The News As We Know It

We welcome you all to what is sure to be a challenging new financial year for all workers compensation industry participants, with the commencement of the Return to Work Act on 1 July 2015.

We wouldn't say that everything old is new again in workers compensation, but longstanding practitioners in the field will certainly see similarities in what's been legislated recently, compared to how the world appeared in the 1980's!

While we will certainly be busy helping to bed down the new workers compensation scheme with our clients, we also look forward to many other challenges this year, with the Federal government looking to implement change across many areas of business, while the State government is also promising a year of 'surprises'.

Hang on to your hats, and best of luck in your respective businesses as we all try to make 2015 a successful year!

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In this Issue

There's been plenty happening in the broader world of workplace law, and amongst other things, we'll be looking in detail in this issue at:

- The challenges employers will face regarding return to work obligations for injured employees, once section 18 of the Return To Work Act comes into effect;

- Exactly what is meant by 'bullying' in the context of Fair Work Act applications for intervention – an update since we last went to print.

As usual, we'll also bring you up to date with what's been happening here at KJK, both in-house and out in the community.

Employment Obligations under the *Return to Work Act 2014*

Section 18 of the new Return to Work Act (the Act) to a large extent replicates the current section 58B of the Workers Rehabilitation and Compensation Act (WRC Act).

Section 18(1) of the Act requires an employer to provide suitable employment for an injured worker who is incapacitated for work insofar as reasonably practicable. The same exceptions to that obligation remain namely, if it is not reasonably practicable to provide suitable employment, the worker has already left the employer's employ prior to commencement of incapacity, the worker has ceased employment after commencement of incapacity or the worker has returned to work. There is no longer an exemption for small business, i.e. an employer with less than 10 employees.

There is reference in section 18(2)(d) of the Act to the obligation not applying when new or other employment options have been agreed between the worker, the employer, and Return to Work SA (RTW SA) under section 25(10) of the Act. However that exemption may not apply to a self-insured employer, who may be obliged to explore new or other employment options within their own organisation. This provision seems more designed to deal with the situation involving a registered employer who might escape their obligation to offer suitable employment because they cannot provide such new employment options. Whether a self-insured employer could look to options outside their own organisation and if that will require the involvement of RTW SA is not yet known.

Similarly to the current provisions of section 58B of the WRC Act, there seems to be no correlation between a worker's entitlement to weekly payments and the obligation to offer suitable employment which is still predicated on the worker's incapacity for work and inability to return to pre-injury employment. So does that mean that even after a non-seriously injured worker's entitlement to weekly payments ceases, 104 weeks after their injury/incapacity commences, that the employer must continue to offer/provide suitable employment? One would have to suggest that the answer to that is likely to be "yes", particularly given the interaction between section 18(1) and section 18(3) of the Act. Also for a self-insured employer, their record as to provision of suitable employment is taken account of by RTW SA when evaluating the employer's performance for the purpose of licence renewal. If an employer takes the view that there is no entitlement to weekly payments, and there is no need for it to offer suitable employment, then it does so at considerable risk for several reasons. Interestingly though, the employer can no longer be prosecuted for a breach of section 18(1) of the Act, which is a significant difference to the current provisions of section 58B of the WRC Act, which can impose a maximum penalty of $25,000 for a breach of the obligation to provide suitable employment. Even without the threat of a prosecution, there are still potential premium implications for a registered employer or licence renewal issues for a self-insured employer if a breach occurs.

There is also a new provision which could potentially create quite a lot of litigation/controversy. This is section 18(3) of the Act which gives the worker a right to seek employment with their pre-injury employer consistent with the obligations set out in section 18(1) of the Act. The worker in seeking such employment can give notice to the employer that he/she is ready, willing and able to return to work with that employer, and provide information about the type of employment that the worker thinks he/she is capable of performing. Section 18(3) of the Act also indicates that the notice must comply with any other requirements prescribed by the RTW Act Regulations, but the Regulations do not appear to set out any such requirements at the moment. Currently they only set out the amount of costs that a worker can seek if an application to the South Australian Employment Tribunal (SAET) is filed.

If the employer fails within a reasonable time to provide suitable employment to the worker then that worker may apply to the SAET for an order for reinstatement. If the employer fails to provide the suitable employment within one month, then an application can be made to the SAET. The SAET then has authority to determine the issue and can order the employer to provide employment specified by the SAET in the exercise of its adjudicative function.

This new power given to the SAET overcomes a jurisdictional issue that has arisen in a couple of recent cases dealt with by the WCT under the WRC Act. There have been 2 cases

in recent times where workers have endeavoured to invoke the jurisdiction of the WCT to in effect order something akin to reinstatement as part of a Notice of Dispute in respect to a rehabilitation and return to work plan. In the first case of *Cerins v ACI*, the worker, who had a partial incapacity for work, was made redundant after the employer satisfied WorkCover that it was not reasonably practicable for it to provide suitable employment.

