



Précis Paper

Reinstatement of Injured Employees

This excellent discussion is highly recommended. It is important sometimes to start from the end for your remedy and work backwards.

Discussion Includes

- What rights to compensation and damages do a person injured at work have under statute and at common law?
- What rights to reinstatement does an injured worker who recovers have?
- The jurisdiction of the Industrial Relations Commission
- The power of the Supreme Court to review decisions of the Industrial Relations Commission for jurisdictional error
- Does the recovery of common law damages on the basis of permanent incapacity remove the right of reinstatement after an unexpected recovery?

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Reinstatement of Injured Employees

1. In this edition of BenchTV, Mark Gibian (Barrister) and Ian Benson (Solicitor) discuss the recent decision of the NSW Court of Appeal (Basten & Ward JJA; Emmett AJA) in *Public Service Association and Professional Officers' Association Amalgamated Union of New South Wales v Industrial Relations Secretary* [2015] NSWCA 386. The case considered an injured employee's right to reinstatement following his receipt of a common law damages settlement. Mr Gibian acted for the successful applicant, the Public Service Union (on behalf of Mr Rudd), in the Court of Appeal.

The Statutory Regime for Worker's Compensation: The *Workers Compensation Act 1987* (NSW)

2. The NSW legislation allows for employees who are injured in the course of their work to recover compensation payments for loss of earnings, medical and other expenses that they incur as a result of those injuries.
3. Procedurally, there are a number of options available to injured employees. The primary option is to seek statutory workers compensation payments that are usually made on a weekly basis for the period in which the worker is unable to work, within the limits of the Act.
4. In addition, the employee can also make a claim for common law damages, alleging negligence on the part of the employer as causative of the injury to the employee. There are significant limitations on the types of damage that can be claimed in common law actions.
5. The amount of statutory damages is determined by reference to scales provided in the Act. Mr Gibian describes statutory damages as a limited form of damages and notes that an employee cannot recover their actual earnings where they remain unfit after 6 months, but can only recover a much lower rate that is statutorily prescribed.
6. Finally, there is a little known jurisdiction which can be enlivened pursuant to Part 8 of the Act where an employee has received a workplace injury and as a result of the injury was dismissed from employment. Where the employee can establish their fitness to undertake their employment within 2 years (or more with an extension) they can seek to be reinstated in their former or similar employment. The process is such that the employer can refuse the application for reinstatement, however the employee then has a right to make an application to the Industrial Relations Commission for an order of reinstatement. The right to apply to the Commission is not absolute, with the employee needing to establish that they are an "injured worker" (within the meaning of the Act), that they are now fit and that there is employment of that type or of a suitable type available in the employer's enterprise. Furthermore, if the

employer can demonstrate that the employee was dismissed for a reason other than the injury they suffered at work the application will be dismissed.

The Legal Issue in *Public Service Association ... v Industrial Relations Secretary* [2015] NSWCA 386

7. Critical to the focus case was the interaction between the various rights the employee, Mr Rudd, had. In a general sense, seeking statutory workers compensation damages is an alternative to pursuing common law damages: s 151A of the Act. However, the question in relation to Mr Rudd was whether he could seek reinstatement after seeking common law damages.
8. Mr Rudd was a correctional officer who suffered a workplace injury to his knee and back in 2008. The injury occurred by reason of him walking down a path at a correctional facility and tripping on a pot-hole. The injury caused Mr Rudd to be entirely unfit to work for a period although he was subsequently able to undertake light duties. He underwent various surgical procedures however they were unable to make him fit to undertake his pre-injury duties.
9. Ultimately, Mr Rudd was medically retired by reason of being unfit to perform the duties of his employment in 2011. He was unemployed and receiving compensation payments at the low statutory rate. He commenced proceedings in the District Court pursuing damages at common law arising from his injury and alleging negligence on the part of the State of NSW. The claim went to mediation and was successfully settled with a substantial lump-sum being paid to Mr Rudd.
10. As a consequence of receiving a settlement of a claim for common law damages, he was considered to have received "work injury damages" for the purposes of the Act. Accordingly, he ceased to be entitled to any statutory compensation payments going forward, whether for medical expenses or the fact that he had an ongoing incapacity arising from his injury.
11. At this stage, Mr Rudd then underwent a further medical procedure that enabled him to recover to a greater extent than he had been able to previously. The recovery was such that he was certified as fit to return to his role as a correctional officer. This change to his fitness did not oblige any of the funds he had received in settlement of his claim to be paid back to the NSW Government because no portion of the funds was dedicated specifically to compensate him for his expected future economic loss from being unfit. Mr Gibian notes that the State of NSW would have certainly felt a portion of the settlement was attributable to his expected unfitness and that they had therefore over-compensated Mr Rudd, but this was ultimately of no consequence.
12. Following his recovery, Mr Rudd wrote a letter to Corrective Services seeking to be reinstated to his former employment pursuant to Part 8 of the *Workers Compensation Act*. The employer refused Mr Rudd's application on the basis that he had recovered common law damages and

they were therefore not bound to reinstate him. The employee's union then made an application to the Industrial Relations Commission seeking an order for his reinstatement. The reaction of Corrective Services was to put on a motion alleging that the Commission had no jurisdiction to hear an application seeking orders of reinstatement where common law compensation had been paid to Mr Rudd.

