



DECISION

Fair Work Act 2009

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

Dr Andrew Amos

(AB2024/225)

DEPUTY PRESIDENT DOBSON

BRISBANE, 5 AUGUST 2024

Application for an FWC order to stop bullying – Jurisdictional objection – Applicant is not a worker

[1] This decision concerns an application made under section 789 FC of the *Fair Work Act 2009* (Cth) for an order to stop bullying (**Application**). The Applicant is Dr Andrew Amos (**Applicant**). The Applicant was at the time of the application, engaged in performing voluntary work for The Royal Australian and New Zealand College of Psychiatrists (**Respondent/RANZCP**). The application is made against the Respondent and a further three persons against whom bullying is alleged by the Applicant (**Named Persons**). Each of the Named Persons is also an employee or office holder of the Respondent in various positions of which are the Chief Executive Officer, President and Chair of the Membership Engagement Committee.

[2] The Respondent and Named Persons each deny having ever behaved unreasonably towards the Applicant.

Jurisdictional objection

[3] The Respondent alleges that the Applicant is not a worker as defined by the *Work Health and Safety Act 2011* (Qld) (**WHS Act**) and further that the Applicant was not at work when the alleged bullying occurred.

The Applicant's submissions

[4] Relevantly the Applicant claims that he performs voluntary work on a number of committees including the Membership Engagement Committee (**MEP**), the Committee for Educational Evaluation, Evaluation, Monitoring and Reporting, the Journals Committee, Member's Advisory Council and Chair of the Queensland Section of Rural Psychiatry.¹

[5] The Applicant submits that one of the Named Person's wrote to the Applicant, in breach of a Mediation Agreement that finalised a previous Application to Stop Bullying in 2023. The particular condition of that agreement that the Applicant alleges was breached reads:

Upon fulfillment of the terms of this agreement, there will be no further communication in relation to past resolutions of the Board requiring production of vaccination certificates, and any other matters pertaining to the subject of the FWC application.²

Procedural Background

[6] The matter was allocated to my chambers on 24 April 2024. The Respondent in their Form F73 – Employer Response raised the Jurisdictional Objection that the Applicant did not meet the definition of a ‘worker’. On 29 April 2024, my chambers wrote to the Applicant seeking submissions on the objection made by the Respondent. The applicant provided a response and my chambers issued directions for formal submissions from all parties. The Applicant filed submissions on 21 May 2024, the Employer provided submissions on 13 June 2024 and the Applicant provided a final reply on 21 June 2024. The parties submitted that they considered the decision could be made on the papers.

Background

[7] The Respondent submits that it is a constitutional corporation and it engages a number of employees and as a membership organisation is responsible for training, education and representing psychiatrists who are members across Australia and New Zealand. Furthermore, the Respondent submits that any tasks undertaken by the Applicant are undertaken in his role as a member of the Respondent.³

[8] The Respondent provided that it has over 8400 members, including more than 5900 qualified psychiatrists (Fellows) and over 24000 members who are training to qualify as psychiatrists (Associate members or Trainees). They submitted that they are registered under the *Corporations Act 2001* as a non-for-profit company limited by guarantee. The RANZCP submitted that they are a company formed on the principle of having liability of its members limited to the respective amounts that the members undertake to contribute to the property of the company if it is wound up, which is defined within their constitution.

[9] The Respondent submitted that the staff that they employ, undertake the operational tasks of, and progress the purpose of the College. They submitted that those employment relationships are defined by standardised employment agreements. In contrast, the Respondent submitted that the member facing contributions to them include participation on a Committee, and should not be deemed volunteer-based work, nor founded on an employment contract.

The Applicant’s Case

[10] The Applicant’s submission set out his case in some detail which I don’t intend to traverse other than to briefly say that the Applicant alleges that:

- a) He was unclear on the meaning behind the Respondent submitting as ‘member facing contributions’ and submitted that his work for the Respondent involved significant work for the purposes of “guiding the decision-making and strategic direction of the Board and other constituent committees” of the Respondent, the value of which, he alleges, is clearly recognised by the Respondent.

- b) The fact that he fulfils other roles within the Respondent does not invalidate his status as a worker by the fact of the work. He submitted that all that is required to be done is that work is performed for an eligible organisation.
- c) The Respondent is constituted by a large number of committees reporting to their Board, which administers the business of the college on behalf of its members both directly and through instructions to college staff. The Membership Engagement Committee (MEC) in which he alleges the bullying took place reports directly to the board. The MEC is chaired by one of the Person's named.
- d) In addition to his constituent work in the committee, which includes recommendations to the Board regarding core membership functions (such as applications to reduce fees in response to member hardship), the Applicant submitted that he has performed many different ad hoc items of work. The Applicant referred to an Agenda filed for a meeting on 30 July 2021. The Agenda contained a refers to his 'work' with the eLearning Advisory Group (eLAG).
- e) The work associated the MEC, the Applicant alleges that it includes both decision making/advisory function during the meetings, as well as preparation for the meetings including detailed reports for each item number and work performed in the subcommittees. The Applicant also submitted that he attends two face-to-face meetings per year, approximately 5 online meetings and contributes to multiple out-of-meeting processes.
- f) The Applicant also noted that he was a member of a number of other constituent committees of the Respondent which perform work. The applicant attended in Canberra for the Respondent's annual congress as a working member of the Journal Committee, and the Member's Advisory Council as the representative for the section of Rural psychiatry where he sits as Chair.
- g) The Applicant concluded that he was a volunteer for the MEC, the Journals Committee, the Members Advisory Council, The Committee for Educational Evaluation, Monitoring and Reporting, and the Section of Rural Psychiatry. The Applicant alleges that he does work as defined by the Act, that the work he does is valued by the Respondent and that he is thereby eligible as a worker to apply for Stop Bullying Orders.