The worker challenged the failure to establish a rehabilitation program that incorporated a return to work with the pre-injury employer as an objective. The matter proceeded before Deputy President Judge Hannon who found that the program could be modified to allow for further exploration as to whether the worker had capacity to return to work with the pre-injury employer and take up employment that might still be available with that employer.

In the second case of *Lawless v Qantas Airways*, similar issues arose but ultimately the worker failed on jurisdictional issues. By the time the matter came on for trial, the Rehabilitation and Return to Work Plan that he disputed for failing to incorporate return to work with the pre-injury employer had expired. Therefore on appeal the Full Bench of the WCT found that the Tribunal did not have jurisdiction to deal with the matter as no relief could be provided.

These issues will no longer "vex" the Tribunal, as the SAET clearly has been vested with jurisdiction to deal with what potentially could be a reinstatement application. This will raise some constitutional issues particularly if the employer argues that the RTW Act provisions clash with the Cth *Fair Work Act* (this issue of course does not arise for local or state government entities which remain under the State industrial system).

What happens if the SAET makes such an order that the employer must provide employment, and the employer still fails to provide the directed employment? In that case the worker can apply to RTW SA (assuming they are employed by a registered employer) for financial support, which is the equivalent of the weekly payments to which they would otherwise be entitled. Those weekly payments however will not be made if the application comes after the end of the 104 week period for non-seriously injured workers. Presumably therefore for applications under section 18(3) of the Act to be effective they should be made in the first two years of incapacity after the worker's injury.

If RTW SA does provide financial support under this section, it can recover any amount paid to the worker together with interest, from the registered employer as a debt. No doubt this will also impact on the premiums the registered employer pays as the claims costs will escalate, however that can only be within the 2 year period post injury.

What happens after the expiry of the two year period is anyone's guess. One might argue that after two years a registered employer can do what it likes in terms of offering or not offering suitable employment and, if the employer is not liable to make payments to a worker, then there is no need for any interference by RTW SA. However, does the registered employer (or even a self-insured employer) have to consider other remedies that a worker might claim outside of the RTW Act, e.g. *Disability Discrimination Act, Fair Work Act – eg general protections claims, unfair dismissal, unlawful termination*.

Self-insured employers will still have to consider how RTW SA views a failure to provide employment when ordered by the SAET to do so. If the self-insured employer is unable or unwilling to offer suitable employment then a worker might pursue an

unfair dismissal claim or, as indicated, pursue an application under section 18(3)of the Act. If the SAET finds against the employer and the employer still does not provide employment then it is likely that RTW SA will use this against the self-insured employer as part of an evaluation of its licence.

Section 129(9) of the Act sets out that RTW SA can revoke self-insurance or reduce a registration period if the employer breaches or fails to comply with the Act. RTW SA can also take the issue into account in terms of the employer's record in provision of suitable employment. Therefore the mere fact that weekly payments are no longer being made does not necessarily mean a self-insured employer is no longer obliged to not offer suitable employment.

On a final point, it has been suggested that section 18(3) of the Act might only apply to a worker whose employment has previously been terminated, as opposed to someone who has simply not been provided with work, or possibly has only been 'detached' from the pre-injury employer under a section 58B release, but whose employment has not been formally terminated. It is likely this issue will be explored quite soon after 1 July 2015, so it will be case of watching this space closely.

If you require any specific advice regarding the application of the new legislative provisions to your workplace, then please contact Tracey Kerrigan on (08) 7324 7820 or tkerrigan@kjklegal.com.au.

What is bullying "at work"?

Dealing with an anti-bullying claim in the Fair Work Commission can be a potential headache for employers who have to maintain a good ongoing employment relationship with employees while dealing with litigation.

The recent decision of the Full Bench of the Fair Work Commission of *Bowker v DP World Melbourne Ltd & Maritime Union of Australia* [2014] FWCFB 9227 has defined the meaning of bullying "at work" within the *Fair Work Act 2009* (FW Act). Three employees lodged an application pursuant to section 789FC of the FW Act, seeking an order that they had been bullied at work. The Commission only has jurisdiction to make orders to stop bullying if, among other things, the Commission is satisfied the worker has been bullied "at work".

The employees claimed that bullying conduct occurred at work if it had a substantial connection with work and should include behaviour such as offensive social media postings which were visible to their co-workers. The Full Bench rejected the employees' proposition in respect to the substantial connection, saying it was merely a temporal connection that needed to be established between the bullying conduct and the worker being at work. The Full Bench concluded that "at work" meant the conduct had to have occurred at a time when the employee was performing work and that this wasn't necessarily confined to the physical workplace. Further, that the concept of being "at work" encompassed both the performance of work and other behaviour that was authorised by the employer, such as meal breaks or accessing social media while performing work.

