



DECISION

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

Mr Feyzullah Kaya

v

Team Global Express Pty Ltd, Salvatore (Sam) Carnibella, Christopher Catania
(SO2022/278)

COMMISSIONER LEE

MELBOURNE, 24 OCTOBER 2023

Application for an FWC order to stop bullying – whether application has no reasonable prospects of success – whether orders should be made given present circumstances – nature of the power and discretion discussed – particular circumstances applying in this case including actions taken by the employer including separation of relevant employees within the workplace and resignation of one person named – in all of the circumstances not persuaded that there is a risk of further bullying –no jurisdictional basis to make stop bullying orders – application dismissed.

Background

[1] This decision deals with an application that has been made by Mr Feyzullah Kaya (the Applicant) for an order to stop bullying under s.789FC of the *Fair Work Act 2009* (the Act). The application alleges bullying by a number of individuals at Team Global Express Pty Ltd (the Employer/ Company). The Applicant works at the Webb Dock location in Melbourne. The site is responsible for the trans-shipment of freight to and from Tasmania.

[2] The two named individuals who have allegedly bullied the Applicant in the original application were Mr Salvatore (Sam) Carnibella, and Mr Christopher Catania. However, Mr Mladin Dimitrovski, the Applicants supervisor has also been named as engaging in bullying.

[3] The application was lodged on 14 June 2022. It has been the subject of a number of conferences and Mention Hearings before me. There have been numerous adjournments as a result of the Applicant not being able to participate in the proceedings due to his mental health. In summary the following conferences and/or Mention hearings were listed:

- Conference listed for 23 August 2022.
- Conference listed for 6 October 2022. An adjournment was sought and granted.
- Conference listed for 2 November 2022. An adjournment was sought and granted.
- Conference listed for 16 November 2022. An adjournment was sought and granted.
- Conference listed for 13 December 2022. An adjournment was sought and granted.
- Mention Hearing listed for 22 December 2022.

- Mention Hearing listed for 24 March 2023.
- Mention Hearing listed for 12 May 2023.
- Mention Hearing listed for 16 June May 2023.
- Mention Hearing listed for 28 June 2023. An adjournment was sought and granted.
- Mention Hearing listed for 6 July 2023.
- Hearing listed for 28 August 2023

Further written submission were filed subsequent to the hearing on 28 August 2023.

[4] The Applicant was not at work due to ill health from 10 June 2022 until May 2023. The Applicant did return for a short time to the workplace on 22 May 2023 on restricted duties.¹ However, the Applicant left the workplace on 1 June 2023 and provided a doctors certificate indicating he was unable to work.² At the date of the hearing the Applicant remained on leave providing doctors certificates for his absence.

[5] The Applicant has set out in some detail his claims as to the allegations of bullying behaviour he maintains has occurred. It is reasonable to say that the vast majority of the allegations, and the most serious of them, pertain to Mr Catania. Mr Catania is no longer an employee of the Respondent as he resigned on 27 June 2023. The allegations as they pertain to Mr Carnibella and Mr Dimitrovski are less onerous and arguably less significant than the numerous allegations directed at Mr Catania. The Employer has conducted investigations into the Applicant's claims of bullying and harassment and found that that the majority of the allegations made by the Applicant against Mr Catania were substantiated. The Employer does not accept that Mr Carnibella and Mr Dimitrovski have engaged in bullying behaviour.

[6] The Employer has implemented a number of initiatives aimed at reducing or eliminating the risk of any bullying against the Applicant. At first instance, this action included allocating the Applicant to the left of the distribution centre and Mr Carnibella and Mr Catania to the right of the distribution centre so as to minimise any interaction. As detailed later in the decision, this action clearly failed to stop the bullying from Mr Catania. There has also been some training of the relevant staff in preventing workplace discrimination, bullying and harassment at the worksite. Further, there has been clearer direction for the relevant employees to be stationed in different locations in the warehouse, including requirements that they eat in separate areas and use different bathrooms, in order to reduce or eliminate the prospect of the Applicant coming into contact with the persons named.

[7] Notwithstanding the implementation of the various initiatives, the Applicant maintains that he continues to be at risk of bullying and seeks that the Commission make orders to stop the bullying. It is not clear what orders the Applicant would have the Commission make that would extend beyond the actions the Employer has already taken. The Employer seeks the Commission does not make orders and dismiss the application on the basis that Mr Catania is no longer employed and consequently there is no risk of further bullying from him. In respect to Mr Carnibella and Mr Dimitrovski, the Company submits that those two individuals have not engaged in bullying and in any event, as a consequence of the initiatives that the Company has put in place to deal with the matter the Applicant will no longer have any contact with them, removing any risk of further bullying. Further the Company submits that it is not apparent that the Applicant will, given his ongoing health condition return to the workplace. In the circumstances they say there is no risk of further bullying given that state of affairs.

