



# DECISION

*Fair Work Act 2009*

s.789FC - Application for an order to stop bullying

**Zoran Momirovski, Anthony Douglas, Roberto Serafini, Peter Naumcevski, Matthew Egan**

(SO2022/558, SO2022/559, SO2022/560, SO2022/561, SO2022/562)

DEPUTY PRESIDENT EASTON

SYDNEY, 8 DECEMBER 2023

*Applications for FWC orders to stop bullying – alleged abuse, yelling, belittling conduct by a supervisor – alleged behaviour over five years – not repeated unreasonable behaviour – no bullying element to behaviour – reasonable management action carried out in a reasonable manner – bullying conduct not found – applications dismissed.*

[1] Zoran Momirovski, Anthony (Tony) Douglas, Roberto Serafini, Peter Naumcevski, Matthew Egan are all engaged by FedEx Australia Pty Ltd performing cartage services out of the FedEx station at Unanderra in Wollongong. Each of them has made an application for stop-bullying orders against FedEx and against FedEx's AM Shift Supervisor, Mr Graeme Bradley. In this decision I will refer to the applicants collectively as the Applicants and FedEx and Mr Bradley collectively as the Respondents.

[2] The Applicants rely on approximately 50 incidents of alleged bullying by Mr Bradley dating back to 2017. None of the incidents are particularly serious when viewed in isolation and, by and large, the incidents and the consequential allegations of bullying are evidence of working relationships that have been strained for a long time.

[3] The Transport Workers' Union of Australia (TWU) represented the Applicants and Mr Cross, solicitor at Australian Industry Group appeared for FedEx and Mr Bradley.

[4] The Applicants attend the Unanderra station each morning. The daily routine is fairly standard: there is a toolbox meeting at 7:00am (also referred to as take-off meetings or start-up meetings) by which time drivers are expected to have collected their scanners and checked the board to know their allocated run. After the toolbox meeting the drivers move to the dock area where parcels arrive on a belt. Drivers are expected to take their parcels from the belt and load their vehicles in order to leave the station as soon as possible.

[5] Almost every incident cited by the Applicants took place at the Station in the morning, which is no surprise given that the drivers primarily interact with Mr Bradley in the mornings at the station before they leave, and then spend the rest of the day making deliveries.

[6] The drivers say that Mr Bradley is “at his most volatile” in the morning and that in the mornings they are “vulnerable to his attacks.”

[7] In this decision I consider the following questions:

- (a) was each applicant a worker who reasonably believed that he had been bullied at work?
- (b) did Mr Bradley engage in bullying behaviour towards each or any applicant?
- (c) did Mr Bradley’s alleged bullying behaviour create a risk to health and safety?
- (d) was any or all of Mr Bradley’s allegedly bullying behaviour reasonable management action carried out in a reasonable manner?
- (e) is there a risk that any or all of the Applicants will continue to be bullied at work by Mr Bradley? and
- (f) what orders are appropriate, if any, to prevent some or all of the Applicants from being bullied at work by Mr Bradley?

[8] For the reasons that follow I have found that Mr Bradley has not engaged in bullying towards the Applicants and their applications must be dismissed.

### **The Applicants’ evidence**

[9] Each applicant has their own story to tell of alleged bullying by Mr Bradley. Each applicant relies on specific instances of interactions with Mr Bradley. There appears to be two to three incidents per year for each worker.

[10] In understanding the allegations described below one needs to also know that:

- (a) Mr Bradley commenced employment at Unanderra station on 3 January 2017, being approximately seven weeks before the first claimed incident of bullying;
- (b) Mr Bentley Guinane is Mr Bradley’s direct line manager and is also based at Unanderra;
- (c) in 2019 FedEx introduced a new process where allegations of workplace bullying made against Mr Bradley could be raised through a nominated Human Resources officer;
- (d) in November 2019 the TWU commenced proceedings on behalf of the Applicants in the Industrial Relations Commission of NSW under s.332 of the *Industrial Relations Act 1996 No 17* (NSW) (***Industrial Relations Act 1996***);
- (e) in 2020 Mr Douglas, Mr Momirovski, Mr Naumcevski, Mr Serafini and another driver made stop-bullying applications under s.789FC. In April 2021 those applications were resolved by way of a signed ‘Terms of Agreement’ document that required FedEx (or TNT Australia as it was at the time) to refrain from certain behaviour and to actively monitor the effectiveness of controlled measures identified in risk assessments; and
- (f) the present stop-bullying applications were lodged on 10 November 2022, and as such many of the alleged incidents occurred after lodgement.

### **The Applicants’ Evidence: Peter Naumcevski**

[11] Mr Naumcevski is employed by FedEx as a driver on a full-time basis. Mr Naumcevski gave evidence of the following events that he said were workplace bullying by Mr Bradley:

- (a) 4 years ago, in May 2019, Mr Naumcevski made a comment about the conveyor belt running too fast and Mr Bradley allegedly replied that if the belt was an issue he could change Mr Naumcevski's run. Mr Naumcevski regarded this as a threat;

- (b) 14 months later in July 2020 Mr Bradley "started screaming" at Mr Naumcevski asking him: "why aren't you on the loading dock", in full view of a number of other workers. Mr Naumcevski took one day of sick leave because, he said, he "became very anxious as a result of the incident" and he did not "feel that [he] would approach Mr Bradley to raise any workplace-related issues without the fear of being threatened of being removed from [his] run or even worse that [he] would be threatened with actually terminated from [his] role";
- (c) 12 months later in July 2021 Mr Naumcevski says he was "abused" by Mr Bradley in front of other workers on four separate occasions. On each occasion Mr Bradley is alleged to have "yelled" at Mr Naumcevski about the time he took to move to the dock area to start loading his vehicle for the day. Mr Bradley also moved Mr Naumcevski's scanner and equipment to the dock area, which Mr Bradley said was to help Mr Naumcevski, but which caused Mr Naumcevski to take great offence. Mr Guinane intervened and instructed Mr Bradley to undo the change;
- (d) 1 month later, in August 2021, Mr Bradley again "yelled" at Mr Naumcevski because he had not moved to the dock area fast enough;
- (e) 10 months later in May 2022 Mr Bradley said at a toolbox meeting that a member of the team had let everyone down the previous day after a number of deliveries were not completed. Mr Bradley then reassigned some of Mr Naumcevski's run to others. Mr Naumcevski said "I found the whole experience embarrassing and humiliating." On the same day Mr Bradley allegedly made Mr Naumcevski "feel like an idiot" by commenting that "it took you five minutes to work out you can't find your keys" and later on "okay Peter you have wasted enough time now so go and get yourself another truck". In a further interaction about the selection of a truck and the location of the keys for the truck, Mr Bradley allegedly yelled at Mr Naumcevski saying "the keys were in the truck and the door was unlocked so you're just wasting more time and you're lying" - to which Mr Naumcevski "felt overwhelmed by Mr Bradley's behaviour [and] felt belittled and embarrassed";
- (f) on five occasions between July and September 2022 Mr Bradley made further comments about Mr Naumcevski's slowness in moving to the dock which Mr Naumcevski said caused him to feel "overwhelmed, intimidated and anxious";
- (g) on 2 August 2022 Mr Bradley allegedly chastised Mr Naumcevski in front of his co-workers at a toolbox meeting, which Mr Naumcevski said made him feel "confused and anxious." It is difficult to describe this event in neutral terms because, frankly, Mr Naumcevski was actually overtly and obviously disrespectful towards Mr Bradley in front of the work team during the toolbox meeting;
- (h) 3 months later on 2 November 2022 Mr Naumcevski says he was "made an example of" in a toolbox meeting when Mr Bradley addressed the team about labelling dangerous goods;

- (i) 2 weeks later on 18 November 2022 Mr Bradley spoke to Mr Naumcevski in the dock area in a “very aggressive tone” when asking Mr Naumcevski why he had not started loading yet. Mr Naumcevski says he defended his actions by saying to Mr Bradley “I’m here because you told us in a previous toolbox meeting to help unload freight for the shopping centres if your next to one”. Mr Naumcevski said he was in a “distressed state” as a result of what occurred and that he raised the matter with Mr Guinane who told him “I’d prefer to get you out on the road”;
- (j) 1 month later on 21 December 2022 Mr Naumcevski spoke to Mr Bradley about a particular consignment and Mr Bradley spoke in a “short-annoyed tone”;
- (k) 6 weeks later on 1 February 2023 Mr Bradley assisted Mr Naumcevski when the battery on his scanner was flat. Mr Bradley arrange for a replacement battery but, in Mr Naumcevski’s view, did so with an aggression that was uncalled for;
- (l) 2 weeks later on 10 February 2023 Mr Bradley spoke to Mr Naumcevski about failing to scan on board some dangerous goods. In his interaction with Mr Bradley Mr Naumcevski “started feeling anxious [because he knew] that these kinds of interactions never go well”;
- (m) 5 days later on 15 February 2023 Mr Bradley abusively yelled at Mr Naumcevski saying “Peter, have you loaded your truck”;
- (n) 5 days later on 20 February 2023 Mr Bradley said in a very aggressive tone “why isn’t your truck loaded Peter” Mr Naumcevski said that another driver’s truck was not loaded either but that he was the only one spoken to in this manner. Mr Bradley also said “you need to get out on the road earlier”;
- (o) 2 weeks later on 7 March 2023 Mr Naumcevski said the following occurred:

“... during the mornings toolbox meeting Mr Bradley again asked everyone if they have had looked at the board. I said, “no I haven’t” Mr Bradley got really angry and yelled towards me that “I need to get here before 7am to see it and get organised.” I said but my start time is 7am and not before 7.00am but he didn’t care and just ignored me. Again, I felt belittled in front of everyone for doing the right thing which makes no sense to me. I am rostered to start at 7:00am and I am at work before then and ready to go by 7:00am so I had no idea why he attacked me in the way that he did.”
- (p) 9 days later on 16 March 2023 made a belittling and condescending remark about whether Mr Naumcevski was going to help another driver load the truck;
- (q) 3 weeks later on 6 April 2023 Mr Bradley “very aggressively yelled” at Mr Naumcevski and two others, saying “one of you needs to get to the belt”; and
- (r) 1 week later on 11 April 2023 Mr Bradley allegedly “screamed” at Mr Naumcevski and Mr Douglas, saying “you both had time to get your stuff before the meeting and you’re supposed to be up on the dock as I have asked you to do”.

**The Applicants' Evidence: Anthony (Tony) Douglas**

[12] Mr Douglas is engaged as a full-time employee of FedEx. Mr Douglas said that he attends work each day “fearful as to what may occur in the workplace with Mr Bradley.” Mr Douglas is currently 70 years old.

