



DECISION

Fair Work Act 2009

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

Applications by E and J

(SO2023/31 & SO2023/32)

DEPUTY PRESIDENT DOBSON

BRISBANE, 14 FEBRUARY 2023

Application for an FWC order to stop bullying – body corporate interim orders – second application.

[1] This decision is made in relation to two applications for orders to stop bullying, jointly filed with the Fair Work Commission (the Commission) by Mr E and Ms J (the **Applicants**) on 24 January 2023. Ms J is the Director of Company F (the **Employer**) and Mr E is an employee of Company F. Company F owns the management rights to caretake and perform on-site management duties at a multi-residential private gated estate of around 93 homes. The owners of the complex are represented by a Body Corporate Committee (**BCC**). Broadly, the role of the BCC is to administer common property and body corporate assets for the benefit of all owners in that complex. The BCC have engaged a Body Corporate Management firm (**BCM**) to undertake the administrative responsibilities of the BCC such as paying bills however the BCM acts on the instructions of the BCC.

[2] The Applicants sought orders against Mr K (**Person Named**) who is the Treasurer of the BCC and, during material times relevant to this matter, the Acting Chairman of the BCC. Mr K is the first Respondent. Company F, the Employer, is the second Respondent. The Body Corporate Committee is the third Respondent to the Applications. (**Group Named**). The Applicants allege that Mr K and the BCC have engaged in unreasonable behaviour towards the Applicants that has caused a risk to their health and safety.

[3] The names of the parties involved have been made confidential as will be apparent throughout the Order and for the reasons stated later in this decision.

Legislation

[4] Part 6-4B of the Act deals with applications for orders to stop bullying. s.789FC through to s.789FF have been considered however for brevity I will not repeat them here.

Background

First Applications

[5] The same parties, among others not presently involved, were named and involved in joint stop order applications before me filed with the Commission on 29 June 2022. Those matters were resolved following a consensus agreement being reached in a private conference before me on 20 July 2022 (**First Applications**).

[6] It is helpful to provide some context around the First Applications and their resolution. In the First Applications, it was not in dispute that Mr E was struggling to cope with the situation at hand and had made an attempt on his own life.

[7] Whilst no findings were made in the First Application, given the Commission's role is a preventative one, my approach was to resolve any potential risk to the health and safety of the Applicants by agreement between the parties.

[8] On that basis, it was resolved by agreement between the parties, to attend to a number of preventative actions being put in place, however in light of the material presented in the current matters, it is clear that the agreement reached subsequently in writing between the parties and the remainder of actions taken by the Respondents, did not accurately reflect the agreement that was made before me on the 20 July 2022 and that further issues have arisen since.

Present Applications

[9] In the present matters the Applicants filed their applications with the Commission on 24 January 2023. The matters were allocated to my chambers on 7 February 2023 and a Notice of Listing issued from my chambers on 8 February 2023, listing the matter for conference on 10 February 2023.

Applicants Case

[10] The Applicants allege that Mr K and the BCC have behaved unreasonably in the manner in which they dealt with them in respect of their obligations to each other.

[11] The Applicants have supplied a significant amount of material in relation to the current matter and referencing the previous matters before me. A vast number of emails have been supplied by the Applicants. These emails are predominantly from Mr K, sent through an intermediary, who has forwarded them back and forth between the Applicant/s and Mr K in what I would describe as an intermediary post box (**Post Box**). This did not accord with my understanding of what was agreed nor intended in respect to the resolution of the First Applications. What was agreed in those applications, was that the BCC would appoint a contact person to liaise between the BCC and the Applicants with the objective of achieving a respectful working relationship to fulfil respective obligations.

[12] The Applicants have also provided evidence to Chambers of ongoing communication with Mr K and with Mr K on behalf of the BCC (albeit through a Post Box) the content of which

they allege was unreasonable and created an immediate and ongoing risk to the health and safety of the Applicants. Ms J expressed her concern that Mr E may make another attempt on his life given the unreasonableness of that correspondence in multiple instances that had occurred since the last conference. Ms J also expressed concerns about her own mental health.

[13] It is helpful to note there were two Post Boxes. One was a member of the BCC appointed by the BCC in conjunction with the Applicants (this was not Mr K but rather was Mr T) and the other was the BCM. Which Post Box was used was dependent upon the nature of the issue. Issues of an administrative nature were passed through the BCM Post Box and other issues were passed through the member of the BCC.

