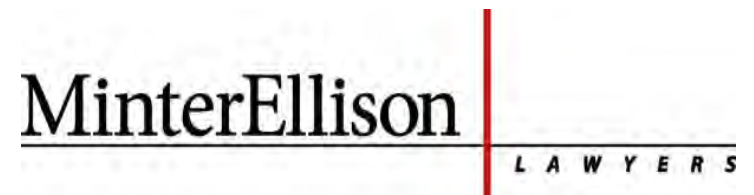


Managing Mutuality

Mark Calligeros

FILE NUMBER



What is mutuality?

There are, or at least were two main kinds:

1. Worker/employer mutuality

' ... the degree of co-operation that is essential to an effective working relationship ...'

Kelvinator v Jezior (1988) 49 SASR 592

- This co-operation is often described as the worker being 'ready, willing and able' to perform suitable work / employment.

1. Worker / Employer Mutuality

- A worker may be ready and willing, but not able to perform alternative work.
- A worker may be ready and able, but not willing to do alternative work.
- Ready connotes that a sufficient degree of recovery has been reached to do alternative work.
- Willing is about the worker exercising his or choice to do the alternative work on offer.
- Able refers to the worker's capacity to do the work.

2. Statutory Mutuality - Post 1 July 2008

- The form of s35 introduced on 1 July 2008 is different to that considered in *Kelvinator v Jezior*.
- It remains to be seen whether worker/ employer mutuality still operates in the way it did pre 1 July 2008, or at all.
- To attempt to answer that, a careful look at s35 is needed.

Statutory Mutuality

- S35(7) - provides a worker shall not be treated as making 'every reasonable effort to return to work in suitable employment' if the worker has:
 - a) refused to have an assessment made of his or her employment prospects; or
 - b) refused or failed to take all reasonably necessary steps to obtain suitable employment; or
 - c) refused or failed to accept an offer of suitable employment from any person; or
 - d) refused or failed to participate in a Rehabilitation Program or a R&RTW Plan.

- S35(6) – A worker is taken to be making every reasonable effort to return to work in suitable employment for (subject to s35(7)), in any reasonable period when:
 - a) where the worker is waiting for a response to a request for suitable employment made by the worker and received by the employer; and
 - b) the employer's response is that suitable employment may be forthcoming, when the worker is waiting for it to commence; and
 - c) if the employer's response is that suitable employment cannot be provided at some time, the worker is waiting for a response to requests for suitable employment from other employers; and
 - d) the worker is waiting for the commencement of a R&RTW Plan, after approval has been given.

The New Mutuality – S 35(6) & (7)

- S35(6) and (7) read together show that unless a worker is making a positive attempt to find alternative employment at all reasonable times, payments may cease.
- If a worker is waiting for a response of the kind in s35(6) for a reasonable period, then the worker is taken to be making 'every reasonable effort to RTW in suitable employment.'
- The test also assists workers avoid a s 35A(3) reduction of weekly payments as if the worker is making 'every reasonable effort', he or she will be immune to a 'designated weekly earnings' reduction.

The New Mutuality – S 35(6) & (7)

- There now seems to be a higher standard of cooperation required of workers than before.
- The onus is cast upon the worker to show that 'every reasonable effort' has been made by him or her.
- A reduction can be made in every entitlement period if 'every reasonable effort' is not made.
- It is essential that sound and considered case management and rehabilitation are in place otherwise the legislative intention may be derailed.

Issues

- Is the onus still on an employer/ compensating authority to offer suitable employment to the worker or is the onus now on the worker?
- If an offer of suitable employment is made by someone other than the employer, what happens if the employer subsequently offers suitable employment?
- What if a worker who is covered by a R&RTW Plan is offered suitable employment which is beyond the scope of the plan while it is in operation?

The New Mutuality – S 35(6) & (7)

- The 1986 Act probably intended that statutory mutuality operate prior to the 2nd anniversary of incapacity.
- There seems little doubt that the 1 July 2008 amendments will achieve that objective.
- After *Jeziar, Grigor* took another step toward a broader notion of mutuality, but stopped short of wholesale change.
- The most recent amendments will make it very difficult not to go the whole way.

Section 36(1)(f) & (1a) – Breaches of the obligation of mutuality

- As well as the new s35(6) & (7), the older instances of breach of statutory mutuality remain.
- These are all contained in s36(1a) and that sub-section is accessed via s36(1)(f).

Section 36(1)(f) & (1a)

- S36(1) contains nine bases upon which weekly payments can be ceased.
- S36(1)(e) provides that one of these is where a worker is dismissed for serious and wilful misconduct.
- S36(1)(f) provides that one of these is where 'the worker breaches the obligation of mutuality'.
- S36(1a) provides eight instances of breach of the obligation of mutuality. They are:

Section 36(1)(f) & (1a)(f)

- f) The worker refuses or fails –
 - i. to undertake work that the worker has been offered and is capable of performing; or
 - ii. to take reasonable steps to find or obtain suitable employment;

or, having obtained suitable employment, unreasonably discontinues the employment; or

Section 36(1)(f) & (1a)(fa)

fa) The worker refuses or fails to participate in assessments of the worker's capacity, rehabilitation progress or future employment prospects (including by failing to attend); or

Section 36(1)(f) & (1a)(g)

- g) The worker does anything else that is, apart from this subsection, recognised as a breach of the obligation of mutuality.
- This sub-section is a catch all and has been taken to refer to non-statutory mutuality, or worker / employer mutuality.
- Eg., a worker may act inconsistently with the cooperation required by the contract of employment, but not commit an act of serious and wilful misconduct.

The New Mutuality

1. A worker breaches mutuality when he or she acts or omits to act as described in s36(1a).
 - Weekly payments will no longer continue for the duration of a s 36 dispute.
 - Unless the WorkCover Ombudsman considers it was 'not reasonably open' to discontinue payments under s 36(15), they will not continue to be made while the dispute is being resolved.

The New Mutuality

2. For the purpose of issuing a s36(1)(f) and (1a) notice, Employers Mutual and WorkCover will adopt a '3 strikes' policy.
 - There must be three instances of breach before a s36 notice is issued.
 - They must be instances where the case manager has a genuine belief that there has been a real breach.
 - Cases of honest mistake or genuine excuse do not count.

The New Mutuality

3. Although the 'three strikes' policy is in place, there will be events which warrant the immediate issue of a s36 notice. These may include:
- dismissal for serious and serious wilful misconduct;
 - an instance of violence against another person at work;
 - larceny, deceit or some other conduct which strikes at the heart of the requisite trust;
 - a clear breach of a fundamental term of the contract of employment.
 - Serious breaches of statutory mutuality.

How to use the new mutuality provisions

Recommendations re R & RTW plans:

- Be willing to modify or concede minor points.
- Meet with the worker and his or her representative to discuss more serious refusals / issues.
- Document offers to meet and compromise in writing.
- Offer such meetings outside of the WCT dispute resolution framework as R&RTW disputes are usually irrelevant by the time they are heard.
- Ask the worker why he or she has refused or failed to do any of the things required by s36(1a)(fa).

How to use the new mutuality provisions

Case managers now have more power than ever before under the Act. With power goes responsibility. Where a case manager has erred on the side of caution and tried to be fair, there is a far greater chance that the s36 notice will ultimately be upheld.

Discussion