[13] In his written evidence Mr Douglas relies on the following specific instances of alleged bullying:

- (a) 5 years ago on 28 February 2017 Mr Douglas saw Mr Bradley yell at a group of workers and he also “yelled at myself and others due to the fact that we as workers were choosing to apply for and to take leave”;
- (b) 2 weeks later on 9 March 2017 Mr Bradley yelled at Mr Douglas that his performance was not up to scratch, which Mr Douglas found to be very distressing, particularly as Mr Bradley yelled at him in an aggressive manner in front of the other workers;
- (c) 9 months later in December 2017 Mr Bradley again yelled at in the dock area saying that “my performance was not up to scratch”;
- (d) 4 months later in April 2018 Mr Bradley changed Mr Douglas’s run on a day that Mr Douglas had a medical appointment. Mr Douglas says “Mr Bradley changed the run so that I would have to travel great distances which have made things difficult to make my medical appointment. I became very distressed by this altercation with Mr Bradley and I was not well enough to remain at work”. Mr Douglas’ doctor advised him to stay home the next day “due to [his] condition”;
- (e) 2 weeks later on 26 April 2019 Mr Bradley yelled at Mr Douglas for not taking items of freight off the belt in the dock area, which left Mr Douglas feeling humiliated and upset;
- (f) 7 months later on 13 November 2019 Mr Bradley informed Mr Douglas that he had to improve his service because the driver that performed his run the previous week finished and was back at the station much sooner than Mr Douglas. Mr Douglas said that he asked other drivers and was informed that what Mr Bradley had said was simply not true;
- (g) 2 months later on 6 January 2020 Mr Douglas was told that his vehicle would be changed for the day and he would be required to drive an 8-tonne truck. As a result he injured his back and had to have his back strapped by a physiotherapist nine days later on 15 January 2020;
- (h) 10 days later on 16 January 2020 Mr Bradley approached Mr Douglas on the dock in an aggressive manner and said “you should be helping the driver next to you take of his freight this is why we have put you here”;
- (i) the next day, 17 January 2020, Mr Bradley told Mr Douglas he would be driving the 8-tonne truck again. Ms Renae Bullock, a human resources representative, was in the area at the time and intervened so that Mr Douglas drove the 3-tonne truck. Mr Douglas said “this is the only time that I have ever seen Mr Bradley’s instructions be overruled”;

- (j) 1 week later Mr Bradley asked Mr Douglas to drive the 8-tonne truck again and asked to see medical paperwork when Mr Douglas resisted;
- (k) 8 months later on 7 September 2020 Mr Douglas approached Mr Bradley to inform him that his scanner was not working properly. Mr Bradley answered very aggressively “well what do you want me to do about it”;
- (l) 6 weeks later on 30 November 2020 Mr Bradley called Mr Douglas out for not doing his stretches properly at the toolbox meeting. Mr Douglas said “then as a form of punishment [he] sent me to sort out freight for areas that I was not familiar with”;
- (m) 7 months later on 16 July 2021 Mr Bradley was staring at Mr Douglas as he loaded his truck and then said “I am just watching you and it looks like we need to organise a meeting to sort out the way you work”. No such meeting was ever called;
- (n) 3 months later on 15 October 2021 Mr Douglas returned to the station because of the scanner problem and was “abused” by Mr Bradley who “accused [him] of not informing him of the scanner problem.” Mr Douglas said “the abuse was so bad that day that I became so unwell to the point that I had to leave work. I left the depot and consulted with my doctor who certified me as being unfit for duties until 20 November 2021”;
- (o) 1 month later on 15 November 2021 Mr Bradley spoke to Mr Douglas very rudely and said “come on Tony, I want you out on the road early”;
- (p) 1 month later on 9 December 2021 there was a large volume of freight on the dock because Mr Douglas had been sick for two days. Mr Bradley approached Mr Douglas and said “Tony, why haven’t you left yet”, to which Mr Douglas said “Graeme, there is a lot of freight here and I’m doing my best.” Mr Bradley replied “we will have to do a review of your performance”;
- (q) 7 months later on 8 June 2022 the following exchange took place:
  - Mr Bradley: “come on Tony, hurry up”
  - Mr Douglas: “Graeme, I am doing my best would you please leave me alone”
  - Mr Bradley: “well maybe your best isn’t good enough”
  - Mr Douglas: “Graeme, would you please leave me alone”
- (r) 3 months later on 21 September 2022 Mr Bradley called out Mr Douglas at the toolbox meeting and said “Tony your body language is of some concern”; and
- (s) 4 months later on 27 January 2023 Mr Bradley asked Mr Douglas if he needed any help “in a very condescending tone while making the requests”.

**[14]** On one occasion at a toolbox meeting in front of other workers, Mr Bradley apologised to Mr Douglas about Mr Bradley’s body language comment at an earlier toolbox meeting. Mr Douglas regarded the apology as short lived and half-hearted.

**[15]** Mr Douglas said that these incidents left him distressed, angry, upset, frustrated, stressed, singled out or similar.

[16] Mr Douglas has never been subject to a performance review despite “constantly being threatened by Mr Bradley that [his] performance is under review.” There is no evidence of Mr Bradley causing any other employee to be dismissed. One diary entry made by Mr Douglas said “spoken to aggressively on dock by [Mr Bradley].”

[17] In his second statement Mr Douglas attached three single page documents that he said were copies of diary entries he said he made at the time of the incidents (being July, November and December 2021).

[18] However under cross examination it became apparent that the three documents were not quite what Mr Douglas described them to be. Mr Douglas admitted that he had “a number of diaries” and that the documents attached were documents created by him in 2023. Mr Douglas hand-wrote the three pages in 2023, describing events in 2021, based on diary entries made in another book/diary.

[19] Mr Douglas attached these documents to his statement and described them in his statement as “copies” of his “diary.”

[20] This evidence was concerning. Witnesses often attach to their statements copies of notes taken at the time of an event and such notes are often given greater weight because they were made when events were fresher in the mind.

[21] The 2023 versions were not materially different from the earlier versions. As it happens, the 2023 “copies” are not particularly authentic in their appearance as diary entries. Each page contains entries regarding two or three events on different days but on the same topic. The page on which the entries are handwritten do not show a particular date and may well be from an open notes section of a diary. None of the pages have any other entries, such as notations from daily activity that people might record in a daily diary.

[22] Mr Douglas's credibility as a witness was significantly impaired by his preparedness to present his reconstructed diary as something that it was not.

### **The Applicants' Evidence: Matthew Egan**

[23] Mr Egan is engaged as a full-time employee of FedEx. In his written evidence Mr Egan raised two incidents of alleged bullying:

- (a) on 27 April 2022 he felt threatened and intimidated by Mr Bradley when he was finalising his delivery dockets to do his run. He noticed that Mr Bradley was staring at him for between 10 and 15 seconds and he “felt really uncomfortable”. Mr Egan said he then had the following exchange with Mr Bradley:

“I looked over at him when he yelled at me “what are you doing” I replied that I was finishing up my run order. Mr Bradley then yelled back at me “you should have gone by now, just get on the road” “now.” I felt sick and had knots in my stomach as a result of Mr Bradley’s aggression towards me. I felt intimidated and embarrassed by what happened particularly as the exchange was witnessed by two (2) other members of staff namely Peter Naumcevski and Jason who is the dockhand.”

(b) 1 year later on 11 April 2023:

“Mr Bradley yelled at me in a very angry manner “what are you doing” I explained that I was getting the keys to move the budget truck so that I could get my vehicle up to the dock.

Mr Bradley became even angrier where he yelled at me “leave the keys there and get on the dock.” I replied to him that “I am only trying to get my truck on the dock” and I asked him to “please not yell at me.” Mr Bradley then yelled at me even louder saying “are you refusing to do what I have just told you to do.” I again said “can you please talk to me properly” before I put the keys back and left the office.

Later that morning at around 8.45am I was finishing up loading and scanning freight onto my vehicle when I notice that Mr Bradley was standing on the walkway bridge with our other supervisor Nin. Mr Bradley once again in a very angry and aggressive tone yelled at me “why haven’t you scanned everything yet.” I replied “can you please just let me load my truck” “I am running late because you wouldn’t let me put my truck on the dock.”

#### **The Applicants’ Evidence: Roberto Serafini**

**[24]** Mr Serafina is a contract carrier with FedEx. In his written statements Mr Serafini said that he has “personally endured” four incidents of alleged bullying by Mr Bradley since 2019:

- (a) on 11 July 2019 Mr Serafini met with management of FedEx and the TWU to hold high-level discussions in relation to allegations of bullying against Mr Bradley. Mr Serafini is a member of the TWU and a delegate at the Unanderra site. Mr Serafini said that after the meeting Mr Bradley did not allow him to go home once his work had completed but required him to stay back and strap trailers until the end of his engagement time. Mr Serafini said he was directed to stay back and complete other duties each day for the next two weeks “as some sort of payback”, and that he has not been directed to stay back ever since;
- (b) 9 months later on 8 May 2020 Mr Bradley allocated Mr Serafini to a different run. This was done, he said, without providing adequate notice or engaging in meaningful consultation beforehand, and resulted in “a very real risk of an accident occurring” because the work that day included pallet deliveries;
- (c) 27 months later on 15 September 2022 Mr Serafini “encountered an issue” with Mr Bradley in front of a colleague that left him feeling embarrassed and belittled:

“... Mr Bradley came up to me and said in a very abrupt and rude manner “what are you doing.” I replied simply “loading freight” Mr Bradley said “what are your restrictions” I said to Mr Bradley four to five (4-5) kilograms. Mr Bradley then went on to say “who told you to do this”” as in who had told me to load the freight. I replied that “Ben told me to come in and do this and you can check it with him if you like” Mr Bradley then walked away.”

- (d) 4 months later on 27 January 2023, being a few days after an extended conciliation conference in the Commission, the following occurred:

“Mr Bradley approached me as I was walking over towards my vehicle and I said “is there a problem” he said “why haven’t you left yet” I replied “because I was looking up street directions as you are sending me to areas that I don’t normally service that I am unfamiliar with.” I also said that “I had to go in the lunchroom to do this as a result of you taking my work desk away.” He replied “well we will have to have a look at what the problem is about you getting out so late.” On this same day Mr Serafini said he also saw Mr Bradley yell at Mr Naumcevski.

[25] Mr Serafini gave evidence of his involvement in meetings and discussions with management representatives and also proceedings in the Commission.

[26] In 2021 Mr Serafini was disciplined about his behaviour and conduct. On 10 September 2021 FedEx issued a “Letter of Expectation – Professional Behaviour and Conduct” in relation to conduct that included the following:

- (a) disrespectful behaviour and conduct towards Mr Bradley including making comments about his physical attributes (height, eyes and voice);
- (b) being obstructive and uncooperative when his manager is exercising reasonable management prerogative; and
- (c) failing to act in good faith in his capacity as the union delegate by using his influence over other workers to raise complaints and persecute Mr Bradley in order to attempt to achieve the removal of Mr Bradley from his current role.

