

Statement of claim

No. VID 590 of 2011

Federal Court of Australia
District Registry: Victoria
Division: Fair Work Division

SALLY BERKELEY

Applicant

PACIFIC BRANDS LIMITED

First Respondent

ROSS TAYLOR

Second Respondent

PACIFIC BRANDS HOLDINGS LIMITED

Third Respondent

Parties

1 The Applicant (**Ms Berkeley**):

- (a) on 24 April 2006 commenced employment with Bonds Industries Pty Limited, a fully owned subsidiary of the First Respondent (**Pacific Brands**), in the position of Head of Product Clothing, Bonds;
- (b) on or about 1 September 2008 was promoted to the more senior role of Divisional Manager, Berlei, and her employer became Pacific Brands;
- (c) on or about 6 October 2010 commenced acting in the more senior role of General Manager, Intimates & Women's Underwear;

Filed on behalf of Sally Berkeley, **Applicant**
Prepared by Rachel Francois of Counsel and Michael Harmer, Solicitor

HARMERS WORKPLACE LAWYERS

Address for service:

Level 28, St Martins Tower

31 Market Street

SYDNEY NSW 2000

mary.meagher@harmers.com.au

Tel: 02 9267 4322,

Fax 02 9264 4295,

Email

- (d) at all material times had family responsibilities as the single mother of three children;
- (e) during 2010 her youngest child was still living at home and undertaking her penultimate year of high school;
- (f) at all material times lived in Sydney.

2 Pacific Brands is and was at all material times:

- (a) a company duly incorporated under the laws of Australia;
- (b) a constitutional corporation within the meaning of the *Fair Work Act 2009*;
- (c) headquartered in Melbourne;
- (d) the ultimate holding company of, *inter alia*:
 - (i) Bonds Industries Pty Limited;
 - (ii) Pacific Brands Holdings Pty Limited;
- (e) predominantly, by itself and through its subsidiaries, in the business of the manufacturing and marketing clothing products.

3 The Second Respondent (**Mr Taylor**):

- (a) at all material times was and is a senior executive employed by Pacific Brands or one of its subsidiaries;
- (b) at all material times during 2010 up to 6 October 2010 held the position of Group General Manager, Underwear & Hosiery;
- (c) at various times during 2006 and 2007, was temporarily acting General Manager of Bonds Industries Pty Limited;
- (d) after 6 October 2010 held the position of Group General Manager of OMNI Apparel;
- (e) at all material times was senior to Ms Berkeley.

4 The Third Respondent (**Pacific Brands Holdings**)

- (a) at all material times is and was a company duly incorporated under the laws of Australia;
- (b) at all material times is and was a constitutional corporation within the meaning of the *Fair Work Act 2009*;
- (c) alleges that it was the employer of Ms Berkeley at the time of her dismissals in November and December 2010.

Jurisdiction

- 5 On 21 February 2011 Ms Berkeley filed an application with Fair Work Australia under section 365 of the *Fair Work Act 2009 (Act)* alleging that she had been subjected to adverse action including dismissal by Pacific Brands contrary to sections 340 and 351 of Part 3-1 of the Act.
- 6 In the “*Employer’s Response to Application for FWA to Deal with a General Protections Dispute*” dated 3 March 2011, Pacific Brands Holdings alleged that it was the respondent to the application and Ms Berkeley’s employer at the time of her dismissal.
- 7 On 4 March 2011 Fair Work Australia conducted a conference to deal with the dispute pursuant to section 368 of the Act.
- 8 On 30 May 2011 Fair Work Australia issued a certificate pursuant to section 369 of the Act certifying that Fair Work Australia was satisfied that all reasonable attempts to resolve the dispute have been, or are likely to be, unsuccessful.

Ms Berkeley’s Workplace Rights

- 9 At all material times Ms Berkeley had the following workplace rights within the meaning of section 341 of the Act:
- (a) the right and/or responsibility to work in an environment free from bullying;
 - (b) the right and/or responsibility to work in an environment free from unlawful discrimination;
 - (c) the ability and/or responsibility to make complaints or inquiries about inappropriate conduct of other employees;
 - (d) the ability to make complaints or inquiries about the terms and conditions of her position and any proposed position;
 - (d) the responsibility to comply with lawful directions from or on behalf of her employer; and
 - (e) the right to refuse unreasonable additional hours of work beyond 38 hours per week.

Particulars

- (i) The express and implied terms of the contracts of employment dated 17 March 2006 and 29 July 2008 and the Code of Conduct (revision June 2006).

- (ii) Section 62 of the Act.
- (iii) *Disability Discrimination Act 1992 (Cth)*, *Sex Discrimination Act 1984 (Cth)*, *Anti-Discrimination Act 1977 (NSW)*;
- (iv) *Occupational Health and Safety Act 2000 (NSW)*.

Adverse Acting including Dismissal in Contravention of the Act

Discriminatory Culture of Bullying by Mr Taylor

10 During 2007 and 2010 Mr Taylor exercised a position of responsibility and power over Ms Berkeley.

Particulars

- (a) During 2007 Mr Taylor was temporarily acting General Manager, Bonds.
- (b) During 2010 Mr Taylor was Group General Manger, Underwear & Hosiery.

11 At all material times, Mr Taylor was Pacific Brands in his dealings with Ms Berkeley.

12 In the alternative, Pacific Brands is vicariously liable for Mr Taylor's conduct in his dealings with Ms Berkeley.

13 At all material times, Mr Taylor was and is a bully and at times deployed:

- (a) his physicality, being approximately 6 feet 4 inches tall and overweight;
- (b) his anger, including yelling, gesticulating and slamming his fists into office furniture and equipment;
- (c) the use of foul language; and
- (b) his seniority

(or any combination of the above) to intimidate and control other employees.

