

[2020] FWC 2458 [Note: An appeal pursuant to s.604 (C2020/4488) was lodged against this decision - refer to Full Bench decision dated 19 August 2020 [[\[2020\] FWCFB 4373](#)] for result of appeal.]



DECISION

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

Ms Anne Pilbrow
(AB2018/705)

COMMISSIONER BOOTH

BRISBANE, 26 MAY 2020

Application for an FWC order to stop bullying – application dismissed – recommendations made.

[1] This is an application brought under s.789FC of the *Fair Work Act 2009* (the Act), by Ms Anne Pilbrow (the Applicant), for an order to stop bullying. The Applicant is employed by Ultrarad Pty Ltd T/A Queensland X-Ray (the Employer/Queensland X-Ray).

[2] The participants in this matter are all employees of Queensland X-Ray, and all, except human resources (HR) staff, are registered health practitioners: nurses, medical doctors and a medical radiographer.

[3] As it stands, the parties have travelled a long, winding track, including conferences with Commissioner Simpson and me before, finally, concluding in the hearing of the matter on 29 January 2020, with final submissions delivered by telephone hearing on 21 April 2020.

Background

Applicant and Named Person

[4] Ms Pilbrow is a nurse who has been employed by Queensland X-Ray since October 2017, principally at its Greenslopes practice. A more senior nurse, Ms Iris Edmondson, is the person named in the application as having engaged in the bullying behaviour.

[5] In this decision, these individuals are referred to as the **Applicant** and the **Person Named** respectively. The decision also refers to various workplaces or rooms as described by witnesses.

[6] In *Mac v Bank of Queensland Limited and Others*, Vice President Hatcher described the jurisdiction created by Part 6–4B of Chapter 6 of the Act and its application. The Vice President observed as follows:

“[74] The circumstances in which the Commission’s power to make anti-bullying orders is enlivened is set out in s.789FF of the FW Act as follows:

(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.”

[7] It can be seen that s.789FF establishes three prerequisites to the exercise of the power to make anti-bullying orders:

1. A worker, here Ms Pilbrow, must have made an application under s.789FC;
2. The Commission must be satisfied that Ms Pilbrow has been bullied at work by an individual or group of individuals; and
3. The Commission must be satisfied that there is a risk that Ms Pilbrow will continue to be bullied at work by the individual or group of individuals.

Alleged bullying

[8] The Applicant alleged conduct by the Person Named, summarised as follows:

1. Allegations of assault and other conduct designed to threaten or belittle the Applicant;
2. Assignment of duties issues, including refusal to assign light duties consistent with medical requirements; lack of consultation about allocation of duties at other work locations; limited or poor responses to the Applicant’s expressed concerns about changes to her work location and duties;
3. Unreasonable enquiries by the Person Named about the Applicant’s work hours and entitlements; and
4. Limited training and professional opportunities.

[9] The Applicant also alleged that HR staff failed to respond adequately to her complaints including about bullying.

Submissions and Evidence

[10] For the Applicant, the Commission had the Applicant’s statement and those of Ms Tammy Daly (a nurse employed at material times by Queensland X-Ray) and Drs Legh and Daunt. All were available for cross-examination. The Applicant was self-represented.

[11] The Person Named, Ms Edmonson, made a statement and made herself available for cross-examination. Ms Murphy, Human Resources Advisor and Drs Fenwick and Crossin gave evidence on behalf of the Employer. Ms Jenny Kindt, Diagnostic Radiographer, made a statement but did not make herself available for cross-examination.

[12] The Applicant was self-represented and was assisted by a support person at the hearing. Mr Melbourne, Solicitor, represented the Employer and the Person Named.¹

[13] All evidence was taken into consideration by the Commission. The following is a summary of the points made by witnesses. More detail of evidence appears below in discussing specific allegations.

Applicant

[14] Ms Pilbrow has worked at Queensland X-Ray in a full-time position since 2 October 2017.² She submits she has a full-time position at the Greenslopes practice. Her evidence included the following.

[15] On 2 May 2018, the Applicant suffered an injury, unrelated to her work, to a finger. The injury required a splint and interfered with her ability to work. She requested light duties, but on her evidence the Person Named refused to provide light duties, commenting that “*it was nothing that she couldn’t strap up and get on with it*”.

[16] On the 4 May 2018 the Person Named told the Applicant she had spoken with HR and Dr Fenwick and both agreed she could return on light duties. The Applicant submits she was not, however, shown consideration for her injury at work.

[17] The Applicant was rostered in CT³ and was not offered the chance to work in Angio⁴ like others.

[18] In a meeting requested by the Person Named and held in the Angio Room⁵ on 10 May 2018, (after the finger injury):

- the Person Named demanded personal medical information of a staff colleague who was on sick leave. The Applicant refused to provide it and the Person Named indicated that she had already enquired from Dr Crossin who refused to provide the information. The Person Named made personal and intimate comments about the colleague’s health issues to which the Applicant replied that the Person Named was disgusting;
- the Person Named responded saying that she had a problem with the Applicant, giving examples about her work including to the effect that “*you are nothing but a people pleaser, you’re too patient-focused and take nursing back to the dark ages*”. The Applicant was upset following this discussion;
- on her evidence the meeting did not include performance matters.

¹ Permission to be represented was contested by the Applicant but granted by the Commission.

² At the time of hearing, the Applicant was on sick leave.

³ Computed tomography.

⁴ Angiography.

⁵ Presumably an angiography suite.

[19] The Applicant submitted that she spoke about this interaction to Dr Fenwick, who assured her he did not understand the Person Named's perspective and assured her she was a valued member of the staff. She says she thanked Dr Fenwick and returned to her CT patients.

[20] She was not acknowledged or addressed after this incident by either the Person Named or Ms Rachael Taylor (another senior nurse).

[21] The Applicant submitted there was a refusal by the Person Named to allow her to return until her finger healed and that the Person Named would contact HR and let them know.

