The Dismissal of Workers Covered by Return to Work Provisions under Workers Compensation Laws

Robert Guthrie*

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.[1] The clear intention of these provisions is to provide some employment security for workers, reduce the costs of compensation claims by enhancing rehabilitation and minimise disruption in the workforce through retraining of new workers. The obligations on employers to return disabled 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 wilful misconduct'.

Introduction

Purse has recently observed that 'dismissal of injured[2] workers in Australia is a perennial and often overlooked feature of the industrial relations landscape'.[3] The return to work of disabled workers is often problematic, raising issues relating to unfair dismissal, frustration of contract and the overlap of industrial and compensation jurisdictions. In the last decade a cluster of cases has raised the issue of the application of return to work provisions under workers compensation legislation in unfair dismissal cases. Most compensation legislation does not directly address the issue of reinstatement or re-employment of workers who are dismissed whilst in receipt of compensation. These provisions are generally penal in nature, imposing a sanction on the employer who fails to provide suitable duties, but not providing the worker with a direct remedy for the loss of employment. Some jurisdictions, notably New South Wales and South Australian have attempted to strengthen the return to work provisions. In the former case, the return to work provisions are directly linked to the jurisdiction of the Industrial Relations Commission which has jurisdiction to reinstate unlawfully dismissed workers. In South Australia, the preventative approach is evident in return to work provisions which require employers to notify WorkCover of any intended termination of disabled workers.

This article will examine how return to work provisions influence applications by workers for reinstatement or re-employment where they allege an unfair

* B Juris, LLB LLM. Head of School of Business Law Curtin University of Technology

The Journal of Industrial Relations, Vol. 44, No. 4, December 2002, 545–561

dismissal.[4] It notes a range of differing attitudes to the application of the return to work provisions to unfair dismissal cases by industrial tribunals and courts and draws attention to the need for reform to coordinate effective remedies for workers who have been dismissed contrary to return to work provisions.

THE RELATIONSHIP OF RETURN TO WORK PROVISIONS AND UNFAIR DISMISSALS CLAIMS

In recent times state workers compensation return to work provisions have been used in aid of applications for unfair dismissal in both state and federal proceedings.[5] The thrust of worker submissions in these cases is that if the workers compensation laws provide some form of protection from dismissal while a worker is in receipt of compensation pending a claim, then a termination of employment contrary to those provisions is prima facie unfair. For example, 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.*[6] 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 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.*[7] 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.[8]

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 an order for reinstatement was not made because section 84AA would, if Mr Pacey became fit for work, entitle him to return to work in any event. It will be observed that the Western Australian Industrial Relations Commission had little difficulty in accepting that section 84AA had application to its deliberations, notwithstanding that there is nothing in the *Workers Compensation and Rehabilitation Act 1981*(WA) or the *Industrial Relations Act 1979* (WA) which gives the Commission jurisdiction to deal specifically with such matters.[9] 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 does not provide a remedy of reinstatement; on a proven breach of the section the employer can be prosecuted.

Federally, 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*[10] Judicial Registrar Murphy was invited to consider the application of section 122 of the *Accident Compensation Act 1985* (Vic.) to a matter concerning the *Industrial Relations Act 1988* (Cwlth). 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 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*.[11]

A similar narrow view was taken in *Dean v. Moore Paragon Australia Limited.*[12] In *Dean*, Commissioner McMahon noted a submission that 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 section 122 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 comment in *Dean* begs the question, which jurisdiction and what rights? Section 122 of the *Accident Compensation Act 1985* (Vic.), like its Western Australian counterpart, does not allow the compensation courts and tribunals to order reinstatement, rather it imposes a penal sanction on the employer for a breach. *Huang and Dean*'s cases were dealt with as applications for reinstatement under the pre-1996 federal industrial legislation. These decisions were noted in some later cases such as *Tran v. Calum Textiles Pty Ltd*[13] where it was submitted that the termination of the worker's employment was unfair because is contravened 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 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 finding in yet another case where section 122 was raised alleging an unfair dismissal. In *Nguyen v. Nissan Casting Australia Pty Ltd*[14] 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 employee's refusal to obtain such a certificate was harsh unjust and unreasonable. 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 date 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.[15]

