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IN THE FAIR WORK COMMISSION

Matter No: AW2016/35

SUBMISSIONS OF THE AUSTRALIAN WORKERS' UNION (AWU)

ABANDONMENT OF EMPLOYMENT

4 September 2017

Background

1. The Abandonment of Employment – Common Issue Full Bench issued a Statement on 16 August 2017 (“the FB Statement”) questioning the validity of the abandonment of employment clause – clause 21 (“the AE Clause”) contained in the Manufacturing and Associated Industries Occupations Award 2010 (“the Manufacturing Award”) and whether the clause is a permitted matter under the *Fair Work Act 2009* (“the Act”).
2. At the conclusion of the FB Statement, the Full Bench issued directions for interested parties to file written submissions as to whether the AE Clause, when correctly read as interpreted by the Full Bench of the Fair Work Commission in *Bienias v Iplex Pipelines Australia Pty Limited* [2017] FWCFB 38 (“Iplex”), is a permitted matter under the *Fair Work Act 2009* (“the Act”).
3. These submissions respond to those directions.

The AE Clause – Clause 21 abandonment of employment

4. The AE Clause in the Manufacturing Award is set out as follows:

21. Abandonment of employment

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.

5. The AE Clause provides prescribed circumstances when an employee is deemed to have abandoned their employment
6. The AE Clause, when correctly read, does not terminate an employee’s employment. If an employer wishes to terminate an employee’s employment for abandoning their employment, the employer must still terminate the employment at the employer’s initiative and provide the employee notice in accordance with the NES.

The AE Clause is not a permitted matter

7. Section 136 of the Act sets out what can be included in modern awards. Section 136 of the Act provides as follows:

136 What can be included in modern awards

Terms that may or must be included

- (1) A modern award must only include terms that are permitted or required by:
 - (a) Subdivision B (which deals with terms that may be included in modern awards); or
 - (b) Subdivision C (which deals with terms that must be included in modern awards); or
 - (c) section 55 (which deals with interaction between the National Employment Standards and a modern award or enterprise agreement); or
 - (d) Part 2-2 (which deals with the National Employment Standards).

Note 1 Subsection 55(4) permits inclusion of terms that are ancillary or incidental to, or that supplement, the National Employment Standards.

Note 2: Part 2-2 includes a number of provisions permitting inclusion of terms about particular matters.

Terms that must not be included

- (2) A modern award must not include terms that contravene:
 - (a) Subdivision D (which deals with terms that must not be included in modern awards); or
 - (b) section 55 (which deals with the interaction between the National Employment Standards and a modern award or enterprise agreement).

Note: The provisions referred to in subsection (2) limit the terms that can be included in modern awards under the provisions referred to in subsection (1).

8. As to Subdivision B - terms that may be included in modern awards, abandonment of employment is not a matter falling within:

- s.138 – terms that may be included in modern awards –general;
- s.140 – Outworker terms;
- s.141 – Industry-specific redundancy schemes; or
- s.142 – Incidental and machinery terms.

9. Subdivision C, of Division 3, sets out the terms that must be included in modern awards. Abandonment of employment is not a term specified in s.143 to s.149D of the FW Act

10. Abandonment of employment therefore is not a term permitted by s.136(1)(a) or s.136(1)(b) of the Act.

11. Section 55 of the Act deals with the interaction between the National Employment Standards and a modern award or enterprise agreement.

12. As to s. 55 of the Act and the AE Clause we submit:

- a. As discussed above at [5]-[6], the AE Clause is a term that provides specified prescribed circumstances when an employee is deemed to have abandoned their

employment. The AE Clause is not a term that terminates the employment or provides for notice of termination. If an employer wishes to terminate an employee's employment for abandoning their employment, the employer must still separately provide notice in accordance with the NES from the date the employer elects to terminate.

- b. Correctly read, the AE Clause does not aid in the operation of any NES, it is not necessary for the operation of any NES and it does not add to any NES. The AE Clause simply provides a circumstance when pursuant to the terms of the clause an employer can deem an employee has abandoned their employment.
- c. The AE Clause does not exclude any provision of the NES;
- d. The AE Clause is not a provision of Part 2-2 of the Act or a term the Manufacturing Award is expressly to include by any regulations made pursuant to s. 127 of the Act;
- e. The AE Clause is not connected in a way that would make it ancillary or incidental to the operation of any NES, and it does not add or supplement any of the NES;

13. In addition, the AE Clause is a clause that causes significant confusion among employers and employees. The Full Bench is entitled to consider its own experience regarding the confusion, and how it is often interpreted by parties in a way that would exclude an employee's entitlement to notice of termination as provided by the NES.

14. The AE Clause therefore is not a term permitted or required by s. 55 of the Act.

Conclusion

15. For the above reasons, the AWU submits that the AE Clause is not permitted under s. 136 of the Act and therefore the AE Clause, and all other clauses similar to the AE Clause as identified, should be deleted by the Full Bench.
