



DECISION

Fair Work Act 2009

s.789FC - Application for an order to stop bullying

Darryl Vine

v

Central Bayside Community Health Services; George Robinson; Sharon Buchanan; Jane Fiscaro
(AB2020/239)

COMMISSIONER YILMAZ

MELBOURNE, 5 NOVEMBER 2020

Application for an order to stop bullying – whether reasonable management action – no risk of continued bullying at work – application for an order to stop bullying dismissed

[1] On 3 April 2020, Mr Darryl Vine filed an application for an order to stop bullying pursuant to s.789FC of the *Fair Work Act 2009* (the Act). Mr Vine, an alcohol and other drugs counsellor (forensic), alleges that he has been bullied by four individuals employed by Central Bayside Community Health Services (CBCHS). CBCHS submit that Mr Vine was subject to reasonable management action.

[2] On Tuesday 17 March 2020, Mr Vine took sick leave due to suspected coronavirus symptoms.¹ He submits he obtained a medical certificate from the Peninsula Health testing station to cover the period 17 March to 20 March 2020. He then obtained a further medical certificate for two days from his GP and returned to work on 25 March 2020.²

[3] Mr Vine submits that while he was absent on sick leave his co-worker, a psychologist, called him on 18 March 2020, and ‘interrogated him, waking him from his sleep with a headache’. On his return to work he was called into a meeting to discuss Facebook posts brought to the attention of management. He was given a letter outlining two allegations for his response at a formal disciplinary meeting on 30 March 2020. Mr Vine attended the meeting with Professor Cree, his support person and advocate. Mr Vine alleges that the meeting and behaviour by three staff towards him constitutes bullying.

[4] CBCHS submit that on 17 March 2020, Mr Vine sent an email to the general manager advising that he had been tested for COVID-19 and was directed to isolate. Late on the same day, an employee of CBCHS reported a post on Mr Vine’s personal public Facebook page which stated that a “client at work just came back from China and tested and has it then in two days I felt funny”.³ At the direction of the general manager, the senior psychologist contacted

¹ Applicant’s Form F72 at Q2.1.

² Ibid.

³ Respondent’s Form F73 at Q4.1 and attachment B.

Mr Vine to understand the link between the client and Mr Vine's symptoms. The Respondent states that this direction was to ensure that CBCHS complied with its duty of care to its employees and clients, including compliance with its obligation to report cases of COVID-19 to the Department of Health and Human Services.

[5] CBCHS provided to Mr Vine a letter on 25 March 2020, which outlined their issues of concern relating to his conduct. The letter invited Mr Vine together with his support person or representative to attend a meeting for him to answer two allegations: posting on Facebook material in breach of the CBCHS Code of Conduct and failure to follow the sick leave policy. Both allegations were scheduled to be discussed at a meeting on 30 March 2020.⁴ CBCHS received a letter from Professor Cree dated 26 March 2020 where he advised that he would be attending the meeting with Mr Vine, his client, and further denies that Mr Vine posted any messages on Facebook and stated that all efforts were made to advise CBCHS of the absence on sick leave.⁵ At the meeting of 30 March 2020, Mr Vine again denied that he posted on Facebook. At the meeting Mr Vine maintained his explanation that the Facebook post had been posted by his ex-wife without his knowledge as he had previously indicated on 25 March 2020, stating further that she had posted on his Facebook page in the past.

[6] On 30 March 2020, another employee reported a further post on Mr Vine's Facebook page which is described by CBCHS as racist and contrary to its Code of Conduct. CBCHS tendered in evidence copies of both posts which show that Mr Vine is an employee of CBCHS. The apparent publication of Mr Vine's employer on his personal Facebook page together with their concerns over the published material, caused CBCHS to take disciplinary action.