[8] Directions were set for the filing of submissions and the matter was listed for Hearing before me on 28 August 2023. All parties were self-represented.

1. The evidence

[9] The Applicant in his Form F72 in the section headed “Tell us what happened” focussed almost entirely on the conduct of Mr Catania. The conduct complained of involving Mr Catania included: On or around January and early February 2022:

- Mr Catania grabbing the Applicants bum
- Mr Catania repeatedly called the Applicant a Dickhead
- Mr Catania described the Applicant as not a human
- Mr Catania called the Applicant an arse hole
- Mr Catania put his fist into the Applicants face in a threatening manner
- Mr Catania poked the Applicant in the face with his finger
- Mr Catania called the Applicant a “Doggg”.³

[10] In respect to Sam Carnibella, the allegation in the initial application was that Mr Carnibella told the Applicant to “fuck off” during a conversation about the appropriate location of a pallet.⁴ It was also alleged that Mr Carnibella made false allegations about the Applicant concerning his interactions with a trainee in May 2023 during the Applicants brief return to the workplace.

[11] While Mr Dimitrovski is not named as a person in the application the Applicant does raise concerns about the conduct of Mr Dimitrovski alleging the following:

- Mr Dimitrovski told the Applicant that he should resign in around March 2022.
- Mr Dimitrovski was angry with him and “told him off” about a misdirected freight consignment which accidentally went to Thailand instead of its intended location
- Mr Dimitrovski allegedly instructed the Applicant to work under the supervision of a casual trainee, Mr Gray.

[12] It is apparent that the Applicant did not feel supported by the Company when he made requests that Mr Carnibella and Mr Catania be kept away from him following the alleged bullying. The Applicant was of the view that the Company was reluctant to take action about the matter as Mr Catania and Carnibella were senior workers.

[13] The Applicant is suffering from a mental health condition including sleeplessness, anxiety and panic attacks which he says have resulted from the bullying at work.⁵

[14] In the Employers F73 response, the Employer confirmed that the Applicant made a complaint about bullying in February 2022. The Applicant complained to Mr Dimitrovski and the site union delegate about the conduct of Mr Catania. The Applicant also complained about Mr Carnibella telling him to “fuck off” during the conversation about the location of the pallet.

[15] An investigation was conducted by the HR Business Partner, who interviewed the Applicant, Mr Catania and Mr Carnibella. The investigation found the following allegations to be substantiated:

- a. Mr Carnibella told the Applicant to “fuck off”;
- b. Mr Catania called the Applicant a “dickhead”;
- c. Mr Catania touched/tapped his finger on the Applicant’s face;
- d. On numerous occasions since January 2022, at the Port Melbourne depot, Mr Catania touched the Applicant inappropriately by grabbing the Applicant’s bum;
- e. On numerous occasions since January 2022, at the Port Melbourne depot, Mr Catania swore at and spoke aggressively toward the Applicant”⁶

[16] The Company notified the Applicant that the investigation had found that his allegations against Mr Catania and Mr Carnibella were substantiated. The Company submits that they then “took appropriate disciplinary action in relation to the findings” and conducted a toolbox regarding acceptable behaviour in the workplace. Specifically, Mr Catania was issued with a written warning that any further conduct breaching the workplace behaviours policy would result in further disciplinary action including termination of employment. Mr Carnibella was also issued a verbal warning that any further conduct breaching the workplace behaviours policy result in further disciplinary action including termination of employment. The Applicants behaviour in responding to Mr Carnibella was considered by the Company to be not acceptable and the Applicant was issued with a verbal caution. As mentioned earlier, subsequent to the February 2022 investigation, the Company allocated the Applicant to the left of the distribution centre and Mr Catania and Mr Carnibella to the right of the distribution centre so as to minimise any interaction between the Applicant and the persons named.⁷

[17] In early June 2022 there was a meeting between the Applicant and Mr Dimitrovski to discuss the Applicant’s performance. The Company submits that at that time the Applicant said words the effect of “the bullying is happening again.” The Company submits that when the Applicant was asked by Mr Dimitrovski if he could provide specific examples of the further bullying the Applicant advised that he is going to take matters into his own hands.

[18] On 10 June 2022 the Applicant left the workplace after Mr Catania allegedly called him a “Dog”.⁸ The Applicant then commenced a long period of personal leave associated with his deteriorating mental health. The Applicant lodged this application on 14 June 2022. The Applicant also travelled to Turkey to visit family who had been impacted by the massive earthquake that occurred. The Applicant subsequently returned to work in May 2023 for a short period.

