HARMERS
WORKPLACE LAWYERS

WORK INSIGHTS

Winter edition 2018

Editorial

Welcome to the Winter 2018 edition of *Work InSights.*

The #metoo and #TimesUp social media campaigns have led to an unprecedented awareness of sexual harassment in the workplace. In this edition of *Work InSights,* we consider two very important issues for employers. Firstly, we look at recent trends in the awarding of "*general damages*" in sexual harassment cases (awarded to compensate a complainant for their "*pain and suffering*"), and we provide practical tips employers can take to protect their employees from unlawful sexual harassment. Secondly, we look at the issue of out of hours conduct of a sexual nature on social media, and a recent decision in the Fair Work Commission involving workplace dismissal. This article reinforces the need for employers to develop comprehensive policies and codes of conduct that expressly address social media and employees' out of work conduct.

Our final article considers workplace bullying - what it is, how it impacts employers, and actions employers should be taking to respond if allegations of bullying are made in your workplace.

We hope you find this edition of value.

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General damages in sexual harassment cases

Amy Zhang and Justin Pen

Introduction

On 20 June 2018, Federal Sex Discrimination Commissioner Kate Jenkins announced a world-first – the Australian Human Rights Commission ("**AHRC**") would be conducting a national inquiry into sexual harassment in Australian workplaces. The announcement followed a series of revelations about workplace sexual misconduct, including allegations against Hollywood producer Harvey Weinstein and Australian television personality Don Burke, as well as increasing global support for the #MeToo movement.

In recent years, Courts and Tribunals have also responded to the hardening community attitudes towards workplace sexual harassment. Indeed, the case law reveals that employers have been forced to pay increasingly large awards sums of "*general damages*", being damages awarded for pain, suffering, stress, hurt, humiliation, psychological injury, damage to personal and professional reputation and dislocation of life.

This approach by Courts and Tribunals follows the Full Court of the Federal Court's landmark decision, in *Richardson v Oracle Corporation Australia Pty Ltd* [2014] FCAFC 82, which held that awards for general damages in cases involving unlawful sexual harassment should reflect "*prevailing community standards*".

Matters general damages aim to compensate

Broadly, general damages are awarded to compensate a complainant for their "pain and suffering", which is usually taken to include stress, hurt, humiliation, psychological injury, damage to personal and professional reputation and dislocation of life.

In assessing "*pain and suffering*", Courts and Tribunals have also taken into account the ongoing impacts of unlawful sexual harassment, including:

- anxiety, depression and other psychological trauma;
- diminished self-worth;
- loss of enjoyment to have a relaxing night out;
- loss of promotional opportunity;
- loss of self-esteem and self-confidence;
- loss of status; and
- loss of sexual interest.

General damages are awarded in addition to economic loss awards and, unlike payments for economic loss, are not easily quantifiable. Indeed, it has been held by the Courts that judicial assessments

of a complainant's damages *"are not susceptible to mathematical calculation"*. Awards for general damages are based on a variety of factors that differ from case to case, but ultimately, general damages aim to "*make a person whole*" in respect of the loss he or she has suffered.

Increase in awards of general damages and "prevailing community standards"

In *Richardson v Oracle Corporation Australia Pty Ltd* [2013] FCA 102, the Federal Court found that Rebecca Richardson had been sexually harassed by a colleague of hers, Randol Tucker, and that her employer, Oracle Corporation, had failed to prevent Mr Tucker's misconduct and mishandled a subsequent investigation into his behavior.

During the course of her employment, Mr Tucker subjected Ms Richardson to comments such as: "*Gosh, Rebecca, you and I fight so much, I think we must have been married in our last life*" and "*So, Rebecca, how do you think our marriage was? I bet the sex was hot".*

The trial judge awarded Ms Richardson $18,000 in general damages to compensate her for pain, suffering and loss of enjoyment resulting from her sexual harassment.

On appeal, Ms Richardson argued that the trial judge's award of general damages was "*manifestly inadequate*".

In *Richardson v Oracle Corporation Australia Pty Ltd* [2014] FCAFC 82, the Full Court of the Federal Court agreed with Ms Richardson's submissions and increased her award by more than fivefold – ordering that Oracle Corporation pay her $100,000 in general damages.

