



DECISION

Fair Work Act 2009

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

Miroslav Blagojevic

v

AGL Macquarie Pty Ltd; Mitchell Seears
(AB2017/585)

COMMISSIONER SAUNDERS

NEWCASTLE, 23 MAY 2018

Application for an FWC order to stop bullying – whether applicant bullied at work – applicant placed on a performance improvement plan – reasonable management action carried out in a reasonable manner – application dismissed.

[1] Mr Miroslav Blagojevic is an experienced, diligent and hard-working engineer. He is employed by AGL Macquarie Pty Ltd (**AGL**) as an Asset Engineer in the power generation industry. There is no question that Mr Blagojevic's employment relationship with AGL has broken down. This is unfortunate, given Mr Blagojevic's knowledge of and interest in the power generation industry. At the centre of this breakdown in Mr Blagojevic's employment relationship with AGL is a dispute as to the scope of Mr Blagojevic's duties and responsibilities as an Asset Engineer.

[2] Mr Blagojevic contends that the action of his supervisor, Mr Mitchell Seears, in placing him on an initial Performance Improvement Plan (**PIP**) in March 2017 and a revised PIP in June 2017, constitutes bullying at work within the definition of that expression contained in s.789FD of the *Fair Work Act 2009* (Cth) (**Act**). Mr Blagojevic asserts that, prior to being placed on a PIP, his performance was not deficient in a way that justified Mr Seears's decision to place him on a PIP. He argues that three of the five areas of underperformance identified by Mr Seears in the initial PIP relate to matters which are not within the scope of his role as an Asset Engineer. He also asserts that many of the work actions contained in the revised PIP are impossible for an Asset Engineer to execute. Mr Blagojevic contends that the imposition of the initial and revised PIP on him was not reasonable management action carried out in a reasonable manner. AGL and Mr Seears disagree, alleging that Mr Blagojevic was not performing as was reasonably expected of a person in his role when he was placed on the initial PIP and that the work actions cited in the revised PIP fall within the scope of Mr Blagojevic's role.

Hearing

[3] I heard this matter on 9 and 10 April 2018. At the hearing, Mr Blagojevic represented himself. AGL and Mr Seears were represented by Mr Williams, solicitor, with permission.

[4] Mr Blagojevic gave extensive evidence in support of his case.

[5] Mr Seears, Engineering Plant Manager, Ms Price, AGL People and Culture Business Partner, and Mr Frank Mazzone, AGL Lead Business Partner - Group Operations, gave evidence in the proceedings on behalf of AGL and the person named, Mr Seears.

[6] I found each of the witnesses generally gave truthful evidence about the relevant matters of fact, and in most cases the factual differences between them were slight. The real dispute between the witnesses requiring my resolution concerns their characterisation of various events and conduct, which has been influenced by their own subjective perception of what took place.

Jurisdiction

[7] Section 789FF of the Act confers on the Commission a broad power to make any order it considers appropriate (other than an order requiring payment of a pecuniary amount) to prevent a worker from being bullied at work.

[8] In order for the Commission to exercise its power under s.789FF of the Act to make any order it considers appropriate in respect of Mr Blagojevic's application, there are three conditions that must be met:

- (a) first, Mr Blagojevic must have made an application under s.789FC of Act;
- (b) secondly, the Commission must be satisfied that Mr Blagojevic has been bullied at work by an individual or group of individuals; and
- (c) thirdly, the Commission must be satisfied there is a risk that Mr Blagojevic will continue to be bullied at work by the individual or group.

Application

[9] There is no contest that Mr Blagojevic is a worker, reasonably believes that he has been bullied at work, and he has made an application to the Commission for an order under s.789FF of the Act. Accordingly, there is a valid application before the Commission.

What constitutes bullying?

[10] The second condition requires the Commission to be satisfied that Mr Blagojevic has been bullied at work by an individual or a group of individuals.

[11] Section 789FD of the Act sets out the test for establishing whether a person has been bullied at work. It provides as follows:

- “(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 behaved 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.”

[12] The test is objective. What is reasonable is a question of fact. Behaviour is unreasonable if a reasonable person, having regard to all the circumstances, may consider it to be unreasonable.¹

Repeatedly behaved unreasonably

[13] The expression “repeatedly behaved unreasonably” in s.789FD(1)(a) of the Act is to be interpreted and applied with reference to the policy or purpose of Part 6–4B of the Act, which is to establish a mechanism by which the bullying of workers at work may be stopped.

[14] A one-off incident will not be a sufficient basis for the making of an application to the Commission.² Provided there is more than one occurrence, there is no specific number of incidents required to meet the condition of “repeated” behaviour, nor does the same specific behaviour have to be repeated.³ The statutory provision requires repeated unreasonable behaviour by the individual or a group of individuals towards the applicant worker or a group of workers to which the applicant belongs.⁴

[15] In *Mac v BOQ*, Vice President Hatcher provided (at [99]) the following examples of conduct “which one might expect to find in a course of repeated unreasonable behaviour that constituted bullying at work”:

“... intimidation, coercion, threats, humiliation, shouting, sarcasm, victimisation, terrorising, singling-out, malicious pranks, physical 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.”

Reasonable management action

[16] Section 789FD(2) of the Act provides that a worker will not be bullied at work if the alleged behaviour constitutes reasonable management action carried out in a reasonable manner.

[17] The Explanatory Memorandum relevantly provides as follows in relation to s.789FD(2) of the Act:⁵

¹ *GC* [2014] FWC 6988 (*GC*) at [47]

² *Re SB* (2014) 244 IR 127; [2014] FWC 2104 (*Re SB*) at [41]

³ *GC* at [45]

⁴ *Ibid*; *Mac v Bank of Queensland Limited* [2015] FWC 774 (*Mac v BOQ*) at [88]-[89]

⁵ Explanatory Memorandum to the *Fair Work Amendment Bill 2013*

“New section 789FD – When is a worker bullied at work?

...

111. The Committee also found that balanced against this definition is the need for managers to be able to manage their staff. New subsection 789FD(2) is included to clarify that reasonable management action when carried out in a reasonable manner will not result in a person being ‘bullied at work’.

112. Persons conducting a business or undertaking have rights and obligations to take appropriate management action and make appropriate management decisions. They need to be able to make necessary decisions to respond to poor performance or if necessary take disciplinary action and also effectively direct and control the way work is carried out. For example, it is reasonable for employers to allocate work and for managers and supervisors to give fair and constructive feedback on a worker’s performance. These actions are not considered to be bullying if they are carried out in a reasonable manner that takes into account the circumstances of the case and do not leave the individual feeling (for example) victimised or humiliated.”

[18] The expression “management action” is not confined only to managerial decisions but encompasses a wider range of conduct or behaviour which affects an employee, including such things as performance and disciplinary matters, the allocation of work and the way in which work is to be carried out.⁶

[19] To determine whether the action constitutes “reasonable management action” it is necessary to undertake “an objective assessment of the action in the context of the circumstances and knowledge of those involved at the time”.⁷ The test for reasonable management action is whether the “management action was reasonable, not whether it could have been undertaken in a manner that was ‘more reasonable’ or ‘more acceptable’”.⁸ I adopt Commissioner Hampton’s explanation of these concepts in *GC* (at [56]):

“In general terms this is likely to mean that:

- management actions do not need to be perfect or ideal to be considered reasonable;
- a course of action may still be ‘reasonable action’ even if particular steps are not;
- to be considered reasonable, the action must also be lawful and not be ‘irrational, absurd or ridiculous’;
- any ‘unreasonableness’ must arise from the actual management action in question, rather than the applicant’s perception of it; and

⁶ *Purcell v St Aloysius College* at [22]

⁷ *Re SB* at [49]

⁸ *Re SB* at [51] see also *Mac v BOQ* at [91]

- consideration may be given as to whether the management action involved a significant departure from established policies or procedures, and if so, whether the departure was reasonable in the circumstances.”

