



DECISION

Fair Work Act 2009

s 789FC - Application for an order to stop bullying

Tanka Jang Karki

(AB2018/599)

DEPUTY PRESIDENT SAMS

SYDNEY, 27 MAY 2019

Application for an order to stop bullying – employee of casino – allegation of using mobile phone at work, contrary to policy – allegation investigated – CCTV footage – applicant’s behaviour during investigation – allegation not denied – warning issued – second allegation of spitting in a bin in a public place in the casino – allegation investigated – CCTV footage – applicant warned – warning not accepted – whether actions taken constitute reasonable management action taken in a reasonable manner – jurisdictional objection - interim orders sought to stop any dismissal and to stop further bullying – disciplinary action reasonable – applicant’s implausible explanations rejected – no evidence of bullying by respondents – interim orders refused – application dismissed as jurisdictionally incompetent.

[1] Mr Tanka Jang Karki (the ‘applicant’) is employed as a Bellman at Star City Casino, Sydney (‘The Star’ or the ‘first respondent’). He has been employed by the employing entity, The Star Pty Ltd, since June 2016. On 27 September 2018, Mr Karki filed an application for an order to stop bullying, pursuant to s 789FC of the *Fair Work Act 2009* (the ‘Act’). In his application, he named Ms Jessica Sykes, Front Office Manager as the second respondent. It is apparent from the application that Mr Karki alleges he was bullied by Ms Sykes during and following an incident on 27 August 2018, in which he had been observed by her using his personal mobile phone while on duty, contrary to The Star’s Policies and Procedures. He claimed he was publically abused, embarrassed and harassed by Ms Sykes. He also claims that the subsequent warning which he received for the use of his mobile phone while on duty was unjustified, constituted inappropriate management action and must be withdrawn.

[2] In The Star’s response on behalf of Ms Sykes, it was submitted firstly, that Mr Karki was not the subject of repeated behaviour, as his claim related to a single one-off incident, which does not meet the definition of bullying. Secondly, the incident for which Mr Karki

was disciplined was ‘*reasonable management action taken in a reasonable manner*’, in accordance with s 789FD(2) of the Act. In any event, the Commission has no jurisdiction to deal with Mr Karki’s application.

[3] Despite these jurisdictional objections, and in accordance with my usual practice, I convened a private conference with the parties on 1 November 2018. The application was unable to be resolved and Mr Karki agreed to my suggestion that he seek advice about his application, given both the jurisdictional and merit issues discussed in the conference.

[4] However, on 19 November 2018, Mr Karki sent a one-sentence email to my Chambers requesting that I recuse myself from any further dealings with his matter. On 20 November 2018, I issued directions for the filing of submissions as to the recusal application and suspended all further programming of the substantive application until the recusal application was determined. I refused the recusal application on 13 December 2018 in *Karki v Star Pty Ltd; Ms Jessica Sykes* [2018] FWC 7463 and immediately issued directions for a hearing of The Star’s jurisdictional objections on 12 February 2019. However, when Mr Karki filed his material on 1 February 2019, he raised an additional incident where he alleged bullying occurred after receiving a final warning for spitting into a rubbish bin in a public area on 30 December 2018, while on duty. Mr Karki sought interim orders seeking that his employment not be terminated, while the stop bullying application is being heard by the Commission. Accordingly, the Commission issued further directions on 6 February 2019 in respect to the second incident and the interim orders application, with all issues to be determined following a hearing on 27 February 2019.

[5] Ms C *Fenton* with Mr J *Wells*, King & Wood Mallesons Solicitors, appeared for The Star, with permission granted for the respondent to be legally represented, pursuant to s 596 of the Act. Mr Karki appeared for himself.

THE EVIDENCE

[6] The following persons gave statement and/or oral evidence in the proceeding:

- Mr Damien Cameron – General Manager Hotel, Retail and Events (not required for cross examination)

- Ms Joanne Ede – General Manager Employment Relations (not required for cross examination)
- Mr Mario Naim – Front Office Manager
- Ms Chiara Lisciotta – Assistant Front Office Manager
- Mr Karki – Bellman

CCTV footage of both the incident on 27 August 2018, and the second incident when Mr Karki was observed spitting into a rubbish bin in a public area, was tendered in the proceeding. I have reviewed this footage.

Mr Tanka Karki

[7] Mr Karki provided two documents; both are titled ‘SUBMISSIONS, but it is obvious they are a mixture of his evidence, submissions, opinion and commentary. I permitted the tender of this material, with the usual caveats as to relevance.

[8] In his first submission, Mr Karki said he has never had any issue with any guest, team member or supervisor in his two and half years employed as a Bellman at The Star and that he had been praised for his hard work and (his display of) ‘Star quality’ from time to time.

[9] Mr Karki claimed that on 27 August 2018 around 9:30am in the Casino’s driveway, he was looking at his mobile around the time he was to go on a break. He was expecting a message from his son to buy him a costume after work. He said that Ms Sykes arrived in a vehicle ‘with a companion’ and stopped ten metres away from him. She motioned at him to come over and he thought she needed help to carry her bag. However, she began yelling at him in front of her companion for using the mobile phone.

