FEDERAL COURT OF AUSTRALIA

Richardson v Oracle Corporation Australia Pty Ltd [2014] FCAFC 82

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| Citation: | Richardson v Oracle Corporation Australia Pty Ltd [2014] FCAFC 82 |
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| Appeal from: | Richardson v Oracle Corporation Australia Pty Limited [2013] FCA 102  Richardson v Oracle Corporation Australia Pty Limited (No 2) [2013] FCA 359 |
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| Parties: | **REBECCA RICHARDSON v ORACLE CORPORATION AUSTRALIA PTY LTD (ACN 003 074 468) and RANDOL TUCKER** |
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| File number: | NSD 438 of 2013 |
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| Judges: | **KENNY, BESANKO AND PERRAM JJ** |
|  |  |
| Date of judgment: | 15 July 2014 |
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| Catchwords: | **HUMAN RIGHTS** – discrimination – causation – whether sufficient causal nexus between sexual harassment and the effects of workplace investigation – whether sufficient causal nexus between sexual harassment and alleged psychological injury suffered as a result of complaint to AHRC and subsequent litigation – whether “false denials” of sexual harasser provided causal link between unlawful conduct and harm suffered rebutting denials in various fora – causation not made out.  **HUMAN RIGHTS** – discrimination – causation – whether appellant left employment ‘voluntarily’ – whether appellant demoted by employer - whether sufficient causal nexus between sexual harassment and decision by appellant to leave workplace – whether analysis of causation in *Medlin v State Government Insurance Commission* (1995) 182 CLR 1 applied to decision by appellant to leave employment – *Medlin* applied – causation made out.  **HUMAN RIGHTS** – discrimination – indirect discrimination – whether higher prevalence of women as sexual harassment complainants rendered workplace policy imposed on complainants generally as one “disadvantaging persons of the same sex as the aggrieved person” – proper starting point for analysis of indirect discrimination discussed – indirect discrimination not made out.  **DAMAGES** – assessment of general damages – whether trial judge assessed statutory damages under s 46PO(4)(d) of the *Australian Human Rights Commission Act 1986* (Cth) by applying tortious principles – whether damages pursuant to AHRC Act can be awarded to partially compensate for loss - proper approach to assessment of damages under s 46PO(4)(d) discussed.  **DAMAGES –** assessment of general damages – whether trial judge assessed appellant’s injuries solely by reference to ability to work – whether trial judge assessed general damages by reference to nature of sexual harassment – no error disclosed in trial judgment.  **DAMAGES** – assessment of general damages – damages for diminished sexual relationship as a result of sexual harassment – decline of relationship discussed by trial judge with reference to a “variety of factors” always operating in a relationship – finding of trial judge overturned - approach to damages and causation where multiple factors potentially at large in recognised loss discussed – damages awarded for diminished sexual relationship.  **DAMAGES –** assessment of general damages – whether award of damages manifestly inadequate – damages awarded pursuant to s 46PO(4)(d) fundamentally compensatory in nature – nature of damages for sexual discrimination and sexual harassment discussed - damages manifestly inadequate.  **DAMAGES –** assessment of economic damages – whether trial judge erred in method for calculation of damages – recovery of damages for foregone chance or opportunity - calculating base salary and damages where projected earnings and promotion prospects are uncertain – assessing entitlement to discretionary bonuses – standard of proof - need to assess the circumstances of past occurrences to assess their utility as a predictive tool – challenge to calculation not made out.  **COSTS** – offer of settlement attracted renewed relevance as result of appeal outcome. |
| Legislation: | *Anti-Discrimination Act 1977* (NSW)  *Australian Human Rights Commission Act 1986* (Cth)  *Disability Discrimination Act 1992* (Cth)  *Equal Opportunity Act 1984* (Vic)  *Equal Opportunity Act* 1995 (Vic)  *Federal Court Rules 1979* (Cth)  *Federal Court Rules 2011* (Cth)  *Sex Discrimination Act 1984* (Cth)  *Sex Discrimination Amendment Act 1995*  *Trade Practices Act 1974* (Cth) |
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| Cases cited: | *Alexander v Home Office* [1988] 1 WLR 968; [1988] 2 All ER 118  *Allianz Australia Insurance Limited v GSF Australia Pty Limited* (2005) 221 CLR 568  *Amaca Pty Ltd v King* [2011] VSCA 447  *Armory v Delamirie* (1722) 93 ER 664  *Australian Iron & Steel Pty Ltd v Banovic* (1989) 168 CLR 165  *BHP Billiton Ltd v Hamilton* [2013] SASCFC 75  *Brackenridge v Toyota Motor Corporation Australia Ltd* (1996) 142 ALR 99  *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* (2001) 117 FCR 424  *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44  *Clarke v Catholic Education Office* (2003) 202 ALR 340  *Commonwealth Bank of Australia v Human Rights and Equal Opportunity Commission* (1997) 80 FCR 78  *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64  *Commonwealth v Evans* (2004) 81 ALD 402  *Coyne v Citizen Finance Ltd* (1991) 172 CLR 21  *Crampton v Nugawela* (1996) 41 NSWLR 176  *Crellin v Kent* [2000] VSCA 165  *Elliot v Nanda* (2001) 111 FCR 240  *Fox v Percy* (2003) 214 CLR 118  *Goldman Sachs JBWere Services Pty Limited v Nikolich* [2007] FCAFC 120  *Hall v A & A Sheiban Pty Ltd* (1989) 20 FCR 217  *Henville v Walker* (2001) 206 CLR 459  *House v The King* (1936) 55 CLR 499  *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109  *Knight v Beyond Properties Pty Ltd* (2007) 242 ALR 586  *Kraus v Menzie* [2012] FCA 3  *Kraus v Menzie* [2012] FCAFC 144  *Lee v Smith* [2007] FMCA 59  *Leslie v Graham* [2002] FCA 32  *Malec v JC Hutton Pty Ltd* (1990) 169 CLR 638  *Marks v GIO Australia Holdings Limited* (1998) 196 CLR 494  *McGaw v Channel Seven Sydney Pty Ltd* [2006] NSWSC 1147  *Medlin v State Government Insurance Commission* (1995) 182 CLR 1  *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559  *Murphy v Overton Investments Pty Ltd* (2004) 216 CLR 388  *Nationwide News Pty Ltd v Naidu* (2007) 71 NSWLR 471  *New South Wales Aboriginal Land Council v Perkins* (1998) 45 NSWLR 340  *Nikolich v Goldman Sach JBWere Services Pty Limited* [2006] FCA 784  *O’Brien v Dunsdon* (1965) 39 ALJR 78  *Obeid v John Fairfax Publications* *Pty Ltd* [2006] NSWSC 1059  *Pitcher v Langford* (1991) 23 NSWLR 142  *Poniatowska v Hickinbotham* [2009] FCA 680  *Precision Plastics Pty Ltd v Demir* (1975) 132 CLR 362  *Qantas Airways Ltd v Gama* (2008) 167 FCR 537  *Rogers v Nationwide News Pty Ltd* (2003) 216 CLR 327  *Rogers v Nationwide News*, *John Fairfax Publications Pty Ltd v O’Shane (No 2)* [2005] NSWCA 291  *Secretary, Department of Foreign Affairs and Trade v Styles* (1989) 23 FCR 251  *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332  *Shiels v James* [2000] FMCA 2  *Smith’s Newspapers Ltd v Becker* (1932) 47 CLR 279  *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247  *State of New South Wales v Amery* (2006) 230 CLR 174  *State of NSW (NSW Police Force) v Whitfield* (EOD) [2012] NSWADTAP 27  *Sved v Council of the Municipality of Woollahra* (1998) NSW ConvR 55‑842  *Swan v Monash Law Book Co-operative* [2013] VSC 326  *Tan v Xenos (No 3)* [2008] VCAT 584  *Teubner v Humble* (1963) 108 CLR 491  *Travel Compensation Fund v Tambree* (2005) 224 CLR 627  *Walker v Citigroup Global Markets Australia Pty Ltd* (2006) 233 ALR 687  *Walker v Citigroup Global Markets Pty Ltd* (2005)226 ALR 114  *Wardley Australia Ltd v The State of Western Australia* (1992) 175 CLR 514  *Waters v Public Transport Corporation* (1991) 173 CLR 349  *Whittaker v Unisys Australia Pty Ltd* (2010) 192 IR 311  *Willett v Victoria* [2013] VSCA 76  *Wilson v Peisley* (1975) 7 ALR 571 |
| Texts cited: | Thornton, M, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (Oxford University Press, 1990) Andrades, C, *What Price Dignity? Remedies in Australian Anti-Discrimination Law*, Parliamentary Research Paper No 13 (1998)  Ronalds, C, “Opening Address III” in Thornton, M (ed) *Sex Discrimination in Uncertain Times* (ANU E Press, 2010)  Ronalds, C, and Raper, E, in *Discrimination Law and Practice* (Federation Press, 4th ed, 2012)  Gaze, B, “The Sex Discrimination ActAfter Twenty Years” (2004) 27(3) *University of New South Wales Law Journal* 914  Senate Standing Committee on Legal and Constitutional Affairs, *Report on Effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality* (Senate Printing Unit, 2008)  Gaze, B, “The Sex Discrimination Act at 25: Reflections on the Past, Present and Future” in Thornton, M (ed) *Sex Discrimination in Uncertain Times* (ANU E Press, 2010)  Gaze, B, “Damages for Discrimination” (2013) 116 *Precedent* 20  Gaze, B, “Anti-Discrimination Laws in Australia” in Gerber, P and Castan, M (eds) *Contemporary Perspectives on Human Rights Law in Australia* (Lawbook Co, 2013) Gaze, B, and Hunter, R, *Enforcing Human Rights: An Evaluation of the New Regime* (Themis Press, 2010)  Watchirs, H, “Opening Address I” in Thornton, M (ed) *Sex Discrimination in Uncertain Times* (ANU E Press, 2010) Andrades, C, “The Struggle to restore dignity – Part 1: remedies in anti-discrimination law” (2012, September) *Employment Law Bulletin* 85  Australian Human Rights Commission, *Federal Discrimination Law* (AHRC, 2011)  Raper, E,“Show me the money: Damages awarded in sexual harassment matters” (2010) 1 *Workplace Review* 100  Donaghey, T, *Termination of Employment* (Lexis Nexis Butterworths, 2nd ed, 2013)  Sappideen, C, et al, *Macken’s Law of Employment* (Lawbook Co, 7th ed, 2011) |
|  |  | |
| Date of hearing: | 19 and 20 August 2013 | |
|  |  | |
| Place: | Sydney | |
|  |  | |
| Division: | GENERAL DIVISION | |
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| Category: | Catchwords | |
|  |  | |
| Number of paragraphs: | 239 | |
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| Counsel for the Appellant: | R Francois with A Rao | |
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| Solicitor for the Appellant: | Picone & Co | |
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| Counsel for the First Respondent: | J J Fernon SC with E Raper | |
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| Solicitor for the First Respondent: | Baker & McKenzie | |
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|  | The Second Respondent did not appear | |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| new south wales DISTRICT REGISTRY |  |
| GENERAL DIVISION | NSD 438 of 2013 |

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| ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA |

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| BETWEEN: | REBECCA RICHARDSON  Appellant |
| AND: | ORACLE CORPORATION AUSTRALIA PTY LTD (ACN 003 074 468)  First Respondent  RANDOL TUCKER  Second Respondent |

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| JUDGES: | KENNY, BESANKO AND PERRAM JJ |
| DATE OF ORDER: | 15 July 2014 |
| WHERE MADE: | sydney |

THE COURT ORDERS THAT:

1. The appeal be allowed.
2. (a) The order made by Buchanan J on 20 February 2013 that “[t]he first respondent is to pay to the applicant within 21 days the sum of $18,000 by way of damages as compensation for breach of s 28B(2) of the *Sex Discrimination Act 1984* (Cth)” be set aside and;

(b) in lieu thereof order:

“There be judgment for the applicant against the first respondent in the sum of $130,000.”

1. The first respondent pay the appellant’s costs of the appeal.
2. The orders made by Buchanan J on 19 April 2013 be set aside.
3. The appellant file and serve any submissions on the issue of the costs of the trial within 21 days.
4. The first respondent file and serve any submissions in reply within a further 21 days.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| New South Wales DISTRICT REGISTRY |  |
| GENERAL DIVISION | NSD 438 of 2013 |

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| ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA |

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| BETWEEN: | REBECCA RICHARDSON  Appellant |
| AND: | ORACLE CORPORATION AUSTRALIA PTY LTD (ACN 003 074 468)  First Respondent  RANDOL TUCKER  Second Respondent |

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| JUDGES: | KENNY, BESANKO AND PERRAM JJ |
| DATE: | 15 JULY 2014 |
| PLACE: | SYDNEY |

**REASONS FOR JUDGMENT**

**KENNY J:**

1. I have had the advantage of reading the reasons for judgment of Besanko and Perram JJ. I respectfully agree with the conclusions their Honours have reached with respect to grounds 1 to 15 and 21 to 28, substantially for the reasons their Honours have given. The reasons which follow deal with the other grounds of appeal, namely 16, 17, 18, 19, 19A and 20. These reasons proffer an alternative discussion of grounds 16 and 17 to that of their Honours, although, as will be seen, the outcome of the appeal is the same.
2. 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 s 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.
3. Oracle’s appeal against his Honour’s judgment on substantive issues raised three main matters: Broadly speaking, these matters were as to:
4. Causation and indirect discrimination (grounds 1-3, 5-9, 11-12);
5. General damages (grounds 16-20); and
6. Economic damages (grounds 21-24).

There were also grounds as to the insufficiency of his Honour’s reasons (grounds 4, 10 and 15) and specific evidentiary issues (grounds 13 and 14), which were incidental to these issues.

1. His Honour’s judgment on costs was also the subject of appeal, raised by grounds 25 to 28.
2. For the reasons stated, I would allow the appeal.

# the decision under appeal

1. At the relevant time in 2008, Ms Richardson was working at Oracle’s Sydney office as a consulting manager and Mr Tucker was working at Oracle’s Melbourne office as a sales representative. About April 2008, Oracle put together a ‘bid team’, which included both Mr Tucker and, until December 2008, Ms Richardson, to attempt to secure a commitment from the ANZ Banking Group (“ANZ Bank”) to engage Oracle for the “Secure Access” project (the details of which are immaterial here). The bid team was mostly based in Melbourne, although Ms Richardson was the bid manager from about October or November 2008 when she travelled as required to Melbourne: see *Richardson v Oracle Corporation Australia Pty Ltd* [2013] FCA 102 (“*Richardson v Oracle* (first instance)”) at [6]-[9].
2. Ms Richardson’s sexual harassment case against Mr Tucker arose out of Mr Tucker’s conduct towards her in the course of their work as part of the bid team. Ms Richardson’s case was “based on the allegation that, from the time of her first face to face meeting with Mr Tucker in April 2008, she was subjected to a humiliating series of slurs, alternating with sexual advances, from Mr Tucker which built into a more or less constant barrage of sexual harassment”: see *Richardson v Oracle* (first instance) at [13]. Ms Richardson’s account of the relevant events was largely accepted.
3. Ms Richardson relied on a total of eleven incidents, each said to amount to sexual harassment and together evidencing a pattern of unlawful conduct. It is unnecessary to discuss these incidents. They are detailed in the reasons for judgment of the primary judge: see *Richardson v Oracle* (first instance) at [16], [118]-[144]. The trial judge substantially accepted Ms Richardson’s evidence about Mr Tucker’s conduct and rejected “Mr Tucker’s denials and attempts to defend his conduct as unintended, misunderstood or innocuous”: see *Richardson v Oracle* (first instance) at [13].
4. The trial judge ultimately found that an initial exchange in April 2008 “marked the beginning of a pattern of behaviour which was to continue over a period of months”: *Richardson v Oracle* (first instance) at [126]. His Honour stated (at [126]-[127]):

A repeated pattern in [these] encounters was behaviour by Mr Tucker consistent with the thesis that he was trying to get the upper hand in his relationship with Ms Richardson. Some of those attempts were at least smutty, some were offensive and some (expressed more privately) involved initiatives representing a more direct interest of a sexual kind. When they occurred in the hearing of others they seemed consistently humiliating.

When the remaining incidents … are taken into account I am satisfied that Mr Tucker embarked on a systematic course of conduct that is fairly described as sexual harassment within its statutory meaning. Some of the individual remarks and suggestions constituted sexual harassment in their own right. The first incident fell into that category. Overall, the whole course of conduct did also.

1. The trial judge described Mr Tucker’s unlawful conduct as “persistent and ultimately callous”: see *Richardson v Oracle* (first instance) at [148]. He added (also at [148]) that:

It was, I am satisfied, intended at least to demean Ms Richardson and perhaps to humiliate her. Perhaps it was Mr Tucker’s way of attempting to get the upper hand in their disagreements, or before their colleagues and representatives of the ANZ Bank. If so, it was an offensive way of doing so, and ultimately cruel. … The explanations he proffered exposed clearly the falsity of his earlier denials to Oracle. They were insufficient to excuse his conduct. They afford no reason to question the elements and essentials of Ms Richardson’s complaints against him.

1. Ms Richardson brought an end to Mr Tucker’s sexual harassment of her only when she informed her direct manager, Ms Amanda Swan, about his behaviour. When so informed, Ms Swan contacted Ms Edweena Stratton, the Senior Director of Human Resources for Oracle (“HR”) in Australia and New Zealand. Ms Stratton delegated investigation of Ms Richardson’s complaints to Ms Rachna Sampayo, a member of Oracle’s HR staff in Melbourne. Ms Sampayo spoke with Ms Richardson and subsequently carried out an investigation into Ms Richardson’s complaint.
2. During the investigation, Ms Richardson continued to have regular contact with Mr Tucker, although only via conference calls or emails. As to this contact, his Honour said (at [47]-[48]):

While the evidence was ultimately unclear about the frequency with which Ms Richardson was involved in ongoing contact with Mr Tucker, I am prepared to accept that, as matters developed, there was regular contact between Ms Richardson and Mr Tucker until the investigation was complete and its findings were provided to Ms Richardson and Mr Tucker. As late as 10 December 2008 Ms Richardson dealt by email directly with Mr Tucker about aspects of the project.

The requirement for Ms Richardson to remain in contact with Mr Tucker after she had revealed the nature of her complaints about him, even while they were being investigated, was criticised in the proceedings. Although there was no suggestion that Mr Tucker committed any further acts of sexual harassment during this period, I am satisfied that these arrangements contributed to some extent to the psychological impact on Ms Richardson of Mr Tucker’s conduct. … .

Their continued contact, it appeared to the trial judge, “compounded Ms Richardson’s distress” ([179]).

1. Ms Sampayo’s findings supported much of Ms Richardson’s complaint. Mr Tucker subsequently wrote an apology to Ms Richardson, in which he stated that his conduct was intended as “light-hearted banter”; and he provided it to Ms Sampayo. On 15 December 2008, Ms Sampayo sent the apology to Ms Richardson; Ms Richardson “reacted very strongly”: see *Richardson* *v* *Oracle* (first instance) at [51]. Ultimately, Oracle gave Mr Tucker a first and final warning, though he retained his Melbourne position.
2. On 17 December 2008, Ms Richardson met with Ms Swan to discuss the way forward. Ms Swan’s recollection was that, at this meeting, she made it clear to Ms Richardson that, in light of the fact that Mr Tucker’s position in the company was unchanged, it was her view that it would be better for Ms Richardson not to go into the Melbourne office at all. The trial judge accepted Ms Swan’s evidence that she had only Ms Richardson’s interests in mind at this time: *Richardson* *v* *Oracle* (first instance) at [58]. As to Ms Swan’s repositioning of Ms Richardson within Oracle, his Honour continued (at [68]-[69]):

Ms Swan’s primary motivation, I am satisfied, was to find a way to protect Ms Richardson, about whom she was very concerned. In my view, Ms Swan simply did her best to find a way to accommodate Ms Richardson’s desire to have nothing further to do with Mr Tucker or to risk any further encounter with him. The steps she took, with Ms Stratton’s knowledge and Mr Simek’s approval, were not intended to be, and did not represent, a demotion or a reduction in Ms Richardson’s role or responsibilities.

