OmbudsmanSA

Report

Full investigation – *Return to Work Act 2014*

Complainant	**[The worker]**
Compensating Authority	**Employers Mutual**
Ombudsman reference	**2016/05231**
Compensating Authority reference	
Date complaint received	**29 June 2016**
Issues	**1. Whether Employers Mutual Limited breached the service standards by failing to ensure that recovery and return to work processes focused on maintaining the relationship between the worker and the employer** **2. Whether Employers Mutual Limited breached the service standards by failing to ensure the employer understood their recovery and return to work obligations** **3. Whether Employers Mutual Limited breached the service standards by failing to provide medical reports within a stated timeframe.**

Jurisdiction

The complaint is within the jurisdiction of the Ombudsman under the *Return to Work Act 2014*.

On 23 June 2016, the worker consented to the release of her name and contact details for the purposes of my investigation.

Investigation

My investigation has involved:

- assessing the information provided by the worker
- seeking a response from Employers Mutual Limited (**the agent**)
- seeking more particulars from the agent
- seeking more particulars from the worker
- considering the service standards in schedule 5 of the Act
- seeking responses to the provisional report from the parties
- preparing this report.

Standard of proof

The standard of proof I have applied in my investigation and report is on the balance of probabilities. However, in determining whether that standard has been met, in accordance with the High Court's decision in *Briginshaw v Briginshaw* (1938) 60 CLR 336, I have considered the nature of the assertions made and the consequences if they were to be upheld. That decision recognises that greater care is needed in considering the evidence in some cases.[1] It is best summed up in the decision as follows:

> The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding, are considerations which must affect the answer to the question whether the issue has been proved … .[2]

Response to my provisional report

In response to my provisional report the agent responded on 3 November 2016 and advised that it did not have any comments or submissions to make.

The complainant did not provide a submission in response to the provisional report.

Background

1. On 30 October 2015 the agent received a claim for workers compensation from the worker in respect of moderate major depressive disorder.

2. At the date of the worker's claim she was working at [the childcare centre] as an employee of [Company A].

3. [Company A] is a payroll organisation that has[xx] business divisions.

4. In March 2016 the childcare centres were sold to [Company B].

5. [Company B] has not offered a new contract of employment to the worker.

6. The General Manager of [Company A] advised the agent that there was no condition of sale that stated the new owners ([Company B]) had any obligations to offer employment to [the childcare centre] employees.

7. The agent has undertaken investigations to determine if [Company A] is the relevant employer for the purpose of the claim and therefore obligated under the Act to provide suitable employment to the worker.

8. Upon receipt of the worker's claim form, the agent requested medical evidence which was required to support the claim determination, which included the worker's attendance at an Independent Medical Examination (**IME**).

9. As the claim for compensation was unable to be determined within 10 business days after receipt of the claim, the agent wrote to the worker on 13 November 2015 and offered interim benefits as per the requirement under section 32(2) of the Act.

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[1] This decision was applied more recently in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449 at pp449-450, per Mason CJ, Brennan, Deane and Gaudron JJ.

[2] *Briginshaw v Briginshaw* at pp361-362, per Dixon J.

10. On 19 November 2015, a meeting occurred between the worker, agent, employer, and treating medical practitioners. The notes from this meeting record the following comment from the worker's general practitioner:

> GP advised that the issues sound industrial and that it needs to be sorted out in a separate meeting with worker and employer

11. On 20 November 2015, the agent contacted the worker and the following communication recorded:

> Called W to discuss w's IME – CM confirmed W has an IME with Dr Hundermark [sic] not Dr Begg
>
> CM & W discussed interim payments – W stated she does not want interim payments

12. In an email dated 25 November 2015, the agent referred to a meeting that had occurred with the worker on 19 November 2015 and the agreed actions resulting from that meeting:

