



REASONS FOR DECISION

Fair Work Act 2009

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

Ari Kypuros
(AB2017/213)

COMMISSIONER WILSON

MELBOURNE, 6 JUNE 2017

Anti-bullying application. Reasons for decision to issue interim orders by consent.

[1] The anti-bullying application made to the Fair Work Commission on 15 April 2017 by Ari Kypuros alleges workplace bullying directed towards him within his workplace, Mag Wheel & Tyre Pty Ltd. The alleged bullying is said to be from his uncle, Costa Kypuros, who is a co-owner of the business with Ari's father, Theo Kypuros. A son of Costa Kypuros, also named Ari Kypuros, also works in the business, but is not a person named in this application.

[2] On 15 May 2017 the matter was the subject of a short hearing before me for the consideration of interim orders if they were necessary. Following the short hearing, the matter proceeded into a conciliation conference. While no orders emerged from the proceedings on 15 May 2017, a broad proposal for resolution of the dispute was developed in a conciliation conference and then put to the parties in a Statement from the Commission the following day on 16 May 2017.

[3] A further statement was put to the parties on 30 May 2017 in which I indicated that I considered there was a sufficient jurisdictional base for the making of consent or interim orders and invited the parties' views about certain proposed orders. Following this communication each of the parties advised their consent to the making of proposed consent orders and as a consequence the following orders were made, in the nature of interim orders, on 1 June 2017;

“[1] With the consent of the parties to these proceedings, I order as follows;

- A. Ari Kypuros (for the purposes of identification, colloquially referred to as “Ari 1”, being the Applicant in this matter) and Costa Kypuros must not while at work;¹
 - i. directly communicate with one another by any means, whether verbally, in writing, or by electronic communication; or
 - ii. cause or permit any person to communicate by any means a message that is, or may reasonably be considered to be, abusive, offensive and/or disparaging of one to the other; or

- iii. be within 10m of each other.
- B. Ari Kypuros, Theo Kypuros and Costa Kypuros, must while at work;
- i. refrain from making written or oral statements to each other and/or other workers² that are abusive and/or offensive to or about each other, and/or disparaging of each other and/or about other workers; and
 - ii. be civil to one another and respectful of each other and refrain from statements and communications that are abusive, offensive and/or disparaging to each other and/or to other workers; and
 - iii. avoid any circumstance in which an argument, confrontation, or violence may arise while at work.
- C. Mag Wheel & Tyre Pty Ltd is, and its Directors Costa Kypuros and Theo Kypuros are, ordered to provide to the Commission, within one week of the date of these orders, its proposal for the implementation of workplace bullying training into the workplace as well as the formulation and implementation of policies and procedures designed to avoid workplace bullying or other inappropriate conduct in the workplace.
- D. Mag Wheel & Tyre Pty Ltd is, and its Directors Costa Kypuros and Theo Kypuros are, ordered to do everything reasonably necessary to give effect to these orders.

[2] This order will operate until matter AB2017/213 is determined or otherwise withdrawn or until further order of the Commission.”³

[4] When the Consent Orders were made, the parties were advised that pursuant to s.601 of the *Fair Work Act 2009* (the Act), reasons for my decision to issue the orders would be published in the near future. These are my reasons for decision.

[5] The matter of interim orders in bullying matters was discussed by Commissioner Hampton in *Re Lynette Bayly*,⁴ which also referred to interim orders having been made in an earlier decision of the Commission dealing with an anti-bullying application.⁵ The decision in *Re Lynette Bayly* noted that the Commission had before it an application to make interim orders pursuant to s.589(2) of the Act.⁶ The decision in *Re Lynette Bayly* assessed whether a prima facie case had been made out and matters of the balance of convenience, noting that in the Federal Court matter of *Quinn v Overland* it had been held the assessment of those matters involves certain inquiries;

“First, whether the applicant has made out a prima facie case in the sense that if the evidence remains as it is, there is a probability that at the trial of the action the applicant will be held entitled to relief. Second, whether the inconvenience or injury which the applicant would be likely to suffer if an injunction were refused outweighs or is outweighed by the injury which the respondent would suffer if an injunction were granted: *Australian Broadcasting Corp v O’Neill* [2006] HCA 46; (2006) 227 CLR 57 at [65], [19].”⁷

[6] In relation to these considerations, as well as the overall potential of interim orders, Commissioner Hampton made the following observations;

“[34] It also appears to me that the consideration of the prima facie case and the balance of convenience must be assessed having regard to the nature of the substantive application, the jurisdictional context in which the application is being considered, and the circumstances of the parties.

[35] In a matter such as this, I also consider that the nature of the remedy provisions of s.789FF of the Act should inform the consideration of the request for interim orders and the nature of any discretion to be exercised. However, the purpose of the interim orders, including to preserve the capacity to advance the substantive application in appropriate circumstances, must also be considered.

