

# Article

## EMPLOYMENT LAW

### Weatherill Labor Government Establishes new State Industrial Court

Weatherill Labor Government seeks to make it easier for employment claims to be brought against employers with its expanded jurisdiction for the State Industrial Court

By Ben Duggan

#### Background

The current State Industrial Court known as the Industrial Relations Court of South Australia (IR Court) is to be disbanded in the New Year.

A new Industrial Court, the South Australian Employment Court (SAE Court), with an expanded jurisdiction will replace the IR Court from 1 July 2017.

The SAE Court will retain the jurisdiction to hear workplace safety prosecutions and monetary claims currently dealt with by the IR Court.

The IR Court's current employment jurisdiction is confined to the ability to hear a monetary claim by an employee for a sum of money:

- Due under a contract of employment;
- Due under an industrial instrument (award or enterprise agreement); or
- Due pursuant to a statute such as the Long Service Leave Act.

As such the current employment jurisdiction conferred to hear monetary claims does not empower the IR Court to deal with a claim for damages arising from a breach of a contract of employment.

Weatherill's Labor Government has in a novel development expanded the SAE Court's employment jurisdiction by providing it with the power to award damages for a breach of a contract of employment which would include a claim for reasonable notice.

#### The Expanded Jurisdiction for the new State Industrial Court

The expanded jurisdiction will provide the SAE Court with the ability to hear various claims arising from a breach of a contract of employment.

An action by an employee or employer for the grant of an injunction or specific performance will also be able to be heard by the SAE Court.

Interestingly, the amendments provide the SAE Court with the ability to grant an injunction or provide for specific performance as a remedy where it "would best serve the interests of justice in a particular case."

The SAE Court would in the exercise of consideration of the "interests of justice" be required to consider the following factors:

The length of time that elapsed between the time when the cause of action in the proceedings arose and the time when the proceedings were commenced.

The extent to which there no longer exists mutual confidence in the employment relationship between the employer and the employee.

The extent to which there is evidence that compliance with an order for specific performance or an injunction would be impracticable or cause undue hardship, including, in the case of an employer,

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by taking into account the size of the employer's undertaking and the circumstances of the particular employment situation.

Additionally, the SAE Court may take into account "such other matters as the Court thinks fit."

The SAE Court will apply the normal costs provisions under the Magistrates Court or the District Court (depending on the size of the matter) when exercising its powers under this expanded employment jurisdiction dealing with claims arising from a breach of a contract of employment.

### The Effect of the Proposed Expanded Jurisdiction of the State Industrial Court

#### Contracts of Employment

An expansion of the jurisdiction to enable an employee to commence a claim against their employer for damages for breach of their contract of employment is a significant step.

The SAE Court would likely enable managers, senior staff and specialist staff to seek a relatively inexpensive and quick remedy seeking damages for breach of their contract of employment.

Our expectation is that the enactment of the proposed changes will mean that the SAE Court will become the preferred Court for such managers and staff to commence claims for breach of their contract of employment, particularly for those in the context of the termination of their employment such as claims for reasonable notice.

#### Injunctions

An expansion of the jurisdiction to enable an action for the grant of an injunction or specific performance would provide all South Australian employees with an effective remedy with respect to an alleged breach of their contract of employment.

The action for an injunction or specific performance could be brought with respect to an alleged breach of contract of employment *during* their employment with their employer.

A union or employee might, for instance, commence such an action where an employer seeks to alter or remove an employee benefit that is no longer sustainable. This has been a common practice for employers since the global financial crisis.

Of particular concern for employers is that the SAE Court in the exercise of its enhanced employment jurisdiction would in this instance be required to consider the "interests of justice" which it could be anticipated likely mitigates against the employer's decision to alter or remove an employee benefit that is no longer sustainable into the future.

In practice, the expansion of the jurisdiction in this manner could be expected to make it more difficult for an employer to introduce change at its workplace entrenching inflexible work practices.

#### A Sword for Employers

In recent years employers have increasingly brought claims against

an employee or former employee for a breach of their contract of employment in State or Federal Courts.

The common types of claims brought relate to a failure to comply with confidentiality obligations, intellectual property obligations or post employment restraint of trade obligations.

A possible impact of the expanded employment jurisdiction of the SAE Court is that employers seek to use its new powers to grant injunctions or specific performance to provide remedies for these common types of claims.

The new SAE Court with its expanded employment jurisdiction could in this manner be utilised as a sword by employers particularly against former employees who fail to comply with their restraint of trade obligations.

We will keep you informed of decisions of the SAE Court following the commencement of this new State Industrial Court on 1 July next year.



MORE INFO

**Ben Duggan** Director

p: +61 8 8124 1881

[ben.duggan@dwfoxtucker.com.au](mailto:ben.duggan@dwfoxtucker.com.au)

**DW Fox Tucker Lawyers**

L14, 100 King William Street, Adelaide, SA 5000

p: +61 8 8124 1811 e: [info@dwfoxtucker.com.au](mailto:info@dwfoxtucker.com.au) [dwfoxtucker.com.au](http://dwfoxtucker.com.au)

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