Actions	When	Who
[Y] and [W] to remain in contact to discuss and sort out annual leave payments and also pay rate for [W]	20/11/2015	Worker & Employer
[W] to attend Independent Medical Examiner appointment on the 25/11/2015 and report will be issued in 10 business days to assist Rachel Dewhurst determine the claim	25/11/2015	Worker
[W] is able to return to work at any time with [the childcare centre] and will communicate this with [X] if she feels she is able too	10/12/2015	Worker
[Z] will touch base with employer and worker once independent report is received to confirm if and when next meeting is required	10/12/2015	Mobile Claims Specialist

13. On 1 December 2015, the worker contacted the agent regarding the sale of the employer's business to [Company B] and seeking payment of interim benefits. The email from the worker stated, in part:

> …I decided to ring [V] from [Company B], first I wanted to clarify if we did change to [Company B] I'd keep my position and role. Amanda said that I would continue with my role as stated on the spread sheet provided by [the childcare centre]…which lead me to my next question, so are we still being purchased by [Company B], Amanda said yes we are should be over the next week or so.
>
> Lastly am I able to claim the interim payment as I'm not doing so well financially and could do with the assistance.

14. On 2 December 2015 the agent responded to the worker's email:

> I am unaware of any changes in your employer as stated and this was confirmed in our last meeting.
>
> With regard your query for interim payments, I have informed Rachel and she will send the paperwork for you to complete.

15. On 3 December 2015 during a telephone conversation the employer stated to the agent that the sale of the business had not gone ahead.

16. The worker contacted the agent again on 15 December 2015 regarding both the interim payments and requesting a copy of the IME report:

> It's been some time now since my appointment with the independent psychiatrist dr hundertmark. Also I would like a copy of the report from that appointment, thanks. Lastly when will the interim payments begin.

17. The agent responded to the worker the same day stating:

> Once the report is received from Dr Hundertmark, (normally 10 business days from the appointment) we would then be in a position to determine your claim. In regards to interim payments, I will have Rachel look into this.

18. It appears that the worker sent a further email to the agent on 21 December 2015 in which she stated:

> I was wondering if I could find out when the interim payments will begin. I sent the paperwork in some time ago…Also I saw Dr Hundertmark on the 26th nov [sic] and had no result regarding my claim as yet. I have requested a copy of the report and any relevant files I'm able to have for my records.

19. The agent responded to the worker the same day stating:

> As stated in my last email reply to you we were awaiting the report from the IME. I understand Rachel is hoping to have the payments started asap [sic] this week and she will be in touch with you.

20. The Curam recorded communication dated 30 December 2015, notes that the Mobile Claims Specialist (MCS) met with the worker to complete a Tax File Declaration Form in order for the interim payments to commence.

21. During a face to face meeting with the worker on 5 January 2016, the worker advised the agent that interim payments had not commenced and she was of the understanding that all required information had been received by the agent. The agent subsequently confirmed the payment details were correct and an emergency payment would be processed and the worker could expect payment on 6 January 2016.

22. On 20 January 2016 the worker's claim for compensation was accepted for an ongoing incapacity.

23. The Curam recorded communication dated 22 February 2016, notes that the agent contacted the worker to discuss an overpayment by the employer and a general discussion regarding return to work. In part, the communication recorded:

> W said she wanted some sort of mediation. CS said that mediation is something that could definitely be organised and which would be very helpful in her RTW. CS to send a report to treating psy [sic] to see if mediation would be reasonable.

24. The WorkCover Medical Certificates certified the worker as fit to return to modified duties from 10 November 2015 until 2 April 2016 restricting the worker from working at the pre-injury work site and working with the pre-injury employer.

25. The WorkCover Medical Certificate dated 4 April 2016 certified the worker fit to return to modified duties for the period 4 April 2016 to 6 May 2016 with the following comments, 'would benefit from mediation with employer'.

