



DECISION

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

Jennifer Watts
(AB2017/517)

COMMISSIONER WILLIAMS

PERTH, 20 MARCH 2018

Application for an FWC order to stop bullying.

[1] This decision concerns an application made by Ms Jennifer Watts (Ms Watts or the Applicant) under section 789FC of the *Fair Work Act 2009* (the Act) for an order to stop bullying.

[2] Conferences were convened in November and December 2017 however Ms Watts subsequently advised she wished to have her application heard and determined by the Commission.

Introduction

[3] Ms Watts is employed as a Catering Assistant, sometimes referred to as a Patient Service Assistant, at the Glengarry Private Hospital (Glengarry). Her employer is Ramsay Health Care (Ramsay).

[4] Ms Watts' application named three employees of Ramsay as persons she believed had engaged in bullying behaviour toward her.

[5] After the second conference Ms Watts advised that she no longer wanted to have one of those persons involved in the application. The two remaining persons named in the application are Mr Ashok Kumar (Ashok or Mr Kumar) the Hotel Services Manager at Glengarry since 27 June 2016 and Ms Miriam Laabei (Ms Laabei) a Human Resources Advisor at Glengarry since 11 January 2017.

[6] At the hearing of this matter Ms Watts represented herself while Mr Kumar, Ms Laabei and Ramsay Health Care were represented by Ms Julianne Allan (Ms Allan) who is Ramsay's Regional H.R. Manager for W.A. and S.A.

The legislation and the relevant considerations

[7] There are relatively few decisions concerning applications for an order to stop bullying. It is helpful then to first set out the relevant provision of the legislation and to also explain the considerations involved in deciding such an application before dealing with the evidence.

[8] Section 789FD of the Act sets out the circumstances that must exist for an employee to be found to have been bullied at work.

“789FD 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

(b) 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.

(3) If a person conducts a business or undertaking (within the meaning of the Work Health and Safety Act 2011) and either:

(a) the person is:

(i) a constitutional corporation; or

(ii) the Commonwealth; or

(iii) a Commonwealth authority; or

(iv) a body corporate incorporated in a Territory; or

(b) the business or undertaking is conducted principally in a Territory or Commonwealth place;

then the business or undertaking is a constitutionally-covered business.”

[9] Section 789FF of the Act sets out when the Commission is empowered to make orders in a case where the Commission is satisfied there has been bullying at work.

“789FF FWC may make orders to stop bullying

(1) If:

(a) a worker has made an application under section 789FC; and

(b) the FWC is satisfied that:

(i) the worker has been bullied at work by an individual or a group of individuals; and

(ii) there is a risk that the worker will continue to be bullied at work by the individual or group;

then the FWC may make any order it considers appropriate (other than an order requiring payment of a pecuniary amount) to prevent the worker from being bullied at work by the individual or group.

(2) In considering the terms of an order, the FWC must take into account:

(a) if the FWC is aware of any final or interim outcomes arising out of an investigation into the matter that is being, or has been, undertaken by another person or body—those outcomes; and

(b) if the FWC is aware of any procedure available to the worker to resolve grievances or disputes—that procedure; and

(c) if the FWC is aware of any final or interim outcomes arising out of any procedure available to the worker to resolve grievances or disputes—those outcomes; and

(d) any matters that the FWC considers relevant.”

[10] Commissioner Wilson in *Katherine (Kate) Burbeck v Alice Springs Town Council; Georgina Davison; Skye Price; Clare Fisher* [[2017] FWC 4988] helpfully identified the relevant consideration involved in determining an application for an order to stop bullying as follows,

“[15] An applicant for an order from the Commission to stop bullying under s.789FC of the FW Act must not only be a worker but one who “reasonably believes that he or she has been bullied at work”, with that belief being actually and genuinely held, as well as it being reasonable in an objective sense. The term “worker” has the same meaning as in the Work Health and Safety Act 2011 (Cth), but does not include a member of the Defence Force.

[16] Conduct does not occur “at work” merely because it has a substantial connection to work. The question of whether behaviour or conduct occurred “at work” does not necessarily equate to the performance of work and will require a consideration of the context, including custom and practice, and the nature of the worker’s contract.

[17] Ascertainment of “unreasonable behaviour” in the context of Part 6-4B of the FW Act requires application of an objective test having regard to all the relevant circumstances applying at the time. The Explanatory Memorandum which accompanied the Bill from which this legislation arises makes reference to the earlier majority report of the House of Representatives Standing Committee on Education and

Employment, entitled “Workplace Bullying - We just want it to stop” and made the following points about behaviour and its assessment by the Commission:

“109. The Committee went on to note that ‘repeated behaviour’ refers to the persistent nature of the behaviour and can refer to a range of behaviours over time and that ‘unreasonable behaviour’ is behaviour that a reasonable person, having regard to the circumstances may see as unreasonable (in other words it is an objective test). This would include (but is not limited to) behaviour that is victimising, humiliating, intimidating or threatening.”

[18] The conduct to be considered is that of natural persons, given that there is no provision in Part 6–4B that suggests bullying at work is something which can be engaged in by a corporation; however the individuals engaging in the unreasonable behaviour need not be workers, for example they may be customers.

[19] Repeatedly behaving unreasonably implies the existence of persistent unreasonable behaviour and it might refer to a range of behaviours over time. There is no specific number of incidents required for the behaviour to represent ‘repeatedly’ behaving unreasonably. ‘Unreasonable behaviour’ should be considered to be behaviour that a reasonable person, having regard to the circumstances, may consider to be unreasonable. Consideration of the question of whether an individual or group “repeatedly behaves unreasonably” will require a purposive approach and “unreasonableness is a conclusion which may be applied to a decision which lacks an evident and intelligible justification”. Further, for conduct to be reasonable it does not have to be the best or the preferable course of action, rather the conduct will be objectively assessed as to whether what was done was done “reasonably”, not whether it could have been done more reasonably or differently.

[20] It will be necessary for the Commission to determine whether the alleged behaviour actually occurred, and once the necessary findings of fact have been made, the Commission can then determine whether the behaviour was unreasonable.

[21] In relation to the risk to health and safety of unreasonable behaviour, there must be a causal link; however, the behaviour does not have to be the only cause of the risk, but a substantial cause of the risk viewed in a common sense and practical way. A risk will be the possibility of danger to health and safety, and not necessarily actual danger. The reference within s.789FD(2) of the FW Act to the effect that the definition of “bullied at work” does not apply to reasonable management action carried out in a reasonable manner is not an exclusion but a reference for the avoidance of doubt. The reference to reasonable management action carried out in a reasonable manner serves to provide guidance in the interpretation and application of s.789FD(1)(a) in circumstances in which it is alleged that management action such as performance management, disciplinary action, allocation of work, restructuring of the workplace and employer directions constituted bullying.” (References omitted)

[11] In *Amie Mac v Bank of Queensland Limited and Ors* [[2015] FWC 774] Vice President Hatcher at [99] indicated that some of the features which might be expected to be found in a course of repeated unreasonable behaviour constituting bullying at work were,

“...intimidation, coercion, threats, humiliation, shouting, sarcasm, victimisation, terrorising, singling-out, malicious pranks, physical abuse, verbal abuse, emotional abuse, belittling, bad faith, harassment, conspiracy to harm, ganging-up, isolation, freezing-out, ostracism, innuendo, rumour-mongering, disrespect, mobbing, mocking, victim-blaming and discrimination.”

[12] In *Ms SB* [[2014] FWC 2104] Commissioner Hampton held at [105] that conduct capable of being considered as unreasonable behaviour of the kind contemplated by s.789FD(1), depending upon the nature of the actual conduct and the context can include:

- the making of vexatious allegations against a worker
- spreading rude and/or inaccurate rumours about an individual, and
- conducting an investigation in a grossly unfair manner.

[13] In some circumstances the evidence before the Commission may prove that an employee has been subject to unreasonable behaviour by other persons however the identity of the persons is unknown. Examples of such behaviour may be where an employee’s personal effects have been deliberately damaged, graffiti referring to an employee appears in the workplace or notes or messages are received by an employee however who was responsible for this behaviour is unknown. The Commission does not have to be able to identify the person/s who have engaged in the unreasonable behaviour and is entitled to accept unchallenged evidence that unreasonable behaviour has occurred. Such was the situation in the case in *Sharon Bowker, Annette Coombe and Stephen Zwarts v DP World Melbourne Limited T/A DP World; Maritime Union of Australia, The, Victorian Branch and Ors* [[2015] FWC 7312] where Deputy President Gostencnik held that,

“[12] Not all individuals who have engaged in the Bullying Behaviour were able to be identified, some remain unknown. Some individuals involved in the Bullying Behaviour no longer work for DP World.

[13] The MUA Respondents, whilst formally denying the allegations of Bullying Behaviour, did not lead any evidence to rebut any allegation of Bullying Behaviour allegation directed to the MUA Respondents made by the Applicants, and they accepted that on the basis of the evidence before the Commission there is a sufficient basis for the Commission to be satisfied that each of the Applicants has been bullied at work and to make the findings sought by the Applicants. The finding sought by the Applicants is for the Commission to issue a statement to the effect that each of Ms Coombe, Ms Bowker and Mr Zwarts had been bullied at work.

[14] Before turning to those findings, it is necessary to say something of the ‘group of individuals’ that engaged in Bullying Behaviour. It seems to me necessary that I am able to identify, by some description, the individual or group of individuals, whether known or unknown, who engaged or participated in the Bullying Behaviour. In the circumstances of this case, identifying the features of a group of individuals that engaged in the Bullying Behaviour whose members (or some of them) are unknown is difficult. Ultimately, I have decided to accept the Applicants’ description of the group as constituting those persons who subscribe to, or support, the existence of a system of authority and control at the WS Terminal which stands apart from DP World, the

employer which stevedores are paid to serve, and a breach of norms of behaviour established and enforced through such a system. In the circumstances of this case, I am satisfied that the description outlined sufficiently describes the group of individuals that engaged in the Bullying Behaviour.”

Background

[14] Ms Watts’ application, which she filed on 18 September 2017, describes the behaviour she has experienced that she thinks constitutes bullying as follows,

“There is a group of people who are repeatedly and unreasonably harassing, teasing, victimising, bullying, and victimising me at work. This behaviour is unrelenting, and will continue.”¹

[15] Ms Watts in her application includes approximately three pages explaining the history of her problems at Glengarry.² This detailed explanation is repeated in Appendix 4 to her outline of submissions which she filed in accordance with the Commission’s directions and which is part of her statement of evidence that she gave at the hearing.