[10] Mr Karki claimed the CCTV footage of the incident provided to the Commission was ‘edited’ and taken from behind the incident. The cameras at the front prove his version of events. He further claimed that in the meeting with Ms Sykes on 30 August 2018, she raised other issues, such as him not smiling or interacting with guests and not demonstrating ‘Star quality’. Mr Karki believed he was being harassed by Ms Sykes and treated differently to others. He warned Ms Sykes that he intended on taking the matter further.

[11] On 3 September 2018, Ms Sykes told him that there was to be another meeting, as the CCTV footage had been found. He claimed this constituted further intimidation by Ms Sykes, because she was not his Supervisor. He claimed this was repeated bullying and The Star has a culture of bullying, of which he is not the first victim.

[12] As to the second incident on 30 December 2018, Mr Karki said that at the time, he had a toothache and as he was bleeding from his gum, he spat into the rubbish bin. He understood this was witnessed by Mr Cameron. Mr Karki claimed The Star's policies and procedures are silent on this matter. Further, The Star is under construction with dust flying about. In these conditions, many guests and colleagues spit. This is common practice and known to Management.

[13] Mr Karki believed the final warning was '*specifically targeted*' as a result of this stop bullying application and The Star was trying to find any reason to dismiss him. He sought interim orders to stop further bullying and prevent him from being terminated; see: *Application by Bayly* [2017] FWC 1886. He claimed to be worried about his job and that he was afraid to go to work, because he is being consistently '*micro watched*'. This intrusion was affecting his health and safety.

[14] In a second submission, (sought by the Commission as his first submission raised new evidence), Mr Karki put that The Star was interfering in the Fair Work Commission's processes, bullying is institutionalised at The Star and that Management has no idea what constitutes bullying and should be properly trained on the subject. He believed the second incident should be admitted into evidence.

[15] In **cross examination**, Mr Karki explained that there were actually four incidents, which amounted to bullying. These were:

- the driveway incident involving Ms Sykes (27 August 2018);
- the disciplinary meeting in which Ms Sykes asked him about unrelated matters (30 September 2018);
- when Ms Sykes directed him to a meeting to view the CCTV footage (3 September 2018); and
- the spitting in the rubbish bin (30 December 2018).

[16] Mr Karki said that despite the brevity of his submissions, he had covered all the matters he wished to raise in responding to the respondents' case. He claimed Ms Sykes had yelled at him during the driveway incident and that yelling was '*a kind of threat*'. Mr Karki now accepted that he was on his mobile for 30-40 seconds. He denied telling Ms Sykes, in the meeting on the 30 August 2018 that it was 3-4 seconds. He believed the respondents' statements were made up. It was also inaccurate that he had said he wasn't using the phone. He had said he was not talking on the phone, just texting.

[17] Mr Karki accepted that he was aware of The Star's policy and that he had breached The Star's policy in using his mobile phone on that day. However, he had never requested to see the CCTV footage. In the disciplinary meeting, Mr Karki agreed he had said in a raised voice, '*I'm going to take this to Human Resources, and you are harassing me*'. Mr Karki acknowledged that he had told Ms Sykes he had made a mistake by using his phone. He claimed he was responding to a family emergency, but agreed his son had asked him to pick up something after work. He now conceded this was not an emergency, as it did not require him to do anything before the end of his shift.

[18] Mr Karki agreed that The Star had a policy on mobile phone use and he had breached that policy. Nevertheless, he claimed that when Ms Sykes yelled at him, it was a threat, because she was not on duty at that time. He believed that a Manager not on duty could not enforce Company policies. Mr Karki was asked about his statement '*I never used my mobile. I was not talking to anyone.*' He denied that he was seeking to mislead the Commission by this comment and accepted the policy does not distinguish between using the phone, texting and talking to anyone. However, he maintained it was unreasonable to be given a written warning for this breach of The Star's policies. He then said he did not have a problem with the warning, but rather his problem was how Ms Sykes spoke to him in the driveway. Mr Karki said Ms Sykes did not explain The Star's policies in the meeting. She had just asked if he was aware of them.

[19] As to when Ms Sykes had raised unrelated issues (which was why the meeting was adjourned), Mr Karki said that she did raise these matters. He had never asked to view the footage. Accordingly, that was not the reason to adjourn the meeting.

[20] When shown the CCTV footage, Mr Karki said Ms Sykes called him over (which could not be seen) from ten metres away while he was on the phone. He claimed she yelled at him when she got out of the car as he had approached her. He believed the footage was not the full footage, as it was taken from the back.

[21] As to the spitting incident, Mr Karki agreed the bin was in a very public place. However, there is no policy about spitting and no warning signs against it. Moreover, everyone does it. He added that due to construction at The Star, there is dust everywhere and everyone spits in the bin.

[22] Mr Karki acknowledged that he made no complaint or grievance, under The Star's policies, about any of these alleged incidents. He had produced no medical evidence of being harmed by these incidents. His only evidence to this effect was his claim that he was taking sleep medication.

[23] Mr Karki asserted that he was disciplined for the spitting incident because he had filed this stop bullying application. He believed it was unreasonable and severe to receive a final warning for the spitting incident. After viewing the CCTV footage, Mr Karki agreed he spat three times into the bin. In answer to questions from me, Mr Karki said he spat because he had a toothache/gum problem with bleeding. However, he had not seen a dentist about the problem.

