2015 SPRING TRIBUNAL CASES UPDATE

Introduction

With the advent of the new South Australian Employment Tribunal, there have been lots of changes. Not the least is the need to rename our cases update service! We doubt that will be the only significant change to the ways things are done over time.

It was hoped that by now we might be getting some sort of indication from the South Australian Employment Tribunal as to their approach to litigation under the Return to Work Act, but there has only been one published decision to date, although it does have something important to say.

What we have gleaned from attendances before the South Australian Employment Tribunal has been their preparedness to push parties along the litigation path, and not tolerate needless adjournments. Parties are more than ever expected to be ready to proceed to trial virtually from the time the matter is referred to judicial level.

The Workers Compensation Tribunal have continued to publish cases as the old dispute resolution scheme runs off, although the rate of publication has slowed down of late. It seems that a good number of the decisions being published relate to strike out applications, and the like, and there was also a flood of litigation shortly before 1 July 2015 over transitional arrangements for section 43 entitlements under the old Act.

First published South Australian Employment Tribunal Decision

Emmett [2015] SAET 1

In the first decision formally handed down by the South Australian Employment Tribunal, the Tribunal was called upon to give consideration to the powers of a Conciliation Officer in relation to the requiring of attendance at a conciliation conference by a worker who lived in a remote location.

As readers would be aware, there is an increased emphasis on parties attending at conciliation conferences under the new South Australian Employment Tribunal, with a prevailing expectation that parties attend unless there are special circumstances to the contrary.

In the case at hand, the worker lived in a very remote location, but nonetheless an order was made for his attendance at a conciliation conference. After a review of the legislation, the Tribunal found that such a direction was capable of being the subject of a review (much like a dispute under the old Act) under section 66 of the South Australian Employment Tribunal Act, and that in the circumstances of the case it was inappropriate for the worker to be directed to attend personally at the conciliation conference (this point having been already conceded by the Compensating Authority).

While the decision of the Tribunal is of narrow importance in one sense, it is worthwhile reading through the decision concerned to gain a fuller understanding of the machinations of the new South Australian Employment Tribunal, its conciliation process, apparent wider

jurisdiction as to what constitutes a matter capable of being brought before it on an application, and the expectations surrounding that process.

Workers Compensation Tribunal Cases

Reade [2015] SAWCT 15

This lengthy decision encompasses all manner of issues arising under the previous legislation, but mostly revolving around the facts of the case. One important takeaway from the decision is the Trial Judge's view that the tendering of expert reports into evidence at trial can be objected to, particularly if the expert report does not refer to the applicable Court Rules surrounding expert reports. In any case where it is anticipated that a medico-legal report (in particular) might need to be tendered into evidence, then the appropriate reference to the applicable rules and information documents needs to be made in your letter of request. Paragraph 125 of the decision outlines the expectations in this regard. We recommend your standard letters be reconsidered in this event.

Scrivener [2015] SAWCT 16

Amongst other things, this decision is notable for the fact that the well-known Dr D Cullum conceded that he was not as much of an expert on causation in the field of neurological medicine, than those who are specifically trained in this field. Moreover, the decision is important in underlining the fact that when expert reports are sought to be relied upon, it is always essential that the expert concerned be provided with a complete and accurate factual foundation when being requested to provide an opinion on causation. Given the new provisions of section 7 of the Return to Work Act, this is all the more important moving forward.

Stock [2015] SAWCT 17

As has been the trend of late, this is another case where an Application for Summary Relief was sought. An argument in the case surrounded section 35B of the old Act, and the question of whether ceasing payments under that provision meant that they were ceased "for all time". While the question was not ultimately decided, it is something that might assume some importance in the short to medium term when consideration is given to clause 37 of the Transitional Provisions of the Return to Work Act.

Devine [2015] SAWCT 18

The worker's much delayed pursuing of her Notice of Dispute was struck out for want of prosecution. What was found to be an inordinate delay was considered to strike out the integrity of the Tribunal and its commitment to enable the prompt resolution of disputes. Given the enhanced emphasis under the new legislation on the timely progress of litigation, we can expect the South Australian Employment Tribunal to be more sympathetic to applications seeking to strike out disputes where progress is anything less than efficient and timely.

Toth [2015] SAWCT 19

A worker who set up her own business and was effectively therefore "self-employed" was found not to be in ‘employment’ such that she could seek relief under section 35C of the old

Act by showing that she was maximising her capacity for work. Judgment will be of some significance if you are still involved in any litigation incorporating an application pursuant to section 35C of the old Act.

Ktisti [2015] SAWCT 20

This decision involves an appeal from an earlier judgment, where the worker established compensability of her psychiatric condition. A good part of the appeal judgment gives consideration to what is meant by the term "administrative action", and in this regard paragraphs 25–35 of the decision are worth reading.