[20] The specific question of whether placing a worker on a PIP constituted “reasonable management action” for the purposes of s.789FD(2) of the Act, was considered by Vice President Hatcher in *Mac v BOQ*. In that case, the applicant, Ms Mac, argued that the managerial decision to impose, and continue to impose, a PIP on her, was not reasonable management action because the shortcomings in her performance had not been sufficiently serious to justify that decision being made.⁹ In assessing the reasonableness of this managerial decision, Vice President Hatcher did not attempt to form his own judgment as to whether Ms Mac’s overall performance was satisfactory, explaining:¹⁰

“... I do not consider that an assessment of whether the imposition of the PIP on Ms Mac was unreasonable requires the Commission to engage in the process of attempting to form its own judgment as to whether her overall performance was satisfactory or not and to substitute its judgment for that of the relevant BOQ managers and supervisors. Even if a different and better opinion of Ms Mac’s work performance could legitimately be formed on the evidence before me, that would not be sufficient to show that the decision to introduce the PIP was unreasonable. What is necessary is for Ms Mac to demonstrate that the decision to introduce the PIP *lacked any evident and intelligible justification* such that it would be considered by a reasonable person to be unreasonable in all the circumstances.” (emphasis added)

[21] I agree with this approach and will adopt it in the present case. It follows that I do not need to form my own judgment as to whether Mr Blagojevic’s overall performance was satisfactory or not. The primary issues for determination are whether the decision to introduce the PIP or revise it lacked any evident and intelligible justification, and whether the introduction and implementation of the initial and revised PIP was carried out in a reasonable manner.

Bullying alleged by Mr Blagojevic

[22] Mr Blagojevic acknowledges that the decision to place him on the initial and revised PIP constituted management action but denies that it was reasonable management action carried out in a reasonable manner.¹¹

[23] Mr Blagojevic’s main contention is that the areas of his alleged underperformance, identified in both the initial and revised PIP, are “either made up completely, or based on facts but intentionally distorted in a way that my performance looks worse than it really is.”¹² In his view, Mr Sears was not justified in making the decision to place him on the initial PIP and therefore, imposing both the initial and revised PIP on him was unreasonable management action. Although Mr Blagojevic directly cites only Mr Sears as the individual whose behaviour was unreasonable, by implication the conduct of Ms Price has also been raised in this case.

⁹ *Mac v BOQ* at [101]

¹⁰ *Ibid* at [102]

¹¹ Ex A3

¹² *Ibid*

[24] Mr Blagojevic also asserts that the PIP process was not carried out in a reasonable manner.¹³ In his opinion, the work actions contained in the revised PIP are not achievable. He also argues that the PIP process was not carried out in a reasonable manner because Mr Sears and AGL knew the extent to which the process was affecting his health, yet continued to impose the PIP on him despite this.

[25] Mr Blagojevic contends that Mr Sears bullied him (as alleged in paragraphs [23] and [24] above) repeatedly during nine PIP meetings which took place from March 2017 to October 2017.¹⁴ Mr Blagojevic argues that the risk to his health and safety has materialised in the form of severe depression and anxiety, both from which he currently suffers.¹⁵

[26] AGL and Mr Sears contend that Mr Blagojevic was not bullied but that he was placed on a PIP in a genuine attempt to remedy his ongoing underperformance.¹⁶ AGL and Mr Sears also contend that the work actions contained in the revised PIP are appropriate to his role and that Mr Blagojevic agreed that this was the case during the nine PIP meetings. AGL and Mr Sears submit that their contentions are consistent with the findings of an internal investigation conducted by AGL after Mr Blagojevic made his application to the Commission for orders to stop bullying.¹⁷

Background issues

[27] Mr Blagojevic has been employed by AGL since late 2006. During his employment with AGL, Mr Blagojevic has demonstrated an outstanding work ethic (e.g. staying late at work, working from home, working through his lunch breaks and using his days off to attend medical appointments) and technical capability (e.g. exhibiting superior report writing skills, having a strong background in mathematics and being the primary expert on thermodynamic evaluation at AGL).¹⁸

[28] Mr Blagojevic has received distinctively positive performance reviews at AGL.¹⁹

[29] Mr Blagojevic's performance reviews for the 2007/2008, 2008/2009, 2009/2010 and 2012/2013, 2013/2014 and 2014/2015 performance periods were placed into evidence. In these performance reviews, appraisers were asked to rate various aspects of Mr Blagojevic's performance in his role according to the following definitions:

- “• Outstanding:– Exceeded all position goals or duties.
- Above Expectation:– Met all position goals or duties and in many instances exceeded them.

¹³ Ibid

¹⁴ Ibid

¹⁵ Ibid

¹⁶ AGL's Outline of Submissions at [8]

¹⁷ Ibid at [5]

¹⁸ Ex A1at [104] – [114]

¹⁹ Ibid at [106]

- Met Expectation:– Met all position goals or duties and in some instances exceeded them.
- Below Expectation:– Failed to meet position goals or duties or met them only partially, marked improvement necessary.
- Unsatisfactory:– Performance of duties or attainment of goals is unacceptable.”

[30] In the 2007/2008, 2008/2009 and 2009/2010 performance review periods, Mr Blagojevic’s ‘Overall Assessment of Performance’ was rated Above Expectation.²⁰ In each of these performance reviews, relevant appraisers commented that Mr Blagojevic had “exceeded expectations”.

[31] In the 2012/2013 performance review period, Mr Blagojevic’s supervisor during that period, Mr Logan, rated Mr Blagojevic’s ‘Overall Assessment of Performance’ as Outstanding, making the following comment:²¹

“Miroslav’s contribution to the overall team effort is highly valued and is well beyond that expected of an Engineer Level 2 and I would encourage and support an immediate application for L2/L3 progression.”

[32] Mr Blagojevic describes his 2012/2013 performance review as probably his best.²²

[33] On 7 December 2013, Mr Blagojevic was promoted from an Engineer Level 2 to an Engineer Level 3.²³

[34] In the 2013/2014 and 2014/2015 performance review periods, Mr Logan rated Mr Blagojevic’s ‘Overall Assessment of Performance’ as Met Expectation. Mr Blagojevic stated in the ‘Employee Comments’ section of both of these performance reviews that he did not agree with them. For example, in the 2014/2015 performance review, Mr Blagojevic made the following comment:²⁴

“I do not agree that my performance is consistent with that expected from a level 3 engineer. It is consistent with the performance of senior professionals.”

[35] In cross-examination, Mr Blagojevic gave evidence that at the time he made the comment referred to in the previous paragraph, his view was that the performance review was not a fair appraisal because he was *exceeding* the requirements of his role.²⁵

[36] Mr Blagojevic’s perception is that his performance in the 2013/2014 and 2014/2015 review periods was not objectively appraised by Mr Logan. In relation to these performance reviews, Mr Blagojevic made the following statement:²⁶

²⁰ Ibid

²¹ Ibid

²² Ibid at [106]

²³ Ibid

²⁴ Ibid

²⁵ PN 81-87

“The last two describe completely different person from the rest of them. Considering that I was working in that period harder than ever before, that my experience and knowledge could only increase, it is clear that the last two appraisals simply reflect the state of our relationship, rather than my performance.”