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.[16] In *Nguyen*, reinstatement was ordered. *Tran* and *Nguygen* 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 be gleaned from *Arrowcrest Group Pty Ltd v. Gill*[17] where the Federal Court considered whether sections 58b and 58c of the *Workers Rehabilitation and Compensation Act 1984* (SA) were inconsistent with a Federal Metal Industry Award 1984 which made certain provision for termination of employment. The Federal Court noted that the award in question did not extend to cover matters relating to workers compensation so that those provisions relating to return to work were held to be valid and not inconsistent with any termination of employment provisions in the award. The award did not 'cover the field' in that regard. However section 58b was noted to refer to the question of notice to be given in the event of termination and was held to be inconsistent with the notice provisions in the award.[18] The Court seems to have accepted that it was proper to determine whether section 58b had been breached and to provide some remedy if appropriate. The employee had sought a declaration that the termination of his employment was invalid as it was in breach of section 58b. The Court seemed to be prepared allow the Australian Industrial Commission jurisdiction to overturn a termination if the employer had breached section 58b. Justice French observed:

> The subject matter of section 58b of the *Workers Rehabilitation and Compensation Act* 1986 (SA) is the compensation and rehabilitation of persons injured at work. That is not an element of the subject matter of the Award. And, given the

> universality of the workers compensation legislation in each State, it is not surprising that the terms of the industrial award do not enter upon that field.[19]

While there is some inconsistency in approach to the application of return to work provisions to termination of employment cases, the preponderance of authority supports the use of return to work provisions as a relevant consideration in relation to dismissal matters where workers have been absent from work through work injury or disease. At a minimum, a breach of a return to work provision is a factor that should be taken into account in considering whether a dismissal was unfair. If a finding that the dismissal was unfair is made it is clear that an order for reinstatement would be consequent upon the relevant provision of the industrial laws and not the actual return to work provisions. The exception to this rule is New South Wales which is discussed below, where much of this jurisdictional overlap has been specifically addressed.

RETURN TO WORK PROVISIONS AND THE RIGHT TO RE-EMPLOYMENT

The question of 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*.[20] 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 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 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 the employer, the imposition of which forms a large part of the statute . . . To my mind it is plain that section 122 was part of general scheme for ensuring that the worker's entitlement to weekly payments did not simply drift on inappropriately and with out warrant. Because a return to work could end the payments altogether, 113 made the provision for the unreasonable rejection of an offer of employment and s. 122 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 sections 113 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 s. 122 was enacted for that purpose.[21]

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. Whilst the reasoning in *Gardiner* seems attractive it is, with respect, not entirely satisfactory. First, the interpretation of workers compensation statutes has consistently been held by the High Court to be considered having regard to the remedial quality of such legislation. Where more than one construction is available, that which favours the worker should be preferred. In general, such legislation should be construed beneficially.[22] There is also a well-recognised obligation on the worker to mitigate the effects of a disability and the return to work provisions arguably merely facilitated this obligation.[23] In the context of return to work provisions, the Industrial Court of South Australia in *Weinel v. Rojas* considered a case under section 120 of the *Workers Rehabilitation and Compensation Act 1986* (SA). That section provides that a person who obtains by dishonest means any payment or other benefit under the Act is liable to a penalty. It was alleged that Rojas had falsely represented to his employer that he was partially incapacitated for work and in consequence obtained suitable light work. The question for consideration was whether obtaining suitable light work was a benefit under the Act. 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*.[24]

The foregoing passage suggests that the return to work provisions are better classified as benefiting workers as a class rather than being provisions for general benefit. A second area of concern is that the Supreme Court formed the view that somehow section 122 limited the amount of compensation paid by reference to some time limits. In fact most compensation acts have specific provisions which allow for the review of compensation payments independent of the return to work.[25] The return to work provision certainly assists in limiting the costs of compensation payable by the employer, but the overall effect is continued benefit to the worker, by assisting rehabilitation, and returning greater remuneration to the worker, because in most states weekly payments are less than the average weekly earnings.

Given the decision in *Gardiner*, the return to work provisions such as 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 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 has not been a single prosecution under these types of provisions.[26]

THE NEW SOUTH WALES RETURN TO WORK PROVISIONS

The return to work provisions in Victoria, South Australia, Western Australia and Tasmania do not specifically link the jurisdiction of their industrial tribunals to relevant compensation legislation. The result is that a breach of the return to work provisions in those states does not automatically give an industrial tribunal jurisdiction to order re-instatement or compensation. By contrast, the *Industrial Relations Act 1996*(NSW) Part 7[27] makes clear that dismissed injured workers have enforceable rights against their employers in the New South Wales Industrial Relations Commission. Section 91 of that Act links the relevant compensation legislation to the scheme of protective provisions under the *Industrial Relations Act 1996*(NSW).[28] Section 92 allows a dismissed injured worker/employee to seek re-instatement from the employer into a position for which they are fit, provided they produce a medical certificate to that effect. If the employer does not re-instate the worker/employee, an application can be made to the Industrial Relations Commission for such an order. The Commission may order re-instatement into any other kind of position for which the worker/employee is fit. If the worker/employee is actually performing light duties at the time of the dismissal, the Commission may re-instate to that position.[29] In deciding what work the worker/employee is 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 is 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.

