SEXUAL HARASSMENT IN THE ERA OF #METOO
The impact of #Metoo on claims and complaints. What can be done to avoid such claims and the likely damages of such claims.
Kellie Edwards

1. As noted by Tvede[1],

> *There are two incontrovertible facts about sexual harassment: workplace sexual harassment remains prevalent; and workplace sexual harassment costs employers money.*

2. This paper looks at recent developments in discrimination law in Australia addressing the #MeToo phenomenon, providing a brief history and assessing:

   a. Recent legislative changes to the Australian Human Rights Commission Act 1986 (Cth) ("AHRCA");

   b. What (if any impact) has it had on complaints to date;

   c. What can be done to avoid such claims; and

   d. damages.

BRIEF HISTORY

3. The #MeToo hashtag came from a woman called Tarana Burke[2], a youth worker and activist. The term has been around for a while, Ms Burke wore a #MeToo T-shirt to a march to End Rape Culture in Philadelphia in 2014. In an interview she gave to journalist Cristela Guerra in the Boston Globe, she described the genesis of the term as arising from an interaction she had with a teenage girl in which that girl told her about sexual abuse at the hands of her step-father.

> *"I watched her walk away from me as she tried to recapture her secrets and tuck them back into their hiding place. I watched her put her mask back on and go back into the world like she was all alone and I couldn't even bring myself to whisper…me too.* [3]*"*

4. Thinking about her response to that event later, caused Ms Burke to use that expression of powerlessness to be a method of identification and supportive group building that could only have the reach it now has because of social media.

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[1] Tvede, T.*; "Taking "all reasonable steps" to prevent sexual harassment :Richardson v Oracle Corporation Pty Ltd"* (2013) Employment Law Bulletin 25.
[2] *"Where did 'Me Too' come from? Activist Tarana Burke, long before hashtags";* Guerra, Cristela; Boston Globe; 17 October 2017 at https://www.bostonglobe.com/lifestyle/2017/10/17/alyssa-milano-credits-activist-tarana-burke-with-founding-metoo-movement-years-ago/o2Jv29v6ljObkKPTPB9KGP/story.html accessed on 21 February 2018.
[3] *Ibid.*

5. Later, after it was picked up by Alyssa Milano (the actress), Ms Burke said,

> *"It's beyond a hashtag. It's the start of a larger conversation and a movement for radical community healing[4]."*

6. The fact that Ms Milano was an actress and that those who tweeted after her were also (many of them to begin with) associated with the movie industry meant the expression gained traction and wide media coverage almost immediately. This would never have happened so quickly without social media and it spread very quickly around the world and into every kind of workplace.

INCREASE IN COMPLAINTS?

Complaint to the Australian Human Rights Commission ("AHRC")

7. In the Australian context, one may think it would mean a significant increase in formal complaints. That appears not to be the case, based on figures I have been able to obtain from the Australian Human Rights Commission ("AHRC"). Those figures show no marked increase in complaints from October 2017 as set out below.

    a. September 2017 – 22 complaints;
    b. October 2017 – 18 complaints;
    c. November 2017 – 24 complaints;
    d. December 2017 – 22 complaints; and
    e. January 2018 – 20 complaints[5].

8. Putting those claims in perspective, in the year ending 30 June 2017, the AHRC received around 14911 enquiries[6] (53% by phone on the National Information Hotline). This is down from 16,836 the previous year[7] and 20,020 the year before that[8]. Of those initial enquiries only 1939 written complaints are received[9] and of those:

    a. 39% concern disability;
    b. 24% concern sex (i.e. around 465);
    c. 21% concern race;
    d. 8% concern age; and
    e. 8% concern matters under the AHRC Act[10].

    The vast majority of written complaints are about treatment occurring in employment (79%)[11].

