is a matter that must be taken into account in any exercise of modern award powers.[7]

[3] Fair Work Act s.539(1)
[4] Fair Work Act s.546(2)(b)
[5] Fair Work Act s.134(1)
[6] Fair Work Act s.3
[7] Fair Work Act s.134(1)(f)

7. Further, as an enforceable obligation, the draft clause is a clause of significance. When considering a variation of significance, the Commission should expect probative evidence properly directed to demonstrating the facts in support of the proposed variation.[8]

8. For the reasons advanced in this submission, the Commission should decline to vary the awards in the terms of the draft clause.

The draft clause is not fair or balanced; a regulatory burden

9. The draft describes circumstances which confront an unsuspecting employer and which are - prima facie - suggestive of the absent employee being in default of the requirement to attend for work.

10. The text of the draft clause does not suggest either expressly or impliedly that the employer has contributed to, or is accountable in any way for, the employee's absence.

11. Nevertheless, the obligations of the clause are imposed solely upon the employer; the clause imposes no obligation upon the absent employee.

12. It follows that it is the employer who will be answerable for any contravention; and it is the employer who is vulnerable to pecuniary penalty.

[8] *Re 4 Yearly Review of Modern Awards – Preliminary Jurisdictional Issues* [2014] FWCFB 1788; (2014) 241 IR 189 p.198, [23]; p.210, [60(3)].

13. Having regard to these considerations, the draft clause presents as incongruous with particular objectives which are fundamental to the exercise of the Commission's award powers.

14. *First,* the draft clause is not fair or relevant. [9]

15. The clause is not fair as the enforceable obligations are imposed upon the employer only, and yet it is the unexplained and unauthorised absence of the employee that precipitates the obligations imposed by the clause.

16. That the clause does not express any obligation upon the employee only compounds the unfairness.

17. As to relevance, the Commission could not be satisfied that the clause is a suitable response to any proven need or contemporary circumstance because the Commission has not been informed by any probative evidence directed at demonstrating the facts supporting the proposed clause.

18. In particular, there is absent from the proceedings any probative evidence about:

- the frequency of unexplained and unauthorised absences in the industries to which the various awards apply;
- the practices and procedures adopted by employers in these industries when making inquiries into such absences;

[9] Fair Work Act s. 134(1) provides, amongst other things, that the Commission *'must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions…'*

- any particular conduct that might demonstrate that the employers in these industries are incapable of pursuing inquiries into unexplained and unauthorised employee absence without this prescriptive award provision;

- particular conduct that might demonstrate that, without this prescriptive award provision, employers in these industries are incapable of giving genuine consideration to explanations provided by employees regarding unexplained and unauthorised absences;

- the justification for the period of the absence to be 3 or more consecutive working days.

19. *Second,* the draft clause does not present as a balanced provision.[10] Again, the enforceable obligations are imposed upon the employer only, and yet it is the unexplained and unauthorised absence of the employee that precipitates those obligations.

20. As a further element of imbalance, it is notable that the clause 21.2 conveys an objective standard with respect to the reasonableness of the steps taken by the employer in pursuit of the inquiry. That standard is not necessarily satisfied according to the employer's view of the reasonableness of the steps its takes, and thus it may not be sufficient for the employer to demonstrate that, in all of the circumstances, the steps taken appeared to it to be reasonable.

[10] Fair Work Act s.3 provides that *'The object of this Act is to provide balanced framework for cooperative and productive workplace relations…'*

21. *Third,* the draft clause would be a regulatory burden upon employers.[11]

22. In this regard, the Commission should take into account the absence of any evidence of the necessity for these enforceable and prescriptive obligations.

Justification not shown

23. It is submitted that the manner in which an employer inquires into an incident of unauthorised or unexpected absence is a matter within the discretion and managerial prerogative of the employer.

24. The steps expressed at cl. 21.2 are prescriptive and therefore have the potential to displace initiatives which would have taken by the employer exercising its discretion and prerogative.

25. If employer initiative is to be displaced by an enforceable award obligation, then a persuasive case – characterised by probative evidence - should be shown to justify the regulation.

26. However, as noted already in this submission, the Commission has not been presented with an evidentiary case in support of the draft clause.

27. In effect, the Commission is being asked to exercise its award powers but without the presentation of evidence of any necessity for the exercise of those powers.

[11] Fair Work Act s.134(1)(f) requires the Commission to take into account *'the likely impact of any exercise of modern award powers'* on, amongst other things, *'the regulatory burden'*.

Doubtful as a term that may be included in a modern award

28. Terms that may be included in modern awards are described at Subdivision B of Division 3 of Part-2-3 of the *Fair Work Act*.

29. Amongst the matters addressed at that subdivision, s. 139(1) (a)-(j) lists the matters that may be included in a modern award.

30. The draft clause deals with unauthorised absence from work; it does not deal with the performance of any work or even the attendance of the employee at the place of work.

31. The Commission would be concerned to ensure that the draft clause qualifies as a term that may be included in a modern award.

32. However, it is not apparent that the draft clause is about any of the permissible matters listed at s. 139(1) (a)-(j).

33. In particular, it is doubtful that the draft clause is concerned with 'consultation' and so it is doubtful that the clause is directly authorised by s. 139(1) (j) as a term about 'procedures for consultation'.

34. That doubt emerges for the reason that the clause does not describe the employer in terms suggestive that:

- the employer has any particular disposition towards the employee in relation to the absence, or

- the employer has made any decision or reached any conclusion that might affect the employee and which could be the subject of consultation.

35. Rather, the language of the clause conveys the impression of an employer that is:

- neutral in its disposition towards the employee, and
- uninformed in relation to the reason for the absence, and
- undecided as to its response to the absence.

36. Consequently, there is no decision (or likely decision) or conclusion which the employer could disclose to the employee for the purposes of any meaningful consultation.

37. In the absence of a persuasive case to show that it is a term that may be included, the Commission should not adopt the draft clause.

38. Even if the clause qualifies as matter permitted, that quality does not justify its inclusion given the absence of a persuasive case demonstrating the necessity for such the clause.

Potentially punitive

39. One of the attributes of an absence addressed by the draft clause is that the absence is of 3 or more consecutive working days.

40. The draft must be understood to have the consequence that there is no enforceable obligation on the employer to take any of the steps at cl. 21.2 until 3 full working days have elapsed.

41. It must necessarily follow that any step taken by the employer *before* the completion of 3 or more consecutive working days will not qualify as a step taken under 21.2.

42. If, for instance, the employer attempts to contact the absent employee after, say, one day of absence, that step will not qualify as a 'reasonable step' for the purposes of cl. 21.2a.

43. Similarly, if the employer takes a step to provide the employee with an opportunity to explain the absence at any time within the 3 day period, that step will not qualify as a reasonable step under 21.2b.

44. Thus, regardless of the extent to which an employer takes immediate and diligent steps of inquiry within the first 3 days, those steps will not satisfy the obligations of the clause, and that employer will be vulnerable to the consequences of contravention.

45. These consequences might be unintended but they are, nevertheless, realistic possibilities.

46. Further, as submitted earlier in this submission, the clause conveys an objective standard and, as such, it may not necessarily be satisfied according to the employer's view of the reasonableness of the steps its takes; and it may not be sufficient for the employer to demonstrate that, in all of the circumstances, the steps it took appeared to it to be reasonable.

Conclusion

47. The draft clause should be declined. An employer's inquiry into the reasons for an unauthorised and unexplained absence is conduct capable of being pursued by the employer without prescriptive regulation. No case is shown to suggest otherwise.

Australian Federation of Employers & Industries

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