The “architecture initiative” … appears not to have been as insignificant as [Ms Richardson] tended to suggest. Later evidence showed that the project was being sponsored and developed at a high level within Oracle. It was in fact proposed in early December to Mr Simek that Ms Richardson be involved in a senior capacity. Ms Swan sent Ms Richardson an email on 16 December 2008 drawing the project to Ms Richardson’s attention and foreshadowing her potential involvement in it. These developments appear to be unrelated to the issues with Mr Tucker. I reject the contention that they disclose any diminution of Ms Richardson’s role.

1. Notwithstanding Oracle’s attempts to reposition Ms Richardson in this way, the trial judge found that Ms Richardson began considering the question of her future employment after she made her complaint against Mr Tucker and before the investigation was complete: *Richardson* *v* *Oracle* (first instance) at [73]. Shortly before Christmas 2008, Ms Richardson telephoned Mr Andrew Ward, with whom she had previously worked at Oracle. Mr Ward was then working from Singapore for EMC Australia (“EMC”) in the same general field as Oracle. According to Mr Ward, “after exchanging Christmas greetings and other pleasantries, Ms Richardson informed him that she was ‘looking for something’ to which Mr Ward responded positively” (although he emphasised that he observed the limits of his contractual restraint): see *Richardson* *v* *Oracle* (first instance) at [76].
2. Ms Richardson resigned her employment with Oracle by a letter to Ms Stratton dated 5 March 2009. She worked out her notice period. Her employment with Oracle ceased on 3 April 2009. Ms Richardson received a letter of offer from EMC dated 13 March 2009, offering her a starting date of 20 April 2009. Ms Richardson began work at EMC on that date.
3. Ms Richardson made a number of complaints about Oracle’s investigation of Mr Tucker’s conduct and its aftermath. In substance, her complaint centred on an alleged need for a “formal complaint”; Oracle’s requirement that Ms Richardson continue to work with Mr Tucker while the investigation was carried out; restrictions on Ms Richardson discussing the matter with colleagues while the investigation was being carried out; and Ms Sampayo’s action in sending Mr Tucker’s apology to Ms Richardson: *Richardson* *v* *Oracle* (first instance) at [168]. The primary judge rejected all these complaints about Oracle’s investigation process: see *Richardson* *v* *Oracle* (first instance) at [169], [175], [181]-[185], [193], [199]; cf [240].
4. Since Oracle failed to show that it took all reasonable steps to prevent Mr Tucker from sexually harassing Ms Richardson, the trial judge held that, under s 106 of the SDA, Oracle was vicariously liable for Mr Tucker’s conduct towards Ms Richardson: see *Richardson* *v* *Oracle* (first instance) at [158], [164]. The trial judge rejected Ms Richardson’s claim that Oracle’s liability extended to compensating her for the distress caused by the investigation process. His Honour held (at [166]) that:

Oracle’s vicarious liability for Mr Tucker’s conduct does not, in my view, without more provide a sufficient foundation for recovery of compensation for added distress caused by Oracle in the conduct of the investigation, to the extent the criticisms were made good.

1. The trial judge also rejected Ms Richardson’s allegation that Oracle had subjected her to indirect discrimination on the ground of her sex based on ss 5(2) and 14(2) of the SDA: see *Richardson* *v* *Oracle* (first instance) at [186]-[193]. Further, his Honour rejected her claims for contractual damages and compensation for victimisation: see *Richardson* *v* *Oracle* (first instance) at [194]-[205].
2. The trial judge assessed the damages to be awarded Ms Richardson as compensation for Mr Tucker’s sexual harassment under s 46PO(4)(d) of the *Australian Human Rights Commission Act 1986* (Cth) (“AHRC Act”) in terms of non-economic loss and damage and economic loss and damage. His Honour fixed general damages (i.e., damages in respect of non-economic loss and damage) at $18,000. His Honour rejected the contention that the economic losses that Ms Richardson claimed were suffered “because” of Mr Tucker’s conduct. In this latter regard, his Honour held that “the necessary causal link was not established”: see *Richardson* *v* *Oracle* (first instance) at [248].

# general damages (grounds 16-20)

1. Section 46PO(4)(d) of the AHRC Act confers a power on the court to make orders, as it thinks fit, including an order for damages by way of compensation for the loss and damage suffered by a victim of ‘unlawful discrimination’ – an expression that includes sexual harassment. The terms of s 46PO(4)(d) are important in the following analysis. Section 46PO(4)(d) is as follows:

If the court concerned is satisfied that there has been unlawful discrimination by any respondent, the court may make such orders (including a declaration of right) as it thinks fit, including any of the following orders or any order to a similar effect:

…

(d) an order requiring a respondent to pay to an applicant damages by way of compensation for any loss or damage suffered because of the conduct of the respondent; …

1. The trial judge accepted that Ms Richardson was entitled to damages by way of compensation for the distress she suffered because of Mr Tucker’s unlawful conduct. As noted earlier, his Honour awarded the sum of $18,000 as general damages. Ms Richardson appealed against this award on six grounds (grounds 16, 17, 18, 19, 19A and 20). I discuss each of these grounds below.

### Ground 16

1. Ground 16 was that his Honour erred “by applying the principles for the assessment of damages in tort rather than the assessment of statutory compensation under section 46PO(4)(d)” of the AHRC Act.
2. At paragraph [208] of his reasons in *Richardson v Oracle* (first instance), the trial judge stated that:

The applicant and Oracle agreed that, generally speaking, assessment of damages by way of compensation for sexual harassment under the SD[A] would normally follow principles for the assessment of damages in tort. While the principle is not to be strictly applied where a particular case calls for a different approach, I see no reason in the present case to depart from that approach. It is not necessary to discuss the cases which support it.

Although her submissions on this point were not entirely clear, the appellant challenged the trial judge’s statement that normally tortious principles would provide a guide as to the measure of damages under s 46PO(4)(d) of the AHRC Act. Her point was not that the particular circumstances of this case called “for a different approach”. Rather, her argument was made at a higher level. As her counsel said, the difference between the two approaches identified in Ground 16 was an important, but “theoretical” one, which would ground a different determination of liability “at the margins of [a Court’s] assessment”. Counsel went on to observe that, in this case, “we say we’re not at the margins of that assessment” and “even if you applied a common law principle we would still have established causation”.

1. In written submissions filed before the hearing of the appeal, the appellant denied that there had been any such agreement regarding damages assessment principles, as mentioned by the trial judge. Rather, so the appellant submitted in support of this ground (and thus ground 20), damages were to be assessed, having regard to “the purpose, nature and scope of the AHRC Act and the SDA”. Referring to *Waters v Public Transport Corporation* (1991) 173 CLR 349 (“*Waters v Public Transport Corporation*”), the appellant highlighted that “when construing beneficial legislation designed to protect human rights (such as the SDA) the Court has a ‘*special responsibility*’ to take account of, and give effect to, the purposes and objects of the legislation”.
2. The chief subject of the passage (in *Waters v Public Transport Corporation* at 359) to which the appellant referred was a principle of construction. In this passage, Mason CJ and Gaudron J stated at that:

[T]he principle that requires that the particular provisions of the Act must be read in the light of the statutory objects is of particular significance in the case of legislation which protects or enforces human rights. In construing such legislation the courts have a special responsibility to take account of and give effect to the statutory purpose.

These statements were made with respect to the **construction** of the words “on the ground of the status” and “by reason of the private life” in s 17(1) of the *Equal Opportunity Act 1984*(Vic). The same principle would be applicable if there were a question about the construction of s 46PO(4)(d) of the AHRC Act. The issue raised by ground 16 is not, however, one of construction; rather, the issue is as to the proper application of s 46PO(4)(d). Of course, as Gleeson CJ said, in relation to s 82 of the *Trade Practices Act 1974* (Cth), in assessing damages for the purposes of exercising a statutory power to award damages, a court is not acting in “a conceptual vacuum”: rather “[i]t is done in order to give effect to a statute with a discernible purpose; and that purpose provides a guide as to the requirements of justice and equity in the case”: see *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109 (“*I & L Securities Pty Ltd v HTW Valuers*”) at 119 [26]. As his Honour added (in the same passage):

Those requirements are not determined by a visceral response on the part of the judge assessing damages, but by the judge’s concept of principle and of the statutory purpose.

1. Section 46PO(4)(d) of the AHRC Act supplies the governing criterion for the assessment of the damages to be awarded under this provision. That is, s 46PO(4)(d) contemplates that these damages will be ‘by way of **compensation**’. In giving content to the concept of compensatory damages in this context, 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):

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.

1. The trial judge described this approach at [208], when he indicated that the measure of damages for the purposes of s 46PO(4) would ordinarily follow tortious principles, although tortious principles would not be applied in a case calling for a different approach. His Honour applied this approach to the assessment of damages in Ms Richardson’s case. Being satisfied that Mr Tucker’s impugned conduct was unlawful discrimination, his Honour assessed damages ‘by way of compensation’ for the loss or damage suffered by the appellant because of that conduct. In so doing, his Honour was guided by tortious principles. Having regard to the authorities, there was no error in this approach. As already stated, the appellant’s challenge was as to the generally applicable principles. The appellant did not argue that, whilst tortious principles provided a guide to the measure of damages in many cases, they could not do so in this case because of its particular characteristics.
2. At the hearing of the appeal, the appellant argued that the approach approved by the Full Court in *Qantas Airways Ltd v Gama* (and in *Hall v A & A Sheiban*) was inconsistent with the High Court’s statement of principle in *Murphy v Overton Investments Pty Ltd* (2004) 216 CLR 388 (“*Murphy v Overton*”) at 407 [44] to the effect that:

[I]t is wrong to approach the operation of those provisions of Pt VI [of the *Trade Practices Act 1974* (Cth)] which deal with remedies for contravention of the Act by beginning the inquiry with an attempt to draw some analogy with any particular form of claim under the general law. No doubt analogies may be helpful, but it would be wrong to argue from the content of the general law that has developed in connection, for example, with the tort of deceit, to a conclusion about the construction or application of provisions of Pt VI of the Act. To do so distracts attention from the primary task of construing the relevant provisions of the Act. In the present case, analogies with the tort of deceit appear to have led to an assumption, at least at trial, that a person can suffer only one form of loss or damage as a result of a contravention of Pt V of the Act.

1. There is nothing in *Murphy v Overton* that would indicate error in the trial judge’s approach. *Murphy v Overton* (in the above passage) acknowledges that analogies with general law principles can assist. The trial judge did not begin his inquiry by drawing an analogy with any particular claim in tort. Nor did his Honour construe s 46PO(4)(d) as in some way limiting compensatory damages to those recoverable in respect of a particular tort. These were the kinds of error to which *Murphy v Overton* referred. Rather, the trial judge based his inquiry firmly on the terms of s 46PO(4)(d) and drew on tortious principles only to inform (but not define) the manner in which the statutory task was to be accomplished, to the extent that such principles were capable of providing appropriate guidance in the particular case. This is the approach sanctioned by previous Full Courts; and it is not inconsistent with *Murphy v Overton*.
2. The general approach taken by the trial judge to the assessment of damages under s 46PO(4) of the AHRC Act disclosed no error of the kind alleged. Ground 16 therefore fails.

### Ground 17

1. Ground 17 alleged that the trial judge “erred by discounting Ms Richardson’s general damages to remove compensation for: (a) Ms Richardson’s further damage caused by Oracle’s investigation into her complaint; and (b) the ongoing stressor of Mr Tucker’s contravening conduct after November 2008”.
2. The appellant’s challenge was to the trial judge’s determination that he could not award damages in respect of any loss and damage suffered by Ms Richardson that did not ‘flow directly’ from Mr Tucker’s unlawful conduct but from Oracle’s **lawful conduct** of its investigation. The short answer to this appeal ground is that the damages to be awarded under s 46PO(4)(d) of the AHRC Act are by way of compensating the victim of sexual discrimination for the loss or damage suffered because of **that unlawful conduct**. In this case, damages are only available to compensate Ms Richardson for the loss she sustained **because** of Mr Tucker’s proven sexual harassment of her. Any loss arising from Oracle’s lawful conduct is not compensable unless it was also loss sustained **because** of Mr Tucker’s unlawful conduct. The trial judge took this into account: see the passage at [240] of his reasons set out above.
3. As I stated earlier, I agree with Besanko and Perram JJ that the appellant’s submissions about Oracle’s investigation process and any further loss and damage must be rejected. In short, this is because the fact that an investigation follows a formal complaint does not, of itself, create the relevant “causal connection” between the unlawful harassment and any conduct by Oracle during an investigation. This is true whether or not such a sequence is contemplated by the overarching framework for the prevention of sex discrimination, of which the SDA and the AHRC Act form part. The order of events in Ms Richardson’s case does not, of itself, render harm caused by an alleged failure in the investigation process harm “**because of the conduct of the respondent**”**.** I emphasise that this is so when regard is had to the words and “discernible purpose” of the SDA and to any guidance given by the general principles governing the assessment of damages in tort. The same must be said of any harm occasioned by Ms Sampayo forwarding Mr Tucker’s apology to Ms Richardson.
4. I agree too that, in this case, the loss and damage asserted by Ms Richardson under this ground (except for any submission in relation to the apology) seems better characterised as loss occasioned by Oracle’s failure to ensure Ms Richardson and Mr Tucker’s separation during the period of investigation, rather than a failure of the investigation per se. This is an additional problem for the appellant.
5. Therefore, it must follow that there was no error in his Honour’s assessment of damages of the kind described in 17(a).
6. The proposition inherent in ground 17(b) that the trial judge discounted Ms Richardson’s general damages to remove compensation for the ongoing stressor of Mr Tucker’s contravening conduct after November 2008 is misconceived. This is not how the trial judge reasoned.
7. The trial judge found that Mr Tucker’s unlawful conduct ended in November 2008, although Ms Richardson’s “**exposure** to him lasted until at least 10 December 2008”: see *Richardson v Oracle* (first instance) at [236] (emphasis added). His Honour preferred the evidence of Dr Klug to the evidence of Dr Phillips, to the effect that Ms Richardson’s adjustment disorder ceased when she left Oracle and joined EMC, although his Honour accepted “the possibility that Ms Richardson’s symptoms extended beyond **exposure** to Mr Tucker for the six months which the diagnosis accommodates”: *Richardson v Oracle* (first instance) at [234], [236] (emphasis added). His acceptance of this latter possibility was consistent with the diagnosis of “adjustment disorder” made by the expert psychiatrists: see *Richardson v Oracle* (first instance) at [219], [225], [236]. On any view of his Honour’s findings, Ms Richardson had ceased to suffer from the adjustment disorder by the time the litigation began in June 2010 or even by the time of the Australian Human Rights Commission (“AHRC”) complaint in October 2009. The trial judge assessed general damages on the basis of these findings.
8. The trial judge rejected the proposition that, for the purpose of calculating damages, litigation was a stressor that could be added to Mr Tucker’s conduct, or for which Oracle could be vicariously liable. This was because this stressor was not causally relevant. His Honour expressly rejected the view of Dr Zeussman that the stress of the litigation “continues seamlessly from the stress occasioned by Mr Tucker’s conduct”: see *Richardson v Oracle* (first instance) at [235]. As his Honour said, “[i]f the litigation is a stressor in this case, it is a stressor in its own right. It does not contribute to the diagnosis of psychological injury made out in the present case”: see *Richardson v Oracle* (first instance) at [235]. His Honour made this finding on the basis of his considered view of the evidence, especially the opinion of Dr Klug.
9. I agree with Besanko and Perram JJ that the question of causation here is only one consideration relevant to resolving this submission. I agree that Oracle is not vicariously liable for any loss occasioned by Mr Tucker’s false denials in so far as they “forced” Ms Richardson to relive her experiences of his unlawful conduct in the AHRC or this Court. This is because Oracle’s vicarious liability for Mr Tucker’s conduct arises if, in the terms of s 106 of the SDA, it was unlawful under either Division 1 or 2 of Part II, or Division 3 of Part II of the SDA and it has been done “in connection with the employment of the employee”. Mr Tucker’s false denials did not satisfy this statutory test.
10. Further, I do not accept that Mr Tucker’s false denials can, instead, provide a “causal bridge” linking Mr Tucker’s unlawful conduct and any harm Ms Richardson suffered reliving that conduct for the purported purpose of rebutting the denials in the AHRC or this Court. In written submissions, Ms Richardson argued that “common sense and the evidence of Dr Phillips and Dr Zeussman confirm that Oracle’s investigative process and the litigation process, which required Ms Richardson to continue to recall and recount Mr Tucker’s humiliating acts of harassment, caused Ms Richardson to continue to suffer as a result of this ‘stressor’”. As already noted, the trial judge expressly rejected this interpretation of the evidence, preferring instead Dr Klug’s opinion as set out above. I am not persuaded that the trial judge’s findings (based as they were on Dr Klug’s evidence) about what was a relevant “stressor” and its temporal limits disclosed relevant error. Furthermore, there is nothing in the medical evidence adduced at trial that warrants this Court departing from the trial judge’s finding that “[i]f the litigation is a stressor in this case, it is a stressor in its own right”. The same must be said of the AHRC complaint.
11. Finally, I note that, to the extent that this ground raised an argument about Oracle’s vicarious liability for Mr Tucker’s false denials and their later consequences, it too must fail for the reasons set out in the previous paragraphs. To the extent that such an argument relied on the logic that unlawful conduct begets a complaint and, in turn, an investigation, it must fail for the reasons already outlined with respect to ground 17(a).
12. There can therefore be no basis for imputing an error of the kind alleged in ground 17(b) and ground 17(b) must fail.

### Ground 18

1. Ground 18 was that the trial judge had “erred by discounting Ms Richardson’s general damages by reference to the consideration that her psychological damage was not debilitating in that it did not prevent [her] from working or pursuing her career without regard to the debilitating impact on the rest of Ms Richardson’s quality of life and the reasons why she had been compelled to make the complaint”. At the hearing of the appeal, the appellant submitted that his Honour’s statement that her psychological damage was not debilitating was contrary to the evidence of Dr Phillips, and of her family and friends. The appellant further submitted that his Honour failed to have regard to other relevant considerations besides work. I consider that these submissions pay insufficient regard to the entirety of his Honour’s reasoning and, to some extent, take his Honour’s observation out of its proper context.
2. It is evident from his reasons that the trial judge took into account, as he was entitled to do, the nature and extent of the psychological damage that Ms Richardson had suffered as a result of Mr Tucker’s unlawful conduct. This led him to conclude that “the psychological damage to Ms Richardson, while not insignificant, was not debilitating in that it did not prevent Ms Richardson from working or pursuing her career”: see *Richardson v Oracle* (first instance) at [244]. This latter statement, including as to the effect of her injury on her working life, derived from the evidence adduced at trial. The finding arose directly from that evidence; and it was plainly open to the trial judge to make it. It was also plainly open to his Honour to regard it as relevant to the assessment of damages.
3. The trial judge did not “measure whether Ms Richardson’s psychological injury was ‘debilitating’ **solely** by reference to her ability to continue to work”, as the appellant at one point argued. The appellant’s contention that the trial judge failed to take into account that her quality of life had been compromised must be rejected. His Honour’s reasons for judgment show an awareness of the ‘quality of life’ considerations and that they were taken into account. Thus, his Honour specifically said (at [246]) that, in fixing the quantum of general damages, he took into account “the medical evidence… evaluated in the light of the findings of fact”, which he discussed in detail: see *Richardson v Oracle* (first instance) at [216] and following. His Honour accepted that Ms Richardson had suffered a chronic adjustment disorder with mixed features of anxiety and depression: see *Richardson v Oracle* (first instance) at [236]. There were also the other matters to which he referred, including her significant distress (especially as revealed in her counselling journal) and changes in her demeanour and physical condition: see *Richardson v Oracle* (first instance) at [209]-[213].
4. No error can be inferred from the fact that his Honour did not set out in detail all the myriad ways in which Ms Richardson’s quality of life had been impaired. In fact many of the ways that Ms Richardson’s life had been impaired were set out (as mentioned above). The obligation to give reasons did not require the trial judge to mention and analyse every aspect of the loss of quality of life that Ms Richardson suffered: it was enough that the basis for his decision was disclosed: see *Pitcher v Langford* (1991) 23 NSWLR 142 at 149-150 (Kirby P) citing *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 270 and 282. His Honour fulfilled this obligation. Bearing the above considerations in mind, Ground 18 is not made out.

