

## QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION: *BHP Billiton Mitsui Coal Pty Ltd v the Workers' Compensation Regulator & Anor* [2017] QIRC 084

PARTIES: **BHP Billiton Mitsui Coal Pty Ltd**  
(Appellant)

v

**the Workers' Compensation Regulator**  
(First Respondent)

and

**Kenneth Bailey**  
(Second Respondent)

CASE NO: WC/2016/136

PROCEEDING: Appeal against a decision of the Workers' Compensation Regulator

DELIVERED ON: 8 September 2017

HEARING DATES: 29 and 30 May 2017  
15, 16 and 17 August 2017

HEARD AT: Mackay and Brisbane

MEMBER: Industrial Commissioner Fisher

ORDERS:

- 1. The Appeal is dismissed.**
- 2. The decision of the First Respondent dated 21 July 2016 is confirmed.**
- 3. The Appellant is to pay the First Respondent's costs of and incidental to the appeal, to be agreed.**
- 4. Costs in relation to the Second Respondent are reserved.**
- 5. Failing agreement, liberty to apply is granted.**

CATCHWORDS: WORKERS' COMPENSATION - APPEAL AGAINST DECISION - whether worker's injury compensable - whether injury arose out of or in the course of reasonable management action taken in a reasonable way - whether final warning was reasonable management action

CASES: *Workers' Compensation and Rehabilitation Act 2003*, s 32

*Q-COMP AND QR Limited (C/2011/26) - Decision* <http://www.qirc.qld.gov.au>  
*Hegarty v Queensland Ambulance Service* [2007] QCA 366  
*WorkCover Queensland v Kehl* [2002] 170 QGIG 93  
*Davis v Blackwood* [2014] ICQ 009  
*Versace v Braun* (2005) 178 QGIG 315

APPEARANCES: Mr G. O'Driscoll, Counsel instructed by HWL Ebsworth Lawyers for the Appellant.  
 Mr P. Rashleigh, Counsel directly instructed by the Workers' Compensation Regulator.  
 Mr S. McSwan, McKays Solicitors for the Worker.

### Decision

- [1] Kenneth Bailey was employed by BHP at the Poitrel Mine in Moranbah where he worked alongside other employees of BHP and labour hire workers. On 30 September 2015 he attended a pre-start meeting where mine management announced that the provider of labour hire would change and that any labour hire worker who wished to continue in employment would transition to the new provider, Mickala Mining. Representatives from Mickala Mining were present at the meeting, although this was not known by Mr Bailey. During the meeting, Mr Bailey referred to labour hire firms as "parasites". Mr Bailey was called to a meeting with his superintendent, Chris Smith, on 10 October 2015 where various performance and conduct issues were discussed and he was presented with a final warning about the "parasites" comment.
- [2] BHP acknowledges, and the Commission accepts, that Mr Bailey was a worker and that he sustained a personal injury that arose out of or in the course of his employment and because the injury was of a psychiatric or psychological nature his employment was a major significant contributing factor to it. The only issues in dispute are whether the injury is compensable either because it arose out of or in the course of reasonable management action taken in a reasonable way<sup>1</sup> or the workers' perception of reasonable management action taken against him.<sup>2</sup> The controversy is whether BHP is correct in asserting the final warning was reasonable management action taken in light of a pattern of behaviour or was issued inconsistently with the performance management tool and without proper regard to Mr Bailey's vulnerabilities as the Regulator contends.

### Background

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<sup>1</sup> *Workers' Compensation and Rehabilitation Act 2003*, s 32(5)(a).

<sup>2</sup> *Workers' Compensation and Rehabilitation Act 2003*, s 32(5)(b).

