2016 SPRING TRIBUNAL CASES UPDATE – 2ND EDITION

Introduction

As prefaced in the initial spring edition of our Tribunal Cases Update, decisions have been coming through at a brisk rate from the South Australian Employment Tribunal ("**the Tribunal**"), and again many of the decisions concerned relate to issues of whole person impairment, although largely to do with residual questions arising from the assessment of multiple injuries, occurring on multiple dates, and where the *Workers Rehabilitation and Compensation Act* is to apply.

In the near future, it is anticipated that a number of decisions will be handed down by the Full Bench of the Tribunal on some of the more particularly vexing issues relating to the *Return to Work Act*, and we will provide a special pre-Christmas update in that regard. In the meantime, the following are some of the more interesting cases of general application that have been handed down of late.

Roberts **[2016] SAET 58**

This decision has received some notoriety in the press, and its facts might well be familiar to many of you as the "mosquito case". The decision concerned is also one of the very few section 7 causation cases to be handed down so far.

The worker was employed in a remote area. She was staying in accommodation arranged and paid for by her employer. The accommodation was less than ideal (there were missing/broken flywire screens etc). The inadequacy of the accommodation led to the worker being exposed to mosquitos, and as a consequence of being bitten by those mosquitos, she developed inflammatory arthritis.

As indicated above, section 7 causation issues arose in the case. Clearly, the worker was not bitten by mosquitos during working hours, but at night time. Nonetheless, she was working and living in a remote location as part of her employment. She was staying at accommodation provided by her employer. The state of that accommodation was also of some significance, as it created a connection between her employment, exposure to mosquitos and development of inflammatory arthritis. The events therefore were said to be referable to the place of the worker's employment, and the whole issue of the accommodation was considered to be significant in creating an employment connection. Compensability was found.

Again, the Tribunal emphasised that each case will be decided on its own facts, but it would seem that if the particular facts of any case create an employment "connection", particularly regarding a place related to employment, then this will help establish the "significant contributing cause" the legislation requires.

***Westwood* [2016] SAET 62**

This matter is a variation on the theme of whether a worker might be entitled to weekly payments on a backdated claim for the same, which extends to a period prior to 1 July 2015, and potentially to a period after that date.

The Tribunal had previously found in favour of the worker on the question of whether or not he had a partial incapacity occurring after sustaining a work injury. Having found so, the Tribunal had to assess the extent to which he might have been entitled to weekly payments. This involved the potential application of the transitional provisions to an "existing injury".

At the outset, the Tribunal confirmed that it had the power to order backdating of weekly payments to a date prior to 1 July 2015, even if the worker had not actually been in receipt of any weekly payments prior to that time (in this case, the dispute arose from a rejected claim). However, the Tribunal also found that its power to order weekly payments was still limited somewhat, insofar as the worker's entitlement prior to July 2015 was dealt with under the provisions of the *Workers Rehabilitation and Compensation Act*, and therefore the old section 35B provisions applied.

In the case where the worker had a current capacity (i.e. a partial incapacity) for work, this subsequently meant that his overall entitlement to weekly payments was limited to 130 weeks – and in this case it meant that his actual entitlement to weekly payments ended up ceasing prior to 1 July 2015 in any event.

The case might well be helpful for any late lodged claims for past weekly payments that might be made, and where on the face of it, clause 37(6) of the Transitional Provisions will not apply, because on the facts of the case there had been no weekly payments made prior to the applicable date, let alone weekly payments being discontinued prior to that time.

***Brennan-Lim* [2016] SAET 64**

The Full Bench of the Tribunal has decided that the new costs rules under the *Return to Work Act* will allow for an unsuccessful appellant worker to recover their costs of appeal, even if they lose the appeal. The Tribunal found that the applicable rules will be those that arise under the general costs provisions, such that in the circumstances of the case, an unsuccessful worker might only be penalised for costs where they have been unreasonable in the bringing of an appeal, the conduct of the appeal, or were frivolous and vexatious.

It seems that this decision might provide a green light to workers who decide to challenge any decision of first instance that goes against them, and with little fear of an adverse costs order, short of there being a particularly hopeless case on the face of it at appeal level, or where the case might be incompetently presented (perhaps because significant time is wasted on the pursuing of silly and unsustainable legal points). Compensating authorities will need to be mindful of a possibility that even a successful outcome at trial might not necessarily discourage an unsuccessful worker from speculatively pursuing an appeal without significant fear of an adverse costs order down the track.

