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Workers Compensation & Self Insurance

Section 18: A Solution Looking for a Problem

State Government releases draft Bill that proposes a range of amendments to the obligation to provide suitable employment under the *Return to Work Act*.

By Patrick Walsh

While few would argue with the proposition that it has taken some time to get some clarity around the operation of section 18 of the *Return to Work Act 2014 (SA)* (**the RTW Act**), this is in large part a consequence of the relatively few applications made pursuant to section 18 that have resulted in decisions from the South Australian Employment Tribunal (**the SAET**) and the Full Bench of the South Australian Employment Tribunal.

Before reviewing the *Return to Work (Employment and Progressive Injuries) Amendment Bill 2023* (**the Section 18 Amendment Bill**), it is worth considering the broader context within which an employer's obligation to provide suitable employment operates in the RTW Act.

The ReturnToWorkSA Annual Report 2021-22[1] sets out the following table with respect to its return to work rates:

Injured workers fully at work at key intervals after injury

	4 weeks	13 weeks	26 weeks	52 weeks	103 weeks
2021–22	72%	83%	89%	93%	94%
2020–21	71%	83%	87%	91%	94%
2019–20	73%	82%	86%	91%	94%
2018–19	75%	84%	88%	92%	95%

Injured workers fully or partially at work at key intervals after injury

	4 weeks	13 weeks	26 weeks	52 weeks	103 weeks
2021–22	83%	90%	93%	95%	96%
2020–21	82%	90%	93%	94%	95%
2019–20	81%	88%	91%	93%	96%
2018–19	82%	90%	93%	95%	96%

Notably and commendably, at least 95% of injured workers in the registered part of the scheme have made at least a partial return to work within 103 weeks of the date of an injury. At the date of publishing, I was not able to locate similar figures for self-insurers; however, as noted in the independent review conducted by the Honourable John Mansfield AM QC in 2018, "*Self-insurers have consistently outperformed the registered scheme*", and so it is relatively uncontroversial to assert that the return to work rates of injured workers employed by self-insurers would be at least as high, if not higher, than for registered employers.

The Fair Work Commission no longer publishes figures with respect to the number of applications for an unfair dismissal remedy that result in an agreement or order for

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1 *https://www.rtwsa.com/about-us/news-room/articles/returntoworksa-annual-report-and-scheme-performance-2021-22*

reinstatement. The most recent figures are contained in its 2018-19 Annual Report, and of 13,928 applications for an unfair dismissal remedy that were lodged, 55 resolved at conciliation with an agreement for reinstatement, and 13 resulted in an order from the Fair Work Commission for reinstatement. That is, 0.488% of applications resulted in reinstatement in a jurisdiction where reinstatement is the legislated preferred remedy.

As noted by ComCare in its Return to Work Information sheet, "*The longer someone is off work, the less likely they are to return to work. Work absence tends to perpetuate itself ...*". ComCare goes on to note that when a person is absent for 20 days there is a 70% chance of returning to work and this falls to 35% at 70 days.

What can reasonably be concluded from this context is that absence from the workplace and an adversarial Court process are simply not conducive to a meaningful and sustained return to the workplace. Even in a jurisdiction, such as the Unfair Dismissal jurisdiction of the Fair Work Commission, applicants rarely genuinely seek reinstatement, and it's even rarer for reinstatement to be agreed upon or ordered.

Seen in this context, it is logical that applications to the SAET seeking an order for the provision of suitable employment pursuant to section 18 of the RTW Act have not exceeded 1.4% of all applications in the last 5 years.

The Section 18 Amendment Bill proposes to make a range of significant changes to the manner in which the RTW Act operates. These include:

1. Provisions to facilitate claims for workers suffering certain conditions

Workers who sustain a prescribed dust/fibre disease injury will be allowed to make an election that the relevant employment for the purpose of calculating average weekly earnings is the employment in which the worker is employed at the time of diagnosis.

Currently, section 5 of the RTW Act requires that an injured worker's average weekly earnings be determined by reference to the employment in which the injury arose.

The issue this amendment appears to be directed at is a worker who may be exposed to dust/fibres early in their career who then goes on to increase their earning capacity as their career progresses before the disease manifests itself. Such a worker would not derive any benefit from subsections 5(6) or 5(9) and would understandably not wish to be disadvantaged by having their average weekly earnings calculated by reference to lower-paid employment.

2. Grounds to reject a request for suitable employment

Employers will be relieved of the obligation to provide suitable employment in circumstances where the worker has been dismissed as a consequence of serious and wilful misconduct. On the face of it, this is a welcome amendment for employers. That said, it seems unlikely that a Tribunal member would exercise their discretion to order the provision of suitable employment in circumstances where the employer has lawfully terminated an employee's employment as a consequence of serious and wilful misconduct.

