



## Comcare scheme guidance – reasonable excuse

### Purpose

To provide decision makers with scheme guidance regarding the term 'reasonable excuse' as it appears in the *Safety, Rehabilitation and Compensation Act 1988* (SRC Act).

### Background

Under the SRC Act, employees must provide a 'reasonable excuse' when they fail to complete certain actions or requirements related to an application for compensation or the provision of rehabilitation. Such circumstances include where the employee refuses or fails to:

- > undergo an examination for an assessment of the employee's capability to undertake a rehabilitation program under section 36(4)<sup>1</sup>
- > undertake a rehabilitation program under section 37(7)
- > undergo a medical examination under section 57(2)<sup>2</sup>
- > comply with a notice to provide information or documents under section 58(3)
- > provide a statutory declaration regarding the receipt of state workers compensation in respect of the claim under section 118(4).

Decision makers should take all reasonable steps to assist individuals in meeting any obligations with regard to the above requirements. However, if reasonable efforts have been made and an employee refuses or fails, without reasonable excuse, to comply with their obligations, there are a number of potential consequences under these sections of the SRC Act, including:

- > suspending the employee's rights to compensation payments until the relevant requirement has been satisfied as per sections 36(4), 37(7), 57(2) and 118(4)
- > suspending the employee's rights to institute or continue any proceedings with respect to compensation as per sections 36(4), 37(7), 57(2) and 118(4)
- > refusing to deal with the claim unless the required information is provided as per section 58(3).

1 While the legislation does not require a reasonable excuse for the obstruction of an examination, Comcare recommends that one be sought from the employee in the interests of natural justice.

2 As per footnote 1.

# Guidance

## General considerations when assessing whether an excuse is a reasonable excuse

When assessing whether an employee has a reasonable excuse for not complying with a request, there are a number of general principles established through case law that a decision maker should consider. However, these will be specific to the facts of each claim and considerations will differ depending on the nature of the request.

### Subjective and objectively reasonable grounds

The decision-maker must consider both the subjective grounds advanced by the employee, and grounds that are objectively reasonable.<sup>3</sup> A reasonable excuse requires more than just a rational explanation from the employee.<sup>4</sup> It is directed to 'physical or practical difficulties in complying' or 'the capacity of the person concerned' and must relate to an employee being unable, rather than unwilling to undergo an examination or undertake a program.<sup>5</sup>

Supporting evidence provided by the employee can assist in establishing whether the grounds for the excuse are objectively reasonable.

### A requirement for more than a general dissatisfaction with the request

Practical difficulties in complying with a request do not extend to an employee simply being dissatisfied with the terms or aspects of that request.<sup>6</sup> A reasonable excuse requires a reason that is personal to the employee, but not an excuse relating to the need for the requirement.<sup>7</sup> An employee's concerns relating to the need for the requirement are more appropriately managed through the reconsiderations and appeals process.<sup>8</sup>

While the employee has the option to engage in an appeal, non-compliance with the requirement on this basis does not constitute a reasonable excuse.

### Likely to occur after the making of the relevant decision or determination

A reasonable excuse generally arises from something that occurs or becomes apparent after a relevant decision or determination has been made.<sup>9</sup> Any issues identified at the time of the decision should be taken into consideration by the decision maker and all reasonable steps taken to ensure that the employee is given the appropriate support to complete the request.

### A genuine intent to comply with the request exists

Understanding whether the employee has a genuine intention to comply with the request, and not an alternative reason for failing to comply, can assist the decision maker in understanding whether the excuse is reasonable when assessed together with the other facts relating to their non-compliance.<sup>10</sup>

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3 *Sambastian and Australian Postal Corporation* [2011] AATA 412; *Comcare v Singh* [2012] FCA 136.

4 *Comcare v Singh* [2012] FCA 136 [27].

5 *Corporate Affairs Commission (NSW) v Yuill* [1991] HCA 28 [19]; *R v John (Graham)* [1974] 2 All ER 561, 565.

6 *Australian Postal Corporation v Pascoe* [2003] FCA 390 [18]. See also *Chowdhary and Comcare* [1998] AATA 448 [43 - 6]; *Barnes and Australian Postal Corporation (Compensation)* [2022] AATA 2413 [26] –[32].