[16] Ms Watts in her application says that she has brought these problems up with Ashok, Mr Vivek Shetty (Vivek or Mr Shetty) (who was Ashok’s second in charge) and Ms Laabei both verbally and in writing but that Ashok’s response was to say that she had no proof, and when she provided specific incidents and the names of witnesses, which she did in writing, they dismissed this. None of the witnesses that she has asked them to talk to, to verify her claims have been approached by Ashok, Vivek or Ms Laabei.

The evidence

[17] At the hearing evidence was given by Ms Watts who also tendered brief statements from two other persons, Mr Lex Robertson (Lex or Mr Robertson) and Mr Philip Aylmore (Philip or Mr Aylmore). Evidence was then given by Mr Kumar, Ms Laabei, Ms Allan and Ms Leonie Gardiner (Ms Gardiner) who has been the Chief Executive Officer of Glengarry since 2015.

[18] Ms Watts’ employment is covered by the *Ramsay Health Care WA – Enrolled Nurses & Support Services Union Collective Agreement 2014* [AE413548]. Clause 41 Bullying and Harassment provides an overview of the Ramsay Healthcare Discrimination, Bullying and Harassment Policy (Ramsay’s Bullying and Harassment Policy).³

[19] Relevant provisions of Ramsay’s Bullying and Harassment Policy are as follows,

“Ramsay Health Care is committed to ensuring a workplace free of discrimination, bullying and harassment.

The objectives of the Discrimination, Bullying and Harassment Policy are to:

- *Meet the requirements of equal employment opportunity and anti-discrimination laws;*
- *Provide a pleasant, harassment-free working environment for all employees;*

- Endeavour to ensure that all employees are treated with fairness, respect, equality and dignity and treat others with these ideals;
- Encourage good working relationships between employees;
- Apply the key principles of equitability to all of Ramsay's current and future people management policies and practices; and
- Encourage all staff to accept responsibility for ensuring that the principles outlined in this policy are an integral part of the culture of the workplace, including reporting of behaviour that breaches the policy.

...

The Discrimination, Bullying and Harassment Policy establishes the organisation's behavioural expectations of its employees with regard to:

...

- Workplace Bullying;
- Victimisation; and
- Vilification.

...

Ramsay will endeavour to ensure that no sexual, racial or other form of harassment, including bullying, occurs in the workplace.

...

It is the responsibility of all staff to monitor their own behaviour. Any reports of discrimination, harassment or bullying will be treated seriously and investigated promptly, confidentially and impartially in accordance with the RHC-Grievance Policy. A written complaint is not required to initiate an investigation.

...

Managers' Responsibilities

Managers are responsible for:

- Promoting a culture free from Discrimination, Bullying and Harassment;
- Making employees aware of what action to take if they believe they have been subjected to, or witness to, inappropriate behaviour; and
- Treating all complaints seriously, investigating and resolving issues in so far as they are able.

Employees' Responsibility

Employees are responsible for complying with the RHC- Discrimination, Bullying and Harassment Policy i.e. they are not to discriminate against others, harass, bully or vilify others, and must cooperate with their employer with respect to any action taken to comply with requirements under all relevant legislation.

...

Ramsay has in place guidelines and procedures to address all aspects of discrimination, bullying and harassment. All managers and staff must familiarise themselves with these resources.

The RHC-Discrimination, Bullying and Harassment Policy and associated guidelines and procedures will be covered as part of all orientation programs and will be made available to employees at all times for the purposes of revision.

Workplace Discrimination, Bullying and Harassment resources are available on the HR Intranet and include:

- *Discrimination, Bullying & Harassment Guidelines for Employees;*
- *Discrimination, Bullying & Harassment Guidelines for Managers;*
- *Managers' Tips for Dealing with Discrimination, Bullying & Harassment;*
- *RHC Policy- Grievance Policy;*
- *RHC Policy- Disciplinary Policy; and*
- *Whistle blower Guidelines.*

...

PROCEDURE

Complaints of discrimination, bullying or harassment should be raised as soon as possible so that the situation can be dealt with quickly, impartially and confidentially. Where there is no on-site HR representative, the State HR Manager and/or National HR Services Team are available for advice and confidential consultation at every stage.

Complaints in relation to discrimination, bullying and harassment should be made in line with the Grievance Policy as outlined below. These stages do not need to be followed sequentially and involvement of the Executive at any or each stage is recommended.

Stage 1 - Discussion with other party

Many problems can be sorted out quickly and informally by speaking directly with the person concerned. Therefore in the first instance, the employee should attempt to resolve the matter with the other party if they feel comfortable doing so.

Contact your HR representative, the National HR Services Team or your state Human Resources Manager to discuss the matter and to seek advice on the situation and some strategies for engaging in the discussion. See also the Discrimination, Bullying & Harassment Guidelines for Employees.

Stage 2 - Referral to Manager

If Stage 1 does not resolve the situation or, if the employee is not comfortable approaching the other party directly, the employee may refer the matter to their manager for discussion. Where the grievance involves another party, the manager may assist in facilitating a discussion, and hopefully a resolution, between the parties and can help the employee to decide whether or not to make a formal complaint.

If the employee believes that their Department Manager is not the appropriate person then the matter should be raised with an alternative appropriate member of management, senior corporate manager, or the relevant State/Hospital HR Manager.

It is still possible to achieve an informal resolution at this stage, however the manager is required by law to investigate as soon as they become aware of an issue, regardless of whether the complaint is made formally and to deal with any safety or criminal matters as appropriate.

Stage 3 - Formalise the complaint

If no effective resolution has been achieved in Stage 1 or 2, or if the employee or manager believes that more serious intervention/support is required, a formal complaint should be lodged with the manager (preferably in writing). A full investigation is likely to follow which collects documentation including statements provided by the parties, records of interview with the complainant, the alleged bully/harasser and any witnesses, personal notes and reports. It is highly recommended that you contact your HR representative, the National HR Services Team or your state HR Manager to discuss the matter and to seek advice on the situation before progressing.

If a formal complaint is made, all parties must agree to:

- *Give a true and accurate disclosure and cooperate in establishing the facts;*
- *Maintain confidentiality at all times to avoid defamation;*
- *Conduct themselves in a professional manner and observe appropriate workplace behaviours; and*
- *Refrain from the victimisation of anyone during or after the investigation process.*

If a formal complaint against an employee is substantiated, a formal record of the complaint, the investigation, the outcome and the action implemented will be lodged on the relevant employee's personnel file. Other documentation relating to the investigation may be kept in a separate confidential file.

Outcomes that may result if a formal complaint is substantiated include:

- *An apology;*
- *An undertaking that the behaviour will cease;*
- *Formal counselling of the alleged harasser;*

- *Formal training or coaching;*
- *Disciplinary action, e.g. transfer, formal warning, dismissal (dismissal will commonly be the outcome of gross acts of sexual harassment);*
- *Notifying the Police (for criminal matters).*

All parties involved may request the attendance of a support person at any interview(s).

Stage 4 - Referral to Executive

If the matter is still unresolved and has not already been referred to the appropriate hospital Executive staff member or senior corporate manager, this must be done at this stage.

Stage 5 - External Complaint Procedures

If the employee considers that the matter has not been dealt with adequately through processes outlined in Stages 1-4 above, they can report the matter through an external complaint procedure.

Ramsay Whistleblower Hotline

The Ramsay Whistle blower Hotline can be contacted using the details below:

Telephone - 1800 058 644

Online - go to www.ramsay.deloitte.com.au

Email - email details of your report to ramsaywhistleblowerhotline@deloitte.com.au

Post - Reply Paid 12628 A'Beckett Street, Victoria 8006.

Other External Bodies

If the dispute remains unresolved after the parties have genuinely attempted to achieve a settlement, then notification of the existence of the dispute can be given to an external body. The body receiving the complaint will attempt to resolve the issue by conciliation between the parties

Disputes of an industrial nature can be given to the Fair Work Ombudsman or an agreed private alternative dispute resolution provider.

Complaints of discrimination, bullying and harassment can be made with the Fair Work Commission or the relevant EEO authority. Jurisdictions under each state are as follows:

<i>Jurisdiction</i>	<i>Administering Body</i>

...

Workplace Bullying:

Workplace bullying refers to repeated unreasonable behaviour at the place of work or in the course of employment that creates a risk to health and safety. That is behaviour that could a reasonable person might regard as victimising, humiliating, undermining or threatening.

Bullying includes behaviour and language that offends, degrades or humiliates a worker, possibly but not necessarily in front of co-workers, clients or customers.

Bullying may be the use of loud threatening language/behaviours, yelling or screaming abuse, or subtle forms of intimidation, such as inappropriate comments about personal appearance, criticism, inappropriate use of authority, isolation of workers from normal work events.

Bullying may occur between:

- *Co-workers;*
 - *A worker and another person in the workplace e.g. a visitor, contractor, student, patient or doctor etc.;*
- or*
- *A worker and a manager (or supervisor).*

Management interaction to address employee poor performance or misconduct, conducted in a fair manner and in accordance with relevant Ramsay policies, is not bullying. Furthermore a reasonable request from a co-worker will also not be considered as bullying.

Vexatious Complaints:

A vexatious complaint is a complaint that is frivolous or malicious, where the person making the complaint does not have sufficient grounds for action and is seeking only to annoy or cause trouble for the defendant. If a complaint is found to be vexatious, frivolous or malicious, the individual will be subject to disciplinary action by Ramsay. If a vexatious complaint is not substantiated, nothing is noted on the personnel file of the alleged offender..."

April 2017 - allegations against Ms Watts

[20] The evidence of Ms Watts was that around 2 April 2017 she was provided with a letter written by Vivek who was the Acting Catering Manager at Glengarry.⁴ The letter detailed six allegations which are set out below and required her response.

