# The current trends in Sexual Harassment & Discrimination Litigation

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## ABSTRACT

In light of the 5th National Survey on Sexual Harassment in Australian Workplaces and the implementation of the Respect@Work recommendations, this paper provides an overview of the current trends in sexual harassment and discrimination litigation and contains an update on major case law developments in discrimination and sexual harassment in 2022 and 2023. Interrogating decisions in respect of the four federal heads of discrimination (sex, race, age and disability), the paper will firstly examine the discretionary time limits for making a complaint of sexual harassment (*Wheatley v Fire Rescue Victoria (Human Rights)* [2023] VCAT 12). Secondly, it considers a record award of compensation for age discrimination (Gutierrez v MUR Shipping Australia Pty Limited [2023] FCA 399) and the possible implications for the assessment of general damages in the future. Thirdly, consideration is given to two recent race discrimination cases (Kaplan v State of Victoria (No 8) [2023] FCA 1092 and *Bharatiya v Antonio* [2022 FCA 428) and the vastly differential awards of damages. Fourthly, it reviews a recent decision concerning a requirement for an employee to disclose medical conditions in a pre-employment process (*Annovazzi v State of New South Wales – Sydney Trains* [2023] FedCFamC2G 542). Finally, the paper concludes with some observations about the future for sexual harassment and discrimination litigation.


## I INTRODUCTION

The past few years have seen major developments in sexual harassment and discrimination law in Australia. In March 2020, the Australian Human Rights Commission (**'AHRC'**) handed down its landmark report *Respect@Work: Sexual Harassment National Inquiry Report* (**'Respect@Work'**). Respect@Work was a clarion call for government, business, unions and individuals alike; sexual harassment was endemic and pervasive in Australian society and our current legal and regulatory frameworks were "no longer fit for purpose". The era of inaction was over, the time had come for systemic change. The intervening years saw a political struggle over the implementation of Respect@Work's 55 recommendations, punctuated by high profile sexual harassment scandals in the judiciary, the media and federal parliament, culminating in the nation-wide March4Justice movement.

In December 2022, almost three years after Respect@Work had been handed down, the *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022* (Cth) came into effect (**'Respect@Work Amendment Act'**). The Respect@Work Amendment Act finally saw the implementation of the remaining Respect@Work recommendations. The amendments include the implementation of a positive duty on employers to take reasonable measures to eliminate sexual harassment and sex discrimination and provide the AHRC with greater regulatory powers, including to monitor compliance with the positive duty. Upon introducing the Respect@Work Amendment Act, Prime Minister Albanese stated that "*Everyone has a right to a safe and respectful workplace…we must never accept sexual harassment as either inevitable or unavoidable*".[1]

However, the AHRC's Fifth National Survey into workplace sexual harassment, handed down in November 2022, demonstrates that rates of sexual harassment remain unacceptably high; in

[1] Commonwealth, *Parliamentary Debates,* House of Representatives, 7 November 2022, 2377 (Anthony Albanese, Prime Minister).

the past 5 years, one in 3 Australia (33%) have been sexually harassed at work.[2] These rates are far higher for women (41%) compared with men (26%). Young people, people who identify as LGBTQIA+, Aboriginal and Torres Strait Islander people and people with a disability disproportionately experience sexual harassment compared to the general population.[3]

In this context, how have our courts and tribunals been addressing the sexual harassment and discrimination question? Recent research by the Australian National University analysed every sex, age, race, and disability discrimination case decided in Australia across federal, State and Territory jurisdictions from 1984 to 2021 (**'ANU Research'**).[4] At the federal level, the ANU Research identified 193 sexual harassment decisions, of which 51% resulted in some form of damages being awarded.[5] The average award for general damages was $14,268.89 however, this had notably increased over time, to $60,500 in 2016-2021.[6] In the state and territory jurisdictions, Victoria was identified as the most complainant-friendly jurisdiction for sexual harassment, with average awards of general damages increasing to $125,000 between 2016–2021, with increases also seen in Queensland.[7] However, this trend was not consistent across the country; the researchers did not identify a single successful sexual harassment case in WA, the ACT and the NT since 2003.[8]

