



## DECISION

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

**Mr Shane Atkins**  
(AB2019/289)

COMMISSIONER MCKINNON

MELBOURNE, 20 JANUARY 2020

*Allegations of workplace bullying.*

[1] For the past 19 years, Shane Atkins has worked as a Ranger for Parks Victoria. On 27 January 2015, Darren Hill was appointed to the newly created role of Ranger Team Leader and became Mr Atkins’ manager. The relationship between the two men has not been easy. Mr Atkins suffered an aggravation of his workplace injury on or around 28 May 2015, which saw him largely confined to office work after many years as a Ranger in the field. Since then, he has had difficulty meeting the performance standards of his new office-based role and it has been Mr Hill’s task to manage his performance. This led to the initiation of a performance improvement plan in September 2015.

[2] In February 2016, Mr Atkins made the first of what would become several complaints about Mr Hill’s conduct toward himself and other employees. For the most part, these complaints have been investigated but not substantiated. Concerningly, both Mr Atkins and Mr Hill say their mental health has declined over the past three years as a result of their deteriorating relationship.

[3] Mr Atkins now asks the Commission to decide if he has been bullied at work in the context of what he describes as an “epidemic” of bullying of staff within Parks Victoria. In essence, he seeks to restrain Mr Hill from managing any employees in the future – a function described by Mr Hill as his “predominant” role at Parks Victoria.

[4] A worker is “bullied at work” if a person or group repeatedly behaves unreasonably towards the worker (or a group of workers of which they are a member) while they are at work in a constitutionally-covered business, and the behaviour creates a risk to health and safety.<sup>1</sup> Bullying at work does not include reasonable management action carried out in a reasonable manner.

[5] If a worker has been bullied at work and there is a risk that the bullying behaviour will continue, orders can be made to prevent its recurrence. The scope of the discretion to make orders of this kind is broad.

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<sup>1</sup> *Fair Work Act 2009* (Cth), s.789FD.

[6] There is no dispute before me about whether Parks Victoria is a constitutionally-covered business. Each party has submitted to the jurisdiction. The questions are these:

1. Has Mr Atkins been bullied at work?
2. If so, is there a risk that the bullying will continue?

[7] For the reasons that follow, the answer to each of these questions is 'No'.

### **Alleged bullying behaviour**

[8] Mr Atkins alleges a pattern of bullying by Parks Victoria against him, as follows:

1. Threat of disciplinary action in a staff meeting on 21 April 2016 related to a direction to take meeting minutes;
2. A requirement that he complete a sign project or "fail" his end of year review;
3. In February and March 2017, micro-management of the Green Army project, including rude behaviour on 2 November 2016 and 24 February 2017; a direction to use unsafe equipment and the denial of access to a post hole digger which management later used, "setting [him] up to fail";
4. Over 2017 – 2018, failing to ensure that a third party was present at all meetings between Mr Atkins and Mr Hill, and not acceding to Mr Atkins preferred choice of third party;
5. Taking him to task on 16 September 2018 about greeting visitors bringing cats, dogs or firearms into park areas;
6. Management inaction or lack of investigation of Mr Atkins' complaints, and procedural failures in relation to those complaints, including failure to interview all relevant persons, failure to provide full copies of requested reports to Mr Atkins, and failure to consider a full copy of the Parks Victoria "health check report";
7. Alleged racial and/or sexual discrimination including when Ms Dixon described Mr Atkins as "intimidating" and a "big threatening scary man"; and
8. In 2018, making a fellow employee, Kirsten Phelan, cry.

[9] Witness statements in support of Mr Atkins' application were given by Mr Atkins as well as Steve Birkett, George McMahon, David Pattison and Pam Pattison. The latter statements are of a general nature only and do not engage directly with any of the alleged bullying incidents. I have given them no weight in my assessment of the merits of the application:

1. Steve Birkett's statement describes his experience working with Mr Hill in most disparaging terms, over a period that long precedes the events that now

arise for consideration. The prejudicial nature of this evidence heavily outweighs any probative value it might otherwise be said to have.

