Gilchrist Connell

Adelaide
Brisbane
Melbourne
Perth
Sydney

Level 4, 41 Currie Street
Adelaide SA 5000
Telephone: +618 8215 7000
Facsimile: +618 8231 1255
info@gclegal.com.au
www.gclegal.com.au

Gilchrist Connell Pty Ltd
ACN 131 087 673

Susan Roberts v Department for Education – Section 18 Case

Introduction

The recent Judgment in *Roberts v Department for Education* is an important case in relation to section 18 Applications – being applications by workers for an order requiring the pre-injury employer to provide suitable employment.

The section 18 Application made by Ms Roberts was dismissed by His Honour Judge Crawley.

The significant legal points arising from the Judgment are:

1. The Tribunal does not have the jurisdiction to make an order for an employer to provide suitable employment unless, at the time of the proposed order, the worker has an ongoing incapacity for work by reason of a work injury.

2. A prolonged absence from work by reason of a work injury does not, of itself, amount to an incapacity for work.

3. Provided that adequate notice of alternative suitable employment positions are given, a worker is not confined to the suitable employment positions nominated by the worker in either the section 18(3) Notice or the section 18 Application.

4. For workers employed under the *Public Sector Act 2009,* employment nominated by a worker will not be suitable within the meaning of section 18 in the absence of the worker securing the position by way of a merit based selection process if section 46 of the *Public Sector Act* applies (subject to regulation 17 of the *Public Sector Regulations 2010*).

5. Even if an employment position nominated by a worker is suitable, the Tribunal may exercise its discretion not to order the employer to provide suitable employment if the worker is not ready, willing and able to undertake the position unconditionally.

6. A worker may not be ready, willing and able to undertake a position unconditionally if, for example, the worker imposes restrictions or conditions that are not medically supported or explained in the evidence.

Background to the Application

Ms Roberts was employed by the Department as an Aboriginal Education Worker.

In 2010, a specially funded project was established to create Aboriginal Children and Family Centres. Ms Roberts successfully obtained a temporary position of Community Development Coordinator of a Centre to be established at Christies Beach.

In February 2014 Ms Roberts ceased work due to a psychiatric injury. A claim for compensation for the injury was accepted and Ms Roberts received workers compensation benefits.

In 2018 Ms Roberts lodged an application for suitable employment under section 18 of the *Return to Work Act 2014* (**the Act**) seeking the pre-injury duties she was performing as a Community Development Coordinator.

At the time that the application was lodged, Ms Roberts continued to have a partial incapacity for work. However, by the time of the trial, the medical evidence established that Ms Roberts had ceased to be incapacitated for work by reason of her work injury.

Incapacity

The Department argued that the Tribunal does not have jurisdiction to order suitable employment unless a worker has a continuing incapacity for work as a result of a work injury.

Ms Roberts argued that the Tribunal has the jurisdiction to order an employer to provide suitable employment if a worker had, at any stage, been incapacitated for work as a result of the work injury.

In the alternative, Ms Roberts argued that the Tribunal had jurisdiction if, at the time that the section 18 Application was made, there was an incapacity for work.

In support of her arguments, Ms Roberts submitted:

1. Section 18 talks in terms in terms of a worker who '*has been incapacitated*' and not a worker who '*has been and continues to be incapacitated*'.

2. there is no reason why a worker who has suffered a compensable injury should not have the support of the Tribunal to enforce a return to employment even when they have recovered from that injury;

3. the Act is concerned with endeavouring to return workers who have been injured to work;

4. the Tribunal can take notice of the fact that workers absent from work for a period of time, even if recovered, may well require assistance to be reintegrated into the workforce.

Judge Crawley rejected the arguments made by Ms Roberts.

Judge Crawley considered that, where a worker has been injured and been unable to work as a consequence, section 18 imposes an obligation on an employer once the worker is fit to return to some employment.

However, the Judge said:

> '*Once an injured worker ceases to be incapacitated for work, the rights and obligations in respect of any employment fall to be determined under the laws governing employment generally; not under a scheme designed to regulate and assist those suffering from a worker injury. It follows that the powers created by the section may only be applied in favour of a worker who remains incapacitated at the time an order is made.*
>
> *To decide otherwise would extend the rights and obligations for formerly injured workers potentially indefinitely. Once a worker had suffered an injury, no matter how trivial or short term, an application could be made under that provision at any time thereafter. That cannot be what was intended.*
>
> …

> *Accordingly, I determine I have jurisdiction to make an order only in circumstances where a worker has, at the time of the proposed order, an ongoing incapacity for work by virtue of a work injury.*'

Judge Crawley also rejected the argument made by Ms Roberts that her prolonged absence from work by virtue of the work injury disadvantaged her and that disadvantage amounted to an incapacity. His Honour considered that the incapacity must arise from a work injury, not from a worker being absent from work.