#### **The Applicants’ Evidence: Zoran Momirovski**

[27] Mr Momirovski is engaged as a contract carrier with FedEx. In his written evidence Mr Momirovski referred to 7 incidents of alleged bullying:

- (a) on 11 March 2019 Mr Momirovski was having trouble loading a large item of freight. He said that Mr Bradley simply stated “if you don’t place the parcel in the van, I will remove you from your run”, which Mr Momirovski thought was unnecessary and unprofessional;
- (b) eight months later on 16 November 2019 Mr Momirovski missed a day of work because his mother was taken to hospital. The next day, he says, Mr Bradley was abusive to him and his wife about the absence from work and “Mr Bradley even went as far as to say that he would be taking my absence from work further and that I could be faced with disciplinary proceedings”;
- (c) 11 months later on 17 September 2020 Mr Momirovski was asked to deliver a parcel to an unlisted address in the suburb of Figtree. Mr Momirovski said Mr Bradley became irate and yelled at him in front of other workers when the parcel could not be delivered. On the same day, Mr Momirovski said that Mr Bradley directed him to deliver three overweight suitcases, that Mr Bradley was aware of Mr Momirovski’s lifting restrictions but “chose to ignore the restriction and made it clear I had to follow his direction and deliver the suitcases”;

(d) 2.5 years later on 7 March 2023 Mr Momirovski said he was abused:

“On 7 March 2023, my colleague Peter Naumcevski approached me to see if I had onboard for delivery any heavy items of freight for North Wollongong. Mr Bradley saw this discussion taking place and approached both of us and started yelling at us when both of us tried to explain that we were simply trying to work out amongst ourselves who was going to deliver the heavy items of freight. Mr Bradley had previously explained that we as drivers could work out with each other how to deliver freight. However, in this instance both myself and Peter were abused simply for doing what was asked of us.”

(e) 3 weeks later 28 March 2023 Mr Momirovski was stuck with a heavy item that he was not able to deliver. He said that Mr Bradley yelled at him and said “this is not good enough” that he had left all of the heavy stuff until the end;

(f) 1 week later on 3 April 2023 Mr Momirovski asked Mr Bradley if he could palletise 32 boxes to be delivered to the same address. Mr Bradley refused his request and Mr Momirovski said “the way that Mr Bradley spoke to me on this day was awful and it was done in full view of the other staff and I found the whole experience to be quite upsetting”; and

(g) the next day, 4 April 2023, Mr Bradley brought up at the morning toolbox meeting that everything went well the day before with the exception of one staff member who performed poorly by bringing back parcels at the end of the day -which Mr Momirovski understood to be a reference to him and which Mr Momirovski found to be humiliating.

**The Applicants’ Evidence: Common drafting in the Applicants’ statements**

[28] In each of the Applicants’ first statements there is a common paragraph:

“I along with a number of other workers have experienced repeated unreasonable behaviours involving Mr Bradley such as the following.

- a) Bullying
- b) Yelling
- c) Abusive
- d) Belittling
- e) Undue criticism
- f) Intimidation
- g) Threatening workers.”

[29] The paragraph itself is a generalised summary of the alleged behaviour by Mr Bradley and does not really add anything to the evidence. The paragraph is identical in each statement and was obviously written by the same person. All five applicants have the same representative. The paragraph does not describe a particular event or raise any concerns of witness collusion.

[30] However, each applicant was asked about the paragraph during cross examination and the evidence from each applicant was evasive and defensive. No applicant was forthright enough to admit in the witness box that the words of a paragraph of their statement were not their own. The reliability of each applicant's evidence was marginally dented by their response.

**The Respondents' Evidence: Mr Graeme Bradley**

[31] Mr Bradley provided a comprehensive witness statement and was cross examined over several hours. Mr Bradley commenced employment with FedEx on 3 January 2017. Mr Bradley has approximately 25 years of experience in the transport and logistics industry, working in Australia and England in various roles, including as an allocator, supervisor and manager.

[32] Mr Bradley explained that FedEx's express freight transport service operates through a hub and spoke network. The Wollongong station (stations were formerly referred to as depots) is one of the many spokes in the network.

[33] The expectation is that 94% of the freight delivered to the station on anyone day will be delivered on time. Mr Bradley said:

“... It's part of my role to keep the freight moving.

One of my main jobs is to get the fleet out on the road in the morning. This includes supervising the unloading of the freight that arrives from the Erskine Park, Enfield, and Botany hubs and then supervising the reloading of that freight onto our fleet of smaller trucks and vans. The freight is then delivered throughout the Station service area, which is from Helensburgh to Kiama.

Currently, we engage about 26 couriers at the Station. The number of couriers available each day can vary, for example, due to leave. I allocate the volume of work for the couriers into “runs” and go through their runs with them daily at the 7am kick-off meeting. I also supervise the Freight Handlers carrying out the unload. This includes directing them to assist the couriers when required. I handle any queries or problems the couriers may have prior to leaving the Station.

...

On a typical day, I will arrive at work between 4.30am and 5am...

The couriers start work at 7am, with a kick-off meeting. I run nearly all the kick-off meetings...

During the kick-off meeting, I go through the runs with the couriers and the areas allocated to a specific run. This is based on courier availability and freight volume. We then review the Station's performance, for example, the Station's percentage performance in relation to scanning, delivery and pickups. These numbers are usually a day behind, so Monday results are reviewed in the Wednesday meeting. Then Bentley [Guinane, Deputy Manager] runs through any training issues, the stretch and flex, management directives or focus areas and toolbox issues.

The "stretch and flex" is a 5-step warm up routine that FedEx brought in during the integration. It's an initiative to minimise courier injuries, by ensuring they stretch and warm up before starting work for the day.

After the kick-off meeting, the couriers get up on the dock with their scanners to load their trucks. Their trucks are parked on both sides of the dock. There is a conveyor belt that runs down the middle of the dock, which is about 40 metres long...

The conveyor belt runs three times, so the couriers have three opportunities to pull their freight. Usually, the couriers pull most of their freight on the first run. If the couriers don't pull their freight, it stacks up at the end of the conveyor belt."

[34] Mr Bradley made a number of complaints to management about the behaviour of the Applicants. He complained about disrespectful outbursts and the like.

[35] Mr Bradley said that in 2021 he was advised by FedEx Human Resources that he should avoid getting drawn into arguments with the Applicants. He was told that if he thought that an interaction was escalating into an argument, he should walk away and make a diary note as soon as possible, especially if there were no other witnesses to the interaction. He said "this has been my habit since about early 2021." In his written evidence he included many of his diary entries.

[36] In his witness statement Mr Bradley went through each and every allegation made against him. Some incidents or allegations he could not recall, some he simply denied. Mr Bradley provided brief explanations for some allegations and for many he provided explanations supported by comprehensive contemporaneous notes.

[37] It is not necessary in this decision to recite each of Mr Bradley's responses. It is helpful to summarise his more specific responses in order to tell Mr Bradley's story and to provide Mr Bradley's perspective on five years of working with the Applicants.

[38] Mr Bradley's responses included the following:

- (a) I deny that I often yell or act aggressively towards Mr Momirovski or other workers. I deny that I choose to ignore doctor certificates and lifting restrictions. I would never ignore these matters;
- (b) I deny yelling at Mr Naumcevski, I said, "come on, let's get up to the dock, they are waiting on you to get up here";
- (c) I often encourage couriers to get up on the dock quickly after the kick-off meeting. This is part of my job. I usually say "come on, let's go";
- (d) asking a courier why their truck isn't loaded, or telling a courier they should get out on the road earlier, are things I say regularly to the couriers. It's part of my job to keep the loading process moving. I don't speak "abusively" or in "a very aggressive tone";

(e) it is not unusual for me to make adjustments to the runs, especially when several couriers are absent from work. The couriers can also exchange items of freight between each other if it will make their runs more efficient. I have no issue with this at all. In fact, during loading, the conveyor belt is stopped after the first freight run down the dock, and the couriers have a five-minute window specifically allotted for this purpose;

(f) in a diary note dated 14 July 2021:

“At kick-off meeting I spoke about working together to pull off freight as there has been a trend amongst drivers to stand at workstations/away from the belt and being tardy getting up to the dock rather congregating in the Operations Office after the meeting. I had previously spoken to Peter Naumcevski about this once on the dock when he told me why don't the dockhands do it - meaning pull of the freight. I also spoke to him in the ops office when he again challenged me asking what time he started work. I answered 7:00am – He continued to challenge me and I left the office rather than debating him. Again this morning Peter went back to the Operations Office after the kick-off and disregarded the message I delivered in regards to working together - I told him I would put his tray on his workstation each morning - he again tried to engage in an argument so I left the office.”

I agree that I put Mr Naumcevski's tray on the dock ... I thought this was a helpful suggestion, that would assist Peter to get up to the dock as soon as possible after kick-off ... Peter did not ask me, at any point, to put his tray back in the operations room. However, I was reprimanded by FedEx in relation to this matter and directed by Bentley to remove Peter's tray from the dock and put it back in the operations room. I did this as soon as possible after-receiving this direction.”

(g) regarding speaking to Mr Douglas on 15 November 2021:

“I recall seeing Tony walking round the operations office. I said something to him along the lines of, "this is a good chance to get out on the road with the others". As previously stated, I often encourage couriers to get up on the dock quickly after the kick-off meeting. I deny Tony said anything about the other couriers in operations room. I deny that I said, "I don't care, as I am only concerned about you." If I thought Tony was trying to engage in an argument with me, I would have walked away;

(h) in a diary entry dated 8 December 2021:

“8:50am I was walking the dog a number of cartons were still on the dock I asked Tony [Douglas] why freight for Dapto was left.

In a raised voice he told me to leave him alone he was too busy and what did I expect him to do and that I told him the same thing an hour ago - the outburst from Tony was disrespectful and didn't make any sense – 22 items from 22 consignments were left by Tony many of which he was already delivering to or in the same street as other deliveries”

- (i) regarding speaking to Mr Egan on 27 April 2022: "I deny that I was "staring" at Matt. I may have been looking at him, but I have to keep an eye on everyone on the dock. I deny that yelled at Matt. I asked him if he had any problems. He said he was putting his run in order. I replied, "Come on, we need you out on the road" I deny I said, "You should have gone by now, just get on the road now";
- (j) file note/email sent on 26 May 2022 regarding "Behaviour of Peter Naumcevski":

"I was approached by Peter Naumcevski at 7.10am this morning and he told me he couldn't locate the keys to his vehicle.

I told him to take another vehicle and load up.

At 8.05am I approached Peter on the dock as he had not started loading a vehicle and there was no vehicle on the Dock - I asked him why he hadn't started loading a vehicle and he replied I was waiting for you to tell me what vehicle to take to which I replied any that is suitable and that you are comfortable with - he didn't move as he was standing opposite Matt Egan both pulling off re-run freight and had Jayden on the adjoining run so I said come on you've wasted enough time this morning - to which Peter started ranting at me wasted enough time doing what you have told me to do pulling off freight.

This continued so I moved away and when Peter left approached Matt Egan to ask if he heard the manner in which I spoken to - Matt turned his back on me and walked away refusing to acknowledge me.

...

Peter went through the key cabinet and checked the yard ...

At 8.15am Peter told me there were no Budget trucks as they were locked and he couldn't find the keys as I was leaving the Operations Office I said this is great and went to locate Nin [Diaz] - Peter followed me telling me how is this my fault when I turned he was pointing at me repeatedly telling me how is this my fault - I told him don't point at me and continued out to find Nin.