2. George McMahon is a former employee of Parks Victoria. His statement attests to his discontent at how Parks Victoria was managed at the time he retired in January 2019 after 17 years' service. It refers to, but does not disclose, information that "may be relevant" to Mr Atkins' case, which he would only be prepared to present confidentially if it was "not accessible to third parties" – a restriction I take to mean so that the information is given only to me and not made available to Parks Victoria or Mr Hill. However, my role in this proceeding is not inquisitorial and the obvious potential for denial of procedural fairness is reason enough not to accede to the approach suggested by Mr McMahon. As it stands, his statement is of no probative value on the questions that arise for determination in this case.
3. David and Pam Pattison appear to be concerned citizens and lay advocates who are dissatisfied with Parks Victoria over its management of the Grand Strzelecki Track and the Tarra Bulga National Park. Their statements evince no direct knowledge of the alleged bullying incidents relied on by Mr Atkins in this proceeding. They are neither relevant nor probative.

[10] The three witnesses whose evidence has probative value in this matter are Mr Atkins, Mr Hill and Annalise Farquhar, Manager – People Services for Parks Victoria, each of whom have direct knowledge of the matters in dispute. It is from their evidence that I make the findings below.

### **Has Mr Atkins been bullied at work?**

#### Direction to complete a sign project – November 2015 to February 2016

[11] Mr Atkins was tasked with developing a signage plan for certain parks and reserves. He says that Mr Hill told him that if he did not finish the project, he would "fail" his end of year review. Mr Atkins knew of other employees who had not met their objectives and passed their end of year review. Mr Hill says the conversation occurred in late February 2016 as part of the mid-year review, and that the task was initiated in mid-November 2015.

[12] As recently as February 2019, Mr Atkins characterised the exchange as a threat. In cross-examination in October 2019, he accepted that Mr Hill's comment was not a threat and that "he was being clear so I knew what was required" but that the tone used by Mr Hill was demanding, rather than asking. In light of this concession, I am not satisfied that Mr Atkins was threatened by Mr Hill in relation to the signage plan.

[13] As I have earlier noted, at the time of the exchange, Mr Atkins' performance was the subject of a performance improvement plan after Mr Atkins had been assessed as "partially meets" expectations in his mid- and end-of-year reviews in January and July 2015. Mr Hill had made a commitment in those reviews to "making clear the tasks and expectations required" of Mr Atkins to assist him.

[14] In the circumstances, being clear in the subsequent mid-year review that completing the signage project was mandatory and that failure to do so may have consequences for Mr

Atkins' end of year review was reasonable. It put Mr Atkins clearly on notice of what he was expected to do. This was reasonable management action.

[15] I accept that the tone used by Mr Hill was demanding, rather than asking. Mr Hill has previously acknowledged that he can at times “be blunt”. But the fact is that what he was communicating to Mr Atkins was not a request – it was an important measure of his performance. The evidence does not establish that the direction to complete the signage project was communicated to Mr Atkins in an unreasonable manner in the circumstances. It was not bullying at work.

#### Direction to take meeting minutes – 21 April 2016

[16] At a staff meeting on 21 April 2016 to discuss occupational health and safety workgroups, a request from the District Work Group for alternate chairpersons and minute-taking responsibilities among the group was discussed, with the purpose of supporting greater employee participation in meetings. Employees were asked to take turns taking minutes. Mr Atkins was not happy with the lack of prior consultation and felt it was not his job to take minutes. He asked Mr Hill what would happen if he refused. Mr Hill replied in words to the effect that it “would be a disciplinary action issue”. That was the extent of the exchange. There was no resulting disciplinary action against Mr Atkins about either taking, or not taking, minutes. The issue was dropped after the Union became involved.

