



# GREG REIFFEL CONSULTING

HUMAN RESOURCES & INDUSTRIAL RELATIONS

## Employee Relations Newsletter

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### Quote of the Edition

*"Bullying is not a reflection of the victim's character, but a rather a sign of the bully's lack of character."* Unknown.

### Introduction

This edition is focused on what I believe to be the latest "gold standard" decision in "Stop Bullying" orders and is quite long. Therefore, I recommend it be read in in two parts: firstly, to read about the case proper, then for practitioners to note from the section headed "the law".

I have also included at the conclusion, some articles of interest which have raised my interest:

- Nurse murdered whilst on-call a safety breach.
- Super: Director liability and how the ATO determines what is owed.
- Whistleblower news.

### Rare Stop-Bully Order

Jennifer Watts. (AB2017/517) [2018] FWC 1455. Williams, C. 20 March 2018.

As mentioned in my introduction, this decision is the latest precedent in stop bullying orders. The decision itself, reinforces the need to follow your policies and investigate **all** complaints, regardless of how trivial. Noting the applicant, Ms Watts was very persistent in her complaints: approaching management on a number of occasions (which were ignored because she could/would not name names; then WorkCover; then her union.

The Commissioner in this matter commented that there are relatively few decisions concerning applications for an order to stop bullying, therefore thinking it helpful to set out the relevant legislation and to explain the considerations involved in deciding such an application.

Ms Watts is employed as a Catering Assistant, sometimes referred to as a Patient Service Assistant, at the Glengarry Private Hospital (Glengarry). Her employer is Ramsay Health Care (Ramsay). Ms Watts' first application named three employees (later amended to two) she believed had engaged in bullying behaviour toward her: Mr Ashok Kumar, the Hotel Services Manager and Ms Miriam Laabei a **Human Resources Advisor**.

Ms Watts represented herself and Ramsay Health Care was represented by Ms Julianne Allan, Ramsay's Regional HR Manager.

## Background

Ms Watts' application describes the behaviour she has experienced that she thinks constitutes bullying as follows (which was supported of three pages of written "history"):

*"There is a group of people who are repeatedly and unreasonably harassing, teasing, victimising, bullying, and victimising me at work. This behaviour is unrelenting, and will continue."*

Ms Watts said that she has brought these problems up with Ashok, Mr Vivek (who was Ashok's second in charge) and Ms Laabei both verbally and in writing. However, Ashok's response was to say that she had no proof, and when she provided specific incidents and the names of witnesses, which she did in writing, they dismissed this. None of the witnesses that she has asked them to talk to, to verify her claims have been approached by Ashok, Vivek or Ms Laabei.

At the hearing evidence was given by Ms Watts who also tendered brief statements from two other persons, Mr Lex Robertson and Mr Philip Aylmore. Evidence was then given by Mr Kumar, Ms Laabei, Ms Allan and Ms Leonie Gardiner (Ms Gardiner) who has been the Chief Executive Officer of Glengarry since 2015.

Ms Watts is covered by the FWA, an EBA and the employer's comprehensive (that is to say, very good) Bullying and Harassment Policy.

Ms Watts was provided with a letter written by Vivek, who was the Acting Catering Manager, and required her response to six allegations to an incident that occurred in April that involved her being late for work (stating that she had to go home), an argument with a work colleague and leaving early without clocking off.

Ms Watts responded accordingly, with one part of the response being:

*"No I did not clock out. All staff members have forgotten to clock in and out at some stage of employment. If I am to be reprimanded for this, then all staff members in the kitchen should be reprimanded in just the same way. This last point is just showcasing the bullying, victimisation and defamation of character that I have been experiencing for six years at Ramsay, and never has any of my co-workers been subject to the same kind of harassment that I have had to endure."*

*"This is because there is a handful of staff members that work in the mornings that have admitted to people that they do not like me. They waged a secret war to get me fired for the past 6 years, this has not worked because my previous bosses have eventually seen through their lies".*

An investigation followed, and a formal meeting was conducted which found that: “...no formal action will be taken.” There was no reference to the bullying and victimisation matters Ms Watts raised in her written response to the allegations. However, the investigation did not pursue the bullying and harassment allegations.

Mr Kumar’s evidence was that Ms Watts advised him and Ms Laabei on a number of occasions that she felt she was being bullied at work by others. He says this most often occurred when she was undergoing formal investigation or being spoken to about her performance or behaviour. He says on each occasion he would ask for specific details of who, when and what has happened, and Ms Watts would not provide details to him and so it was impossible for him to commence investigations into her allegations of bullying. Ms Laabei gave similar evidence.