Respondent's Evidence

Ms Jessica Sykes

[24] Ms Sykes' role involves overseeing the Front Office, the Concierge and the Bellmen. Ms Sykes described the Bellman's duties as being typically performed at, or near the Driveway and include:

- attending to guests as they arrive at the hotel;
- delivery and collecting bags from hotel rooms;
- answering enquiries from guests or directing them to the appropriate person or department; and
- performing errands for the Hotel.

[25] Ms Sykes said that The Star's policies do not permit team members to use their mobile phones during their shifts without their Manager's approval, or unless the phone is used for business-related purposes. However, employees may keep their phones with them in the event of a pressing emergency or family circumstances, subject to advising their manager prior to the shift, and if necessary, to take phone calls at the 'back of house', out of the view of guests. Ms Sykes said that as recently as 30 July 2018, all Concierge Team Members (including Mr Karki) were reminded of the policy and acknowledged that they would comply with the Policy. Proof of this acknowledgement by Mr Karki was attached to Ms Sykes' statements. The document stated:

'Misconduct is defined as:

- Conduct of behaviour that falls outside of expectations under The Star and property specific Codes of Conduct of company values.

Internal procedures: internal signage displayed in Back of House areas which communicate the use of personal mobile phones is prohibited during working hours.

The Star Values, including:

- Ownership – We are encouraged and empowered to take ownership and responsibility for being the best we can be. We look, continually, with purpose and a sense of urgency at ways to better ourselves and the experience we deliver to our guests and our team. We accept our actions as our own.

The Star Qualities, including:

- Own It (Be a Start Player); Choosing to take accountability and ownership for your actions; positive and proactive for the guests and yourself and having the ability to influence the circumstance. You are empowered to deliver the best guest experience you can. Star Player are committed to going that extra mile, understanding that a situation can be influenced through thoughts and actions.
- Deliver it (Be the Perfect Host); Creating experiences, not just performing task. It is about building rapport and looking after your guests every need, making them feel special and creating legend stories. The perfect host is full of warmth and modesty and makes all people feel special.'

[26] Ms Sykes described the incident on 27 August 2018 as follows. Around 9:30am, she arrived at the Hotel in an Uber, as she was rostered to work that day. As the Uber drove into the porte-cochère area of the Hotel, she noticed Mr Karki on his phone with his head down. He looked at the car, but went back to his phone (later acknowledging he had been typing on

his phone). Ms Sykes said that as she got out of the Uber, Mr Karki recognised her and came over. She did not motion for him to come to her. When she asked if he was using his phone, he said 'no' and she replied, *'I think you were, I saw it with my own eyes'*. Mr Karki mumbled something and then asked if she needed help with her bags. She declined and walked off. It was Ms Sykes' evidence that their interaction lasted a few seconds, although she had observed him on the phone for 30-40 seconds.

[27] Ms Sykes informed the Front Office Manager, Mr Naim, of having observed the applicant on his phone, in breach of The Star's policies. Mr Naim had directed him in writing to attend a meeting with Ms Lisciotta and herself at 3pm on 30 August 2018. The purpose of the meeting was stated as *'Use of personal mobile phone without managerial permission during shift on Monday 27 August 2018'*. He was invited to bring a Union or support person to the meeting and was told the matter was serious and could result in disciplinary action, up to and including termination of employment.

[28] Ms Lisciotta took detailed notes of the meeting, which Ms Sykes believed corroborate her understanding of the conversation in the meeting. Mr Karki was not permitted to record the meeting and did not bring a support person. In response to the allegation, the meeting notes record as follows:

‘Manager – I observed you using your personal mobile phone whilst on shift on Monday 27/08/18 around 9:15am. Do you recall this situation and can you explain what happened?’

Team Member – I was checking the time to see how much longer until my break, I saw a message from my son asking me to buy something and quickly replied “ok” in a message. I used the phone for 3-5 seconds.

Manager – Why did you have your phone in your possession?

Team Member – Always have it on me but on silent, everyone does

Manager – Did you have permission from your manager to have your personal mobile phone in your possession?

Team Member – No, I wasn't “using” the phone, I wasn't talking on the phone.

Manager – Why did you deny using your phone when I confronted you?

Team Member – Tanka immediately raised his voice – I wasn't talking on the phone, I was being quick. I denied as you have no right to use your power in front of another

person. You were not on duty and you harassed me in front of another person I don't know. I was only using the phone for a few seconds to send a quick message, you had not right to over when not on duty.

Manager – just because you weren't [sic] talking on your phone but sending a text still means that you were using your phone. You have said that you were on the phone for approx.. 3-5 sec, while I was coming down to the drive you were on the phone, looked at the car and returned to your phone would say it would be about 30-40 seconds that you were using your phone. Also I do not recall motioning for you to come over. The other person is not relevant to the matter we are discussing.

Team Member – (raised voice) Not it was not that long and you can check the footage, You are wrong.

Tanka then requests to see footage.

Manager – This can definitely be arranged and I will contact HR when we adjourn.

Tanka – (raised voice) How about when you used your phone and text while at work, last week I was struggling to carry heavy boxes from Loading Dock and you were just texting, walking next to me. You cannot tell us not to do it when you do it, we are not slaves you know.