I saw Nin and Trevor and asked if they knew where the keys for the Budget truck were - Trevor checked the Budget truck which was unlocked and had the keys in the console - I went up on the dock and gave Peter the keys. I told him I asked another Driver to check the vehicles and he found the Budget Truck unlocked with the keys in the console - he started at me saying which Budget truck and he was talking about the other one - he then threatened to go home - I replied I am leaving - Peter continued yelling at me as I walked across the shed and approached Nin to tell him I was shaken up by the way I was spoken to and was going home.

I have had the opportunity to gather my thoughts and will be able to continue my duties."

(k) regarding the incident in the kick-off meeting on 2 August 2022 “I recall this incident clearly. Peter moved directly in front of me while I was talking during the kick-off meeting. He was obviously reading the board and ignoring what I was saying to him and the team. I said, "Don't look at the board when I'm talking please, it's very rude." I would have said the same thing to anyone who did this”;

(l) handwritten note dated 6 September 2022:

“belt was stopped – Peter Naumcevski walk up to the dock check out how much left to unload went back to run area stood at belt talking to Paul Lonergan.

Ashley was struggling and need assistance - I asked Peter Naumcevski to assist as he was adjoining van and no freight handlers available they were tidying other areas Peter ignored me I then repeated my request to which he told me to calm down - he kept mocking me in front of other employees with hand gesticulation telling me to stay calm after I asked him not to talk like that to me.”

(m) handwritten note dated 26 September 2022:

“spoke to Tony about improving on road times - he replied do you want me to go now - remark was flippant and disrespectful”

(n) regarding an alleged incident on 1 February 2023:

“Couriers often have spare batteries with them on the dock and when they leave the Station in case their scanners run out of power. Peter said he had a flat battery, so I stopped the belt and asked all the couriers if they had a spare battery. Rob gave me a battery then asked what he was going to use for his spare. I said we would sort that out later. He didn't tell me to "calm down". I gave Rob's spare battery to Peter. I did not "demand" that Peter give me his flat battery. I asked Peter for it so it could be recharged;

(o) regarding an alleged incident at a kick-off meeting on 4 April 2023:

“... The performance updates I provide at the kick-off meeting are very generic. I talk about performance in terms of percentages. It's highly unlikely that individual couriers could be identified from the updates provided. The performance reports are also two days behind, so I would have been talking about performance on 2 April 2023 in this meeting, not 3 April 2023.”

[39] Mr Bradley was cross-examined at length about the contents of his witness statement. Under cross examination Mr Bradley adhered to his statement.

### **The Respondents' Evidence: Bentley Guinane**

[40] Mr Bentley Guinane has been the Deputy Manager of the Wollongong Station since 2020. Mr Guinane has worked for FedEx and TNT since 2005. As the Deputy manager of the Wollongong Station, Mr Guinane is responsible for the operation of all freight and delivery activities taking place at that station. Mr Bradley reports to Mr Guinane.

[41] In late 2020 Mr Guinane became aware that certain drivers had commenced stop bullying proceedings in the Commission. At about this time Mr Guinane spoke to Mr Bradley and told him that he must avoid getting into any sort of argument with the drivers where no other company representative is present. Mr Guinane told him that if things are heading in that direction, then he should walk away, make a file note of what happened and let Mr Guinane know.

[42] Mr Guinane received a complaint from Naumcevski about Mr Bradley in July 2021. Mr Guinane consulted with the Human Resources department of FedEx. Mr Guinane investigated the complaint and found that none of Mr Naumcevski's complaints were substantiated, save for one. Mr Naumcevski had complained that Mr Bradley had moved his pigeonhole out of the operations office and onto the dock. Mr Guinane observed about this complaint:

“Mr Bradley claimed that Mr Naumcevski had agreed with, even welcomed, the move of the thing to the dock as it would make it easier for him to get ready at the start of the shift. Whilst this seemed plausible to me, Mr Naumcevski was now complaining about it and the effect of having his pigeonhole on the dock was to make him stand out from the other drivers. Because of the history of the earlier stop bullying proceedings, I did not think that having Mr Naumcevski's pigeonhole on the dock was wise. I decided that it should go back into the office. I also decided that Mr Bradley should in future consult with me before taking any steps in relation to the drivers' pigeonholes. Because it seemed to me that tension had arisen between Mr Naumcevski and Mr Bradley over the routine observed by drivers at the start of the shift, I also decided to instruct Mr Bradley to allow the drivers a 5 to 10 minute "grace" period in which to get ready for work after the morning start meeting finished.”

[43] Mr Guinane spoke to Mr Bradley about this complaint and issued a “Manager/Supervisor File Note”, which is an informal warning outside of FedEx's disciplinary processes.

[44] Mr Guinane also recalled that in 2021 the TWU had raised a health and safety issue in relation to alleged conduct by Mr Bradley and an “improvement notice” had been issued by the TWU health and safety representative, and that SafeWork was looking into the matter.

[45] In 2022 Mr Guinane received a complaint from Mr Bradley about Mr Naumcevski's conduct, and a complaint from Mr Naumcevski about Mr Bradley's conduct. After Mr Guinane reviewed the material he concluded that Mr Bradley had not behaved unreasonably.

[46] In August 2022 Mr Naumcevski complained to Mr Guinane that Mr Bradley had tried to stop him from doing stretches as part of the start-up meeting each morning. Mr Naumcevski has a background as a personal trainer. Mr Guinane said of this complaint:

“... The view I formed was that Mr Naumcevski's concerns were not genuine. He was playing games. He did not like doing the stretches when they were meant to be done in the meeting, but then wanted to go through a stretching routine later when everyone else had started work. In any normal situation, I would have been inclined to tell the driver to stop being childish and to get on with the job. But because of the history of difficult dealings between Mr Naumcevski and Mr Bradley, I wanted to avoid escalation. I did

not view Mr Bradley's stance as unreasonable, but I felt that Mr Naumcevski should be indulged to some extent, so as to avoid confrontation. I believed that if the other drivers saw Mr Naumcevski hanging around stretching or whatever whilst they were busy doing their work on the dock, they would soon take steps to end the problem. I told Mr Naumcevski that I would speak to Mr Bradley about it. Afterwards, I spoke to Mr Bradley and said to him that he should give Mr Naumcevski a 5 to 10 minute grace period after the start-up meeting before he needed to get onto the dock."

[47] Similarly, in September 2022 Mr Naumcevski raised a concern about the start of work and Mr Guinane formed the view that Mr Guinane was not raising a genuine concern. Mr Guinane said "[Mr Naumcevski] was playing games and looking to prolong the moment before he was required to get onto the dock and help with loading/unloading work. Because I felt it was important to avoid escalation of the problems I again decided that Mr Naumcevski should be indulged to some extent."

[48] Mr Guinane attended some morning start-up meetings and made the following observations:

"In or about September 2022, I had a meeting with Mr Douglas where he said that Mr Bradley had told him that his body language was a concern. By this time, I had attended quite a few morning start-up meetings. In those meetings I had observed drivers making facial and hand gestures, and body movements (including back turning), directed to Mr Bradley as sign of disregard or disrespect. I had been the recipient of some of that myself. On one occasion I had addressed the drivers in relation to RUOK Day and referred to some experiences that happened to me in my earlier career as a police officer. Part of the way through, Mr Douglas completely turned his back and made as if to walk away. I could understand why Mr Bradley might have reasonable concerns about the body language displayed by Mr Douglas. But to express those concerns was, in my view, a dead end because there was no way of avoiding appearing overly subjective. After my meeting with Mr Douglas, I spoke to Mr Bradley and explained my view. I asked him to give a verbal apology to Mr Douglas. Mr Bradley agreed to do so and later he reported to me that it had been done. I regarded the matter as closed."

### **The Respondents' Evidence: Robert Fishburn**

[49] Mr Robert Fishburn gave evidence for the Respondents. Mr Fishburn is the Senior Manager Operations, Regional NSW/ACT for FedEx. Mr Fishburn has worked for FedEx or TNT since 1985. Mr Guinane reports directly to Mr Fishburn. Mr Fishburn is responsible for 12 regional stations in NSW and ACT, including the Wollongong station. Mr Fishburn only became responsible for the Wollongong station in 2022.

[50] When Mr Fishburn took up responsibility for the Wollongong station in 2022 he became aware of difficulties between Mr Bradley and some of the drivers.

[51] Mr Fishburn has visited the Wollongong station on a number of occasions and has looked at the environment and spoke to people there. Mr Fishburn said:

"I wanted to understand what instructions Mr Bradley had been given to manage difficult dealings with drivers. I was informed by Mr Guinane that Mr Bradley was told to avoid

all confrontations and that if things were heading in that direction he was to walk away and notify Mr Guinane of the problem. I agreed that this was a prudent and reasonable way to go. From time to time I would receive notes from Mr Guinane where these sorts of encounters occurred.”

[52] Mr Fishburn’s summary of the situation was as follows:

“I consider health and safety at work to be of great importance. If I ever believed that Mr Bradley's conduct at work created a risk to the health and safety of the drivers then I would take steps to ensure that the risks were identified, assessed and dealt with. As described above, I have made sure that I was informed about issues affecting the relationship between the drivers and Mr Bradley that arose before 2021 when the Wollongong Station came into my area of responsibility, and also about complaints and confrontations that have occurred since. At no time have I thought that Mr Bradley's conduct was unreasonable. The conclusion I have reached from the circumstances is that certain drivers want to drive Mr Bradley away from the Wollongong Station for reasons of their own. Mr Bradley has my confidence as an effective supervisor who manages his responsibilities well.”

**The Respondents’ Evidence: Nin Diaz**

[53] Mr Nin Diaz is the PM Operations Supervisor at the Wollongong station. Mr Diaz gave evidence about the incidents in May 2022 when Mr Naumcevski could not find keys to his truck. Mr Diaz said that during this episode he saw Mr Naumcevski yelling at Mr Bradley. Mr Diaz said that Mr Naumcevski was 20–25 metres away from Mr Bradley at the time and observed that Mr Bradley did not raise his voice at Mr Naumcevski, nor call Mr Naumcevski a liar.

**Other evidence: earlier attempts to resolve disputes**

[54] There was also evidence of meetings between representatives of FedEx and the TWU from as early as February 2017.

[55] In November 2019 the TWU commenced proceedings on behalf of the Applicants in the Industrial Relations Commission of NSW under s.332 of the *Industrial Relations Act 1996*.

[56] In 2019 FedEx introduced a new process whereby allegations of workplace bullying made against Mr Bradley had to be raised to a nominated human resources representative. As the Applicants say, "none of the allegations were ever substantiated."