On 14 August 2017 Mr Kumar met with Ms Watts regarding her allegations of bullying. Mr Kumar completed an Employee File Note (which was signed by Ms Watts) of that meeting which concluded that:

- *“Jennifer should have clear understanding of bullying (sic) at work and if she still feels that she is being bullied then she should contact Miriam immediately with evidence.*
- *If Jennifer fails to contact Miriam, then she should not bring up previous incidents of bullying (sic) moving forward.*
- *False allegation of bullying (sic) may lead to performance management.”*

The next day, 15 August 2017, Mr Kumar met with Ms Watts and Ms Elizabeth Meldrum “to discuss the conflict between Elizabeth and Jennifer on 8th August afternoon and investigate the reason of conflict”. Mr Kumar completed an Employee File Note (which was again signed-off by all parties) of that meeting which concluded:

- *“We expect all employees to attend work and carry out their job in a professional and efficient manner, it is inappropriate to create or bring problems in to the workplace, it is inappropriate to cry in the workplace. It is expected that all employees behave in appropriate manner at all times according to Ramsay Values and code of conduct*
- *We must show respect when communicating and working with our team members and all employees of Ramsay, we must treat each other with respect and dignity at all times.*
- *“...we should not be participating in or starting rumours, you are at work, not in a playground.*
- *“I do not want to see a repeat incident of what happened on Tuesday. I expect to see all employees working together as a team in a professional manner to ensure the best care for the patient. If you have a problem at work, please try to resolve the problem with the person in a professional manner, if you feel you cannot do this, please let me know, do not include everyone else in the team, this is a distraction to others.*
- *We have to adhere to the Ramsay Values and code of conduct at all the times failure to adhere to the Ramsay Values and code of conduct may lead to disciplinary action being taken.”*

Mr Kumar’s said he sought advice from Ms Laabei regarding concerns he had about Ms Watts’ health and well-being at work. Examples of the concerns he had were that Ms Watts lacked concentration and was claiming to forget things; was unable to retain information some of which had the potential to compromise patient safety; and she had tripped twice in a six month period. Ms Watts was highly emotional and had two recent outbursts at work and she could not provide him with a reason as to why she had become extremely emotional. It was decided that Ms Watts would be asked to attend a Fitness for Work Assessment.

No report of the assessment was tendered by either party in evidence, however a letter dated 30 August 2017 Mr Kumar confirmed details of a meeting held the same day following the assessment (which was comprehensive) and concluded:

*“...In Dr Berrisford’s opinion there was no evidence of a current major affective or cognitive disorder impacting on your insight or ability to undertake the inherent requirements of the role”.*

With the letter concluding:

*“As your employer we have a duty of care to provide you with a safe system of work and to ensure that you are both physically and psychologically fit to perform the inherent requirements of your role. As a result of Dr Berrisford’s findings and recommendations, you are currently fit to perform the inherent requirements of your role as a Catering Assistant.*

*“In relation to the allegations of bullying, there has been no evidence to substantiate your allegations.”*

Another report concluded:

*“As Jennifer did not, and would not, provide us with specific information about the allegations of bullying, there were no allegations to investigate.”*

As Ms Watts did not provide them with specific allegations of bullying that could be investigated Ramsay decided to run **education sessions** for employees dealing with acceptable and unacceptable behaviour and the process for reporting concerns. Ms Watts was also in attendance at this session. The Commissioner finding that **no investigation** at all was undertaken by Ramsay into Ms Watts’ complaints of bullying.

In September 2017 Mr Kumar notified Ms Watts in writing of allegations that were made against her. Ms Watts provided a four-page written response and then meetings were held with her regarding these allegations.

On 5 October 2017 Ms Gardiner wrote to Ms Watts regarding these five allegations detailing Ramsay’s investigation findings and conclusions and issuing Ms Watts a **First Formal Written Warning** relating to her discussing the issues with her colleagues in direct violation of her undertaking not to do so.

Ramsay concluding that Ms Watts had *“...breache(d) of confidentiality, a reasonable management request, the Ramsay Values and Code of Conduct, and making false statements you are being issued with a First Formal Written Warning.*

Ms Watts then raised her concerns with Worksafe. A Worksafe inspector met with Ms Gardiner, Ms Laabei and two of Ramsay’s OHS managers. Worksafe advised they had completed their enquiries and no breaches of the occupational safety and health legislation were identified.

Ms Watts then approached her union, which filed application to the FWC.

