



DECISION

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

Application by Josh Whiteford (AB2023/394)

COMMISSIONER SCHNEIDER

PERTH, 3 MARCH 2024

Application for an FWC order to stop bullying

[1] On the 28 August 2022, Mr Josh Whiteford (the Applicant or Mr Whiteford) made an application under section 789FD of the *Fair Work Act 2009* (Cth) (the Act) for an order to stop bullying in the workplace. The Applicant is employed by Apple Pty Ltd (the Employer or Apple).

Background

[2] The initial application listed four fellow Apple employees as Persons Named, this was later amended and reduced to a single Person Named – who was, at one point in time, the Applicant’s manager.

[3] In brief summary, the Applicant’s allegations arise in part from an internal investigation, which included a period of monitoring commenced by the Person Named, by the Employer into concerns over the Applicant’s performance.

[4] The parties attended two conferences before the Commission in attempt to resolve the application without the need for a Hearing.

[5] However, ultimately, the matter could not be resolved amicably, and a Hearing was listed on 14 December 2023.

[6] During the course of the conferences before the Commission, the Applicant agreed to amend his application to remove three of the original Persons Named.

[7] The Applicant was still concerned that he was at risk of bullying in the workplace from the remaining Person Named, Nicholas Horton (Mr Horton or the Person Named), and sought the Commission to arbitrate the matter.

Objections

[8] The Employer, in responding to the application, raised a jurisdictional objection. The Employer objects to the application on the grounds that the alleged bullying was reasonable management action, carried out in a reasonable manner.

[9] Following the conferences in this matter, the Employer raised a further jurisdictional objection. The Employer objects to the application on the grounds that the Applicant is no longer at ongoing risk of bullying.

[10] The Employer claims the Applicant and the Person Named are no longer in direct contact at the workplace and that the Employer has directed the Person Named not to interact with or approach the Applicant during the course of his duties.

[11] The Employer outlined that, for this reason, there is no order that the Commission could make. And, therefore, the Employer requests the application be dismissed on the basis that there are no reasonable prospects of success.

Hearing

[12] At the Hearing, as permission had been denied for the Employer to be represented by a lawyer,¹ all parties were self-represented.

[13] The following individuals provided evidence on behalf of the Applicant:

- Mr Nicolas Zenteno (Mr Zenteno), Team Manager – AppleCare Australia;
- Ms Kristelle Wachs (Ms Wachs), Mac Technical Support Advisor Tier 2; and
- Ms Rochelle Rye (Ms Rye), Manager - Leadership Academy.

[14] The following individuals provided evidence on behalf of the Employer:

- Mr Horton, Area Manager Apprentice - the Person Named; and
- Ms Sarah Thompson (Ms Thompson), Employee Relations Business Partner.

[15] The Employer, prior to the hearing, confirmed it would not seek to question the Applicant's witnesses. Regardless, the Commission instructed the parties that it required the attendance of Mr Zenteno to be present at the Hearing and subject to questions from the Commission.

Relevant legislation

[16] A worker who reasonably believes that he or she has been bullied at work may apply to the Commission for an order to stop bullying.

[17] Section 789FC of the Act provides:

“789FC Application for an FWC order to stop bullying

(1) A worker who reasonably believes that he or she has been bullied at work may apply to the FWC for an order under section 789FF.

(2) For the purposes of this Part, worker has the same meaning as in the *Work Health and Safety Act 2011*, but does not include a member of the Defence Force.

Note: Broadly, for the purposes of the *Work Health and Safety Act 2011*, a worker is an individual who performs work in any capacity, including as an employee, a contractor, a subcontractor, an outworker, an apprentice, a trainee, a student gaining work experience or a volunteer.

(3) The application must be accompanied by any fee prescribed by the regulations.

(4) The regulations may prescribe:

(a) a fee for making an application to the FWC under this section; and

(b) a method for indexing the fee; and

(c) the circumstances in which all or part of the fee may be waived or refunded.”

[18] Section 789FD of the Act sets out when a worker has been bullied at work, as below:

“789FD When is a worker *bullied at work*?