[7] On 31 March 2020 a show cause letter was sent to Mr Vine stating that he had breached the CBCHS Code of Conduct, Values and the requirements of his position by posting inappropriate material on Facebook. The allegations concerned the post on 17 March 2020, and the new post described as racist which was reported on 30 March 2020. The show cause letter confirmed that the allegation concerning sick leave was withdrawn. The letter required a response from Mr Vine by 7 April 2020 concerning the two allegations.⁶

[8] On 2 April 2020, Mr Vine wrote to the CEO raising his concerns about the allegations made against him and made the following points:

- He denied making the posts on Facebook and suggested they were made by his hostile ex-wife and stated that he had experienced such attacks in the past,
- He complained about the telephone call from his co-worker, the psychologist, on 18 March 2020, in which he described it as aggressive interrogation while he was home sick with a headache and while under stress of a potential coronavirus assessment,
- He also criticised the meeting held on 30 March 2020, where he described the meeting as an unsuccessful mediation event and unprofessional conduct by CBCHS, and
- Advised that he was stressed and that his GP informed him that he needed to be on WorkCover.⁷ Mr Vine requested that the CEO to resolve the dispute.

⁴ Respondent's Form F73 at Q4.1 and attachment D.

⁵ Respondent's Form F73 attachment E.

⁶ Ibid at attachment G.

⁷ Ibid at attachment H.

[9] On 3 April 2020, Mr Vine filed a workers' compensation claim and on 6 April 2020, correspondence from Carbone Lawyers informed CBCHS that they were representing Mr Vine.

[10] Mr Vine is seeking a stop bullying order and an order to suspend three named persons, a written apology and assurances from the CEO that Mr Vine would not suffer any further bullying.⁸

[11] I held a conciliation conference on 1 May 2020. Professor Cree confirmed that he was Mr Vine's representative and that Carbone Lawyers were not representing Mr Vine's interests in the Bullying application but had provided his client with legal advice. Professor Cree submitted he was a professor from 1990 to 1994 at Monash University, that he is an accredited mediator and now consults through his company People Count Today P/L.

[12] I granted leave to appear for both Professor Cree and Mr Gregory Christodoulou of the Fair Work Centre.

[13] CBCHS raised a jurisdictional objection that the allegations raised by the Applicant did not constitute bullying and that the conduct of the Respondent was reasonable management action.

[14] Mr Vine indicated his preference for the matter to be arbitrated. Directions for hearing were agreed and sent to the parties on 4 May 2020. The hearing date was scheduled for 11 June 2020.

[15] Late on 14 May 2020, I received correspondence from Carbone Lawyers indicating they were representing Mr Vine and sought an extension of 14 days to file submissions and the Applicant's statement. An extension was denied. The Applicant's outline of submissions was filed on time on 18 May 2020, but additional materials filed failed to comply with directions. Those materials included:

- A statement by Professor Cree dated and received on 27 May 2020
- A medical report from a psychologist dated 29 May 2020 addressed to the Accident Compensation Conciliation Service (received 2 June 2020)

[16] On 5 June 2020 Professor Cree requested an adjournment and indicated he would be providing evidence of the Applicant's medical condition in support of the request. The material filed by Professor Cree included the same psychologist report to the Accident Compensation Conciliation Service dated 29 May 2020, a GP medical certificate dated 6 June 2020 stating Mr Vine was unfit for work, Mr Vine's WorkCover certificate of capacity certifying him as unfit for work on 9 June to 8 July 2020, a further psychologist report dated 5 June 2020 to Mr Vine's GP advising of the status of his referral and confirming he was continuing treatment, and a copy of the referral by his GP to the psychologist. A further document was received which confirmed that Mr Vine attended counselling on 29 March 2020 with the employee assistance program.

[17] I advised the parties that the request for adjournment was denied. The material submitted by Mr Vine's representative did not provide valid reasons for an adjournment.

⁸ Applicant's Form F 72 at Q7.1.

Among the medical certificates it appeared that Mr Vine and Professor Cree relied on the certificate of incapacity to perform work as the reason that he could not attend the hearing. At no time did Mr Vine provide evidence of his incapacity to attend the hearing and give evidence, and the directions were issued after taking into account Mr Vine's insistence on a hearing and his verbal instructions concerning his availability and capacity to comply with directions.

