

**From:** [REDACTED]  
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**18 November 2017**

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Dear Director, Legal Policy of the Northern Territory Department of the Attorney-General and Justice,

**Potential future amendments to the Anti-Discrimination Act of the Northern Territory Parliament.**

In relation to any potential future amendments to the Anti-Discrimination Act (Northern Territory) the Northern Territory Government is considering I wish to draw to the Parliamentarians of the Northern Territory Parliament the following case authorities of the Fair Work Commission.

**1. Using alleged uncomplimentary terms when talking to another person.**

1. In the Full Bench decision **[2016] FWCFB 7667 Luis Perez v Northern Territory Commissioner for Public Employment and others (25 October 2016)** the Full Bench determined -

*“[22] Mr Perez further submitted the Commissioner erred in failing to find that Ms Thomas calling Mr Perez a “pig” constituted unreasonable bullying behaviour.*

*[30] In respect of the “pig” incident, the Commissioner said:*

*“[91] On 29 December 2014, Mr Perez was in the cleaners’ room. It is common ground that Mr Perez, without warning, gave a loud burp. Upon exiting the room, and in the presence of other cleaners, Ms Thomas called Mr Perez a ‘pig’.*

*[92] Mr Perez accepts that he burped but contends that in the Asian culture (where he previously lived), it was common practice and indeed a compliment to burp and that it was not necessary to excuse oneself. He further contends that the region of his original country is dominated by people of the 'Muslim religion' and thus for him it is very offensive to call someone a 'pig'.*

*[93] On or around 30 December 2014, a meeting was conducted by Ms Sauvana. At the meeting Ms Sauvana requested both Mr Perez and Ms Thomas to shake hands and forget everything in the past. I note that there was little, if any, discussion about the events and this meant that Mr Perez did not describe the significance of being called a 'pig' and there was no real discussion about Ms Thomas' perspective on the events. Whilst an informal meeting may have been appropriate, this was an inadequate process for dealing with the circumstances. I will return to this aspect later in this decision.*

*[94] It is clear to me that the incident took place largely in the manner advanced by both parties. That is, Mr Perez burped loudly and did not consider that such would cause offence or that an apology was necessary. Ms Thomas considered that this action was rude and called Mr Perez a 'pig', which was communicated in a manner that was not intended to be offensive. In many circumstances, nothing would flow from such an exchange. The absence of a mutual understanding about the competing cultural norms has meant that this incident has become more significant, at least for Mr Perez." [Endnotes omitted].*

*[31] It is apparent the Commissioner considered the "pig" incident in his decision. We are not persuaded the Commissioner erred in how he regarded this incident having regard to the circumstances surrounding its occurrence."*

2. In the original decision **[2016] FWC 4097 Luis Perez v Northern Territory Commissioner for Public Employment and others (1 August 2016)** Commissioner Hampton states -

*"[7] Mr Perez referred to the following alleged incidents involving the persons named as illustrations of alleged workplace bullying conduct:*

- On 29 December 2014, being called a "pig" by Ms Thomas after he loudly burped whilst alone in the cleaners room;*

*[32] Furthermore, in the two incidents where inappropriate verbal remarks were directed at Mr Perez, the employer conducted a meeting with the individual and Mr Perez. On the occasion when Mr Perez was called a "pig", the individual and Mr Perez managed to avoid each other and/or remain civil for a period of 12 months. On the occasion when Mr Perez was called an "arrogant prick", a formal apology was made by the individual to Mr Perez.*

*[91] On 29 December 2014, Mr Perez was in the cleaners' room. It is common ground that Mr Perez, without warning, gave a loud burp. Upon exiting the room, and in the presence of other cleaners, Ms Thomas called Mr Perez a "pig".*

*[92] Mr Perez accepts that he burped but contends that in the Asian culture (where he previously lived), it was common practice and indeed a compliment to burp and that it was not necessary to*

excuse oneself. [48](#) He further contends that the region of his original country is dominated by people of the “Muslim religion” and thus for him it is very offensive to call someone a “pig”.[49](#)

**[93]** On or around 30 December 2014, a meeting was conducted by Ms Sauvana. At the meeting Ms Sauvana requested both Mr Perez and Ms Thomas to shake hands and forget everything in the past. I note that there was little, if any, discussion about the events and this meant that Mr Perez did not describe the significance of being called a “pig” [50](#) and there was no real discussion about Ms Thomas’ perspective on the events. Whilst an informal meeting may have been appropriate, this was an inadequate process for dealing with the circumstances. I will return to this aspect later in this decision.

**[94]** It is clear to me that the incident took place largely in the manner advanced by both parties. That is, Mr Perez burped loudly and did not consider that such would cause offence or that an apology was necessary. Ms Thomas considered that this action was rude and called Mr Perez a “pig”, which was communicated in a manner that was not intended to be offensive. In many circumstances, nothing would flow from such an exchange. The absence of a mutual understanding about the competing cultural norms has meant that this incident has become more significant, at least for Mr Perez.