(1) A worker is *bullied at work* if:

(a) while the worker is at work in a constitutionally-covered business:

(i) an individual; or

(ii) a group of individuals;

repeatedly behaves unreasonably towards the worker, or a group of workers of which the worker is a member; and

(b) that behaviour creates a risk to health and safety.

(2) To avoid doubt, subsection (1) does not apply to reasonable management action carried out in a reasonable manner.

(3) If a person conducts a business or undertaking (within the meaning of the *Work Health and Safety Act 2011*) and either:

(a) the person is:

(i) a constitutional corporation; or

(ii) the Commonwealth; or

(iii) a Commonwealth authority; or

(iv) a body corporate incorporated in a Territory; or

(b) the business or undertaking is conducted principally in a Territory or Commonwealth place;

then the business or undertaking is a constitutionally-covered business.

[19] The circumstances in which the Commission may make orders to stop bullying are set out in section 789FF of the Act, as quoted below:

“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 an 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] Pursuant to section 789FF(1)(b)(i) of the Act, for the Commission to make orders with respect to an application under section 789FC for an order to stop bullying, it must be satisfied

that the worker was bullied at work and that there is a risk that the worker will continue to be bullied at work.²

Submissions & Evidence

The Applicant

[21] The Applicant has submitted a wealth of documents in support of his application.

[22] Many of the documents provided by the Applicant are copies of emails relating to a recent workplace investigation, medical certificates, and copies of his workers' compensation claim.

[23] While the documents provided a background of the Applicant's issues with the Employer and the Person Named, in the Commission's assessment, they are limited in their scope as a form of compelling evidence that the Applicant is still at risk of being bullied by the Person Named in the workplace.

[24] In summary, the Applicant makes the following submissions:

- The Person Named failed to complete assigned duties and responsibilities consistent with his job description, which impacted the Applicant.
- The Person Named failed to follow AppleCare policies and procedures in relation to performance feedback and coaching, which impacted the Applicant.
- The Person Named failed to follow AppleCare Performance Management policy and procedure.
- The Person Named failed to share relevant information with, and follow the direction of, the Employee and Labour Relations Department.
- The Person Named, by way of the above, bullied the Applicant.
- The Person Named, prior to the formal investigation, framed and portrayed allegations and omitted critical information in a manner and to an extent that it amounted to unreasonable bullying behaviour.
- The Person Named misused his position to unjustly build a case of misconduct against the Applicant and, in doing so, failed to follow standard policy and procedure.
- The Person Named repeatedly and deliberately failed to contact the Applicant to share business critical information identified during the monitoring process.

[25] The Applicant submits that the above is not reasonable management action.

[26] The Applicant submits that he is at risk of on-going bullying by the Person Named despite the Employer's contentions to the contrary.

Witness - Mr Zenteno

[27] It was the evidence of Mr Zenteno that he had known the Applicant since his commencement with the Employer which was more than eight (8) years ago.

[28] It was the evidence of Mr Zenteno that he became involved in the *situation*, in 2022, after the Applicant advised Mr Zenteno that he felt he was being bullied and was unsafe in his team.

[29] Mr Zenteno's evidence was that he had built up a mutual trust with the Applicant in the seven (7) preceding years.

[30] Mr Zenteno gave evidence that, despite not being the direct manager of the Applicant in 2022, he tried to support the Applicant as he would have done other employees outside of his direct team.

[31] Mr Zenteno explained that he felt, as a manager, it was his duty to support other employees where possible.

[32] Mr Zenteno's evidence was that the initial performance management of the Applicant could have been handled by more direct coaching and mentoring rather than the process pursued by the Person Named.

Witness - Ms Wachs

[33] It was the statement of Ms Wachs that another employee, Mr Julian McGarry (Mr McGarry), approached her in October 2022 in relation to the Person Named becoming the Applicant's manager.

[34] It was the statement of Ms Wachs that Mr McGarry advised her that the Person Named was not certain as to how best manage the Applicant.

[35] Ms Wachs's evidence largely concerned events that transpired over 12 months ago. Briefly, in my assessment of the evidence, the events outlined in Ms Wachs's evidence, due to their age, are limited in weight concerning any support of the position that the Applicant is at an on-going risk of being bullied by the Person Named.

