IN THE FAIR WORK COMMISSION

Matter No.: AM2016/35 Abandonment of Employment
Re Application by: "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU)

Submission of the "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU)

4 Yearly Review of Modern Awards

COVER SHEET

About the Australian Manufacturing Workers' Union

The Australian Manufacturing Workers' Union (AMWU) is registered as the "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union". The AMWU represents members working across major sectors of the Australian economy, including in the manufacturing sectors of vehicle building and parts supply, engineering, printing and paper products and food manufacture. Our members are engaged in maintenance services work across all industry sectors. We cover many employees throughout the resources sector, mining, aviation, aerospace and building and construction industries. We also cover members in the technical and supervisory occupations across diverse industries including food technology and construction. The AMWU has members at all skills and classifications from entry level to Professionals holding degrees.

The AMWU's purpose is to improve member's entitlements and conditions at work, including supporting wage increases, reasonable and social hours of work and protecting minimum award standards. In its history the union has campaigned for many employee entitlements that are now a feature of Australian workplaces, including occupational health and safety protections, annual leave, long service leave, paid public holidays, parental leave, penalty and overtime rates and loadings, and superannuation.

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Introduction

1. The Australian Manufacturing Workers' Union (AMWU) makes the following Submission to the Fair Work Commission in response to the directions in the Decision of the Full Bench 23 January 2018 [2018] FWCFB 139.[1]

2. The Full Bench has asked parties to file proposals for a clause to replace the current clause 21 in the Manufacturing and Associated Industries and Occupations Award 2010.

3. This submission proposes a new clause to replace the current clause 21.

4. The Full Bench indicated the following in response to the AMWU's previously proposed clause:

> "[34] We do not necessarily endorse the above clause (in particular we do not endorse the proposed clause 20.4 and the reference to labour hire businesses in the proposed clause 20.3), however we set out the proposal because it is broadly indicative of the type of provision which might be a permissible replacement for the current clause 21."

5. In light of the above statement, the AMWU's proposed clause in this submission does not contain the parts which the Full Bench has explicitly not endorsed in its decision.

6. While the clause indicating three months is not included, the AMWU continues to press for a note which draws the employer's attention to the General Protection against dismissal for an illness or injury.

7. The AMWU continues to press for labour hire protections. Labour hire employees are included in all awards via the standard clause which exists in every Coverage clause of every Modern Award. It makes sense for the Modern Awards to also comprehend what additional protections might be necessary to ensure that labour hire arrangements don't undermine the employment relationship an allow businesses to circumvent entitlements and rights by utilising labour hire arrangements.

AMWU revised proposed clause for consultation

8. The AMWU proposes a revised clause to retain the part of the clause which provides for a process of engagement by the employer with the employee.

9. The AMWU's proposed clause and note is as follows and is contained in a draft determination at Attachment A to this submission.

[1] [2018] FWCFB 139

"20. Unexplained Absence from work

20.1 This clause applies where an employer is unaware of the reasons for an employee's absence.

(a) Where clause 20.2 applies, an employer must not take any action against an employee (such as giving notice of termination) before:

(i) the employer has used all available means to attempt to contact the employee; and

(ii) the employer has provided the employee with at least 21 days to provide an explanation for the absence from work.

Note: Section 352 of the Fair Work Act 2009 provides that an employer must not dismiss an employee because the employee is temporarily absent from work because or illness or injury of a kind prescribed by the regulations.

21. Abandonment of Employment"

10. The AMWU's proposed clause provides for a procedure for consultation, and is a term allowed by s.139(1)(j). Section 139(1)(j) provides as follows:

"**139 Terms that may be included in modern awards – general**

(1) A modern award may include terms about any of the following matters:

…

(j) procedures for consultation, representation and dispute settlement"

11. The AMWU's proposed clause is also an ancillary or incidental term to the NES entitlements (s.55(4)) and to Award terms (s.142), as they provide a process for determining whether a worker is accessing an entitlement where there is uncertainty. In particular, the NES entitlements a worker may be accessing include Personal Leave/ Carer's leave, Public Holidays or Community Service Leave.

12. Award terms an employee may be accessing an entitlement from include Hours of Work terms which provide for a rostered days off, Time off instead of payment for overtime or Substitute Public Holiday clauses.

13. Other "Agreements" which may provide for entitlements to be absent include:

a. Individual Flexibility Agreements which may stipulate arrangements for when work is performed;

b. A contract of employment which may stipulate other arrangements for when work is performed; or

c. An agreement reached subsequent to successful request for a "request for flexible work arrangement" under the NES entitlement.

14. The first part of the AMWU's proposed clause 20.1 sets out the circumstances where the clause might apply.

15. The second part at clause 20.1(a) sets out the process of engagement required by the employer in more detail.

16. The third part of clause 20.1 is a note which ensures that an employer is aware of section 352 which also provides relevant protections. Where an employer may suspect or have information available to them which indicates there may be health issues, particularly mental health issues or physical health issues which may warrant additional measures such as a welfare check, there may be an obligation on the employer to take those additional steps.