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[4] *Ibid.*
[5] Information supplied directly from the AHRC to the author.
[6] Australian Human Rights Commission 2016-2017 Complaint Statistics; Australian Human Rights Commission 2017; (Sydney) ("2017 Statistics"); 1.
[7] Australian Human Rights Commission 2015-2016 Complaint Statistics ("2016 Statistics"); Australian Human Rights Commission (Sydney); 1.
[8] Australian Human Rights Commission 2014-2015 Annual Report ("2015 AHRC Report"); Australian Human Rights Commission (Sydney); 1.
[9] I note it was 2,388 in year ending 2015 and .
[10] 2017 Statistics; 1.
[11] 2017 Statistics; 1.

9. Of the 1128 conciliations held by the AHRC, around 75% settle at mediation. Thirty one per cent (31%) of those negotiated outcomes included terms, which had benefits for people other that the Complainant (including the introduction of policies and training)[12]. Less than 2% of complaints resulted in applications to the Federal Circuit Court or the Federal Court[13]. So of the 1128 conciliations held, only about 22 go to Court.

10. Sexual harassment amounts to around 24% of complaints under the SDA (being 247 in number), second only to complaints of sexual discrimination (which is around 41% of the total number of complaints under the SDA)[14]. This percentage appears to be gradually rising as a proportion of total complaints.

    a. In 2014 there were 222 which was 18% of the total complaints[15].

    b. In 2015 there were 212 which was 19% of the total complaints[16].

    c. In 2016 there were 217 which was 22% of the total complaints[17].

11. That there were only 247 written complaints of sexual harassment to the AHRC this year is interesting, given the research shows that about one in every two women say they have experienced sexual harassment in their lifetime and around 17% saying they have experienced it in the last 12 months. The latest research from the ABS also says there was a statistically significant increase (2%) in the report of sexual harassment by both women and men by comparison to research done in 2012[18].

Claims under the SDA in the Federal Jurisdiction

12. Analysing the number of cases determining claims of sexual harassment over the last four years shows:

    a. There was no determined claims concerning sexual harassment under the SDA in 2017 and 2016;

    b. There were two claims in 2015; and

    c. 1 in 2014.

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[12] 2017 Statistics; 1.
[13] 2017 Statistics; 2.
[14] 2017 Statistics; 16.
[15] Australian Human Rights Commission Annual Report 2013-2014; Australian Human Rights Commission 2014; (Sydney) ("2014 AHRC Report"); 141. It was the same percentage in 2008, as reported in the 2008 Annual Report (page 50) accessed 21 February 20189 at <https://www.humanrights.gov.au/sites/default/files/content/about/publications/annual_reports/2007_2008/AR_2007_2008_complete.pdf >.
[16] 2015 AHRC Report; 145.
[17] 2016 Statistics; 1.
[18] 4906.0 - Personal Safety, Australia, 2016; ABS (Canberra); 2016; accessed online <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4906.0~2016~Main%20Features~Experience%20of%20Sexual%20Harassment~29>.

Impact of Changes to the AHRCA

13. The *Human Rights Legislation Amendment Bill* 2017 (Cth) ("Amending Act") came into affect in about April 2017 and was the result of a Parliamentary inquiry into the operation of s 18C of the *Racial Discrimination Act* and certain aspects of the *Australian Human Rights Commission Act 1986 (Cth*) ("AHRCA"). It is unfortunate but true to note that the changes to the AHRCA were made without any broader consultation with groups other than those representing people from various multicultural and ethnic groups. In short, the changes:

    a. impose greater hurdles on applicants, including the requirement for the Court to take into account any offers made during conciliation of a complaint (entirely confidential previously – as per s 46PSA of the Amending Act) and

    b. grants greater powers to the President of the Australian Human Rights Commission, effectively allowing them to bring complaints to an end with limited review by the Courts[19].

14. In relation to the latter, it was the case that each of the matters listed under s 46PH prior to the Amending Act, provided a basis for the President to terminate and the termination provided jurisdiction to the Court. However, termination now means an end to the complaint (without leave being granted by the Court) unless the termination is on one of two grounds, being:

    a. where the President terminates the complaint under s 46PH(1)(h) (i.e. where the "President is satisfied that the subject matter of the complaint involves an issue of public importance that should be considered by the Federal Court or the Federal Circuit Court") or

    b. s 46PH(1B)(b) (i.e. where the President is satisfied that ""there is no reasonable prospect of the matter being settled by conciliation".