### Ground 19

1. Ground 19 was that the trial judge erred “by assessing general damages by reference to the nature of Mr Tucker’s unlawful conduct rather than by reference to the impact of that unlawful conduct on Ms Richardson”. The appellant contended that, in assessing general damages, the trial judge took into account Mr Tucker’s conduct, which was an irrelevant consideration, since the only basis for assessing general damages was by reference to the impact on her. In particular, at the hearing of the appeal, the appellant submitted that the trial judge’s comment that “Mr Tucker’s conduct was not accompanied by physical elements of sexual harassment” indicated that his Honour had taken into account an irrelevant consideration, since “the only question [was] what was Ms Richardson’s reaction and what [was] her loss and damage by reason of that conduct”. I consider that the appellant’s submissions involve a misreading of his Honour’s reasons.
2. At paragraph [244] of his reasons, the trial judge stated that:

Any assessment of damages in a case such as the present is bound to be a broad one, not involving any particularly scientific approach. The following matters, in particular, must be taken into account in the present case: Mr Tucker’s conduct was not accompanied by physical elements of sexual harassment which are a feature of some of the decided cases; it is only Mr Tucker’s conduct which is the foundation for an award of damages on the findings I have made; some attempt must be made to discount from Ms Richardson’s account of her feelings, and from the assessment made by the medical experts of her condition, matters which are not a response or reaction to Mr Tucker’s conduct; and, the psychological damage to Ms Richardson while not insignificant, was not debilitating in that it did not prevent Ms Richardson from working or pursuing her career.

There is no error discernible in this passage, or elsewhere in his Honour’s reasons, of the kind alleged by the appellant.

1. In the circumstances as found by the trial judge, s 46PO(4)(d) conferred a power to make an order for damages by way of compensation for the loss and damage suffered by Ms Richardson **because** of the unlawful conduct of Mr Tucker. It is true, as the appellant submitted, that s 46PO(4)(d) contemplated an award of **compensatory** damages for the **loss sustained by the victim**,but only in so far as it was caused by Mr Tucker’s unlawful conduct. There is no doubt that his Honour was fully cognisant of the necessarily compensatory nature of an award of damages under s 46PO(4)(d) because he repeatedly referred to the compensatory nature of an award of damages under this provision: see, for example, [207]-[208], [237]. Whilst it is true to say, as the appellant does, that the loss and damage attracting compensatory damages is the loss and damage **suffered by her**, it is equally true to say that the only loss and damage that can be the subject of an award of compensatory damages is that caused by Mr Tucker’s conduct. It was thus correct to say, as the trial judge did, that Mr Tucker’s conduct was the only “foundation for an award of damages on the findings … made”: see [244] of his Honour’s reasons, set out above. In assessing the measure of damages, the effect of Mr Tucker’s conduct on Ms Richardson was pivotal. In this sense it was relevant, as his Honour said, that “Mr Tucker’s conduct was not accompanied by physical elements of sexual harassment” since the absence of **physically** harassing conduct was capable of throwing light on the loss and damage suffered by his victim. It has been accepted elsewhere that the nature of the respondent’s conduct is relevant in this way (although, of course, not for the application of a limitation by reference to whether damage is “justifiable” by so-called “reasonable community standards and expectations”): see *Hall v* *A & A Sheiban* at 238 and 256 (Lockhart J and Wilcox J). When his Honour’s reasons are considered overall, it is tolerably clear that his Honour did not treat this consideration as relevant in any other impermissible way.
2. For the reasons stated, I can discern no error in his Honour’s decision of the kind alleged in ground 19.

### Ground 19A

1. Ground 19A was that the trial judge had “erred in not finding that the contravening conduct affected Ms Richardson’s sexual relationship with her then partner, Mr Dunphy”. In relation to this ground, the appellant referred to Lockhart J’s observation in *Hall v A & A Sheiban* at 242 that “[o]nce the applicant’s account of her reaction is accepted, if it is accepted, then damages fall to be assessed having regard to that reaction …”. As Lockhart J went on to say (at 243), “[t]he relevant question is whether there was such a connection between the acts of sexual harassment and the failure of the [pre-existing] relationship”. In that case, error was found in the Commission’s finding because it was not “based on the evidence before it but based upon [its] perceptions of ordinary or normal human experience of human nature” (at 243). At the hearing of the appeal, the appellant submitted in substance that the trial judge’s treatment of her relationship with Mr Dunphy disclosed the same sort of error. In written submissions, the appellant challenged his Honour’s finding on the basis that it was “against the evidence and ordinary human experience”.
2. As noted above, the trial judge accepted that Ms Richardson was very distressed by Mr Tucker’s conduct and this distress was manifest in her suffering forms of physical and mental impairment, including an adjustment disorder. In this connection, his Honour referred to Ms Richardson’s own evidence, which was, so his Honour held, corroborated by the evidence constituted by her counselling journal and the evidence of her then partner, Mr Adrian Dunphy, her friends and a neighbour, Ms O’Toole: see *Richardson v Oracle* (first instance) at [212] and [213].
3. Having so concluded with respect to the distress suffered by Ms Richardson, his Honour went on to say (at [214]):

On the other hand, it is difficult to place as much weight on Ms Richardson’s complaints that her interpersonal relations with her partner, Mr Dunphy, were affected in various ways. There are always a variety of factors operating in any relationship and it is often not possible to be confident about the necessary causal relationship. I am not able to reach the necessary confidence about that matter in this case.

1. Whilst it may be said that his Honour dealt with this point briefly, this of itself does not indicate error. It must be borne in mind that his Honour dealt with the point only after he had discussed and accepted the other non-medical evidence concerning her distress; and that he went on to discuss and assess the medical evidence in detail. Further, this was not an instance where, as in *Hall A & A Sheiban* at 243, this part of Ms Richardson’s case was expressly rejected by reference to ordinary human experience. Rather, this part of her case was rejected because, in his Honour’s view, the evidence did not establish the requisite causal connection that Ms Richardson alleged. It is in this context that his Honour’s reference to “a variety of factors” must be understood.
2. The evidence as to the sexual relationship between Ms Richardson and Mr Dunphy was relatively slight compared with that relating to other loss and damage suffered by Ms Richardson. Ms Richardson and Mr Dunphy gave evidence and were cross-examined about their relationship. Their evidence was that they entered into a close relationship in late 2007, some several months before Mr Tucker’s unlawful conduct began. Mr Dunphy’s evidence was that he noticed a change in their relationship “when Rebecca indicated to me that she was having trouble at work” in the sense her personality changed including “sexually and also just our closeness”. His evidence at the trial on 26 March 2012 was that the relationship had not improved since then. As Mr Dunphy explained in examination in chief:

Rebecca became withdrawn. She was anxious, and when these incidences started, in the timeframe your Honour is talking about, our socialising, our very, you know, intimacy between ourselves did change.

1. He confirmed that his reference to intimacy was a reference to his and Ms Richardson’s sexual relationship and their “closeness” was the connected physical intimacy they have previously enjoyed. He explained that:

[W]hen Rebecca explained to me that there was someone that was making comments to her of a sexual nature, it changed the dynamic. We were – she was hesitant.

1. Ms Richardson also gave evidence in chief of a marked change in the frequency with which she and Mr Dunphy had sex in the period after April 2008 until the time of the trial, March 2012. In cross-examination, she accepted that “there’s a difference here in this relationship with Adrian in that you are in a partnership with a child” but she repudiated the suggestion that the child had in this case “ever been of detriment to my relationship with Adrian”. It was clear at trial that Mr Dunphy’s child had been a feature of the couple’s relationship for its duration, including, relevantly before the marked change in April 2008. There was no relevant expert medical or psychological evidence adduced on this issue, although I note that such evidence is not routinely required: see *Walker v Citigroup Global Markets Australia Pty Ltd* (2006) 233 ALR 687 (“*Walker v Citigroup*”); *Crellin v Kent* [2000] VSCA 165 at [15]-[17].
2. The trial judge was not obliged to accept the evidence of Ms Richardson and Mr Dunphy on the issue. In this context, it may be recalled that the trial judge preferred Ms Richardson’s evidence to Mr Tucker’s concerning the eleven incidents of sexual harassment, but did not accept her evidence about all matters in issue. For example, his Honour “rejected significant elements of Ms Richardson’s assertions” about Oracle’s investigation and treatment of her and her future prospects there: see, for example, *Richardson v Oracle* (first instance) at [74], [169], [221]. Such rejections were not, importantly, on credit grounds, but rather because, for example “Ms Richardson insufficiently appreciated the factors that were necessarily in play” within Oracle HR ([at 169]). In keeping with his Honour’s generally considered approach, which involved assessing the reliability of the evidence of all witnesses, including Ms Richardson, on an issue by issue approach, his Honour apparently considered Ms Richardson’s and Mr Dunphy’s evidence about their relationship.
3. As a result, his Honour did not accept that their evidence established to the requisite standard that Mr Tucker’s unlawful conduct caused Ms Richardson’s and Mr Dunphy’s sexual relationship to deteriorate. In evaluating their evidence, his Honour presumably had regard to various salient matters, perhaps including the duration of the relationship as at April 2008, Ms Richardson’s work-related absences from home and the other matters referred to in cross-examination, which were summed up in his Honour’s reference to a “variety of factors”. I accept that as counsel for Oracle, Mr Fernon, said “on that small part of the case, [his Honour was] not able to reach the necessary level of confidence about the matter”.
4. Even in an appeal such as this, by way of rehearing, an allowance must be made for the fact that the trial judge has advantages not shared by the appellate court: see *Fox v Percy* (2003) 214 CLR 118 (“*Fox v Percy*”) at 124-129 [20]-[31], 138-139 [65]-[67]. As the joint judgment stated in *Fox v Percy* (at 125-126 [23]):

On the one hand, the appellate court is obliged to “give the judgment which in its opinion ought to have been given in the first instance”. On the other, it must, of necessity, observe the “natural limitations” that exist in the case of any appellate court proceeding wholly or substantially on the record. These limitations include the disadvantage that the appellate court has when compared with the trial judge in respect of the evaluation of witnesses’ credibility and of the “feeling” of a case which an appellate court, reading the transcript, cannot always fully share. Furthermore, the appellate court does not typically get taken to, or read, all of the evidence taken at the trial. Commonly, the trial judge therefore has advantages that derive from the obligation at trial to receive and consider the entirety of the evidence and the opportunity, normally over a longer interval, to reflect upon that evidence and to draw conclusions from it, viewed as a whole.

(Citations omitted)

1. Leaving aside the particular considerations regarding factual findings based on credit, whilst the appellate court must make up its own mind on the facts, the court does not proceed as if it were trying the case at first instance. There is a need for the appellant to show error on the appeal, since the task of the appellate court is to correct such error: see also *Knight v Beyond Properties Pty Ltd* (2007) 242 ALR 586 at 590-591 [20] (French, Tamberlin and Rares JJ). In determining whether there is error, the appellate court must take into account and weigh the advantages held by the trial judge: see *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* (2001) 117 FCR 424 (“*Branir*”) at 437 [28].
2. On this ground of appeal, the relevant evidence in chief and cross-examination was not, as the appellant accepted, overwhelmingly detailed or long-running. The Court has been taken to the parts of the transcript said to bear on the issue of Ms Richardson’s relationship with Mr Dunphy. Plainly enough the trial judge had the advantage of hearing all the evidence, including that of Ms Richardson and Mr Dunphy. I acknowledge both that this advantage is “subtle and imprecise, yet real” (*Branir* at 437 [28]) and that, as stated in *Branir* at 437 [28], “if a choice arises between conclusions equally open and finely balanced and where there is, or can be, no preponderance of view, the conclusion of error is not necessarily arrived at merely because of a preference of view of the appeal court for some fact or facts contrary to the view reached by the trial judge”.
3. In my view, however, in this instance the choice between the conclusion the trial judge came to, and my own conclusion, is not “equally open”. Neither is it a circumstance where this Court has merely “a preference … for some fact or facts” over those preferred by the trial judge. In the circumstances of this case, there was no real basis disclosed, either in the evidence to which the Court was referred or in the trial judge’s reasons, for his Honour’s lack of satisfaction as to the causal connection between Mr Tucker’s sexual harassment of Ms Richardson and the significant decline in sexual intimacy between her and her partner. I consider that there was error of the kind alleged in ground 19A.
4. I reach this conclusion notwithstanding any advantage the trial judge may have had to assess the evidence. This is particularly because the evidence was discrete. Mr Dunphy and Ms Richardson’s evidence about their relationship was consistent and corroborative of one another’s account. The reliability of their evidence was unaffected by any matter of credit; and their cross-examination revealed no factor that would justify a different conclusion from the one I would reach.
5. Further, the brevity and generality of his Honour’s reasons on this discrete and relatively simple point makes it virtually impossible to discern and appreciate what may have been the basis for his Honour’s contrary conclusion. It appears from what his Honour did say (at [214]) that he accepted that their sexual relationship had diminished, but we know only that his Honour was unconvinced of the existence of the requisite causal connection, perhaps because he accepted that “a variety of factors were operating” on the couple’s sexual relationship (as to which, see further below). Although his Honour referred to the possibility that a “variety of factors” may have impinged on this relationship, nothing in his Honour’s reasons, read by themselves or in conjunction with the evidence, identifies the particular factors his Honour had in mind when he said that he did not have “the necessary confidence” that **a** cause of this diminished relationship was Mr Tucker’s sexual harassment. As already indicated, a number of factors were put to Ms Richardson and Mr Dunphy in cross-examination as alternate or combined causes of the change in their sexual relationship, which were mostly repudiated by them; but his Honour’s reasons for judgment do not identify one or other of these as so persuasive that he was unable to accept the witnesses’ evidence.
6. The gist of the evidence of Ms Richardson and Mr Dunphy was that Mr Tucker’s sexual harassment was a cause of their diminished sexual relationship. Mr Dunphy’s evidence that Ms Richardson’s anxiety, the existence of which was subsequently diagnosed and accepted, led to a reticence on both their parts to engage in sexual intimacy with one another and his evidence that there was a “change in the dynamic” sexually because of the sexual nature of Mr Tucker’s harassment is particularly telling. This evidence establishes that Mr Tucker’s sexual harassment of Ms Richardson was a cause of their diminished sexual intimacy. It may also indicate that Ms Richardson’s behaviour in this regard was but another manifestation of the psychological injury she sustained because of his misconduct.
7. In cross-examination, it was put to Ms Richardson that her work travel, distress from factors other than the harassment (such as the litigation itself) and Mr Dunphy’s child should be accepted as the factors **affecting** the sexual dynamic between her and Mr Dunphy. The same factors were put to Mr Dunphy in cross-examination, as well as the proposition that Ms Richardson’s alleged increase in colds and illness may have also dampened their sex life. His responses were consistent with his original evidence. So far as I can discern there was no evidence that these “other” factors were relevantly active in their relationship; Ms Richardson and Mr Dunphy’s responses largely discounted them. There was no direct challenge to their evidence that Mr Tucker’s sexual harassment harmed Ms Richardson’s sexual relationship with her partner. In my view, even if the trial judge thought that these “other factors” might have loomed as possible influences on the relationship, this possibility could not contradict the clear evidence of Ms Richardson and Mr Dunphy that Mr Tucker’s sexual harassment was a cause of Ms Richardson’s diminished sexual relationship with Mr Dunphy. Further, in my view, these other factors were not sufficiently disclosed or pursued by the respondent to establish that they were **the** factors active in the loss she suffered, such that they might make this loss referrable to some other act or acts entirely for which Oracle is not vicariously liable: see *Henville v Walker* (2001) 206 CLR 459 (“*Henville v Walker*”) at 483 [70] per Gaudron J; 510 [166] per Hayne J. It was not enough to raise the possibility of other explanations in the face of Ms Richardson and Mr Dunphy’s evidence of their own relationship dynamics.
8. Further, quite apart from the appellant’s suggested application of *Hall v A & A Sheiban*, there is likely error in an approach which concludes without further analysis that the presence of multiple factors giving rise to a specific form of loss or damage will bar a victim of sexual harassment from recouping compensation for the part which the contravening conduct played in that loss. That discriminatory conduct which **contributed**(but was not the sole contributor) to the onset of injury is a loss “suffered because of the conduct of the respondent” was accepted without question by French and Jacobson JJ in *Qantas Airways Ltd v Gama* at [99] in the course of applying s 46PO of the AHRC Act. Such an acceptance reflects the remedial nature of s 46PO(4)(d). In reflecting on s 82(1) of the *Trade Practices Act 1974* (Cth), which was in its terms relevantly indistinguishable from s 46PO(4)(d), Hayne J explained in *Henville v Walker* at 509 [163]:

[S]eldom, if ever, will contravening conduct be the *sole* cause of a person suffering loss. Other factors will always be capable of identification as a cause of their loss … What the Act directs attention to is whether the contravening conduct was *a* cause. It does not require, or permit, the attribution of some qualification such as “solely” or “principally” to the word “by”.

(Emphasis in original)

(See also *Henville v Walker* at 482-483 [68]-[72] (Gaudron J).)

1. In *I & L Securities Pty Ltd v HTW Valuers* at 130 [62] Gaudron, Gummow and Hayne JJ elaborated that:

As was recognised in *Henville v Walker* there may be cases where it will be possible to say that some of the damage suffered by a person following the contravention of the Act was not caused by the contravention. But because the relevant question is whether the contravention was *a* cause of (in the sense of materially contributed to) the loss, cases in which it will be necessary and appropriate to divide up the loss that has been suffered and attribute parts of the loss to particular causative events are likely to be rare. Further it is only in a case where it is found that the alleged contravention did not materially contribute to some part of the loss claimed that it will be useful to speak of what caused that separate part of the loss as being “independent” of the contravention.

(Emphasis in original)

1. It is not clear, in large part because of the brevity of his Honour’s reasons, whether his Honour intended to reject the appellant’s claimed loss because it was, in his view, caused by a variety of factors (of which the contravening conduct was one). To the extent this reasoning featured in the trial judge’s analysis, it was in error.
2. For the above reasons, ground 19A is made out.

### Ground 20

1. Ground 20 was that the trial judge “erred by awarding manifestly inadequate general damages to Ms Richardson”. As already noted, the trial judge awarded Ms Richardson $18,000 by way of general damages as compensation for the non-economic loss she sustained because of Mr Tucker’s sexual harassment of her. By ground 20, Ms Richardson challenged this amount, inviting the Court to find relevant error in the trial judge’s exercise of discretion in fixing that figure and to fix a higher amount.
2. It must be clear by now that the trial judge accepted that Mr Tucker’s unlawful conduct caused Ms Richardson both physical and psychological damage: see *Richardson v Oracle* (first instance) at [4], [149], [209], [236]. Mr Tucker’s conduct occasioned her distress that was manifest in a noticeable change in her demeanour and in significant physical symptoms. His conduct also caused her psychological injury: she suffered a chronic adjustment disorder with mixed features of anxiety and depression: see *Richardson v Oracle* (first instance) at [236]. This psychological damage was “not insignificant”: see *Richardson v Oracle* (first instance) at [244].
3. In discussing her distress, the trial judge specifically said (at [209]-[213]):

I am satisfied that Mr Tucker’s conduct, over a period of some months, was very distressing for Ms Richardson, who did her best to deal with it alone for some considerable time. Her partner, friends and acquaintances noticed changes in her demeanour. Ms Richardson noticed changes in her own physical condition, including the management of her diabetes, which seemed to her attributable to her heightened feelings of stress and anxiety. There was no medical evidence to make this connection directly but I am prepared to take into account Ms Richardson’s own observations of her psychological and physical responses as being consistent with the medical evidence …

Even though her decline appears to have been apparent to others, it was not until Ms Richardson was confronted with unmistakeable evidence that she was no longer able to manage the situation on her own or control her responses to Mr Tucker’s behaviour that she decided to make a complaint about Mr Tucker’s conduct. In that sense I am satisfied that she was driven to take that step.