26. The Mobile Action Plan dated 6 April 2016 records the notes of a meeting between the worker and the Mobile Claims Specialist (**MCS**), Mr Richard Meakin in which:
    - the MCS provided the worker with a number of documents including the IME report of Dr Hundertmark and the Return to Work Plan
    - the return to work goal was pre injury employment with the pre injury employer
    - the worker advised that she was keen for mediation to occur
    - the MCS advised that the agent was able to organise mediation very soon
    - the MCS was to contact the pre injury employer regarding mediation to see if they are willing to participate.

27. The Curam recorded communication dated 22 April 2016 records the following:

> [the childcare centres] have been sold to [Company B]. Not a South Australian company. W is considered a [Company A] employee. [Company A] is a payroll company. X's understanding is that W is employed by [Company A], so they cannot offer duties re: childcare as they don't have those centres anymore. She stated that they would definitely be able to offer suitable duties in another area of the business, in home services.
>
> X read a part of a letter which stated 'the purchaser' [Company B] would not be offering position to W and advised that she should be terminated from employment…MCS asked for a copy of the letter. X is going to ask her lawyers if she can supply EML with a copy.

28. On 2 May 2016, the agent emailed the worker and advised:

> I have been in contact with [Company A] to try and gather information regarding the sale of [the childcare centres].
>
> They are still yet to provide this information so I have informed ReturntoWorkSA and they are now looking into it for us.
>
> My understanding so far is that [Company B] the company that bought [the childcare centres] is not wanting to offer a contract of employment to you, as they have been informed by someone that they have no obligation to do so. I am trying to establish if they do have an obligation.

29. On 9 May 2016, RTWSA contacted the employer via email and stated:

> So that Richard, and [the worker], are able to proceed with [the worker's] rehabilitation and return to work, can you please provide evidence (aka, an extract of the contract of sale) that clarifies whether the company that purchased [the childcare centre] sites agreed to take on the staff or if it was at their discretion…
>
> Furthermore, if selection of staff was at the discretion of the new company, as I suspect it will be, can you please provide information to Richard that outlines the suitable employment available for [the worker] within your organisation (pursuant to Section 18)…keeping in mind the Act's definition of suitable employment and the employer's obligation to provide it.

30. On 16 May 2016, the agent emailed the worker and advised that it had contacted RTWSA regarding the details of the sale of the business as it was unclear at that stage where the obligation sat in regards to the worker's employment:

> I spoke to RTWSA again last week regarding the details of the sale of the business and they still have not been able to get to the bottom of it yet.

31. By letter dated 6 July 2016, the agent advised my Office that:
    - upon receipt of the claim for compensation it was initially thought that the worker's psychological condition was related to an industrial issue
    - the worker attended an independent medical examination with Dr Hundertmark on 25 November 2015

- Dr Hundertmark's report dated 15 December 2015 was received by the agent on 17 December 2015
- the worker's employer had concerns regarding the onset of the worker's psychological condition and wanted to provide further information prior to the determination of the claim
- this information from the employer was received by the agent on 8 January 2016
- the information from the employer was provided to Dr Hundertmark on 12 January 2016 with a request for a supplementary report
- Dr Hundertmark was unavailable to complete the report until approximately February 2016
- the agent determined not to wait for supplementary information as this would delay the claim determination
- interim payments were initially offered to the worker on 13 November 2015, however the worker declined payments at this time
- an application for interim benefits was sent to the worker on 4 December 2015
- the average weekly earnings calculation was completed on 23 December 2015
- all information had been received from the worker to commence interim payments except for the tax file number declaration
- the tax file number declaration was completed by the worker on 30 December 2015
- the payment was unable to be processed due to incorrect bank account details and once this was corrected, payments commenced on 6 January 2016
- the confirmation of the sale of the pre injury employer's business is yet to be clarified
- the worker was certified with capacity for the period 10 November 2015 to 25 July 2016
- the worker's Work Capacity Certificate certifies her fit to return to work once mediation occurs
- to date the agent has been unable to engage the pre injury employer with mediation
- the agent has referred the worker for Fit for Work rehabilitation services and a meeting is scheduled for 15 July 2016 to discuss the return to work goal.

