GENERAL DAMAGES IN DISCRIMINATION/ADVERSE ACTION CLAIMS
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In July 2014, the Full Court of the Federal Court handed down a decision in *Oracle*[1] making it clear that the award of general damages for unlawful discrimination ought not be insignificant. This case encapsulates the principles applicable awarding general damages (for pain and suffering) in the Federal jurisdiction and is applicable not just to federal discrimination law, but federal industrial law, including the adverse action provisions[2] and state discrimination laws[3].

ORACLE DECISION

The Court at first instance awarded $18,000.00 in circumstances where sexual harassment had been proven and the Applicant had been diagnosed as suffering from a psychiatric illness ("chronic adjustment disorder with mixed features of anxiety and depression"[4]), which did not prevent her from working and earning a living[5] and was "not insignificant" [6]. As Justice Kenny put it,

> *The appeal is from a judgment of a single judge of the Court delivered on 20 February 2013, in which his Honour declared that the second respondent (Mr Randol Tucker) had engaged in conduct contrary to 28B(2) of the Sex Discrimination Act 1984 (Cth) ("SDA") by sexually harassing the appellant (Ms Rebecca Richardson) between April and November 2008, while both were employees of the first respondent, Oracle Corporation Australia Pty Ltd ("Oracle"). His Honour declared that Oracle was vicariously liable for Mr Tucker's unlawful conduct, pursuant to s 106 of the SDA and ordered that Oracle pay Ms Richardson $18,000 by way of damages as compensation.*[7]

The Full Court Awarded overturned the award of $18,000 and instead awarded $100,000.00 in general damages[8], as well as $30,000 for loss of opportunity of increased wages with Oracle if the Applicant had remained employed.

In doing so Justice Kenny noted[9]:

> "*the authorities establish that the court **may** be guided, at the assessment stage, by the general principles governing the assessment of damages in tort: see Hall v A & A Sheiban Pty Ltd(1989) 20 FCR 217 ("Hall v A &A Sheiban") at 238-239 (Lockhart J), 256-257 (Wilcox J); and 281 (French J) and Qantas Airways Ltd v Gama (2008) 247 ALR 273 ("Qantas Airways Ltd v Gama") at 303 [94] (French and Jacobson JJ). In the latter case, French and Jacobson JJ stated (at 303 [94]) in respect of s 46PO(4) (in its current form):*

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[1] *Richardson v Oracle Corporation Australia Pty Limited* [2014] FCAFC 82; (2014) 223 FCR 334 ("*Oracle*"), as per Kenny, Besanko and Perram JJ.
[2] See for example: *Heraud v Roy Morgan Research Ltd (No 2)* [2016] FCCA 1797 (15 July 2016) ("Heraud") a decision of Judge Jones and in which is was accepted that Oracle ought apply to a determination of damages for a breach of s 340 of the FWA; as per Tracey and Buchanan JJ [31] and Bromberg J at [83].
[3] See for example: Lipman v Commissioner of Police [2015] NSWCATAD 250 (1 December 2015), Colins v Smith (Human Rights) [2015] VCAT 1992 (23 December 2015) and Kovac v The Australian Croatian Club Limited (no.2) (Discrimination) [2016] ACAT 4 (25 January 2016).
[4] *Oracle First Instance*; [74].
[5] *Richardson v Oracle Corporation Australia Pty Ltd* [2013] FCA 102; (2013) 232 IR 31 ("*Oracle First Instance*").
[6] *Oracle First Instance*; [244].
[7] *Oracle*; [2].
[8] *Oracle*; [81] as per Kenny J and [119] of the joint judgment of Besanko J and Perram J.
[9] *Oracle*; [27].

> "*The damages which can be awarded under s 46PO(4) … are damages "by way of compensation for any loss or damage suffered because of the conduct of the respondent". Such damages are entirely compensatory. In many cases, as in damages awarded under s 82 of the Trade Practices Act 1974 (Cth) the appropriate measure will be analogous to the tortious. That may not be in every case. Ultimately, it is the words of the statute that set the criterion for any award."* [Emphasis added.]

The Respondent on the appeal in *Oracle* argued that the history of awards of general damages for such injuries was between $12,000 and $20,000[10] and so there had been no error of the Court. They were undeniably correct and the Full Court agreed but determined,

> "*community standards now accord a higher value to compensation for pain and suffering and loss of enjoyment not life than ever before*[11]*."*

In coming to a determination that a higher amount was warranted, the Full Court traversed many of the significant cases across a range of state and federal jurisdictions. In particular, regard was had to *Willett*[12], in which the Supreme Court of Victoria replaced a finding of damages in the amount of $108,000, with $250,000.00, in respect of damages awarded to Ms Willett as compensation for her pain and suffering and loss of enjoyment of life caused by her former employer (Victorian Police) in exposing her to bullying and harassment in her workplace. Justice Kenny stated (at paragraph 100),