14 At all material times, Mr Taylor was known by Pacific Brands to be a bully and capable of acts of anger, aggression and intimidation by reason of at least the following matters pleaded below.

Katrina Mitchell

15 On or about 1998 Katrina Mitchell (nee Magnus) was 24 years of age and employed by Pacific Brands or one of its subsidiaries and worked as Mr Taylor's personal assistant.

16 During 1998, after an in-house sales and marketing conference, Mr Taylor made public criticisms about Mrs Mitchell and her preparation of a PowerPoint presentation.

17 When Mrs Mitchell objected to Mr Taylor's criticisms, Mr Taylor then became angry, started yelling, turned red in the face and towered over Mrs Mitchell and gesticulated broadly as he yelled.

18 During this tirade, Mrs Mitchell felt shaken and was visibly trying not to cry.

19 During the next day at the conference, Mr Taylor did not speak to Mrs Mitchell, which was a deliberate shunning of Mrs Mitchell as he normally would speak to her on such occasions.

20 The next day back at work Mrs Mitchell was called into a meeting with Mr Taylor and the Human Resources manager.

21 Mr Taylor demanded that Mrs Mitchell apologise to him and when she refused, Mr Taylor:

(a) stood up, pointed his finger at her and said, "I'm going to teach you a lesson";

(b) said to the Human Resources Manager, "All yours";

(c) slammed the door as he left the room.

22 Mrs Mitchell was visibly upset and her hands were shaking.

23 The Human Resources manager then constructively dismissed Mrs Mitchell.

24 Mrs Mitchell commenced proceedings for unfair dismissal which were settled by Pacific Brands.

Ken Hanvey

25 During 2003 and 2004 Ken Hanvey was the General Manager of Dunlop Sport Footwear and Apparel.

26 On or mid 2003, Mr Hanvey went into Mr Taylor's office to complain about the decision to transfer Dunlop's Commercial Manager out of Mr Hanvey's group without consultation to him.

27 In response to Mr Hanvey's complaint, Mr Taylor yelled angry foul abuse at Mr Hanvey in the presence of other senior management for approximately one to two minutes.

Particulars

The foul language included word to the effect "How fucking dare you!", "I'm fucking sick of you!"

28 Between mid 2003 to mid 2004, Mr Hanvey was subjected to numerous other incidents by Mr Taylor of a similar quality to the one pleaded above, often in the presence of administrative staff.

29 In mid 2004, Mr Hanvey attended a meeting with Dunlop Sports advertising agency with Mr Taylor.

30 After the meeting, Mr Hanvey sought to raise with Mr Taylor concerns about Mr Taylor's conduct toward the advertiser during that meeting.

31 In response, Mr Taylor, walked close to Mr Hanvey and directed a tirade of foul abuse at Mr Hanvey and assaulted Mr Hanvey.

Particulars

The foul abuse included the words to the effect "You're a fucking dud, though you used to be a star!", "You're a fucking loser!"

The assault consisted of Mr Taylor: kicking a rubbish bin at Mr Hanvey; slamming his hand down on the desk; and, punching the desk and his computer; and spittle from his mouth flying at Mr Hanvey.

32 Mr Hanvey felt physically ill after this incident and requested that Human Resources move him to a position that did not require him to work with Mr Taylor.

33 Mr Hanvey's request for a transfer was refused.

34 Shortly after the transfer was refused, Mr Taylor came into Mr Hanvey's office and gloatingly said that he had had been responsible for the transfer being denied.

35 When the then Human Resources Manager of Pacific Brands made it clear to Mr Hanvey that he had to work with Mr Taylor, Mr Hanvey commenced a period of sick leave based upon his suffering severe depression.

36 During his period of leave, Mr Hanvey was offered a settlement to leave his employment with Pacific Brands which he accepted.

Richard Abela

37 During September 2005, Richard Abela, the Head of the Manufacturing and Supply Chain for Bonds Industries Pty Limited, witnessed Mr Taylor screaming at the top of his voice and berating Human Resources Staff and Product Managers at the Pacific Brands office in Wentworthville.

38 During 2006, Mr Taylor became unhappy with Mr Abela's progress in dealing with performance issues of particular staff and during a conversation with Mr Abela became angry, red in the face and threatened Mr Abela.

Particulars

Mr Taylor said words to the effect, "If you don't begin to sack staff who I think are underperforming then I will sack you."

39 Shortly after this conversation Mr Abela was transferred and demoted to the position of the Commercial Manager of King Gee.

Rebecca Doyle

40 On or around June or July 2006, Mr Taylor was in a meeting with Rebecca Doyle, Divisional Manager, Baby at Bonds Industries Pty Limited and other employees.

41 During the meeting, when Ms Doyle told Mr Taylor that she did not think it was appropriate for him to be publicly criticising a certain employee at that time, Mr Taylor:

- (a) became very angry and went red in the face;
- (b) slammed his hand on the table a number of times;
- (c) pointed his finger in Ms Doyle's face so that the tip of his finger was only a few centimetres from her face;
- (d) yelled foul abuse at Ms Doyle.

Particulars

Mr Taylor's language included words to the effect "Do you know who the fuck I am? I can say whatever the fuck I like to whoever the fuck I like about whoever the fuck I like!"

42 Mr Taylor's behaviour towards Ms Doyle had caused Ms Doyle to cry in front of her staff.

43 On or about August 2006, Ms Doyle was dismissed from her employment with Bonds Industries Pty Limited by means of a redundancy.

Rick Harris

44 During 2006 Rick Harris was the National Sales Manager for Holeproof.

45 During 2006 Mr Harris was in a meeting with Mr Taylor and approximately four other staff to discuss Holeproof sales and Mr Taylor asked Mr Harris about the concerns with those sales.

46 Upon Mr Harris responding to the question by stating words to the effect "We are losing our competitive advantage in the children's area", Mr Taylor became angry, starting yelling abuse and glared at Mr Harris for the rest of the meeting.

