

Summary of Decision

19 December 2014



Sharon Bowker; Annette Coombe; Stephen Zwarts

V

DP World Melbourne Limited T/A DP World; Maritime Union of Australia, The Victorian Branch and Others

(AB2014/1260; AB2014/1261; AB2014/1266)

[\[2014\] FWCFB 9227](#)

[1] Three employees of DP World Melbourne Limited (DP World) have each made an application for an order to stop bullying pursuant to s.789 of the *Fair Work Act 2009* (Cth) (the FW Act). The Applicants want the Commission to make a finding and issue a statement to the effect that each of them has been bullied at work. In addition, various orders are sought against DP World and the Maritime Union of Australia (MUA).

[2] The Applicants have provided a Points of Claim document outlining the various alleged elements of unreasonable behaviour relied upon by them. This includes alleged conduct by individuals that are, or were, employees of DP World, members of the MUA and/or officials of the MUA.

[3] The Commission only has jurisdiction to make orders to stop bullying if, among other things, the Commission is satisfied that ‘the worker has been bullied at work’ (s.789FF(1)(b)(i)). DP World and the MUA (the Respondents) seek to have certain allegations in the Applicants’ Points of Claim struck out on the basis that the alleged bullying conduct did not occur ‘at work’, within the meaning of s.789FD.

[4] The relevant provisions are set out in Part 6-4B of the FW Act (ss 789FA-789FL). Part 6-4B was inserted into the FW Act by the *Fair Work Amendment Act 2013* (Cth) (the 2013 Amendment Act).

[5] Section 789FD deals with when a worker is ‘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***.” (emphasis added).

[6] The definition of ‘bullied at work’ is central to the operation of Part 6-4B. A worker may only apply to the Commission for an order under s.789FF if they reasonably believe that they have been ‘bullied at work’ (s.789FC(1)). The Commission’s power to make orders to stop bullying is only enlivened if, among other things, the Commission is satisfied that the applicant worker has been ‘bullied at work’ (s.789FF(1)(b)).

[7] In these proceedings only one aspect of the definition of when a worker is ‘bullied at work’ is in contention - the meaning of the expression ‘while the worker is at work’ in s.789FD(1)(a), though that expression must be considered in its legislative context.

[8] The Full Bench observed that the focal point of the definition is on ‘the worker’, that is on the applicant for an order to stop bullying. In this context ‘worker’ has the same meaning as in the *Work Health and Safety Act 2011*, but does not include a member of the Defence Force (see s.789FC(2)). Broadly speaking, this means that a ‘worker’ is an individual who carries out work in any capacity for a person conducting a business or undertaking, including as an employee; a contractor or subcontractor; an outworker; an apprentice or trainee; a student gaining work experience, or a volunteer.

[9] The Full Bench also observed that the definition of ‘bullied at work’ includes the requirement that an individual or group of individuals ‘repeatedly behaves unreasonably towards the worker [ie the applicant], or a group of workers of which the worker is a member’ (see s.789FD(a)(i) and (ii)). The individuals engaging in the unreasonable behaviour need not be workers, for example they could be customers of the business or undertaking in which the applicant works. Nor do the relevant statutory provisions contain any requirement for these individual(s) to be ‘at work’ at the time they engage in the unreasonable behaviour which the applicant contends constitutes bullying.

[10] The Full Bench found that the first part of the expression ‘while the worker is at work’ is plainly intended to create a temporal connection between the bullying conduct (ie. the repeated unreasonable behaviour directed at the worker: s.789FD(1)(a)) and the worker being ‘at work’. The more challenging task is to determine the legal meaning of the phrase ‘at work’ in the context of s.789FD(1).

