

Return to work – Recent Amendments to the *Workers’ Compensation and Injury Management Act 1981 (WA)*

**Professor Robert Guthrie
School of Business Law and Taxation
Curtin University of Technology**

Abstract

In Australia, all states have enacted provisions that attempt to provide some employment security for workers who are disabled by injury or disease. Return to work provisions enacted under workers compensation legislation characteristically require the employer to attempt to re-employ a disabled worker provided they are able to return to some form of work within 12 months from the date of injury or disease onset. The clear intention of these provisions is to provide some employment security for workers, reduce the costs of compensation claims by enhancing rehabilitation and minimize disruption in the workforce through retraining of new workers. The obligations on employers to return injured workers to work usually do not apply if it is not "reasonably practicable" to provide "suitable duties" or if the worker has been dismissed on the grounds of "serious and willful misconduct." Western Australia introduced section 84AA of the *Workers Compensation and Injury Management Act 1981(WA)* in 1993. Unlike a number of jurisdictions this provision did not provide any civil remedy for dismissal of a worker contrary its terms. At present an employer has an obligation to notify WorkCover of an intention to terminate a workers employment and quasi-criminal sanctions apply where there is a breach. No right of re-instatement is provided until the recent amendments to the Act which are the subject of this paper. Recently amendments have been made to the *Industrial Relations Act 1979 (WA)* to enable the WA Industrial Relations Commission to consider matters relating to section 84AA and the new related provisions and order re-instatement if appropriate. This paper will trace the history of return to work provisions and review the Western Australian position with particular attention to these amendments. The paper will provide a guide to advocates on how section 84AA and related provisions might be utilized in the future.

Introduction

This paper deals with the Industrial and Related Legislation Amendment Act 2007 (the IRLA Act) in so far as it relates to the *Workers' Compensation and Injury Management Act 1981* (WCIM Act). Clause 47 of the IRLA Act provides that Part 6 of the Act amends the WCIM Act. Section 3(b) of the WCIM Act provides that that Act will inter alia "make provision for the management of workers' injuries in a manner that is directed at enabling injured workers to return to work." The apparent intention of this part of the IRLA Act is to promote this purpose by providing a remedy to workers who are dismissed within a specified period of becoming injured. Significantly this process is achieved by amendments to section 84AA of the WCIM and the addition of related sections which will be enforceable by the Western Australia Industrial Commission (the Commission). Among other things the IRLA Act provides for the reinstatement and/or reemployment of workers dismissed contrary to section 84AA. The model for these amendments is probably the repealed provisions in the *Industrial Relations Act 1996*(NSW) Part 7.¹ One leading New South Wales decision

¹ This part of the now repealed New South Wales legislation made it clear that dismissed injured workers have enforceable rights against their employers in the New South Wales Industrial Relations Commission. Section 91 of that Act linked the relevant compensation legislation to the scheme of protective provisions under the *Industrial Relations Act 1996*(NSW). Section 92 allowed a dismissed injured worker/employee to seek reinstatement from the employer into a position for which they are fit, provided they produce a medical certificate to that effect. If the employer did not re-instate the worker/employee, an application could be made to the Industrial Relations Commission for such an order. The Commission could order re-instatement into any other kind of position for which the worker/employee was fit. If the worker/employee was actually performing light duties at

under the *Industrial Relations Act 1996*(NSW) may provide a useful interpretive guide to the Western Australian provisions. In *Tyrell v State Rail Authority*² where Bauer J observed;

The aim of rehabilitation, if such a consideration be relevant to the issues of construction raised, must surely be to integrate injured workers into the workforce at a type of work that they can perform and to be useful that integration requires the continuing provision of suitable employment. There is an obligation on the employer to assist and co-operate in such a purpose, an obligation contained not only in legislation but imposed on the employer by its position as a corporate citizen. If the employer terminated the employment of an employee who after a work related injury has been integrated into the workforce the subversion of the laudable aim of rehabilitation lies in the dismissal not the reinstatement.

On the facts in *Tyrell* the worker who had been dismissed whilst on light duties was entitled to reinstatement to that position; it not being a necessary requirement to show that he was dismissed from his pre-injury position.³ The

the time of the dismissal, the Commission could re-instate the worker to that position; see *State Rail Authority v Bauer J and Tyrell* (1994) AILR 377. In deciding what work the worker/employee was fit for the Commission may refer the applicant to a medical referee or panel as provided for under the *Workers Compensation Act 1998*(NSW). The effect of these provisions was to provide a clearly enforceable duty to retain employment of injured workers. The Act also creates penalties for dismissal of worker/employees within 6 months of injury. Notably under section 95, there is a presumption that the injured worker was dismissed because he or she was not fit for employment because of the injury received. This presumption can be rebutted if the employer satisfies the Commission that the injury was not a substantial and operative cause of the dismissal of the employee. Similar provisions were included in the *Industrial Arbitration Act 1940* (NSW). These provisions are more or less preserved under the *Workers Compensation Act 1987*(NSW) s s241-243

² [1991] NSWIRComm 20 (17 October 1991)

³ *Tyrell* was followed in a series of cases more recently in *Tasovac v New South Wales Police Service* [1999] NSWIRComm 436 (10 October 1999) where a Clerk Grade 5/6 who was dismissed after having suffered a work-related stress condition was reinstated to that position subject to the involvement of a rehabilitation provider to guard against the prospect of a relapse of her condition. In *Johnston v Impala Kitchens Administration Pty Ltd* [1998] NSWIRComm 530 (29 September 1998), the employer attempted to invoke

New South Wales legislation appears to offer considerable protection for injured workers who are dismissed during the period of incapacity. The New South Wales compensation legislation makes clear that the jurisdiction for reinstatement of a dismissed injured worker lies with the Industrial Commission. Further, a breach of a return to work provision in New South Wales is more than a factor for consideration in an unfair dismissal matter; it is determinative in an application for reinstatement. In this respect the New South Wales provisions provide a suitable “reactive” approach to the issue of dismissal of injured workers. The selection of the New South Wales approach probably stems from recommendations made in the 2001 *Report on the Implementation of the Labor Party Direction Statement in Relation to Workers Compensation* which contained a working paper on this issue and contains a survey of the different approaches to protection of injured workers under workers compensation legislation.⁴ What follows below is a brief discussion, by way of background of the manner in which section 84AA has been considered by the Commission in the past.

section 95 of the Act to rebut the presumption that the worker had been dismissed because of the work injury. The employer alleged that the worker had been subject to a genuine redundancy. Commissioner Cambridge observed that even if this submission was accepted the worker had not been consulted in relation to the redundancy and therefore the dismissal was unfair. See *Needham v Shepparton Preserving Company Ltd* (1991) AILR 395. In any event, the Commissioner held that the substantial and operative cause of the dismissal was the worker's work-related asthma. Reinstatement was not ordered, but compensation of \$11,400 was awarded. The section 95 presumption was rebutted in *Hall v Solo Waste Aust Pty Ltd* [2000] NSWIRComm 1136 (23 March 2000) where the employer was able to establish that an injured worker had abandoned his employment due to domestic strife and non-work related depression.

