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BREACH OF MUTUALITY

Section 36(1)(f) of the Act provides that weekly payments of income maintenance may be discontinued where a worker breaches the obligation of mutuality.

Prior to 1995 the definition of “breach of mutuality” was left to common law case law developed by different Courts and Tribunals over many years. The common law definition of a breach was an unwillingness or unavailability to perform suitable duties, which the injured worker had the capacity to perform.

Actions which could be said to “strike at the heart” of the employment contract (such as acts of gross misconduct) could constitute a breach of mutuality. Other circumstances might include a worker becoming totally incapacitated for work by reason of a non-work related condition.

The common law breach could only apply to a worker who was partially incapacitated for work. A totally incapacitated worker could not breach mutuality at common law. Weekly payments could not therefore be discontinued pursuant to Section 36(1)(f) if a worker was totally incapacitated for work.

In 1995 Parliament introduced Section 36(1a), which provided a number of statutory definitions of breach of mutuality, including a worker:

- Failing to comply with an obligation under a Rehabilitation and Return to Work Plan – S36 (1a)(d);
- Participating in a rehabilitation program in a manner which frustrates
- The objects of the program - s36 (1a)(e);
- Refusing or failing to submit to proper medical treatment for the compensable disability – section 36(1a)(c),

amongst other grounds.

The Full Tribunal has held that these “statutory breaches” may apply to totally incapacitated workers. The exception is Section 36(1a)(g), which simply includes the common law definition of breach of mutuality and Section 36(1a)(f).

In [Elyward v Select Staff Pty Ltd \[2000\] SA WCT 192](#) the worker was partially incapacitated for work when she commenced a period of unpaid maternity leave. Weekly payments were ceased on the basis that she had breached mutuality by making herself unavailable for suitable duties. The worker did not dispute the decision to cease payments. However, during her maternity leave she required surgery for the compensable disability leading to a period of total incapacity for work. The worker claimed payments of income maintenance during this period, notwithstanding the fact that she was not willing or available to perform suitable duties due to her parenting responsibilities. The compensating authority rejected her claim.

The Full Tribunal held that the worker was entitled to weekly payments of income maintenance during the period of total incapacity for work. In initially rejecting her claim the compensating authority had not relied upon any of the “statutory” grounds of breach of mutuality but, instead, relied on Section 36(1a)(g) – that is, the “common law” definition of breach of mutuality – that she was unwilling or unavailable to perform suitable duties. The Tribunal noted that no point was



served by denying weekly payments to a worker because he or she was not willing or available to perform suitable duties when they were totally incapacitated for work and therefore unable to perform suitable duties in any event. In contrast, in relation to the provisions of Section 36(1a)(a) to (e) it was appropriate to apply the sanction of ceasing weekly payments to a worker who was fully incapacitated but who refused, for example, to submit to proper medical treatment or participate in a rehabilitation program.

In summary, therefore, if you are planning to allege that a worker, who is fully incapacitated for work, has breached mutuality, it is necessary to rely upon the statutory definitions contained in Section 36(1a)(a) to (e). You cannot assert a breach of mutuality due to the worker's unwillingness or unavailability to perform suitable duties if that worker is fully incapacitated for work. However, case managers should note that it will be necessary to show that the worker had no reasonable excuse for the actions relied upon as constituting a breach of mutuality. So for example, a worker who has a reasonable excuse for failing to attend a medical examination will not be found to have breached mutuality.

CAUSATION

Two recent decisions of the Tribunal highlight the difficulties often associated with deciding questions of causation.

[*Sanguinetti v North Western Adelaide Health Service* \[2003\] SA WCT 111](#)

After bending over to lift a box a worker experienced sudden and significant pain. He was diagnosed as suffering from a perianal abscess resulting from an infection process in an anal gland. The medical evidence as to whether the condition was work related was equivocal. However, the medical experts conceded that there was a possible connection between the lifting at work and progress of the infection. The Tribunal noted that evidence of a medical possibility, when considered with

other evidence (such as the fact that the worker did not experience any pain until lifting the box) could amount to a legal probability. The Tribunal held that, although the infection process was already under way when the worker lifted the box, the act of lifting the box caused a pathological change in the abscess (making it more acute or accelerating the infection process). Accordingly, the condition was compensable, as a secondary disability.

