Harrington v Healthscope SA **[2017] SAET 65**

SOUTH AUSTRALIAN EMPLOYMENT TRIBUNAL
In Court Session

HARRINGTON, Margaret

v

HEALTHSCOPE SA

JURISDICTION:	Referral
FILE NO:	2620 of 2016
HEARING DATE:	1 June 2017
JUDGMENT OF:	His Honour Deputy President Judge BP Gilchrist Her Honour Deputy President Judge L Farrell His Honour Deputy President Judge M Calligeros
DELIVERED ON:	11 July 2017

CATCHWORDS:

Referral of question of law to the Full Bench - Whether a worker can invoke the jurisdiction provided for by s 18(5) of the Return to Work Act 2014 to challenge the suitability of the employment on offer or whether that provision can only be invoked where there is no employment on offer - ***Held*** *that to construe s 18(5) as allowing the Tribunal jurisdiction in connection with the suitability of the employment on offer best gives effect to the purpose of the section overall and should be preferred – S 18, 25 Return to Work Act 2014.*

Project Blue Sky v ABA [1998] HCA 28; 194 CLR 355

REPRESENTATION:

Counsel:	
Appellant:	Mr C Jacobi
Respondent:	Mr I Colgrave
Solicitors:	
Appellant:	Lieschke and Weatherill
Respondent:	Duddy Shopov

1 This is a referral of a question of law that concerns the scope of the power vested in the Tribunal by s 18(5) of the *Return to Work Act 2014* (RTW Act) that enables an employer to be ordered to provide suitable employment to a worker.

2 Margaret Harrington commenced employment with Healthscope SA in January 1998 as a full-time enrolled nurse. Over the course of that employment she has sustained injuries to various body parts, and as a result, is partially incapacitated for work. Following the injuries, Ms Harrington has been undertaking work for Healthscope under various recovery/return to work plans. Such plans are provided for by s 25 of the RTW Act and set out the respective actions and responsibilities of the worker and the employer, and where appropriate, the compensating authority. The purpose of a recovery/return to work plan is to achieve the earliest possible safe return to work for an injured worker.

3 In January and February 2016 Healthscope advised Ms Harrington that it identified administrative duties as suitable employment. By letter dated 22 February 2016 it advised Ms Harrington that she had been transferred to that position. Ms Harrington indicated that she did not wish to be transferred and that she did not agree to accept the transfer.

4 Section 18(3) of the Act enables a worker who has been incapacitated for work as a result of a work injury to give notice to his or her pre-injury employer that he or she is ready, willing and able to return to work and seeks suitable employment. Such notice must include information about the type of employment that the worker considers he or she is capable of performing.

5 On 22 April 2016, Ms Harrington gave Healthscope notice under s 18(3). She advised that she considered herself capable of performing all of the duties on an enrolled nurse including patient transfers and the operation of the emergency trolley in performing emergency resuscitation and defibrillation functions. She stated that the only qualification was an inability to undertake two person assist transfers.

6 Healthscope responded on 18 May 2016 offering employment in an administrative position.

7 Section 18(4) of the RTW Act provides that if an employer fails to provide suitable employment within one month of receiving a notice under s 18(3), the worker has one month in which to lodge an application with the Tribunal. Section 18(5) provides that if the Tribunal is satisfied that it is not unreasonable for the employer to provide employment to the worker, the Tribunal must order the employer to do so, unless in the exercise of its adjudicative function, the Tribunal determines otherwise.

8 That leads to the issue that we must determine. Healthscope contends that s 18 only has application where the pre-injury employer is not offering the worker any employment. Heathscope contends that because it has offered Ms Harrington employment, she cannot rely on s 18 to secure an order from the Tribunal.

9 Those parts of s 18 relevant to the present issue provide:

> "(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 to his or her previous employment), 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 as, or equivalent to, the employment in which the worker was working immediately before the incapacity).
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> (2) Subsection (1) does not apply if—
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> (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
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> (b) the worker left the employment of that employer before the commencement of the incapacity for work; or
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> (c) the worker terminated the employment after the commencement of the incapacity for work; or
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> (d) new or other employment options have been agreed between the worker, the employer and the Corporation under section 25(10); or
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> (e) the worker has otherwise returned to work with the pre-injury employer or another employer.
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> (3) Furthermore, if—
>
> (a) a worker who has been incapacitated for work in consequence of a work injury seeks employment with the pre-injury employer consistent with the requirements of subsection (1); and
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> (b) the worker, in seeking the employment—
>
> (i) by written notice to the employer—

(A) confirms that he or she is ready, willing and able to return to work with the employer; and

(B) provides information about the type of employment that the worker considers that he or she is capable of performing; and

(ii) complies with any other requirements prescribed by the regulations; and

(c) the employer fails, within a reasonable time, to provide suitable employment to the worker,

the worker may apply to the Tribunal for an order under subsection (5).

(4) If an employer fails to provide suitable employment under subsection (3) within 1 month after the worker seeks such employment in accordance with that subsection (the ***prescribed period***), the application by the worker to the Tribunal may be made within 1 month after the end of the prescribed period unless the Tribunal allows an extension of time.