I am satisfied that Mr Tucker’s conduct was cruel and calculated, but he may not have fully appreciated the effect it was having on Ms Richardson. I think it is equally likely that Ms Richardson managed to disguise her reactions sufficiently that Mr Tucker simply settled into a systematic form of humiliation and sexually charged aggression as his normal mode of interacting with her. He should be given no credit for his lack of insight. The maintenance, over an extended period of time, of the conduct which the evidence disclosed in this case deserves censure in a way which makes clear that it was unacceptable and unlawful. It was a clear breach of Ms Richardson’s legal rights.

Some of the picture of Ms Richardson’s distress is revealed by her counselling journal, which I regard as a sufficiently reliable contemporaneous record for this purpose. …

Ms Richardson’s account is sufficiently supported by the evidence of her partner, some friends and her neighbour, Ms O’Toole, who provided her direct observations of changes in Ms Richardson’s demeanour corresponding to the time of the events in question.

1. An appellate court ought not interfere with the sum of general damages fixed by a trial judge simply because it considers it would have fixed some other amount: see *Smith’s Newspapers Ltd v Becker* (1932) 47 CLR 279 at 300 (Dixon J); *Precision Plastics Pty Ltd v Demir* (1975) 132 CLR 362 (“*Precision Plastics v Demir*”) at 369 (Gibbs J); *Wilson v Peisley* (1975) 7 ALR 571 (“*Wilson v Peisley*”) at 585 (Mason J); and *Rogers v Nationwide News Pty Ltd* (2003) 216 CLR 327 (“*Rogers v Nationwide News*”) at 348-349 [62]-[66] (Hayne J). Before this Court can interfere with the award made by the trial judge, the Court must consider either that the judge acted on an error of principle, misapprehended the facts, allowed extraneous matters to affect the assessment, failed to take account of a material consideration, **or** that “the judge has made a wholly erroneous estimate of the damages suffered”: see *House v The King* (1936) 55 CLR 499 at 504-505 and *Precision Plastics v Demir* at 369. Ground 20 is directed to this last-mentioned matter. That is, a contention that an award of damages is “manifestly inadequate” “invokes the last of the bases for appellate review of an exercise of discretion identified in *House v The King*”: compare *Rogers v Nationwide News* at 348 [62]*.*
2. To adapt the language of Hayne J in *Rogers v Nationwide News* at 348 [62] and [64] (who was speaking of “manifest excess”):

If manifest [inadequacy] is alleged, it is not said that a specific error of principle or fact can be identified. Rather, the contention that damages are manifestly [inadequate] alleges that the result at which the primary judge arrived is evidently wrong and that, although the nature of the error made may not be discoverable, there must have been a failure to properly exercise the discretion in fixing the amount to be awarded.

…

It is important to emphasise, however, that the task of an appellate court asked to set aside an award of damages as manifestly [inadequate] is not simply mathematical. The appellate court does not begin by identifying the damages which it would have allowed and then, applying some margin for difference of view, observe the mathematical relationship between the award made and the figure it would have awarded. Rather, the question for the appellate court is whether the result at which the trial judge arrived *bespeaks* error. What must be identified is *manifest* [inadequacy], not just [inadequacy].

(Emphasis in original)

1. Oracle submitted that “[t]he Federal discrimination law cases reveal that the monetary award [made by the trial judge] was well within the permissible range” and that “[m]onetary awards for general damages arising from sexual harassment are ordinarily within the range between $12,000 and $20,000”. In this connection, the Court was referred to numerous cases, including *Elliot v Nanda* (2001) 111 FCR 240 (award of $15,000 as general damages; $5,000 as aggravated damages), *Leslie v Graham* [2002] FCA 32 (award of $16,000), *Kraus v Menzie* [2012] FCA 3 (award of $12,000; appeal dismissed in *Kraus v Menzie* [2012] FCAFC 144). These cases were said to be illustrative of the “permissible range” within which the trial judge set Ms Richardson’s general damages award. It was on this basis that, citing *Wilson v Peisley* at 585, Oracle submitted that “[t]he general damages awarded in this case were not *so inordinately low* as to be a wholly erroneous estimate of the damage suffered” (emphasis original).
2. Further, Oracle sought to distinguish Ms Richardson’s case from the few sexual harassment cases in which damages were awarded outside this range such as *Lee v Smith* [2007] FMCA 59 (“*Lee v Smith*”) where a general damages award of $100,000 was made and *Poniatowska v Hickinbotham* [2009] FCA 680 (“*Poniatowska v Hickinbotham*”) where a general damages award of $90,000 was made. The Court’s attention was drawn to differences in the nature of the conduct in these two cases and in the nature of the injuries sustained by the victims because of this conduct. Ms Lee was subjected to months of sexual propositioning and other unlawful conduct which culminated in a sexual assault, whilst Ms Poniatowska was subject to sexual propositioning, inappropriate comments by her supervisor and the receipt of explicit pornographic messages on her telephone from a co-worker. Ms Lee was found to have suffered “very significant pain, suffering, hurt and humiliation” over the five or six years before trial, had been deprived of the enjoyment of life, had been unable to work, suffered fear and had been at times suicidal: see *Lee v Smith* at [215]. At the time of the award, Ms Poniatowska remained incapacitated for work by her psychiatric illness; with years of considerable personal distress and unhappiness caused by her underlying psychiatric condition (an adjustment disorder with mixed anxiety and depression) brought on by the sexual harassment: see *Poniatowska v Hickinbotham* at [350]-[351]. I accept that in both these cases the victims sustained more severe injuries than Ms Richardson did in this case.
3. Oracle argued the appellant’s reliance on the awards of damages in “different areas of the law” including in defamation cases (such as *Crampton v Nugawela* (1996) 41 NSWLR 176, *New South Wales Aboriginal Land Council v Perkins* (1998) 45 NSWLR 340, *Rogers v Nationwide News*, *John Fairfax Publications Pty Ltd v O’Shane (No 2)* [2005] NSWCA 291, *Obeid v John Fairfax Publications* *Pty Ltd* [2006] NSWSC 1059 and *McGaw v Channel Seven Sydney Pty Ltd* [2006] NSWSC 1147) were ill-suited to the question whether the damages awarded in this case, in the Federal discrimination context, were manifestly excessive. As will be seen hereafter, I do not entirely accept this submission.
4. For the reasons set out below, I consider ground 20 to be made out in this case: whether or not the award of damages in the sum of $18,000 is manifestly inadequate is not to be determined here by reference to some previously accepted ‘range’ in sexual harassment cases. For the reasons stated below, I consider that, having regard to the nature and extent of Ms Richardson’s injuries and prevailing community standards, the low level of the damages awarded by the trial judge itself bespeaks error.
5. As Hayne J indicated in *Rogers v Nationwide News* at 348 [63], cases in which an award of damages is challenged as ‘manifestly inadequate’ or ‘manifestly excessive’ assume that there is a standard against which inadequacy or excess can be judged. In the context of an award of damages for defamation, his Honour said (at 349 [66]):

In searching for the standard … account must be taken of three basic propositions. First, damage to reputation is not a commodity having a market value. Reputation and money are in that sense incommensurable. Secondly, comparisons between awards for defamation are difficult. Every defamation, and every award for damages for defamation, is necessarily unique. Thirdly, because the available remedy is damages, courts can and must have regard to what is allowed as damages for other kinds of non-pecuniary injury.

In searching for the standard against which to measure the ‘manifest inadequacy’ of an award of damages for sexual harassment, the same, or similar, matters must be taken into account. Pain and suffering, hurt and humiliation and, more generally, the deprivation of the enjoyment of life have no market value: pain and suffering and money are “in this sense incommensurable”: compare *Rogers v Nationwide News* at 349 [66]. Comparisons between sexual harassment cases are not straightforward; and since the remedy with which the court is concerned is damages, it is appropriate and necessary to have regard to the damages allowed for other kinds of analogous non-pecuniary injury. As explained hereafter, this latter matter is especially important when considering damages for sexual harassment.

1. It is important to note at the outset that damages for sexual discrimination (which includes sexual harassment), have only been available in federal law for around thirty years. This is a comparatively short period in the history of our law. The early decisions as to general damages to be awarded in sexual harassment cases indicate a degree of uncertainty and difficulty in fixing the appropriate amount. This can be seen in the caution evident in *Hall v A & A Sheiban*, which substantially adopted the approach in *Alexander v Home Office* [1988] 1 WLR 968; [1988] 2 All ER 118(“*Alexander v Home Officer*”) – an English race discrimination case.Thus, in *Hall v A & A Sheiban* (at 256), in the context of sexual harassment damages, Wilcox J cited with approval the reasoning of May LJ in *Alexander v Home Office*, who explained at 122:

As with any other awards of damages, the objective of an award for unlawful racial discrimination is restitution. Where the discrimination has caused actual pecuniary loss, such as the refusal of a job, then the damages referrable to this can be readily calculated. **For the injury to feelings however, for the humiliation, for the insult, it is impossible to say what is restitution and the answer must depend on the experience and good sense of the judge and his assessors.** Awards should not be minimal, because this would tend to trivialise or diminish respect for the public policy to which the Act gives effect. On the other hand, just because it is impossible to assess the monetary value of injured feelings, awards should be restrained. **To award sums which are generally felt to be excessive does almost as much harm to the policy and the results which it seeks to achieve as do nominal awards. Further, injury to feelings, which is likely to be of relatively short duration, is less serious than physical injury to the body or the mind which may persist for months, in many cases for life.**

(Emphasis added)

1. Academic commentators have also remarked on the difficulty initially faced by courts and tribunals in fixing amounts for general damages for sexual harassment and the courts’ cautious approach: see, for example, Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (Oxford University Press, 1990) at 197-198; Carol Andrades in *What Price Dignity? Remedies in Australian Anti-Discrimination Law*, Parliamentary Research Paper No 13 (1998) (“Parliamentary Research Paper No 13”); and see also *State of NSW (NSW Police Force) v Whitfield* (EOD) [2012] NSWADTAP 27 at [102]-[103].
2. The apparent result of this initial uncertainty was that the range of awards for general damages in cases of the present kind was fixed at a conservative level. This phenomenon is the subject of extensive academic analysis: see, for example, Andrades, Parliamentary Research Paper No 13; and Chris Ronalds, “Opening Address III” in Margaret Thornton (ed) *Sex Discrimination in Uncertain Times* (ANU E Press, 2010) 17 at 21.
3. The perception that awards for general damages in cases of sex discrimination and harassment are generally low has led academic commentators to opine that “the courts have not accorded much weight or significance to the emotional loss and turmoil to an applicant occasioned by acts of unlawful discrimination and harassment”: see Chris Ronalds and Elizabeth Raper in *Discrimination Law and Practice* (Federation Press, 4th ed, 2012) (“Ronalds and Raper”) at 216; see also Parliamentary Research Paper No 13; Beth Gaze, “The Sex Discrimination ActAfter Twenty Years” (2004) 27(3) *University of New South Wales Law Journal* 914 at 919; and Senate Standing Committee on Legal and Constitutional Affairs, *Report on Effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality* (Senate Printing Unit, 2008) at 81-83.
4. Commentators have surmised that the level of damages awards in such cases runs counter to the beneficial intent of the SDA, impeding the deep social reform intent that expressly accompanied its introduction and informs the legislation as a whole: see s 3 of the SDA: see, for example, Beth Gaze, “The Sex Discrimination Act at 25: Reflections on the Past, Present and Future” in Margaret Thornton (ed) *Sex Discrimination in Uncertain Times* (ANU E Press, 2010) 107 at 121; Beth Gaze, “Damages for Discrimination” (2013) 116 *Precedent* 20 at 22; Beth Gaze, “Anti-Discrimination Laws in Australia” in Paula Gerber and Melissa Castan (eds) *Contemporary Perspectives on Human Rights Law in Australia* (Lawbook Co, 2013) 155 at 176-177; Beth Gaze and Rosemary Hunter, *Enforcing Human Rights: An Evaluation of the New Regime* (Themis Press, 2010) at 165; Helen Watchirs, “Opening Address I” in Margaret Thornton (ed) *Sex Discrimination in Uncertain Times* (ANU E Press, 2010) 3 at 6. Indeed, one writer surmised that the damages presently awarded in this Court for sex discrimination risked “creating a time capsule”, which in most cases fixes the valuing of non-economic loss to an unofficial range set, in effect, 20 to 30 years ago: see further Carol Andrades, “The Struggle to restore dignity – Part 1: remedies in anti-discrimination law” (2012, September) *Employment Law Bulletin* 85 at 86. Although the academic literature cannot determine the outcome of the Court’s deliberation on ground 20, it indicates that the question to which ground 20 gives rise may be a significant one.
5. Leaving the academic literature aside, it may be accepted that there is, at least for some purposes, a “general range” for awards of general damages in sex discrimination or sexual harassment cases. The trial judge himself mentioned such a range, when (at [242]-[243]) he stated that:

There were helpful submissions made about the quantification of damages and a range of decided cases was referred to. The applicant submitted that the award of general damages should be, at least, commensurate with that in *Poniatowska v Hickinbotham* [2009] FCA 680 (“*Poniatowska”*). In that case, the Court awarded general damages in the amount of $90,000. That award was upheld on appeal (*Employment Services Australia Pty Ltd v Poniatowska* [2010] FCAFC 92). In my view, *Poniatowska* is an inappropriate point of reference. The award of damages in *Poniatowksa* was linked to a finding of sex discrimination as well as specific instances of sexual harassment. The trial judge found that when Ms Poniatowska raised concerns regarding sexual harassment with her employer, she was “not regarded as the victim but as a problem presenter to be managed”. Ms Poniatowska’s employment was ultimately terminated not for reasons related to her work performance, but, on the trial judge’s findings, because she was unwilling to tolerate sexual harassment and a robust work environment. These features were not replicated in the present case.

As the submissions for the second respondent pointed out, cases where the award of general damages for sexual harassment fell outside the range of $12,000 to $20,000 (such as *Poniatowska* and *Lee v Smith* [2007] FMCA 59) involved features of aggravation such as psychological trauma and resulting incapacity for work, which do not feature in the present case.

1. A review of the decided cases confirms that, broadly speaking, his Honour correctly identified a range of between $12,000 and $20,000 for general damages awards in sex discrimination/sexual harassment cases, other than in cases such as *Poniatowska v Hickinbotham* and *Lee v Smith*. This is illustrated by the table of damages awarded under the SDA between 13 April 2000 and 2011 set out in the Australian Human Rights Commission publication, *Federal Discrimination Law* (AHRC, 2011) at 17-19; 26-28. See also *Commonwealth v Evans* (2004) 81 ALD 402 at [82] (Branson J); *Shiels v James* [2000] FMCA 2 at [79]; Elizabeth Raper, “Show me the money: Damages awarded in sexual harassment matters” (2010) 1 *Workplace Review* 100 at 100; and Ronalds and Raper at 216. In the main, although there have been some exceptional cases such as *Poniatowska v Hickinbotham* and *Lee v Smith*, little changed between 2000 and 2011. Little has changed since then. Whilst there may have been some modest increase at the lower end of this range, the upper end has remained the same for well over a decade. I accept, therefore, that, in fixing the sum of $18,000, the trial judge fixed a sum within what has been accepted as the range in cases of the present kind.
2. As foreshadowed earlier, this is not the end of the matter. Indeed, the authorities indicate that it can be dangerous to rely too heavily on such a range in assessing the quantum of damages. This proposition is illustrated by *O’Brien v Dunsdon* (1965) 39 ALJR 78 (“*O’Brien v Dunsdon*”). In *O’Brien v Dunsdon*, the appellant challenged an award of general damages “for pain and suffering and other matters excluding economic loss” as unreasonably low. Noting that “it was suggested that the… assessment of general damages for pain and suffering … have not exceeded” five thousand pounds, the High Court stated (at 78) that “it would be quite wrong to suggest that there is any fixed limit to the amount that can be awarded under this head”. Instead, Barwick CJ, Kitto and Taylor JJ stated (at 78) that:

Each case must be considered in the light of its own facts and an assessment made of the amount which can fairly be regarded as reasonable compensation for the injuries and disabilities which a plaintiff has sustained. It is true, as has been observed on other occasions, that it is impossible precisely to translate pain and suffering and the loss of enjoyment of life into money values. But, nevertheless, some attempt must be made to assess a reasonable sum, remembering, whilst attempting to do so, that it is not possible by payment of an amount of compensation to effect a *restitutio in integrum* and that **the assessment should be made having regard, as far as possible, to the general standards prevailing in the community**.

(Emphasis added)

1. It is convenient and appropriate to say at this stage of my analysis that I would not accept the appellant’s argument that:

It has been observed in the context of the SDA that awards of general damages should not be minimal, because this would tend to trivialise or diminish respect for the public policy of the SDA: *Hall* (supra) at 356 per Wilcox J, see also 238 per Lockhart J. The primary judge’s award of general damages of $18,000 was, with respect, so minimal as to undermine this area of law and the status of human rights in Australia.

1. This argument was elaborated at the hearing of the appeal, but it misses the point. A similar argument was rejected in *Clarke v Catholic Education Office* (2003) 202 ALR 340 (“*Clarke v Catholic Education Office*”), in relation to damages under the *Disability Discrimination Act 1992* (Cth), where Madgwick J said (at 360 [83]):

It was faintly suggested, on the strength of remarks made in a case decided by the Human Rights and Equal Opportunity Commission, that there were policy reasons why damages for a breach of the DDA should be substantial. It was also faintly suggested that an award should not be so low that it might be eaten up by non-recoverable costs. Both propositions must be rejected. Damages are compensatory and no more.

1. The real issue is whether, having regard to the facts as found, the amount fixed by the trial judge was so disproportionately low when the facts, as found, are considered that the award cannot fairly be seen as reasonable compensation for the loss and damage suffered by the appellant because of Mr Tucker’s sexual harassment of her. The terms of s 46PO(4)(d) make this the critical issue. Thus, I focus on the appellant’s other contention that the award was so low as not to compensate her for her loss and damage, rather than on the appellant’s submissions about diminishing respect for the public policy of the SDA.
2. I also note at this point that I do not understand the comment of French and Jacobson JJ in *Qantas Airways Ltd v Gama* at [94] that “the discretionary character of the remedy allows an award of an amount ‘by way of compensation’ which does not fully compensate for the loss suffered” to detract from the fundamentally compensatory nature and object of an award of damages under this provision. Rather, I understand their Honour’s comment to refer to the inherently non-scientific and imprecise nature of an assessment of general damages and the need to place a money value on loss and damage that does not have a money value for any purpose other than the assessment of damages. Further, in so far as it is necessary to do so, I refer to my reference to *Henville v Walker* and *I & L Securities Pty Ltd v HTW Valuers* at the conclusion of my discussion of ground 19A.
3. An award of damages by way of compensation under s 46PO(4)(d) of the AHRC Act is to compensate for the injury suffered by the person harassed: see *Hall v A & A Sheiban* at256 (Wilcox J), 281 (French J). In making an award, a court necessarily has regard to the general standards prevailing in the community. As indicated above, other awards of general damages for injury of the kind suffered by Ms Richardson may provide some measure of manifest inadequacy since they may provide some guidance as to what contemporary courts have discerned as proper compensation for such an injury according to generally prevailing community standards.Cases in the field of personal injury may be particularly useful because the object of an award of damages for non-pecuniary loss in such cases is much the same as an award of damages under s 46PO(4)(d) of the AHRC Act: see *O’Brien v Dunsdon* at 78 and *Teubner v Humble* (1963) 108 CLR 491 at 507 (Windeyer J); and *Qantas Airways Ltd v Gama* at [96].
4. I begin by observing that, in the context of damages for personal injury, there is reason to believe that community standards now accord a higher value to compensation for pain and suffering and loss of enjoyment of life than before. This was the assessment of the Victorian Court of Appeal in *Amaca Pty Ltd v King* [2011] VSCA 447 (“*Amaca Pty Ltd v King*”). I refer to this case only to demonstrate the Court’s adoption of this proposition in 2011 and its subsequent effect in other cases more closely akin to the present case.
5. In *Amaca Pty Ltd v King*, the Court of Appeal dismissed an appeal against an award of damages in the sum of $1,150,000 ($730,000 for pain and suffering and loss of enjoyment of life) for the respondent’s personal injuries caused by the appellant’s negligence. The appellant had negligently caused the respondent to suffer mesothelioma as a result of his exposure to asbestos dust and fibres at the appellant’s factory. In the course of their reasons for judgment, Nettle, Ashley and Redlich JJA said (at [177]):

We do not suggest that there is any necessary relationship between earnings and the measure of compensation appropriate for pain and suffering. But inasmuch as contemporary society pays and receives vastly greater amounts of remuneration than that of a generation ago (even allowing for inflation) and, at the same time as it seems to us, writes and speaks of the importance of the quality of life to an extent not before contemplated, who doubts that modern society may place a higher value on the loss of enjoyment of life and the compensation of pain and suffering than was the case in the past?