> *"Ms Willett's injuries were serious. At the time of the trial, she was undergoing treatment in a psychiatric hospital following an attempted suicide: Willett v Victoria at [13]. Tate and Priest JJA summarised her condition (at [48]) as follows: The upshot of Dr Shan's evidence was thus that Willett suffered from an ongoing and persistent major depressive disorder, which, while varying in severity from mild to moderate, affected her in an invasive way on a daily basis requiring significant doses of anti-depressant and associated medication and which rendered her permanently incapacitated for her pre-injury work as a police officer. Ms Willett was able to work, although in another occupation: Willett v Victoria at [50]. Tate and Priest JJA observed (at [50]), "[t]he negligence of the respondent had thus … deprived [her] of the career she had chosen, in which she was proficient, and which she found fulfilling. In these circumstances, their Honours held (at [61]) that the jury verdict was "so small as to be unreasonable; so inadequate that no jury could reasonably have awarded them and out of all proportion to the severity of the circumstances of the case". In reaching this conclusion, Tate and Priest JJA endorsed the statements in Amaca Pty Ltd v King that society places a greater value on the loss of enjoyment of life and the experience of pain and suffering than previously and that awards of damages for injury of this kind had increased: see Willett v Victoria at[79]-[80*]. [13]

Justice Kenny then noted[14].

> *More recently, in Swan v Monash Law Book Co-operative [2013] VSC 326 ("Swan v Monash Law Book Co-operative"), a trial judge again had occasion to assess damages suffered for pain and suffering caused by the defendant's negligence in exposing the victim, Ms Swan, to an unsafe workplace in which she was subject to bullying, harassing, and intimidating*

[10] *Oracle*; [78]-[79].
[11] *Oracle;* [96] as per Kenny J, with whom Besanko and Perram JJ agreed [119].
[12] *Willett v Victoria* [2013] VSCA 76 ("*Willett*").
[13] *Oracle;* [100] as per Kenny J, with whom Besanko and Perram JJ agreed [119].
[14] *Oracle*; [101] as per Kenny J, with whom Besanko and Perram JJ agreed [119].

conduct. This conduct caused Ms Swan to suffer a mental 'breakdown': Swan v Monash Law Book Co-operative at [16]. Dixon J found (at [246]) that Ms Swan's injuries were "extremely onerous and deleterious" and continued (at [246]-[248]):

> *In addition to the primary symptoms of her Adjustment Disorder/Depressive condition, continuing anxiety and depression, that have been described by the medical witnesses, the plaintiff has somatic symptoms including temporomandibular joint dysfunction with bruxism and tinnitus, chronic insomnia, pain, including migraine and headache, anxiety, a disabling sensitivity to antidepressants, high blood pressure, and debilitating rashes and skin irritations that have all required separate diagnosis, and continue to require separate ongoing management and treatment. ……I am satisfied that the plaintiff remains substantially compromised in most aspects of her life, which has been reduced to one of isolation and disconnection from her family and friends and from the world around her. The plaintiff has surrendered her personal independence, lost her confidence, and lost her capacity to take interest in and derive pleasure from the stimulus in life. This has been a substantial loss of enjoyment of life, with much pain and suffering, both mental and physical.His Honour awarded Ms Swan $300,000, as damages for pain and suffering and enjoyment of life. In so doing, his Honour referred (at [261] to [263]) to Willett v Victoria and Amaca Pty Ltd v King, observing (at [261]) that "once liability has been determined, the starting point for the assessment of damages for pain and suffering and loss of enjoyment of life must be that it was common ground that the plaintiff had suffered a serious mental disturbance of which the respondent's conduct was a cause".*

Justice Kenny also referred to *Nikolich*[15], noting Mr Nikolich had received around $80,000.00 in general damages (in circumstances not dissimilar to the Applicant in *Oracle*) and the decision of the Full Court in *Walker v Citigroup Global Markets Australia Pty Ltd* (2006) 233 ALR 687 ("*Walker v Citigroup*"), which increased the general damages awarded from $5,000.00 to $100,000.00.

In coming to a conclusion that the award of $18,000.00 ought be substituted for a higher amount of $100,000.00, Just Kenny held[16],

> *"Putting aside comparisons with general damages in negligence, including in connection with workplace bullying and harassment, and in other actions,* ***it is clear that continued adherence in sex discrimination cases, including sexual harassment cases, to a 'range' of damages awards that has not absorbed the increases evident in awards in other fields of litigation has resulted in an award in Ms Richardson's case that, judged by prevailing community standards, is disproportionately low having regard to the loss and damage she suffered****. As noted earlier, 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. Indeed the range has remained fixed despite changing views of what might be "*sums which are generally felt to be excessive*":* Hall v A & A Sheiban *at 256. In that case, in addition to cautioning against such excessive sums, Wilcox J (at 256) implored that while:*

[15] *Nikolich v Goldman Sachs JBWere Services Pty Limited* [2006] FCA 784 ("*Nikolich*").
[16] *Oracle*; [117].