Particulars

Mr Taylor's language words to the effect "That's not fucking true. I'll get fucking Mark Daniels in here to talk to you about sourcing because that's just not fucking true." and repeated "That's not fucking true" a number of times.

47 During 2006 another incident occurred when Mr Harris explained a problem with branding at Holeproof which Mr Taylor did not accept and caused Mr Taylor to become angry, yell and use foul language at Mr Harris.

Particulars

Mr Taylor shouted "Don't grinfuck me".

48 During 2006 Mr Harris was present at a meeting for Holeproof which included Mr Taylor and Pam Jarvis and approximately twelve other people and there was a discussion about a discounting arrangement for Kmart.

49 During the meeting Ms Jarvis suggested that the problem being discussed would be better addressed by head office at a more senior level at which point Mr Taylor:

- (a) got up and walked over to Ms Jarvis who was sitting down;
- (b) leant down at her and brought his face about five inches from her face;
- (c) screamed "Don't grinfuck me."

50 After the meeting, Mr Harris offered to support any complaint that Ms Jarvis may wish to make about Mr Taylor's conduct to which she replied, "That's just Ross. That's just the way he is."

Pauline Whitehead

51 During 2008 Pauline Whitehead was the General Manager of Sheridan.

52 During 2008 Mr Taylor was dissatisfied with Ms Whitehead's performance but had been told by the head of Human Resources not to have any further meetings alone with Ms Whitehead without Human Resources being present.

53 Despite this direction, during the second half of 2008 Mr Taylor held a meeting alone with Ms Whitehead and dismissed her in that meeting.

54 Ms Whitehead wrote a complaint to the board of Pacific Brands about her treatment by Mr Taylor.

55 The then Chairman of Pacific Brands, Mr Pat Handley, conducted an investigation into Ms Whitehead's complaint.

56 Upon the conclusion of that investigation, Mr Handley wrote a disciplinary letter to Mr Taylor about his conduct towards Ms Whitehead.

57 Mr Handley had requested that his letter be counter signed but Mr Taylor refused to do so and the Chief Executive Officer of Pacific Brands, Sue Morphet, did not require Mr Taylor to countersign the letter.

Ms Berkeley

58 During mid-2006 Ms Berkeley was made aware of:

- (a) Mr Taylor's conduct towards Ms Doyle by Ms Doyle and other employees;
- (b) Mr Taylor's reputation for bullying and making redundant employees who crossed him.

59 Ms Berkeley was aware that Ms Doyle had been made redundant shortly after the incident between Ms Doyle and Mr Taylor.

60 During July or August 2007, when Mr Taylor was again acting General Manager of Bonds Industries Pty Limited, Ms Berkeley was further warned by other employees that Mr Taylor had a reputation for bullying and could "fly off the handle at any time."

61 On or about August 2007, Mr Taylor was in Sydney and called a meeting of the senior management team at Bonds Industries Pty Limited at short notice (**Short Notice Meeting**).

62 At the time Mr Taylor called the Short Notice Meeting, Ms Berkeley was physically out of the office and at a factory attending a production meeting.

63 Upon Ms Berkeley entering the Short Notice Meeting late, and despite her apology and explanation, Mr Taylor engaged in behaviour designed to bully, humiliate and intimidate her.

Particulars

- (a) Mr Taylor shouted angrily at her for a protracted period, becoming red in the face and banging his hand on the table and berated her for being late and not making meetings with him the priority.
- (b) Mr Taylor's shouting was loud enough to draw the attention of the staff outside the room, some of whom looked into the meeting room to try and see what was happening.

64 Immediately after the Short Notice Meeting, Ms Berkeley was scheduled to, and did, attend a face to face meeting with Mr Taylor.

65 Upon entering Mr Taylor's office Ms Berkeley asked permission to shut the door at which point Mr Taylor again shouted at her and lunged at her to stop her closing the door.

66 Ms Berkeley requested that Mr Taylor stop shouting at her at which point Mr Taylor:

- (a) again shouted at her angrily;
- (b) became red in the face;

(c) yelled at her to leave his office and to make a complaint to Human Resources about him being a bully.

67 In the premises, Ms Berkeley exercised a workplace right within the meaning of the Act.

68 By reason of the events in paragraphs 61 to 66 above, Ms Berkeley was struggling to hold back her tears and, shortly thereafter left the office to go home and began shaking and crying.

69 By reason of the events in paragraphs 58 to 66 and 68 above, Ms Berkeley was fearful in her dealings with Mr Taylor and found dealing with him stressful.

70 Further, by reason of the matters pleaded in paragraphs 11 to 57 and 60 to 66, Pacific Brands imposed the requirement or condition that employees in Mr Taylor's areas of responsibility not be affected by Mr Taylor's bullying and not antagonise Mr Taylor (**Discriminatory Condition**).

71 Between late 2007 and early 2010, Ms Berkeley was not required to work closely with Mr Taylor.

Proposed Restructure of Pacific Brands

72 In or around March 2010, Mr Taylor informed Ms Berkeley that:

- (a) Pacific Brands intended to undertake a restructure;
- (b) he wanted Ms Berkeley to take a promotion in the restructure to the role of General Manager, Women's Intimates, Underwear and Hosiery (**New Role**);
- (c) the New Role would be a step towards Ms Berkeley assuming Mr Taylor's role of Group General Manager, Underwear and Hosiery, on his retirement the following year.

73 The New Role involved significantly more travel and responsibilities for Ms Berkeley and Ms Berkeley was concerned that if she accepted the New Role without any modifications she would not be home to provide sufficient support to her youngest child during her final two years of high school.

74 Ms Berkeley became very stressed about how to balance her family responsibilities and yet not antagonise Mr Taylor in relation to negotiating the New Role.