- [3] Mr Bailey was absent from the Poitrel Mine between December 2014 and April 2015 suffering from a psychiatric or psychological disorder as a result of mine management's treatment of him. He had been particularly distressed by the change in his roster from 12 hour to 10 hour shifts which reduced his income significantly. Mr Bailey claimed workers' compensation for this injury but was unsuccessful both at first instance and on review. He did not appeal the review decision.
- [4] Mr Smith was aware that Mr Bailey had been absent from work because of a psychiatric or psychological disorder. He had a "catch up" with Mr Bailey on his return to work to have a "quick run through of previous events"<sup>3</sup> from Mr Bailey's perspective. Those "previous events" included a discussion about the reduction in shift length. The meeting was more of a "meet and greet, welcome back to work, type scenario."<sup>4</sup>
- [5] Mr Smith was not present at the meeting where Mr Bailey made the "parasites" comment; he was travelling to Mackay. Once he was within mobile telephone range he received several text messages and missed calls. Because he was concerned a serious incident had occurred, he stopped the car to check his messages. He learnt that Mr Bailey had made the "parasites" remark and this had not been taken well by the management team and some of his peers. By the next morning he received statements from crew members, including labour hire workers, and the leadership team, including the Production Manager, expressing their distress at the comment. The labour hire workers had expressed concern to him about the future of their employment considering what had transpired.
- [6] As a result, it was decided that when both he and Mr Bailey were next at the mine together a performance management discussion would occur. The performance management process is called a SHAPE Plan. The SHAPE Plan process for Mr Bailey was to address "a few other outbursts and performance issues" that had arisen prior to the "parasites" comment being made as well as the "parasites" comment. The view had been taken, including by Human Resources, that this comment was in breach of BHP's Code of Business Conduct and Charter of Values. Those documents require employees to show respect for those that they work for and with as well as embracing trust, teamwork and relationships that are mutually beneficial.

### **The SHAPE Conversations Meeting**

- [7] The meeting occurred on 10 October 2015 between Mr Smith and Mr Bailey. Adriana Coombes, the leading hand in the Production Mining C Crew, attended as the note-taker and Mark Scott, Superintendent, C Crew, attended as Mr Bailey's support person at his request. It seems the collection of the information included in the SHAPE Plan was done by others for Mr Smith to use with Mr Bailey.<sup>5</sup>
- [8] Mr Smith said the meeting took place on a Saturday because he was aware that Mr Bailey had experienced some issues previously with more senior managers. He found a quiet office to avoid distractions. They sat down for a "chat" and went through the SHAPE Plan and the final warning. From the notes of Ms Coombes, it

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<sup>3</sup> T3-3.

<sup>4</sup> T3-3, T3-5.

<sup>5</sup> T3-15.

appears that Mr Smith read through the Final Warning letter and Mr Bailey made certain comments. The SHAPE Plan was then discussed.

- [9] The Final Warning letter signed by Mr Smith is in two parts - the final warning and the SHAPE Plan. The final warning identified that Mr Bailey had "displayed exceptionally poor behaviours in front of a number of employees and contractors. Specifically, during the pre-start meeting you called the likes of company's (sic) i.e. Mickala Mining 'parasites'."<sup>6</sup> After advising that this language and behaviour was highly offensive and in breach of Charter values and the Code of Business Conduct, Mr Smith went on to explain why the final warning was being issued:

"As discussed during our meeting today, this type of poor behaviour is not tolerated onsite.

This behaviour and use of the derogatory term of 'parasites' has had an adverse impact on the Mickala Mining employees present, the business relationship with Mickala Mining, and on your co-workers. BMC, nor I, will not<sup>7</sup> tolerate this type of behaviour. Accordingly, it has been decided to issue you with a Final Warning."

- [10] In his evidence Mr Smith said Mr Bailey was issued with a Final Warning letter because his "parasites" comment was the "final straw ... in an escalating trend of outbursts ... and ... harmfulness ... towards the workforce."<sup>8</sup> However, under cross-examination, Mr Smith conceded that the Final Warning letter does not explain that the final warning was the culmination of a series of similar preceding incidents.
- [11] The notes taken by Ms Coombes show that Mr Bailey disputed the presence of Mickala Mining at the pre-start meeting. He indicated that his "parasites" comment referred to all labour hire companies and not Mickala Mining individually. He also disputed that his comment was in breach of the Code of Business Conduct. He referred to two members of upper management having lied about him causing him to lose his "court case". These actions, in his view, had been breaches of the Code of Business Conduct.  
The evidence of Mr Smith and Mr Bailey generally confirmed the accuracy of Ms Coombes' notes on these points.
- [12] The second part of the letter explained that Mr Bailey had been placed on the SHAPE Plan because "BMC currently hold concerns that you are not meeting the performance and behavioural expectations required of you in your position of Mine Employee at Poitrel mine."
- [13] The SHAPE Plan is a pro-forma document with twelve sections, including the following:

1. Guiding Pillars of Performance Management;
2. WHY - Objective of the Discussion;

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<sup>6</sup> Ex 7.

<sup>7</sup> The original letter read by Mr Smith omitted the word "not". He amended it during the meeting to include this word. A handwritten amendment was made to the letter to reflect this. The letter tendered to the Commission as exhibit 7 includes the word "not".

<sup>8</sup> T3-16.

