

Ripper and Australian Postal Corporation [2015] AATA 15 (14 January 2015)

Key Points

- Whether rehabilitation program suitable in the circumstances
- Whether applicant had failed to undertake a rehabilitation program
- Whether there was a reasonable excuse for failing to comply with the program

Background

Ms Ripper was employed by the Australian Postal Corporation (**APC**) as a Communications Consultant. She made a claim for compensation for an injury to her left knee in a work-related motor vehicle accident sustained on 2 May 2001. Liability for Ms Ripper's left knee injury was accepted.

On 4 October 2012, APC issued a reviewable decision affirming a determination of 15 June 2012 that Ms Ripper should commence rehabilitation pursuant to a rehabilitation upgrade program dated 7 June 2012. The APC also issued a second reviewable decision on 4 October 2012 which affirmed a determination which suspended Ms Ripper's entitlement to compensation from 10 October 2012 due to her alleged failure to undertake or continue to participate in the rehabilitation program dated 7 June 2012 (**the program**). Ms Ripper sought review of both of the decisions at the Tribunal.

The Tribunal was required to consider whether the return to work program constituted a rehabilitation program pursuant to section 37 of the Act and if so, whether it was suitable in the circumstances. The Tribunal was also required to consider whether Ms Ripper refused or failed to undertake the program and if so, whether she had a reasonable excuse for doing so.

The Law

Section 37 of the Act allows a rehabilitation authority to make a determination that an injured employee should undertake a rehabilitation program, having regard to a number of factors including the employee's attitude to the program and any other relevant matter. The section also provides that where an employee refuses or fails, without reasonable excuse, to undertake such a program, the employee's rights to compensation under the Act or to continue any proceedings in relation to compensation are suspended until they begin to undertake the program.

Conclusion

Ms Ripper submitted that the program was not a valid rehabilitation program for the purposes of section 37 of the Act because it did not have regard to her attitude to the program and did not have regard to "*any other relevant matter*" as it had not been developed in consultation with Ms Ripper

and her treating general practitioner. The Tribunal noted that Ms Ripper had attended her general practitioner with a representative from the rehabilitation authority to discuss her capacity to participate in a graduated return to work program. The Tribunal also noted that Ms Ripper attended a case conference at which goals were set for her return to work and her concerns regarding a proposal for two hours of work per day, twice weekly, were discussed. As such, the Tribunal found that the rehabilitation authority had regard for Ms Ripper's attitude to the program. The Tribunal also noted that the rehabilitation provider had made reasonable attempts to consult Ms Ripper's general practitioner by attending a medical appointment with her, sending the program to her on two occasions and following up with telephone calls which appeared to have been unanswered. As such, the Tribunal found that the rehabilitation authority also had regard to "*any other relevant matter*" and found the program to be a valid program for the purposes of the Act.

In relation to whether the program was a suitable program, Ms Ripper submitted that she could not comply due to her pain. Ms Ripper referenced the fact that the program had been drawn up by an occupational therapist and had not been reviewed or approved by her general practitioner. The Tribunal noted that the program had in fact been drawn up after assessment of Ms Ripper's work capacity was conducted by a multidisciplinary team consisting of an occupational therapist, psychologist and physiotherapist who had concluded she had capacity to work two hours per day, one day per week. Numerous unsuccessful attempts were then made to contact Ms Ripper's general practitioner. The Tribunal noted that the difference between Ms Ripper's certification of 1.5 hours per day and the recommended 2 hours was only 30 minutes and that the program provided for regular ongoing reviews. As it appeared flexible to accommodate Ms Ripper's situation, the Tribunal found the program was a suitable program.

Ms Ripper submitted that on 15 June 2012, she attended her workplace in accordance with the program but could only tolerate working 1.5 hours on one day per week, which she advised she would do. In considering whether Ms Ripper had failed to "*undertake*" the program, the Tribunal noted there was no definition in the Act and concluded on review of relevant case law and the Explanatory Memorandum that, for the purposes of the Act, "*undertake*" means more than "*to begin*", but less than "*to complete*". The Tribunal found that it was synonymous with "*to participate in*" or "*to engage in*". On the material and based on Ms Ripper's attendance at her workplace, the Tribunal found that Ms Ripper made a genuine and reasonable effort to fulfil her obligations under the program. The Tribunal noted that Ms Ripper worked 75% of the stipulated time and as such, found she complied substantially with the program and therefore, there was no failure or refusal to undertake the program and her rights to compensation should not be suspended.

For completeness only, the Tribunal found that Ms Ripper to be a honest, reliable witness and accepted her evidence that her continuing pain prevented her from working more than 1.5 hours per day. The Tribunal also took into account that there was no review of the program contrary to the terms of the program and that the *Notice of Effects of Non-Compliance* was issued only three days after the first scheduled day of the program. As such, the Tribunal found that Ms Ripper's reasons for not fulfilling her obligations constituted a reasonable excuse.

Lessons Learnt

This decision confirms that an employee who demonstrates an attempt to participate or engage with a rehabilitation program, whether or not they successfully complete it, are considered to have undertaken a rehabilitation program for the purposes of the Act.

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