DECISION

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

Abandonment of Employment
(AM2016/35)

VICE PRESIDENT HATCHER
DEPUTY PRESIDENT GOSTENCNIK
COMMISSIONER CRIBB SYDNEY, 23 JANUARY 2018

4 yearly review of modern awards – Abandonment of Employment – common issue.

Introduction

[1] On 1 February 2017 the President, Justice Ross, issued a Statement[1] referring to this Full Bench the task of reviewing, as part of the 4 yearly review of modern awards, provisions concerning abandonment of employment in six modern awards: the *Manufacturing and Associated Industries and Occupations Award 2010* (*Manufacturing Award*), the *Business Equipment Award 2010*, the *Contract Call Centres Award 2010*, the *Graphic Arts, Printing and Publishing Award 2010*, the *Nursery Award 2010* and the *Wool Storage, Sampling and Testing Award 2010*. As the Statement noted, the 13 January 2017 Full Bench decision in *Boguslaw Bienias v Iplex Pipelines Australia Pty Limited*[2] (*Iplex*) had determined that clause 21, *Abandonment of Employment* of the *Manufacturing Award*, if read as effecting an automatic termination of employment in specified circumstances, was not a term that was either permitted or required to be in a modern award under Division 3 of Part 2-3 of the *Fair Work Act 2009* (FW Act) and was consequently of no effect by virtue of s 137. Clause 21 provides:

> **21. Abandonment of employment**
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> 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.
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> 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.

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[1] [2017] FWC 669

[2] [2017] FWCFB 38, 266 IR 11

> 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.

[2] The five awards other than the *Manufacturing Award* contain provisions in similar terms to clause 21 of the *Manufacturing Award*. The provisions in all six awards were required to be reviewed in light of the decision in *Iplex*.

[3] As part of the conduct of this review, we issued directions on 27 April 2017 requiring interested parties to file written submissions concerning whether the "Abandonment of Employment" provisions in the six identified awards were terms that might be included in modern awards under Subdivision B of Division 3 of Part 2-3 of the FW Act. A hearing was conducted before us on 14 August 2017. At that hearing, it became apparent that the submissions of a number of parties were based on a misunderstanding of what had been decided in *Iplex* and had strayed into matters beyond the remit of the review function allocated to us. Accordingly, in a Statement issued on 16 August 2017[3] (which was an edited version of a statement made by us on transcript at the end of the hearing on 14 August 2017) we invited interested parties to file further submissions directly addressing the question of whether the "Abandonment of Employment" provisions were terms permitted to be contained in modern awards by the FW Act. A number of interested parties subsequently filed further written submissions.

Statutory framework

[4] Section 136 of the FW Act prescribes what terms may, must and must not be included in modern awards as follows:

> **136 What can be included in modern awards**
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> *Terms that may or must be included*
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> (1) A modern award must only include terms that are permitted or required by:
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> (a) Subdivision B (which deals with terms that may be included in modern awards); or
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> (b) Subdivision C (which deals with terms that must be included in modern awards); or
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> (c) section 55 (which deals with interaction between the National Employment Standards and a modern award or enterprise agreement); or
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> (d) Part 2-2 (which deals with the National Employment Standards).

[3] [2017] FWCFB 4250

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).

[5] Section 137 simply provides:

137 Terms that contravene section 136 have no effect

A term of a modern award has no effect to the extent that it contravenes section 136.

[6] Section 139 sets out terms that may be included in a modern award:

139 Terms that may be included in modern awards--general

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

(a) minimum wages (including wage rates for junior employees, employees with a disability and employees to whom training arrangements apply), and:

(i) skill-based classifications and career structures; and

(ii) incentive-based payments, piece rates and bonuses;

(b) type of employment, such as full-time employment, casual employment, regular part-time employment and shift work, and the facilitation of flexible working arrangements, particularly for employees with family responsibilities;

(c) arrangements for when work is performed, including hours of work, rostering, notice periods, rest breaks and variations to working hours;

(d) overtime rates;

(e) penalty rates, including for any of the following:

(i) employees working unsocial, irregular or unpredictable hours;

(ii) employees working on weekends or public holidays;

(iii) shift workers;

(f) annualised wage arrangements that:

(i) have regard to the patterns of work in an occupation, industry or enterprise; and

(ii) provide an alternative to the separate payment of wages and other monetary entitlements; and

(iii) include appropriate safeguards to ensure that individual employees are not disadvantaged;

(g) allowances, including for any of the following:

(i) expenses incurred in the course of employment;

(ii) responsibilities or skills that are not taken into account in rates of pay;

(iii) disabilities associated with the performance of particular tasks or work in particular conditions or locations;

(h) leave, leave loadings and arrangements for taking leave;

(i) superannuation;

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

(2) Any allowance included in a modern award must be separately and clearly identified in the award.