⁴ R Guthrie (2001) *The Report on the Implementation of the Labor Party Direction Statement in Relation to Workers Compensation* WAGP (the Guthrie Report)

Reinstatement and Re-employment under the current return to work provisions

The current section 84AA⁵ has been used in aid of applications for unfair dismissal in both State and Federal proceedings.⁶ The thrust of worker submissions in these cases is that if the workers compensation laws provide some form of protection from dismissal whilst a worker is in receipt of compensation of pending a claim, then a termination of employment contrary to those provisions is prima facie unfair. Section 84AA of the *Workers Compensation and Rehabilitation Act 1981*(WA) was specifically referred to in the Western Australian Industrial Relations Commission by Commissioner Beech in *Stockwin v Cablesands Pty Ltd.*⁷ In *Stockwin*, a submission was made on behalf of the employee that he could not be dismissed because section 84AA prevented the employer from dismissing the employee within 12 months of the date that compensation was first paid. The Commissioner accepted that section 84AA required the employer to preserve the employee's job until the employee returned to work within 12 months unless the employee was dismissed for serious and wilful misconduct. However, the Commissioner found that section 84AA had no application because the employee had not been able to return to work within the 12-month period prescribed. Importantly, the Commissioner noted that even if section 84AA applied, it was still possible for the employer to

⁵ Section 84AA has similarities with provisions in other compensation schemes. See section 155A *Accident Compensation Act 1985* (Vic) s58B *Workers Rehabilitation and Compensation Act 1984* (SA) s 84AA *Workers Compensation and Rehabilitation Act 1981* (WA) s75A *Work Health Act* (NT) s 49 *Workplace Injury Management and Workers Compensation Act 1998* (NSW) s138B *Workers Rehabilitation and Compensation Act 1998* (Tas) s246 *WorkCover Queensland Act 1996* (Qld).

⁶ The term unfair dismissal is used to cover the range of procedural and substantive improprieties of the employer in termination of employment. Each State and the Commonwealth have differing formula for dismissals of this kind. In addition, there are the common law concept of wrongful dismissal and the statutory concepts of unlawful dismissal relevant to the Federal jurisdiction.

⁷ (1997) WAIRC 528/96 7 January 1997

dismiss the employee. The Commissioner observed that even if the *Workers Compensation and Rehabilitation Act 1981(WA)* prohibits the doing of an act it does not mean that the act could not be done. However he also noted that a dismissal contrary to section 84AA might amount to an unfair dismissal and that reinstatement would be an appropriate remedy for the employee/worker. The same Commissioner referred to section 84AA in *Pacey v Modular Masonry*.⁸ In *Pacey*, the worker claimed his dismissal was unfair because he was on workers compensation at the time of his dismissal. He relied on section 84AA. The Commissioner observed as follows:

Therefore, if an employer does dismiss an employee who is absent from work on workers compensation for a reason other than serious or wilful misconduct, the dismissal may well be of no effect where the employee attains partial or total capacity for work in the 12 months from the day the employee becomes entitled to receive weekly payments of compensation from the employer. Therefore, since section 84AA came into effect an employer should not use the employee's absence on workers compensation as a reason to dismiss the employee particularly where, as in Mr. Pacey's case, the absence had only just commenced and its duration is just not known. (In that respect, the *Workplace Relations Act 1996 (Cth)* in section 170CK (2) (a) contains a similar, though not identical, restriction on dismissing an employee by reason of temporary absence from work because of illness or injury). If an employer did so, the dismissal may, depending upon the circumstances, be harsh or oppressive against the employee as to an amount to an abuse of the right to dismiss."⁹

The Commissioner went on to find that in fact the dismissal of Mr. Pacey had been harsh and oppressive. An order for compensation was made but interestingly an order for reinstatement was not made because the Commissioner considered that section 84AA would, if Mr. Pacey became fit for work, entitle him to return to work in any event. This conclusion was reached

⁸ (1998) WAIRC 1468/97 13 March 1998

⁹ Emphasis added

notwithstanding that section 84AA does not currently provide for any enforcement action to be taken for reinstatement. It will be observed that the Commission had little difficulty in accepting that section 84AA had application to its deliberations, notwithstanding that there was nothing in the *Workers Compensation and Rehabilitation Act 1981(WA)* or the *Industrial Relations Act 1979 (WA)* which gave the Commission jurisdiction to deal specifically with such matters.¹⁰ Commissioner Beech suggested that a dismissal of an employee/worker contrary to section 84AA may be of no effect, presumably because of the statutory requirement to provide suitable duties. This comment perhaps overstates the case, as section 84AA as noted above did not provide a remedy of reinstatement; on a proven breach of the section the employer can be prosecuted.

Federally, and in other jurisdictions with similar provisions (save for New South Wales noted in the introduction) the application of return to work provisions to termination of employment cases has been more problematic. For example in *Huang v Ford Motor Company of Australia*¹¹ Judicial Registrar Murphy was invited to consider the application of repealed section 122 of the *Accident Compensation Act 1985 (Vic)* to a matter concerning the *Industrial Relations Act 1988 (Cth)*. The Registrar noted;

It was further argued that the termination infringed the Act by reason of the provisions of Section 122 of the Accident Compensation Act (Victoria). This provision imposes certain obligations on an employer where an employee has an

¹⁰ Commissioner Beech made similar comments in *Hoffman v Western Australian Aboriginal Media Association* [1999] WAIRComm 230. See also *Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch v Burswood Resort Management Limited* [2001] WAIRComm 1966 and *Gentry v Coles Myer Logistics Pty Ltd* [2001] WAIRComm 3552

¹¹ Print 950488 8 September 1995

entitlement to weekly payments of compensation. Those obligations do not prevent a termination of employment being lawful under the Industrial Relations Act. The obligations remain under the Accident Compensation Act independently of the existence or non-existence of an employment contract. There is no basis for the submission.¹²

A similar narrow view was taken in *Dean v Moore Paragon Australia Limited*¹³. In *Dean* Commissioner McMahon noted a submission that repealed section 122 had been breached and said;

Notwithstanding that the Commission does not have the jurisdictional power to decipher the Compensation Act; the Commission nonetheless is not able to conclude on the brief material before it that Moore Paragon are in breach of s122 of the Compensation Act. It is, of course, open to the applicant to pursue this aspect and have it determined on its merits by the appropriate jurisdiction.

The penultimate comments in *Dean* beg the question, which jurisdiction and what rights? The repealed section 122 of the *Accident Compensation Act 1985* (Vic), like section 84AA of the WCIM Act, did not allow the compensation courts and tribunals to order reinstatement, rather they impose a penal sanction on the employer for a breach.