3. Identify the performance and/or behaviours which conflict with expectations of the company or role and provide supporting evidence of facts or examples of the substandard performance/behaviours;
4. What's the employee's understanding of concerns/reason for Plan, their view of the situation and/or responses/perspective;
- ...
8. Improvement Actions;
9. Outline potential consequences if workplace expectations are not met;
10. Outcomes; and
- ...
12. Signatures.

- [14] Under the heading of "Guiding Pillars of Performance Management", there are three sub-headings, viz., Role Performance, Misconduct and Gross Misconduct. "Misconduct" is described as "Wrongdoing in relation to the individuals (sic) responsibilities as outlined in the BHP Billiton Code of Conduct, policies, procedures and/or standards." In the SHAPE Plan prepared for Mr Bailey, the box next to the heading of "Misconduct" was checked.
- [15] Section 2 concerns the objectives of the discussion. It sets out that the issues are to be discussed in an open manner, contributing factors are to be identified and improvement actions to be agreed. It also notes that the meeting provides the employee with a right of response and an opportunity to contribute to the solution. While no objectives of the discussion are identified in Mr Bailey's Shape Plan, he had an opportunity to address some issues as noted below.
- [16] In Section 3 dealing with the identification of the performance and/or behaviour(s), two types of offending behaviour are identified. The first concerns Mr Bailey's "numerous issues where his behaviours and reactions have not aligned with the BHP Billiton Code of Business Conduct and the BHP Billiton Charter Values." Four issues which were said to have been included in this area of concern were then listed. In short form these are:
- Aggressive verbal outburst at Charlie Conway on 12 December 2014;
  - Mr Bailey's response to miscommunication with a Digger Operator on 9 June 2015;
  - An incident that occurred at 2.30 am on 6 August 2015 where Mr Bailey was counselled about his statements over the 2 way radio where he repeatedly claimed a High Potential Incident had occurred prior to it being investigated for both actual and potential severity; and
  - His "verbal outburst" at the pre-start meeting where he referred to Mickala Mining as "parasites".
- [17] The second type of offending behaviour referred to "issues with both reliability and ensuring fitness for work". Three occasions are nominated - one in 2013, one in 2014 and one in 2015 - where Mr Bailey was unfit for work because of being impaired or possibly being impaired due to alcohol.
- [18] As the focus of the hearing was on the "parasites" comment, only brief evidence was given in relation to the other issues identified in the SHAPE Plan.

- [19] The evidence of Mr Smith was that he was not aware of the detail of the first behavioural issue. Mr Bailey said it concerned the reduction in shift length. He repeatedly asked for "paperwork" to assist him to plan for the financial impact of the change. At first Mr Conway agreed to provide it then changed his mind. Ultimately, Mr Bailey raised his voice but denied he was aggressive. This issue was raised in Mr Bailey's earlier application for workers' compensation.
- [20] In respect to the issue with the digger operator, Mr Smith agreed it was proper for Mr Bailey to try to clarify what the digger operator had said. Mr Bailey initially believed the operator had sworn at him. Following this, Mr Bailey did not attend for a few shifts. On his return to work, Mr Smith and Mr Bailey listened to the recording of the exchange and Mr Bailey accepted the operator had not sworn at him.
- [21] At the SHAPE Plan meeting Mr Bailey also took issue with the incorrect date being nominated for the incident.
- [22] The third issue concerns a safety issue in the context of Mr Bailey being the Site Safety Health Representative. A difference in view arose about whether Mr Bailey should have been broadcasting the tyre blow out as a high potential incident in circumstances where the incident had not been investigated.
- [23] The incidents concerning the alcohol readings were not discussed in any detail at the meeting of 10 October, although Mr Bailey mentioned that the date and reading for the first incident were wrong. He denied the second incident happened. In relation to the third event, he self-tested as procedure dictated.
- [24] Returning to the SHAPE Plan, section 4, which deals with the employee's understanding, is blank.
- [25] The section dealing with "Improvement Actions" set out the activities Mr Bailey was to focus on, the type of support that was to be given to him as well as dates when his performance would be reviewed both on an interim basis and finally.
- [26] The potential consequences for not meeting expectations were:
- "Should Ken not be fully meeting expectations by 6 January 2016 in all facets of his performance, he will face disciplinary action, up to and including termination of his employment."
- [27] Four possible Outcomes are set out in the SHAPE Plan of which three were identified as applying to Mr Bailey:
- Coaching;
  - Ongoing Performance Improvement Management; and
  - Final Written warning.
- [28] The Final Written warning comes under the outcome of "Disciplinary Action". The types of disciplinary action are verbal warning (written confirmation); final written warning and termination. Disciplinary action is described as:

"For once off breach issues or as a result of ongoing performance issues.

