

[2017] FWC 3907

The attached document replaces the document previously issued with the above code on 21 August 2017 to amend paragraph [37].

Associate to Commissioner Simpson

Dated 22 August 2017





# DECISION

*Fair Work Act 2009*  
s.789FC - Application for an order to stop bullying

**Application by E.K**  
(AB2017/135)

COMMISSIONER SIMPSON

BRISBANE, 21 AUGUST 2017

*Application for an FWC order to stop bullying - Evidence considered – Conduct of named persons reasonable management action taken in a reasonable manner - Application dismissed*

[1] This matter involves an application brought under s.789FC of the *Fair Work Act 2009* (the Act) by EK (the Applicant) against two named persons VH and VD (Named Persons) who are alleged to have bullied her at work. The employer of both the Applicant and the two named persons is UC (the Employer).

## Background

[2] The Applicant commenced employment as an Aged Care Worker for the Employer in 2011. The Applicant submitted that her manager VH and supervisor VD have engaged in repeated bullying behaviour against her at work which started in 2014. The Applicant has not been at work since January 2017.

[3] The matter was filed on 13 March 2017 and was the subject of a private conference on 19 April 2017. A proposal was discussed in the course of the conference to resolve the matter and at the conclusion of the conference the Applicant undertook to advise after a period of consideration whether she accepted the proposal to resolve the matter or not.

[4] On 24 April 2017 the Applicant advised that she did not wish to accept the proposal and that she wished to continue with her application. On the same day UC sent correspondence to my chambers seeking that the application be dismissed under section 587(1) of the Act.

[5] On 25 May 2017 I issued decision [2017] FWC 2822 dismissing an application by the Employer to dismiss matter AB2017/135. The matter was listed for hearing of the substantive matter on 27 and 28 July 2017 in Brisbane.

[6] On 4 July 2017 I issued decision [2017] FWC 3448 denying permission for the Employer and named persons to be legally represented at the Hearing. The Applicant represented herself, and GB, Employee Relations Manager – People and Culture represented the Employer, and the Named Persons.

[7] The originating Form 72 application filed by EK contained a summary of allegations made. EK filed a statement<sup>1</sup> of 4 pages with attachments A to M and a reply statement<sup>2</sup> of 4 pages. EK also filed a copy of reasons for decision of 14 July 2017 issued by the Queensland Government's Office of Industrial Relations, setting aside a decision of Workcover to reject an application for compensation and directing Workcover to conduct further investigation of the claim.

[8] UC filed seven witness statements from JC,<sup>3</sup> NC,<sup>4</sup> PH,<sup>5</sup> JD,<sup>6</sup> ER<sup>7</sup> VH<sup>8</sup> and VD.<sup>9</sup> UC requested that EK advise which witnesses would be required for cross-examination. My chambers sent correspondence to EK on 19 July 2017 explaining that she would need to challenge the evidence of witnesses she wished to dispute. Following an exchange of correspondence between the parties about this issue, the matter was listed for a further directions hearing on the afternoon of 26 July 2017, the day before the substantive hearing.

[9] It was made clear to EK that the evidence of witnesses not required to attend would be accepted as evidence. EK confirmed that she only required VH and VD to attend the hearing. On that basis the statements of the other five witnesses admitted into evidence uncontested. It was also determined that the matter would proceed for determination in conference and not open hearing.

[10] On 10 July 2017 EK made an application for an Order requiring ER attend the hearing. This Order was not issued on the basis that UC had filed a witness statement from ER. EK also made an application for an Order to produce documents related to an incident on 15 January 2015. The Order was not issued as documents that appeared to meet the description of what EK required were filed on behalf of UC and the named persons.

[11] It was not in contest that EK was suffering from a medical condition. I accept the submission from UC that the medical reports provided by EK do not themselves provide evidence that EK was bullied at work. UC and the named persons submitted that the medical condition suffered by EK did not arise because EK was bullied at work within the meaning of s789FD of the *Fair Work Act 2009* (Cth).

[12] EK said she had worked as a personal carer for ten years in aged care however since VH joined UC in September 2014 the environment had changed to being "very toxic". In regard to VD it appeared from EK's evidence that her claim was that VD's conduct, in the manner in which he conducted investigations and reached conclusions into allegations both raised by and against EK, was bullying.

[13] UC submits that EK was subject to reasonable management action including:

- (a) formal warning on 31 March 2015;
- (b) formal counselling on 12 September 2016;
- (c) formal warning on 19 October 2016;
- (d) formal counselling meeting on 12 January 2017;
- (e) Show cause as to why employment should not be terminated on 20 January 2017.

[14] UC submits that at all times the reasonable management action was carried out in a reasonable manner.

[15] VH was employed by UC from August 2014 as a field support supervisor for Brisbane North PCP care workers. In her role she is required to supervise and support personal care workers including EK.

[16] VD is employed as State Manager – Community Care and has been in the role for approximately ten years.<sup>10</sup>

***September and October 2014***

[17] EK claimed that VH yelled and screamed at her in her office on their very first encounter. VH said she did not recall their first encounter however denied that she would have yelled and screamed at EK.

[18] EK also claimed that she witnessed in September or October 2014 VH abusing another employee, AD. VH responded that she has never had a complaint from AD and she hasn't worked at Employer for two years.<sup>11</sup>

[19] EK submitted that in October 2014, VH yelled at her regarding a client that was having a "bad day". EK submitted that the client was not in her care at the time. VH submitted she has no recollection of this event.