Judge Crawley dismissed the section 18 Application on the basis that Ms Roberts had ceased to be incapacitated and, therefore, the Tribunal had no jurisdiction.

It was therefore not necessary for Judge Crawley to consider any other arguments - but he went on to do so given the evidence and submissions presented.

The Scope of a Section 18 Application

In her application for suitable employment, Ms Roberts sought employment as a Community Development Coordinator.

However, in her Affidavit filed before trial, Ms Roberts said she sought employment as either a Community Development Coordinator or employment as an Aboriginal Education Worker.

The Department argued that the Tribunal could only consider the suitability of employment positions identified by a worker in his or her section 18 Application.

In support of this argument, The Department relied upon the decisions of the Tribunal in:

1. *Oldman v Department for Education* where President Dolphin said that *'when considering whether a suitable employment order should be made in any given circumstance, the specific employment nominated by the applicant will frame the relevant enquiries …'*

2. *Walmsley v Crown Equipment Pty Ltd*, where Judge Hannon said that: '*The question is whether an order should be made for specified employment nominated by the applicant* …'

Ms Roberts argued that suitable duties can include any other duties subsequently identified by a worker, provided sufficient notice is given so as to afford the employer procedural fairness.

Judge Crawley accepted this argument. He noted that matters in the Tribunal are "*dynamic*" and determined that, provided adequate notice is given, a worker may rely upon alternative positions at trial and is not limited to the suitable duties set out in the 18 Application.

Suitability

Judge Crawley found that the role of a Community Development Coordinator was not suitable, and, in any event, it was not reasonably practicable for the Department to provide such employment.

In finding that the position of a Community Development Coordinator was not suitable, Judge Crawley noted the following:

1. The positions were transferred from the Department for Education to the Department of Human Services, another public sector agency;

2. There were 46 Community Development Coordinator positions and with no present vacancies. Five of the positions were geographically proximate to the home of Ms Roberts;

3. The role had changed since it was performed by Ms Roberts and she would require additional and ongoing training;

4. The focus of the role was no longer on Aboriginal families.

Section 46 of the *Public Sector Act 2009* provides, amongst other things, that the engagement of an employee of the public sector, or the promotion of an employee to a higher remuneration level, may only occur as a consequence of a merit based selection process.

Judge Crawley determined that, in the absence of Ms Roberts undergoing a merit based selection process, employment as a Community Development Coordinator was not suitable within the meaning of section 18.

However, in relation to the Aboriginal Education Worker roles, the Judge found that they were suitable.

Residual Discretion

Judge Crawley decided that, even if Ms Roberts had an incapacity for work as a result of her work injury, he would decline to make an order that the Department provide suitable employment to Ms Roberts.

In exercising his discretion, Judge Crawley relied on the following:

1. Ms Roberts said she could only work in primary schools, but this restriction was not medically supported;

2. Ms Roberts said she would require, as a condition of any offer of employment, that there be a discussion regarding the cultural aspect of the role and that the role be culturally sensitive, culturally safe and that others be culturally aware. None of those conditions were explained in the evidence;

3. Ms Roberts had previously disparaged one of the roles.

Judge Crawley therefore found that Ms Roberts was not ready, willing and able to undertake these roles unconditionally and so no order should be made requiring the Department to provide suitable employment.

Conclusion

The judgement in *Roberts* sets a favourable precedent for employers.

It is important for employers, in dealing with section 18 Applications, to ensure they have up to date medical evidence about work capacity. If the medical evidence establishes that a worker does not have any incapacity for work, then the Tribunal does not have jurisdiction.

Even if an employment position nominated by a worker is suitable, workers need to show that they are ready, willing and able to undertake the position unconditionally. Workers who impose restrictions or conditions that are not medically supported or explained in the evidence may not be ready, willing and able to undertake the position unconditionally – in which case, the Tribunal may not make an order for suitable employment.

Ms Roberts has lodged an appeal.