[22] The Applicant asserted Mr Greg Mayo, HR Manager, ignored or dismissed her oral complaint to him of bullying by The Person Named.

[23] Following medical clearance, the Applicant received the following text from the Person Named:

"Hi Anne, Good to hear you are finally better. I have employed more staff and the Mater are short currently so in discussion with Greg Mayo we think that you can commence working there next week. You have any questions regarding this could you, please contact HR thanks Iris".

[24] There were breaches of the Nurses Award in terms lack of notice and consultation regarding the start date of her new position, including being given 30 minutes notice to attend the new workplace.

[25] Having been at the Mater she was then asked to go to another practice at Queen Elizabeth II Hospital (QE2) for 8 to 9 weeks, seemingly to backfill a temporary absence. She submits that these instructions were not given to her by the Person Named but by the head nurse at the Mater practice.

[26] She was subject to repeated unreasonable behaviour about timesheets by the Person Named when working at QE2, and further the Person Named followed up Mr Mayo from HR about timesheets.

[27] The Applicant is very critical of several work practices of the Person Named including describing unsafe medical practices.

[28] The Applicant submitted that following a conversation in front of a patient, the Person Named criticised the Applicant for being a smoker. The Applicant sought out Dr Daunt talk to him about this matter. The Applicant says Dr Daunt apologised to her.

[29] Dr Legh praised the Applicant including asking whether he could do anything with respect to her position with the Person Named; he said it was unfair for her not to know where she was working on any given day and requested Mr Mayo discuss the situation.

[30] Mr Mayo then met with the Applicant on 11 October 2018. In those discussions other work locations including Springfield and Taringa were proposed.

[31] The next day the Applicant submitted, unexpectedly, clinical performance concerns were raised with her. She said she told Mr Mayo that she had never had any clinical issues raised whatsoever prior to this.

[32] The Applicant submitted she was constantly work-shamed by the Person Named in front of patients and staff.

Ms Daly

[33] Ms Daly submitted the Applicant did not swear and was not given any special consideration or light duties after her finger injury. She was not cross-examined on this evidence.

[34] It should be noted that Ms Daly provided a further statement after final submissions. The Applicant sought to admit this to evidence. The effect of allowing this new material would be to reopen her evidence. I ruled the new evidence inadmissible. Nevertheless, I reviewed the material and as detailed below, concluded that the content of the statement, even if accepted uncontested, was of limited relevance only and would not have changed the ultimate decision.

Dr Legh

[35] Dr Legh stated he never witnessed any interactions between the Applicant and the Person Named and that he did not know the Applicant well. He recalled she came into his office on three to five occasions, with concerns about her future, knowing that she would be leaving QE2 when another nurse returned from sick leave, and that there was some suggestion she would not be returning to Greenslopes.

[36] He did not understand the reasons and called Dr Fenwick (who he described as the doctor in charge of Greenslopes) and who advised there was some difficulty in her returning to Greenslopes. As a result, he spoke to Mr Mayo advising him that this needed to be sorted out, but it was unfair that a staff member did not know where her future was. He understood that some discussions were held with Mr Mayo but not the details.

[37] The allegation of bullying by the Person Named was raised by the Applicant with Dr Legh. He had no direct evidence about alleged bullying. The matters were purely with the Applicant and at the time he had no idea if this true or not.

[38] Certain allegations around Dr von Tonder were emphatically denied by Dr Legh, and he never received any feedback from Ms Kindt about the way the Person Named treated the Applicant.

Dr Daunt

[39] Dr Daunt had no recollection of a conversation with the Applicant about smoking and derogatory comments.

Ms Edmondson

[40] Ms Edmondson gave evidence as follows.

Angio room meeting

[41] Ms Edmondson, the Person Named, submitted a conversation occurred in the Angio Room with the Applicant before her finger injury on 2 May 2018.

[42] She submitted she needed to have this conversation with the Applicant because she had been approached by multiple staff members who had raised concerns about working with the Applicant. Issues included poor sterilisation and procedural techniques leading to a concern about patient safety. There were complaints about poor work ethic, often disappearing at important times, and doing unnecessary work like making tea and coffee for others when required for procedures. The Person Named wanted to raise these issues and give some feedback and guidance.

[43] In this conversation the Person Named asked the Applicant to be more available rather than making tea and coffee as that was the job of support workers and this was causing discontent.

[44] Ms Edmondson admitted she did talk about not taking nursing back to the dark ages. However she stated she did not use this comment to berate the Applicant, rather it was said in a friendly way to explain herself. She was also asked to be careful about swearing because complaints had been received, and after this comment the Applicant started crying. The Person Named submitted that until this point the conversation was friendly.

[45] In trying to lighten the mood she then began speaking about another nurse who had been on sick leave. She deposed that the whole conversation had not been about the other nurse nor that she was trying to get information about that nurse. She says she did not ask about details of why the nurse was off sick and she did not tell the Applicant that she had asked Dr Crossin for information.

[46] She denied verbally abusing the Applicant or “*completely annihilating her personality*”. The issues were fairly normal work issues, raised in a caring way to better undertake her role in the team.

[47] As for not acknowledging the Applicant after this conversation the Person Named suggested she did give her some space, but she did not ignore her or treat her like she was invisible.

[48] She submitted the Applicant had not been left out of informal meetings.

[49] Ms Edmondson submitted she has never had a bullying complaint against her before.

Assault Allegation

[50] As to the assault allegation, Ms Edmondson denied that she marched the Applicant down the hallway. Rather, she linked arms with her to guide her out of the room, describing this in more detail in oral evidence. The incident was in the context of the Applicant not taking her scheduled lunch break potentially disrupting others’ scheduled breaks.

[51] She did not berate the Applicant but admitted everyone was under pressure and she may have hurried her along as part of a normal interaction.