[19] As to the further allegation that Mr Catania had called the Applicant a “Dog”⁹ or “Doggg”¹⁰, the Company were unaware of this allegation until the bullying application was lodged and undertook to investigate that matter and any other allegations if further particulars were provided. As the Applicant was unwell and not at work there was no further investigation into the further allegations made against Mr Catania until 22 May 2023 when the Applicant returned to work. That investigation concluded that Mr Catania had engaged in further bullying and harassment towards the Applicant.

[20] A letter dated 27 June 2023 was sent to Mr Catania by the Company setting out their findings. That letter was attached to further submissions provided to the Commission. The letter is headed: Show Cause -Serious Misconduct.¹¹ It sets out the allegations that the Company found to be substantiated as follows:

1. On 12 January 2022 at around 10am in the small lunch room, you said to Mr Dimitrovski about Mr Kaya, “Mladen, take this lazy cunt who is not doing any work.”
2. In April 2022 Mr Kaya was talking to Adam Skinner at the smoking point when you screamed about Mr Kaya “this fucking cunt is not doing any work”
3. In May 2022 you said about Mr Kaya to Mr Carnibella in the presence of Mr kaya, “I told them to put me in charge and I’ll make this cunt work”
4. On 31 May 2022 in the company of Mr Carnibella, you falsely informed Mr Dimitrovski that Mr Kaya was letting the trainee do all the work in northbound, instead of working with him.
5. On 10 June 2022 between 7:00am and 8:00am Mr Kaya was walking to the office from northbound when you yelled at “DOGGGGG!” at Mr Kaya.

[21] The letter sets out that the Company was now, in light of the seriousness and repeated nature of Mr Catania’s misconduct, considering terminating his employment on the grounds of serious misconduct. Mr Catania was offered an opportunity to respond to the allegations. However, Mr Catania resigned before the disciplinary process concluded and ceased employment with the Company on 24 June 2023.

[22] One might think that that would be the last the Applicant would hear from Mr Catania. However Mr Catania saw fit to send a Facebook messenger message to the Applicant on 11 July 2023 which reads “Hey scumbag I beet u (sic) u didn’t get me the sack I’m retired go and learn and learn(sic) to speak English or fuck off”.¹² It is rather ironic that Mr Catania’s written English so far as it is on display in this message, is less proficient when compared to that of the Applicants. Mr Catania’s view expressed in his message to the Applicant that he “retired” instead of being dismissed is delusional. It seems clear enough that Mr Catania ended his own employment before his likely termination. I note that the Employer on becoming aware of the message sent Mr Catania a “Notice to cease and desist” on 22 August 2023.

[23] In respect to Mr Dimitrovski, the Company found that it was satisfied that Mr Dimitrovski had not reprimanded Mr Catania for using inappropriate language and that Mr Dimitrovski had attempted to dissuade the Applicant from filing a complaint against Mr Catania for use of inappropriate language. Mr Dimitrovski received a written warning for this behaviour. Mr Carnibella was found not to have engaged in two further allegations. The first being that he “stared and smirked” at the Applicant on 1 June 2023 when driving past him in the car park with two other employees. The second allegation was that Mr Carnibella had told Mr Dimitrovski on 31 May 2022 that the Applicant was letting the trainee do all the work at northbound instead of helping him. That allegation was found by the Company to be substantiated against Mr Catania. That is, it was found that Mr Catania made that statement not Mr Carnibella.

[24] In addition to the various warnings the Company issued to employees, further action that the Company took to deal with the situation was to implement comprehensive workplace behaviours training in July and August 2022 and again in July and August 2023. Supervisors

and managers were also trained on the expectations of a leader in addressing inappropriate workplace behaviour.

2. The return to work plan

[25] In preparation for the Applicants return to work, a return to work plan has been prepared. Ms Emilia Cvetkovic gave evidence that the plan was prepared by the health and safety manager, the return to work advisor and the manager of ambient operations, Mr Ripper. The return to work plan provides that when the Applicant returns to work he will continue working in the groceries area which was where he was working prior to going on the most recent period of leave. The Applicant confirmed he was content with working in the groceries area¹³ The evidence of Ms Cvetkovic is that the groceries area is approximately 150 metres away from the Rio area where Mr Carnibella works and the work between the two areas does not intersect. Mr Ripper will ensure that the Applicant and Mr Carnibella are not directed to cover any requirements for additional workers in each other's area. Further, Mr Carnibella will use the luncheon and bathroom closest to his work area. Mr Carnibella will commence work at 6.00 AM and the Applicant will commence work at 8.00 AM in order to eliminate the possibility of them passing in the car park or the entrance to the workplace. The Applicant confirmed that he was happy to work in the depot so long as he is not in the same location as Mr Carnibella.¹⁴

