



FACT SHEET



Abandonment of Employment



Updated: August 2020
Replaces: January 2019

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 contract is not terminated until the employer accepts the employee's repudiation and terminates the employment contract, however in the circumstances of an abandonment of employment – it can still be said that the employment relationship has been ended by the employee's rejection of their employment obligations.

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, a Full Bench of the Fair Work Commission ('FWC'):

- 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).
- A Full Bench of the FWC, as part of its review of the abandonment of employment clauses in modern awards (as noted on page 2, these clauses have since been deleted), provided a general summary of what is an abandonment of employment, as well as some commentary on the potential consequences an abandonment of employment can have on the employer and employee in question. As per paragraphs 21 to 22 in the Decision *Abandonment of Employment (AM2016/35)* [2018] FWCFB 139 -

"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. 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.

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)).

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, if the employee is working in a position to which a formal workplace agreement applies, and that agreement contains an abandonment clause, this may provide guidance about what constitutes an abandonment of employment and the process that should be followed.

If a modern award applies to an employee's position, please note that modern awards do not contain an abandonment of employment clause (previously, a limited number of modern awards, not including the *Hospitality Industry (General) Award 2020* ('HIGA') or *Restaurant Industry Award 2020* ('RIA'), did have an abandonment clause, but it was removed by the FWC in 2018).

PROCESS

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, which would lead the employer to view that the employment relationship has now ended; 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

In the Decision *Abandonment of Employment (AM2016/35)* [2018] FWCFB 139, the Full Bench commented that notice of termination or payment in lieu would not be required, if an employee had abandoned their employment. As per the extract of the Decision reproduced on page 2 of this fact sheet, '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.'

Previous case law had led to a view that notice of termination or payment in lieu was still required, and the risk of an employee disputing that notice should have still been provided cannot be eliminated, however as this is a recent Full Bench Decision of the FWC, members may decide to terminate the employee's employment without providing the standard notice period (or pay in lieu) that would have ordinarily been required (except in cases of serious misconduct).

Please note: unless an industrial instrument or contract of employment states otherwise, no notice of termination 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.

Please note, as per Full Bench commentary in the Decision of *Abandonment of Employment (AM2016/35)* [2018] FWCFB 139, where an employee has abandoned their employment, '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'. Under the HIGA, clause 16.1 does allow an employer to deduct from an employee's wages for failure to provide the notice of resignation required under the Award, if the deduction complies with the requirements of clause 16.1.

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.

The information contained in this document is intended for general information only. Whilst due care has been taken in preparing this document, no responsibility is accepted by the author for the accuracy of the information therein contained.

All liability is expressly disclaimed for any damage which may arise from any person acting on any statement or information contained herein.

© Queensland Hotels Association
August 2020