Australian Industry Group

4 YEARLY REVIEW OF MODERN AWARDS

Submission

Abandonment of Employment – Common Issue

(AM2016/35)

1 September 2017

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ABANDONMENT OF EMPLOYMENT – COMMON ISSUE (AM2016/35)

1. INTRODUCTION

1. This submission is made in response to the Commission's Statement[1] of 16 August 2017 in the 4 Yearly Review of Modern Awards – Abandonment of Employment proceedings.

2. This submission should be read in conjunction with Ai Group's submission of 8 August 2017.

3. In its Statement, the Full Bench invited further submissions on whether clause 21 of the *Manufacturing and Associated Industries and Occupations Award 2010* (**Manufacturing Award**) is a term that is able to be included in an award and made the following comments: (emphasis added)

> **[3]** In the decision in *Boguslaw Bienias v Iplex Pipelines Australia Pty Limited t/a Iplex Pipelines Australia* (Decision), the Full Bench expressed the view that clause 21, if interpreted in the way contended for by the employer in that case - that is, that the clause effected automatic termination of the employee if a deemed abandonment of employment arose would not be a permitted matter under the FW Act. However, it should be made clear, and we think this was made absolutely clear in the Decision, that this interpretation of the clause advanced by the employer was rejected by the Full Bench. Therefore, the Decision cannot be read as expressing any definitive view about the permissibility of clause 21.
>
> **[4]** We therefore, again, invite submissions concerning whether clause 21 is a permitted matter under the FW Act having regard to the interpretation that the Full Bench placed upon the clause in the Decision. We propose to allow the parties a further 21 days to make submissions about that question in writing.

[1] [2017] FWCFB 4250

2. IS CLAUSE 21 – ABANDONMENT OF EMPLOYMENT, A CLAUSE THAT CAN BE INCLUDED IN A MODERN AWARD?

4. We submit that the answer to this question is Yes.

5. The issue of whether an Abandonment of Employment Clause is a matter that can be included in an award of course depends on the content of such a clause. There are numerous clauses in awards that have a different title to the matters that are expressly referred to in the *Fair Work Act 2009* (**FW Act**) as matters than can be included in awards.

6. The proposed clause is able to be included in an award as a result of s.142 (Incidental and Machinery Terms) of the FW Act. The clause is incidental to the Wages clause, because it assists in resolving the issue of when the obligation to pay wages ceases. The clause is also incidental to the Notice of Termination by an Employee clause because in circumstances of abandonment termination is at the initiative of the employee and the employer is entitled to deduct pay for notice not given by the employee.

7. The proposed clause is "essential for the purposes of making these terms operate in a practical way" (s.142(1)(b)) in a similar manner to the following clauses in the Manufacturing Award:

    - Clause 20 – Absence from Duty, which is incidental to the Wages provisions that are allowable under s.139(1)(a)(i).

    - Clause 31 – Employer and Employee Duties, which is incidental to the classification provisions that are allowable under s.139(1)(a)(i).

    - Clause 34 – Payment of Wages, which is incidental to the Wages provisions that are allowable under s.139(1)(a)(i).

8. It is evident, when all of the terms of the 122 modern industry and occupational awards are considered, that the Commission has taken a practical and not overly narrow approach when determining whether longstanding award provisions meet the requirements of s.142.

9. In 2008/09, the Australian Industrial Relations Commission (**AIRC**) Award Modernisation Full Bench decided to retain clause 21 in the Manufacturing Award.

10. At the time, Ai Group proposed that abandonment of employment clauses should be included in all modern awards. In response to Ai Group's submissions, in the *Priority Stage Award Modernisation Decision*[2] the Full Bench said:

> **[55]** It was also suggested that we should draft a standard clause dealing with abandonment of employment. We are not prepared to do so. Not all awards contain such a provision and what provisions there are differ in a number of respects. We have adopted the approach of generally maintaining existing provisions where practical and not extending their area of operation unless it is necessary to remove interstate differentials.

11. In adopting this approach, the Full Bench must have been satisfied that the abandonment of employment clauses met the requirements of s.142.

12. This approach was not limited to abandonment of employment clauses, the Award Modernisation Full Bench decided to retain a number of longstanding incidental provisions in awards. For example, a similar approach was taken with dispute resolution training leave clauses on the basis that these clauses are incidental to an allowable award matter. The following extract from the *Priority Stage Award Modernisation* Decision is relevant:

> **[46]** The Minister and a number of parties made submissions concerning dispute resolution training leave. This type of leave was found to be incidental to an allowable award matter and necessary for its effective operation pursuant to s.89A of the WR Act, as it stood at that time, by a Full Bench of the Commission in 1998. Dispute resolution training leave, although quite common in pre-reform awards prior to the Work Choices amendments, has never been a test case provision. We have decided to maintain dispute resolution training leave where it is a prevailing industry standard.