75 In mid April 2010 Ms Berkeley experienced a panic attack in the Hertz rental car park in Melbourne on her way to the office.

- 76 In late April 2010 Ms Berkeley attended her doctor who informed her that her blood pressure had changed from 120/70 to 145/99 due to stress.
- 77 During late April 2010 to May 2010 Ms Berkeley attended Dr Peter Babilis and began an intensive treatment for insomnia, high blood pressure, anxiety, acute migraines and exacerbated psoriasis which required her to attend upon him at 7.15am on approximately nine occasions for up to an hour.
- 78 On or about May 2010 Ms Berkeley attended a meeting with Mr Taylor and Jenni O'Brien, the Human Resources Manager for Underwear & Hosiery, to further discuss the New Role.
- 79 During the meeting, Ms Berkeley informed Mr Taylor and Ms O'Brien that she was:
- (a) enthusiastic to accept the New Role;
 - (b) concerned about the additional hours it would require her to work;

Particulars

Ms Berkeley had estimated the New Role would require 68 -70 hours per week just in attending sign off meetings (ie, excluding travel and other work) instead of the average 48-60 hours per week of her current position. Ms Berkeley provided a spread sheet of her calculations during the meeting.

- (c) was concerned about the amount of travel the New Role involved;
 - (d) was concerned about the consequential impact upon her family and her family responsibilities.
- 80 In the premises, Ms Berkeley exercised a workplace right within the meaning of the Act.
- 81 Mr Taylor was not interested in Ms Berkeley's concerns about the New Role and told her that she would figure it out.
- 82 Because Ms Berkeley raised her concerns about balancing the increased responsibilities, increased work hours and increased travel required by the New Role with her family responsibilities, Mr Taylor formed the adverse view that Ms Berkeley was "not on board" with the restructure.

Particulars

Conversation between Ms Berkeley and Ms Morphet on or about May 2010.

- 83 As a result of being informed by Ms Morphet in May 2010 of Mr Taylor's negative view of Ms Berkeley's concerns, Ms Berkeley became more stressed about how she could

avoid antagonising Mr Taylor but still balance her responsibilities to her family in relation to the New Role.

84 In the premises, by reason of Mr Taylor's conduct, Pacific Brands took adverse action against Ms Berkeley because she had exercised a workplace right contrary to section 340 of the Act.

85 Further, in the premises, Mr Taylor was involved in Pacific Brands' contravention of section 340 of the Act and, pursuant to section 550 of the Act, is taken to have also contravened section 340 of the Act.

86 Further, or in the alternative, Pacific Brands took adverse action against Ms Berkeley contrary to section 351 of the Act by requiring her to comply with the Discriminatory Condition in circumstances where she was not able to comply or was disadvantaged in complying because:

(a) she was suffering a disability by reason of the stress and fear she experienced in dealing with Mr Taylor; and/or

(b) she had family responsibilities, being a single mother to her youngest child who was completing her final two years of high school.

87 Further, or in the alternative, Mr Taylor was involved in Pacific Brands' contravention of section 351 of the Act and, pursuant to section 550 of the Act, is taken to have also contravened section 351 of the Act.

88 On or about June 2010, Mr Taylor met with Ms Berkeley and Ms O'Brien about the New Role and stated that:

(a) he would agree to removing the category Hosiery from the New Role for three months;

(b) Ms Berkeley would only be required to travel to Melbourne an extra two days a fortnight in addition to her existing travel to Melbourne of approximately two to three days a month.

89 By the time the restructure was formally announced on 6 October 2010, which stated, *inter alia*, that Ms Berkeley was now the General Manager, Intimates & Women's Underwear, the details of Ms Berkeley's New Role, including her remuneration, still had not been agreed.

Negative Feedback about the Restructure

90 On 5 October 2010, Ms Berkeley was directed to:

- (a) carry out one on one meetings with her staff after the formal announcement of the restructure; and
- (b) inform Human Resources of any issues from the one on one meetings.

Particulars

Email from Mr Taylor to Ms Berkeley and others dated 5 October 2010.

- 91 On 5 October 2010, Ms O'Brien, also directed Ms Berkeley to provide her and Mr Taylor with the feedback from Ms Berkeley's one on one meetings with staff.
- 92 On 6 October 2010, Kate O'Hara, the Human Resources Manager, Berlei, also confirmed the direction to Ms Berkeley to provide feedback from Ms Berkeley's one on one meetings with staff.
- 93 On 6 October 2010, Ms Berkeley commenced acting in the New Role despite no agreement about the terms and conditions of her employment in the New Role.
- 94 On 6 October 2010 Ms Berkeley met with her staff including Jo Holding, Sarah Ann Gebser and Vicky Fletcher.
- 95 Each of Ms Holding, Ms Gebser and Ms Fletcher gave Ms Berkeley negative feedback about the restructure including that they perceived that their responsibilities had increased but they were not being properly remunerated for those additional responsibilities.
- 96 On 6 and 7 October 2011 Ms Berkeley complied with the direction she had been given and provided the feedback from her one on one meetings with her staff.

Particulars

Emails from Ms Berkeley to Mr Taylor and Ms O'Brien on 6 October 2010 and at around 1am on 7 October 2010.

- 97 In the premises, Ms Berkeley exercised a workplace right within the meaning of the Act.
- 98 On 7 October 2010 at approximately 9am, Melanie Allibon, the Group General Manager, Human Resources of Pacific Brands, met with Ms Berkeley and informed Ms Berkeley that:
- (a) Mr Taylor was distressed and had been crying in his hotel room because of Ms Berkeley's emails particularised in paragraph 96 above;
 - (b) Mr Taylor believed that Ms Berkeley was not "on board" with the restructure.