Average damages awarded for the other federal heads of discrimination were considerably less, and complainants were less likely to receive an award of damages compared with complainants in sexual harassment matters.[9] The same was true in the state and territory jurisdictions, where damages were typically significantly lower than those awarded for sexual harassment.[10]

Across 37 years of case law, the researchers identified just under 2,000 cases, demonstrating the paucity of case law in this area. While in some areas damages are increasing, there is a corresponding decrease in both the number of cases resulting in a final decision and the percentage of cases awarding damages.[11] The reality remains that the vast majority of sexual harassment and discrimination claims settle outside of court. The case law can therefore provide only one, limited, insight into how the discrimination law framework operates in practice. With this in mind, this overview seeks to highlight some of the significant developments in the previous years in both federal and state jurisdictions. The discussion is grouped into the four federal heads of discrimination: sex, race, age and disability.

## II SEXUAL HARASSMENT AND TIME LIMITS FOR MAKING A COMPLAINT

All discrimination law frameworks, both at the federal and state and territory level, have discretionary time limits for bringing a claim of sexual harassment. That is, if a claim is brought outside of a specified time frame, the relevant Commission or Tribunal has the discretion to

[2] AHRC, *Time for Respect: Fifth National Survey on Sexual Harassment in Australian Workplaces* (Fifth National Survey) (Report, November 2022) 12.
[3] Ibid.
[4] Margaret Thornton, Kieran Pender and Madeleine Castles, *Damages and Costs in Sexual Harassment Litigation: A Doctrinal, Qualitative and Quantitative Study* (Research Report, 24 October 2022).
[5] Ibid 18.
[6] Ibid 19.
[7] Ibid 28.
[8] Ibid 31.
[9] See for example average general damages awarded in sex discrimination $7,825.09, disability discrimination $13,323.38 and race discrimination $12,132.
[10] Ibid 33.
[11] Ibid 20.

terminate the complaint. In cases involving historic allegations of sexual harassment, or where sexual harassment has been perpetrated over a long period of time, time limits can create a significant impediment for complainants. The Victorian Civil and Administration Tribunal (**'VCAT'**) has recently in *Wheatly* had to grapple with these issues, recognising that complainants in sexual harassment cases involving historic or longstanding unlawful conduct may have justifiable reasons for delay that should not prevent them from accessing remedies under anti-discrimination law.

The Applicant, Donna Wheatley, commenced employment as a Fire Fighter with Fire Rescue Victoria (**'FRV'**) in 2003. In 2021, Ms Wheatley ceased work due to illness and remains off work and in receipt of workers' compensation payments. Ms Wheatley claimed that throughout her employment with FRV she was subjected to serious and sustained sexual harassment and abuse. Ms Wheatley lodged a sexual harassment claim in the Victorian Civil and Administrative Tribunal pursuant to sections 92 and 93 of the *Equal Opportunity Act 2010* (VIC) (**'EOA'**).

FRV made an application to strike out all of the applicant's allegations arising prior to 2015. The basis of this application was section 76 and clause 18 of Schedule 1 of the VCAT Act, which provides that VCAT may summarily dismiss an application under the EOA if the alleged contravention occurred more than 12 months before the application was made. FRV submitted that it would be subject to "significant prejudice" due to the historical nature of the complaint, including as a result of unavailable witnesses, a degraded forensic environment, a lack of documentary or other objective evidence and a lack of sufficient explanation for the delay.[12]

Ms Wheatley submitted that throughout her career, FRV had demonstrated a lack of commitment to addressing sexist and misogynistic behaviours and even when she did complain of such conduct, her complaints were routinely ignored or discouraged.[13] As a result of this, Ms Wheatley believed that making an external complaint would adversely harm her career prospects and status within her workplace.[14] Ms Wheatley further submitted that for much of her employment she had been able to "cope" with the sexual harassment and discrimination she experienced at work.[15] However, in 2016 and again in 2021 she became seriously unwell and sustained a serious psychological injury as a result of the "accumulation of trauma" from the conduct she had been subjected to throughout her career.[16]