Jessica – I was on my work phone, discussing work matters with other management (Jessica shows work phone) unfortunately I am unable to carry boxes due to several reasons, one being OHS concerns. If you needed help you should have raised this with me and I would have arranged for another porter for assistance. Again we are here to discuss you using your phone FOH on the driveway, not to discuss a task assigned to you last week.

Tanka – (in a raised voice) I am going to take this to HR as you are harassing me

Jessica – You are more than welcome to utilise that resource should you need to. At this point I suggest we lower our voices and get back to the questions at hand and continue with your statement in relation to the matter at hand.

Tanka – Ok fine

Manager – Do you recall the time we spoke about not having mobile phones FOH in briefing?

Team Member – Yes

Manager – Do you think it's appropriate to have your phone out while on the driveway, especially after having discussed this matter with all staff?

Team Member – It is okay to have it on your but not to have it out.

Manager – So why did you have it out?

Team Member – I told you, to check the time for my break. When I saw a text from my son I quickly responded.’

[29] Ms Sykes said that during the meeting, Mr Karki ultimately admitted using his phone while working and he was aware this was contrary to Company policy. Ms Sykes confirmed Mr Karki yelled and banged his hands on the table a number of times. She had raised her voice, but only so she could be heard above Mr Karki and get the meeting on track. She believed Mr Karki’s conduct was aggressive and inappropriate. Mr Karki requested to see the CCTV footage, which was arranged to occur at a further meeting in three days’ time. Ms Sykes had no further involvement in the matter.

[30] In cross examination, Ms Sykes denied mentioning to Mr Karki in the meeting on 30 August 2018, whether he had ‘Star qualities’, or that he doesn’t interact with guests or help with their luggage. The meeting was adjourned because he had asked to see the CCTV footage. She accepted Mr Karki requested to record the meeting, but this was denied because it was contrary to The Star’s policy.

Ms Chiara Lisciotta

[31] Ms Lisciotta confirmed her role in taking notes at the meeting with Mr Karki on 30 August 2018. She said that it was clear Mr Karki wanted to argue irrelevant matters, including that Ms Sykes should not have pulled him up on 27 August 2018, because she was not the Duty Manager that day, and by texting, he was not actually using the phone.

[32] Ms Lisciotta confirmed that during the meeting, Mr Karki was quite aggressive - hitting his hands on the table and raising his voice. Ms Sykes was not aggressive and had not bullied Mr Karki. She recalled Mr Karki wanted to view the CCTV footage to dispute how long he was on the phone. Ms Lisciotta had no further involvement in the matter.

[33] In **cross examination**, Ms Lisciotta recalled Ms Sykes had asked Mr Karki if he was displaying ‘Star qualities’ during the meeting on 30 August 2018, but she could not recall her mentioning that he does not smile at guests. She did recall Mr Karki banging his hand on the table. She believed that Ms Sykes asked relevant questions in respect to the driveway incident. It was relevant to ask him about The Star’s qualities in relation to the driveway incident.

Mr Mario Naim

[34] Mr Naim, with Ms Tatiana Grigorian, HR Advisor, met Mr Karki on 3 September 2018 to show him the CCTV footage of the incident. Mr Naim said the meeting lasted for about 45 minutes, during which it was clear Mr Karki was more interested in trying to demonstrate Ms Sykes had motioned him over, rather than his own conduct. He kept interrupting while he was speaking. Nevertheless, Ms Karki claimed that he needed to send a message, as he was expecting a text from his son. Mr Naim explained that if this was so, he should have sought permission from the Duty Manager. Mr Naim said Mr Karki told him he felt uncomfortable and unhappy about the situation and had been unable to sleep. Towards the end of the meeting, when Mr Naim told him he would be receiving a written warning, Mr Karki replied:

‘if you want to give me the written warning, you will see what will happen.’

[35] Mr Naim recalled that during the meeting, Ms Gregorian raised her voice, but only in response to Mr Karki’s raised voice. He was very aggressive and banged the table.

[36] Mr Naim met Mr Karki to deliver the disciplinary outcome. The meeting only lasted a few minutes as Mr Karki declined to sign the form acknowledging he had received it. Mr Naim told him that even if he refused to sign it, it remains a written warning on his file.

[37] Mr Naim said that on 30 December 2018, he was informed by Mr Damien Cameron that he had observed an employee (later identified as Mr Karki) spitting into a rubbish bin in a public area. A disciplinary meeting was arranged for 17 January 2019. Mr Naim attached the notice of the meeting. Mr Karki’s response is recorded as he:

- advised he was finishing up from his break when this incident occurred;
- advised he had a toothache and believed his gums were bleeding;
- admitted that he spat in the bin near the lobby lifts and advised there were no guests in the area;
- advised he can’t stop blood if it is coming from his mouth;
- advised he did not perceive the lobby area as a Guest facing area;

- advised he was avoiding the Guests and went to a spot where he thought no one could see him but someone did witness his actions, resulting in him being caught and the reason for the meeting;
- advised if someone feels sick and needs to throw up, they should do so in the bin. It is a rubbish bin and he was close to the bin whilst spitting;
- doesn't think his actions have any effect on Guests/Customer service;
- advised that if he was previously told not to spit in the bin, he would not have done so;
- advised there was no sign to advise he was not allowed to spit in the bin;
- advised that because of the construction occurring near the lobby area, there is dust around and therefore people spit in the bin all the time;
- advised he did not return to back of house or to a bathroom, when he felt blood in his mouth, as it was not nearby;
- advised he did not see how the Misconduct and Disciplinary Policy, Code of Conduct as well as Star Values and Star Qualities were related to the incident;
- advised he understood The Star's position on the matter, and how The Star deems this behaviour as inappropriate and unprofessional; and
- advised how he understood it is not in line with The Star's expectations of its Team Members and its Vision.