- 99 Upon being told this information by Ms Allibon Ms Berkeley felt sick in stomach and became very anxious.
- 100 Later on 7 October 2010, Ms Berkeley met with Mr Taylor and Ms Allibon in the Bonds Human Resources office.
- 101 As Ms Berkeley walked into the meeting room she saw that:
- (a) Mr Taylor was sitting with his head hanging down towards his legs;
 - (b) Mr Taylor's face appeared to have a purple hue;
 - (c) Mr Taylor was breathing very heavily; and
 - (d) Mr Taylor looked extremely angry.
- 102 During the meeting, Mr Taylor, in tones which appeared to barely contain his rage, said to Ms Berkeley that:
- (a) he was very angry and upset with Ms Berkeley;
 - (b) that she was not on board with the restructure and had not been on board from day one; and
 - (c) the emails that Ms Berkeley had sent in paragraph 96 above, which contained negative feedback, were hurtful and untrue.
- 103 During the meeting, Ms Allibon advised Ms Berkeley that:
- (a) Ms Berkeley would not be receiving any pay increase in connection with the New Role and would not be receiving a new contract;
 - (b) Ms Allibon did not know whether Mr Taylor could "get over this", or whether Mr Taylor and Ms Berkeley could continue to work together; and
 - (c) pressed Ms Berkeley to agree to the New Role with no pay increase.
- 104 During the meeting, Ms Berkeley:
- (a) attempted to again explain that she was "on board" with the restructure;
 - (b) began to cry and as she realised the implications of Ms Allibon stating that she did not know if Mr Taylor and Ms Berkeley could continue to work together;
 - (c) explained why she could not carry out the New Role without any remuneration increase; and
 - (d) explained that her income would effectively be reduced by 20% due to the operation of Pacific Brands' new bonus system which came into operation in July 2010.

- 105 In the premises, Ms Berkeley exercised a workplace right within the meaning of the Act.
- 106 By the end of the meeting:
- (a) Ms Berkeley remained in tears and left work early to go home;
 - (b) Ms Berkeley believed, having regard to Ms Berkeley's knowledge of Mr Taylor and what she had seen and been told of his reputation as pleaded in paragraphs 58 to 60 above, that her continued employment at Pacific Brands was at risk.
- 107 By reason of the conduct pleaded in paragraphs 100 to 104 above, Ms Berkeley experienced severe stress and had difficulty sleeping and eating.
- 108 Between 8 October and 26 October 2010, Mr Taylor refused to talk to Ms Berkeley and Ms Berkeley was told by Mr Taylor's personal assistant and Ms Allibon to put everything in writing to Mr Taylor.
- 109 By reason of Mr Taylor's conduct between 7 October and 26 October 2010, Ms Berkeley continued to experience severe stress and had difficulty sleeping and eating.
- 110 In the premises, Pacific Brands took adverse action against Ms Berkeley because she had exercised a workplace right contrary to section 340 of the Act.
- 111 Further, in the premises, Mr Taylor was involved in Pacific Brands' contravention of section 340 of the Act and, pursuant to section 550 of the Act, is taken to have also contravened section 340 of the Act.
- 112 Further, or in the alternative, Pacific Brands took adverse action against Ms Berkeley contrary to section 351 of the Act by requiring her to comply with the Discriminatory Condition in circumstances where she was not able to comply or was disadvantaged in complying because:
- (a) she was suffering a disability by reason of the stress and fear she experienced in dealing with Mr Taylor; and/or
 - (b) she had family responsibilities, being a single mother to her youngest child who was completing her final two years of high school.
- 113 Further, or in the alternative, Mr Taylor was involved in Pacific Brands' contravention of section 351 of the Act and, pursuant to section 550 of the Act, is taken to have also contravened section 351 of the Act.
- 114 Between 12 October to 26 October 2010 Ms Berkeley complained to Ms Allibon about Mr Taylor's conduct and in particular his refusal to talk with her and the abrupt nature of his emails to her post 7 October 2010.

115 In the premises, Ms Berkeley exercised a workplace right within the meaning of the Act.

116 On 12 October 2010 Ms Berkeley spoke to Ms Allibon in relation to attempting to obtain an increase in her car allowance and base salary in the New Role.

117 On 26 October 2010 Ms Berkeley met with Mr Taylor and Ms Allibon.

118 During the meeting:

(a) Mr Taylor purported to have resolved his differences with Ms Berkeley;

(b) Mr Taylor and Ms Allibon agreed in principle to include in Ms Berkeley's remuneration for the New Role a \$20,000 allowance while her daughter was still at school for one year;

(c) Ms Allibon stated that there was no need for a mediation process between Mr Taylor and Ms Berkeley as everything was now purportedly resolved.

119 On 4 November 2010 and 11 November 2010 Ms Berkeley made written requests for a copy of her proposed employment contract for her New Role but she was not provided with the document prior to her purported redundancy on 19 November 2010.

Particulars

Email dated 4 November 2010 to Ms Allibon, email dated 11 November to Ms O'Brien.

120 During November 2010 Ms Berkeley also made a number of oral requests to Ms O'Brien to be provided with a copy of her proposed employment contract for her New Role.

Conduct of Jeff Swan and Dean Jennings

121 On 5 November 2010:

(a) Ms Berkeley and Helen Hughes, the Women's Underwear Category Manager, were working on a Three Year Strategy document for women's underwear;

(b) Mr Taylor reviewed the draft document and was critical that it did not include certain information;

(c) Ms Berkeley explained that Jeff Swan had refused to provide her with that information;

(d) Mr Taylor contacted Mr Swan and Mr Swan immediately provided the necessary information to Mr Taylor;

(e) Ms Berkeley again complained to Mr Taylor about the difficulties she was encountering with Mr Swan and Dean Jennings and their failure to work collaboratively with other senior managers, including her.

122 In the premises, Ms Berkeley exercised a workplace right within the meaning of the Act.

123 Sometime between 6 and 12 November 2010, Mr Taylor directed that Ms Berkeley be excluded from presentations to key clients, Big W and Farmers, in relation to brands for which she remained responsible.