[26] The Applicant will not be reporting to Mr Dimitrovski when he returns to the workplace. The Applicant will be reporting to Mr Cowley who will in turn report to Mr Ripper for any matters escalated by the Applicant. Mr Dimitrovski will avoid as far as reasonably practicable all physical interaction with the Applicant. Mr Dimitrovski will have his lunch in his office and use the bathroom and the operational area which is approximately 100 m away from the facilities the Applicant will use at the front office.¹⁵ The Applicant confirmed during the hearing he was happy to work with Mr Cowley¹⁶ and that he was happy with the reporting relationship with Mr Ripper.¹⁷

3. Consideration

[27] The Employer seeks that the application be dismissed as they have implemented various initiatives which will have the effect that there is no longer a risk of the alleged bullying occurring. Further the main protagonist, Mr Catania, is no longer an employee and there is therefore no longer a risk of bullying by him.

[28] The initiatives are set out earlier in the decision. Essentially arrangements have been made whereupon if and when the Applicant returns to the workplace he will be working in the same location he was working prior to going on leave, in the groceries area, and by virtue of his physical separation and separate starting times the Employer submits that there is virtually no chance that the Applicant will need to interact with either Mr Carnibella or Mr Dimitrovski. The Applicant remains concerned about the prospect of further bullying by Mr Carnibella and Mr Dimitrovski. The Applicant remains concerned about the return-to-work plan stating in his final submission that "I have no trust in them that they will follow management's directions"¹⁸The orders that the Applicant seeks the Commission to make was set out in the F72 as follows:

“we all deserve to work in a non-stressful environment (no bullying, harassment or being hit by our work colleagues) if they keep that kind of people no matter what they do obviously they will continue to bully, abuse or harass other people. Those kind of people needs to stopped work immediately”¹⁹

3.1 The power and discretion to make orders

[29] In *Ms LP*²⁰ Commissioner Hampton set out the relevant principles in relation to the power and discretion for the Commission to make orders as follows and I adopt them:

“[19] Section 789FF of the FW Act provides as follows:

“789FF FWC may make orders to stop bullying

(1) If:

- (a) a worker has made an application under section 789FC; and
- (b) the FWC is satisfied that:
 - (i) the worker has been bullied at work by an individual or a group of individuals; and
 - (ii) there is a risk that the worker will continue to be bullied at work by the individual or group;

then the FWC may make any order it considers appropriate (other than an order requiring payment of a pecuniary amount) to prevent the worker from being bullied at work by the individual or group.

(2) In considering the terms of an order, the FWC must take into account:

- (a) if the FWC is aware of any final or interim outcomes arising out of an investigation into the matter that is being, or has been, undertaken by another person or body—those outcomes; and
- (b) if the FWC is aware of any procedure available to the worker to resolve grievances or disputes—that procedure; and
- (c) if the FWC is aware of any final or interim outcomes arising out of any procedure available to the worker to resolve grievances or disputes—those outcomes; and
- (d) any matters that the FWC considers relevant.”

[20] The Fair Work Amendment Bill 2013 Revised Explanatory Memorandum explained the provisions as follows:

“New section 789FF – FWC may make orders to stop bullying

119. New subsection 789FF(1) empowers the FWC to make any order it considers appropriate to prevent a worker from being bullied at work by an individual or group of individuals. Before an order can be made, a worker must have made an application to the FWC under new section 789FC and the FWC must be satisfied that the worker has been bullied at work by an individual or group of individuals. There must also be

a risk that the worker will continue to be bullied at work by the individual or group. Orders will not necessarily be limited or apply only to the employer of the worker who is bullied, but could also apply to others, such as co-workers and visitors to the workplace. Orders could be based on behaviour such as threats made outside the workplace, if the threats relate to work.

120. The power of the FWC to grant an order is limited to preventing the worker from being bullied at work, and the focus is on resolving the matter and enabling normal working relationships to resume. The FWC cannot order reinstatement or the payment of compensation or a pecuniary amount.

121. Examples of the orders that the FWC may make include an order requiring:

- the individual or group of individuals to stop the specified behaviour;
- regular monitoring of behaviours by an employer;
- compliance with an employer's workplace bullying policy;
- the provision of information and additional support and training to workers;
- review of the employer's workplace bullying policy.