VCAT refused FRV's application, holding that in the circumstances of Ms Wheatley's delay in making the complaint were not inordinate or unreasonable and inexcusable.[17] Member Cameron placed weight on the fact that FRV held a "virtual monopoly" on the employment of fire fighters in Victoria and that in these circumstances it was plausible that Ms Wheatley did not want to jeopardise her career, which she believed she would do so, by making an external complaint.[18] Notably, Member Cameron recognised that Ms Wheatley's complaint concerned "continuing and cumulative discrimination and harassment over a long period" and it was only after the accumulation of many years of experiencing this conduct that she came to understand

[12] *Wheatley v Fire Rescue Victoria (Human Rights)* [2023] VCAT 12 [22]–[23].
[13] Ibid [32].
[14] Ibid.
[15] Ibid [33].
[16] Ibid.
[17] Ibid [42].
[18] Ibid [44].

that she could no longer cope with it.[19] Member Cameron acknowledged FRV's concerns regarding the uncertainty of documentary and witness evidence due to the delay, but noted that these were matters that could be weighed upon the hearing of the claims and further emphasised that due to the "interconnected and cumulative nature" of Ms Wheatley's claims, none of the individual claims should be excluded in their entirety.[20]

Fire Recuse Victoria appealed. The Supreme Court of Victoria held that clause 18 of the VCAT Act should be interpreted such that it gives the Tribunal a "broad power" to summarily dismiss an application commenced more than 12 months after the alleged conduct where the proceedings would be unfairly prejudicial to the respondents or contrary to the public interest.[21] However, the Supreme Court rejected FRV's submission that clause 18 created a "statutory presumption" that a delay of more than 12-months will be unfair to the respondent. Notably, the Supreme Court extended this reasoning to Commonwealth legislation or analogous state legislation and emphasised:

> *"[t]he passage of more than 12 months enlivens the power to dismiss and certainly raises the prospect of prejudice, but does not create an implied limitation period that has to be overcome*."[22]

The Supreme Court was ultimately satisfied that the Tribunal member had properly satisfied herself that the delay did not, in the circumstances, mean that the proceedings should be summarily dismissed.[23]

The decision in *Wheatley* is significant because it recognises that the impact of sexual harassment and discrimination can be cumulative and sustained over a long period of time. It also recognises that there may be powerful reasons for women deciding not to take legal action about it until years after the event. Sexual harassment and discrimination cannot be examined in a vacuum. They are endemic features of our culture and are manifestations of entrenched inequality, including gender inequality, that continue to pervade modern Australian workplaces. When considering the reasons for delay in bringing complaints of sexual harassment, we must also consider the norms, practices and attitudes the underpin discriminatory conduct and workplace responses to such conduct. The Fifth National Survey found that of those who reported having been sexually harassed within the previous 5 years, 50% reported that the sexual harassment had been occurring for over 12 months, one third (35%) reported that it had been occurring for more than 2 years, and 16% reported that it had been occurring for more than 5 years.[24]

We also know that formal reporting of sexual harassment remains low; in the past 5 years fewer than 1 in 5 people (18%) who experienced workplace sexual harassment made a formal report or complaint.[25] People do not report for a range of reasons, including that they believe it is

[19] Ibid [45]
[20] Ibid [46].
[21] *Fire Rescue Victoria v Wheatley* [2023] VSC 269 [12].
[22] Ibid [13].
[23] Ibid [24].
[24] Fifth National Survey 85.
[25] Australian Human Rights Commission, *Time for Respect: Fifth National Survey on Sexual Harassment in Australian Workplace* (Report, November 2022) 130.

