

## How can an employer trigger the section 19(4)(c) deeming argument?

*Talevski and K & S Freighters Pty Ltd (Compensation)* [2016]  
ATA 492

### Key Points

- The Tribunal found that Mr Talevski was not offered suitable employment and therefore, his employer was unable to rely on the deeming provisions in section 19(4) of the *Safety, Rehabilitation and Compensation Act 1988 (Cth)* (**the SRC Act**).

### Background

On 4 July 2011, Mr Talevski sustained an injury to his right knee while delivering cylinders to a café at the rear of Sydney Hospital. On 22 July 2011, he sustained an injury to his left upper limb and lower back while delivering cylinders to the Marlborough Hotel in Newtown. K & S Freighters Pty Ltd (K&S) initially denied liability to pay compensation for the injuries, however liability was later accepted following a decision of the Tribunal.

Liability to pay compensation for incapacity for work pursuant to section 19 of the SRC Act was accepted up to 27 September 2011, after which date it was argued that Mr Talevski had been offered suitable employment but had failed to accept the offer. He was therefore deemed able to earn his full NWE in suitable employment pursuant to section 19(4)(c).

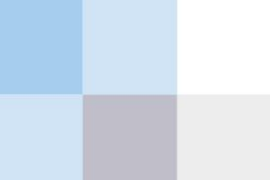
### The Law

Section 19(4)(c) of the SRC Act states that in determining the amount per week that an employee is able to earn in suitable employment, an employer shall have regard to:

- (c) *where, after becoming incapacitated for work, the employee received an offer of suitable employment and, having accepted that offer, failed to engage, or to continue to engage, in that employment.*

In those circumstances, the amount per week that an employee would be able to earn in suitable employment is the equivalent amount that he or she would have earned had they been engaged in the suitable employment that they failed to engage or to continue to engage in.

For an employer to succeed in a deeming argument pursuant to section 19(4)(c), the employer must be able to show that it made an offer of suitable employment, which was accepted by the employee. An employer must also show that the employee then failed to engage or to continue to engage in the suitable employment, and that this failure was not reasonable in the circumstances.



In determining what constitutes an offer of suitable employment, the Tribunal had regard to the decision of *Sumner and Comcare* [1998] AATA 1031, which stated “...for an “offer of suitable employment” to provide a basis for reducing or ceasing a person’s payments of compensation, the offer must be clearly identifiable and must refer to a particular position so that it is possible to ascertain “the amount per week that the employee would be earning in that employment”, and the duties that would be performed”

## Conclusion

The Tribunal found that Mr Talevski was had not been made an offer of suitable employment on or about 27 September 2011, and therefore there was no need to consider whether he had failed to engage or to continue to engage with that employment.

The Tribunal came to this conclusion based on evidence that there was no employment proposal, by either party, which could be negotiated. While the Tribunal accepted the submission made by K&S that Mr Talevski was resistant to pursuing with his GP what duties he might be able to perform, the Tribunal was not satisfied that the conversations between the Return to Work coordinator and Mr Talevski were precise enough and provided enough detail to meet the criteria set out in *Sumner*. The Tribunal stated that the development of a return to work plan or suitable duties plan was not sufficiently advanced or articulated for there to have been a suitable offer of employment.

## Lessons Learnt

In the present case, even though Mr Talevski was involved in rehabilitation, had two suitable duties plans implemented, and was involved in continued conversations with his return to work coordinator and doctor, The Tribunal found that this was not enough to show that he had been made an offer of suitable employment. Accordingly, the deeming provisions in section 19(4)(c) were not open to K&S.

The deeming provisions in 19(4) are prescriptive in their requirements and it is important for employers who seek to rely on them to make sure that each element of the section is satisfied before a determination is issued.


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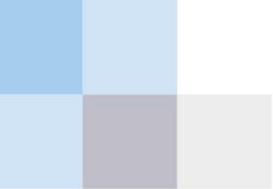
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