"Dear Jennifer,

Re: Meeting to discuss unauthorised absence from work, breach of a reasonable management request and alleged breach of the Ramsay Values, Code of Conduct and your Contractual Obligations

I write to confirm details of incidents that took place on Thursday 30th March. Details of the specific allegations are as follows:

1. *You arrived for your shift at approximately 7.05am. You said to your colleague, Dalys Jecks, you had to go home. Dalys stated “you can’t go because there is no cover”, you replied saying “well I won’t be any good and you will have to suffer. You contacted your colleague, Delia Marr, directly to cover your shift that day.*
2. *At approximately 7.50am, you left the kitchen to give out the breakfasts to the wards. This took you approximately 35 minutes.*
3. *When you returned from giving out breakfasts to the wards at approximately 8.25am. You stated that the trolley was missing things, your colleague Aini Woolfe disagreed. You became angry and yelled at Aini, “it wasn’t there, do you think I am stupid”.*
4. *Following this, Dalys said to you “you are supposed to do the cafe bars”, you replied “well I didn’t know I had to do that, ask the volunteer”. Dalys told you “that’s not the volunteer’s job”. You replied to Dalys saying “don’t yell at me you’ll make me cry, ask nicely”. Dalys then asked “could please do the cafe bars”. You then left to carry out this task. When you returned, Dalys asked you if you had done them and you told her “yes”.*
5. *At approximately 9.00am, you said to Dalys “I’m going now and I’ll tell the press your phone number”, Dalys said “you don’t have my phone number” and you replied “I know where you work.”*
6. *You left work at 9.00am, you did not clock out. ...”*

[21] Ms Watts responded in writing to the six allegations with a 2½ page typed response.⁵ That response having dealt with the first five allegations read as follows,

“Allegation 6.

No I did not clock out. All staff members have forgotten to clock in and out at some stage of employment. If I am to be reprimanded for this, then all staff members in the kitchen should be reprimanded in just the same way. This last point is just showcasing the bullying, victimisation and defamation of character that I have been experiencing for six years at Ramsay, and never has any of my co-workers been subject to the same kind of harassment that I have had to endure.

This is because there is a handful of staff members that work in the mornings that have admitted to people that they do not like me. They waged a secret war to get me fired for the past 6 years, this has not worked because my previous bosses have eventually seen through their lies.

...

For your investigation of me to run smoothly, I will provide some backup for myself for you to check.

I would advise you to call the previous catering manager Lex Robinson (sic), on 0432 30# ###, ask him anything, these girls have tried everything with all my bosses, or

acting bosses, and I do believe that he will tell you the truth and that this alone will confirm the harassment that I have endured at Ramsay without complaint.

If you need more confirmation, speak to Philip, an orderly in theatre. I was having a private conversation with my boss about two weeks ago, we were in the storeroom and Philip came into the kitchen and observed Elisabeth leaning against the wall eavesdropping on my private conversation. She then proceeded to tell other staff members what had been said in my private conversation. If things like this are not a code of conduct violation, then me being upset at work is not a violation. Philip was, and still is, shocked by the behaviour of Lizzie that day, and he continually brings it up as he is so upset anyone would do this to another person.

I would also ask you to check with Stephanie, and Amanda, nurses on Boronia ward that day. Stephanie gave me a hug and told (sic) to stay in there, she knows about my mum and what I put up with in the kitchen, Amanda has sent me a text message that day after I got home stating that she was (sic) upset at the behaviour of the kitchen staff that day, and if they were to talk to her about me she would tell them that this is not right and to show some compassion for me. I will show the text in the meeting.

Finally, just walk around the wards, speak to the nurses and orderlies about me. All of them that know me will only say positive things. And the ones that know me well will agree that I have cried at work on numerous occasions, and that they can see what is going on, and that I must be a strong person to put up with it all.

During our meeting, I have a right to know who you spoke with and what they said, if you so desire, so please make sure to keep a record of the conversations. There are numerous other incidents I could bring up but that is enough for you to investigate me for now.”

[22] Having received Ms Watts’ response to the allegation a meeting was held with her on 6 April 2017 with Vivek and Ms Laabei. In preparation for that meeting Ramsay’s staff had prepared 22 written questions to be asked of Ms Watts at the meeting dealing with the six allegations. The pre-prepared list of questions contains a space underneath each for a response.⁶

[23] With respect to what Ms Watts had said in her written response about bullying and victimisation and who she had asked Ramsay to contact to confirm what she said was true, the notes of the meeting included the following three pre-prepared speaking points raised at the end of the meeting,

“Before we finish I want to address a few of the points that you made in your response letter

...

You state that you had to endure harassment, have you ever raised this with your manager?”

There is no recorded response to this question.

“We only require witnesses to the alleged incidents that occurred; we would not contact ex-Glengarry employees.”

There was no space provided on the question sheet for there to be any response to this statement and none was recorded.

“In relation to the incident you describe involving your boss; did you raise your concerns about this at the time? I am unsure as to what relevance this has in relation to the allegations submitted to you.”

The response recorded, the first word of which is unclear, was “---@ the time.”

[24] A letter dated 28 April 2017 written by Vivek, detailed the outcome of Ramsay’s investigation into the six allegations.⁷ These respectively were,

“1.

...

Outcome: *Substantiated, you confirmed you contacted Delia to cover your shift after speaking to Dalys about it. It is inconclusive as to whether or not you arrived for your shift with the intent of going home. It is inconclusive as to whether you or Dalys said “You will have to suffer”.*

2.

...

Outcome: *Inconclusive, there is some evidence to suggest the reason you took 35 minutes to give out breakfasts was because you were speaking to staff.*

3.

...

Outcome: *Unsubstantiated, there is no evidence to suggest that you became angry and yelled at your colleague.*

4.

...

Outcome: *Inconclusive, there is some evidence to suggest that you did not do the cafe bar run as your colleague that arrived to cover your shift suggested they had to do it.*

5.

...

Outcome: *Substantiated, both you and Dalys agreed this was the conversation that took place however you both stated that you normally joke about these things, it was just different on this day.*

6.

...

Outcome: *Substantiated, you confirmed you left work and 9.00am when you cover arrived and you forgot to clock out.”*

[25] Given these outcomes the letter explains,

“With regards to the alleged breaches of unauthorised absence from work and breach of a reasonable management request, allegation 1 and 6, it has been founded that you did follow the correct process of finding cover for your shift and advising the head chef of the day that you were leaving once your cover had arrived.

Decision

Due to the outcomes outlined above, no formal action will be taken.”

[26] The letter makes no reference at all to the bullying and victimisation matters Ms Watts raised in her written response to the allegations.

[27] Ms Laabei was the only witness called by Ramsay who was involved in the investigation into the six allegations and who participated in the April 2017 meetings with Ms Watts. Given Ms Laabei was the Ramsay HR representative dealing with these allegations it can be inferred that Ms Laabei had seen Ms Watts’ written response to the allegations. This became clear during the cross-examination.⁸

[28] Ms Laabei’s witness statement makes no reference to the complaint of bullying and victimisation that Ms Watts made in her written response to the allegations.

[29] Ms Gardiner’s evidence was that she was aware of the allegations raised in April 2017 against Ms Watts and of the investigation into those allegations. Her evidence was that she reviewed the investigation findings and was the decision maker. She says she was confident that a fair and thorough investigation process was conducted. It is unclear whether Ms Gardiner in reviewing the investigation and making her decision had seen Ms Watts written response to the allegations.

[30] There is no evidence that anybody from Ramsay undertook any investigation into Ms Watts’ bullying and victimisation complaint that she detailed in her written response to the allegations made against her.

[31] Ramsay at this time did not attempt to contact Mr Robertson, a former Manager at Glengarry, on the phone number provided by Ms Watts.

[32] Ramsay at this time did not contact the Orderly Philip who was then and still is an employee of Ramsay at Glengarry.

[33] Ramsay at this time did not contact either of the two nurses on Boronia ward, Stephanie and Amanda.

[34] Ramsay did not ask to see the text message Ms Watts says she received from Amanda, saying she was upset at the behaviour of the kitchen staff towards Ms Watts.

[35] I note that following the second conciliation conference held on 18 December 2017 on my recommendation Ramsay did speak to Mr Robertson and to Philip. Further factual findings will be set out below regarding this.

[36] Ramsay’s Bullying and Harassment Policy rightly identifies that one form of bullying can be a vexatious complaint as follows.

“A vexatious complaint is a complaint that is frivolous or malicious, where the person making the complaint does not have sufficient grounds for action and is seeking only to annoy or cause trouble for the defendant.”

[37] The allegations made against Ms Watts in April 2017 did not result in any disciplinary action against her and in her written response to the allegations she had said that these showcased the bullying and victimisation she had been experiencing for years at Ramsay. There is however no evidence that Ramsay’s staff after concluding the investigation gave any consideration as to whether the complaints made against Ms Watts were vexatious, frivolous or malicious and so warranted disciplinary action being taken against the complainant.

August 2017 – (a) Mr Kumar’s direction regarding bullying – (b) Fitness for Work Assessment

Mr Kumar’s direction regarding bullying

[38] Mr Kumar’s evidence was that Ms Watts advised him and Ms Laabei on a number of occasions that she felt she was being bullied at work by others. He says this most often occurred when she was undergoing formal investigation or being spoken to about her performance or behaviour. He says on each occasion he would ask for specific details of who, when and what has happened and Ms Watts would not provide details to him and so it was impossible for him to commence investigations into her allegations of bullying. Ms Laabei gave similar evidence.

[39] On 14 August 2017 Mr Kumar met with Ms Watts regarding her allegations of bullying. Mr Kumar completed an Employee File Note of that meeting⁹ which reads as follows,

“Purpose of the meeting:

To discuss and explain bullying at work and give Jenifer (sic) opportunity to speak up if she has been bullied in last few months and provide evidence.

Details of discussion (please detail managers concerns/feedback and employees responses):

- *Explain Jennifer the protocol if she thinks she has been bullied. She needs to contact Ashok or Miriam straight after any bullying incident with evidence.*
- *Jennifer has been given opportunity previously to meet Miriam to discuss the bullying (sic) which she has been complaining with previous years incidents.*
- *Jennifer did not contact anyone so she needs to stop with the allegation of bullying (sic).*
- *She cannot relate every incident with bullying (sic) without proper evidence.*
- *Having argument with in relation to work is conflict and not bullying (sic).*
- *If Jennifer thinks that she has evidence and she wants us to investigate then she should gather her evidence and contact Ashok/Miriam and we will investigate.*

Outcome of meeting (please detail next steps/training or support to be provided/potential consequences if any reoccurrence or if no improvement is made):

- *Jennifer should have clear understanding of bullying (sic) at work and if she still feels that she is being bullied then she should contact Miriam immediately with evidence.*
- *If Jennifer fails to contact Miriam then she should not bring up previous incidents of bullying (sic) moving forward.*
- *False allegation of bullying (sic) may lead to performance management.”*

[40] The note was signed by Ms Watts and Mr Kumar confirming the above was discussed.

