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Discrimination and Sexual Harassment Case Law Review

ALERA National Conference, 27 October 2023

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Decided cases and awards of damages (Federal)

Half of decided sexual harassment cases saw the claimant succeed (from a sample of 193 cases).

Average awards of damages

Economic loss: $30,034.90

Non-economic loss: $14,268.89

The average award of general damages has increased over time:

— 2004-2009: $21,544
— 2016-2021: $60,500

SH v other discrimination claims

Damages awarded for other forms of discrimination were considerably less, and only race discrimination has, partially, seen a comparable significant increase in general damages in recent years.

Complainants in sexual harassment were far more likely than complainants in other areas of discrimination to receive an award of damages.

States and territories

— Victoria was the most complainant-friendly jurisdiction in sexual harassment matters, with significant average awards of damages for economic and non-economic loss.
— Queensland had the highest success rate for sexual harassment claimants (73%).
— NSW and Tasmania both had a lower general damages average than the federal average.

Damages and Costs in Sexual Harassment Litigation: A Doctrinal, Qualitative and Quantitative Study
(19 December 2022, ANU)

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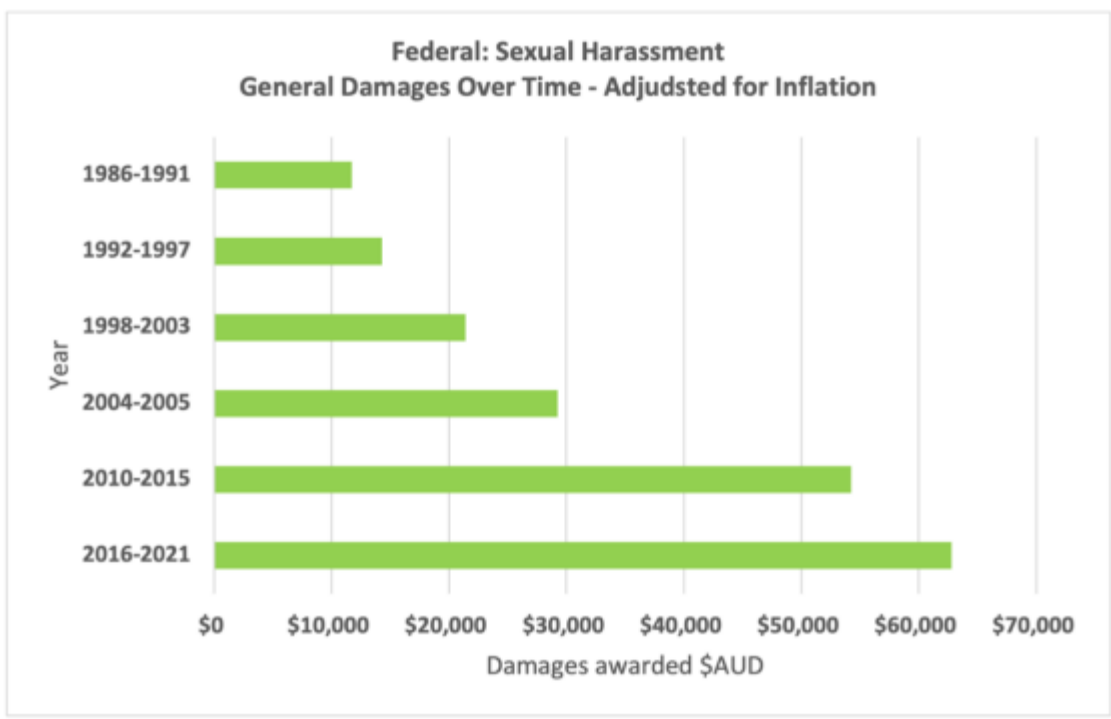