... damages for... injury to feelings, distress, humiliation and the effect on the claimant's relationships with other people are not susceptible of mathematical calculation ... [t]o ignore such items of damage simply because of the impossibility of demonstrating the correctness of any particular figure would be to visit injustice upon a complainant by failing to grant relief in respect of a proved item of damage."

INCREASED GENERAL DAMAGES FOLLOWING ORACLE

Huntley[17] involved a claim of discrimination on the ground of disability in which the applicant was ultimately awarded $75,000.00 in general damages, plus significant damages for economic loss (in the amount of around $100,000.00). Ms Huntley suffered from Crohn's Disease and Idiopathic Hypersomnolance[18]. The applicant was diagnosed with the Crohn's disability in June 2009, following related surgery on 24 June 2009. As a result, Ms Huntley was unfit for work for a period between 22 June 2009 and 3 July 2009 and from 30 July 2009 to 31 August 2009[19].

As a result of the Crohn's disability, Ms Huntley required frequent bathroom access and was restricted in her ability to travel without "immediate" access to a bathroom. Her access requirements could not be anticipated and were often "urgent". This meant she was unable to attend to the full range of work she was required to do in her substantive position of Probation and Parole Officer, including (but not limited to "field work"). As a result she negotiated an informal arrangement with her employer, which changed her duties as set out below and lasted from 31 August 2009 until March 2010[20].

1. She did not perform home visits for the cases, or reports, allocated to her. These were performed by her supervisor, or her PPO colleagues.
2. Her case load was reduced from over 140 hours per month to no more than 80 hours per month. She continued to be assigned "offenders" of all "risk levels".
3. She was permanently placed on "intake" duties.
4. She was given the "additional duty of being responsible to meet with all 'walk-ins'."
5. She responded to all external enquiries from other District Offices and Parole Units.
6. She carried out ad hoc administrative tasks as required.
7. She undertook further report writing and administrative tasks to relieve her colleagues who were in turn relieving her of the need to perform home visits

In March 2010, the respondent advised the applicant that the informal arrangement could not continue due to "constraints that it placed on the operations in the workplace". No constraints were identified, no formal workplace assessment was conducted, and no complaints from co-workers were provided before the decision to terminate the informal arrangement was made. Ms Huntley was referred to a medical examiner and determined to be unfit for duties, largely on the basis she could not undertake field visits. The applicant argued that the medical examiner was not provided with the inherent requirements of the role, nor were they asked to identify any reasonable adjustments[21].

Ms Huntley was offered alternative positions working with prisoners, which she rejected[22]. In

[17] *Huntley v State of NSW, Department of Police and Justice (Corrective Services NSW)* [2015] FCCA 1827 (3 July 2015) ("*Huntley*").
[18] Like narcolepsy, it is a condition characterised by excessive sleepiness. Patients also experience difficulty in waking (either in the morning or at the end of nap periods during the day). "Idiopathic" means "of unknown cause".
[19] *Huntley*; [20].
[20] *Huntley*; [21]-[24].
[21] *Huntley*; [29].
[22] *Huntley*; [31].

September 2010, she was successful in obtaining a temporary position on merit with the Corrections Intelligence Group during which she disclosed the extent and nature of her disability. That position came to an end in May 2011 and the applicant again sought redeployment. In about July 2011 she was diagnosed with Idiopathic Hypersomnolance, around which time she took further sick leave and requested that she be allowed to complete office duties at home. That request was rejected and no reasons provided. There was internal discussion regarding concerns with her sick leave. Such discussions were not disclosed to the Applicant, who was applying for other jobs from May 2011[23].

The respondent gave the applicant two choices in a meeting held in May 2011, medically retire or undertake further medical assessments. The applicant refused to medically retire and went home very upset by this meeting. The applicant argued this had exacerbated her diagnosis of depression, which developed after she had been diagnosed with Crohn's Disease.

The applicant sought a temporary transfer to the police. That application was not addressed by the respondent who determined she was unsuitable for such a transfer due to her condition. The applicant was advised of this and expressly requested that she be consulted before decisions were made in relation to her disease. The applicant says the respondent simply refused to consider her requests contrary to its obligations to assess whether she was suitable in the context of reasonable adjustments[24]. In general it was the applicant's argument that the respondent failed to make the following reasonable adjustments[25].

