

Employment Alert

Gone for good?

Making the case for abandonment of employment

WHAT YOU NEED TO KNOW

- Whether an employee has voluntarily ended their employment by abandonment turns on an objective view of all the facts.
- The Fair Work Commission will not readily find or infer abandonment.
- An absent, uncommunicative employee will not necessarily have abandoned their employment by refusing to comply with a direction to return to work or to provide correspondence even if this direction is reasonable in the circumstances.

WHAT YOU NEED TO DO

- Take adequate steps to satisfy yourself that an employee has chosen to end their employment.
- Consider our practical tips for employers.

Background

Employers dealing with absent employees who won't discuss their return to work or who break off communication altogether are often quick to conclude that the employee has abandoned their employment. From a manager's perspective, abandonment can seem an easier solution - if the employee has chosen to end their employment by disappearing, then surely the risk of an unfair dismissal claim also disappears?

Not so. The Fair Work Commission may look into the circumstances behind an employee's alleged abandonment of their employment as part of the threshold question of whether there has been a dismissal at the initiative of an employer. The Commission will not readily find or infer abandonment unless it is clear that the employee no longer intends to be employed. But when is this clear?

In this Alert, we consider how employers can satisfy themselves that an absent, uncommunicative employee has ended their own employment.

What is abandonment of employment?

A few modern awards specifically provide for circumstances where an employee will be deemed to have abandoned their employment. An enterprise agreement or contract of employment may also

expressly provide for situations that will be deemed to constitute abandonment of employment.

However, whether an absent employee has voluntarily terminated their employment is a matter of fact (and judgment). Even if an employee "breaches" a deeming provision in a contract or industrial instrument it does not necessarily follow that the employee has in fact abandoned their employment resulting in its termination.

Generally speaking, an employee has abandoned their employment where the employee unequivocally, through their actions or lack of action, indicates that they do not wish to continue at work. Conduct such as never returning after walking off the job or after a holiday without explanation are examples.

The position is less straightforward if an absent employee simply stops corresponding or refuses to have any direct contact with their employer about their circumstances including their likely return to work date. This commonly arises when an employee has been away from work for a lengthy period due to illness or injury.

Gone but no abandonment

It is risky to conclude that an employee has given up their job, simply because an employee does not attend work or provide correspondence as reasonably directed, especially where there is some evidence

indicating the employee does not wish to end their employment.

It is usually not enough for an employer to rely upon a direction "attend work or we will consider you have abandoned your employment" no matter how reasonable that position may be in the circumstances. This is because abandonment turns on an objective view of all the facts and not whether it was reasonable for an employer to conclude that the employee had given up their job.

Situations where an employer was found to have wrongly concluded their employee had abandoned employment include:

- An employee did not attend and perform work as directed, in circumstances where he was challenging his employer's change to his position - *Duke v Central Norseman Gold Corporation Ltd* [2013] FWA 2993
- An employee did not respond to his employer's demand for information about his intentions of returning to work or provide satisfactory evidence for his continued absence, but he had written to his employer to renounce the notion he was abandoning his job - *Christopher Jason Millard Wright v Department of Corrective Services* [2012] WAIRC 00764
- An employee continued to be absent from work after the expiry of medical certificates. Her employer repeatedly tried to contact her through her solicitor warning she would be considered to have abandoned her employment if she didn't return to work. Eight days after her first workers' compensation certificate expired, the employer wrote to her stating it considered she had abandoned her employment. It was unaware that the day before her doctor had issued a new certificate and that she had lodged a workers' compensation claim - *J Searle v Moly Mines Limited* [2008] AIRCFB 1088 (C2008/2011) (29 July 2008)
- An employee took leave notwithstanding that his employer had refused his leave application - *Dun & Bradstreet (Australia) Pty Ltd v Robbie* [1999] NSWIRComm 316 (20 July 1999).

What can I do to establish abandonment?

There are a number of practical ways you can establish whether an absent employee has chosen to end their employment.

Exhaust all possible avenues of contact

Employers are surprisingly often reluctant to make direct or informal contact with an employee who is absent without reason. It is incumbent on employers to do what is necessary to find out what is going on. Consider using telephone, mobile phone, email, Facebook or even contact through other people such as work colleagues, family members or treating practitioners. Consider visiting the employee's home.

Make formal contact

If the employee is not contactable, send a letter by registered and ordinary mail to the employee's home address requesting the employee to contact you as soon as possible. This step is important if it is possible the employee is avoiding personal contact with individuals.

Be thorough

Make sure that the employee has not notified someone else of their absence – check with your workers compensation and medical personnel, including external providers.

Be reasonable

Consider any underlying issues behind the employee's unexplained absence such as mental health issues. Mental health issues may affect the appropriate approach, including in relation to making contact.

Be patient

An employee's absence for one or two days is unlikely of itself to mean the employee has abandoned their employment.

Making the Case: Insights from Geoff Giudice

When considering the potential for an employee who appears to have abandoned his or her employment to successfully undertake unfair dismissal proceedings in the Fair Work Commission, the main question is whether the employment was terminated at the employer's initiative. If the answer to that question is no then the application cannot succeed. A termination will not be at the employer's initiative if the employer can demonstrate that the employee unambiguously abandoned his or her employment. If there is doubt, it is more likely than not that the termination was at the employer's initiative. Where the employer argues that it did not decide to dismiss the employee, but merely accepted the abandonment, and that argument is rejected, the employee will usually have a strong case for a remedy.

Contacts



Marie-Claire Foley
Partner
Perth
T: +61 8 9366 8734
E: marie-claire.foley@ashurst.com



Geoffrey Giudice
Consultant
Melbourne
T: +61 3 9679 3636
E: geoffrey.giudice@ashurst.com



Dominique McConnell
Senior Associate
Perth
T: +61 8 9366 8153
E: dominique.mcconnell@ashurst.com

This publication is not intended to be a comprehensive review of all developments in the law and practice, or to cover all aspects of those referred to. Readers should take legal advice before applying the information contained in this publication to specific issues or transactions. For more information please contact us at aus.marketing@ashurst.com.

Ashurst Australia (ABN 75 304 286 095) is a general partnership constituted under the laws of the Australian Capital Territory carrying on practice under the name "Ashurst" under licence from Ashurst LLP, a limited liability partnership registered in England and Wales. Further details about the Ashurst group can be found at www.ashurst.com.

© Ashurst Australia 2013. No part of this publication may be reproduced by any process without prior written permission from Ashurst. Enquiries may be emailed to aus.marketing@ashurst.com. Ref: 652610002.01 27 June 2013