These decisions were noted in some later cases such as *Tran v Calum Textiles Pty Ltd*¹⁴ where it was submitted that the termination of the workers employment was unfair because it contravened repealed section 122 of the *Accident Compensation Act 1985* (Vic). In *Tran* Judicial Registrar Ritter, taking a broader approach seemed less reluctant to consider section 122 than his colleagues did. He noted the possible application of repealed section 122 but observed that it had not been breached because the employer had offered suitable duties, and was therefore held to have no application in any event. More noteworthy is the

¹² Emphasis added

¹³ Print N6866 6 December 1996

¹⁴ Print 970078 13 March 1997

finding in yet another case where repealed section 122 was raised alleging an unfair dismissal. In *Nguyen v Nissan Casting Australia Pty Ltd*¹⁵ it was held that the dismissal was unfair because the employer had forced the employee to seek a medical certificate evidencing his capacity to do certain work when the medical information, then available, showed the employee was not fit for such work. In effect, there was a finding that the direction by the employer, in this case for the employee to obtain a medical certificate to show he was fit, was not a lawful direction. Dismissal based on the employees refusal to obtain such a certificate was harsh unjust and unreasonable. The repealed section 122 was noted in the following way;

...It is not clear to me whether such an aggravation as that alleged led to an entitlement under section 122(1) and (3) to a further period of up to 12 months in which the employer was required to provide suitable employment. Nevertheless, it is apparent that the respondent terminated the applicant's employment less than 12 months from the dated of the first injury and, on the medical certificates, whilst the applicant still had an injury related incapacity for work and was certified as unfit to perform duties.¹⁶

In other words, it can be inferred from this decision that section 122 was a relevant consideration, although the conclusion did not require a finding that section 122 had been breached.¹⁷ In *Nguyen*, reinstatement was ordered. *Tran* and *Nguyen* seem at odds with *Huang and Dean*, but consistent with the broader approach taken by Commissioner Beech in Western Australia. Glimpses of support for the broader approach can also be gleaned from some South Australian decisions.¹⁸ Whilst there is some inconsistency in approach to the

¹⁵ Print 950657 15 December 1995

¹⁶ Print 950657 15 December 1995 at 19

¹⁷ The Judicial Registrar noted that the parties had not addressed this issue in detail.

¹⁸ *Arrowcrest Group Pty Ltd v Gill* (1993) 46 FCR 90

application of return to work provisions to termination of employment cases, the preponderance of authority supports the use of return to work provisions only as a relevant consideration in relation to dismissal matters where workers have been absent from work through work injury or disease.

So much for the issue of reinstatement of workers covered by the current section 84AA. Do the return to work provisions give any rights to re-employment? The question arises whether return to work provisions create any other private rights for workers, or a duty on an employer to re-employ the worker, was discussed by the Victorian Supreme Court in *Gardiner v State of Victoria*.¹⁹ Gardiner had been a long-term employee of the Victorian State Government. He developed a work-related mental illness and was in due course paid compensation. He had however resigned his position before the approval of his claim. He sought to be re-employed claiming that repealed section 122 of the *Accident Compensation Act 1985* (Vic) gave rise to a statutory duty on the employer to re-employ and that the employer had been in breach of that duty. The Court held however that, on an examination of the statute and in particular repealed section 122, it could not be said that the provisions created any private civil rights for workers because the statute was one for the public good rather than for the protection of a particular class of persons. Phillips JA (at 16) said

...while the Act is concerned to deliver compensation to workers who are incapacitated by work related injury, it is equally concerned to set fair limits to such compensation and, as well, to cast the burden of such compensation on employers as a group in relief of the public purse. In former days, the latter was achieved by requiring employers to insure; nowadays it is achieved by a compulsory levy on employers, the imposition of which forms a large part of the statute.... To my mind it is plain that s122 was part of general scheme for ensuring that the worker's entitlement to weekly payments did not simply drift on inappropriately and without warrant. Because a return to work could end the payments altogether, 113 made the provision for

¹⁹ [1999] VSCA 100

the unreasonable rejection of an offer of employment and s122 required the employer to provide employment... Of course it can be said that a return to work is in the best interests of the worker, but that is not to say that provisions such as s113 and 122 were enacted for the purpose of conferring a benefit on the worker. To my mind they were not. They were enacted instead in order to ensure compensation, once payable, did not run on unchecked. The entitlement was to end at a fair and proper time and s122 was enacted for that purpose.²⁰

The Court held that no private rights accrue to a worker in these circumstances. An employer who does not comply with such a provision may be liable for a fine, but no more. By contrast with the approach taken in *Gardiner* in *Weinel v Rojas*²¹ the Court said;

The provision of suitable work by the employer to a worker who has suffered a work caused disability can therefore be properly said to be a 'benefit under this Act', even although (sic) the worker has carried out the light work made available, and has been paid for those services. In those latter circumstances, the employer pays the worker the agreed or legally enforceable wage or salary for the light work which he performs. That payment is made as a consequence of the contract of employment. The fact that the worker gives consideration for the suitable light work provided to him by the employer does not detract from the fact that the provision of that light work is a benefit granted by the Act to him. It is something to which he was not otherwise, at common law, entitled from the employer.²²

Given the decision in *Gardiner*, the return to work provisions such as repealed section 122 of the *Accident Compensation Act 1985* (Vic), and probably other States such as Western Australia and Tasmania which have similar provisions, do not currently provide any right to "suitable duties" if the contract of employment has been terminated at the volition of the worker. These provisions and others like them are more likely to give rise to prosecutions by the various

²⁰ [1999] VSCA 100 (2 July 1999)

²¹ (unreported Olsen J Supreme Court of South Australia 10 June 1994)

²² Emphasis added.

WorkCover authorities around Australia. Compliance is a quasi-criminal matter, but as Purse has shown that over the decade 1988 -1998 (save for South Australia) there was not a single prosecution under these types of provisions.²³ As a consequence of reviewing these and similar provisions recommendations were made to the Minister for Labour Relations in 2001 to amend section 84AA to specifically provide for the remedies of reinstatement and re-employment.

The Amendments to Return to Work Provisions

Clause 48 of the IRLA Act will amend section 84AA of the WCIM Act by deleting the offence provision which was attached to that section since its inception in 1993. So far as the writer is aware no prosecutions have ever eventuated from the current section 84AA. Instead, by reason of clauses 49 and 50 of the IRLA Act a new section 84AC and 84AB of the WCIM Act will create a civil penalty provision relating to breaches of section 84AA for the purposes of section 83E of the *Industrial Relations Act 1979* (WA). Significantly this affects the burden of proof (which was previously the criminal standard) as applications for civil penalties are heard by the Industrial Magistrates Court and determined on the balance of probabilities. An application for imposition of civil penalties may be made by:

- (a) the affected worker;
- (b) a union (where affected worker is a member); or
- (c) an industrial inspector designated under the *Industrial Relations Act 1979* (WA).