The Full Bench also stated that the definition of "bullied at work" includes the requirement that the individual/group had to repeatedly behave in an unreasonable manner towards the employee and that the individual/group need not also be employees.

Employers should take note that "at work" includes any time or place where the employee is authorised to perform work for the employer. Further, an individual or group engaging in the unreasonable behaviour need

not be a co-worker or "at work". Specifically, in terms of social media, bullying social media posts need not be posted at work. Is it enough the worker sees them at work?

We recommend you review your social media policy to ensure it provides clear guidelines and requirements for all employees to follow.

If you require any advice regarding the above as it specifically relates to your workplace, or require assistance in the review of your applicable workplace policies, then please contact Neville John on (08) 7324 7830 or njohn@kjklegal.com.au.

Hearing Aids

Many of you will be familiar with the approach being taken by many hearing aid providers of late, who work in conjunction with certain law firms in the pushing of claims for compensation, and the resulting request for payment of hearing aids.

What you may not appreciate is that settling a claim for hearing loss does not oblige you to accept the quote for the hearing aids that almost inevitably come with the claim in the first place. There is nothing to stop you challenging the quote as provided and querying with the provider if it is their 'best price' and most appropriate product, especially if you can source a quote from elsewhere. You should consider speaking to your local and smaller hearing aid company, who might well be willing to provide advice on alternative options for the hearing aids recommended, and a price for them. A little bit of leg work can save you thousands of dollars on each claim.

New Dispute Resolution system

With the advent of the new Return to Work Act this year, our team have been busy providing training and seminars to industry associations, including SISA, REG SA, the LGA and SA Government Departments. We've also been busy doing presentations for many of our clients. What we've learned so far is that there is a great thirst for knowledge about the new Return to Work Act, and some trepidation as to how it will apply/work in the 'real world'. It seems the new South Australian Employment Tribunal is just as keen to get stuck into the new Act, and we can expect them to fast track important issues through the system, and to create particular streams for aspects of the legislation (e.g. rehabilitation issues being dealt with expeditiously, and within the time frame for the life of any disputed Recovery/return to work plan).

There will of course still be a run-off of matters in the current Workers Compensation Tribunal. This will lead to the possibility of disputes being on foot in more than the one jurisdiction at the one time. We expect these matters will often be 'co-joined' before a member of the respective Tribunals who will hold a joint commission. That may not be possible in all cases, so exactly how things will operate in that event is something we trust the powers that be are working on now.

Important events coming up

- KJK Legal has renewed their sponsorship commitment again this year for the annual SISA Closing the Loop conference. This year's conference is being held on 30 July at Adelaide Oval. As always, it will be an interesting and stimulating event. For more details go to www.sisa.net.au.

- Speaking of forthcoming events, the annual Both Sides of the Fence conference will also be held at the Adelaide Oval this year. Save the date of 16 October. Details of the conference will follow in our next newsletter.

KJK Legal news

- An update on our Steptember fundraising efforts from last year. Thanks to the very generous support of our many clients and contacts we managed to walk millions of steps between us, lose a few pounds, and more importantly we raised over $2,000 for assistance to those unfortunate enough to suffer from cerebral palsy.

- We were very pleased to support the Work Injured Resource Connection's Bags of Love emergency food project recently, with a financial donation, while our client Thomas Foods International also came on board with a donation of products, for which we are appreciative.

- Speaking of the Work Injured Resource Connection, they are in the process of establishing an Op Shop for clothing, as a way to raise further funds. If you can help out in that regard with clothes or cash donations then I'm sure Rosemary at the Centre (phone (08) 8255 9138) would love to hear from you. The Centre were also recently looking for some help with research related activities, to assist them when making submissions to government etc. If you know of someone such as a law student who might be willing to undertake some pro-bono activity, then get them to contact Rosemary direct.

- Other sponsorship activities we've engaged in recently include supporting Chip in for Calvary's annual golf day, the SALA Festival through local painter Richard John (look him up on Facebook), and supporting local amateur football club the Unley Mercedes Jets.

- Finally. it is a big year for several of our team, with Carmel Preece and Mark Keam celebrating 30 years since their graduation from Adelaide University. Among their contemporaries, it is noted that Mark Calligeros has recently been appointed a Deputy President of the Workers Compensation Tribunal, and Tim O'Callaghan has been appointed the head of national legal firm Piper Alderman's Adelaide Office. We congratulate them both on their achievements.

Something to think about as Safety Week approaches!