[17] The instruction to assist with minute-taking was not, as Mr Atkins considered, completely outside the scope of his job description. The Ranger Position Description speaks to active participation as part of a team and providing support to team leaders and team members. It contemplates the performance of necessary duties as required, as well as leading and supporting compliance through internal controls, including policies, procedures and delegations to manage how decisions and actions are undertaken. The letter of offer of employment given to Mr Atkins on 14 August 2000 also makes clear the requirement to perform duties as set out in the Position Description as well as “other duties” which may be required from time to time. In my view, the instruction was plainly within the bounds of the employment relationship. It was both reasonable and lawful. As long as Mr Atkins was in a position to comply (and I am not aware that there were any practical reasons preventing Mr Atkins from cooperating with the instruction), it was an instruction Mr Hill was entitled to give. His response to the question asked by Mr Atkins was plainly open because disciplinary action was a potential consequence of the path Mr Atkins had foreshadowed.

[18] I am not satisfied that the response given by Mr Hill was delivered in an unreasonable manner. It occurred in the presence of others because it was in that context that the challenge from Mr Atkins arose. It was reasonable management action carried out in a reasonable manner. It was not bullying at work.

#### Micro-management of the Green Army project – November 2016 to March 2017

[19] Mr Hill arranged for the Green Army employment program established by the Department of the Environment and Energy to assist with Parks Victoria projects including at the Tarago Reservoir, replacing car park bollards. Mr Atkins was responsible for planning and delivering the project.

[20] Mr Hill expected Mr Atkins to support the Green Army at least in the induction phase of the project, by setting the standard of work and explaining how Parks Victoria operates. Instead, he says Mr Atkins refused to manage the Green Army activities.

[21] In a conversation with Mr Hill over the radio on 2 November 2016, Mr Atkins says he told him that the Green Army were under trained and not up to the job. He said “I am not there to be their caretaker, I have other things I need to be doing”. Mr Hill replied “I am not their caretaker either”. Mr Atkins says the tone used by Mr Hill in this radio exchange was “direct, rude and arrogant”. Diary notes provide context for the exchange, which occurred after Mr Hill asked Mr Atkins if he had equipment ready for the Green Army, and Mr Atkins said no, that was Mr Hill’s job. The notes illustrate what is apparent from this exchange - that Mr Atkins was refusing to cooperate with Mr Hill in relation to the Green Army in a way that was openly defiant. It is unsurprising that he was met with a short response from Mr Hill.

[22] Mr Atkins says that he did provide instruction to the Green Army, but that he refused to manage some of their activities including working with a double handed post hole digger he felt was unsafe to use. Mr Atkins wanted to use a motorised digger and wanted to get a contractor in to dig the holes. He says Mr Hill refused his request as it was not within budget - a claim Mr Hill denies. A compromise was reached in consultation with Parks Victoria’s Regional Safety Coordinator and a motorised single man post hole digger was used instead. Still, according to his statement of 16 February 2019, he eventually “walked away” from the project because he “didn’t want to do it”. Under cross-examination, Mr Atkins agreed he was not told by Mr Hill which equipment to use for the project and that he was able to arrange the equipment himself. He had a budget that he had to stay within to get the job done.

[23] By February 2017, communication and cooperation levels between Mr Hill and Mr Atkins in relation to the Green Army project were poor. Mr Atkins felt Mr Hill was micro-managing him, not letting him run the project the way he wanted. He was taken by surprise on 1 February 2017 when fences were pulled down without first checking with him. On 24 February 2017, while discussing the project, there was a disagreement between them and Mr Atkins says Mr Hill stamped his fingers on the desk, pointing at the paper in front of him. Mr Hill on the other hand felt rebuffed by several attempts to assist Mr Atkins with the project. He described Mr Atkins’ approach as “being obstructive to spite me”.

[24] I infer from the evidence that the project was due to be completed in March 2017 and that at least some of the project funds relied on work being done by Green Army participants. As the timeline approached, there was a discussion between Mr Hill and Acting District Manager Dean Sutton. They were concerned about progress on the project, including that bollards funded by the Green Army had not yet been ordered.

