

“Do your rehab” - Tribunal doesn’t accept workers pain complaints

Oliver and Comcare 2019 AATA 888

Key Points

- The Tribunal was required to consider whether a worker had a reasonable excuse for failing to undertake a rehabilitation program.
- The Tribunal found in favour of the employer.

Background

Ms Katrina Oliver was employed as an Executive Assistant and suffered an injury to her left wrist on 30 July 2012, while working for the Department of Families, Housing, Community Services and Indigenous Affairs, which later became DSS. Ms Oliver underwent surgery to her wrist and DSS, as the rehabilitation authority, attempted to rehabilitate her back into the workforce. There was some disagreement between Ms Oliver and DSS over her rehabilitation and Ms Oliver sought relief from the Administrative Appeals Tribunal.

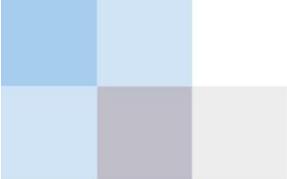
There were three applications before the Tribunal related to Ms Oliver’s rehabilitation:

1. Whether Ms Oliver was obliged to undertake the rehabilitation program which was to commence on 14 July 2016. Ms Oliver argued that she should not be required to undertake the program as it would cause pain and psychological distress.
2. Ms Oliver did not undertake the rehabilitation program and by Determination dated 4 November 2016, her rights to claim compensation were suspended under section 37(7).
3. On 30 August 2017, Ms Oliver wrote to DSS and asked for a new rehabilitation program to be provided to her. This request was denied by DSS.

Ms Oliver’s central claim was that she suffered unbearable pain when attempting to comply with the rehabilitation program. That pain caused stress and psychological difficulties and she did not believe that she should have to undertake the rehabilitation program.

Video surveillance was presented during the hearing to challenge Ms Oliver’s complaints of pain and disability. The surveillance showed Ms Oliver using her left hand to a greater degree than she claimed.

Comcare argued that Ms Oliver did not want to work on Wednesdays and that is why she refused to undertake the rehabilitation program. Comcare presented evidence that Ms Oliver had childcare difficulties on Wednesdays and preferred to stay home and look after her children. Comcare argued that the dramatic increase in pain was highly unlikely. Comcare submitted that because the rehabilitation program was appropriate, and she had no reasonable excuse not to undertake the program, the third appeal should fall away.



The Tribunal called the credit of Ms Oliver and her witnesses into question. There was evidence that Ms Oliver had colluded with witnesses and the Tribunal concluded that the behaviour of Ms Oliver caused the Tribunal to be cautious about accepting her evidence.

The Decision

The Tribunal spent some time going through the elements in section 37(3) as per the test set out in *McGuiness*. The Tribunal confirmed that it is mandatory to take these considerations into account when making a determination that a worker should undertake a rehabilitation program under section 37(1). The Tribunal considered the elements afresh and found the program was properly and appropriately made, despite Ms Oliver's resistance to it. The Tribunal concluded that Ms Oliver was obliged to undertake the rehabilitation program created by DSS on the following grounds:

1. There was no dispute that Ms Oliver had refused to undertake the rehabilitation program. The issue was whether her complaints of pain constituted a reasonable excuse for that failure. Due to her credit being brought into question the Tribunal found that it could not accept Ms Oliver's complaints of pain at face value.
2. The Tribunal noted that Ms Oliver's evidence should be viewed with caution and so too should the medical evidence that relied on her self reporting of pain. The Tribunal did not believe Ms Oliver's reported levels of pain and concluded that she had no reasonable excuse for her failure to undertake the rehabilitation program.
3. As the Tribunal concluded that the rehabilitation program was appropriately made, and that Ms Oliver had no reasonable excuse for her failure to undertake the program, they concluded that no new rehabilitation should be made.

Lessons Learnt

Once again, the Tribunal confirmed that when a determination is made that a worker should undertake a rehabilitation program pursuant to section 37(1) of the SRC Act, it is mandatory to take the elements set out in section 37(3) into account as per the authority of *McGuiness*.

When an applicant's excuse for her failure to undertake a rehabilitation program centres around the self-reporting of subjective complaints, it is necessary to undertake a careful examination of the credibility of the witnesses presented at hearing and give the appropriate weight to their evidence.

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