Administrative action does not encompass a situation where the worker is unable to cope with the general operation of the workplace. Administrative action must be some form of action taken "in respect of" a worker's employment, and is to do with the actual operation of the employer's business, but not the everyday minutiae of that business.

Antonello [2015] SAWCT 21

This decision highlights the importance of identifying the issues to be argued before trial, and be based on the available evidence, rather than the parties throwing up remotely possible alternative variations to the issues, much like a "grab bag" of alternative outcomes. While there are no strict pleadings in the workers compensation jurisdiction, the Tribunal still emphasised that it was important that the parties identify realistic issues arising from the evidence, and nothing more.

It is also noticeable that the Trial Judge took the opportunity to criticise what he considered to be "loaded" questions that were put to the injured worker by an investigator, through what was considered to be a lengthy and convoluted interview process. It effectively led the Trial Judge to disregard a significant part of the contents of the worker's statement, even though it contained a number of inconsistent assertions within it. A lesson is that once you get hold of a good investigator, who is able to properly, comprehensively, and logically take the injured worker through an interview process, then keep hold of them!

Rasheed [2015] SAWCT 22

Again, this was an application seeking to summarily dismiss a worker's dispute over their failure to attend a medical examination. Again, the Workers Compensation Tribunal emphasised the fact that when bringing applications of this nature, it is imperative that you establish a very clear and non-disputable factual foundation for the application.

Bullock [2015] SAWCT 23

This decision is perhaps quite well known already, because of the media publicity that accompanied it, and which involved criticism of a Compensating Authority and the WorkCover Ombudsman for their conduct in relation to a worker. The decision to persist with rehabilitation efforts in relation to a long term totally incapacitated employee came in for heavy criticism from the Bench, with the comments made almost having the ring of a "parting shot" by the Trial Judge concerned.

Mastromihalis [2015] SAWCT 24

This is the first of several cases that involved the flurry of litigation that arose in June 2015, when there was some degree of panic amongst those representing workers as to the changeover in laws between section 43 of the old Act and section 58 of the new Act, which with the passing of time has now become somewhat less of an issue.

Mansoori [2015] SAWCT 25

A rare example of a worker who was precluded under the legislation from trying to litigate over injuries dating back to 2003, particularly in circumstances where there was no claim made for the injuries until 2010. It took until 2015 for a decision to be made, and so the quite excessive timeframe over which the whole scenario unfolded might have something to do with why the worker failed. It is rare for time points that are taken, and prejudice in the proper determination of the claim, being established at trial.

Thompson [2015] SAWCT 26

Again, another case dealing with the pre and post 1 July 2015 transitional issues concerning whole person impairment assessments, and will now largely be of historical interest.

Mastromihalis [2015] SAWCT 27

See commentary under SAWCT 24 above. The Tribunal was called upon to deal with ongoing issues about the making or not making of determinations upon order of the Tribunal, and the possible use of contempt powers (although this ultimately did not occur).

Hutchinson [2015] SAWCT 28

While this decision again dealt with the effective changeover from one piece of legislation to another when it comes to permanent impairment assessment, it is also important because of the way the Workers Compensation Tribunal decided that a claim for compensation ought to be treated by the Compensating Authority in the first place.

The worker had lodged claims for further injuries arising as a consequence of there being additional injuries or sequelae to an original injury. The Compensating Authority simply determined to reject the alleged injuries concerned on causation grounds, but did not proceed to make any determination pursuant to section 43, as had been requested by the worker's solicitors when lodging the claims for compensation.

The Workers Compensation Tribunal determined that it was not appropriate for the Compensating Authority simply to determine issues of causation, when it had clearly been identified at the time of lodging of the claim that benefits in the nature of permanent impairment assessments and lump sum payments were also being sought. In other words, while the Compensating Authority might have desired to make a decision about causation/compensability, it was also required to proceed to make a decision on compensability/entitlement as well.

Ettridge [2015] SAWCT 29

Following on from an unsuccessful appeal, an unrepresented litigant was ordered to pay the costs of the appeal, with the Workers Compensation Tribunal indicating that the standard/prevailing rule as to the cost of appeals remains – the loser will pay unless there are "unusual circumstances", such as the matter involving an important point of law.

Nelson [2015] SAWCT 30

In an appeal brought by a worker over a decision to confirm the rejection of their stress claim, the matter was confined largely to a narrow legal issue – that once the parties set the frame of reference for a trial, then it is sufficient for the Trial Judge to at least acknowledge elements of the framework of the issues put forward when handing down his or her decision, as opposed to dealing with all issues individually and comprehensively.

Copies of the Workers Compensation Tribunal Decisions discussed above can be accessed at www.industrialcourt.sa.gov.au, while South Australian Employment Tribunal Decisions can be accessed at www.saet.sa.gov.au.

As always, representatives from KJK Legal are available to answer any queries that you might have in relation to issues that rise out of the cases discussed above. Please feel free to contact us at your convenience.

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