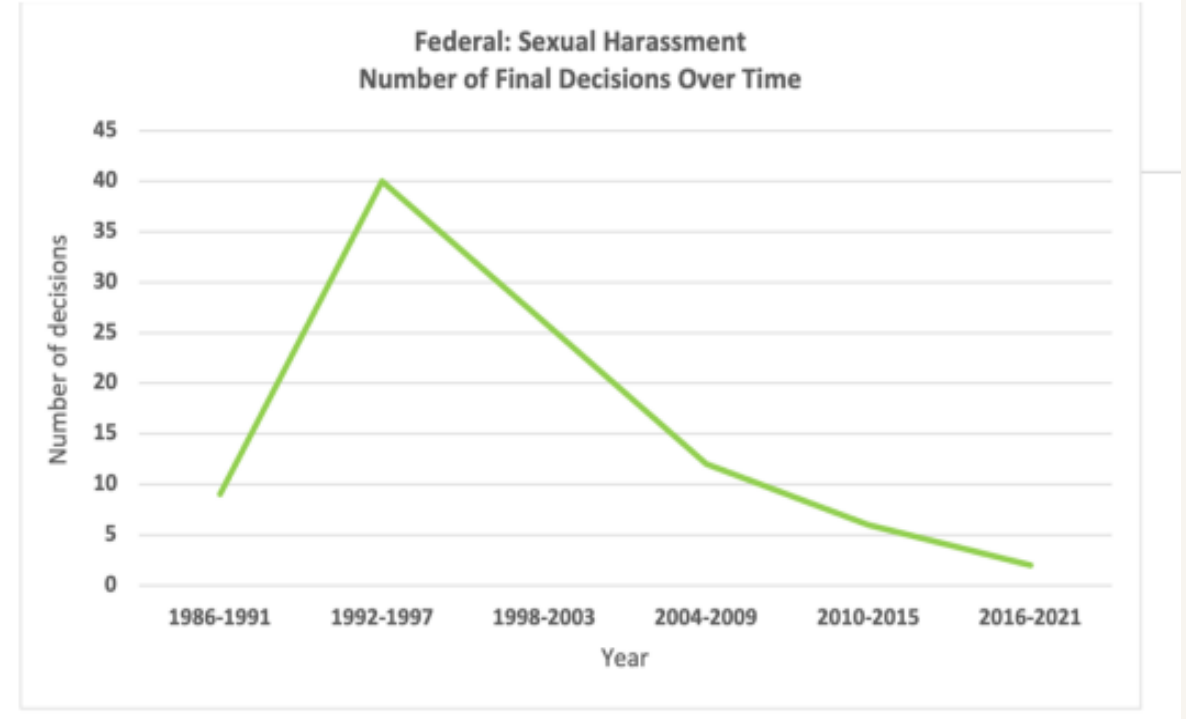

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Changing attitudes towards sexual harassment – delay in making complaints

Wheatley v Fire Rescue Victoria (Human Rights) [2023] VCAT 12

Facts

- Ms Wheatley was employed as a fire fighter by FRV since 2003. She alleges that throughout her employment, she was subjected to sexual harassment, sexual discrimination and a sexually hostile workplace (i.e. pornography in the workplace, etc.).
- Ms Wheatley alleges that she made various complaints throughout her employment, which were ignored or discouraged.
- In 2016 and again in 2021, she suffered a psychological injury as a result of the cumulative trauma of her experiences throughout her career. The injury was substantial and she can no longer work in the service. Ms Wheatley filed an application in VCAT pursuant to the *Equal Opportunity Act 2010* (VIC).
- Ms Wheatley's evidence was that had she made an external complaint about the conduct earlier, she would have been driven out of the service and would have lost her career.

Issue: FRV applied to strike out all claims prior to 2015 on the grounds that the delay in bringing the application caused it "significant prejudice". The application was brought pursuant to section 76 and clause 18 of Schedule 1 of the VCAT Act, which provides that the Tribunal may summarily dismiss an application under the EOA if the alleged contravention occurred more than 12 months after the application was made.

Wheatley v Fire Rescue Victoria (Human Rights) [2023]

VCAT 12 – First Instance

- VCAT refused FRV's application, holding that in the circumstances Ms Wheatley's delay in making the complaint was not inordinate or unreasonable and inexcusable. This included:
  - FRV held a "virtual monopoly" on the employment of fire fighters in Victoria.
  - Ms Wheatley was "deeply committed" to her career and it was reasonably that she did not wish to jeopardise it.
  - Ms Wheatley had attempted to resolve her concerns internally, but had been repeatedly ignored or discouraged.
  - Ms Wheatley's complaint concerned "continuing and cumulative discrimination and harassment over a long period."
  - Concerns regarding the uncertainty of documentary and witness evidence due to the delay were matters that could be weighed upon the hearing of the claims.
  - Due to the "interconnected and cumulative nature" of Ms Wheatley's claims, none of the individual claims should be excluded in their entirety.