[7] Sections 140 and 141 permit the inclusion in modern awards of terms concerning outworkers and industry-specific redundancy schemes subject to various specified conditions and limitations. Section 142 allows for incidental and machinery terms as follows:

142 Incidental and machinery terms

Incidental terms

(1) A modern award may include terms that are:

(a) incidental to a term that is permitted or required to be in the modern award; and

(b) essential for the purpose of making a particular term operate in a practical way.

Machinery terms

(2) A modern award may include machinery terms, including formal matters (such as a title, date or table of contents).

[8] The terms that must be included in modern awards are set out in Subdiv C of Div 1 of P-t 2-3 of the FW Act, and the terms that must not be included are set out in Subdiv D.

[9] As set out above, paragraphs (c) and (d) of s 136(1) allows a modern award to include terms permitted or required by s 55 and Pt 2-2 respectively, and Note 1 to the subsection makes a specific cross-reference to s 55(4). Section 55(1) provides that (relevantly) a modern award must not exclude the National Employment Standards (NES) or any provision of them. Section 55(2), (3) and (4) then provide:

Terms expressly permitted by Part 2-2 or regulations may be included

(2) A modern award or enterprise agreement may include any terms that the award or agreement is expressly permitted to include:

(a) by a provision of Part 2-2 (which deals with the National Employment Standards);

or

(b) by regulations made for the purposes of section 127.

Note: In determining what is permitted to be included in a modern award or enterprise agreement by a provision referred to in paragraph (a), any regulations made for the purpose of section 127 that expressly prohibit certain terms must be taken into account.

(3) The National Employment Standards have effect subject to terms included in a modern award or enterprise agreement as referred to in subsection (2).

Note: See also the note to section 63 (which deals with the effect of averaging arrangements).

Ancillary and supplementary terms may be included

(4) A modern award or enterprise agreement may also include the following kinds of terms:

(a) terms that are ancillary or incidental to the operation of an entitlement of an employee under the National Employment Standards;

(b) terms that supplement the National Employment Standards;

but only to the extent that the effect of those terms is not detrimental to an employee in any respect, when compared to the National Employment Standards.

Note 1: Ancillary or incidental terms permitted by paragraph (a) include (for example) terms:

(a) under which, instead of taking paid annual leave at the rate of pay required by section 90, an employee may take twice as much leave at half that rate of pay; or

(b) that specify when payment under section 90 for paid annual leave must be made.

Note 2: Supplementary terms permitted by paragraph (b) include (for example) terms:

(a) that increase the amount of paid annual leave to which an employee is entitled beyond the number of weeks that applies under section 87; or

(b) that provide for an employee to be paid for taking a period of paid annual leave or paid/personal carer's leave at a rate of pay that is higher than the employee's base rate of pay (which is the rate required by sections 90 and 99).

Note 3: Terms that would not be permitted by paragraph (a) or (b) include (for example) terms requiring an employee to give more notice of the taking of unpaid parental leave than is required by section 74.

[10] Section 117 is part of the NES provisions in Div 11 of Pt 2-2 of the FW Act which deal with notice of termination, payment in lieu of notice and redundancy pay. It relevantly provides:

(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).

Note 1: Section 123 describes situations in which this section does not apply.

Note 2: Sections 28A and 29 of the *Acts Interpretation Act 1901* provide how a notice may be given. In particular, the notice may be given to an employee by:

(a) delivering it personally; or

(b) leaving it at the employee's last known address; or

(c) sending it by pre-paid post to the employee's last known address.

Amount of notice or payment in lieu of notice

(2) The employer must not terminate the employee's employment unless:

(a) the time between giving the notice and the day of the termination is at least the period (the ***minimum period of notice***) worked out under subsection (3); or

> (b) the employer has paid to the employee (or to another person on the employee's behalf) payment in lieu of notice of at least the amount the employer would have been liable to pay to the employee (or to another person on the employee's behalf) at the full rate of pay for the hours the employee would have worked had the employment continued until the end of the minimum period of notice.
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> . . .

