

IN THE FAIR WORK COMMISSION

2014 Award Review

(AM2016/35)

Community and Public Sector Union (CPSU) (PSU Group)

Submissions re: Abandonment of employment

Additional

Introduction

1. On 19 May 2017 and 1 June 2017 the CPSU filed submissions pursuant to Vice President Hatcher's Directions of 27 April 2017 regarding the 'Abandonment of Employment' provisions in six awards. The CPSU has an interest in the *Contract Call Centres Award 2010* which contains at clause 16 an Abandonment of Employment clause.
2. At the hearing of this matter on 14 August 2017, the Full Bench invited parties to further address the Bench specifically on the issue of whether an abandonment of employment clause, as interpreted in the decision in *Mr Boguslaw Bienias v Iplex Pipelines Australia Pty Limited T/A Iplex Pipelines Australia [2017] FWCFB 38*, was a matter that could be included in a modern award.
3. It is the CPSU's primary submission that clause 16 of the *Contract Call Centres Award* is not a provision can be included in an award under s55, s136, s139 or s142 of the *Fair Work Act*.

Contract Call Centres Award 2010

4. This award contains an 'Abandonment of employment' provision in the following terms:

16. Abandonment of employment

16.1 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 will be prima facie evidence that the employee has abandoned the employment.

16.2 Provided that if within a period of 14 days from the employee's last attendance at work or the date of the employee's last absence in respect of which notification has been given, or consent has been granted, an employee has not established to the satisfaction of the employer that the employee is absent for reasonable cause, the employee will be deemed to have abandoned the employment.

16.3 Termination of employment by abandonment in accordance with this clause will operate 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.

The *Iplex* decision and terms that may be included in a modern award

5. Following the decision of the Full Bench in *Iplex*, which dealt with a similar clause in the *Manufacturing and Associated Industries and Occupations Award*, such a provision requires an employer follow a process in the event an employee is absent without cause prior to an employer terminating employment. The Full Bench says at [41], [43] and [45] of that decision that the clause does not automatically terminate an employee's employment, and requires an action on the part of the employer to terminate the employment. It defines a process to be followed in a particular situation of absence which may result in termination of employment.
6. Such a clause can only be included in a modern award if it is a term that the Act says can be included. Section 136 of the Act defines terms that can be included as follows:

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).

7. Subdivision B and Subdivision C do not deal with abandonment of employment. Section 136 allows a modern award to include terms that deal with the National Employment Standards in part 2-2, providing those terms do not contravene or exclude the National Employment Standard: Section 55. These provisions allow a term to be included in an award that deals with s117 Notice of Termination. Section 117 provides:

Requirement for notice of termination or payment in lieu

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).

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.

(3) Work out the minimum period of notice as follows:

(a) first, work out the period using the following table:

| Period | Employee's period of continuous service with the employer at the end of the day the notice is given | Period |
|---------------|--|---------------|
| 1 | Not more than 1 year | 1 week |
| 2 | More than 1 year but not more than 3 years | 2 weeks |
| 3 | More than 3 years but not more than 5 years | 3 weeks |
| 4 | More than 5 years | 4 weeks |

(b) then increase the period by 1 week if the employee is over 45 years old and has completed at least 2 years of continuous service with the employer at the end of the day the notice is given.

- 8. Section 117 of the Act requires an employer not terminate an employee's employment until they have provided written notice. Section 117 goes on to detail how notice can be effected and to provide minimum periods of notice.

9. The Abandonment of employment clause in the *Contract Call Centres Award* deals with a process to be followed when a particular reason which may warrant potential termination occurs. It does not deal specifically with notice of termination as s117 provides. Therefore section 136(1)(d) does not provide a basis for this term to be included in a modern award.
10. Further, clause 16.3 of the *Contract Call Centres Award* deals with determining a date for termination in cases of abandonment, and allows a date for termination before notice is provided by the employer. This brings clause 16.3 into conflict with the express terms of s117, which requires notice of the day of termination which cannot be before the day on which notice is given. The clause is thereby of no effect pursuant to s56 of the Act.

Conclusion

11. The CPSU's view is that clause 16.3 of the *Contract Call Centres Award* is not a term that can be included in a modern award and should be removed.

CPSU Sydney

4 September 2017