1. Whilst *Amaca Pty Ltd v King* is self-evidently a very different case from that which this Court is considering, the point made by their Honours in the above passage – that the community may place a higher value on the loss of enjoyment of life and the compensation of pain and suffering than in the past – is, if accepted, no less valid for this appeal than that case. (See also *BHP Billiton Ltd v Hamilton & Anor* [2013] SASCFC 75 at [324]-[330] where Stanley J, with whom Kourakis CJ agreed, cited *Amaca Pty Ltd v King* with approval.)
2. The Victorian Court of Appeal has subsequently affirmed that the change in the community’s appreciation of the value of the loss of enjoyment of life and compensation for pain and suffering, discussed in *Amaca Pty Ltd v King*, is relevant in assessing damages in the context of other kinds of personal injury cases. Specifically, I note that, in *Willett v Victoria* [2013] VSCA 76 (“*Willett v Victoria*”), Tate and Priest JJA relied on this aspect of *Amaca Pty Ltd v King* in determining to substitute damages of $250,000 for the jury verdict of $108,000. These damages were awarded to Ms Willet as compensation for her pain and suffering and loss of enjoyment of life caused by the negligence of her employer, Victoria Police, in exposing her to bullying and harassment in her employment.
3. 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].

1. 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 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”.

1. In referring to *Willett v Victoria* and *Swan v Monash Law Book Co-operative* I do not intend to suggest that Ms Richardson’s pain and suffering and loss of enjoyment of life were the same as, or comparable to, the injuries sustained by Ms Willett and Ms Swan. Ms Willett’s injury was plainly more severe than that of Ms Richardson. So too was that of Ms Swan. I refer to these cases of workplace bullying and harassment mainly to indicate that awards of damages today place a significant value on the loss of enjoyment of life and the experience of pain and suffering.
2. The same general approach to the assessment of damages in Victoria is also evident at a tribunal level. In *Tan v Xenos (No 3)* [2008] VCAT 584 (2008) EOC 93-491 (“*Tan v Xenos (No 3)*”), her Honour Judge Harbison, sitting as Vice President of the Victorian Civil and Administrative Tribunal, awarded damages in the sum of $100,000 for sexual harassment in contravention of s 87 of the *Equal Opportunity Act* 1995 (Vic), even without medical evidence as to the effect of the sexual harassment on the victim, saying at [556]:

In my view, there should not be a perception that awards of damages in this jurisdiction should be set at some lower rate than awards for comparable cases in the Courts. The purpose of the award of damages is to attempt to measure, in monetary terms, the hurt that has been done to the Complainant by the Respondent’s act of harassment. My approach should mirror the approach that would be taken if this case were to be heard in a Court, instead of a Tribunal.

1. Indeed, this Court has in the past apparently placed a greater value on the loss of enjoyment of life outside the anti-discrimination legislation field than in it. One example is *Nikolich v Goldman Sach JBWere Services Pty Limited* [2006] FCA 784 (“*Nikolich*”) (quantum of damages unchallenged on appeal, challenge to liability dismissed: *Goldman Sachs JBWere Services Pty Limited v Nikolich* [2007] FCAFC 120). In 2006, Mr Nikolich recovered damages for breach of his employment contract with an employer in the finance industry, in respect of the loss and damage caused by workplace bullying and harassment. Wilcox J found (at [158]) that Mr Nikolich had “suffered, and perhaps continues to suffer, a major depressive disorder”, although his psychological condition would not ultimately prevent him returning to the finance industry. In 2006, when fixing the award of general damages for breach of contract at $80,000, Wilcox J said (at [341]) that:

Mr Nikolich was extremely distressed and disturbed by the way in which he was treated by GSJBWS’s employees. This caused him to suffer a mental illness from which he had yet to fully recover. His psychological condition appears to have been a major factor in the break-up of his marriage and separation from his children. It must have adversely affected his professional reputation. On the other hand, as I read the expert evidence, there is no reason to suppose that Mr Nikolich’s psychological disability will be permanent. Although it may take him some time to do so, there is every prospect that he eventually will obtain employment and return to normal life.

1. Another case in this Court, also decided in 2006, tends to confirm that, historically at least, damages awards have been at a higher level for loss of enjoyment of life and pain and suffering outside the anti-discrimination legislation field. In *Walker v Citigroup Global Markets Australia Pty Ltd* (2006) 233 ALR 687 (“*Walker v Citigroup*”), a Full Court of this Court held that, in an action for damages for misleading and deceptive conduct under the *Trade Practices Act 1974* (Cth), the trial judge’s award of $5000 for general damages was “a significant under-assessment of the loss” Walker suffered, for “a considerable dislocation of his life with serious long-term effects”: *Walker v Citigroup* at 709 [91]. An award in the amount of $100,000 was substituted for the award of $5000 (at 709 [91]) without reference to psychological or other medical evidence of the distress Mr Walker claimed.
2. At trial, Mr Walker had claimed a general sum of $100,000 in respect of prejudice to his reputation and “not less than $50,000 in respect of his distress and vexation in both his career and personal life”: see *Walker v Citigroup Global Markets Pty Ltd* (2005)226 ALR 114 (“*Walker v Citigroup* (first instance)”) at 135 [98]. The trial judge accepted that Mr Walker’s marriage had broken down and he had lost the day-to-day company of his children in the year after the unlawful conduct in question: *Walker v Citigroup* (first instance)at 144 [137]. On appeal Mr Walker contended that the award of $5,000 was insufficient “compensation for damage to his reputation and career prospects, to his marriage and for distress and vexation arising out of Citigroup Australia’s conduct”: see *Walker v Citigroup* at 691 [11]. The Full Court accepted Mr Walker’s uncorroborated, but unchallenged, evidence that he had suffered “a considerable dislocation of his life with serious long-term effects” as a result of the unlawful conduct. It is relevant to note that the focus of the Full Court in increasing this amount was not on reputation; and that at the earlier trial, Mr Walker’s counsel had submitted that “his business began to flourish from the time the decision on liability was delivered” (i.e., before the trial on quantum of damages): see *Walker v Citigroup* (first instance) at 135 [98]. Accordingly, I reject Oracle’s submission that the Full Court’s decision turned on the fact that “Mr Walker’s reputation was irreparably harmed such that he was unable to secure employment and his professional reputation was ‘now mud’”. These were not the “serious long-term effects” to which the Court referred in its reasons for judgment at 709 [91].
3. Oracle also referred to the decision of Mansfield J in *Kraus v Menzie* [2012] FCA 3, in which his Honour awarded the sum of $12,000 by way of general damages. His Honour explained that he awarded this “small amount” for conduct amounting to sexual harassment because, “although it amounted to a contravention of the SD Act, it barely had any adverse personal effect upon Ms Kraus” (at [138]). In view of his Honour’s finding as to the lack of loss and damage, this case does little to support Oracle’s submissions.
4. In each of the cases to which I have referred, damages have been awarded by way of compensation for pain and suffering and loss of enjoyment of life. Non-pecuniary damages in sexual harassment cases are also commonly awarded by way of compensation for injury of this kind. Whilst the loss and damage suffered by victims of sexual harassment and workplace bullying will in a sense be unique to each victim, I am unable to discern any in-principle difference between the compensable value of the pain and suffering and loss of enjoyment of life suffered by a victim of sexual harassment (in this case, in the workplace) and of a victim of (workplace) bullying and harassment lacking a sexual element. I note that in both types of case the victim may suffer psychological injuries and distress of a comparable kind. Ms Richardson’s psychological injury and distress bears some of the hallmarks of the injuries suffered by the claimants in the cases to which I have referred. The same may be said regarding the nature of the psychological injuries and distress considered in *Nikolich* and *Walker v Citigroup*.
5. Even this cursory overview of the quantum of awards historically awarded in these other fields to successful claimants in situations not wholly unlike Ms Richardson’s reveals a substantial disparity between the level of those awards and the typical compensatory damages provided to victims of sexual discrimination and harassment. Such disparity bespeaks the fact that today an award for sexual harassment, though within the accepted range for such cases, may be manifestly inadequate as compensation for the damage suffered by the victim, judged by reference to prevailing community standards.
6. Others have recognised that the circumstances of personal injury caused by unlawful discrimination bears some comparison with a person’s mental distress following an unlawful termination of employment, negligence or related breaching or unlawful conduct. As Basten JA observed in the context of a negligence claim for psychiatric injury caused by an employee’s humiliation and harassment by his supervisor (in *Nationwide News Pty Ltd v Naidu & Anor* (2007) 71 NSWLR 471 at 525 [378]):

[S]ome of the conduct complained of involved racially abusive epithets of a kind which could readily give rise to a racially hostile working environment. Like cases of sexual harassment, racial harassment of that kind would be unlawful under the Anti-Discrimination Act 1977 (NSW) …

See also Tim Donaghey, *Termination of Employment* (Lexis Nexis Butterworths, 2nd ed, 2013) at 201 and Carolyn Sappideen et al, *Macken’s Law of Employment* (Lawbook Co, 7th ed, 2011) at 192, fn 337. In *Qantas Airways Ltd v Gama*, French and Jacobson JJ held (at [96]) that reference to a negligence case in an attempt to “find some basis for an assessment of damages…did not err in principle”. The need for coherence in the law means that, in attempting to compensate victims for comparable kinds of injuries, interconnected fields of law look to one another in establishing a “reasonable” sum by way of compensation. The analogy between sums awarded for pain and suffering and loss of enjoyment of life caused by unlawful discrimination with sums awarded in the tortious context is particularly obvious.

1. The appellant urged us to make a similar comparison with the level of general damages awarded in cases of defamation. It was unclear, however, exactly what the Court was to take from the amount of compensation awarded for non-economic loss in the defamation context. On the one hand, the appellant relied on awards in defamation cases to make the point I have already considered: namely, that in this field (like others) awards for general damages have increased and today are significantly different from that typically awarded under the SDA. On the other hand, they were relied on as representing what the courts considered in the defamation context to be fair compensation for pain and suffering which resembled that experienced by Ms Richardson in this case. Thus, at one point, Ms Richardson’s counsel, Ms Francois, explained that:

I guess my point is not some nicety about, ‘Should it be 300 or 400,000?’ The reference to defamation awards is to determine whether or not something is excessive or inadequate.

Nonetheless, when the Court asked Ms Francois how it should “put a figure on pain and suffering”, the following exchange occurred:

MS FRANCOIS: We say that the 2008 decision in Poniatowska which is in my submissions in reply, is, for the reasons set out in my submissions, closely to be on all fours, but obviously that’s four years ago – five years ago now, and the value of money changes over time to the point of increasing it. So we would say it ought be an award greater than that case, where the trial judge – so the primary judge accepted that she had an adjustment disorder with mixed features and anxiety and depression. And …

BESANKO J: That’s a bit difficult, isn’t it, just picking one case out and saying, “Well, that’s all we’ve got so we should rely on that”.

MS FRANCOIS: No. I would like to say that’s the minimum, you Honour.

BESANKO J: Yes.

MS FRANCOIS: That’s the low mark. I think you should go much higher.

KENNY J: But you say to us, “Well, we can bear in mind general salary levels, increase in … the value of the costs of money” …

MS FRANCOIS: Value of the costs of money, **value of defamation judgment[s]**… and then, of course, the purpose and scope – nature and scope of the Act. So, is it an award of damages that furthers those purposes?

1. I do not consider that direct comparison with the quantum of damages awards for defamation provides useful guidance as to the disproportionate insufficiency of the award of damages in this case. For one thing, an award of damages for defamation serves three purposes: consolation for the personal distress and hurt caused to the victim by the publication, reparation for the harm done to his or her personal and (if relevant) business reputation, and vindication of his or her reputation: see *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44 (*“Carson*”) at 60-61 (Mason CJ, Deane, Dawson and Gaudron JJ). In the present context, this Court is concerned with an award of general damages as compensation for Ms Richardson’s loss and damage, which is in the main referable to her pain and suffering and loss of enjoyment of life.
2. As already indicated, I accept that there are, of course, structural or normative considerations to be borne in mind. Considerations of this kind are relevant to an appellate court’s judgment that an award of damages in a particular case was disproportionately high or disproportionately low. Thus, in *Carson*, Mason CJ, Deane, Dawson and Gaudron JJ found no error in Kirby P’s approach making a qualified comparison with verdicts in serious personal injury cases in considering whether a defamation award was manifestly excessive. In so doing, their Honours rejected an argument that the Court’s earlier decision in *Coyne v Citizen Finance Ltd* (1991) 172 CLR 211 prevented “an appellate court, deliberating on the quantum of a defamation verdict, from considering verdicts in personal injury cases for the purpose of comparison”, although this did “not deny that the harm suffered in defamation cases differs from the ‘tearing of flesh and bone and the pain of body’ suffered in personal injuries cases nor that ‘*precise* comparisons’ should not be drawn between the different types of cases”: see *Carson* at 57-58 (citations omitted; emphasis in original).
3. In a similar context, Chernov JA, with whom Ormiston and Callaway JJA agreed, acknowledged that normative or structural considerations were relevant in *Crellin v Kent* [2000] VSCA 165 at [22], when, referring to *Carson*, he said:

[I]t seems to have been accepted that, in considering if an award of damages for non-economic loss is manifestly excessive, it may be appropriate to have regard to awards of damages in a relevant category of cases for the purpose of determining if they establish a range of damages appropriate to a particular class of injury with which the award in question may be rationally compared. Thus, for example, in *Carson v John Fairfax & Sons Ltd* the majority said, in effect, that, in determining whether an award of damages for defamation is manifestly excessive, it is legitimate to consider the kind of figures which have been held to be proper in cases of disabling physical injuries. … In my view, however, the injury sustained by the plaintiffs in the two cases referred to by the respondent do not constitute a relevant class of injuries for comparison purposes and are otherwise not a useful indicator of what might be an appropriate award of damages in this case.

In earlier discussion, I have had regard to the awards of damages in other interconnected categories of cases, with which, in my view, the award in Ms Richardson’s case may be rationally compared. As I have already stated, such a comparison demonstrates that the award for general damages in this case was disproportionately low and failed adequately to compensate Ms Richardson for the loss and damage she suffered because of Mr Tucker’s conduct.

1. I have not overlooked that the quantum of awards of damages in other jurisdictions (including from State to State) and in other fields of law vary, sometimes significantly, including for pain and suffering and loss of enjoyment of life. This is apparently a peculiarity of the Australian federal system. If it matters, it seems that damages awards in New South Wales and Victoria for pain and suffering and loss of enjoyment of life caused by workplace bullying and harassment are on a par. I note too that some Australian jurisdictions have placed statutory restrictions upon recovery for non-economic loss in particular kinds of cases. I consider that these cases do not provide sufficient helpful guidance to warrant further discussion here. The AHRC Act imposes no statutory restriction on the quantum of damages awards for sexual harassment. Rather, the power conferred on the court by s 46PO(4)(d) to award damages is broad, limited only by need for such damages to be by way of compensation for the loss and damage suffered by victim because of the unlawful conduct.
2. As I noted, in *Tan v Xenos (No 3)* the Victorian tribunal awarded the victim of sexual harassment $100,000. I have also referred to the following court awards: in *Willett v Victoria* the victim received $250,000; in *Swan v Monash Law Book Co-operative* the victim received $300,000; in *Nikolich* the victim received $80,000; and in *Walker v Citigroup* the victim received $100,000. Bearing in mind the nature of the injuries in each case, their severity and when the relevant awards were made, these cases give some guidance as to the level of damages that, having regard to the general standards prevailing in the community, would compensate Ms Richardson for the loss and damage of the kind she suffered because of Mr Tucker’s conduct.
3. 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:

… 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.

1. I agree. While the sum of $18,000 was not out of step with past awards in cases of this kind, this amount was nonetheless manifestly inadequate. It was out of step with the general standards prevailing in the community regarding the monetary value of the loss and damage of the kind Ms Richardson sustained. In my view the appeal should succeed on this ground and an award of $100,000 general damages should be substituted for the award of $18,000. The amount of $100,000 includes compensation for the injury that the sexual harassment caused to Ms Richardson’s sexual relationship with her then partner, Mr Dunphy.

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| I certify that the preceding one hundred and eighteen (118) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Kenny. |

Associate:

Dated: 15 July 2014

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| New South Wales DISTRICT REGISTRY |  |
| GENERAL DIVISION | NSD 438 of 2013 |

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| ON APPEAL FROM THE FEDERAL COURT OF AUSTRALIA |

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| BETWEEN: | REBECCA RICHARDSON  Appellant |
| AND: | ORACLE CORPORATION AUSTRALIA PTY LTD (ACN 003 074 468)  First Respondent  RANDOL TUCKER  Second Respondent |

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| --- | --- |
| JUDGES: | KENNY, BESANKO AND PERRAM JJ |
| DATE: | 15 JULY 2014 |
| PLACE: | SYDNEY |

**REASONS FOR JUDGMENT**

# BESANKO and PERRAM JJ:

1. We have had the advantage of reading the reasons for judgment of Kenny J. We gratefully adopt her Honour’s description of the decision under appeal. There were 30 grounds of appeal. We respectfully agree with Kenny J’s consideration of grounds 18, 19, 19A and 20 and her Honour’s conclusions with respect to those grounds. The reasons which follow deal with the other grounds of appeal.

# Grounds 2 and 16

1. Ms Richardson submits that the trial judge erred in applying the principles for the assessment of damages in tort rather than the principles for the assessment of statutory damages under s 46PO(4)(d) of the *Australian Human Rights Commission Act 1986* (Cth) (“AHRC Act”). She further submits that any loss and damage she suffered was compensable under s 46PO(4)(d), providing there was a sufficient causal nexus between Mr Tucker’s sexual harassment of her and that loss and damage.
2. The trial judge applied the principles for the assessment of damages in tort. He said (at [208]):

The applicant and Oracle agreed that, generally speaking, assessment of damages by way of compensation for sexual harassment under the SD Act would normally follow principles for the assessment of damages in tort. While the principle is not to be strictly applied where a particular case calls for a different approach, I see no reason in the present case to depart from that approach. It is not necessary to discuss the cases which support it.

1. Ms Richardson submits that, in fact, she did not agree with the proposition contained in the first sentence of this passage. That submission was not seriously challenged by Oracle and Ms Richardson certainly put the arguments she advances on appeal in her closing written submissions before the trial judge.
2. Ms Richardson submits that the trial judge did not award damages to her for the psychological injury (and consequential physical injuries) flowing from Oracle’s investigation into her complaint, her complaint to the Australian Human Rights Commission (“AHRC”) and her litigation in this Court. Although she submits that she was entitled to such damages under the principles for the assessment of damages in tort, she also submits that, in any event, she was entitled to such damages under the proper test of causation under s 46PO(4)(d) of the AHRC Act because that test is a different one and is informed by the objects and purposes of the *Sex Discrimination Act 1984* (Cth) (“SD Act”). She also submits that the trial judge erred in not awarding her damages for the economic loss she suffered as a result of leaving Oracle, and again she submits that the facts satisfied the common law test and, in any event, they satisfied the test posited by the words used in s 46PO(4)(d).
3. Section 46PO(4) of the AHRC Act is in the following terms:

**46PO Application to court if complaint is terminated**

…

(4) If the court concerned is satisfied that there has been unlawful discrimination by any respondent, the court may make such orders (including a declaration of right) as it thinks fit, including any of the following orders or any order to a similar effect:

(a) an order declaring that the respondent has committed unlawful discrimination and directing the respondent not to repeat or continue such unlawful discrimination;

(b) an order requiring a respondent to perform any reasonable act or course of conduct to redress any loss or damage suffered by an applicant;

(c) an order requiring a respondent to employ or re‑employ an applicant;

(d) an order requiring a respondent to pay to an applicant damages by way of compensation for any loss or damage suffered because of the conduct of the respondent;

(e) an order requiring a respondent to vary the termination of a contract or agreement to redress any loss or damage suffered by an applicant;

(f) an order declaring that it would be inappropriate for any further action to be taken in the matter.