These provisions, like their predecessors under sections 154C–F of the *Industrial Arbitration Act 1940* (NSW) have spawned a good deal of case law. The leading case is *Tyrell v. State Rail Authority*[30] 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 while 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.[31]

By all accounts, the New South Wales legislation offers considerable protection for injured workers who are dismissed during the period of incapacity. Unlike other states, 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 but 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. On the other hand, these provisions are deficient in that they do not appear to have a serious 'proactive' quality. Apart from the deterrent effect of the reinstatement and the cost of payment of compensation, there is nothing in the New South Wales provisions (and indeed in any other provisions save for South Australia) which require the employer to give notice of the intention to terminate an injured worker.[32]

In South Australia and possibly Queensland, 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.[33] 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 maintaining 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.[34]

RETURN TO WORK PROVISIONS AND THE RELATIONSHIP WITH THE EMPLOYER'S DUTY OF TRUST AND CONFIDENCE

The requirement to return a worker to work following injury or disease is clearly part of the regime of rehabilitation and injury management. Often, despite the best intentions of the parties, the employment relationship deteriorates following a compensation claim. In *Carrigan v. Darwin City Council*,[35] von Doussa J considered an unfair dismissal application under the *Industrial Relations Act 1988*(Cwlth) brought following a resignation by an employee who alleged that she was not provided with suitable duties while undergoing a rehabilitation program. It was alleged by the employee that she had been dismissed contrary to section 75A of the *Work Health Act* (NT) which provides that:

> An employer liable under this Part to compensate an injured worker shall:
>
> (a) take all reasonable steps to provide the injured worker with suitable employment or, if unable to do so, to find suitable employment with another employer; and
>
> (b) so far as is practicable, participate in efforts to retrain the worker.

Von Doussa J was not prepared to incorporate into the employee's contract of employment a term that would reinforce this statutory obligation, despite the contract making reference to the need for the employer to comply with statutory requirements. This was considered a 'motherhood statement' not strong enough to support the incorporation of the return to work provisions. Likewise, it was not considered appropriate to imply section 75A into the contract of employment.[36] If the employee had been successful in regard to the latter two submissions there is no doubt that the Court would have had to consider the effect of not providing suitable work for the employee while she was attempting a rehabilitation program. However, von Doussa J found that the employer had been in breach of an implied term as to trust and confidence.[37]

Von Doussa J then went on to find that the employer had failed to provide the employee with suitable duties intending to make her work so difficult that she would resign, as in fact she did. Her resignation was not voluntary. The circumstances of the termination of employment constituted a constructive dismissal.[38] Having established that the termination was at the initiative of the employer, von Doussa J held that the employer's conduct amounted to a breach of the implied term as to trust and confidence. He said (at 7):

> Whilst I have held that the rehabilitation provisions of the Work Health Act do not operate as contractual provisions between the parties, I consider that Ms Carrigan is correct in her submission that a failure on the part of the Council to fulfil its rehabilitation obligations under the Work Health Act could amount to conduct likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.

Later he found (at 19):

> I find that the respondent was not serious about full rehabilitation of the applicant. I find this because initially the respondent took little or no interest in finding suitable alternative duties for the applicant or for putting a long-term rehabilitation program together. This is evident also in the queries by Mr Morgan concerning paying the applicant a lump sum.

Von Doussa J found the applicant's termination was unfair and awarded the maximum (6 months wages) compensation.[39] Thus while section 75A of the *Work Health Act* (NT) did not protect the employee from dismissal directly, it did provide a backdrop against which the employer's conduct could be measured for the purposes of assessing the employer's good faith in attempting to facilitate rehabilitation.

