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# ROUSSOS LEGAL ADVISORY

Strategic Business Counsel



## Bullying and Reasonable Management Action

### **Application for an order to stop bullying – Luis Perez [2016] FWC 4097**

#### **Fair Work Commission, Bullying**

A worker who reasonably believes that he or she has been bullied at work may apply to the FWC for an order: s789FC. The definition of when a worker is bullied at work is set in s789FD (ie a worker is bullied at work if another repeatedly behaves unreasonably towards the worker; and that behaviour creates a risk to health and safety (but excludes reasonable management action carried out in a reasonable manner)).

#### **Case details**

This Fair Work Commission (FWC) case was an application for an order to stop bullying under of the *Fair Work Act (FWA)*. It was decided by the FWC on 1 Aug 16.

The Applicant, Mr Perez, was unsuccessful in his application. The Commission found ‘many of the incidents and aspects relied upon by Mr Perez did not constitute relevant unreasonable conduct.’ There were some aspects that potentially could be unreasonable; however, in all, the Commission decided to make no order and dismiss the Application.

Mr Perez appeared in person; and the Northern Territory Office of the Commissioner for Public Employment appeared by its representative. The case was heard in Alice Springs over two days in Jun 16; and one day in Jul 16 by video link to Adelaide. Mr Perez gave evidence and submitted a number of documents. Three employees of the Dept of Health also gave evidence. The FWC written reasons comprise 34 pages.

#### **Background and context**

Mr Perez was engaged on 16 Jun 14 by the Northern Territory Department of Health, Central Australian Health Service, working at the Alice Springs Hospital. He was employed as cleaner, generally working shifts in the public areas of the hospital.

The Commission noted ‘Alice Springs Hospital is the only medical facility within a radius of 1,500kms and is an important part of the health care system in central Australia. As with any such facility, the maintenance of appropriate hygiene and cleaning standards is critical. Given the nature of the workforce and the work carried out at the Hospital it is reasonable and appropriate that the cleaning work be highly structured, with cleaning manuals and duty lists on how tasks are to be performed.’

One of the employees alleged to have bullied Mr Perez were employed as housekeeping cleaner for eight years; and the other employee was a leading hand since Dec 13, and was a Health and Safety Representative (HSR).

The Environmental Services Supervisor at the Hospital, who also gave evidence, was responsible for supervising 45 staff in the environmental services section at the Alice Springs Hospital Campus and Renal Unit. This Supervisor was responsible for ensuring cleaning standards are maintained in accordance with Infection Control practices.

### **The alleged bullying conduct**

Mr Perez 'reasonably believed he was bullied at work', allegedly by the housekeeping cleaner / leading hand and food; and environmental manager. Relying on eight incidents involving other employees, Mr Perez argued the:

- employer maintains an abusive and bullying workplace.
- repeated 'unreasonable behaviours of the group of individuals poses a real and significant threat to his health and safety, and further that there is sufficient evidence that on the balance of probabilities there is a greater risk that he will continue to be bullied at work.'
- cumulative 'bullying behaviour of the two employees has caused the recurrence of his medical condition.'

### **The employer's case**

The employer generally agreed with Mr Perez regarding exchanges between the relevant people. However, the employer addressed the detail of what went on; and had a different characterisation of the events and conduct.

The Dept argued the:

- various incidents and circumstances relied upon by Mr Perez did not constitute repeated unreasonable behaviour within the meaning of the FWA.
- alleged behaviour did not create a risk to health and safety.
- actions taken by management were reasonable management action carried out in a reasonable manner.

The Dept also contended:

- the management action taken was perhaps not perfect or ideal, but it does not fall into the unreasonable category.
- Mr Perez should have taken alternative action. There were a range of avenues open to employees, under the Employee Internal Complaints Guideline (the Guideline), to progress the matter. Where Mr Perez utilised the internal procedures, the matters were resolved.
- Mr Perez did not utilise the process of escalating the matters through to Human Resources, in accordance with the Guideline, or to anyone else. 'This is because Mr Perez only had the intention of being on the record to commence future litigation, rather than actually trying to resolve the issue or concerns he had about the way he was being managed in the workplace.'