15. Problematically, there is no guidance provided in the legislation as to how Courts ought exercise the discretion. In that regard, it could be that the example of other similar legislation is to be followed, such as that found in NSW under the ADA, which has a similar regime in which the NSW Civil and Administrative Tribunal determines the matter anew (rather than as a review of the President's decision). This mark a fundamental shift in the work done and approach taken by the AHRC to date and is likely to further reduce the number of matters being the subject of application before a relevant Court.

16. The current framework already provides plenty of discouragement for complainants. The new six (6) month (discretionary) limitation is arguably inconsistent with the indirect discrimination provisions found in the *Disability Discrimination Act 1992 (Cth)* ("DDA"), which requires corporations to make reasonable adjustments and prevent a discrimination on criteria that applies equally to everyone but has a disproportionate effect on individuals with a disability. It is also problematic in terms

[19] Which are allowed to grant leave for terminated complaints to continue (as per s 46PO(3A) of the Amending Act), the basis upon which such leave shall be granted being a matter difficult to determine in the absence of case law.

of solicitors obligations to ensure the health and safety not just of their staff but clients. Those who have a psychiatric injury because of the discrimination often find it difficult to commence within 6 months. Further, the full extent of a psychiatric injury is not always apparent before two years has elapsed, thus the Amending Act, making changes without consultation with disability advocates is likely to significantly disadvantage those with a disability arising from the discrimination.

17. Discrimination law in Australia has also become one of the most complex jurisdictions, one that is almost impossible to navigate without legal assistance. In that context, applicants wishing to pursue such claims must therefore bear the burden of paying legal costs associated with doing so, along with the substantial risk that they may also be liable for legal costs associated with losing a claim.

18. It is no secret that respondents often spend much more on defending these claims than applicants have available to litigate these claims. Indeed, the former Disability Discrimination Commissioner, having successfully sued Railcorp in 2013 over their failure to make station announcements[20], applied under freedom of information laws to get access information regarding the level of funds used to defend his claim (heard over only 5 days by the then Federal Magistrates Court) and they amounted to a very substantial amount (i.e. more than $400,000[21]). That was an amount for which he may have been liable if he had lost. That risk of being liable for a respondent's legal costs is a very significant disincentive to all applicants in these types of claims - particularly where the outcome is often not about damages, but social change in a particular context.

AVOIDING CLAIMS

Need for Policies and Procedures

19. Have policies and procedures in place covering:

    a. the definitions of harassment and

    b. what people should do if they experience treatment they think might be sexual harassment,

    c. Not a 'one size fits all' approach.

    d. Policies and procedures must be tailored to meet the needs of the particular business. They ought not be inflexible as each case may need a different approach.

20. There are some very good resources online in relation to managing sexual harassment, such as the AHRC's "Effectively preventing and responding to sexual harassment: A Code of Practice for Employers (2008)"[22].

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[20] *Innes v Rail Corporation (NSW) (No 2)* (2013) 273 FLR 6.
[21] < http://www.smh.com.au/nsw/disability-case-costs-railcorp-420000-20130328-2gxn5.html>.
[22] Accessible at < http://www.humanrights.gov.au/our-work/sex-discrimination/publications/effectively-preventing-and-responding-sexual-harassment-0>.