It is further recorded at page 3 of the notes that Mr Karki believed:

- his actions had no impact on guest experience,
- the event did not take place in the view of our guests; and
- The Star is at fault for failing to display appropriate signage to serve as a reminder to team members of the expectation that The Star and its guests have, when they are in the front of house space.

Mr Karki received a final warning and wrote in the section requiring his signature 'Unhappy with the outcome'.

[38] In **cross examination**, Mr Naim said that in the driveway incident, Mr Karki approached Ms Sykes and asked him why he was using his mobile phone.

[39] In the meeting on 3 September 2018, Mr Karki banged the table and kept interrupting him and Ms Grigorian by seeking to deflect the discussion away from his conduct, to Ms Sykes' alleged conduct. Mr Naim said that initially Mr Karki did not want to see the CCTV footage, but he then asked to see the footage. This was the purpose of the 3 September 2018 meeting. He agreed Mr Karki told him he felt 'uncomfortable' and couldn't sleep.

[40] Mr Naim described the applicant's performance as 'average'. He had never heard him swearing and no complaints had been made about his work.

Ms Joanne Ede

[41] The purpose of Ms Ede's evidence was to advise that despite The Star's comprehensive Bullying and Grievance and Complaint processes, at no time had Mr Karki availed himself of the grievance process. Ms Ede was not required for cross examination. There is no dispute about this evidence.

Mr Damien Cameron

[42] Mr Cameron said that around 1.30pm on 30 December 2018, he was walking from the public car park escalators through to the Hotel reception – a route frequently taken by customers and guests. Mr Cameron was not in his uniform, as he was heading to the Hotel gym. After stepping off the escalator, he observed a staff member (as he was in a bellman's uniform), picking something out of his teeth, and then spitting into a bin. Mr Cameron informed Mr Naim later that day of the incident. Mr Naim confirmed, from his description, that it was Mr Karki. Mr Cameron had no further involvement in the matter.

SUBMISSIONS

For the applicant

[43] Mr Karki accepted that he had acknowledged each incident for which he received warnings and he feared he would lose his job if he made another mistake. He was seeking interim orders in order to prevent The Star from dismissing him. He acknowledged Ms Sykes' investigation was unrelated to the spitting incident. He claimed the warning for the spitting

incident was too severe, as there was no policy of The Star stating he is prohibited from doing so.

[44] Mr Karki further submitted that interim orders were sought, because he did not feel safe at work. He claimed there was another recent incident when he was directed to go to the Casino driveway by another executive (Rick). He conceded he had received no warning for this incident.

For The Star and Ms Sykes

[45] By reference to the definition of bullying at ss 789FC(1) and (2) of the Act, the respondents contended that Mr Karki's complaint does not meet the requirements of the Act. His complaint arose from his own breach of The Star's policy, as confirmed by the CCTV footage. However, he asserts:

- (a) he did not use his phone on duty because he was texting, not talking on the phone;
- (b) Ms Sykes threatened him angrily;
- (c) he never requested to see the CCTV footage, although he was ultimately shown it on 3 September 2018; and
- (d) at the end of this meeting, he received a written warning.

[46] The respondents submitted that isolated incidents cannot constitute bullying and there is nothing in the application or Mr Karki's submissions to suggest that the events of 27 August 2018, 30 August 2018, 3 September 2018 or 17 January 2019, involved unreasonable conduct. The evidence established:

- (a) Mr Karki had breached the policy on phone use (and this is not in dispute);
- (b) Mr Karki was aware of the policy, and had acknowledged it in writing;
- (c) the second respondent spoke to Mr Karki about it when she observed it happening. His version, to the extent he claims there was a threat or that the interaction was excessive, is inconsistent with both the second respondent's evidence and the CCTV footage;
- (d) the allegations were put to Mr Karki, and he was given an opportunity to respond to the allegations;
- (e) Mr Karki's response at the time was inconsistent with both the Second Respondent's observations and the CCTV footage;

- (f) a determination was made that Mr Karki should be disciplined for a policy breach;
- (g) he received a written warning; and
- (h) aside from the Mr Karki's own unprofessional and aggressive behaviour, the meetings conducted on 30 August 2018 and 3 September 2018 were unexceptional in the context of a disciplinary process. This is particularly so when Mr Karki was not providing a fair and reasonable response to what was an undeniable and straightforward breach of policy.

[47] As to the second incident, the respondents submitted that Mr Karki acknowledged he spat in the bin in a public area. He was disciplined for this conduct. His defence that there is no policy dealing with spitting was nonsense. In an environment like The Star, a policy would not be necessary. It would be common sense that such behaviour was unacceptable. It was submitted that the incidents cannot be treated as having been engaged in by an individual or group of individuals, because it involved different people acting in a reasonable manner in respect to an unexceptional disciplinary process. Further, it was submitted that the evidence does not establish that there is a risk Mr Karki will continue to be bullied at work (without accepting he ever had been).