[14] The Applicants provided evidence that their invoices and several reimbursement requests to the Group Named sent through the Post Boxes, had not been paid (over a period of several months) as a result of actions taken by Mr K and the BCC, resulting in financial strain on the Applicants, particularly over the Christmas period.

[15] One of the invoices not paid, was for the regular monthly management fee. The Applicants provided evidence that the invoice for November 2022, due for payment by 29 December 2022, had not been paid. The Applicants sent a number of emails requesting payment after 29 of December 2022 to Mr K through the Post Box.

[16] The Applicants submitted that the BCC had made the decision to changeover the Body Corporate Manager (BCM), who was responsible for managing, *inter alia*, the actual payment of invoices once approval was given by the Treasurer, from the beginning of December and that the new BCM had subsequently closed for a number of weeks over the Christmas period.

[17] The emails requesting payment became increasingly desperate to the point that in one email Ms J stated that the Applicants were ‘living a misery’ due to not having money to live on over the Christmas period. The Applicants provided a copy of an email in response from Mr K, taunting them about “living in misery”. They were eventually paid some 12 days late after several emails were sent.

[18] The Applicants also provided evidence of correspondence, unilaterally and substantially changing long held arrangements 9 days before Christmas from Mr K, through the Post Box. Those changes in summary included a refusal to reimburse receipts for 3 types of fuel (variously used for the mower, vehicle and other equipment), for mower blades and a requirement to provide log books because Mr K was concerned about a sudden spike in fuel use. The Applicants provided extensive correspondence detailing the reasons for the spike in fuel use (due to fluctuations in season, floods and weather) and explaining that all such expenses had been reimbursed for years (including to previous Caretakers/Managers), that there were 3 types of fuel and log books were only relevant to one of those types of fuel and pointing to a letter received from the BCC some months earlier which had advised them that all such expenses would be reimbursed.

[19] Mr E also filed a copy of a notice to owners, alleging that Mr K and the Secretary of the BCC (both persons named in the First Applications) had distributed this Notice to residents of the complex (‘**Notice**’) and also placed it on its noticeboard on 6 February 2023, subsequent to the Applicants filing these present applications.

[20] The contents of the Notice included a paragraph advising residents that the Applicants had brought further action for stop bullying orders before the Commission, alleging that the BCC had voted to indemnify the Treasurer from any legal cost and alleging that Mr K and the BCC ‘shall defend the false and unsubstantiated allegations made’.

Respondents Position

[21] Company F filed a Form F73 in response on 25 January 2023. This response supported the Applicants’ contentions. I note that the Company Representative is also one of the Applicants, Ms J, Director of Company F.

[22] Mr K (Person Named/First Respondent) filed a form F74 in response on 3 February 2023.

[23] Mr K submitted that the Respondents (himself and the BCC) had “entered into a Deed of Settlement which had the effect of compromising all claims relating to alleged conduct to that date” which was 9 September 2022 and “because of the provisions of the Deed, the only matters which the Applicant may validly be able to agitate (which are denied in any event) are those occurring from 2 November 2022”. It is unclear why the date referred to isn’t the 9 September 2022.

[24] Mr K made a number of contentions which I shall summarise as denying all of the allegations, claiming that actions taken were justified and reasonable, that allegations in respect of conduct being of a bullying nature were denied as untrue and claiming that all of the issues raised resulted from decisions made by the Body Corporate rather than himself,

[25] MBA Lawyers filed a response on the same day on behalf of the Group Named. Essentially, MBA Lawyers forwarded the same response and in their response to the claim at Question 9 of the form, said ‘*The Body Corporate repeats and relies on the content of the response submitted by the Respondent*’ (referring to Mr K).

Listing of 10 February 2023

[26] MBA Lawyers wrote to my chambers and requested the matter be adjourned from the listed date as they were unable to attend at that time. Noting that leave to be represented had not been granted to either party I sought the views of the parties. The Applicants expressed strong views that the matter be dealt with quickly given the impact on their mental health as outlined earlier.

[27] In consideration of the views of the parties and my obligations under the Act, particularly in regard to s789FE, I determined not to grant an adjournment.