***25 and 26 November 2014 – car accident***

[20] On 25 November 2014 EK was involved in a minor car accident whilst at work and driving a vehicle owned by UC. It was VH's evidence that EK failed to follow the proper procedure because she had not reported the incident to the insurance company and she had not filled out the necessary paperwork. The incident occurred in the morning and EK did not return to the office to report the incident until the afternoon.<sup>12</sup>

[21] EK said the incident occurred around 10am and, as it was just a scratch, she decided to proceed to the next client. EK said she called the coordinator FS who said to her it didn't matter and she could sort it out when she got back. EK said she was a little bit distressed and worried about scratching the car. EK said that on returning to work she reported the incident to VH and claimed that the way she was treated by PH and VH was not in a way that was beneficial to someone who was already distressed. EK said she signed the incident report and tried to call the insurance company who didn't answer her call. EK said she wanted to go home to her new puppy as she and her husband made sure one of them got home early to feed the dog. EK claimed that when she spoke to the insurance company she was told she had 48 hours to report the incident.<sup>13</sup>

[22] EK felt she was being held against her will. EK claimed PH or VH scared her by saying it was a hit and run and needed to go to police, and that the insurance company told her she didn't need to go to police. EK conceded she did not leave a note on the car.<sup>14</sup>

[23] GB submitted that the damage was considerably more than a scratch. He said that EK was well enough to contact parties, and she should have followed the organisational policy which was to contact her supervisor and leave a note on the car.<sup>15</sup>

[24] EK claimed there was no instruction manual booklet in the car at the time of her accident, and it was put in the car after the incident. VD said the booklet should always be in

there notwithstanding that they sometimes go missing. VD said the records show after EK returned she took her meal break at the end of the day which is not in line with policy. VD said after her meal break EK remained in the office for another hour after a half hour break. VD said the hour was sufficient to document what happened and call the insurance company.<sup>16</sup>

[25] VH said she was concerned about EK's state of mind. VH said she did not want EK to drive home given how distressed she was. VH said the paperwork was a separate concern that could be done the following day. VH was worried that EK didn't report the incident or didn't leave a note on the car she had damaged.<sup>17</sup>

[26] VH said that on 26 November EK came into her office and she was very upset about the day before. VH said EK verbally abused her about the fact that VH wanted her to fill out the accident forms. VH said she felt intimidated by EK's aggressive tone and loud demeanour during this incident.<sup>18</sup>

[27] VH said that she was so concerned about care workers' emotional state after an accident that she expressed her concerns in an email sent to VD on 26 November 2014. The email was attached to her statement.<sup>19</sup> The email includes what is a contemporaneous version of the nature of the discussions between VH and EK on both the afternoon of 25 November, and the next day on 26 November. The email is consistent with VH's other evidence and her having acted in reasonable manner on 25 November in trying to address the issue of EK not having complied with policy.

[28] PH is an administration officer and gave evidence about a discussion she had with EK when she returned to the office on the afternoon of 25 November. PH said she consulted CC the Fleet Officer about what EK should do and was instructed that EK should contact the police regarding the incident as she did not leave her details with the third party vehicle. PH said EK became very angry and was yelling at her saying she did not want to fill out the paperwork or ring the insurance company because she wanted to get home to feed her dog. PH said she never tried to stop her from going and told her she could take the paperwork home with her and ring the insurance company from home. PH said EK stayed and completed the paperwork.<sup>20</sup>

[29] PH said that the next morning she could hear EK yelling from VH's office. PH said she would not have gone in but that she heard EK say her name and something about EK making a complaint to HR about her so she felt like she had to find out what was going on. PH said that EK yelled at her and said that PH had frightened her by telling her to go to the police and she said PH wouldn't let her go home.

[30] PH said that she and VH placated EK by saying they were following CC the Fleet Officer's advice and it was only for her own protection to avoid a possible fine. PH provided a copy of a contemporaneous statement she made at the time.<sup>21</sup>

[31] The evidence overall supports the conclusion that VH took a reasonable management action in a reasonable manner with the regard to the incidents of 25 and 26 November 2014.

***9 December 2014 - meeting regarding editing of phone records and car accident***

[32] EK claimed that at a meeting on 9 December 2017 SM started yelling at her as soon as she walked in to the meeting. She claimed he raised his voice and said “*we can deal with it nicely or we can take it to the HR office*”. EK claimed she said to him he was aggressive. EK said she advised SM she was getting upset and very nervous and was experiencing physical anxiety and no one stopped it. EK said she was in tears and said she thought the meeting was an appraisal where things about work could be sorted out. EK said she felt like a “cornered animal sitting in the corner unable to move”.<sup>22</sup>

[33] VH said that she held a meeting with EK on 9 December for the purpose of conducting an appraisal. VH said she requested SM to also attend because she had not done many appraisal meetings and she considered SM to be very experienced and objective. VH said the two issues she raised in the meeting were;

- (a) VH had become aware that EK had not been truthful in her time recording in the Comcare system; and
- (b) EK had failed to comply with the WMQ policy requirements concerning the paperwork following the car accident.

