

KJK LEGAL SEMINAR | February 2025



TODAY'S AGENDA:

<u>PAUL DEWING:</u>	Fictions & Facts – noise and NIHL
<u>OLIVER FRAGNITO:</u>	Ins and Outs of Section 18
<u>NEVILLE JOHN:</u>	Section 18 Amendments
<u>TRACEY KERRIGAN:</u>	Case Updates (Part 1)
<u>CHRISSY PSEVDOS:</u>	Case Updates (Part 2)



Section 18 – the ins and outs

Section 18—Employer's duty to provide work

- (1) If a worker who has been incapacitated for work in consequence of a work injury is able to return to work (whether on a full time or part-time basis and whether or not his or her previous employment), including if the worker has ***ceased to be incapacitated*** for work in consequence of the work injury the employer from whose employment the injury arose (the “pre-injury employer”) must provide suitable employment for the worker (the employment being employment for which the worker is fit and, subject to that qualification and this section, so far as reasonably practicable the same, or equivalent to, the employment in which the worker was working immediately before the incapacity).

Roberts v Department for Education [2021] SAET 56

- The issue of whether the incapacity is required to be ongoing in order for s18 to have application was addressed by Crawley DPJ.
- s 18 does not have application once a worker ceases to be incapacitated for work.
- Once an injured worker ceases to be incapacitated for work, their rights and obligations in respect of any employment fall to be determined under the laws governing employment generally; not under a scheme designed to regulate and assist those suffering from a work injury. It follows that the powers created by this section may only be applied in favour of a worker who remains incapacitated at the time an order is made.
- To decide otherwise would extend to the rights and obligations for formerly injured workers potentially indefinitely. Once a worker had suffered an injury, no matter how trivial or short-term, an application could be made under that provision at any time thereafter. That cannot be what was intended.
- The jurisdiction of the Tribunal as created by the Act extends to employment law only to the extent that it is necessary to support injured workers returning to work.
- On Appeal: Is the relief available under s 18 limited to a worker who has an ongoing incapacity for work?
- In seeking to strike a balance between the interests of employers and workers, we see no warrant in giving the expression 'has been incapacitated' a liberal construction.

Section 18-Employer's duty to provide work

- The employer's duty does not apply if;
- (a) it is not reasonably practicable to provide employment in accordance with that subsection (and the onus of establishing that lies on the employer); or
- (b) the worker left the employment of that employer before the commencement of the incapacity for work; or
- (c) the worker terminated the employment after the commencement of the incapacity for work;
- ***(ca) the worker's employment with the pre-injury employer has been properly terminated on the ground of serious and wilful misconduct (and the onus of establishing that lies on the employer); or***
- (d) new or other employment options have been agreed to by the worker under section 25(10a); or
- (e) the worker otherwise returned to work with the pre-injury employer or another employer

Cases

- *Morphett v Chief Executive, Department of Treasury and Finance* (Forestry South Australia) [2022] SAET 143 - Section 18 is not limited by any contractual terms as to duration of the pre-injury employment - A primary object of the Act is the return to work of an injured worker, as the name of the Act and of the scheme's corporate administrator implies.
- *Reimers v Department for Education (No 4)* [2023] SAET 3 – There was no evidence as any relevant financial implications. No evidence was presented to suggest that such a position would have an effect upon the employment of others at the school
- *Giehr v SA Health* [2021] SAET 213 - An application under Section 18 involves an evaluative judgment that takes into account a range of factors;

Section 18(2)(ca)

- (ca) the worker's employment with the pre-injury employer has been properly terminated on the ground of serious and willful misconduct (and the onus of establishing that lies on the employer);
- Previously – no explicit exception covering an employee terminated on the grounds of serious and willful misconduct;
- What will be required for establishing the onus?
- Will “performance issues” be enough to argue it is no reasonably practicable for suitable employment to be provided?

