



DECISION

Fair Work Act 2009

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

Margaret Trainor

v

Council for Christian Education in Schools and others

(AB2023/96)

DEPUTY PRESIDENT COLMAN

MELBOURNE, 30 MAY 2023

Application for orders to stop bullying – application dismissed

[1] This decision concerns an application by Mrs Margaret Trainor under s 789FC of the *Fair Work Act 2009* (FW Act) for anti-bullying orders against the Council of Christian Education in Schools (the Council) and two of its employees, Mrs Shirley Culhane, who is the Council’s communications director, and Mrs Dawn Penney, the chief executive officer. Mrs Trainor is employed by the Council in the position of communications coordinator. She contends that she has been subjected to bullying by all of the respondents. They deny this and contend that their conduct has at all times been reasonable.

[2] Mrs Trainor lodged a detailed application, attaching correspondence and documents that she considered to be demonstrative of the bullying to which she claimed to have been subjected. The respondents filed a detailed reply. At the commencement of the listed proceeding on 29 May 2023, I asked the parties for an update. After hearing their responses, I advised the parties that I proposed to conduct a determinative conference to resolve the matter. They agreed.

[3] The Commission may make an anti-bullying order if it is satisfied that a worker has been ‘*bullied at work*’ and that there is a risk that the worker will continue to be bullied at work (see s 789FF(1)(b)(i)). A worker is ‘*bullied at work*’ if, while the worker is at work, an individual or group of individuals ‘*repeatedly behaves unreasonably towards the worker*’ and that behaviour ‘*creates a risk to health and safety*’ (see s 789FD(1)).

[4] Mrs Trainor said that the respondents had behaved unreasonably towards her principally in the context of five incidents that she described in her application. In summary, her evidence was to the following effect:

- The first incident occurred in November 2022. A colleague said to Mrs Trainor that she would like to visit certain countries. Mrs Trainor replied that she should just believe, and it would happen. Mrs Culhane then said, in a ‘*scoffing*’ manner, ‘*Oh Maggie, that is poor theology*’. Mrs Trainor was offended. She believed that Mrs Culhane’s comment amounted to religious discrimination.

- The second incident took place in December 2022. Mrs Trainor asked to take six days of annual leave. Mrs Culhane refused because she was thinking of going abroad at the same time. Mrs Trainor complained to Mrs Penney. The matter was then resolved *'with the full cooperation of Mrs Culhane and Mrs Penney'*. Mrs Trainor's leave request was granted.
- The third incident occurred on 6 March 2023, when Mrs Culhane *'berated'* Mrs Trainor for having participated in a discussion with three colleagues in an open plan setting about a possible four-day working week. The conversation was overheard by the manager of a tenant (another Christian ministry group that shares the Council's premises) who did not want her workers to hear the discussion, because she could not afford such arrangements. Mrs Trainor said that Mrs Culhane *'remonstrated'* with her about having this discussion in an open plan area and gave her a threatening directive to *'just drop it'*. Mrs Trainor said that Mrs Culhane raised her voice and used an aggressive tone. She said that she felt humiliated, and that she was the only person to be told off by Mrs Culhane.
- The fourth incident was Mrs Penney's handling of an internal bullying complaint made by Mrs Trainor on 28 March 2023 about the conduct of Mrs Culhane in the first and third incidents. Mrs Trainor said that Mrs Penney refused her request for the complaint to be resolved through an informal and confidential process contemplated by the Council's antibullying policy, and instead chose, unreasonably and against her wishes, to involve the chair of the board, to whom she presented only the respondents' point of view. Mrs Trainor said that Mrs Penney's email correspondence with her about how the complaint would be handled involved coercion and bullying. She said that Mrs Penney had failed to follow the Council's bullying policy.
- What Mrs Trainor refers to as the *'fifth incident'* was a collection of instances in which she was allegedly subjected to unreasonable performance management and micro-management. Examples cited were a message from Mrs Culhane following up on a task assigned to Mrs Trainor that was said to have *'slipped off the radar'*, when in fact the deadline was not for several months; and the fact that, after Mrs Trainor made her internal complaint on 28 March 2023, Mrs Culhane copied Mrs Penney on all email correspondence with Mrs Trainor.

