

## Carbone and Comcare [2014] AATA 376 (16 June 2014)

### Key Points

- Applicant claimed that duties in a Return to Work program were unreasonable
- AAT did not agree and affirmed decision under review

### Background

Ms Carbone had five claims before the Tribunal. She had an accepted claim for aggravation of lumbar sprain and sciatica sustained on 30 April 2009 and accepted on 21 August 2009. Other claims are were secondary to that claim.

The focus of this article will be on Application number 2013/4023. In relation to this Application, Ms Carbone sought review of a decision as to the hours she should work under a graduated return to work plan (RTWP). The reviewable decision upheld the original decision and MS Carbone sought further review by the Tribunal.

### The Law

Section 37(7) of the SRC Act provides that:

*Where an employee refuses or fails, without reasonable excuse, to undertake a rehabilitation provided for the employee ... the employee's rights to compensation under this Act, and to institute or continue any proceedings under this Act ... are suspended until the employee begins to undertake the program.*

A RTWP is only lawful if it is established in accordance with sections 36 and 37 of the SRC Act.

The Act provides that an employee may object to a RTWP if they have a reasonable excuse for doing so.

### Conclusion

The Tribunal identified that the issues in this matter were:

- Whether Ms Carbone was able to undertake the return to work program; and
- If so, whether the program was appropriate pursuant to section 37(3) of the SRC Act.

The applicant claimed that the RTWP went against her GP's recommendations and exacerbated her situation as allegedly, her employer would continuously provide her with "*lists of work' that were 'not doable' and thus left her without work for 95% of her working hours.*"

In relation to the current matter, no issue was raised in relation to whether the procedures in the formulation of the RTWP were compliant with the SRC Act.

Broadly speaking, the applicant objected to the RTWP on the grounds that the program was inappropriate, or that it was not administered appropriately.

As to the appropriateness of the RTWP, the evidence was that both of the applicant's GPs certified her as fit to comply with the proposed program and the program was also "*fine-tuned*" by an experienced occupational physician, who also certified the program as appropriate.

The Tribunal also noted the willingness of the employer to amend the RTWP and make workplace modifications to respond to Ms Carbone's concerns. Therefore, the Tribunal found that the RTWP was appropriate for Ms Carbone's needs and was reasonable.

In relation to Ms Carbone's allegations that the RTWP was not administered in a reasonable manner, the Tribunal accepted the evidence that Ms Carbone's regular absences meant that her supervisors could not rely on her to complete time sensitive tasks. Ms Carbone was also reminded that she needed to inform her colleagues if she had no work to do, and although she did do so on occasions, the evidence indicated she "*could have been more proactive in this regard*".

There was also evidence that Ms Carbone was taking time off during her working hours to attend medical appointments, rather than attending those appointments in her non-work hours.

Finally, there was evidence to suggest that Ms Carbone's personality differences with staff meant she could not work within a team, which was a recurring difficulty in her workplaces and indicates one of the many difficulties for her employer in finding her suitable work.

The Tribunal was not satisfied with Ms Carbone's explanation that the reason that she did not comply with the program was because the work available for her to do under the RTWP was not suitable or reasonable for her level of competence. Accordingly, the decision in this matter was affirmed.

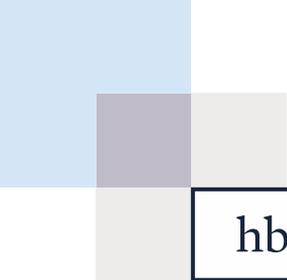
## Lessons Learnt

This decision is useful when an applicant does not comply with a RTWP on the basis that it is allegedly inappropriate. In such circumstances, the employer needs to examine section 37 of the SRC Act and also investigate how the RTWP was formulated and the circumstances surrounding the alleged unreasonableness of the plan. It is also relevant to consider the applicant's actions in response to the RTWP.

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