



## **COVERED CASES**

### **REHABILITATION WAGES AND SECTION 58B - THE EMPLOYER'S OBLIGATIONS**

#### **DAY v STATE OF SA**

**[2000] SASC 451**

Further to our comments made in Volume1, Issue 17, page 4 Covered, Day v State of SA (see [2000] SASC 451) was been appealed to the Full Court of the Supreme Court. Whilst an appeal from the Industrial Relations Court it does have wide reaching effects on the Corporation and its Agents.

To refresh your memories, the worker had been employed by the Department of Education and Children Services as a contract teacher since 1987. The worker entered into annual contracts with the employer in the latter years. The worker sustained a disability in June 1995, causing her to become incapacitated for work from the 13<sup>th</sup> of November 1995. The worker was totally or partially incapacitated for work until the 22<sup>nd</sup> of January 1998 by which date she had fully recovered and resumed normal duties.

The worker received income maintenance payments for the period of the 20<sup>th</sup> of November 1995 until the 22<sup>nd</sup> of January 1998 at the full rate of average weekly earnings for the first 12 month period, and thereafter at 80% of that rate. Pursuant to various rehabilitation and return to work plans the worker undertook various duties including the functions usually performed by a School Services Officer. The worker did not receive wages for work performed as a School Services Officer, which would have been \$374.18 gross per week.

The worker sought payment of wages for the work she undertook as a School Services Officer pursuant to Section 14 of the Industrial and Employee Relations Act, 1994, arguing that such wages were payable to her pursuant to the School Services Officer (Government Schools) Award. Section 14 of the Industrial Act confers jurisdiction on the Industrial Relations Court to hear and determine a monetary claim for a sum due to

an employee or former employee from an employer or former employer under a contract of employment or an award.

The intention of the worker was to increase the amount received by her from the employer, by arguing that she should have been paid wages for the work she undertook as a School Services Officer of \$374.18 gross per week, as well as compensation by way of top up comprising of 80% of the difference between that amount and her notional weekly earnings.

The total sum would have exceeded 80% of her original notional weekly earnings.

The Full Supreme Court held that an award can only apply to those persons who have entered into a common law contract of employment. The worker needed to establish that she had been employed by the employer under a contract of employment to perform the duties of a School Services Officer. Even in the absence of an award, the worker would need to establish that she was employed at all relevant times as a teacher, and that there was a variation to her contract of employment whereby for a limited period of time she would be required to perform only the duties of a School Services Officer, and would be paid at the appropriate award rate, or some other agreed rate.

There was no evidence to support that a contract of employment was entered into between the worker and the employer for the worker to perform the duties of a School Services Officer for the period 1996 and 1997. There was a reasonable expectation on the part of the employer that as soon as the worker was able to return to teaching duties, the worker would be provided with work as a teacher, as indeed occurred in February 1998.

There was however an obligation on the employer pursuant to Section 58B of the Act to provide suitable employment to the worker. The functions of a School Services Officer performed by the worker were not performed under a contract of employment, however pursuant to a series of rehabilitation and return to work plans given statutory force by Section 28A of the Act. As there was no contract to perform such duties, there was nothing from which the Award could operate, and there was no evidence of a variation of any existing contract of employment, whereby the worker would perform the duties of a School Services Officer and would be paid wages for the work performed.

The practical effect of this decision is that all employers will not be under an obligation to pay wages to a worker who has returned to his/her workplace under a Rehabilitation & Return to Work Plan except where the worker returns to normal duties (or only slightly modified), there is a clear new contract of employment entered into between the employer and the worker, or variation of an existing contract, and the worker will be entitled only to income maintenance payments during the period covered by such Rehabilitation & Return to Work Plans (which compensation will be fully met by WorkCover Corporation).

However the fact that the employer would not in those circumstances be obliged to pay wages to a worker may reduce the number of instances when an employer can argue that

it is not reasonably practicable to provide employment to accommodate a Rehabilitation & Return to Work Plan and this may potentially result in an earlier “return to work” by a worker than otherwise may have been possible.

In other words this decision does not reduce or modify the employer’s liability as set out in Section 58B of the Act to provide suitable employment and the consequences of failing to do so viz a viz the penalty levy which may be imposed by the Corporation.

The effect of this case cannot be ignored by WorkCover Corporation or its agents - in other words it is appropriate that the impact of this case be recognised and that an employer is not “persuaded” to supplement the Corporation’s liability to pay income maintenance to workers by payment of wages where workers undertake a return to work, except in circumstances where there is a return to essentially normal duties, a clear new contract entered into between the employer and the worker or a variation of an existing contract relevant to the duties which a worker is expected to undertake under a Rehabilitation & Return to Work Plan. This is the case whether the duties which an employer can make available are or are not supernumerary, are or are not productive etc.

Additionally, we see the following adverse effects of this decision:-

(a) A return to work within the meaning of Section 36(1)(c) of the Act may not be achieved until a worker has returned to essentially their normal pre-injury duties or a worker has entered into a new contract of employment with the pre-injury employer or an alternate employer to undertake functions different from those required in his / her original contract of employment - we say this as in determining whether there has been a return to work within the meaning of the Act it is necessary to look at whether the worker has reintegrated himself / herself into the workforce and this involves, inter alia, the existence of employment under a contract and entitlement to wages.

(b) Discontinuances pursuant to Section 36(1)(d) of the Act and reductions pursuant to Section 36(2)(b) of the Act will not be appropriate until much later, if at all, than currently is the case.

We do not consider this decision in any way will impact on the application of Section 35(2) of the Act as availability of employment to a worker and receipt of wages by a worker are not relevant to the application of those provisions.

We do not consider a worker can use the effect of this decision to avoid his/her obligations under the Act to undertake suitable employment when it is offered nor avoid the consequences where suitable employment, when offered, is not undertaken by a worker. We do not consider that a worker can argue that it would be unreasonable to expect him/her to attend work to undertake such duties when wages will not be paid. We consider it is highly unlikely that the WCT would sanction such conduct and we do not consider therefore that the WCT would find a refusal to undertake suitable employment to be reasonable, simply because a worker to whom suitable employment is being offered will not be paid wages for undertaking such work. That would defeat the

entire purpose of rehabilitation and the main purpose of the Act. In such circumstances the case manager may consider applying Section 36(1)(f) of the Act.

However be aware a worker may now be able to claim (and in fact may have always been able to claim) travelling expenses to and from the place of employment where such is required under an approved Rehabilitation & Return to Work Plan by virtue of the provisions of Section 32(2)(d) of the Act.

## **RECOMMENDATIONS**

In summary, the effect of this decision is likely to be a higher cost to the scheme by increased income maintenance payments, where in the past such liability was reduced by the employer making some payment to a worker by way of wages.

To reduce this impact, Case Managers will need to look at encouraging a variation to an existing contract of employment between an employer and a worker, or a new contract of employment being entered into, even if only temporarily, as is appropriate in each case and this can be approached as part of a rehabilitation and return to work plan.