Article Information

Author: Emily Slaytor, Tim Lange, Shane Entriken, Tim Capelin
Service: Employment & Labour

Do I have to provide suitable employment?

An examination of two recent decisions of the South Australian Employment Tribunal regarding South Australia's extremely generous obligations to provide suitable employment under the Return to Work Act 2014.

Section 18 of the *Return to Work Act 2014* (SA) (**RTW Act**) is somewhat unique when compared with workers compensation laws in other Australian jurisdictions. While other States' workers compensation laws contain obligations to provide suitable duties, or suitable employment, no other jurisdiction contains as extensive an obligation as is imposed on South Australian employers.

Section 18 of the RTW Act requires an employer *must* provide suitable employment to an injured worker (where the injury is compensable under the RTW Act), where that worker is able to perform work in any capacity.

There is no time limitation on this obligation. However, the requirement will not apply in the following very narrow circumstances:

1. where it is not 'reasonably practicable' to provide suitable employment (noting the onus is on the employer to establish this); or
2. the worker left their job *before* becoming incapacitated for work; or
3. the worker resigns from their job; or
4. alternative employment options have been 'agreed' between the worker, the employer and Return to Work SA; or
5. the worker has already returned to work with the pre injury employer or with another employer.

Outside of the limited circumstances noted above, there is otherwise no restriction on an employer's statutory obligation to provide '*suitable employment*' (which could comprise alternative hours of work, restricted/alternative duties, or a combination). With no time limit placed on this obligation, theoretically, an employee could remain employed with their pre-injury employer performing suitable duties in an alternative role for many years following the date of the injury, even after the workers compensation payments have ceased.

Furthermore, a worker who has been certified as unfit for work and in receipt of income support payments for the maximum period, may decide to seek suitable employment with their employer once those payments are due to cease. If that worker sustains a new injury or an aggravation or exacerbation of the existing injury while undertaking suitable employment, there is the potential for a new claim to be made.

The operation of section 18 in practice means there can be considerable residual risks if they bring the employment to an end where the employer believes a worker cannot, and is unlikely to ever be able to, safely perform the inherent requirements of the role they were employed to perform. This is because section 18(5) of the RTW Act enables a worker to seek an order from the South Australian Employment Tribunal (**SAET**) *directing* the worker's pre-injury employer to provide suitable employment.

As a result, seeking to comply with the requirements of section 18 can have significant impacts, particularly on small to medium sized employers, who may be required to accommodate an injured worker in alternative duties effectively indefinitely, or to go to the time and expense of demonstrating (in the absence of one of the other exclusionary provisions) that it is not 'reasonably practicable' to provide suitable employment.

There have been comparatively few decisions examining section 18 of the RTW Act, particularly in the context of psychological injuries.

However, two recent decisions have provided some clarity around the obligation to provide suitable employment and are worth revisiting here. Interestingly, both decisions involved the SAET declining to make orders for suitable employment under s 18 of the RTW Act.

The first decision, *Coleman-Sleep v Return to Work Corporation of South Australia (Ceduna Koonibba Aboriginal Adelaide Health Service)* [2021] SAET 144 (15 July 2021) (**Coleman-Sleep**) involved an employee who developed a psychological injury as a result of workplace conflict. Attempts had been made to resolve the conflict, without success. When her income support payments were coming to an end, she presented Return to Work SA and her employer with evidence that she had 'recovered from her work-related psychiatric injury so as to be able to return to her pre injury employment and without restriction.'

She sought to return to her employment with the Health Service, with rehabilitation supports provided by Return to Work SA in order to '*achieve an enduring and sustainable return to work*'. The employee agreed she had '*ceased to be incapacitated for work as a result of her compensable psychiatric injury*'.

The employer resisted the return to work for a number of reasons including on the basis that the employment relationship had irretrievably broken down and the employee had worked elsewhere for a period of time.

Deputy President Judge Rossi declined to make the order sought. He accepted that employment relationship had broken down, and that there was a '*substantial risk*' the employee would become mentally unwell again if she were to return to work with the employer.