[34] VH said she recalled that she explained to EK the importance that she not edit her time including the fact that WMQ needs to be able to track personal care workers for their own safety. VH said EK seemed to understand the concern regarding editing times but she claimed EK became very angry when VH discussed the car accident. VH claimed EK stood up and was waving her finger at SM and VH across the table. VH said to try and calm EK down she suggested that they try to deal with the issue informally without having to involve HR. VH attached to her statement a contemporaneous file note of the meeting.<sup>23</sup>

[35] VH explained the importance of keeping it in live time, and workplace health and safety issues if anything happens to a carer and they don't turn up to the next job. The recording of live time allows UC to track the carer. VH said in appraisals it is an opportunity to go through things staff can improve on. VH said she remembers she had just finished conflict resolution training, and as she recalled it was not SM making allegations, but that EK stood up and pointed her finger and SM then said “*Well, we'll take it to HR*”. VH said she did not want a formal complaint going to HR about one of her care workers and so she said “*Look, lets deal with it in calm way here, so it doesn't go to HR.*”

[36] EK said she had visited her psychologist to understand why she was scared and frozen in a corner. EK said she gets scared and freezes and doesn't know why. EK said she was telling VH and SM her physical symptoms.

[37] VD said when the issue was raised with him, he asked both VH and SM to put a statement to him and their statements were consistent. He said he was satisfied that VH's and SM's versions of events were plausible, and accepted the accounts of VH and SM that EK was being aggressive. VD said EK claimed she was freezing but the evidence indicated she was in fact being aggressive toward her direct line supervisor VH.<sup>24</sup>

#### ***19 December 2014 - Request to work additional hours while on leave***

[38] EK submitted she was requested to work additional hours while on holiday leave. EK submitted that these hours were not authorised by VH. VH submitted she did not have the authority to authorise additional working hours. VH submitted she informed EK that she was

unaware that EK was on holiday leave, and that she would endeavour to resolve the matter before payroll was processed. VH submitted she subsequently raised the matter with VD.

[39] VH said that on 19 December 2014 she sent EK a message through the Comcare system asking that EK please see her on 22 December 2014 after the weekend. VH said EK called her on the telephone that same day and said that she was on annual leave. VH said she apologised because at the time of sending the message she did not realise the EK was on annual leave. VH said that she needed to talk to EK because she had worked two and a half hours extra on 18 December 2014 and VH did not have the delegation to authorise any hours in excess of half an hour worked over the rostered finishing time. VH said she was conscious of the fact that she needed to investigate the hours and have it sorted by 22 December 2014 which was the last pay run of the year.<sup>25</sup>

#### ***20 December 2014 – EK complaint to VD***

[40] EK submitted she made a formal complaint to VD about VH regarding the above incident. EK submitted she was issued with a written warning in January 2015 as a result of making the complaint. On 20 December 2014 EK sent an email to VD making a formal complaint against VH, SM and PH. VD replied asking for specific details.

[41] EK said she had taken three weeks stress leave and Christmas was a sad time for her family that year. EK said she started to suffer panic attacks, the first one being on 21 December 2014 when she went to Chermside to do Christmas shopping. EK said her husband had to take her home. EK said she became unwell.

#### ***12 January 2015 EK – Return to work***

[42] EK said she returned to work after three weeks leave on 12 January 2015 with the help of her Doctor and medication.<sup>26</sup> On 12 January 2015 EK sent a further email to VD with details of the complaint against VH.<sup>27</sup> VD said he conferred with NC from Human Resources about EK's complaint.

#### ***13 January 2015***

[43] EK said on the afternoon of 13 January 2015 VH wanted to talk about something. EK questioned why it had to be when she was leaving the office, and she wanted to go home. EK said she didn't know what VH wanted to talk about.<sup>28</sup> EK said after Christmas she wouldn't be alone in a room with VH, and that she asked GP to be with her as a witness as she didn't want to be alone in room. EK indicated that if VH wanted to speak to her, it should be done during work hours. EK said there was no conversation about air conditioning or anything like that, she just wanted to go home and VH wouldn't let her go home.<sup>29</sup>

[44] VH claimed she said to EK "How are you Lovely?" VH said she apologised for that, she just wanted to have a "nicety in there" to soften and put everyone at ease. VH said EK then started attacking her verbally, and told her she didn't need to have anything to do with her. VH said she felt threatened by EK's behaviour, and went into her office and EK followed her screaming and was blocking her exit.<sup>30</sup>

[45] VH said that JD was at her computer and witnessed EK's behaviour. EK claimed that a statement attached to the statement of VD from GP<sup>31</sup> supported her version of the incident



that VH chased her and not the other way around. The statement of GP which was provided to VD at his request does have VH following EK, however according to GP's statement VH tried to explain to EK the reasons for certain matters in connection with the earlier meeting on 9 December 2014, and EK started shouting and getting more upset and was crying saying that VH twists everything. GP's statement said that VH tried to calm EK down.

[46] EK appeared to concede the version of her conduct as described in GP's statement including that she attacked VH on a personal level.<sup>32</sup>

[47] VH said it was her recollection that if she followed EK it would have been to the door only, and then she went to her office and was cornered after that.

[48] VD said carers are only in the office at the start or end of the day as carers are out on the road and this is the only opportunity for a line supervisor to catch up with carers. He submitted that the statement of GP and VH are consistent regarding EK's aggressive behaviour, and there is no evidence of VH has been aggressive. VD said that the process is that care workers actually have five minutes allocated before and at the end of shift with line managers to catch up.<sup>33</sup>

[49] A written record of EK's version of the events on 13 January 2015 was included in an email sent to VD on 14 January and was attached to VD's statement.<sup>34</sup> It indicates EK was anxious and stressed merely by having to interact with VD.