The Industrial Magistrates Court may, under section 83E of the *Industrial Relations Act 1979* (WA) order penalties of up to \$5,000 against an employer, which is the current penalty provided. For the purposes of civil penalty

²³ Purse K, (2000) The Dismissal of Injured Workers and Workers' Compensation Arrangements in Australia *International Journal of Health Services* 30(4) 849-871 p 861

proceedings, the new sections 84AC(2) and (3) of the WCIM Act will provide that a declaration made by the Western Australian Industrial Relations Commission under new section 84AL(6)(c) or (6)(d) of the WCIM Act is prima facie evidence that an employer contravened section 84AA or 84AB. The intent of these provisions is to expedite civil penalty proceedings where a declaration has been made by the Western Australian Industrial Relations Commission.

A new Part IIIA of the WCIM Act will provide a remedy to workers who are dismissed within a specified period of becoming injured.²⁴ The new section 84AD will define terms for the purposes of new Part IIIA. In particular a “reinstatement order”, in relation to a worker, means an order for

- (a) the reinstatement of the worker under the *Industrial Relations Act 1979* (WA) section 23A (3); or
- (b) the re-employment of the worker under the *Industrial Relations Act 1979* (WA) section 23A (4), whichever the Industrial Relations Commission considers appropriate.

Jurisdiction is conferred on the Commission by section 84AE and it is empowered to hear and determine matters under the new section 84AH. New section 84AF provides that matters will be heard by a single commissioner (exercising powers under new section 84AE). When allocating a matter, the Chief Commissioner is required to consider the desirability of that commissioner having relevant knowledge of the WCIM Act.

A range of powers and procedures will be modified in order for the Commission to deal with the WCIM Act matters. New section 84AG (1) will *apply* certain provisions of the *Industrial Relations Act 1979* (WA) for the purposes of the

²⁴ New section 84AR provides that new Part IIIA of the WCIM Act does not limit a worker's rights under the WCIM Act or any other written law.

Western Australian Industrial Relations Commission exercising jurisdiction under new section 84AE of the WCIM Act. The *applied* provisions relate to:

- (a) the functions and powers of the Commission
- (b) intervention by the Minister for Employment Protection in Commission proceedings
- (c) the representation of parties
- (d) the exercise of conciliation and arbitration powers by the Commission
- (e) evidence before the Commission
- (f) the form of decisions –and
- (g) appeals to the Full Bench and the Industrial Appeal Court

The new section 84AG (2) will enable these *applied* provisions to be modified in certain circumstances to provide flexibility to ensure that the provisions are appropriate for the WCIM Act. New section 84AG (3) (a) will modify section 31(1) of the *Industrial Relations Act 1979* (WA) to allow legal representation for the parties to a WCIM Act matter before the Commission. New section 84AG (3) (b) will modify section 33(6) of the *Industrial Relations Act 1979* (WA) to make reference to new section 84AK of the WCIM Act, which will allow the Commission to summon any person to conciliation proceedings. New section 84AG(3)(c) will modify section 90(1) of the *Industrial Relations Act 1979* (WA) so that appeals can be made to the Industrial Appeal Court on the ground that a decision of the Commission Full Bench was in excess of jurisdiction.

Significantly the new section 84AH (1) will enable a worker who has been incapacitated by injury to seek a reinstatement order (as defined by new section 84AD noted above) from the Commission in two circumstances. First, where the worker is dismissed in the period that begins on the day the injury occurred and ends 12 months from the day the worker becomes entitled to receive workers' compensation payments (the prescribed period); and the worker attains partial or

total capacity for work in the prescribed period. Importantly, a worker will only be able to seek a reinstatement order if they have attained partial or total capacity for work.

For example where a worker suffers an injury on 1 January 2008 and is incapacitated for work.²⁵ She is subsequently dismissed on 28 January 2008, when she has no capacity for work because of the injury. On 1 March 2008 she becomes entitled to receive workers' compensation payments. On 25 November 2008 she is declared fit for work. Because the certificate of fitness is issued inside the 12 month prescribed period the worker can apply to the Commission for a reinstatement order under new section 84AH(1) of the WCIM Act.

Second, the worker can apply for an order under the new section 84 AH (1) where an employer dismisses them without giving a reasonable opportunity to return to work, or to be fully rehabilitated once back at work. The employer may also be in contravention of section 84AA of the WCIM Act and subject to a civil penalty.²⁶

An application for a reinstatement order may be made by the

(a) affected worker; or

²⁵

Based on the example given in the explanatory memorandum to the Bill

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As an aside it is noteworthy that in South Australia (as it now is in Western Australia) the employer has to give notice to the WorkCover authority that it is about to terminate a worker covered by the return to work provisions. The effect is that employers who might be in breach of a return to work provision are alerted to the consequence of that breach and in many cases (about 33%) the termination is reversed. (Purse op cit). The *Workers Rehabilitation and Compensation Act 1986* (SA) also links failure by the employer to provide suitable duties with sections 35 and 36 which establish the employer's liability for compensation at the full rate where such duties are not provided, subject to the worker proving maintains a mutual obligation to seek suitable duties. In addition, section 67 of the *Workers Rehabilitation and Compensation Act 1986* (SA) allows WorkCover to levy increased premiums on employers who have a poor return to work record. See *Longyear Australia Pty Ltd v Workers Rehabilitation and Compensation Corporation* [1995] SASC 4951.

- (b) a union (provided the affected worker is a member or is eligible to be a member).

New section 84AH (2) will require a copy of the application for reinstatement to be served on the employer and new section 84AH (3) provides that the application must be brought within 28 days after the end of the prescribed period. Using the above example the prescribed period is the period between 1 January 2008 (when the worker is injured) and 1 March 2009 which is 12 months from when the worker becomes entitled to receive workers' compensation payments. That worker will have 28 days after 1 March 2009 to make an application under new section 84AH (1) of the WCIM Act. Importantly new section 84AH (4) will enable the Commission to accept an application out-of-time if it considers that it would be unfair not to do so.

New section 84AI will provide that the applicant and the employer are the parties to proceedings for a reinstatement order subject to section 27(1)(j) of the *Industrial Relations Act 1979 (WA)* which enables the Commission to direct that parties be struck out or that persons be joined to proceedings.

Consistent with existing practice in both the Commission and under the WCIM Act new section 84AJ(2) will enable the Western Australian Industrial Relations Commission to conciliate an application for a reinstatement order prior to any arbitration hearing. The conciliation proceedings will be in private pursuant to new section 84AJ (6). New section 84AJ (3) will enable the Commission to make enforceable directions, orders and declarations consequent upon the conciliation. Any such direction, order or declaration will be enforceable under new section 84AJ (9) of the WCIM Act. Enforcement under new section 84AJ (9) will proceed via section 84A of the *Industrial Relations Act 1979 (WA)*. In addition section 84A of the *Industrial Relations Act 1979 (WA)* enables the Commission Full Bench to order penalties against a person subject to an enforcement order. New section

84AJ (8) will enable the parties to agree upon a binding settlement in the form of an order made by the Commission. Any such order will also be enforceable under new section 84AJ (9) of the WCIM Act.

