2017 NEW YEAR TRIBUNAL CASES UPDATE (2ND EDITION)

Introduction

Despite having released our initial 2017 cases update a matter of weeks ago, the South Australian Employment Tribunal (the Tribunal) has continued to be busy in handing down decisions. This includes a flurry of late release 2016 decisions.

Issues are certainly coming to the boil in a number of respects, with matters concerning causation, whole person impairment and transitional provisions continuing to command the attention of the SAET.

Pratt [2016] SAET 90

The worker was injured while playing pool after work. He was doing so at the invitation of his supervisor, who had invited him over after work for a meal. The supervisor lived on the employer's property. The worker had gone home after work to collect a change of clothes, in order to shower at the workplace, before dinner. After consuming a number of drinks, the worker suffered a significant eye and brain injury as a consequence of a bizarre incident while playing pool. He lodged a claim for compensation.

On the facts of the case, the worker's claim did not succeed, as it was found that he was not in the course of his employment at the time of the incident, nor engaging in a social or sporting activity at the request of his employer.

What was noticeable about the case was an assertion that the worker's consumption of alcohol constituted serious and wilful misconduct. There was a prevailing workplace policy prohibiting employees from working under the influence of alcohol. The Deputy President held that a few drinks at a work related social activity (if that was what it end up being) was not to be considered a breach of a workplace policy that was really designed to impact on the performance of **work** at the workplace.

The Tribunal also found that having a few drinks after work did not really constitute being "under the influence of alcohol" for the purpose of section 30B(2)(b)(ii) of the *Workers Rehabilitation and Compensation Act,* and that there was a need for a lot more probative evidence that would substantiate a state of alleged inebriation before the relevant disqualifying provision could apply.

Malthouse [2016] SAET 93

A request was lodged on behalf of the worker for pre-approval of a broad range of medical treatment expenses. The nature of the treatment to be provided was not particularised. The treatment was not identified in terms of timeframes for when it would occur either. The request was rejected by the Compensating Authority. Subsequently, the worker's Application to the Tribunal was struck out at a conciliation conference.

Acknowledging that a Conciliation Officer has powers to strike out Applications in appropriate circumstances, the Tribunal did indicate that strike out applications ought to

have some formality attached to them (e.g. file a document), and not just be raised verbally during dispute resolution proceedings.

Additionally, the Tribunal indicated that if a strike out application is to be brought forward at the conciliation stage, then it should not be heard and determined by the Conciliation Officer who is conducting the conciliation proceedings, and particularly if issues directed towards the possible resolution of the matter have already been discussed between the parties.

In the circumstances, it would be advisable that where a strike out application is to be pursued, then it should be raised at the initial directions hearing in the first place, and made the subject of a formal application in writing for the matter to be dealt with. Additionally, if there have already been discussions concerning possible options for a conciliated outcome of the matter, the strike out application should be directed or requested to be directed towards another Conciliation Officer.

Finally, the Tribunal also made the point that not only must a pre-approval application be lodged before the end of the relevant period of entitlement for payment of medical expenses, but that it should also identify the precise nature of the expenses to be incurred, and that they are to be incurred prior to the end of the entitlement period itself (perhaps the first response to an inadequate request is to ask the worker to lodge a further and compliant request). Otherwise, the Tribunal rhetorically asks, what would be the point of section 33(21) of the *Return to Work Act*?

***Cutting* [2017] SAET 1**

This decision confirms that any claim for noise induced hearing loss which is based on pre-30 September 1987 exposure to noise, where the worker has been subsequently retired from employment for greater than two years since exposure last occurred, means that any such claim can be rejected as being statute barred. It is important to note this fact, given the many hearing loss claims which appear to be "coming out of the woodwork" in recent times.

***Martin* [2017] SAET 2**

The Full Bench of the Tribunal has confirmed that while an appeal to the Full Bench can only be grounded on a matter of law, and not fact, once an appeal is allowed then the Full Bench of the Tribunal can then proceed to deal with the matter by way of a **re-hearing** of the evidence, if required.

As a side issue, it was notable that a worker who was found to have given less than satisfactory evidence at trial, while also losing out on appeal, was still awarded costs.

***Thiess* [2017] SAET 3**

The worker was employed as a FIFO worker at a mine in the northern region of South Australia. He sustained an injury one afternoon while on his way to the work mess area, in order to eat before starting his shift at the mine. In fact, his injury occurred 30 minutes before the mess area was due to open, but this was not considered significant.

It was found that the worker's activity in leaving to go to the mess area, not only to eat, but to also prepare his mid-shift meal to take with him down into the mine, was considered to be an

activity "so consequential upon or incidental or ancillary to fundamental to the employment that it was something in virtue of or in pursuance to employment".

As to the second leg of the causation test, the Tribunal also had to address whether the worker's employment was a significant contributing cause. In this regard, the Tribunal confirmed that it is not the duties of employment, but the more general circumstances of employment, which are determinative. In this regard, there were various atypical elements to the worker's employment, including the fact of remote location work, which gave rise to the necessary connection.

In essence, the new causation test under section 7 of the *Return to Work Act* is not providing much of a hurdle, let alone a barrier, to the breadth of employment related claims.

***Bryan* [2017] SAET 4**

The Full Bench of the Tribunal confirmed that a seriously injured worker, in order to get around the deeming effect of clause 37(6) of the Transitional Provisions, has to show an entitlement to receive weekly payments as of the designated day (1 July 2015). In this regard, the Tribunal confirmed its decision in *Pennington*, which decision had previously left open the question mark of whether clause 37(6) did or did not apply to seriously injured workers. It does.