[50] The evidence of JD was that on 13 January 2015 she was in VH's office when she witnessed an altercation between VH and EK and GP was also present. It was JD's evidence that EK was aggressive towards VH by yelling and screaming personal insults towards her, and EK pointed her finger in VH's face. JD said VH appeared intimidated by this behaviour as she kept moving back and at one point told EK that she was blocking her exit. JD said at that point she stepped in to stop the altercation and told EK that she needed to leave VH's office.<sup>35</sup> JD attached to her statement a copy of a file note concerning the incident which was dated 16 January 2015. The file notes description of EK's conduct is even more critical than her witness statement.<sup>36</sup>

[51] The evidence concerning this incident indicates that despite EK becoming anxious and stressed at having contact with VH, VH's interaction with EK was at all times reasonable and EK's response was not. There is no demonstrated evidence of VH "ambushing" EK.

### ***15 January 2015 – Incident over air conditioning in clients residences***

[52] EK said on 15 January 2015 she bumped into a colleague DS at the carers room, and they were chatting, including that it was a hot day. EK said that VH's office was nearby and VH waited until DS had left and EK was alone and then came and spoke to her. EK's evidence appeared to be to the effect that she believed VH knew EK did not want to be alone with VH and deliberately waited for DS to leave before approaching EK. EK said she didn't ask for any help from VH and told her she didn't want to be alone with her and why did VH approach her.<sup>37</sup>

[53] VH said she overheard a conversation between EK and DS relating to clients not turning their air conditioners on and wanted to let EK know she was going to support her regarding the use of air conditioning in client's premises, and to let her know if the client she

is caring for does not put on the air conditioning. VH said she had received a lot of complaints from staff regarding the air conditioning issue, including care workers having had heat exhaustion.<sup>38</sup> VH said EK became extremely upset and reacted hysterically. VH said she did not understand what she said or did to provoke such a hysterical reaction from EK because she was only trying to offer help. VH attached to her statement a contemporaneous file note of the incident<sup>39</sup> which is consistent with her oral evidence.

[54] VD said on the day he received a phone call from FS telling him he had to come to her office because EK was extremely upset. He said when he arrived EK was on the ground, hysterical, in tears and talking but making no sense. He said shortly after he arrived EK calmed down a bit and he stayed with her until her husband came to pick her up. VD said that EK is not entitled to feel she does not have to speak to her supervisor, and that it is not unusual practice for supervisors to check carers are having enough fluids.<sup>40</sup>

[55] VD said he asked FS, DS and VH to prepare a statement for him about the incident and he provided those as attachments to his witness statement.<sup>41</sup>

#### ***16 January 2015***

[56] On 16 January 2015 EK submitted a Workers Compensation Medical Certificate for 16 January 2015 to 30 January 2015.

#### ***22 January 2015***

[57] On 22 January VH made an official complaint forwarded by email to VD about EK's behaviour on 13 January 2015.

#### ***28 January 2015***

[58] EK lodged a Workers Compensation Claim on 28 January 2015 for unreasonable management action and bullying and harassment by VH.

#### ***16 February 2015***

[59] On 16 February VD wrote to EK to provide the outcome of the investigation of her complaint as outlined in her emails of 20 December 2014, 12 January and 14 January 2015. The investigations concluded the allegations were not substantiated.

#### ***5 March 2015 – EK back from stress leave***

[60] EK returned from what she described as stress leave on 5 March 2015.<sup>42</sup>

#### ***16 to 31 March 2015 – formal warning***

[61] On 16 March 2015 EK received a letter stating that complaints had been made about her, including her failure to follow procedure on 25 November 2014, her behaviour toward PH and VH on 26 November 2014, her behaviour toward VH and SM on 9 December 2014, her behaviour toward VH on 13 and 15 January 2015. ON 19 March EK attended a meeting with NC from Human Resources and DV. On 31 March 2017 VD issued a formal warning to EK.<sup>43</sup>

[62] Having considered the evidence I can find no basis to determine that any conduct on the part of VH or VD in connection with the events leading up to and including the issue of a formal warning on 31 March 2015 was anything other than reasonable management action taken in a reasonable way.

***5 November 2015- EK allegation she overheard VH talking about her***

[63] EK alleged that she overheard VH talking about her in very derogatory terms, on 5 November 2015. EK claimed to have been sent home after completing three hours of work and her hours of work were cancelled. EK said she realised she still had a folder in her car and she already said goodbye and left. EK said she returned to the office and VH did not know she had returned and her evidence was to the effect that VH's door was open and she overheard VH talking about her in nasty terms. VH said she cannot remember speaking in such terms. VH said if she was speaking about a care worker she would have shut the door.<sup>44</sup>

[64] EK did not raise this allegation with UC until 19 January 2017 when she included it in an email to VD.<sup>45</sup> VD sent correspondence to EK on 27 January 2017 advising the allegation could not be substantiated on the available evidence.<sup>46</sup> VD said had there been anything of significance i.e. a name, he would have investigated it further.

***11 January 2016 - Request for leave incident***

[65] On 11 January 2016 EK made a request for leave on 25 January 2016. VH gave evidence that she was reluctant to approve the leave application because of a requirement that employees give three weeks' notice when applying for leave and she had already had to reject other employees leave requests that had been put in a few weeks earlier requesting the same day off because the employer would have been short staffed. VH said that she told EK she would need to speak to JD (Senior Co-ordinator) to have her leave approved. VH attached to her statement an email she forwarded on 11 January to JD (Senior Co-ordinator) explaining why she did not feel comfortable approving the leave in the circumstances.<sup>47</sup>

[66] EK claimed that she explained to VH at the time the nature of reasons why she needed leave, being that her daughter needed a medical procedure and that she had asked VH "a couple of weeks" before for one day off, that VH was frustrated and not pleased about it, and refused.

