2016 WINTER CASES UPDATE

Introduction

As you will appreciate, we have reached the first anniversary of the advent of the *Return To Work Act 2014*. While we have certainly seen an active South Australian Employment Tribunal, which has been flooded with many applications over the last twelve months, the actual amount of relevant decisions being handed down on key aspects of the new legislation has been small in number.

While we have been endeavouring to glean any significant trends from the decisions being handed down, our database in that regard is quite small. Nonetheless, it is probably fair to say the following are emerging as clear trends in the decisions being handed down in regard to the new legislation:

1. The Tribunal will be adopting a black letter law approach. Terms in the legislation will be given their 'plain and ordinary meaning' and the Tribunal will be implementing Parliament's wishes if those wishes are clear on the face of the applicable legislation;

2. The Tribunal itself will be taking on board Parliament's directive that the new process be one where appropriate compliance is expected with all aspects of the conciliation and litigation phases, and with penalties metered out to those who don't comply.

The next six months are likely to provide more direction in relation to some key legislative changes that have been brought about. We can expect to see some decisions concerning the issues of serious injury certification and the ongoing entitlement to weekly payments and medical expenses being prominent.

In the meantime, the following are a selection of those cases of some importance from a claims management perspective.

Davies [2016] SAET 12

A complaint was lodged in relation to the worker's behaviour in the workplace when dealing with members of the public. The complaint later morphed into the subject of an investigation. The worker psychologically decompensated as a result of the series of events, and lodged a claim for compensation.

The Tribunal made a number of points in regard to the section 7(2)(b) disqualifying provisions concerning psychiatric injuries, against a background of a claim lodged over the fact of human resources action being taken.

- When dealing with an employee over an industrial action, a worker must always be provided with procedural fairness, and the ultimate decision made in relation to the matter must be objectively fair;

- A decision to suspend an employee pending investigation does not mean they are required to be presented with **all** of the available evidence and the reasons for the suspension, as it is only an interim measure in the process;

- An employer is only required to provide what is reasonable in the circumstances of the case, and in the following of due process. The Tribunal will not expect a 'counsel of perfection' in the way the employer acts, and which flows over into the assessment of what is or is not 'reasonable action'.

***James* [2016] SAET 17**

The worker had sustained injury and lodged several claims for compensation. Some of those claims for compensation were rejected. In light of this, and to ensure that she continued to receive an income while her claims remained in dispute, the worker had to apply for annual leave. As a workplace requirement and at the request of a line manager, the worker was required to come into the workplace in order to complete the annual leave forms. She was also required to complete her timesheet for work previously performed. After the worker had completed the necessary steps to lodge and complete the various forms, she was leaving the workplace. As she was heading out of the workplace she rolled her ankle on a footpath. She was still within the employer's premises at the time.

The Tribunal heard submissions on elements of the legislation and case law that deal with issues such as an injury occurring between intervals of work, attendance at her workplace at the direction or request of the employer, whether the worker's injury was in accordance with the well-known case of *Peet* (where an injury sustained by a worker while attending for a medical service to deal with his rejected claim was considered not to be compensable), and the possible application of the PVYW case. Ultimately the Tribunal found that the worker's injury was compensable as her attendance to complete the forms was considered to be an incidental aspect of her employment in an everyday sense, and integral to her employment. If she did not attend at work to complete the required forms she would not get paid. It was accepted that the worker was therefore in the course of her employment at the time the injury was sustained.

***Pennington* [2016] SAET 21**

While this decision has been the subject of an earlier Special Case Update, it is worth noting again that the Tribunal strictly applied what appeared to be the clear legislative intent of Parliament, in not reading into clause 37(6) of the Transitional Provisions any expansive wording so that the apparent punitive effect of the provision would be watered down.

While the Tribunal confirmed that weekly payments lawfully ceased prior to 1 July 2015 cannot simply be revived at a time after that date, there have been several issues come up subsequent to the decision concerned which throw open other potential outcomes:

- What is the situation if weekly payments were 'discontinued' prior to 1 July 2015 by virtue of a closed period claim acceptance? It is questionable whether the same defence can be mounted to a further claim for weekly payments in such circumstances;

- What happens if there is a change of circumstances at some point in time after weekly payments were ceased, but before 1 July 2015, which on a revived claim for compensation might give rise to an entitlement to weekly payments? The issue has

arisen in cases of purported revival of mutuality that occurred before 1 July 2015, but which are still winding their way through the Tribunal;

- Is the Tribunal limited in circumstances where it might want to order backdated weekly payments to a time prior to 1 July 2015, but is faced with the prior operation of clause 37(6) in any event – see *Westwood* [2016] SAET 25, where the Tribunal has made a preliminary finding on certain facts, and is now inviting the parties to make submissions as to how its power to award weekly payments might or might not be neutralised by clause 37(6).