The *Iplex* decision

[11] The *Iplex* matter concerned whether an employee whose employer considered had abandoned his employment had been dismissed within the meaning of s 386(1)(a) of the FW Act – that is, whether the employee's employment had been terminated at the initiative of the employer. In the decision at first instance[4], it was determined that there was no such dismissal, but rather that the employment had terminated by operation of clause 21 of the *Manufacturing Award*, which applied to the employment. On that basis, the employee's unfair dismissal application was dismissed.

[12] The employee appealed. There were three appeal grounds, of which only the first two were dealt with in the appeal. They were:

(1) The conclusion at first instance that clause 21 of the *Manufacturing Award* operated to terminate automatically the employment was based on a misconstruction of the clause.

(2) Clause 21 had no effect under s 137 because it was neither a permitted or required term of a modern award under s 136.

[13] The Full Bench in the *Iplex* appeal decision upheld the first ground of appeal. The Full Bench said:

> "[36] We consider that clause 21 of the Award does not have the effect of automatically terminating employment and did not have that effect in this case. Both textual and contextual considerations tell against such a conclusion.
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> [37] The first paragraph of clause 21 says nothing at all about termination of employment. It merely sets out that an employee's absence from work for a continuous period exceeding three working days for which there is no consent by the employer, and for which there is no notification to the employer, is *prima facie* evidence that the employee has abandoned the employment. There is at this stage, no termination of the employment. There is only *prima facie* evidence of abandonment.
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> [38] The second paragraph of clause 21 is no more than a deeming provision which has the effect of deeming an employee to have abandoned the employment if the employee, relevantly, within 14 days from the last attendance at work has not

[4] [2016] FWC 6624

established to the satisfaction of the employer that the employee was absent for reasonable cause. It seems to us that the employer must take the positive step of concluding that it is not satisfied that the employee was absent for reasonable cause before the deeming provision operates. However, that an employee is deemed to have abandoned his employment within the meaning of the clause does not mean that the employee's employment is thereby at an end.

[39] A deeming provision by its nature deems that a thing, act or event having particular characteristics but which may or may not also be another thing, act or event, to be that other thing, act or event. In this case, an employee's absence for the period described in the paragraph is deemed to be abandonment of employment after taking on the characteristics described in the paragraph, whether or not as a matter of fact or law the employee has abandoned his or her employment.

[40] The employment has not been terminated by reason thereof, nor does the paragraph suggest that the employment is terminated. In our view, it would be extraordinary for the paragraph to operate as automatically terminating the employment irrespective of the wishes of the employer. Thus under the automatic termination theory, the employer would be prevented from continuing to employ the employee, waiting a further period before deciding whether to terminate the employment of the employee or taking other disciplinary action short of termination of employment.

[41] In truth, once an employee is deemed pursuant to clause 21 of the Award to have abandoned his or her employment, the employment of the employee does not come to an end nor is the employer required to end the employment by terminating it. In order to do so, we consider the employer must take the additional step of terminating the employment and if it does not do so employment continues.

[42] In this respect, the question of whether there was a termination on the employer's initiative by reason of clause 21 of the Award is somewhat analogous to the question raised for consideration in the Federal Court Full Court decision in *Mahony v White* ([2016] FCAFC 160), namely whether the operation of a statutory provision prohibiting an employer from employing or continuing to employ a person in particular circumstances meant that a termination of employment as a consequence of the operation of the statutory provision was on the initiative of the employer. In *Mahony* the Court accepted that whether or not an employer was required to dismiss an employee by some legislative, contractual or other obligation, if the employer did not take that step the employment would continue and employment did not come to an end by operation of the statute (see also *O'Connell v Catholic Education Office, Archdiocese of Sydney* [2016] FWCFB 1752).

[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 reasonable cause, and decides to act. Therefore, it is not the unauthorised absence of the employee which causes employment to terminate, nor is it the deeming of the unauthorised absence to be an abandonment. Rather, it is the act of the employer that brings about the termination of the employee's employment."