21. In *Luke Colwell v Sydney International Container Terminals Pty Limited* [2018] FWC 174 (9 February 2018) Commissioner McKenna determined that an employer was correct in determining to sack an employee for sending a pornographic video to facebook friends including his workmates. There were interesting issues in the case about the connection to work because this was done well out of work time, but this case is interesting in this context, because of the direct link drawn between gender participation and sexual harassment by the employer. The employer is quoted in workplace Express as saying,

> "*The company has recently been pro-active in recruiting women to the waterfront through its innovative and market leading 'women as wharfies' program and is proud of the growing ratio of female employment within its teams.*
>
> "*There are company policies in place to create an environment for all employees that is free from harassment, and as such, while terminations are difficult at any time, the company will not tolerate obstructions to this workplace freedom."*

Further, Hutchison is reported to have been encouraging women to take up stevedoring roles, with its Port Botany workforce having 32, up from 4 since 2014[23].

22. That is, there is increasing acceptance that sexual harassment is a barrier to gender equity and some employers are being proactive about ensuring such policies are properly implemented and upheld on that basis.

Implementation

23. It is no used having policies and procedures if they are not implemented. Implementation means:

    a. Ensuring there is an induction procedure that involves making it clear to staff that they are expected to know and follow the policies;

    b. ongoing training to make sure staff do not forget;

    c. Monitoring/culture building; and

    d. Evaluating how the policies and procedures are going (e.g. could be qualitative or quantitative such as by assessing male to female ratios); and

    e. Ensuring procedural fairness in any investigation process (High Court has granted leave to appeal in Govier v Unitingcare Community [2017] HCATrans 183 (15 September 2017)[24]).

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[23] "Social media post had sufficient nexus with workplace: FWC"; Workplace Express at <https://www.workplaceexpress.com.au/nl06_news_selected.php?R=2&act=2&stream=1&selkey=56479&hlc=2&hlw=Luke+colwell&s_keyword=Luke+colwell&s_searchfrom_date=631112400&s_searchto_date=1519275426&s_pagesize=20&s_word_match=2&s_articles=1>.

[24] Counsel for the Appellant putting the case thus: *"We make the distinction between that statutory obligation in Paige and that which is in the control of the employer and we say specifically that the letters were found in fact to be insensitive and critical, that the risk of such an injury was reasonably foreseeable and that by the timing of delivering the content of the two letters, the respondent had failed to take reasonable care for the applicant's*

24. In relation to these matters, cases such as *Murugesu No. 1*[25] (addressed below) are instructive. I also note in the

Defences

25. Defences are not a method of "avoiding" complaints. However the steps outlined above, will go some way to assessing whether any defence is made out.

DAMAGES

Oracle Decision the Guide

26. It is now well accepted that damages must be in line with damages for personal injury claims and by reference to *Oracle*[26]*.* However given the dearth of recent cases on sexual harassment, regard must be had to the award of general damages more generally. That would lead one to the following general guide as set out below.

    a. No medical evidence but evidence of personal suffering is likely to result in an award of around $10,000-$40,000 (as per*Murugesu v Australian Postal Corporation & Anor* [2015] FCCA 2852 (12 November 2015) ("*Murugesu No.1*") an award of $40,000.00).

    b. Some medical evidence about exacerbation of existing psychiatric condition is likely to result in an award of around $75,000-$100,000 (as per *Huntley v State of NSW, Department of Police and Justice (Corrective Services NSW)* [2015] FCCA 1827 (3 July 2015) ("*Huntley*")).

    c. Medical evidence of psychiatric damage is likely to result in an award of around $100,000-$300,000 plus (as per *Richardson v Oracle Corporation Australia Pty Limited* (2014) 223 FCR 334 ("*Oracle*"), as per Kenny, Besanko and Perram JJ).

27. Greater detail of the two key decisions in relation to lower awards of damages are set out below.

Huntley[27]

28. *Huntley*[28] 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

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psychiatric health….- we distinguish Paige and say that the ratio in Paige is quite narrow and we invite this Court to look at the matter."

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

[26] *Richardson v Oracle Corporation Australia Pty Limited* [2014] FCAFC 82; (2014) 223 FCR 334 ("*Oracle*"), as per Kenny, Besanko and Perram JJ.

[27] *Huntley v State of NSW, Department of Police and Justice (Corrective Services NSW)* [2015] FCCA 1827 (3 July 2015) ("*Huntley*").