[41] The next day 15 August 2017 Mr Kumar met with Ms Watts and Ms Elizabeth Meldrum (Ms Meldrum). Mr Kumar completed an Employee File Note of that meeting¹⁰ which reads as follows,

“Purpose of the meeting:

To discuss the conflict between Elizabeth and Jennifer on 8th August afternoon and investigate the reason of conflict.

Details of discussion (please detail managers concerns /feedback and employees responses):

- *We only discuss the conflict between Elizabeth & Jennifer and try to resolve the issue*
- *No one relates the issue with past incidents and rumours*
- *Only one person speaks at one time*
- *No one leaves the room without Ashok permission*
- *Have respect for each other and behave in professional manner*
- *Fail (sic) to follow the above rules may lead to disciplinary action being taken*

Outcome of meeting (please detail next steps/ training or support to be provided/ potential consequences if any reoccurrence or if no improvement is made):

- *We have to behave in professional manner at all times.*
- *We expect all employees to attend work and carry out their job in a professional and efficient manner, it is inappropriate to create or bring problems in to the workplace, it is inappropriate to cry in the workplace. It is expected that all employees behave in appropriate manner at all times according to Ramsay Values and code of conduct*
- *We must show respect when communicating and working with our team members and all employees of Ramsay, we must treat each other with respect and dignity at all times.*
- *As mentioned before we should not be participating in or starting rumours, you are at work, not in a playground.*
- *I do not want to see a repeat incident of what happened on Tuesday. I expect to see all employees working together as a team in a professional manner to ensure the best care for the patient. If you have a problem at work, please try to resolve the problem with the person in a professional manner, if you feel you cannot do this, please let me know, do not include everyone else in the team, this is a distraction to others.*

- *We have to adhere to the Ramsay Values and code of conduct at all the times failure to adhere to the Ramsay Values and code of conduct may lead to disciplinary action being taken.”*

[42] The note was signed by Ms Watts, Ms Meldrum and Mr Kumar confirming the above was discussed.

Fitness for Work Assessment

[43] Mr Kumar’s evidence was that in August 2017 he sought advice from Ms Laabei regarding concerns he had about Ms Watts’ health and well-being at work. Examples of the concerns he had were that Ms Watts he said lacked concentration and was claiming to forget things she had been told. She was unable to retain information some of which had the potential to compromise patient safety. Ms Watts had tripped twice in a six month period. Ms Watts was highly emotional and had two recent outbursts at work and she could not provide him with a reason as to why she had become extremely emotional. It was decided that Ms Watts would be asked to attend a Fitness for Work Assessment.

[44] By letter dated 22 August 2017 Mr Kumar wrote to Ms Watts advising he had become concerned about her and would like her to attend an appointment with an occupational health practitioner for assessment. Ms Watts attended the assessment as requested which was conducted by Dr Berrisford a Consultant Occupational Physician.

[45] No report of the assessment from Dr Berrisford was tendered by either party in evidence.

[46] By letter dated 30 August 2017 Mr Kumar confirmed details of a meeting held the same day attended by him, Ms Laabei and Ms Watts.¹¹ The letter included the following,

“Following your assessment, we received a report from Consultant Occupational Physician Dr Berrisford with whom you met. A summary of the findings and recommendations is as follows:

Findings and Recommendations

The report states that you enjoy your job and feel capable of carrying out all requested duties and hours. You stated you love your job and that “everyone loves me there” reporting that you go to see dying patients on your days off and that you are called “smiley”.

The report stated that you have a perception of having been bullied over the last 6-7 years whilst working at a Ramsay by a particular colleague and a group of co-workers. You also stated that you had initially perceived that the previous supervisor was bullying you by taking sides with the “head bully” however that your previous supervisor had then realised what was going on i.e. that you were the victim and then it was “nipped in the bud”. When asked who the particular colleague and co-workers were you named your colleagues Lizzie, Maggie, Aini and Judy. You explained that these colleagues approached your previous supervisor complaining about you, your supervisor told them to stop approaching him with these issues and get out of his

office, this is how it was “nipped in the bud”. There is no documentation available to support this.

You state that when I began employment, you believed that the bullying by this particular colleague and other co-workers started again. You state you have been accused of smoking beyond the allocated break, not doing your job properly, smelling of alcohol and being subject to defamatory remarks. We asked you who was making these accusations and how did you know. You said that Maggie and Lizzie speak about you taking long breaks, not doing your job properly and smelling of alcohol and you know this because other co-workers have overheard them however you were unable to provide us with the names of these co-workers. I confirmed that these accusations have never been brought to my attention.

You spoke about the most recent incident that occurred on the 14th August 2017. You stated to Dr Berrisford that you were subject to a verbal aggressive outburst by the person you identify as the “head bully”. You state that your manager’s response to resolve the issue was to put the both of you in a room together, you state after this meeting you were “made to work”. You confirmed that the person you were speaking about was Lizzie. In the meeting with you and Lizzie, Lizzie explained that she wasn’t speaking to you, she was talking to Maggie. I was in the kitchen at the time and I did not hear Lizzie shouting at anyone. When asked why you became upset over this incident, you stated because “she always does it”, when asked for an example you stated, “She has actually been ok over the last year”. I confirmed that you were not “made to work”, you appeared fine after a period of time and you stated you would continue to work.

The report outlines another incident that occurred 4-6 months ago. You stated you were accused of yelling and screaming however reported that the subsequent investigation decided that you had been the victim. We explained to you that this statement is untrue, the outcome of this investigation was that there would be no formal action taken however all parties involved were reminded of the Ramsay Values, Code of Conduct and how to communicate with each other at work. It was not founded that you were the victim.

When asked why you had not followed through with any action regarding the perceived bullying, you state because “I am a nice person” and that you did not want to take this course of action but it would be an absolute last resort should the need arise.

The report states that you specifically deny any sustained low mood, anxiety symptoms, disrupted sleep or appetite. The report states that you deny feeling depressed or anxious but admitted that you feel occasional low in mood at work, secondary to allegations and your perception of being victimised.

In Dr Berrisford’s opinion there was no evidence of a current major affective or cognitive disorder impacting on your insight or ability to undertake the inherent requirements of the role.

Next Steps

As your employer we have a duty of care to provide you with a safe system of work and to ensure that you are both physically and psychologically fit to perform the inherent requirements of your role. As a result of Dr Berrisford's findings and recommendations, you are currently fit to perform the inherent requirements of your role as a Catering Assistant.

*In relation to the allegations of bullying, there has been no evidence to substantiate your allegations. You stated that you have provided a four page document to the union which outlines examples and incidents of bullying behaviour. **Can you please provide us with a copy of this document by Wednesday 6th September?***

***We request that you refrain from speaking to co-workers, whether in your own department or other areas of the hospital, about alleged bullying.** It disrupts and distracts employees and places them in an uncomfortable position. Please speak to me directly.*

You state that none of your colleagues assist you in the kitchen and you carry out your tasks on your own. I confirmed that I have seen a number of your colleagues assist you regularly when you require it. It appears that your perception of what you believe is happening is different to what is actually happening. I ask that you truly reflect on this and the possibility that your perception may be mistaken.

We ask that, should a colleague approach you or you overhear something you feel is inappropriate, you inform me immediately.

We also request that you complete the e-learning module, anti-discrimination, bullying and harassment by Friday 15th September.

Please be advised that visiting patients on your day off is unacceptable and is a breach of confidentiality, we understand your intent is of a good nature however, we request that you do not do this again.

This matter will be treated with confidentiality and you are reminded not to discuss this with any colleague or person working within hospital. I expect your co-operation regarding this matter. If you would like to discuss this matter further or have any questions regarding you or Glengarry's requirements, please do not hesitate to contact me."

[47] Mr Kumar's and Ms Laabei's witness statement regarding the meeting with Ms Watts on 30 August 2017 was practically identical word for word.¹²

[48] Most relevantly the evidence of both witnesses for Ramsay concluded as follows,

"As Jennifer did not, and would not, provide us with specific information about the allegations of bullying, there were no allegations to investigate."¹³

[49] Whilst in other proceedings concerns might be raised as to the integrity of the evidence where two witnesses provide identical word for word evidence, in this case the evidence of the two witnesses given in this way obviously demonstrates that both Mr Kumar, Ms Watts' Supervisor and Ms Laabei, Ramsay's Human Resources Advisor had adopted a common position in response to Ms Watts' complaints of bullying.

[50] This position was that nothing Ms Watts had written or said about bullying during the April 2017 disciplinary process nor during her assessment with Dr Berrisford nor during their meeting with her on 30 August 2017 warranted any form of investigation by them.

[51] Consequently no investigation at all was undertaken by Ramsay into Ms Watts' complaints of bullying.

September 2017 - allegations against Ms Watts

[52] On 4 September 2017 Mr Kumar notified Ms Watts by letter of two allegations against her, he notified her by letter on 15 September 2017 of a further three allegations.¹⁴ Ms Watts provided a four page written response¹⁵ and then meetings were held with her regarding these allegations.

[53] On 5 October 2017 Ms Gardiner wrote to Ms Watts regarding these five allegations detailing Ramsay's investigation findings and conclusions and issuing Ms Watts a First Formal Written Warning.

[54] Relevantly that letter read as follows,

“1. On Friday 25th August, you were in the kitchen and you told a colleague that you had been sent for a mental evaluation by Miriam and stated that you were going to sue Ramsay if it came back negative.

Outcome: *Substantiated, you admitted in your response that you did tell a colleague you had been sent for a psych evaluation. You deny saying you would sue Ramsay.*

2. You also stated that you had to strip off and then had a psych review and that you should be able to claim your parking.

Outcome: *Substantiated, you admitted that you did tell a colleague you had been sent for a psych evaluation and you were asking them about claiming parking.*

In relation to allegations 1 and 2, you state in your response that these conversations were taken out of context or you said it jokingly. Whether the conversation was taken out of context or not or if you were joking, you were still discussing matters with co-workers which you were asked not to do. You had a choice in relation to discussing these matters with your co-workers and unfortunately you chose not to act in line with management request or the Ramsay Values. Your response to co-workers about matters like these should have been “I don't want to talk about it”. If you felt your co-workers were “hounding you” as you said in your response, the correct process is to report your concerns to management rather than discussing it.

3. On Monday 11th September, you showed a colleague the letter of allegations, dated 4th September, on your phone.

Outcome: Substantiated, you admitted that you showed a colleague the letter on your phone because she asked you to. This is a breach of confidentiality and a reasonable management request as well as the Ramsay Values. If a co-worker has asked you for something, and you know it is not appropriate, you should not have complied and you should have reported this to management. You state that your co-workers were breaching your confidentiality however you showed a co-worker the letter on your phone and you left the phone with them as per your response, you were also in the kitchen trying to find out who approached your manager with feedback in relation to conversations you had with them.