[14] The Full Bench also gave consideration to the second ground of appeal, and said (footnote omitted):

> '[49] We are also persuaded that even if clause 21 of the Award operates in the manner determined by the Senior Deputy President, it is of no effect because it is a term that is neither a permitted nor a required term of a modern award, contrary to s.136 of the Act. It would therefore be of no effect by virtue of s.137.
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> . . .
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> [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.
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> [52] As earlier indicated, Iplex points to s.55(4) of the Act as the relevant source of authority for the inclusion of clause 21 in the Award...
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> [53] Iplex submits that clause 21 of the Award concerns the termination of an employee's employment in particular circumstances; namely, where the employee is deemed to have abandoned his or her employment. It says that termination of employment is a matter addressed by the National Employment Standards contained in Part 2-2 of the Act (Division 11) and, on this basis, clause 21 of the Award is a permitted term either as one that:
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> > "(a) is ancillary or incidental to the operation of Division 11 of the National Employment Standards; or
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> > (b) supplements the National Employment Standards."
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> [54] Iplex further submits that clause 21 of the Award is not detrimental within the circumscribed meaning of s.55(4) of the Act.
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> [55] We do not accept that clause 21 of the Award operating in the manner suggested by Iplex, that is as an automatic termination of employment, is either ancillary or incidental to the operation of Division 11 or that it supplements any provision of the National Employment Standards...
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> [56] It is self-evidently the case that s.117 deals with termination of the initiative of the employer and the employer's obligation to an employee in those circumstances. It seems to follow that a provision in an award which would operate to automatically terminate employment cannot reasonably be described as ancillary or incidental to the operation of a provision which deals with the obligations of an employer when the employer seeks to terminate the employment of an employee. Nor can it reasonably be said that such a provision supplements that National Employment Standard or for that matter, any other of the National Employment Standards.

> [57] For completeness, we make the observation that clause 21 is also not a term of the kind contemplated by s.118 of the Act; that is, it is not is not a term specifying the period of notice an employee must give in order to terminate his or her employment.
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> [58] Iplex further submits that clause 21 of the Award is not detrimental within the circumscribed meaning of s.55(4) of the Act. In our view, even if clause 21 of the Award, operating as an automatic termination of employment as suggested by Iplex, could be regarded as either ancillary or incidental to the operation of the National Employment Standards or as supplementing those standards, the "not detrimental" submission does not bear scrutiny. The effect of the clause operating this way would be to deprive an employee of both the written notice of the day of termination requirement in s.117(1), and except in the case of serious misconduct, the receipt of notice or compensation in lieu of notice as required ss.117(2) and (3). On any view, the effect of such a term would be detrimental to an employee in the respects we have identified.'

Submissions

[15] The Australian Industry Group (Ai Group) submitted that clause 21 of the *Manufacturing Award* was a permitted modern award term empowered by s 142. It was incidental to the wages clause of the award because it assisted in resolving the issue of when the obligation to pay wages ceased, and was also incidental to the termination of employment clause because, in circumstances of abandonment the termination of employment was at the initiative of the employee and the employer was entitled to deduct pay for notice not given by the employee. Clause 21 was also essential for the purpose of making these provisions operate in a practical way in a similar manner to clause 20, *Absence from Duty* (which was incidental to the wages provisions), clause 31, *Employer and Employee Duties* (which was incidental to the classification provisions) and clause 34, *Payment of Wages* (which was also incidental to the wages provisions). The Ai Group noted that clause 21 had been retained in the *Manufacturing Award* in the award modernisation process in 2009, and had also been retained in the predecessor award as an allowable matter during the award simplification process conducted under the *Workplace Relations Act 1996* in 1998. It submitted that, in the context of the law concerning abandonment of employment, clause 21 should be retained as a matter of merit because it contained practical provisions of assistance to employers and employees when applying various other provisions of the award in circumstances of abandonment of employment. In particular, it assisted employers when making decisions in circumstances where an employee failed to attend work without notification.

[16] Australian Business Industrial and the NSW Business Chamber (ABI and NSWBC) submitted that "abandonment of employment" clauses were not terms permitted or required by the FW Act to be included in modern awards. By reference to *Iplex*, ABI and the NSWBC characterised clause 21.1 as setting out matters which prima facie constituted abandonment of employment, clause 21.2 as deeming certain circumstances as abandonment of employment, and clause 21.3 as explaining when a termination operates from in circumstances where an employer has carried out a termination based on abandonment of employment. They submitted that it was uncontroversial that the subject matter of clause 21 did not relate to any of the terms specified in Subdiv C of Pt 2-3, s 55 or Pt 2-2, which only left Subdiv B of Pt 2-3 as a possible source of power. In relation to s 139, it was observed that a permissible term had to be "*about*" a specified matter, which was to be contrasted to the use of the broader expression "*relating to*" in s 140 in relation to outworkers, and required a more than

incidental connection. Clause 21 was not about any of the matters identified in s 139. In relation to s 142, clause 21 did not meet the high bar of essentiality for the practical operation of another provision. Although clause 21.3 might assist the operation of clause 34, *Payment of Wages* by determining the effective date of termination of employment in abandonment circumstances, it was not clear how an award could change the effective date of termination when, as stated in *Iplex*, it was the act of the employer in accepting the employee's repudiation that brings the employment to an end and consequently determines the termination date.

