

## *Freeman v Fleetmaster Services Pty Ltd* [2013] FCA 1068 (23 October 2013)

### Key Points

- The Federal Court considered whether an employee had a reasonable excuse for refusing to undertake a rehabilitation program, at the request of their employer.
- In determining what constituted a reasonable excuse, the Court had to determine whether a subjective or objective test was to be applied.

### Background

Mr Freeman was employed as a truck driver with Fleetmaster Services Pty Ltd (**Fleetmaster**) in 2006 and 2010.

On 16 August 2010 Mr Freeman lodged a claim for workers' compensation for a sprained right wrist, which he claimed was sustained when a trailer curtain ratchet broke and he fell backwards onto the concrete floor on 30 July 2010. By determination on 23 August 2010, liability was accepted by Fleetmaster for an injury described as '*scaphoid fracture*'.

Pursuant to section 37(1) of the SRC Act, Fleetmaster made a determination that Mr Freeman should undertake a rehabilitation program, which Mr Freeman declined to participate in.

As part of the rehabilitation program, Mr Freeman was given duties to perform around the depot. He argued that these duties were '*unsuitable as they either required use of both his hands or were duties that were unsuitable due to his level of training and experience*'. Mr Freeman stated that he was unable to do such duties and suffered an exacerbation of the pain in his arm which required him to cease work. Mr Freeman held that this was a reasonable excuse for his failure to undertake the rehabilitation program.

On 18 November 2010, Fleetmaster determined that Mr Freeman had failed, without reasonable excuse, to participate in a rehabilitation program, which was further affirmed by reviewable decision dated 21 December 2010. As a result of the determination, Mr Freeman's rights to compensation were suspended pursuant to section 37(7) of the SRC Act.

Mr Freeman sought review of the decision of 21 December 2010 at the Administrative Appeals Tribunal. At the review, the AAT affirmed the reviewable decision and confirmed that the applicant had failed, without reasonable excuse, to undertake a determined rehabilitation program pursuant to section 37 of the SRC Act. Based on the evidence before it, the Tribunal did not accept that Mr Freeman had a reasonable excuse not to participate in the rehabilitation program or that he had suffered an exacerbation of pain. Rather, as per the witness evidence of two of Mr Freeman's colleagues, the Tribunal found that Mr Freeman had simply refused to participate in tasks that were

explained to him, which were uncomplicated and within his capacity.

Mr Freeman appealed the decision to the Federal Court of Australia on various alleged questions of law.

## The Law

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

*“where an employee refuses or fails, without reasonable excuse, to undertake a rehabilitation program provided for the employee under this section, the employee’s rights to compensation under this Act, and to institute or continue any proceedings under this Act in relation to compensation, are suspended until the employee begins to undertake the program.”*

Further, the Full Court in the case of *Pascoe v Australian Postal Corporation*<sup>1</sup> decided that:

*“...when considering whether an employee has a reasonable excuse for failing to undertake a rehabilitation program, the program in question is to be taken to be appropriate for the employee.”*

## Conclusion

The Federal Court considered several grounds of appeal on alleged questions of law.

Mr Freeman contended that the Tribunal erred by only applying an objective test in relation to ‘reasonableness’ under section 37(7) of the SRC Act, and did not consider and weigh the subjective explanations of Mr Freeman.

The Court rejected this contention as it was clear from the Tribunal’s reasoning that it took into account Mr Freeman’s explanation, however it did not accept the evidence when contrasted to the evidence of the witnesses. The Court referred to the matter of *Comcare v Singh*,<sup>2</sup> which held that the subjective state of mind of an employee is not the sole dictate of what is considered a reasonable excuse even when there is a rational foundation for an employee’s state of mind. Accordingly, the Court found that the Tribunal’s decision was not infected with error of law on this ground and Mr Freeman’s appeal was dismissed.

## Lessons Learnt

The decision of the Federal Court of Australia further outlines what will be considered a reasonable excuse for an employee to fail to undertake a rehabilitation program. When determining whether an employee has a reasonable excuse, a decision maker should consider both the subjective

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<sup>1</sup> *Pascoe v Australian Postal Corporation* [[2004] FCAFC 4, (2004) 77 ALD 464 (Hill, Marshall & Finklestein JJ)].

<sup>2</sup> *Comcare v Singh* [2012] FCA 136 (24 February 2012), 27.



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explanations of an employee in addition to the objective facts of the matter. It is not enough that the reasonable excuse be rational in only the employee's mind, it needs to be rational in the objective circumstances also.

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