Injured finger

[52] She denied diminishing the Applicant's injury, and denied saying it was nothing and she could strap it up and get on with it. She notes she would never say this, and that this allegation did not appear in the original complaint.

[53] She submitted that the Applicant's work was not at a level where she could work unsupervised, for example performing angiograms.

[54] She did not tell the Applicant to stay at what she is good at.

Work Shaming

[55] She denied work shaming allegations including about the Applicant being a single parent, her hip injuries, her children, and whether she was a smoker.

Work relocation to Mater

[56] As for the relocation, following her full recovery from her injury, the witness confirmed the Applicant was placed at the Mater, not Greenslopes.

[57] She referred to the employment contract and submitted that it was not unusual, and consistent with the practice and needs of the Employer.

[58] As for parking costs, the Applicant would be no worse off as a result of paying for parking at the Mater as she is entitled to be reimbursed for the parking costs.

[59] The witness submitted it is not uncommon to liaise with a head nurse in terms of other locations for example at the Mater.

[60] As to checking timesheets, at the relevant time the witness was required to sign off the timesheets. The witness submitted this was usual and to ensure that they are correct. She stated claimability of daily allowances was raised with the Applicant in the ordinary course of supervision.

[61] Allegations about unsafe workplace at QE2 were explained by the different operating practices compared to those at Greenslopes.

[62] Procedure-related allegations against her by the Applicant were denied by the witness.

Dr Fenwick

[63] Dr Fenwick is the leading radiologist at the Greenslopes clinic, and gave evidence summarised as follows.

[64] He recalled being approached by the Applicant, reviewing the x-ray images of her injured finger, and confirming the absence of a fracture. His evidence was that he was cautious to avoid any further interaction regarding the management of the injury and recommended that the Applicant seek qualified medical advice. He submitted he simply informed the Person

Named of the injury and the need for a splint, and to the best of his knowledge did not diminish the treatment of the plaintiff.

[65] He recalled the Applicant entering the room crying (after the Angio Room Meeting) and that he was uncomfortable to see her in such an emotional state and provided reassurance to get her back on track for work. He was not at that time aware of any background and does not specifically recall speaking to the Person Named afterwards but he may have seen her to listen to her side of the story.

[66] Dr Fenwick described the Applicant's performance as adequate and not dangerous, but not outstanding, recalling a lack of focus on the key goals of a nurse to facilitate prompt, safe and efficient performance of procedures.

[67] He described avoiding the Applicant, not wanting to deal with offers of coffee as this was perceived as her priority over her nursing duties, and he did not want to hurt her feelings.

[68] His evidence was he was relieved when the Applicant no longer worked at the Greenslopes practice as there was less distraction from the business of patient care.

Ms Murphy

[69] Ms Jenna Murphy is the HR advisor at Queensland X-Ray and has been in this role since January 2019.

[70] She has dealt with the Applicant including dealing with the bullying claim she made internally Queensland X-Ray and in these proceedings.

Return to work proposal

[71] While not admitting to bullying by the Person Named, Ms Murphy indicated that Queensland X-Ray has put into place arrangements to ensure there is no risk of bullying when the Applicant returns to work. The Applicant will be based at the Mater practice and will not work with the Person Named on a day-to-day basis; she will report directly to the Mater nurse in charge and will be managed by that nurse. For example, no timesheets will be signed off by the Person Named. The Applicant will not be required to attend nurses' meetings which are usually led by the Person Named but the information will be relayed to her by the nurse in charge.

[72] She will be required to do relief work at other practices as per her contract but not at Greenslopes. Any training required will be monitored by Ms Murphy to ensure no contact with the Person Named. The arrangement will be overseen by Ms Murphy.

[73] This offer was made before this bullying application was heard and continues to be made.

[74] Since the offer was made, Queensland X-Ray has acquired a further practice being at the Mater Public. Ms Murphy notes that this new practice is about a two-minute walk from the Mater Private Hospital and that there are currently four positions for full-time nurses, and it would be helpful to the Employer if the Applicant could fill one of these roles.

[75] In cross-examination, Ms Murphy was asked about the Applicant returning to the Mater. In particular, the Applicant raised concerns that there had also been criticism by the chief sonographer of the Applicant's work and that she had failed to do tasks even after she was asked to do so:

“Would you expect me to go back to one of the locations where I felt I had been bullied there?---No.

So you wouldn't expect me to go back to the Mater either, where allegations of bullying?---The Mater Public is a brand new practice, so it's - - -

With the same old staff?---I mean you could say that about anywhere within Queensland X-Ray, where all staff are expected to rotate. So trying to find an area where it's completely all new staff is - I mean realistically it's just not feasible. I don't think there would be, like I think Mater Public is an excellent option, because it is a brand new practice which is a rarity.”⁶

[76] As to HR procedures the following exchange occurred:

“MS PILBROW: If HR procedures were in place and correct, this would not be happening now, is this true?---No.

It's not true. So, the correct procedures were in place?---I don't think if there - I think there's room for improvement with how things were handled from HR's perspective, potentially, based on what I've heard, not necessarily been privy to, but it doesn't necessarily mean that we wouldn't have resulted with what's happened.

So, no changes have been made to HR as a result of this application?---There have been a lot of changes which I'm sure we have noticed, especially with staff turnover and a restructure. There's been significant changes.”⁷

[77] Her evidence included the following about matters raised by the Applicant:

- Queensland X-Ray regularly rotates nurses to cover different practice needs. It is a condition of the employment contract.
- On the question of the investigation report into the allegations of bullying which began following lodgement of this complaint, Ms Murphy in her statement could not recall the response from Dr Crossin, but in oral evidence confirmed that the Person Named did not ask her to reveal personal medical information.
- As to Ms Murphy's response to the Applicant's case that she was forced on medical leave by the Person Named and came back from leave with no job to do with no justification, Ms Murphy said:

⁶ Transcript at PN683.

⁷ Transcript at PN710.