**[57]** All parties led evidence regarding the earlier stop-bullying applications filed in 2020 by Mr Douglas, Mr Momirovski, Mr Naumcevski, Mr Serafini and another driver (not Mr Egan). In April 2021 those applications were resolved by way of a signed ‘Terms of Agreement’ that required FedEx (or TNT Australia as it was at the time) to refrain from certain behaviour and to actively monitor the effectiveness of control measures identified in risk assessments. The terms of settlement included the following:

“The Respondents will do all that is necessary to ensure that:

- a. The Respondent’s management team does not raise their voice or yell beyond what is reasonable necessary when speaking to workers at the Wollongong station;
- b. The Respondent’s management team does not act unreasonably towards workers at the Wollongong station.
- c. The Respondent’s management team does not act aggressively or intimidate workers at the Wollongong station;
- d. The Respondent will continue to provide bullying and harassment training to all workers at the Wollongong station;
- e. The Respondent has in place appropriate anti-bullying policies and complaints handling process;
- f. The Respondent will continue to actively monitor the effectiveness of controlled measures identified in risk assessments; and
- g. The Respondent manages psychological hazards in the workplace and mitigates psychological risks to workers as part of the Respondents obligations pursuant to the Work Health Safety Act (Cth) 2011.

If in the event that the Respondent fails to comply with this agreement the TWU on behalf of the Applicants reserves the right to seek that the Fair Work Commission makes orders to give effect to this agreement.

The Parties agree that the effectiveness of this agreement will be reviewed within a period of no more than three (3) months.”

### **Submissions: The Applicants**

**[58]** In relation to whether the Applicants have been bullied at work Mr Grumley submitted the following:

- (a) the Applicants are a combination of employees or contractors/subcontractors to carry out work for FedEx;
- (b) on the evidence the Commission should be able to find that Mr Bradley has repeatedly engaged in workplace bullying towards the Applicants over a lengthy period of time;
- (c) the evidence establishes that Mr Bradley has engaged in bullying, yelling, abuse, belittling, undue criticism, intimidation and threatening workers;
- (d) the concept of repeated unreasonable behaviour refers to the existence that the behaviour is unreasonable and is repeated over a range of time;
- (e) unreasonable behaviour would include behaviour that is victimising, humiliating, intimidating or threatening;

- (f) the Commission would only need to be satisfied that Mr Bradley has engaged in repeated unreasonable behaviour towards the Applicants to establish that workplace bullying has occurred;
- (g) the direction by Mr Bradley that drivers perform duties that they wouldn't normally performed was unreasonable conduct;
- (h) the directions to lift cartons outside of a worker's lifting restrictions were unlawful and unreasonable;
- (i) the test to determine if management action was reasonable does not involve an assessment of whether the action could have been performed in a more reasonable or acceptable manner;
- (j) it is unlikely that any of the actions and circumstances that have been raised against Mr Bradley as part of these proceedings would have formed part of established policies and procedures of FedEx; and
- (k) most of the complaints are complaints about Mr Bradley's tone or him raising his voice.

**[59]** Mr Grumley submitted that Mr Bradley's behaviour creates a risk to health and safety:

- (a) the repeated unreasonable behaviour needs to be a risk to health and safety without being limited to actual danger to the health and safety of a worker;
- (b) all the Applicants have raised as part of these proceedings that they have felt unsafe working under Mr Bradley;
- (c) the risk is not just theoretical - the Applicants have provided evidence that Mr Bradley's behaviour has forced them to take time off work; and
- (d) risk conveys the idea of a possibility of danger. The Commission should take the same approach to "risk" as the Industrial Court of NSW did in relation to causation and risk in work health and safety prosecutions, citing *Newcastle Wallsend Coal Co Pty Ltd v Workcover Authority (NSW) (Inspector McMartin)* [2006] NSWIRComm 339 at [301]; (2006) 159 IR 121 at 225-6 and *Abigroup Contractors Pty Limited v WorkCover Authority of New South Wales (Inspector Maltby)* [2004] NSWIRComm 270 at [58]; (2004) 135 IR 317 at 337;

**[60]** Mr Grumley submitted that there is a risk that the Applicants will continue to be bullied:

- (a) it should be open to the Commission to find that FedEx has failed to address and/or prevent the workplace bullying from occurring;
- (b) despite the Applicants raising allegations of workplace bullying over a number of years, there have been no adverse internal findings made against Mr Bradley;
- (c) many of the incidents relied on by the Applicants occurred after their applications were made;
- (d) through the evidence provided in these proceedings it became clear that FedEx's management did not understand the nature of workplace bullying; and
- (e) the Agreement reached in 2021 arising from the earlier stop-bullying applications did little to settle the allegations that were raised against Mr Bradley because the behaviour has continued. The TWU is seeking to exercise its right pursuant to the terms of the Agreement and the Act to seek that the FWC makes orders to give effect to the terms of the Agreement and to protect the health and safety of the Applicants.

- [61]** In relation to the form of order the Commission should make Mr Grumley submitted:
- (a) the Commission can issue orders against FedEx and/or Mr Bradley;
  - (b) the Commission has a very broad discretion with respect to the orders it can make, and is able to make an order that Mr Bradley be redeployed to another area of the business to prevent further workplace bullying from occurring (citing *South Eastern Sydney Local Health District v Lal* [\[2019\] FWCFB 1475](#) at [24]; (2019) 285 IR 355 at 363);
  - (c) the only order the Commission cannot issue is an order requiring that a financial penalty should be paid to the Applicants;
  - (d) orders would not be issued on the basis of punishing past behaviour (citing *Re Ms McInnes* [\[2014\] FWCFB 1440](#) at [9]);
  - (e) FedEx is a large employer who could as a preventative measure accommodate Mr Bradley being redeployed;
  - (f) the consideration of risk simply requires an exposure to the chance of injury or loss, however, there must be a real risk that goes beyond being conceptual;
  - (g) the longer workplace bullying has occurred the harder it can be to repair the working relationship between the affected parties;
  - (h) the Commission could make an order requiring that Mr Bradley not act unreasonably towards the Applicants. The acting unreasonably component of such an order would be more around the yelling and screaming and raising his voice and acting aggressively towards the Applicants; and
  - (i) it is not unreasonable that orders are put in place so that Mr Bradley does not yell and scream at people.

### **Respondents' Submissions**

**[62]** In relation to whether the Applicants have been bullied at work Mr Cross submitted the following on behalf of the respondents:

- (a) the case put against the Respondents is not so much about what Mr Bradley said to each applicant, but how he said it;
- (b) the Applicants have developed perceptions, beliefs and feelings around Mr Bradley which have led them to give evidence of things that did not occur in the way that they describe them, specifically about that surplus or excess element of anger, aggression, sarcasm, yelling, screaming, running on the dock whilst screaming and the like;
- (c) unreasonable behaviour is behaviour that a reasonable person, having regard to the circumstances, may see as unreasonable. The assessment is an objective one (citing *Re Ms SB* [\[2014\] FWC 2104](#) at [43], (2014) 244 IR 127 at )136 (**Re SB**);
- (d) unreasonableness is a conclusion which may be applied to a decision which lacks an evident and intelligible justification (citing *Mac v Bank of Queensland Limited and Others* [\[2015\] FWC 774](#) at [90], (2015) 247 IR 274 (**Re Mac**) and *Minister for Immigration and Citizenship v Li* [2013] HCA 18 at [76], (2013) 249 CLR 332);
- (e) an Applicants' concerns or fears about future bullying is not determinative and that the correct assessment is undertaken objectively from the evidence at hand (citing *Andrew Hamer* [\[2018\] FWC 6037](#));
- (f) the expression "management action" is not confined only to managerial decisions but encompasses a wider range of conduct or behaviour which affects an employee, including such things as performance and disciplinary matters, the allocation of work and the way in which work is to be carried out (citing *Application by Po Keng Chang* [\[2019\] FWC 3178](#) at [20]);

- (g) the mutual intention that is objectively ascertainable from the agreement is that all controversies arising out of applications made under s.789FC of the *Fair Work Act 2009* (Cth) (**FW Act**) in 2020 (such as the allegations of bullying conduct on the part of Mr Bradley) were quelled in return for FedEx taking the actions referred to in clause 3 of that agreement. If FedEx fails to take any of those actions the quelled controversies do not come back to life. The Commission's functions and the public policy purpose underlying the process would be undermined if parties were able to re-litigate allegations forming part of an earlier dispute that had been resolved through the conferenced-based dispute resolution process;
- (h) the Applicants' assertion that FedEx took no action in relation to particular complaints is not correct;
- (i) each Applicants' evidence does not corroborate the other applicants. The applicants say that many of the alleged incidents occurred in front of other people, including other applicants. *Jones v Dunkel* [1959] HCA 8; 101 CLR 298 inferences are available where the alleged witnesses led no corroborative evidence;
- (j) Mr Bradley's behaviour did not create a risk to health and safety;
- (k) the focus on occupational health and safety cases, which occurs in the Applicants' submissions, is misplaced. The statutory context/objective of the laws under consideration in those cases is very different from this one and we don't see the need to import those considerations when authorities such as *Re SB* state the principles clearly and in a way that's readily capable of application to the sorts of cases brought under these provisions;
- (l) there is no risk that the Applicants will continue to be bullied;
- (m) in giving his evidence Mr Bradley was careful to render as precise a record of his recollections as possible. As Mr Bradley explained in his evidence, he began the practice of recording a note after any interaction with the drivers that was potentially argumentative, and he has continued the practice at all material times since;
- (n) in relation to Mr Douglas' diary entries there are two possible explanations. Mr Douglas intended to mislead the Commission about the provenance of the diary notes. Or in his zeal to bring down Mr Bradley he wanted to rely on diary entries like Mr Bradley was doing in his evidence but felt it would look better if the notes appeared in a 2021 diary (being the year in which the events are alleged to have occurred) rather than a 2019 diary. The diary documents must be regarded as worthless from an evidentiary standpoint, and the Commission cannot safely rely on any other part of Mr Douglas' evidence unless it is supported by established facts;
- (o) Mr Naumcevski and Mr Serafini both said that they kept diary notes but neither applicant tendered these notes in evidence. Mr Naumcevski's and Mr Serafini's omission to address the role of the diary in their evidence is a matter that might justifiably cause the Commission some unease;
- (p) Mr Naumcevski has contrived his evidence in accordance with the objective of maximising the prejudice to Mr Bradley, rather than to give an accurate account of his recollection; and
- (q) it is open to the Commission to conclude that Mr Naumcesvki himself has taken an unreasonable, perhaps even irrational view, about the morning routine. Mr Naumcevski perceives and responds to difficulties which are not real. For reasons of his own he would prefer to put off the moment of getting to the dock, but it does not mean that the company's requirement, as expressed by Mr Bradley, to commence the loading of freight on the dock in a timely way is unreasonable.

**Consideration: The Stop-Bullying jurisdiction generally**

[63] Recently Deputy President Gostencnik provided a helpful overview of the stop-bullying jurisdiction in *Dr Maxwell Winchester v Rechelle Martinez, Prof Andrew Smallridge, Victoria University* [2023] FWC 2829 at [3]-[17]. As the Deputy President said in the first paragraph of his summary:

“... The Commission’s power to make a stop bullying order is enlivened if the circumstances in s 789FF of the Act exist. That section sets out three conditions which must be satisfied before the discretion to make an order may be exercised. First, a “worker” must have made an application under s 789FC of the Act. Second, the Commission must be satisfied that the worker has been bullied at work by an individual or a group of individuals. Third, the Commission must be satisfied that there is a risk that the worker will continue to be bullied at work by the individual or group.”