[25] Mr Hill agrees that he intervened in the project on 8 March 2017 with the assistance of, and at the direction of, Mr Sutton. They ordered the bollards and hired a Dingo with auger attachment to complete the project. This upset Mr Atkins, who saw the hiring of the Dingo as confirmation that he had been ‘set up to fail’ by the choice of equipment given to him in comparison to Mr Hill.

[26] I am not satisfied that Mr Atkins was directed to use unsafe equipment on the project. He was right to raise his safety concerns about use of the double handed post hold diggers. The concerns were acted upon by Parks Victoria and an alternative agreed method of work was implemented.

[27] I am also satisfied that Mr Hill's conduct in relation to the Green Army project was reasonable management action and that it was carried out in a reasonable manner in the circumstances. Mr Hill was focused on delivering the project with the use of Green Army funds, while also trying to manage the lack of cooperation from Mr Atkins. He was not setting Mr Atkins up to fail. Mr Atkins had a number of months to complete the project but allowed his discontent with Mr Hill's involvement and that of the Green Army to frustrate his performance. Ultimately, it was not open to Mr Atkins to simply walk away. When he did, and in consultation with the Acting District Manager, Mr Hill intervened to ensure the project's timely completion.

#### Conduct of meetings between Mr Atkins and Mr Hill

[28] For approximately three months in 2017, a note taker was arranged to attend meetings between Mr Hill and Mr Atkins. The employee nominated by Parks Victoria to assist in this regard was Tara Donegan, District Business Support Officer.

[29] Mr Atkins says the arrangement was put in place by agreement because he asked for it "after I raised my complaint in 2017", because Mr Hill was aggressive toward him and stamped his finger while talking. He seeks to characterise the arrangement as one Mr Hill was instructed to follow by higher levels of management "to stop past bullying" brought to Parks Victoria's attention by Mr Atkins. The evidence does not support this latter explanation. From what I can gather, no bullying allegation against Mr Hill had yet been substantiated.

[30] Mr Hill says the purpose of the arrangement was twofold:

1. To document action lists for Mr Atkins so that he had a good record of tasks to complete; and
2. To support Mr Hill in dealing with Mr Atkins who was regularly aggressive in his interactions with Mr Hill.

[31] I prefer this explanation but find that purpose of the arrangement was also to support Mr Atkins in his dealings with Mr Hill.

[32] Mr Atkins says the meetings helped because Mr Hill was polite to him in the presence of Ms Donegan. However, the arrangement fell away for a while after it became difficult to schedule meetings with all three persons. An email from Bridget Grant, Chief Area Ranger (who was also Mr Hill's manager) to Mr Atkins on 31 May 2018 also suggests Mr Atkins became unhappy with Ms Donegan's involvement and was not prepared to continue with the arrangement at that time. It later recommenced until at least December 2018.

[33] What Mr Atkins appears most concerned about in relation to the arrangement is that Ms Grant was not the person nominated to be present at the meetings. He asked for Ms Grant because she could "keep Darren under control". This led to a separate complaint about Mr Atkins being 'lied to' when told that people at Ms Grant's level could not attend such meetings. As time went by, Mr Atkins also lost trust for Ms Donegan: in his words, "it is like she is a little spy".

[34] The request for Ms Grant to attend all meetings between Mr Atkins and his manager was not a reasonable request. Its purpose was to undermine the authority of Mr Hill in his

dealings with Mr Atkins. As Area Chief Ranger, it is extremely unlikely that Ms Grant would have had the capacity to perform her role while also acting as note taker for every interaction between two of her subordinates, assuming Parks Victoria could justify allocating such resources to note-taking activities. The activity itself was a sensible short-term solution to support respectful communication between Mr Hill and Mr Atkins and reduce misunderstandings by improving transparency, and as Mr Atkins acknowledged, having Ms Donegan at the meetings “worked”.