[18] In the evening of 9 June and again on 10 June 2020, I received an email from Mr Vine to Professor Cree which confirmed that Carbone Lawyers were not representing in this matter and that Professor Cree was his representative.

[19] On the day of the hearing Mr Vine refused to give evidence and insisted on a further adjournment. Professor Cree made submissions and the Respondent raised procedural fairness matters particularly as Mr Vine insisted on the matter proceeding to arbitration. Due to the impasse, I also assessed whether the matter could be conciliated. The matter could not be resolved and it was agreed to adjourn to enable Mr Vine to obtain a medical assessment from his psychiatrist confirming his capacity to provide witness evidence.

[20] Neither party objected to my determination of the matter. The matter was then programmed for determination on the papers and the parties were directed to file submissions. Mr Vine sought 5 weeks to file written submissions, it was agreed two weeks was sufficient for the Respondent, and Mr Vine sought 3 weeks to file his reply submissions. This decision is made based on the written material provided to date.

The submissions of Vine

[21] Mr Vine produced a confidential report from his psychiatrist addressed to his general practitioner on 4 July 2020, about his own account into his concerns and mental wellbeing. The letter does not provide direct advice regarding his capacity to present witness evidence but does report that Mr Vine says that he finds himself in a difficult position to negotiate with his employer and to present his case to the Fair Work Commission. The Report is not an objective medical assessment of Mr Vine's capacity to give evidence but rather a report of Mr Vine's narrative to his psychiatrist. The Report then suggests that Mr Vine should be represented because Mr Vine lacks coping skills. The Report concludes that medical treatment has little to offer and his recovery depends on resolution of his workplace grievance.⁹ While the Report does not confirm Mr Vine's incapacity to give evidence, the production of the Report confirms the unwillingness of Mr Vine to give witness evidence, therefore I will proceed to determine the matter on the papers.

[22] Mr Vine filed his statement dated 18 May 2020 where he alleges that he was subject to bullying from about November 2019. He names his general manager Mr Robinson and the senior psychologist Ms Fiscaro and refers to behaviour inter alia as victimising, humiliating, intimidating and threatening. Specifically, he refers to his work being scrutinized. There is no evidence or further particulars relating to the allegations of victimisation, humiliation, intimidation or threats, nor of being scrutinized unfairly or improperly.¹⁰ Generalised statements makeup the allegations against both individuals. Mr Vine's statement refers to five alleged examples or instances and then proceeds to provide a narrative of the events leading to

⁹ Report of Dr Kruk dated 4 July 2020.

¹⁰ Applicant's statement at [4] to [5].

his sick leave and the response from CBCHS. The five alleged examples or instances of bullying identified in the statement include:

- Demeaning body language by Ms Fiscaro after Mr Vine received client feedback. He described her behaviour of shrugging shoulders, rolling her eyes and looking at another CBCHS staff member. No date was provided of the incident;
- On a daily basis as he would greet Ms Fiscaro as he walked past her, she would often ignore him;
- Ms Fiscaro would ignore him when he tried to communicate with her. He alleges that he reported this concern to Ms Hill, their supervisor;
- Ms Fiscaro would often walk past his consulting room where he was with a client as if spying or stalking him. Mr Vine speculated her behaviour was for the purpose of scrutinising how he did his work; and
- Ms Fiscaro allegedly belittled him by telling him how to conduct his work and write his case notes. Mr Vine submits he raised this with Ms Hill and confirmed that Ms Fiscaro was not his superior. Mr Vine also alleges that the general manager instructed Ms Fiscaro to look at his work.¹¹

[23] On 17 March 2020, Mr Vine was on sick leave and in isolation as he suspected he may have had COVID-19. On 18 March 2020 Ms Fiscaro called him and Mr Vine described her questioning as interrogation about being sick. It is submitted that Ms Fiscaro advised him of the Facebook post and accused him of putting his clients and colleagues at risk.¹²

[24] Mr Vine submits he called and texted his general manager Mr Robinson about the phone call and submits his messages were not returned, therefore he contacted the CEO.¹³

[25] On 25 March 2020, Mr Vine returned to work and alleges that bullying continued. He submits he was not informed of any changes in relation to COVID-19 and the preventative measures implemented.