1. *CSNSW's failure to assess the adjustments put in place in September 2009 and to ascertain whether they were reasonable and could continue before advising Ms Huntley in March 2010 that they could not continue.*
2. *CSNSW's failure to consider and make reasonable adjustments to the PPO role in the period of March 2010 until early July 2010 when it determined that she was substantively unfit for the PPO role.*
3. *The failure to make reasonable adjustments for Ms Huntley to enable her to continue in the CIG secondment.*
4. *The failure to consider or make reasonable adjustments for Ms Huntley in or around June 2011 when Ms Huntley was referred by Ms Lobley for a second medical assessment by Dr Crowle.*

While this was also (successfully) argued as a breach of contract case[26], the applicant was successful on the claims of disability discrimination[27], notwithstanding the respondent's reliance on the defence of unjustifiable hardship on the basis the applicant was unable to carry out the inherent requirements of the job (which they put at around 80%). As Judge Nicholls put it[28],

> *Having regard to what, ultimately, was admitted into evidence and in particular the oral evidence given by Mr Morgan, Ms N Smith and Ms Caruana, I find that while not exclusively so, CSNSW's primary focus was not on providing reasonable adjustments in light of Ms Huntley's disability, but in dealing with a person whom they saw had an illness which necessitated long, disruptive and unplanned absences from work which impacted on the efficiency of the work of the office, and impacted on other staff.*

[23] *Huntley*; [32]-[38].
[24] *Huntley*; [49]-[52].
[25] *Huntley*; [212].
[26] Including the terms of: trust and confidence; safe work term; good faith term; reasonable adjustment term; and the policy compliance term. *Huntley*; [56] and [438]-[454].
[27] *Huntley*; [49]-[52] and [436]-[437].
[28] *Huntley*; [259]-[261].

It is understandable that managers and supervisors at the Campbelltown Office would seek to focus on the work that needed to be done, the efficiency and effectiveness of the office's operations, and the wellbeing of other staff.

However, the DDA, and the reliance by CSNSW on s.21A of it, in defence of Ms Huntley's assertions against it, requires a balance between those proper considerations set out above, and the efforts to provide reasonable adjustments in light of Ms Huntley's disability. CSNSW did not achieve this balance. While, on the evidence, it may be accepted that the task faced by CSNSW contained some difficult issues, these cannot be said to excuse CSNSW's failure to provide, or to attempt to provide, reasonable adjustments to Ms Huntley.

I set out the Judge's reasoning with regard to general damages below[29].

Ms Huntley referred to Alexander v Cappello and Anor [2013] FCCA 860 at [148] – [149] (per Judge Driver) to differentiate between what were said to be "different" classes of claims with respect to general damages:

1. *Claims where there is no medical or expert evidence,*
2. *Claims with medical expert evidence but the damage does not show psychological trauma, and*
3. *Claims where the medical or expert evidence demonstrates significant psychological trauma.*

Ms Huntley submitted that on the evidence, her case falls within the third category identified by his Honour (at [148]):

> *"...Claims where the medical or expert evidence demonstrates significant psychological trauma. These cases have led to awards in excess of $20,000 and up to $100,000. Cases such as Poniatowska and Lee along with VCAT decision Tan v Xenos are cases of this kind."*

Plainly, CSNSW did not cause, by its conduct, Ms Huntley's disabilities. The focus for current purposes must be on whether CSNSW's conduct, as described variously above, caused further, or "contributed to", "trauma" to Ms Huntley, and "pain and suffering" (*Richardson v Oracle Corporation Australia Pty Ltd [2014] FCAFC 82 ("Richardson") at [69] – [70] and [96] – [103]).* ***Further, if so, whether it was significant, as she now asserts, such as to support the claim for $100,000 in general damages****.*

On the evidence, I find that Ms Huntley was diagnosed as suffering depression prior to the events of May 2011. Plainly CSNSW's conduct therefore cannot be said to have caused this condition. However, I agree, on the evidence as referred to above, that CSNSW's conduct did result in an acute and, on the report from Ms McIntyre, chronic impact on Ms Huntley*. I note Ms McIntyre's report as to the relevant "original diagnosis" of "Major Depressive Disorder" as being "moderate in severity". This was linked to what were described as "acute and/or chronic stressors", which on the evidence I accept, resulted from CSNSW's conduct as variously described above.*

For current purposes, it is also important to note Ms McIntyre's prognosis that the "ongoing acute and chronic stressors and health conditions are likely to sustain her diagnosis" (see page 4 of the report). I understand this to mean that the stressors on Ms Huntley, and her

[29] *Huntley*; [469]-[474].

"health" conditions, are both relevant to the prognosis.

I accept that CSNSW's conduct caused psychological injury to Ms Huntley. In the circumstances that injury was "significant". However, this must be seen in light of Ms McIntyre's opinion (see page 4 of the report):

> *"However, Mrs. Huntley's expression of current symptomology remains linked to, and is a function of, the following factors:*
> *anti-depressant usage; active participation in treatment both medical and psychological; her reported level of current workplace functioning; and absence or presence of on-going chronic and acute stress(ors). Should any of these factors change there is likely to be a shift in Mrs. Huntley's presentation."*

In all, the impact on Ms Huntley of CSNSW's conduct has been significant in the sense of the psychological trauma she has suffered. In reaching this conclusion I have taken into account that the depression in some degree was pre-existing, the significant impact of CSNSW's conduct, and Ms McIntyre's diagnosis of Ms Huntley's psychological symptomology meeting the criteria for "Major Depressive Disorder", as being described as "mild" on balance. I also accept that the impact of CSNSW's actions caused Ms Huntley "pain and suffering", through emotional distress. I am of the view that an amount of $75,000 is appropriate as general damages.