[17] The Australian Manufacturing Workers' Union (AMWU) also submitted that clause 21 in its current form was not a term permitted or required to be included in a modern award. It said that, to the extent clause 21.2 required a process of discussion or consultation to ensure that a NES or award entitlement was not excluded by the employer's assumptions or actions, it might be permitted as an ancillary or incidental provision, but it could not stand on its own if clauses 21.1 and 21.3 were removed because it would then lack context to operate properly. Additionally, clause 21.2 also required amendment in order to avoid being an objectionable term that offended s 150 because it permitted a contravention of s 352, in that the 14 day time limit did not allow for illnesses or injuries that might require a longer reasonable time for contacting the employer. The AMWU proposed a modification to clause 20, *Absence from duty* of the *Manufacturing Award* to provide a process for the employer to contact an absent worker and seek an explanation for the absence prior to taking any action against the worker including termination of employment.

[18] The Community and Public Sector Union (CPSU) made submissions in relation to the abandonment of employment provision in clause 16 of the *Contract Call Centres Award 2010*. It submitted that the provision was not one permitted or required to be included in a modern award. It was not authorised by any provision of Subdiv B or C of Div 3 of Pt 2-3. Nor was it permissible as a provision relating to the NES notice of termination provisions in s 117, since it did not deal with that subject matter but rather was concerned with a process to be followed when a particular reason which might warrant termination occurred. Further, to the extent that it determined a date of termination to be provided before notice was provided by the employer, it conflicted with and excluded the notice provisions of s 117 and therefore had no effect under s 56.

[19] The Australian Workers' Union (AWU) also submitted that clause 21 of the *Manufacturing Award* was not a permissible term. Clause 21 was to be characterised as providing specific prescribed circumstances when an employee was deemed to have abandoned their employment, but was not a term which terminated the employment or provided for notice of termination. The employer is still required to act to terminate the employee and provide notice in accordance with s 117. So read, clause 21 did not aid in and was not necessary for the operation of any NES provision, nor did it supplement any such provision. It did not relate to any provision of Pt 2-2 and was not authorised by any regulation made pursuant to s 127. It was therefore not permitted under s 55(4) or s 136, and should be removed.

[20] The Construction, Forestry, Mining and Energy Union (CFMEU) likewise submitted that clause 21 was not a permitted matter. Clause 21.3, on its plain wording, seeks to authorise an operative date of termination before notice is given by an employer. It therefore excluded the NES notice provisions in s 117, contrary to s 55(1), and had no effect by virtue of s 56. It was not a term permitted by s 118, which authorised award terms specifying the period of

notice an employee had to give to terminate his or her employment, nor by s 127. It was not otherwise authorised by s 55(4) since it was not ancillary or incidental to, and did not supplement, any NES provision.

Consideration

[21] "Abandonment of employment" is an expression sometimes used to describe a situation where an employee ceases to attend his or her place of employment without proper excuse or explanation and thereby evinces an unwillingness or inability to substantially perform his or her obligations under the employment contract. This may be termed a renunciation of the employment contract. The test is whether the employee's conduct is such as to convey to a reasonable person in the situation of the employer a renunciation of the employment contract as a whole or the employee's fundamental obligations under it. Renunciation is a species of repudiation which entitles the employer to terminate the employment contract.[5] Although it is the action of the employer in that situation which terminates the employment *contract*, the employment *relationship* is ended by the employee's renunciation of the employment obligations.[6]

[22] Where this occurs, it may have various consequences in terms of the application of provisions of the FW Act. To give three examples, first, because the employer has not terminated the employee's employment, the NES requirement in s 117 for the provision of notice by the employer, or payment in lieu of notice, will not be applicable. Second, if a modern award or enterprise agreement provision made pursuant to s 118 requiring an employee to give notice of the termination of his or her employment applies, a question may arise about compliance with such a provision. Third, if the employee lodges an unfair dismissal application, then the application is liable to be struck out on the ground that there was no termination of the employment relationship at the initiative of the employer and thus no dismissal within the meaning of s 386(1)(a) (unless there is some distinguishing factual circumstance in the matter or the employee can argue that there was a forced resignation under s 386(1)(b)).