4. On Wednesday 13th September, you said to a colleague “Ashok told me today that it was Diane who reported me”.

Outcome: Substantiated, you admitted that you said to a co-worker “Ashok told me today that it was Diane who reported me”. This is a breach of confidentiality, a reasonable management request, the Ramsay Values and also making false statements about your manager to co-workers. It is very serious and also extremely disappointing that you would make statements about your manager to co-workers which are untrue. As well as making untrue statements, you were trying to ascertain and conduct your own investigation in relation to who said what to your manager. You were provided with a time and date to meet with your manager and HR which was your opportunity to ask questions and provide your own response to the allegations; however you did not follow instructions and behaved very unprofessionally.

5. On Wednesday 13th September, you said to your colleague Diane “Ashok told me that you were the one that dobbed me in”

Outcome: Substantiated, you admitted that you did say to Diane, “Ashok told me that you were the one that dobbed me in”. This is a breach of confidentiality, a reasonable management request, the Ramsay Values and also making false statements about your manager to co-workers. You approached more than one co-worker to ascertain and conduct your own investigation in relation to who said what to your manager. You made false accusations about Diane and your manager which I find extremely worrying and dangerous behaviour.

You have taken limited responsibility for your own actions. You are blaming your colleagues and your manager for the position you put yourself in. If you did not have discussions with your colleagues and if you had followed a reasonable instruction and correct process, you would not be in this position. You did you (sic) not comply with a reasonable management request and furthermore you made untrue statements to your co-workers about your manager. You also stated throughout your response that your manager has been discussing your personal life and gossiping behind your back, I do not consider your comments to be true. Essentially, comments such as these, without any evidence to support your claims are a breach of the Ramsay Values as you are not showing respect for your manager. Your behaviour is not in line with the Ramsay Values and Code of Conduct.

Decision

Following careful consideration and review, due to the breaches of confidentiality, a reasonable management request, the Ramsay Values and Code of Conduct, and making false statements you are being issued with a First Formal Written Warning.

Moving forward you are expected to adhere to the Ramsay Values, Code of Conduct and all Glengarry and RHC Policies at all times. Any further breaches may result in formal action being taken, up to and including termination of employment. Your colleagues were only aware of your issues because you told them. I would advise that if you do not want your co-workers speaking about things you have told them, you should not disclose the information to them. This is why we ask employees not to discuss matters like these and I expect you to comply with management instructions moving forward.

You will also be placed on a Behavioural Improvement Plan to support you to ensure your behaviour is in line with the Ramsay Values and Code of Conduct at all times. Please find the Ramsay Values and Code of Conduct attached to this letter, you are requested to read and ensure you understand what is expected, if you have any questions, please let me know.”

[55] In Ms Watts’ written response to the five allegations Ramsay was investigating she mentions her bullying complaints. She said that,

“On Monday 11th September, I found out from a co-worker that someone had told Elizabeth Meldrum all about it. She is the one who started all this through her bullying of me, in which I have asked Ashok to investigate many times both verbally and in writing. He has done nothing to investigate my harassment claims. Every time the topic of my bullying comes up Ashok either act’s like it’s nothing, denies all knowledge of it, gives me an investigator letter, or sends me for a psychological evaluation.

...

If either Ashok or Miriam had done their jobs, all they would have had to do is ask just one of the staff members at the hospital who I have named as witnesses to my bullying if my claims were true, and all this would have been stopped from the start. My bullies would have been reminded of the Ramsay Values and told that if the behaviour keeps up they could face termination. I have told this to Ashok many times, and said this is how the last boss slowed it down, but Ashok became angry and said that he is not Lex and never mention his name again.

I am finding it harder and harder to believe that Ashok and Miriam would go out of their way to question certain staff repeatedly as to whether I’m talking about my personal issues, then keep adding on to the investigation, and make me go through all that they have, all the while avoiding the people I have asked them to talk to clarify my harassment issues. This is unacceptable behaviour from a boss...”¹⁶

Worksafe

[56] In-between 4 September 2017 when Ramsay first raised these most recent allegations with Ms Watts and before Ms Gardiner wrote to Ms Watts on 5 October and gave her the First Formal Written Warning, Ms Watts raised her concerns about the workplace with Worksafe W.A.. Consequently on 7 September 2017 Worksafe emailed Ms Gardiner to arrange a meeting to discuss the systems in place for the prevention and management of unhealthy workplace behaviour and the actions taken in relation to an enquiry received from Ms Watts.

[57] A Worksafe inspector met with Ms Gardiner, Ms Laabei and two of Ramsay's OHS managers. Ms Gardiner's evidence was that no information was provided to them about Ms Watts' claims. Ms Gardiner says they presented their processes and policies for managing grievances and in response the same day in writing Worksafe said that from their review of the information it appeared that their system is a compliant system for the prevention and management of unhealthy workplace behaviour at Glengarry. Worksafe advised they had completed their enquiries and no breaches of the W.A. occupational safety and health legislation were identified.

[58] The evidence is that nobody from Ramsay has ever communicated anything to Ms Watts about the meeting with Worksafe or the outcome of that meeting.¹⁷

Workplace incidents

[59] Ms Watts around 23 August 2017 provided to her union a 3½ page document detailing incidents of bullying and harassment she said she has experienced.¹⁸ This is the document that Mr Kumar referred to in his letter to Ms Watts dated 30 August 2017 under the heading of "Next Steps" wherein he requested she provide a copy of that document to him. Ms Watts did not provide a copy of this document to Ramsay however it was reproduced in full in her application for an order to stop bullying which was filed with the Commission on 18 September 2017.¹⁹

[60] I find that from shortly after 18 September 2017 Ramsay was aware of this detail of the various incidents of bullying that Ms Watts says she experienced.

[61] Relevantly for the purposes of this application there are a number of these incidents which Ms Watts detailed with sufficient particularity for Ramsay to investigate or that could have been investigated if Ms Watts was asked to provide some limited additional information. For example it seems from Ms Watts' documented narrative that most of these incidents occurred in April or August 2017 as noted in brackets in the examples below which are included in her application and in Appendix 4 to her outline of submissions.

1. Whilst Ms Watts' Acting Boss was the Cook "Judy" (April 2017?), Ms Watts was told by another employee that Judy had found an orange pill in a drawer. Judy held the pill up for all Ms Watts' co-workers who were present to see and said to them "it's probably Jennifer's". All her co-workers laughed. Ms Watts told the second in charge Vivek about what she had been told had occurred and asked him to make a record of it and to tell Mr Kumar when he returned. She told both Vivek and Mr Kumar about this. She told them that when something like this occurs it is up to her whether she accepts it as a joke or not and when

it is said behind her back with co-workers present it becomes victimisation. Nothing was done or said to the people involved.

2. During the time that Mr Kumar was away, (April 2017?)²⁰ the Chef Clare told her that another employee had told Vivek that Ms Watts was seen at the bus stop out the front of Glengarry smoking on a non-break period. Ms Watts says that is not true. She took Clare into the storeroom to have a private conversation with her about how Ms Watts was sick of the constant harassment at work and to ask her what Vivek had said about this and Clare told her that he said he would be watching Ms Watts closely and would reprimand her if he witnesses her smoking. Ms Watts said that during this conversation with Clare, a member of the Theatre staff Philip, walked into the kitchen and realising it was a private conversation walked back out. A few days later Philip informed Ms Watts that he had observed Ms Meldrum behind a wall listening in on her conversation with Clare.
3. During this time (April 2017?) Ms Meldrum told Vivek that she smelled alcohol on Ms Watts' breath and that Ms Watts was intoxicated at work. Ms Watts says that Ms Meldrum has said this to all her Supervisors including Mr Kumar, as well as her previous Supervisor Mr Robertson. Mr Robertson had dealt with this by telling Ms Meldrum that he had worked with Ms Watts for years and had never had any indication of this and had told Ms Meldrum to stop coming to him with gossip.
4. On Saturday, 10 June Ms Watts was working a 12.00 p.m. to 8.00 p.m. shift alongside Ms Hyland. Ms Hyland told Ms Watts that she had been asked by two other employees what it was like to work with Ms Watts on the night shift and did she change or did she work the same? Ms Watts says she immediately went up to Vivek and told him of this and that she did not like her co-workers talking like this about her and it was another example of the victimisation. Ms Watts says she told Vivek to speak to Mr Kumar and for him to speak to the two employees. Vivek however told her that he will do nothing as he does not listen to rumour and must "hear it from the horse's mouth". Ms Watts told him that "the horse's mouth is right over there" referring to Ms Hyland but Vivek said that he must hear the two other employees saying it to believe it. This upset Ms Watts because she felt that Vivek would watch her when others told him she was drunk or she was smoking but if she complained about others nothing was done and she is branded a liar or a troublemaker.
5. On 15 April Mr Kumar told her to take off her necklace which she had forgotten to do. Ms Watts says most staff wear necklaces, rings, watches etc. and no one else has been told to take off the jewellery. She raised this with Mr Kumar the next day and told him she felt it was unprofessional to reprimand her in front of everyone and then let others get away with the same thing. This singles her out.
6. About a week ago (mid-August 2017?) Ms Meldrum walked through the kitchen and abused Ms Watts as she left. Mr Kumar and Vivek were in the kitchen. Ms Watts said to Mr Kumar is he going to let Ms Meldrum speak to her like that. Mr Kumar said he did not see anything. Ms Watts says Mr Kumar

said to her he could not tell what Ms Meldrum was saying, that it was clear that she was angry at something but could not tell Ms Watts what it was. Ms Watts told him it does not matter Ms Meldrum should not be acting like that at work. Ms Watts became upset and went to the bathroom to compose herself and then resumed her job. The next day Mr Kumar called her aside and told her off for her behaviour and kept saying “we are not children in the playground” and her behaviour was unacceptable. She asked why he was not also saying this to Ms Meldrum and Mr Kumar said Ms Watts was causing disruption in kitchen. A couple of days later he pulled her aside and expressed concern for her well-being, she told him she was fine if Mr Kumar didn’t keep telling her off for the things others should be told off for. He then called a meeting with Ms Watts and Ms Meldrum to discuss the incident.²¹ Ms Meldrum denied everything and said she was abusing another employee. Ms Watts became upset again and when Ms Meldrum left the room told Mr Kumar that she did not think she was fit to work that day. Ms Watts said the meeting was horrible, she came off as a diva and Ms Meldrum came off as a hero. Mr Kumar told her to compose herself and work her shift. Ms Watts said that later during this shift she was still upset. Mr Kumar pulled her aside and asked if she was okay and what was making her upset? She told him that she did not know what he expected to happen in that meeting and it was clear that Ms Meldrum would deny everything and now nothing has been resolved. Sometime after this Mr Kumar arranged for Ms Watts to undergo the Fitness for Work Assessment.