*“... you would assume that it was normal practice for me to be notified by HR or a manager what my next move was daily?--- Where they’re going to be working so it needs to be communicated in some way shape or form yes”.*⁸

Ms Kindt

[78] Ms Kindt made a statement but did not make herself available for cross-examination. As there is ample other evidence, I have not taken this statement into consideration.

Consideration

Applicant’s allegations and the responses

1. Allegations of assault and conduct designed to threaten or belittle

[79] The Applicant alleged that the Person Named both berated her, and physically grabbed her arm. This was in the context of a request by the Person Named for the Applicant to take her scheduled lunch break. As proceedings progressed the grabbing was described as an assault.

[80] Under cross-examination the Person Named admitted to being hurried and under pressure that day, but not to berating her. She was asked to, and did, re-enact the event as she recalled it, admitting she linked arms and guided the Applicant to the lunchroom.

[81] Whatever word is used to describe the incident, it is common ground that the Person Named touched the Applicant.

[82] I prefer the Person Named’s version of this event. The Applicant seems to me to overstate what happened, exemplified by the change in language from grabbing to assaulting. I add that an assault does not necessarily constitute bullying for the purposes of the Act⁹ and that the Commission does not need to inquire into the lawfulness of allegedly bullying conduct.¹⁰

[83] The task of this Commission is not to decide if the touching was an assault but whether there was repeated behaviour that constitutes bullying. I conclude the touching was, on balance, as described by the Person Named and was not in the course of bullying. It may have been poor management behaviour but that is a matter for Queensland X-Ray to address in its professional development for the Person Named.

[84] Whether the Applicant was berated by the Person Named in relation to this incident is similar. I accept the admission of the Person Named being hurried that day, and that the Applicant’s failure to take a lunch break as scheduled had consequences for other employees’ lunch breaks.

[85] I do not doubt the Applicant felt subjectively berated. Objectively considered, requiring timely breaks was a reasonable request in the context of a busy radiology practice. The

⁸ Transcript at PN664.

⁹ See for example the decision in *Singh* [2015] FWC 5850.

¹⁰ *Application by McInnes* [2014] FWCFB 1440, at [24].

communication and conduct of the Person Named could well have been done better, but it was not bullying as defined by s.789FD of the Act.

[86] At this point it is necessary to note both the Applicant and the Person Named exhibited hostility toward each other at the hearing: the Person Named spoke sharply under cross-examination, and the Applicant sought to identify personal and professional limitations of the Person Named, many of which did not relate to the Application.

[87] On one occasion during the hearing the Person Named responded in a sharp way to the Applicant.¹¹ This type of communication is something that needs to be addressed by the Employer, and something I address in my Recommendations below, complementary to any Investigation Recommendations.¹²

[88] While there are some concerns about the communication style of the Person Named, it falls well short of establishing the Applicant was berated by the Person Named.

Angio Room Meeting

[89] The Applicant asserted she was verbally abused in the meeting in the Angio Room and that one subject of the meeting was an inappropriate enquiry about personal medical information of a colleague. She denied performance issues were discussed at the meeting. The Person Named agreed she requested to meet with the Applicant; submitted the meeting was about performance; admitted the meeting did not go well; and that the colleague was mentioned towards to end of the meeting. She asserted the meeting took place before the Applicant's finger injury.

[90] In final submissions, the Applicant confirmed that the meeting in the Angio Room was not about performance:

*"MS PILBROW: That's okay, Commissioner. I'll just say I don't think it was a reasonable action, nor was it - nor was there absolutely any discussion regarding my performance or performance management. I've never, ever been performance managed. I've never made a clinical error."*¹³

(Emphasis added)

[91] The Applicant placed the meeting after the injury. She submitted on 10 May 2018 she had just placed her bag in the locker and was asked by the Person Named if she had a minute and asked if she could have a word with her in Angio.

[92] The Applicant described this as a turning point in the relationship between her and the Person Named. Up until then there is evidence¹⁴ that the Applicant in the Person Named had a good relationship.

¹¹ Transcript at PN946.

¹² Respondent's Supplementary Response to the Applicant's application, filed 7 December 2018.

¹³ Transcript at PN84.

¹⁴ Demonstrated by a number of text messages of a friendly nature.

[93] The Applicant submitted the Person Named asked her about why another nurse was off work and deposed that the Person Named told her she had asked the question of Dr Crossin. The doctor would not tell her anything. The Applicant's case is that the Person Named pressed the Applicant for details, and that the Person Named made certain suggestions of an intimate nature, to which the Applicant responded saying that the suggestions were disgusting and that the Person Named was being unprofessional.

[94] The Applicant submitted the Person Named then berated her, saying she is nothing but a people-pleaser, too patient-focused and was taking nursing back to the dark ages. The Applicant stated she began crying and the Person Named said "*Stop your bloody crying or I'll be crying in a minute too*". The Applicant left the Angio Room and went outside to settle down.

[95] Shortly after she went into the doctors' rooms. She spoke to Dr Fenwick who noticed she was upset; she eventually told him she had been verbally abused by the Person Named who had "*completely annihilated my personality and my work ethic*". Her evidence was that Dr Fenwick listened and assured her he did not understand the perspective of the Person Named, and that she was a valued member of staff. Her evidence is that only later did she learn Dr Fenwick spoke shortly thereafter to the Person Named.

[96] The Person Named submitted a very different meeting occurred. It dealt with concerns around the Applicant's performance, and took place much earlier, before the finger injury.

[97] On her evidence, the conversation was necessary because multiple staff members had raised concerns about working with the Applicant including issues of poor sterilisation and procedural techniques leading to concern about patient safety. Other complaints about work included the Applicant disappearing at important times and performing unnecessary tasks such getting tea and coffee when she was required for procedures.

[98] The Person Named submitted she raised these issues to give feedback and guidance, and did so not by berating the Applicant but in a friendly way. She also raised an issue of the Applicant's swearing. She denies she spoke to Dr Crossin about the other nurse, deposing she worked at different times from that doctor. Dr Crossin however confirmed the request for information had been made.

