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FACT SHEET

Abandonment of Employment

Abandonment of employment arises in circumstances where an employee:

- Is absent from work without a reasonable excuse;
- For an unreasonable period of time; and
- Has not communicated to the employer any reason for the absence.

For an employee to have abandoned their employment, it must be clear that the employee has demonstrated an intention to no longer be bound by the terms of the contract of employment.

At common law, the abandonment of an employee's employment may constitute a repudiation of their employment contract – that is, the employee clearly indicates through their actions an absence of readiness or willingness to perform their contractual obligations. In the case of repudiation, the employment is not terminated until the employer accepts the employee's repudiation and terminates the employment contract.

It is important that an employer follows a process prior to terminating the employment contract for abandonment of employment as the employee may have access to unfair dismissal laws in the *Fair Work Act 2009* (the 'Act').

LAW

CASE LAW

Tribunals have given a number of decisions outlining what constitutes abandonment of employment. By way of example:

- Employers should approach abandonment of employment situations with caution as "*abandonment of employment is not quantified in time but requires an analysis of what happened at the time and a consideration of the intent of the employee.*" (as per *Erbacher v Golden Cockerel Pty Ltd* [2007] AIRC 491). Therefore, a lapse of time on its own may not indicate abandonment and an analysis of the situation is required before concluding that the employee has abandoned their employment.
- Additionally, part of this analysis should include looking at whether the employee has clearly demonstrated an intention to no longer be bound by the terms of the contract of employment (as per *Searle v Moly Mines Limited* [2008] AIRCFB 1088).

It is important to note that what constitutes abandonment of employment is dependent upon the facts and circumstances of the particular situation.

INDUSTRIAL INSTRUMENT

When dealing with abandonment of employment situations, it is important to firstly identify whether abandonment is referred to in the applicable industrial instrument, for example, the modern award or formal workplace agreement. If there is an abandonment clause, this may provide guidance about what constitutes an abandonment of employment and the process that should be followed.

Please note that the *Hospitality Industry (General) Award 2010* and the *Restaurant Industry Award 2010* do not contain abandonment clauses.

PROCESS

In the absence of an abandonment clause, a process to help employers deal with an abandonment of employment situation is outlined below. Please note that this process may not be appropriate in every situation, and is dependent upon the facts and circumstances of the particular situation.

STEP 1

The first step is for the employer to make a genuine attempt to contact the employee to ascertain the reason/s for their absence from the workplace. Appropriate methods of contact are telephone, mobile phone and email.

Employers should ensure that they make a number of attempts to try to contact the employee. It is recommended that written notes be made of all attempts to contact the employee including any messages left and conversations held. These notes should be placed on the employee's personnel file. Notes are important as these provide evidence of the process followed, and where the employee refuses to speak to the employer or fails to attend for work without a reasonable excuse, the notes will support the decision the employee has abandoned their employment.

Where contact is established with the employee, it is important to obtain the following information:

- The reason for the absence;
- If the absence is due to a medical condition, appropriate evidence, eg a medical certificate, supporting the absence and the dates of absence;
- If the reason is not due to a medical condition, an explanation of the absence from the employee and an indication of what their intention is regarding their employment.

Where an employee provides a reason for their absence, consideration should be given as to whether the reason provided is valid to explain the absence. Where the reason provided is not considered valid, this should be managed in accordance with the employer's performance management and/or disciplinary procedure.

Where contact is established and the employee advises that they no longer wish to be employed with the employer, this signals the employee's intention to resign from their employment and should be managed as such.

It is also important to note that in all situations where contact is established with the employee, the situation can no longer be considered as a potential abandonment.

STEP 2

If the verbal and email contact is unsuccessful, the second step is to send a letter to the employee's last known postal address. It is recommended that the letter be sent by registered post as this will provide evidence that the employee has received the letter. You may also send the employee an email with the automatic receipt notification activated.

STEP 3

If the employee fails to respond to the letter (as per step 2), the third step would be to send another letter to the employee by registered post.

The letter should:

- Set out all the attempts to contact the employee (including dates and details of messages, emails, SMSs, letters and any other contact methods); and
- Notify the employee that if by a specified date*, no contact is made by the employee or a valid reason for the absence is not provided, the employer will deem the employee to have abandoned their employment; and
- That this amounts to a repudiation of the employment contract; and
- That the employer will accept the repudiation and terminate the employment contract.

** this is a date specified by the employer. The date must be reasonable in the circumstances.*

STEP 4

If the employee fails to respond to the letter or does not provide a reasonable excuse for their absence, it would be appropriate to send a final letter notifying the employee that the employer has deemed that the employee has abandoned their employment, that this constitutes a repudiation of the employment contract, and that the employer has accepted the repudiation and decided to terminate the employment contract.

TERMINATION ENTITLEMENTS

NOTICE OF TERMINATION

Please note that in order to terminate the employment of a permanent full-time or part-time employee, notice of termination may need to be given pursuant to the National Employment Standards ('NES'), an industrial instrument (award or workplace agreement) or contract of employment.

However, abandonment of employment and therefore a repudiation may also be considered serious misconduct if it is willful or deliberate behaviour that is inconsistent with the continuation of the contract of employment. Serious misconduct is defined at regulation 1.07 in the *Fair Work Regulations 2009* and before any determination of serious misconduct, it is important to ensure the conduct falls within the definition:

Meaning of serious misconduct

- (1) For the definition of **serious misconduct** in section 12 of the Act, serious misconduct has its ordinary meaning.
- (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;
 - (b) conduct that causes serious and imminent risk to:
 - (i) the health or safety of a person; or
 - (ii) the reputation, viability or profitability of the employer's business.
- (3) For subregulation (1), conduct that is serious misconduct includes each of the following:
 - (a) the employee, in the course of the employee's employment, engaging in:
 - (i) theft; or
 - (ii) fraud; or
 - (iii) assault;
 - (b) the employee being intoxicated at work;
 - (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.
- (5) For paragraph (3) (b), an employee is taken to be intoxicated if the employee's faculties are, by reason of the employee being under the influence of intoxicating liquor or a drug (except a drug administered by, or taken in accordance with the directions of, a person lawfully authorised to administer the drug), so impaired that the employee is unfit to be entrusted with the employee's duties or with any duty that the employee may be called upon to perform.

In the instance of serious misconduct, no notice would be required and termination would be instant upon notification to the employee. Unless an industrial instrument or contract of employment states otherwise, no notice is required for a casual employee.

OUTSTANDING ENTITLEMENTS

An employer will still be obliged to pay the employee any outstanding entitlements upon termination of employment. This includes any applicable accrued annual leave or long service leave.

A failure by the employer to make final termination payments will be in breach of the Act.

If for some reason the employee's pay is not accepted by the financial institution (eg because the account has been closed), the employer should take reasonable steps to contact the employee to arrange payment or provide payment by other means (eg cheque to the last known address – sent by registered post).

If the employer is unable to pay the employee because the employer does not know the employee's whereabouts, section 559 of the Act allows the employer to pay the employee's final termination payments to the Commonwealth (ie Fair Work Ombudsman). These funds will be forwarded to the Federal Government's Consolidated Revenue Fund, which acts as custodian of the funds until the funds can be paid to the employee. The Fair Work Ombudsman has a facility for former employees to search a database for outstanding monetary entitlements that have been forwarded to the Federal Government's Consolidated Revenue Fund.

Further Assistance

Financial QHA members are encouraged to contact the QHA's Employment Relations Department (refer the contact details at the bottom of this page) for a confidential discussion about the information in this Fact Sheet, or to discuss any queries relating to specific workplace matters.

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