Article Information

Authors: Ben Motro, Emily Setter
Service: Employment & Labour

Do performance improvement plans constitute 'reasonable management action'?

The recent decision of the Fair Work Commission in B v AGL Macquarie Pty Ltd; Mitchell Seears [2018] FWC 2906 has shed further light on what constitutes "reasonable management action" in the context of performance management under section 789FD of the Fair Work Act 2009 (Cth).

The case involved an application by Mr MB ("the Applicant"), an Asset Engineer, for an order to stop alleged bullying by his employer, AGL Macquarie Pty Ltd and Mr Seears, his supervisor. The Applicant contended that the actions of Mr Seears in placing him on a Performance Improvement Plan (PIP) in March 2017, and a revised PIP in June 2017, constituted bullying in accordance with section 789FD of the *Fair Work Act*.

Section 789FD provides that a worker is bullied at work if an individual or group of individuals repeatedly behaves unreasonably towards the worker and that behaviour creates a risk to health and safety. Importantly, the Fair Work Commission will not make an order under section 789FD, where such action is "reasonable management action carried out in a reasonable manner".

Background

The Applicant was placed on a Performance Improvement Plan which largely focussed on his alleged underperformance in addressing electrical and control issues in the plant which he was expected to manage. This included issues with meeting deadlines and revised deadlines, cost forecasting/budgeting inaccuracies and failure to exert pressure on workers within the plant so as to ensure deadlines were met.

The Applicant had demonstrated an outstanding work ethic and technical capabilities during his employment, and received "distinctly positive" performance reviews in the years before he was placed on the PIP.

The Applicant contended that, as a result of the alleged bullying by the Respondents in imposing the PIP and revised PIP, the risk to his health and safety materialised in the form of severe depression and anxiety. The Applicant had been absent from work since 30 October 2017 and had not returned to work at the time of the hearing before the Commission on 9 April 2018.

Reasoning

The Commission referred to the leading decision of Vice President Hatcher in *Amie Mac v Bank of Queensland Limited* [2015] FWC 774, in which a solicitor from the Bank of Queensland sought orders to stop bullying, claiming that she had been bullied by her colleagues when she was placed on a PIP. In the *Amie Mac* case, the Commission determined that the decision to impose a PIP constituted reasonable action in the circumstances of that case. Importantly, Vice President Hatcher read the phrase "repeatedly behaves unreasonably" as requiring an Applicant to demonstrate that the "decision to introduce the PIP lacked any evident intelligible justification".[1]

In the present case, Commissioner Saunders referred to the approach of Vice President Hatcher with approval, noting that the relevant issues were:

1. whether the decision to introduce the PIP or revise it, lacked any evident and intelligible justification; and
2. whether the introduction and implementation of the initial and revised PIP was carried out in a reasonable manner.

The Applicant submitted that his performance was not deficient in any way prior to being placed on the first PIP and accordingly the decision to place him on the successive PIPs lacked any evident and intelligible justification. Additionally, the Applicant contended that three of the five areas of underperformance identified by Mr Seears in the first PIP related to areas of work which were not within the scope of the Applicant's role as an Asset Engineer, and that many of the work actions contained within the revised PIP were impossible for an Asset Engineer to execute.

The Applicant further argued that the PIP process was not carried out in a reasonable manner because the Respondents were aware of the extent to which the performance improvement process was affecting his health and continued to impose the PIP regardless.

Findings and Conclusions of the Commission

The Commission came to the view that there was evident and intelligible justification for the Respondents to place the Applicant on a PIP. Accordingly, the Applicant failed in his application for an order to stop bullying because it was found that the alleged action was reasonable management action, undertaken in a reasonable manner.

The Commission held that it was reasonable to direct the applicant to "exert influence" over relevant persons in the plant (which was found to be reasonably within the Applicant's job requirements), particularly given he was able to escalate matters to Mr Seears if he needed support.

Additionally, in relation to the Respondents being aware of the depression and anxiety that the Applicant was suffering as result of being placed on the PIP, Commissioner Saunders was not satisfied that the continued imposition of the PIP was unreasonable. The Commission pointed to a number of actions of the Respondents that went to the reasonableness of the action taken, including:

- making enquiries to ascertain whether there were any suitable alternative roles available for the Applicant;
- organising for the initial PIP to be independently reviewed to ensure the objectives were reasonable and achievable;
- acting slowly throughout the performance improvement process to ensure the Applicant understood the requirements of the plan;
- referring the Applicant to the Respondent's Return to Work Coordinator once it became apparent that the Applicant's mental health was suffering. This involved the Coordinator speaking to the Applicant's treating doctor to obtain information about his mental health and receiving a treating doctor questionnaire;
- removing an area of concern from the PIP when it became apparent that another employee was responsible for the task; and
- approving the Applicant's request for an extended period of annual leave.

Commissioner Saunders also adopted Commissioner Hampton's explanation of "reasonable management action" in *GC [56]*, noting:

- management actions do not need to be perfect or ideal to be considered reasonable;
- a course of action may still be "reasonable action" even if particular steps are not;
- to be considered reasonable, the action must also be lawful and not be "irrational, absurd or ridiculous";
- any "unreasonableness" must arise from the actual management action in question, rather than the applicant's perception of it; and
- consideration may be given as to whether the management action involved a significant departure from established policies or procedures, and if so, whether the departure was reasonable in the circumstances.

An attempt by Mr MB to appeal this decision was refused in late July (see *B v AGL Macquarie Pty Ltd; Mitchell Seears* [2018] FWCFB 4174). In determining whether to grant permission to appeal, the Full Bench emphasised that the unreasonableness of any management action must arise from the actual management action, rather than an employee's perception of the reasonableness of such action.

Additionally, in accordance with *Amie Mac v Bank of Queensland Limited*, the same Full Bench emphasised that the Commission's role is not to review an employee's performance and substitute its own assessment of whether or not such performance is satisfactory. Rather, it is sufficient for the Commissioner to find that a manager's concerns about an employee are genuinely held and that there was an evident and intelligible justification for them.

Key takeaways

This case demonstrates that employers should not avoid undertaking performance management, even where an employee disputes the necessity to do so.

Performance management processes don't have to be perfect, but do need to be undertaken reasonably and in a rational

manner.Employers unsure of their obligations in this regard, should seek legal advice.

[1] *Amie Mac v Bank of Queensland Limited* [2015] FWC 774, [102].