122. New subsection 789FF(2) provides that, when considering the terms of the order, the FWC can take into account any factors that it considers relevant, but must have regard to the following (to the extent that the FWC is aware):

- any final or interim outcomes of an investigation into the matter that is being undertaken by another person or body;
- any procedures available to the worker to resolve grievances or disputes;
- any final or interim outcomes arising from any procedures available to the worker for resolving grievances or disputes.

123. These factors may be used by the FWC to frame the order in a way that has regard to compliance action being taken by the employer or a health and safety regulator or another body, and to ensure consistency with those actions.”

[21] Having regard to the provisions of the FW Act, there are two prerequisites to the making of orders in matters of this kind. Firstly, a finding that the worker has been bullied at work by an individual or a group of individuals; and secondly, that there is a risk that the worker will continue to be bullied at work by the individual or group concerned.

[22] Accordingly, where there is no risk that the Applicant worker will continue to be bullied at work by the individual or group concerned, there is no prospect that the s.789FC application can succeed. Equally, where such a risk is found, the Commission may make an order preventing the worker from being further bullied by that individual or group. This means that any orders must be directed towards the prevention of relevant future unreasonable conduct and be informed by, but not necessarily limited to, the prior unreasonable conduct as found. However, any orders must deal with the actual future

risk, based upon appropriate findings, and having regard to the considerations established by s.789FF(2) of the FW Act.

[23] Subject to the above, and the constraint that an order cannot be made requiring payment of a pecuniary amount, the making of an order is a matter of discretion to be exercised judicially in the circumstances of each case.

[24] Accordingly, the power of the Commission to grant an order is limited to preventing the worker from being bullied at work, and the focus is on resolving the matter and enabling normal working relationships to resume in a mutually safe and productive manner.

[25] Orders made in this jurisdiction are enforceable by the Courts as a civil remedy provision. This means that orders should not be made lightly and where they are made, they should be expressed in such a manner that clearly establishes enforceable obligations upon relevant identified parties.”²¹ (Endnotes omitted)

3.2 Is there a risk of further bullying?

[30] As outlined above, the Employer has taken a number of steps to remove or reduce the risk of bullying. However, the Applicant is of the view that he remains at risk of bullying. In my view, the fact of the resignation of Mr Catania, combined with the actions that the Employer set out in paragraphs 25 and 26 above are such that I am satisfied that there is not a risk of further bullying of the Applicant. The distances between the Applicant and the two individuals remaining in the workplace who are the subject of the allegations is significant and the other arrangements made regarding separation of bathrooms and lunch rooms will mean that it is extremely unlikely that there will be any interaction in the future. There will be no reporting relationship between the Applicant and Mr Dimitrovski . Moreover, I have had the opportunity to hear evidence directly from Mr Carnibella and Mr Dimitrovski. I am satisfied that they will make strenuous efforts to avoid contact with the Applicant.²²

[31] It is understandable, given what has happened to the Applicant that he continues to worry about his safety at work. However, he should be reassured by a number of factors. Firstly, and most importantly, Mr Catania no longer works there and there is not a risk of further bullying at work from him. Secondly, while I have found, for reasons set out later that it is not likely that Mr Carnibella nor Mr Dimitrovski have engaged in bullying behaviour as defined in the Act. The Applicant will in any case no longer have to work with or engage with Mr Carnibella and Mr Dimitrovski. The Company has assured me that those two individuals have been directed not to engage with the Applicant and there will be consequences for them if they do. I expect that the Company will abide by that commitment.²³

[32] As I am not satisfied that there is a further risk of bullying, it is not strictly necessary to make findings as to whether bullying behaviour was engaged in by those named. Nevertheless, it is appropriate that I make findings on some matters and make some observations on other matters given the problematic background to this matter.

[33] Mr Catania is no longer employed by the Company. The numerous allegations against Mr Catania that the Company found to be substantiated most certainly constitute bullying

behaviour. The Company agreed with that assessment when I put it to them.²⁴ The substantiated conduct was reprehensible and repeated. It involved physical aggression and verbal abuse. His conduct appears to have had a significant impact on the health of the Applicant. If Mr Catania remained an employee, my determination in this matter would most certainly have been different. Mr Catania's past behaviour suggests that no matter where he would have been placed in the workplace the Applicant would have remained at risk of bullying from him. However, his welcome departure from the business means that the risk of further bullying in the workplace by Mr Catania has departed with him. There is of course the issue of the further message that Mr Catania sent to the Applicant after he ended his employment, I will say more about that later in the decision.

[34] In respect to Mr Carnibella, it is not in contest that Mr Carnibella told the Applicant to “fuck off” when there was a conversation about the location of the pallet. This was unreasonable behaviour and Mr Carnibella who was correctly, in my view, warned about that.