[36] I would also observe that given the scheme of the Act, interim orders of the nature being considered here would not be issued lightly. The direct intervention of the Commission at such an early stage of proceedings should be exercised with considerable caution. Further, the mere indication that a disciplinary process was involved in the complaints of workplace bullying, without much more, is unlikely to trigger the balance of convenience necessary for such action. Of course, each application must be considered in its own right and circumstances.”⁸

[7] The application to the Commission was lodged on 15 April 2017. The alleged bullying conduct complained of by the Applicant relates largely to repeated verbal abuse allegedly directed at him by his uncle, Mr Costa Kypuros. The alleged behaviour includes ridicule of his personal achievements; physical intimidation; insinuating he was a liability to the company; mentioning he was destined for failure in future professional endeavours; and undermining him in front of other staff and customers.

[8] Prior to an initial hearing and conference in the matter, and because of the nature of the allegations made and the preliminary responses given to the Commission by each of Messrs Ari, Costa and Theo Kypuros, the Commission issued, of its own motion, an order compelling the production of various classes of documents. Each of the parties served with the notice complied with its terms.

[9] In preparation for the hearing and conference several CCTV video extracts were filed in the Commission by solicitors acting for Mr Costa Kypuros and served on both Mr Ari Kypuros and Mr Theo Kypuros. The CCTV footage appears to show at least two acts of violence. The videos are from 2 March and 13 April 2017. While these matters have not been tested in evidence, it is alleged that what is depicted in the videos are actions of the Applicant directed at Mr Costa Kypuros. The Applicant also provided video footage to the Commission, again untested in evidence, of another physical altercation which took place on 31 March 2017.

[10] An Interim Intervention Order was issued by the Magistrates’ Court at Heidelberg on 18 April 2017 against Mr Ari Kypuros and in favour of Mr Costa Kypuros. Mr Ari Kypuros was subsequently charged on summons about matters alleged to have taken place on 13 April 2017 and that were the subject of the Interim Intervention Order. Two charges were laid, both in respect of conduct alleged by Mr Ari Kypuros and directed against Mr Costa Kypuros; firstly causing injury without lawful excuse, and secondly unlawful assault. The charges have

now apparently been stood over until 19 June 2017, however a Police “Diversion Notice”, dated 27 April 2017 and discussed by the Applicant in the course of the conference held on 15 May 2017, proposed that the first of the charges be removed and that in respect of the charge of unlawful assault the court consider the matter be resolved through the accused being required to make a suitable donation to a court-appointed charity.

[11] The hearing and conference of the anti-bullying application on 15 May 2017 discussed a potential suite of measures aimed at stabilising the workplace situation by endeavouring to have each of Messrs Ari, Costa and Theo Kypuros agree to a protocol for ongoing conduct, and to agree to certain training and measures to develop workplace policies to deal with workplace bullying. The development of such measures were to be notwithstanding the business dispute between the two owners which, in the opinion of the Commission, may well have been driving at least some of the claimed conduct.

[12] Despite the parties being in broad agreement with the agreed measures, there was a further report of conduct on 25 May 2017 between the Applicant and his uncle which may amount to bullying within the meaning of the Act, although no findings on the subject are made. Mr Ari Kypuros is alleged to have taken affront to an action of his uncle’s in relation to a particular tyre job; to have written a note to Mr Costa Kypuros in a diary taking issue with his actions; before the two then argued, with Mr Costa Kypuros alleged to have said things that Mr Ari Kypuros took to be bullying.

[13] While this latter conduct appears confined to some written words and a brief medium-level altercation between the two individuals, it called into question the extent to which the parties may be ready to act on the undertaking they appeared ready to give to the effect that each would be civil to the other, refrain from abusive and offensive oral and written statements; avoid circumstances in which a workplace argument, confrontation or violence may arise; and that they would not act inconsistently with the Interim Intervention Order issued by the Magistrates’ Court. Each of these were matters outlined in the 16 May 2017 Statement as matters agreed in the conference held on 15 May 2017.

[14] The Magistrates’ Court Interim Intervention Order requires Mr Ari Kypuros to not commit “family violence” against the order’s beneficiary, Mr Costa Kypuros, and notes that family violence includes “behaviour by a person towards a family member of that person that is physically or sexually abusive, emotionally or psychologically abusive, economically abusive, threatening, coercive, or in any other way controls or dominates a family member and causes that family member to feel fear for the safety or wellbeing of that family member or another person.” It also obliges Mr Ari Kypuros to not;

“3. Contact or communicate with a protected person by any means except when necessary to continue working in the family business.