[37] Mr Blagojevic gave evidence that his relationship with Mr Logan began to deteriorate towards the end of 2014 and that it had completely broken down by February 2015.²⁷

[38] On 31 January 2016, Mr Blagojevic made an internal bullying complaint to AGL against Mr Logan.²⁸ Ms Price was assigned to investigate Mr Blagojevic’s complaint. I accept Ms Price’s evidence that the investigation was highly confidential and that the outcome was only shared with Mr Blagojevic and Mr Logan at the time the investigation was concluded.²⁹

[39] In a statement to AGL’s insurer dated 7 December 2017, Ms Price stated the following about the outcome of the investigation:³⁰

“12. Through the investigations process it was identified that one of the key contributing factors to the bullying complaint was that Chris [Mr Logan] was informally providing performance feedback to Miro and it wasn't being received very well by Miro.

13. Even though there was no substantiated evidence that Chris was bullying Miro, I don’t believe he dealt with it well. He should have put him on a performance improvement plan.

14. I believe that Miro wasn’t coping well with the feedback, and therefore, in my opinion his mental health concerns were impacting his ability to cope with that situation.

15. The action out of that for the leader, Chris, was that he would get some coaching on the formal performance improvement process, which I believe should have been applied with Miro, so he was very clear with his expectations and his gaps. Also HR would have gotten involved, and we could have provided a structured process.

16. Miro was moved teams because of that, because we felt that relationship was damaged, and knowing he had mental health concerns.”

[40] In cross examination, Ms Price gave evidence that Mr Logan began to provide Mr Blagojevic with informal performance coaching in the first half of 2015.³¹ Mr Blagojevic strongly denies that Mr Logan ever provided informal performance coaching to him.³²

²⁶ Ex A1 at [106]

²⁷ Ibid at [6]; PN 1785

²⁸ PN 1770

²⁹ PN 1823

³⁰ Ex R2

³¹ PN 1853- 1855

³² PN 1856

[41] Because Mr Logan did not give evidence in these proceedings, I am not prepared to make a finding as to whether Mr Logan provided Mr Blagojevic with informal performance coaching or in relation to Mr Blagojevic's allegation that Mr Logan bullied him. It is also not necessary to make such findings to determine the present application before the Commission. In defending Mr Blagojevic's allegation that he was bullied at work by Mr Seears, AGL and Mr Seears do not submit that Mr Blagojevic exhibited a pattern of behaviour whereby he makes bullying complaints after having received performance feedback.³³ Mr Blagojevic's bullying complaint against Mr Logan and Ms Price's investigation into that complaint merely serve as background matters to Mr Blagojevic's present application for orders to stop bullying.

[42] Following Ms Price's investigation into Mr Blagojevic's bullying complaint against Mr Logan, Mr Blagojevic was moved from the external plant team to another team within AGL.

Events leading up to the initial PIP

[43] Prior to being moved from the external plant team following Ms Price's investigation, Mr Blagojevic had received a comprehensive survey of electrical and control issues which were limiting the operation and performance of the Ravensworth Fly Ash Plant (***Ravensworth Plant***). On 21 January 2016, Mr Blagojevic put a notification in AGL's Computerised Maintenance Management System (***SAP***) detailing these issues. The notification is referred to as DN 10354319. On 29 January 2016, Mr Blagojevic sent an email advising relevant persons that he had put DN 10354319 in SAP.

[44] In September 2016, Mr Logan left AGL and Mr Blagojevic was moved back to the external plant team. When he returned to the external plant team, Mr Blagojevic became responsible for the Ravensworth Plant and the Liddell Water Plant.

[45] Between January and September 2016, no progress had been made in regards to the electrical and control issues at the Ravensworth Plant.³⁴

[46] On 29 September 2016, Mr Blagojevic sent an email to Mr Basil Paynter and Mr Brett Sills in the following terms: "I put SAP DN 10354319 and then left to another section but it seems we have not started with this work". Mr Blagojevic sent two further emails to relevant persons reminding them that the works arising from the SAP notification had not yet been completed.³⁵ I also accept Mr Blagojevic's evidence that he had various conversations with relevant persons to that effect.

[47] On 29 November 2016, Mr Seears commenced employment with AGL and became Mr Blagojevic's supervisor.³⁶ When Mr Seears commenced employment with AGL, Mr Blagojevic was employed in the role of Asset Engineer.

[48] I accept Mr Seears's evidence that when he started in his role, he spent a lot of time trying to understand the roles of engineers in the external plant team who reported to him.³⁷ In

³³ PN 1884

³⁴ A1 [35]-[37]

³⁵ Ibid at [39]

³⁶ Ex R4 at [1] – [2]

cross-examination, Mr Seears confirmed that, in relation to Mr Blagojevic's role, this involved the following:³⁸

“When you came into that role did you look at the position descriptions of those in your team that you were going to manage?---Correct, yes.

And did you satisfy yourself that what was in Mr Blagojevic's position description when you looked at it was it appropriate for what you expected for his role?---Our position descriptions were by nature very - very generic. They covered a level within the business that also talked about long-term planning. Excuse me - sorry - so I guess the key for me was we - I guess I had a belief that the position descriptions could have been more granular so part of my role was to impart my expectations as a leader within the team and that wasn't just Miroslav. That was every member of the team that I was coming into

How did you do that?---So I did that for my first few months was, I guess, through some informal processes, spending time out in the plant. Having our stand-ups together and setting expectations through that process. One on one's with each individuals which I definitely had with Miroslav. So, I guess, yes - everyone within the team had a pretty good understanding about what was expected.

So in terms of as you have described them - the granular aspects of what he was required to do to achieve these objectives - those granular aspects were not covered off in the position description. Is that fair to say?---Correct, yes.

But they were the subject of your discussions with him when you started in the role?---Yes.”

[49] I accept Mr Seears's evidence he made clear to all AGL employees who he supervised within the external plant team, including Mr Blagojevic, the following expectations:

- that he would only grant one extension of time for a task;³⁹ and
- that SAP should be used as the central database and that all strategy for equipment should reside in it.⁴⁰

[50] Shortly after he commenced employment with AGL, Mr Seears began to hold concerns regarding the condition of the Ravensworth Plant.⁴¹

[51] I accept Mr Seears's evidence that he first raised this concern with Mr Blagojevic in a meeting on 16 December 2016 and that he told him it was unacceptable.⁴² Mr Seears's

³⁷ Ibid at [4]

³⁸ PN 572 - 576

³⁹ Ex R4 at [17]

⁴⁰ A1 at [76]

⁴¹ Ex R4 at [5]

⁴² Ibid

version of events is corroborated by a contemporaneous note made by Mr Sears about this meeting, which states:⁴³

“We discussed Electrical/Instrumentation/Control defects on Ravensworth Plant and that notifications date back some time (around January 2016) and that this is not acceptable.”

