The Varying Nature of Employment Arrangements and Obligations under Section 18 of the Return to Work Act – Do they run together neatly?

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Section 18 of the *Return to Work Act* was part of an overhaul of the state's worker's compensation scheme in 2015. Section 18 created an obligation on an employer to provide suitable employment to an injured worker. As a new provision, it was designed to enhance the similar provision in the preceding legislation, which effectively had been seen by many stakeholders as "*toothless*".

There was also a recognition of the need to provide injured workers with some sort of security in terms of their employment, where the *Return to Work Act* had effectively introduced a "*capped entitlement*" scheme – so that insofar as an injured worker might have an entitlement to weekly payments for 104 weeks only, they could reasonably expect to have some sort of ongoing security in terms of their employment after the end of that entitlement period if they had a capacity for some form of work.

The underlying concept of Section 18 is to ensure, as far as reasonably practicable, that an injured worker who has some capacity to work and is able to identify some form of suitable employment that can be made available by his or her pre-injury employer, is then able to access such employment. In circumstances where the injured worker is able to identify such suitable employment, then the onus falls on the employer to establish (if it chooses not to offer such suitable employment) that it is not reasonably practicable to do so in the circumstances of the case to do so.

But as we will see from the Case Study to follow, the circumstances of the case can throw up all sorts of issues, possible outcomes, and an unforeseen impact on the nature of the pre-injury employment relationship between the worker and their employer.

But first, and at a very high and simplistic level, Section 18 has a few pre-requisites before it will apply:

1. Self-evidently, nothing happens if a worker hasn't sustained a compensable injury;
2. Equally, that work injury must give rise to an incapacity for work at the time the injured worker agitates for relief under Section 18, and that incapacity for work must still be present by the time that the South Australian Employment Tribunal might hear the case – and so former employees who were cleared to return to work on normal duties at some stage in the past are not able to access the provision as a back door way to effectively be re-employed, and current employees subject to some sort of industrial action threatening their employment can't use it as a shield if they are no longer incapacitated;
3. The whole process can be avoided if the circumstances of the case are that:
    a. As described previously, it is not reasonably practicable for an employer to provide suitable employment of the same or an equivalent nature to that which the worker performed prior to their injury – and the onus of establishing this is on the employer;
    b. If the worker left the employment before the commencement of their incapacity for work, e.g., they resigned, or perhaps a latent condition arose later on, where the worker might have been suffering from symptoms at the time they terminated the employment, but had no relevant incapacity until

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much later on when their condition might have deteriorated; or

c. The worker terminated the employment after the commencement of their incapacity and again, classically that might be a situation where the worker resigns, or is found to have abandoned their employment; or

d. Where new or other employment options are identified during the recovery and return to work process – classically, this in terms of worker's not employed by a self-insurer are "*detached*" from their pre-injury employer, so that they can endeavour to obtain suitable employment elsewhere. But query if those efforts come to nothing and the worker wants to re-establish the relationship with the pre-injury employer – this is a discussion for another day.

The main battleground in regard to Section 18 is the question of whether it is or isn't reasonably practicable for an employer to provide the suitable employment identified. Obviously, if they can, then that is the end of the discussion for the time being.

In providing suitable employment it is important to understand that there are several aspects of what it means to provide suitable employment:

- It is clear that suitable employment does not mean the provision of simply suitable duties. What must be identified is some form of employment that in ordinary circumstances would give rise to a contractual obligation, with all of the duties that would be associated with the identified employment, or at least a substantial element of that employment. I call the latter the 80/20 rule;
- The Tribunal has identified that suitable employment in these circumstances can involve more than one role that would otherwise give rise to a contract of employment;
- It is also equally clear the obligation can extend past the 104 week entitlement period for which weekly payments are otherwise payable; and
- In the event the worker identifies suitable employment that it is reasonably practicable for the employer to provide, then there are penalties for the employer should they fail to do so at the direction of the South Australian Employment Tribunal.

In terms of the coalface and when an individual employer might be called upon to provide by way of suitable employment, the Tribunal will look at a number of factors:

- The nature of the employee's injuries, ongoing medical status, prognosis, and the like;
- The size of the employer, and the range of employment options it is able to provide and the range of duties that can be provided;
- The make-up of the workforce, in terms of whether there are enough suitable roles generally performed of the nature being sought;
- The ability to cope with an employee who might not be able to contribute as much as others, and where many of the existing workforce may be of advanced age (e.g. a common scenario in the aged care environment);
- The proportion of employees who might already be on restricted duties, and where the remaining fully fit workforce are seen to be carrying a much higher workload;
- The worker's history with the pre-employer – is it fair to inflict upon the workforce a "*bad egg*", who in the past might have caused workplace conflict, have a very poor attendance record etc; and
- Particularly significantly, where work health and safety considerations may well

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need to be taken account of, can the injured worker be provided with duties that do not put him or her at any reasonably likely risk of further injury, or where that injured worker's incapacity and restrictions might in turn impact the safety of other employees.