Compare the decision of [*Vause v CSR Ltd* \[2003\] SA WCT 109](#)

A worker cut his finger while at work. Around 3 ½ hours later he began to feel unwell. He went home and was later admitted to hospital. It was ultimately determined that he had a staphylococcus aureus infection. This infection had dreadful consequences for the worker causing endocarditis, requiring heart surgery. The most probable source of the infection was bacteria on the worker's skin. The worker argued that the only way the bacteria could have entered his blood stream from his skin was when he cut his finger at work. The medical evidence was that it was highly unlikely for signs and symptoms to occur within such a short period of time, suggesting that the cut finger at work was not relevant. One of the medical experts was prepared to concede the possibility that the bacteria had entered the worker's blood stream through the cut finger at work. Although the worker argued that in the absence of any other known event that could have caused the bacteria to enter his blood stream, he had proved his case, the Tribunal was not convinced and upheld the rejection of his claim.



COVERED CASES

Section 43 – Loss of Teeth and Disfigurement

**RILSTONE V WORKCOVER
(KEMPS MURRAY VALLEY NURSERIES
PTY LTD)**

[2003] SA WCT 108

A worker suffered from gum disease and lost teeth as a result of a compensable disability. His teeth were capped and evidence was given that the dental reconstruction work was of a very high standard. The worker claimed Section 43 compensation pursuant to the Schedule 3 category of “loss of all teeth” in addition to disfigurement. The compensating authority argued that if the teeth were capped there could be “no loss of teeth”. The Tribunal rejected this argument stating that “the caps are not teeth and the teeth remain lost”. The worker was entitled to Section 43 compensation for loss of teeth.

However, as the dental reconstruction work was of such a high standard, the Tribunal held that there was no disfigurement.

Salary Sacrifice Superannuation

**NEMER V WORKCOVER (HATTI NOMINEES
PTY LTD)**

[2003] SA WCT 95– Full Tribunal

A worker’s salary package included payment of “additional” superannuation as salary sacrifice. Section 4(8)(ab) provides that any contribution paid by an employer to a superannuation scheme for the benefit of an injured worker is not included in the calculation of the worker’s average weekly earnings. In this case, the Full Tribunal held that “additional” superannuation was also excluded

from the calculation of average weekly earnings, pursuant to Section 4(8)(ab).

Accordingly, when determining notional weekly earnings in a case where there is a “salary package”, close attention should be paid to the actual components rather than the total value of it.

Costs – Set Off

**CUMMINGS V WORKCOVER (EXTRASTAFF
PTY LTD)**

[2003] SA WCT 98

After a Judicial Determination hearing the Tribunal ordered the compensating authority to pay the worker’s costs. The worker’s solicitors then sought an order that the costs be paid directly to them pursuant to Section 95(4). The compensating authority had previously secured a judgement against the worker in the District Court for over \$70,000.00, relating to payments made in the course of the dispute pursuant to Section 36(4) of the Act. The Tribunal declined to order that the costs of JD be paid directly to the worker’s solicitors because to do so would deny the compensating authority the ability to set off its liability to pay the worker’s legal costs against the worker’s debt.

UPDATE

In Covered Volume 2, Issue 31 - September 2003 – we reported on the decision of Lubner v WorkCover where the Tribunal had granted an order compelling the worker to submit to a medical examination with an independent expert. In Tudor v WorkCover (Lightburn Pty Ltd) [2003] SA WCT 110 the Tribunal also issued an order compelling the worker to attend an examination with an independent expert and stayed the proceedings until the worker had complied with the order and attended the medical examination. Is this a trend?



TID BITS

GAVRANICH V WORKCOVER

[2002] SA WCT 118

Her Honour Deputy President Parsons found that a worker who had worked overtime on a total of 16 Friday afternoons out of 32 weeks (that is 50%) could not establish an overtime component pursuant to Section 4(8) of the Act. Her Honour determined that although the worker had performed overtime frequently, she could not discern a qualifying regular and established pattern!

**ATHANASIOU V WORKCOVER
(CHURCH OF ENGLAND COLLEGIATE
SCHOOL OF ST PETER)**

[2003] SA WCT 122

The Tribunal held that it had the power to grant an extension of time for the filing of a Notice of Dissatisfaction with Reconsideration, pursuant to Section 48(1) of the Limitation of Actions Act, 1936.

**ABDULLAH V WORKCOVER (ABC
INTERNATIONAL PTY LTD)**

[2003] SA WCT 120

The Tribunal held that a translator and interpreter was an independent contractor and not an employee.

TILSNER V WOOLWORTHS (SA) PTY LTD

[2004] SA WCT 3

Here the Deputy President was highly critical of an exempt employer, which had rejected a worker's claim noting that a decision maker is not entitled simply to consult its own interests when performing the statutory duty of determining a claim. His Honour also noted that a Section 110 authority issued by the

Corporation had been abused by a licensed investigator who interviewed the worker at length about the circumstances of his dismissal which, His Honour found had "nothing to do with the compensation claim". Accordingly, case managers should ensure that investigators provided with a Section 110 authority are given clear instructions as to the extent of that authority.