No employer obligation to provide 'suitable duties' to an injured employee indefinitely

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Is it acceptable to dismiss an injured worker once all reasonable accommodations and options have been considered? If yes, what exactly is considered reasonable?

The NSW Industrial Relations Commission recently shed light on these troublesome questions.

It confirmed that an employer is not obliged to provide suitable alternative duties to an injured worker indefinitely nor are they required to search for suitable employment externally.

What is important, as always, is to look closely at the particular facts in each and every case as there are so many specific considerations that can influence how the case should be managed.

THE DECISION AND BACKGROUND

Bartier Perry assisted Nepean Blue Mountains Local Health District (**NBMLHD**) in defending an unfair dismissal claim in *Jenkins v Secretary, Ministry of Health* [2022] NSWIRComm 1013.

Mr Jenkins had been employed by NBMLHD since 2002. In 2016, he suffered a workplace injury for which workers compensation liability was accepted. In the four years following the injury, Mr Jenkins was unable to fully perform his normal duties.

HOW DID NBMLHD ATTEMPT TO ACCOMMODATE MR JENKINS?

To accommodate Mr Jenkins, NBMLHD ensured that:

- Mr Jenkins performed suitable duties in a number of alternative positions
- Mr Jenkins was referred to an external Vocational Rehabilitation provider
- numerous workplace assessments were undertaken for alternative roles for which Mr Jenkins was unsuited
- a skills assessment report was obtained to understand Mr Jenkins' strengths and difficulties.

By mid-2020, all reasonable alternatives had been exhausted. At that point, NBMLHD terminated Mr Jenkins' employment.

DID NBMLHD ACT REASONABLY?

Section 49 of the *Workplace Injury Management and Workers Compensation Act 1998* (**1998 Act**) obliges an employer to provide suitable employment to an injured worker following workplace injury. Failure to comply can incur a penalty of up to $5,500.

This obligation is not absolute. It only applies where:

- there is a work-related injury
- the employee recovers a capacity to resume work, full-time or part-time and whether or not to the pre-injury role, following a period of incapacity resulting from the injury
- the employee requests provision of suitable employment.

If the worker remains totally unfit, the obligation does not arise.

WHAT IS MEANT BY "SUITABLE EMPLOYMENT"?

"Suitable employment" is defined by section 32A of the *Workers Compensation Act 1987* (**1987 Act**) as *"employment in work for which the worker is currently suited"*, having regard to:

- their age, education, skills and work experience
- the nature of the incapacity and medical information
- injury management and return to work plans
- occupational rehabilitation services.

and regardless of:

- whether the work or employment is available
- whether the work or the employment is of a type that is generally available in the employment market
- the nature of the pre-injury employment
- the worker's place of residence.

Within reason, the suitable employment must be the same as, or equivalent to, the employment at the time of injury.

The employer cannot provide work that is meaningless, demeaning, or for which the worker is not qualified or is unable to perform.

EXCEPTIONS TO THE OBLIGATION TO PROVIDE SUITABLE EMPLOYMENT

The obligation to provide suitable employment does not apply if it is not reasonably practicable to do so in accordance with section 49. That means the circumstances of the worker and injury must be considered. Relevant issues also include any operational requirements and administrative burden to the employer.

Usually, employers rely on the latter to demonstrate that, the rehabilitation process having been exhausted, nothing further can reasonably be done.

Other circumstances that would render the obligation irrelevant include:

- if the employee voluntarily leaves the employer after the injury; in other words, they resign, accept redundancy or leave by mutual agreement for other reasons
- if the employment is terminated after the injury for reasons other than unfitness as a result of the injury, for instance, misconduct.

MR JENKINS' CIRCUMSTANCES

In deciding Mr Jenkins' case, the Commission quoted the Full Bench of the Federal Commission in its decision in J *Boag & Son Brewing Pty Limited v Alan John Button* [2010] FWAFB 4022 (at [22]):

> *When an employer relies upon an employee's incapacity to perform the inherent requirements of his position or role, it is the substantive position or role of the employee that must be considered and not some modified, restricted duties or temporary alternative position that must be considered.*

Relevantly, and referring to Full Bench authority, Webster C found that section 49 of the 1998 Act does not oblige an employer to create a position of suitable duties on a *permanent* basis. Further, the Commissioner found that the section does not prohibit dismissal of an injured worker.

That said, the employer must act reasonably. The Commission said:

> *It may, for example, be reasonably practicable to provide "suitable duties" for a finite time, while an employee attempts to recover from an injury, but not reasonably practicable to provide those same duties on a permanent basis. There is no obligation upon an employer to provide "suitable duties" to an injured employee indefinitely.*

Mr Jenkins asserted that suitable duties were available to him because he was performing certain duties of a role, but not all the duties of the role. The Commission dismissed this argument, stating that it was not reasonably practicable for NBMLHD to offer those duties on an ongoing basis because:

- Mr Jenkins could only perform some of the duties required for the role; and
- to have Mr Jenkins' perform those duties permanently would have required a new unbudgeted role in a small team, which would lead to unreasonable implications for NBMLHD.

The Commission also found that NBMLHD took reasonable steps to support Mr Jenkins including looking for suitable employment *within* NBMLHD. Despite Mr Jenkins' claim that his employer was "morally obliged" to do so, the Commission added that this obligation did not extend to searching for suitable employment outside of NBMLHD.

DID NBMLHD DO THE RIGHT THING?

Yes. The Commission found:

- NBMLHD had a proper basis to conclude that Mr Jenkins could not fulfill the inherent requirements of his substantive role
- NBMLHD took reasonable and appropriate steps to support Mr Jenkins, initially with the aim of returning him to his pre-injury duties and then in efforts to find suitable alternative employment
- a fair and reasonable process was adopted in the dismissal process. Although the decision maker did not meet with Mr Jenkins face to face, that did not necessarily render the process unfair.

The Commission dismissed Mr Jenkins' application.

The Commission noted that should Mr Jenkins regain fitness within two years of his dismissal, he may apply for reinstatement pursuant to sections 241 and 242 of the 1987 Act. In that case, Mr Jenkins would need to demonstrate that he is medically fit for employment.

We also note that this case notwithstanding, what is reasonably practicable for an injured worker and the employer will vary according to the circumstances. We can be certain that this area of the law will continue to be tested in court.

OTHER EMPLOYER RISKS

If an employee recovers their capacity to work following an injury, identifies and requests suitable work, and the employer fails to provide it, the employer may be subject to an injury management dispute in the Personal Injury Commission.

We have also seen the failure to provide suitable employment referred to IRO (the workers compensation industry ombudsman) and SIRA (the workers compensation insurer regulator). These complaints can be troublesome for employers who are self-insured and subject to the scrutiny of IRO and SIRA.

Occasionally, this type of complaint is escalated to SafeWork NSW. This often sees the safety regulator entering the employer's workplace to scrutinise injury management and return to work programs, and issuing improvement notices if the programs are considered deficient.