

CFMEU

CONSTRUCTION

IN THE FAIR WORK COMMISSION
Matter Number: AM2016/35

Fair Work Act 2009
s.156 - 4 yearly review of modern awards

4 yearly review of modern awards – Abandonment of Employment
(AM2016/35)

**REPLY SUBMISSION OF THE CONSTRUCTION, FORESTRY, MINING AND
ENERGY UNION (CONSTRUCTION & GENERAL DIVISION)**

1st June 2017

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Introduction

1. The Fair Work Commission (the Commission) is currently undertaking a 4 yearly review of modern awards (the Review) as required by s.156 of the *Fair Work Act 2009* (the FW Act). On the 1st February 2017 the President, Justice Ross, issued a Statement¹ regarding the review of the ‘abandonment of employment’ terms in a number of modern awards, which indicated that the review of those terms would be referred to the Full Bench that dealt with the appeal in *Boguslaw Bienias v Iplex Pipelines Australia Pty Limited* ([2017] FWC 38) (hereinafter referred to as *Iplex*).
2. A Mention/Directions hearing took place on 27th April 2017, following which Directions were published by the Full Bench². The Directions invited interested parties to file in the Commission any written submissions they wished to make in relation to whether the “abandonment of employment” provisions in the six identified awards³ are terms that may be included in modern awards. Such submissions were required to be filed by 5pm on Thursday 18th May 2017. Any submissions in reply were to be filed by 5pm on Thursday 1st June 2017.
3. The AMWU, AWU, and CEPU filed submissions seeking the deletion of the abandonment of employment provisions in the six identified awards. As these submissions are supportive of the position of the CFMEU Construction and General Division (the CFMEU C&G), set out in its submission of 18th May 2017, no reply is required.
4. The only other party to make a submission was the Australian Industry Group (the AIG)⁴. Whilst the AIG supports the deletion of the specific clauses dealing with abandonment of employment,⁵ the AIG opposes the complete removal of all references to abandonment. The AIG proposes that a new subclause (c) be added to clause 22.2 Notice of termination by an employee, of the *Manufacturing and Associated Industries and Occupations Award 2010* (the Manufacturing Award)⁶, in the following terms:

“(c) Subclause (b) applies in circumstances where termination is at the initiative of the employee, including circumstances where an employee abandons his or her employment.”

¹ [2017] FWC 669

² <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201635-dir-270417.pdf>

³ See Attachment A of [2017] FWC 669

⁴ <https://www.fwc.gov.au/documents/sites/awardsmodernfouryr/am201635-sub-aig-180517-amended.pdf>

⁵ AIG at paragraph 4a

⁶ Ibid at paragraph 4b

5. The CFMEU C&G supports the deletion of clause 21 from the Manufacturing Award, but does not support the variation to clause 22.2 as proposed by the AIG. The CFMEU C&G therefore makes the following submission in reply.

Abandonment of Employment is not Automatic Termination

6. The AIG claim that when an employee abandons his or her employment, the termination of the employment occurs at the initiative of the employee. The AIG further claim that,

“When an employee abandons his or her employment, termination of employment automatically occurs at the point in time when the employee voluntarily left the employment. In such circumstances, it is not necessary for the employer to take any steps to terminate the employee’s employment.”⁷ (underlining added)

7. The AIG are clearly wrong.⁸ Whilst abandonment of employment may be a factor in any claim for unfair dismissal it does not detract from the legal requirement as recognised in *Iplex*, and indeed as provided for in ss.117 and 118 of the FW Act, i.e. that termination of employment requires written notice (either by the employer or the employee). Although an employee may repudiate his or her contract of employment through abandonment, there still requires written notice by either side to end the employment relationship.
8. The decision in *Mohazab v Dick Smith Electronics Pty Ltd (No 2)*⁹ does not assist the AIG argument. In that decision the Full Court noted with apparent approval the findings of Moore J in *Grout v Gunnedah Shire Council* (1994) 125 ALR 355, that:

“An employee may do some act which is the first in a chain of events that leads to termination. An example would be an employee who engaged in misconduct at work which ultimately led to the employer dismissing the employee. However, that situation and the present are not situations where the termination was at the initiative of the employee. In both instances the step or steps that effectively terminated the employment or purported to do so were taken by the employer.”¹⁰

9. If an employee abandons his or her employment then that might be seen as the first step but, failing any written resignation from the employee, it would still require written notice from the employer to bring the employment relationship to an end.

⁷ AIG at paragraph 11

⁸ See *Iplex* at [56]

⁹ 62 IR 200

¹⁰ *Ibid* at 205

10. In *Erbacher, Sean and Golden Cockerel Pty Ltd*¹¹, although abandonment of employment was the reason justifying dismissal it is clear from paragraph [3] that “*The Applicant was dismissed for abandoning his employment from 29 January 2007 to 5 February 2007*”, and that dismissal took place on 7th February 2007¹².
11. Further, the AIG’s reliance on *Erbacher, Sean and Golden Cockerel Pty Ltd* is misconceived. Although termination by an employer on the grounds of abandonment of employment can be seen as termination on the initiative of the employee it stills requires the act of the employer to bring about the termination. The corollary of this is where an employee resigns under duress, but the termination is still seen as a termination at the initiative of the employer. As the Full Bench in *Mohazab v Dick Smith Electronics Pty Ltd (No 2)* found,
- “On the finding of fact that the respondent directed the appellant to resign or have the police “called in”, it is our view that what occurred was a termination of employment at the initiative of the employer. When an employee has no effective or real choice but to resign it can hardly be said that the termination of her or his employment is truly at the employee's initiative. But for the insistence of the employer, termination of employment would not cross the mind of the employee.”*¹³
12. As noted by the Full bench in *Iplex* an employee must receive written notice of the day of termination and except in the case of serious misconduct, the receipt of notice or compensation in lieu of notice.¹⁴

Proposed Variation to Clause 22.2

13. The AIG have proposed a variation to clause 22.2 by the addition of a new 22.2(c). The effect of the proposed variation would be to give an employer an automatic right to withhold from any monies due to an employee on termination (e.g. accrued annual leave) up to four weeks’ pay (depending on the length of service) for lack of notice, if the reason for the termination is abandonment of employment. The CFMEU C&G opposes the variation.
14. As stated above, situations involving allegations of abandonment of employment still require the employer to provide written notice of the day of termination. The additional subclause proposed by the AIG would, as clearly intended by the AIG (see the second dot point in paragraph 30 of the AIG submission) wrongly imply that this is not required.

¹¹ [2007] AIRC 491

¹² Ibid at [27] and [46]

¹³ 62 IR 200 at 206

¹⁴ Iplex at[58]

15. The Full Bench should therefore reject the AIG proposed variation and delete all references to abandonment of employment from the awards.