[67] VH said EK did not explain the reasons why she had applied for the leave and that she did not know what the reason was. VH claimed she would have been more compassionate had she known the reason for the request.

[68] JD (Field Support Co-ordinator) referred to this matter in her statement.<sup>48</sup> JD gave evidence that after VD had not approved EK's leave, EK called JD (Senior Co-ordinator) and was screaming through the phone at her and JD (FS Co-ordinator) was able to hear her voice through the phone and through the wall. JD (FS Co-ordinator) said she went to see JD (Senior Co-ordinator) to see if she was okay and she recalled JD (Senior Co-ordinator) to stop yelling at her or she would end the call.

[69] I am inclined to accept VH's evidence that she was not told the reason for the leave application; however given her explanation for referring the application to a higher level was

based on a number of earlier applications for leave on the same day having already been rejected, her approach was not unreasonable.

### ***31 May 2016 – Medication sheets***

[70] On 31 May 2016 VH said she asked EK to please refrain from signing medication sheets on the other side of the page because they were legal documents, and the usual process is that you add an additional sheet if you run out of space.<sup>49</sup> EK said VH's raising of the matter was trivial, and if there is no room left on the sheet she draws lines on the back to save going and getting another sheet. EK claimed a lot of carers do this. EK said VH told her she needed to write a report about it. EK claimed VH threatened her if she didn't write the report. EK said that time is critical, and spending 5 to 10 minutes to go back to the car and get the attendance sheet or medication is impractical. EK questioned why it was necessary to make a big issue about this.

[71] VH denied threatening EK in anyway, and explained it is a process that she wanted EK to follow, that giving medicine may mean the document becomes a legal document and signing on the back means the next person doesn't know to bring a new sheet in and looks shabby.<sup>50</sup> VD said he did not find any aggressive behaviour on the part of VH and in the contrary it is an expectation of supervisors to remind workers to follow processes.<sup>51</sup>

[72] I am satisfied VH's request was a reasonable request to use the documentation in a manner she requested for the reasons explained by her.

### ***June 2016 – Timesheets***

[73] VH said on 17 June 2016 she sent an email to EK because she had edited her times in the Comcare system and VH requested EK's reasoning for the edits. VH attached to her statement a copy of the email.<sup>52</sup> VH explained the Comcare system is a live time recording system in which personal care workers record their times accurately and all employees are consistently reminded to do so.<sup>53</sup>

[74] VH said she has to go through and check every worker's times the day after they have worked them. VH said the system would have flagged that there may have been excessive travel time, and then she would take a screen shot and sent an email to the care worker asking why the system logged excessive travel time. GB said all Co-ordinators are charged with undertaking this task.

[75] EK said in June 2016 she discovered she was lactose intolerant. EK said the reason she was editing her times was because she had to stop between clients at the shopping centre to use the toilet.<sup>54</sup>

[76] GB submitted that the employer was entitled to query the edits given this involved billable hours and VH had a responsibility to know what her staff were doing. EK said she wasn't trained until 13/14 September on how to edit info on your own car.

[77] VD submitted that EK would have been provided training in 2014 and was not using the system correctly; the system must record live time in case something goes wrong. VD sent an email to EK on 17 June highlighting the importance of live time.<sup>55</sup> VD explained that then rest pause is a function within the system whereby carers can take rest breaks to use

bathroom. He said EK has used them in the past, it does not affect live time and there is no plausible explanation to edit times.<sup>56</sup> EK said restrictions exist on 'Rest Pause' and everyone edits timesheets because of traffic. EK said she did not edit to deceive but to reflect the correct time. VD said it has never been suggested EK was intentionally deceiving them by her actions.

[78] I am satisfied the actions of VH and VD were reasonable management action taken in a reasonable way in regard to this matter.

***August 2016 – Smoking/editing incident/Parking inappropriately***

[79] VD claimed in regard to this incident EK was deceptive in that she had edited times to provide she was with clients when witnesses had seen her smoking at their site. EK said she was going to a client and at the boom gate she met her colleague and they hadn't seen each other for a long time. EK parked her car and they had a cigarette together. EK said her colleague did not get a warning over this incident but she did. EK said someone went out of their way to take a photo of her smoking with a colleague.<sup>57</sup>

[80] EK's evidence indicated she had decided to use her own car to visit her first client because he was being picked up for another activity at a specific time and she had to ensure that client was ready. EK said she realised if she went to the base to pick up a car she would not make it in time. EK said there was a huge thing about where she parked the car. EK said she was not blocking anyone. EK said whilst she edited her times they would add up to the amount of work she performed. EK conceded she should not have stopped and had the cigarette earlier in the morning.<sup>58</sup> VD said the other staff member who was smoking with EK had not started her day of work.

[81] VH referred to attachments to her statement<sup>59</sup> and explained she had received an email from the Workplace Health and Safety Officer, wanting to know who drove a car blocking the pathway. Another issue was smoking on site other than in a designated smoking area, and a photo was received of the vehicle parked in a way where it was in part on the pathway. VH said she spoke to the other care worker who told her she was across the road at 8:30am smoking with EK. VH said she asked the employee to confirm this in a text message.

[82] I am satisfied it was reasonable for VH to follow up on the complaint made in relation to EK's car and photo of EK smoking. I find that the actions of VH were reasonable management action taken in a reasonable way in regard to this matter.

***25 August 2016 – Wrong client picked up***

[83] On 25 August 2016 EK picked up the wrong client. EK said she was given an address with insufficient information, it was an honest mistake and VH was off that day. EK said she reported it to VD and others so there was no need for VH to have spoken to her about it.<sup>60</sup>

[84] VH said she contacted EK seeking an explanation as to why she went to the wrong client because it is part of her role to ensure all care workers are accountable for their time and for attending to clients in the correct order. VH denied EK's allegation that she was provoking her.