[28] Mr K confirmed his attendance by email on 9 February at 9am however no response came from anyone on the BCC. My chambers attempted to contact Ms A who was the person at the BCM for the BCC, however they did not respond. I instructed my chambers to contact the Chairman of the BCC, Mr P, directly to ensure the BCC were represented. Mr P advised

that the BCM should have advised him, however that they had failed to. Mr P very helpfully agreed to attend on behalf of the BCC.

Interim Determinative Conference

[29] At the conference, given the views expressed by the parties, I determined the matter should proceed at least on an interim basis, as a determinative conference. The Applicants objected to Mr P appearing on behalf of the BCC given he was a legal practitioner as they felt this would disadvantage them and was unfair. Mr P did not require my leave to appear as he was the Chair of the BCC (a Group Named), however I noted upon hearing from Mr P that he did not have expertise in this area of law. Whilst Mr P acknowledged he had received all of the material in the matter at the same time as Mr K, Mr P submitted that he thought the BCM or MBA lawyers had the matter in hand. Mr P submitted that he had only discovered an hour earlier that he had to attend on behalf of the BCC and was therefore unprepared. Mr P advised that he was willing to proceed in an effort to resolve the matter. Mr P alluded to there being a number of problems with respect to communication between the BCC and the new BCM. Mr P acknowledged that he had been copied on the material including the correspondence between the Commission and Mr P and his legal representatives. As the Chairman of the BCC, I considered that the onus for putting in place appropriate communication mechanisms in respect of this application, was a matter for the BCC. Mr P as Chairman of the BCC, particularly given he was a legal practitioner, understood that the BCC was a party to these proceedings, was copied on the material filed and that the BCC was required to be represented at the conference. This is even more so given he was also respondent to the First Applications and their resolution. I noted for the record that all of the parties were self-represented and that I would proceed accordingly.

[30] To assist the parties, I narrowed the issues to be examined as follows:

1. Withholding the payment of invoices as issued by the Applicants from November 2022 to January 2023 including the correspondence between the parties about this issue.
2. The Notice published to the residents/lot owners on 6 Feb 2023.
3. The emails supplied by Mr E on 9 February 2023 – specifically Attachment C09 – in which an email from Ms F indicates that photos have been taken of Mr E in the residential area as well as notes detailing his “whereabouts”.

However, as we progressed it became evident that a number of other issues required examination and I will come to those later.

Applicants Evidence

[31] Mr E submitted that the BCC had withheld the regular monthly payment made by the BCC for the month of November 2022, which was due to be paid on 29 December 2022. After a number of emails from the Applicant, explaining their distress given the time of the year, the payment was eventually made on 9 January 2023. In an email in response to that in which Ms J expressed the distress suffered by the Applicants as a result of the delayed payment at that

time of the year, with the words that the Applicant were ‘living in misery’. Mr K responded in a mocking manner (through the Post Box) saying he was sorry they were ‘living in misery’. Mr E submitted that this remark was unreasonable and contributed greatly to the distress they were experiencing from the lack of funds caused by the delay in payment of the management fee. (**Allegation 1**).

[32] Further, that the BCC had ceased making payments for the reimbursement of fuel (**Allegation 5**) and mower blades (**Allegation 6**) inter alia, unilaterally changing the rules as detailed in preceding paragraph [18].

[33] Mr E provided a copy of a notice which was issued to the residents and owners of the complex which he submitted had caused the Applicants distress (**Allegation 2**).

[34] Mr E also provided copies of emails which he submitted indicated that the BCC had engaged in unreasonable conduct in breaching Mr E’s privacy by the taking of photographs and tracking of his whereabouts during the course of him carrying out his duties and going about his personal business as a resident of the complex (**Allegation 3**).

[35] Mr E also submitted that the reason the previous matters had been discontinued, despite the Applicants being concerned that the deed they were asked to sign was not reflective of the agreement reached before the Commission in the First Applications, was because the process to finalise the deed had become so distressing and costly (legal expenses), that the Applicants felt they would do anything just to bring it to an end (**Other Relevant Matters**).

