



SOUTH
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SOUTH AUSTRALIAN EMPLOYMENT TRIBUNAL

FAST TRACK STREAM RULES 2020

(draft for consultation as at 28 April 2020)

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FAST TRACK STREAM RULES 2020

The President and Deputy Presidents of the South Australian Employment Tribunal, noting the *South Australian Employment Tribunal Rules 2017*, make the following further Rules under the *South Australian Employment Tribunal Act 2014*.

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1. Name of Rules

These Rules may be referred to as the *South Australian Employment Tribunal Fast Track Stream Rules 2020* (and by the abbreviation FTSR).

2. Commencement

The Rules will commence operation on the date of publication in the Gazette.

3. Objects

The objects of the FTSR are to –

- a. Establish a Fast Track Stream (FTS) for the resolution of disputes arising under the *Return to Work Act 2014* in non-complex cases which may be ready for trial in a short period of time;
- b. Facilitate the FTS cases proceeding to trial at short notice noting the distancing requirements between people whilst dealing with the Covid-19 pandemic;

- c. Have the FTS cases available to replace matters that have been removed from callovers of cases to be heard as a result of the impact of the Covid-19 pandemic;
- d. Facilitate the allocation and transfer of actions between streams to ensure that an action is heard in the most appropriate stream;
- e. Limit interlocutory steps and pre-trial hearings in the FTS;
- f. Simplify the hearing of FTS cases.

4. Referral

- a. At any time following the referral of a matter for Hearing and Determination, an application may be made by any party to the proceedings to have the matter placed into the FTS or the Tribunal may do so of its own motion.
- b. At any time a party to the proceedings may apply to have a matter which has been placed in the FTS, to be transferred back to the general stream or the Tribunal may do so of its own motion.

5. Criteria

- a. In determining whether a matter should be placed in the FTS, the Tribunal will have regard to the following:
 - i. Whether all parties to the proceedings consent to such a placement;
 - ii. Whether it will be unfair to a party for the matter to proceed in the FTS;
 - iii. Whether the credibility of any witness is in issue and the ability to receive that evidence in the court room;
 - iv. The advantages and disadvantages to the parties of the matter proceeding in the FTS;
 - v. Whether the matter is likely to be concluded in one sitting of consecutive days of the Tribunal;
 - vi. The number of witnesses required to give oral evidence;
 - vii. The anticipated length of time of each witness giving oral evidence;
 - viii. Generally whether there is a need for oral evidence to be given in a court room;
 - ix. The extent to which the parties are seeking the presence, within the court room, of persons other than the witness giving oral evidence at the time and counsel for each party, for example, an interpreter or persons required to be present to provide

instructions;

- x. The number of parties to the proceedings and the number of counsel to appear at the Bar Table;
- xi. The anticipated length of opening addresses;
- xii. Whether final submissions are to be given orally or in writing;
- xiii. Any other matter the Tribunal considers relevant to the exercise of the discretion.

6. Responsibility of applicants

- a. Any party seeking a placement of a matter into the FTS is to first consider, by reference to the objects and criteria in these FTSR, whether it is appropriate for the FTS and to seek the position of all parties before any application is made to enter the matter into the FTS. If objection is taken by another party, an application to the Tribunal should only be made if the applicant reasonably considers that there is no merit in the objection raised.

7. Tribunal's control of procedure

- a. The *South Australian Tribunal Rules 2017* continue to have general application to matters before the Tribunal which are placed in the FTS.
- b. Subject to any contrary direction by the Tribunal, priority will normally be given to the FTSR over the application of the *South Australian Employment Tribunal Rules 2017* where there is an inconsistency between the Rules, whilst a matter is in the FTS.

8. Establishment of a Fast Track Stream

- a. The FTS is established in the South Australian Employment Tribunal.
- b. It is intended that proceedings which are non-complex, may readily proceed to trial and are amenable to modification to the mode of hearing so as to limit the presence of persons within a courtroom for the purpose of conducting a trial may proceed in the FTS of the Tribunal.

9. Entry into and designation of the Fast Track Stream

- a. The Registrar of the Tribunal is to maintain a record of matters which are entered into the FTS.
- b. Upon a matter being entered into the FTS all subsequent documents filed in the proceeding are to show as part of the case heading, immediately above the case number, that it is either the subject of an application for placement of the proceeding in the FTS or that the document relates to a proceeding which has been placed in the FTS as at the time of the filing of the relevant documents. [possible visual example].