This mirrors other provisions of the RTW Act, which require that the conduct be both **wilful and serious** in order to disentitle a worker. This is a high standard, and in circumstances where the employer cannot establish that the conduct was wilful, it will need to rely on the relative seriousness of the misconduct to persuade a Tribunal member not to exercise their discretion to grant the remedy sought by the worker.

3. The requirement to consider certain factors in determining whether it is reasonably practicable for an employer to provide suitable employment

In assessing whether it is reasonably practicable for an employer to provide suitable employment, the Tribunal will, in addition to anything else of relevance, be required to have regard to five factors:

- the size of the employer;
- the extent of any adjustments required to the role to accommodate the worker;

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- the risk of re-injury and potential for further harm;
- whether the parties can maintain trust and confidence in the employment relationship; and
- the impact on other employees.

This proposed amendment, on the face of it, is unlikely to result in a substantial change to the manner in which the Tribunal approaches the issue of reasonably practicable. It will require, however, Tribunal members in their written reasons to address each of these issues if the employer relies on subsection 18(2)(a) as a defence to an application for suitable employment.

As noted earlier in this article, the available statistics suggest that returning to work with the employer is unlikely in an adversarial setting. In my experience, this is often because the relationship has broken down, and it is not possible to maintain trust and confidence in the employment relationship. However, should the Section 18 Bill Amendment Bill pass in its current form, employers will need to consider adducing evidence to support an argument that the parties cannot maintain trust and confidence in the employment relationship. In this regard, employers who have terminated the employment of an employee for serious misconduct – but not serious and willful misconduct – may seek to argue that the seriousness of the misconduct means that they can no longer maintain trust and confidence in the employment relationship.

4. Labour-hire requirements

Labour-hire workers will be able to request the "host" employer's cooperation in the provision of suitable employment, but it is unclear exactly how the Government proposes to enforce these provisions. Quite understandably, host employers will be concerned about providing suitable employment to injured workers, particularly if those workers are vulnerable to further injury. In this regard, it is important to remember that host employers do not enjoy the protection afforded by section 66 of the RTW Act and may be the subject of a claim brought at common law for damages.

Another concern is that while host employers will have an obligation to cooperate in this process, currently, they will not have automatic standing as a party in respect of any dispute before the Tribunal regarding the provision of suitable employment in the absence of an order from the Tribunal for host employers. Feedback from the Government on the Section 18 Amendment Bill is that it is intended for them to have standing to participate in proceedings, should they wish to do so. In this regard, it is envisaged that an order could be made pursuant to section 49 of the *South Australian Employment Tribunal Act 2014* (SA) for the host employer to be joined to the relevant proceeding. On the face of it, this is not an unreasonable approach; however, it may create some procedural difficulty in that the proceeding would need to be referred to a Presidential member to make an order joining the host employer before the application can be conciliated before a Commissioner.

The alternative would be that the worker makes the application against **both** the employer and the host employer such that the host employer is a party to the proceeding from the beginning. I anticipate, however, that this may be difficult to accommodate from a practical perspective.

While the intent of the provisions is clearly to try and ensure a labour-hire worker's right to being provided with suitable employment is not unduly hindered by their employer's inability to control the relevant workplace and who works there, it is difficult to see how these proposed amendments could work in practice. There are a range of reasons that a business will elect to utilise labour-hire, but generally, it is because the business does not require those roles to be performed on a permanent basis. As such, it is hard to see the utility in an order for suitable employment to be provided at a host employer in circumstances where the application has been resisted through to trial. As the Full Bench of the Tribunal stated in *Forestry SA v Morphett* [2023] SAET 39 at [33], "*The obligation it [section 18] imposes is for the employer to make work available pursuant to a contract of employment*". There is nothing in the RTW Act that would allow for the Tribunal to create a contract of employment between an injured worker and a host employer (and any attempt to create such a power

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would likely be subject to a legal challenge), and so the "legal nexus" of the basis on which the host employer would be required to cooperate with the provision of suitable employment will remain the employment contract between the worker and the labour-hire provider. If there is a change in the agreement between the host employer and the labour-hire provider (such as a decision to use a different labour-hire provider), any order to provide suitable employment is likely to be unenforceable.

5. Right to request suitable employment after recovering from an injury

Workers who have returned to their pre-injury capacity will have a period of 6 months within which to bring an application for suitable employment. This amendment is clearly directed at the decisions of *Roberts v Department for Education* [2021] SAET 56 and *Coleman-Sleep v Return to Work Corporation of South Australia (Ceduna Koonibba Aboriginal Adelaide Health Service)* [2021] SAET 144, in which the Tribunal has stated that section 18 can only have application if the relevant worker has an incapacity for employment at the time the relevant order is made.