[36] Mr E submitted that the appointment of Mr K as the person representing the BCC through the Post Box came as a shock and that he felt this appointment put the Applicants at risk of further bullying behaviour or even of having their contract terminated. Ms J broke down and demonstrated an extreme, even hysterical, amount of distress, explaining as best she could in the circumstances, how terrified she was when news of this change was conveyed to her later in 2022. (**Other Relevant Matters**).

Mr K (Person Named) Evidence

[37] Mr K submitted that whilst he had been aware that the payments from the November – January period would likely be delayed. He agreed that the delay was unreasonable but that it was not his responsibility to take any action in respect of their payment. He said payment was the responsibility of the BCM. Mr K also submitted and acknowledged that his email regarding the delay in the payment of these monies included sarcastic comments about the Applicants’ “living in misery” and that such comments were not reasonable and that he would endeavour to communicate differently in the future.

[38] Mr K submitted that whilst he considered the delays to the payment of the Applicant’s management fee invoices were unreasonable, he claimed that this was outside his control. When asked, Mr K acknowledged that he knew there was a change in the company appointed as the BCM at the end of November and that he had not taken any steps to ensure payment was made before the BCM closed for Christmas. He claimed he had left it in their hands.

[39] In relation to the notice as published, Mr K submitted that it had been created by the whole of the BCC and authored by the Secretary, Ms D. That he believed the issuing of the notice was done in order to keep the owners of the lots within the estate abreast of what was happening in the estate in the interests of transparency.

[40] Mr K submitted that the BCC had not approved the taking of photographs of the Applicants in the estate but that the BCC had not taken any steps to prevent it re-occurring once it came to their attention.

[41] Mr K submitted that the logbook request was reasonable and a common request for an independent contractor to provide to the BCC. (**Allegation 4**)

[42] In relation to the reimbursement of the fuel and motor blades, Mr K submitted that it wasn't a decision he could make and that the Applicants hadn't provided specifics about the different fuel requirements for the equipment (there were 3 types of fuel and only one of those was for a motor vehicle) and usage.

[43] Mr K submitted that he believed that he hadn't been required to undertake the Anti-Bullying training because he understood it to be a requirement of BCC members at the time of the agreement, not that new BCC members would need to undertake it. I found this curious given he was a party to the First Applications and was present when we agreed that all existing and new members of the Committee would undergo this training.

[44] Mr K refuted that he was the point of contact for the Applicants and submitted that he was the treasurer and that his communications had occurred through a third party, he refused to comment on whether he thought it was appropriate.

[45] Mr E put to Mr K under cross examination the question as to whether it was reasonable or not, to unilaterally alter the manner in which a number of issues had been dealt with (namely the reimbursement of fuel and mower blade costs) on 16 December for the first time, without any consultation, 9 days before Christmas. Mr K was evasive and claimed that he just sent the email at that time because it needed to be sent.

[46] Mr K said he didn't understand the difference between the different fuels or the reasons for the peak in fuel consumption. During cross examination he claimed not to have seen the correspondence detailing this information that had been sent to him by the Applicants dated 19 December 2022 (he was taken to this in the court book). Mr K acknowledged he was aware of some parts of that same correspondence. He claimed he couldn't remember the rest but that given it had been brought to his attention in the conference, he would make arrangements to pay the fuel expenses for the mower and other equipment as soon as he could. I found it curious that he was able to assure the Commission he could arrange these payments whilst also giving evidence that he wasn't the person who made the decisions, that the decisions had been made by all of the BCC and that he wasn't responsible for the late payments (monthly management fees) or non-payments over several months for the fuel and mower blade claims made by the Applicants.

Mr P (Group Named/Chairman of the BCC) Evidence

[47] Mr P advised that he was away attending to personal affairs during the period of around 18 September 2022 through to January 2023. In respect of the non-payment of the Management fees for November, until 9 January 2023, he submitted that he believed the issue stemmed from the change over from one Body Corporate Manager to another. Mr P submitted that he was surprised to hear that the Applicants had not been paid.

[48] Mr P submitted that he did not feel comfortable with the wording in the Notice to the Owners as published by the BCC and had sought legal advice on it. Mr P submitted that he believed that Mr K and another BCC member (being the Secretary Ms D) had drafted the Notice to the Owners but that Mr K was strongly of the view it should be published to the Owners.