A case involving similar issues was dealt with in the Western Australian Industrial Relations Commission. In *Durham v. Westrail*,[40] an employee claimed his dismissal was unfair because he was forced to resign in order to obtain a settlement of his damages claim against the employer. The President of the Commission found that the employee's contract of employment had not ended through work-related disability, despite the employee having been absent from work for an extended period.[41] The President found that the worker had been forced to resign his position with the employer in order to obtain a damages

settlement. The resignation, the President found, was non-consensual and obtained under duress.[42] The President took account of the fact that the employer was under an obligation to re-employ and attempt to rehabilitate the employee under the *Workers Compensation and Rehabilitation Act 1981(*WA). [43] The President would have made an order for reinstatement, but he was in the minority in this case. These two cases raise the issue of the relationship of return to work and rehabilitation. As can be seen, an employer's failure to establish a suitable rehabilitation program, in compliance with a return to work provision, might show a lack of good faith, trust and confidence. The worker's poor rehabilitation outcome results in resignation which could be construed as a termination at the initiative of the employer, often leading to an allegation of unfair dismissal. A claim for unfair dismissal could then be grounded on the destruction of the relationship of trust and confidence due to the employer's failure to implement an adequate rehabilitation program.

RETURN TO WORK AND REHABILITATION

It is useful to examine the issue of return to work as a rehabilitation tool. The intent behind return to work is to operate as an instrument of rehabilitation. Kenny who has surveyed authorities in the Comcare New South Wales and Victorian systems has carried out some recent research in this area. Her research disclosed the following:

> The small body of evidence on the effectiveness of modified (i.e. suitable) duties has been comprehensively reviewed and the results indicate that the provision of suitable duties facilitates return to work, reduces days lost because of injury, and is cost effective.[44] (Text references omitted.)

From her research Kenny found:

> In general, employers felt that the provision of suitable duties was problematic. Overall, 51.5 % of respondents reported that the provision of suitable duties was 'very difficult' (20.4%) or 'difficult' (31.1%); while 32.8% felt that it was neither difficult or easy. Only 16.1% felt it to be 'easy' or 'very easy'.[45]

Of the employers who found that providing suitable duties was either difficult or very difficult, the majority reported the reasons for this as: 'the nature of the work is not suitable, suitable duties disrupt the workplace and are not productive, doctors certificates do not specify what the employee could do and the organisation is too small'.[46] Kenny found that, generally, larger employers were in a better position to provide suitable duties than smaller employers.[47] She concluded that:

> The majority of employers reported that they could provide suitable duties in most or all cases of work injury. Although the quality of the suitable duties offered and their acceptability to injured workers were not examined in this study, previous research has found that in a sample of 407 injured workers, 20% were dissatisfied with the suitable duties offered, 48% reported that the suitable duties offered aggravated their injuries, and 30% reported that the supervisors were not supportive of their modified duties program. This study has demonstrated that the provision

> of suitable duties is an ongoing problem for a rehabilitation system based in the workplace.[48] (Text references omitted.)

The Kenny study illustrates that return to work of disabled workers may not only be a difficult practical issue, but also an area where rehabilitation providers have insufficient legislative backing to implement meaningful programs. As noted the return to work provisions vary between states, as do the remedies and the mechanisms for utilising these provisions. A reasonable starting point for the consideration of the interaction of return to work provision and rehabilitation obligations is the *WorkCover Queensland Act 1996* (Qld), which adopts a holistic approach to the return to work and rehabilitation. Unlike most states, there are no specific provisions which require that a worker's position be kept open or that suitable duties be made available. Instead, Part 4 of Chapter 4 of the *WorkCover Queensland Act 1996* (Qld) sets out the employer's obligation for rehabilitation. In particular, section 243 creates on obligation on the employer to appoint a rehabilitation coordinator if the employer employs more than 30 workers. Section 244 establishes an obligation on the employer to have workplace rehabilitation policy and procedures. Section 245 provides for the employer's obligation to assist or provide rehabilitation for disabled workers for the period for which the worker is entitled to compensation. Section 245(3) provides:

> If an employer, other than a self-insurer, considers it is not practicable to provide the worker with suitable duties, the employer must give WorkCover evidence that the *suitable duties* are not practicable.

Rehabilitation is defined in section 44(1) to include suitable duties programs and the provision of necessary aids and equipment to the worker. Section 44(2) provides that the purpose of rehabilitation is to ensure the worker's earliest possible return to work or to maximise the worker's independent functioning. Suitable duties is defined in section 46 and requires consideration of the worker's pre-injury employment, medical information, the rehabilitation plan for the worker, the employer's rehabilitation policy and the worker's age, education, skills and work experience. In addition consideration is given as to whether it reasonable for the worker to re-locate in order to find work. Section 246 provides sanctions for employers who fail to provide rehabilitation for workers. Notably, this section requires the employer to pay WorkCover the equivalent of the compensation that the worker would receive but for that failure. Section 246(4) allows employers to seek a waiver of this sanction if they can provide evidence of extenuating circumstances.