[35] As to the allegation about Mr Carnibella “smirking” in the car park at the Applicant, having considered the evidence I’m not satisfied that Mr Carnibella smirked at the Applicant in the car park on 1 June 2023. I accept that the Applicant has become constantly fearful of further bullying behaviour, and it has to be remembered that Mr Catania was also in the car on that day. Given Mr Catania’s repeated bullying behaviour, it is not surprising that the Applicant was anticipating some sort of unwanted conduct from the occupants of the vehicle. However, I am not satisfied Mr Carnibella engaged in the behaviour as alleged. I accept the evidence, which was plausible, that there was some laughter about the discovery of \$5 in a child’s toy. The Applicant likely saw this and given all that has transpired before thought their smirk was directed at him. Mr Lorenzo Tuccitto corroborated this version of events.²⁵ Further, The Applicant confirmed he could not hear what was being said in the vehicle.²⁶

[36] As to the claim Mr Carnibella made false allegations about the Applicant concerning his interactions with the trainee, the evidence supports a finding that conduct occurred, but it was Mr Catania who was responsible for that, not Mr Carnibella.

[37] Finally, I don’t accept as suggested at one point by the Applicant that Mr Carnibella was the cause of Mr Catania's behaviour.²⁷ There is insufficient evidence to support that contention.

[38] In respect to Mr Dimitrovski, the Company found that he attempted to dissuade the Applicant from filing a complaint against Mr Catania for use of inappropriate language and failed to reprimand Mr Catania for using inappropriate language.²⁸ Mr Dimitrovski received a written warning for this behaviour and appropriately so.²⁹ This was not bullying behaviour on the part of Mr Dimitrovski. It was however a failure of his obligations as a supervisor and leader to model and enforce respectful behaviour in the workplace. Mr Kaya’s evidence on this point was as compelling as it was distressing.³⁰ The failure of Mr Dimitrovski's leadership is significant because the behaviour of Mr Catania was so appalling and occurred so frequently. The Applicant felt unsupported in the workplace and understandably so.³¹

[39] The other allegations against Mr Dimitrovski are that:

- Mr Dimitrovski told the Applicant he should resign in around March 2022:
- Mr Dimitrovski told off the Applicant about an incorrect dispatch and

- Mr Dimitrovski instructed the Applicant to work under the supervision of Mr Gray, a casual trainee.

[40] On the first allegation the Applicant was also clear in his evidence that Mr Dimitrovski did suggest to him that he quit because “this is not the right place for you”³² Mr Dimitrovski strongly denied that he said that the Applicant should resign.³³ While the Applicant was at times emotional, he was for the most part a witness of credit. In contrast the evidence of Mr Dimitrovski was somewhat vague and at times self-serving. For example, Mr Dimitrovski claims that he “reported the bullying as it was happening” however, he claims to have only seen one incident of bullying behaviour, yet his reaction on that occasion was to deal with the matter himself.³⁴ He did not report the incident and encouraged the Applicant not to report it. Indeed, the Company warned Mr Dimitrovski for his failure in that regard. The claim of Mr Dimitrovski that he only saw one occurrence of bullying behaviour lacks credibility. The Applicant was clear and unshaken in his evidence that Mr Dimitrovski asked him to consider quitting. I think it more likely than not that Mr Dimitrovski did ask him to consider quitting.

[41] In respect of the allegation that Mr Dimitrovski “told off” the Applicant about the incorrect dispatch, I accept that Mr Dimitrovski did speak to the Applicant about the error and no doubt “told him off” about it. However, in all the circumstances, the evidence suggests that was reasonable management action taken in a reasonable manner. The Applicant had made a mistake and Mr Dimitrovski was entitled to speak to him about that mistake.

[42] As to the allegation that Mr Dimitrovski directed the Applicant to work under the supervision of the casual worker, Mr Gray, the evidence of Mr Dimitrovski as to what occurred was detailed and credible and this evidence was corroborated by Mr Cowley³⁵ and Mr Kilic³⁶ On the balance of the evidence, I am not satisfied that Mr Dimitrovski directed the Applicant to work under the supervision of Mr Gray. Ultimately The Applicant conceded that he was not directed to work under the supervision of Mr Gray.³⁷

[43] In any event even if these findings are not right the Applicant will not be engaging with Mr Dimitrovski or Mr Carnibella in the workplace in the future and there is no future risk of bullying from either of them.

