

Hull and Australia Postal Corporation [2013] AATA 635 (5 September 2013)

Key Points

- Whether the applicant refused or failed, without reasonable excuse, to comply with a rehabilitation program issued pursuant to section 37 of the SRC Act
- The Tribunal found that the applicant's excuse that he was caused discomfort in the drive to his workplace did not constitute a reasonable excuse, given the applicant had chosen to move two hours away from his workplace following his injury
- The Tribunal also rejected the applicant's excuse that he did not comply with the program because it was contrary to his GP's recommendations, and found that this should have been raised during the consultation period prior to the commencement of the program

Background

Mr Hull commenced employment with the Australian Postal Corporation (**APC**) in 1999 as a mail sorter, and later became a postal delivery officer.

Mr Hull lodged a workers' compensation claim in respect of "*muscular pain to lower half of back*" sustained as a result of "*very heavy week of work... through day just got sorer and tighter when finished back was very stiff*" on 7 November 2008.

Liability to pay compensation pursuant to section 14 of the SRC Act was accepted in respect of "*lower back strain – lumbo sacral and left hip strain*", and Mr Hull underwent various treatments and undertook various forms of rehabilitation over the following years.

At the time of his injury, Mr Hull lived and worked in Sunshine, Victoria. Around January 2010, Mr Hull moved to Ararat, which is approximately a two hour drive from Sunshine.

On 1 March 2012, APC issued a determination pursuant to section 37 of the SRC Act that required Mr Hull to commence a rehabilitation program, including a return to work for full time hours and restricted duties at his workplace in Sunshine.

Mr Hull failed to comply with the rehabilitation program, and provided reasons for his non-compliance by letter dated 3 April 2012. Mr Hull stated that he did not agree to the program, as its requirements were more than what had been recommended by his general practitioner. He also advised that he experienced considerable pain and discomfort on the two hour drive between Ararat to Sunshine.

As a result of Mr Hull's failure to comply with the rehabilitation program, APC issued a determination pursuant to section 37(7) which suspended his rights to compensation on the basis that he had refused or failed, without reasonable excuse, to comply with the rehabilitation program. A further

determination was issued which deemed Mr Hull able to earn in accordance with his return to work program, so any hours not worked by Mr Hull were assessed as being non-compensable.

The Law

Section 37 of the SRC Act deals with the rehabilitation of employees, and in particular, the issuing of rehabilitation programs by an employer or rehabilitation authority.

Section 37(1) allows a rehabilitation authority to make a determination that an employee who has suffered an injury resulting in incapacity for work or an impairment should undertake a rehabilitation program.

Section 37(3) lists a number of matters which must be taken into account by a rehabilitation authority when issuing a rehabilitation program, and includes such things as the costs of the program, the likely psychological effect on the employee of not providing the program, the employee's attitude to the program and the relative merits of any alternative and appropriate rehabilitation program.

Of particular importance in this matter is section 37(7), which states that where an employee refuses or fails, without reasonable excuse, to undertake a rehabilitation program, the employee's entitlement to compensation under the SRC Act (other than the right to compensation or medical treatment) can be suspended.

In determining whether Mr Hull refused or failed, without reasonable excuse, to comply with the APC's rehabilitation program, the Tribunal had to consider:

1. Whether there was a valid rehabilitation program issued, including the issues of:
 - a. Whether a return to work program can meet the definition of a rehabilitation program
 - b. Whether APC gave consideration to the matters listed in section 37(3) when developing the rehabilitation program
2. If there was a valid rehabilitation program, whether Mr Hull had refused or failed to comply with that program
3. If Mr Hull had refused or failed to comply with the program, whether his excuse for doing was reasonable

Conclusion

Of note in the Tribunal's discussion of the issues was the fact that it found that Mr Hull's assertion that the program was against the advice of his general practitioner was not a valid excuse for his non-compliance with the program. Neither Mr Hull nor his GP had raised any issues with the contents of the program prior to it coming into effect. The Tribunal made a clear distinction between objecting to a program on the grounds that it was unsuitable, which should be done during the consultation period and before the program comes into effect, and non-compliance with the program.

In relation to each issue listed above, the Tribunal concluded that:

1. The rehabilitation program issued by APC was valid, because:
 - a. A return to work program can constitute a rehabilitation program where it is a plan for the rehabilitation of an employee and returning to work is an element of that rehabilitation, and
 - b. APC gave sufficient consideration to the matters listed in section 37(3) when developing the rehabilitation program, including the fact that Mr Hull did not agree with the program
2. Mr Hull had refused or failed to comply with the rehabilitation program by failing to attend on the specified days
3. Mr Hull's excuse that he suffered pain and discomfort during the long drive between his home and his work was not a reasonable excuse for not complying with the rehabilitation program, as Mr Hull had chosen to move away from his place of employment.

Lessons Learnt

There are few decisions which provide an in depth discussion of the important issues surrounding rehabilitation. This matter provides a helpful analysis of many of those issues.

Of particular interest was the Tribunal's distinction between objecting to a program on the grounds that it is unsuitable, which should be done during the consultation period and before the program comes into effect, and non-compliance with a program after the consultation period has passed and the program has commenced.

For more information on this article, please contact:

Claire Tota
Solicitor
Email: claire.tota@hbalegal.com
Direct Line: (08) 9265 6011

Brett Ablong
Partner
Email: brett.ablong@hbalegal.com
Direct Line: (08) 9265 6001

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