32. By letter dated 29 August 2016, the agent further advised my Office that:
    - the report of Dr Hundertmark was provided to the worker on 6 April 2016
    - following the worker's assessment with Dr Hundertmark, he suggested a fitness for work following meaningful mediation
    - mediation was first discussed with the worker on 6 November 2015, however this process was delayed due to the pending sale of the business
    - at a meeting on 19 November 2015, [the childcare centre] advised they would support the worker to return to work
    - following the meeting of 19 November 2015, the worker contacted the agent to advise the business had been sold
    - this information was followed up with [Company A] on 3 December 2015, however at that time the company denied the business had been sold
    - the Work Capacity Certificate dated 6 May 2016 states, 'fit to return to work once mediation occurs, and issues with workplace resolved'
    - the agent has continued to attempt to establish employer obligations following the sale of [the childcare centre]
    - the agent contacted [Company A] on 22 August 2016 to arrange mediation, to which [Company A] agreed
    - on 8 March 2016 the agent contacted the worker regarding mediation, however around the same time, ReturntoWork SA were engaged to determine the obligations of the employer due to the sale of the business so mediation could proceed
    - this query has not been resolved to date
    - the agent has attempted to establish contractually where the worker's employment belongs and what obligations under the Act can be imposed and to date this information remains undetermined

- the worker is currently certified fit to return to suitable duties following mediation
- the agent is to arrange mediation with [Company A] at a date to be determined.

Breach of service standards

33. The agent advised my Office on 29 August 2016 in relation to the alleged breach of clause 4(c) of the service standards that:
    - the focus of the claim was to establish obligations rather than maintain the relationship between the parties
    - there have been delays in establishing where obligations exist for the pre-injury employer to provide suitable duties
    - however the obligations are important for meaningful mediation to commence
    - the mediation and return to work process has been significantly delayed
    - the agent has identified the need to improve processes when undertaking investigations of this nature
    - a review of this process has now commenced.

34. The agent advised my Office on 29 August 2016 in relation to the alleged breach of clause 4(d) of the service standards that:
    - investigations into the sale of [the childcare centre] have remained consistent and it has made continuous attempts to clarify information, including seeking the assistance of RTWSA to obtain an excerpt of the contract of sale
    - it has been agreed that [Company A] will participate in mediation and potentially use their alternate business groups to source suitable employment.

35. The agent advised my Office on 29 August 2016 in relation to an alleged breach of clause 4(e) of the service standards that:
    - the medical report of Dr Hundertmark was received by the agent on 17 December 2015
    - the worker received a copy of the report on 6 April 2016
    - the time delay for the provision of the medical report to the worker did not comply with the obligation pursuant to section 182 of the Act in that it was required to provide a copy of the report to the worker within 7 days of receipt
    - it has reviewed and refined this procedure to ensure this delay does not happen again in the future.

Relevant law

36. Schedule 5, Part 1(2) of the Act provides:

> Unless the contrary intention appears, a reference in these standards to the Corporation includes-
>
> (a) a reference to a self-insured employer
>
> (b) a reference to a claims agent or to a provider of services engaged by the Corporation or the self-insured employer

37. Schedule 5, Part 2 Standard 4(c), 4(d) and 4(e) of the Act provide:

> (c) with the active assistance and participation of the worker and the employer, consistent with their obligations under this Act, ensure that recovery and return to work processes focus on maintaining the relationship between the worker and the employer

(d) ensure that a worker's employer is made aware of, and fulfils, the employer's recovery and return to work obligations because early and effective workplace-based coordination of a timely and safe return to work benefits an injured worker's recovery

(e) treat a worker and an employer fairly and with integrity, respect and courtesy, and comply with stated timeframes

38. Section 23 of the Act provides:

23 - Object

(1) The object of this Part is to establish a system that seeks to ensure that a worker who suffers a work injury-

(a) achieves the best practicable levels of physical and mental recovery; and

(b) returns to the worker's pre-injury work or, if that is not reasonably practicable, is in any event restored to the workforce and the community in a timely, safe and durable way.

