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# GREG REIFFEL CONSULTING

## HUMAN RESOURCES & INDUSTRIAL RELATIONS

*"Empowering businesses through practical and strategic IR & HR solutions"*

## Employee Relations Newsletter

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### Quote of the Edition

*"The Tau of military operations lies in harmonising people. When people are in harmony, they will fight naturally, without being exhorted to do so. If the officers and soldiers are suspicious of each other, warriors will not join up; if loyal advice is not heard, small minds will talk and criticise in secret. When hypocrisy sprouts, even if you have the wisdom of ancient warrior kings you could not defeat a peasant, let alone a crowd of them. This is why tradition says, 'A military operation is like fire; if it is not stopped, it will burn itself out'". Sun Tzu, The Art of War*

### Modern Awards to catch up on abandonment of employment issues

Late last year the Full bench of the FWC as part of its 2014 Modern Award Review (noting 2018 is the next review in the four-year cycle) issued a Statement relating to the "Abandonment of Employment" see [2017 FWCFB 4250]. The FB having leapt into action following a FB decision *Mr Boguslaw Bienias v Iplex Pipelines Australia Pty Limited T/A Iplex Pipelines Australia (C2016/6606)*.

By way of comment, the Modern Award process has now identified some six awards that define abandonment of employment in terms of the number of days the employee has been absent, totally ignoring the Fair Work Act's termination of employment requirements. As the Act "overrides" the Awards, it could be argued that the Awards therefore are moot on this issue; and therefore, the Award Modernisation process has merely set forth to fix this issue and has called for submission from employer and employee parties. The FB agreed with this sentiment, but for different reasons.

It is disappointing that this decision does not provide any guidance on how to deal with **unauthorised absences**, I believe the process adopted by Iplex comes close to perfect.

The "Iplex" FB decision, dated 13 January 2017, resulted from an Appeal against decision [2016] FWC 6624 of Senior Deputy President O'Callaghan at Adelaide on 17 October 2016 in matter number U2016/3008.



In the original Decision, Senior Deputy President O'Callaghan the termination of Mr Bienias' employment had not occurred on Iplex's initiative.

By way of background, Mr Bienias had been employed by Iplex since December 1983, and from 1992 he was employed as a Team Leader, and that he was covered by the Manufacturing and Associated Industries Occupations Award 2010 (Award) and the Award applied.

Mr Bienias had a clean record of employment until 2015, after which time he was given a written warning for failing to comply with the required quality standards and on 21 December 2015 was stood down following a positive alcohol test reading while at work. This also resulted in a written warning.

Mr Bienias was absent from work for his rostered shifts on 19, 20, 21 and 22 January 2016. Iplex met with Mr Bienias 28 January 2016 to discuss the absences. During this meeting Mr Bienias was advised that he was required to call his supervisor in the case of future absences prior to the commencement of his rostered shift. Mr Bienias was absent from work on 7 March 2016. He did not notify his supervisor of that absence because it was a public holiday. On 10 March 2016, Mr Bienias was given a written warning relating to his absenteeism and failure to comply with notification requirements.

### **The process (all good, so far)**

Mr Bienias did not attend work on 2 and 3 May 2016, not advising his supervisor until 3 May 2016, that he could not attend for work because he was ill. On his return to work 4 May 2016, Mr Bienias attended work and was stood down with pay pending investigation of this absence. A further meeting provided Mr Bienias the opportunity to respond to issues relating to his absences and a quality assurance issue. He was also provided the opportunity to attend the meeting with a support person (which he did), with Iplex having three representatives present.

The meeting concluded on the basis that Iplex would consider Mr Bienias' responses and there would be a further meeting on the following day, upon which Mr Bienias was advised that he would be issued with a final written warning and would be placed on a performance improvement plan. A warning letter was subsequently prepared but not given to Mr Bienias as the meeting on 11 May 2016 was the last occasion on which Iplex had seen or spoken with Mr Bienias.

### **No further attendance**

Mr Bienias did not attend work at Iplex again. He said that the following days he stayed at home in bed and was barely aware that the phone had rung or that he had to eat, take his medication or even care for his life, and that he was appalled and did not want to talk to anyone.

His supervisor telephoned Mr Bienias and left a message advising him that he was required to produce a medical certificate in support of his absence.



On 23 May 2016, Iplex arranged for a letter to be delivered to Mr Bienias. This letter requested that Mr Bienias urgently contact his supervisor. Mr Bienias said that, for reasons relating to his mental health, he did not become aware of this letter until sometime in June 2016.

A management employee of Iplex contacted the Western Australian **Police** on 26 May 2016 to request that the police conduct a **welfare check** on Mr Bienias and was advised that the police had been able to contact him.

21 On 30 May 2016, Iplex prepared and dispatched by courier a letter to Mr Bienias, terminating his services for reason of abandonment. He was paid five weeks' notice and all statutory entitlements.

### **The decision**

In the initial Decision the DP considered both the Fair Work Act and the Award, in effect interpreting the award provision (which in my view is a matter for the courts – not the FWC), stating:

*“Notwithstanding my significant reservations about the potential inequities created by this strict approach to the application of clause 21 of the Award, I am unable to apply that clause in any other manner.”*

The FB then described in detail how difficult it is to uphold an appeal. It is not a “right”. But in this matter the FB was persuaded that Mr Bienias has made out a case of error, namely, that the decision-maker has acted on a wrong principle, has mistaken the facts, has considered an irrelevant consideration or failed to consider a relevant consideration, or has decided which is unreasonable or manifestly unjust. In our view, the appellable error identified is one that attracts the public interest and so permission to appeal must be granted.

In short, the FB, stated that the Award was inconsistent with the FWA (relating what can and cannot be in a Modern Award), and deemed the Award clause relating to abandonment of employment to be a non-allowable matter.

The FB also stated that therefore, it was Iplex which terminated the employment, not the Award, adding:

*“Furthermore, the payment to Mr Bienias of five weeks' pay in lieu of notice is inconsistent with the employment having been terminated other than on the initiative of Iplex. The correspondence makes no suggestion that the payment in lieu is by way of gratuity or without obligation to make it”.*

### **Conclusion**

The FB sent the matter back to the DP for rehearing.



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## Commentary

I look forward to the DP's decision (if it is not settled beforehand), which I believe should focus on Mr Bienias' inability to contact Iplex or have someone do so on his behalf. Goodness knows that I am no fortune teller but given the cost (and anxiety) of this matter to date, and the likelihood, that even if Mr Bienias wins the case, I cannot see a big pay out.

Now if he had of applied under the General Protections provision of the FWA, this might be a different story (maybe).

*Until next time....*

**Greg Reiffel**  
Principal Consultant