[85] I am satisfied VH's conduct was reasonable in wanting to find out what happened as EK's supervisor.

***28 September 2016 – Shopping Centre incident and subsequent meeting on 6 October 2016***

[86] VD said that in late September 2016 he was informed by NC that there had been a complaint from a payroll staff member who alleged that they had witnessed EK being rude to a client whilst outside the Chermside Shopping Centre on 28 September 2016. On 30 September 2016 EK was sent a letter by VD requesting she attend a meeting about the complaint.<sup>61</sup>

[87] On 6 October 2016 a meeting was held between VD, NC and EK and a transcript and audio recording of the meeting is in evidence.<sup>62</sup> EK described the meeting as a 1.5 hour interrogation and claimed the investigation was not fair.

[88] EK submitted that the allegation made against her that she spoke "rudely" to a client was unsubstantiated allegation. In the investigation EK's recollection of events was not preferred over another witness. EK submitted that the allegations made against her were based on one person's verbal report with no additional evidence.

[89] On 19 October EK was issued a final warning letter by VD as a result of the investigation.<sup>63</sup> I am not satisfied on the available evidence that any actions taken by VD fell outside reasonable management action. A review of the outcome of the investigation was conducted by GB after EK's request for a review. The review determined the outcome was fair and reasonable.

[90] I am satisfied the conclusions reached from the investigation were reasonably open on the available evidence and they are not evidence that EK was the subject of bullying behaviour.

[91] EK also submitted that she was told by VD in the meeting that she should take English language lessons. She submitted that while English is her second language, the suggestion that her English is inadequate in such a way that requires a remedy of attending language classes is patronising and humiliating.

[92] It was submitted for UC that the meeting was a formal disciplinary meeting chaired by VD and EK mitigated the conduct by stating that her English was limited. It is not denied that the suggestion was made however it is claimed it was done to support the Applicant. This explanation is plausible.

***8 November 2016 – VH complaint about EK***

[93] VD said in his statement that on 8 November 2016 he was copied into an email exchange between VH and JD in which VH complained she was victimised by EK being constantly aggressive towards her and that she felt unsupported by her superiors. VD said he responded to VH on the same day seeking further clarification of the complaint but said he did not receive a reply from VH. VD said he contacted VH again on 19 December 2016 and requested that she respond to his email seeking further clarification. VH replied on 20 December 2016 saying she did not wish to pursue the complaint.<sup>64</sup>

[94] VH said that the incident on 8 November 2016 had been that EK was on annual leave and did not organise for a car be set aside for her when she came back to work to use as transport. VH said EK came back to work and found there was not a car for her. VH said she asked EK why she had not called or emailed earlier to organise a car and VH claimed EK became very aggressive and started screaming at her for asking her to call during family time. VH said she felt shaken by the incident because EK was so aggressive toward her.

[95] JC provided a statement where she said she witnessed the incident on 8 November and said EK snapped at VH after VH suggested to her that she should have emailed or called earlier that morning. JC said that VH did not raise her voice in response to EK, but every time VH tried to say something to EK, EK would cut her off. JC said she found EK's behaviour extremely rude. JC claimed EK continued to yell at VH until JC stepped in and offered for EK to take her car that had been set aside for JC, in an effort to defuse the situation. VH said for JC not to give up her car. JC said she was quite upset and disgusted by EK's behaviour.<sup>65</sup>

[96] JC's version of the incident is consistent with that of VH and contradicts that of EK. I prefer the version of this incident as described in the evidence of VH and JC. I am satisfied the actions of VH were reasonable management action taken in a reasonable way in relation to this matter.

#### ***22 December 2016 – Messy car complaint***

[97] On 22 December 2016 EK said she got in trouble with VH for leaving a mess in her car. EK said the car she was driving for most of the week had something left in it. EK said she did not leave mess in the car and never did, and the matter was trivial. VH said she contacted EK regarding a mess left in a car. VH said she was not bullying or harassing EK because she often asks other care workers if she receives a report that there has been a mess left in a car and they were the last person to use it. VH said she does this because the cars are sometimes used to transport clients and it is part of her role to remind carers of the employer's expectations.<sup>66</sup>

[98] I can discern nothing in the evidence concerning this matter to support a claim the VH's conduct was anything but reasonable management action carried out in a reasonable manner.

#### ***29 December 2016 – Timesheet entries***

[99] VH said that on 29 December she contacted EK with queries relating to her timesheet entries for 28 December 2016. VH said she needed to keep track of which modules of learning EK had done because VD requested that the care workers do the learning and VH wanted to keep track of who had done which modules. VH attached to her statement a copy of the email trail regarding EK's timesheet entries for 28 December 2016. I see nothing out of the ordinary in VH's request.