(2) Without limited subsection (1), the aim is-

(a) to intervene and provide services under this Part as early as is reasonably practicable after a worker suffers a work injury; and

(b) in connection with paragraph (a)-

(i) to return the worker to work in the worker's pre-injury duties; or

(ii) if it is not reasonably practicable to return the worker to work in the worker's pre-injury duties – to return the worker, either temporarily or permanently, to other suitable duties with the worker's pre-injury employer; or

(iii) if subparagraphs (i) and (ii) are not reasonably practicable – to return the worker, either temporarily or permanently, to work with another employer; or

(iv) if subparagraphs (i), (ii) and (iii) are not reasonably practicable – to maximise the worker's independent functioning as a member of the community; and

(c) to ensure that any employer, worker or other person involved in a recovery or return to work process cooperate to achieve the object referred to in subsection (1).

(3) This Part may apply to a worker even if it has not been fully established that the worker's injury is a work injury.

39. Section 32 of the Act provides:

32-Payment of interim benefits

(1) The Corporation may, pending the final determination of a claim, make interim payments under this Part to the claimant.

(2) The Corporation must offer to make interim payments under this section if it fails to determine the relevant claim within 10 business days after the date of the receipt of the claim.

(3) If on the final determination of a claim it appears that an amount to which the claimant was not entitled has been paid under this section, the Corporation may recover that amount as a debt in a court of competent jurisdiction.

40. Section 182 of the Act provides:

182-Worker to be supplied with copy of medical report

Where a report is obtained for the purposes of this Act by the Corporation or an employer on the findings made, or the opinions formed, by a health practitioner on the examination of a worker, the Corporation or the employer must, within 7 days after receiving the report, send a copy of the report to the worker.

Whether Employers Mutual Limited breached the service standards by failing to ensure that recovery and return to work processes focused on maintaining the relationship between the worker and the pre-injury employer

41. The agent advised that the matter of mediation was first discussed with the worker on 6 November 2015.

42. Mediation was also suggested by Dr Hundertmark in his report of 15 December 2015 (received by the agent on 17 December 2015) in which he suggested a fitness for work following meaningful mediation.

43. It also appears that during a meeting held on 19 November 2015 between the worker, employer and treating medical practitioners, the worker's general practitioner suggested that the issues between the worker and the employer needed to be worked out.

44. It appears that the worker raised organising mediation on 22 February 2016 during a telephone conversation with the agent and again on 6 April 2016 during a face to face meeting.

45. From the WorkCover Medical Certificates provided the worker had capacity to return to modified duties on 10 November 2015.

46. Although the business that the worker was employed in appears to have been sold in March 2016, the pre-injury employer agreed to work with the worker to return her to suitable duties as early at 19 November 2015.

47. I am of the view that the agent discussed the ability for mediation to occur, however they did not fully inform the worker that mediation was unlikely to occur due to the difficulties establishing the obligations of the employer.

48. I agree with the agent's assertion that the new owner of the childcare centres, [Company B] was under no particular obligation to provide suitable employment for the worker. However, the agent's focus needed to be on the responsibility of the pre-injury employer to provide suitable employment, and clearly the agent could have done more to facilitate the worker's return to work (albeit, engaged in different duties) with the pre-injury employer.

49. In any case, the agent agrees it has breached service standard 4(c) by failing to ensure recovery and return to work focused on maintaining the relationship between the worker and the pre-injury employer.

50. I note the agent advised it has commenced a process to improve processes when undertaking investigations as to where the pre-injury employer's obligations lay.