[62] Ramsay having been made aware of the detail of these examples of what Ms Watts viewed as bullying since a few days after 18 September 2017 apparently has never investigated them.²²

The statements of Mr Robertson and Mr Aylmore

[63] In the materials Ms Watts filed for the hearing were two email statements from other Glengarry employees.²³

[64] The first was from Mr Robertson and is dated 18 October 2017. The email says that he is happy to be contacted regarding Jennifer Watts and provides his phone number.

[65] The email explains that he had been Ms Watts’ Manager in the Catering Department at Glengarry for four years. Relevantly he said as follows,

“There was a close-knit group of women that had been there for many years. From the day that I began there was negative talk towards many of the new younger girls who weren’t allowed to work day shifts at that time as this was part of the culture. I managed to chip away a lot of that culture however Jennifer was isolated by a number of the ladies. Jennifer never fit in to the group or got on well with the ladies. In fact they targeted her continuously over the time I was there. I received many work-related complaints but when I investigated it was often someone else’s mistake. A number of the ladies including Liz, Clare and Erica, continuously came to me saying they could smell alcohol on Jennifer. However, I could never smell anything and never saw any signs of intoxication. The quality and speed of Jennifer’s work was always of a high standard.”

[66] The second was from Mr Aylmore and is dated 18 October 2017. Mr Aylmore said as follows,

“I was walking into the kitchen stockroom and stopped at the door as Jenny and the woman (I forget her name now) Chef where having a private conversation I backed out and stood back near the Pepsi machine, Lizzie walked past me and the stock room she looked in and walked forward a few feet, out of sight of the stock room and was listing for about 3/4 minutes Lizzie stood to the right of the stockroom door, out of sight of Jenny and the Chef as they continued to talk.

I left as I needed to be elsewhere and walked past the stock and Lizzie.”

[67] At the first conference convened by the Commission in November 2017 to deal with this application Ms Watts provided copies of these statements to myself and with her agreement the Commission provided copies of these to Ms Gardiner. Ms Gardiner’s evidence was that they agreed that they would speak to Mr Robertson and Mr Aylmore.

[68] Subsequently Ms Hogan, the Ramsay HR Manager at the Hollywood Hospital conducted phone interviews with Mr Robertson, Mr Aylmore and Mr Shetty and also attempted to contact Ms Clare Pettigrew but was unable to do so.

[69] Ramsay provided the Commission with a document headed Summary of Investigation Findings, dated 20 November 2017 prepared by Ms Hogan.²⁴ This in effect is her notes of what was said by the three people. These notes read as follows,

“Investigation Meeting – Philip Aylmore

I referred to the email Philip sent to Jennifer and asked him to discuss this alleged event further. Philip provided the following information:

- Jennifer and Clare were having a private conversation. Unsure what they were talking about but it was evident from their body language and where they were standing that it was a private conversation.*
- Philip saw Liz listening in on their conversation (hiding from Clare and Jennifer) for approximately 1 minute, then he left so he is not sure how much longer she stayed for.*
- Philip believes Liz would have been able to hear what they were talking about due to where she was standing and her body language.*
- He thought it was “wrong to listen in on someone else’s conversation”.*
- He informed Jenny approximately ½ hour later that he saw Liz listening in on her conversation but told her that he wasn’t sure how long she was listening for. Jennifer appeared to be upset by this.*
- Later that day he saw Liz talking to another employee (can’t recall who) and assumed that she was telling her about what she overheard Jennifer and Clare talk about, however this was only an assumption and in fact they could have been talking about anything. He told Jennifer that he saw this and that he assumed Liz was retelling what she had heard Jennifer and Clare talk about.*
- Philip stated that he has never seen or heard any other inappropriate conduct directed towards Jennifer and that this was an isolated incident.*

Investigation Meeting- Vivek Shetty

- *When he was employed by Glengarry approximately 2-3 weeks, Jennifer came to see him and said “the girls may be telling you stories about me, but don’t listen they are not true”. He asked her why they would say things about her and she said “doh” and pointed down to herself as if to say ‘because I’m gorgeous’. Nobody had come to him at this stage to say anything about Jennifer.*
- *Following the event above, there was one occasion whereby a member of staff said to him that Jennifer has taken longer breaks so that she could go for a smoke. He could not recall who exactly told him this but thinks it may have been Clare. He could not recall the comment about ‘smoking at the bus stop’ but said something had been said to him once about Jennifer smoking.*
- *Aside from the one occasion above, nobody has passed any personal comments about Jennifer, including comments about taking longer breaks, being under the influence of alcohol, etc.*
- *Jennifer has never submitted a written complaint to him.*
- *Jennifer once came to him and said that the previous day a comment was made about medication and a member of staff said “this might be Jennifer’s” (referring to the medication) and the others laughed. Jennifer refused to tell Vivek who told her of this and did not want to tell him who the people were who laughed/made the comment. Jennifer advised him that she did not want him to take it any further; she just wanted to inform him that this is what she had been advised. Nobody else mentioned this alleged event to him, only Jennifer.*
- *Vivek never told anyone that he would be watching Jennifer closely, or any other employee.*

Investigation – Lex Robertson – Conducted over the phone on 17/11/2017 at 08:50

I referred to the email Lex sent to Jennifer and asked him to discuss this further. Lex provided the following information:

- *He did not always see eye-to-eye with Jennifer due to a difference in personality and there were times he had to discipline her about not following policy or being too loud.*
- *This was all recorded at the time but would not be accessible anymore.*
- *There was a group of ladies who were challenging to work with and they were Maria, Elizabeth and Judith, and then others would join them at times.*
- *These ladies were challenging to work with for everyone, not just Jennifer (sic).*
- *They would talk about Jennifer and some other staff when they weren’t there.*
- *They made comments about Jennifer saying she was on drugs and that she was drunk/they could smell alcohol on her breath.*
- *Lex was told about a dozen times that they could smell alcohol on her; however he never smelt alcohol on her breath.*
- *Lex made notes at the time and liaised with Lisa Dore who was acting in HR position. Together they explored options but they never found anything to go off- it was all ‘hearsay’. Notes were made at the time but these would be no longer accessible.*
- *These staff members also bullied other younger night girls and they left because of it.”*

[70] As can be seen from Ms Hogan's notes what Mr Robertson and Mr Aylmore had said in their emailed statements to Ms Watts, which had been provided to Ramsay on 1 November 2017, was confirmed by them when they were respectively interviewed over the phone. There is no evidence to contradict what these two men have said and I accept their statements and what Ms Hogan recorded they said above as true and correct.

[71] What was said by both Mr Robertson and Mr Aylmore about what had happened with Ms Watts at Glengarry was consistent with what Ms Watts had explained in her written response to the allegations made against her, at the outset, back in April 2017.

[72] Ramsay only decided to speak to these two men in November 2017 about what Ms Watts had said following the Commission conference.

[73] All of Ramsay's witnesses at the hearing gave evidence that they did not fail to investigate Ms Watts' complaints of bullying but rather she had never, when requested, provided examples with specific detail that had allowed them to investigate. I note this evidence from Ramsay's witnesses to this effect and Ramsay's submissions making the same point were filed with the Commission on 25 January 2018.

[74] The evidence of these witnesses and Ramsay's submissions self-evidently are directly contradicted by the evidence above. Indeed this evidence from Ramsay's witnesses is contradicted by Ramsay's own actions, as recorded in Ms Hogan's Summary of Investigations Findings. In November 2017 Ramsay was able to investigate some of what Ms Watts had claimed back in April 2017 by ringing two of the same people she had asked them to at the time.

Education sessions regarding bullying

[75] The witness evidence, including that of Ms Gardiner, is that although Ms Watts did not provide them with specific allegations of bullying that could be investigated Ramsay decided to run education sessions for employees dealing with acceptable and unacceptable behaviour and the process for reporting concerns. The majority of the Catering Department employees attended this session on 6 November 2017 which Ms Gardiner also attended, as a way of demonstrating the seriousness of the issues being discussed and Ramsay's commitment to managing any such issues that are raised. Ms Watts was also in attendance at this session.

Ms Watts' health

[76] In her application Ms Watts states that the behaviour she has been subjected to has created a risk to her health and safety. She says she cries every day and this can happen at any time when she thinks about work. She cannot seem to stop thinking about why people hate her so much and it's like a physical pain in her chest. She says she has developed a stress disease called neuralgia on her arms and she has stomach complaints.

[77] In her submissions and statements Ms Watts provided medical certificates stating she was unfit to work between 5 September 2017 and 8 September 2017 and on 20 September 2017. She provided a medical certificate stating she was unwell and unable to attend a

university examination on 21 November 2017 and an associated email to her lecturer explaining these health problems were related to being bullied at work.

[78] Under cross-examination she confirmed the above and that she had been put on antidepressants by her doctors with increasingly strong dosages.

[79] The evidence of Mr Kumar and Ms Laabei as to why they requested that she attend a Fitness for Work Assessment confirms that there were some signs in their opinion that she was unwell. The subsequent report from Dr Berrisford according to Mr Kumar's letter to Ms Watts dated 30 August 2017 concluded however that Ms Watts was not suffering at that time, August 2017, a major affective or cognitive disorder impacting on her insight or ability to undertake the requirements of her role.²⁵

[80] Ms Watts' evidence that the behaviour she has experienced at work has affected her health negatively has not been challenged by Ramsay.

[81] I am satisfied on the evidence that Ms Watts' health has been negatively affected by her experiences at work and what she perceives to have been bullying behaviour.

Submissions

Ms Watts

[82] Ms Watts is self-represented in this matter. She has in a number of different parts of the materials she has submitted to the Commission and which were served on Ramsay explained why she believes she has been bullied at work and her complaints about the behaviour of some of her co-workers. She has confirmed much of this in her oral evidence under cross-examination.