[23] Against this background, what purpose does clause 21 of the *Manufacturing Award* seek to achieve? As discussed in *Iplex*, while clause 21.1 renders a certain factual situation involving an absence from work to be *prima facie* evidence of abandonment of employment, and clause 21.2 purports to deem another factual situation involving a longer absence from work to be an abandonment of employment, neither provision operates to automatically terminate the employment. Nor do we consider that clause 21.2 was intended to, or could, "deem" there to be a renunciation of the employment contract by the employee for the purpose of s 117, any award or agreement provision made pursuant to s 118, s 386(1) or any other relevant provision of the FW Act. We are inclined to the view, along the lines of the submission put by the AMWU, that what clauses 21.1 and 21.2 seek to achieve is to establish a minimal process by which an employer may proceed to dismiss an employee in response to an absence from work without consent. Clause 21.2 in particular requires the employer to determine whether the employee has established to the employer's satisfaction that there was reasonable cause for the absence prior to the termination of the employee by the employer, which implies some measure of consultation or attempted consultation with the employee.

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[5] *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* [2007] HCA 61, 233 CLR 115 at [44]-[47]

[6] *Visscher v Giudice* [2009] HCA 34, 239 CLR 361 at [53]

The function of clause 21.1 in the process is less clear, but it may be that an absence of over three days calls for an explanation from the employee as to why he or she should not be regarded as having abandoned the employment, with again the implication being that the employer will attempt to consult with the employee, as a prerequisite to the operation of clause 21.2.

[24] Based on the approach taken in *Iplex*, clause 21.3 is to be read as operating so that when an employer terminates the employment for an absence from work after the conditions in clause 21.2 are satisfied, the termination operates retrospectively from the date of the last attendance at work, or the date of the last absence from work which was consented to by the employer or for which notification was given. That is, it is concerned with the date of operation of a dismissal under clause 21.2. Clause 21.3 would effect a modification to the common law principle that a termination of employment cannot take effect unless it is first communicated to the employee, subject only to the possible exception that a contract of employment might contain an express provision to the contrary.[7]

[25] So characterised, it is necessary to determine whether clause 21 is a provision permitted or required to be included in a modern award. Because they have different purposes, we will consider clauses 21.1 and 21.2 separately to clause 21.3.

[26] As earlier stated, the process of termination of employment due to absence from work established by clauses 21.1 and 21.2 imply a measure of consultation with the employee, but that is not sufficient we consider to make them "*about*" consultation such as to be authorised by s 139(1)(j). We accept the submission made by ABI and the NSWBC that the use of the word "*about*" in s 139(1) requires a connection between the award term and the subject matter that is more than just of an incidental or ancillary nature. That is demonstrable from the ordinary meaning of the word "*about*" (that is, "*concerned with*"), the legislature's presumably intentional use of the wider expression "*relating to*" in s 140 when it came to permissible award terms regarding outworkers, and the existence in s 142(1) of a discrete and limited power to include incidental terms in modern awards. The clauses cannot be said to be about any of the other subject matters identified in s 139(1), and no party contended otherwise. Nor are they terms that must be included in modern awards under Subdiv C of Div 3 of Pt 2-3, or terms authorised by s 55(4) or any provision of Pt 2-2. The Ai Group's submission that clause 21 is authorised by s 142 as a term incidental to the wages or termination of employment provisions in the *Manufacturing Award* mainly relied on matters connected with clause 21.3, not clauses 21.1 and 21.2. We do not consider that clauses 21.1 and 21.2 are incidental to the wages provision in the award, since they have nothing to do with wages. Nor are they incidental to the termination of employment provision (clause 22) which, apart from a cross-reference to the notice of termination provisions in the NES (clause 22.1), is concerned only with the notice to be given by employees to terminate their employment (clause 22.2) and the job search entitlement of an employee who had been given notice of termination (clause 22.3). Clauses 21.1 and 21.2 are therefore not terms which are permitted or required to be included in a modern award. Their inclusion in the *Manufacturing Award* is contrary to the prohibition in s 136, and accordingly they have no effect under s 137.

