

Nunez and Australian Postal Corporation [2014] AATA 125

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
- When is suspension for non-compliance with a rehabilitation program reasonable?

Background

Mr Nunez (the “**Applicant**”) has been employed with Australia Postal Corporation (the “**Respondent**”) for 25 years and worked at the Rockdale Mail Centre until it closed. Despite numerous requests to be transferred to Kingsgrove Mail Centre, he was transferred to the Croydon Park Mail Centre and then the Strathfield Mail Centre. The Applicant alleges that whilst employed at these two centres, he was subjected to harassment and bullying.

The Respondent accepted that the Applicant suffered psychological injury in connection with his work, and made payments of compensation and medical expenses pursuant to section 14 of the *Safety, Rehabilitation and Compensation Act 1988* (Cth) (‘the SRC Act’).

A Rehabilitation Program was prepared pursuant to section 37 of the SRC Act and the final component of the Rehabilitation Program required the Applicant to re-commence work on 21 March 2012 at the Waterloo Mail Centre.

The Applicant failed to comply with the rehabilitation program, and consequently, his benefits were suspended by the Respondent pursuant to sections 37(7) and 37(8) of the SRC Act.

The Evidence

The Applicant maintained that he had a reasonable excuse for not complying with the program as he had a reasonable expectation that he would be sent only to Kingsgrove as agreed by the psychiatrist retained by Respondent. Furthermore, the Applicant stated that his treating doctor had certified that he was not fit to start work before 23 March 2012. Finally, the Applicant stated that his request to work in Kingsgrove was not only a convenience or proximity issue, but rather, he believed he would feel safe and respected if he commenced work amongst the people he knew at Kingsgrove. He did not feel it would be possible for him to commence work anywhere other than at the Kingsgrove Mail Centre.

The Law

In considering whether the Applicant had a reasonable excuse for non-compliance with the rehabilitation program, the Tribunal defined reasonable excuse in the context of sections 37(7) and 37(8) of SRC Act as follows:

In this respect, with reference to relevant case law, the Tribunal formulated the following principles:

- a) For a finding that there was, on the balance of probabilities, a reasonable excuse the person should have:
 - (i) a genuine intention to pursue a program of return to work
 - (ii) a genuine subjective belief in the factual basis of the excuse
 - (iii) support by some informed expert opinion of the subjective belief.

- b) In cases where there was a finding of no reasonable excuse it was commonly found that:
 - (i) a genuine personal belief in facts unsupported by any expert opinion was insufficient.
 - (ii) an asserted belief professed because of an ulterior motive of not intending to return to work was a disqualification

The Tribunal further stated that section 37 is phrased so that the decision-maker is required to consider if the person failed to comply “*without reasonable excuse*”. In the context of a Workers’ Compensation claim, this would place the onus of proof on the employer to prove that, on the balance of probabilities, the employee had no reasonable excuse for non-compliance.

The Tribunal further considered that it must be borne in mind that the emphasis in section 37 of the SRC Act is on the excuse rather than the program and stated that in *Menz and Border Express Pty Ltd* [2012] AATA203, the employee failed to attend a medical, but the employer had breached an undertaking to prepare a suitable duties plan, to relocate his work place, to arrange psychological help and to hold a case meeting before requiring the employee to return to work. It was held that these breaches meant the employee had a reasonable excuse for non-compliance.

Conclusion

The Reviewable Decision made by Australian Postal Corporation was set aside and substituted with a decision that the Applicant did not fail or refuse to undertake the rehabilitation program without reasonable excuse and that he genuinely intended to return to work. It was held that the payment of benefits and expenses suspended as a result of the Reviewable Decision should be made from the date upon which they were suspended.

Lessons Learnt

This decision is useful when suspending employees’ benefits pursuant to sections 37(7) and 37(8) of the SRC Act due to non-compliance with a rehabilitation program.

If an employee has not complied with a rehabilitation program, other factors need to be considered such as whether the employee has a genuine intention to comply with the rehabilitation program and return to work, and whether the employer has been reasonable in facilitating the employee’s rehabilitation program.



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