Section 18(3) and (4)

(3) A worker who has been incapacitated for work in consequence of a work injury who seeks employment with the pre-injury employer in accordance with this section must, for the purpose of seeking the employment—

(a) Give written notice to the employer (a “subsection (3) notice”) –

- (i) Confirming that they are ready, willing and able to return to work with the employer; and
- (ii) Providing information about the type of employment that the worker considers that they are capable of performing; and
- (iii) If the worker was a labour hire worker at the time of the work injury, the injury arose from employment while the worker was supplied to a host employer and the worker seeks the host employer to cooperate with the pre-injury employer in the provision of suitable employment to the worker containing a statement to that effect; and

(4B) The pre-injury employer must, within 1 month of receiving a subsection (3) notice from a worker notify the worker whether or not they will provide suitable employment;

Worker can then within 1 month of the refusal or offer, apply to the Tribunal

Section 18(5a) – (5h)

- Now has power to make specific orders;
- Duties to be provided to the worker;
- What adjustments the employer may need to make for the worker to perform the duties;
- How many hours the employer needs to provide to the employer.

Section 18(6), (7) & (9)

- Employers (not being the compensating authority) will be entitled to have their legal costs paid in the same way as workers.
- This was allowed previously, but only if Tribunal decided to make an order that the employer provide the worker with suitable employment.
- Costs may also be declined if worker or employer has acted unreasonably, frivolously or vexatiously.

Section 18(7a) – (7d)

- The Tribunal has the power to hear compensability disputes and Section 18 disputes concurrently.
- Previously could not be combined.

Section 18(16a) – (16b) & (17)

- (16a) A host employer must co-operate with a labour hire employer in respect of action taken by the labour hire employer to comply with its obligation under this section to provide suitable employment to a worker, to the extent that it is reasonably practicable to do so by:
 - (a) communicating with a labour hire employer about co-operation in the provision of any suitable employment requested by a worker under a subsection (3) notice; and
 - (b) participating in discussions with the employer and the worker about the return to work planning, including in relation to the establishment of a recovery/ return to work plan
- (17) definitions of host employer, labour hire employer, labour hire worker and related bodies corporates.

Section 18(16c) – (16d)

- Previously, the duty to provide suitable employment only applied to the pre-injury employer.
- ‘Group Employers’ now included.
- Self-insured employer that is a member of a group of self-insured employer, the duty to provide suitable employment applied across the group.
- The notice can be given to the lead employer in the group.
- If a pre-injury employer is an agency or of the Crown, the duty applied to all such agencies and instrumentalities of the Crown.

Section 18 (37ba)

- Any prescribed amount ordered by the Tribunal to be paid to the worker by the employer under section 18(5e);
- Section 18(5e) If the Tribunal makes an order in favour of a worker under subsection (5), the Tribunal must make an order that the employer pay an amount (the "prescribed amount") to the worker to reflect the wages or salary the worker would have been expected to receive in the suitable employment if it were provided during the period from the day on which the worker provided the subsection (3) notice to the employer until the making of the order (the "relevant period").

02

Section 18
amendments –
deeper dive



Section 18 amendments – deeper dive

1. Has Section 18 turned into a Sovereign Citizen?
2. Section 18(4e) – The six-month danger zone
3. Section 18 (5c) – Employment with associated entities



- what to pay?
- for how long?



Section 18 amendments – deeper dive

4. Section 18(7c) - Application without accepted claim

5. Are inherent requirements still valid?

WHAT NOW?





03

Case Summaries

AL-Shareeda v RTWSA & Mitcon Formwork Pty Ltd (No 2) [2025] SAET 7

Facts:

- Worker pursued a claim for injuries to his head, neck, thoracic and lumbar spine, knees and right arm allegedly due to a fall at work in April 2018.
- No claim or report of injury to employer or any doctors until June 2021.
- Worker was found to have *“lied, deliberately omitted parts of his medical history to suit current circumstance, embellished or changed his version of events and present such implausible explanations of discrepancies that his evidence lacks credit”*.
- Worker was found to have fabricated the allegation of a fall at work.



AL-Shareeda v RTWSA & Mitcon Formwork Pty Ltd (No 2) [2025] SAET 7

Section 106(3) provides that if the SAET considers a party has acted unreasonably in bringing proceedings or has acted frivolously or vexatiously in bringing or in the conduct of proceedings then the SAET can decline to make an order for costs or reduce the amount of costs to which they may be entitled.



AL-Shareeda v RTWSA & Mitcon Formwork Pty Ltd (No 2) [2025] SAET 7

Issues:

- So, was it reasonable for the applicant to be awarded costs against RTWSA and vice versa?



AL-Shareeda v RTWSA & Mitcon Formwork Pty Ltd (No 2) [2025] SAET 7

Held:

- Worker must have known from the outset that his claim was unreasonable.
- Worker was not entitled to costs against RTWSA.
- Worker's conduct was 'so egregious' as to warrant an order for costs in favour of RTWSA.
- It was noted that the worker was not put on notice as to costs by RTWSA . That led to the judge reducing the amount of costs payable by the worker to RTWSA by 50%.