[49] Mr P submitted that the taking of photographs of and making notes monitoring the movements the Applicants, was not a process that the BCC would endorse and that the action taken was that of a single member of the BCC and that the only course of action that he could have taken to prevent it was to add it to the agenda for the next BCC meeting.

[50] Mr P submitted that on the basis of the document provided by Mr E in relation to the fuel, that the instigation of a logbook and resulting invoice would likely be paid by the BCC.

[51] In relation to the Mower Blades, Mr P gave evidence that Mr K had strong views that the BCC should not reimburse these.

Consideration

Allegation 1 – Withholding the payment of invoices for Management Fees as issued by the Applicant from November to January

[52] It is uncontested that the November Invoice for Management Fees ought to have been paid over the Christmas Period but was not paid until the 10th of January 2023. Mr P was away over this period however it appears that there was some communication breakdown between the BCC (which Mr P says was chaired by Mr K during this period) and the BCM. Given the handover from the previous BCM occurred at the end of November, it was reasonable to expect the BCC would have taken proactive steps to ensure suppliers were paid, particularly over the Christmas period. Whilst this is demonstrative of poor co-ordination of the new BCM by Mr K I do not find that this was unreasonable within the context of workplace bullying. However, the email that Mr K sent in response to Ms J stating to him that the Applicants were ‘living in misery’ as a result of not being paid their November management fee in time, sought to taunt or mock the Applicants. Mr K admitted himself that this comment was not appropriate. I am of the view whilst the delay in the payment may have been a mistake caused by poor planning (reasonable management action), the mocking/taunting comments by Mr K fell short of being “carried out in a reasonable manner”. Mr K acknowledged that this was inappropriate, and in that respect it is my view that it was reasonably foreseeable that this would cause distress and mental anguish to the Applicants. I therefore find that Mr K’s handling of this was unreasonable in all the circumstances.

Allegation 2 – The Notice published to the community on 8 Feb 2023

[53] Mr K gave evidence that this notice was written by the entire BCC. Mr P gave evidence that it was written by Mr K and Ms D and that it was Mr K who was insistent that it be published to lot owners. I preferred Mr Ps evidence over Mr K and I do not believe that the document was written by the entire BCC, rather that it was in fact written by Mr K and Ms D. It is not a matter for me to decide whether the declaration that Mr K was indemnified by the BCC was approved by the BCC on behalf of owners. Whilst sending out the notice and declaring to the owners of property at the complex that the Applicants allegations were unfounded and unsubstantiated may have been in bad faith, I do not find that the action was unreasonable in all the circumstances.

Allegation 3 – The emails supplied by E of 9 January 2023 – specifically Attachment C09 – in which an email from F indicates that photos have been taken of E in the residential area.

[54] The evidence before me is that Mr I, a member of the BCC, was the person who instigated tracking, photographing and taking notes about the conduct and whereabouts of the Applicants. There is no evidence before me that the BCC endorsed this conduct and therefore I do not find that the action was unreasonable with respect to any of the named Respondents. It is my view that such conduct would amount to unreasonable action had it been condoned by the BCC. Mr P gave evidence that such conduct should stop and I expect he will appropriately raise that at the next BCC meeting.

Allegation 4 – Requirement for log books

[55] Given the evidence before me it is my view that the requirement for logbooks to be submitted in respect of fuel reimbursement for the use of the Applicants motor vehicle could be reasonable, albeit the manner in which it was suddenly implemented without consultation or discussion particularly considering it had never been required before, was unreasonable. It is obviously unreasonable to ask for logbooks to be provided retrospectively, given that log books are a recording of what is occurring rather than what has occurred months or weeks previously. Had the Applicants been consulted and advised that logbooks would be required in the future, then it would be possible for them to do so.

Allegation 5 – Reimbursement of fuel

[56] Given the evidence before me it is my view that Mr K unreasonably withheld approval for the reimbursement of fuel for equipment (not including motor vehicle fuel which I have addressed in the preceding paragraph) costs despite receipts being provided and a full explanation being provided by the Applicants. This reimbursement has been held for some months and it wasn't until the determinative conference that Mr K acknowledged he had withheld this in error. I find that the withholding of these reimbursements was unreasonable.