In her application (and contrary to the “for-for-work” test) Ms Watts stated that the behaviour she has been subjected to has created a risk to her health and safety. She says she cries every day and this can happen at any time when she thinks about work. She cannot seem to stop thinking about why people hate her so much and it’s like a physical pain in her chest. She says she has developed a

stress disease called neuralgia on her arms and she has stomach complaints; confirming she had been put on antidepressants by her doctors with increasingly strong dosages.

[Despite medical evidence to the contrary], the Commissioner was satisfied on the evidence that Ms Watts' health has been negatively affected by her experiences at work and what she perceives to have been bullying behaviour.

Following the conciliation meeting in the Commission on 18 December 2017, a meeting took place with Ms Gardiner, CEO, and Ms Allan, Regional HR Manager WA & SA, and Ms Watts. As an alternative to proceeding to a full hearing, a number of temporary measures were agreed. Ramsay submit Ms Watts was extremely satisfied with the temporary plan that had been agreed and advised them that she was keen to see 'how it goes', and therefore would be postponing the Commission hearing until after this time. The temporary plan was due to commence when Ms Watts returned from annual leave in January 2018.

Ms Watts retracted this agreement and decided to proceed to full hearing; claiming workplace bullying against Mr Kumar, Hotel Services Manager, and Ms Laabei, HR Advisor. Both Ms Laabei and Mr Kumar strongly deny these allegations.

The Commissioner deciding:

- Ms Watts is a worker who reasonably believes that she has been bullied at work.
- Based on **Ms Watts evidence alone**, the majority of her allegations were accepted and therefore she was in fact bullied whilst at work.
- In terms of the "**no investigation**," the managers "**imposed their own requirements on how Ms Watts must complain to them about alleged bullying**" thus ignoring the requirement set out in the Ramsay policy. The commissioner also noting:

*"Whilst complaints of bullying under the policy are required to "...be raised as soon as possible so that the situation can be dealt with quickly..." **the reality** will often be that an employee may be subject to unreasonable behaviour by individuals and initially may be willing to and able to ignore and tolerate this **however as time passes if this continues they may no longer be willing to or able to tolerate further unreasonable behaviour**. In these circumstances an employee should not be criticised for not having raised the earlier instances of unreasonable behaviour at the time they occurred. [My emphasis].*

*"The corollary of this however is that when an employee raises a complaint about a past incident of unreasonable behaviour it may be difficult for that to be investigated because of the passage of time. **This potential difficulty is not a sufficient reason to not commence an investigation at all**. [My emphasis].*

- That there are two reasons why an investigation into an allegation of bullying is undertaken by an employer:
  - The first is to establish whether in fact an employee has been subject to unreasonable behaviour so that if this has happened they can be provided with support and assistance and remedial action taken.
  - Secondly that investigation will seek to identify whom was responsible for any unreasonable behaviour and as part of taking action to prevent further unreasonable

behaviour the individual/s may be subject to disciplinary sanction if appropriate. In some cases it may be established that an employee has been subjected to unreasonable behaviour but for any number of reasons the investigation does not lead to disciplinary sanctions against any other individual perhaps for example because no individual can be identified. This investigation will still be an important and positive development for that employee who had been subjected to unreasonable behaviour.

- Ms Watts was at work some individuals have repeatedly behaved unreasonably towards her. I have also been satisfied that the evidence is Ms Watts' health has been negatively affected by her experiences at work.
- I am satisfied that there is a risk that Ms Watts will continue to be bullied at work.
- Some of the instances of bullying that I have found did occur can be viewed in isolation as relatively low-level bullying however considering all that has happened together I have no doubt that it is **necessary for the Commission to intervene** and it is appropriate to make an order to prevent Ms Watts from being bullied at work in future.

The Commissioner concluding:

***"It is to be remembered that the legislative scheme is not directed at punishing those who may have behaved unreasonably in the past nor is it to compensate someone who has endured such bullying instead it is directed at preventing Ms Watts from being bullied at work in the future".***

The Commissioner deciding to issue a "draft order" that can be considered by the parties until to 4 April 2018.

## THE LAW

### ***"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**. [my emphasis].

Section 789FF of the Act sets out when the Commission is empowered to make orders in a case where the Commission is satisfied there has been bullying at work.