[11] In reply to the Respondent's submissions, the Applicant again largely traverses matters that are relevant to the merits of the application. To the extent they comment on the role/s performed by the Applicant in his capacity on various committees of the Respondent, they have been considered.⁴

The Respondent's Case

[12] The Respondents set out their case in their outline of arguments which in brief, submit the Applicant does not meet the definition of a worker, describe the function of the RANZCP, the Membership contributions of the Applicant both as a member of the RANZCP and as a member of a number of RANZCP Committees including the Membership Engagement

Committee.⁵ They also attach a copy of the Regulations (which details the role, responsibilities, relationships, composition, operation and appointment to and/or of the Committee).⁶

[13] Where the Respondents submissions traverse the merits of the case, I have not included them in the consideration of the jurisdictional objection.

Statement of Agreed Facts

[14] The parties filed a statement of agreed facts on 21 June 2024. That statement largely goes to the merits of the application rather than the jurisdictional objection. Where it talks about factors relevant to the nature of RANZCP, this has been summarised briefly in the background section of this decision.

Consideration

[15] Section 789FF of the Act sets out the matters the Commission must be satisfied of before it has the power to make an order to stop bullying. Even where the prerequisites have been satisfied the making of an order is not required but rather it remains a discretionary decision for the Commission as to whether or not an order will be issued.

[16] Section 789FF is set out below.

“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.”

[17] The Commission only has the jurisdiction to make an order to stop bullying where it is satisfied that a **worker** has been bullied at work by an individual or group, and the Commission is satisfied there is a risk that the worker will continue to be bullied at work by the individual or group. (Emphasis added)

[18] As noted by the Full Bench in *Bibawi*:⁷

“the definition of “worker” in s 7(1) of the WHS Act⁸ is very broad in that, a person need only perform work “in any capacity for” the other person conducting the business or undertaking in order to satisfy the definition. The definition was expressly described as “broad” in the Explanatory Memorandum to the Fair Work Bill 2013 which added Pt 6-4B to the FW Act. The types of workers listed in paragraphs (a)-(i) of s 7(1)” are taken to be included in the general definition in the chapeau to the provision, but do not operate to limit it.”

[19] In considering the submissions of both the Applicant and the Respondent, I accept that the Applicant is a Member of the Respondent (RANZCP/College). Further, I accept the Respondent’s submissions that it engages employees to perform the daily operations and functions of the College including performing the clerical duties that support the College and its committees in their operations. I also accept the submissions of the Respondent that Members of the RANZCP do not participate in the daily operations of the College.⁹

[20] It is important to note that Vice President Watson in *Balthazaar*,¹⁰ helpfully sets out the interpretation and the application of s7(1) which I adopt, as follows:

“[19] The definition of “worker” in s.7(1) of the WH and S Act contains two primary elements. First, the person must carry out work. Secondly, the work must be carried out for a person conducting a business or undertaking. There follows words of inclusion to emphasise that the work carried out for a person conducting a business or undertaking can be in any capacity whatsoever. The capacities extend beyond that of an employee. It can extend to persons performing work as an independent contractor under a contract for services. Indeed it is not necessary that there be any contract or any payment for the work. Volunteer work is included within the definition (subject to the exclusion of volunteers working together in a volunteer association: WH and S Act s.5).”

[21] Turning to the first limb, the person must carry out work. Whilst I note that the Respondent submits that Members of the college and of the committees of the College do not perform operational work and are instead supported by staff who perform that work,¹¹ nonetheless I note in the Regulations for the Membership Engagement Committee (MEC) of which the Applicant is a member, that the MEC carries a number of responsibilities. Those responsibilities include briefly strategic oversight of membership engagement, providing strategic advice, direction and leadership, improving member awareness. Having strategic

oversight of College events, providing acknowledgement and recognition of membership contributions and achievements, ensuring College publications are fit for purpose, support member recruitment and retention activities, oversee operational membership processes and risk management of the Committee.¹² Whilst there may well be a distinction between operational strategic work, nonetheless it all falls within the broad definition of being work.

[22] The second limb is that the Respondent must be a person conducting a business or undertaking (PCBU) pursuant to s.5 of the WHS Act. Given that on the Respondent's own evidence, it conducts employees who perform paid work,¹³ I am satisfied that the Respondent is a PCBU.

[23] On that basis I am satisfied that while the Applicant remains a member of a membership committee of the Respondent, he is a worker for the purposes of the WHS Act. The jurisdictional objection is dismissed. The matter will be listed for further consideration of its merits and directions will issue from Chambers accordingly.



DEPUTY PRESIDENT

Printed by authority of the Commonwealth Government Printer

<PR777893>

¹ Digital Court Book (DCB), pp.16-19.

² DCB p.10.

³ DCB p.26.

⁴ Digital Court Book pp.20-22.

⁵ Digital Court Book pp.68-71.

⁶ Ibid 113-119.

⁷ *Bibawi v Stepping Stone Clubhouse Inc t/a Stepping Stone & Others* [2019] FWCFCB 1314 at [18].

⁸ *Workplace Health and Safety Act 2011* (Qld).

⁹ Digital Court Book p.70 at [18]

¹⁰ *Arnold Balthazaar v Department of Human Services (Commonwealth)* [2014] FWC 2076 a [19].

¹¹ Digital Court Book pp.69-70.

¹² Digital Court Book pp.113-114.

¹³ Digital Court Book p.70 at [18].