Article

WORKERS COMPENSATION & SELF INSURANCE

Obligations Under the *Return to Work Act 2014 (SA)*: All for One, but Not Necessarily One for All!

By Tiffany Walsh

South Australian Employment Tribunal confirms that section 18 of the *Return to Work Act 2014* does not apply beyond the parties to the employment contract to other entities in a group of self-insured employers.

The Full Bench of the South Australian Employment Tribunal has recently delivered a decision in *ASC Pty Ltd v Rory McCormack and ASC Ship Building Pty Ltd* [2021] SAET 195 which has significance for self-insured employer groups with respect to the obligations of the individual employers in accordance with Section 18 of the *Return to Work Act 2014* (SA) ("**the RTW Act**").

The matter concerned a worker (Mr McCormack) who was employed by ASC Shipbuilding Pty Ltd and who, in 2014, sustained an injury which was accepted as compensable under the *Workers Rehabilitation and Compensation Act 1986* (SA) ("**the WRC Act**").

ASC Shipbuilding Pty Ltd was part of a group of self-insured employers that were registered as such under the WRC Act. The other members of the group were ASC Pty Ltd and ANI Pty Ltd. Section 60(7) of the WRC Act required that one member of the group be nominated to "be treated as the employer of all workers employed by the various members of the group", and ASC Pty Ltd was the member nominated for this purpose. The three entities continued on as a group of self-insured employers when the WRC Act was repealed, and the RTW Act commenced operation, and the worker's rights and entitlements transitioned to the RTW Act.

In 2018 the worker's employment with ASC Shipbuilding Pty Ltd was terminated as a result of redundancy. One month later, the business of ASC Shipbuilding Pty Ltd was acquired by another company. ASC Shipbuilding Pty Ltd then ceased to be a member of the self-insured employers group, and Return to Work SA assumed the liabilities of ASC Shipbuilding Pty Ltd with respect to the RTW Act.

The worker then applied to be provided with suitable employment in accordance with Section 18 of the RTW Act. He made applications to all three of ASC Pty Ltd, ASC Shipbuilding Pty Ltd, and ANI Pty Ltd – who had comprised the self-insured employer group during his employment with ASC Shipbuilding Pty Ltd. The worker's position was that the three companies were jointly and severally liable to fulfil the obligations of pre-injury employment under Section 18 of the RTW Act. The worker also argued that because ASC Pty Ltd was the nominated employer in accordance with Section 129(12) of the RTW Act (an identical provision to Section 60(7) of the WRC Act), that ASC Pty Ltd was his 'pre-injury employer'. ASC Pty Ltd and ANI Pty Ltd sought orders from the Tribunal that the applications by the worker against them were incompetent,

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but the judge at first instance held that the applications were competent. ASC Pty Ltd appealed this decision to the Full Bench of the Tribunal.

The members of the Full Bench, His Honour Deputy President Judge Gilchrist, His Honour Deputy President Judge Calligeros, and His Honour Deputy President Judge Rossi, all ultimately agreed that the appeal should be allowed. However, the reasoning by which the three members of the Full Bench came to this conclusion differed slightly.

His Honour Deputy President Judge Gilchrist and His Honour Deputy President Judge Rossi came to this conclusion through examining the "text and context of the relevant provisions", which:

> *"strongly indicate that the duty imposed by s 18 is personal to the actual employer from whose employment the worker's injury arose. Given that RTWSA is independently provided with powers to encourage self-insured employers to provide suitable employment to injured workers there is no reason related to legislative purpose not to adopt that construction."*

Their Honours went on to state that while the nominated employer for the purpose of Section 129(12) of the RTW Act *"is to be treated as the employer of all workers employed by the various members of the self-insured group,"* this does not extend to treating them *"as the employer from whose employment the injury arose for the purposes of s 18"* and noted that the joint and several liability obligations set out in Section 129(14) of the RTW Act do not extend to Section 18.

His Honour Deputy President Judge Calligeros examined the use of the words "treated as", as they appear in Section 129(12) of the RTW Act. He noted that the expressions "will be taken to be" and "will be taken to have" operated as deeming provisions, but that in accordance with the authority of *Local Government Association of South Australia v Wissell* [2001] SA WCT 97, the expression "will be treated as" does not operate in the same way and is more confined in its operation. Ultimately, His Honour concluded that Section 129(12) is *"not a deeming provision that creates an exclusive relationship of employment, but rather 'simply means that the entity will be dealt with in a certain way'"* and that given that Part 2 of the RTW Act (within which Section 18 falls) and Part 9 (within which Section 129 falls), Sections 129(12) and (14) was *"not intended to intrude upon the operation of s 18".*

The practical implication of this decision is that:

- the nominated member of a group of self-insured employers, while treated as the employer of all people employed by the other members of that group, is not so treated for the purpose of Section 18 of the RTW Act; and
- each individual member of a group of self-insured employers is individually responsible for the Section 18 obligations of their employees.

This means that for groups of self-insured employers which have members of varying sizes, there is no requirement for one of the larger members of the group to fulfil the Section 18 obligations of one of the smaller members if it is not possible for that smaller member to fulfil their Section 18 obligations due to, for instance, their smaller size.

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