[35] The decision to nominate Ms Donegan as note-taker was a reasonable step taken by Parks Victoria to manage a difficult working relationship between Mr Hill and Mr Atkins. It had the positive effect of improving the tone of their interactions. It was reasonable management action carried out in a reasonable manner. I am not satisfied that the failure to ensure a third party was present at all meetings between Mr Atkins and Mr Hill was bullying at work.

Visitor greeting about cats, dogs and firearms in park areas – 16 September 2018

[36] Mr Atkins says he was misinformed and threatened with disciplinary action by Mr Hill about his use of a particular greeting for visitors to Saint Gwinear, a public snow play area. Parks Victoria manages the car park at Saint Gwinear. Its employees provide education and information to park visitors about compliance with park regulations. In addition, trained and authorised officers undertake compliance activities.

[37] Mr Atkins is not authorised to undertake compliance activities for Parks Victoria. In 2017, Mr Hill became concerned that he was greeting park visitors by asking them if they had any cats, dogs or firearms in their vehicles. He conducted a pre-season briefing for the whole team including Mr Atkins. He explained that direct questions relating to park offences were considered compliance activities and that initial contact with park visitors should be welcoming and include the provision of information and options for people observed with animals in their vehicles.

[38] On 16 September 2018, Mr Hill and Mr Atkins were working together at Saint Gwinear. Mr Hill heard Mr Atkins greet a park visitor by saying “do you have any cats, dogs or firearms?”. When they returned to the office, he spoke to Mr Atkins about the greeting and Mr Atkins became agitated, saying “Don’t you tell me what I can and can’t say. I’m allowed to greet people that way.” Mr Hill says he tried to explain that it was the role of authorised officers to assess compliance by park visitors, and that the greeting he had used was bordering on enforcement work that he was not authorised to do. Mr Hill referred to potential disciplinary action. After the discussion broke down, each raised it separately with management – Mr Hill with Ms Grant and Mr Atkins with Ms Helen Dixon, Regional Director of Parks Victoria.

[39] Mr Atkins says asking visitors if they have any cats, dogs or firearms in their vehicle is a standard greeting he was trained to use and has always used. He says Mr Hill gave him “no real reason not to say it” other than he didn’t have the authority to say it. Mr Atkins says he asks the question for educational purposes but also says that if visitors say they have cats, dogs or firearms, he tells them to “turn around and leave”.

[40] The difficulty for Mr Atkins is that in 2017, he was trained by Mr Hill in a different form of greeting and given a genuine reason for the change in approach which was to ensure

compliance with relevant legislation. He may not have agreed with Mr Hill but it was not open to him to ignore his more recent training and the reasons for it.

[41] The conduct of Mr Hill in this regard was both reasonable and lawful management action. It was carried out in a reasonable manner in the circumstances. It was Mr Atkins’ conduct that was unreasonable. Mr Hill’s conduct was not bullying at work.

Procedural failures in relation to complaints

[42] Mr Atkins says that from the Chief Executive Officer to local Traralgon managers, of Parks Victoria have consistently sought to hide bullying under the carpet, stop investigations and blame staff for problems.

[43] There are three elements to this complaint: management inaction or lack of investigation; a failure to interview all relevant persons in investigations; and failure to properly consider or provide a full copy of the health check and investigation reports to Mr Atkins.

*Management inaction or obfuscation*

[44] The history of relevant complaints and responses from Parks Victoria is set out in the table below.