4. Approach or remain within 2 metres of a protected person, except when necessary to continue working in the family business.” (underlining added)

[15] In relation to the criteria for the issuing of an interim decision, I am satisfied that there is a prima facie case made out. While the Commission has not made any determination at this time as to whether any or all of the alleged conduct falls within the Act’s definition of workplace bullying, I am nonetheless satisfied that at least some of the behaviour and conduct so far reported to the Commission by Mr Ari Kypuros *could* fall within the definition of

workplace bullying. The same can be said of the conduct alleged by Mr Costa Kypuros to have been directed toward him by Mr Ari Kypuros.

[16] While allowing for the fact that a full agitation of the evidence before the Commission may lead to contrary findings on any of the specific allegations, the material provided to the Commission so far leads to the possibility that in the case of the conduct alleged by Mr Ari Kypuros to have been directed at him, at least some of it appears unreasonable and designed to provoke a reaction from him and may therefore be capable of being found to have been workplace bullying. Similarly, allowing for the possibility that a hearing of the full evidence about the allegations by Mr Costa Kypuros of the conduct directed at him from Mr Ari Kypuros may well lead to those allegations being dismissed in part or in whole, those allegations too appear to lead in the direction of a finding by the Commission that they are workplace bullying.

[17] The balance of convenience in the circumstance is not singular. That is, this is not a circumstance in which interim orders by consent would benefit one person and not another. It would appear instead that the balance of convenience is widespread to at least the three parties referred to in this decision but also possibly to other people in the workplace who undoubtedly are either feeling the negative aspects of the conduct referred to or who may potentially, in the absence of interim orders, be drawn into an altogether unsavoury workplace dispute.

[18] As referred to above the matter of *Re Lynette Bayly* accepted that the test in these matters should be whether the inconvenience or injury which the applicant party would be likely to suffer if the proposed order were refused outweighs or is outweighed by the injury which the respondent would suffer if it were granted.

[19] This matter is featured by frequent communication to the Commission from each of the protagonists in strong and emotional tones. While that is by no means an unusual situation in relation to matters in the anti-bullying jurisdiction, the tone of those communications leaves the Commission unpersuaded that the issues between all concerned will either be resolved through conciliation, if one were to take place in the near future, or paused for the betterment of all concerned to enable a full hearing and determination of the matters between the parties. Put bluntly, the Commission would be concerned that in the absence of interim orders, even by consent, the dispute between the parties may well get worse rather than stabilise, let alone improve.

[20] In my opinion, there is a strong prejudice, again to multiple parties, to be found if interim orders are not made. The concern held by the Commission is that otherwise low and medium level conduct such as inappropriate comments, arguments, and confrontations between the main protagonists in this matter may already have escalated to acts of physical violence, and there is a medium to high potential that in the absence of interim orders that otherwise innocuous disputes may well escalate in such a manner in the future. Having said that, this matter is not merely about the apprehension of violence and my consideration of the need for interim orders is not merely an endeavour to circumvent any such potential. Instead, the matter is about whether any conduct may be workplace bullying in the sense defined in the Act.

[21] I consider it is, and that the emanation of violence or physical abuse or violence, if it occurs, may well be a manifestation of workplace bullying.⁹

[22] The Commission apprehends that in the absence of interim orders there may likely be significant detrimental effects upon the health of one or more people involved in this dispute. Those detrimental effects may stem from a deterioration in the mental health of the Applicant or others; or it may well be in the form of further physical abuse or violence, again involving one or more of the protagonists. My concern in respect of the physical abuse or violence is not only in respect of the injury to be done to a particular person or people, but also to the criminal justice consequences for anyone who may perpetrate the violence.

[23] While it is a matter of record that there is an Interim Intervention Order against Mr Ari Kypuros and in favour of Mr Costa Kypuros, that order appears ineffectual in keeping two of the protagonists apart and ordaining workplace civility, at least to the point of the correspondence received from the parties referring to the further incident on 25 May 2017.

[24] On this basis, the Commission considered that interim orders by consent were appropriate to discuss with the parties and, with their consent, to make. In forming this view I heed the caution put forward by Commissioner Hampton in *Re Lynette Bayly* to the effect that interim orders should not be issued lightly and that the direct intervention of the Commission at such an early stage of the proceeding should be exercised with considerable caution. This matter however is featured by rare and unusual circumstances. It is thus appropriate to make such orders.

[25] Having made the Consent Orders referred to above I noticed that two aspects of the file had not been brought to the attention of all parties to the matter and took steps to do so. In particular there had been a communication to the Commission from Mr Theo Kypuros on 28 May 2017 which had not been provided by him to the other parties in the matter, and further that the Applicant's mother had attended the Commission's Registry in Melbourne expressing her concerns to my Associate about the matter before the Commission. Both these actions were prior to the issuing by me of a Statement to the parties mooted consent or interim orders.