[48] The respondents maintained that the actions taken against Mr Karki were reasonable management action carried out in a reasonable manner, being an unremarkable and proper approach to dealing with breaches of The Star's Policies, through a fair and reasonable disciplinary process. In any event, The Star has internal procedures for dealing with bullying complaints and the respondents were never notified of any grievance by Mr Karki in this respect. The relief sought by him should be refused and the application dismissed.

[49] In oral submissions, Ms *Wells* said the Commission could not be satisfied that interim orders should be made, as there was no serious question to be tried and the balance of convenience did not favour Mr Karki. In any event, the respondents relied on their written submissions that the application should be dismissed, as the incidents Mr Karki alleged as examples of bullying, were no more than reasonable management action taken in a reasonable manner, in respect to the usual disciplinary processes carried out as a result of admitted breaches of The Star policies.

CONSIDERATION

Statutory provisions and relevant authorities

[50] The Commission's power to make stop bullying orders is found in s 789FF of Part 6-4B of the Act which relevantly provides:

'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.'

[51] A number of other provisions in Part 6-4B of the Act are relevant to the exercise of the power to make stop bullying orders. Section 789FC(1) establishes that 'a worker who **reasonably believes** that he or she has been **bullied at work**' may make an application for an order under s 789FF. Put another way, the Commission's jurisdiction under s 789FF can only be enlivened if the worker reasonably believes they have been bullied at work. It is common ground that Mr Karki is a worker (according to the cross reference definition in the *Workers*

Compensation Act 1987 (NSW)) and believes he has been bullied at work. Of course, whether his belief is reasonable is an entirely different question. However, for present purposes, I am prepared to accept that Mr Karki's application has been validly made to the Commission.

[52] There are however, as will be apparent from s 789FF, two other jurisdictional prerequisites which must be satisfied, before the Commission may exercise its power to make stop bullying orders: These are:

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

It has been recently held by a Full Bench of the Commission that by the use of the definite article (the) in s 789FF(1)(b)(ii), the individual or group of individuals must be the same as those who had been found to have bullied the worker; see: *Mekuria v MECCA Brands Pty Ltd t/a Mecca Cosmetics and Others* [2019] FWCFB 2771.

[53] The test of what constitutes being 'bullied at work' is set out in s 789FD which provides as follows:

'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***.⁷
(my emphasis)

[54] Three preconditions arise from s 789FD. These are:

- the unreasonable behaviour must be repeated behaviour;
- the behaviour must create a risk to health and safety; and
- being ‘bullied at work’ does not apply to reasonable management action taken in a reasonable manner.

[55] In respect to repeated behaviour, the Full Bench said in *Blagojevic v AGL Macquarie Pty Ltd; Mitchell Seears* (‘*Blagojevic*’) [2018] FWCFB 4174 at [17]:

‘A one-off incident will not be a sufficient basis for the making of an application to the Commission. 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. 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.’

[56] As to the definition in ss 2 of s 789FD as to what being ‘bullied at work’ is not, the Full Bench in *Blagojevic* said at [19]-[23]:

[19] The expression ‘management action’ in s.789FD(2) 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. Placing an

employee on a PIP clearly falls within the scope of the expression ‘management action’.

[20] 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”. 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’.”

[21] 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 Bank of Queensland Limited*. 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. In assessing the reasonableness of this managerial decision, the Vice President did not attempt to form his own judgment as to whether Ms Mac’s overall performance was satisfactory, explaining:

‘... 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)

[22] In the Decision subject to appeal the Commissioner agreed with the approach taken by the Vice President and applied it to the matter before him, noting:

‘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.’

[23] It is convenient to note here that Mr Blagojevic did not challenge this aspect of the Commissioner’s decision; nor did he contend that *Mac v BOQ* was wrongly decided. For our part, we agree with the observations of Vice President Hatcher set out at [21] above.’

[57] *Hampton C* put it this way in *Ms SB* [2014] FWC 2104 where at [51]-[54]:

[51] The test is whether the management action was reasonable, not whether it could have been undertaken in a manner that was ‘more reasonable’ or ‘more acceptable’. 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
- 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.

[52] For the circumstances in s.789FD(2) of the FW Act to apply, the management action must also be carried out in a ‘reasonable manner’. Consistent with the approach above, what is ‘reasonable’ is a question of fact and the test is an objective one.

[53] Whether the management action was taken in a reasonable manner may depend on the action, the facts and circumstances giving rise to the requirement for action, the way in which the action impacts upon the worker and the circumstances in which the action was implemented and any other relevant matters.

[54] All of the requirements of s.789FD(1) must be read together. In terms of the issues in dispute in this case, this means that the Commission must consider whether an individual or group of individuals have repeatedly behaved unreasonably towards the applicant and whether that behaviour has created a risk to health and safety. A positive finding on each of these elements, and if appropriate, a finding that the circumstances contemplated in s.789FD(2) of the FW Act do not apply to the behaviour, must be made for the Commission to find that the applicant worker has been bullied at work.’

[58] In my view, the correct test is the objective reasonableness of the alleged bullying conduct, not how Mr Karki subjectively perceives it, no matter how firm his conviction.