[64] Section 789FC allows a worker to make a stop-bullying application if they reasonably believe they have been bullied at work:

**“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.

...”

[65] Section 789FD defines when a worker is bullied at work:

**“789FC 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.

...”

**[66]** Section 789FF allows the Commission to make stop-bullying orders in certain circumstances:

**“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.

(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.”

**[67]** A contravention of a stop-bullying order by “a person to whom an order under section 789FF applies” is a civil remedy provision (per s.789FG).

**Consideration: Five individual applications**

**[68]** The five applications to the Commission were heard together and evidence in each matter was taken to be evidence in the other matters.

**[69]** Section 789FC allows individual workers to make an application. The definition of bullying in s.789FD refers to action towards individual workers or towards “a group of workers of which the worker is a member.”

**[70]** None of the Applicants allege that Mr Bradley’s behaviour was behaviour “towards ... a group of workers” of which they are a member. There was no evidence of any particular circumstances or attributes that suggest that the Applicants were treated as a group. In other

words, there is no submission by any of the Applicants that Mr Bradley's alleged bullying behaviour towards another applicant should be treated as bullying towards them.

[71] As such each of the five applications must be considered separately. This is significant because the applications by Mr Egan, Mr Serafini and Mr Momirovski are considerably weaker than Mr Naumcevski's and Mr Douglas' applications, for reasons that will become apparent.

[72] That said, most of the allegations against Mr Bradley related to very similar conduct in very similar circumstances. In most of the incidents Mr Bradley is alleged to have behaved towards each applicant more or less in the same way. Whether that alleged conduct is workplace bullying can be evaluated more generally.

**Consideration: Questions for determination**

[73] In these matters there are several elements of the stop-bullying jurisdiction that are not in contest:

- (a) the Applicants are all 'workers' within the wider definition found in s.789FC(2), even though not all the Applicants are employees;
- (b) the Applicants were at work when each of the incidents of alleged bullying took place; and
- (c) FedEx is a constitutionally covered business for the purposes of s.789FC(3).

[74] The following matters arise for determination in each application:

- (a) was each applicant a worker who reasonably believed that he had been bullied at work?
- (b) did Mr Bradley engage in bullying behaviour towards each or any applicant?
- (c) was any or all of Mr Bradley's allegedly bullying behaviour reasonable management action carried out in a reasonable manner?
- (d) did Mr Bradley's alleged bullying behaviour create a risk to health and safety?
- (e) is there a risk that any or all of the Applicants will continue to be bullied at work by Mr Bradley? and
- (f) what orders are appropriate, if any, to prevent some or all of the Applicants from being bullied at work by Mr Bradley?

**Consideration: Was each applicant a worker who reasonably believed that he had been bullied at work?**

[75] There is no contest that each applicant is a worker. I am convinced that each applicant genuinely believes that they have been bullied by Mr Bradley. I have been able to observe each applicant over the course of these proceedings and recognise that they are concerned by and, to differing degrees, affected by what they believe to be Mr Bradley's bullying behaviour.

[76] However only workers who "reasonably believe" that they have been bullied at work have standing to apply under s.789FC. This belief can be actually and genuinely held by the worker, but the belief must also be reasonable when viewed objectively. There must be something to support the belief or some other rational basis for the holding of the belief, and cannot be irrational or absurd.

[77] The five applications were made on 10 November 2022. It seems to me that if Mr Egan, Mr Serafini or Mr Momirovski had lodged their stop-bullying application in isolation they might not have been able to establish that they reasonably believed that they were bullied at work (see s.789FC(1)).

[78] The Respondents did not challenge the standing of any of the Applicants to make their applications however:

- (a) Mr Egan relies on two events that took place one year apart. Only one of these two incidents took place before he made his application. I am not satisfied that the conduct he complained about in his initial application, even if it were bullying conduct, was repeated conduct. The second incident allegedly took place in February 2023. The two events have no apparent connection except that the nature of the behaviour on each occasion is very similar. The separation of time between the two events is concerning;
- (b) The same concern arises for Mr Momirovski's application. Mr Momirovski relies on three incidents of alleged bullying: the first was in November 2019, the second in September 2020 and the third in March 2023. Only the first two pre-date his application and both of those incidents occurred more than two years before his application. I am not satisfied that the conduct of which he complains was repeated for the same reasons, or that he could have reasonably believed in 2022 that he has been bullied at work; and
- (c) Mr Serafini relies on four incidents. The first was four years ago (July 2019), the second was three years ago (May 2020), the third was one year ago (September 2022) and the last was in February 2023 after his application was filed. At the time of his application the September 2022 incident was relatively current but could not reasonably be understood to have been repeated behaviour 2.5 years after the previous incident.

[79] None of the incidents that Mr Egan or Mr Momirovski rely upon could objectively be described as serious or even significant.

[80] Overall I am not satisfied that Mr Egan, Mr Serafini and Mr Momirovski could have reasonably believed at the time that they made their applications in November 2022 that they had been bullied at work by Mr Bradley.

**Did Mr Bradley engage in bullying behaviour towards each or any applicant?**

[81] The question of whether Mr Bradley engaged in bullying conduct towards each or any applicant calls for consideration of the following issues:

- (a) is any and all unreasonable conduct bullying behaviour if it occurs towards a worker at work and causes a risk to health and safety?
- (b) what was Mr Bradley's conduct towards the Applicants?
- (c) Was that conduct bullying?

*Is any or all unreasonable conduct bullying?*

[82] The applicants argued that any and all unreasonable conduct is bullying behaviour if it taken towards a worker at work and causes a risk to health and safety. I do not agree.

[83] In *Re Mac* at [88]-[89] Vice President Hatcher (as he was then) made the observation that the term "repeatedly behaves unreasonably" in the definition of bullying in s.789FD falls within a definition provision, its function is not to enact substantive law and it is not to be given

a meaning in isolation or given a meaning that loses sight of the objective and the subject matter of the stop-bullying jurisdiction:

“[88] In *Re SB 10*, the Commission (Hampton C) discussed the requirement for repeated unreasonable behaviour in the following terms:

“[41] Having regard to the approach urged by the authorities, the concept of individuals ‘repeatedly behaving’ unreasonably implies the existence of persistent unreasonable behaviour but 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 (provided there is more than one occurrence), nor does it appear that the same specific behaviour has to be repeated. 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.

[43] ‘Unreasonable behaviour’ should be considered to be behaviour that a reasonable person, having regard to the circumstances, may consider to be unreasonable. That is, the assessment of the behaviour is an objective test having regard to all the relevant circumstances applying at the time.”

[89] I respectfully agree with those statements, but I would add three further observations about the interpretation and practical application of the expression “repeatedly behaves unreasonably” in s.789FD(1)(a). First, the expression falls within a definition provision. The function of a legislative definition, as was pointed out by McHugh J in *Kelly v R 11*, is not to enact substantive law, but to provide aid in construing the statute. A definition provision is therefore not to be interpreted in isolation and thereby given a meaning which negates the evident policy or purpose of a substantive enactment. Part 6-4B has the evident purpose of establishing a mechanism by which the bullying of workers at work may be stopped. In interpreting, and applying, the expression “repeatedly behaves unreasonably” as it appears in s.789FD(1)(a), the concept of repeated unreasonable behaviour is not to be approached in a manner which divorces it from that purpose. The subject matter is bullying at work, and that must be borne steadily in mind in any consideration as to whether particular behaviours are unreasonable for the purpose of s.789FD(1)(a). A consideration of unreasonable behaviour which loses sight of the objective and subject matter of Part 6-4B may lead to the provisions not achieving their intended purposes, or being used for a purpose that was not intended.”

[84] The Vice President’s analysis at [89] was endorsed by the Full Bench in *Blagojevic v AGL Macquarie Pty Ltd; Mitchell Seears* [\[2018\] FWCFB 4174](#) at [16] (**Blagojevic**).

[85] In order to give effect to the evident policy or purpose of the enactment, recognising the subject matter of the stop-bullying regime, there must be a bullying element to the unreasonable conduct to bring it within the jurisdiction. The inclusion of the word “repeated” supports this understanding when one understands bullying behaviour to invariably be repeated or persistent behaviour.

[86] In *Re Mac* the Vice President's *longueur* list at [99] captures the essence of the bullying element of workplace behaviour:

“Ms Mac's case involved the proposition that Ms Hester, Ms Van Den Heuvel, Mr Thompson, Ms Locke and Ms Newman had bullied her at work - that is, either individually or as a group had repeatedly behaved unreasonably towards her - in placing her on a PIP and in commencing to implement the PIP. However the overall nature of Ms Mac's case in this respect was somewhat elusive. It was not suggested by her that the identified individuals were acting with malice or sinister intent, or had conspired in some way to cause detriment to Ms Mac. During a *longueur* in the hearing, I attempted to draw up a list of the features at least some of which one might expect to find in a course of repeated unreasonable behaviour that constituted bullying at work. My list included the following: **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.** However no instance of behaviour of this nature has been alleged against Ms Hester, Ms Van Den Heuvel, Mr Thompson, Ms Locke or Ms Newman in the Points of Claim. Although Dr Jetnikoff's report, from which I have earlier quoted, indicated that Ms Mac had reported to him some perception on her part of victimisation and targeting by Ms Van Den Heuvel, that did not feature in the evidence that Ms Mac gave at the hearing.”

[Emphasis added]

#### **Mr Bradley's Conduct: Words, tone and context**

[87] Tone and context is everything in many interactions at work. In stop-bullying applications the Commission is often called upon to adjudicate on whether words and messages sent and received at work were innocent, innocuous, offensive, destructive, and so on.

[88] Innocent or innocuous words, said in a certain context or delivered in a certain tone, can send offensive or destructive messages. Offensive or destructive messages can also be coated in innocuous or innocent words or can be delivered in the most pleasant or professional of tones.

[89] The Commission applies an objective test: behaviour is unreasonable if a reasonable person, *having regard to all the circumstances*, may consider it to be unreasonable. But applying this objective test is a difficult task - particularly if tone is important. Witnesses might provide evidence of context and of the words used, but unless there is a video or audio recording of the conversation or the exchange occurs in written form, the Commission has to make an objective assessment of tone and intention based on the subjective descriptions given by the sender and the recipient.

[90] The Applicants accepted that for the most part the words used by Mr Bradley in the incidents they allege to be bullying were reasonable and accept that it was a legitimate part of Mr Bradley's job to supervise the Applicants and to press them to leave the Station as quickly as possible.

[91] Each applicant said that Mr Bradley yelled at them, abused them or adopted other similar hostile tones towards them. Mr Bradley denies yelling, abusing or otherwise acting towards any of the Applicants with hostility.

[92] One way to test the Applicants' allegations is to look at the substance of the directions and instructions given by Mr Bradley.