17. In drafting the clause, the AMWU has deleted the current "Absence from Duty" clause and renamed the clause. The AMWU submits that the current clause 20 is unnecessary, as it does not appear to have any work to do. The current Clause 20 provides as follows:

> "20. Absence from duty
>
> Unless a provision of this award or the Act states otherwise, an employee not attending for duty loses their pay for the actual time of such non-attendance."

18. The current clause 20 is simply stating the current position, which is that an employee will not be paid for work they haven't performed unless there is an entitlement to be absent and paid for that absence. The clause is not "necessary" to achieve the modern awards objective as required by s.138. It is simply stating the obvious, but in a manner which places the focus on an employer's right to make an employee lose pay. From a regulatory perspective, the clause's focus on employee's losing pay for being absent goes against the primary focus of the NES and other minimum safety net entitlements in Awards which are about clearly creating entitlements, rights or obligations and providing a safety net for workers.

Why should the Commission include the proposed clause?

19. The Commission should include the AMWU's proposed clause because it ensures that there is a process which an employer is required to undertake before taking any action against an employee.

20. From a regulatory perspective, providing for an engagement process that affords natural justice before adverse decisions are made encourages parties to behave in a cooperative and mutually supportive manner.

21. Once an employer has made a decision to dismiss, there are flow on effects of engaging new staff and/or rearranging workplaces which may make overturning a dismissal more difficult.

22. Given that a dismissal is difficult to overturn, without commencing a potentially lengthy legal or quasi-judicial process, a clear process of consultation balances the employer's rights against those of employees who may have legitimate explanations for their absence and potentially avoids parties having to commence proceedings.

23. Additionally, the process ensures that the NES and Award entitlements operate as effectively as possible, by avoiding any decisions by businesses, that may in the short term undermine the NES entitlement and potentially require reversal.

24. The process protects employees who may be accessing legitimate entitlements or be entitled to be absent. It also protects employers by guiding them through a process to avoid making decisions that may be in breach of the National Employment Standards, Award terms or the General Protections.

25. This is particularly pertinent to small businesses with minimal human resources experience, who may not be as familiar with entitlements such as carer's leave or compassionate leave.

A process which is expected by every Australian

26. It is is a legitimately held expectation of every worker in Australia that if their employer doesn't know why they are absent – they would attempt to make contact with the employee and seek an explanation before taking any action.

27. This is a basic entitlement to show cause for the absence which every one would expect.

28. A fair and relevant minimum safety net of conditions and entitlements must provide for this most basic expectation of the industrial relations system.

29. Employers who take action against an employee without even attempting to comply with this community expectation and seeking an explanation from the employee should be subject to civil penalties.

30. No employee should be subject to the vagaries of an employer's mood, and whether the employer feels like they want to contact an employee about their absence before taking action.

Conclusion

31. The AMWU submits that the AMWU's proposed clause is a term permitted by s.139.

32. The AMWU submits that the AMWU's proposed clause is necessary to achieve the modern awards objective because it provides for a minimum process of consultation which is a legitimately held expectation of every worker in the in Australia.

33. The fair and relevant safety net of entitlements would not be complete without this most basic entitlement to show cause for an unexplained absence.

End

20 February 2018

Attachment A - Proposed Draft Clause

DRAFT DETERMINATION

Fair Work Act 2009
Part 2-3 Division 4 – 4 Yearly Review of Modern Awards
s.156(2)(b)(i)

Manufacturing and Associated Industries and Occupations Award 2010
(MA000010)

Manufacturing and associated industries

AM2016/35 Abandonment of Employment

VICE PRESIDENT SYDNEY, X XXX 2018

Review of modern awards to be conducted.

[1] Further to the decision and reasons for decision <<decision reference>> in AM2016/35, it is determined pursuant to section 156(2)(b)(i) of the Fair Work Act 2009, that the Manufacturing and Associated Industries and Occupations Award 2010 be varied as follows.

[2] Delete clause 20 and 21 and replace with the following:

"**20. Unexplained Absence from work**

20.1 This clause applies where an employer is unaware of the reasons for an employee's absence.

(a) Where clause 20.2 applies, an employer must not take any action against an employee (such as giving notice of termination) before:

(i) the employer has used all available means to contact the employee; and

(ii) the employer has provided the employee with at least 21 days to respond to the attempts to contact the employee and provide an explanation for the absence from work.

Note: Section 352 of the Fair Work Act 2009 provides that an employer must not dismiss an employee because the employee is temporarily absent from work because or illness or injury of a kind prescribed by the regulations.

21. Abandonment of Employment"

[3] This determination will operate on and from 1 XXX 2018.

VICE PRESIDENT