ANDERSONS SOLICITORS

LawTalk Blog

Can injured workers force their employers to give them work?

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An updated version of this blog can be found here.

On 1 July 2015 new legislation governing workers compensation claims in South Australia came into operation. One of the objects of the *Return to Work Act 2014* (the RTW Act), section 18, is to assist workers who suffer a work injury to return to their pre-injury work as soon as possible, and retain that employment.

It is only natural that when workers injure themselves at work and cannot perform all their usual duties, they can become anxious and fearful about their career. Will the boss be angry? What will I do if I get the sack? What if this injury is permanent? The RTW Act does provide some protections to injured workers to ensure the employer maintains the employment relationship.

What are the obligations on employers to provide employment to injured workers?

Section 18 of the RTW Act imposes a duty on employers to provide suitable employment to a worker if that worker was injured at work and can return to work (even if the worker can no longer perform the specific duties they were initially employed to perform).

Suitable employment is employment that the worker is fit to perform and is as far as possible the same as, or equivalent to, the worker's employment immediately before they were injured.

This section applies regardless of whether the worker is able to return to full time or only part time work and whether the worker can return to their pre-injury duties or other duties.

In effect, this means that the employer has an obligation to provide the worker with suitable duties even if that means it has to create a new position or assign the worker duties usually performed by other employees.

In addition, if the worker had worked full time hours prior to the injury and is returning initially on part time hours or restricted duties, the suitable employment provided must allow for a graduated increase in hours of work and range of duties.

The employer may argue that it does not have to provide suitable employment to the worker if:

- the employer can show that it is not reasonably possible to provide suitable employment;
- the worker already ended their employment with the employer before the injury occurred;
- the worker terminated the employment after they became unable to work;
- the employer, worker and ReturnToWorkSA have agreed on alternative employment options; or
- the worker has already returned to work with another employer.

Also, this section does not interfere with an employer's right to terminate an employee if the employee has engaged in serious or wilful misconduct.

What are the rights of injured workers to apply for suitable employment?

If a worker believes an employer should have, and failed to, provide them with suitable employment they can serve a written notice on the employer which:

- confirms that they are ready, willing and able to return to work; and
- provides information about the type of employment they think they are capable of performing.

The type of employment nominated by the worker in the notice must be suitable for their physical capacity (based on a medical assessment) and skill level.

If the employer fails to provide suitable employment in accordance with the notice within one month after the notice is provided, the worker can apply to the South Australian Employment Tribunal (the Tribunal) for an order to compel the employer to provide the worker with employment. The worker must make this application within two months after the notice is provided to the employer.

Who can make a section 18 application?

Section 18 can be used by workers who have been injured at work and whose employer has refused to provide suitable duties or has dismissed the worker after they sustained the injury.

Even though the RTW Act only came into operation on 1 July 2015, workers injured before that date can still make an application under section 18. This is because the obligation on employers to provide suitable employment was also included in the previous *Workers Rehabilitation and Compensation Act 1986*.

Also, there is no time limit to making these applications. In other words, even when other entitlements to income maintenance (weekly payments or wages whilst on workers compensation) and medical expenses expire the worker may still be able to make a section 18 application.

What does the Tribunal consider when a section 18 application has been made?

On application, the Tribunal decides whether the employer has established that it is not reasonably possible for it to provide the worker with suitable employment. If established, then the Tribunal will reject the worker's application.

If not established, then the Tribunal decides whether it is reasonablefor the employer to provide employment. Matters the Tribunal may take into account include:

- the work and employment history of the worker;
- the extent of the worker's recovery;
- the prognosis of the worker's injury;
- the worker's skills and retraining potential;
- the employer's size, history and operational circumstances;
- the previous relationship between the worker and employer; and
- health and safety issues.

If satisfied that it is reasonable for the employer to provide employment, the Tribunal must order the employer to provide the worker with suitable duties unless it considers that this would be inappropriate in the circumstances. An example of such circumstances is when there is evidence of workplace conflict or misconduct which could compromise the ongoing relationship of the worker and employer or the employer's operational developments. This could include current or pending retrenchments.

Section 18 is a useful tool for injured workers who are ready to return to work and whose employers are refusing to assist them.

Today's blog is drafted by Associate in Civil Litigation, Michael Irvine with the assistance and research of GDLP student, Karina Dearden.