Particulars

Email from Mr Jennings to Ms Berkeley dated 12 November 2010.

124 In the premises, by reason of Mr Taylor's conduct, Pacific Brands took adverse action against Ms Berkeley because she had exercised a workplace right contrary to section 340 of the Act.

125 Further, in the premises, Mr Taylor was involved in Pacific Brands' contravention of section 340 of the Act and, pursuant to section 550 of the Act, is taken to have also contravened section 340 of the Act.

126 Further, or in the alternative, Pacific Brands took adverse action against Ms Berkeley contrary to section 351 of the Act by requiring her to comply with the Discriminatory Condition in circumstances where she was not able to comply or was disadvantaged in complying because she was suffering a disability by reason of the stress and fear she experienced in dealing with Mr Taylor.

127 Further, or in the alternative, Mr Taylor was involved in Pacific Brands' contravention of section 351 of the Act and, pursuant to section 550 of the Act, is taken to have also contravened section 351 of the Act.

128 On 12 November 2010 Ms Berkeley received an email from Mr Jennings whose content she considered was unprofessional and unfair.

129 On 14 November 2010 Ms Berkeley sent an email to Mr Taylor in which she further complained about the conduct of Mr Swan and Mr Jennings.

130 In the premises, Ms Berkeley exercised a workplace right within the meaning of the Act.

131 On 15 November 2010 Mr Taylor replied to Ms Berkeley by email and rejected Ms Berkeley's complaints and explained that Mr Swan and Mr Jennings were acting upon his directions.

- 132 On or around 17 November 2010 Ms Berkeley consulted Ms O'Hara about how to deal with Mr Taylor's response to her email of 14 November 2010.
- 133 Acting on the advice of Ms O'Hara, Ms Berkeley sent a further email to Mr Taylor on 17 November 2010 in which she gave a more detailed explanation for the reasons for her complaints about Mr Jennings and Mr Swan.
- 134 In the premises, Ms Berkeley exercised a workplace right within the meaning of the Act.
- 135 On 18 November 2010 Ms Berkeley:
- (a) reviewed her bank account and noticed that the deposit for her salary did not include the allowance agreed with Mr Taylor and Ms Allibon on 26 October 2010;
 - (b) was informed by payroll that they had not received notice of any change to her salary.

First Dismissal: purported redundancy of Ms Berkeley

- 136 On Thursday, 18 November 2010 Mr Taylor rang Ms Berkeley at approximately 6.30pm and:
- (a) directed her to attend a meeting with him at 9.30am the next day, Friday, at the offices of Sheridan to discuss "role clarity once and for all";
 - (b) directed her to cancel her meeting with David Jones at 9am on Friday in the city.
- 137 Neither Mr Taylor nor Ms Berkeley had an allocated office at the Sheridan premises and there was no apparent rationale for the choice of meeting location other than to deprive Ms Berkeley of access to her office and records.
- 138 On Friday, 19 November 2010 Mr Taylor and Ms Allibon met with Ms Berkeley and:
- (a) told her that she was being made redundant from her role as Divisional Manager, Berlei; and
 - (b) directed her to leave the premises immediately
- (First Dismissal).**
- 139 After the meeting, Ms Berkeley felt extremely humiliated and distressed and was shaking and was sobbing as she drove home.

- 140 In the premises, the First Dismissal constituted adverse action against Ms Berkeley to prevent the exercise of Ms Berkeley's workplace rights (or any combination of them):
- (a) the right to work in an environment free from bullying;
 - (b) the right to work in an environment free from unlawful discrimination.
- 141 Further or in the alternative, the First Dismissal constituted adverse action against Ms Berkeley:
- (a) because Ms Berkeley had exercised the following workplace rights (or any combination of them):
 - (i) the right to work in an environment free from bullying
 - (ii) the ability and/or responsibility to make complaints about inappropriate conduct of other employees;
 - (iii) the responsibility to comply with lawful directions from or on behalf of her employer;
 - (iv) the ability to make complaints or inquiries about the terms and conditions of her position and any proposed position;
 - (v) the right to refuse unreasonable additional hours of work beyond 38 hours per week; and/or
 - (vi) the right to work in an environment free from unlawful discrimination.
 - (b) further, or in the alternative, because Ms Berkeley was not able to comply or was disadvantaged in complying with the Discriminatory Condition because:
 - (a) she was suffering a disability by reason of the stress and fear she experienced in dealing with Mr Taylor; and/or
 - (b) she had family responsibilities, being a single mother to her youngest child who was completing her final two years of high school.
- 142 In the premises, Pacific Brands contravened section 340 and/or section 351 of the Act.
- 143 Further, in the premises, Mr Taylor was involved in Pacific Brands' contravention of section 340 and/or 351 of the Act and, pursuant to section 550 of the Act, is taken to have also contravened section 340 and/or 351 of the Act.

Second Dismissal: Alleged Breach of Obligations of Confidentiality

144 Immediately after the meeting with Mr Taylor and Ms Allibon, Ms Berkeley considered that there was a real risk that Pacific Brands could misplace documents relevant to any dispute about her dismissal.

Particulars

Ms Berkeley had been told of two cases where there were missing documents in relation to claims by employees: a WorkCover claim by the Berlei/Bonds receptionist; and a complaint by Natalie Flegg against Mr Swan.

145 Ms Berkeley wished to ensure the following documentation was not lost and was immediately available to her for the purpose of obtaining legal advice:

- (a) documents which established that Pacific Brands had undertaken a restructure and that she had been promoted to the more senior role of General Manager, Underwear and Hosiery, and had already been acting in that role for eight weeks; and
- (b) documents that would establish the lack of collaboration and communication, exclusion and bullying behaviour that she had been complaining of to Mr Taylor.