[99] The performance discussion clearly did not go well and the Applicant began to cry.

[100] The Person Named admitted at the conclusion of the performance meeting, she raised the matter of the other nurse's absence so as to lighten the mood and relieve the Applicant's upset. She denied the conversation in terms stated by the Applicant.

Conclusion on Angio Meeting

[101] There is conflicting evidence and recollection about what occurred in this conversation and when the meeting took place.

[102] There does appear some commonality that the meeting concerned the Applicant's work conduct, even if the characterisation is divergent: professionally raising complaints and concerns as opposed to making judgemental statements.

[103] It is apparent the Applicant left the meeting upset, and spoke to Dr Fenwick about feeling abused, though not, apparently, about the allegedly unprofessional conduct of inquiring about another employee's personal medical concerns.

[104] Given the Applicant contends the meeting was focused on the other staff member, it seems unlikely she would not raise this with Dr Fenwick, even if indirectly. Rather the Applicant's own evidence was that she focussed on how she felt she was treated. Additionally, the reference to work ethic is strong evidence that performance issues were at least raised in that meeting.

[105] I conclude as follows:

- performance issues were raised with the Applicant at the meeting in the Angio Room and were not welcomed by the Applicant;
- she was upset at these issues being raised and the wording used by the Person Named, at least towards the end of the meeting, and relayed this concern to Dr Fenwick;
- issues about the other nurse were raised at the meeting, but the evidence does not establish clearly what was discussed except that enquiries had also been made of Dr Crossin by the Person Named; and
- that aspect of the conversation was not mentioned to Dr Fenwick.

[106] I conclude on balance that the meeting was primarily about performance, raised in an informal setting. In the circumstances, despite the upset, the poorly chosen language, and other content, the discussion was reasonable management action.

Was the reasonable management action conducted in a reasonable way?

[107] This performance meeting was clearly not best practice. It is impossible on the evidence to know exactly what was said or even when it took place. At the least, and accepting the comments about work focus, providing tea and coffee, and taking the nursing back into the dark ages, what was said could have been better put. It was not a preferable course of action in raising performance and conduct issues.

[108] The task of this Commission is to objectively assess what happened, and whether it was done reasonably, not whether it could have been done more reasonably or differently.¹⁵ There were valid management concerns motivating the conversation. They appear to have been ventilated in a suboptimal way, but that does not mean the management action was unreasonable.¹⁶

[109] I conclude that while this meeting was not conducted in the best possible way, it raised performance issues that were appropriate to be raised in the circumstances.

¹⁵ *Mac v Bank of Queensland Limited and Others* [2015] FWC 774, at [91].

¹⁶ cf *Ferguson and Commonwealth Bank of Australia* [2012] AATA 718.

Conflicting evidence

[110] One particular aspect of the conflicting evidence about this meeting deserves mention, namely whether the Person Named sought information from Dr Crossin about the other nurse, a matter which she denied in her evidence.

[111] Under cross-examination, Dr Crossin confirmed that the Person Named had enquired about that person's health and that she had refused to provide the information.

[112] The Person Named deposed that she did not ask Dr Crossin for the information because she did not work when Dr Crossin was on, so she would not have spoken to her.

[113] On this point I prefer the evidence of Dr Crossin who had no reason to be other than truthful. That the Person Named, a registered nurse, would ask a doctor for personal medical information, and to deny that in evidence, is a matter that should be directly addressed with the Person Named by the Employer.

Conduct after the Angio Room meeting

[114] The Person Named admitted that, given the Applicant was upset after the meeting, she did 'give her some space'. She denied, however, not acknowledging her.

[115] The Applicant also suggested that after the meeting she received communication about her position from other staff members, for example Lyn the head nurse. At times she felt humiliated by the lack of communication from the Person Named and the organisation generally as she was required to move to various locations.

[116] The Person Named submitted it was appropriate that others communicate with the Applicant including the head nurse and HR.

[117] Generally, this response from the Person Named is orthodox and I conclude that the conduct was explicable including that directions for work were given sometimes by another head nurse.

[118] The lack of communication by HR is dealt with below. Their role should have been elevated at this point to assist the Applicant as she was required to move to various locations. I conclude in this regard that the support given was inadequate.

[119] Other allegations made by the Applicant about 'work shaming' in front of patients and staff are, in the main, mere assertions on the Applicant's material. Save for two matters below (smoking; derogatory comments), the alleged 'work shaming' is not sufficiently detailed to be considered here.

The smoking allegation

[120] The Applicant complained of being humiliated in front of patients about being a smoker. The humiliation was denied by the Person Named.

[121] The Applicant called Dr Daunt who, the Applicant said, had asked to speak with her after the smoking conversation and he apologised. The Applicant said she felt humiliated at this conversation concerning her personal habits.

[122] Dr Daunt's evidence was that he had no recollection of this conversation whatsoever. I accept a witness may forget particular conversations, but it seems this was no ordinary workplace exchange, and is indeed elevated by the Applicant beyond the ordinary: attitudes to her smoking is one of her key allegations.

[123] The Applicant says Dr Daunt specifically asked to speak with her and was 'apologetic for being involved in the conversation'. This plainly elevates the conversation out of the ordinary: on the Applicant's telling, Dr Daunt both asked to speak with the Applicant and apologised for having to have the conversation. It is reasonable to conclude that Dr Daunt would have remembered if he had done so, yet he does not recall it. It may be there was a conversation between the Applicant and Dr Daunt, but I do not accept his participation was as described by the Applicant.

Derogatory comments made to Ms Daly

[124] After final submissions in this matter, the Applicant sought to file a further statement from her witness Ms Daly.

[125] The statement from Ms Daly alleged that she had had a conversation with the Person Named and during this conversation the Person Named had made personal and pejorative comments about the Applicant.