That is, despite having a pre-existing illness (depression arising after the Crohn's diagnosis) the Applicant still obtained significant general damages due to the clear medical evidence the discriminatory treatment had exacerbated the pre-existing illness. This case has very significant implications for claims under the FWA and underlines the importance of clear, targeted medical evidence that links the specific diagnosis, or exacerbation thereof with the discriminatory conduct.

Murugesu[30]

In Murugesu No. 1[31], an applicant (a delivery driver) brought a claim under the *Racial Discrimination* Act 1975 (Cth) ("RDA") against Australia Post in respect of a supervisor (working at Port Melbourne depot) who made a number of racist and offensive remarks to the Applicant, including:

(a) asking him to "*kiss my white arse*";

(b) calling him "*a f@*king black bastard*"*;* and

(c) telling him to "*going back to Sri-Lanka*" and "*slave work*".

The applicant, a Sri Lankan Tamil, found these remarks offensive and distressing.

The driver brought a claim of racial discrimination against the supervisor and Australia Post in respect of the remarks as well as an alleged physical assault by the supervisor, after which the driver ceased working.

Australia Post denied the conduct occurred but the Federal Circuit Court of Australia found that conduct (amounting to insulting behaviour), occurred and amounted to racial discrimination in breach of the Act because it involved a distinction based on the driver's race and colour and

[30] *Murugesu v Australian Postal Corporation & Anor* [2015] FCCA 2852 (12 November 2015) ("*Murugesu No.1*").
[31] *Murugesu v Australian Postal Corporation & Anor* [2015] FCCA 2852 (12 November 2015) ("*Murugesu No.1*").

national and ethnic origin, which had the effect of nullifying and impairing his right to just and favourable conditions of work. The Court held this included a right to work in an environment free of racist insults. The alleged assault was held not to amount to unlawful discrimination because it occurred in relation to a safety issue and because the supervisor would have responded in the same way with any other employee who was not Sri Lankan.

Australia Post otherwise argued it ought not be held liable because it had taken reasonable steps to prevent the conduct. While the Court found that Australia Post's training regimes and official position against racial or other unlawful harassment were "exemplary", that could not prevent a finding against it where it failed to address the driver's complaints in accordance with the official position. That is, it had not taken all reasonable steps to prevent the supervisor's conduct. The Court found that an effective response on occasions when allegations of racist conduct were raised was entirely lacking. Further, the complaints were met with scepticism at an early stage and nothing happened even after the driver complained directly to senior members of management, including the State Manager. This was despite a clear and unqualified assertion of "*harassment/bullying/racism*" at the depot by another member of staff.

The Court stated there was a "*curious lack of active engagement*" with the complaints and they did not produce any "*significant or energetic investigation*".

In relation to the seriousness and the impact on the Applicant, Justice Burchardt stated.

> *Taking all of the evidence into account, I find that the applicant was subjected to racial taunts in the form of being called "a black bastard, a fucking black bastard, told to go home to Sri Lanka by boat and subject to remarks equating his labour to slave labour. I do not think that these remarks took place on anything like as many occasions as the applicant asserts. They were, in my view, more probably than otherwise isolated.*
>
> *Equally, however, there is no doubt that they were deeply distressing to Mr Murugesu.*[32]

Murugesu No. 2[33] addressed the issue of damages to be awarded in respect of breaches of the *Racial Discrimination Act 1975 (Cth)* ("RDA") applying *Oracle*. Importantly, the Applicant relied upon a medical report for his claim of $100,000 for pain and suffering. While that report supported a finding that the Applicant was suffering from anxiety and depression, unfortunately, that diagnosis was said to arise primarily from the assault, which was found not to be unlawful racial discrimination. Thus the ultimate award of $40,000.00 (awarded applying *Richardson* and *Gama*) was made on the basis of the personal upset suffered by the Applicant alone, rather than the medical evidence, which opined that the diagnosis flowed from an event not considered to be discrimination.