easier to keep quiet, they are concerned about embarrassment or adversely affecting their career or reputation or that they believe reporting will not result in any change or action being taken.[26]

Further, those who do formally report sexual harassment often experience negative or no action in response. 40% of people who *did* make a complaint, reported that no changes occurred in their workplace as a result of the complaint,[27] while in 24% of cases a formal report resulted in no consequences for the harasser.[28] Workplaces are *less likely* to take action for complaints made by women compared to those made by men.[29] People also report negative consequences flowing from making a complaint, including being ostracised, victimised or ignored by colleagues, being labelled as a 'troublemaker', or resignation. Notably, only 28% of people who reported harassment said that the sexual harassment stopped after they made a formal report or complaint.[30] Evidently, there remains strong cultural obstacles to structural change in workplaces to address sexual harassment. It is therefore unsurprising that women often delay reporting sexual harassment until they are at breaking point, or do not report the abuse they experience at all. Legal decisions alone are unlikely to change this dynamic, but the decision in *Wheatley*, at the very least, recognises this reality and does not seek to impute statutory presumptions that might prevent complainants from seeking remedies under anti-discrimination laws.

## III AGE DISCRIMINATION, COMMUNITY EXPECTATIONS AND DAMAGES

At the federal level, there has only been 1 successful case of age discrimination; *Gutierrez v MUR Shipping*. The recent successful appeal by the applicant has set a record for damages for age discrimination and may represent a new frontier for general damages for discrimination.

Mr Gutierrez had been employed at MUR Shipping since 2003 and held the position of Chief Accountant. Mr Gutierrez was a "long serving faithful employee" and planned to work until he was at least 75 years of age.[31] In February 2018, the Managing Director of MUR Shipping told Mr Gutierrez that the company had a retirement age of 65 and asked him when he planned to retire.[32] At the time, Mr Gutierrez was 68 years of age. Mr Gutierrez informed the Managing Director that there was no mandatory retirement age in Australia and consequently forcing him to retire based on his age would be unlawful.[33] Mr Gutierrez said that he would provide 3 months' notice when he intended to retire.[34]

In March 2018, Mr Gutierrez was informed that Ms Fernandes from MUR Shipping's affiliated office in Dubai would be taking over his job from him.[35] Mr Gutierrez asked why they were engaging someone to replace him when he had not yet retired. The Managing Director said, "I

[26] Ibid 152.
[27] Ibid 146.
[28] Ibid 143.
[29] Ibid 146
[30] Ibid 142.
[31] *Gutierrez v MUR Shipping Australia Pty Limited* [2021] FedCFamC2G 56 [35]–[36].
[32] Ibid [37].
[33] Ibid.
[34] Ibid.
[35] Ibid.

know you have a retirement unit in Manila".[36] As a result of this conversation, Mr Gutierrez felt compelled to nominate a retirement date of July 2019.[37]

In April 2018, Ms Fernandes commenced work, 15 months before Mr Gutierrez's planned retirement date. In July 2018, Mr Gutierrez was told that his contract would come to an end on 31 December 2018, and he would then be on a new fixed term contract to train Ms Fernandes.[38] Mr Gutierrez contended that this conversation constituted a repudiation of his contract of employment with MUR Shipping.[39] Following the July 2018 discussion, Mr Gutierrez's health "deteriorated rapidly".[40] In August 2018, Mr Gutierrez filed an application to AHRC alleging age discrimination.

At first instance, Judge Driver found that MUR Shipping had unlawfully discriminated against Mr Gutierrez due to his age. Judge Driver considered that MUR Shipping had deprived Mr Gutierrez of his agency as to his own future by placing him on a fixed term contract and had disrespected and demeaned him in his employment by asking him to train his replacement.[41] As a result of the discriminatory conduct, Judge Driver found that Mr Gutierrez suffered a "mild adjustments disorder" that did not preclude him from working. Mr Gutierrez was awarded $20,000 in general damages.[42]