[26] On 2 June 2017 I disclosed these matters to all the parties and their representatives as follows (noting that the File Note referred to within item 2 of the text below was made by my Associate);

“Dear Parties,

Further to the Order issued in this matter, the Commissioner is in the process of settling his reasons for decision for issuing the Order and wishes to draw the following to the attention of all concerned.

1. On 28 May 2017, Mr Theo Kypuros wrote to the Commission in confidential terms. Because the correspondence was expressed as confidential, it has not been copied to the other parties at this time. However, it discusses his view of the most recent interaction between Ari Kypuros and Costa Kypuros and expresses his concern over Ari's health. Should any party wish to see the correspondence, they should apply to do so.
2. The following file note was made by me on 29 May 2017;

Litsa Kypuros, the Applicant's mother, attended the FWC Melbourne registry. She raised concerns over her son's wellbeing, and queried whether a letter, signed by her detailing some of the alleged bullying events and dated April 2017, had been received by Chambers. I was circumspect in what I discussed with Mrs Kypuros - I broadly explained the jurisdiction, and the conduct of conferences and hearings before the FWC. I said it may be appropriate, given she was not identified on the file, for her to seek clarification of whether the letter was provided to FWC from the Applicant himself, or have the Applicant provide it to the Commission if that was what he wished to do. I explained that if matters such as these proceed to arbitration hearing, then witness evidence is given at that time, including from those who may have witnessed alleged bullying conduct.

Sincerely,”

[27] On 5 June 2017, solicitors acting for Mr Costa Kypuros wrote to the Commission expressing their concern about the situation as well as referring to it being a potential denial of natural justice to their client through not being afforded the opportunity to respond to representations made to the Commission by parties who are not directly involved in the matter. The correspondence forwarded by Mr Costa Kypuros’ solicitors advised in finality that;

“In light of the above, we are instructed by our client that:

1. he objects to all or any communications of this nature being permitted to take place; and
2. he respectfully requests that the Commission:
 - a. disregards all representations and communications that have been made to it by any party in this proceeding that have not been disclosed to him; and
 - b. directs Mr Ari Kypuros and Mr Theo Kypuros to take all steps to ensure that no future representations are made by either of them or on behalf of Mr Ari Kypuros contrary to the Commission’s usual processes.

In the interim, we request that the Commission provide us with a copy of Mr Theo Kypuros’ communication to the Commission dated 28 May 2017 referred to in your e-mail below.

Mr Costa Kypuros’ rights are fully reserved.

Yours sincerely,”

[28] I regret the circumstance which has occurred in which Mr Costa Kypuros, or anyone else for that matter, consider that relevant correspondence or information has been received by the Commission without it being on-forwarded or drawn to their attention. I take responsibility for that situation and apologise to the parties for what has occurred.

[29] Having considered the correspondence from the solicitors acting for Mr Costa Kypuros and the concerns expressed therein, I now afford the opportunity to any party who wishes to do so to seek that the orders made by me be either varied or revoked pursuant to the power of the Commission to do so within s.603 of the Act, noting that orders made under Part 5–1 (relevant to s.589(2)) and Part 6–4B (relevant to anti-bullying orders made pursuant to s.789FF) do not appear to be decisions that may not be varied or revoked as set out in s.603(3).

[30] Any such application for variation or revocation, or any other interlocutory application any party wishes me to consider, should be made as soon as possible, and in any case within 7 days of the date of these Reasons for Decision.

[31] Absent such an application for variation or revocation, or alternative interlocutory application, the Commission will proceed to program the substantive matter for hearing and determination.



COMMISSIONER

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¹ The legislative phrase “while the worker is at work” was considered by the Full Bench in the matter of *Bowker and Others v DP World Melbourne Limited* [2014] FWC 9227 [48]–[50].

² “worker” is defined in the *Fair Work Act 2009* at s.789FC(2).

³ PR593414.

⁴ [2017] FWC 1886.

⁵ *Worker A, B, C, D and E v “Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union” known as the Australian Manufacturing Workers’ Union (AMWU); Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia and others* [2016] FWC 5848.

⁶ [2017] FWC 1886 [5].

⁷ *Ibid* [31]; from *Quinn v Overland* [2010] FCA 799, (2010) 199 IR 40, [45], cited in *Australian Manufacturing Workers’ Union v WW Wedderburn Pty Ltd* [2016] FWC 2260, (2016) 258 IR 12, [6].

⁸ [2017] FWC 1886 [34]–[36].

⁹ *Amie Mac v Bank of Queensland Limited & Ors*, [2015] FWC 774 [99].