(5) If, on an application under subsection (3), the Tribunal is satisfied that it is not unreasonable for the employer to provide employment to the worker, the Tribunal must order the employer to provide to the worker employment specified by the Tribunal unless the Tribunal, in the exercise of its adjudicative function, determines otherwise."

10 Healthscope relies primarily upon the language of ss 18(3) and 18(5), and in particular the expression "seeks employment with the pre-injury employer" in s 18(3) and the expression "the Tribunal is satisfied that it is not unreasonable for the employer to provide employment" in s 18(5). It says that this indicates that s 18 is only concerned with a situation where there is no offer of employment to a worker. On Healthscope's construction, any offer of employment defeats an application under s 18.

11 There are some curious consequences that flow from the construction urged upon us by Healthscope. Section 18(5) makes it clear that if the Tribunal makes an order for employment and that the Tribunal specifies what that employment is. The Act clearly contemplates that it is within the jurisdiction of the Tribunal to identify what it regards as suitable employment for an injured worker. However, on Healthscope's construction, the Tribunal has no jurisdiction to deal with an offer of patently unsuitable employment. It is hard to understand why a worker who is offered no employment can seek an order from the Tribunal that

suitable employment be offered, but a worker who is being offered unsuitable employment cannot seek such an order.

12 The duty that s 18 imposes upon a pre-injury employer is contained in s 18(1). It directs a 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 as, or equivalent to, the employment in which the worker was working immediately before the incapacity)."

13 An offer of substantially reduced hours of work to an incapacitated worker who was working full time immediately prior to being injured may not be the provision of work equivalent to the employment in which the worker was working immediately before the incapacity. The answer will depend on the worker's capacity for work and the whether it is reasonably practicable for the employer to provide that work. On Healthscope's suggested construction, the Tribunal is not able to provide a worker with any relief under s 18(5), even if it was established that the pre-injury employer was able of offer more hours of work.

14 Ultimately the issue is one of statutory construction.

15 In *Project Blue Sky v ABA*, McHugh, Gummow, Kirby and Hayne JJ made the following observations that are pertinent here. They said:

> "The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined 'by reference to the language of the instrument viewed as a whole'. In *Commissioner for Railways (NSW) v Agalianos*, Dixon CJ pointed out that 'the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed'. Thus, the process of construction must always begin by examining the context of the provision that is being construed.
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> A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals. Where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions. Reconciling conflicting provisions will often require the court "to determine which is the leading provision and which the subordinate provision, and which must give way to the other'. Only

> by determining the hierarchy of the provisions will it be possible in many cases to give each provision the meaning which best gives effect to its purpose and language while maintaining the unity of the statutory scheme."[1]

16 The leading provision is s 18(1). It declares the purpose of the provision to be, so far as is reasonably practicable, to get injured workers back to their pre-injury employment or close to it. The word "suitable" qualifies the word "employment" in s 18(1). While s 18(1) mentions "suitable employment", ss 18(2), (3) and (5) mention "employment".

17 However, a closer reading reveals that the references to employment in ss 18(2), (3) and (5) are references to suitable employment.

18 The reference to "employment" in s 18(2)(a) and to the requirement that it must be "reasonably practicable" for an employer to offer suitable employment is a reference to employment in accordance with subsection (1). In other words, s 18(2)(a) is referring to suitable employment under subsection (1).

19 The references to "employment" in ss 18(2)(b) and (c) are references to the worker's earlier employment with the employer, and s 18(2)(d) refers to where a worker has already agreed new employment options with the employer and the Corporation.

20 Section 18(3)(a) concerns a worker who "seeks employment with the pre-injury employer consistent with the requirements of subsection (1)." The reference to subsection (1) is a reference to suitable employment as it is explained by the words in the third set of brackets found in s 18(1)

21 Section 18(5) explains how an application under s 18(3) is to be dealt with by the Tribunal. Because s 18(3) concerns "employment with the pre-injury employer consistent with the requirements of subsection (1)", namely suitable employment, it follows that s 18(5) also concerns suitable employment. This reading is confirmed by s 18(4) which expressly refers to an employer's failure "to provide suitable employment under subsection (3)".

22 Section 18(5) is the mechanism by which suitable employment is provided, where appropriate. Properly construed, the Tribunal must have jurisdiction to determine whether the employment which has been offered to the worker is suitable employment or not.

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[1] [1998] HCA 28 [69]-[70]; 194 CLR 355.

23 We would answer the questions posed by the referral as follows:

1. Is the Applicant's application invalid (and there is accordingly no jurisdiction to determine it) by reason of the fact that the Respondent has, at all relevant times, provided employment to the Applicant? **No**

2. In determining the application pursuant to section 18(5) of the Return to Work Act 2014 ("the Act') is it relevant for the Tribunal to consider whether the employment provided is "suitable employment" within the meaning of the Act? **Yes**

PUBLICATION OF THESE REASONS

It is the practice of this Tribunal to publish its reasons for decision in full on the Internet. If any party or person contends that these reasons for decision should not be published in full the party or person must make an application within seven days of the delivery of these reasons. The application shall be by an Application for Directions with a supporting affidavit and should be addressed to the presiding member(s). If no such application is lodged within the time specified these reasons will be published in accordance with the Tribunal's usual practice.