However, Judge Driver considered that the termination of Mr Gutierrez's employment was *not* discriminatory in circumstances where he "chose to resign" when he was not being forced to do so and could have continued working until his nominated retirement date.[43] As a consequence, Judge Driver declined to award Mr Gutierrez any compensation for economic loss.[44]

Mr Gutierrez appealed on the basis that the general damages awarded were "manifestly inadequate", that the primary judge erred in failing to make an award of economic loss and that the primary judge erred in failing to find that MUR Shipping had brought about his termination because of his age.[45]

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

> *"It is of course correct to compare and, if appropriate, contrast factual findings as to the extent of injury suffered in assessing compensable harm in comparable cases in consideration of the correct allocation of damages. No two cases will be precisely the same and each must be considered on its own facts. However, to suggest, as the primary judge appears to, that the seriousness of the conduct of a defendant towards a victim, separately from a consideration of the damage caused by that conduct, is relevant to the assessment*

[36] Ibid.
[37] Ibid.
[38] Ibid [38]–[39].
[39] Ibid [42].
[40] Ibid.
[41] Ibid [146]; [149].
[42] Ibid [176].
[43] Ibid [111].
[44] Ibid.
[45] *Gutierrez v MUR Shipping Australia Pty Limited* [2023] FCA 399 [3].

*of general damages reflects error. At the point of the assessment of damages, the question is the amount which can fairly be regarded as reasonable compensation for the injuries and disabilities which a plaintiff has sustained…not the manner in which the harm was caused or egregiousness by which it was inflicted."*[46]

Burley J considered that the primary judge had erred in failing to have proper regard to the "unchallenged" medical evidence, which found that as a result of the discriminatory conduct, Mr Gutierrez suffered from an adjustment disorder with depression and anxiety, loss of enjoyment of social aspects of his life and would have no capacity to work until the adjustment disorder resolved.[47] Considering that the harm suffered by Mr Gutierrez was comparable to that suffered by Ms Richardson, Burley J awarded $90,000 in general damages.[48]

Further, while Burley J did not challenge the primary judge's finding that Mr Gutierrez had chosen to resign, he considered that there was a sufficient causal connection between the discriminatory conduct and Mr Gutierrez's economic loss as on the evidence Mr Gutierrez was incapable of working as a result of the discrimination. On a preliminary assessment, Burley J considered an award of economic loss of $142,215.56 plus interest was appropriate.[49]

Burley J's reliance on Kenny J's reasoning in *Richardson v Oracle* provides a definitive statement that general damages for discrimination should be commensurate with the community's deeper appreciation for the experience of hurt and humiliation and value of loss of enjoyment of life occasioned by discriminatory conduct.[50] That such a significant award was made in respect of non-sexual harassment conduct demonstrates that the increase in general damages observed in recent sexual harassment cases should not be confined to that sphere. Rather, compensation should be tied directly to the actual harm arising from the discriminatory conduct and should not be correspondingly devalued simply because the harm arises in a particular sphere of discrimination law.

## IV RACE DISCRIMINATION, SYSTEMIC INACTION AND COMPARATIVE CONDUCT

As identified in the ANU Research, race discrimination cases have seen a similar, if less substantial, rise in awards of damages compared with those in sexual harassment cases.[51] A recent decision by the Federal Court, *Kaplan*, confirms this trajectory with record damages awarded for breaches of section 9 of the *Racial Discrimination Act 1975* (Cth) (**'RDA'**)

### *Kaplan v State of Victoria*

In *Kaplan*, five applicants all former students at Bright Secondary College ('BSC'), brought proceedings against the State if Victoria, the principal of BSC and two BSC teachers alleging contraventions of the *Racial Discrimination Act 1975*.[52] Spanning a period from 2013 to 2020,

[46] Ibid [52].
[47] Ibid [69]; [79]; [89].
[48] Ibid [92].
[49] Ibid [103].
[50] See *Richardson v Oracle Corporation Australia Pty Ltd* [2014] FCAFC 82 [117].
[51] See Thornton, Pender and Castles, *Damages and Costs in Sexual Harassment Litigation: A Doctrinal, Qualitative and Quantitative Study* (Research Report, 24 October 2022) 25.
[52] *Kaplan v State of Victoria (No 8)* [2023] FCA 1092.