[52] On 21 December 2016, Mr Sears and Mr Blagojevic met to walk around the Ravensworth Plant. I accept Mr Sears’s evidence that during the ‘walk around’, he again raised his concerns with Mr Blagojevic that the condition of the Ravensworth Plant was not up to standard and told Mr Blagojevic that he expected him to have a plan of action to address the electrical and control issues at the plant. I accept Mr Sears’s evidence that at this meeting, he made clear to Mr Blagojevic that it was his expectation that strategy for equipment should reside in SAP as a central location. I also accept that during this meeting, Mr Sears communicated to Mr Blagojevic that he could speak to Mr Sears to have issues escalated if he was not able to make progress on a particular issue or problem. Mr Sears’s account of this meeting is supported by a contemporaneous note made by Mr Sears about this meeting, which states:⁴⁴

“Miro Discussion, post walk around 21/12/16

- Walk around Miro’s plant and spent time asking some questions about integrity, items picked up were the open cabinet around the dry dust vessels, pipe work supports, pipe work bandages on elbows and flanges.
- Summary of discussion of plant condition:
 - o Had discussion about condition of plant and that it is not up to the standard that is required. Spoke of asset management plans and what his understanding is of this. Miro's response was that Derek had not shown him where they were stored. I quickly got onto share point and found them in 30 seconds. My feedback to Miro was that I had not been here long and found them yet he should know where to find the without Derek's assistance and hadn't. This was an excuse, my feedback to Miro was that the lack of understanding of the long term plan for this plant was concerning to me and is not acceptable. As the engineer accountable for this area he needs to take ownership for this.
- Set some expectations for Miro as to what I expect from him:
 - o Three areas of focus, (1) get in place his plan and ensure this is in the budget, (2) get the strategies for this plant in build (MSD or similar), (3) engage more with TWPS and Basil’s team contacts about work priority and the systems and processes that affect plant condition. To explore more on item (3) direct feedback was to be a voice to make change in this area, to role model where necessary and when required to have a tough conversation if things are being done. We talked about escalation, Miro is to engage with

⁴³ Ex R4; attachment MS-2

⁴⁴ Ibid

his peers at his level first, demonstrate to me this has been done then escalate to me for action.

- He needs to act, he has this information stored in his head. With no change in plant condition or performance the issue is him not doing his job. Miro needs to pull together his priority list of work and do the work.
- I asked him to playback the discussion which he did to the three points above, we were aligned.”

[53] Following Mr Sears’s meeting with Mr Blagojevic on 21 December 2016, Mr Sears continued to have concerns about Mr Blagojevic’s performance.

[54] On 23 December 2016, Mr Blagojevic communicated to Mr Sears that he needed an extension of time to complete a myHSE Action that had been assigned to him to determine the cause of a slurry pipeline failure that had occurred at Chillcotts Creek on 21 April 2016 (*Chillcotts Creek myHSE Action*). ‘myHSE’ is AGL’s online system that is used to report health, safety and environment hazards, incidents and near misses. Mr Blagojevic was assigned the Chillcotts Creek myHSE Action when he returned to the external plant team in September 2016.⁴⁵ In order to complete the myHSE Action, a section of the pipeline of about several meters in length needed to be cut and sent to a third party for analysis to determine the cause of the failure.⁴⁶ The Chillcotts Creek myHSE Action had an original due date of 31 January 2017. Mr Sears granted Mr Blagojevic a new deadline of 16 February 2017.⁴⁷

[55] On 18 January 2017, the section of the pipeline was cut. On 20 January 2017, Mr Blagojevic put a notification in SAP requiring the section of pipeline to be sent to a third party for analysis. He also sent the following email to Mr Brett Sills, Maintenance Contracts Coordinator:⁴⁸

“DN 10404919 created for ALS to do failure analysis”.

[56] Mr Blagojevic approved a purchase order for \$15,000.00 to a third party testing provider, ALS Limited, to complete the report required for the Chillcotts Creek myHSE Action.

[57] On or around 2 February 2017, Mr Blagojevic realised that it was impossible to complete the Chillcotts Creek myHSE Action by the revised deadline because he had not yet received the report from ALS Limited.⁴⁹

[58] Mr Blagojevic sent a follow-up email to Mr Sills on 9 February 2017. The relevant part of the email is as follows:⁵⁰

“I put DN 10404919 for ALS to investigate failed pipeline at Chillcotts creek, and it was converted to WO 2003868, but I do not see any PR or PO. Please let me know if

⁴⁵ Ex A1 at [18]

⁴⁶ Ibid

⁴⁷ Ex R4 at [4]

⁴⁸ Ex A1

⁴⁹ Ibid at [28]; [31]

⁵⁰ Ibid

there is a problem. I have a MyHSE against me to do this investigation and it is due end of Feb; already extended once.

This was all after I sent email in December (attached) and discussed this work and believed it was on track.”

[59] On 15 February 2017, Mr Blagojevic requested a second extension to the deadline of the Chillcotts Creek myHSE Action. Mr Seears did not approve Mr Blagojevic’s request for a second extension.

[60] On 20 February 2017, Mr Blagojevic and Mr Seears met to discuss Mr Blagojevic’s request for second extension. I accept Mr Seears’s evidence that at this meeting, he told Mr Blagojevic that he had already had sufficient time to complete the myHSE Action from when it was assigned to him and that he should have used the avenue of escalation available to him because the myHSE Action involved was very high risk. I also accept Mr Seears’s evidence that at this meeting, he discussed with Mr Blagojevic the fact that he had already approved a purchase order for incomplete work done by a contractor.⁵¹ Mr Seears’s account of this meeting is corroborated by a contemporaneous note made by Mr Seears, which states the following:

“Discussed the request for an extension with Miro the morning of Monday the 20th January [sic]. I asked him to provide me the context behind why it was necessary to gain a second extension after the first was granted in December 2016.

- First discussion Miro gave feedback that there was issues with the PO for the job. I highlighted to him previous correspondence which had me questioning the PO for the job and the value of the \$15k. We agreed there was a PO in place and sufficient time to complete the work.
 - Miro explained to me that the work had not been completed by Brett Sills and that this was holding him up, I asked Miro what he had done to chase Brett to execute the \$15k PO, his response was that he sent an email at the start of January and he “strongly felt” this was adequate. I indicated to him that strongly felt would have been to talk and email daily until the work was complete.
 - We spoke and agreed that he was the single point contact for this investigation and full accountability sits with him to deliver the investigation in the timeline committed.
 - We next discussed escalation and that if he did not get the support he needed through Brett to execute the works, he should have discussed this with me which is something we have talked about in a prior discussion.
 - Miro had not completed what he should have in the timeframe and did not show the urgency necessary to get it fixed with personnel from other teams.
- In summary I did not grant an extension and asked Miro to do one of two things:
- Complete the investigation to a set quality in the timeframe required (he indicated to me that this would not be possible).
 - Come back to me with a revised timeline on completing the investigation to a set

⁵¹ Ex R4 at [17] and [59]- [60]

quality to which this will come with consequences for Miro. Miro finished the sentence for me, that I would “get somebody else to do the job”. I indicated that wasn't my preference and that I didn't intend to go that extreme however I cannot tolerate shifting milestones and him not meeting his commitment.”

[61] On 28 February 2017, Mr Blagojevic closed the Chillcotts Creek myHSE Action, having received what he describes as a preliminary report from ALS Limited. Both Mr Blagojevic and Mr Sears accept that the report did not address the requirements of the myHSE Action.

[62] I accept Mr Sears' evidence that by the end of February 2017 he had formed the view that Blagojevic's performance had not improved since December 2016 despite him setting appropriate expectations, and explaining these expectations to Mr Blagojevic by outlining the shortfalls in his performance and how he could go about rectifying his performance.⁵² I also accept Mr Sears' evidence that after he formed the view that Mr Blagojevic's performance had not improved over this two month period, he decided to place Mr Blagojevic on a PIP.⁵³ Mr Blagojevic was one of three persons within the external plant team placed on a PIP around this time.⁵⁴

The initial PIP

[63] On 3 March 2017, Mr Sears met with Mr Blagojevic and advised him that he would be placing him on a PIP.