As noted above the new section 84AK will enable the Commission to summon a person to attend conciliation proceedings. A person who fails to attend will have the onus of proving in any enforcement proceedings that they:

- (a) did not receive the summons²⁷ or
- (b) had good cause for not attending²⁸

The requirement to attend conciliation will be enforceable in accordance with new section 84AJ (9) of the WCIM Act²⁹.

New section 84AL (1) allows the Commission to arbitrate upon applications for a reinstatement order not resolved by conciliation or which the Commission chooses not to endeavour to resolve by conciliation. Consistent with past practices within the Commission and under the WCIM Act (in relation to arbitrators) the new section 84AL(2) will enable the same industrial commissioner who conciliated the application to arbitrate upon the application although this is subject to the right of the parties to object³⁰, usually on the grounds of perceived bias.

Importantly the new section 84AL (6) will enable the Commission to do one or more of the following things in determining an application:

- (a) make a reinstatement order;

²⁷ new section 84AK(2)(b)

²⁸ (new section 84AK(4))

²⁹ As with reinstatement application enforcement proceedings in respect of a Commission summons under new section 84AJ (9) will proceed via section 84A of the *Industrial Relations Act 1979* (WA). section 84A of the *Industrial Relations Act 1979* (WA) enables the Western Australian Industrial Relations Commission Full Bench to order penalties against a person

³⁰ New section 84AL(4)

- (b) make a compensation order for loss or injury caused by the dismissal³¹ ;
- (c) make a declaration that the employer failed to comply with section 84AA (1) of the WCIM Act;
- (d) make a declaration that the employer failed to comply with section 84AB (1) of the WCIM Act;
- (e) make an order dismissing the application.

The issues relating to loss or injury have been subject to considerable scrutiny by the Western Australian Industrial Commission. In *Australian Liquor, Hospitality and Miscellaneous Workers Union, Western Australian Branch v Happy Face Child care centre*³² Commissioner Harrison said the 'notion of injury must be treated with some caution (*AWI Administration Services Pty Ltd v Andrew Birnie* (2001) 81 WAIG 2849). In *AWI Administration Services Pty Ltd v Birnie* (op cit) at 2862 Coleman CC and Smith C observed:

It is accepted that there is an element of distress associated with almost all employer initiated terminations of employment. For injury to be recognised by way of compensation and thereby fall outside the limits which can be taken to have normally been associated with a harsh, oppressive or unfair dismissal there needs to be evidence that

³¹ Injury or loss has to be considered as part of an order for compensation. See *Bogunovich v Bayside Western Australia Pty Ltd* [1998] WAIRComm 191 *Tranchita v Wavemaster International Pty Ltd* (1999) 79 WAIG 1886 for a discussion of the potential for the Commission to take into account the manner of dismissal in assessing compensation. Note that section 84AA was in fact referred to in that judgement as having been breached. Damages were awarded for the harsh manner in which the dismissal took place. Note however this decision made reference to the now repealed section 23A of the *Industrial Relations Act 1979* (WA). For a discussion of current principle see *Curtis v Ausdrill Limited* [2006] WAIRComm 5656 – note the extensive discussion on the duty to mitigate at paras – 31-49. See also *Skinner v Fisher & Paykel Australia Pty Ltd* [2006] WAIRComm 4581. Where remuneration is in shares or bonuses see *Hotcopper Australia Ltd v Saab* [2001] WAIRComm 3827 – but note this decision was overturned on appeal in *Hotcopper Australia Ltd v Saab* [2002] WASCA 190 (18 July 2002) as to the issue of whether the claim was an industrial matter – a consideration which may not affect workers compensation claims. See also *Bell Potter Securities Limited v Catena* [2003] WAIRComm 9783 for a case dealing with salary sacrificed remuneration.

³² [2004] WAIRComm 13512

loss of dignity, anxiety, humiliation, stress or nervous shock has been sustained. Injury embraces the actual harm done to an employee by the unfair dismissal. It comprehends 'all manner of wrongs' including being treated with callousness (*Capewell v Cadbury Schweppes Australia Limited* (1998) 78 WAIG 299).'

It follows that the Commission is entitled to consider the manner in which the dismissal took place as well as the efforts by the worker to mitigate any loss as is required by section 23A of the *Industrial Relations Act 1979* (WA) as discussed below. The ability of the Commission to make a declaration as to the non-compliance of the employer with section 84AA assists in the process of obtaining civil penalties as discussed above.

Reinstatement orders

As noted above the Commission will be able to make a reinstatement order under new section 84AL (6) (a). New section 84AD of the WCIM Act will define "reinstatement order" to mean an order for:

- (a) reinstatement of the worker under section 23A (3) of the *Industrial Relations Act 1979* (WA) (namely reinstatement to the worker's former position on conditions no less favourable than what the worker enjoyed immediately before dismissal);

or

- (b) re-employment of the worker under section 23A (4) of the *Industrial Relations Act 1979* (WA) (reemployment to another position if reinstatement would be impracticable).

New section 84AL (7) of the WCIM Act will apply section 23A (5), (11) and (12) of the *Industrial Relations Act 1979* (WA) for the purposes of making a reinstatement order.

This will allow the Commission to:

- (a) make an order preserving the worker's continuity of employment between the time of dismissal and reinstatement or re-employment;
- (b) order the employer to pay the worker remuneration lost (or likely to have been lost) because of the dismissal;
- (c) require the employer to comply with the reinstatement order within a specified time; and
- (d) make any ancillary or incidental order the Commission thinks necessary for giving effect to the reinstatement order.

New section 84AL(9) of the WCIM Act provides that the Commission can only order reinstatement if it is satisfied that the worker is fit for the kind of employment to which the worker is to be reinstated or re-employed. The question of whether a worker is fit to return to work may attract some attention. Attached to this paper is a schedule of cases dealt with under the New South Wales provisions relating to reinstatement of workers whose fitness is in issue. If the Western Australian Industrial Commission follows the approach of adopted in New South Wales the question of fitness for work may include consideration of the employers capacity to provide injury management support for the worker.³³ For example in *Tasovac v NSW Police Service*³⁴ it was observed that a larger employer might have a greater capacity to provide graduated return to suitable work, such that it was possible for the NSW Commission to hold that the worker could return to alternative duties under supervision of a rehabilitation counselor. Not all employers will have such capacity. Reinstatement may not be practicable in situations where the worker is currently fit but has a high potential for re-injury.³⁵

³³

A recent example is *Hofman v Penford Australia Limited* [2008] NSWIRComm 1026

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[1998] NSWIRComm 395 and [1999] NSWIRComm 436, and *Silaphet v South West Area Health Service NSW* [1998] NSWIRComm 128
Vitullo Computerised Medical Services t/as Dr Ed Price & Associates [2003] NSWIRComm 1012. There is also UK authority to this effect, see *R v Board of Trustees of the Science Museum*, Court of Appeal (Eng), Criminal Division, [Steyn LJ, Garland & Rougier JJ], (1993) 3All ER, at 853