the students alleged that they were subject to antisemitic bullying and harassment by BSC students, including "extreme" antisemitic taunts, death threats, "unreasonably and extraordinarily high" levels of antisemitic graffiti, and in the case of some of the students, physical assault. The students submitted that the failure by the principal, Mr Minack, to address the antisemitism in any proactive or systemic way, despite various complaints from the students and their parents, constituted a breach of the RDA.

In a searing judgment over almost 2000 paragraphs, Chief Justice Mortimer agreed, upholding the majority of the allegations levelled by the students. In particular, Mortimer CJ found that Mr Minack contravened section 9 of the RDA by failing to take appropriate steps to address antisemitic bullying and harassment perpetrated by BSC students. This failure culminated in a finding that at a leadership and systemic level, Mr Minack took a different and less favourable approach to antisemitic bullying and harassment, including an "inexplicable and unusual tolerance for antisemitic graffiti and a preparedness to ignore, downplay and take less seriously the complaints made by Jewish students and their families".[53]

Central to the student's case was a finding that there was a breach of the RDA by reason of Mr Minack's *failure* to act. Mortimer CJ considered that whether the inquiry is concerned with positive or negative conduct, the central question is concerned with the *consciousness* or *choice* for the conduct, that is "*why* did a person act as they did; or *why* did they refuse to act?"[54] Notably, Mortimer CJ held that section 9 of the RDA could be contravened by a negative act because there could still be a direct connection between the failure or omission and race, that is the failure to act was *because* of the student's race. However, Mortimer CJ considered that the Court need not assign any *subjective* motivation for the inaction, it is sufficient if the failure or inaction is connected to race:

> *"The Court does not have to ascribe any subjective motivation to Mr Minack. There was no cross-examination of him about what may have motivated him to be so unconcerned about the presence of swastika graffiti, to be unmoved by the presence of a symbol of evil in many places around the school. The Court does not speculate about what drove his unwillingness to engage in school-wide, proactive educational steps such as those taken for LGBTQIA+ students. What is material is that the Court is comfortably satisfied Mr Minack had a distinct attitude to antisemitic student behaviour, including swastika graffiti, that led to such student behaviour being more tolerated than other kinds of unacceptable student behaviour. In that sense, his conduct was connected to race."*[55]

A breach of section 18C could not be so constructed. This was because it was not the failure to address the antisemitic behaviour that was reasonably likely to offend, insult, humiliate or intimidate another person or group of people, rather it was the antisemitic conduct *itself* that gave rise to a contravention of the section.[56]

[53] Ibid [8].
[54] *Kaplan* [55].
[55] Ibid [860].
[56] Ibid [103]–[104].

***Comparative conduct***

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

> *"Discrimination is about differential treatment. This raises the question – different from whom? The whole purpose of a comparator in a discrimination context is to assist in focusing on first whether there was differential treatment, and second on the reason for that treatment. Using a comparator who has different attributes, or who does not have nominated attributes, can assist in a forensic and reasoning sense in identifying why a person was treated differentially (assuming that has been established)"*[57]

Mortimer CJ found that the evidence demonstrated that Mr Minack, the leadership cohort and BSC teachers took proactive steps to address the needs and vulnerabilities of LGBTQIA+ students and adopted a deliberate strategy to make these students feel safe and valued at school. This finding was "of some weight" as it highlighted the differential treatment that led to the tolerance of antisemitism at BSC and the resulting neglect for the safety and wellbeing of the relevant Jewish students.[58]

***Damages***

The students were collectively awarded a total of $435,280.74 in compensation. In considering amounts for non-economic loss, Mortimer CJ took into account the fact that the applicants were children at the time of the discrimination, the interference that the discrimination caused in their education and the impairment of their rights to be proud of their Jewish identity.