[64] I accept Mr Sears's evidence (corroborated by a contemporaneous note) that during this meeting:⁵⁵

- Mr Blagojevic appeared visibly upset;
- he explained to Mr Blagojevic that the PIP was not a formal warning but a process to follow to assist him to improve his performance and work output;⁵⁶
- he offered Mr Blagojevic access to AGL's Employee Assistance Program (*EAP*) and his personal support; and
- he arranged to meet with Mr Blagojevic to go through the PIP with him on 8 March 2017.

[65] At some point between this meeting and 8 March 2017, Mr Sears had a conversation with Ms Price regarding AGL policies.⁵⁷ I accept Ms Price's evidence that during this conversation, she explained to Mr Sears that AGL's Counselling for Improved Performance and Disciplinary Policy required supervisors to informally coach employees before placing

⁵² Ibid at [18]

⁵³ Ibid at [20]

⁵⁴ PN 1241

⁵⁵ Ex R4 at [22]; Ex R4; attachment MS-2

⁵⁶ PN 258 - 262

⁵⁷ Ex R4 at [23]

them on a formal PIP.⁵⁸ Although Mr Seears's and Ms Price's recollection differs as to the precise date on which this conversation took place, there is no dispute, and I find on the evidence, that this conversation took place.

[66] I accept Mr Seears's evidence that after he had the above conversation with Ms Price, he prepared the PIP, which was then reviewed by Ms Price.⁵⁹ Ms Price gave evidence that when she reviewed the PIP prepared by Mr Seears, she formed the view that it was appropriate, reasonable and in accordance with AGL's policies and procedures.⁶⁰ She gave evidence that Mr Seears was able to provide her with documentation showing that he had informally coached Mr Blagojevic during the two month period between January 2016 and February 2017, as well as file notes, emails and incomplete myHSE actions, demonstrating to her that Mr Blagojevic had continued to underperform, in this period, despite receiving informal coaching from Mr Seears.⁶¹

[67] On 8 March 2017, Mr Seears met with Mr Blagojevic to discuss the initial PIP. The initial PIP is dated 13 March 2017 and has a stated duration of three months.⁶² I accept Mr Seears's evidence that he reiterated to Mr Blagojevic that he had access to EAP and his personal support and that the PIP was not itself a disciplinary process. I also accept Mr Seears's evidence that at this meeting, he told Mr Blagojevic that he did not know Mr Logan and that he had never seen "the file" with respect to Mr Logan. Mr Seears's version of events is supported by a contemporaneous note made by Mr Seears about this meeting, which states the following:⁶³

"8/3/17 - Miro discussion on Performance Plan

My first question to Miro before we started was how he was doing since the discussion, I apologized for not being available to him the last few days as I was off work ill. He has a concern over the stress this plan has placed on him and that stress can kill you. He isn't enjoying the last few days since our discussion. Is anxious and devastated that he has been cast as an under performer. I reiterated to him the EAP support and I are there to offer him support and that our concern through this process is for Miro the person.

As a surprise, Miro requested a move if it was available that there may be an opportunity in the business. I committed to asking the question however there wasn't a great deal of opportunity elsewhere and for right now you work in the external plant team and delivery here will be the same as anywhere else in business. Miro asked that even if the move is to a more menial role he would look at it. The issue that he has is delivery and I reiterated that this process can help him deliver.

I demonstrated that the plan is the mechanism to help you not go down the path of discipline. Again I demonstrated that I want to support him to go down the positive path rather than the negative path. He now has a week to digest the plan.

⁵⁸ Ex R5 at [1]

⁵⁹ Ex R4 at [24]

⁶⁰ Ex R5 at [6]

⁶¹ Ibid at [5]

⁶² Ex R4; attachment MS-3

⁶³ Ibid; attachment MS-2

One key question Miro asked was did I get the chance to meet Chris Logan before he left the business. My response was no. He then asked if I had ever seen his file with respect to Chris Logan, I again said no.

The reason he asked was that he wanted to know whether I had formed an opinion of him based on feedback from Chris Logan. My feedback was that I was aware that he had a previous issue with Chris Logan, this was brought to my attention by P&C. I clarified the reason why I had gone down this path was as a result of forming my own opinion in the time I have been here. Miro again commented on his belief that this process is reserved for people who partake in serious misconduct etc. who are lazy, who do the wrong thing etc. I reiterated that I don't believe he fits into that category and again showed him this is around delivery of commitments, working with people and action orientation which are the key themes behind the performance plan.

Closed off the discussion again with support offering for the EAP and my phone and door are available for him. Again reiterated that I want to support Miro as the person as well as this is a difficult process. The key Piece for him is to understand the plan, he has a week to digest it, he can ask me any questions between now and then. After he has digested it we will sit down formally and sign off on the plan.”

[68] Mr Blagojevic gave evidence that his reaction to Mr Sears’s decision to put him on the initial PIP was as follows:⁶⁴

“In March 2017 he suddenly put me on a formal “performance improvement plan”. It was devastating news for me, after all what happened before. I could not understand why; my first thought was that it had something to do with my previous complaint. I asked him if he knew my previous boss and he said he had never met him.”

[69] There are three aspects of Mr Blagojevic’s reaction that must, from an objective point of view, be considered. The first is Mr Blagojevic’s opinion that Mr Sears’s decision to put him on a PIP was sudden. The second is his perception that the decision to put him on the initial PIP had something to do with his former complaint against Mr Logan. The third is Mr Blagojevic’s professed inability to understand why he was placed on the initial PIP.

[70] I do not consider that Mr Blagojevic has a reasonable objective basis for perceiving Mr Sears’s decision to put him on a PIP was sudden. My earlier findings in relation to what transpired at the meetings between Mr Sears and Mr Blagojevic during the period from December 2016 to February 2017, as well as emails Mr Sears sent Mr Blagojevic during that period,⁶⁵ supports a finding that Mr Sears provided informal coaching to Mr Blagojevic and gave him a chance to improve. Having made this finding, I am satisfied that Mr Sears complied with AGL’s policy, which (I accept on Ms Price’s evidence)⁶⁶ required Mr Sears to provide Mr Blagojevic with informal coaching before placing him on a formal PIP.

⁶⁴ Ex A1 at [7]

⁶⁵ Ex R4; attachment MS-2

⁶⁶ See paragraph [65]

[71] I also do not consider that Mr Blagojevic had a reasonable objective basis for thinking that Mr Seears's decision to place him on the initial PIP had something to do with his previous bullying complaint against Mr Logan.

[72] In cross-examination, Ms Price gave the following evidence:⁶⁷

“...when Mr Seears came to see you about my alleged conduct performance, did you see that as an opportunity to correct that previous mistake?---No.

No? Who was actually the one who suggested that I should be put on performance improvement plan, you or Mr Seears?---It was Mr Seears who came to me who wanted to put you on a performance improvement plan.

Okay. Did you mention to Mr Seears my previous bullying complaint?---I provided no details of the bullying complaint to Mr Seears.

But did you mention it?---No, I didn't mention there was a bullying complaint; I mentioned that there was issues with your previous leader but there was no mention of the investigation that we conducted.”

[73] The ‘previous mistake’ referred to by Mr Blagojevic in his questioning of Ms Price above, is an opinion Ms Price expressed in paragraph [13] of her statement to AGL's insurer that Mr Blagojevic should have been put on a PIP by Mr Logan.⁶⁸ I accept Ms Price's evidence that it was Mr Seears's decision to put Mr Blagojevic on a PIP and that she was not involved in Mr Seears' decision-making process beyond confirming that placing Mr Blagojevic on a PIP aligned with AGL's policies.