***Botsos* [2016] SAET 65**

This decision has been commented on previously, where the Tribunal ordered a trial date be vacated as a result of non-compliance with various pre-trial orders by the worker. The matter was subsequently listed for argument as to what costs orders might be made, and particularly whether the worker might be required to pay any costs thrown away because of the adjournment of the trial. Ultimately, the Tribunal backed off from any adverse order against the worker, particularly in circumstances where the problems with the trial proceeding were more the result of his solicitors than his own conduct. The Tribunal felt it would be inappropriate to sheet home to the worker a penalty in relation to costs for what were essentially the actions of his solicitors. The decision was also made somewhat easier when the solicitors concerned conceded they would not charge the worker for any costs thrown away.

***Farrows* [2016] SAET 66**

The Tribunal was asked to assess several injuries for the purposes of permanent impairment under the *Workers Rehabilitation and Compensation Act*, and where the injuries concerned have been the subject of further problems down the track, as well as operative intervention.

The Tribunal decided that the fixing of a date of injury within the legislation carries through to implementing various aspects of the legislation, including the question of what year to utilise for the assessment of permanent impairment, in circumstances where there might have been no specific election at a later time by an injured worker to formally lodge a claim for compensation alleging a later date of injury in relation to any particular disability e.g. in asserting a later date of injury occurring as a consequence of operative treatment.

In the absence of a specific election in this regard, the Tribunal was able to read down the effects of *Lovatt's* case. It is also noteworthy that the new legislation effectively rules out the ability of injured workers to claim a later date of injury based on operative intervention, where section 7(6) has now been enacted.

***Edwards* [2016] SAET 67**

This is the second case where the provisions of section 18 of the *Return to Work Act* have been given consideration. The decision is notable for one simple issue.

Where a worker makes a request for suitable employment, the Tribunal has confirmed that he or she cannot seek the intervention of the Tribunal under section 18 of the Act until a full month has passed from the date when the issue is first raised with the employer.

The Tribunal confirmed that this might be the case even where the employer might decline the request to provide suitable employment within that one month period. The worker must still "cool their heels" until the full month has expired, before being able to take the matter any further.

***Vlassis* [2016] SAET 69**

The compensating authority brought an application seeking to dismiss the worker's action due to the worker's alleged failure to comply with requests that were made by the compensating authority, including the granting of permission to the compensating authority to speak to the worker's treating doctors. The compensating authority asserted that the worker's conduct was unnecessarily disadvantaging the compensating authority, and that they were able to then make application pursuant to section 42 of the *South Australian and Employment Tribunal Act* for penalty orders against the worker.

The Tribunal disagreed with the approach taken by the compensating authority, finding that to compel the worker to give permission to have another party speak to his or her treating medical practitioners was a bridge too far in relation to the worker's obligation not to engage in unnecessarily disadvantageous conduct. The Tribunal noted that it was not for the worker to actively assist the compensating authority in the prosecution of its defence of the matter, particularly noting that while the new legislation and rules might encourage cooperation in the conduct of litigation, it is still adversarial litigation and there are rights and interests to be protected in any event.

The Tribunal did take time to again bring to the fore concerns as to the way in which parties might be seen to conduct litigation, particularly as to failure to respond to requests, generally being uncooperative in matters, and so forth. There have been two common threads running through these cases. The first is that no actual adverse costs orders have been made against any particular firm of solicitors, and the second relates to the firm concerned.

***Tinti* [2016] SAET 72**

In what is probably the first in-depth consideration of the new provisions under section 33 of the *Return to Work Act*, dealing with the pre-approval for medical treatment and surgery, the Tribunal has confirmed that it is prepared to look closely at the merit of requests for medical treatment, both in relation to short term needs and as to longer term needs.

In the case at hand, the Tribunal was not convinced that suggested minor surgery was going to be necessary, where there was little benefit to be gained from the surgery concerned on the evidence. However, the Tribunal was quite prepared to entertain the possibility of approving major surgery which was probably going to be required at some stage in the future, although at an undefined time.

The Tribunal confirmed that in assessing anything in relation to future treatment or surgery needs, the starting point is whether the proposed treatment or surgery is reasonable **and** appropriate, on the balance of probabilities, in the circumstances of the case.

The Tribunal also indicated that when dealing with issues of specific proposed treatment, even at some vague date in the future, requests might well be given approval, but that the seeking pre-approval for an unspecified number and unspecified types of surgery should be declined. If this becomes the consistent view of the Tribunal, given the multitude of cases currently "in the system" in this regard, then it should see a good deal of such applications fall over, and potentially be susceptible to application for dismissal at a preliminary stage.

Time will tell as to whether this becomes a consistent approach across all members of the Tribunal.

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

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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