[11] The Full Bench rejected the proposition advanced on behalf of the Applicants that conduct occurs ‘at work’ if it has ‘a substantial connection to work’, noting that the difficulty with the submission was there was no persuasive argument linking the definition proffered with the actual language of s.789FD(1)(a). The submission advanced simply sought to recast the statutory language into a more palatable form. The Full Bench said that it could see no warrant for such an approach:

“We reject the proposition, advanced on behalf of the Applicants, that conduct occurs ‘at work’ if it has ‘a substantial connection to work’. We note that counsel for the Applicants put the proposition even more broadly during the course of oral argument:

“Because the ‘at work’, as we contend, is the condition of being engaged by a constitutional corporation in some capacity, be it employment or other, in its business. That person is engaged in that business, even if they are asleep. This is a problem with, again, language. Somebody says to you, ‘Where do you work’, you say perhaps you work at the Fair Work Commission, that doesn't stop when you're asleep.”¹

[12] The central findings of the Full Bench are set out at paragraphs [48] - [51]:

“[48] We have concluded that the legal meaning of the expression ‘while the worker is at work’ certainly encompasses the circumstance in which the alleged bullying conduct (ie the repeated unreasonable behaviour) occurs at a time when the worker is ‘performing work’. Further, being ‘at work’ is not limited to the confines of a physical workplace. A worker will be ‘at work’ at any time the worker performs work, regardless of his or her location or the time of day. As we have mentioned, the focal point of the definition is on the worker (ie the applicant). The individual(s) who engage in the unreasonable behaviour towards the worker need not be ‘at work’ at the time they engage in that behaviour.

[49] While a worker performing work will be ‘at work’ that is not an exhaustive exposition of the circumstances in which a worker may be held to be at work within the meaning of s.789FD(1)(a). For example, it was common ground at the hearing of this matter that a worker will be ‘at work’ while on an authorised meal break at the workplace and we agree with that proposition. But while a worker is on such a meal break he or she is not performing work. Indeed by definition they are on a break *from* the performance of work. It is unnecessary for us to determine whether the provisions apply in circumstances where a meal break is taken outside the workplace.

[50] In our view an approach which equates the meaning of ‘at work’ to the performance of work is inapt to encompass the range of circumstances in which a worker may be said to be ‘at work’.

[51] It seems to us that the concept of being ‘at work’ encompasses both the performance of work (at any time or location) *and* when the worker is engaged in some other activity which is authorised or permitted by their employer, or in the case of a contractor their principal (such as being on a meal break or accessing social media while performing work).”

[13] The Full Bench noted that the use of social media to engage in bullying behaviour creates particular challenges:

“In most instances the practical application of the definition of ‘bullied at work’ in s.789FD will present little difficulty. But there will undoubtedly be cases which will be more complex, some of which were canvassed during the course of oral argument. For example, a worker receives a phone call from their supervisor about work related matters, while at home and outside their usual working hours. Is the worker ‘at work’ when he or she engages in such a conversation? In most cases the answer will be yes, but it will depend on the context, including custom and practice, and the nature of the worker’s contract.”²

¹ [2014] FWCFB 9227 at paragraph [46]

² [2014] FWCFB 9227 at paragraph [53]

[14] The Full Bench rejected an argument advanced by counsel for the MUA that the worker would have to be ‘at work’ at the time the facebook posts were made (at paragraph [55]),:

“The relevant behaviour is not limited to the point in time when the comments are first posted on facebook. The behaviour continues for as long as the comments remain on facebook. It follows that the worker need not be ‘at work’ at the time the comments are posted, it would suffice if they accessed the comments later while ‘at work’, subject to the comment we make at paragraph 51 above.”

[15] The Full Bench declined to strike out the claims said to be beyond the scope of Part 6-4B at this preliminary stage and decided that the more appropriate course was to remit the matter to the member at first instance, Deputy President Gostencnik. It will then be a matter for the Deputy President to hear evidence about the alleged conduct and to determine the extent, if any, that the proceedings are to be confined, and to deal with any challenges to the relevance of certain evidence. In dismissing the strike out application the Full Bench said (at paragraph [60]):

“The Commission is not a court of pleading and acceding to such a strike out application introduces a level of legal technicality which is inimicable to the manner in which the Commission is to perform its functions and exercise its powers.”

- *This statement is not a substitute for the reasons of the Fair Work Commission nor is it to be used in any later consideration of the Commission’s reasons.*

- ENDS -

For further information please contact:

Camilla Moses

Media and Communications Team

Phone: 0427 097 628

Email: communications@fwc.gov.au