In doing so, the Court held that the initial sum of $18,000 was *"out of step with the general standards prevailing in the community regarding the monetary value of the loss and damage of the kind Ms Richardson sustained."*

Furthermore, after noting that general damages awards in sex discrimination and sexual harassment cases have not increased in line with other areas of law, the Full Court relevantly observed that:

> "*The general range of general damages in respect of pain and suffering and loss of enjoyment of life caused by sex discrimination has scarcely altered since 2000 and does not reflect the shift in the community's estimation of the value to be placed on these matters. The range has remained unchanged, notwithstanding that the community has generally gained a deeper appreciation of the experience of hurt and humiliation that victims of sexual harassment experience and the value of loss of enjoyment of life occasioned by mental illness or distress caused by such conduct"*

The above comments demonstrate an intention and willingness by the Full Court to increase, and to promote increased, general damages awards in sex discrimination and sexual harassment matters so as to reflect current community standards and views regarding this issue.

Cases

Indeed, following *Richardson v Oracle,* significant awards of general damages have become commonplace in sexual harassment cases. For example:

- In *Matthews v Winslow Constructors (Vic) Pty Ltd* [2015] VSC 728, a female labourer received $380,000 in general damages for sexual harassment and bullying at the hands of her direct manager and co-workers over a nearly two-year period. On one occasion, one of her colleagues said to her: *"I am going to follow you home, rip your clothes off and rape you."*
- In *Collins v Smith* [2015] VCAT 2019, a 31-year-old female post office worker received $180,000 in general damages after she was sexually harassed by her 55-year-old male manager over a three-month period. Over several occasions, her manager forcibly kissed and groped her, sent her inappropriate text messages, and, at one point, likened her to an expensive car and threatened her employment, stating: *"if I had a Lamborghini in the garage, and I can't drive it, then I don't want it here anymore."*
- In *STU v JLK (QLD) Pty Ltd & Ors* [2016] QCAT 505, a hotel operator was ordered to pay $70,000 in general damages to a female employee after her male colleague indecently assaulted her in a hotel room in which she stayed. During her first stay in the hotel room, the female employee woke up to her colleague touching her upper thigh and groin and attempting to remove her underwear. She asked her colleague to leave the room and broke down to cry. Her colleague left the room and said, "*I'll let you get changed*", before returning to tell her "*This can be our little secret*".

Practical tips for employers

Employers can be held vicariously liable for any unlawful sexual harassment that occurs within the workplace, unless they can show that they have taken all reasonable steps to prevent the unlawful conduct.

Importantly, the "*workplace*" is not limited

to the office or traditional workspace and can include offsite locations, such as hotels, restaurants, bars, party venues and other places that can be connected to work.

Given the significant damages that can be ordered, it is imperative that employers ensure that they do all that is reasonable to prevent sexual harassment in the workplace.

To protect employees from unlawful sexual harassment, employers should develop and maintain:

- workplace policies about sexual harassment and its consequences. These policies should set out the employer's expectations in relation to appropriate behavior at work, as well as the relevant consequences and implications if employees are in breach of these expectations;
- proper complaints processes, so that employees subjected to sexual harassment (or any form of inappropriate workplace behaviour) have a supportive and fair procedure to follow in order to raise their concerns with their employer without fear of reprisal;
- employment contracts, job descriptions, employee targets, and performance review processes that are all consistent with ensuring compliance with the above expectations and workplace behaviours;
- training on the topic addressed to all areas of the business, including the most senior members of an organisation.

In particular, it is worth noting that having proper policies and procedures in place is not, in and of itself, enough. Employers must ensure that all employees, from the most junior employee to the most senior managers, are adequately and regularly trained in relation to those policies and the relevant law, and that the policies and procedures are actively enforced in practice.

Employee dismissed for after-hours conduct of a sexual nature directed at colleagues, even though company policies and code of conduct did not expressly cover out of work conduct

Emma Pritchard and Justin Pen

Introduction

The Fair Work Commission recently found that an employer could validly dismiss an employee for conduct that was of a sexual nature and directed at his colleagues, but which occurred after-hours on social media, even though his employer's policies and code of conduct did not expressly cover out of work conduct.[1]

Background

In this case, Sydney International Container Terminals Pty Limited ("**Sydney International**") dismissed a stevedore, Mr Luke Colwell, after he sent a pornographic and offensive video to a group of colleagues via Facebook Messenger.