[93] The common thread in the Applicants' allegations is the fact that Mr Bradley was calling them to account for their actions: in most incidents he was either moving the Applicants on to do their job or directly asking them what they were doing. I accept that in many situations a supervisor asking a worker the seemingly neutral question "what are you doing" amounts to an accusation that the worker is not doing what they are supposed to be doing, or worse, doing something they are not allowed to do. But even if Mr Bradley's questions had an accusatory purpose, in his role as their supervisor he was entitled to query or challenge the Applicants.

[94] The allegations of yelling, abuse and the like could be more readily accepted if at least some of the directions or instructions were unreasonable. There is evidence of only a small number of instructions that were prima facie unreasonable, for example where a driver was directed to handle parcels outside of his lifting restrictions.

[95] In most of the interactions Mr Bradley is alleged to have said things to individual applicants about the way in which they performed their work. The words used by Mr Bradley were unremarkable for a supervisor, as the following list of quotes from the Applicants' evidence reveal:

- (a) (to Mr Douglas) "[your] performance [is] not up to scratch";
- (b) (to Mr Douglas) "come on Tony, I want you out on the road early";
- (c) (to Mr Douglas) "Tony load your freight and go";
- (d) (to Mr Douglas) "come on Tony, hurry up";
- (e) (to Mr Douglas at a toolbox meeting) "Tony your body language is of concern";
- (f) (to Mr Egan) "what are you doing? ... You should have gone by now, just get on the road, now";
- (g) (to Mr Egan) "what are you doing? Leave the keys there and get on the dock ... are you refusing to do what I have just told you to do?"
- (h) (to Mr Egan) "why haven't you scanned everything yet?"
- (i) (to Mr Serafini) "is there a problem ... why haven't you left yet? ... well we will have to have a look at what the problem is about you getting out so late";
- (j) (to Mr Serafini) "hurry up Peter I need you on the road";
- (k) (to Mr Momirovski) "you have to deliver the parcel regardless of any address issues";
- (l) (to a toolbox meeting) "everything went well [yesterday] with the exception of one staff member who performed poorly by bringing back parcels at the end of the day";
- (m)(to Mr Naumcevski) "why aren't you on the loading dock?";
- (n) (to Mr Naumcevski) "you need to pay more attention to what you are doing as these items went up and down the belt three times";
- (o) (to Mr Naumcevski) "stop arguing with me, take out the deliveries and do as you're told";
- (p) (to Mr Naumcevski) "come on Peter get up to your dock, we are always waiting on you to get up here";
- (q) (to Mr Naumcevski) "you need to get up on the dock immediately";

- (r) (to Mr Naumcevski) “it took you five minutes to work out you can't find your keys ”;
- (s) (to Mr Naumcevski) “okay Peter you have wasted enough time now so go and get yourself another truck”;
- (t) (to Mr Naumcevski) “I’ve asked you to get up on the dock nicely so get up there”;
- (u) (to Mr Naumcevski) “everyone in the toolbox meetings has been told to leave those consignments on their dock, why don’t you know this?”;
- (v) (to Mr Naumcevski) “Peter why haven’t you loaded your truck”;
- (w)(to Mr Naumcevski) “Peter are you going to help someone load the truck? .... well go on then , get to it”; and
- (x) (to Mr Naumcevski and Mr Douglas) “you both had time to get your stuff before the meeting and you’re supposed to be up on the dock as I have asked you to do.”

**[96]** The applicants invariably describe Mr Bradley to have "yelled" when he said these things, and described the interactions as abuse, humiliating, belittling or similar.

**[97]** Unfortunately it seems to me that each of the Applicants are now proverbial loaded guns when working around Mr Bradley. Each applicant seems to be on edge and vigilantly watching Mr Bradley for signs of aggression or hostility. Each applicant keeps a diary of events or at least is in the practice of keeping notes of their interactions with Mr Bradley.

**[98]** Unfortunately, so is Mr Bradley. Understandably he is on edge when dealing with the Applicants and wary of the possibility of more complaints being made against him.

**[99]** It may well be that Mr Bradley is blunt in the way he issues instructions to the Applicants and other drivers.

**[100]** It is significant that Mr Bradley was advised or instructed in 2021 that he should avoid getting drawn into arguments with the Applicants. He was told that if he thought that an interaction was escalating into an argument, he should walk away and make a diary note as soon as possible, especially if there were no other witnesses to the interaction.

**[101]** Mr Bradley said he has followed this instruction and he only speaks to the Applicants if he has to. The evidence of the advice he received rings true in the Applicants’ evidence: none of the alleged incidents involved a protracted conversation or exchange – in fact most allegations describe Mr Bradley saying only a few words in each entire conversation.

**[102]** This instruction also rings true in the Respondents’ evidence. Mr Bradley did in fact make extensive contemporaneous notes of controversial exchanges, and on his version of events he quickly extracted himself from conversations that became fractious. Mr Guinane’s evidence and his oversight at the Unanderra Station indicates that on several occasions he intervened and made concessions or indulgences to the Applicants in order to appease their complaints (reasonable or not) or to avoid escalation.

**[103]** The Applicants and their union have raised allegations of bullying against Mr Bradley since 2017. The conduct complained of is largely unchanged since 2017.

[104] The longevity of the complaints both supports the credibility of the Applicants' complaints but also calls into question their legitimacy. Superficially the Applicants have not had much success with their complaints, Mr Bradley is still the manager and most of their internal complaints were rejected by FedEx. If the complaints were mischievous or for an ulterior purpose, it is unlikely that the Applicants would have persisted for so long. Alternatively, it is distinctly possible that because their complaints have not been accepted or validated by FedEx each new incident is [wrongly] perceived by the Applicants as more serious than it actually is, because it is yet another incident in a long line of incidents that have not been properly addressed.

[105] Most of the alleged incidents of bullying are so spread out in time for each applicant that they are almost all isolated incidents. For example, Mr Momirovski relies on three incidents of alleged bullying by Mr Bradley: the first was in November 2019, the second in September 2020 and the third in March 2023. It is clear from Mr Momirovski's evidence that he feels pressure being under the supervision of Mr Bradley but I could not objectively find that three incidents in 40 months applied any undue or unreasonable pressure on Mr Momirovski.

[106] From their own evidence the Applicants also pushed back on Mr Bradley on some occasions. For example:

- (a) Mr Douglas said that he said to Mr Bradley on different occasions "Graeme, I am doing my best would you please leave me alone", and repeated in the same conversation "Graeme, would you please leave me alone";
- (b) Mr Egan said to Mr Bradley in 2023 "can you please talk to me properly" and "can you please just let me load my truck" and "I am running late because you wouldn't let me put my truck on the dock" and also "if you had let me put my truck on the dock I would have been loaded and gone by now", and on another occasion he simply ignored Mr Bradley's direct question; and
- (c) Mr Naumcevski said on one occasion he asked Mr Bradley "why do you always have to speak to me like this", and when questioned about starting work "what is my clock-on time" and on another occasion "how am I wasting time, I was waiting for you to help me find another truck to take", and "when am I supposed to view the board then", and "when will you stop harassing me about getting up on the dock", and "don't speak to me like that."

[107] There is evidence of the Applicants "mocking" and ignoring Mr Bradley. On one occasion in a morning toolbox meeting Mr Naumcevski provoked Mr Bradley by standing in front of him as Mr Bradley was addressing the whole work team. Mr Bradley said to Mr Naumcevski "don't look at the board while I'm talking Peter, it's very rude". Mr Naumcevski claims to have been "embarrassed and belittled ... in front of all [his] work colleagues" by Mr Bradley.

[108] Mr Guinane described Mr Naumcevski as "playing games" and being "childish" in his dealings with Mr Bradley. On more than one occasion Mr Guinane instructed Mr Bradley to "indulge" Mr Naumcevski, or other applicants, "so as to avoid confrontation." In 2023 Mr Naumcevski was formally disciplined for making a vexatious complaint against Mr Bradley. Neither FedEx nor Mr Bradley filed a cross-application and so is not necessary to consider whether Mr Naumcevski's conduct was bullying behaviour towards Mr Bradley.

**[109]** I accept the Respondents' evidence, which was in fact consistent with much the Applicants' evidence, that since at least 2021 Mr Bradley engaged with the Applicants only when he had to, for as short a time as possible, and with the clear intention of avoiding or de-escalating any contentious interactions. To the extent that the Applicants' allegations rely upon tone and volume I cannot find that Mr Bradley adopted hostile or antagonistic tones in these brief interactions.

**[110]** I accept what Mr Bradley said to be his intention because he has nothing to be gained by provoking, abusing or intimidating any of the Applicants, and much to lose. If nothing else Mr Bradley would have known that he would face a formal complaint if any of the Applicants considered that he had crossed the line into bullying territory. Certainly after these current proceedings commenced Mr Bradley would have known that any abusive conduct by him would become evidence in the Commission's proceedings. History has also taught Mr Bradley that the Applicants' complaint thresholds are very low - meaning that the Applicants had already made numerous complaints about minor conduct by him.

**[111]** There is no suggestion, for example, that Mr Bradley included any false information in his contemporaneous notes of his interactions with the Applicants. His records of conversations are reasonably similar to the Applicants' recollections. It would be either very bold or very stupid of Mr Bradley to intentionally abuse or antagonise the Applicants and then make careful contemporaneous notes of his conduct, particularly in the context of five years of intervention by the TWU and three separate legal proceedings.

**[112]** Mr Bradley persisted in doing his job of supervising the Applicants and managing their conduct and performance. This has inevitably led to Mr Bradley calling the workers to account from time to time and, in light of the long history, causing discomfort and offence to them.

**[113]** In all the circumstances I am not satisfied that by his words or his tone Mr Bradley yelled, abused, belittled, intimidated, made undue criticism or threats, or any other bullying behaviour towards any of the Applicants when he spoke to them about everyday work arrangements including:

- (a) wasting time, moving from the toolbox meeting to the dock area and also leaving the Station as quickly as possible;
- (b) the changing of runs or allocations within runs;
- (c) rudeness at toolbox meetings; and
- (d) dealing with equipment problems included scanners, truck selection and keys, and so on.

**[114]** This finding covers almost all of the incidents of bullying alleged by the Applicants. Three particular matters fall outside of this finding:

- (a) Mr Douglas' allegation that in January 2020 he was directed to drive an 8-tonne truck which caused him to injure his back;
- (b) Mr Serafini's allegation that in July 2019 after attending a meeting with the TWU and FedEx representatives he was required to stay back for two weeks to strap trailers instead of leaving early "as some sort of payback"; and
- (c) Mr Momirovski's allegation that in September 2020 Mr Bradley directed him to deliver three overweight suitcases in contravention of his lifting restrictions.

[115] The first thing to say about all three allegations is that they are now too old to form the basis of a finding in 2023 that Mr Bradley engaged in bullying, or to establish that there is presently a risk that any of these three applicants might be bullied in the future.

[116] Secondly, apart from the fact that Mr Douglas suffered an injury, there is no evidence that establishes that the direction to drive an 8-tonne truck was unreasonable, let alone conduct of a bullying nature. Mr Douglas did not drive the 8-tonne truck for a second time, even though he was asked to, and so the conduct that caused the risk to health and safety was not repeated.