Allegation 6 – Reimbursement of mower blades

[57] The evidence is that reimbursement of the cost for used mower blades has been the established practice for many years. Mr K has ceased reimbursing these payments he says due

to advice from the BCM. There was no evidence before the Commission to demonstrate this. Further, I have concerns about the credit of Mr K. His evidence was contradicted in respect of a number of matters by both Mr P and Mr E. On Mr Ps evidence, Mr K is a key driver of the issues that have so far been found to be unreasonable. I believe Mr K has unreasonably, unilaterally changed this practice in writing just 9 days before Christmas and that to do so despite the BCC writing to the Applicants a few weeks earlier confirming that reimbursements would be made, was unreasonable. Given Mr Ps evidence regarding Mr P's absence, it is my view that Mr K did not have the endorsement of all of the BCC to take this action.

Other Relevant Issues

[58] The failure to effectively implement the measures agreed at the conference of 22 July 2022, particularly the bullying training, the communications protocol and the point of liaison between the parties, is disappointing. It does seem that the parties did implement a proper policy, albeit its policy position on the bullying training did not reflect what was agreed. Had these measures been properly implemented as agreed, I think it was unlikely this matter would have come back before me.

[59] The appointment of Mr K by the BCC as the contact point from the BCC with the Post Boxes, was inconsistent with what was agreed at the conference of 22 July 2022. Had a point of contact been appointed to liaise with the Applicants in a meaningful way rather than to act purely as a post office, it is highly likely that matters would have been resolved in a reasonable manner instead of escalating to the point they have. Further, given Mr Ks role as a Respondent in the First Applications and my findings in this current matter regarding Mr Ks handling of matters set out in this decision, his appointment as the contact point on behalf of the BCC, was unreasonable in all the circumstances.

Conclusions

[60] As required by s.789 FF I am satisfied that Mr E and Ms J are workers as defined by s.7(1) of the *Workplace Health and Safety Act 2011* (Qld) in a constitutionally covered business.

[61] The Applicants believe that they have been bullied at work. The bullying conduct has been set out in the preceding paragraphs but in summary whilst the majority of the issues raised were reasonable matters to be raised by the BCC, the manner in which they have been raised, including the frequency, tone, timing, content and approach detailed in that correspondence is not at all times reasonable and there are multiple incidents of substantiated unreasonable behaviour. As required by s.789 FF, I am therefore satisfied that the Applicants have been bullied at work by Mr K and given his role as Treasurer and acting Chairman of the BCC, that flows to the BCC itself.

[62] I am satisfied that repeated unreasonable behaviour has created an ongoing risk to the health and safety of the Applicants given:

- (i) the substantiated unreasonable conduct;
- (ii) the evidence in respect of the distress caused to the Applicants as a result of this conduct;

- (iii) the evidence of the parties as set out in the preceding paragraphs;
- (iv) the evidence that Mr K has been a driving factor in a number of the substantiated allegations;
- (v) the history of the matter before me;
- (vi) my view that the BCC and named parties failed to implement the proactive measures in accordance with those agreed in the conference before me on 22 July 2022;
- (vii) given the history of the matter, it is my view that it is more likely than not that Mr K will continue to engage in such conduct; and
- (viii) it is my view that the BCC is unable or unwilling to keep Mr K in check.

In that respect I am therefore satisfied that repeated unreasonable conduct has occurred and that there is an ongoing risk to the health and safety of the Applicants as defined by s789FF and therefore the Commission's jurisdiction is enlivened, and consequently it is appropriate to make orders.

[63] I don't consider the orders sought by the Applicants are necessary as they would place unreasonable restrictions on the parties that would prevent them from performing their voluntary roles effectively, however I have determined to issue interim orders to ensure proactive steps are taken to ensure a safe place of work for the Applicants.

Confidentiality

[64] I have issued the orders and this decision without identifying the parties involved. In this respect I have done so on the basis of similar orders issued by Deputy President Asbury¹ in which she states:

*"I have done so on the basis that it will be more conducive to the resumption and continuation of on-going safe and productive working relationship between the parties. I am also satisfied that the identification of the parties would also result in the identification of the complex, which may impact other residents. In this regard Ms A and Mr C should note that conflict of the kind dealt with in this decision could adversely affect their own interests and those of others in terms of the values of properties in the complex."*²

[65] Orders will be issued separately.



DEPUTY PRESIDENT

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¹ [\[2018\] FWC 4147](#).

² Ibid para [99].