***Botsos* [2016] SAET 22**

In this case there were a number of steps not taken by the worker's representatives which effectively led to the vacating of a trial date. In a number of respects the worker's solicitors were in breach of Orders made by the Tribunal for the orderly process of the matter to trial. The President of the Tribunal wielded a very large stick, in making comments about what he considered to be the flagrant disregard for the Tribunal's rules and practices by the worker's solicitors, and made the point very clear that there is a new "cop on the beat" as far as procedural expectations, compliance and costs are concerned. It will be interesting to see to what extent the Tribunal does dish out some form of costs penalty to the worker's solicitors.

In the meantime, the very clear message has been sent that timeframes for the undertaking of steps leading up to trial are expected to be complied with, and that the parties should not necessarily presume the Tribunal will be accommodating of slack practices into the future. It will be incumbent on parties to litigation to get themselves prepared early, and take all the necessary and reasonable steps to ensure timeframes are met so that litigation is disposed of promptly.

***Nemesis* [2016] SAET 24**

A settlement was negotiated between a worker, his solicitors and a claims agent at the Tribunal. Settlement resulted in Minutes of Order that included amongst other things an 'all injuries discharge' regarding the worker's section 58 entitlements. In other words, there were specific injuries that were compensated for, and then a general catch all clause also inserted into the Orders.

The worker subsequently sought to claim for further injuries that he had previously suffered. The claims agent disputed he was entitled to do so, relying on the principles of issue estoppel and res judicata. The Tribunal looked not only at the clear and unequivocal wording of the Orders, but also delved back into the worker's written instructions to his solicitors as to settlement of the matter in the first place. The Tribunal was satisfied that the worker knew that there were some injuries that he was not going to be compensated for as a result of the settlement. It was accepted by the Tribunal that in those circumstances the worker would be held to what he had negotiated away previously, acknowledging that there was always a level of give and take in any negotiations in these circumstances.

It would be fair to say that not in all circumstances will an 'all injuries' clause survive attack at a later time, but clearly if the range of injuries being compensated for, and not compensated

for, is clear throughout the negotiating process, including any orders made by the Tribunal, then the better protected a compensating authority will be.

***Ward* [2016] SAET 28**

This case has received some notoriety of late, and the circumstances of it might be familiar to many of you. A worker suffered a non-work related medical event that caused him to collapse. His workmates had to shift him into a safer position from where he had collapsed (he was on a boat on the river undertaking fisheries related research). Somehow, in shifting the worker to a safer position, it appears that the worker's ankle might have been fractured. He claimed compensation for this latter injury.

The decision caused the Tribunal to consider the new causation provisions under section 7 of the Act, and particularly the 'a significant contributing cause' requirement to establish compensability. Ultimately, the Tribunal decided that every case is decided on its own unique facts, as pundits had long suspected that it would. Nonetheless, the presiding judge endeavoured to give some guidance to the application of the new provision, and his line of reasoning might be distilled as follows:

- Recognising that there can be several causes of an injury, it is enough that a work event is one of them, even when it is a lesser, but a still significant (meaning more than minimal) cause;

- The surrounding circumstances of an event may be relevant, and particularly the peculiar circumstances of a workplace e.g. a delineating line might be as between when you faint, fall to the ground, and injure yourself, or whether you faint and fall against a machine in a workplace, which creates a unique circumstance, and an employment connection.

We understand that the decision concerned will not be going on appeal, but nonetheless there are several other matters in the pipeline where we might begin to receive some more definitive guidance from the Tribunal (and from a broader range of members of that Tribunal) as to how they might apply the new provision.

***Hoffman* [2016] SAET 30**

The Tribunal was called upon to decide when a 'determination' had been made by a claims agent, because identifying the relevant date and time in that regard had ramifications for the application of the transitional provisions of the new legislation.

In the case at hand the Tribunal confirmed that the making of a determination does not necessarily occur only at the time a written decision is produced, but can occur at an earlier date and time. It will always be a question of fact in this regard, but the Tribunal did say that insofar as a verbal decision might be made at any time, and relied on as such, there should be some formality attached to it so that it is abundantly clear what has occurred.

As a possible example, it would seem the Tribunal would treat differently an indication from a compensating authority that they are considering rejecting the worker's claim, and tell the worker that, as opposed to stating to a worker that a claim has been rejected, and giving a

brief summary of the reasons therefore. The latter would carry with it the necessary decisiveness and formality that would indicate that a disputable decision had therefore been made at that point in time, even if there is an indication it would be followed up in writing at a later time.

As always, copies of the South Australian Employment Tribunal decisions can be accessed at www.saet.sa.gov.au.

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

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