Conclusion

In light of the above, I consider that the agent acted in a manner that was in breach of clause 4(c) of the Service Standards set out in schedule 5 of the *Return to Work Act 2014.*

Whether Employers Mutual Limited breached the service standards by failing to ensure the employer understood their recovery and return to work obligations

51. On the information before me I consider that the agent was aware in November 2015 that the worker may have been able to return to work pending mediation with the employer. However, I note that the worker's claim was not determined and accepted as compensable until 20 January 2016.

52. While there is an ability for the agent under section 23 of the Act to return the worker to the pre-injury role or an alternate role even in the circumstance that the claim has not been determined, in this instance the agent was unable to determine the pre-injury employer's obligation to provide suitable employment to the worker.

53. I am of the view that the agent was first aware that the pre-injury employer's business was going to be sold in December 2015 after the worker alerted them to this fact. However upon clarifying this with the employer it was clear that the sale of the business had not gone ahead at that stage and the agent was unable to confirm that the business had been sold until 22 April 2016.

54. Further, I acknowledge that the agent took action to confirm not only the sale of the business but also to clarify the pre-injury employer's obligation to provide suitable employment to the worker. This included seeking the assistance of RTWSA, however to date there has been no clear outcome from those investigations.

55. I note that it would have been prudent of the agent to engage the pre-injury employer in the rehabilitation and return to work processes even in the circumstance that the claim had not been determined. However it was unable to do this as it was unclear as to whether the pre-injury employer had an obligation to provide suitable employment.

56. From the evidence before me it appears that the agent has continued to engage the pre-injury employer in discussions about mediation and that it is likely to go ahead if it has not already commenced.

Conclusion

In light of the above, I consider that the agent did not act in a manner that was in breach of clause 4(d) of the Service Standards set out in schedule 5 of the *Return to Work Act 2014.*

Whether Employers Mutual Limited breached the service standards by failing to provide medical reports within a stated timeframe

57. The obligation under section 182 provides that where a report is obtained for the purpose of the Act, the Corporation must within 7 days after receiving the report send a copy of the report to the worker.

58. The report of Dr Hundertmark was received by the agent on 17 December 2015, which indicates the worker should have received a copy of the report on or around 24 December 2015.

59. The worker queried the agent on several occasions as to when she would be provided with a copy of the report. The last time being 21 December 2015, after the agent had received the report.

60. The worker received the report on 6 April 2016, well outside of the statutory timeframe.

61. It is unclear why the agent did not action the request for a copy of the report from the worker on 21 December 2015.

62. In any case, the agent acknowledged it did not provide a copy of the report to the worker within the required timeframe.

63. Although the agent agrees it has breached the service standards, it has undertaken a review of the process to ensure this type of delay does not occur again in the future.

Conclusion

In light of the above information, I consider that the agent acted in a manner that was in breach of clause 4(e) of the Service Standards set out in schedule 5 of the *Return to Work Act 2014.*

Recommendations

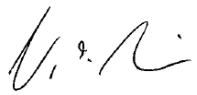
To remedy these errors, I recommend under schedule 5 of the Return to Work Act that the agent:

1. provide a written apology to the worker for the failure to ensure that the recovery and return to work processes focused on maintaining the relationship between the worker and the employer
2. provide my Office with the outcome of the agent's review to improve the processes when undertaking investigations into the pre-injury employer's obligations
3. provide a written apology to the worker for the failure to provide the report of Dr Hundertmark to her within the statutory timeframe
4. advise my Office what specific actions the agent has undertaken to ensure this type of delay does not happen again in the future.

In accordance with schedule 5, clause 5(2)(b) of the Return to Work Act the agent should report to the Ombudsman by 2 December 2016 on what steps have been taken to give effect to the recommendations above, including:

- details of the actions that have been commenced or completed
- relevant dates of the actions taken to implement the recommendations.

In the event that no action has been taken, reason(s) for the inaction should be provided to the Ombudsman.



Wayne Lines
SA OMBUDSMAN

11 November 2016