[126] I did not allow this statement into evidence on the basis it was made after the final submissions and in response to the Respondent's final submissions.

[127] While ultimately the statement was not in evidence, on the version provided by Ms Daly, (which was less coloured than the version of the conversation suggested by the Applicant) while bordering on unreasonable, as a one-off pejorative comment does not fall within the scope of bullying behaviour.

2. Light duties; relocation to other practices etc

[128] The Applicant asserted a refusal to provide light duties consistent with medical requirements; lack of consultation about her relocation to the other workplaces (the Mater, QE2); limited or no response to concerns about the changes to location and potentially different work to be done at the new locations; and complaints being ignored or dismissed by HR.

Timeline of Events

It is relevant to not here the following timeline of events:

- **2 May 2018** Applicant hurts her finger away from work.
- **3 May 2018** Applicant tells Person Named of the injury; Applicant submits she is dismissive of the injury; Applicant seeks advice from Dr Fenwick; attends QE2 hospital and receives medical treatment which includes a splint which must be left on for 6 to 8 weeks with restricted duties.

- **4 May 2018** the Applicant notifies HR that she could do light duties.
- **5 May 2018** Person Named indicates that certain tasks cannot be done by Applicant and Person Named would “cover those”; Applicant thanks Person Named for reorganising things.
- **16 May 2018** re-injures hand at work.
- **17-18 May** injury reviewed at QE2; Person Named advised the Applicant to stay at QE2 after her appointment on 18 May; Applicant agrees.
- In a text, the Person Named writes that she is “very confused if the Applicant was prepared to come back to Greenslopes to work but cannot stay at QE2 with Anna.” The Person Named goes on to say in the same text “I assume then that you will need to be off completely until your finger heals. I will contact HR and let them know.”
- **21 May 2018** the Applicant was prepared to go back to Greenslopes; but x-rays which confirm she has reinjured her finger, requiring her to restart rehabilitation. The Applicant indicated the tasks at QE2 were “in Angio”, which the Applicant believes she could perform.
- The Applicant indicated that the Person Named’s decision to contact HR was “possibly presumptuous but necessary.”¹⁷ The Applicant wrote that she would contact HR to provide more information and that “CT has not been light duties for me and in hindsight should have taken the time off to have my finger heal properly”.
- The Person Named responded that that was fine and that “obviously you weren’t up to working after your injury; that that it’s obviously impossible for us to offer you light duties”. The Person Named then indicated that she would wait until she hears back from HR.
- **22 May 2018** Applicant requested Person Named to do her timesheets and thanked her for doing so.

Clearance to return to work

- **17 July 2018** Applicant notified Person Named she is clear to start work on 24 July; Person Named replied that more staff had been hired and the Mater branch is short and that she can begin there next week and to follow up with HR.
- **18-20 July 2018** Applicant phones HR but gets no answer.
- **24 July 2018** HR calls back and notifies the Applicant to start in one hour at the Mater; Applicant has no knowledge of where she is going, where to park, or who to see when she gets there.
- **25 July 2018** Applicant advised there was no position at the Mater anymore and was to go to “Ultrasound” for three weeks and then to QE2 for eight weeks.
- **13 August 2018** Applicant starts at QE2.
- **23 October 2018** Applicant called to speak to HR and clinical operations staff following a complaint from a doctor about safety and procedures undertaken by the Applicant. She met and training was offered to her; the Applicant raised the issue of the Person Named bullying her. HR did not respond to her bullying complaint but focussed on her training needs.

¹⁷ Transcript at PN191-193.

Light Duties

[129] The Applicant submitted that she was never shown any consideration for her injury at work even though she was assured light duties by the Person Named.¹⁸

[130] A text message from the Person Named sent to the Applicant sometime between 3 and 5 May 2018 states:

“Hi Anne. Hope your finger is being sorted... If you are up to it just come in when you’re able to. Iris”

[131] Initially, the text messages from the Person Named indicate that light duties would be forthcoming. However, on 16 May 2018 the Applicant reinjured her hand at work and, on her evidence had to start her treatment again.

[132] By this point the Applicant was working at QE2. Her evidence is that light duties did not happen.

[133] I have concluded by this stage, any failure to offer light duties was a failure of HR to properly support the Applicant and could not amount to bullying by the Person Named who had properly referred management of the Applicant’s injury to HR.

[134] This is because by about 16 May 2018, both the Applicant and the Person Named agree that it was necessary for the matter to go to HR: the Applicant replied to the Person Named suggestion of referral to HR as “presumptuous but necessary”.

[135] The referral to HR of an employee whose continuing work required special measures certainly seems appropriate.

[136] Unfortunately, HR did not take adequate steps to ensure light duties. There was no evidence of a plan for injury management for this employee or of workplans for the various locations she was required to work in. Unsurprisingly, she declares with hindsight she should have taken time off for her finger to heal properly.

Return to work

[137] The Applicant raised issues about her return to work including whether the Person Named hired more staff, leaving no position for her; and a lack of advice, support and training in assuming duties at various clinics.

[138] The Applicant raised return to work in cross-examining Ms Murphy:

“So my full time position at Greenslopes wasn't terminated?---No, no.

So the response that Iris has given that whilst I was away for seven or eight weeks that they now had employed full time staff and I wouldn't be allowed to work there anymore?---I don't know what relevance I can give to - - -

¹⁸ Applicant’s Submissions filed 26 July 2019, at page 1.

...

MS PILBROW: Well, is it HR's job to relieve me or give me more information about my position, about my job if I was to move, or if it was to be terminated, or?---Yes, there should be, like there's a clause in your contract for example, where you can - I guess the expectation is that you can - I don't know on the specific wording, but are required to work at multiple sites. If you - - - (emphasis added)

Sorry, that wasn't the question. The question was, was it HR's position to give me notice of my change of position?---Yes.