[83] For example in her complaint to Worksafe which is included as Appendix 11 to her outline of submissions she says at page 5 in summary the following,

- Although the bullying she has been exposed to during her time at Glengarry has at times been extremely upsetting her previous boss was able to see through the lies and stop many of the problems she had been having.
- However since Mr Kumar started the bullying has increased significantly but when she has told Mr Kumar and Ms Laabei about it they will do nothing for her. In fact they have been making it seem like she is making it all up. They have made her feel much worse because of their treatment of her. They have made it obvious that they want to let her go and will not consider her claims of bullying even though she has given them names of witnesses and dates of incidents. She has asked Mr Kumar numerous times to call her previous boss Mr Robertson and he refuses to do so.
- She now has nowhere to turn for help.

[84] In terms of what Ms Watts is seeking she again in her Worksafe complaint explains at page 9 as follows,

- She would like to be heard when she says she is being harassed. She would like the co-workers involved to be reprimanded and reminded of the seriousness of this issue.
- She does not think Mr Kumar and Ms Laabei have handled the situation very well at all. She should have had more support from them, but they were the ones who began to make the situation worse for her. They were not very experienced in conflict resolution and she does not feel she can go to either of them with her problems.
- She says in their correspondence to her they have stated that she has not made any bullying complaints and then also state that she has been given the opportunity to discuss the bullying that she has complained about. This is contradictory and all very confusing.
- Ms Watts says she wants to be able to hold her head high and say that she is not crazy and this has happened to her and that she may have been instrumental in seeing it does not happen to others in future.

Ramsay

[85] Ramsay's submission is made on behalf of Ramsay as Ms Watts employer and the two persons named Mr Kumar and Ms Laabei.

[86] Ramsay strongly denies the allegations of workplace bullying.

[87] It is submitted at no point did Ms Watts raise a formal complaint of bullying to her Manager, HR Advisor, or Chief Executive Officer. The first time specific allegations were received by either party was upon receipt of the application to the Commission on 20 September 2017.

[88] They did not fail to act on allegations raised by Ms Watts. Ramsay asked Ms Watts on several occasions to provide specific examples of the allegations of bullying by others, and assured her that if they had the specifics they would investigate them accordingly. It submitted Ms Watts did not provide Ramsay with the allegations, nor did she ever submit a formal complaint.

[89] Although Ms Watts never provided a formal complaint of bullying (in line with the Ramsay Health Care Discrimination, Bullying and Harassment Policy), they decided to run education sessions for all employees to attend on acceptable/unacceptable behaviour and the process for reporting concerns.

[90] All informal and formal discussions that took place with Ms Watts regarding her performance and conduct were warranted and conducted in a fair, equitable and consistent manner.

[91] The two formal investigations that were conducted with Ms Watts were warranted, and were conducted in a fair, equitable and consistent manner. They were also conducted in line with current legislation and Ramsay Health Care policies and procedures.

[92] The Fitness for Work Assessment that Ms Watts attended was warranted, and in line with obligations under current *WA Occupational Safety and Health Act 1984* (WA).

[93] Following the conciliation meeting in the Commission on 18 December 2017, a meeting took place with Ms Gardiner, CEO, and Ms Allan, Regional HR Manager WA & SA, and Ms Watts. As an alternative to proceeding to a full hearing, a number of temporary measures were agreed. Ramsay submit Ms Watts was extremely satisfied with the temporary plan that had been agreed and advised them that she was keen to see ‘how it goes’, and therefore would be postponing the Commission hearing until after this time. The temporary plan was due to commence when Ms Watts returned from annual leave in January 2018.

[94] Ms Watts has since retracted this agreement and decided to proceed to full hearing.

[95] The current claim of workplace bullying is against Mr Kumar, Hotel Services Manager, and Ms Laabei, HR Advisor. Both Ms Laabei and Mr Kumar strongly deny these allegations.

Consideration

s.789 FC

[96] I am satisfied that Ms Watts is a worker who reasonably believes that she has been bullied at work and consequently she is able to make this application under section 789FF of the Act.

[97] There is no dispute and I accept that she is a worker as defined in section 789FC (2).

s. 789FD (a)

[98] This section of the legislation requires that it be proven that while Ms Watts was at work an individual, or a group of individuals repeatedly behaved unreasonably towards her and that behaviour creates a risk to health and safety. However this does not apply to reasonable management action carried out in a reasonable manner.

[99] The Commission must first determine on the evidence presented at the hearing what behaviour occurred then considering this determine whether individuals have behaved unreasonably towards Ms Watts and where relevant determine whether this was reasonable management action carried out in a reasonable manner.

[100] ‘Unreasonable behaviour’ is behaviour that a reasonable person, having regard to the circumstances, may consider to be unreasonable.²⁶

[101] Determining whether management action is reasonable requires an objective assessment of the action in the context of the circumstances and knowledge of those involved at the time. Without limiting that assessment, the considerations might include the circumstances that led to and created the need for the management action to be taken, the circumstances while the management action was being taken and the consequences that flowed from the management action.²⁷

[102] Throughout the outline of submissions provided by Ms Watts which she under oath has sworn is true and correct (Exhibit A1 and the 12 appendices incorporating various documents) and her oral evidence given at the hearing Ms Watts has detailed a number of instances of what she believes was unreasonable behaviour by some co-workers amounting to bullying.

[103] Some of the specific instances of behaviour Ms Watts submits amounted to bullying which were included in her application to the Commission and referred to throughout her outline of submissions and evidence are summarised below,

1. Around April 2017 co-workers were laughing at the Cook's 'joke' that a pill found in a drawer must be Ms Watts.
2. Around April 2017 a co-worker was eavesdropping on a private conversation Ms Watts was having with the chef Clare.
3. On a number of occasions a co-worker told Ms Watts' supervisors including Mr Robertson in the past and Vivek in April 2017, that Ms Watts smelt of alcohol and was intoxicated when she was not.
4. On 10 June 2017 two co-workers asked another employee, in a derogatory manner, what it was like to work with Ms Watts on the night shift.
5. A co-worker verbally abused Ms Watts as she left the kitchen in mid-August 2017.
6. On 15 April 2017 Mr Kumar directed Ms Watts to remove her necklace. He did this in front of her co-workers, not in private, and was singling her out because he did not direct other employees to remove their jewellery.²⁸
7. Vivek took no action about the complaints Ms Watts made about the behaviour of her co-workers laughing about her or querying her behaviour behind her back, in instances 1 and 4 above.
8. Mr Kumar and Ms Laabei decided not to investigate the bullying and victimisation Ms Watts mentioned in her written response to the allegations made against her in April 2017, notwithstanding she provided them a phone number for Mr Robertson and named three other current employees at Glengarry they could speak to and notwithstanding she urged them to do so on a number of occasions.

[104] With respect to the behaviour in 1, 2, 3, 4, and 5 above and having considered the evidence of all the witnesses I am satisfied that what occurred in each instance was as Ms Watts said.

[105] In the circumstances I am satisfied that in each of the instances 1 to 5 inclusive Ms Watts' co-workers behaved unreasonably towards her. As has been explained above at [13] in some instances unreasonable behaviour can be established to have occurred however the person/s whom behaved in this way may not be known. Such is the case in some of these instances.

[106] With respect to 6 above whilst it was a reasonable management action for Mr Kumar to direct Ms Watts to remove her necklace this was not carried out in a reasonable manner because he reprimanded her about this in front of her co-workers and he did not, around this time, similarly reprimand Ms Watts' co-workers working in the same area who were also wearing jewellery. Mr Kumar in this way behaved unreasonably towards Ms Watts.

[107] With respect to 7 above I recognise that the notes taken by Ms Hogan on 20 November 2017 regarding her conversation with Vivek on the phone differ from Ms Watts account of what occurred. However Ramsay did not call Vivek to give evidence under oath at the hearing and so he was not subject to cross-examination as Ms Watts was. Consequently I accept Ms Watts' evidence as to what occurred. I find that she did ask Vivek on a number of occasions to act on her complaints about the behaviour of her co-workers but he did not do so. I find this decision not to investigate or otherwise positively deal with the complaints Ms Watts had made was unreasonable. Vivek in this way behaved unreasonably towards Ms Watts.

[108] With respect to the behaviour mentioned in 8 above I am satisfied on the evidence that this is what occurred. There is no doubt Mr Kumar and Ms Laabei consciously decided not to investigate the bullying and victimisation Ms Watts had referred to in her written response she provided in April 2017 at that time or any time thereafter.

[109] There is evidence from Mr Kumar and Ms Laabei as to why these matters were not investigated as Ms Watts urged them to.

[110] Mr Kumar's evidence was that Ms Watts advised him and Ms Laabei on a number of occasions that she felt she was being bullied at work. He said this most often occurred when she was undergoing investigation about her performance or behaviour. He says she did not provide him with specific information about the allegations of bullying so there were no allegations to investigate.²⁹

[111] Under cross examination Mr Kumar said,

“Yes, so when I come back from holiday, yes, Miriam - Miriam did mention to me that the whole incident, what happened, and that was the first time which was mentioned about Phillip and Lex, and I did explain that we cannot contact Lex because he left already and then all this time I haven't seen any bullying at the workplace and the Phillip incident was just a one-off incident which didn't warrant me for bullying. So that's the reason there was no investigation.”³⁰

[112] So Mr Kumar's reasons for there being no investigation in April 2017 of Ms Watts' complaints about bullying and victimisation were that Mr Robertson was no longer employed and the incident Philip had witnessed was a once off incident. There is no explanation as to why Mr Robertson no longer being employed was a barrier to ringing him at that time. Neither is there any explanation as to how Mr Kumar concluded that what Mr Aylmore had witnessed was a once off incident without having undertaken any investigation.

[113] Ms Laabei's evidence in chief did not explain why she did not investigate the claims of bullying and victimisation which Ms Watts had committed to writing in response to the allegations made against her in April 2017. Ms Laabei echoed the evidence of Mr Kumar that

Ms Watts did not provide specific information about allegations of bullying so there were no allegations to investigate.³¹

[114] Under cross-examination Ms Laabei said,

Ms Laabei: *“Well, normal process is we wouldn’t contact a previous manager. You put that in response, in a written response to say: “In order for the investigation to run smoothly, please contact my previous manager” in that instance, we didn’t feel that contacting your manager was relevant so we would never do that.”*³²

Ms Watts: *“Yes. That’s what I was trying to do when I asked you in April to investigate my claims?”*

Ms Laabei: *“So in the written response where you mentioned that you were being harassed at work and you said to contact Lex, we did tell you in that meeting that we normally wouldn’t do that, but if you could come and meet with me afterwards and provide me with the information in relation to who was bullying you, what their names were, incidents that had happened. However, you failed to do that and you never came and saw me about that.”*³³

Ms Watts: *“I felt that by you calling Lex and him as independent without me giving you names - as an independent ex manager of over four years, the names he named would be more relevant than me just bitching to you about my co-workers?”*

Ms Laabei: *“I’m not sure when Lex left. I think it was in May of the previous year, so it’s probably about 12 months. Within that 12 months, I would have expected you to come with evidence and incidents that had happened in that 12 months where Ashok would have been there where we could have investigated. So I didn’t see the need to contact Lex at that point.”*³⁴

[115] Ms Laabei, when she interviewed Ms Watts in April 2017, did not recognise Ms Watts’ unsurprising reticence to name co-workers that had bullied her and so unfortunately dismissed out of hand the option of contacting a past manager in the first instance as Ms Watts had asked.