[26] Mr Vine submits that he was informed that staff were annoyed with him for posting on Facebook. Mr Vine named Ms Buchanan and states that she informed him “*what do you expect, people are angry at you because of the post you posted on Facebook*”.¹⁴ Mr Vine met with Mr Robinson and Ms Buchanan where two allegations were put to him in writing and he was invited to a meeting on 30 March 2020 to respond to allegations of misconduct.

[27] Mr Vine submits that he attended the meeting on 30 March 2020 with Professor Cree and alleges he was not given the opportunity to respond. Mr Vine denied making the Facebook posts and states that he was spoken to in a manner where he felt intimidated and pressured. Mr Vine received further correspondence on 1 April from the Respondent’s representative regarding a further allegation regarding a post characterised as racist. Mr Vine states that his “*employer continued to aggravate this situation and make a mountain out of a mole hill.*”¹⁵ Mr Vine was further concerned that staff at CBCHS had spoken to him about the Facebook matter and therefore submits that the matter was not treated confidentially.

¹¹ Applicant’s statement at [6] to [11].

¹² Ibid at [12].

¹³ Ibid at [13].

¹⁴ Applicant’s statement at [16].

¹⁵ Ibid at [19] to [22].

[28] The other behaviour that Mr Vine complains of, and describes as bullying, relates to:

- The meeting held on 25 March 2020 when Mr Vine was handed the allegations letter by Ms Buchanan;
- The inclusion of the allegation that Mr Vine failed to follow the sick leave policy;
- The disciplinary meeting held on 30 March 2020;
- Failure of the CEO to contact Mr Vine; and
- The addition of the second allegation concerning the Facebook post on 30 March 2020

[29] On 18 July 2020, Mr Vine filed his written submissions in which he states that the bullying commenced in April 2019. Mr Vine submits that CBCHS made spurious claims about COVID-19 and neglected a cyber security attack of which he suggests CBCHS was a victim, thereby putting some 13,000 patient records at risk. Mr Vine relies on an address to the Press Club by the ASIO Director as the basis for his submissions. Mr Vine submits he immediately reported to ASIO and the Victorian Health Department. The content of his report is unclear from his submissions in terms of whether it relates to his Facebook posts or his allegations that CBCHS was subject to a security cyber-attack. Towards the end of Mr Vine's submission and in an attachment, he suggests there had been a ransomware attack on CBCHS via his Facebook page. No evidence was provided in support of the submissions. Mr Vine submits that he expected that CBCHS would support his theory of a cyber-attack via his Facebook page, instead he was accused of authoring the posts on his personal pages. A further document titled "research paper" by Professor Cree was attached to the submissions. Professor Cree's paper contains extensive allegations including that Mr Vine was subject to "tall poppy syndrome" after he was praised by management which resulted in alienation. The "evidence" relied on was generalised interpretations of news items regarding cyber-attacks to explain that Mr Vine's Facebook page was a conduit to an attack on his employer. I note that no explanation was provided in relation to why Mr Vine originally submitted that the posts were made by his ex-wife and then subsequently formed the view and submitted that the posts were caused by an elaborate cyber security attack.

[30] On 23 June 2020, I received an email from Mr Vine attaching correspondence from the Australian Cyber Security Centre in the Australian Signals Directorate where he requested an investigation into his Facebook page, as he reported that someone posted two items that had created difficulty for him in the workplace. The response thanks him for his email and directs him to report the incident to both Facebook and by directly filing the report on ReportCyber. No confirmation was received from Mr Vine that he followed up with the advice to properly report the alleged tampering of his Facebook page to either Facebook or the ReportCyber facility. The response from the Australian Cyber Security Centre attaches Mr Vine's email of the same date.

The submissions of CBCHS and the named persons

[31] CBCHS concedes that Mr Vine is a worker pursuant to s.789FC(2) of the Act and the Respondent is a constitutionally covered business pursuant to s.789FC(3) of the Act. Mr Vine remains a current employee of CBCHS.