13. The approach that the Award Modernisation Full Bench took with abandonment of employment clauses and dispute resolution training leave clauses highlights that a clause can legitimately meet the requirements of s.142 for those modern awards where there were longstanding provisions in the key pre-modern

[2] [2008] AIRCFB 1000

awards, even though most other modern awards do not contain such provisions.

14. As explained in our submission of 8 August 2017, an abandonment of employment clause has been in the Metal Industry Award / Manufacturing Award since at least 1971. Ai Group and the Metal Trades Federation of Unions (i.e. the AMWU, AWU, CEPU, CFMEU, NUW and United Voice) confirmed their agreement to retain the clause in the Award during the award simplification proceedings in 1996-98 and in the award modernisation proceedings in 2008-09.

15. In the 1998 *Metal Industry Award Simplification Decision*,[3] Senior Deputy President Marsh held that the abandonment of employment clause in the Award was an allowable matter. Her Honour said:

> **4.5 Absence from Duty**
>
> **4.6 Standing Down Employees**
>
> **4.7 Abandonment of Employment**
>
> Clause 4.6 is an allowable matter and consistent with the hospitality decision. Clauses 4.5 and 4.7 were not addressed in the hospitality decision.
>
> No party or intervener argued that these agreed matters are not allowable. I am satisfied they are allowable pursuant to s.89A(2)(n) and s.89A(2)(c) or s.89A(6). They are current award provisions and will be included in the new award.

16. It can be seen from the above extract that, the three provisions of the *Workplace Relations Act 1996* that Marsh SDP referred to, in determining that the abandonment of employment clause (clause 4.7) and the absence from duty clause (clause 4.5) were able to be included in the Award, were:

- s.89A(2)(n) – notice of termination;
- s.89A(2)(c) – rates of pay; and
- s.89A(6) – incidental award provisions.

[3] Print P9311, 11 March 1998, Marsh SDP.

17. There is no reason why the approach of the Award Modernisation Full Bench and of Marsh SDP cannot, and should not, be followed in these proceedings.

18. Accordingly, clause 21 should be retained in the Manufacturing Award and the similar clauses in the other awards that are the subject of these proceedings should be retained.

3. THE MERITS OF THE ABANDONMENT OF EMPLOYMENT CLAUSE

19. We note that the Full Bench has not asked for submissions about the merits of retaining clause 21 in the Award, or whether or not any changes should be made to clause 21 to provide more clarity to employers and employees in circumstances of abandonment. The Full Bench has only invited submissions on the jurisdictional issue of whether or not clause 21 can be retained in the Award.

20. However, for the purposes of completeness we make the following submissions.

21. The case law surrounding the concept of abandonment of employment has not fundamentally changed in recent times. For the reasons explained in Ai Group's submission of 8 August 2017, the key legal principles include:

    a. Abandonment of employment constitutes repudiation by the employee of the employment contract.

    b. Upon acceptance of the repudiation by the employer, termination is at the initiative of the employee.

    c. Whether an employee has abandoned his or her employment in an individual case is not a question of law but a question of fact.

    d. The test is objective. It is not necessary to prove a subjective intention on the part of the employee.

22. Given that the case law has not fundamentally changed in recent times, the merits of retaining the clause in the Manufacturing Award are similar to the merits that were no doubt considered by the Award Modernisation Full Bench in 2008-09 and Marsh SDP in 1996-98, when they decided to retain the clause.

23. Clause 21 promotes fairness to employees and employers. It contains practical provisions of assistance to employers and employees when applying various other provisions of the Award (namely the Wages clause and the Notice of Termination by an Employee clause) in circumstances of abandonment of employment. It gives both employees and employers a framework within which the important issue of abandonment of employment can be dealt with. For example, an employee who goes missing for four days without notification to the employer will know that such circumstances will only constitute prima facie evidence of abandonment. The proposed clause assists employers when making decisions in circumstances where an employee fails to attend work without notification.

24. With regard to the merits of clause 21 and the reasons why the clause is consistent with the modern awards objective, Ai Group relies on paragraphs 5-31 and 52-81 of our submission of 8 August 2017 which are equally relevant to the retention of clause 21.

25. If the Full Bench decides that the Commission has jurisdiction to retain an abandonment of employment clause in the relevant awards, but that there would be merit in making some changes to the clause, we submit that the appropriate course would be for the Full Bench to call for submissions on this after determining the jurisdictional issue.