[28] *Huntley v State of NSW, Department of Police and Justice (Corrective Services NSW)* [2015] FCCA 1827 (3 July 2015) ("*Huntley*").

suffered from Crohn's Disease and Idiopathic Hypersomnolence[29]. 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[30].

29. 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[31].

30. **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[32].

31. Ms Huntley was offered alternative positions working with prisoners, which she rejected[33]. In 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 Hypersomnolence, 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[34].

32. 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.

33. 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

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[29] 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".
[30] *Huntley*; [20].
[31] *Huntley*; [21]-[24].
[32] *Huntley*; [29].
[33] *Huntley*; [31].
[34] *Huntley*; [32]-[38].

transfer due to her condition. While this was also (successfully) argued as a breach of contract case[35], the applicant was successful on the claims of disability discrimination[36], 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%). Judge Nicholls' reasoning with regard to the general damages is set out below[37].

> *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*

[35] 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].
[36] *Huntley*; [49]-[52] and [436]-[437].
[37] *Huntley*; [469]-[474].

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 "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.***

34. 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 underlines the importance of clear, targeted medical evidence that links the specific diagnosis, or exacerbation thereof with the discriminatory conduct. It also shows that although the case law is clear that employers are not required to provide employees with a different job, the fact that they do may but used as evidence that such a permanent arrangement is not unreasonable.

Murugesu[38]

35. In Murugesu No. 1[39], 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

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

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

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

37. 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 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.

38. 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.

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

40. 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.*[40]

41. *Murugesu No. 2*[41] addressed the issue of damages to be awarded in respect of breaches of the *Racial Discrimination Act 1975 (Cth)* ("RDA") applying *Oracle*.

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

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.

42. 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 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.*[42]

43. In coming up with the figure of $40,000.00, regard was had to other awards in similar circumstances[43], 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[44].

SUMMARY

44. There is no doubt that formal claims of sexual harassment have been rising overall, apparently unconnected to the #MeToo movement.

45. Good policies and procedures, properly drafted (by reference to the legislation and the case law) and implemented are crucial to avoiding sexual harassment claims.

46. The cost of not addressing the issues raised by sexual harassment in the workplace, is reduced productivity and, if there is a claim, exposure to increased general damages.

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[41] *Murugesu v Australian Postal Corporation & Anor (No.2)* [2016] FCCA 2355 (15 September 2016) ("*Murugesu No.2*").
[42] *Murugesu No.2*; [80].
[43] 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].
[44] *Murugesu No.2*; [81]-[83].

LIST OF CASES FINALISED (i.e. excluding interlocutory matters and appeals)

Final hearing
Summary Dismissal

2017 – Casey v Rebel Sport Ltd & Anor [2017] FCCA 1470 (3 July 2017) decision of Nicholls J application for extension of time rejected. UNSUCCESSFUL

2016 – None
Related - Wroughton v Catholic Education Office Diocese of Parramatta [2015] FCA 1236 (17 November 2015) Decision of Flick J. Considering s 28A in the context of s 351 of the FWA. UNSUCCESSFUL

2015 -

- Chen v Monash University (includes Corrigendum dated 23 March 2015) [2015] FCA 130 (27 February 2015) decision of Tracey J. UNSUCCESSFUL
- Earg Huang v University of New South Wales [2014] FCA 1337 (8 December 2014) decision of Perry J. UNSUCCESSFUL
- Picos v Seven West Media Ltd [2015] FCA 660 (1 July 2015) decision of Perry J. UNSUCCESSFUL
- TN v BF & Anor [2015] FCCA 1497 (12 June 2015) (determination of substantive matter) decision of Lloyd-Jones J. UNSUCCESSFUL

2014 –

- *Huang v University of New South Wales & Anor* [2014] FCCA 644 (4 April 2014) decision of Cameron J. UNSUCCESSFUL
- Shammas v Canberra Institute of Technology [2014] FCA 71 (13 February 2014) decision of Foster J.