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Appeal against damages of \$466,000 for sexual harassment and discrimination upheld

The Full Court of the Federal Court has upheld an earlier award of \$466,000 in damages for the unlawful discrimination of a terminated employee, one of the highest payouts ordered for a case of this type.

The decision

At first instance the employer, Employment Services Australia Pty Ltd (**ESA**), was found to have discriminated against Ms Poniatowska by terminating her employment following sexual harassment complaints made by her.

Justice Mansfield found the majority of incidents alleged by Ms Poniatowska had in fact taken place, and that ESA had failed to satisfactorily investigate those complaints or take any sincere measures to discipline the individuals involved. The court found that ESA had treated the employee as “*a problem to be dealt with*” and dismissed her for poor work performance, when in reality the termination was based on Ms

Poniatowska’s “*sensitivity*” to the conduct in question (ie, the sexual harassment).

In assessing whether unlawful discrimination had occurred, his Honour was required by the legislation to consider how a male employee in the same situation would have been treated, and ultimately found that the same approach would not have been taken by ESA had a male employee been sexually harassed and complained.

Ms Poniatowska was awarded a total of \$466,000 in compensation, including sums for pain and suffering, lost earning capacity, interest and medical expenses (relating to the depression and anxiety she had developed due to the harassment).

On appeal, ESA argued that it should not be required to pay the amount, on the basis that it was not liable for the actions of its employee who had sent offensive emails because he had not done so in connection with his employment at ESA. This submission was rejected by the Full



Court because Justice Mansfield had not based his conclusion of sex discrimination by ESA on the basis of its vicarious liability for that employee.

As to the amount of compensation awarded, ESA sought to have the matter remitted back to the single judge so that it could lead evidence as to the effect of Ms Poniatowska's subsequent conviction for social security fraud on her employment (and earning) potential. ESA also submitted that Justice Mansfield had failed to take into account certain facts and material relating to the history of the allegation, namely the apology offered to and accepted by Ms Poniatowska, when assessing damages.

While the majority of the Full Court accepted that the conviction would be likely to affect Ms Poniatowska's prospects of obtaining other employment, it nevertheless concluded that the cause of her inability to work was the detrimental effect of ESA's actions, and those of its employees. It further stated that, in assessing damages for pain and suffering, Justice Mansfield was not required to specifically account for the apology, and in any event ESA had not demonstrated any failure by his Honour to take all relevant matters into account.

The appeal was dismissed in its entirety and ESA was ordered to pay 90% of Ms Poniatowska's costs.

Conclusion

It is clear that courts are willing to award significant damages to employees who are discriminated and/or sexually harassed, especially where the employer fails to properly investigate or deal with complaints.

Employers should:

- ensure they have appropriate policies in place to deal with and

discourage sexual harassment;

- ensure employees are aware of the employer's policies and their obligations under them;
- train managers to address complaints properly; and
- discipline employees who engage in inappropriate sexual conduct.

Victorian employers should also note that, in assessing whether discrimination is unlawful under state anti-discrimination legislation, from 1 August 2011 a comparison between the victim and an individual without the protected attribute in the same or similar circumstances will no longer be required. Instead, simply demonstrating that the person was treated unfavourably *because* of that attribute (such as pregnancy, industrial activity, sex, race etc) will suffice.

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