- ‘Mr Perez’s own conduct does not demonstrate someone who actually wants to resolve issues in the workplace; that Mr Perez jumps to conclusions.’
- ‘Mr Perez, by his own admission, is someone who believes that he can do things in any manner he sees fit, including determining what will be cleaned, how it will be cleaned and within what time frames. Further, it contends that Mr Perez is of the view that he can take his breaks as he deems appropriate.’
- ‘The employer submits that Mr Perez responds to anyone that is critical of him as saying that they are bullying him.’

### **Some of the incidents**

The eight alleged incidents occurred in late 2014 (that Mr Perez was abused; was called a ‘pig’ after he loudly burped; question about the contents of his trolley in an intimidating manner); Feb 16 (‘espying’ others speaking about him assassinating his character); and May 16 (being rudely awoken whilst resting his eyes in a darkened unused room; and being directed to take his lunch and tea breaks in the staff room).

These incidents were analysed on the evidence of the witnesses. The Commission found ‘Mr Perez to be an honest witness but whose subjective views about the rights and wrongs of the situation dominated his recollections of the facts.’ The Commission found the other witnesses to have given evidence honestly and fairly.

The Commission had to make an evaluation of the facts. The reasons are reasonably lengthy, but the following illustrates some of the factual issues.

In relation to the burp and being called a pig, everyone agreed Mr Perez, without warning, gave a loud burp; and that another employee called him a pig. Mr Perez took exception to this as in his culture ‘it was common practice and indeed a compliment to burp and that it was not necessary to excuse oneself... [and in the] the region of his original country is dominated by people of the “Muslim religion” and thus for him it is very offensive to call someone a ‘pig’.

The Commission noted that in ‘many circumstances, nothing would flow from such an exchange. The absence of a mutual understanding about the competing cultural norms has meant that this incident has become more significant, at least for Mr Perez.’

On the occasion when Mr Perez was called a ‘pig’, the individual and Mr Perez managed to avoid each other and/or remain civil for a period of 12 months.

In relation to the trolley incident, ‘Mr Perez was cleaning when he was stopped by Ms Thomas who, in the presence of other cleaners, allegedly aggressively questioned him about the contents of his trolley. In particular, Ms Thomas asked why Mr Perez did not have water in his bucket; Mr Perez agrees that he did not have water in his bucket.’ The Commission thought this approach was a ‘legitimate inquiry about the absence of warm soapy water in his bucket or pale.’ Mr Perez thought it ‘appropriate to undertake the duties at different times and in a different manner than is set out in the cleaning protocols.’ On the evidence, when considered objectively, the Commission was not ‘satisfied that the approach and behaviour’ of the other employee was unreasonable.

Regarding the sleeping incident ‘it was reasonable that in these circumstances Mr Meldrum should seek to ascertain what was taking place. He enquired as to whether Mr Perez was alright, and when he awoke, Mr Meldrum advised Mr Perez that he should not be taking his break in that area and that he should be using the crib facilities provided.’

The Commission had to weigh up evidence that Mr Perez contends that he walked past Ms Kelly who proceeded to called him an ‘arrogant prick’. The employer contends that this took place when Mr Perez rudely and deliberately walked between Ms Kelly and another person with whom she may have been talking. After a complaint was made and a meeting was organised, the other employee apologised to Mr Perez. At the time, Mr Perez stated that in accepting the apology, he did not surrender his rights to later bring an application in the Commission. On the occasion when Mr Perez was called an ‘arrogant prick’, a formal apology was made by the individual to Mr Perez.

Mr Perez also referred to some more incidents, including three in late 2014, 2015 to argue the employer maintains a bullying workplace; but no evidence was lead on that. Mr Perez also made contentions around the general workplace culture and environment, but referring to other allegations against other employees. There was no evidence about those other matters ‘other than the fact that the complaints were made.’

Mr Perez also complained he was not given CCTV footage of the incidents he relied on. Mr Perez said that not retaining the CCTV footage was ‘illegal’ action.

The Commission accepted Mr Perez had ‘a perception that various employees behave unreasonably toward him from time to time’; however, ‘based upon the evidence that is before the Commission [the Commission was] unable to make such a finding.’

### **Legal principles**

The Commission referred to these principles:

- the concept of individuals ‘repeatedly behaving’ unreasonably implies the existence of persistent unreasonable behaviour but might refer to a range of behaviours over time.
- what is required is repeated unreasonable behaviour by the individual or individuals towards the applicant worker or a group of workers to which the applicant belongs. No specific number of incidents are required.
- the assessment of the behaviour is an objective test, having regard to all the relevant circumstances applying at the time.
- the behaviour must occur whilst the applicant is at work. The unreasonable behaviour must also create a risk to health and safety. There must be a causal link between the behaviour and the risk to health and safety.
- behaviour will not be considered to be bullying conduct if it is reasonable management action carried out in a reasonable manner. What is ‘reasonable’ is a question of fact and the test is an objective one.