Fire Rescue Victoria v Wheatley [2023] VSC 269 – Appeal

- Fire Rescue Victoria appealed.
- The Supreme Court of Victoria held that clause 18 of the VCAT Act does not create a "statutory presumption" that a delay of more than 12-months will be unfair to the respondent.
- The Supreme Court extended this reasoning to Commonwealth legislation or analogous state legislation and emphasised:

  "[t]he passage of more than 12 months enlivens the power to dismiss and certainly raises the prospect of prejudice, ***but does not create an implied limitation period that has to be overcome****."*

- The Supreme Court was satisfied that the Tribunal member had properly satisfied herself that the delay did not, in the circumstances, mean that the allegations before 2015 should be summarily dismissed.

Importance of *Wheatley*

- Recognises that the impact of sexual harassment and discrimination can be cumulative and sustained over a long period of time.
- Recognises that there may be sensible reasons for women delaying the taking of legal action.
- The Fifth National Survey found that of those who reported having been sexually harassed within the previous 5 years:
  - 50% reported that the sexual harassment had been occurring for over 12 months.
  - One third (35%) reported that it had been occurring for more than 2 years; and
  - 16% reported that it had been occurring for more than 5 years.
- Formal reporting of sexual harassment remains low; in the past 5 years fewer than 1 in 5 people (18%) who experienced workplace sexual harassment made a formal report or complaint.
- Those who do formally report sexual harassment often experience negative or no action in response: only 28% of people who reported harassment said that the sexual harassment stopped after they made a formal report or complaint.

A new frontier for general damages? Age discrimination and *Gutierrez*

***Gutierrez v MUR Shipping Australia Pty Limited* [2023] FCA 399**

Facts:

- Gutierrez employed by MUR Shipping for over 25 years and planned to work until he was at least 75 years of age (the new 65?).
- In February and March 2018, Gutierrez was aged 68. He was asked by the Managing Director when he planned to retire and was informed that Ms Fernandes from MUR Shipping's affiliated office in Dubai would be taking over his job. Gutierrez felt compelled to nominate a retirement date in 2019.
- In mid-2018, MUR informed Gutierrez that his contract would come to an end in December 2018 and he would then be on a fixed term contract to train Ms Fernandes.
- Gutierrez alleged that this conversation constituted a repudiation of his contract of employment with MUR.
- Following this discussion, Gutierrez's health rapidly deteriorated and in August 2018 he filed an application in the AHRC alleging age discrimination.

Gutierrez v MUR Shipping Australia Pty Limited [2023] FCA 399 – First Instance

- At first instance, Judge Driver of FCC found that MUR Shipping had unlawfully discriminated against Mr Gutierrez due to his age, in that it had:
  - Deprived Mr Gutierrez of his agency as to his own future by placing him on a fixed term contract; and
  - Had disrespected and demeaned him in his employment by asking him to train his replacement.
- As a result of the discriminatory conduct, Judge Driver found that Mr Gutierrez suffered a "mild adjustments disorder" that did not preclude him from working. Mr Gutierrez was awarded **$20,000** in general damages.
- However, Judge Driver considered that the termination of Mr Gutierrez's employment was not discriminatory in circumstances where he "chose to resign" when he was not being forced to do so and could have continued working until his nominated retirement date. In these circumstances, Judge Driver declined to award Mr Gutierrez any compensation for economic loss.

Gutierrez v MUR Shipping Australia Pty Limited [2023] FCA 399 – Appeal

- Gutierrez appealed, including, on the following grounds:
  - the general damages awarded were "manifestly inadequate"
  - the primary judge erred in failing to make an award of economic loss; and
  - the primary judge erred in failing to find that MUR Shipping had brought about his termination because of his age.
- Burley J considered that the primary judge had erred in failing to have proper regard to the "unchallenged" medical evidence, which found that as a result of the discriminatory conduct, Mr Gutierrez suffered from an adjustment disorder with depression and anxiety, loss of enjoyment of social aspects of his life and would have no capacity to work until the adjustment disorder resolved.
- Endorsing *Richardson v Oracle,* Burley J substituted the general damages award of $20,000 for an award of $90,000.
- Burley J did not challenge the finding that Mr Gutierrez had chosen to resign, but held there was a sufficient causal connection between the discriminatory conduct and Mr Gutierrez's economic loss; on the evidence Mr Gutierrez was incapable of working as a result of the discrimination. On a preliminary assessment, Burley J considered an award of economic loss of $142,215.56 plus interest was appropriate.