One student, Zach, received $244,968.31, the bulk of this award, representing record compensation awarded at the federal level for race discrimination. This included $80,000 in general damages for the pain and suffering occasioned by ignored complaints of antisemitic bullying at BSC over *seven* years which "tragically culminated" in a serious assault by 6 BSC students, all of whom were criminally charged, and which forced Zach to leave BSC.[59] A further $30,000 in aggravated damages was awarded for the lack of "common human decency" that Mr Minack demonstrated towards Zach and his family following this attack, with Mortimer CJ finding that this encapsulated a course of conduct by Mr Minack in 'downplaying' the harassment Zach was experiencing at BSC and thereby increasing his hurt and suffering.[60]

***Bharatiya v Antonio* [2022] FCA 428**

Not all complainants have had the same level of success as in *Kaplan.*

[57] Ibid [70].
[58] Ibid [395].
[59] *Kaplan* [1568]; [1614].
[60] Ibid [1789].

In *Bharatiya v Antonia*, the applicant was awarded just $750 in general damages for race discrimination perpetrated by his next-door neighbour, that included the shouting of slurs such as "black bastard", "cockroach" and "parasite".[61]

Colvin J noted that racial insults can be deeply hurtful, cause humiliation, distress and deprive people of dignity,[62] however emphasised that damages awarded under s 49PO(4) of the AHRC Act are "entirely compensatory".[63] Mr Bharatiya was unrepresented in the proceedings and did not present any medical evidence to demonstrate a significant and ongoing injury as a result of the discrimination.[64] While Colvin J accepted that the respondent's words were "hurtful" he concluded that they were "at the lowest end of the scale".

Colvin J also warned against using the Court to prosecute what he deemed to be "insufficiently serious" subject matter:

> *"Just because conduct is unlawful does not mean that it is appropriate to burden prospective respondents with compensation claims that could only result in small, possibly trivial, awards of damages. It is a very significant thing for an applicant to invoke the authority of the Court to require a person to attend and participate in court proceedings. It is a step that should be reserved for instances where the conduct and its consequences warrant that course."*[65]

## V DISABILITY DISCRIMINATION, DISCLOSURE OF MEDICAL INFORMATION AND THE RELEVANT COMPARATOR

In or around 2015, Ms Annovazzi was diagnosed with Asperger's Syndrome and ADHD. Ms Annovazzi was prescribed dexamphetamine to manage her ADHD on an 'as-needs' basis. In March 2017, she applied for a position as a trainee train driver with Sydney Trains. In both the application form and a later re-employment health questionnaire, Ms Annovazzi was asked questions relating to any medical conditions she had, including whether she required any reasonable adjustments, whether she had a condition which would affect her ability to perform the role, whether she was currently receiving treatment for an illness or injury and whether she was taking any prescribed medication.[66] Ms Annovazzi answer 'no' to all these questions.[67] As part of the recruitment process, Ms Annovazzi was required to attend an independent medical examination. During this examination, she disclosed her diagnoses of Asperger's Syndrome and ADHD and her prescription of dexamphetamine.[68]

In August 2017, Ms Annovazzi was offered employment as a trainee driver.[69] In November 2017, Ms Annovazzi texted the Train Crew Coordinator and advised that she was prescribed dexamphetamine tablets to manage her ADHD on an 'as-needs basis'. Ms Annovazzi

[61] *Bharatiya v Antonio* [2022] FCA 428 [23]–[47].
[62] Ibid [62].
[63] Ibid [61].
[64] Ibid [65].
[65] Ibid [68].
[66] *Annovazzi v State of New South Wales – Sydney Trains* [2023] FedCFamC2G 542 [13]–[16].
[67] Ibid.
[68] Ibid [21].
[69] Ibid [26].