146 Soon after arriving home, Ms Berkeley commenced downloading the following documents from her laptop computer:

- (a) documents and emails in relation to establishing Pacific Brands' restructure and confirming Ms Berkeley's new role in the restructure;
- (b) emails in relation to her recent complaints to Mr Taylor, namely, recent emails from Ms Hughes, Ms Allibon, Mr Taylor, Mr Shaw and Mr Jennings.

147 On 22 November 2010, Ms Berkeley met with Ms Morphet at Ms Morphet's request.

148 Ms Morphet told Ms Berkeley that she wished to know what had happened between Ms Berkeley and Mr Taylor to cause Mr Taylor to want Ms Berkeley out of the company.

149 During the meeting, Ms Berkeley complained to Ms Morphet that:

- (a) Mr Taylor was a bully who leads by fear;
- (b) her redundancy was a sham.

150 In the premises, Ms Berkeley exercised a workplace right within the meaning of the Act.

151 During the meeting, Ms Morphet:

- (a) raised the possibility of Ms Berkeley having a six month sabbatical and then returning to work with Pacific Brands under a different manager;

- (b) stated that Ms Berkeley had made a very significant contribution to Pacific Brands but had “ticked Ross off”.
- 152 On or around 24 November 2010, Ms Berkeley asked her partner to start removing her personal documents from her laptop computer and transfer them to their home computer.
- 153 On or around 24 November 2010, Ms Berkeley’s partner accessed her laptop computer and transferred all of the folders and documents in Ms Berkeley’s “My Documents” folder on her laptop computer and copied these to their home hard drive without reviewing any of the documents.
- 154 On 3 December 2010:
- (a) Ms Berkeley complained to Ms Allibon in relation to Mr Taylor’s history of bullying at Pacific Brands and her redundancy being a sham;
- (b) Ms Allibon informed Ms Berkeley that Ms Morphet had asked her to investigate Ms Berkeley’s bullying allegations.
- 155 In the premises, Ms Berkeley exercised a workplace right within the meaning of the Act.
- 156 On or around 8 December 2010, Ms Allibon advised Ms Berkeley by letter that she had fully investigated Ms Berkeley’s bullying allegations and that it found them to have no substance.
- 157 At no time did Ms Allibon or any other person from Pacific Brands approach Ms Berkeley and seek her input or involvement in relation to the purported investigation into her bullying allegations against Mr Taylor.
- 158 On 8 December 2010, Ms Morphet wrote to Ms Berkeley and, *inter alia*, requested the immediate return of Ms Berkeley’s laptop.
- 159 Prior to returning the laptop on 10 December 2010, Ms Berkeley asked her daughter to transfer any remaining personal documents on the laptop to their home hard drive.
- 160 On 20 December 2010, Ms Morphet wrote to Ms Berkeley and requested that Ms Berkeley sign and return a Deed of Release.
- 161 On 20 December 2010, Harmers Workplace Lawyers responded to Ms Morphet’s letter and advised, among other things, that the firm acted for Ms Berkeley.
- 162 On 23 December 2010, Pacific Brands purported to terminate Ms Berkeley’s employment again with immediate effect by reason of a “fundamental breach” of her employment contract being the downloading of purportedly “confidential documents” (**Second Dismissal**).

Particulars

Letter from Mr John Grover, Company Secretary and General Counsel of Pacific Brands, to Ms Berkeley dated 23 December 2010.

- 163 Pacific Brands purported to terminate Ms Berkeley's employment again on a summary basis without providing her with any opportunity to explain her position.
- 164 None of the documents downloaded by or on behalf of Ms Berkeley were:
- (a) confidential; or
 - (b) being misused by Ms Berkeley.
- 165 In the premises, the Second Dismissal constituted adverse action against Ms Berkeley to prevent the exercise of Ms Berkeley's workplace rights (or any combination of them):
- (a) the right to work in an environment free from bullying;
 - (b) the right to work in an environment free from unlawful discrimination.
- 166 Further or in the alternative, the Second Dismissal constituted adverse action against Ms Berkeley:
- (a) because Ms Berkeley had exercised the following workplace rights (or any combination of them):
 - (i) the right to work in an environment free from bullying;
 - (ii) the ability and/or responsibility to make complaints about inappropriate conduct of other employees;
 - (iii) the responsibility to comply with lawful directions from or on behalf of her employer;
 - (iv) the ability to make complaints or inquiries about the terms and conditions of her position and any proposed position;
 - (v) the right to refuse unreasonable additional hours of work beyond 38 hours per week; and/or
 - (vi) the right to work in an environment free from unlawful discrimination.
 - (b) further, or the alternative, because Ms Berkeley was not able to comply or was disadvantaged in complying with the Discriminatory Condition because:
 - (a) she was suffering a disability by reason of the stress and fear she experienced in dealing with Mr Taylor; and/or
 - (b) she had family responsibilities, being a single mother to her youngest child who was completing her final two years of high school.

- 167 In the premises, Pacific Brands contravened section 340 and/or section 351 of the Act.
- 168 Further, in the premises, Mr Taylor was involved in Pacific Brands' contravention of section 340 and/or 351 of the Act and, pursuant to section 550 of the Act, is taken to have also contravened section 340 and/or 351 of the Act.

Damage

- 169 By reason of the contraventions of the Act and each of them, Ms Berkeley suffered loss and damage.

Particulars

- (a) Offence, humiliation, distress, anxiety and depression (including sleeplessness, reduced appetite and loss of motivation and self esteem);
- (b) Dislocation to life;
- (c) Loss of income, bonuses and other benefits as an employee at Pacific Brands;
- (d) Loss of opportunity for promotion and advancement at Pacific Brands;
- (e) Damage to personal and professional reputation.

Breach of Contract

- 170 On or about 29 July 2008, Ms Berkeley entered into a contract of employment with Pacific Brands.