[44] As set out earlier, there is no doubt that the conduct that the Employer substantiated was engaged in by Mr Catania did amount to bullying. However, Mr Catania is no longer in the workplace. I am concerned about the messenger message that was sent by Mr Catanaia but agree with the Respondent that it would be a stretch to construe that message to be bullying that occurred at work.³⁸ Given that Mr Catania is no longer in the workplace, there is no risk of further bullying from him and there is no basis to make an order to stop bullying in respect to Mr Catania. However, Mr Catania is not beyond the reach of other laws such as the Racial Discrimination Act that protect the Applicant. Mr Catania would be well advised to comply with the cease and desist demand from his former Employer and refrain from any further contact with the Applicant.

[45] As I set out earlier, I am not satisfied that the conduct of Mr Dimitrovski and Mr Carnabilla was bullying behaviour. In any event, even if I am wrong on that and their behaviour was in fact bullying behaviour and one proceeds on an assumption that, if the bullying conduct as alleged by the Applicant in respect of the group of the two individuals who remain in

employment was in fact occurring, are the various initiatives that have been implemented by the Employer sufficient to satisfy me that there is not a risk that the individual will continued to be bullied at work by the remaining two individuals.?

[46] It is important that all those involved in this matter understand that the Commission only has the jurisdiction to make an order to stop bullying where it is satisfied that a worker has been bullied at work by an individual or group and the Commission and is satisfied there is a risk that the worker will continue to be bullied at work by the individual or group. As stated above, in this matter, the persons named that remain relevant to the application are Mr Dimitrovski and Mr Carnibella.

[47] It is also important to note that the anti-bullying jurisdiction is not designed to punish persons who have behaved unreasonably towards others in the past. Rather, it is centred on stopping future bullying behaviour and this was reinforced in the Full Bench decision in *Re McInnes*.³⁹

“[9] Importantly, a s.789FF order operates prospectively and is directed at preventing the worker being bullied at work. The Commission is specifically precluded from making an order requiring the payment of a pecuniary amount, hence it cannot make an order requiring a respondent to pay an amount of compensation to an applicant. The legislative scheme is not directed at punishing past bullying behaviour or compensating the victims of such behaviour. It is directed at stopping future bullying behaviour.”⁴⁰

[48] In a number of previous Decisions the Commission has taken into account any change in circumstances in the workplace when considering whether there is a risk that the worker will continue to be bullied at work and/or whether it will exercise its discretion to issue an order or not.⁴¹

[49] In *Ms LP* Commissioner Hampton considered circumstances where there had been a finding of past bullying, however the employer had put in place a number of changes designed to reduce the risk of bullying. The Commissioner determined this was an important consideration in determining whether or not orders should be made in that case. Relevantly, the Commissioner found:

“[50] In many, if not most cases, where a finding of bullying conduct is made and there is some future risk, preventative orders would be expected to follow. Such orders would, in appropriate cases, establish the appropriate basis for future mutually safe and constructive relationships.

[51] In this case, given the history of this particular matter, the extent of positive measures that the employer has subsequently put into place as a result of Ms LP’s applications, and my understanding of the workplace and the relationships that has developed from hearing this matter, I do not consider that the making of orders at this time would be conducive to the constructive resumption of working relationships.”⁴²

[50] In this case, the Employer has introduced a number of significant initiatives that have responded to the claims made by the Applicant. Not the least of these has been the relocation of work locations and the reorganisation of start times in order to significantly reduce and likely

eliminate the chance of contact between the persons named and the Applicant. Both Mr Carnibella and Mr Dimitrovski have been warned about the inappropriate behaviour they did engage in as mentioned earlier. I am satisfied with their evidence that they have taken on board the warnings and have learnt from the experience. In any event the Employer has directed them to comply with the arrangements that will ensure their separation and there will be consequences if they do not. The training of staff is also an important component of the initiatives undertaken by the Employer.

[51] Having regard to all of the circumstances, I am not satisfied that there is a risk that the Applicant will continue to be bullied at work by the persons named in her application pursuant to s.789FF(1)(b)(ii). Therefore, even assuming that the first jurisdictional prerequisite of s.789FF(1)(b)(i) was satisfied, there would not be jurisdiction to make an order to stop bullying.