[116] Ms Laabei decided that ringing Mr Robertson was not appropriate and that unless Ms Watts provided information about the last 12 months and named the employees that had bullied her she would not investigate. Consequently no investigation was conducted into the bullying and victimisation that Ms Watts had raised in April 2017.

[117] Separately neither Mr Kumar nor Ms Laabei gave any evidence to explain why they did not speak to the other current employees, the two nurses, that Ms Watts had referred to in her written response to the allegations in April 2017.

[118] In fact none of Ramsay’s witnesses gave an explanation, nor was it explained in Ramsay’s submission, as to why these two other employees that Ms Watts had urged them to contact were never interviewed. These two employees were identified by name by Ms Watts in writing in April 2017 and were current employees at the time. There is no evidence these employees have ever been interviewed by Ramsay.

[119] The evidence of Ramsay's witnesses was that Ms Watts had not given them specific details that would have allowed them to commence investigations. This explanation, that they were unable to commence an investigation, is not correct. What actually occurred was that Mr Kumar and Ms Laabei imposed their own requirements on how Ms Watts must complain to them about alleged bullying before they would investigate. They in their own evidence say that they required her to name persons who she alleged had acted unreasonably and to provide details of the particular instances that occurred and when this had occurred. Consequently when Ms Watts complained about bullying and victimisation without these details as she did in writing in April 2017 this was ignored and there was no investigation.

[120] Mr Kumar and Ms Laabei persisted with this approach when they discussed with Ms Watts the outcome of the Fitness for Work Assessment on 30 August 2017. Mr Kumar's evidence of this discussion³⁵ included the following,

"We asked Jennifer why she did not report these allegations of bullying to us. Jennifer's response was that she was 'a nice person' and she did not want to take this course of action unless it was an 'absolute last resort'."

[121] In that meeting they continued on to say to her that they would investigate if she provided them with appropriate details.

[122] I note that Ramsay's Discrimination, Bullying and Harassment Policy provides that managers have particular responsibilities including,

"Treating all complaints seriously, investigating and resolving issues in so far as they are able."

[123] There is nothing in Ramsay's policy which required Ms Watts to provide the particular detail in support of a complaint of bullying which Mr Kumar and Ms Laabei required of her before an investigation would be undertaken.

[124] Ramsay's staff could have investigated the complaint about bullying just as Ms Watts had suggested to them in writing they do, but they did not.

[125] In my view not investigating what Ms Watts had raised about bullying was inconsistent with Ramsay's own policy.

[126] Whilst complaints of bullying under the policy are required to "...be raised as soon as possible so that the situation can be dealt with quickly,..." the reality will often be that an employee may be subject to unreasonable behaviour by individuals and initially may be willing to and able to ignore and tolerate this however as time passes if this continues they may no longer be willing to or able to tolerate further unreasonable behaviour. In these circumstances an employee should not be criticised for not having raised the earlier instances of unreasonable behaviour at the time they occurred.

[127] The corollary of this however is that when an employee raises a complaint about a past incident of unreasonable behaviour it may be difficult for that to be investigated because of the passage of time. This potential difficulty is not a sufficient reason to not commence an investigation at all.

[128] It should be recognised there are two reasons why an investigation into an allegation of bullying is undertaken by an employer. The first is to establish whether in fact an employee has been subject to unreasonable behaviour so that if this has happened they can be provided with support and assistance and remedial action taken. Secondly that investigation will seek to identify whom was responsible for any unreasonable behaviour and as part of taking action to prevent further unreasonable behaviour the individual/s may be subject to disciplinary sanction if appropriate. In some cases it may be established that an employee has been subjected to unreasonable behaviour but for any number of reasons the investigation does not lead to disciplinary sanctions against any other individual perhaps for example because no individual can be identified. This investigation will still be an important and positive development for that employee who had been subjected to unreasonable behaviour.

[129] In this case Ms Watts in writing had identified by name specific persons who were then current employees who she said could confirm that she had been subjected to what she said was bullying and harassment. There was nothing preventing Ramsay's staff having a discussion with each of those employees to find out whether, as Ms Watts had said, these employees held concerns about the way she was being treated by her co-workers and/or to ask them whether they had witnessed other employees behaving unreasonably towards her.

[130] Separately Ms Watts had provided Ramsay the name of a past supervisor, Mr Robertson, and his phone number and there is no valid explanation as to why a phone call to him wasn't made in April 2017. In fact when such a phone call was belatedly made in November 2017 and Ms Hogan for Ramsay then spoke to him Mr Robertson, according to her notes,³⁶ he confirmed much of what Ms Watts had said from the outset in April 2017.

[131] What should have also been alarming for Ramsay was that Mr Robertson concluded his conversation with Ms Hogan by saying that Ms Watts co-workers had,

“...also bullied other younger night girls and they left because of it.”

[132] There is no reasonable explanation for why Ramsay's staff did not investigate the bullying and victimisation that Ms Watts had first raised in April 2017 and which she later raised on a number of occasions. Consequently I find that the behaviour in 8 above was unreasonable. It was not reasonable management action to not at all investigate these matters raised by Ms Watts. Mr Kumar and Ms Laabei in this way behaved unreasonably towards Ms Watts.

[133] I stress however there is no evidence that the failure to investigate Ms Watts bullying complaints was motivated by malice towards her on behalf of Mr Kumar or Ms Laabei.

[134] In terms of the requirements of section s.789FD (a) of the Act I am therefore satisfied that whilst Ms Watts was at work some individuals repeatedly behaved unreasonably towards her as detailed in [109] above.

s.789FD (b)

[135] I have found that whilst Ms Watts was at work some individuals have repeatedly behaved unreasonably towards her. I have also been satisfied that the evidence is Ms Watts' health has been negatively affected by her experiences at work, which include these instances

of unreasonable behaviour towards her. Consequently I am satisfied that this unreasonable behaviour crests a risk to her health and safety.

s.789FF

[136] I am satisfied that Ms Watts has been bullied at work by an individual or a group of individuals. Ms Watts remains employed and working in the same area of Glengarry as some of those individuals. In all the circumstances I am satisfied that there is a risk that Ms Watts will continue to be bullied at work.

[137] Some of the instances of bullying that I have found did occur can be viewed in isolation as relatively low level bullying however considering all that has happened together I have no doubt that it is necessary for the Commission to intervene and it is appropriate to make an order to prevent Ms Watts from being bullied at work in future.

[138] In considering the terms of an order the Commission may make I am required to take into account,

- Any outcomes arising out of an investigation that is being has been undertaken by another person or body.
- Any procedure available to the worker to resolve grievances or disputes.
- Any outcomes arising out of any procedure available to the worker to resolve grievances or disputes.

[139] Considering these matters in this case firstly there has been no investigation into the bullying of Ms Watts and so no outcome to be taken into account, secondly Ramsay does have a procedure to deal with grievances including complaints of bullying however this has been of no assistance to Ms Watts in dealing with the bullying she has experienced and finally there has been no outcome from the Ramsay grievance procedure relevant to this matter.

[140] It is to be remembered that the legislative scheme is not directed at punishing those who may have behaved unreasonably in the past nor is it to compensate someone who has endured such bullying instead it is directed at preventing Ms Watts from being bullied at work in the future.

[141] A draft of an order that I am proposing to issue in this matter will separately be provided to those involved who will be affected by whatever final order is issued, being Ms Watts, her employer Ramsay Health Care, Mr Kumar and Ms Laabei. All of those involved are directed to provide any comments, submissions or suggestions about the proposed order to my chambers by no later than 4 April 2018.

COMMISSIONER

Appearances:

J. Watts on her own behalf.

J. Allan on behalf of the respondents.

Hearing details:

2018.

Perth:

February 12.

Printed by authority of the Commonwealth Government Printer

<PR601076>

¹ See form F72 at 2.1.

² *Ibid.*, at 2.2.

³ Ramsay's submissions, Appendix P.

⁴ *Ibid.*, Appendix A.

⁵ Exhibit A1, Appendix 1, pp.2-4.

⁶ *Ibid.*, at pp.5-9.

⁷ Ramsay's submissions, Appendix B.

⁸ Transcript at PN239.

⁹ Ramsay's submissions, Appendix J.

¹⁰ *Ibid.*, at Appendix K.

¹¹ *Ibid.*, at Appendix C.

¹² Exhibit R1 at paragraphs 16-18 compared to Exhibit R2 at paragraphs 15-17.

¹³ Exhibit R1 at paragraph 19 is identical to Exhibit R2 at paragraph 18.

¹⁴ Ramsay's submissions, Appendix E and F.

¹⁵ *Ibid.*, at Appendix G.

¹⁶ *Ibid.*, at pp. 52-53.

¹⁷ Transcript at PN336.

¹⁸ *Ibid.*, at PN42 and Exhibit A1, Appendix 4.

¹⁹ See form F72 at 2.2, everything that follows after the first paragraph is a copy and paste from Appendix 4.

²⁰ Exhibit R2 at paragraph 7.

²¹ Ramsay's submissions, Appendix K dated 15 August 2017.

²² *Ibid.*, at paragraph 2.

²³ Exhibit A1, Appendix 8.

²⁴ Ramsay's submissions, Appendix Q.

²⁵ *Ibid.*, at page 39.

²⁶ [2014] FWC 2104 at [44].

²⁷ *Ibid.*, at [49].

²⁸ Transcript at PN82.

²⁹ Exhibit R1 at paragraphs 19 and 27.

³⁰ Transcript at PN127.

³¹ Exhibit R2 at paragraphs 18 and 35.

³² Transcript at PN237.

³³ Ibid., at PN239.

³⁴ Ibid., at PN240.

³⁵ Exhibit R1 at paragraph 17.

³⁶ Ramsay's submissions at page 136.