Mr Colwell lodged an application for unfair dismissal, arguing that Sydney International lacked a valid reason to dismiss him. He asserted that, because he had sent that video whilst at his home and outside of work hours, his actions had no connection to his employment with Sydney International.

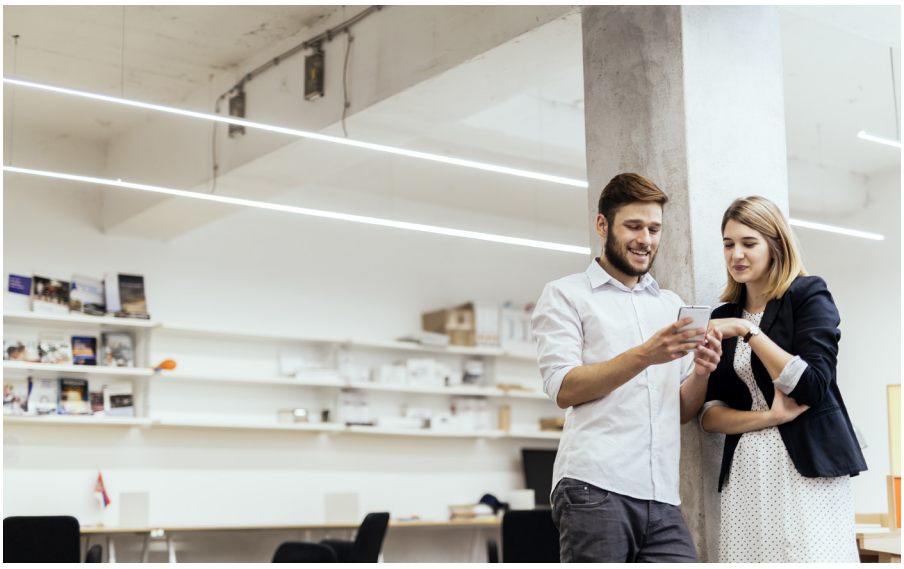
The Commission heard evidence that Sydney International had recently commenced active steps to encourage female participation in the workplace. In 2016, it launched the "*Women as Wharfies*" initiative, supported by the Maritime Union of Australia ("**MUA**"), increasing the number of women in stevedoring roles from four in 2014 to 32 in 2018 (out of a total stevedoring workforce of 200 employees).

To further achieve these aims, Sydney International also had a company policy in place directed at preventing workplace bullying and harassment. Significantly, that policy did not expressly apply to employees' conduct outside of work.

Although no formal complaint was lodged against him, Sydney International commenced an investigation into Mr Colwell's conduct. The company's General Manager told the Commission that she had contacted the three female employees who had received the video, because she was genuinely concerned about Mr Colwell's conduct as a sexual harassment matter.

Decision

Commissioner McKenna held that, although she was not satisfied that Mr Colwell had breached Sydney International's workplace



bullying and harassment policy because it did not refer to out of work conduct, Mr Colwell's conduct was "*contrary to what underpinned [Sydney International'] policies when read in a purposive fashion*" and the company's broader "*zero tolerance approach*" to sexual harassment in any form.

The Commissioner rejected Mr Colwell's argument that he had sent the video "*in private*", because, based on the evidence, his conduct had the potential to, and, in fact, did "*spill into*" the workplace.

Furthermore, Commission McKenna recognised that the policies could not "*realistically be isolated*" to the workplace, observing that:

> *"The behavioural standards that the respondent expected of its employees, as reflected in its policies and code, could not realistically be isolated because of the fact that the pornographic video was sent by the applicant by Messenger out of hours, any more than if, for example, a racially-vilifying video were similarly sent as a "joke" to members of the respondent's workforce."*

In finding that Sydney International had a valid reason to dismiss him, the Commissioner rejected various submissions made on Mr Colwell's behalf, including that:

- he had apologised, via his Facebook his page, to the recipients of the video (at [30]);
- he did not believe his conduct constituted sexual harassment, which "*meant things like groping or wolf-whistling in the workplace*" (at [51]);
- the women who received the video were "*forthright*", "*strong*", "*assertive*" and "*articulate*" (at [113]);
- he viewed the sending of the video as a joke, not intended to cause offence (at [116]);
- his out of work actions were effectively "*private*" and had no connection to the workplace (at [98]-[99]).