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[7] See *Ayub v NSW Trains* [2016] FWCFB 5500, 262 IR 60 at [17]-[22]

[27] Clause 21.3 is, we consider, plainly a provision that is rendered of no effect either by s 56 or s 137. We have earlier set out the terms of s 117. Section 117(1) prohibits the termination of employment by the employer unless written notice has been given of the day of the termination, *which cannot be before the day the notice is given*. That is, consistent with the common law position earlier described, the employer cannot terminate the employment with a retrospective date of effect. Therefore because clause 21.3 of the *Manufacturing Award* provides for a retrospective date of termination, it clearly excludes s 117(1) where the subsection is applicable. It would have the effect of denying the employee the benefit of the notice provisions in s 117(2) and (3). In that circumstance, it could not be said that the provision could be authorised by s 55(4), since it directly contradicts it and this is necessarily detrimental to the employee.

[28] The effect of s 123(1)(b) is that s 117 does not apply to "*an employee whose employment is terminated because of serious misconduct*". Section 12 provides that "*serious misconduct*" has the meaning prescribed by the regulations, and reg 1.07 of the *Fair Work Regulations 2009* relevantly defines the expression for s 12 as follows:

> **1.07 Meaning of serious misconduct**
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> (1) For the definition of *serious misconduct* in section 12 of the Act, serious misconduct has its ordinary meaning.
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> (2) For subregulation (1), conduct that is serious misconduct includes both of the following:
>
> (a) wilful or deliberate behaviour by an employee that is inconsistent with the continuation of the contract of employment;
>
> . . .
>
> (3) For subregulation (1), conduct that is serious misconduct includes each of the following:
>
> . . .
>
> (c) the employee refusing to carry out a lawful and reasonable instruction that is consistent with the employee's contract of employment.
>
> (4) Subregulation (3) does not apply if the employee is able to show that, in the circumstances, the conduct engaged in by the employee was not conduct that made employment in the period of notice unreasonable.

[29] The reference in reg 1.07(1) to the ordinary meaning is difficult, since as explained in *Sharp v BCS Infrastructure Support Pty Limited*[8] (in the context of proceedings under Pt 3-2) it is not clear that the expression has a fixed ordinary meaning:

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[8] [2015] FWCFB 1033

> "[34] It may be accepted that an assessment of the degree of seriousness of misconduct which has been found to constitute a valid reason for dismissal for the purposes of s.387(a) is a relevant matter to be taken into account under s.387(h). In that context, a conclusion that the misconduct was of such a nature as to have justified summary dismissal may also be relevant. Even so, it is unclear that this requires a consideration of whether an employee's conduct met a postulated standard of "serious misconduct". In *Rankin v Marine Power International Pty Ltd* ([2001] VSC 150; (2001) 107 IR 117) Gillard J stated that "There is no rule of law that defines the degree of misconduct which would justify dismissal without notice" (at [240]) and identified the touchstone as being whether the conduct was of such a grave nature as to be repugnant to the employment relationship (at [250]-[257]). "Serious misconduct" is sometimes used as a rubric for conduct of this nature, but to adopt it as a fixed standard for the consideration of misconduct for the purpose of s.387(h) may be confusing or misleading because the expression, and other expressions of a similar nature, have been considered and applied in a variety of contexts in ways which are influenced by those contexts. In *McDonald v Parnell Laboratories (Aust) Pty Ltd* ([2007] FCA 1903; (2007) 168 IR 375) Buchanan J said:
>
> > '[48] The terms 'misconduct', 'serious misconduct' and 'serious and wilful misconduct' are often the subject of judicial and administrative attention as applied to the facts of particular cases but there is relatively little judicial discussion about their content and meaning. Naturally enough, when the term 'serious misconduct' is under consideration an evaluation of what conduct represents 'serious' misconduct is influenced by the (usually statutory) setting in which the phrase must be given meaning and applied. Frequently, for example, the question at issue is whether an employee is disentitled by reason of his or her conduct to a statutory entitlement (eg. in New South Wales, where Ms McDonald was employed, see *Long Service Leave Act 1955* (NSW) s 4(2)(a)(iii); *Workers Compensation Act 1987* (NSW) s 14(2).'"

