

# Article

## EMPLOYMENT LAW

### Proposed Amendments to the South Australian Employment Tribunal Act (SA) 2014

Weatherill Labor Government seeks to make it easier for employment claims to be brought against employers with its proposed 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 constituted under the *Fair Work Act (SA) 1994* (FW Act).

A principal jurisdiction of the IR Court is the ability to hear monetary claims in accordance with section 14 of the FW Act.

A monetary claim is a 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*.

The jurisdiction conferred by section 14 of the FW Act does not empower the IR Court to deal with an employment claim for damages arising from a breach of a contract of employment including a claim for reasonable notice.

Currently a manager, senior staff or specialist (who earns in excess of the remuneration cap for an unfair dismissal application) seeking to make an employment claim for damages needs to commence such a claim in State Courts, such as the District Court, where a risk exists of an adverse costs order if their claim is not successful.

#### Proposed expanded jurisdiction for State Industrial Court

State Labor has recently released the Statute Amendment (South Australian Employment Tribunal) Bill 2016 for comment as part of its consultation regarding proposed amendments to the *South Australian Employment Tribunal Act (SA) 2014* (SAET Act).

An interesting aspect of the proposed amendments is the introduction of a new Industrial Court, the South Australian Employment Court (SAE Court), with an expanded jurisdiction to replace the current IR Court.

The expanded jurisdiction would provide the SAE Court with the ability to hear a claim arising for damages for breach of a contract of employment.

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

Interestingly, the proposed amendments include sub-section 26A(3) of the FW Act which would enable the SAE Court 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 in accordance with sub-section 26A(4)(b) of the FW Act:

- 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, 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 effect of the proposed expanded jurisdiction of the State Industrial Court

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.

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

In practice, the enactment of the proposed changes means the SAE Court may 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.

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 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.

### Future

The Weatherill Government is consulting about the proposed changes to the SAET Act.

Employers will be concerned about the proposed changes particularly as they provide yet another option for an employment claim against them by an employee dissatisfied with something that has occurred during their employment relationship.

We will keep you informed of developments in relation to the progress of this aspect of the proposed amendments to the *South Australian Employment Tribunal Act (SA) 2014*.

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