DWFoxTucker Lawyers

# Alert

WORKERS COMPENSATION & SELF INSURANCE

# Reinstatement under the Return to Work Act

## *The South Australian Employment Tribunal delivers first course in the Section 18 moveable feast!*

**By Patrick Walsh**

In what is likely to be a very contentious area of the Scheme under the *Return to Work Act* ('**the Act**'), the South Australian Employment Tribunal ('**Tribunal**') has delivered its first decision shortly before Easter on an application brought pursuant to section 18(3) for the provision of suitable employment to a worker who had been dismissed in *Walmsley v Crown Equipment Pty Ltd*.

Perhaps unsurprisingly, the Tribunal found that there is no inconsistency between the power conferred on the Tribunal by the *Return To Work Act* to require an employer to provide suitable employment (despite the worker having been dismissed) and the ability of an employee to make an application for an Unfair Dismissal Remedy pursuant to the *Fair Work Act*. In this regard, the Deputy President relied on a judgement in the New South Wales Industrial Relations Commission in *ACI Operations Pty Ltd v Field*, in which Boland P concluded that *"in light of the public policy purposes of workers compensation, that a "beneficial and broad interpretation" be afforded the phrase "workers compensation" in s 27(2)(b) of the FW Act, and held that Part 8 was a law dealing with workers compensation which remained operative alongside the provisions of the FW Act."*

Although any application brought pursuant to Section 18(3) will largely turn on the unique facts of each case, this decision does provide some useful general principles for employers and raises some important issues for further consideration.

### The Facts

The worker began his employment as a field service technician in August 2010. The Job Dictionary stated that this position required *"amongst other things, occasional lifting and carrying of weights of 10-20kg, frequent and sustained bending, squatting and kneeling, and occasional pushing and pulling "heavy forces, and downward pushing up to 35kg force."*

The relevant injury suffered by the worker was an aggravation of the workers degenerative back condition on 4 June 2014. The worker had previously suffered a lower back injury during the course of work in 2012, but had made a return to his pre-injury duties.

The worker was provided with modified duties during the period 4 June 2014 to 15 April 2015. During the trial there was disagreement between the worker and the employer as to whether the employer had intended for the worker to be offered a permanent role encompassing the modified duties, although the Deputy President stated that this did not affect his reasons.

Critically there was a meeting on site on 24 September 2014 between the worker, representatives from the employer and Employers Mutual Limited ('**EML**'), and the worker's treating GP. In evidence, the worker's GP stated that, as a result of the site visit, she had formed the view that a return to the work performing workshop duties *"were outside the applicant's (worker's) weight limitations"*.

The GP wrote a report, dated 17 November 2014, which stated that the worker's injury had caused a permanent aggravation to the worker's underlying degenerative condition and that he would need some permanent restrictions and modifications in order to ensure a sustained return to work. Importantly, the GP also observed that the workshop duties were more physical than those of a field service technician and that the worker would benefit from a Functional Capacity Evaluation ('**FCE**') to determine whether he had some capacity as a field service technician.

The employer formed the view that providing the worker with modified duties was not sustainable as it required the employer to provide a range of tasks taken from other employees and there was a significant risk of further aggravation. The employer notified EML that it intended to seek detachment of the worker pursuant to section 58B of the *Workers Rehabilitation and Compensation Act 1986*. EML subsequently approved the change in the rehabilitation goal to obtain employment with another employer.

The worker's GP became aware of the employer's proposal to detach the worker on 25 March 2015 and requested that EML arrange for a FCE. A FCE was conducted on 17 April 2015 which determined that the worker had capacity for medium to heavy level work with a restriction that he not engage in work which involved reaching below one metre (bending at the back) for sustained periods or on a repetitive basis, and that he kneel and squat on an occasional basis only.

It was recommended that the worker's capacity be increased to reflect this.