### ***"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. [My emphasis].*

*(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.”*

The Commissioner cited *Katherine (Kate) Burbeck v Alice Springs Town Council; Georgina Davison; Skye Price; Clare Fisher* [[2017] FWC 4988] helpfully identified the relevant consideration involved in determining an application for an order to stop bullying as follows:

- “An applicant for an order from the Commission to stop bullying...must not only be a worker but one who ‘reasonably believes that he or she has been bullied at work’.
- This belief being actually and genuinely held, as well as it being reasonable in an objective sense.
- Conduct does not occur “at work” merely because it has a substantial connection to work. The question of whether behaviour or conduct occurred “at work” does not necessarily equate to the performance of work and will require a consideration of the context, including custom and practice, and the nature of the worker’s contract.
- “Unreasonable behaviour” requires application of an objective test having regard to all the relevant circumstances applying at the time.
- “Repeated behaviour” refers to the persistent nature of the behaviour and can refer to a range of behaviours over time.
- “Unreasonable behaviour” is behaviour that a reasonable person, having regard to the circumstances may see as unreasonable. This would include (but is not limited to) behaviour that is victimising, humiliating, intimidating or threatening.
- A Corporation cannot bully, however, the individuals engaging in the unreasonable behaviour need not be workers, for example they may be customers.
- “Repeatedly behaving unreasonably” implies the existence of persistent unreasonable behaviour and it might refer to a range of behaviours over time. There is no specific number of incidents required for the behaviour to represent “repeatedly” behaving unreasonably
- “Unreasonable behaviour” should be considered to be behaviour that a reasonable person, having regard to the circumstances, may consider to be unreasonable.
- “Repeatedly behaves unreasonably” (by an individual or group) will require a purposive approach.
- “Unreasonableness is a conclusion which may be applied to a decision which lacks an evident and intelligible justification”.
- Further, for conduct to be reasonable it does not have to be the best or the preferable course of action, rather the conduct will be objectively assessed as to whether what was done was done “reasonably”, not whether it could have been done more reasonably or differently.
- It will be necessary for the Commission to determine whether the alleged behaviour actually occurred, and once the necessary findings of fact have been made, the Commission can then

determine whether the behaviour was unreasonable.

- In relation to the risk to health and safety of unreasonable behaviour, there must be a causal link; however, the behaviour does not have to be the only cause of the risk, but a substantial cause of the risk viewed in a common sense and practical way. A risk will be the possibility of danger to health and safety, and not necessarily actual danger.
- “Reasonable management action carried out in a reasonable manner” is not an **exclusion** but a reference for the avoidance of doubt. The reference to reasonable management action carried out in a reasonable manner serves to provide guidance in the interpretation and application of s.789FD(1)(a) in circumstances in which it is alleged that management action such as performance management, disciplinary action, allocation of work, restructuring of the workplace and employer directions constituted bullying.

In *Amie Mac v Bank of Queensland Limited and Ors*, some of the features which might be expected to be found in a course of repeated unreasonable behaviour constituting bullying at work:

*“...intimidation, coercion, threats, humiliation, shouting, sarcasm, victimisation, terrorising, singling-out, malicious pranks, physical abuse, verbal abuse, emotional abuse, belittling, bad faith, harassment, conspiracy to harm, ganging-up, isolation, freezing-out, ostracism, innuendo, rumour-mongering, disrespect, mobbing, mocking, victim-blaming and discrimination.”*

In *Ms SB* [[2014] FWC 2104] Commissioner Hampton held that conduct capable of being considered as unreasonable behaviour, depending upon the nature of the actual conduct and the context can include:

- The making of vexatious allegations against a worker,
- Spreading rude and/or inaccurate rumours about an individual, and
- Conducting an investigation in a grossly unfair manner.

The Commission does not have to be able to identify the person/s who have engaged in the unreasonable behaviour. An employee can be subject to unreasonable behaviour by other persons however the identity of the persons is unknown. Examples of such behaviour may be where an employee’s personal effects have been deliberately damaged, graffiti referring to an employee appears in the workplace or notes, or messages are received by an employee however who was responsible for this behaviour is unknown. [See *Sharon Bowker, Annette Coombe and Stephen Swartz v DP World Melbourne Limited T/A DP World; Maritime Union of Australia, The, Victorian Branch and Ors* [[2015] FWC 7312]].

### Interesting reading from the web:

Nurse murdered whilst on-call a safety breach:

[http://www.mondaq.com/article.asp?articleid=688138&email\\_access=on&chk=1332247&q=644109](http://www.mondaq.com/article.asp?articleid=688138&email_access=on&chk=1332247&q=644109)

Super: Director liability and how the ATO determines what is owed:

[http://www.mondaq.com/article.asp?articleid=689856&email\\_access=on&chk=1333965&q=644109](http://www.mondaq.com/article.asp?articleid=689856&email_access=on&chk=1333965&q=644109)

Whistleblower news:

[http://www.mondaq.com/article.asp?articleid=689514&email\\_access=on&chk=1333623&q=644109](http://www.mondaq.com/article.asp?articleid=689514&email_access=on&chk=1333623&q=644109)

Until next time....**Greg Reiffel**, Principal Consultant