<b>Date</b>	<b>Recipient</b>	<b>Subject Matter</b>	<b>Response Action</b>
22 Feb 2016	Wendy Berick - Support Officer	Concerned about being disciplined for asking for help; warned in his mid-year review that there would be consequences if he failed to meet expectations again	Meeting with Berick after the incident on 21 April 2016 (referred to in subsequent email from Atkins thanking her for the talk).
13 Feb 2017	Roger Fenwick	Green army – disregard for OHS; lack of consultation; micromanagement “paramount to bullying”; staff resourcing	Not apparent
16 Feb 2017	Helen Dixon Regional Director	Relationship with Hill; performance management	Investigation by Dixon; findings issued 29 May 2017
27 June 2017	Helen Dixon	Request for further investigation of Hill for rudeness	Complaint withdrawn 29 June 2017
1 Feb 2018	Helen Dixon	Follow up query re: what is a threat; concerned about “lies”, “being misled”, “manipulated”	5 Feb 2018 response from Dixon and apology for not replying to earlier query; follow up from Dixon on 29 March 2018 (no apparent response)
May 2018	Bridget Grant Area Chief Ranger	Minutes taken by Donegan Adding work to the works scheduler Hill’s behaviour as a bully	Grant responded by email on 31 May 2018 directly on some issues and seeking more information on others. Advised Atkins he could make a formal

		Workload	complaint and he chose not to.
August 2018	Graeme Baxter	Bullying by Hill	Not apparent
26 Oct - 11 Nov 2018	Health Check Process	Provided input alleging crimes of bullying, lying, threats and corruption	Health Check Report prepared and summary presented to employees 21 Dec 2018
7 Nov 2018	Health Check Process; copied to Megan Galbally Manager, People Services	Alleged crimes of bullying, lying, threats and corruption	Galbally called Atkins to discuss
20 Nov 2018	Megan Galbally	Workplace bullying Sex discrimination Lying to staff about policy and procedure Ongoing covering up of complaints	Galbally directed Farquhar to investigate
29 Nov 2018	Annalise Farquhar (then) Workplace Relations Manager	Providing detail of complaints to Galbally	21 Jan 2019: engaged Grange Advisory to undertake external investigation
4 Jan 2019	Senior Executive Team	Workplace bullying East region.  Sought copy of health check report) and raised concern about stalling tactics to prevent disclosure of report	7 Jan 2019: Ian Sargent (Chief Financial Officer) confirmed it would not be provided to protect confidentiality of participants  8 Jan 2019: Meeting with Farquhar to discuss Grange Advisory appointed to undertake investigation of bullying concerns
7 January 2019	Annalise Farquhar	Further discussion of complaints made to Galbally; Atkins requested investigation to interview Atkins, Hill, Dixon and Craig Campbell	21 January 2019: engaged Grange Advisory to undertake external investigation: Report finalised 13 March 2019
15 February 2019	Senior Executive Team	Alleged threatening behaviour by senior management in meeting to discuss Atkins behaviour on 21 Dec 2018 in health check briefing. Proposal to take it to the authorities	Sargent replied on 18 Feb 2019; noted advance notice of meeting and purpose had been provided

[45] As is clear from the history of this matter, Parks Victoria has taken a number of active steps to address complaints and allegations made by Mr Atkins over the three-year period from 2016 to 2019. It carried out internal and external investigations, undertook a “health check” process to understate the wellbeing of its affected employees, offered to provide coaching, mentoring, training and mediation or facilitation for he and Mr Hill as well as gave direct responses to a number of questions asked. In the case of complaints made to Mr

Fenwick and Mr Baxter, what steps, if any, they took to respond to Mr Atkins are not established. If the result was that his complaints went unanswered, in my view those deficiencies have been cured by subsequent investigations undertaken by Parks Victoria into the complaints. In any event, Ms Dixon commenced her investigation into the relationship between Mr Atkins and Mr Hill three days after the complaint made to Mr Fenwick in 2017. The coincidence in timing suggests a possibility that Mr Fenwick may have referred the complaint to Ms Dixon for action.

[46] Overall, I do not agree with Mr Atkins that there has been management inaction in relation to his complaints or that attempts have been made to hide or avoid dealing with his concerns. The result has not been the termination of Mr Hill's employment, which until the hearing of this matter is what the correspondence shows Mr Atkins was plainly seeking. However, that does not mean Parks Victoria failed to act or engaged in obfuscation.