1. Prior to 1999, the statutory provision giving the AHRC the power to award damages for contraventions of the SD Act was in the SD Act itself (s 81(1)). The words used were “any loss or damage suffered by reason of the conduct of the respondent”.
2. The Full Court of this Court considered the meaning of the words in s 81(1) of the SD Act in *Hall v A & A Sheiban Pty Ltd* (1989) 20 FCR 217. Lockhart  J said (at 239) that, although it could not be stated that in all claims for loss or damage under the SD Act the measure of damages is the same as the damages in tort, it is the closest analogy and would, in most cases, be a sensible and sound test. However, his Honour said that a case may arise which calls for a different test. French J (as his Honour then was) made the point (at 281) that the measure of damages was not to be found in the law of tort, but rather in the words of the statute (i.e., “by reason of”). The rules applicable in tort were of no avail if they were in conflict with the statute. His Honour said that that did not mean that every adverse consequence, however remote, was to be the subject of compensation, because causation was to be understood as the man in the street, not the scientist or metaphysician, would understand it. His Honour said that the test posited by the words “by reason of” was one of practical judgment of cause and effect and allowed for the possibility that principles analogous to remoteness of damage and mitigation may be subsumed within that practical test. His Honour also made the point that the existence of loss and damage was not to be judged by some general principle of “reasonableness”.
3. There are a number of cases in which the High Court has considered the test of causation in what was s 82(1) of the *Trade Practices Act 1974* (Cth) where the words used were “loss or damage by conduct of another person”.
4. In *Henville v Walker* (2001) 206 CLR 459, Gaudron J expressed the view (at 482, [66]) that questions of foreseeability and contributory negligence were irrelevant to a consideration of the test under s 82(1), whereas Hayne J left the question open (at 510, [166]). McHugh J traced the history of the interpretation of s 82(1) from *Wardley Australia Ltd v The State of Western Australia* (1992) 175 CLR 514 to *Marks v GIO Australia Holdings Limited* (1998) 196 CLR 494. His Honour discussed the common law concept and said that it was not to be applied mechanically to s 82(1) (see also Gleeson CJ at 470, [18], and Gaudron J at 482, [66]). His Honour favoured a test of whether the defendant’s contravention had materially contributed to the loss and damage suffered, as did Gaudron J (at 480, [61]). His Honour said that it is not necessary for a plaintiff to exclude other causes and it is not fatal that the contravention, without more, would not have brought about the damage (at 493, [107]). His Honour referred to cases where the intervening act of the plaintiff or third party was the immediate cause of the loss and damage and said that that did not of itself preclude a finding of a causative link between a defendant’s negligence and the loss or damage. This last point will be significant when we consider the challenge to the trial judge’s decision not to award damages for economic loss.
5. In *Murphy v Overton Investments Pty Limited* (2004) 216 CLR 388, the High Court said (at 407, [44]) (citations omitted):

This Court has now said more than once that it is wrong to approach the operation of those provisions of Pt VI of the Act which deal with remedies for contravention of the Act by beginning the inquiry with an attempt to draw some analogy with any particular form of claim under the general law. No doubt analogies may be helpful, but it would be wrong to argue from the content of the general law that has developed in connection, for example, with the tort of deceit, to a conclusion about the construction or application of provisions of Pt VI of the Act. To do so distracts attention from the primary task of construing the relevant provisions of the Act. In the present case, analogies with the tort of deceit appear to have led to an assumption, at least at trial, that a person can suffer only one form of loss or damage as a result of a contravention of Pt V of the Act.

1. In a case where the Court is considering a statutory power to award damages, the statutory objects and purposes may inform the proper approach to causation in a particular case: *I & L Securities Pty Limited v HTW Valuers (Brisbane) Pty Limited* (2002) 210 CLR 109 at 119, [26] per Gleeson CJ; *Allianz Australia Insurance Limited v GSF Australia Pty Limited* (2005) 221 CLR 568 at 596‑598, [96]‑[100] per Gummow, Hayne and Heydon JJ; *Travel Compensation Fund v Tambree* (2005) 224 CLR 627 at 642‑643, [45] per Gummow and Hayne JJ.
2. We return to the trial judge’s approach as set out in the passage we have quoted (at [121]). His Honour appears to have adopted an approach similar to that taken by Lochkart J in *Hall v A & A Sheiban Pty Ltd*. However, the more modern authorities appear to support the approach taken by French J in the same case. There is a difference in emphasis in that the common law principles may be helpful by way of analogy, rather than being the principles which are normally applied. Of course, in some cases there may be no difference in the result.
3. It is convenient to make two further points at this stage. Counsel for Ms Richardson submitted that her argument did not depend on Ms Richardson identifying an ambiguity in s 46PO(4)(d). In one sense, that is so, but ultimately we think it is a question of determining what words such as “because of” or “by reason of” or “by” mean in their particular statutory context, including the objects and purposes of the statute or statutory provision. The other point is that issues of what loss and damage may be recovered may raise questions of cause and effect, and may also raise questions of remoteness of damage and mitigation. In this case, the Court is concerned with the questions of cause and effect, and not questions of remoteness of damage and mitigation.
4. In this case, any difference between the test of causation under s 46PO(4)(d) and the common law test of causation is only of potential significance in relation to one head of damage claimed by Ms Richardson.
5. In the case of her claim for psychological injury flowing from Oracle’s investigation, her complaint to the AHRC and this litigation, Ms Richardson submits that the facts satisfy the test in s 46PO(4)(d) when regard is had to the objects and purposes of the SD Act. The objects of the SD Act include eliminating, so far as is possible, discrimination involving sexual harassment in the workplace and promoting recognition and acceptance within the community of the principle of the equality of men and women (ss 3(c) and 3(d) of the SD Act).
6. As we understood Ms Richardson’s argument, it is that sexual harassment will not be eliminated in the absence of complaints about its occurrence. Complaints will invariably lead to investigations to determine whether the complaint is justified or the appropriate corrective action or both. If a complainant suffers a psychological injury as a result of an investigation (and whatever other action may follow), then there is a sufficient causal link between the sexual harassment and the injury. Put another way, the failure to find a sufficient causal link will mean the psychological injury will act as a deterrent to complainants, and, therefore, not promote one of the important objects of the SD Act, being the elimination of sexual harassment. Ms Richardson submits that, at the very least, the trial judge erred in not holding that this case called for a different approach or a departure from the common law principles.
7. We will address this submission and its application to the facts in the next section when we address grounds 1, 3, 4 and 17(a).
8. In the case of Ms Richardson’s claim for the economic loss flowing from her decision to leave Oracle, the trial judge found that common law causation was not established. With respect, we think that his Honour erred in doing so and we will state our reasons for that conclusion when dealing with the grounds of appeal dealing with this particular head of damage. Ms Richardson did not develop her argument about the difference between common law causation and the test of causation under s 46PO(4)(d) in relation to this head of damage. We find it difficult to see how the test could be different in the case of economic loss, but, as we conclude that Ms Richardson satisfied the common law test, it is unnecessary for us to deal with the point.
9. Before leaving this section of our reasons, it is convenient to deal with an argument put by Oracle as to the proper construction of s 46PO(4). Oracle referred to the opening words of s 46PO(4), and in particular, the words that the Court may make such orders as it thinks fit, including any of the orders set out in the paragraphs which follow. Oracle submits that these words give the Court a discretion as to the damages it awards and they mean that the Court is not required to award full damages in any particular case. They mean that the Court could award something less than the full damages to which the applicant might otherwise be entitled. In support of this submission, Oracle relied on observations made by French and Jacobson JJ in *Qantas Airways Ltd v Gama* (2008) 167 FCR 537. Their Honours said (at 568, [94]):

The damages which can be awarded under s 46PO(4) of the HREOC Act 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 every case. Ultimately it is the words of the statute that set the criterion for any award. In any case the discretionary character of the remedy allows an award of an amount “by way of compensation” which does not fully compensate for the loss suffered.

1. As we understood Oracle’s submission, it is that this Court ought not to interfere with the trial judge’s award of damages because it could not be an error for him to award an amount which did not fully compensate Ms Richardson for the loss suffered.
2. In our opinion, this submission can be dealt with quite simply. The trial judge did not exercise a discretion not to award damages by way of compensation. He did award damages. Nor did he purport to exercise a discretion not to award damages in accordance with s 46PO(4)(d). In fact, he proceeded to award damages in accordance with that paragraph and he did not purport to exercise a discretion (assuming only for the sake of argument the existence of such a discretion) involving a selection as to the items of loss and damage which were properly the subject of compensation. In those circumstances, any error in that process is properly the subject of appellate review. If the obiter remarks of French and Jacobson JJ in *Qantas Airways Ltd v Gama* are to be understood as suggesting a contrary approach, then we would respectfully decline to follow them.

# Grounds 1, 3, 4 and 17(a)

1. These grounds are directed to his Honour’s decision not to award general damages for the psychological injury Ms Richardson allegedly suffered as a result of Oracle’s investigation into her complaint. They allege that the trial judge erred in rejecting her argument that there was sufficient causal nexus between Mr Tucker’s sexual harassment of her (for which Oracle was held vicariously liable) and the effects on her of Oracle’s investigation and, further, that he gave inadequate or insufficient reasons for doing so.
2. It is necessary to identify a number of key findings made by the trial judge and, in the course of doing so, we will identify Ms Richardson’s four criticisms of Oracle’s conduct of the investigation.
3. Mr Tucker’s sexual harassment of Ms Richardson occurred between late April 2008 and 12 November 2008. The first formal step in the complaint procedure occurred on 17 November 2008, when Ms Richardson met with Ms Rachna Sampayo, a member of Oracle’s Human Resources staff in Melbourne. At that time, Ms Richardson made a formal written complaint.
4. At trial, Ms Richardson contended that she was forced or bullied by Ms Sampayo to make a formal complaint, but the trial judge rejected that submission in that he said that he was not satisfied that Ms Richardson had been forced or bullied into making a complaint. This was her first criticism of Oracle’s conduct of the investigation and the trial judge dealt with it by finding that it did not happen. In any event, even on Ms Richardson’s case as we understood her oral submissions to this Court, it did not cause her psychological injury.
5. Ms Sampayo told Ms Richardson that she should not discuss her complaints against Mr Tucker with other people, including those Ms Richardson had identified as witnesses. In fact, Ms Richardson spoke to two of these people, but there were no adverse consequences. Ms Sampayo was informed but she did not remonstrate with Ms Richardson or take any other action. This was Ms Richardson’s second criticism and the trial judge dealt with it by finding that Oracle, through Ms Sampayo, did not act unreasonably in seeking confidentiality on a temporary basis. Again, as we understood her oral submissions to this Court, Ms Richardson did not contend that it caused her psychological injury.
6. After the investigation had been completed, and on a date in early December 2008, Mr Tucker was given a first and final warning and Ms Richardson was advised of the outcome of the investigation on or about 11 December 2008.
7. On 11 December 2008, Mr Tucker sent an email to Ms Sampayo which contained an apology to Ms Richardson. Ms Sampayo sent the apology to Ms Richardson on 15 December 2008. Ms Richardson reacted very strongly to Ms Sampayo sending Mr Tucker’s apology to her, advising her direct manager at the time that she was very offended by Ms Sampayo’s action. This was Ms Richardson’s third criticism, and the trial judge dealt with it by rejecting any suggestion that Ms Richardson’s rights were infringed by Ms Sampayo’s action in sending Mr Tucker’s apology to her and by concluding that Ms Sampayo could not be fairly criticised for doing so. It was not clear from Ms Richardson’s oral submissions to this Court whether she was alleging that this act by Oracle, through Ms Sampayo, caused her psychological injury.
8. During the period of the investigation, which the trial judge said was eventually a period of almost four weeks, Ms Richardson remained a member of the bid team for the ANZ Bank project. This came about because of Ms Sampayo’s desire to maintain confidentiality during the investigation. It meant that Ms Richardson was required to maintain contact with Mr Tucker. There was no face to face contact, but there was frequent contact in telephone conferences and by email. The trial judge found that there was regular contact by way of conference calls and emails between Ms Richardson and Mr Tucker during the investigation. The trial judge said that it was unclear why the arrangement whereby Ms Richardson was required to maintain contact with Mr Tucker during the investigation was put in place and he said that, in the end, Oracle made little attempt to justify it. He described the arrangement as unsatisfactory. He found that it contributed to some extent to the psychological impact on Ms Richardson of Mr Tucker’s conduct.
9. The trial judge did not award damages for the psychological injury caused by the fact that Ms Richardson continued to have contact with Mr Tucker during the investigation. However, he did assess them in the amount of $4,000, presumably in the event that he was wrong.
10. Oracle submitted on the appeal that the trial judge did make an allowance for the psychological injury caused by Ms Richardson’s continued contact with Mr Tucker during the investigation. However, we think it is clear from the following passage in his reasons that he did not do so (at [247]):

If I had been satisfied that Oracle was directly liable to Ms Richardson for its own conduct, I would have awarded a further $4,000 as compensation for that conduct. That compensation would have related to the requirement to remain exposed to Mr Tucker for the period from 17 November 2008 to 10 December 2008 and the consequent psychological effects attributable to Oracle’s conduct which were taken into account by the experts. However, on the findings about liability which I have made that is not a course which is open or appropriate.

1. The trial judge’s reason for not awarding damages for the psychological injury to Ms Richardson as a result of Oracle’s investigation was that he did not consider that Oracle had breached any legal obligation it owed to Ms Richardson. He said (at [166]):

In order to succeed in obtaining any measure of compensation arising from these matters it was necessary for Ms Richardson to make good some cause of action against Oracle in which these complaints could properly be seen to identify a breach by Oracle of some duty or legal obligation owed by it to Ms Richardson. Oracle’s vicarious liability for Mr Tucker’s conduct does not, in my view, without more provide a sufficient foundation for recovery of compensation for added distress caused by Oracle in the conduct of the investigation, to the extent the criticisms were made good.

1. In this passage, the trial judge appears to reject the notion that there was a causal link between Mr Tucker’s unlawful conduct and the consequences of the manner in which Oracle conducted its investigation. We think he was correct to do so.
2. It is important to remember that Oracle is not said to be liable under this head because it did something wrong in the course of the investigation. It is said to be liable because it was vicariously liable for Mr Tucker’s unlawful conduct. In other words, there must be a sufficient causal link between Mr Tucker’s unlawful conduct and the particular aspect of the investigation giving rise to the loss and damage. The perpetrator would also be liable for the loss and damage. As it happens in this case, Ms Richardson did not seek monetary relief against Mr Tucker to the extent that Oracle was found vicariously liable for his conduct.
3. It is correct to say that, but for Mr Tucker’s unlawful conduct, the investigation would not have taken place and Ms Richardson would not have been required to have contact with him during the investigation into his conduct. However, that by itself is not enough. We do not think that the link that Ms Richardson sought to identify by reference to the SD Act, that is, that an investigation inevitably follows a formal complaint, is sufficient, because it would mean a complainant could recover irrespective of the nature or conduct of an investigation in circumstances where there would be many different types of investigations and great variations in how they are conducted. Furthermore, the direct or immediate cause of the loss and damage suffered by Ms Richardson was not the investigation as such, but Oracle’s decision not to prevent contact between Ms Richardson and Mr Tucker during it, and there is nothing in the objects of the SD Act which provides a link between that cause and Mr Tucker’s unlawful act.
4. The same result follows from an application of the common law test of causation. The unlawful conduct of Mr Tucker provided the setting or occasion for what followed, but, as a matter of common sense and experience, Mr Tucker’s unlawful conduct was not a cause of Oracle’s decision not to prevent contact between Ms Richardson and Mr Tucker during the investigation and nor did it materially contribute to it.
5. The same conclusion applies insofar as Ms Richardson claims that she suffered a psychological injury as a result of Ms Sampayo forwarding Mr Tucker’s apology to her.
6. The above grounds referred to Oracle’s investigation and did not refer to the consequences of Ms Richardson’s complaint to the AHRC or this litigation. However, in oral submissions to this Court, counsel for Ms Richardson sought to put the same submission in relation to the alleged psychological injury resulting from these matters. For the same reasons, the submission is rejected in relation to these matters.

# Grounds 5, 6 and 17(b)

1. These grounds also relate to the psychological injury said by Ms Richardson to have been suffered by her as a result of Oracle’s investigation, her complaint to the AHRC and this litigation. The grounds raise a different argument from that considered in the previous section.
2. The trial judge found that, as a result of Mr Tucker’s unlawful conduct, Ms Richardson suffered an adjustment disorder with mixed features of anxiety and depression. The stressor implicit in this diagnosis of Ms Richardson’s condition was Mr Tucker’s unlawful conduct. The trial judge found that that stressor ceased or came to an end when Mr Tucker’s unlawful conduct ceased in November 2008. Ms Richardson challenged this finding and she submitted that the stressor constituted by Mr Tucker’s unlawful conduct continued after his conduct ceased. That came about because Ms Richardson was, from time to time, required to recount and relive her experiences. That in turn, and this is important, was caused by “Mr Tucker’s continued false denials of his sexual harassment” of Ms Richardson because that required Ms Richardson to “continue to engage in processes with Oracle, the Australian Human Rights Commission and then the Court” (Ground 6).
3. In his reasons, the trial judge made a number of important findings in relation to Ms Richardson’s psychological injury. First, as we have said, he found that Ms Richardson suffered from a chronic adjustment disorder with mixed features of anxiety and depression as a result of Mr Tucker’s unlawful conduct. Secondly, he found that Ms Richardson’s symptoms had come to an end, or were in remission, and that that must be so because of the diagnostic criteria for the condition which all the medical experts agreed was the condition from which Ms Richardson was suffering. Thirdly, the trial judge found that, if the litigation was a stressor, it was a stressor in its own right. He said that it did not contribute to the diagnosis of psychological injury made out in the present case. Finally, the trial judge accepted Dr Klug’s evidence that Ms Richardson adjusted “very quickly” in that she found an alternative job and has been functioning normally in that job. He also accepted Dr Klug’s evidence that it is necessary to relate the adjustment disorder to an identifiable stressor and that such a stressor could not be seen in Ms Richardson’s case after March 2009.
4. We did not understand Ms Richardson to submit under these grounds that any event which caused Ms Richardson to relive or recount Mr Tucker’s unlawful conduct is causally linked to that conduct. Such an argument could not succeed. Ms Richardson’s submission is that the causal link or “bridge” between Mr Tucker’s unlawful conduct and her reliving or recounting of that conduct was Mr Tucker’s false denials of his sexual harassment of Ms Richardson.
5. The timing of the three events identified by Ms Richardson in her grounds was 17 November 2008 to about 11 December 2008 for the Oracle investigation, October 2009 for the complaint to the AHRC, and June 2010 for the institution of these proceedings. The medical evidence of Dr Phillips to which the Court was referred was directed to the complaint to the AHRC and the litigation, and the need for Ms Richardson to relive and recount Mr Tucker’s unlawful conduct when preparing statements and when giving instructions. At trial, the Oracle investigation was the subject of complaint, but more as to the manner in which it was conducted rather than causing Ms Richardson to recount and relive Mr Tucker’s unlawful conduct. We have already held that Ms Richardson’s claim for damages in relation to the Oracle investigation must be rejected. In those circumstances, the Oracle investigation can be put to one side and the focus of the present grounds is the effect of Ms Richardson’s complaint to the AHRC and this litigation.
6. In our opinion, Oracle is not liable for Mr Tucker’s false denials. It was held vicariously liable for Mr Tucker’s unlawful conduct under s 106 of the SD Act. That involved a connection between his unlawful conduct and his employment by Oracle. That connection is not present in the case of Mr Tucker’s false denials. Furthermore, there are other substantial difficulties with Ms Richardson’s argument. The trial judge accepted the evidence of Dr Klug and that makes it very difficult to find a causal link between Mr Tucker’s unlawful conduct on the one hand, and the distress caused to Ms Richardson by her complaint to the AHRC and this litigation on the other. Although Ms Richardson challenged the trial judge’s acceptance of Dr Klug’s evidence, we have read the medical evidence to which the Court was referred and we see no reason to interfere with the trial judge’s finding. In addition to this matter, it may be noted that the trial judge did not actually make a finding that this litigation was a stressor in the relevant sense, and it may be that the stress associated with the litigation was of such a nature as not to be compensable (*Sved v Council of the Municipality of Woollahra* (1998) NSW ConvR 55‑842).