7 *Telstra Corporation Limited v Administrative Appeals Tribunal* [2003] FCA 102 [11].

8 For section 36, 37, and 57 determinations made under the SRC Act, a reconsideration can be requested under section 38 or 62 of the SRC Act for Commonwealth employees and section 62 of the SRC Act for licensee employees. Decisions made under sections 58 and 118 of the SRC Act are not section 60 determinations but may be appealed under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) or the *Judiciary Act 1903*.

9 *Australian Postal Corporation v Pascoe* [2003] FCA 390 [18].

10 *Nunez and Australian Postal Corporation* [2014] AATA 125 [28].

## Medical inability to participate in the required activity

For an excuse to be considered reasonable, the employee should be physically, medically or emotionally unable to comply with a request or requirement. If the proposed activities are beyond the individual's capacity or could cause a deterioration of the individual's medical condition, this constitutes a reasonable excuse.<sup>11</sup> Even if an employee is considered to be physically capable of complying with a requested action or requirement, failure to do so as a result of the employee's mental state can be considered reasonable.<sup>12</sup>

However, simply being unwilling to comply with a request does not constitute a reasonable excuse. Where an employee fails to complete a requested action or requirement as a result of the employee's belief that the proposed activity will be detrimental, this is unlikely to be considered reasonable where the risk is slight enough that it would not constitute a real risk.<sup>13</sup> Similarly, failing to comply due to a belief that doing so may be uncomfortable or potentially unpleasant does not constitute a reasonable excuse.<sup>14</sup>

### Example – Reasonable excuse due to medical inability to participate

An employee made a claim for workers' compensation in respect of an injury to their foot.

The employer organised a rehabilitation program for the employee, however a week later the employee's injury worsened. The employee identified that many of the activities in the program involved walking, lifting and other actions that would put pressure on their injury. The employee considered that given their limited capacity for movement, the activities were likely to exacerbate their injury and cause pain and discomfort. The employee consulted their treating physician who agreed that the activities described in the program could cause a deterioration of the condition.

The employee contacted their employer to inform them that they will not be participating in the current rehabilitation program. They requested a new rehabilitation program that would be more suitable for their current medical capacity.

In assessing whether the employee had provided a reasonable excuse for not complying with the rehabilitation program, the decision maker considered:

- > that according to the medical evidence provided by the employee, the proposed activities were beyond their medical capacity and could cause a deterioration of the employee's condition
- > that the employee believed that the consequences of partaking in the program would be greater than just slight discomfort or unpleasantness, the activities involved would be significantly harmful, with this belief supported by evidence
- > that the employee was not simply dissatisfied with the program, but had reason to believe that it would harm their recovery
- > that the employee showed a genuine attempt to return to work, through requesting a revised program.

In consideration of these factors, the decision maker determined that the employee had a reasonable excuse in this instance for not attending the rehabilitation program.

11 *Corrie and Comcare* [2009] AATA 203 [111 – 2]; *Karhani and Linfox Australia Pty Ltd* [2011] AATA 506.

12 *Perrin and Telstra Corporation Limited* [1994] AATA 712 [68].

13 *McKinnon v Commonwealth* [1998] FCA 1456.

14 *Twaddel and Comcare* [2001] AATA 759 [29]; *NRJT and Australian Offshore Solutions Pty Ltd* [2015] AATA 588 [66].

## Critical or unforeseen incident

An employee's failure to participate or comply with a request or requirement due to a critical or unforeseen incident may constitute a reasonable excuse for the purposes of the SRC Act. A critical or unforeseen incident can include a number of events including, but not limited to:

- > a transport strike
- > the employee being involved in an accident
- > the employee or their dependant falling ill
- > a natural disaster
- > traffic delays or car issues
- > a large scale crisis (for example a COVID-19 outbreak)
- > machine/electronic issues, such as an elevator breaking down.

The decision maker should give consideration to whether the incident impacted upon the employee's ability or capacity to comply with the requirement and whether the employee failing to comply with the request would, in the circumstances, be considered not just rational to the employee, but also objectively reasonable.