10. Form of application of entry into the Fast Track Stream

- a. A party to the proceeding may, by application for direction, apply to the Tribunal to transfer a proceeding out of the general stream into the FTS. If a matter is in the FTS, an application may be made to transfer it back to the general stream.
- b. The application for directions is to be filed and served upon each party to the proceeding.
- c. The application for directions must set out the material particulars, relied upon by the applicant, in seeking to have the matter transferred to the FTS or back to the general stream.
- d. Each application for transfer into the FTS or back to the general stream shall be treated as specially returnable.
- e. The application for directions is not required to be supported by a supporting affidavit upon filing but the Tribunal may, upon application of any other party to the proceeding, or of its own motion, require that the applicant subsequently file an affidavit in support.
- f. Each party served with an application to have a matter transferred to the FTS or application to remove a matter from the FTS shall, within 2 business days provide its position, in writing, in relation to the application and to provide such position to the Registry of the Tribunal and to each party to the proceeding.

11. Preliminary hearing

- a. Upon acceptance of a matter into the FTS, a preliminary hearing is to be held on the date and time to be fixed by the Registrar and notified to the parties.
- b. The principal matters to be considered at the preliminary hearing are:-
 - i. The prospects of settlement;
 - ii. Identification of the real issues in dispute;
 - iii. Whether the matter proceeding to hearing and determination in the FTS is by way of a final hearing or a preliminary hearing;
 - iv. Directions for interlocutory steps and evidence at trial;
 - v. Hearing or fixing a date for hearing of any interlocutory application or other pre-trial matters;
 - vi. Fixing the date of the preliminary point or final determination hearing;
 - vii. If it is proposed that oral evidence be adduced at trial then the Court will consider the limiting of the number of expert, and non-expert witnesses to give oral evidence, the time to be permitted for

asking questions of witnesses, and whether its witness is required to be present in the court room during the trial.

- viii. The number of persons required to be in the courtroom during the trial.

12. Interlocutory applications

- a. Before making an interlocutory application for any order which the Tribunal is empowered to make before trial, a party is first to use reasonable endeavours to resolve the issue by agreement. A failure to do so will be taken into account in determining the appropriate court order relating to the application.
- b. An interlocutory application is to identify concisely, but with sufficient detail, the orders sought and the grounds on which it is sought.
- c. A supporting affidavit is not to be filed with an interlocutory application but the Tribunal may require a supporting affidavit to be subsequently filed and give directions in that regard.

13. Interlocutory hearings

The hearing of an interlocutory application will be conducted informally and may be conducted by teleconference or videoconference.

14. Conduct of trial

- a. The parties to a proceeding, and their lawyers, have a duty to the Tribunal to take all reasonable steps to ensure that the trial proceeds as expeditiously and efficiently as possible.
- b. The trial Presidential Member may control the conduct of the trial to efficiently identify the issues in dispute, the parties' respective contentions and hear the evidence relevant to those issues.
- c. The trial Presidential Member may give directions about:-
 - i. The issues on which the Tribunal requires evidence;
 - ii. The nature of the evidence the Tribunal requires to decide those issues;
 - iii. The way in which the evidence is to be placed before the Tribunal;
 - iv. Limiting the number of witnesses or the amount of evidence that a party may call or introduce on a particular issue.
- d. By way of illustration, the presiding Presidential member may:-
 - i. Direct where multiple expert opinions have been received by a party on a particular issue that only one expert give oral evidence and that the opinion of the other experts be received by way of

written report as untested evidence;

- ii. Consistent with Rule 52(a) of the *South Australian Employment Rules 2017*, give directions as to the order in which the witnesses give evidence, regardless of the party by whom they are called;
- iii. Enquire into and determine the issues in dispute at trial;
- iv. Direct that witnesses give evidence on different topics and different times during the trial;
- v. Direct that submissions be heard on different topics at different times during the trial or otherwise depart from the usual order in which submissions are made;
- vi. Limit the time spent on the whole or any part of evidence or submissions;
- vii. Direct that oral evidence be received in such manner as the Tribunal thinks fit including the evidence of a witness by teleconference or videoconference;
- viii. Determine whether submissions are to be received orally or in writing.

15. Non-expert evidence in chief

- a. The Tribunal will determine the form of the evidence in chief of non-expert witnesses.
- b. In general, the evidence will be in the form of an affidavit and either filed and served in a form which has been sworn or affirmed or the oath or affirmation will be taken at trial upon the filing of a solicitor's affidavit, with the unsworn affidavit, where the solicitor attests to:
 - i. The reasons why it was not possible for the witness affidavit to be sworn or affirmed by the deponent;
 - ii. The witness affidavit having been prepared by the solicitor on the instructions of the deponent;
 - iii. The deponent having advised the solicitor that he/she has read the unsworn and unaffirmed affidavit and agrees with its content; and,
 - iv. The deponent having provided an assurance to the solicitor that he/she will affirm its contents at trial.

16. Reasons for decision

In matters proceeding to trial from the FTS, reasons for decision may be less expansive and less intensive with a focus upon the making of critical findings and addressing the contested issues.

17. Review

The continuation of these FTSR shall be reviewed from time to time by the Tribunal.

Dated:

The Honourable Justice Steven Dolphin
President

His Honour Judge Anthony Rossi
Deputy President

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