

On 1 July 2015, [section 18](#) of the *Return to Work Act 2014* (SA) (the Act) came into effect. This provision replaced the former section 58B, which required an employer to provide an injured worker suitable duties where reasonable, with a worker based right to request duties, backed by broad-ranging powers for the South Australian Employment Tribunal ([SAET](#)) to order an employer to employ an injured worker, even so far as creating a position or duties for the worker.

Within two weeks of this provision coming into effect, one of our clients was targeted with a tactical use of this provision. Employers in South Australia now face considerable risks with a worker who is injured in their employment. Because of this, employers need to take a far more active role in managing compensation claims, and disputing questionable ones.

### The return to work obligation

Under section 18, an injured worker may make a written request to the employer from whose employment their injury arose to provide them duties that they are fit to perform. The worker must establish what duties they are fit to perform. Once this is done, the employer has in effect one month to respond. If the worker does not believe the employer has provided [suitable employment](#), they have a further month to make an application to SAET (unless extended).

This provision is unprecedented in its scope. There is no limitation on how long after the injury an application may be made, it applies to workers who have been terminated (eg redundancy), the worker does not have to have an open claim, it extends to workers who are unhappy with the duties being applied and there is no time limit on the duration of a return to work order.

These orders may also be sought by [workers](#) who are not employees (such as labour only subcontractors in the construction industry). This could lead to the perverse situation of an employer being required to provide employment to a former subcontractor.

### The costs risk

One unique feature of this jurisdiction is its costs provisions. If the worker is successful, the employer is required to pay the worker's costs (and their own). However, if the tribunal declines to make an order, Return to Work SA pays both parties costs of both parties. In other words, the employer faces a 'double or nothing' costs situation and it is only in where an employee acts unreasonably (a very high threshold) that they face costs pressures. While there is a [limit](#) on the costs that can be awarded, the amount could still be significant.

The combination of extraordinarily broad powers and costs creates obvious risks for employers that section 18 applications will be used tactically by workers and their representatives – not only in relation to compensation disputes, but also more broadly in relation to employment disputes – including disciplinary matters, bullying claims and redundancies to name but a few.

### Defences

There are five circumstances where an employee is not entitled to an order under section 18. Employers will need to consider these circumstances both in the context of managing workers compensation claims but also in the context of managing the risks associated with tactical claims.

### **It is not reasonably practicable to provide duties**

The primary defence is that it is not reasonably practicable to provide duties. The onus of proof rests with the employer to demonstrate that it is not reasonably practicable. Since the legislation states that the duty to provide work extends to circumstances “whether or not the work is available” it is extremely risky to rely on this exception, at least until case law develops. NB: being dismissed for serious misconduct is a relevant factor, but it is not by itself [determinative](#).

### **The worker left the employment before the incapacity commenced**

A worker cannot make a section 18 application if the incapacity arose after they left employment. However, it is not clear whether the notion of having “left” employment requires an act of the employee, or if having “left” refers to the employment having ended before the incapacity arose.

### **The worker terminated employment after the incapacity commenced**

If a worker terminates employment (ie. resigns or, at least arguably, abandons) after the incapacity arose, they are not able to make a claim. However, it is unlikely that a ‘constructive dismissal’ (ie. being forced to resign by the employer’s conduct) would satisfy this criteria.

### **New or other employment options have been agreed under s25(10)**

If incapacity has gone for more than 6 months, and the worker, employer and Return to Work SA agree a [rehabilitation plan](#) that includes finding employment elsewhere, section 18 doesn’t apply.

### **The worker has otherwise returned to work**

If a worker has ‘returned to work’, they are not entitled to make an application. This phrase has previously had a specific meaning in compensation law, taken to [mean](#) where the worker has been re-established as a settled wage-earner who doesn’t need workers compensation payments (i.e. earning at least their [‘average weekly earnings’](#)) performing any duties consistent with physical limitations.

### **Disputing dubious claims**

The Act significantly tightens the [definition](#) of injuries that attract compensation, especially psychological injuries. Because of the broad-ranging and long-term risks associated with section 18, employers should take a more critical approach to managing compensation claims, and disputing dubious ones. Provided you have reasonable grounds to dispute a claim, Return to Work SA will cover your reasonable legal costs in disputing a claim. Importantly, under the [current premium system](#) employers are no longer punished for exercising their right to dispute a claim. Fair Work Lawyers will act on a ‘no gap’ charging arrangement for such disputes, meaning clients are not out of pocket while disputing a dubious claim.

### **Need more information**

If you would like further information about section 18, or you are involved in or wish to dispute a claim for compensation, please contact the team at Fair Work Lawyers.

The information contained in this publication is general in nature and does not constitute legal advice. Employers should seek legal advice in relation to their own specific circumstances. This is new law and, until there is judicial guidance, employers should take extra care. Fair Work Lawyers recommend employers seek advice in relation to all workers compensation matters.

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