Part 5 of the *WorkCover Queensland Act 1996* (Qld) creates workers' mitigation and rehabilitation obligations. Section 248 provides that the worker must mitigate any loss by participating in rehabilitation. Section 249 establishes that a worker must participate in rehabilitation under threat of suspension of compensation unless participation is satisfactory.

Overall it can be observed that the Queensland return to work provisions are comprehensive in that they provide a nexus between the employer's obligations to provide rehabilitation and the worker's obligation to participate in the

programs. Return to work is given priority with appropriate sanctions for non-compliance.

The requirement to give notice to Queensland WorkCover where suitable duties are not available is similar to section 58B[49] of the *Workers Rehabilitation and Compensation Act 1986* (SA), but it is noteworthy that the Queensland Act, unlike the South Australian equivalent, does not attempt to interfere with the employer's right to dismiss an injured worker. However, the employer's obligation in relation to rehabilitation extends (under section 245) to the 'period for which the worker is entitled to compensation'. This period may be longer than the 12 months period nominated in most return to work clauses and thus arguably extends the period of the employer's obligations to the worker. Compensation is defined under section 10 to include benefits payable under chapters 3 and 4 of the Act and therefore includes weekly payments, medical expenses and rehabilitation expenses. It follows that a worker who is no longer in receipt of weekly payments, but still requires medical treatment is a 'worker is entitled to compensation' and therefore protected under Part 4 of chapter 4 of the Act. The provision of sanctions in the form of an amount equal to the compensation paid to the worker during the period of non-compliance connects the cost of the worker's continued incapacity to the employer's default unlike most other jurisdictions.[50]

FEDERAL INDUSTRIAL PROVISIONS RELATING TO TEMPORARY ILLNESS

Since 1994 with the adoption of international treaty obligations into federal industrial legislation, it has become unlawful to dismiss an employee on the grounds of temporary absence from work because of illness or injury. Temporary absence because of illness or injury under the regulations means for a period less than 6 months. This issue was addressed directly in *Andrews v. Uniting Church in Australia Frontier Services*[51] where Judicial Registrar McIlwaine held that the employer had unlawfully dismissed the applicant after she had been absent from work for only three weeks. This decision was made notwithstanding that at the time of hearing (some eight months after the dismissal) the applicant was still not fit for work. The employer's precipitate action did not allow the Registrar to invoke the doctrine of frustration because the case had to be considered in the light of the facts as at the date of the termination. Likewise, precipitate (and prohibited) action was taken by the employer in *Emmerson v. Housing Industry Association*[52] in dismissing a worker, then on sick leave, purportedly for wilful misconduct, because he had not returned a works vehicle which was part of his salary package. The Federal Court found inter alia that the employer had breached section 170CK of the *Workplace Relations Act 1996* (Cwlth) in dismissing the employee due to his temporary absence because of illness, in this case chest pains. The Court also observed that the employer had also been in breach of its duty to maintain trust and confidence as in *Carrigan* above. Thus despite no medical evidence being tendered, the Federal Court awarded $4000 damages for pain, shock and humiliation resulting from the dismissal, accepting that the applicant was entitled to damages for the stress reaction due to the dismissal.[53] An unlawful dismissal was also established in *Masters v. Local Boys Pty Ltd*[54] where the employee

was dismissed while absent from work suffering a migraine. No warning, counselling or opportunity to respond to allegations of poor performance were given to the employee, allowing the Court to also hold that the dismissal was harsh, unjust and unreasonable. The employee was not however able to establish a claim for mental distress consequent upon termination, although this case predates *Emmerson* above where damages of this kind have emerged. More recently, in *Waghorn v. South Blackwater Coal Limited*,[55] unlawful termination of employment was established where the employer attempted to invoke the terms of a Certified Agreement which allowed for termination of employees 'whose absences form a 'pattern' and/or are above 3% per year'. Such an agreement did not prevent the worker from invoking section 170CK of the *Workplace Relations Act 1996* (Cwlth), to claim termination actuated by temporary absence because of illness. Where the Agreement conflicted with the Act, the Act prevailed.[56]

The *Workplace Relations Act 1996* (Cwlth) could no doubt also be invoked by compensation claimants where a dismissal takes place within 6 months of the onset of the illness or injury, provided the worker makes an application to the AIRC within the prescribed 21 day period. To some extent, it is therefore an avenue by which workers can supplement the deficiencies in state return to work provisions, which fail to provide the direct link between a breach of such provisions and remedy of re-instatement or compensation.