Not to be used in isolation - ongoing coaching, performance improvement or training to be provided in conjunction with disciplinary action."

- [29] Mr Bailey refused to sign the SHAPE Plan document. He described his reaction to the meeting: he shook in frustration at what had gone on, was close to tears, felt totally drained and as if his heart had been torn out. He was sent to the onsite paramedic for an assessment to determine whether he should be removed from the site for a psychological impairment.

### **Brief Overview of Submissions**

- [30] BHP submits that the "parasites" comment was of a different character to the previous outbursts. It breached the Code of Business Conduct and Charter of Values. Given that these documents are either a specific term or an implied term of Mr Bailey's employment contract, then, where there is a breach such that the reputation of BHP is brought into disrepute, it can only be unreasonable management action if the disciplinary action was exercised capriciously. BHP submits this was not done given the unfolding events over 2013 to 2015. In those circumstances the management action was reasonable and taken reasonably and therefore disentitled Mr Bailey to compensation.
- [31] The Regulator accepts that some response to the "parasites" comment was warranted but contends that the Final Warning letter was unreasonable management action taken unreasonably for several reasons. In particular, it is inconsistent with the rest of the SHAPE Plan. It was not dealt with in accordance with the SHAPE Plan which provided Mr Bailey with the right to respond, to contribute to the solution and for contributing issues to be identified. Although disciplinary action might have been reasonable, a final warning went too far. Further, mine management was aware of Mr Bailey's vulnerabilities but they did not consider them in deciding to issue the Final Warning letter.
- [32] On the issue of Mr Bailey's vulnerabilities, BHP submits that Mr Smith was acting in circumstances where Mr Bailey had been given a full clearance to return to work. Mr Smith took reasonable care to ensure Mr Bailey's safety at work. In this regard, Mr Bailey was offered, and took up the opportunity, to have a support person present with him at the meeting.
- [33] No submissions were made on behalf of Mr Bailey.

### **Consideration**

- [34] Mr Bailey and two other BHP employees called by the Regulator attested to the representatives of Mickala Mining not being introduced at the meeting. However, the evidence from BHP's witnesses, who were from mine management and who attended the meeting, establishes their presence. Despite Mr Bailey not being aware of them, a reference to labour hire firms as "parasites" in front of workers engaged by such firms is derogatory. Even Mr Bailey begrudgingly accepted that it was. It may have been a term used in the industry in the past, but on the evidence before the Commission, it is not in contemporary usage.

- [35] The term does not reflect the values of respect, trust, teamwork and mutually beneficial relationships which are required by the BHP Billiton Code of Business Conduct and Charter of Values. According to the SHAPE Plan, wrongdoing in relation to the individual's responsibilities as outlined in the BHP Billiton Code of Business Conduct is misconduct. In those circumstances, it was appropriate for mine management to discipline Mr Bailey.
- [36] The Regulator contends that a final warning was a step too far. The SHAPE Plan provides for three types of disciplinary action, viz., a verbal warning with written confirmation; a final written warning and termination of employment. In my view a verbal warning was an insufficient penalty and termination too harsh. A written warning, had that been an option, may have been the appropriate penalty. In circumstances where this was not available, and, given the extent of distress reported to Mr Smith by mine management and crew members, including labour hire workers, that had been caused by Mr Bailey's comment as well as the poor light it cast on BHP, the Commission considers a final warning was reasonable management action.
- [37] In *Q-COMP v QR Limited*,<sup>9</sup> Hall P cited the observations of Keane JA in *Hegarty v Queensland Ambulance Service*<sup>10</sup> that taking reasonable care for the safety of employees at work does not extend to absolute and unremitting solicitude for an employee's mental health. However, where an employer is fixed with the knowledge of an employee's make-up it is incumbent on that employer to assess what was a reasonable way to implement an otherwise reasonable decision.<sup>11</sup>
- [38] Mr Smith was aware of Mr Bailey's pre-existing psychiatric or psychological disorder but discounted that after he received a clearance to return to work. He also acknowledged in his evidence in chief that he had raised with Mr Bailey after his return to work, when the alcohol issue had begun to "creep in", that he could access the employer provided Employee Assistance Program but Mr Bailey had advised he was already receiving treatment. Mr Bailey's vulnerability had also resurfaced as recently as June when he did not work a few shifts after he believed he had been sworn at by the digger operator. The reason for Mr Bailey's absence at that time was known to Mr Smith. He described it as someone making an attack on Mr Bailey.<sup>12</sup>
- [39] The SHAPE Plan is a performance management tool. It includes both remedial action by way of stating the activities required to improve an employee's actions and disciplinary action. Although disciplinary action is not to be used in isolation but is one of a suite of performance measures, it is nonetheless punitive. A final warning is the most serious disciplinary action that can be taken short of termination of employment.
- [40] The evidence given by those in attendance at the meeting of 10 October was a little vague as to the detail of what was discussed. This is not surprising given nearly two years have elapsed between the meeting and the hearing. Ms Coombes' notes of the meeting were tendered as part of Mr Smith's evidence and thus can be considered to have been adopted by him. They are a contemporaneous record and are more reliable than the oral evidence. In any event, I have previously noted that the evidence of