The Commission will not be able to make a reinstatement order if the employer proves that the worker was dismissed during the prescribed period for serious or willful misconduct.³⁶ This is consistent with the existing section 84AA which relieves the employer of any obligations where the worker is dismissed summarily. Whether the Commission will actually order reinstatement or re-employment of the worker will be decided having regard to established industrial law principles. In general terms this means that reinstatement is not granted where it is impracticable. That is to say with regard to the decision in *Nicolson v Heaven & Earth Gallery Pty Ltd*³⁷ and *Liddell v Lembke*³⁸ where it was observed that reinstatement is not appropriate where it is likely to impose unacceptable problems or embarrassments or seriously affect productivity or harmony within the employers business. Reinstatement should be practical.³⁹ It is not appropriate where the parties have displayed an antipathy towards each other.⁴⁰ An order for reinstatement should not require the employer to undo efficiencies gained by restructuring its enterprise.⁴¹

Compensation orders

The Commission will be able to make a compensation order under new section 84AL (6)(b) but only if it considers that a reinstatement order would be impracticable.⁴² The question of what is impracticable has been discussed above. New section 84AL (8) of the WCIM Act will be subject to section 23A(7)

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New section 84AL (11) of the WCIM Act

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(1994) IRICR 199

³⁸

(1994) 56 IR 447

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Quality Bakers of Australia Ltd -v- Goulding and Another ((1995) 60 IR 327

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Shirren v E-Span Solutions Pty Ltd [2005] WAIRComm 1796

⁴¹

Gilmore v Cecil Bros., FDR Pty Ltd, Cecil Bros. Pty Ltd [1996] WAIRComm 18

⁴²

New section 84AL(10) of the WCIM Act

to (12) of the *Industrial Relations Act 1979* (WA) for the purposes of making a compensation order.⁴³ This will:

- (a) require the Commission to take certain things into account when deciding the amount of compensation (such as the worker's efforts to mitigate the loss suffered as a result of the dismissal);⁴⁴
- (b) cap the amount of compensation that may be ordered by Commission to a maximum of 6 months' remuneration of the worker;
- (c) enable the Commission to permit the employer to pay compensation in installments;
- (d) require the employer to comply with the compensation order within a specified time; and
- (e) make any ancillary or incidental order the Commission thinks necessary for giving effect to the compensation order.⁴⁵

It is likely that the Commission will take into account whether or not the worker is in receipt of weekly payments of compensation at the time of making an application under section 84AL.⁴⁶

Practitioners may need to consider all options when making an application for compensation under these provisions. Bearing in mind that in some situations the worker may have been subjected to discrimination on the grounds of disability, the worker may have an capacity to seek damages under the *Equal Opportunity Act 1984* (WA) or the *Disability Discrimination Act 1992*(Cth).

⁴³ Under new section 84AL(11) of the WCIM Act the Commission will not be able to make a compensation order if the employer proves that the worker was dismissed during the prescribed period for serious or wilful misconduct.

⁴⁴ See the discussion in *Curtis v Ausdrill Limited* [2006] WAIRComm 5656 – note the extensive discussion on the duty to mitigate at paras – 31-49.

⁴⁵ See footnote 31 above and *Guerin v Nannup River Cottages* [2007] WAIRComm 306 for a discussion of some of the principles relating to orders for compensation.

⁴⁶ In *Gunes v Hankar Nominees Pty Ltd* (1998) WAIRC 182 (17 September 1998) and *Watson v JK Colero Enterprises Pty Ltd* (1998) WAIRC 259 (1 December 1998) the WA Industrial Relations Commission took into account the fact that the applicant in unfair dismissal proceedings was in receipt of compensation when assessing compensation under section 29 of the *Industrial Relations Act 1979* (WA).

Careful consideration of the quantum of damages available needs to be made. The worker may be unable to make a claim for both forms of compensation/damages, although this will have to be determined after careful consideration of the relevant provisions.⁴⁷ Prudent practitioners may seek to settle all claims by way of a deed of settlement taking into account all potential claims.⁴⁸ In addition where the termination of employment is outside the 12 month moratorium period this does not prevent the worker from taking proceedings for a remedy on the grounds that the dismissal was unfair. In such situations the question will arise whether the worker could perform the inherent requirements of the job. If this is so, despite previous injury a worker might be able to make a case for re-instatement.⁴⁹

The Commission will also be able to make a declaration that an employer failed to comply with section 84AA or 84AB of the WCIM Act which will be prima facie evidence of a contravention of section 84AA or 84AB for the purposes of civil penalty proceedings in the Industrial Magistrates Court.⁵⁰

When hearing an application for a reinstatement order, the Commission is likely to consider complex medical issues and conflicting opinions concerning a worker's capacity for work. The Commission may refer a question concerning a worker's capacity for work to the Director of the Dispute Resolution Directorate

⁴⁷ *Bates v Mountway Nominees Pty Ltd* [1998] WAIRC 133, *Wheatley v Smith* (1994) EOC 92-655, *Mercedes-Benz (Australia) Pty Ltd v The Commissioner for Equal Opportunity and Ors* (1992) EOC 92-465. In *Soares v Bayer Australia Ltd* (1996) HREOCA 15 (15 July 1996) a claim for discrimination on the grounds of disability and race was allowed to proceed in conjunction with a claim in the Victorian Compensation Court for workers' compensation on the basis that the damages payable in the Human Rights and Equal Opportunity Commission were different in nature to those in the Compensation Court. *Tasovac v NSW Police Service* [1998] NSWIRComm 395 and [1999] NSWIRComm 436

⁴⁸ A tactic which succeeded in *Glover v Eltham College* [1995] VADT 1

⁴⁹ *Qantas Airways Ltd v Christie* [1998] 193 CLR 280 discusses the deals with the issue of inherent requirements which are applied in this context recently in *Tham v Coles Group Supply Chain Pty Limited* [2008] AIRC 110

⁵⁰ New section 84AC of the WCIM Act

(DRD) for determination by an arbitrator.⁵¹ If a referral is made by the Commission to the Director of the DRD;

- (a) the Commission must not hear and determine the application for a reinstatement order until it has been given the arbitrator's decision;
- (b) the Commission is bound by the arbitrator's decision;
- (c) the arbitrator's decision is not subject to appeal or judicial review⁵² and
- (d) the Commission's determination of the application is not subject to appeal or judicial review, to the extent that it gives effect to the arbitrator's decision.⁵³

Incidental to the referral processes the new section 84AN of the WCIM Act will enable regulations to be made providing for:

- (a) the functions and proceedings of an arbitrator under new section 84AM; and
- (b) the practice and procedure governing those functions and proceedings.

The intention of the regulations is to ensure that referrals under new section 84AM are be dealt with expeditiously

.