#### **8. Has the applicant been bullied at work within the meaning of the Fair Work Act?**

**[131]** As indicated above, I have found that many of the incidents and aspects relied upon by Mr Perez did not constitute relevant unreasonable conduct. However, I have found that the following elements could potentially be considered to be unreasonable behaviour:

- The incident on 29 December 2014 - Ms Thomas calling Mr Perez a “pig” after he burped loudly;”

**[136]** In Harpreet Singh [65](#) I dealt with the implications of the need for the unreasonable behaviour to be repeated.[66](#) Having reviewed the authorities discussed earlier in this decision the following conclusion was drawn:

“[19] As is clear from the above, for the behaviour to be ‘repeated unreasonable behaviour’ it cannot be a single occurrence. The definition implies the existence of persistent unreasonable behaviour but might refer to a range of behaviours over time. That behaviour may also be undertaken by an individual or a group of individuals and be directed towards the applicant worker or a group of workers to which the applicant belongs. The unreasonable behaviour must however be repeated.

[20] The definition in s.789FD(1) must also be read conjunctively. That is, the requirements in both ss.(1)(a) and ss.(1)(b) must both be satisfied. This arises because of the

construction of the provision and the “and” which links both subsections. This is also the evident intention of the provision.

*[21] This means that the Commission must be satisfied that there was conduct whereby an individual (or a group of individuals) has repeatedly behaved unreasonably towards the worker, or a group of workers of which the worker is a member, **and** that this behaviour created a risk to health and safety.”*

*[137] On that basis, the potentially relevant unreasonable conduct as I have found it to be involves a group of individuals and although it involves a range of behaviours, it should all be assessed as part of the overall consideration of alleged bullying conduct.*

*[141] On balance, I am not satisfied that there was relevant unreasonable behaviour towards the applicant (and/or the group of workers to which he belongs) whilst at work so as to meet the requirements of s.789FD of the Fair Work Act.*

## **2. Hurt Feelings.**

In the Fair Work Commission decision **[2016] FWC 2559 Mrs Miranda Jane Gore v Yura Yungi Aboriginal Medical Service (24 May 2016)** where the allegations by Mrs Gore against three other employees included:

- *• One of the accused employees openly praised another employee in the same role as Mrs Gore, in front of her.*
- *• One of the accused employees corresponded with Ms Gore on occasion using what Mrs Gore describes as an impolite tone.*
- *• One of the accused employees gave Mrs Gore a “suspicious stare”.*
- *• One of the accused employees was quieter and more withdrawn than usual in her dealings with Mrs Gore and acted in a hesitant manner towards her.*
- *• One of the accused employees requested that Mrs Gore take more detailed phone messages, and did not make the same comment to the other receptionists.*
- *• One of the accused employees asked Mrs Gore whether she was aware of a particular company policy after she did something contrary to it.*
- *• One of the accused employees initially ignored Mrs Gore after she called out the accused employee’s name.*

Commissioner Cloghan concluded in this decision **[2016] FWC 2559 Mrs Miranda Jane Gore v Yura Yungi Aboriginal Medical Service (24 May 2016)** as follows:

*“[72] Parliament allows a worker who has been bullied at work to apply to the Commission for an order for others to stop bullying.*

*[73] Any application of alleged bullying is both inevitably, and importantly, highly contextual. However, the legislation does not provide for an applicant’s self-belief or self-conviction, to trump all other factors.*

*[74] An applicant’s perspective has to be balanced against the conduct of others, including reasonable management action carried out in a reasonable manner.*

*[75] It is normal, so I am informed, to see patterns in clouds or among trees. However, we also see patterns where others do not – especially gamblers. Sometimes we are just overly sensitive to what is happening around us when we allegedly see a pattern.*

*[76] Having a preference about how things should be done, like Mrs Gore, and suggestions not being agreed to by a supervisor, is not bullying. The choice is a matter for the supervisor. An employer gives a supervisor, a role and responsibilities. To deprive a supervisor of the ability to carry out their role in a reasonable way, as Mr Evans did, is not a breach of reasonable management action.*

*[77] While Mrs Gore may be sincere in her beliefs and views, the anti-bullying provisions of the Fair Work Act, are to protect bullying behaviour, not substantially a person's feelings.*

*[78] Having considered the facts and evidence, I am unable to conclude that Mrs Gore's complaints of bullying are made out. The alleged bullying was over-estimated and insubstantial; in particular, there was no repetition of unreasonable behaviour.*

*[79] The conduct of Ms Evans, Ms Chadwick and Mr Evans cannot be given the expansive view of bullying as submitted by Mrs Gore. If the Commission adopted such a submission, reasonable workplace behaviour and reasonable management action, would cede to a person's feelings of being anxious or uncomfortable.*

*[80] The facts and evidence, in this application, emphasise and reinforce that important distinction Parliament recognised between reasonable workplace conduct and a person having a self-belief or feelings of discomfort. Such self-belief or feelings does not automatically transform into bullying. Finally, I find, as Mrs Gore conceded, there was no risk to her health and safety by returning to work.*

*[81] The application is dismissed."*

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Yours sincerely,

