

Article

Employment, Workplace Relations & Safety



From Fixed Term to Permanent

The Full Bench of the South Australia Tribunal clarifies that the Tribunal has the power to make an order under section 18 that changes the legal nature of the employment relationship.

By Patrick Walsh

In a recent decision of *Forestry SA v Morphett* [2023] SAET 39 the Full Bench considered an appeal which raised the question as to whether an order can be made, pursuant to section 18 of the *Return to Work Act 2014* (SA) (**'the Act'**), for the provision of permanent full-time employment to an employee who had been employed pursuant to a fixed term contract of employment that had expired.

Mr Morphett had been employed pursuant to a fixed term contract as a seasonal Forestry Management Worker when, on 22 December 2016, the trunk of a tree fell on him and he sustained a significant injury to his left shoulder. As a consequence of his injury, Mr Morphett was left with a permanent partial incapacity for work.

Following his injury, Mr Morphett returned to light duties and made a graduated return to work. Of relevance, Forestry SA continued to offer Mr Morphett fixed term contracts for periods of work and provided Mr Morphett with, among other things, duties as a Ranger.

On 28 November 2018, Forestry SA provided Mr Morphett with notice that his employment would cease on 13 December 2019 at the expiry of his contract and that he would not be offered further periods of employment.

Mr Morphett brought an application pursuant to section 18 of the Act and sought employment as a Ranger on a permanent full-time basis.

The Full Bench found in Mr Morphett's favour and dismissed the appeal and made the following observations about the operation of section 18:

- The requirement under section 18(1) of the Act to provide suitable employment the same as or equivalent to the pre-injury employment is a reference to the duties performed by the injured worker and **not** a reference to the legal nature of the relationship. As such, there is no impediment to make an order for the provision of suitable employment that would change the legal nature of the employment relationship. This requires an analysis of the particular duties of the role being sought as against the pre-injury role.
- An order under section 18 for the provision of suitable employment is **not** an order for ongoing employment. As such, the likelihood that the employment sought by the worker is going to result in sustainable employment goes to the utility of making such an order and whether the Tribunal ought to exercise its discretion to make the order being sought by the applicant.
- "*Section 18 does not impose upon an employer an obligation to provide a worker with ongoing modified restricted duties. The obligation it imposes is for*

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the employer to make work available pursuant to a contract of employment that comprises of suitable employment that is the same as, or equivalent to, the employment in which the worker was acting immediately before the worker's incapacity if it is reasonably practicable for the employer to do so."

One issue that doesn't appear to have been considered by the Full Bench in Forestry SA is the application of section 18(2)(e), which states that the obligation to provide suitable employment does not apply if "the worker has otherwise returned to work with the pre-injury employer or another employer."

Section 3(1)(c) sets out that the object of the Act is to support workers to return to work (whether pre-injury work or otherwise) it would make sense that, once that objective is achieved, section 18 has no further role to play.

Noting the Full Bench's observation that an order for the provision of suitable employment pursuant to section 18 is not an order for ongoing employment it would appear that the Full Bench is stating that section 18 does not operate such as to constrain an employer's rights to lawfully terminate the employment relationship.

In meeting their obligations pursuant to section 18, employers should be mindful of not restricting themselves to only considering roles that have the same legal nature as the injured worker's role. Central to the consideration of provision of suitable employment should the actual nature of the duties and the worker's capacity to perform those duties.



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