In relation to the operation of s 18, Judge Rossi stated that:

- s 18 has no application in the absence of an ongoing incapacity for work, that is, a worker *must* have an ongoing incapacity for work in order to be eligible to seek an order for suitable employment, otherwise, he said s 18 '*would have the effect of providing security of tenure following an incapacity from work injury, no matter how brief the period of incapacity*';
- the RTW Act is concerned with injured workers, not those who have recovered and have capacity to return to their pre-injury role;
- where a worker has capacity for their pre-injury duties but the employer is resisting their return to work, the worker should instead seek redress via the rights contained in their contract of employment and under the *Fair Work Act 2009*;
- even where suitable employment is available and it is reasonably practicable for the employer to provide it, the Tribunal has an unfettered discretion to decline to make the order sought. This would depend on the individual circumstances of each case, but could include:
    - the employment relationship has broken down;
    - unresolved conflict between the employer and the employee is such that it would be unreasonable to order the pre-injury employer to provide employment;
    - the fact that it may be unsafe for the employee to return to the workplace and any risk of re-injury to the employee; and
    - the period of absence from work and whether that has adversely impacted on a constructive working relationship being re-established,
- while it may be that an employee achieves alternative employment elsewhere to assist with recovery and rehabilitation, this will not necessarily '*permanently discharge*' a pre-injury employer's obligation to provide suitable employment, unless there is an agreement otherwise.

The the recent decision of *Roberts v Department for Education* [2021] SAET 255 (**Roberts**), further clarifies the operation of section 18, particularly as it is a decision of the Full Bench of the SAET.

As was the case in the Coleman-Sleep matter, in Roberts the employee sought to return to work *after* a full recovery from her injury.

The employee worked for the Department of Education as an Aboriginal Education Worker (**AEW**), which was her substantive role. She was promoted to the role of Community Development Coordinator (**CDC**) under a contract which was for a fixed term '*with no right of return to alternative public sector employment.*' In 2014, the employee developed a psychological injury and became incapacitated for work. While she was incapacitated, her fixed term contract for the role of CDC ended.

In 2018 she made an application for the Department to provide her with suitable employment. She was subsequently certified as having no medical restrictions and sought employment as a CDC. Because she was no longer incapacitated the SAET dismissed her application.

The employee appealed this decision and argued that section 18 should be interpreted '*liberally and beneficially to workers*' and not be limited to those who are currently incapacitated, but should include a duty to provide suitable employment to someone who was previously incapacitated. (There were other grounds of appeal that related to her CDC role, and beyond the scope of this article.)

In a set of important findings regarding the scope of section 18, the Full Bench of the SAET acknowledged that section 18 '*can have a significant economic impact upon an employer because an order might require the provision of employment to a worker who is only capable of working at a level well below optimum productivity*'. The Full Bench also acknowledged that section 18 can adversely impact others in the workplace by requiring them to pick up work to accommodate an injured worker, or by being denied a position to accommodate an injured worker.

Accordingly, the Full Bench sought to '*strike a balance between the interests of employers and workers*' and declined to interpret s 18 in a broad manner.

Agreeing with Justice Rossi's reasoning in Coleman-Sleep, the Full Bench stated that '*the context surrounding s 18 suggests that it only applies to a worker with ongoing incapacity for work, extant at the time of adjudication*' and '*on the proper construction of s18 of the RTW Act, it has no application in the absence of an ongoing incapacity for work…*' On this basis, the appeal was dismissed.

The Roberts and Coleman-Sleep decisions are helpful in that they have clarified an employer's obligation to provide suitable employment to injured workers only exists insofar as the injured worker has a *present* incapacity, and does not extend to previously injured workers who are able to return to their pre-injury employment.

Even with these clarifying decisions, balancing the obligations imposed under section 18 with the need to appropriately manage the workforce will continue to form a significant feature of managing long-term workers compensation matters in South Australia. Organisations should obtain specific legal advice when dealing with these difficult issues.

For more information or guidance please contact our Employment Relations team.