

# Article

## EMPLOYMENT LAW



## Return to Work Obligation

### When it is not “reasonably practicable” for an Employer to provide employment to an injured worker under the RTW Act

By Ben Duggan

A new workers compensation scheme commenced operation at the start of this month.

The RTW Act retains the return to work obligation imposed on employers by the former scheme.

An employer’s obligation did not apply in several circumstances including when it is not “reasonably practicable” to provide “suitable employment” under the former scheme.

Employers can obtain some guidance as to the interpretation of this primary qualification from an earlier decision of the Supreme Court because of its retention under the new RTW Act.

A rare decision which considers whether an employer’s obligation to provide “suitable employment” to an injured worker is “reasonably practicable” is the Supreme Court decision of Longyear.

*Longyear Australia Pty Ltd v Workers Rehabilitation and Compensation Corporation* No. SCGRG 94/1494 Judgement No. 4951 [1995] SASC 4951 (7 February 1995)

The matter involved a challenge of a determination by the Board of the Compensating Authority (WorkCover) to uphold the imposition of a

supplementary levy for the employer’s failure to provide suitable employment to an injured worker.

The worker had earlier developed an irritant contact dermatitis in compensable circumstances which prevented him from performing his work as a fitter and turner. Longyear had made arrangements to enable the worker to be provided with suitable employment. Over time it became clear that the only employment for which the worker was fit was clerical employment.

Longyear dismissed the worker having taken the view that no clerical employment was available to the worker and that it was not “reasonably practicable” for them to create a position for the worker.

In response WorkCover not being satisfied that Longyear had complied with its obligation to provide suitable employment to the injured worker where this was “reasonably practicable” imposed a supplementary levy.

A challenge to the decision was subsequently brought by Longyear in the Supreme Court.

Longyear argued before the Supreme Court that the Board had misconstrued the obligation to provide “suitable

employment” under the scheme which existed at the time. In particular Longyear contended that it could not be regarded as reasonably practicable to provide “suitable employment” if no suitable position was available. Longyear further contended that the obligation does not require an employer to create an unnecessary position or to dismiss an employee to create a vacancy.

The Supreme Court noted that the primary obligation is to provide “suitable employment” which if “unqualified would undoubtedly require the creation of a position if no suitable vacancy existed.”

In its decision the Supreme Court rejected Longyear’s contention regarding the need for there to be a suitable position indicating that whether the qualification of reasonable practicality relieves the employer of the obligation to create a position must “depend upon the circumstances.”

The Supreme Court went on to acknowledge the difficulties faced by a small business because of its smaller staff contingent and resources. In contrast a larger business it was suggested may have little or no difficulty

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in finding appropriate tasks for an injured worker. The Supreme Court did however qualify this discussion by indicating that the effect on the employment of others is a factor to be considered having regard to the circumstances of the case.

A circumstance which was discussed in the Longyear decision was whether casual employment was “suitable employment” in the context of an employer’s obligation. The Supreme Court indicated that the use of the term “suitable” enlarged the obligation to provide employment. An employer would according to the Supreme Court not discharge its obligation by the provision of casual employment to an injured worker. The circumstance might be different where an employer was able to demonstrate that it was not reasonably practicable to provide permanent employment. In such a circumstance the Supreme Court indicated that it would be appropriate to consider whether the employer should provide casual employment to comply with its obligation to provide “suitable employment.”

A conclusion was reached by the Supreme Court on the facts that Longyear had not demonstrated that WorkCover was in error in finding that it was “reasonably practical” for them to provide clerical employment to its injured worker.

The Supreme Court upheld the decision to impose a supplementary levy on Longyear because of its failure to provide suitable employment as required by the scheme.

### Lessons for Employers

An employer faces the same difficulties today as they grapple with the onerous obligation to provide “suitable employment” which retains the same primary qualification of “reasonable practicability” that existed at the time of the Longyear decision.

A take away from the Longyear decision is that it will be unlikely for an employer, particularly a larger business, to rely simply upon a consideration of their own circumstances to justify the absence of the provision of suitable employment to an injured worker.

It is clearly beneficial for an employer to be able to demonstrate an adverse impact upon other workers due to its compliance with the obligation to provide “suitable employment.”

In the absence of an adverse impact it is difficult to envisage a larger employer being able to demonstrate that it was not “reasonably practicable” for them to provide “suitable employment” to an injured worker.

Employers should consider seeking advice regarding their obligation to provide employment under the new scheme in appropriate circumstances.



**MORE INFO**

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