Witness - Ms Rye

[36] It was the evidence of Ms Rye that, in December 2022, she was advised that any call avoidance behaviour displayed by the Applicant be reported to Nick Horton but did not need to be discussed directly with the Applicant.

[37] Ms Rye stated that she questioned the directive as "*we can't expect advisors to improve on performance or behaviours if they are not made aware of what they may be doing wrong or what is expected of them*". Ms Rye stated that she was advised a conversation had already taken place with the Applicant.

[38] Ms Rye gave evidence that, in her experience with the business, such a directive did not align with usual coaching practices, as any kind of action plan or documented coaching should be in partnership with the advisor, so they have opportunities correct any behaviours as they continue to work and take calls.

[39] Ms Rye stated that in, the short period of time she was managing the Applicant, she did not observe any call avoidance behaviour.

[40] Ms Rye gave evidence that, in January 2023, the Applicant advised her that he:

“felt unfairly targeted by managers in his org in regard to his Customer Facing Time (CFT) and performance. He mentioned he was considering an ELR complaint as managers that were not Ash had been approaching him about his actions and that he felt he was being watched closely”.

[41] Ms Rye then asked the Applicant, “*if it was about the investigation with Nick Horton when Leadership Academy supported his team in December*”. Ms Rye states that the Applicant then replied that he was not made aware of any concerns, nor did he know or understand why Nick Horton was involved.

The Employer

[42] The Employer confirmed that both the Applicant and the Person Named are current employees of Apple Pty Limited.

[43] The Employer outlined the below in relation to the Applicant’s current situation:

- Mr Whiteford is employed by Apple in the role of a Technical Support At Home Advisor;
- the role of an Advisor is performed entirely from home;
- the responsibilities of an Advisor are to provide technical consultancy and customer service;
- Mr Whiteford is subject to Apple’s directions, and is expected to perform his role in a professional, competent and productive manner;
- Mr Whiteford is equally subject to monitoring at work to assess his performance and conduct, generally, proactively and reactively to concerns raised with AppleCare management; and
- Mr Horton was assigned some management responsibilities for Mr Whiteford in November and December 2022.

[44] The Employer provided a chronology of events relevant to the application, which reads as follows:

Date	Event
October 2022	Mr Whiteford complained about his then managers. This resulted in a temporary assignment of management responsibilities for Mr Whiteford to Mr Horton.
1 November 2022	Mr Horton assumes some management responsibilities for Mr Whiteford. Mr Whiteford makes clear that Mr Horton is only to perform
22 November 2022	Mr Horton received peer feedback (i.e. a complaint from a colleague) about Mr Whiteford, which caused Mr Horton to commence proactive monitoring of Mr Whiteford's conduct (Monitoring).
6 December 2022	Mr Whiteford is assigned to a different Team Manager, not Mr Horton.
11 April 2023	Mr Horton ceases Monitoring, and an Employee and Labour Relations employee commences consideration of a formal investigation process shortly after. Mr Horton is no longer involved in any investigation or disciplinary process at all.
Late April 2023	Ms Thompson confirms that a formal investigation process is to commence.
4 May 2023	Mr Whiteford is informed of formal investigation process by his manager, Mr Zenteno.
15 May 2023	Mr Whiteford attends a meeting about his conduct and is afforded an opportunity to respond in writing, which he does.
10 July 2023	Ms Thompson sends a letter to Mr Whiteford from Apple asking him to show cause why disciplinary action should not be taken (Show Cause Letter).
6 August 2023	Mr Whiteford responds to the Show Cause Letter.

28 August 2023	Mr Whiteford filed this Application.
6 October 2023	The Application is listed for conference.
18 October 2023	Ms Thompson and Mr Zenteno deliver the outcome, being a letter warning to Mr Whiteford about his misconduct (Warning Letter) and a performance improvement plan for the next 2 months (Action Plan). This finalises the disciplinary process.

[45] The Employer submits that the above outlines the basic facts of the matter that should be taken into account when determining the application.

[46] The Employer submits that much of the material provided by the Applicant relates to peripheral matters or issues which do not relate to the Person Named.