CONCLUSIONS

The return to work provisions implemented throughout Australia are generally lame and without adequate remedy for workers. In all states save New South Wales there is no direct remedy of reinstatement if the employer is in breach of the provisions. The failure of the legislation to provide the remedy of reinstatement weakens their effect overall. If such provisions were designed to reduce employer costs of compensation claims and promote mutuality of responsibility, then in most cases the provisions fail. This is particularly the case in Tasmania and Western Australia where there are ineffective penal clauses that are not acted on by hesitant and powerless bureaucrats. Penal sanctions do not achieve the stated aim of returning the worker to work. Penal sanctions rely on high criminal standards of proof and, as *Gardiner's* case establishes these provisions standing alone, (as they do in Victoria, Western Australia and Tasmania) do not give an employee/worker a right of action for breach of statutory duty to provide work where the contract of employment has been terminated at the employee's volition.

The lack of jurisdiction of the workers compensation tribunals to order reinstatement has meant that industrial tribunals and courts have been left to find their way through the legislative mire. On the one hand, *Arrowcrest's* case suggests that a breach of return to work provision by an employer, which results in dismissal, may give an industrial commission/tribunal jurisdiction to reverse the dismissal. Western Australian cases seem close to the decision in *Arrowcrest*. Decisions dealing with the Victorian return to work provisions do not show a clear adoption of return to work provisions as an aid to deciding unfair dismissal cases. Workers who have been paid compensation under the Victorian

compensation provisions and who have been dismissed have to date been the l east successful in convincing industrial tribunals that the compensation provisions should be taken into account. It does seem that the weight of authority is trending against the line of cases that have invoked the Victorian provisions.

The course adopted by von Doussa J in *Carrigan* where the relevant provisions are taken into account in deciding whether the employer has breached the implied term of trust and confidence is fraught with difficult issues of proof for workers. Establishing that the implied duty of trust and confidence applies may be subject to a range of evidentiary problems. At the heart of this concept is the need to investigate the effectiveness of the employer's injury management, rehabilitation and return to work programs. What is an adequate rehabilitation program, and how does a small employer put in place such a program without appropriate resources? Are employers to be considered differently depending on their resources? If an insurer is responsible for such a program as is the case in some states, is the employer liable for an insurer's failure to act appropriately?[57]

Overall, the return to work provisions in most states must be considered unsatisfactory, as they do not readily protect employees from the potential of dismissal while they are disabled. Recourse to the industrial courts may be delayed by jurisdictional arguments. Workers compensation claims may be inflated by continuation of payments. Rehabilitation may become ineffective. Payments may be delayed and injuries aggravated by the stresses caused by unnecessarily complex litigation.

Reform of return to work provisions is necessary for a number of reasons. It is now clear that despite the best efforts of governments to reduce compensation costs around Australia, most states are experiencing increasing duration in claims. That is, workers are making fewer claims; but once a claim is made they are absent from work for longer periods. This means that the costs of personal injury claims continues to climb, despite reductions in common law rights and capping of compensation and damages awards. Therefore, preventative actions as well as appropriate remedies are required. South Australia attempts a preventative approach by requiring the employer to give notice of the intention to terminate employment. If the employee does not achieve a return to work at the intervention of WorkCover (SA) then they must revert to the industrial tribunals. Therefore, the first step in reform is to require notice of intention to terminate a disabled worker to be given not only to the worker but also to the insurer and/or compensation authority. Second, it is necessary to empower the authority to investigate whether the employer has genuinely attempted to provide suitable duties. Compensation authorities should, together with insurers and rehabilitation providers assist the employer to provide suitable duties. Where work cannot be found the authority should provide a report to that effect. The report may be used in evidence in any compensation or related proceedings. If the employer has not made genuine efforts to arrange suitable duties then they should be subject to prosecution. An alternative to prosecution is the Queensland approach, which allows the insurer to levy the costs of ongoing payments against the employer, with the employer having to show cause why levy should not be

imposed. Finally, the New South Wales model which attempts to create a nexus between work-related disability and dismissal by creating parallel legislation in the industrial area should be adopted. Such reforms would represent a structured approach to protecting employment for disabled workers. If the employer's performance in rehabilitation and return to work was also a factor in assessing their insurance premiums, this would act as an incentive for employers to participate in the process in good faith. Return to work provisions have been developed on an ad hoc basis and it is time for a unified approach.