AL-Shareeda v RTWSA & Mitcon Formwork Pty Ltd (No 2) [2025] SAET 7

Key takeaways:

- It is a high bar to overcome the usual discretion in the SAET to award costs to an injured worker even if their case is unsuccessful, BUT fraudulent behaviour should generally meet that hurdle
- Putting a worker on notice as to costs should be done at least prior to trial in order to produce the best outcome in a subsequent argument as to costs



***Holberton v Tasmaea Limited* [2025] SAET 8**

Facts:

- Worker pursued a claim for NIHL against Ottoway Engineering (OE).
- He was employed by OE (a subsidiary of Tasmaea) as a manager there from August 2012 to August 2016. He mainly worked in the office adjacent to the workshop but also worked in the workshop.
- He then worked for Ecospec P/L from January 2017 to January 2018.
- He was then self employed from January 2018 (Tube Solutions). The work he did in self employment was basically the same as what he did at Ecospec.
- The claim was made against Tasmaea as the last “noisy” employment.



***Holberton v Tasma Limited* [2025] SAET 8**

- The worker provided an affidavit of evidence. This included evidence of noise exposure prior to OE, exposure at OE and alleged non-exposure at Ecospec and Tube Solutions.
- Dr Fagan was called for the worker and Dr Tomich for the employer.
- A witness from OE was called to give evidence about the level of noise in the workshop.
- The judge identified a number of factual errors in the witness affidavits corrected in oral evidence.
- A number of reports were obtained from the doctors but these factual errors had to be corrected at trial.

***Holberton v Tasmea Limited* [2025] SAET 8**

- Worker was required to prove that he has NIHL and was employed in work involving exposure to noise.



- The burden of proof then shifts to the employer (Tasmea) to refute the assertion that the hearing loss did not arise from OE's employment.

***Holberton v Tasmaea Limited* [2025] SAET 8**

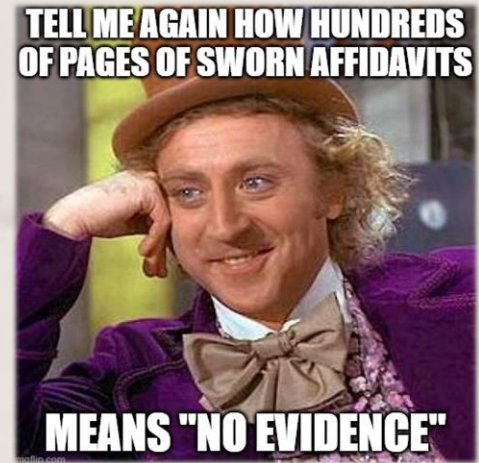
Held:

- Worker proved that the was suffering NIHL and that the work at Ecospec and Tube Solutions was not capable of causing NIHL.
- Tasmaea however successfully discharged their onus based on the combination of factual evidence and the opinion of Dr Tomich that any exposure at OE was insufficient to cause NIHL (specifically being exposed to about 90dB of noise between 1 and 2 hours per day whilst wearing hearing protection and working in a quiet environment for the rest of the day is unlikely to result in NIHL).
- The judge was highly critical as to the standard of medical reports obtained from the experts and the lack of proper factual evidence/history being provided to the experts.

***Holberton v Tasmaea Limited* [2025] SAET 8**

Key takeaways:

- Review the affidavit evidence that is being provided when preparing a NIHL case for trial.
- Seek supplementary comments from your expert as early as possible after receiving the worker's affidavit and any other factual information.



Hussain v Return to Work Corporation of South Australia [2024] SAET 98

Facts

- The worker has some compensable injuries namely, right shoulder, the left shoulder, right hand and wrist, xerostomia and deglutition claimed to be due to medication prescribed to treat work injuries, liver dysfunction (fatty liver), which has been claimed as a consequential injury to the right shoulder injury, a complex regional pain syndrome of the right wrist, the neck, upper back, right bicep and his lower digestive system which he also attributes to medication prescribed to treat his work injuries.