On this last submission, Commissioner McKenna stated:

> "*This is not a case of an employer seeking to intrude too far into the private lives of employees or to attempting to exercise supervision over the private activities of employees.*"

Instead, the Commissioner observed, this was a case of an employer trying to respond appropriately to a matter that involved sexual harassment, in circumstances where it was trying to foster a safe and inclusive workplace for female employees.

Implications for employers

This decision highlights the need for employers to develop comprehensive policies and codes of conduct that govern employees' out of work conduct. Whilst in this case, there was no express policy governing after-hours conduct, the Commission considered the workplace initiatives that Sydney International had taken to increase female participation and workforce diversity. It would be prudent for all employers to have policies in place expressly dealing with social media and out of work conduct.

1 *Luke Colwell v Sydney International Container Terminals Pty Limited* [2018] FWC 174.

Workplace bullying: still a major problem more than 10 years after the tragic death of Brodie Panlock

David Bates

In September 2006, Australians were shocked when they learned 19-year-old café worker, Brodie Panlock, had taken her own life after enduring more than a year of relentless bullying by her co-workers. More than ten years have now passed since Brodie's tragic death, yet the scourge of workplace bullying continues to cause untold physical and mental harm in Australian workplaces. In this article we seek to answer two questions: why is workplace bullying so rife, and what can be done about it?

Defining bullying

Legal definitions of the term '*bullying*' have, historically, been provided by Australia's state and commonwealth health and safety laws. However, amendments to the *Fair Work Act 2009* ("**FW Act**"), which took effect in 2014, introduced a single definition of '*bullying*' for the purposes of the FW Act for all employees covered by the national workplace relations system. Sections 789FD(1) and (2) of the FW Act now relevantly provide as follows:

(1) A worker is bullied at work if:

(a) while the worker is at work in a constitutionally-covered business:

(i) an individual; or

(ii) a group of individuals;

repeatedly behaves unreasonably towards the worker, or a group of workers of which the worker is a member; and

(b) that behaviour creates a risk to health and safety.

(2) To avoid doubt, subsection (1) does not apply to reasonable management action carried out in a reasonable manner.

As is made clear by s789FB(1), four separate requirements must be met for conduct to amount to '*bullying*' for the purposes of the FW Act. Specifically, the behavior in question must:

- be repeated; and
- be unreasonable; and
- be directed towards a worker or group of workers (of which the alleged victim is a member); and
- create a risk to health and safety (either physical or mental).

Critically, s789FD(2) makes it expressly clear that '*reasonable management action*' which is taken in a '*reasonable manner*' will not constitute bullying. It is this sub-section which ensures employers remain free to initiate performance management and take disciplinary action as and when appropriate.

Brodie's story

Brodie Panlock began work at Café Vamp in the Melbourne suburb of Hawthorn in early 2005. Almost immediately this young woman - described by her mother as a '*little ray of sunshine*' - became the subject of relentless bullying by her three male co-workers. For more than twelve months Ms Panlock endured physical and emotional abuse, including having fish sauce poured into her bag, being spat on, being told she was '*worthless*', '*fat*' and '*ugly*' and - perhaps most shockingly of all - finding rat poison enclosed in her pay packet following a previous suicide attempt.

The endless abuse suffered by Ms Panlock culminated in her suicide late one evening in September 2006. The subsequent coronial inquest concluded Ms Panlock was experiencing an '*unbearable level of humiliation*' on the night she ended her relatively short life.