Such a ruling is consistent with the decision of *Walmsley v Crown Equipment Pty Ltd* [2016] SAET 4, which noted there is no constitutional inconsistency because section 18 of the RTW Act is directed towards the provision of modified employment by reference to the work injury and in circumstances where a return to the pre-injury employment might not be the appropriate outcome.

On the face of it, any power to order an employer to provide an employee who is no longer incapacitated for work with their pre-injury role is liable to be invalid if the employer has lawfully terminated the employment relationship.

It is also worth noting His Honour Deputy President Judge Rossi's comments in *Coleman-Sleep* at [222]:

> *"I respectfully agree that it is unlikely that the legislature intended that the expanded obligation upon an employer to provide suitable employment as contemplated by s18, would extend to circumstances where the injured worker had recovered to a point where there was no ongoing incapacity for work. Otherwise s18 would have the effect of providing security of tenure following an incapacity from work injury, no matter how brief the period of incapacity. That would not be consistent with Object 3(2)(c) of the RTW Act to provide a reasonable balance between the interests of workers and the interests of employers."*

6. New Tribunal powers

The Section 18 Amendment Bill would confer powers on the Tribunal to:

I. *Make orders as to the nature of the suitable employment being provided, which will include, amongst other things, the power to order a graduated increase in duties or hours of work.*

   Pursuant to section 97(c), the Tribunal already has the power to review any decision relating to a recovery/return to work plan. In this regard, the proposed power simply extends this to determining an application for suitable employment and provides the Tribunal with greater scope to determine the provision of suitable employment in circumstances where a work injury is not yet stable.

II. *Order any member of a group of self-insured employers (even if it is not the pre-injury employer) to provide suitable employment. With respect to the Crown, the Tribunal would be able to make an order for the provision of suitable employment with any agency or instrumentality of the Crown.*

   The proposed amendment to create the power for the Tribunal to order the provision of suitable employment with any entity within a group of self-insured employers or the Crown is a response to the decisions of the Tribunal in *ASC Pty Ltd v McCormack* and *ASC Ship Building Pty Ltd*

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[2021] SAET 195 and *Roberts v Department for Education* [2021] SAET 255.

The majority of the Full Bench in *ASC Pty Ltd* at [48] noted:

"Read collectively, the code and s 129 (10) and (11) apply to a self-insured employer and to all members of a group of self-insured employers. They give RTWSA ample power to encourage self-insured employers to provide suitable employment to injured workers. They allow RTWSA to address the concern raised that a corporate group might structure itself to avoid adherence by certain entities with the group of their expectation of providing injured workers with work. It is therefore unnecessary to apply an expansive construction of ss 18, 129 (12) and (14) of the RTW Act to achieve that purpose."

Clearly the Government disagrees with the Full Bench!

Interestingly, the Full Bench took the view in *Roberts* that, while there are good arguments in favour of the proposition of treating the public service as one entity, it was bound by precedent to treat each agency as a distinct employer for the purpose of the Act.

On the face of it, treating the public service as one entity has the potential to create significant issues if there is an expectation that an injured worker can expect suitable employment to be provided in the agency or instrumentality of their choice. Section 18 will still operate on the basis that suitable employment is employment that is the same as or equivalent to the pre-injury employment. As such, it seems likely that the power to treat all agencies and instrumentalities as one employer will only apply if an injured worker's role is replicated within another agency or instrumentality.

On a practical level, the Government will have to carefully consider how the costs associated with rehabilitating an injured worker will be budgeted. Given each department operates under its own budget, there may be some understandable resistance to incurring the cost of rehabilitating an injured worker in circumstances where the worker was injured while employed by an entirely different department. It's unclear whether the Government has consulted with the various agencies and instrumentalities about how this approach might work in practice.

III. *Take into account any change in capacity for work and any other evidence before the Tribunal in determining suitable employment and is not limited to the type of employment nominated by the worker.*

Deputy President Judge Hannon in Walmsley at [136] stated, "*…the question is whether an order should be made for specified employment* ***nominated*** *by the applicant*". His Honour's reasons in this regard were adopted by President Justice Dolphin in *Oldman v Department for Education and Child Development* [2018] SAET 225 at [49].

It is important that section 18(3) only requires a worker to nominate the type of employment that they consider they are capable of performing, not the precise role. For example, a worker could seek an administrative role and provide their qualifications and experience.

Such an approach allows the employer to review their available roles and determine whether there is suitable employment of the type nominated by the worker that can be made available to the worker.

In exercising this power, it is unclear whether the Tribunal would also need to take an inquisitorial approach to determine what constitutes suitable employment.

Such a power also has the potential to cause delays in litigation if there is a significant change

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in the injured worker's capacity or position as to what employment is sought. Given that the Tribunal would require evidence to support an order for the provision of employment other than what is set out in the application. Cost and procedural fairness issues will likely arise if there is any significant change in the position as to what constitutes suitable employment after the employer has obtained all of its evidence in preparation for trial.