NOTES

1. See section 122 Accident Compensation Act 1985 (Vic.), s. 58B Workers Rehabilitation and Compensation Act 1984 (SA), s. 84AA Workers Compensation and Rehabilitation Act 1981 (WA), s. 75A Work Health Act (NT), s. 49 Workplace Injury Management and Workers Compensation Act 1998 (NSW), s. 138B Workers Rehabilitation and Compensation Act 1998 (Tas.), s. 246 WorkCover Queensland Act 1996 (Qld).
2. Purse (noted below) uses the term 'injured' worker to denote work-related injury and disease. For the purposes of this article, the terms 'disability' and 'disabled worker' are used to include injury and disease.
3. Purse has noted that the propensity for disabled workers to be dismissed is not known in Australia, largely due to lack of data collection in most states. The same writer has estimated that as many as 5000 workers per annum are dismissed following work-related disability. Such an estimate suggests that the problem of ineffective return to work provisions is significant and that the lack of data in this area has allowed the problem to remain almost invisible. Purse K (2000) The Dismissal of Injured Workers and Workers' Compensation Arrangements in Australia. *International Journal of Health Services* 30(4), p. 849.
4. For convenience, the expression *unfair dismissal* is used throughout. It is acknowledged that state and federal industrial legislation includes a range of provisions that prevent termination of employment which is procedurally unfair, harsh, unjust or unreasonable, unlawful and wrongful.
5. 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 formulae 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.
6. (1997) WAIRC 528/96 7 January 1997.
7. (1998) WAIRC 1468/97 13 March 1998.
8. Emphasis added.
9. Commissioner Beech made similar comments in *Hoffman v. Western Australian Aboriginal Media Association* [1999] WAIR Comm 230 (11 October 1999).
10. Print 950488 8 September 1995.
11. Emphasis added.
12. Print N6866 6 December 1996.
13. Print 970078 13 March 1997.
14. Print 950657 15 December 1995.
15. Print 950657 15 December 1995 at 19.
16. The Judicial Registrar noted that the parties had not addressed this issue in detail.
17. (1993) 46 FCR 90.
18. The provisions then in issue where slightly different from those shown above, however the conclusions apply equally to the current South Australian provisions.
19. (1993) 46 FCR 90 at 111.
20. [1999] VSCA 100.
21. [1999] VSCA 100 (2 July 1999).
22. *Bird v. Commonwealth* (1988) 62 ALJR 336 and *Wilson v. Wilson's Tile Works Pty Ltd* (1960) 104 CLR 328.

23. *Fazlic v. Millingimbi Community Inc* (1982) 38 ALR 424.
24. Emphasis added.
25. For example in Western Australia sections 60, 61 and 62 of the *Workers' Compensation and Rehabilitation Act 1981*(WA).
26. Purse K (2000) The Dismissal of Injured Workers and Workers' Compensation Arrangements in Australia *International Journal of Health Services* 30(4), p. 861.
27. Similar provisions were included in the *Industrial Arbitration Act 1940* (NSW).
28. Section 49 of the Injury Management Act 1997 (NSW).
29. *State Rail Authority v. Bauer J and Tyrell* (1994) AILR 377.
30. [1991] NSWIRComm 20 (17 October 1991).
31. *Tyrell* was followed in a series of cases more recently in *Tasovac v. New South Wales Police Service* [1999] NSWIRComm 436 (1October 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 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.
32. The notice provisions under an award or agreement or section 170CM of the *Workplace Relations Act 1996* (Cwlth) might apply, but such notice does not alert an insurer or a WorkCover authority to a possible breach of a return to work provision.
33. Purse op. cit.
34. See *Longyear Australia Pty Ltd v. Workers Rehabilitation and Compensation Corporation* [1995] SASC 4951.
35. Print 970101 20 March 1997.
36. Following *Byrne & Frew v. Australian Airlines Ltd* (1995) 185 CLR 410 where the High Court held that award provisions do not automatically become incorporated or implied into a contract of employment.
37. Applying *Woods v. WM Car Services (Peterborough) Limited* [1982] ICR 693.
38. This concept is discussed in detail in A.A. Russian v. Woolworths (SA) Pty Ltd [1995] SAIRC 59 and Mohazab v. Dick Smith Electronics (1995) 62 IR 200.
39. The acceptance by von Doussa J of the employer's duty of trust and confidence is supported by a decision of the Full Bench of the Industrial Relations Court of Australia (of which he was a member) in *Burazin v. Blacktown City Guardian Pty Limited* (1996) 142 ALR 144 at 151. See also *Perkins v. Grace Worldwide (Aust) Pty Ltd* (1997) 72 IR 186 and the discussions in Naughton R (1997) The implied obligation of mutual trust and confidence—A new cause of action for employees? *Australian Journal of Labour Law* (10) p. 287 which discusses *Malik v. Bank of Credit and Commerce International SA (in liq)* [1997] 3 WLR 95, and Spry M (1997) Damages for mental distress and the implied contractual term of confidence and trust. *Australian Journal of Labour Law* (10) p. 292.
40. (1995) WAIRC 19305/94 17 May 1995.
41. The President also found that the contract had not been frustrated and his decision contains a useful survey of the law in this regard.
42. Evidence given at first instance showed that had the claim not been settled, the employer would have continued to attempt to rehabilitate the employee and that his employment would have continued indefinitely.
43. The other members of the Full Bench did not agree, finding that the resignation was not obtained by duress. The majority having found that the employee resigned of his own volition concluded that it had no jurisdiction to make a finding of unfair dismissal. With respect to the majority it could be argued that their decision is naive. The reality being more in line with the Presidents position namely that the financial pressures on a worker