Principles in respect to interim decisions and/or orders

[59] Section 589 of the Act provides as follows:

‘589 Procedural and interim decisions

(1) The FWC may make decisions as to how, when and where a matter is to be dealt with.

- (2) The FWC may make an interim decision in relation to a matter before it.
- (3) The FWC may make a decision under this section:
 - (a) on its own initiative; or
 - (b) on application.
- (4) This section does not limit the FWC’s power to make decisions.’

[60] As s 589(2) does not limit the Commission’s powers to make an interim decision to particular species of applications or exclude others, it may be safely assumed that the making of interim orders in a stop bullying application is a power available to the Commission. Put another way, there is no express or inferred statutory provision which would exclude the Commission from exercising such a power in s 789FC applications; see: *Worker A, Worker B, Worker C, Worker D and Worker E v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union known as the Australian Manufacturing Workers’ Union; Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia and others listed in Schedule A* [2016] FWC 5848 and *Lynette Bayly* (‘Bayly’) [2017] FWC 1886.

[61] The Commission is frequently called upon in all of its areas of jurisdiction under the Act to make interim decisions and/or orders. The principles to be applied in such circumstances are well established and are often referred to as the tests of whether *prima facie* firstly, there is a serious question to be tried, and secondly, whether the balance of convenience favours an order for interim relief. In *Quinn v Overland* [2010] FCA 799, *Bromberg J* set out at [45] and [46] the two main considerations as follows:

‘[45] In determining an application for interlocutory relief, the Court addresses two main inquiries. First, whether the applicant has made out a *prima facie* case in the sense that if the evidence remains as it is, there is a probability that at the trial of the action the applicant will be held entitled to relief. Second, whether the inconvenience or injury which the applicant would be likely to suffer if an injunction were refused outweighs or is outweighed by the injury which the respondent would suffer if an injunction were granted: *Australian Broadcasting Corp v O’Neill* (2006) 227 CLR 57 at [65], [19].

[46] The requirement of a “*prima facie* case” does not mean that the applicant must show that it is more probable than not that the applicant will succeed at trial. It is sufficient that the applicant show a sufficient likelihood of success to justify in the circumstances the preservation of the status quo pending the trial. How strong the

probability needs to be depends upon the nature of the rights the applicant asserts and the practical consequences likely to flow from the order the applicant seeks. In that context there is no objection to the use of the phrase “serious question” to convey the strength of the probability: *Australian Broadcasting Corp v O’Neill* per Gummow and Hayne JJ at [65]-[72], Gleeson CJ and Crennan J agreeing at [19].’

[62] In the present matter, Mr Karki relied on *Bayly* in support of his application for interim orders. In my view, such reliance is misplaced. Moreover, it is the ratio in *Bayly* that interim orders ‘would not be issued lightly’ (at [36]). The facts and circumstances of this case do not lend themselves to the same outcome in *Bayly*. For reasons I shall shortly outline, Mr Karki’s application and the case he presented do not disclose a serious issue to be tried, being a probability he will be entitled to final relief, and the balance of convenience does not fall in Mr Karki’s favour.

[63] In my view, this matter can be readily determined by my conclusion that the actions taken by The Star and Ms Sykes constituted reasonable management action carried out in a reasonable manner and therefore Mr Karki could not have been ‘bullied at work’. Such a finding does not establish the necessary jurisdictional prerequisites for stop bullying orders, either on an interim basis, or otherwise. Accordingly, it is unnecessary to determine whether the incidents of 27 August 2018, the disciplinary meetings of 30 August 2018 and 3 September 2018 and the written warning issued at that time and the incident on 30 December 2018 and the disciplinary meeting which resulted in a final warning, were isolated events or repeated unreasonable behaviour constituting bullying.

[64] The fact that Mr Karki was the subject of disciplinary action for his own unacceptable conduct, and which was entirely justified and his steadfast refusal to acknowledge his conduct warranted any disciplinary action, demonstrates he has little understanding of what bullying in the workplace really means.

[65] Any employer which has concerns about an employee’s conduct and is able to prove that conduct occurred (as here by the CCTV footage and Mr Karki’s own admissions) is perfectly entitled to conduct a disciplinary process and make a disciplinary outcome. In the case of The Star’s policies and procedures, The Star has a comprehensive and detailed regime for dealing with such matters and ensuring fair and reasonable outcomes. Of course, Mr Karki is just as entitled to justify his conduct, defend his position and challenge the outcome, which

he did in this case. The fact he did not, and continues to not accept the warning, is completely beside the point. Mr Karki seems to believe he can shield himself from soundly based and entirely justified disciplinary action for poor conduct which he does not deny. He is very much mistaken.

[66] In my opinion, it is not acceptable to use the stop bullying jurisdiction of this Commission as a shield or stalking horse, to prevent, delay or deflect justifiable disciplinary outcomes, or to claim that the disciplinary outcomes themselves are repeated unreasonable behaviour, constituting bullying. It demeans and undermines the important work of the Act's stop bullying provisions to prevent workplace bullying. On one view, such conduct might be said to be perilously close to an abuse of process.