IV. *Make an order for back pay in respect of the suitable employment ordered by the Tribunal from the date of the application.*

This power appears to be directed at ameliorating the impact of prolonged proceedings on a worker who is not in receipt of weekly payments.

While such an order might seem straightforward in some instances, it seems likely that the order will often be speculative in nature. If, for example, a worker has sought an order for the provision of suitable employment with a graduated increase in hours – is it to be presumed, for the purpose of ordering back pay, that the graduated return to work commenced on the same date as the application? In that case, a further assumption will be required that the worker proceeds through the graduated return to work as expected. Finally, does the worker, having presumed to have successfully progressed through the graduated return to work, then experience a drop in their salary when they actually commence a return to work?

Certainly, this is likely to make an application pursuant to section 18 of the RTW Act a far more attractive proposition than any of the other avenues open to a worker to seek reinstatement. Bearing in mind that – subject to the operation of section 106 of the RTW Act – the worker will likely have most, if not all, of the costs paid by the Compensating Authority, the ability to seek an order for back pay in addition to the seeking of an order for suitable employment; it seems likely that section 18 will become the preferred vehicle to litigate against an employer (as opposed to the Fair Work Act as an example).

V. *Determine whether the worker has suffered a work injury within the meaning of the Act, even if that injury has not been the subject of a previous claim for a species of compensation.*

In dealing with an application regarding section 25 of the RTW Act, his Honour Deputy President Judge Gilchrist in *Department for Education v Long* [2020] SAET 29 found that it is a pre-condition of the invocation of section 25 of the RTW Act that there is a 'work injury' within the meaning of the Act.

Presumably, the intention of this proposed amendment is to avoid an application for suitable employment being struck out on the basis that the relevant worker has not previously had a claim accepted by the relevant Compensating Authority or obtained an order from the Tribunal to that effect.

This is likely intended to allow a worker to pursue a claim for suitable employment while also contesting a decision to reject a claim for weekly payments and/or medical and like expenses. The mischief this creates is that should a member of the Tribunal determine that a worker has sustained a work injury, it is hard to see how this cannot prejudice any other proceedings on foot in which that is a live issue. Furthermore, should the other proceedings result in a finding that the worker has not suffered a 'work injury', this proposed amendment does not address how such a conflict will be resolved.

There is no doubt that the delay in resolving a disputed claim can (and often does) make rehabilitation from an injury much harder. Determining an application for suitable employment before resolving a disputed claim

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for weekly payments and/or medical expenses will only create more mischief as an applicant may elect to try and fast-track an application for suitable employment after a claim has been rejected.

7. Costs

The proposed amendments would clarify the entitlement to costs and make it clear that both the worker and employer are entitled to costs from the Compensating Authority, subject to the ability of the Tribunal to reduce or decline costs contained in subsection 18(9) of the RTW Act.

8. New jurisdiction for monetary claims

A new jurisdiction to hear monetary claims in respect of workers who have been undertaking duties under employment or arrangement that falls outside the contract for service.

The Government has not provided any evidence of any widespread issues with injured workers not being paid wages for alternative or modified duties. On the face of it, any employee directed to perform duties outside of the contract of service is still going to be covered by an industrial instrument such as a Modern Award. It's unclear why the Government wishes to create an entirely new jurisdiction in circumstances where a person, performing duties under employment or arrangement outside the contract for service with the employer from whose employment the injury arose, would have the right to bring a monetary claim pursuant to the *Fair Work Act 1994* (SA).

9. Impairment assessments for terminally ill workers

A largely uncontroversial amendment is the provision allowing terminally ill workers to make an election to have their impairment assessment performed before their injury can be considered stable. The clear intention of this amendment is to ensure that such workers can benefit from the appropriate lump sums payable before they die.

Conclusion

While some of the proposed amendments contained in the Section 18 Amendment Bill are uncontroversial (such as the ability of terminally ill workers to make an election to receive their lump sum early), most of the other amendments are likely to result in an increased number of applications pursuant to section 18, increased complexity associated with such proceedings, and larger sums of money being paid in respect of these applications.

In my experience, the significant majority of applications made pursuant to section 18 of the RTW Act are made by workers who have been absent from the workplace for a significant period of time, have been unable to return to their pre-injury roles, and/or have had their employment terminated for a range of reasons. It is very rare in such circumstances for the parties to agree to reinstatement or (as experience in the Fair Work Commission illustrates) have an order for reinstatement made.

Overall I consider that the most significant outcome of most of these amendments is going to be that expectations with respect to financial settlements will increase as workers point towards the ability to obtain an order for back pay and/or press for suitable employment to be provided elsewhere within the group of employers as leverage for settlement negotiations.

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