long absent from work are likely to operate so as to force a settlement with contingent resignation.

44. Kenny DT (1999) Employers' perspectives on the provision of suitable duties in occupational rehabilitation. *Journal of Occupational Rehabilitation*. 9(4), p. 268.
45. ibid. p. 269.
46. ibid. p. 270.
47. It should also be noted that some gender issues arise in relation to return to work. Women's return to work is generally slower than men's. Morrison D, Wood G, MacDonald S, Munrowd D (1993) Duration and cost of workers' compensation claims: An empirical study. *Journal of Occupational Health and Safety* 9(2), p. 117. Further, the type of disability may be a predictor of return to work. Interestingly there is American research that shows that workers with previous back injuries may return to work earlier than first timers. See Dasinger LK, Krause N, Deegan JI, Brand RJ, Rudolph I (2000) Physical workplace factors and return to work after compensated low back injury: A disability phase-specific analysis. *Journal of Occupational & Environmental Medicine* 42(3), 323–333.
48. Kenny op. cit. p. 274.
49. Previously section 58b.
50. In *Bilson v. George Chapman Pty Ltd* [1993] SAIRC 56 Commissioner McCutcheon observed that section 58b did not require the employer to hold a job open or to provide light duties for an unlimited period. When, in that case, the employer put in place a reasonable rehabilitation program, which the employee failed to regularly attend, the Commission found that the employer was entitled to terminate the contract and that section 58b did not affect this right. The worker having returned to work was no longer protected by section 58b. In *Bilson* it was found that the employer had genuinely attempted to assist the worker, the result may be different if the return to work was a sham meant to entice the worker to return and thus free the employer from the section 58b obligations.
51. In another case, involving the South Australian provisions, of *Horberry v Yazaki Australia Pty Ltd (SA) Operations* [1994] SAIRC 9a worker who was given light duties, but who became unable to perform any work due to his work-related disability, was not entitled to claim a redundancy payment on termination of this employment. It was held that the termination was bought about by frustration of contract. The employer was entitled to invoke section 58b(3) to give the worker due notice under the Act. In *Horberry* there was no question of inconsistency between section 58b(3) and a federal award as the redundancy agreement operated under state legislation. The redundancy payment was not due as the termination came about as a matter of law, namely frustration of contract.
52. Unreported AIRC 198 of 1994 5 May 1994.
53. [1999] FCA 5000.
54. Kocis A (1999) Breach of the Workplace Relations Act, Contract and Implied Term to act Fairly. *Inhouse Counsel* 3(1), 4–5.
55. (1996) 40 AILR 3-419.
56. (1999) 47 AILR 4-208.
57. Interestingly Waghorn is also an example of an attempt to contract out of the statutory protection against unlawful dismissal on the grounds of temporary illness.
58. See Guthrie R (2001) Improper conduct and good faith in workers compensation claims *Insurance Law Journal* 12(2), p.152.