Central question in determining general damages

Burley J emphasised that the central question in determining the quantum of general damages is assessing compensation for the actual harm caused, **rather than a consideration of the severity of the conduct** that gave rise to the injury:

> *"It is of course correct to compare and, if appropriate, contrast factual findings as to the extent of injury suffered in assessing compensable harm in comparable cases in consideration of the correct allocation of damages. No two cases will be precisely the same and each must be considered on its own facts. However, to suggest, as the primary judge appears to, that the seriousness of the conduct of a defendant towards a victim, separately from a consideration of the damage caused by that conduct, is relevant to the assessment of general damages reflects error. At the point of the assessment of damages,* ***the question is the amount which can fairly be regarded as reasonable compensation for the injuries and disabilities which a plaintiff has sustained…not the manner in which the harm was caused or egregiousness by which it was inflicted.***"

Importance of *Gutierrez*

- The *Gutierrez* appeal and the quantum of general damages awarded is a definitive endorsement of *Richardson v Oracle* and the corresponding value the community places on harm arising from discriminatory conduct.
- Significant awards in respect of non-sexual harassment conduct demonstrates that the increase in general damages observed in recent sexual harassment cases should not be confined to that sphere- as a matter of legal principle.
- Compensation should be tied directly to the actual harm arising from the discriminatory conduct and should not be correspondingly devalued simply because the harm arises in a particular sphere of discrimination law.

Record damages for race discrimination - *Kaplan v State of Victoria (No 8)* [2023] FCA 1092

Facts:

- Five applicants, all former students at Bright Secondary College ('BSC'). Alleged that over a period spanning 2013 to 2020 they had each been subject to race discrimination on the basis of their Jewish identity, in contravention of section 9 and 18C of the *Racial Discrimination Act 1975* (Cth).
- The students alleged that they were subject to anti-Semitic bullying and harassment by BSC students, including "extreme" anti-Semitic taunts, death threats, "unreasonably and extraordinarily high" levels of anti-Semitic graffiti, and in the case of some of the students, physical assault.
- The students submitted that the failure by the principal, Mr Minack, to address the anti-Semitism in any proactive or systemic way, despite various complaints from the students and their parents, constituted a breach of the RDA.

Decision

- Chief Justice Mortimer upheld the majority of the allegations levelled by the students., finding that Mr Minack contravened section 9 of the RDA by failing to take appropriate steps to address anti-Semitic bullying and harassment perpetrated by BSC students, including demonstrating an "inexplicable and unusual tolerance for anti-Semitic graffiti and a preparedness to ignore, downplay and take less seriously the complaints made by Jewish students and their families".
- The students were collectively awarded $435,280.74 in compensation, representing a record award at the federal level for race discrimination.

Kaplan v State of Victoria (No 8) [2023] FCA 1092 – failure to act

- Critical to the students' case was a finding that there was a breach of the RDA by reason of Mr Minack's *failure* to act.
- The central question is concerned with the *consciousness* or *choice* for the conduct, that is "*why* did a person act as they did; or *why* did they refuse to act?". The Court need not assign any *subjective* motivation for the inaction, it is sufficient if the failure or inaction is connected to race
- Section 9 of the RDA could be contravened by a negative act because there could still be a direct connection between the failure or omission and race, that is the failure to act was *because* of the student's race.
- A breach of section 18C could not be so constructed: it was not the failure to address the antisemitic behaviour that was reasonably likely to offend, insult, humiliate or intimidate another person or group of people, rather it was the antisemitic conduct *itself* that gave rise to a contravention of the section.

Kaplan v State of Victoria (No 8) [2023] FCA 1092 – comparator

- Mortimer CJ had regard throughout the decision to the comparative treatment of LGBTQIA+ students at BSC.
- Section 9 does not require a comparator before a contravention can be found, however reference to a comparator can be a useful tool to locate discriminatory conduct:

> *"Discrimination is about differential treatment. This raises the question – different from whom? The whole purpose of a comparator in a discrimination context is to assist in focusing on first whether there was differential treatment, and second on the reason for that treatment. Using a comparator who has different attributes, or who does not have nominated attribute, can assist in a forensic and reasoning sense in identifying why a person was treated differentially (assuming that has been established)."*

- The evidence demonstrated that Mr Minack, the leadership cohort and BSC teachers took proactive steps to address the needs and vulnerabilities of LGBTQIA+ students and adopted a deliberate strategy to make these students feel safe and valued at school.
- This finding was "of some weight" as it highlighted the differential treatment that led to the tolerance of antisemitism at BSC and the resulting neglect for the safety and wellbeing of the relevant Jewish students.