[5] Mrs Trainor said that the respondents' conduct had entailed aggressive and intimidating behaviour, belittling comments, victimisation, and unreasonable work expectations. She said that because of the performance management, micro-management, and the manner in which the complaint of 28 March 2023 had been handled, she was concerned that Mrs Penney was *'preparing a constructive dismissal'*, meaning that she would have no option but to resign. She believed that the decision of the Council to close the office during the school holiday period was taken in order to ensure that staff would not witness how her internal complaint was being dealt with, and that the only reason she did not suffer further mistreatment was because she filed an anti-bullying application in the Commission.

[6] During the proceeding, Mrs Trainor gave evidence that she believed her mistreatment was connected to her objection, early in 2022, to the Council's decision to have employees return to the workplace, which she did not consider to be consistent with government COVID-

19 advice. Mrs Trainor said that she was subjected to bullying in connection with her views about these matters.

[7] Mrs Trainor's application asked the Commission to make an antibullying order that would, among other things, require the Council to reimburse her medical expenses and reinstate the sick leave she had taken in connection with the conduct of which she complains, compel the Council to remove Mrs Penney as the CEO while her internal complaint is resolved, and for the Commission to manage the internal dispute resolution process.

[8] The evidence of Mrs Culhane was that her remark to Mrs Trainor in November 2022 about '*bad theology*' was made during an informal discussion between a group of employees sitting around a table sorting foreign coins. She said that the remark was not work-related, that it was said gently, and that she did not scoff at or mock Mrs Trainor. She said that both she and Mrs Trainor had theology degrees and she was not making any judgment about Mrs Trainor. As to Mrs Trainor's leave request in December 2022, the matter had been resolved. There had simply been an initial difference of opinion as to whether her leave should be granted.

[9] As to the incident on 6 March 2023, Mrs Culhane denied berating or remonstrating with Mrs Trainor, being aggressive or intimidating, or mocking or humiliating her in any way. Mrs Culhane said that she merely told Mrs Trainor that the Council did not want internal discussions to be overheard by others, such as the tenant who shared the premises. She gave Mrs Trainor an instruction not to do this and to drop this issue. Mrs Culhane said that she was firm but civil, and that she did not discipline Mrs Trainor or performance manage her in any way.

[10] The evidence of Mrs Penney was that she had followed the organisation's antibullying policy, and that Mrs Trainor's grievance about this issue reflected a misunderstanding on her part about how the policy worked. Mrs Penney said that because Mrs Trainor's complaint named her, the CEO, the matter had to be referred to the board. Mrs Penney denied that she had behaved unreasonably in her handling of the complaint. Her correspondence with Mrs Trainor had been respectful and clearly linked to the terms of the policy. She said that the internal complaint process was suspended when Mrs Trainor made her application in the Commission.

[11] Mrs Penney denied that she or the Council had any intention of orchestrating a constructive dismissal of Mrs Trainor, and that she had directed Mrs Culhane to copy her in on messages sent to Mrs Trainor because this seemed prudent in light of the issues that Mrs Trainor had raised. Mrs Penney said that the decision of the Council to close the office had nothing whatsoever to do with Mrs Trainor's complaint. She said that the Council's decision to have employees return to the office in early 2022 was in accordance with Victorian government health advice, and that she had sought legal advice in relation to the matter.

[12] I make the following factual findings. First, I find that Mrs Culhane's remark about Mrs Trainor's '*bad theology*' was not unreasonable in substance or form. Mrs Trainor was free to express her opinion. Mrs Culhane was free to disagree. Her response was not discriminatory. It did not breach the Council's policy. Mrs Culhane denied that her comment was made in a scoffing tone. I accept her evidence. It was a frank but reasonable remark.

[13] Secondly, I find that the disagreement about Mrs Trainor's leave request was resolved in December 2022 and that all concerned behaved reasonably.

[14] Thirdly, I find that on 6 March 2022, Mrs Culhane did not berate or remonstrate with Mrs Trainor. I find that she did not raise her voice at Mrs Trainor or use an aggressive tone. Mrs Culhane denied doing so. Her denial was credible and persuasive. Further, I find it reasonable that Mrs Penney and Mrs Culhane should have expected Mrs Trainor not to discuss working conditions in places where employees of third parties could hear the discussion. I note that in her email message to Mrs Culhane on 9 March 2023, Mrs Trainor acknowledged the concern that had been raised with her about this matter. The tone of her message is entirely positive. There is no suggestion that Mrs Trainor believed that she had been mistreated. Mrs Culhane gave Mrs Trainor an instruction and did so firmly. There is nothing unreasonable about this. Contrary to Mrs Trainor's contention, an instruction is not the same thing as a disciplinary measure, and firmness does not equate to harshness. Mrs Trainor felt that she was singled out about this issue, because no one else who participated in the conversation was spoken to by management. Mrs Culhane appears to have believed that, because Mrs Trainor was known to have views about a four-day week, she had started the discussion, when in fact this was not necessarily the case. But any mistake here was a minor matter. It did not involve '*social rumours*', as Mrs Trainor contended.