In meantime, at a meeting on 15 April 2015, the worker had been advised that he was detached, that his employment was terminated, and he was provided with 4 weeks' pay in lieu of notice, along with his accrued entitlements.

On 21 May 2015 the worker lodged an application for an unfair dismissal remedy, which was ultimately dismissed because it was outside the 21 day time limit imposed by the *Fair Work Act 2009*.

## The Decision

The Deputy President noted that *"s 20(1) of the RTW Act, a provision in Part 2 Division 3 in which s 18 appears contemplates that* ***an injured worker may be dismissed lawfully with appropriate notice****. There is no indication in the RTW Act that any such dismissal will result in the s 18 remedy no longer being available to the dismissed worker".*

The Deputy President then went on to consider whether any of the provisions in section 18(2) of the Act applied, and in this particular case whether the employer had established that it was not reasonably practicable to provide suitable employment. The Deputy President phrased the application of section 18(2) as a threshold question, which needed to be resolved before the Tribunal could consider whether it should make an order in favour of the worker. The Deputy President ultimately found that the duties the employer had provided up to April 2015 were tasks which had some productive value, and were not menial as asserted by the employer. Furthermore, the Deputy President stated that *"I find that Crown (the employer) declined to provide suitable employment to the applicant beyond 15 April 2015 without adequately exploring the full extent of his work capacity, and did not consider on an informed basis whether it was reasonably practicable to provide the applicant temporarily or permanently with a greater range of suitable duties that those provided to that time".*

Next, the Deputy President considered whether the worker was entitled to an order for suitable employment to be provided, pursuant to section 18(5). In his decision he states that this requires consideration of two issues:

1. Whether the Tribunal is satisfied that it is not unreasonable for the employer to provide the specified employment, which may be different from that contemplated by section 18(1) and the employment sought by the application made under section 18(3); and
2. Whether, even if the Tribunal is satisfied that it is not unreasonable to provide suitable employment, there are any other grounds upon which it should grant or refuse the application.

In this particular case, the Deputy President found that the worker was seeking an order for a return to the suitable employment which had previously been provided, and so there were no grounds under section 18(5) upon which to refuse the application.

## Lesson for Employers

This judgement highlights the importance of ensuring that an employer has clear expert evidence that an injured worker:

1. Is unable to perform the inherent requirements of the pre-injury role;
2. Will not be able to return to the pre-injury role in the foreseeable future; and
3. The employer is not able to make any reasonable accommodations in the worker's pre-injury role to take into account permanent restrictions,

before considering whether termination of an injured worker's employment is warranted.

Some other things that an employer will need to consider are whether:

- any suitable employment being offered to the worker is productive and sustainable; and
- the worker can be redeployed to another role within the business.

There is no discussion in this decision as to the effect of time passing between an injured worker leaving the employment and making an application pursuant to section 18(3).

It is noteworthy that in the Second Reading of the *Return To Work Bill* Deputy Premier John Rau made it clear that there was no intention to impose a time limit on an application for the provision of suitable employment. It would be reasonable to expect that the Tribunal will consider that the amount of time that has passed since an applicant has left their employment until they make the application as a relevant factor in the second step of considering whether an order should be granted pursuant to section 18(5), but this remains to be seen.

What is also unclear is how this will interact with section 25(10) of the Act which requires the Compensating Authority to take into account new or other employment options.

What also arises from this decision is that, for the time being, the Tribunal considers an injured worker can bring an application pursuant to section 18(3) for employment *"of a nature not previously provided"*. Hopefully the Tribunal will consider this issue more carefully as section 18(3) requires a worker to seek employment that is *"consistent with the requirements of subsection (1)"* which relevantly states that suitable employment must be provided that is *"so far as reasonably practicable* ***the same as, or equivalent to****, the employment in which the worker was working immediately before the incapacity"*.

MORE INFO
**Patrick Walsh** Senior Associate
p: +61 8 **8124 1941**
patrick.walsh@dwfoxtucker.com.au