# Grounds 11 and 12

1. It is convenient to deal with these grounds at this point because, if successful, they will lead to an award of damages for psychological injury which is the subject of the grounds previously discussed. Grounds 7, 7A, 8, 9, and 10 are conveniently considered with grounds 13, 14 and 15 because they all relate to Ms Richardson’s claim for economic loss.
2. One of Ms Richardson’s claims at trial was that, by reason of the manner in which Oracle had conducted its investigation into her complaint, it had discriminated against her on the ground of her sex, either in the terms and conditions of employment it afforded to her or by subjecting her to a detriment, or both, within s 14(2)(a) and (d) of the SD Act. She relied on the concept of indirect discrimination embodied in s 5(2) of the SD Act. That subsection is in the following terms:

**5 Sex discrimination**

…

(2)For the purposes of this Act, a person (the ***discriminator***) discriminates against another person (the ***aggrieved person***) on the ground of the sex of the aggrieved person if the discriminator imposes, or proposes to impose, a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging persons of the same sex as the aggrieved person.

1. Ms Richardson’s case was that Oracle imposed a requirement on her during the investigation that she continue to have contact with Mr Tucker, which had, or was likely to have, the effect of disadvantaging women. She suffered loss by way of a psychological injury. There were other aspects of her indirect discrimination case at trial by way of allegations of the imposition of other requirements, but they were not pursued on appeal.
2. In the context of this case, the possible application of s 5(2) raises two issues. First, did Oracle impose a requirement on Ms Richardson that she continue to have contact with Mr Tucker during the period of its investigation into her complaint? Secondly, if the answer to the first question is yes, did the requirement have the effect, or was it likely to have the effect, of disadvantaging women?
3. The trial judge rejected Ms Richardson’s claim on the basis that there was no evidentiary basis for the proposition that Oracle imposed the suggested requirement upon women who complained about sexual harassment, or even that such a requirement was likely to be imposed on others should the circumstances arise. His Honour said that the fact that Ms Richardson was required to remain in some contact with Mr Tucker whilst the investigation was carried out did not establish that it was the result of “the discriminatory imposition of a condition, requirement or practice on women employed by Oracle”.
4. The trial judge was correct to conclude that there was no evidence before him that a female complainant of sexual harassment was, or would be, treated differently from a male complainant in that she would be required to have contact with her harasser while her complaint was being investigated, whereas a male complainant would not be the subject of such a requirement. Whether that matter could only be proved by evidence of what had happened in other cases is probably doubtful, but the fact is that there was no other evidence in this case to the effect that there would be differential treatment. Ms Richardson did not challenge the trial judge’s rejection of her indirect discrimination case on this basis. Her submission was that, implicit in his analysis was a construction of s 5(2) which was erroneous.
5. Ms Richardson submits that most complainants of sexual harassment are women. Assuming that a requirement that a complainant have contact with her or his harasser whilst the complaint is being investigated is a disadvantage, then the requirement has the effect of disadvantaging women within s 5(2).
6. In our opinion, this argument must be rejected because the relevant comparison is not between female complainants of sexual harassment and men generally, but rather between female complainants and male complainants.
7. Section 5(2), in its current form, was the result of an amendment to the SD Act in 1995 (*Sex Discrimination Amendment Act 1995* (No 165 of 1995)). Prior to 1995, s 5(2) was in the following terms:

**5 Sex discrimination**

…

(2) For the purposes of this Act, a person (in this sub-section referred to as the “discriminator”) discriminates against another person (in this subsection referred to as the “aggrieved person”) on the ground of the sex of the aggrieved person if the discriminator requires the aggrieved person to comply with a requirement or condition:

1. with which a substantially higher proportion of persons of the opposite sex to the aggrieved person comply or are able to comply;
2. which is not reasonable having regard to the circumstances of the case; and
3. with which the aggrieved person does not or is not able to comply.
4. The subsection in this form was considered by this Court in *Secretary, Department of Foreign Affairs and Trade v Styles* (1989) 23 FCR 251 and *Commonwealth Bank of Australia v Human Rights and Equal Opportunity Commission* (1997) 80 FCR 78. Sections in various pieces of State legislation in similar, although not identical, terms were considered by the High Court in *Australian Iron & Steel Pty Ltd v Banovic* (1989) 168 CLR 165 (“*Banovic*”) (*Anti-Discrimination Act 1977* (NSW)), *Waters v Public Transport Corporation* (1991) 173 CLR 349 (“*Waters*”) (*Equal Opportunity Act 1984* (Vic)) and *State of New South Wales v Amery* (2006) 230 CLR 174 (“*Amery*”) (*Anti-Discrimination Act 1977* (NSW)).
5. In *Banovic*, Dawson J said (at 185) that the words “requirement or condition” in the legislation before the High Court in that case should be construed broadly so as to cover any form of qualification or pre-requisite demanded by an employer of his employees (see also *Waters*, at 393 per Dawson and Toohey JJ).
6. The key concept behind the indirect discrimination provisions in the legislation considered by the High Court in *Banovic*, *Waters*, and *Amery* was described by Mason CJ and Gaudron J in *Waters* as follows (at 357):

… some criterion has been used or some matter taken into account which, although it does not, in terms, differentiate for an irrelevant or impermissible reason, has the same or substantially the same effect as if different treatment had been accorded precisely for a reason of that kind.

In the same case, Dawson and Toohey JJ said (at 392):

The major difference is that in the case of direct discrimination the treatment is on its face less favourable, whereas in the case of indirect discrimination the treatment is on its face neutral but the impact of the treatment on one person when compared with another is less favourable.

The observations of Mason CJ and Gaudron J were referred to with approval in *Amery*, at 191‑192 per Gummow, Hayne and Crennan JJ.

1. Clearly the words in s 5(2) as it now stands are different from s 5(2) in its pre‑1995 form and that might affect the operation of indirect discrimination in various circumstances. However, in our opinion, the key concept of indirect discrimination remains the same. The relevant comparison must be between female complainants of sexual harassment and male complainants of sexual harassment and, on the evidence in this case, there is nothing to suggest that there was any difference between the two groups. In other words, one starts the exercise by assuming that the requirement of working with one’s harasser during the investigation into the complaint is applied to men and women alike. The fact that the majority of complainants are women does not have the same effect as if the requirement had not been imposed on male complainants, and nor can it be said that a female complainant received less favourable treatment than a male complainant.

# Grounds 7, 7A, 8, 9, 10, 13, 14 and 15

1. The trial judge rejected Ms Richardson’s claim for economic loss resulting from her resignation from Oracle and her employment by EMC Australia (“EMC”). However, he did assess such damages at $30,000 in the event that he was wrong in rejecting her claim. That assessment is the subject of a separate challenge by Ms Richardson, which is dealt with below.
2. We will not go through the grounds seriatim. They contain challenges to the three principal conclusions of the trial judge in relation to Ms Richardson’s claim for economic loss. First, Ms Richardson submits that the trial judge erred in finding that she left her employment with Oracle voluntarily. Secondly, she submits that the trial judge erred in concluding that she had not been demoted by Oracle. Thirdly, she submits that the trial judge erred in rejecting her case that, even if, as a matter of objective fact, she had not been demoted, the circumstances were such that there was a sufficient causal link between Mr Tucker’s unlawful conduct and her decision to leave Oracle and the resulting economic loss.
3. With respect to the first submission, we conclude that, as a matter of objective fact, Ms Richardson was not forced out or pressured to leave Oracle. However, there was a sufficient causal link between Mr Tucker’s unlawful conduct and Ms Richardson’s economic loss.
4. With respect to the second submission, we conclude that the trial judge was correct in concluding that Ms Richardson was not, in fact, demoted by Oracle. An actual demotion does not provide a causal link between Mr Tucker’s unlawful conduct and Ms Richardson’s economic loss.
5. With respect to the third submission, we conclude that, when regard is had to the objective circumstances, Ms Richardson’s understanding and perceptions of the circumstances, and Dr Klug’s evidence, the trial judge erred in concluding that there was no causal link between Mr Tucker’s unlawful conduct and Ms Richardson’s decision to leave Oracle and the resulting economic loss.
6. Before explaining our reasons for reaching these conclusions, it is appropriate to identify the relevant principles.
7. As far as demotion is concerned, a person may be demoted by a reduction in his or her remuneration or in the increases in remuneration which might be expected to follow in the ordinary course: *Brackenridge v Toyota Motor Corporation Australia Ltd* (1996) 142 ALR 99, at 101. That did not happen to Ms Richardson as her remuneration was not reduced. A demotion may also occur if there is a significant reduction in a person’s status or responsibility: *Whittaker v Unisys Australia Pty Ltd* (2010) 192 IR 311, at 320, [41] per Ross J. There was no formal change in Ms Richardson’s status within Oracle and there was no change in her employment level. Her case was that there was a significant and sustained reduction in her responsibilities and that that amounted to a demotion.
8. As far as causation is concerned, the High Court in *Medlin v State Government Insurance Commission* (1995) 182 CLR 1 (“*Medlin*”) considered a claim for economic loss in a case where a plaintiff suffered injuries in a motor vehicle accident and then decided to retire early. The plurality (Deane, Dawson, Toohey and Gaudron JJ) said (at 6‑7):

The ultimate question must, however, always be whether, notwithstanding the intervention of the subsequent decision, the defendant's wrongful act or omission is, as between the plaintiff and the defendant and as a matter of commonsense and experience, properly to be seen as having caused the relevant loss or damage. Indeed, in some cases, it may be potentially misleading to pose the question of causation in terms of whether an intervening act or decision has interrupted or broken a chain of causation which would otherwise have existed. An example of such a case is where the negligent act or omission was itself a direct or indirect contributing cause of the intervening act or decision.

1. The plurality said that causation may be established even though the immediate trigger for the loss and damage sustained by the plaintiff was his own decision to retire early. They said (at 10):

The necessary causation between a defendant’s negligence and the termination of a plaintiff’s employment, in the sense that the termination of the employment is the product of an accident-caused loss of earning capacity, can exist notwithstanding the fact that the immediate trigger of the termination of the employment was the plaintiff’s own decision to retire prematurely. If, for example, it appears that a plaintiff’s decision to retire prematurely would not have been made were it not for the fact that the effect of accident-caused injuries is that continuation in employment would subject him or her to constant pain and serious risk of further injury, it may well be that commonsense dictates the conclusion that the plaintiff’s decision to retire prematurely was a natural step in a chain of causation which suffices to designate, for the purposes of the law of negligence, the termination of the employment as a product of those injuries.

1. There is no reason why this analysis should not be applied to a decision to change employment following sexual harassment.
2. Their Honours also considered the extent to which the reasonableness of the plaintiff’s decision to retire is relevant to the issue of causation. Their Honours said that reasonableness was relevant, but in a limited sense of what was reasonable as between the plaintiff and defendant. Their Honours said (at 11):

… the relevant question was not whether the plaintiff “should” have continued in his University post or whether his decision to retire was not “reasonable” but whether, in the context of what was reasonable between the plaintiff and the defendant in determining the defendant’s liability in damages, the premature termination of the plaintiff’s employment was the product of the plaintiff’s loss of earning capacity notwithstanding that it was brought about by his own decision to accept voluntary retirement.

1. A little later, they reiterated the point (at 13):

Subject to one qualification, we also agree with his Honour’s reasons for that answer in all the circumstances of this case. The qualification is that, as indicated, any question of reasonableness should be framed in terms of what is reasonable as between the plaintiff and the defendant in the context of assessing damages for negligence rather than as a question of whether the plaintiff acted reasonably or unreasonably in resigning his post.

1. *Medlin* means, we think, that in this case it is not a question of whether Ms Richardson acted reasonably or unreasonably in resigning her position with Oracle and joining EMC, but rather what was reasonable as between Ms Richardson on the one hand, and Mr Tucker/Oracle on the other, in determining the latter’s liability for damages.
2. The starting point in the analysis is the period between the making of the formal complaint on 17 November 2008 and the completion of the investigation on or about 11 December 2008. In this period, the trial judge found that Ms Richardson began considering her future employment with Oracle because she considered that she would be stigmatised for having made a complaint and she was losing confidence in Oracle. She began making inquiries about the state of the jobs market in the IT field in November 2008 after she had made her complaint, and she made at least one unsuccessful job application at about this time. A friend and neighbour of Ms Richardson, Ms Ann O’Toole, gave evidence (which, as far as we can see, was not rejected by the trial judge) that Ms Richardson indicated to her, after November 2008, that “she made a decision that she would probably have to leave the company, that she didn’t have any future with them”. Subject to a consideration of what happened following this, this is powerful evidence in Ms Richardson’s favour. It supports a conclusion that Mr Tucker’s unlawful conduct was a material cause of her decision to leave Oracle.
3. There was a meeting on 17 December 2008 between Ms Richardson, Ms Amanda Swan, who was Ms Richardson’s direct manager in late 2008 and was based in Sydney, and Ms Edweena Stratton, who was the Senior Director of Human Resources for Oracle in Australia and New Zealand and who was also based in Sydney. By this time, Mr Tucker had been given his first and final warning and his manager once removed had decided that he would continue in his role on the ANZ Bank project, which the trial judge described as a key role. Ms Richardson wished to be and was off the ANZ Bank project.
4. The trial judge accepted the evidence of Ms Swan on a number of matters and he found that before this time Ms Richardson and Ms Swan had enjoyed a mutual regard and a friendly working relationship. He found that Ms Swan had a genuine concern for Ms Richardson’s welfare.
5. We come at this point in the narrative to one of the key issues concerning Ms Richardson’s contention that she was demoted. Ms Richardson’s case was that she did not want to work with Mr Tucker, but that Oracle went further than that and removed her from any projects in Victoria. Ms Richardson’s case was that Oracle’s major projects were in Victoria. Oracle’s case was that Ms Richardson went further than indicating that she did not want to work with Mr Tucker and made it clear that she wished to avoid any further contact with him in any form, even by way of an accidental encounter. It was in that context, according to Oracle, that Ms Swan said at the meeting on 17 December 2008 that it would be better for Ms Richardson not to go to the Melbourne office at all.
6. The trial judge accepted Oracle’s case and he preferred the evidence of Ms Swan and Ms Stratton over that of Ms Richardson. Furthermore, he rejected Ms Richardson’s evidence that she complained about a reduction of her responsibilities at the meeting on 17 December 2008. He also accepted that Ms Swan had raised with Ms Richardson the possibility of her working on a project in Melbourne involving Fosters whereby she would not go to Oracle’s office in Melbourne, but rather would go straight to the customer’s office. He also accepted that Ms Swan, at about this time, raised with Ms Richardson the possibility of her being involved in an “architecture initiative”.
7. Ms Richardson submits that the trial judge erred in accepting Ms Swan’s evidence and that this was a case where, despite the fact that he had had the advantage of seeing and hearing the witnesses, he had acted contrary to compelling inferences. In our opinion, the evidence falls a long way short of establishing Ms Richardson’s proposition. In support of her submission, Ms Richardson relies on the following matters. First, she submits that Ms Swan’s evidence was vague and general and not supported by notes made at the time. That did not preclude the trial judge from accepting it, particularly as it was supported in material respects by Ms Stratton’s evidence. Secondly, she submits that there was evidence that she had said to others no more than that she did not want to work with Mr Tucker. However, that is not inconsistent with a finding that she had conveyed what the trial judge described as a stronger impression to Ms Swan, that she wished to avoid any further contact with Mr Tucker in any form, even by way of an accidental encounter. Thirdly, she relies on the objective circumstances. We turn now to consider those objective circumstances.
8. A number of objective circumstances, in fact, support the trial judge’s conclusion that Ms Richardson was not demoted. First, as at 19 December 2008, Ms Richardson was not working on any Victorian projects, nor had any future Victorian projects been identified to which she would be assigned. Secondly, Ms Swan had raised with her the Victorian project involving Fosters where she might go straight to the customer’s office rather than Oracle’s office in Melbourne. Thirdly, the trial judge found that the “architecture initiative” was not a minor project and that it was being sponsored and developed at a high level within Oracle. Significantly, there was a proposal in early December 2008 that Ms Richardson be involved in the project in a senior capacity. Fourthly, Ms Richardson acted in Ms Swan’s role in January 2009 when Ms Swan was on leave. Fifthly, Ms Richardson met Ms Swan on 29 January 2009 for a performance review and at no time during the review did she suggest that she was under‑utilised, unhappy with the allocation of her responsibilities, or felt that her responsibilities had been reduced.
9. As against these matters, Ms Richardson contends that the evidence establishes that in January and February 2009 she was put on special projects, was under‑utilised and, at times, had no work to do. Furthermore, she contends that projects were allocated to an Oracle employee who was junior to her. The trial judge rejected these allegations. His conclusions were attacked by Ms Richardson by reference to a number of rather general documents about the flow of work into Oracle and Ms Richardson’s involvement in them. We reject these challenges because the trial judge’s findings were clearly open to him. Even if there was a lag in Ms Richardson’s flow of work, we entirely agree with the trial judge’s observation that Ms Richardson did not allow much time for things to settle down.
10. In our opinion, the trial judge was correct to find that Ms Richardson had not been demoted as a matter of objective fact.
11. The trial judge traced events in January, February, March and April 2009, including Ms Richardson’s contact with representatives of EMC. It is not necessary for us to detail those matters. Ms Richardson resigned from Oracle by letter dated 5 March 2009 and, after working out her period of notice, left Oracle on 3 April 2009.
12. The trial judge found that Ms Richardson had left Oracle for reasons of her own. He said, in the context of Ms Richardson’s claim that Oracle had repudiated her contract of employment, the following (at [90]):

Although Ms Stratton’s letter was presumably written with a view to the protection of Oracle’s interests, I do not regard the request that Ms Richardson reconsider her decision as an insincere one. This exchange of correspondence was followed by a meeting attended by Ms Richardson, Ms Stratton and Ms Swan on 9 March 2009. Ms Richardson was asked again by Ms Stratton to reconsider her decision but Ms Richardson declined. This, in my view, is a further reason why Oracle may not be held responsible for Ms Richardson’s decision to leave her employment with Oracle. The reality is that Ms Richardson had decided to go for reasons of her own. Those reasons do not match the suggestion that her career had been damaged, much less that Oracle had repudiated her contract of employment. Although I think there is a case that Oracle’s response during the investigative process may have failed Ms Richardson in certain respects, that did not amount to repudiation of Ms Richardson’s ongoing employment relationship with Oracle, nor repudiation of her contract of employment.

1. The trial judge said that Ms Richardson had not established that her alleged economic loss was suffered “because of” Mr Tucker’s conduct and he said that the necessary causal link was not established. He went on to say the following (at [249], [250]):

In my view, this part of Ms Richardson’s case was largely misconceived. In my view, Ms Richardson left her employment with Oracle essentially because it suited her to do so in the circumstances at the time. She resigned. She was not constructively dismissed. Although she commenced steps to find other employment (not just at EMC) she did not actually resign until she was confident she was to receive an offer of employment. What was her loss at that stage? I am satisfied she was not demoted. There was no evidence at all that her remuneration at Oracle was or would have been reduced. There was no evidence that her promotion prospects were or would have been reduced.

It was contended that it was sufficient to find that Ms Richardson’s own motivation for leaving Oracle lay ultimately in Mr Tucker’s conduct and Oracle’s inadequate response to her complaints about it. I have rejected elements of these allegations on the evidence. I do not accept that Ms Richardson’s subjective motivation establishes a relevant foundation for damages. Even if it did she would be obliged to mitigate her loss, which she did very effectively.