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<sup>9</sup> *Q-COMP AND QR Limited (C/2011/26) - Decision* <http://www.qirc.qld.gov.au>

<sup>10</sup> *Hegarty v Queensland Ambulance Service* [2007] QCA 366, [47].

<sup>11</sup> *WorkCover Queensland v Kehl* [2002] 170 QGIG 93, 94.

<sup>12</sup> T3-27.

Mr Smith and Mr Bailey on the matter of the final warning was generally consistent with Ms Coombes' notes.

- [41] The final warning was presented as a *fait accompli*, with Mr Bailey only being given an opportunity to respond after the warning had been read to him. Mr Smith did not first invite Mr Bailey to explain what had happened at the pre-start meeting, to indicate what words he used or the purpose of his remarks. Mr Bailey was also denied the opportunity to have input into the solution.
- [42] The Final Warning letter was also a pre-determined outcome. It is dated two days before the meeting was held. Although Counsel for BHP objected to the Regulator raising this issue in closing submissions without it being put to its witnesses, it is self-evident. The purpose of the final warning was to inform Mr Bailey that his conduct was unacceptable. While the letter was amended to correct the omission of the word "not" during the meeting and the version issued to Mr Bailey included this correction, this was an administrative rather than a substantive change and did not alter what Mr Smith told Mr Bailey.
- [43] It may have been Mr Smith's belief and intention that the final warning was issued because of Mr Bailey's offending behaviours over a period of time culminating in the "final straw" of the "parasites" remark, however, the letter speaks for itself. The final warning specifically concerned the "parasites" comment. Further, the other issues recorded in the SHAPE Plan were dealt with separately because the potential consequence of Mr Bailey not meeting expectations by January was that he would face disciplinary action, up to and including termination of his employment.
- [44] Almost inevitably, an employee will find being issued with a final warning confronting. In this case, despite knowing about Mr Bailey's vulnerability, which seemed to be most apparent when he believed he was being treated unfairly or when someone was attacking him, Mr Smith issued the disciplinary action of a final warning in isolation and as a pre-determined outcome. He approached the meeting of 10 October without proper consideration of Mr Bailey's vulnerability. The meeting did not proceed in accordance with the SHAPE Plan provisions which requires issues to be discussed openly, for the employee to have input and an opportunity to contribute to the solution. Further, it did not adhere to the SHAPE Plan provisions concerning potential consequences and outcomes. By not following the SHAPE Plan requirements, the approach was not management action that was taken in a reasonable way.
- [45] The Commission's task is to assess whether the management action was reasonable and whether it was taken reasonably.<sup>13</sup> Here, I have decided that although the management action was reasonable it was not taken reasonably. Accordingly, the appeal must be dismissed.
- [46] BHP is ordered to pay the costs of the Regulator.
- [47] The position in relation to the Second Respondent is different. In this case, the hearing of this appeal was conducted in two stages when, close to commencement of the hearing, the Appellant advised the Regulator it intended to alter its case. When the

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<sup>13</sup> *Davis v Blackwood* [2014] ICQ 009, [47]; *Versace v Braun* (2005) 178 QGIG 315.

issue was raised formally with the Commission after the proceedings had commenced, the advice prompted Mr Bailey to become a party. Consequently, further directions were issued by the Commission, the hearing was adjourned, and three further days of hearing were listed. No submissions about the costs of the Second Respondent were made. Accordingly, costs in relation to the Second Respondent are reserved.

**Orders**

1. The appeal is dismissed.
2. The decision of the First Respondent dated 21 July 2016 is confirmed.
3. The Appellant is to pay the First Respondent's costs of and incidental to the appeal, to be agreed.
4. Costs in relation to the Second Respondent are reserved.
5. Failing agreement, liberty to apply is granted.