[117] Thirdly, Mr Serafini's allegation involves repeated behaviour over a two-week period in 2019. No similar conduct has occurred since 2019. But for the fact that the conduct was so long ago, it is conceivable that this behaviour was repeated unreasonable bullying behaviour. Mr Bradley led no evidence about this incident. On Mr Serafini's version of events he was singled out.

[118] Fourthly, there is no basis to find that the conduct of which Mr Momirovski complains was repeated behaviour.

**Consideration: Was any or all of Mr Bradley's allegedly bullying behaviour reasonable management action carried out in a reasonable manner?**

[119] Given the above findings that Mr Bradley has not engaged in bullying behaviour, it is not strictly necessary to consider whether Mr Bradley's conduct was reasonable management action carried out in a reasonable manner.

[120] There is no real contest that the behaviour by Mr Bradley was management action. Each of the incidents involved action by Mr Bradley in managing, supervising, correcting or directing the Applicants in their work (see *Blagojevic* at [19]).

[121] The test for whether management action constitutes "reasonable management action" was summarised by the Full Bench in *Blagojevic* at [20]:

"To determine whether the action constitutes "reasonable management action" it is necessary to undertake "an objective assessment of the action in the context of the circumstances and knowledge of those involved at the time". The test for reasonable management action is whether the "management action was reasonable, not whether it could have been undertaken in a manner that was 'more reasonable' or 'more acceptable'."

[Footnotes omitted]

[122] The Applicants argued that this management action was not "done in a reasonable manner" by Mr Bradley.

[123] The Applicants argued that management action done by way of yelling, abusing and so on could not be action done in a reasonable manner. I have already made findings in relation to whether Mr Bradley engaged in conduct that could be described as yelling, abuse, belittling, undue criticism, intimidation and threatening workers, or the like.

[124] In *Re SB* Commissioner Hampton, as he was at the time, suggested at [48] that parliament did not intend that the stop-bullying jurisdiction regulate everyday actions of managers directing and controlling how work is done:

“The Explanatory Memorandum refers to management decision and decisions about how work is to be carried out. This suggests that the term may be required to be given a wide meaning under s 789FD(2) and that the Legislature intended everyday actions to effectively direct and control the way work is carried out to be covered by the exclusion.”

[Footnote omitted]

[125] When the Commission considers the “reasonableness” of any particular event, it is not for the Commission to micro-analyse each relevant event and to substitute its own view for that of the employer, but instead to examine whether the particular conduct said to be unreasonable lacks an evident and intelligible justification (per *Re Mac* at 303[102]).

[126] It could not be said that the manner in which Mr Bradley undertook his reasonable management actions lacked an evident and intelligible justification.

[127] As the Full Bench in *Mekuria v Mecca Brands Pty Ltd* [2019] FWCFB 2771 observed at [33], bullying matters may involve ongoing and evolving workplace situations:

“It may be accepted that anti-bullying matters may not necessarily proceed upon a fixed and static set of bullying allegations and that, somewhat like an industrial dispute, they may involve an ongoing and evolving workplace situation. This is more likely to be the case where the bullying allegations are made against a group of persons at the workplace, since this will involve the dynamic of a network of inter-relationships with the capacity to give rise to new developments operating conterminously with the conduct of the proceedings in the Commission.”

[128] What is clear from how the Applicants’ claims have evolved is that the Applicants each have a heightened sensitivity to the possibility of Mr Bradley saying something to them that might be critical of them or hostile towards them. Unsurprisingly, Mr Bradley is no longer given the benefit of the doubt in any of these interactions. That is, if Mr Bradley’s words or tone could be interpreted either positively or negatively, the Applicants are all likely to interpret Mr Bradley's actions negatively.

[129] It is pretty clear that Mr Bradley is frustrated from time to time having to deal with the Applicants. It is also pretty clear that the Applicants are tense and anxious dealing with Mr Bradley.

[130] The observations of the full Court in *Perkins v Grace Worldwide Australia Pty Ltd* (1997) 72 IR 186 at 190, [1997] IRCA 15, albeit in very different context, are apt:

“... 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. And in assessing that question, it is appropriate to consider the rationality of any attitude taken by a party.”

[131] In these matters there is much evidence of "friction and doubts" in the working relationships between the Applicants and Mr Bradley. Whilst it is natural to search for someone to blame for the current state of affairs, there is no point in doing so.

[132] I am prepared to assume that Mr Bradley gets exasperated from time to time with the Applicants. This is a safe assumption because the vast majority of incidents complained about by the Applicants appear to be attempts by Mr Bradley to hustle the drivers out of the station and onto the road as soon as possible each day, and also to manage operational variables and challenges while simultaneously dealing with resistance and, at least on some occasions, disrespect and defiance towards him from the Applicants.

[133] If on some occasions Mr Bradley's tone revealed his exasperation, Mr Bradley's attempts to supervise the Applicants could still be reasonable management action undertaken in a reasonable way. In other words, it is appropriate to make allowances for some degree of exasperation or tension between managers and those whom they manage. In the same way that employers must apply the standards of men and not angels to their employees (*Jupiter General Insurance Co Ltd v Shroff* [1937] 3 All ER 67 at 73-4), managers and supervisors are also entitled to some latitude when the Commission assesses whether their management action was done in a reasonable way.

[134] In the circumstances I am satisfied that all of the conduct relied on by the Applicants was reasonable management action carried out in a reasonable manner.

**Consideration: Did Mr Bradley's alleged bullying behaviour create a risk to health and safety?**

[135] The bullying referred to in Part 6.4B of the Act, being behaviour that "creates a risk to health and safety" (per s.789FD(1)(b)), is insidious and unwelcome in any workplace. The Act provides a mechanism for workers who have been bullied to call upon the Commission to intervene and make orders to prevent further bullying.

[136] The qualification in the definition of bullying that the conduct "creates a risk to health and safety" is an important one. There is no reference, for example, to the conduct creating a risk to well-being or welfare (cf s.387(a) or s.424(1)(c)).

[137] The test is whether there is a real risk to health and safety (per *Re SB* at [45]).

[138] There is no medical evidence at all of the risks to work health and safety. The Applicants say that they were "distressed", or "humiliated" or "embarrassed" when addressed by Mr Bradley in the course of their work. Importantly the allegations span more than five years of working under Mr Bradley and that in five years there were three occasions when a driver took sick leave because of, they said, Mr Bradley's conduct. Those three occasions resulted in approximately five days sick leave in total.

[139] The duration of the behaviour, and the fact that the nature of the conduct has not materially changed over the years, speak against there being a risk to health and safety arising from the behaviour. The longer the period without the possibility of danger any actual risk to health and safety the more likely it is, in practical terms, that the risk is theoretical.

**Consideration: is there a risk that any or all of the applicants will continue to be bullied at work by Mr Bradley?**

[140] The Commission can only intervene and make orders when it is satisfied that there is a risk of future bullying. If there is no risk of bullying in the future, the Commission cannot and should not intervene to make orders to improve or repair relationships in the workplace.

[141] In the present circumstances, and given the findings I have already made, I am not satisfied that there a risk that any or all of the Applicants will continue to be bullied at work by Mr Bradley.

**Remedy: Orders sought**

[142] Given my findings there is no basis for the making of any stop-bullying orders. In this context I make some very brief observations about the orders sought by the Applicants, viz:

- “• An order that Mr Bradley does not raise his voice or yell when speaking with any of the Applicants;
- An Order that Mr Bradley stops acting unreasonably towards the Applicants;
- An Order that Mr Bradley does not act aggressively or intimidate Mr Naumcevski;
- An Order that FedEx implement and actively monitor the effectiveness of control measures identified in risk assessments;
- An Order that FedEx provides all staff with anti-bullying training to be conducted by an external provider;
- An Order to ensure that FedEx has in place updated anti-bullying policies and complaints handling processes;
- An Order that Mr Bradley is redeployed to another area of the business operated by FedEx to ensure that there is at all times separation between Mr Bradley and the Applicants; and or
- Any other Order the FWC may deem to be appropriate and necessary in all circumstances.”

[143] Most of these orders are problematic because neither FedEx nor Mr Bradley would know precisely what is required of them to comply with the orders. A contravention of a stop-bullying order is a civil remedy provision and so a significant level of precision is required when formulating orders. For example, if an order was made that “Mr Bradley stops acting unreasonably towards the Applicants” the reasonableness of any particular behaviour by Mr Bradley is dependent upon the circumstances in the moment. Similarly, an order that Mr Bradley not raise his voice or yell is problematic in a noisy environment such as the belt at the Station. If Mr Bradley has to raise his voice to be heard over some other noise he is at risk of contravening the order.

[144] In *Australian Industry Group v Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union & Ors* [2000] FCA 629 at [33] Justice Merkel made the following observation that applies equally to stop-bullying orders<sup>1</sup>:

“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 or boundaries of the injunction” (*ICI Australia Operations Pty Ltd v Trade Practices Commission* [1992] FCA 474; (1992) 38 FCR 248 at 259 per Lockhart J). 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: see *Iberian Trust Ltd v Founders Trust and Investments Co* [1932] 2 K.B. 87 at 95, *Redwing Ltd v Redwing Forest Products Ltd* (1947) 177 L.T. 387, *John Fairfax & Sons Pty Ltd v Australian Consolidated Press Ltd* (1960) SR (NSW) 413 at 416, *Australian Consolidated Press Ltd v Morgan* [1965] HCA 21; (1964) 112 CLR 483 at 503, 506, 515-516, *Re Bramblevale Ltd* (1969) 3 All ER 1062 at 1064, *Concrete Constructions* at 71-72 and *Nexus Mortgage Securities Pty Ltd v Ecto Pty Ltd* (1998) 4 VR 220 at 222-223.”

[145] Another significant difficulty with the orders sought is that they travel beyond what could reasonably be made in order to prevent future bullying. An order that Mr Bradley not act unreasonably is unlimited in its scope and could not be enforced.

## Conclusion

[146] In conclusion:

- (a) I am not satisfied that Mr Bradley has engaged in bullying towards the Applicants;
- (b) Mr Bradley’s conduct in each of the complaints raised by the Applicants was reasonable management action carried out in a reasonable manner;
- (c) Mr Bradley’s conduct did not create a risk to health and safety;
- (d) I am not satisfied that there is a risk that the Applicants will be bullied in the future;
- (e) Accordingly the Commission does not have any power to make stop-bullying orders in any of the applications; and
- (f) Each application must be dismissed.

[147] Accordingly I will make separately make orders dismissing each application<sup>2</sup>.



DEPUTY PRESIDENT

*Appearances:*

*A Grumley* for the Applicants  
*D Cross* for the Respondent

*Hearing details:*

2023.

Sydney

June 13, 14, 15, August 4.

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<PR769227>

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<sup>1</sup> See also *TWU v AIRC* (2008) 171 IR 84 at 107, [2008] FCAFC 26 at [49].

<sup>2</sup> [PR769228](#), [PR769229](#), [PR769230](#), [PR769231](#), [PR769232](#), [PR769233](#).