1. With respect, we think that the trial judge erred in not finding the necessary causal link between Mr Tucker’s unlawful conduct and Ms Richardson’s decision to leave Oracle. We have reached that conclusion because of the combination of three matters.
2. First, there is the evidence referred to above (at [190]) that Ms Richardson began considering her future employment with Oracle in November 2008 and the steps she took at that time to secure alternative employment. The timing of these activities means that they could only have been taken because of Mr Tucker’s unlawful conduct.
3. Secondly, in the context of addressing Ms Richardson’s adjustment disorder, Dr Klug said that Ms Richardson adjusted to the situation “very quickly” by finding an alternative job. That evidence was referred to by the trial judge in another context, but we think it was an important matter to bring to account on the issue of causation.
4. Thirdly, we think to say, as the trial judge did, that Ms Richardson’s subjective motivation does not establish a relevant foundation for damages is not to bring to full account Ms Richardson’s understanding of the circumstances and the circumstances as they actually existed. Ms Richardson saw a counsellor at Ms Sampayo’s suggestion. The counsellor suggested to Ms Richardson that she keep a journal recording events and her feelings, which she did. The journal was part of the evidence before the trial judge. He found that it was not kept to be used in later proceedings. At the same time, he found that it was not a completely accurate historical account of events. It was, however, a substantially correct account of Ms Richardson’s feelings and physical symptoms. The journal clearly reveals that Ms Richardson considered that there had been a diminishment of her responsibilities and that Oracle was trying to push her out. It also reveals her lack of trust in Oracle. Although the trial judge found that Ms Richardson had not been demoted and that she had not allowed much time for things to settle down (and we would not interfere with those findings), the fact is that, on any view, there were substantial changes in her working arrangements at Oracle in late December 2008, and January and February 2009. In these circumstances, we think Ms Richardson’s subjective motivation, qualified by the objective circumstances, was relevant to whether a causal link between Mr Tucker’s unlawful conduct and Ms Richardson’s decision to leave Oracle, and the resulting economic loss, was established.
5. *Medlin* makes it clear that the question is one of reasonableness as between plaintiff and the defendant. In light of that, we think the three matters we have identified, when combined, were sufficient to establish causation between Mr Tucker’s unlawful conduct and Ms Richardson’s decision to leave Oracle and the resulting economic loss.

# damages for economic loss and damage (Grounds 21-24)

1. The trial judge regarded Ms Richardson’s claims for economic loss occasioned by reason of her change in employment as “largely misconceived” (at [249]). His Honour nevertheless gave some attention to what her economic loss would have been if she had established an entitlement to it. The trial judge reasoned that at the time she left Oracle on 5 March 2009, her salary had been $150,000 and her new salary at EMC was $140,000. That salary was increased to $150,000 in 2012. His Honour concluded that her loss would have been $10,000 per year for the period between 2009 (when she started with EMC) and 2012 when her salary at EMC reached what her salary had been at Oracle. His Honour accepted that Ms Richardson had a discretionary entitlement to bonuses at both firms. The trial judge rejected Oracle’s argument that when one took into account the bonuses in fact paid at EMC she appeared to be in a better position than she had been at Oracle on the basis that this was speculative. His Honour also rejected Ms Richardson’s argument that her entitlement to bonuses at Oracle was likely to be more valuable in the future on the same basis.
2. Ms Richardson pursued four grounds of appeal in relation to these conclusions (Grounds 21-24).

### Ground 21

1. Ground 21 was that the Court had erred by finding that there was no evidence that Ms Richardson would not do as well in her career with her new employer as she would have done at Oracle. The trial judge made a finding to this effect at [102]:

Ms Richardson did well at EMC. Although she commenced with a lower base salary ($140,000 rather than $150,000) she made up that shortfall by 2012. She achieved on average higher actual bonuses at EMC, compared to Oracle, also doing better on average than her target of 25% of base salary. The suggestion that her promotion prospects were less at EMC than at Oracle was based on the argument that EMC was a smaller company than Oracle and that the division in which Ms Richardson worked at EMC was not the core of EMC’s business. There was no evidence, however, that over the time frames suggested (four to five years and then seven years) Ms Richardson would not do as well at EMC as she might at Oracle. The only certainty was that for a period of about three years her base salary was lower.

1. That statement must be read, however, in the light of paragraphs 99-101 where the trial judge set out in detail Ms Richardson’s case on this issue:

99. Ms Richardson also sought the calculation of compensation or damages upon the basis that (as expressed in final written submissions) she might have expected a promotion at Oracle within four to five years, and a further promotion within a further seven years, each opening up the prospect of bonuses higher than 25% of base salary. By contrast, it was argued “it is likely to take a longer period of time for Ms Richardson to be promoted at EMC”. The comparison thus offered is delightfully vague.

100. I accept that Ms Richardson was a valued employee at Oracle, although she appeared to occupy a unique role which was created specially for her. Her role at Oracle involved no direct supervision of staff. Hers was, therefore, a role which turned particularly on the quality of her individual contribution, about which to that point there had been no doubt. Ms Richardson had in fact been promoted about every two years to that point in Oracle and, notwithstanding that hers was not a fully billable role, had managed to earn bonuses consistently at just under her target level of 25% after being promoted to the IC4 level. Ms Richardson accepted that, at the level she had reached, opportunities for promotion would be fewer. She would have had to assume responsibilities which went beyond her experience to that point, including direct supervision of other staff. Just as an example, Ms Swan who was at a higher relative level (effectively one above Ms Richardson) waited eight years for a promotion from that level. By contrast with Ms Richardson’s assumptions, Ms Swan, who appears to have been successful in her own right, did not achieve target bonus at her level. Inevitably, there is a large element of speculation in Ms Richardson’s claims. The evidence to support them was largely historical, from which extrapolations were attempted on the basis of some presumption that things would go on as before. But there were obvious difficulties in the analysis.

101. Ordinary base salaries at Oracle moved in response to a range of factors, including economic factors well abroad of Australia. Some years there was no increase, except for very special cases. That was the case in 2008 and 2009. Bonuses were discretionary and depended on a variety of discretions and allocations, themselves based initially on Oracle’s global fortunes. Support from the historical position was obviously subject to the uncertainties of future economic cycles worldwide. No attempt was made to deal with these matters at any real level of rigour except for mathematical extrapolation from variously calculated averages.

1. When read in that full context we would not read paragraph 102 as suggesting that there was no evidence; rather, we would read it as a statement that there was no evidence which the Court accepted. We would accept that the choice of words was perhaps unfortunate but the meaning, when the four paragraphs are read together, is tolerably clear. We would therefore reject this ground of appeal.

### Ground 22

1. Ground 22 was that the trial judge had erred by concluding that Ms Richardson would only have been entitled to economic loss calculated at $10,000 per year until 2012 when her salary at EMC reached what it had been at Oracle without addressing the likelihood of any future pay rises Ms Richardson would have received had she remained in employment at Oracle. The essence of this point was that what was likely to happen in the future at EMC and what might have happened in the future at Oracle were matters which the trial judge should have assessed on a probabilistic basis and it was not sufficient for his Honour merely to dismiss them as speculative. Reference was made to cases in a variety of contexts where plaintiffs had been held entitled to recover damages for lost chances: cf. *Malec v JC Hutton Pty Ltd* (1990) 169 CLR 638 (“*Malec*”) (tort); *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 (contract); *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332 (statutory damages).
2. The uncertainties related to what Ms Richardson’s future base income would have been at Oracle and EMC and also to what magnitude of bonuses she might have received at both.
3. It is convenient to deal with the issue of base income separately from the position of the bonuses. Ms Richardson sought to prove her case by calculating what the rate of growth had been in her base income at Oracle and comparing it to the rate at which her base income at EMC had increased. The evidence showed that her base salary in January 2003 had been $118,700 (which excluded superannuation). That base salary was increased in March 2008 to $150,000 (although the offer letter appears to be dated November 2007, nothing turns on this). This reflected a net increase of $31,300 or an increase of 26.36% over that five year and two month period. Taking into account the effects of compounding this was equivalent to an annual rate of 3.98% or 3.99%. However, as the trial judge’s analysis set out above shows, the question of salary increases was connected with the question of promotion (at [100]). Ms Richardson had been promoted every two years at Oracle up to the time at which the events giving rise to this litigation occurred. However, his Honour noted that another person at Oracle at the level immediately above hers had waited eight years for her promotion. It was clear that his Honour did not accept that Ms Richardson would continue to be promoted at the same speed. For that reason he was sceptical about using her past salary increase rate as a guide for what might happen in the future.
4. There is nothing outlandish about this reasoning. Consequently, it is difficult to fault (and we do not) the trial judge’s conclusion: “The evidence to support them was largely historical, from which extrapolations were attempted on the basis of some presumption that things would go on as before. But there were obvious difficulties in the analysis” (at [100]).
5. Insofar as her base salary at EMC was concerned, the trial judge noted that she had commenced at that firm on the lower base salary of $140,000 (as opposed to $150,000 at Oracle) but that she had made this up by 2012. It was that reasoning which led his Honour to conclude (at [253]-[254]) that her future economic loss was limited to $10,000 per annum for that three year period. That conclusion proceeds upon an assumption that her base salary would not have increased at Oracle over the same period. That assumption on the trial judge’s part was, however, quite consistent with his Honour’s rejection of the manner in which Ms Richardson had sought to prove what the increase in her base income might have been at Oracle. In the absence of some other methodology there was really no other way for his Honour to have proceeded.
6. The central plank in Ms Richardson’s future economic loss case was the alleged disparity between the rate of growth in her salary at Oracle (which she calculated at 3.98% or 3.99%) and the rate of growth in her base salary at EMC (which she calculated at 2.33%). As we have said above, the trial judge was unpersuaded for reasons with which we agree that he should proceed on the basis of the 3.98% or 3.99% figure. His Honour did not deal directly with the growth rate for EMC but this was unnecessary once one integer in the comparison process had been rejected. Large difficulties stood in the way of accepting the proposed analysis in light of the trial judge’s conclusion that her promotion opportunities were just as good at EMC and his rejection of her argument that this was not so just because EMC was a smaller company than Oracle (at [102]).
7. Turning then to the question of bonuses at Oracle, Ms Richardson’s submission was developed by reference to the bonuses she had been paid upon achieving her then current level within Oracle (‘IC4’). She had been paid three such quarterly bonuses but not a fourth since she had been on leave during that quarter. Those bonuses were $11,906.20 (Q4 FY08), $11,344.14 (Q1 FY09) and $3,098.75 (Q2 FY09). Her target bonus was set at 25% of her base salary and so was $37,500. Her quarterly bonus target was therefore $9,375. Ms Richardson submitted that she had achieved an average bonus rate of 23.42% of her salary. This was true but conceals considerable variability. For the three quarters for which data was available, the percentage rates were 127%, 121% and 33% of her target bonus ($9,375). It is thus true to say that overall Ms Richardson achieved 93.6% of her target bonus (being the average of the percentage of the three quarters). The three figures, however, are a distinctly small sample set which is consistent with the fact that the three quarters exhibit a very high level of deviation from that mean.
8. A similar process was engaged in to show that the long term average bonus rate achieved by Ms Richardson in all positions, and not just IC4, was 68.5%. The submission was that the Court should have awarded Ms Richardson a figure somewhere between 68.5% and 93.6% of her target bonus (being 25% of annual salary). Again, we agree with the trial judge that this was a highly speculative way to approach the matter.
9. Ms Richardson’s payslips at EMC showed that in the period between April 2009 and September 2012 she achieved 103% of her target bonus of 25% of base salary (i.e., 25.55%). Thus her bonus position at EMC was better as a percentage than the bonus position she put forward at Oracle. To counter that proposition it was observed that at EMC her bonus target would not be increased on promotion (unlike the situation at Oracle). It also operated off a lower base salary.
10. The Court’s reasoning on the issue of the bonuses was as follows (at [252]):

The bonuses were not guaranteed; they were discretionary. They fluctuated from time to time from zero to around 25% of base salary for particular quarters of the financial year. Looking back it is possible to say, as the applicant urged, that after being promoted to the IC4 level she appeared to receive, on average, about 23% of her base salary in bonuses. *However, that conclusion is based on data from only three quarters* and is only available with the benefit of hindsight. The longer term historical position appears to have been less favourable, but any such calculation (whatever the resulting figure) suffers from the same defect.

[emphasis added]

1. The gravamen of the complaint is that it was erroneous for the Court to have discounted the value of what had happened in the past as a guide to what might happen in the future. Reliance was placed on *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 (“*Guo*”) where six Justices said this (at 574):

The course of the future is not predictable, but the degree of probability that an event will occur is often, perhaps usually, assessable. Past events are not a certain guide to the future, but in many areas of life proof that events have occurred often provides a reliable basis for determining the probability - high or low - of their recurrence. The extent to which past events are a guide to the future depends on the degree of probability that they have occurred, the regularity with which and the conditions under which they have or probably have occurred and the likelihood that the introduction of new or other events may distort the cycle of regularity.

1. This does not require the past always to be considered in assessing future possibilities although it does suggest that it is often likely to be useful. The second half of the passage quoted above suggests that the extent to which the past may be used as a reliable tool for predicting the future may fluctuate from case to case. It is quite likely, although not certain, that the sun will come up tomorrow because that is what it has done for all of recorded human history. On the other hand, it is very unlikely, although not altogether impossible, that Mr Smith who won the lottery last week will win it again this week. In one case, what has happened in the past is useful material; in the other it is not. As the plurality observed in *Guo*, one needs to assess the circumstances of the past occurrences to assess their utility as a predictive tool.
2. In the particular circumstance in *Guo* the question was whether there was a real chance that Mr Guo would be persecuted for his political activities by the Chinese authorities. The plurality’s conclusion was that this question could not really be addressed without considering what Mr Guo’s past relations with those authorities had been. It was in that context that their Honours also said (at 575):

Determining whether there is a real chance that something will occur requires an estimation of the likelihood that one or more events will give rise to the occurrence of that thing. In many, if not most cases, determining what is likely to occur in the future will require findings as to what has occurred in the past because what has occurred in the past is likely to be the most reliable guide as to what will happen in the future. It is therefore ordinarily an integral part of the process of making a determination concerning the chance of something occurring in the future that conclusions are formed concerning past events. In the present case, for example, the Tribunal correctly relied on what it found had happened to Mr Guo and others to make a finding that he was not "differentially at risk for a Convention reason." Without making findings about the policies of the Chinese authorities and the past relationship of Mr Guo with those authorities, the Tribunal would have had no rational basis from which it could assess whether there was a real chance that he might be persecuted for a Convention reason if he were returned to the PRC.

1. We do not read this second passage as requiring a different approach to the first. It was a remark made in the particular context of assessing whether an applicant for a protection visa had a real chance of persecution if returned. It is very difficult to see that such an issue could be approached without an examination of the past.
2. We do not consider that the primary judge approached the case in a manner contrary to that which was suggested in *Guo*. His Honour’s point in relation to both base salary and bonuses was that the material which was available about the past was insufficient to provide any real guidance about the future.
3. There are two interrelated footnotes to this conclusion. The first is that the case pleaded by Ms Richardson was one in which she sought damages for “loss of income, bonuses and other benefits as an employee at Oracle” and also for “loss of opportunity for promotion and advancement at Oracle”. This was consistent with the case developed in this Court that she should be compensated for the loss of the chance that she would have been paid more if she had remained at Oracle. In principle, we would accept that this invited an approach to damages consistent with the kind of approach exhibited in *Malec*, that is, an assessment of the value of a foregone chance or opportunity. However, the material before the trial judge was simply not sufficient for the purpose of assessing that prospect.
4. The second is the invocation by Ms Richardson of the principle said to be embodied in *Armory v Delamirie* (1722) 93 ER 664 that where there is a difficulty in calculating damages and that difficulty has been brought about by the act of a defendant the Court should err in a plaintiff’s favour. We do not think that principle has anything to say in this case. The difficulties which exist are not related to the actions of Oracle. They are related to the, with respect, simplistic approach taken to the task at hand.
5. Another aspect to Ground 22 was that the trial judge had erred in only awarding $10,000 per year until 2012 when Ms Richardson’s salary at EMC had reached what it had been at Oracle in 2009. Ms Richardson submitted that this overlooked the possibility that Ms Richardson’s salary might itself have increased by 2012. It was said that this also overlooked the fact that her salary had grown faster at Oracle than it did at EMC. Given his Honour’s scepticism about the rate used to model the increases in Ms Richardson’s base salary at Oracle, we do not see that he could have proceeded otherwise than as he did.
6. We would reject this ground.

### Ground 23

1. Here the argument was that the trial judge erred in imposing a standard of proof in relation to Ms Richardson’s economic loss which required inferences or findings to be made without the benefit of hindsight. We do not read the judgment that way. What the trial judge said was that the material before him was not adequate. His Honour did not say that past evidence could not be used; only that this past evidence was not up to the task which had been imposed upon it.

### Ground 24

1. Lastly, Ms Richardson submitted that the trial judge had erred by failing to determine the value of Ms Richardson’s lost opportunity. We have dealt with this point above at [227].
2. It will follow that we would not interfere with the trial judge’s calculation of Ms Richardson’s economic loss as being $30,000, but we do differ respectfully from his Honour in concluding that that amount should in fact be awarded.

# Grounds 25-28 (trial costs)

1. The result of this Court’s conclusions is that Ms Richardson’s damages award should be increased from $18,000 to $130,000. This has costs implications. Well in advance of the trial the solicitors for Oracle and Mr Tucker served an offer of compromise apparently under the former *Federal Court Rules* by which they offered to settle the proceedings for $55,000 plus interest together with Ms Richardson’s costs as assessed or agreed. The offer was dated 1 September 2010, but was attached to an email, by way of service, sent on 3 September 2010.
2. Because his Honour only awarded $18,000 this led the trial judge, in a separate costs judgment, to order that Oracle pay Ms Richardson’s costs up until 11:00 am on 4 September 2010 (the day after the offer) and that she pay Oracle’s and Mr Tucker’s costs on an indemnity basis thereafter.
3. The factual underpinning for that conclusion has now gone since the judgment has been increased to $130,000. Grounds 25-28 attacked in various ways the trial judge’s reasoning on Oracle’s offer of compromise but none of these are material now that the judgment is to be increased.
4. On 20 September 2010 Ms Richardson made an offer expressed to be under Order 23 of the former *Federal Court Rules* on the basis that the respondents pay Ms Richardson $106,500 plus interest together with her costs as assessed or agreed. This offer was not accepted. The effect of this offer was not the subject of submissions before us. Ordinarily, it would be appropriate to remit this issue to the trial judge. However, there are some circumstances which may suggest that this is not appropriate in the present appeal. As the reasons of Kenny J show, whilst we have concluded that the award in this case was manifestly inadequate, the award given by the trial judge was not out of step with some past awards in cases of this kind. In this circumstance, there may be an argument available to Oracle that it ought not to be criticised for rejecting an offer which was out of line with those other awards. In turn, this may require a consideration of the parties’ reasonable or prudent expectations of the litigation at the time of the offer. This Court is better placed to decide this than the trial judge. In those circumstances, we would hear the parties (in writing) on the issue of the costs of the trial.
5. In the course of his Honour’s costs judgment, the trial judge referred to the former Order 62 r 36A(1) which provides for a one third reduction in costs if less than $100,000 is recovered (unless the Court otherwise orders). As his Honour correctly noted at [44] this former rule was directed to the taxing officer. It might be noted that the current rule (r 40.08 of the *Federal Court Rules 2011* (Cth)) does not operate in that fashion and requires the making of an application to the Court before it is enlivened. On the conclusion his Honour reached that there should be judgment for $18,000 he could see no reason to order that Order 62 r 36A(1) not apply. On the conclusions we have reached this issue does not, however, arise.

# Conclusion

1. We would make the following orders:
2. The appeal be allowed.
3. (a) The order made by Buchanan J on 20 February 2013 that “[t]he first respondent is to pay to the applicant within 21 days the sum of $18,000 by way of damages as compensation for breach of s 28B(2) of the *Sex Discrimination Act 1984* (Cth)” be set aside and;

(b) in lieu thereof order:

“There be judgment for the applicant against the first respondent in the sum of $130,000.”

1. The first respondent pay the appellant’s costs of the appeal.
2. The orders made by Buchanan J on 19 April 2013 be set aside.
3. The appellant file and serve any submissions on the issue of the costs of the trial within 21 days.
4. The first respondent file and serve any submissions in reply within a further 21 days.

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| I certify that the preceding one hundred and twenty-one (121) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Besanko and Perram. |

Associate:

Dated: 15 July 2014