***Rudduck* [2017] SAET 5**

A worker's application for pre-approval of medical expenses was struck out as being too general in nature, and/or asserting a requirement for medical treatment of injuries which were not the subject of existing accepted claims for compensation. The same outcome was arrived at in the subsequent decision of ***Karpathakis*** [2017] SAET 6. It is also notable that in both cases the worker's concern incurred somewhat of a cost penalty in bringing the applications in the first place.

Drawing the threads together of the above two decisions and the earlier discussed decision in ***Malthouse*** [2016] 93 suggests that applications for pre-approval under section 17 of the Act:

1. must be specific in relation to the nature of the treatment to be provided;

2. need to identify that the treatment concerned will be occurring before the end of the entitlement period; and

3. can only relate to treatment to be provided to accepted compensable disabilities.

***Stephenson [*2017] SAET 7**

When is an “all injuries” discharged in Minutes of Order not an all injuries discharge at all?

In this case, the worker was aware of various symptoms that he was experiencing at the time that he settled a dispute over his entitlements under section 43 of the *Workers Rehabilitation and Compensation Act*. However, the Tribunal found that while he might have been aware

of the symptoms he was experiencing, he did not necessarily understand at that time that they were related to his then existing compensable injuries, or that they might give rise to permanent problems further down the track.

As a consequence of the above, the worker was not estopped from later pursuing claims for permanent impairment arising as a result of the various symptoms concerned. The lesson for those Compensating Authorities that are hoping to have an "all injuries" discharge stick as part of settling a matter and entering into subsequent settlement documentation, including any Minutes of Order to be lodged at the Tribunal, is to ensure that all medical records and reports are considered for the existence of all possible injuries and their sequelae that should then be covered in any such Minutes of Order.

***Watkins* [2017] SAET 8**

In a decision which has caused some disquiet amongst practitioners for its apparent changing of direction in what are considered to be 'existing' or 'new' injuries for the purposes of the transitional provisions of the *Return to Work Act*, the Tribunal found that surgery which occurred post 1 July 2015, when combined with the fact of a pre-1 July 2015 injury and surgery, can be considered as a new injury for the purpose of the transitional provisions, and as a basis on which a worker could avoid the effect of clause 37(6) of the Transitional Provisions, where the worker concerned had ceased to have an entitlement to weekly payments prior to 1 July 2015. This decision is to be contrasted with clause 7(6) of the *Return to Work Act* which outlines that an injury attributable to surgery is not considered to be a new injury per se, but considered to be part of the original injury. We are advised that this matter is most likely to proceed on appeal.

***Ashfield* [2017] SAET 11**

The Tribunal has moved to clarify an issue that has been the subject of some uncertainty since the new legislation came in.

The worker concerned applied for section 33(17) pre-approval for a future hip replacement. The Compensating Authority concerned took the view the request was unnecessary, as a hip replacement involved a therapeutic appliance, and therefore was an exception to the time limitation on medical expenses. The Tribunal agreed – see the discussion at paragraphs 20-25 of the decision.

There is talk the worker will appeal this decision, because of some possible ramifications the decision has for income support under section 40 of the Act. The point being articulated seems to jump at shadows, but time will tell whether there is an issue there or not.

Other cases of interest

In ***Richter v Driscoll*** [2016] VSCA 142, the Victorian Supreme Court of Appeal was asked to give consideration to what was meant by the term "no current work capacity" in their legislation. The term is used similarly to that in sections 36 and 39 of the *Return to Work Act*.

The Victorian Supreme Court of Appeal decided that the definition of "no current work capacity" requires there be an injury caused inability to return to work in employment,

whether that is to the worker's pre-injury employment or suitable employment. Furthermore, whether a worker has "no current work capacity" requires consideration of the worker's ability to work in employment **having regard to the entirety of the worker's personal circumstances**. This includes both their work caused incapacity as well as other circumstances personal to the particular worker concerned, and bearing upon his or her ability not simply to perform the physical tasks required by their particular employment, but also to work in that employment as a settled member of the workforce.

Were the above considerations to be adopted by our own Tribunal, this would mean that a worker's entitlement to weekly payments under section 39 of the Act will be assessed having regard to both their work related injury and potentially other broader factors, such as any non-work related medical condition that might impact on the nature of the duties that the worker is fit to perform.

On a final point, the Fair Work Commission in ***Double N Equipment Hire v Humphries*** [2016] FWCFB 7206 confirmed that in assessing the entitlement to compensation that a worker has when succeeding with their unfair dismissal claim, the fact that the worker concerned is receiving weekly payments of compensation under the workers compensation legislation is a matter to be taken account of, and the effect of any such payments is to be deducted from any compensation paid arising from an established unfair dismissal claim.

The above is to be contrasted in a way with the fact that workers compensation benefits are not to be reduced on account of any potential compensation that a worker might obtain from the Fair Work Commission when pursuing an unfair dismissal claim. However, the reality is that the principle against "double compensation" is not offended in this regard in an overall sense, where there is the appropriate deduction in the industrial arena for the fact of receipt of benefits in the compensation jurisdiction.

Should you have any queries concerning any of the issues outlined in the above cases, then please do not hesitate to contact us.

Copies of the South Australian Employment Tribunal decisions referenced above can be accessed at www.saet.sa.gov.au.

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