[67] For some time, I have been troubled that the important and beneficial purpose of the stop bullying jurisdiction of the Commission is being used for a purpose for which it was never intended by the legislature. This has been a strategy to file a stop bullying application as a deflection, or diversion, or even to overturn a justified disciplinary action or legitimate or performance improvement processes, implemented by an employer as a reasonable management response to incidents of misconduct or poor performance. This case is an obvious example of this improper purpose.

[68] Regrettably, I found much of Mr Karki's evidence to be fanciful or implausible and for the most part, entirely made up. He attempted to reconstruct events according to his own narrative, which was far removed from reality. The CCTV footage can give him little comfort. Specifically, I reject his claims that:

- Ms Sykes aggressively yelled at him;
- the driver of the Uber vehicle was a companion of Ms Sykes;
- Ms Sykes was loud and aggressive in the meeting on 30 September 2018;
- Ms Sykes bullied him by telling him of a meeting with Mr Naim to view the footage;
- Ms Sykes had no right to question his conduct because she was not his manager; and
- the CCTV was 'edited'.

[69] Most ridiculous of all was his submission that he was not using his phone because he was texting, not speaking on the phone. It hardly needs to be said that I doubt this argument would ‘wash’ when a person is caught by the Police using their mobile while driving.

[70] As to Mr Karki’s claims of Ms Sykes bullying him in the meeting of 30 September 2018, I prefer the evidence of Ms Sykes and Ms Lisciotta that it was rather the reverse – Mr Karki was acting aggressively, raising his voice and banging his hands on the table. This is consistent with Mr Naim’s experience at the subsequent meeting with him on 3 September 2018.

[71] Mr Karki defended his spitting in the bin on the basis that there is no express policy of The Star dealing with the matter. This is nonsense. One does not need a policy, or direction that you do not spit in a public area at a venue such as The Star (or any public place, in my view) while on duty, or otherwise. It seems clear to me that Mr Karki did not know Mr Cameron was in the vicinity (because he was not in uniform) and incorrectly assumed he would get away with it. I also find highly improbable that the applicant had a toothache and a bleeding gum which required him to spit blood into a bin. In a question from me, Mr Karki said he did not seek any dental or first aid assistance.

[72] Lastly, it is a relevant consideration that Mr Karki took no steps to lodge any grievance he had against Ms Sykes or The Star generally, in accordance with The Star’s detailed policy for dealing with such matters. Rather, on the same day of the incident on 27 August 2018, Mr Karki lodged this 789FC application in the Commission. In the ordinary course, the Commission would not intervene in a bullying grievance (let alone make interim or final orders), without an internal process having been initiated and/or completed. This is particularly so for an employer such as The Star, which on any objective view, has a comprehensive and commendable bullying policy applying to its workplace. This is a matter I am required to take into account under s 789FF(2) of the Act. The circumstances of this case, tell against the making of any stop bullying orders, either on an interim or final basis.

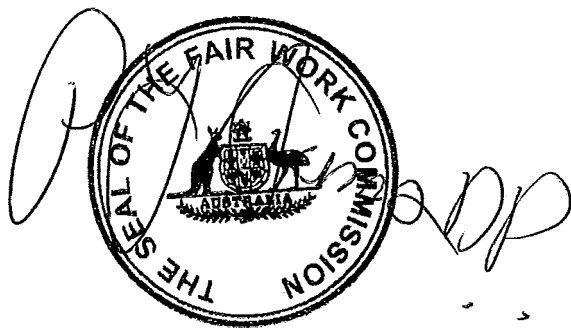
[73] Mr Karki seems to forget that had it not been for his own conduct on 27 August 2018 and 30 December 2018 - which in reality he does not deny - there would have been no disciplinary meeting and no warnings. The Star did not force him to use his mobile phone, or force him to spit in the bin. When viewed in this way, he cannot seriously suggest that the

final warning was a retaliatory action of further bullying by The Star and that they were looking for any reason to terminate his employment. One might have thought that if he was so concerned about his job security, he would have scrupulously sought to ensure he behave appropriately in the future. In essence, Mr Karki was the architect of his own unacceptable behaviour. He should not be the least surprised that it had consequences. For these reasons, I decline to make the interim orders sought by Mr Karki.

[74] I am satisfied that Mr Karki has been unable to demonstrate that the disciplinary outcomes he received for the incidents on 27 August 2018 and 30 December 2018, ‘*lacked any evident and intelligible justification*’, such that they would be considered by a reasonable person to be unreasonable in all the circumstances; see: *Annie Mac v Bank of Queensland Limited*; *Michelle Locke*; *Matthew Thompson*; *Stacey Hester*; *Christine Van Den Heuvel*; *Jane Newman* [2015] FWC 774 at [102].

[75] For these reasons, I am satisfied that Mr Karki was not bullied at work by the first or second respondent. The incidents he alleged as bullying, within the meaning of s 789FD of the Act, were reasonable management action carried out in a reasonable manner.

[76] The application is otherwise dismissed for want of jurisdiction. I order accordingly.



DEPUTY PRESIDENT

Appearances:

Mr Karki appeared for himself.

C Fenton, Solicitor, and J Wells, Solicitor, for the Respondent

Hearing details:

2019.

Sydney,

27 February.

Final written submissions:

For the respondent: 20 February 2019

For the applicant: 27 February 2019

Printed by authority of the Commonwealth Government Printer

<PR708066>