[30] It may be accepted that termination of employment on the basis of an absence from work of the nature described in clause 21.2 could usually be characterised as a dismissal for serious misconduct, based upon that part of the "*serious misconduct*" definition in reg 1.01(2)(a). Regulation 1.07(3)(c) may also be applicable where the employee has refused to comply with an instruction to return to work, subject to subreg (4). However it may not be every case in which a dismissal under clause 21.2 to which clause 21.3 applies will be a termination for serious misconduct. For example, if the absence is caused by an incapacity (such as an injury) to attend work for the requisite period, and the employer does not accept that this constitutes a reasonable cause for the absence (because, say, the injury was caused by the employee's own negligence or was self-inflicted), a termination for such an absence may not be able to be characterised as being for serious misconduct. If the clause is capable of operating in a way which denies employees the benefit of an entitlement under the NES, then it excludes the NES for the purpose of s 55(1).[9]

[31] In any event, clause 21.3 is not otherwise authorised by s 136. It is not about any of the subject matters in s 139(1), nor is it a term that must be included in modern awards under Subdiv C of Div 3 of Pt 2-3. No party contended otherwise. As discussed above, the Ai Group

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[9] *Canavan Building Pty Ltd* [2014] FWCFB 3202; 244 IR 1 at [36]

submitted that the provision was authorised by s 142(1) as incidental to the wages and termination of employment provisions of the *Manufacturing Award*. It is not incidental to the latter, for the same reasons as with clauses 21.1 and 21.2. In respect of the former, we do not accept the Ai Group's submission that clause 21.3 is incidental to the wages provision and authorised by s 142 because it identifies when the obligation to pay wages ceases, for two reasons. First, clause 21.3 does much more than that; it actually establishes a retrospective date of the termination of employment, with all that involves. Second, clause 20, *Absence from duty*, has the function which the Ai Group seeks to assign to clause 21.3; in properly confined terms it provides that, unless stated otherwise in the award, an employee not attending for duty loses their pay for the actual time of such non-attendance. This would clearly include a non-attendance of the type referred to in clauses 21.1 and 21.2. It cannot therefore be said that, to the extent it retrospectively ends any entitlement to wages, clause 21.3 is essential for the purpose of making the wages provisions operate in a particular way, since clause 20 fulfils that function.

[32] We conclude therefore that the entirety of clause 21, as interpreted in *Iplex* and in our reasons above, is not a term permitted or required to be included in a modern award. For that reason, the clause should be deleted from the *Manufacturing Award.* We cannot identify any distinguishing circumstances in the other five awards containing equivalent terms, and they should be deleted also.

[33] However we accept the submissions of the Ai Group and the AMWU that there would be utility in the *Manufacturing Award* including a provision (either as a separate clause or as supplementation to clause 20) which identifies procedures to be followed in the event that there is an extended and unexplained absence from duty on the part of an employee. This would primarily be concerned with the steps the employer might take to attempt to consult with the employee about the reasons for the absence before taking action against the employee. Its terms would need to be either directly authorised by s 139(1)(j) or be incidental to any directly authorised terms for the purpose of s 142. We have earlier referred to the proposal advanced by the AMWU, which involved a supplemented clause 20 as follows:

> "**20. Absence from work**
>
> 20.1 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.
>
> 20.2 This clause applies where a business is unaware of the reasons for a worker's absence or believes a worker no longer wishes to work for the business. The purpose of the clause is to ensure a business does not take action against a worker who is entitled to be on leave or absent under the National Employment Standards, this Award or another Agreement they have entered into.
>
> 20.3 Where clause 20.2 applies, a business must not take any action against the worker (such as giving notice of termination or advising the labour hire business that it no longer wants the labour from the worker) before the business has attempted to use all available methods to contact the worker and provide them with an opportunity to give an explanation to the business.

> 20.4 Where a business has complied with clause 20.3 but is still unable to communicate with a worker, a business must not give notice of a termination date that is earlier than 3 months from the beginning of the absence.
>
> *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*

[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.

[35] We propose to invite interested parties to file proposals for a provision to replace the current clause 21 in the *Manufacturing Award*, and the equivalent provisions in the other five awards, having regard to our reasons for decision. We will allow 28 days for this to occur. We also invite interested parties to confer and, if they wish to do so, participate in a conference conducted by a member of the Commission, in order to try to reach a consensus position about a replacement provision. We will not make determinations to delete the relevant provisions from the *Manufacturing Award* and the other five awards until a standard replacement provision has been determined.

VICE PRESIDENT

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