Particulars

- (a) Ms Berkeley's contract of employment was partly express and partly implied;
- (b) To the extent that Ms Berkeley's contract of employment contained express terms it was in writing constituting:
 - (i) Written terms and conditions of employment set out in a letter to Ms Berkeley dated 29 July 2008 and the Code of Conduct (revision June 2006);
 - (ii) Further particulars to be provided after discovery.
- (c) To the extent that Ms Berkeley's contract of employment contained relevant implied terms those terms included:

- (i) Pacific Brands would not conduct itself, without reasonable and proper cause, in a manner likely to destroy or seriously damage the relationship of trust and confidence between the parties (the **Trust and Confidence Term**).
- (ii) Pacific Brands would act towards Ms Berkeley fairly and in good faith (the **Good Faith Term**).
- (iii) Pacific Brands would provide a safe system of work for its employees including Ms Berkeley and take all reasonable steps to protect the safety of its employees including Ms Berkeley (the **Safe Work Term**).

171 The express terms of Ms Berkeley's written contract included the right to work in an environment free from discrimination and bullying (**Discrimination and Bullying Terms**).

172 Ms Berkeley repeats paragraphs 10 to 66, 68 to 70, 72 to 79, 81 to 83, 88 to 96, 98 to 105, 106 to 109, 111, 114, 116 to 121, 123, 127 to 133, 135 to 139, 144 to 154 and 156 to 164 above.

173 By reason of Pacific Brands' conduct referred to in the paragraphs cited in paragraph 172 above or any combination of them, Pacific Brands fundamentally breached:

- (a) the Discrimination and Bullying Terms; and/or

Particulars of Discrimination

Ms Berkeley refers to discrimination pleaded in paragraphs 86, 112, 126, 141(b) and 166(b) above.

- (b) the Trust and Confidence Term; and/or
- (c) the Good Faith Term; and/or
- (d) the Safe Work Term

causing Ms Berkeley loss and damage.

Particulars

Ms Berkeley repeats the particulars given to paragraph 169 above.

Intentional Infliction of Personal Injury

174 Ms Berkeley repeats paragraphs 11 to 66, 68 to 70, 72 to 79, 81 to 83, 88 to 96, 98 to 105, 106 to 109, 111, 114, 116 to 121, 123, 127 to 133, 135 to 139, 144 to 154 and 156 to 164 above.

175 By acting as pleaded, Mr Taylor committed acts calculated to cause Ms Berkeley harm or acted intentionally with reckless indifference to the obvious harm his conduct was likely to cause Ms Berkeley.

176 By so acting, Mr Taylor has caused Ms Berkeley harm.

Particulars

Ms Berkeley has suffered harm consisting of extreme stress, anxiety, insomnia, lack of appetite, increased blood pressure and depression.

177 By acting as pleaded Mr Taylor and Pacific Brands treated Ms Berkeley with deliberate contumelious disregard and she claims exemplary damages.

Particulars

- (a) Ms Berkeley had a lawful entitlement to work in an environment free from bullying, intimidation and discrimination and refers to the particulars at paragraph 9 above;
- (b) Pacific Brands knew and permitted Mr Taylor to be a bully in circumstances where his conduct was known to have caused other employees harm and repeats paragraphs 13 to 57 above;
- (c) Pacific Brands knew and permitted Mr Taylor to be a bully because he achieved financial results desired by Pacific Brands.
- (d) Mr Taylor was financially rewarded by Pacific Brands from 2007 as follows:
 - (i) 2007: base salary \$265,000 and incentive payment \$25,000;
 - (ii) 2008: base salary \$295,152 and incentive payment \$165,000;
 - (iii) 2009: base salary \$359,657 and incentive payment \$NIL; and
 - (iv) 2010: base Salary \$372,668 and incentive payment \$296,150.
- (e) Further particulars to be provided after discovery and subpoenas.

Alleged Employment by Pacific Brands Holdings

178 On 20 November 2010, after Ms Berkeley had been purportedly made redundant, Ms Berkeley received in the post a contract of employment for her New Role (**New Contract**).

179 The New Contract included a term that Ms Berkeley's new employer was Pacific Brands Holdings.

180 Ms Berkeley had not been informed at any time that if she accepted the New Role the identity of her employer would change.

181 Ms Berkeley did not execute the New Contract.

182 The New Contract was not effective to change the identity of Ms Berkeley's employer.


Particulars

- (a) pursuant to Ms Berkeley's contract of employment dated 29 July 2008 any variation to her contract of employment (other than reasonable variations to her job duties, title and reporting structure) was required to be in writing and executed by the parties;
- (b) Ms Berkeley did not agree to the change in the identity of her employer;
- (c) Pacific Brands Holdings did not, prior to 3 March 2011, purport to be Ms Berkeley's employer;
- (d) the formal letters of termination on 8 December (being two letters: one from the Company Secretary and one from the Chief Executive Officer) and on 23 December 2010 were from Pacific Brands;
- (e) Pacific Brands Holdings did not pay Ms Berkeley's remuneration.

183 In the alternative, if the New Contract was effective to change the identity of Ms Berkeley's employer, then:

- (a) the conduct pleaded in this statement of claim against Pacific Brands after 1 November 2010 was done by Pacific Brands Holdings; and
- (b) Pacific Brands was involved in Pacific Brands Holdings' contravention of the Act and, pursuant to section 550 of the Act, is taken to have also contravened the Act.

Date: 19 August 2011



Signed by Michael Harmer
Lawyer for Ms Berkeley

This pleading was prepared by Rachel Francois of Counsel and Michael Harmer, Solicitor.

Certificate of lawyer

I Michael Harmer certify to the Court that, in relation to the statement of claim filed on behalf of Ms Berkeley, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date: 19 August 2011



Signed by Michael Harmer
Lawyer for Ms Berkeley