[32] Ms Fiscaro submits that the behaviour complained of by Mr Vine in respect to her body language, tendency to ignore him, allegedly "spying or stalking" him and belittling him by telling him how to write up his case notes over the period November 2019 to 16 March

2020 is denied. Further CBCHS submits the behaviour did not amount to bullying pursuant to s.789FD of the Act.

[33] In relation to complaints about the phone call by Ms Fiscaro on 18 March 2020, CBCHS and Ms Fiscaro deny that the behaviour was as described by Mr Vine, and a single phone call does not amount to bullying, rather the phone call was at the direction of management to ascertain the connection between the client and Mr Vine's absence due to alleged COVID-19 symptoms. CBCHS submit the phone call was reasonable management action.

[34] Ms Fiscaro provided a witness statement which details her position, large client workload and her role in drug and alcohol counselling. She described her relationship as strictly professional with Mr Vine. She stated that she declined his invitation to his wedding in March 2020, as they are not at that friendship stage.¹⁶

[35] Ms Fiscaro denies they work alongside each other on a daily basis as they have limited contact at one site each Monday. In describing her workload, Ms Fiscaro explains that she has very limited time to engage in discussion seeing between 4-6 clients a day, while Mr Vine will see 1-2 clients. She leaves at 3.00pm to collect her child from school. She denies ever deliberately ignoring Mr Vine and she provides an example of their written communication where she invites him to a team support session and describes the window which Mr Vine alleges that she peers through while he is with a client. Ms Fiscaro describes the window as a small one-way mirror where the person cannot see out from the room into the corridor. Pictures of the room, the door and windows were tendered in evidence.¹⁷

[36] Ms Fiscaro denies looking at Mr Vine's files, and does say that client files are not the property of a practitioner and in her role she is required to prepare the CBCHS data report of drug and alcohol client files for the Department of Human Services, which Mr Vine was well aware of.¹⁸

[37] Ms Fiscaro provided an account of the request from Mr Robinson to contact Mr Vine after he did not answer Mr Robinson's call. Ms Fiscaro provided her notes of the telephone call to Mr Vine where he provided details of a client, the location of the consultation and where she could find the record of date that he last consulted with the client. She also tendered her correspondence to Mr Robinson of her discussion with Mr Vine.

[38] Ms Buchanan also provided a witness statement which described her interactions with Mr Vine, the procedural process in putting to Mr Vine the allegations, her recollection and notes of the meeting with Mr Vine on 25 March and 30 March 2020, including the interactions with Professor Cree on 30 March, including the reasons for setting aside the allegation concerning sick leave and events subsequent to the meeting of 30 March. Ms Buchanan confirms that at no time had Mr Vine lodged any complaint per the CBCHS Prevention of Bullying, Harassment and Discrimination Policy.¹⁹

¹⁶ Witness statement of Jane Fiscaro at [2] and [3] and attachment F1.

¹⁷ Ibid at [4] - [6] and attachment JF2 and JF3.

¹⁸ Ibid at [7].

¹⁹ Witness statement of Sharon Buchanan and attachments.

[39] Ms Caron Hill provided a witness statement which does not support the statements made by Mr Vine but corroborates the statements of Ms Fiscaro. Importantly Ms Hill denies any complaints were made by Mr Vine to her against Ms Fiscaro. Ms Hill also provides evidence regarding meeting minutes relating to the incident where Mr Vines complains against Ms Fiscaro's alleged conduct when he received favourable client reports.²⁰

[40] Mr Robinson also denies that he failed to communicate with Mr Vine between 17 and 24 March as alleged. Mr Robinson provides evidence of his phone records of calls and text messages to Mr Vine.²¹ In relation to allegations that Mr Robinson repeatedly bullied him since November 2019, Mr Robinson submits that he only saw and spoke to Mr Vine twice in February 2020, at first instance in relation to the commitment to continue to provide him with external forensic supervision, and the second time was a work related interaction regarding the needle exchange room at Chelsea. Mr Robinson confirms there had not been any reason to talk to Mr Vine about his performance other than two complaints, one in March 2019 and the other in July 2019.²² Evidence of the complaints and the process undertaken by CBCHS was provided in evidence.