In making the award, Justice Burchardt stated,

> *It is all too easy to say that these matters were intermittent and not at the worst end of the possible scale. Nonetheless, to be routinely described over an extensive period of time as a 'black bastard, a fucking black bastard' and told to 'go home to Sri Lanka by boat' and subject to remarks equating your labour with slave labour is extraordinarily demeaning and offensive. Noting as I do the awards made referred to in schedule D to the respondent's*

[32] *Murugesu v Australian Postal Corporation & Anor (No.2)* [2016] FCCA 2355 (15 September 2016) ("*Murugesu No.2*"); [224]-[225].
[33] *Murugesu v Australian Postal Corporation & Anor (No.2)* [2016] FCCA 2355 (15 September 2016) ("*Murugesu No.2*").

submissions (albeit with the caution referred to by Bromberg J in Ewin), I think that an award of some $40,000 by way of compensation is appropriate.[34]

In coming up with the figure of $40,000.00, regard was had to other awards in similar circumstances[35], including *Abdulrahman v Toll Pty Ltd* [2006] NSWADT 221 what the respondent describes as remarks of an offensive nature made to "*two to three times a week during a six month period and in staff meetings*" between February 2004 to 12 August 2004, which were found to have caused the applicant a great deal of distress, humiliation and embarrassment, gave rise to an award of $25,000 in general damages. His Honour otherwise declined to make orders for aggravated or exemplary damages, noting in relation to the latter the unsettled nature of the case law as to whether such damages were in fact available[36].

DECISIONS UNDER THE FWA

Authority that Oracle Applies to Adverse Action Claims

The Federal Circuit Court has been applying the reasoning of Oracle to determine awards for compensation of general damages for pain and suffering since the decision was delivered as set out below.

Heraud[37]

Heraud Liability[38] concerned a claim brought by a woman whose position had been made redundant during her parental leave. Ms Heraud was the National Operations Manager for Roy Morgan at the time that she took maternity leave. In February 2014, Ms Heraud was advised there would be changes to her role and reporting lines. In early May 2014, Ms Heraud attended a meeting and was advised her position would likely be made redundant and that an appropriate redeployment option was within a newly created division called the "Research Centre". Two days after this meeting Ms Heraud emailed her employer requesting flexible work arrangements, after which it was determined that the person relieving her in her substantive position (to be made redundant) would continue in that position and she would not be offered the Research Centre position. Further, her request for flexible work was denied on the basis there was no role to which to return. Ms Heraud then brought an adverse action claim alleging adverse action including:

(a) failing to consult with her,
(b) not returning her to her role and
(c) terminating her employment),

The workplace rights relied upon were those allowing her to return to work/parental leave and prohibiting discrimination (on the grounds of family responsibilities and pregnancy).

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[34] *Murugesu No.2*; [80].
[35] Noting "any comparison with other cases must be undertaken with the greatest of caution"; *Murugesu No.2* [75]. No doubt a reference to Justice Kenny's decision in *Oracle* in which she accepted that conducting a review of the decided cases for the purpose of providing a range for damages awarded forms part of, but does not constitute the entirety of, the relevant inquiry, stating, "it can be dangerous to rely too heavily on such a range in assessing the quantum of damages"; [90].
[36] *Murugesu No.2*; [81]-[83].
[37] *Heraud v Roy Morgan Research Ltd* [2016] FCCA 185 ("*Heraud Liability*") and *Heraud v Roy Morgan Research Ltd (No 2*) [2016] FCCA 1797 (15 July 2016) ("*Heraud Damages*"). Decisions of Judge Smith handed down in Melbourne.
[38] *Heraud v Roy Morgan Research Ltd* [2016] FCCA 185 ("*Heraud Liability*")

The Court held that the employer engaged in adverse action in relation to three of the seven claims as set out below.

- Deciding not to return the employee to her pre-parental leave position.
- Deciding not to make any research positions available (after creating an expectation that the employee would be redeployed).
- Terminating Ms Heraud's employment for the reason (or reasons including that) she had requested flexible.

Key to making the above findings, was the fact that the employer provided no explanation as to why the decision-makers (being the General Manager of Operations and the HR Director, both not longer employed by Roy Morgan at the time of the hearing) were not called to give evidence. Thus the absence of any evidence in relation to those decisions meant that Roy Morgan had failed to discharge the reverse onus.

In *Heraud Damages*[39], Judge Smith awarded $20,000.00 in circumstances where there was no psychiatric diagnosis and limited evidence of distress as set out below[40].

> *I am satisfied that at the time the Applicant was terminated from her employment, she was in a vulnerable position. She was on maternity leave, with a young baby, seeking to return to work with the Respondent in a senior position, which she derived substantial enjoyment from. Prior to the termination she had occupied positions of responsibility and it is logical to assume her reputation and status was part of the enjoyment of employment.*
>
> ***I accept that the Applicant suffered acute distress, loss of enjoyment and humiliation by being terminated, and by being effectively frozen out of the redeployment process. Although she has not produced medical evidence regarding her distress, nor corroborative evidence regarding the impact of the Respondent's conduct on her, I am of the view that the Court should not diminish her suffering, taking into account that the general protection provisions operate in the context of beneficial legislation, designed to protect those employees who take leave because of the birth or the adoption of a child. I am satisfied that prevailing community standards demand recognition of the fundamental entitlement of an employee to take paternal leave to care for their child or children, safe in the knowledge that their employment and future will not be prejudiced because they have exercised their right to take paternity leave, including to request flexible working arrangements. I am satisfied that community standards now recognise the distress and suffering an employee will experience when those statutory rights are contravened by an employer."***
> [Emphasis added.]