Hussain v Return to Work Corporation of South Australia [2024] SAET 98

- He also claims to be suffering from sleep apnea attributable to his other claimed work injuries. He attributes his claimed work injuries and claimed resultant impairments to a fall at work on 1 May 2020. In addition to the physical injuries the worker asserts that he suffers from a psychiatric injury.
- On 21 March 2024 the worker made an application pursuant to s21(3) of the RTW Act to be taken as in interim seriously injured worker. The respondent arranged for the worker to be examined by Dr Champion for the purposes of determining the application and in accordance with s31(2) of the RTW Act. The worker refused to attend.



Hussain v Return to Work Corporation of South Australia [2024] SAET 98

- The respondent rejected the s21(3) application
- By application for directions the respondent compensating authority sought an order that would require the worker to attend a medical examination arranged by the respondent with Dr Gary Champion for the purposes of confirming a diagnosis of CRPS in accordance with chapter 2.22 of the IAGs.

Issues



- The worker argued that the attendance was not in the interests of justice and that there was neither an express or implied statutory power vested in the Tribunal to make an order.
- In the alternative, the worker argued that if the Tribunal did have the power to order the examination, jurisdiction could not be exercised where the object of the assessment was to seek an opinion as to permanent impairment where the worker had already been assessed in accordance with s22 of the RTW Act.

Hussain v Return to Work Corporation of South Australia [2024] SAET 98

Held

- There is an implied power conferred the South Australian Employment Tribunal Act (SAET Act) that r213 of the SAET Rules is a valid exercise of the rule making power conferred by s92 of the SAET Act.
- His Honour, Deputy President Judge Rossi determined that the onus is on the party seeking the examination to persuade the Tribunal that its intervention is reasonably required in the interests of justice.

The factors to be taken into account in the exercise of discretion will include:

- Whether the compensating authority exercised the power conferred by s31(2) of the RTW Act to have the worker examined prior to the determination of the claim and, if it did, whether there has been a material change in circumstances so as to require a further examination.
- The issues to be determined at trial by the Tribunal and whether the examination requested is reasonably required in order for the party to be able to properly present its case.
- Any likely adverse impact upon the worker if the examination is to proceed.
- The nature of the examination to be conducted.
- The reasonableness of the arrangements made including the date, time and location of the scheduled examination and the identity of the proposed examiner.

- In consideration as to whether the compensating authority is able to seek an opinion pertaining to chapter 2.2 of the IAGs his Honour considered the decision in *Clayton Church Homes Incorporated v Return to Work Corporation of South Australia and Orphanou* [2019] SAET 113 and the finding of Calligeros DPJ that there may be a relevant diagnosis for the purposes of verification by more than one examining physician outside of the twelve months leading to the permanent impairment assessment but the requirement that the diagnosis must have been present for at least one year relates to the twelve months period immediately prior to the assessment.
- His Honour concluded that the worker should be required to attend the scheduled appointment with Dr Champion in relation to the claimed injury of CRPS and was directed to cooperate with the examination process and not hinder it.



Key Takeaway

- Whether the Presidential Members of the Tribunal will ultimately exercise their discretion to order that someone attend a medical examination will depend on whether the party seeking the examination is able to persuade the Tribunal that its intervention is reasonably required in the interests of justice and will be determined on a case-by-case basis





Hussain v Return to Work Corporation of South Australia (No 2) [2024] SAET 114

Facts

- The applicant filed a notice of appeal against that order on 20 November 2024 – the applicant also filed an application for directions on the same day seeking an order staying the operation of the order which directed him to attend the medical examination – the application for directions was initially heard by the President.
- An order was made described as an “interim” order staying the operation of the order made on 13 November 2024 until the application for directions was heard and determined by Rossi DPJ – in the circumstances, the order made by the President had the effect of an order that the applicant not be required to attend the examination.

- The order made by the President had the effect of an order that the applicant not be required to attend the examination
- The respondent then made application seeking an order that the applicant attend an examination to be performed by Dr Champion at 11.00am on 24 February 2025

Held

- The respondent bears the onus of persuading the Tribunal that the discretion should be exercised in its favour and that the order should be made
- The discretion conferred should be exercised to require the applicant to attend the scheduled examination to be undertaken by Dr Champion
- It was reasonably required as part of the respondent's preparation of its case to be presented upon the hearing of the substantive proceedings. That outweighs any likely disadvantage to the applicant.





Thanks!

Do you have any questions?

admin@kjklegal.com.au
(08) 7324 7800
www.kjklegal.com.au