[47] Nor has there been any action to prevent investigation of Mr Atkins' complaints or to blame staff for problems. I have set out above reasons why some of Mr Atkins' conduct over the relevant period might have prompted a disciplinary response. It is never easy to be the subject of a performance management process and for long serving employees, perhaps even more so. However, the actual disciplinary response from Parks Victoria has been largely in the form of informal discussions and guidance on appropriate workplace behaviours and standards as well as ongoing feedback through the established yearly and mid-yearly review process. Training has been provided to assist with computer skills. Mr Atkins may perceive these efforts as a form of blame or deflection of what he considers to be broader managerial deficiencies. However, this ignores his own contribution to the circumstances in which he has found himself.

*Failure to interview all relevant persons*

[48] Mr Atkins sought to have a number of individuals interviewed in relation to his complaints, including George McMahon, Craig Campbell, Steve Beckett, Kirsten Phelan, Pam Patterson and Andy Gillham. In the report provided by Grange Advisory, the investigator explained that the reason for not interviewing some of the nominated individuals was that they "generally did not observe the alleged behaviour". Given that the scope of the investigation was "allegations made by Mr Shane Atkins against his manager, Mr Darren Hill", that seems to me to be a reasonable position to have taken.

[49] The version of the investigation report filed in this matter is heavily redacted. It appears that at least two employees in addition to Mr Atkins were interviewed as part of the investigation although the material before me does not disclose their identity. The result is that I am not in a position to determine whether relevant witnesses were omitted from the investigation process. From the list of witnesses provided by Mr Atkins, Mr McMahon (former employee), Ms Phelan and Mr Campbell appear to be those likely to have at least some direct knowledge of relevant matters.

*Failure to properly consider or provide a full copy of the health check and investigation reports to Mr Atkins.*

[50] Mr Atkins submits that failure to provide him with a full copy of the investigation report requested on 25 March 2019 was a continuation of management's inaction and 'cover up'.

[51] Parks Victoria responded to the request for a copy of the investigation report on the same day that it was made. The response confirmed that a summary of findings would be provided. A meeting was subsequently held with Mr Atkins on 8 April 2019 and Ms Farquhar and Mr Sargent and a follow up telephone call was made to him on 9 April 2019. Mr Atkins was advised that Parks Victoria had accepted all of the recommendations in the report. An offer of facilitation between he and Mr Hill was made and declined.

[52] Mr Atkins is also concerned about Parks Victoria's failure to fully consider or to provide him with a full copy of the "health check report". The reason given by Parks Victoria for its decision not to provide the report was to maintain promised confidentiality of participant input. The evidence does not establish what aspects of the health check report were made available for the information of employees including Mr Atkins and which aspects were withheld. Mr Atkins was told that an action plan would be developed to respond to the Health Check report. What happened after that is not in evidence. My preliminary view is that the position taken by Parks Victoria was reasonable because it was consistent with what employees were told about the health check process before they decided to participate. However, absent more detailed information about what actual information was available to Parks Victoria, in comparison to what was disclosed to employees, I am not in a position to make a definitive finding on this question.

#### Alleged racial and/or sex discrimination

[53] This allegation arises from statements alleged to have been said to Mr Atkins by Ms Dixon, that he was a "big threatening scary man" and one who could be intimidating. The context in which those statements were made is not fully apparent. It was during a conversation giving feedback to Mr Atkins on his performance.

[54] Sex discrimination is a concept defined in, and prohibited by, federal legislation. In summary, it means treating a person less favourably than a person of a different sex because of their sex, or a characteristic appertaining or imputed generally to persons of that sex. It includes imposing or proposing to impose conditions, requirements or practices that will or are likely to have the effect of disadvantaging persons of a particular sex.<sup>2</sup>

[55] In a similar way, racial discrimination is defined as any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.<sup>3</sup> Section 18C of the *Racial Discrimination Act 1975* (Cth) makes it unlawful to publicly engage in offensive behaviour because of race, colour or national or ethnic origin.