Enforcement of orders

New section 84AO confers jurisdiction on the Industrial Magistrates Court to deal with applications under new section 84AP of the WCIM Act. An application for enforcement of a reinstatement or compensation order may be made by:

- (a) the affected worker;
- (b) a union (provided the affected worker is a member or is eligible to be a member); or

⁵¹ New section 84AM(1) of the WCIM Act

⁵² Consistent with the current section 187 of the WCIM Act

⁵³ New section 84AM(3) and (4)

(c) an industrial inspector designated under the IR Act.⁵⁴

The provisions of the *Industrial Relations Act 1979* (WA) will apply for the purposes of the Industrial Magistrates Court enforcing a reinstatement or compensation order.⁵⁵ These *applied* provisions relate to:

- (a) the time limit for making an application to the Industrial Magistrates Court to enforce a reinstatement or compensation order;⁵⁶
- (b) the powers of the Industrial Magistrates Court to enforce a reinstatement or compensation order⁵⁷
- (c) the awarding and payment of costs in enforcement proceedings⁵⁸
- (d) appeals to the Commission Full Bench and the Industrial Appeal Court, and⁵⁹
- (e) the ability of industrial inspectors to make an application for enforcement of a reinstatement or compensation order⁶⁰

Finally the IRLA Act allows for the applied provisions to be modified in certain circumstances to ensure that the applied provisions are appropriate for the WCIM Act.⁶¹

Conclusions

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New section 84AP

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New section 84AQ(1)

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New section 84AQ(1)(a) - the time limit will be 6 years from when the employer failed to comply with the order

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New section 84AQ(1)(b)

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New section 84AQ(1)(c) and (d)

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New section 84AQ(1)(e) –(h)

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New section 84AQ (1) (i).

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New section 84AQ(2) New section 84AQ(3) will modify section 83C(1) of the *Industrial Relations Act 1979* (WA) to delete the references to “the Registrar” and “a deputy registrar” as they are not relevant because the Registrar and deputy registrars will not have standing to bring enforcement proceedings under new section 84AP of the WCIM Act.

It is as well to recall that section 84AA and the subsequent amendments and additions to that section are beneficial provisions and should be read in that light.⁶² Although it is unlikely that section 84AA proceedings will be taken in many instances, because section 84AB may prevent some employers from taking precipitate action, the new provisions represent a significant change in focus for the Western Australian workers compensation jurisdiction. They further cement the theme of return to work within the WCIM Act and may be used as a tool by injury management professionals, on the one hand as a deterrent to employers who have not pursued injury management with enthusiasm and on the other hand, by workers seeking a remedy for a breach of section 84AA. These provisions tidy up the difficult relationship between section 84AA and the Western Australian Industrial Commission and the DDR and its predecessors. It does present some interesting challenges for the Commission in dealing with some matters not normally falling within its bailiwick. At the same time there are some issues to be considered in relation to assessment of damages. Whilst the Commission has established some clear authority on these points in relation to unfair dismissal claims, workers compensation matters have an essential difference with most unfair dismissal matters in that the worker may often have an ongoing right to weekly payments notwithstanding their apparently unfair or unlawful dismissal. The Commission will be obliged to take into account the workers ongoing entitlements to weekly payments in any compensation order it makes. This may present some challenges in calculating the quantum of compensation under the new provisions. In addition the requirement that reinstatement only be granted if it is practicable will require in some instances some in depth analysis of the employers' circumstances and resources. Fortunately the Western Australian Industrial Commission is no stranger to these

⁶² *Public Service Association and Professional Officers' Association Amalgamated Union of New South Wales (on behalf of Peter Riley) v Workcover Authority of New South Wales*) Full Commission of Industrial Relations Commission of NSW, [Wright P, Boland J, Connor C], [2006] NSWIRComm 108 (26 June 2006)

forms of enquiry. There is also no shortage of authority on these sorts of matters from the New South Wales cases.

Finally it is apparent from the New South Wales experience that many cases of this kind are taken on behalf of the worker by trade union advocates as part of the industrial relations service of the union movement. It is likely that this trend will operate in Western Australia as well

Employment Protection Provisions Case Summaries

<i>Case name and citation</i>	<i>Facts</i>	<i>Decision/orders</i>
<i>Murphy v Council of City of Sydney</i> [1992] 45 IR 339	This case was decided under <i>the Industrial Relations Act 1940</i> (NSW). The workers suffered a delusional disorder which was incurable but the symptom could be suppressed by medication. She was terminated from her employment on the grounds that unfit permanently for her duties after referral to the employers medical adviser. She was not given the opportunity to contest the medical report to the employer. The employer acted on the advice without consulting the worker.	Held that the involuntary retirement based on medical advice disputed by the employee's doctor and not adjudicated upon by a medical referee amounted to a dismissal. Court held that the dismissal was precipitate and heavy handed and unfair. It ordered the worker to be referred to a medical referee to determine if the employers medical advice was correct, and if it was for the parties to confer upon whether an alternative position was available for the worker
<i>Patterson and Another v Newcrest Mining Ltd</i> [1996] 67 IR 101	The application was made under the Industrial Relations Act 1988 (Cth) section 170EA – the question of the appropriate remedy arose. It had been determined that reinstatement was a possible remedy	It was held – after review of the authorities (see <i>Nicolson v Heaven & Earth Gallery Pty Ltd</i> (1994) IRICR 199 and <i>Liddell v Lembke</i> (1994) 56 IR 447) that reinstatement is not appropriate where it is likely to impose unacceptable problems or embarrassments or seriously affect productivity or harmony within the employers business. Held that in this case the workers lumbar degeneration

		prevented him from returning to work as there was evidence that he would suffer further injury. This evidence was robust and not mere conjecture.
<i>Mitchell v MacQuarie Health Service</i> [1995] 67 IR 107	Worker had suffered multiple back injuries and at the time of her dismissal was also suffering work related stress/depression. Over an extended period the employer had accommodated the worker with light duties. She was dismissed on the grounds that she could not carry out her pre-accident work, although she was fit for the lighter duties which the Hospital had created.	Held that the employers dismissal was based on the workers disability and was prohibited under the <i>Industrial Relations Act 1988</i> (Cth) section 170EA –reinstatement was appropriate and held that reinstatement could be made to the alternative lighter position, following <i>State Rail Authority of New South Wales v The Honourable Justice Bauer</i> [1994] AILR 377
<i>Silaphet v South West Area Health Service NSW</i> [1998] NSWIRComm 128	This matter dealt with a number of applications by workers dismissed from the respondent's employment whilst in receipt of workers compensation. Each applicant argued that they were fit to return to work.	Held that some of the applicants who had shown a capacity to work should be reinstated. It is noteworthy that reinstatement was made subject to the employer providing ongoing rehabilitation support. It was noted however that the employer was not obliged to provide light duties on an indefinite basis. This approach was adopted in <i>Banning v Great Lakes Council</i> [2002] NSWIRComm 47.
<i>Johnston v Impala Kitchens Administration Pty Ltd</i> [1998] NSWIRComm 530	At the time of the workers dismissal the applicant was absent from work and receiving workers compensation as	The failure of the employer to consult made the termination on the grounds of redundancy unfair. However, the