### Example – Reasonable excuse due to critical or unforeseen incident

An employee makes a claim for compensation in respect of an injury. Pursuant to this claim, it is determined that the employee should undertake a rehabilitation examination, which has been organised by the employer.

The day the employee is due to attend the examination, they receive a phone call notifying them that a close family member has passed away suddenly. As a result, the employee does not attend the appointment.

The decision maker was informed that the employee was unable to attend the rehabilitation examination and had to assess whether the excuse provided was reasonable. The decision maker considered that:

- > the death of the employee's family member was unforeseen and affected the employee's ability to attend the rehabilitation examination
- > even though the employee was physically well, it is likely that under the circumstances, the employee would not have been emotionally able to attend the examination.

After considering the circumstances, the decision maker found that the employee's excuse could be considered objectively reasonable and that they did have a reasonable excuse for failing to attend the rehabilitation examination.

## Practical difficulties in complying

Where an employee experiences practical difficulties in complying with a request, and these difficulties are objectively reasonable, it is likely that this would be assessed as being a reasonable excuse under the SRC Act. Examples of such difficulties can include:

- > an employee's remote location making it difficult for them to comply with a request
- > an employee having difficulty sourcing information or documents (pursuant to section 58 of the SRC Act) from a third-party
- > an employee not being aware that they have received a request<sup>15</sup>
- > an employee having accessibility needs that prevent them from meeting a requirement.

<sup>15</sup> *Oakes and Comcare* [1995] AATA 311 [71 - 6]; *Wilkinson and Australian Postal Corporation* [1998] AATA 849 [106]; see also *Virasinghe and Comcare* [1995] AATA 557 [8] where, among other reasons, the applicant was found to have had a reasonable excuse for failing to attend a medical appointment as it was determined that the applicant had no subjective knowledge of the requirement.

A decision maker should take all reasonable steps to attempt to facilitate the employee's ability to satisfy the requested activity. This may involve:

- > covering reasonable costs associated with obtaining relevant information or documents required under section 58
- > for remotely located employees, organising online examinations or paying for an employee's travel and accommodation expenses to attend the location of the examination under section 36(5) and section 57(3)
- > making arrangements to ensure the employee's accessibility needs are met.

Practical difficulties in complying with a request do not extend to situations where an employee is unable to satisfy a requirement solely due to a decision of personal preference. For example, an employee may have practical difficulties in participating in a rehabilitation program due to their personal preference to relocate to another country, however those practical difficulties only arose because the employee chose to remove themselves from the location of their employer. In such circumstances, the personal preference of the employee is unlikely to constitute a reasonable excuse for the purposes of the SRC Act.<sup>16</sup>

In all instances, the decision maker should have regard to the facts and information arising from each individual case when assessing whether an excuse is reasonable.

### **Example – Reasonable excuse due to practical difficulties in complying**

An employee works at a Commonwealth agency and makes a claim for compensation in respect of an overuse injury.

Documents submitted with the employee's claim form seem to suggest that this injury may have occurred as a result of their previous employment with the local council. The decision maker issues a notice under section 118(3) to the employee by mail, stating that they must provide a statutory declaration advising whether they have received any state workers' compensation payments in relation to the injury.

After receiving no response, the decision maker calls the employee to follow up on the request. The decision maker understands that if the employee does not have a reasonable excuse for complying with the request, their rights to compensation will be suspended under section 118(4) of the SRC Act.

The employee advises the decision maker that they had not received the request but had received a notification from their delivery service advising that there had been a disruption to their mail services. The employee forwards the notification to the decision maker in support of their excuse for not complying with the request and advises that they will submit the statutory declaration shortly.

The decision maker concluded that the employee had a reasonable excuse for not complying, finding that:

- > not receiving the mail presented a practical difficulty for the employee in complying with the requirement
- > the employee provided evidence to support the excuse
- > the employee appeared to show a genuine desire to comply with the request, and was unable to do so in the circumstances, rather than unwilling to do so
- > the excuse provided by the employee was objectively reasonable.