#### ***3 January 2017 and complaint from VH of 6 January 2017***

[100] EK submitted that on 3 January 2017 she was "ambushed" in the carpark by VH. EK was returning to work after a public holiday the previous day. An issue arose again as a car was not available for EK. EK claimed that she offered to VH to go and see her first client in

her own car and return to see if a car was available for her next scheduled client. EK claimed that VH went and checked with other staff and returned a few minutes later to advise a car was available. EK said the nurse who offered her car to EK said she needed to retrieve some things from the car and there was no issue.<sup>67</sup>

**[101]** VH said this issue was related to the incident on 8 November 2016 and when someone returns from leave there is a shortage of cars at the site and care workers will usually send VH a text saying they need a car. VH said she sent an email to VD and JD asking if it was realistic to request at care workers meetings that they are told to look at their phone the night before to make sure that they have enough time when they are starting to have a thirty minute break. VH said she withdrew the complaint about EK concerning her behaviour on 8 November but it happened again on 3 January 2017. VH's version is quite different to EK's. VH claimed EK said (when initially advised there was not a car) "*Oh, well, I'll just go home then.*" VH claimed she asked EK if she was refusing the shift to which she said EK replied "*No*". VH said she enquired off a nurse if EK could take her car and EK took that car.<sup>68</sup>

**[102]** EK submitted VH's conduct toward her was witnessed by LB. DV said in evidence he spoke with LB and there was no evidence to support EK's claims about that day. This is consistent with what DV found in an investigation conducted into this specific event at the time.

**[103]** VH denied that she lectured EK in an angry voice in front of LB on 3 January. In an email of 6 January 2017 sent from VH to VD, VH provides an account of the incident on 3 January 2017. Again, I prefer VH's version of events and there is nothing in the evidence concerning this matter to support a claim the VH or VD's conduct was anything but reasonable management action carried out in a reasonable manner in connection with this incident.

### ***12 January 2017***

**[104]** On 12 January 2017 VD sent correspondence to EK requesting she attend a formal counselling meeting surrounding her conduct and specifically her conduct on 8 November 2016 and 3 January 2017. The letter included a reminder that EK had already received a Final Written Warning on 19 October 2016.

**[105]** EK said she was going home and received an SMS from VD saying there is a letter left in pigeon hole which hadn't been collected. EK said she went back to the office and retrieved letter, and after reading the letter she got so upset she could not go home and could not drive because the letter was so untrue.<sup>69</sup>

### ***16 January 2017 – Counselling meeting, further issues raised by EK and subsequent findings and show cause***

EK said after consulting her Doctor she attended the meeting on 16 January with her support person, GD. EK said at the meeting she was asked by VD and DJ to write two letters in response by 18th and 19<sup>th</sup> January.<sup>70</sup> The evidence includes a transcript of the meeting on 16 January.<sup>71</sup> EK said on 20 January VD sent her a letter asking her to show cause. VD confirmed this in his evidence.<sup>72</sup>



[106] EK challenged the procedural fairness of such a quick decision concerning the matters when a meeting occurred on 16 January and her written responses were only received the previous day on 19 January. The a decision was reached on the show cause letter and sent to her on 25 January even though it was dated 27 January. VD clarified it was an error on his part concerning the date on the letter.

[107] At the same time as allegations were being addressed concerning EK, EK sent several emails to VD on 19 January 2017 regarding past complaints which VD said he forwarded to DJ in Human Resources. VD said he sent correspondence to JL and JC seeking any further information either of those employees could provide concerning matters raised by EK in her email to him on 19 January. The same process was followed with MP. VD attached contemporaneous emails to his statement to demonstrate that he had spoken to JL, JC and MP and none of them corroborated EK's claims.<sup>73</sup> VD also gave evidence concerning a phone call he had with EK on 25 January concerning her allegations against VH. VD said he provided all of this information to DJ who was handling EK's grievances against VH. VD said he read the draft of a letter DJ had prepared providing an outcome concerning the grievances she had raised in her email on 19 January 2017 and he was satisfied with the response and he emailed it to EK that afternoon.<sup>74</sup>

[108] EK said that the show cause process directed at her should not have proceeded until her own complaints were resolved.<sup>75</sup> Specifically she received a letter dated 20 January 2017 making findings against her concerning the incidents of 8 November and 3 January, and further expressing the view that the employer had lost confidence in EK when allegations EK had raised had not been finalised.

[109] VD responded by saying matters started to get:

“a little bit blurry when we start mixing issues together, especially when you go back, you know, two years.”

[110] Further VD said:

“I don't believe that the issues that were raised were directly relevant to the issues that EK [my editing] was raising.”<sup>76</sup>

[111] Whilst it may have been preferable for the employer not to finalise its conclusions in its letter to EK on 20 January before concluding its views concerning her grievances, having viewed the evidence concerning both sets of issues I can see no basis to disagree with the conclusions reached by the employer, and therefore can see no basis to conclude any of the actions of VD or VH were other than reasonable management action carried out in a reasonable manner in connection with these matters.

### ***January 2017 – unpaid mileage issue***

[112] EK raised in her evidence that several instances have occurred since September 2016 where her claims for payment of mileage were not paid by VH when she approved it for others.<sup>77</sup>

[113] VH said there had been a glitch in the system, and EK did not let her know on some occasions that she was in her own car so she would have to enter the kilometres manually. VH

said she told EK they will do an investigation to look into it in January 2017. VH attached to her statement copies of various emails concerning the chronology of this matter. VD said she requested information from EK on 10 January 2017 and EK responded on 12 January. VH said she did not have authority to progress the claims further herself.<sup>78</sup> I can see no issue that might give rise for concern about VH's conduct toward EK in regard to this issue.

## Legislation

[114] Section 789FD of the Fair Work Act 2009 reads as follows:

### “When is a worker bullied at work?”

- (1) A worker is *bullied at work* if:
  - (a) while the worker is at work in a constitutionally-covered business:
    - (i) an individual; or
    - (ii) a group of individuals;repeatedly behaves unreasonably towards the worker, or a group of workers of which the worker is a member; and
  - (c) that behaviour creates a risk to health and safety.
- (2) To avoid doubt, subsection (1) does not apply to reasonable management action carried out in a reasonable manner.