This decision is also significant because of the high awards of penalties (a total of $52,000.00) paid directly to the Applicant in respect of the three breaches[41].

Collison [42]

In *Collison*[43], delivered on the same day as Heraud, there was arguably more significant evidence

[39] *Heraud v Roy Morgan Research Ltd (No 2*) [2016] FCCA 1797 (15 July 2016) ("*Heraud Damages*").
[40] *Heraud Damages*; [72]-[73].
[41] *Heraud Damages*; [122].
[42] *Collison v Brighton Road Enterprises Pty Ltd T/A The Grosvenor Hotel & Anor (No.2)* [2016] FCCA 1798 (15 July 2016) ("*Collison*").

of distress and injury but the Court only awarded $10,000 in general damages. This appears to be on the basis there was an exacerbation of an existing psychiatric injury unrelated to work as set out in the below extract,

> *In this case, the Applicant was suffering anxiety, distress and taking prescribed medications before the contraventions. Her unchallenged evidence is that she was managing, nevertheless, to work until she was dismissed. I am satisfied that the conduct of the Second Respondent in terminating her employment in contravention of the Act, both prolonged and exacerbated these symptoms, with the consequence she suffers, in addition, panic attacks, loss of self-esteem and experiences moments of suicidal ideation.*
>
> *I am satisfied that an award of compensation for this loss in the amount of $10,000.00 is neither derisory nor excessive and I will so Order.*[44]

Arguably this case is on all fours with *Huntley*, the big difference being the lack of medical evidence.

MUA v FWO[45]

The decision of the Full Court in *MUA v FWA* was made after both of the above decisions. In that case, the Full Court considered whether the reasoning in *Oracle* applied to determinations of general damages for adverse action claims.

MUA v FWO was an appeal from a decision at first instance that there was a breach of section 346 of the FWA in respect of conduct occurring during the negotiation of an enterprise agreement Specifically, there was strike action during which some employees continued to work and the appellants published a poster called five such employees 'scabs'. The appeal concerned, in part, whether the primary judge erred the approach to determining compensation. Both parties, on appeal and at first instance apparently agreed that *Oracle* applied.

On appeal it was argued that the amount of compensation ordered to be paid by primary judge was in excess of the discretion. Those orders required payment of $20,000 to four of the employees and $40,000 to the fifth (a Mr Watson who was said to have been treated worse than the others), being a total payment of around $120,000.00.

Judges in the majority[46] considered that the award of damages ought not be overturned by reference to *Oracle*. They do so without providing any reasons for that view. Although such a failure to provide reasons could give rise to an appeal, it was not the subject of appeal on that ground as it would not have assisted the appellant given their findings by reference to *Oracle*, despite the deficiencies of the reasons. Specifically, the Appellant alleged that award failed to have proper regard to the different circumstances of each employee and was otherwise "manifestly excessive" and "unreasonable and plainly unjust". The Full Court rejected those contentions[47]. The majority of the Full Court quoted what the primary judge held in the penalty judgment, as set out below[48].

> *77 I have set out in the principal judgment the emotional distress and the fear which each*

[43] Being another decision (like *Heraud*) from Justice Smith in Melbourne.
[44] *Collison*; [62]-[63].
[45] *Maritime Union of Australia v Fair Work Ombudsman* [2016] FCAFC 102 (11 August 2016); 264 IR 121 (*MUA v FWO*).
[46] Ibid; Tracy and Buchanan JJ
[47] Ibid; 131, [28].
[48] Ibid; 131-132, [29].

of the named employees suffered. In my view, in awarding compensation, a distinction is to be drawn between Mr Daly, Mr Donaldson-Stiff, Mr Mawbey and Mr Scott, on the one hand and Mr Watson, on the other hand.

78 An important distinguishing aspect of this case, from the cases to which I have referred above, is that each of the five named employees experienced a continuing fear of physical harm to themselves and their family, and the fear of damage to property. This aspect of the emotional distress experienced by each of the named employees should find expression in the amount of compensation awarded.

79 In relation to each of Mr Daly, Mr Donaldson-Stiff, Mr Mawbey and Mr Scott, I award compensation in the sum of $20,000. In making an award in this sum, I have taken into account that Mr Daly and Mr Donaldson-Stiff after the scab poster action again elected to work during a strike, and that I found in the principal judgment, that Mr Daly exaggerated the extent of his emotional distress.

80 Mr Watson did not work during the strike. Mr Watson was, nevertheless, named as a "scab" because he fraternised for a very brief time with the incoming crew who attended for work as the first shift to work during the strike period.

