

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)**

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

4th September 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, and 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] FWCFB 38) (hereinafter referred to as *Iplex*).
2. The matter was listed for Mention/Directions 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.
3. The CFMEU Construction and General Division (the CFMEU C&G) filed an initial submission on 18th May 2017 and a reply submission on 1st June 2017.
4. The Full Bench, at the request of the AIG, conducted a hearing of the matter on 14th August 2017. At the end of the hearing the Full Bench gave a statement on transcript as to the remit of the Full Bench in these proceedings and invited the parties to make submissions concerning whether clause 21 of the *Manufacturing and Associated Industries and Occupations Award 2010* (Manufacturing Award) is a permitted matter under the FW Act. An edited version of the statement issued on transcript was published as a formal Statement on 16th August 2017⁴.
5. This Third Submission of the CFMEU C&G is made to address the specific issue of whether clause 21 is a permitted matter.

Clause 21 is Not a Permitted Matter

6. The CFMEU C&G submits that clause 21 of the Manufacturing Award is not a permitted matter for the reasons set out below.

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 [2017] FWCFB 4250

7. Division 3 of Part 2-3 of the FW Act is concerned with the terms of modern awards. S.136 of the FW Act sets out what can be included in modern awards and 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. In regard to Subdivision B - Terms that may be included in modern awards, abandonment of employment is not a matter falling within:

- s.139 – 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.

Therefore an abandonment of employment term is not permitted by s.136(1)(a) of the FW Act.

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, therefore it is not a term permitted by s.136(1)(b) of the FW Act.

10. The conclusions reached in paragraphs 8 and 9 above are supported by the findings of the Full Bench in *Iplex*⁵, where it is stated,

“[51] It seems to be accepted by Iplex, and in any event we consider, that clause 21 is not a term which is either permitted by any provision enumerated in Subdivision B or required to be included by any provision enumerated in Subdivision C of Part 2-3 Division 3 of the Act.”

11. S. 55 of the FW Act deals with the interaction between the National Employment Standards and a modern award or enterprise agreement. Under s.55(1) a modern award or enterprise agreement must not exclude the National Employment Standards or any provision of the National Employment Standards. Whilst the term “abandonment of employment” is not a National Employment Standard, the matters dealt with or intended to be dealt with in clause 21.3 of the Manufacturing Award, i.e. the operative date of the termination, is.

12. S.117 – Requirement of notice of termination or payment in lieu, of the FW Act, sets out the obligations on employers when terminating an employee’s employment. Significantly for these proceedings s.117(1) provides that,

Notice specifying day of termination

(1) An employer must not terminate an employee’s employment unless the employer has given the employee written notice of the day of the termination (which cannot be before the day the notice is given).

⁵ [2017] FWCFB 38

13. Clause 21.3, on its plain wording, seeks to operate in a manner to authorise an operative date of termination before notice is given by an employer. But such a provision cannot operate this way as noted by the Full Bench in *Iplex*,

“[43] Thus termination of employment by abandonment as set out in the third paragraph of clause 21, though said to operate as from the date, relevantly, of the last attendance at work, cannot operate at all until the employer reaches the conclusion that it is not satisfied that the employee was absent for a reasonable cause, and decides to act.”

14. Therefore as clause 21.3 has no effect, in that it cannot operate to exclude the National Employment Standards (as per s.55(1) of the FW Act), the clause serves no purpose and should be deleted.
15. It is also submitted that if clause 21.3 did seek to exclude the NES than it must not be included in an award in accordance with s.136(2)(b) of the FW Act.
16. In regard to s.55(2) of the FW Act, which allows terms to be included in awards permitted by either a provision of Part 2-2 (which deals with the National Employment Standards) or by regulations made for the purposes of section 127 of the FW Act, the CFMEU C&G submits that the abandonment of employment clause is not a term permitted by either of these provisions.
17. The only specific provision in Part 2-2 which could possibly be relevant under s.55(2)(a) is s.118, which provides as follows:

118 Modern awards and enterprise agreements may provide for notice of termination by employees

A modern award or enterprise agreement may include terms specifying the period of notice an employee must give in order to terminate his or her employment.

However as the abandonment of employment clause does not specify the period of notice an employee must give to terminate his or her employment, the clause is not permitted by s.55(2)(a).

18. S.127 of the FW Act provides that the regulations (i.e. the Fair Work Regulations 2009) may:

(a) permit modern awards or enterprise agreements or both to include terms that would or might otherwise be contrary to this Part or section 55 (which deals with the interaction between the National Employment Standards and a modern award or enterprise agreement); or

(b) prohibit modern awards or enterprise agreements or both from including terms that would or might otherwise be permitted by a provision of this Part or section 55.

The CFMEU C&G has been unable to identify any regulation that relates to s.127 or that would permit an abandonment of employment clause.

19. In regard to s.55(4) of the FW Act, the CFMEU C&G dealt with this specific issue in our initial submission of 18th May 2017 (at paragraph 5) and relies on that submission. An Abandonment of Employment clause is not ancillary or incidental to an entitlement of an employee under the National Employment Standards.

Remedy

20. The CFMEU C&G again submits that abandonment of employment is not a permitted term and that the Full Bench should delete clause 21 from the Manufacturing Award.