[74] I accept Mr Seears's evidence that at the time he placed Mr Blagojevic on the initial PIP, he did not have knowledge of Mr Blagojevic's bullying complaint against Mr Logan and that the only knowledge he had in relation to Mr Blagojevic's relationship with Mr Logan, was that Mr Blagojevic had some “issues” with Mr Logan, which resulted in Mr Blagojevic being moved to a different team.⁶⁹ This evidence is corroborated by the discussion Mr Seears and Mr Blagojevic had during the 8 March 2017 meeting and Ms Price's evidence that the outcome of the complaint was highly confidential.⁷⁰ Mr Seears also gave evidence that he placed Mr Blagojevic on a PIP as a result of forming his own opinion about Mr Blagojevic's performance at work.⁷¹

[75] Based on the evidence outlined in paragraphs [72] – [74] above, I am satisfied that Mr Seears's made the decision to put Mr Blagojevic a PIP as a result of him forming his own mind as to Mr Blagojevic's underperformance. I do not consider that Mr Seears's motivation in placing Mr Blagojevic on a PIP was malicious, intended to make Mr Blagojevic's life miserable or in any way influenced by Mr Blagojevic's complaint against Mr Logan. Such a

⁶⁷ PN 1865- 1868

⁶⁸ See paragraph [39]

⁶⁹ Ex R4 at [28]

⁷⁰ See paragraphs [67] and [38] respectively.

⁷¹ Ex R4 at [29]

finding is supported by the fact that Mr Sears decided to place two other AGL employees within the external plant team on a PIP around February 2017.⁷²

[76] Mr Blagojevic’s professed inability to understand why he was placed on the initial PIP is an important part of the basis on which he submits that Mr Sears’s management action of placing him on the PIP was unreasonable. Mr Blagojevic submits that the five areas of concern used by Mr Sears to justify putting him on the initial PIP are either made up completely or based on facts but intentionally distorted in a way that makes his performance look worse than it actually is.

[77] The five “areas of concern”, along with examples, tabled in the initial PIP, are as follows.⁷³

Area of Concern	Example/ Further Information
Delivery of commitments	Examples of areas that require improvement: - HSE Action request (Ravensworth Plant investigation into failed discharge pipe work at Chilcotss Creek) to extension despite having 7 weeks to obtain report. When the HSE action was investigated it was not complete and thorough as it had been pushed through quickly to meet the timeline rather than complete the full scope.
Action Orientation in addressing plant issues	Several plant issues being unaddressed: - Electrical and Control issues with the Ravensworth Plant. - Outstanding notifications and work orders in the Ravensworth Plant.
Budget Control and understanding of the work being executed in his plant	The PO approval for the \$15k ALS work was an example of being detached from the work being completed in his area. Understanding of open work orders and defects as per the December digestion of current work in the Rav plant.
Working with peers and obtaining deliverables	Acceptance of lack of action by peers within the water contract management and TWPS of not executing work and deliverables. - Example was Chilcotts creek investigation. Emails are ineffective in gaining action from personnel. - Example electrical work, lots of emails

⁷² See paragraph [62]

⁷³ Ex R4; attachment MS-3

	behind getting work done.
Equipment strategy residing in SAP as a central location. Other systems outside of SAP are meant for support only.	Miro has provided examples of using spreadsheets, word documents etc. for his strategy which is not a sustainable solution. All strategy set up, strategy changes should all be living in SAP. Examples have been air receiver work in the dry dust plant, actions out of the Chilcotts creek pipe failure have been to manage a change outside the system.

[78] I make the following findings in relation to the five areas of concern stated in the initial PIP.

Areas of concern one, two and four

[79] As identified by Mr Blagojevic,⁷⁴ the examples given by Mr Seears in relation to these areas of concern largely focus on Mr Blagojevic's alleged underperformance in relation to the electrical and control issues at the Ravensworth Plant and the Chillcotts Creek myHSE Action. These areas of concern all arise from the fundamental dispute between Mr Blagojevic and AGL as to the scope of Mr Blagojevic's duties and responsibilities as an Asset Engineer.

[80] Mr Blagojevic describes his role of Asset Engineer as follows:⁷⁵

“My job is a long term strategy, to determine what needs to be done with the plant so it delivers what is required from it. I also provide support to day to day operation and when there is a failure (and many other things as well). But I do not do execution part of work, which includes planning, organising and supervising of work. That part is done by:

- a. Internal maintenance crews, who report to their team leaders and whose work is planned by Planners team.
- b. Internal Projects team; they execute major works, typically by engaging contractors. This team reports to their manager.
- c. Contracts maintenance team; they execute minor works, typically by engaging contractors. This team reports to their manager.
- d. Facilities and infrastructure team; they execute minor works, typically by engaging contractors. This team reports to their manager.

I would like to stress the following: while I am a stakeholder in this process (execution of work), because it is my plant and I am accountable for its performance, I **do not have any authority over the execution teams listed above**. I can provide

⁷⁴ Ex A1 at [15]

⁷⁵ Ibid at [70]-[72]

organisational charts showing how these teams are organised and who they report to, but I do not think anyone would dispute this simple fact.

When we talk about projects in my plant, the core of my responsibilities is to provide all necessary information for the work to be executed, and to put it in SAP... I normally do not run projects. By all means, I should, and I do, follow up with execution teams, ask questions, explain why my project is important (if it really is), provide support whenever required, etc., but beyond that, I do not have much power.” (original emphasis)

[81] I accept Mr Blagojevic’s evidence that his role does not require him to execute work and that work is executed by various other teams within AGL or by external contractors. I also accept Mr Blagojevic’s evidence that he does not have authority over personnel within execution teams or external contractors. Given the title, nature and position description of Mr Blagojevic’s role as an Asset Engineer, however, I do not accept that, in relation to projects in his plant, Mr Blagojevic’s role only requires him to (a) put a notification in SAP (b) provide all necessary information for the work to be executed and (c) follow up with execution teams by asking questions, explaining why the project is important (if it really is) and provide support whenever required.

[82] The title Asset Engineer connotes accountability for the assets assigned to the engineer. Indeed, Mr Blagojevic accepts that he is accountable for the overall performance of plant for which he is responsible. In having accountability for the overall performance of plant, it cannot be disputed that Mr Blagojevic’s role requires leadership. Indeed, the position description applicable to Mr Blagojevic in his role of Asset Engineer states the following:⁷⁶

“The role will demand **strong and effective leadership skills** in further developing and delivering best practise planning to support the asset mission and operational requirements at AGL Macquarie.

The key focus is on the 5 week rolling plan managing plant defects, preventative maintenance, minor outages, statutory inspections and smaller project plans.

Plan and schedule routine and defect works in nominated area. **This involves the procurement of materials, resources and services in addition to planning and scheduling of internal/external resources in conjunction with Maintenance Teams to complete maintenance and project work.** The position also involves the upkeep of the areas computerised maintenance system, and shutdown work.” (emphasis added)

[83] Mr Blagojevic’s position description lists a number of internal and external “key stakeholders” and outlines their nature or purpose. For example, the stated nature or purpose of Maintenance Teams is to “Interact daily to Provide advice and scheduling information to obtain maintenance feedback on plant/system issues”.