[47] The Employer submits that the Person Named has not engaged in conduct amounting to bullying, rather, Mr Horton engaged in reasonable management undertaken in a reasonable manner.

[48] The Employer submits that the “*monitoring*” of the Applicant was “*unremarkable in all the circumstances*”.

[49] The Employer submits that the Person Named received peer feedback regarding the Applicant and acted on this information in a reasonable manner.

[50] The Employer submits that the application is better defined as a complaint made by the Applicant concerning the monitoring of employees (including the Applicant himself) which can and does occur in the workplace.

[51] The Employer highlights that all employees are notified of the monitoring requirement when they sign their contract of employment and, due to the work being completed 100% remotely from home, such monitoring is a reasonable condition.

[52] The Employer submits that the practice of monitoring is “*usual and common practice for managers to carry out monitoring where issues arise with an Advisor’s conduct at work*”.

[53] The Employer also highlights that, when concerns arise that could justify the use of monitoring, it is common practice, for the Employee and Labour Relations Team – in conjunction with an employee’s manager, to monitor the behaviour over an extended duration to determine if the concerns warrant further investigation and potentially disciplinary action or if the concerns are not warranted and cease the monitoring.

[54] The Employer also confirmed that the Person Named was never directed to cease monitoring of the Applicant, rather, the Employer decided that any formal investigation would not commence until the Applicant’s complaints about other managers were resolved.

[55] The Employer submits that the level of interaction between the Person Named and the Applicant is a direct result of the Applicant's refusal to be managed by the Person Named.

[56] The Employer submits that the Person Named was not involved in the formal investigation or any disciplinary outcomes, as he had long been removed from any involvement.

[57] The Employer submits that there was and is no repeated behaviour which would constitute bullying and certainly no conduct from the Person Named which created a risk to health and safety.

[58] The Employer outlines that the investigation that led to the monitoring was reasonable management action conducted in a reasonable manner and that the Person Named was not involved in the investigation or decision to issue the Applicant with a written warning and a 2 Month Action Plan.

[59] The Employer submits the Applicant has not established or outlined in his materials that a risk to health and safety exists, or did exist, since the application has been filed.

[60] The Employer submits that the Applicant has not been bullied at work and that all disciplinary action was reasonable management action undertaken in a reasonable manner.

[61] The Employer submits that, simply, the Applicant is dissatisfied with the outcome of the investigation and that, consequently, the application lacks merit.

[62] The Employer submits that the application must be dismissed for the following reasons:

- There has been no interaction between Mr Horton and Mr Whiteford for over twelve months. Mr Whiteford has conceded as much from the time the application was filed;
- Mr Horton is currently employed as an Area Manager, and is assigned to work with the Korea AppleCare team only; and
- Mr Horton will not interact with Mr Whiteford at work, in light of the operational and practical realities of their positions.

[63] The Employer submits that there are no orders that the Commission is open to make in such an application, noting the orders sought by Mr Whiteford in the Application: to address a "continuing" risk of bullying, as there is no future risk of any bullying. Therefore, the Employer submits, this application has no prospects of success.

[64] The Employer submits that, consistent with Part 6-4B of the Act, the Commission has repeatedly dismissed applications where employees do not work together anymore, and that this case is consistent with the Commission's previous precedent.

[65] The Employer submits that the evidence of its witnesses supports the above position.

[66] In her statement, Ms Thompson confirmed that the practice of monitoring is standard for AppleCare Advisors, like the Applicant – who work 100% from remotely from home, and that employees are informed of this at the commencement of their employment.

[67] It was also confirmed in the statement of Ms Thompson that the process followed and involvement of the Person Named in the initial stage of the investigation was not uncommon or controversial, rather:

“It is common for managers who raise an issue remain involved when they raise concerns or issues to ELR. This can include supporting ELR to review and monitor processes where they have knowledge of the issues and relevant background, and so Mr Horton’s continued involvement after he stopped performing management functions was not unusual”.

[68] It was also confirmed by Ms Thompson that, once the formal investigation commenced, the Person Named had no further involvement in the investigation, other than providing clarification to earlier information provided.