	<p>result of aggravation of asthma due to certain building renovation work undertaken at her workplace. She had been employed less than 12 months at the time of her dismissal. There was no misconduct or poor work performance. Termination occurred as consequence of the application being made redundant as a result of a business transfer to an associated company. There was no consultation with the employees and no redundancy payment made to the applicant.</p>	<p>selection of the applicant for redundancy instead of other employees did not satisfy the Commission that the applicant's injury was not a substantial or operative cause of her dismissal.</p> <p>Commission formed the view that the applicant/employee was entitled to a remedy for the termination. Reinstatement was not appropriate (employee did not want to return). An award of \$11,400.00. This award was based on 20 weeks wages – though no rationale was given for this sum.</p>
<p><i>Tasovac v NSW Police Service</i> [1998] NSWIRComm 395 and [1999] NSWIRComm 436</p>	<p>Several preliminary issues for consideration relating to proceeding available under anti-discrimination legislation alleging disability discrimination at work. Such proceedings could not run concurrently with an application for reinstatement. (Similar provisions apply in WA under the IR Act).</p> <p>The applicant was terminated from the Police Service following a work related psychological injury. Termination was based on medical grounds. Nearly two years after the termination she applied</p>	<p>The employer argued that the fitness certificate was conditional, there were no current vacancies, and workers skill levels were inadequate and that there was a poor relationship between the applicant and employer. The commission found on the evidence that the worker was fit to return to work. Importantly the commission also found that the respondent employer should, as a large employer have reasonable flexibility in finding suitable work for the applicant. Reinstatement was ordered – to be proceeded with the assistance</p>

	<p>for reinstatement – with medical evidence to show she was fit to work. NB – the NSW legislation allows applications to be made up to 2 after the termination. Considerable discussion as to the weight to be given to the possibility of a worker re-injuring.</p>	<p>of a rehabilitation provider. An order was also made for remuneration equal to that which the worker would have been paid from the date of her application for reinstatement to recommencement of work – less any other payments received. This case refers to principle outlined in <i>Donato v Big W Discount Stores</i> (IRC 1735 of 1992; 2 August 1994 – approved on appeal <i>Big W Discount Stores v Donato</i> (1995) 58 IR 239) and <i>Tyrell v State Rail Authority</i>. Both these cases emphasized the rehabilitation aspects of the compensation legislation and the need for the employer to maintain a flexible approach to suitable work and provision of duties. This approach was approved recently in <i>HSU o/b Ayoub v Ambulance Service of NSW</i> [2003] NSWIRComm 1078</p>
<p><i>Hall v Solo Waste Aust Pty Ltd</i> [2000] NSWIRComm 1136</p>	<p>Injured worker makes application to employer to return to pre-accident work. Worker is experiencing significant domestic pressures at the same time and does not attend regularly for work.</p>	<p>Held that the worker had abandoned his employment and the employer was not obliged to reinstate him. Application dismissed.</p>
<p><i>Malkoun v Australian Liquor Marketeers Pty Ltd</i> [2000]</p>	<p>Worker had injuries in 1995 – returned to work and did light duties, another</p>	<p>Extensive survey of medical evidence pointed to fitness for pre-accident</p>

NSWIRComm 1098	episode in 1998 when workers compensation claim was settled on the basis that he had a permanent impairment. Termination of employment in April 1999. – He sought reinstatement. The employer resisted on the basis that the worker was not fit for work. Relied on the settlement of the compensation as evidence in part – to show that the worker was not fit.	work, despite some inconsistencies. An order for reinstatement was made. Found employer had the capacity to take the worker back. (NB – does not seem have considered the issues raised in the <i>Australian Salaried Medical Officers Federation (New South Wales) (on behalf of Professor Morris) v Health Administration Corporation and Other</i> [2004] NSWIRComm 319 matter discussed below – i.e. consideration of the effect of the settlement. – note that settlement for impairment in some jurisdictions does not finalise weekly payments. Consideration given as to whether return to work of worker would be in breach of OHS laws – to prevent injury to the worker and/or others – found not compelling evidence of likelihood of breach.
<i>Vitullo Computerised Medical Services t/as Dr Ed Price & Associates</i> [2003] NSWIRComm 1012	Worker dismissed whilst in receipt of workers compensation following an injury. The employer has suffered significant downturn in business. Employer argued it could not return the worker to limited duties. The only work available with the employer (which was a small employer) was her original job	Accepted the employer’s argument and evidence that there was a strong likelihood of re-injury and that with a small employer that no suitable duties were available. Did not apply <i>Tasovac</i> (above) to reinstate with rehabilitation assistance.

	which would more than likely cause re-injury to the worker (shoulder injury – typing).	
<i>Rail Tram and Bus Union of Australia, New South Wales Branch, Locomotive Division (on behalf of David George) v State Rail Authority of New South Wales</i> [2003] NSWIRComm 1048	Worker suffered injury at work – with a series of claims over a number of years. In November 1999 he commuted (redeemed) claim for \$130,000 – which included payments for permanent injury. – The respondent challenged and application for reinstatement following dismissal on the grounds that acceptance of the lump sum estopped the worker from making an application to return to work. The dismissal predated the payment of the lump sum. (NB Malkoun above – dismissal after the settlement). Noted that commutation did not surrender rights to reinstatement.	Workers fitness improved after the settlement (exercise and losing weight) – found that there was no attempt to hide previous incapacity and commutation based on medical opinions at the time. Held that the medical evidence now showed the worker was fit to return to work – although there was some change of relapses – this did not prevent reinstatement, which was ordered. It was noted that the applicant need a certificate of competency to resume his pre-accident occupation -
<i>Australian Salaried Medical Officers Federation (New South Wales) (on behalf of Professor Morris) v Health Administration Corporation and Other</i> [2004] NSWIRComm 319	Question of “injured worker” discussed. Worker involved in a MVA. As a result suffers injury and brings civil action against other driver, which is settled by agreement. Workers employment was terminated and he sought reinstatement.	The employer argued the worker was not an injured worker because his injuries were caused by the negligence of a third party and not the employer. As such the financial adjustment had taken place. The worker argued that the reference to “compensation” in the NSW Act meant compensation payable under that Act at the time of injury, and

		that the fact that the injury was caused by a negligent third party was not relevant. Commission found that the right to compensation must arise at the time of dismissal of the worker. So that the power to reinstate arises from the time of dismissal not from the time of injury. NB the WA provisions are different to the NSW on this point and do not make reference to compensation – refers to incapacity.
<i>Hermes v Australian Correctional Management Pty Ltd</i> [2005] NSWIRComm 1108	Applicant suffered psychological injury in the course of his work as a Correctional officer. Was dismissed within 12 months of the occurrence of the injury. The employer reinstated the worker after about 7 months BUT to a different institution and without continuity of service. The worker sought reinstatement to his original workplace and under original conditions.	Although the facts are hard to decipher, it appears the reinstatement of the worker was not to his original contractual conditions and his continuity of service had been affected. On this basis an order for reinstatement was made, to restore continuity, and a further order for remuneration for the period between reinstatement and dismissal.

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Contact rob.guthrie@cbs.curtin.edu.au