Workplace bullying today

Brodie Panlock's death certainly raised awareness around the scourge of bullying in Australian workplaces, yet bullying sadly remains a major problem with an extraordinary economic toll. For example, a 2010 report by the Productivity Commission estimated workplace bullying costs the national economy between $6 and $36 billion dollars a year.[2]

And then, of course, there is the human toll which bullying continues to extract. According to a May 2014 report published by the University of Wollongong, 5-7% of Australian employees have experienced workplace bullying in the last six months, while an extraordinary 40% of workers report being bullied early in their careers.[3] Specific examples of shocking workplace bullying also continue to make the headlines:

- Charity collectors being forced to crawl along the floor in a '*slug race*' if they failed to meet their sales targets.
- A young Victorian carpentry apprentice forced to swallow methylated spirits and having sandpaper applied to his face.

2 Australian Productivity Commission, Performance Benchmarking of Australian Business Regulation: Occupational Health and Safety, Research Report, March 2010

3 University of Wollongong, Final Report - Workplace Bullying in Australia, 30 May 2014

- A construction worker regularly fired at with a nail gun and struck in the head by a large piece of timber.
- An employee returning from maternity leave being excluded, ignored, and subjected to unwarranted criticisms.

Given the above statistics and specific case examples, many may understandably find it surprising that the Fair Work Commission ("**FWC**") was not inundated with bullying-related applications following the commencement of its dedicated '*bullying jurisdiction*' in 2014. Indeed, according to the statistics published by the FWC – covering the period January to March 2017 – a total of 188 '*Stop Bullying Order*' applications were received by the FWC. Of these, 104 were withdrawn by the applicant during the course of proceedings, and only 13 were ultimately resolved via a final Decision being made by a Commissioner.[4]

However, the relatively small number of bullying-related applications being filed with the FWC is almost certainly a consequence of the limited powers invested in the FWC when dealing with allegations of workplace bullying. For example, while the FWC can issue so-called '*Stop Bullying Orders*'[5] (which, as the name suggests, direct the offending party to immediately cease bullying the applicant), the FWC does not have the power to award any form of monetary compensation to the bullying victim him or herself.

Instead, an applicant seeking a financial remedy must file their claim with the relevant workers' compensation authority in their jurisdiction. The FW Act makes express allowance for the filing of simultaneous

4 Fair Work Commission, Quarterly Report: Anti-Bullying Report January-March 2017

5 See section 789FF of the FW Act

workers compensation claims and '*Stop-Bullying Order*' applications via section 789FH, which provides as follows:

> *Note: Ordinarily, if a worker makes an application under section 789FC for an FWC order to stop the worker from being bullied at work, then section 115 of the Work Health and Safety Act 2011 and corresponding provisions of corresponding WHS laws would prohibit a proceeding from being commenced, or an application from being made or continued, under those laws in relation to the bullying. This section removes that prohibition.*

Given the potential long-term consequences workplace bullying may have on a worker's health, it is perhaps unsurprising that '*mental stress*'-related claims filed with Australia's workers' compensation regulators are the most expensive type of claims they manage. [6]

The simple fact is that workplace bullying clearly remains a serious issue in contemporary Australian workplaces, and employers face expensive claims, penalties, and even potential criminal conviction in some jurisdictions if they fail to adequately protect workers from bullying at work.

Steps employers can (and should) take

There are a range of simple steps employers can take to help stop workplace bullying before it starts, and to comprehensively address and resolve allegations of bullying once they have been made.

Preventing bullying

We recommend all employers take the following steps to help prevent bullying in their workplace:

Understand what conduct does – and does not – constitute workplace bullying. Having a clear understanding of what workplace bullying is and is not will assist everyone to behave appropriately in the workplace.

Provide training. Practical, clear and interactive training sessions focused specifically on workplace bullying will not only reduce the likelihood of workplace bullying, but also reduce the employer's overall vicarious liability if bullying ever happens in the workplace.

Ensure comprehensive policies are in place. Rolling-out anti-bullying-related policies and complaint procedures tells workers the employer takes workplace bullying seriously. Good policies will make it clear that bullying will not be tolerated, and will result in appropriate disciplinary action being taken.

