



COVERED CASES

HINES v WORKCOVER CORPORATION
(TRANSFER MAINTENANCE P/L)

[2000] SAWCT 171

Catchwords:

Section 28B, Section 36, Reasonableness

Facts:

The worker was employed as a casual marine pilot's assistant. The worker accepted the job as he anticipated that the hours he would be required to work would enable him to spend considerable time looking after his seriously ill wife.

In 1996 the worker suffered a right knee injury, and after a period of time off work, resumed his normal duties. On the 6th of July 1999 he suffered a further knee injury, and as a result continues to be partially incapacitated for work.

On the 2nd of March 2000 a Rehabilitation and Return to Work Plan ("second plan") was initiated, from the 3rd of March 2000 to the 1st of June 2000. The plan provided for light administrative duties, for 16 hours per week.

On the 14th of March 2000 the worker was directed to attend a meeting, and was informed that his employer wished to offer him different duties consisting of 38 hours per week full time. The worker was presented with a further Rehabilitation and Return to Work Plan ("third plan") commencing on the 14th of March 2000 until the 14th of June 2000. At the meeting the worker informed IQ Consultants that due to his personal circumstances i.e. his wife's illness, he was unable to work a full 38 hour week, every week, and was unable to manage what was contemplated in the third plan. The worker declined to sign the plan. The worker's solicitors also

corresponded with the employer and confirmed that the worker would not be attending at work in the new position, and advised that the worker was prepared to continue to attend at work undertaking the hours that he had been doing to date.

On the 7th of April 2000 the worker lodged a Notice of Dispute challenging the reasonableness of the third plan. That same day the Corporation made a determination discontinuing the worker's weekly payments on the basis that the worker had refused or failed to participate in a rehabilitation program and therefore breached mutuality pursuant to Section 36(1)(f) and 36(1A)(d) of the Act. (We note that this determination was defective in that it should have referred to a rehabilitation and return to work plan, not program, but it was still held to be substantially compliant with the requirements of Section 36 and the Regulations). The worker lodged a Notice of Dispute dated the 11th of April 2000 against this discontinuance.

Issues:

1. Can Section 36 be invoked where a worker fails to comply with a Rehabilitation and Return to Work Plan that was not reasonable.
 2. Can a Rehabilitation and Return to Work Plan be established despite there being an earlier, still current plan?
 3. Should the personal circumstances of the worker be taken into account when establishing a Rehabilitation and Return to Work Plan
1. The relationship between Section 28B and Section 36 of the Act.

It was held that if as a result of a review pursuant to Section 28(B)(3), the Tribunal was of the opinion that the return to work plan was unreasonable, the Section 36 notice based on the asserted refusal or failure to participate in the terms of that plan must fail, and the worker's challenge must succeed. Therefore the fate of the worker's challenge to the Section 36 determination was ultimately held to be contingent upon the outcome of the application for review of the rehabilitation and return to work plan.

2. Is the third plan unlawful?

The third plan was made before the second plan was given the opportunity to run its course. The reason that a rehabilitation and return to work plan has a starting and a completion date, is so that the parties know exactly where they stand, and for the duration of the plan they are bound by its terms. The remedy would therefore have been to file a Notice of Dispute to apply for a review pursuant to Section 28B(1) of the Act.

It was therefore held that the third plan created no obligations on the part of the worker, and the determination discontinuing the worker's weekly payments on the basis of the worker's failure to submit to the terms of the third plan must be set aside.

3. Are the terms of the third plan unreasonable?

In the alternative, it was held that in determining the reasonableness of a return to work plan, the worker's personal circumstances must be taken into account. Even though the worker may have been physically and mentally capable of undertaking the duties proposed in the third plan, considering all of the circumstances it was held that the plan was unreasonable.

The reason why the worker had taken the casual position in the first place, was so that he could work limited hours and have sufficient time to care for his wife. If the worker had to work the hours proposed, he would have to break a system that had been in place for six years, organise care for his wife and leave her unattended for much longer periods of time than she was accustomed to.

Commentary:

This is an important decision in terms of rehabilitation and the question of reasonableness has been further clarified in that the personal circumstances of the worker are important to this question. However, the most significant consequence of this decision is that a new Rehabilitation and Return to Work Plan can only be established upon the expiration of the previous Plan.