And you didn't give me any notice of my change of position?---I can't comment on that. I think there was some sort of notice, whether it was sufficient or not, that wasn't - - - So, my leave for eight weeks was justified in hiring more staff? That eight week break was too much to keep my position open?---Sorry?

Why was my position at Greenslopes terminated?---I think we've already gone over that - - - Because you found new staff.

THE COMMISSIONER: I don't know whether you have answered that question Ms Murphy. I think it's a - Ms Pilbrow wants to know why her position was terminated. If you don't know the answer, you can so say. But if you do know the answer, then you should answer that question. It's my recollection and Mr Melbourne, correct me if I'm wrong, but I don't think that question has been answered.

MR MELBOURNE: That's correct.

THE WITNESS: I think maybe it's the use of terminated. My association with that is that the role itself, so I think from what I recall, you were transferred from Greenslopes to the Mater. Whether your position was still open at Greenslopes, I don't know that I'm in a position to say whether that was still there or not. I think that if an employee is asked to transfer from Greenslopes to the Mater, and they are really unhappy about it, usually that's an opportunity then to discuss it.”¹⁹

[139] This exchange is important. It seems without the Applicant’s knowledge on her return to work it was proposed that she be relocated from Greenslopes to the Mater.

[140] This is in the context of the Employer identifying the Applicant as adequate²⁰ but with some reservations about her capacity to work, especially at the ‘busy’²¹ Greenslopes clinic.

[141] The Applicant identified, properly in my view, that if she was to be relocated on her return to work it is up to HR to give her information about the job she was required to do. It seems HR did not do so.

¹⁹ Transcript at PN597-608.

²⁰ Statement of Dr Fenwick.

²¹ Transcript at PN990-992.

[142] As Ms Murphy says, if an employee is required to move but is unhappy about the proposed move, there is an opportunity to discuss it.

[143] From July 17 onwards, the Applicant was sent to various locations with, it seems, limited or no support.

[144] Queensland X-Ray is entitled by the employment contract to move the Applicant from Greenslopes to the Mater. It seems the way the proposed move was implemented was not, however, acceptable and the opportunity for discussion did not arise. Even now, the Applicant has concerns about the proposed move to the Mater.

[145] The lack of support and consultation cannot, however, be characterised as bullying by the Person Named. She had properly called HR in. The evidence is that other managers agreed, for legitimate reasons, that an alternative to Greenslopes was preferable.

Lack of advice, support and training re transfer

[146] It seems that Queensland X-Ray's HR team had a significant turnover. The Applicant says that she had to deal with eight different HR advisors. This, she characterised as "mobbing". While mobbing can clearly be bullying²² the circumstances described cannot be so characterised.

[147] Staff turnover in HR may not be a good thing, and may reflect poorly on the Employer, but it would explain the lack of continuity of the Applicant's case management and possibly also the failure to give advice and support.

[148] The Applicant also complains that she raised bullying with Mr Mayo. Mr Mayo did not give evidence and Queensland X-Ray says there were no written complaints. But it is likely the Applicant raised these concerns orally with Mr Mayo. She certainly did raise issues in the meeting about training after the doctor's complaint in October 2018.

[149] Once the matter was formally raised by way of this Application, in November 2018, the Employer began a formal process to review the allegations. It would have been preferable to deal with it far earlier, and certainly by the time the Applicant raised her distress with Dr Fenwick after the meeting in the Angio Room.

[150] I conclude that there was intent initially to assign light duties but certainly after the reinjury at work, effective management did not take place. This should have been undertaken by HR and the failure no doubt contributed to the Applicant's concerns. It seems clear there was a lack of consultation about relocation and very limited response to her concerns and the potentially different work to be done. Her complaints were not adequately recognised or dealt with by HR.

[151] I conclude the Employer's HR practices fell short of what is required to deal with challenging circumstances.

²² *Amie Mac v Bank of Queensland Limited* [2015] FWC 774.

[152] Relocation, of itself, is not bullying when done for legitimate purposes even if it must be communicated and explained. I accept Dr Fenwick's evidence that the nature of the Greenslopes practice meant perhaps it was not the best placement for the Applicant. Properly explained, this is a reasonable reason for relocation.

[153] I conclude Queensland X-Ray's HR could have done more to ensure that the Applicant had duties consistent with her medical requirements. HR should have consulted the Applicant about her work locations and responded to her concerns about proposed relocation; and further, *reasons* for the relocation should have been provided to the Applicant.

[154] Similarly, her likely complaints on bullying to Mr Mayo and HR more generally should have been followed up.

[155] It may have been that this significant failure by HR to assist the Applicant potentially reached the required level of unreasonableness in the bullying application. However, no such claim has been brought by the Applicant against any persons from HR.

[156] Additionally, in anti-bullying matters allegations must concern the conduct of a natural persons: the legislation does not suggest for example that bullying at work can be engaged in by a corporation.

[157] I therefore conclude that the Applicant's claim that the Person Named bullied her in regard to provision of light duties is not established.

[158] Relocation was an option open, but the necessary support around that relocation should have been provided by HR *and was not*.

[159] In these tasks, HR fell well short of what was required. But it is not bullying within the meaning of the Act and this application.

3. Unreasonable enquiries

[160] The Applicant asserted the Person Named made unreasonable enquiries about her hours worked and entitlements. Throughout the relevant period the Person Named remained responsible for the Applicant.

[161] A supervisor is entitled (and possibly obliged) to check about an employee for whom she is responsible including timesheets and to deal with matters such as allowances and entitlements.

[162] I conclude that these were not unreasonable enquiries.

4. Training and opportunities

[163] The Applicant made two separate complaints in relation to training and opportunities. The first is the Person Named did not offer her the chance to work in Angio when others were given that chance.

[164] The Person Named agreed with this, but stated the Applicant did not work at the level where she could work unsupervised in angiography.