6 Safe Work Australia, The Incidence of Accepted Workers' Compensation Claims for Mental Stress in Australia. April 2013

Responding to bullying-related complaints

It is essential that complaints are taken seriously and dealt with promptly. We recommend employers take the following steps whenever allegations of workplace bullying are made:

- Ensure the employee understands the seriousness of their complaint. Allegations of workplace bullying should not be made lightly. Accusing a colleague of bullying can have significant financial, professional, and reputational consequences for all involved. It is, accordingly, important for employers to ensure alleged victims understand both the definition of workplace bullying and the seriousness of their allegations.
- Ensure the complaint is in writing. If the allegation is made verbally, the alleged victim should be asked to put their complaint in writing as soon as possible. It is important the alleged victim is asked to include the following information in their written complaint:
  - specific examples of the alleged bullying;
  - dates and times of the alleged incident(s);
  - how the incident(s) made the alleged victim feel;
  - names of any witnesses to the incident(s); and
  - any and all other relevant information they would like the employer to consider.

If the initial allegation was put in writing but did not include any of the above information, the employee should be asked to provide those additional details as soon as possible.

Protect the worker. When a complaint is made, it is essential the alleged victim is immediately protected from any further potential bullying. While no conclusions have of course been reached regarding the validity of the allegations at this preliminary stage, it is nonetheless wise to err on the side of caution and assume the allegations are true. The alleged victim can, for example, be offered paid leave or temporarily transferred to a different section of the business. It is, however, critical that any such steps are taken with the employee's consent. If not, the employer will be exposed to a potential '*adverse action*' claim.

Conduct a thorough and impartial investigation. It will often be appropriate to engage an independent third party to conduct the necessary investigation, which should include interviews and the gathering and reviewing of all relevant evidence. Investigations should be conducted as quickly as circumstances allow, though the complexity of many workplace bullying claims will necessarily result in investigations often taking between 2 and 8 weeks to finalise. A good investigator will also ensure their investigation is entirely consistent with the principles of procedural fairness.

Take appropriate action. Once the final investigation report has been received, the employer should take immediate action. If the allegations have been substantiated, appropriate disciplinary action should then be initiated. If the allegations were ultimately found to be without merit, this should be confirmed with all parties in writing.

Where to go for help

One of the easiest things employers can do to assist workers is ensure they know where to go for help if they feel depressed, stressed, or anxious for any reason, including as a result of bullying at work. The following services provide invaluable help to those in need of assistance (information provided by beyondblue.com.au):

Suicide Callback Service: 1300 659 467

Lifeline: 13 11 14

MindSpot Clinic: 1800 61 44 34. This is an online and telephone service providing free assessment and treatment services for Australian adults with anxiety or depression.

SANE Australia: 1800 187 263. SANE Australia provides information about mental illness, treatments, and where to go for help and support.

Brodie Panlock's legacy

Brodie Panlock's tragic death was not in vain thanks to the extraordinary efforts of her parents, Damian and Rae Panlock, who have worked tirelessly since 2006 to raise awareness of - and increase the penalties for those who engage in – workplace bullying. It was their lobbying which resulted in the Victorian Government amending its state law in 2011 to make serious bullying a crime carrying a maximum penalty of 10 years' imprisonment. These legislative amendments were named '*Brodie's Law*'.

Today, the Panlocks continue to engage in lobbying, public speaking, and other campaigns to educate the community about the scourge of bullying via the organisation they established in their daughter's name, the Brodie's Law Foundation. The Foundation's website can be viewed here: **http://www.brodieslaw.org/**

About us

Harmers Workplace Lawyers "**Harmers**" focuses on innovative, high quality problem solving and a preventive approach to law across all areas of employment and industrial law. While having an emphasis on corporate Australia and its senior executives, the firm seeks to implement workplace fairness for all, and will represent employers, employees and their representative organisations as needed. Harmers has represented many of Australia's leading corporations, senior executives and media personalities as well as having run some of Australia's leading cases in employment and discrimination areas.

Harmers won the 2017 Lawyers Weekly "*Workplace Relations and Employment Team of the Year*"; was the "*Gold medal winner for employment law*" in the inaugural 2017 Human Resources Director magazine's HR Service Provider Awards; and was the recipient of the 2017 Australasian Law Awards for "*Employment Law Specialist Firm of the Year*". The firm has won the employment category of the Australasian Law Awards ten times since 2006; and has been the recipient of several global awards for "Employment/Industrial Law Firm of the Year - Australia" (2011 - 2017). The firm also won the 2017 Lawyers Weekly Women in Law Awards "*Boutique Diversity Firm of the Year*".

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