### **CCTV issue**

As noted above, it appears CCTV evidence became a contentious issue. Some CCTV footage was retained but not all of that Mr Perez wished for.

The Commission indicated ‘the early responses to the request for the retention of the CCTV footage were inadequate; albeit that this did not lead to unfairness given the particular circumstances of this matter.’

Regarding the latter complaints, CCTV footage was retained. The Commission discussed NT government Advice 7 which discusses retention of records in the face of, among other things anticipated legal proceedings.

### **The employer’s policies**

The Commission discussed the employers policies regarding the manner in which Mr Perez’s complaints were dealt with.

Mr Perez contended the employer did not (i) properly investigate or take reasonable measures to deal with his earlier allegations of workplace bullying; and (ii) follow the relevant workplace policies and procedures in relation to his complaints.

Mr Perez made complaints via email to his supervisor. He contends the Dept failed to implement the workplace Anti-bullying Policy for all complaints made as it was only implemented for 2 out of the 11 complaints. Mr Perez was concerned management did not follow the required process set out for Managers in the Employee Internal Complaints Guideline.

Reference was made to Policy (the Department’s ‘Aggression Zero Tolerance Policy’, ‘Appropriate Workplace Behaviour Policy’, ‘Employee Internal Complaints Policy’, and ‘Employee Internal Complaints Guideline’ (employees to take responsibility for raising concerns at a local level; Managers to be proactive in addressing any potential conflict, issue or concern and to judge all complaints on their merits and facts)).

Mr Perez thought his complaints were not taken seriously initially. The Commission understood this view and noted ‘although the policy contemplates matters being resolved at a local level, there is an obligation on a manager to be proactive in addressing potential conflict and dealing with complaints. Further, although I have ultimately found, after detailed consideration of the evidence, little substance, I do not consider that all of the complaints made by Mr Perez were given sufficient attention when first made. Unfortunately, the lack of attention has, in some ways, then become the focus rather than the allegations themselves and opportunities to informally clarify the reasonable expectations of management, and Mr Perez, were not taken.’

The Commission also observed it ‘is also the case that Mr Perez did not use the complaint process to escalate many of the matters he had raised and this does lead to the conclusion that he was, in effect, willing to store up the matters to bolster his case against Ms Thomas.’

In the conclusions, the Commission said there ‘are, however, some observations made in this decision that should be considered by management of the hospital. This might lead to some reinforcement of the role of middle management in terms of the best application of the policies and workplace grievance procedures. Further, a review of the manner in which requests for the preservation of CCTV footage are dealt with, would be appropriate.’

### **Conclusion about whether the Applicant been bullied at work within the meaning of the Act?**

The Commission found that some elements could ‘potentially be considered to be unreasonable behaviour’; however, many of the incidents and aspects relied upon by Mr Perez did not constitute relevant unreasonable conduct’; and ‘many of the allegations about unreasonable conduct were not supported by the evidence or were not of a character as to fit within the meaning of bullying conduct established by’ the FWA.

Regarding the matters of potentially relevant unreasonable conduct, ‘it should all be assessed as part of the overall consideration of alleged bullying conduct.’

Mr Perez took sick leave between 7 Dec 15 and 1 Jan 16. He provided a medical certificate in which a doctor stated Mr Perez ‘was suffering from a medical condition (detail provided), which he claims is from workplace bullying.’ In terms ‘of the risk to health and safety, the fact that Mr Perez was earlier certified as being unfit for work is relevant and indicative of risk. It is not however conclusive in its own right.’

In the end, the Commission was ‘not satisfied that there was relevant unreasonable behaviour towards the applicant (and/or the group of workers to which he belongs) whilst at work’; and the Commission declined to make an order under s.789FF of the FWA.

As at 1 Aug 16, ‘Mr Perez continues to attend work but has been prescribed with medication apparently related to his condition.’

### **Take away**

The decision in the case turned on its facts and the particular circumstances. The case highlights the importance of the following policies and procedures; and following the process outlined.

**For further information please get in touch with our lawyers at**

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