[41] Mr Robinson submits that he was informed of Mr Vine's Facebook post by another employee in the evening of 17 March 2020 and tried to contact Mr Vine unsuccessfully in the morning. Mr Robinson directed Ms Fiscaro to contact Mr Vine on 18 March 2020.

[42] After discussing the matter with the CEO, an email was sent to all staff from the CEO providing advice on the alleged coronavirus risk, citing that a staff member misled CBCHS about the risk of infection from a client. The email confirms that CBCHS followed-up with the client, their parent and external agencies. The email confirms that the client did not travel overseas and there was a low risk of infection. Staff were reminded of the processes to follow regarding coronavirus risk, the arrangements concerning the delivery of services in response to COVID-19 requirements, and a reminder to staff about their social media responsibilities in terms of upholding CBCHS values and code of conduct and to refrain from posting material damaging to clients, colleagues and the reputation of CBCHS. A copy of the CEO's email was tendered in evidence.²³

[43] On 19 March 2020, Mr Robinson submits that he spoke to Mr Vine on the phone about the content of the CEO's email. During the phone conversation Mr Robinson submits that Mr Vine did not express any concern about Ms Fiscaro's phone call, only that he wrongly advised her that it was not a client but a family friend who he had been in contact with the virus that came back from overseas.²⁴

[44] Mr Robinson tendered in evidence copies of the communication with Mr Vine while he was absent, and in disputing that Mr Vine was excluded from important COVID-19 information, he tendered in evidence a copy of the staff SharePoint that contains all emails regarding COVID-19 staff updates which was available to Mr Vine at all times.

²⁰ Witness statement of Ms Caron Hill and attachment.

²¹ Witness statement of George Robinson at [5] and attachment GR-5 and GR-6.

²² Ibid at [2] and [4] and attachments GR-1, GR-2 and GR-3.

²³ Ibid at [5] and GR-4.

²⁴ Ibid at [6].

[45] Mr Robinson denies the submission made by Mr Vine concerning alleged statements by Ms Buchanan during the meeting of 30 March 2020, and submits that the meeting was brought to a close after Mr Vine stated in response to a question on the Facebook posts, that he found the questioning “psychologically damaging.”²⁵

[46] CBCHS submit that the behaviour complained by Mr Vine is reasonable management action conducted in a reasonable manner and this does not constitute bullying. The allegations of bullying arose after an incident which resulted in CBCHS investigating alleged misconduct and that such action was reasonable.

[47] CBCHS deny any cyber-attack on any of their patient files as alleged by Mr Vine in his written submissions of 18 July 2020.

Consideration

[48] The remedy available to the Commission in respect to a bullying application is an order to stop bullying of a worker. Relevantly, s.789FF of the Act provides the Commission with the discretion to issue an any order it considers appropriate “to prevent the worker from being bullied at work by the individual or a group of individuals,”²⁶ where it is satisfied that the worker has been bullied at work; and there is a risk that the worker will continue to be bullied at work.²⁷

[49] The Commission may issue an order to stop bullying, that it considers appropriate, if an application is made under s.789FC, and if it is satisfied that:

- i. The worker has been bullied at work by an individual or group of individuals; and
- ii. There is a risk that the worker will continue to be bullied at work by the individual or group of individuals.

[50] An order is to have the effect of preventing future bullying behaviour at work by an individual or a group of individuals.

Was Vine Bullied and is he at risk of further bullying?

[51] Mr Vine makes a range of allegations against named individuals, although the nature of those allegations transformed from the first submissions filed to the last. In summary, Mr Vine alleges:

- He had been bullied from November 2019 and in the most recent submission from April 2019;
- The phone call and actions by his employer arising from his sick leave from 17 March 2020 is bullying conduct and not reasonable management action;
- He had complained about the behaviour of Ms Fisicaro to his manager Ms Hill in 2019; and

²⁵ Ibid at [9].