[52] It is important to note that notwithstanding, at this point in time, I am satisfied that the Respondent has taken the necessary steps to remove the risk of bullying. Overall, the history of this matter demonstrates that the Applicant has, in my view, been let down by his employer. The substantiated conduct of Mr Catania that occurred back in 2022 was serious. Poking the Applicant in the face, grabbing his bum, swearing at him and taunting him. He was given a written warning to stop this behaviour. It is a matter for the Employer as to what sanction they chose to apply, but it is evident that the sanction of a warning that was applied to Mr Catania was insufficient. The behaviour continued. As stated earlier, the evidence of Mr Dimitrovski that he only saw one incidence of bullying was not credible... He was the person in charge, and it is likely he did not do enough to intervene to protect the Applicant from the appalling conduct of Mr Catania. I acknowledge that the Company did sanction Mr Dimitrovski for some elements of these failures and appropriately so. However, the damage was done to the Applicant while Mr Catania was allowed to engage in his reprehensible behaviour without sufficient action being taken by the Employer to stop it. Nor was there any evidence that his colleague Mr Carnibella took any action to support the Applicant. Mr Carnibella was aware of the behaviour of Mr Catania stating in an interview with his Employer “Sometimes Chris (Catania) goes too far”⁴³ This is clearly an understatement when the substantiated behaviour of Mr Catania is taken into account. One can choose to ignore or tolerate poor behaviour in the workplace but there are real consequences when that occurs. “Bad men need nothing more to compass their ends, than that good men should look on and do nothing.”⁴⁴

[53] The fact that there is not, at this point in time, jurisdiction to make an order to stop bullying is not a failure of the Applicant. It is a reflection of the fact that, eventually, Mr Catania has left the organisation. That does not change my view that there was a failure of the local leadership in the organisation, those who knew what was happening, to do something about it. In my opinion, the Company should make clear to all those in leadership positions this is not something that they will accept.

[54] These failures provide context for the continuing reluctance of the Applicant to return to the workplace. However, for the reasons set out, the Applicant is in my view safe to return to the workplace having regard to the changed working environment set out above. Therefore, subject of course to the Applicant securing the necessary medical clearance, I encourage him to return to work.

[55] To conclude, as there is no jurisdiction to make an order to stop bullying the application is dismissed. An order⁴⁵ will be issued concurrently with this decision. The file will now be closed.



COMMISSIONER

Appearances:

F Kaya from the Applicant

J O'Sullivan from the Respondent

Hearing details:

2023.

Melbourne:

August 28.

Final written submissions:

Applicant, 6 September 2023.

Respondent, 4 September 2023.

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¹ Witness statement of Emilia Cvetkovic at [12(o)].

² Ibid at [35].

³ Form F72 at question 12.

⁴ Ibid.

⁵ Ibid.

⁶ Ibid at [3].

⁷ Witness statement of Emilia Cvetkovic at [12(j)].

⁸ Ibid at [12(l)].

⁹ Ibid.

¹⁰ Form F72 at question 12.

¹¹ Respondents closing Submissions – Show cause.

¹² Digital Court Book at page 29.

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- ¹³ PN319.
- ¹⁴ PN233.
- ¹⁵ Witness statement of Emilia Cvetkovic at [42] to [48].
- ¹⁶ PN194 to PN196 and PN199 to PN200.
- ¹⁷ PN205.
- ¹⁸ Applicants Closing Submissions on 3 September 2023.
- ¹⁹ Form F72 at question [22].
- ²⁰ *Ms LP* [\[2016\] FWC 763](#).
- ²¹ *Ms LP* [\[2016\] FWC 763](#) at [19] – [25].
- ²² PN557 and PN558 and Witness statement of Mladin Dimitrovski at [47].
- ²³ PN463, PN465 and PN466.
- ²⁴ PN768 and PN796.
- ²⁵ PN735 to PN748.
- ²⁶ PN388.
- ²⁷ PN170.
- ²⁸ Witness statement of Emilia Cvetkovic at [18].
- ²⁹ *Ibid* at [19].
- ³⁰ PN165 and PN166.
- ³¹ PN190.
- ³² PN301.
- ³³ Witness Statement of Mladen Dimitrovski at [33].
- ³⁴ PN632.
- ³⁵ Witness Statement of John Cowley at [12].
- ³⁶ Witness Statement of Berden Kilic at [11].
- ³⁷ PN288.
- ³⁸ Respondents Submissions as to Judication at [8] to [13].
- ³⁹ *Re McInnes* [\[2014\] FWCFB 1440](#).
- ⁴⁰ *Re McInnes* [\[2014\] FWCFB 1440](#) at [9].
- ⁴¹ See *Re Fsadni* [\[2016\] FWC 1286](#); *Darren Lacey and Chris Kandelaars v Murrays Australia Pty Limited and Andrew Cullen* [\[2017\] FWC 3136](#).
- ⁴² [\[2016\] FWC 763](#) at [50] – [51].
- ⁴³ Witness Statement of Sam Carnibella at [SC-2].
- ⁴⁴ John Stuart Mill inaugural address at the University of St. Andrews (1867).
- ⁴⁵ [PR767545](#).