81 Mr Watson was unable to sleep for a number of nights after he found out about the scab poster. He felt a particular outrage because he had not worked during the strike and he had been falsely denigrated by Mr Tracey as having done so. When he sought an explanation from Mr Tracey as to why he was named in the scab poster and sought an apology from Mr Tracey, Mr Tracey insulted Mr Watson and refused to give an apology. Mr Watson's emotional distress was further exacerbated by the fact that Mr Tracey had told him that he would not be able to work again in the maritime industry in Western Australia and, on the basis of the threat, Mr Watson changed his plans which had been to work overseas for some time before returning to Australia. Further, Mr Watson feared that he and his family would suffer harm at the hands of disgruntled workers.

The majority of the Full Court then held that *"We do not accept that any of those awards of compensation exceeded what was permissible in the proper exercise of the primary judge's discretion*[49]**"**. In making that finding, the Full Court addressed arguments that the Judge had miscarried in the discretion by failing to have proper regard to the approach taken on appeal in *Oracle*. Specifically, it was suggested that the award *Oracle* concerned a "severe psychological injury", thus distinguishing it from the facts of this case. Thus, it was argued by the Appellant that the compensation awarded by the primary judge too closely approached the level in *Richardson*, absent the required higher level of injury. The Full Court rejected these submissions stating that the injury in Oracle was not "*found to be severe in the sense suggested in the appellants' submissions*[50]**"** and further,

> *"The primary judge discussed Richardson. We can see no error in his consideration of that case. It would not govern the exercise of discretion in the present case.* [51]**"**

The third (Bromberg J), expressly followed *Oracle* in arriving at a different finding[52], that he would reduce the damages, based on the express findings of the trial judge. Specifically, Bromberg J held it appropriate to reduce the largest payment to a Mr Watson from $40,000 to $10,000 and the

[49] Ibid; 132, [30].
[50] Ibid; 132, [31].
[51] Ibid; 132, [31].
[52] Ibid as per Bromberg J from [82] in relation to Oracle.

awards of $20,000 to $7,500 for the awards made to Mr Daly, Mr Mawbey, Mr Donaldson-Stiff and Mr Scott[53]. He did so on an analysis of the law that held that:

* *Oracle* was authority for a requirement of parity in awards for compensation for similar types of damages;

* the claims the subject of these proceedings did not give rise to any psychiatric injury (unlike the Oracle case);

* the Court ought have regard to decided cases based on legislation in which awards of damages would be made without the necessity for medical evidence of psychiatric injury to ensure that the compensation awarded was not in excess of the discretion.

In relation to the last of the above matters, Bromberg j stated,

> *In the case at hand, non-economic loss was suffered in the absence of any physical injury or psychiatric illness. At common law, and save for exceptional circumstances, a person is not liable in negligence for being a cause of distress, alarm, fear, anxiety, annoyance, or despondency, without any resulting recognised psychiatric illness: Tame v New South Wales (2002) 211 CLR 317 at [7] (Gleeson CJ), [44] (Gaudron J), [171], [175] (Gummow and Kirby JJ), and [285] (Hayne J). Negligence cases are therefore not likely to be of much assistance in throwing up circumstances for the assessment of compensation for emotional distress comparable to those of this case. I turn, then, to other fields.*
>
> *Cases in which compensation for non-economic loss has been awarded pursuant to s 85B of the Sentencing Act 1991 (Vic) (the Sentencing Act) have the potential to provide some guidance….*[54]

In my view, the approach of Bromberg J is the correct approach as it provides clear reasoning as to why and how *Oracle* ought to apply. You would otherwise have to say that this issue remains unsettled in the absence of clear reasons to the contrary (i.e. reasons do not appear to have been given by the majority as they would not have changed their view). Having said that, in terms of the level of damages, it must be said that this case supports awards at the higher end as already determined in other cases such as those already described above, albeit by reference to *Oracle*.

It is also to be noted that cases post-*Oracle* that have not had regard to *Oracle*, have often resulted in the award of damages being reduced on appeal[55].

SUMMARY

The current state of the case law, having regard to the above cases, the minimum amount of general damages to be awarded in the absence of any significant evidence beyond mere upset or psychiatric injury caused by the adverse action is likely to be around $20,000.00 to $40,000.00. Increasingly, discrimination case law will be relevant to argue for increases general damages in the Fair Work jurisdiction of the Federal Circuit Court. Indeed, it is clear that where discrimination law has been relied upon (and specifically *Oracle*), applicant's damages have been increased.

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[53] Ibid as per Bromberg J [155] in relation to the compensation he would have substituted.
[54] Ibid; 152; [127]-[128].
[55] See for example; *RailPro Services Pty Ltd v Flavel* [2015] FCA 504 (22 May 2015); [179] as per Perry J, being an appeal from the decision of Judge Simpson on damages and penalty in *Flavel v Railpro Services Pty Ltd (No.2)* [2013] FCCA 1449 (27 September 2013).