²⁶ *Fair Work Act 2009* (Cth) s.789FF(1).

²⁷ Ibid 789FF(1).

- The Facebook posts were by his ex-wife and/or part of an elaborate cyber security attack on CBCHS patient records accessed from his personal Facebook page.

[52] Based on his submissions in reply, Mr Vine now submits that he is a victim of tall poppy syndrome resulting in alleged bullying by the named individuals, although mainly by Ms Fiscaro. He submits that while he was legitimately away on sick leave, his Facebook page was hacked by “ransomware” as a means to attack CBCHS patient records, and rather than treating him as a victim of a cyber-attack, he was subject to unfair and improper disciplinary action. In his first submission and in his application, Mr Vine submits that his Facebook page was most likely hacked by his ex-wife who he says had posted on his Facebook page in the past. The inconsistencies in Mr Vine’s submissions regarding the cause of the posts on Facebook were unexplained.

[53] Mr Vine’s allegations are unsubstantiated allegations. There is no evidence to support his contention that his Facebook page was hacked, nor that there was any cyber security threat. He submits he immediately reported the hacking to ASIO, but the evidence demonstrates that he did not make an official inquiry until 23 June 2020, and even after receiving advice to report the alleged hacking to both Facebook and Report Cyber, Mr Vine did not submit any evidence that he had done so.

[54] Mr Vine submitted he had in the past lodged a complaint with Facebook when his ex-wife hacked his Facebook, and he alleges that he was informed by Facebook that nothing could be done unless she was caught in the act. However, such submissions were without any evidence and implausible. Importantly, Mr Vine failed to justify why a report was not made to Facebook since March 2020. Facebook has a simple facility to report a problem or abuse. Consequently, I consider on a balance of probability that Mr Vine’s submissions have not been substantiated.

[55] Mr Vine is aggrieved that CBCHS had taken steps to investigate the Facebook posts and whether he took sick leave in compliance with its policy. Mr Vine appears to fail to comprehend that procedural fairness requires that allegations are put to him for his response. As part of that due process, the sick leave allegation was dropped, and two Facebook posts remained subject to disciplinary action. I find that the disciplinary action initiated by management is justified. Staff that reported the posts were panicked, understandably. The Facebook page clearly identifies his employer, therefore a reasonable person could connect the alleged client with CBCHS. The post is unambiguous about a client and further Mr Vines provided details of the client to Ms Fiscaro. I concur with the Respondent that the racist remarks on the post have the potential to damage the reputation of CBCHS and are in breach of the CBCHS policies.

[56] Mr Vine works in the health industry and is well aware of the obligations on CBCHS including his own obligations in complying with health and safety law and to report to the Department of Health and Human Services. Mr Vine’s job description reinforces his obligations. The relevant extracts from his job description are as follows:

‘OHS

All employees have a responsibility to ensure requirements of the Occupational Health and Safety Act 2004 are followed. This includes ensuring work is undertaken safely, injuries, accidents, near misses and potential hazards are reported immediately, and as

required employees participate in or support consultative structures including the OHS Committee.

.....

Duty of Care

All employees are required to take reasonable steps to protect themselves, their colleagues and clients from injury or harm. This includes ensuring that adequate supervision/support is provided to all clients.

.....

[57] I do not accept that Mr Vine considered that CBCHS had overreacted as suggested. Firstly to suggest a client was infected and that he likely contracted the virus caused panic among staff that saw his post, it required CBCHS to act promptly to investigate and by Mr Vine providing misleading/inaccurate information about a client in all likelihood led to difficult conversations with the client, their parents and the Department of Health and Human Services.

[58] Mr Vine had been subject to disciplinary action in the past and was familiar with the process. CBCHS did not depart from its legitimate process and in my opinion the conduct of management was not unreasonable and was fair.

[59] While Mr Vine submitted that he knew nothing of the Facebook posts and that they appeared by a hacker, these submissions were without evidence and furthermore, Mr Vine took no definitive action to report the incidences as directed by the Australian Cyber Security Centre.