[56] The comments made by Ms Dixon were direct, descriptive and most likely confronting for Mr Atkins because they were critical of him. I infer that the comments were made to explain to Mr Atkins how he was perceived by others at work at some time in 2017, for the purpose of encouraging him to modify his behaviour. The words used could have been more carefully chosen but they do not amount to racial or sex discrimination against Mr Atkins.

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<sup>2</sup> *Sex Discrimination Act 1984*, s.5.

<sup>3</sup> *Racial Discrimination Act 1975*, s.9.

[57] As far as the allegation of racial discrimination is concerned, there is no apparent connection between the comments and the race, colour, descent or national or ethnic origin of Mr Atkins. The comments appear to have been made to Mr Atkins in private and to the extent that they might otherwise fall within the description of “offensive behaviour”, they would not be caught by the prohibition in section 18C of the *Racial Discrimination Act 1975*.

[58] In addition, simply describing someone by reference to their sex is not discrimination. The concept requires more – including that it involve some less favourable treatment of the person due to their sex or characteristics generally connected to persons of that sex. No such less favourable treatment is apparent in connection with the comments made by Ms Dixon. For example, I do not accept that in society, men are generally considered “big, threatening and scary” or that Ms Dixon was stereotyping Mr Atkins or otherwise treating him less favourably than those without the characteristic of being male.

#### Making Ms Phelan cry

[59] Finally, and to the extent that the allegation was pressed in these proceedings, Mr Atkins says Mr Hill bullied Ms Phelan when he made her cry. The allegation is a mere assertion. There is no evidence to support it. The allegation is denied by Mr Hill. It is not established.

#### **Other relevant matters**

[60] I commented at the outset about the adverse consequences that three years of conflict between Mr Atkins and Mr Hill have had on their respective mental health. That is a cause for concern and one for which all parties bear some responsibility. Mr Atkins, because of what I consider to be his lack of cooperation with Mr Hill and the active campaign he has waged to have Mr Hill removed from his position. Mr Hill, because at times he has allowed his frustration to get the better of him so that his communication with Mr Atkins has broken down completely. Parks Victoria, because notwithstanding its reasonable attempts to respond to the concerns of both Mr Atkins and Mr Hill, the position of conflict was allowed to persist for so long.

[61] Mr Atkins says that he is acting on behalf of the broader group in seeking to have Mr Hill removed from a managerial role. The difficulty is none of these other employees were brought forward as witnesses. I cannot verify his claim. Nor am I in a position to understand their own experience of working with Mr Atkins and Mr Hill or to find that there is a bullying epidemic within the organisation.

[62] On 8 April 2019, Mr Atkins is alleged to have stated about Mr Hill: “I will thump Darren if he ever talks to me again”. Mr Atkins denies that he made the statement but I do not accept his denial. The statement was recorded in contemporaneous notes made by Ms Farquhar. The notes are credible. They establish a threat of violence in the workplace by Mr Atkins that was wholly inappropriate, even if it was not a genuine threat.

[63] The evidence does not establish that Mr Atkins has been bullied at work.

[64] Even if it had, I would not have found jurisdiction to make orders in this case. At the time of hearing, and since September 2019, Parks Victoria has acted to separate Mr Hill and

Mr Atkins in terms of their daily roles and responsibilities. This appears to have had the desired effect of eliminating the conflict between them. At Mr Hill's request, he is no longer Mr Atkins' manager and the evidence is to the effect that there is no foreseeable change to this position. There is accordingly no apparent future risk of bullying of the type alleged by Mr Atkins.

[65] The application is dismissed.



COMMISSIONER

*Appearances:*

*S Atkins* on his own behalf.

*J Tracey* of counsel for Parks Victoria and Darren Hill.

*Hearing details:*

2019.

Melbourne:

October 28.

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