Bharatiya v Antonio [2022] FCA 428 – the role of damages in discrimination

Facts:

- Mr Bharatiya was subject to race discrimination perpetrated by his next-door neighbour, that included the shouting of slurs such as “black bastard”, “cockroach” and “parasite”.
- Mr Bharatiya was awarded just $750 in general damages.

Decision

- Colvin J emphasised that damages awarded under s 49PO(4) of the AHRC Act are “entirely compensatory”.
- Mr Bharatiya was unrepresented in the proceedings and did not present any medical evidence to demonstrate a significant and ongoing injury as a result of the discrimination.
- While Colvin J accepted that the respondent’s words were “hurtful” he concluded that they were “at the lowest end of the scale”. Query whether the court confused liability with impact?

Disability Discrimination and the relevant comparator

***Annovazzi v State of New South Wales - Sydney Trains* [2023] FedCFamC2G 542**

Facts

- Annovazzi was a trainee train driver employed by Sydney Trains. Annovazzi had autism and ADHD and had prescription medication for the latter, but did not declare those conditions on her employment application and during a pre-employment medical questionnaire.
- Prior to commencing employment she was required to undertake a medical examination. During this examination, Annovazzi disclosed her medical conditions and medication.
- Annovazzi was offered a position in the trainee program.
- Three weeks into the training program, Annovazzi asked the train crew coordinator if she could take 5mg dexamphetamine tablets to treat her ADHD, and told him she had discussed her diagnoses with the doctor who performed the pre-employment medical assessment.
- Sydney Trains then removed Annovazzi from the training program and placed her on light duties.
- The Chief Medical Officer recommended that she be referred to an independent medical examination to determine if she could undertake her duties safely. This referral never occurred.
- After asking for several medical notes regarding her diagnoses and medications over the course of several months, Sydney Trains dismissed Annovazzi on the grounds that she failed to disclose her medical conditions and use of prescription medication, with one week's pay in lieu of notice.

Relevant comparator

- Sydney Trains submitted that the relevant comparator for the purposes of section 15 of the DDA was a "person who had applied for or accepted for the role of a Trainee Train Driver on probation *who dishonestly answered the relevant questions in the medical questionnaire*".

- Judge Manousaridis rejected this submission: there was no evidence to demonstrate that Ms Annovazzi had been dishonest and in any event Sydney Trains either didn't believe that she acted dishonestly or didn't care whether the allegation of dishonesty was true, as it had not taken any steps to ascertain whether the allegations of dishonesty were true.

- The ***relevant comparator*** was a person who did not disclose in the initial medical questionnaire two medical conditions that were subsequently disclosed to the examining doctor and Sydney Trains.

Annovazzi v State of New South Wales - Sydney Trains [2023] FedCFamC2G 542

Judge Manousaridis concluded:

1. Sydney Trains would have permitted the relevant Comparator to undergo a medical assessment rather than terminating their employment.
2. Annovazzi's disabilities therefore formed the reason, or a substantial reason, for deciding to dismiss the trainee, and for treating her differently to the hypothetical comparator, which contravened s15(2)(c).
3. Sydney Trains also unreasonably kept Annovazzi out of the trainee program by failing to assess her fitness for duty earlier, the resulting reason for keeping her out of the trainee program was because she had ADHD and Asperger's Syndrome, which contravened s15(2)(d).
4. In making its two requests for notes from Annovazzi's doctor, Sydney Trains contravened s 30(2), because it asked for this information in circumstances where it was already considering terminating her employment rather than assess her fitness for duty. As a result, the information was requested "in connection with" the decisions that led to her dismissal.

What's next for sexual harassment and discrimination litigation?

- Progress is being made in the battle against gender inequality.
- Damages will continue to trend up in both sexual harassment.
- Liability and Quantum will continue to be conflated until an authoritative judgment addresses the confusion.
- The question of costs neutrality proposed by Respect At Work report remains unresolved.

THE END…

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