13. In short, Corrective Services argued that the scheme of the Act was such that once an employee received common law compensation they ceased to have rights under the legislation.
14. As the matter proceeded before the Commission, the proceedings ultimately turned on the definition of an "injured worker" under the Act. Section 240 provides that an "Injured worker" is "a worker who receives an injury for which the worker is entitled to receive compensation under this Act...". Accordingly, Corrective Services argued that once Mr Rudd received compensation he was no longer an "injured person" for the purposes of the Act and therefore not entitled to reinstatement. Specifically, Corrective Services argued that the word "is" in the definition, being in present tense, created a temporal element that meant Mr Rudd was no longer an injured worker.

Resolution of the Issue before a Single Commission, the Full Bench and the Court of Appeal

15. The matter was initially heard before a single Commissioner, Commissioner Newall, and Corrective Services' motion was dismissed. Commissioner Newall saw nothing within the Act that expressly prohibited Mr Rudd from making an application for reinstatement in his circumstances. Furthermore, the Commissioner stressed the importance of the right of reinstatement and accordingly did not find that anything in the Act implied that Mr Rudd's right of reinstatement was no longer available.
16. The employer then appealed to a Full Bench of the Industrial Relations Commission (Walton J, Harrison DP, Tabbaa C) in [2015] NSWIRComm 11. The Full Bench disagreed with the Commissioner at first instance and read the definition of "injured worker" as containing a temporal element. The effect of this finding was that once Mr Rudd had received common law compensation he was not entitled to compensation under the Act nor was he entitled to make any application for reinstatement. They considered that this outcome was consistent with the scheme and purpose of the Act.
17. There is no right of appeal from the Full Bench of the Industrial Commission. However, the Court of Appeal does have a general supervisory jurisdiction to intervene in respect of decisions of the Commission and other inferior tribunals, where those decisions are infected with jurisdictional error: *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531. Jurisdictional error will usually involve a decision-maker making some error in approaching a matter or in relation to the construction of the power being exercised. For example, where

a tribunal asks itself the wrong question it will have erred as to jurisdiction. So long as the tribunal asks the right question, it will not commit jurisdictional error even if it comes to the wrong answer.

18. An application was then made to the Court of Appeal on behalf of Mr Rudd in the nature of a prerogative writ to quash the decision of the Industrial Commission. There was no dispute in this matter that if the Full Bench had decided incorrectly on the question of construction of the Act that they had made a decision infected with jurisdictional error. This followed because if the Full Bench was wrong, it had effectively declined to exercise the jurisdiction it had to set aside the motion challenging the reinstatement application.
19. The Court of Appeal unanimously decided that the Full Bench had erred and agreed with the decision of Commissioner Newall. Their Honours did not read the definition of "injured worker" under the Act as containing any temporal element. The definition caught any worker who had received an injury *of a kind* which is dealt with under the Act. Thus, a worker who is an injured worker at any time will remain one, notwithstanding their entitlements to compensation under the Act ending at some later time.
20. The matter was remitted to Commissioner Newall for a determination of whether Mr Rudd could prove his fitness and whether a suitable position was available for him with his employer. The matter has now been resolved and Mr Rudd is currently employed and working at Corrective Services.

The Obligations of Employers

21. The employer of an injured employee has various obligations. They include a prohibition on dismissing the employee because of the injury for a period of at least 6 months from the date of the injury. Furthermore, there is an obligation to assist with injury management and with the provision of suitable duties, if possible.
22. An employer is NOT required to retain an employee indefinitely if an employee is unable to perform work in their job. If the employer does terminate the employment on this basis, employers should be aware of the right of employees to seek reinstatement at least within a 2 year period, if the employee does recover.
23. Disability discrimination legislation also generally applies in the case of workplace injury. The legislation obliges employers to make reasonable adjustments to enable injured employees to continue in their employment. What is reasonable will depend on the size and the nature of the employer, as well as what the employee's duties are and the level of adjustment required.
24. Finally, employers should be aware that whilst it may be that they are within their rights to dismiss employees who are unfit, they are not able to take adverse action against an

employee because they have made a workers compensation claim or reinstatement claim. Provisions within the *Workers Compensation Act* and "adverse action" provisions in the Fair Work Act 2009 (Cth) protect employees in that regard.

Conclusion

25. Although one can understand the practical misgivings Corrective Services had about reinstating an employee whom they had compensated on the basis that he would never work again, this ignores the fact that economic loss settlements always require prediction and speculation and one cannot be certain about their accuracy.
26. Ultimately, Corrective Services was advertising for corrective services officers throughout these proceedings and Mr Rudd was a very experienced correctional officer who could do the job if fit. It would be plainly undesirable if both the State was denied the services of a corrective services officer and Mr Rudd was denied employment where he has recovered sufficiently to perform that work.

BIOGRAPHY

Mark Gibian

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Mark was admitted as a solicitor in 2000 before being called to the NSW bar in 2002. His primary practice is in administrative law, appellate and industrial/employment law.

Ian Benson

Ian Benson is a solicitor at AR Conolly & Company and hold a First Class Honours degree in law.

BIBLIOGRAPHY

Focus Case

Public Service Association and Professional Officers' Association Amalgamated Union of New South Wales v Industrial Relations Secretary [2015] NSWCA 386

Benchmark Link

https://benchmarkinc.com.au/benchmark/composite/benchmark_09-12-2015_insurance_banking_construction_government.pdf

Judgment Link

<https://www.caselaw.nsw.gov.au/decision/565f91e3e4b05f2c4f049535>

Cases

Kirk v Industrial Court of New South Wales (2010) 239 CLR 531

Legislation

Workers Compensation Act 1987 (NSW)