

Senate Standing Committee on Education Employment and Workplace Relations

QUESTIONS ON NOTICE Additional Estimates 2012-2013

Outcome 4 - Workplace Relations and Economic Strategy

DEEWR Question No. EW0944_13

Senator Abetz asked on 13 February 2013, Hansard page 119

Question

Flexible Work Arrangements- Capacity to Break Agreement

Senator ABETZ: they have spoken to each other. As a result of speaking to each other—this new right they have been granted—they have decided to make an agreement, which they intend to last for two years, given your scenario of a high school child and the employee's requirements. That agreement is reached. Can the employer say, 'Look, mate, I know I made that agreement with you yesterday but I'm going to cancel it as of tomorrow'? Could the employer do that? What certainty is there if the parties have reached an agreement but one of them wants to unilaterally break it? Mr Kovacic: The intent— Senator ABETZ: No, not the intent. What is the capacity? Ms Paul: We are talking about the current arrangement— Mr Kovacic: In terms of the specifics, I would need to take that on notice. I can take the question on notice but, very realistically, what you would expect to occur is that the employer would raise their concerns with the employee and, as part of the process, try to resolve any issues there might be in terms of the practical operation of those in a way that balanced the needs of the employee with those of the employer. That is very much the purpose of this provision. Senator ABETZ: Yes, we know the purpose. Mr Kovacic: What is different in terms of the informal arrangement is that the right to request in the National Employment Standards not only gives the employee the right to make the request but importantly—and this is where it differs from the informal approach—the obligation is on the employer to respond in writing within 21 days and the employer is only able to refuse to agree to that request on reasonable business grounds. That is very different from an informal arrangement, where the employer is under no obligation to respond. Senator ABETZ: Yes; but there is no test or enforcement of the 'reasonable business grounds'. So, after 21 days, or indeed the very next day, the employer writes to Joe, the employee, saying, 'I agree to your flexible working arrangements as detailed here and I agree that this will be in place for two years,' and gives the written document to the employee and then the next day says, 'I have changed my mind; I'm going to break it.' What recourse is there for that employee? Mr Kovacic: I have taken that question on notice.

Answer

The recourse available to an employee wishing to enforce an agreement that he or she has reached with their employer under section 65 of the *Fair Work Act 2009* (FW Act) would turn on the circumstances leading up to and including the making of the section 65 agreement (e.g. the intention of the parties and the particular terms of the agreement, which could itself give rights to either party to terminate or vary the arrangement). Precisely what contractual, equitable or other statutory remedies/obligations arise would depend on these matters, but the agreement could potentially be enforceable in a court of competent jurisdiction according to its terms.