Consideration

[69] For reasons outlined further below, I have come to the conclusion that the Applicant is not being bullied by the Person Named and there is no reasonable basis to conclude that the Applicant is at risk of future bullying from the Person Named. Therefore, the application must be dismissed. My reasons are as follows.

[70] The Applicant is engaged in a position that required he completes his work 100% from home. Therefore, interaction between the Applicant and fellow employees, such as the Person Named, occurs primarily through online communication.

[71] Although I accept that bullying, obviously, *can and does* occur online, I note that this method of interaction, in the circumstances of this matter, does dictate the nature of the interaction between the individuals concerned, lessening potential negative occurrences, and is easily able to be monitored and remedied in the event issues arise.

[72] The Applicant and the Person Named have had limited direct contact with each other in the last 12 months.

[73] At the most, the Applicant and the Person Named are, from time to time, required to be present for various online meetings together. However, on assessment of the evidence presented, the Applicant is not required to have any prolonged or extended engagement with the Person Named.

[74] The Person Named was not involved in the outcome of the workplace investigation conducted by the Employer and was not involved in any disciplinary action involving the Applicant.

[75] I am not satisfied that the conduct of the Person Named can be construed as bullying, as contemplated by the Act.

[76] I have also considered the written direction, that the Employer has provided to the Person Named, which clearly states the following:

“Apple will direct Mr Horton not approach or engage in any further actions against you during your employment (noting that given the operational changes there is no prospect he would in any event).”

[77] Relevant to the above direction, that the Applicant has raised concerns that the Person Named will resume working in the Employer’s Australian operations or in some capacity that will require interaction between the two again.

[78] Despite the Employer’s statement regarding the change in the Mr Horton’s role, it is not impossible that the Person Named may change roles leading to increased proximity to the Applicant.

[79] Nevertheless, and of the utmost relevance, as I am not satisfied bullying has occurred, such possibility of Mr Horton changing roles again does not lead me to find there is ongoing risk.

[80] Furthermore, the direction from the Employer to the Person Named, alongside the general impact of this process – which would have been undeniably unpleasant for the Person Named, I am satisfied that any potential for future interaction would be heavily considered by all involved and would not support any finding of ongoing risk.

[81] Having considered the above items, I am not satisfied that the Applicant is at ongoing risk of any bullying by the Person Named.

[82] I note the Respondent’s submission, that the Applicant is not happy with the findings of the investigation and has used this application as a means of questioning the outcome of the investigation. On assessment of the evidence before the Commission, I am inclined to agree with the Respondent’s submission.

[83] Although it is clear that the Applicant is not maliciously or vexatiously pursuing this application, it indeed appears his dissatisfaction with the outcome of the investigation has motivated his pursuit of this action.

[84] Having considered the submissions of the parties and all the evidence provided, I am not satisfied that the Applicant was bullied by the Person Named. Rather, I have formed the view the Person Named engaged in reasonable management action conducted in a reasonable manner.

[85] Consequently, the application must be dismissed.

[86] It is not uncommon in the workplace that managers will have different styles in how they manage performance concerns of each of their individual employees. Such differences in management style, much like differences in personality, can give rise to upset in employee’s

who, due to their own personality and reaction to feedback, do not take well to a particular management style.

[87] Although good managers should strive to ensure their communication, with as many employees as possible, is tailored to reduce any such issues, the incompatibility of personality styles as a phenomenon within the workplace, and any resulting friction that can occur, does not constitute bullying under the Act.

Conclusion

[88] Accordingly, as I am not satisfied, upon assessment of the materials and evidence in this matter, that bullying has occurred and, further, I am not satisfied that there is ongoing risk, the application must be dismissed.

[89] An Order dismissing the matter has been issued concurrently.³



COMMISSIONER

Appearances:

M Howlett, Employer.

J Whiteford, Applicant.

Hearing details:

2023.

Perth (by video):

December 14.

Printed by authority of the Commonwealth Government Printer

<PR771963>

¹ *Fair Work Act 2009* (Cth), s.596.

² [\[2014\] FWC 3408](#); [\[2015\] FWCFB 1661](#).

³ [\[PR772023\]](#).