[84] Mr Blagojevic accepts that he was aware of his position description at the time he was placed on the initial PIP.⁷⁷ He agrees that it is the statement of expectations from AGL

⁷⁶ Ex R4; attachment MS-1

⁷⁷ PN 436

regarding his role as an Asset Engineer;⁷⁸ however, he denies that the position description accurately reflects what is reasonably expected of him in his role.⁷⁹

[85] Although the position description is couched in general terms, I reject Mr Blagojevic's contention that his position description is not a reasonable reflection of his role as an Asset Engineer. It is reasonable to require an Asset Engineer to have strong and effective leadership skills, liaise with key stakeholders on a daily basis and work in conjunction with other teams to complete maintenance and project work that is essential to ensuring the overall performance of plant for which an Asset Engineer is ultimately responsible.

[86] Having read Mr Blagojevic's position description and learnt that Mr Blagojevic was an 'Asset Engineer' with overall responsibility for the Ravensworth Plant, I am satisfied that it was reasonable (and lawful) for Mr Seears to direct Mr Blagojevic to exert influence and, where necessary, put pressure on relevant persons to ensure that actions were taken to address the issues at the Ravensworth Plant and works were executed to deliver the Chillcotts Creek myHSE Action, and to hold Mr Blagojevic accountable when the issues at the Ravensworth Plant remained unaddressed and the Chillcotts Creek myHSE Action was not completed in a timely manner. An employer's right to direct an employee about when, where and particularly how and what work is to be done has been one of the defining indicia of employment for many years. In accordance with my earlier findings in relation to the meetings between Mr Seears and Mr Blagojevic during the period from December 2016 to February 2017, I am satisfied that Mr Seears communicated this direction to Mr Blagojevic. For example, during the 20 December 2016 meeting, Mr Seears told Mr Blagojevic that he was required to engage with his peers at his level first, have a "tough conversation" if necessary and escalate matters to him if he needed support. Although Mr Blagojevic was obliged comply with Mr Seears's direction, he did not.

[87] In relation to the electrical and control issues at the Ravensworth Plant, Mr Blagojevic sent emails that were passive and without urgency. He admits that his verbal communications with relevant personnel were merely reminders that he had put the notification in SAP and that the work had not yet been completed. In relation to the Chillcotts Creek myHSE Action, it was not until 9 February 2017 that Mr Blagojevic sent an email with any urgency to Mr Sills, however, by this time, he admits that he had already realised that the revised deadline was impossible to meet. In relation to both the electrical and control issues at the Ravensworth Plant and the Chillcotts Creek myHSE Action, Mr Blagojevic could have exerted more pressure on these relevant personnel to ensure that works within his plant were completed in a timely manner through more regular and urgent communications. Although I understand why Mr Blagojevic was frustrated by the organisational hierarchy of AGL, in that he was expected to put pressure on people over whom he had no authority or control, the avenue of escalation was readily available to him if relevant personnel were not responding to his communications. I reject Mr Blagojevic's contention that the avenue of escalation was artificial because Mr Seears was regularly updated on Mr Blagojevic's progress at fortnightly meetings he held with the external plant team (*RARs*).

[88] Consequently, I am satisfied on the balance of probabilities that Mr Blagojevic's complacency and lack of leadership in relation the electrical and control issues at the

⁷⁸ PN130-132

⁷⁹ PN 131; PN 233-234

Ravensworth Plant and Chillcotts Creek myHSE Action was an evident and intelligible justification for Mr Sears to place Mr Blagojevic on a PIP.

Area of concern three

[89] Mr Sears was concerned that Mr Blagojevic did not properly understand his requirements concerning cost forecasting or budgeting for the Ravensworth Plant and other assets for which he was responsible. As an example of this concern, Mr Sears referred to Mr Blagojevic's approval of a purchase order of \$15,000 for incomplete work undertaken by a contractor, ALS Limited.

[90] Mr Blagojevic admits that budget control was the only area of control he was not good at,⁸⁰ however, submits that it did not justify Mr Sears placing him on the initial PIP as it is difficult to forecast costs because the majority of maintenance is reactive. For this reason, he also contends that Mr Sears was unreasonable in the way he held Mr Blagojevic to account for budgeting processes not being carried out with vigour.⁸¹

[91] On a number of occasions prior to deciding to place Mr Blagojevic on a PIP, Mr Sears discussed with Mr Blagojevic his concerns in relation to Mr Blagojevic's understanding of forecasting and budget control.

[92] I accept that it was reasonable for Mr Sears and AGL to expect Mr Blagojevic to appropriately manage the budget for the Ravensworth Plant and therefore it was reasonable for these concerns to form part of the justification for Mr Sears's decision to place Mr Blagojevic on a PIP when he did not improve in this area. It follows that this issue provided an evident and intelligible justification for putting Mr Blagojevic on a PIP.

Area of concern five

[93] This area of concern relates to Mr Blagojevic's alleged use of systems other than SAP to store his strategy for equipment. In relation to this area of concern, Mr Sears gives examples of how Mr Blagojevic failed to find his strategy for equipment in his SharePoint and that he was not aware of the certification of pressure vessels in the Ravensworth Plant, despite that information being located in SAP.

[94] In relation to Mr Blagojevic's failure to find his strategy for equipment in his SharePoint,⁸² Mr Blagojevic argues that this was a trivial error that could have been prevented or corrected by Mr Sears's instruction. Mr Blagojevic contends that it was not reasonable for Mr Sears to rely on such a trivial error to justify placing him on a PIP.⁸³

[95] In relation to the pressure vessels, Mr Blagojevic contends that another employee was responsible for updating the information and therefore it was not reasonable for Mr Sears to rely on this in placing him on the PIP. At the hearing, Mr Sears accepted that another employee was responsible for updating the information in relation to the pressure vessels, so it was not Mr Blagojevic's fault that information about the pressure vessels had not been

⁸⁰ Ex A1 at [45]

⁸¹ PN 221-225

⁸² See paragraph 54

⁸³ Ex A1 [66]

updated in SAP⁸⁴ Mr Seears was not aware that another employee was responsible for this task at the time he put Mr Blagojevic on the initial PIP and I accept Mr Seears' evidence that he would not have relied on this example to place Mr Blagojevic on a PIP if he had been aware of that fact in March 2017.⁸⁵

[96] I accept that Mr Seears had a genuine concern that some information was being recorded on documents and in systems outside SAP in circumstances where Mr Seears reasonably required all relevant information to be included in SAP. Mr Seears ultimately made the decision to remove this area of concern from the PIP on 7 June 2017, because he formed the view that Mr Blagojevic was hung up on it and it was distracting them from focusing on the main tasks set out in the PIP. That was an appropriate and reasonable course to take in the circumstances.

Events leading up to the revised PIP

[97] Mr Seears met with Mr Blagojevic on the following dates to discuss the PIP:

- (a) 15 March 2017;
- (b) 24 March 2017;
- (c) 26 April 2017;
- (d) 24 May 2017;
- (e) 7 June 2017;
- (f) 22 June 2017; and
- (g) 23 June 2017.