[115] I have considered all of the evidence concerning this application including competing versions of events. It is clear to me that whilst EK holds a strong perception that she has been the subject of bullying by VH and VD this is simply not borne out by the evidence. To the contrary the evidence demonstrates the conduct of both VH and VD was at all times reasonable management action carried out in a reasonable manner.

[116] Throughout this matter there is pattern of EK making specific allegations that she has been bullied when the evidence points on a number of occasions to her own conduct being inappropriate. This pattern is sufficient for me to be satisfied even in those instances, such as in September and October of 2014 where EK has made an allegation against VH and VH has been unable to recall the incident, that it is unlikely on balance that the allegation would have substance.

[117] On the basis of the conclusions set out above the application is dismissed.

COMMISSIONER

*Appearances:*

*Ms EK appearing on her own behalf*  
*Mr GB appearing on behalf of the Employer and Named Persons*

*Hearing details:*

2017,  
Brisbane:  
27 July

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- <sup>11</sup> Exhibit 6
  - <sup>2</sup> Exhibit 7
  - <sup>3</sup> Exhibit 1
  - <sup>4</sup> Exhibit 2
  - <sup>5</sup> Exhibit 3
  - <sup>6</sup> Exhibit 4
  - <sup>7</sup> Exhibit 5
  - <sup>8</sup> Exhibit 8
  - <sup>9</sup> Exhibit 9
  - <sup>10</sup> Exhibit 9 paragraph 1.
  - <sup>11</sup> Transcript PN 718-735
  - <sup>12</sup> Exhibit 8 paragraph 3
  - <sup>13</sup> Transcript PN 78
  - <sup>14</sup> Transcript PN 86
  - <sup>15</sup> Transcript PN 87
  - <sup>16</sup> Transcript PN 90
  - <sup>17</sup> Transcript PN 82
  - <sup>18</sup> Exhibit 8 paragraph 4
  - <sup>19</sup> Exhibit 8 attachment VH 1
  - <sup>20</sup> Exhibit 3 paragraph 11
  - <sup>21</sup> Exhibit 3 attachment PH 3
  - <sup>22</sup> Transcript PN 92
  - <sup>23</sup> Exhibit 8 attachment VH 2
  - <sup>24</sup> Transcript PN 106-111
  - <sup>25</sup> Exhibit 8 paragraph 7
  - <sup>26</sup> Transcript PN 125
  - <sup>27</sup> Exhibit 9 paragraph 11

- <sup>28</sup> Transcript PN 129
- <sup>29</sup> Transcript PN 140-147
- <sup>30</sup> Transcript PN151
- <sup>31</sup> Exhibit 9 attachment VD 7
- <sup>32</sup> Transcript PN 158-162
- <sup>33</sup> Transcript PN 166
- <sup>34</sup> Exhibit 9 attachment VD 6
- <sup>35</sup> Exhibit 4 paragraphs 5 and 6
- <sup>36</sup> Exhibit 4 attachment JD 1
- <sup>37</sup> Transcript PN 169-177
- <sup>38</sup> Transcript PN 176-181
- <sup>39</sup> Exhibit 8 attachment VH 4
- <sup>40</sup> Transcript PN 184
- <sup>41</sup> Exhibit 9 attachment VD 8
- <sup>42</sup> Transcript PN 190
- <sup>43</sup> Exhibit 9 paragraph 28
- <sup>44</sup> Transcript PN 515
- <sup>45</sup> Exhibit 9 attachment VD 34
- <sup>46</sup> Exhibit 9 attachment VD 41
- <sup>47</sup> Exhibit 8 attachment VH 8
- <sup>48</sup> Exhibit 4 paragraphs 7-9
- <sup>49</sup> Exhibit 8 paragraph 15
- <sup>50</sup> Transcript PN 534-536
- <sup>51</sup> Transcript PN 539
- <sup>52</sup> Exhibit 8 attachment VH 9
- <sup>53</sup> Exhibit 8 paragraph 17
- <sup>54</sup> Transcript PN 230-151
- <sup>55</sup> Exhibit 9 attachment VD 20
- <sup>56</sup> Transcript PN 263 to 265
- <sup>57</sup> Transcript PN 293
- <sup>58</sup> Transcript PN 318
- <sup>59</sup> Exhibit 8 attachment VH 11
- <sup>60</sup> Transcript PN 545-567
- <sup>61</sup> Exhibit 9 attachment VD 25
- <sup>62</sup> Exhibit 9 attachment VD 26; Exhibit 10.
- <sup>63</sup> Exhibit 9 attachment VD 29
- <sup>64</sup> Exhibit 9 paragraph 37 attachment VD 28
- <sup>65</sup> Exhibit 1 paragraph 3 to 7
- <sup>66</sup> Exhibit 8 paragraph 22
- <sup>67</sup> Transcript PN 626-627
- <sup>68</sup> Transcript PN 629-632
- <sup>69</sup> Transcript PN 446-454
- <sup>70</sup> Transcript PN 464
- <sup>71</sup> Exhibit 9 attachment VD 32
- <sup>72</sup> Exhibit 9 attachment 35
- <sup>73</sup> Exhibit 9 attachments 36,37 and 38

<sup>74</sup> Exhibit 9 paragraph 50 attachment 41

<sup>75</sup> Transcript PN 491

<sup>76</sup> Transcript PN 498

<sup>77</sup> Transcript PN 700

<sup>78</sup> Exhibit 8 paragraph 26 attachment VH 16