## **Requesting and assessing evidence of a reasonable excuse**

It is at the discretion of the decision maker as to whether or not the employee should provide evidence to support the reasonableness of their excuse for not complying with the request. In requesting evidence, a decision maker should consider whether the request is appropriate in the circumstances and whether it would present hardship or be onerous to the employee.

<sup>16</sup> *Galbraith and Comcare* [2006] AATA 762 [30].

## Providing the employee with natural justice

Natural justice (or procedural fairness) is a legal requirement that applies to most decisions that directly affect the rights, interests or legitimate expectations of individuals or organisations. Natural justice requires that decision makers adhere to a fair decision-making procedure. This ordinarily involves the ability of the affected person to provide the decision maker with information relevant to the decision, and to have the decision appropriately reviewed.

Before proceeding to suspend an employee's benefits or refusing to deal with a claim, the decision maker should take all reasonable steps to assist the employee comply with the requirement, taking into consideration the specific needs of their case. If the employee remains non-compliant, the decision maker must provide the employee with an opportunity to give their reasons for refusing or failing to complete the action or requirement before deciding whether the employee's excuse is reasonable. While not legislatively required, it is best practice to issue this request in writing.

There is no legislative timeframe setting out how long a decision maker must provide an employee for the right of reply. The timeframe provided to an employee to respond is discretionary but should be reasonable and take into consideration the employee's circumstances.

## Is an assessment of a reasonable excuse a determination?

A decision is a 'determination' if it is listed under section 60(1) of the SRC Act. Determinations must comply with the set of requirements prescribed by section 61 of the SRC Act and are subject to reconsideration under section 62.<sup>17</sup>

If a decision maker makes an assessment that an employee does not have a reasonable excuse for failing to participate in a section 36 rehabilitation examination, a section 37 rehabilitation program or a section 57 medical examination, any subsequent decision to suspend the employee's compensation that is made under section 36(4), section 37(7) or section 57(2) of the SRC Act requires a determination.<sup>18</sup> If a decision maker decides that the employee's excuse is reasonable, a determination is not required, however they should inform the employee of their decision in writing.

An assessment of an employee's reasonable excuse in regards to a refusal to deal with a claim made under section 58 or a decision to suspend compensation or section 118, is not a determination for the purposes of the SRC Act and is not subject to a reconsideration or review by the Administrative Review Tribunal. However, an employee may be able to seek review of these decisions under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) or the *Judiciary Act 1903* by making an application to the Federal Court of Australia.

## Notifying an employee of the assessment of the reasonable excuse

As soon as practicable after a determination is made under section 36(4), section 37(7) or section 57(2) of the SRC Act, the delegate should provide written notice to the employee detailing:

- > the terms of the determination
- > the reasons for the determination
- > a statement informing the claimant that they are able to request a reconsideration of the determination if they are dissatisfied with the determination.

While an assessment of a reasonable excuse made under section 58 or section 118 is not a determination, the decision maker should still communicate the outcome to the employee both verbally and in writing, with a letter setting out the terms and reasons for the assessment.

In all circumstances, the employees must be made aware that the suspension of their entitlements or the refusal to deal with their claim, will be lifted as soon as they comply with the request.

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<sup>17</sup> Section 38 of the SRC Act, also provides for review of a Commonwealth rehabilitation authority's determinations by Comcare.

<sup>18</sup> *Australian Postal Corporation v Fergie* [2003] FCAFC 223 [79], [86].

## Further information

Comcare provides specific scheme guidance covering the topics of suspension of compensation and refusal to deal with a claim. For further information regarding these topics, please refer to Comcare's [scheme guidance](#):

- > Suspension of compensation under the Rehabilitation Provisions of the *Safety, Rehabilitation and Compensation Act 1988*
- > Section 57 Power to require a medical examination under the *Safety, Rehabilitation and Compensation Act 1988*
- > Section 58 Requests for information or documents and refusal to deal with a claim

For more information, please contact Comcare's Scheme Policy team on 1300 366 979 or email: [schemepolicyanddesign@comcare.gov.au](mailto:schemepolicyanddesign@comcare.gov.au).