[15] Fourthly, I find that Mrs Penney's handling of Mrs Trainor's complaint dated 28 March 2023 was reasonable. The policy states that if a complaint is made against the CEO, it must be referred in writing to the chair of the organisation. There are sound reasons why this should be the case. Mrs Trainor's complaint was partly directed at the conduct of the CEO. Therefore, Mrs Penney was required to refer it to the chair. In any event, the existence of a disagreement about the meaning and effect of a workplace policy does not mean that someone is behaving unreasonably. Mrs Penney's opinion was clearly genuinely held. It was also correct. But even if Mrs Trainor's view had been correct, that would not mean that Mrs Penney had behaved unreasonably. I see no basis for Mrs Trainor's contention that the confidentiality of her complaint has been compromised. The chair of the board, who participated in the conference, confirmed that she had kept it confidential.

[16] Fifthly, I find that Mrs Penney's correspondence with Mrs Trainor about her complaint, which was attached to Mrs Trainor's application, was respectful and reasonable.

[17] Sixthly, I find that it was sensible for Mrs Penney to instruct Mrs Culhane to copy her in on messages to Mrs Trainor. This allowed her to monitor their relationship, which evidently had become somewhat strained. It was not unreasonable.

[18] Seventhly, the remark in Mrs Culhane's email of 31 March 2023 that a particular email had '*managed to slip off the radar*' was innocuous. The email correspondence was attached to Mrs Trainor's complaint. The context of the message was polite.

[19] Eighthly, I accept Mrs Penney's evidence that neither she nor the Council have any intention of placing Mrs Trainor in a position where she feels compelled to resign, and that the decision to close the office for some weeks had nothing to do with Mrs Trainor's complaint. I find Mrs Trainor's suspicions about an ulterior motive for closing the office to be unfounded.

[20] Ninthly, Mrs Trainor's claim that in early 2022 she was subjected to bullying in connection with her view that employees should not return to the workplace is too general to

be accepted. I find it to be unsubstantiated. In any event, I do not see any ongoing relevance of any disagreements about this matter that occurred over 12 months ago. Finally, I find unsubstantiated Mrs Trainor's claims that she has been subjected to aggressive, intimidating and belittling comments, victimisation and unreasonable work expectations.

[21] Mrs Trainor has different perceptions about these matters. I accept that she believes that she has been subjected to unreasonable behaviour. However, the Commission's task is to make an objective assessment of the evidence and make findings based on the balance of probabilities. I do not consider that the respondents engaged in any unreasonable conduct. On the basis of my findings above, and my assessment of the material before the Commission, I am not satisfied that Mrs Trainor has been bullied at work within the meaning of s 789FD(1).

[22] Moreover, I am not satisfied that the conduct of which Mrs Trainor complains created a risk to health and safety. Mrs Trainor did not provide any details about the risk. She did not produce any medical evidence. The fact that Mrs Trainor may have experienced poor health following the events in question does not mean that the behaviour of the respondents caused that poor health or otherwise created a risk to her health and safety. Mrs Trainor has not established any risk to her health and safety or any link between the respondents' behaviour and the alleged risk. I find that therefore, also for this reason, Mrs Trainor was not subjected to bullying within the meaning of the Act. Further, I am not satisfied that there is a risk that Mrs Trainor will be bullied in the future. In this regard, I note that the parties have much in common, including a shared faith, a commitment to a common cause, and, in my view, a measure of good will towards one another. All concerned want Mrs Trainor's employment to continue and to be successful. I am confident that this will be the case.

[23] As I am not satisfied that Mrs Trainor has been bullied at work, I have no power to make an antibullying order. The application is therefore dismissed.



DEPUTY PRESIDENT

Appearances:

M. Trainor for herself

D. Penney and *S. Culhane* for the respondents

Details of the proceeding:

2023

Melbourne

29 May

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