[98] Ms Price also attended these meetings. Her minutes of each of these meetings were put into evidence.⁸⁶

[99] I accept that at some point during these meeting, Mr Seears realised that Mr Blagojevic's health was being adversely affected by the PIP process. Although Mr Seears (and AGL) knew the process was affecting Mr Blagojevic's health, I am not satisfied that, in continuing to impose the PIP on him, Mr Seears was carrying out the implementation of the PIP in an unreasonable manner. Mr Seears offered Mr Blagojevic his personal support and coaching and confirmed his ability to access AGL's EAP.⁸⁷ I accept that Mr Seears and/or Ms Price also took the following reasonable actions in response to requests made by Mr Blagojevic at meetings during the period from March to June 2017:

⁸⁴ PN 1130-1133

⁸⁵ PN1133

⁸⁶ Ex R4; attachment AP-3

⁸⁷ See paragraphs [64] and [67]

- made enquiries to ascertain whether there were any suitable alternative roles in AGL;⁸⁸
- organised for the initial PIP to be independently reviewed by Mr Barry Miller, Head of Engineering. Ms Price gave evidence that during a meeting between herself, Mr Miller and Mr Blagojevic on 31 May 2017, Mr Miller explained to Mr Blagojevic that he had reviewed the PIP and he considered the expectations to be reasonable and achievable. Mr Miller did not give evidence in these proceedings; however, I accept Ms Price's account of the meeting, which is supported by her minutes of the meeting;
- acted slowly throughout the PIP process to ensure Mr Blagojevic understood the requirements of the plan;⁸⁹
- referred Mr Blagojevic to Ms Nam Silvestri, AGL's Return to Work Coordinator.⁹⁰ This step was taken when it appeared that Mr Blagojevic's mental health was suffering. AGL asked Mr Blagojevic to give Ms Silvestri permission to speak to his treating doctor to obtain information about his mental health. As a result of that process, Mr Blagojevic's treating doctor completed a treating doctor questionnaire and provided it to AGL; and
- removed the fifth area of concern from the PIP.

[100] Mr Sears also gave approval (on relatively short notice) for Mr Blagojevic to take an extended period of annual leave from 24 June 2017 until 21 August 2017.

The revised PIP

[101] The revised PIP is dated 26 June 2017 and has a stated duration of three months.⁹¹ It was prepared as a result of the numerous meetings referred to in paragraph [97] above and the many discussions between Mr Sears and Mr Blagojevic at those meetings. I accept Mr Sears's evidence that he continued to hold genuine concerns in relation to Mr Blagojevic's performance at the time the revised PIP was put in place. I am also satisfied that those concerns were reasonable and justified, such that there was an evident and intelligible justification for putting the revised PIP in place.

[102] I accept Mr Sears's evidence that he did not commence monitoring Mr Blagojevic's performance under the revised PIP until Mr Blagojevic returned from annual leave.⁹²

[103] I accept Mr Sears's evidence that before Mr Blagojevic went on annual leave, he and Mr Blagojevic agreed on a timeline for the completion of expectations and work actions that were part of the revised PIP. I reject Mr Blagojevic's contention that he was forced to agree with Mr Sears on those timelines.

⁸⁸ Ex R3 at [25]

⁸⁹ Ex R4 at [32]

⁹⁰ Ex R3 at [16]

⁹¹ Ex R4 at [42]-[43]

⁹² Ibid at [44]

[104] In September 2017, Mr Blagojevic and Mr Seears met on at least one occasion to work through the content and the timelines of the PIP. Mr Seears gave evidence that during the meeting(s) it became clear to him that Mr Blagojevic was starting to slip on some of the timelines.⁹³

[105] Mr Blagojevic believes that Mr Seears intentionally tightened these timelines so that it was harder for him to meet the deadlines.⁹⁴ I reject this. The evidence demonstrates that Mr Seears was clearly going out of his way to try and help Mr Blagojevic meet the timelines. For example, to assist Mr Blagojevic to meet the requirements of the PIP, Mr Seears reduced Mr Blagojevic's workload, by relieving him of responsibility for the Ravensworth Plant. Having been offered and provided such support from Mr Seears, I am not satisfied that the expectations, work actions or timelines contained in either the initial PIP or the revised PIP were not achievable or were unreasonable.

[106] On 6 September 2017, Mr Blagojevic advised Mr Seears that he was suffering from depression and finding it difficult to come to work, that he felt disengaged and that his performance had dropped.

[107] On 13 October 2017, Mr Blagojevic and Mr Seears met for a final time. Mr Blagojevic brought his solicitor along to the meeting as his support person.⁹⁵ At this meeting, Mr Seears advised Mr Blagojevic that he had slipped on a timeline and that he needed to go away and review it.

[108] On 30 October 2017, Mr Seears sent Mr Blagojevic an email containing information comparing Mr Blagojevic's progress to the timeframes in the revised PIP. The email also arranged a future meeting for 2 November 2017.⁹⁶

Ms Blagojevic goes off work

[109] On 30 October 2017, Mr Blagojevic provided AGL with a medical certificate stating that he was unfit for work from 30 October 2017 until 3 November 2017 inclusive.

[110] On 8 November 2017, Mr Blagojevic attended an independent medical review to determine his fitness for work. The review concluded that Mr Blagojevic was likely suffering from an adjustment disorder with a depressed anxious mood and that he was not fit to return to his current workplace without clearance from his General Practitioner.

[111] On 9 November 2017, Mr Blagojevic was certified as unfit for work from 9 November 2017 until 9 December 2017.

[112] Mr Blagojevic has been absent from work since 30 October 2017 and had not returned to work as at time of the hearing.

⁹³ Ibid at [45]

⁹⁴ Ex A1 at [67]

⁹⁵ Ex R4 at [46]

⁹⁶ Ibid at [48]

Conclusion

[113] On many occasions throughout his employment with AGL, Mr Blagojevic received feedback from his supervisors that his performance was exceeding expectations. Having become accustomed to such feedback, it is perhaps understandable why, subjectively speaking, Mr Blagojevic found Mr Seears's decision to place him on a PIP to be devastating news. However, any unreasonableness must arise from the actual management action in question rather than Mr Blagojevic's perception of it.

[114] I am satisfied that Mr Blagojevic's performance in relation to a range of issues, including the electrical and control issues at the Ravensworth Plant and the Chillcott Creek myHSE Action, provided an evident and intelligible justification for Mr Seears' decision to place Mr Blagojevic on a PIP. It was reasonable for Mr Seears and AGL to expect Mr Blagojevic to demonstrate leadership in his role as an Asset Engineer by taking responsibility for the timely completion of work in connection with the assets assigned to Mr Blagojevic, including by expecting and requiring Mr Blagojevic to influence and, where necessary, place pressure on others to complete work in the time required. Mr Seears complied with AGL policy in providing Mr Blagojevic with informal coaching and an opportunity to improve before placing him on the PIP and thereafter, provided him with a range of measures of support in an attempt to assist him to improve his performance. Further, Mr Seears own manager, Mr Barry Millar (AGL's Head of Engineering), was consulted in relation to Mr Blagojevic's PIP. Mr Millar formed the view that Mr Blagojevic's PIP was reasonable and achievable. The revised PIP was put in place after lengthy discussions between Mr Blagojevic and Mr Seears and on the basis of genuine and reasonable concerns on Mr Seears' part that Mr Blagojevic was not performing at the necessary level in some aspects of his role as an Asset Engineer. I am satisfied that Mr Seears' action in placing Mr Blagojevic on the initial PIP and then revising and maintaining the PIP was reasonable management action carried out in a reasonable manner.

[115] I reject the contention that the PIP process was put in place by Mr Seears in an effort to have Mr Blagojevic removed from AGL; instead, I am satisfied that it was put in place in a genuine attempt to improve Mr Blagojevic's performance.

[116] For the reasons set out above, I find that Mr Blagojevic has not, as alleged by him, been bullied within the meaning of s.789FD of the Act. I therefore do not have the power to make any of the orders sought by Mr Blagojevic. Mr Blagojevic's application for orders to stop bullying is dismissed.



COMMISSIONER

Appearances:

M. Blagojevic, appearing on his own behalf.

D. Williams, solicitor for the respondents.

Hearing details:

2018.

Newcastle:

9 and 10 April.

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