[60] In relation to Mr Vine's criticism that it was unlawful that he was contacted while on sick leave, in my view, a reasonable person would expect that an employer, particularly in the health industry if faced with the risk of COVID-19 infections in the workplace would contact their employee even while on sick leave, to gauge the necessary information to ascertain the level of risk to staff, clients and the community. Regardless, the phone call was a single incident and cannot be described as bullying in the context of the obligations on both Mr Vine and CBCHS during the COVID-19 pandemic, and considering that the post identified the cause of risk was a patient while undergoing treatment.

[61] Mr Vine alleges that he was bullied from November 2019, and in his second submission alleges he was bullied from April 2019. I do not accept that the allegations of bullying from either November 2019 or April 2019 were substantiated. The evidence from Ms Fisicaro, Ms Buchanan, Ms Hill and Mr Robinson disputes the allegations made by Mr Vine. There is no evidence that Mr Vine filed any complaints in accordance with CBHCS policy, and the allegations are contrary to the evidence. On balance I accept the evidence of the Respondents.

[62] I do not find that there was any evidence of bullying in 2019, nor was there evidence of bullying directly related to the Facebook posts while he was absent on sick leave by CBHCS or by any of the named persons in Mr Vine's application. Further I do not find the actions of the employer and the individuals specifically, in its intention to investigate and afford Mr Vine due process to be considered bullying, even though he may perceive it to be

so. I do find the disciplinary action taken by CBCHS to be fair and reasonable management action.

[63] To make an order to stop bullying I need to find there was bullying and there is a risk of bullying should Mr Vine return to work. Based on the evidence, I am not inclined to make any orders to stop bullying.

[64] I note that Mr Vine submits that he is absent from work and submits in his submissions of 18 July 2020 he would unlikely ever return to the workplace. He has filed a workers' compensation claim which was rejected by the insurer and the claim is subject to appeal. CBCHS report that a second workers compensation claim has been filed.

[65] The submissions of 18 July 2020 contain a "report" authored by Professor Cree on behalf of Mr Vine which states:

"15. Based on his experience of bullying, direct and indirect, by his managers, ongoing since April 2019, Vine considers CBCHS is not a safe and healthy workplace for him, either now or in the future because of the people involved and their actions to victimise him."

[66] These submissions are relevant in that Mr Vine submits he is unlikely to return to the workplace, making any orders to stop bullying (even if I found there was bullying) to be of no practical effect. If there is no future risk that Mr Vine will be bullied at work, then there is no prospect that a s.789FC anti bullying application can succeed.

[67] Further to the above, whilst Mr Vine may believe that he has been bullied, the conduct must not only be perceived as being bullying, but that belief "must be reasonable in the sense that it is able to be supported or justified on an objective basis".²⁸

[68] CBCHS has made application for the matter to be dismissed and submits that Mr Vine complains of behaviour which is reasonable management action which is exempted from s.789FD(2) of the Act.

[69] On a proper assessment of the material, and on an objective basis, I find no credible evidence in support of any of the allegations of bullying contained in Mr Vine's submissions and as there has been no future prospect of bullying identified. I find the actions of the Respondent to be reasonable management action carried out in a reasonable manner and as a result an order to stop bullying cannot be made.

Conclusion

[70] For the reasons outlined above I find that Mr Vine has not satisfied the requirements of his application for the making of an order to stop bullying. I have decided to dismiss Mr Vine's application on the basis that there is insufficient objective evidence to reach a finding that he was bullied at work. An order dismissing the application will be issued separately.

²⁸ *Edwards v E & S Trading Co (Discounts) Pty Ltd (t/as E & S Kitchen, Bathroom Laundry)* [2016] FWC 8223 at [61].



COMMISSIONER

Appearances:

Professor M. Cree for the Applicant

Mr G. Christodoulou for the Respondent

Hearing details:

2020

Melbourne (via Microsoft Teams)

11 June

Final written submissions:

Applicant's submission via email dated 18 August 2020

Respondent's final submissions dated 23 July 2020

Printed by authority of the Commonwealth Government Printer

<PR724272>