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Update on stop bullying orders – FedEx workers fail in Fair Work Commission

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A 2023 decision of the Fair Work Commission has provided fresh guidance on a number of issues associated with workplace bullying, including:

- assessing the 'reasonableness' of certain behaviours;
- the importance of tone and context when assessing spoken words;
- determining what is (and what is not) reasonable management action carried out in a reasonable manner; and
- the need for precision when formulating orders.

FedEx Australia workers apply for stop bullying order

In *Momirovski &Ors* [2023] FWC 3299, a number of workers engaged by FedEx Australia made an application to the Fair Work Commission for a *"stop bullying order"* against FedEx and one of its managers.

The claim relied upon 50 separate incidents of alleged workplace bullying by the manager over a period of about five years. Given the number of claimants, the Commission noted that there appeared to be two or three incidents complained of each year for each worker.

The alleged incidents of bullying by the manager were broadly similar in nature - yelling at workers, chastising them in front of other workers, and speaking in an aggressive and unpleasant tone (often in relation to the commencement of work). Workers claimed to have felt belittled and embarrassed by the actions of the manager.

In return, the manager gave evidence complaining about the behaviour of the workers in question, particularly about their disrespectful outbursts and the fact that it was an essential part of his duties to ensure they commenced work in a timely way.

Applying for a ‘stop bullying order’

The *Fair Work Act 2009* allows a worker to bring an application for a stop bullying order if they *reasonably believe* they have been bullied at work.

Under the Act, a worker is bullied at work if an individual (or more than one individual) repeatedly behaves unreasonably towards the worker or a group of workers, and that behaviour creates a risk to health and safety. Importantly, the definition of workplace bullying does not apply to *“reasonable management action carried out in a reasonable manner”*.

Assessing a worker’s ‘reasonable belief’ they are being bullied

The Commission found that whilst each applicant genuinely believed that they had been bullied by the manager, the real issue was whether such a belief was *reasonable* when viewed objectively. In other words, there must be something to support the belief or some other rational basis for holding the belief; it cannot be irrational or absurd.

In this case, given the lack of seriousness of some of the allegations in question, and the lengthy periods of time between alleged incidents, the Commission was **not** satisfied that a number of the applicants could have reasonably believed that they had been bullied.

Both tone and context are important in assessing spoken words

Much of the analysis in the case focused upon the tone and context of the comments made by the manager, which were said to be of a bullying nature.

The Commission noted that innocent or innocuous words said in a certain context or delivered in a certain tone can nonetheless send offensive or destructive messages. Likewise, offensive or destructive messages can also be coated in innocuous or innocent words that can be delivered in the most pleasant or professional of tones.

The Commission noted it had to apply an objective test as to whether the behaviour was unreasonable, i.e., would a reasonable person, having regard to all the circumstances, consider it to be unreasonable? Here, the applicant workers accepted, for the most part, that the actual words used by the manager in the incidents alleged to be workplace bullying were reasonable, but they alleged that words were delivered in an abusive and hostile manner.

The Commission found that it may well be the case that the manager was *“blunt”* in the way that he issued instructions to workers. However, it did not find that he adopted hostile or antagonistic tones in his interactions with the workers, despite speaking to them about topics such as wasting time, rudeness, equipment problems and changes to the work schedule.

The standards expected of managers

The Commission also considered whether the manager's conduct could be regarded as reasonable management action carried out in a reasonable manner. The case law makes clear that this is an objective assessment in the context of the circumstances and knowledge of those involved at the time. The test is not whether the management action could have been taken in a *"more reasonable"* or *"more acceptable"* manner.

Importantly, the Commission noted that when considering the reasonableness of a particular event, it is not for the Commission to micro-analyse each event and substitute its own view for that of the employer. Rather, the Commission will examine whether the particular conduct said to be unreasonable lacks an evident or intelligible justification.

The Commission noted in this case that it is clear from the applicants' claims that they had a heightened sensitivity to the conduct of the manager towards them.

The Commission went on to make some important observations about the way working relationships should be assessed. It reiterated previous case law, which noted that:

"in most cases, the employment relationship is capable of withstanding some friction and doubts. Trust and confidence are concepts of degree. It is rare for any human being to have total trust in another. What is important in the employment relationship is that there be sufficient trust to make the relationship viable and productive. Whether that standard is reached in any particular case must depend upon the circumstances of the particular case."

The Commission noted that it is appropriate to make allowances for some degree of exasperation or tension between managers and those whom they manage. It noted that:

"in the same way that employers must apply the standards of men and not angels to their employees, managers and supervisors are also entitled to some latitude when the Commission assesses whether their management action was done in a reasonable way."

In circumstances where many of the cases of workplace bullying focus on the assessment of employee conduct, this case provides an interesting insight that similar latitude must be applied to the actions of managers and supervisors.

Stop bullying orders must be clear and precise

Finally, the Commission made some comments about the way that stop bullying orders should be framed (although declining to make such an order in this case). The Commission noted that problems can arise when orders are not defined with precision.

Because a contravention of a stop bullying order is a civil remedy provision, a significant level of precision is required when formulating orders. For example, an order that a manager *"stop acting unreasonably towards workers"* may simply raise questions about the reasonableness of any particular behaviour, dependent upon the circumstances (a noisy work environment could justify a

raised voice, for example).

The Commission cited a previous case of the Federal Court in which it was noted that orders of the court must be in clear and unambiguous terms, which leave no room for the persons to whom they are directed to wonder whether or not their future conduct falls within the *"scope and boundaries"* of the order:

"Although it is the duty of a defendant to ascertain the proper means of obeying an order, a defendant will not be committed for contempt where the order is not clear and therefore, on one construction of it, there may not have been a breach. In such cases the breach will not have been established beyond reasonable doubt."

Get help from an employment lawyer

If you've been exposed to workplace bullying and would like to understand your legal options or if you're an employer seeking to defend allegations of workplace bullying, you should get in contact with one of our employment lawyers for advice and assistance.

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