[165] The Applicant may disagree with that conclusion, but that does mean she was denied a legitimate opportunity. On the limited evidence before the tribunal, the complaint cannot be sustained.

[166] The Applicant also complained generally about lack of training when she was required to relocate. It can be difficult moving to a new workplace, and a degree of support is often necessary to ensure high standards and proper performance. Once HR had taken over the role of managing the Applicant's relocation, it would have been reasonable to provide appropriate training. I accept HR did not do so and generally the Applicant was left without specific training for the new location, though there is evidence of HR seeking to assist by October 2018.²³

Conclusions

[167] It was uncontested that the prerequisites to the matter being determined by the Commission were in place.²⁴

[168] I am satisfied that the Applicant genuinely believes she has been bullied at work. However, those beliefs must be reasonable in the sense that they are able to be supported or justified on an objective basis by evidence.²⁵

[169] It is difficult to reach firm conclusions about certain aspects of the evidence: the Applicant and Person Named have divergent versions of key events. Perhaps recall was coloured by animus and hurt, and an understandable desire to present their cases well. However, neither the Applicant nor the Person Named was a compelling witness, each with inconsistent testimony or witnesses who disagreed with their propositions.

[170] Regardless, there is enough before the Commission to draw conclusions about the matters necessary to be determined: the elements of bullying, the statutory pre-requisites to an order, and material to inform exercise of discretion.

[171] The Applicant must show that there has been repeated unreasonable conduct by the Person Named towards her, where that behaviour creates a risk to health and safety. The evidence does not support the conclusions on an objective basis. The Application therefore must fail.

[172] But even if the evidence had supported a conclusion of bullying, this is a case where I would not exercise my discretion to make an order as requested.

[173] Once the Application was filed, the Employer undertook an investigation. While the investigation itself was of limited value it did find some practices that require improvement.

²³ A recording of a meeting held between HR and the Applicant reveals a desire to provide appropriate training to the Applicant by HR.

²⁴ See s.789FD of the Act; and *Ms SB* [2014] FWC 2104.

²⁵ *Edwards v E&S Trading Co (Discounts) Pty Ltd* [2016] FWC 8223.

[174] Further, before the hearing, the Employer made an offer of return to employment. This offer can be taken into consideration under s.789FF(1)(b)(ii) for assessing the risk that the worker will continue to be bullied at work.

[175] It is clear from this offer that the Applicant remains a valued member of Queensland X-Ray staff.

[176] As indicated in the beginning of this decision, the Employer seeks to rely on the Tribunal's discretion.

[177] The offer from Queensland X-Ray was updated with the acquisition by the practice of another facility at Mater public.

[178] The offer is for the Applicant to return to work at the newly acquired practice in a way that would remove any need for the Applicant to have contact with the Person Named.

[179] This offer, made before hearing, was at that time rejected.

[180] It would be in all parties' best interests for this offer to be remade and I make that recommendation formally below.

[181] Additionally, as I have foreshadowed, the language of the Person Named, at least once in the hearing, was unnecessarily sharp. While I have not made any orders pursuant to this Application, there is evidence of interactions between the two employees that falls short of what should be expected of a supervisor and subordinate.

[182] Further training in communicating respectfully and maintaining appropriate boundaries would be appropriate for the Person Named, and I recommend accordingly.

[183] Finally, in relation to the offer, the Applicant raised concerns about potential bullying at other workplaces by other persons. As indicated during the hearing, a senior person raising concerns about the Applicant's performance is not of itself bullying even if it is difficult for the Applicant to accept.²⁶ It seems objectively she may need guidance and counselling in terms of her performance wherever she returns to work.

[184] Should the Applicant reasonably form the view that she is experiencing bullying at a different workplace, she is entitled to raise that appropriately whether with a supervisor, HR, senior management or by fresh application to the Commission. For the sake of clarity, on the material before the Commission, nothing suggests the Applicant is likely to be bullied at the proposed workplace.

[185] Indeed, the careful proposal detailed in the supplementary statement of Ms Murphy, who is a HR advisor at Queensland X-Ray, and who now has a clear understanding of the challenges facing the Applicant, in my view provides extra protection for her.

[186] In this regard I note the following final dot point in the proposal:

²⁶ see for example Transcript of Final Submissions at PN84.

“I will oversee and monitor the situation to ensure there is no need for [the Applicant] to have contact with the [the Person Named]. This will be made easier because of the fact that the Mater Hospital Brisbane is close to our head office where I am located.”

[187] I add an additional observation. It is clear from Ms Murphy’s evidence that a significant review of HR has occurred. This matter shows the difficulties faced by employees such as the Applicant when HR is not appropriately and actively involved in matters such as return to work, and supporting them generally.

[188] While the Applicant has not established her bullying claim, she has exposed severe limitations in the role that HR provided at this company at the relevant time. It would be expected that going forward HR can properly support its employees whether in return to work or relocation.

Finding

[189] The evidence does not support a finding that Ms Pilbrow has been bullied at work, within the meaning of the Act.

[190] An Order dismissing the Application is published at the same time as this decision.

Recommendations

I make the following Recommendations:

1. That the company remake its offer to Ms Anne Pilbrow to begin work at the Mater public hospital practice once the Applicant is medically fit to return to work.
2. That the Applicant be given the support and training to ensure she has the skills necessary for her role at this new workplace. The support and training should be overseen by Ms Murphy.
3. Ms Iris Edmondson should participate in further training to ensure she is better able to effectively communicate with employees, including training about professional boundaries including enquiring about colleagues.
4. Queensland X-Ray build on the work already undertaken as part of the investigation to ensure its HR department properly supports employees returning to work after injury.



COMMISSIONER

Appearances:

Ms Pilbrow appeared on her own behalf.

Mr Melbourne, Solicitor, appeared on behalf of the Employer and the Person Named.

Hearing details:

29 January &
21 April.
2020.
Brisbane.

Printed by authority of the Commonwealth Government Printer

<PR719269>