With all of the above background, we now turn to the recent case of Mr Morphett, an employee of Forestry SA, to see where things can unexpectedly create an employment outcome that is a long way from the circumstances that prevailed before the worker concerned sustained their injury, and identifying the complexities associated with trying to fit square employment contracts into round employment realities.

Mr Morphett was employed as a Forestry Management Worker with Forestry SA on what was effectively a seasonal fixed term contract basis.

He sustained reasonably significant injuries in 2016 but was able to recover sufficiently by 2017 to return to work performing a modified pre-injury role.

For several years thereafter, Mr Morphett was subject to rolling fixed term contracts. During this time, he expressed interest in becoming a Forest Ranger. While he was not appointed to any such position, he began undertaking some elements of the role.

Eventually, the worker was advised in late 2018 his next fixed term contract would effectively be his last and that the employer would not be in a position to provide him with duties after December 2019. At about this time he had also been looking at exercising his right to convert his continuous fixed term contracts into a permanent role.

In having duties withdrawn in late 2019, Mr Morphett thereafter made a request to his employer to be provided with suitable employment as a Forest Ranger. When Forestry SA declined to do so, the worker filed a formal Section 18 Application with the South Australian Employment Tribunal.

While there were a lot of factual issues surrounding the actual suitability of the work identified by Mr Morphett as a Forest Ranger, we will just concern ourselves today with what I will describe as aspects of the case that concern "*employment*" issues in the classical sense.

Firstly, Forestry SA argued Section 18 only had application where there was, at the time the matter came before the Tribunal, a valid contract of employment in place. Of course, here the previous contract had expired. The Trial Judge at first instance hearing the case, and then the Full Bench of the South Australian Employment Tribunal, disagreed with this position.

Both the Trial Judge and Appeal Judges felt that to narrow a worker's rights in this regard would have a capricious outcome and would not fundamentally meet the objects of the prevailing legislation. In effect, it meant whether or not you might have a seasonally employed worker, such as during vintage time only, or where they might be on a fixed term contract, perhaps as part of expanding an employer's workforce to meet a special project, the provisions of Section 18 might still apply post the ending of the expected time frame for the employment concerned.

The Trial Judge in Mr Morphett's case then went further to suggest Section 18 might create a whole new employment relationship, in circumstances where the previous employment relationship, whether it be seasonal/casual/fixed term, had ended. He did not declare this would always be the necessary outcome in the circumstances of any given case and it would always be a matter of evidence as to the employer's circumstances.

The Trial Judge also took note of the fact that Forestry SA built their case around two important elements. One, that there was a notionally competitive employment hiring

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process in place, and also that a role as a Forest Ranger was not then currently available. His Honour, in terms of the former, found an employer's discretionary practices were not to trump their legislative obligations. In terms of the latter, he took note, in terms of the facts of this case, that there was a rolling workforce and while there might not currently be a role available as a Forest Ranger, historically those roles came up continuously, and therefore the existence of a role at the current point in time was not a determinative matter.

Where the Trial Judge found Forestry SA had the capacity to provide ongoing/permanent employment to Mr Morphett as a Forest Ranger, again, this finding was challenged on appeal. Forestry SA argued that suitable employment meant that in being the same as or equivalent to the pre-injury employment, you must give cognisance of the terms of that past employment, i.e. seasonal in this case, and so that there were some degree of equivalency both in terms of the nature of the duties to be performed and the nature of the employment relationship that might be created when making an order for suitable employment.

The Full Bench of Appeal Tribunal was aware that the arguments that were put forward in this case needed to find a balance, between what might be required of a pre-injury employer in later going potentially well beyond the pre-injury employment obligation, when weighed against a permanently injured worker's right to some form of secure employment past the end of their entitlement period, where they have ended up in a situation through no fault of their own.

Ultimately, the Full Bench of the Tribunal broadly sided with the Trial Judge and found Section 18 deals with the nature of the duties in contemplation as constituting suitable employment, and not strictly the legal nature of the pre-injury contract of employment.

However, in making this finding, the Full Bench did not entirely discount the nature of the worker's pre-injury employment. Going back to the notion of what is reasonably practicable as being the key determinant here, ultimately, if an employer's business and the suitable employment that can be offered is only truly seasonal, periodic, or significantly affected by labour requirements from time to time, then so might be the nature of any suitable employment that is obliged to be offered – and so in some cases it might truly end up being a case that suitable employment is a seasonal obligation.

The takeaway lesson here is that Section 18 can see you take on board an injured worker on a permanent basis, where their pre-injury employment was something else altogether.

But it is also apparent, that once an incapacity for employment ends and that is established as a matter of fact, then the injured worker concerned reverts to having only the same rights as would normally apply industrially, so even if it was a case of Section 18 applying periodically to a seasonal worker, the obligation will not be permanent or ongoing once incapacity is no longer a matter of fact.

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