Special Case Update

One of the early issues identified with the implementation of the *Return to Work Act 2014* was the possible wide ranging effect of **clause 37(6) of the transitional provisions** which accompanied the new legislation.

To quote the relevant provision:

> "*(6) To avoid doubt, a person who, before the designated day, has ceased to have an entitlement to weekly payments on account of a discontinuance under section 36 of the repealed Act is not entitled to weekly payments under this clause (or under the repealed Act).*"

There has been a good deal of discussion since the *Return to Work Act 2014* was first legislated as to how far reaching this transitional provision was likely to be, and in the event that the provision concerned was going to be the subject of litigation, then the extent to which the South Australian Employment Tribunal might read down the possibly punitive effect of the provision concerned.

The Full Bench of the South Australian Employment Tribunal has now handed down a decision in relation to clause 37(6), in the matter of *Pennington v ReturnToWorkSA* [2016] SAET 21. If you want to read a full copy of the Decision, then go to www.saet.sa.gov.au. The upshot of the decision is that clause 37(6) does what it says it does – it disentitles workers to claim weekly payments post 1 July 2015, if payments on an applicable claim were lawfully discontinued before that date.

Background

Ms Pennington injured her lower back at work in June 2013. She lodged a claim for compensation, which was accepted and she came to be in receipt of weekly payments. After a time those payments were ceased, when Ms Pennington was able to take up suitable alternative employment, which provided her with a level of weekly earnings that were in excess of her compensation entitlement. As a consequence, the relevant claims agent issued a determination, pursuant to section 36(1)(d), of the *Workers Rehabilitation and Compensation Act 1986*, which decision was not disputed at the time.

As of 30 June 2015, when the *Workers Rehabilitation and Compensation Act 1986* ceased to have effect, Ms Pennington was still in employment, and earning equal to or greater than her average weekly earnings. However, and unfortunately for Ms Pennington, approximately three weeks later she lost her job because her then employer had gone into liquidation and ceased trading. As a consequence, Ms Pennington lodged a fresh claim for compensation, alleging that she was again entitled to weekly payments of income maintenance because she had an ongoing and accepted partial incapacity for work.

The relevant compensating authority rejected Ms Pennington's claim for weekly payments based on the application of clause 37(6) of the transitional provisions. As a consequence, the matter came to be listed for hearing by the Full Bench of the South Australian Employment Tribunal in April 2016. The Full Bench's decision was subsequently handed down on 3 June 2016.

The arguments in the case

In essence, the worker argued before the Full Bench of the South Australian Employment Tribunal that the fact she was not actually in receipt of weekly payments as of 30 June 2015 was not essential to her entitlement to later claiming weekly payments. In effect, Ms Pennington argued that she had a potential/notional entitlement at that time, given that if she had lost her job on the 30 June 2015 she would have been partially incapacitated for work, and effectively entitled to the benefit of the deeming provisions of the previous legislation, such that the partial incapacity for work would give rise to an entitlement to weekly payments in the event that Ms Pennington lodged a fresh claim for compensation.

A significant part of the submissions put forward on behalf of the worker before the Full Bench of the South Australian Employment Tribunal was to the effect that a potentially arbitrary and harsh decision to disentitle her to weekly payments, on account of the operation of the relevant transitional provision, defeated the objects of the legislation, insofar as a worker who had returned to work in accordance with the expectation to do so under the previous legislation, then could be at a disadvantage at a later time because of the change in legislation and application of the relevant transitional provisions. This was said to be at odds with what is intended to be the remedial effect of workers compensation legislation, and the relevant provisions should have also be read down in their effect so there is compliance with the asserted statutory mandate to interpret the legislation in light of its objects.

The compensating authority put forward a much more straight forward argument, submitting that the expression "was still entitled to receive a weekly payment" in sub-clause (1) of clause 37 meant just that, and not the fact that there might be a potential entitlement to receive a weekly payment, and that this set the background against which clause 37(6) operated.

The compensating authority submitted that once a lawfully issued determination had been made, and was not challenged, this effectively ended a worker's entitlement to weekly payments, and unless something happened before 1 July 2015 that might have the effect of reviving the entitlement before that day, then there was no entitlement.

The decision

Despite recognising the potentially harsh application of the relevant provision, the Full Bench of the South Australian Employment Tribunal ultimately found that clause 37(6) operated as submitted by the compensating authority, such that if there was no actual entitlement to weekly payments immediately before 1 July 2015 then that is the end of the matter when a claim for resumption of those payments is made after that date. They pointed out that the transitional provision appeared to be directed towards allowing for a situation of certainty to apply, rather than flexibility or equity.

To quote the final and relevant findings of the Full Bench of the South Australian Employment Tribunal:

> "*We interpret cl 37(1) to provide that for a worker to come within Category A, B or C, the worker must have an actual entitlement to receive a weekly payment during the relevant entitlement period. On that approach, Mrs Pennington does not come within Category C. Even if she did, the words of cl 37(6) evince an unequivocal intention of Parliament to draw a line in terms of the continued receipt of weekly payments by a worker in her position. Clause 37(6) makes it plain that if a worker before the designated day was not in receipt of weekly payments and was not at that time entitled to receive weekly payments on account of a discontinuance under s 36 of the WR&C Act, the worker has no entitlement to weekly payments under cl 37 of the RTW Act or under the WR&C Act.*"

Ramifications of the decision and is there still uncertainty?

The ramifications of this decision are fairly clear. Workers who attempt to revive claims for weekly payments that arose under the old legislation will now have a hard time doing so in the future, where their weekly payments were previously the subject of a lawful discontinuance pursuant to section 36 of the old legislation.

That being said, it is anticipated that there might now be belated challenges to the issuing of previous section 36 notices, where they might have been issued on less than solid grounds, although in those circumstances the previous Workers Compensation Tribunal tended to rule unfavourably where workers later tried to rely on unexpected judicial outcomes on legislative interpretation issues that might have occurred after a decision had been made that impacted on their own entitlements which they chose not to challenge at the time the decision was made.

It is also likely that there will be a good deal of agitation at union and political levels to have the potentially punitive effect of this decision and the applicable transitional provision watered down – although it remains clear that even if there was to be a change of the law in this regard, it would probably only apply to 30 June 2017 in any event due to the more broader effect of the transitional provisions that limit the entitlement to weekly payments in this area to two years post 1 July 2015.

On a final note, what of the case of a closed period acceptance of weekly payments under the previous legislation, and where the relevant worker now wants to agitate for more weekly payments on that claim? Clause 37(6) on its face clearly does not apply. A loophole?

If you have any queries concerning the potential impact of this decision on any of your own claims, then please do not hesitate to contact us for further advice.

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