confirmed that she had informed the doctor during her pre-employment medical examination. Ms Annovazzi was subsequently removed from the trainee driver's course. The Chief Medical Officer requested Ms Annovazzi be referred for a psychiatric, and if necessary neuropsychological, assessment to determine whether she had the capacity to perform the role of trainee train driver. This assessment never took place. Instead on 31 January 2018 Sydney Trains terminated Ms Annovazzi's employment on the basis of her "dishonesty" in failing to disclose her medical conditions and use of prescription medication during the pre-employment process and medical assessments.[70]

Ms Annovazzi made an application to the AHRC alleging breaches of sections 15(2)(c), 15(2)(d) and 30(2) of the *Disability Discrimination Act 1992* (Cth) (**'DDA'**).

*Comparator*

In relation to the 'comparator' for section 15 of the DDA, Sydney Trains submitted that the relevant comparator was a "person who had applied for or accepted for the role of a Trainee Train Driver on probation *who dishonestly answered the relevant questions in the medical questionnaire*".[71] Judge Manousaridis rejected this submission, finding that there was no evidence to demonstrate that Ms Annovazzi had been dishonest or that Sydney Trains had taken any steps to ascertain whether the allegations of dishonesty were true.[72]

Consequently, the relevant comparator was a person who did not disclose in the initial medical questionnaire two medical conditions that were subsequently disclosed to the examining doctor and Sydney Trains. Judge Manousaridis found that Sydney Trains would have permitted the relevant Comparator to undergo a medical assessment rather than terminating their employment.

Judge Manousaridis therefore concluded that Sydney Trains had discriminated against Ms Annovazzi on the basis of her disability by unreasonably keeping her out of the trainee course by refusing to refer her to a medical assessment and, in the absence of a finding of dishonestly, ultimately made the decision to terminate her employment because of her ADHD and Asperger's Syndrome.[73]

*Medical information*

Ms Annovazzi also submitted that Sydney Trains had breached section 30(2) of the DDA by requesting medical information from her. Judge Manousaridis agreed, finding that on the two occasions Sydney Trains requested medical information from Ms Annovazzi's treating practitioners, it was already considering whether to terminate her employment rather than independently assess whether she was able to safely perform her duties. In those circumstances, Judge Manousaridis concluded that Sydney Trains requested the medical information in connection with the decision to terminate Ms Annovazzi's employment because of her disability.[74]

[70] Ibid [75]–[76].
[71] Ibid [129].
[72] Ibid [131].
[73] Ibid [141]-[142].; [145]–[146].
[74] Ibid [157].

## VI CONCLUSION – WHAT'S NEXT?

Next year marks the 40th anniversary of the *Sex Discrimination Act.* Despite its broad objectives, the events of the past few years have made it clear that there is a long way to go to reduce discrimination and sexual harassment. Whether Respect@Work, the March4Justice movement and the recent reforms will have a significant impact on litigation in this space, particularly regarding quantum of damages, remains to be seen. For many complainants, damages for discrimination and harassment remain persistently low when compared to other forms of civil harm, for example defamation or personal injury. Damages for hurt, humiliation, pain and suffering continue to be discounted. Given the paucity of case law, we are yet to see the Federal courts address the damages issue in the post Respect@Work era. The devastating impact of discrimination and sexual harassment has been laid bare; community expectations, as they were so described in 2014, are much clearer now. We should, as a result, expect to see damages awarded by courts continue their upward trajectory.

Costs remain a live issue. While not discussed in this paper, the debate continues to rage around the most appropriate costs model for the anti-discrimination framework. The Commonwealth Attorney-General's Department instigated a review of costs in discrimination proceedings in February 2023, with submissions closing in April. To date, there is no outcome of this review.

It's too soon to assess the impact of the raft of reforms introduced by the Albanese government. The new Fair Work Commission sexual harassment jurisdiction, intended to expand access to justice, is untested, as is the new positive duty to prevent sexual harassment. That said, the legislative burden of seeking to eliminate gender inequality has shifted so that it is not just affected women who are left to seek redress. Unions, the regulator and employers now have a much greater role to play.

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