

## How do you compensate a victim of discrimination?

### *The dawning of a new era following Richardson v Oracle Corporation Australia Pty Ltd*

Once a Court makes a finding that unlawful discrimination<sup>1</sup> has occurred, it has a wide range of monetary and non-monetary remedies available to it. Damages for hurt, distress and humiliation (i.e. general damages) are, by their nature, inherently non-scientific and imprecise. In order to ensure consistency, the courts have developed an unofficial general range or scale of compensation for general damages commensurate to the type of harm or loss suffered. That scale now needs to be significantly adjusted following the decision in *Richardson v Oracle Corporation Australia Pty Ltd*<sup>2</sup> (***Richardson v Oracle***). The Court concluded in this case that compensation being awarded under this head of damage was no longer meeting community standards. General damages flowing from discrimination will inevitably now result in higher awards of compensation following this ground breaking Full Federal Court decision.

#### **Remedies**

Every state and federal discrimination law in Australia provides for a broad range of remedies.<sup>3</sup> They can generally be split into two categories:

1. monetary remedies (e.g. special damages for economic loss, general damages for non-economic loss and exemplary or aggravated damages); and
2. non-monetary remedies (e.g. re-employment, training, apology etc).

The focus of this article is monetary remedies and, in particular, general damages following the decision in *Richardson v Oracle*.

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<sup>1</sup> For the purposes of this article, the term 'discrimination' is used in a broad sense and is designed to capture the causes of action which arises under the full suite of State and Commonwealth anti-discrimination laws e.g. direct discrimination, indirect discrimination, sexual harassment, victimisation etc

<sup>2</sup> [2014] FCAFC 82

<sup>3</sup> *Equal Opportunity Act 1984* (SA), s 96; *Australian Human Rights Commission Act 1986* (Cth), s 46PO(4); *Anti-Discrimination Act 1997* (NSW), s 108; *Anti-Discrimination Act 1992* (NT), ss 88 and 89; *Anti-Discrimination Act 1991* (Qld) s 209; *Equal Opportunity Act 2010* (Vic), s 125; *Equal Opportunity Act 1984* (WA), s 127; *Anti-Discrimination Act 1998* (Tas), s 89(1)(h)

## Approach of the Courts

Damages are compensatory in nature.<sup>4</sup> They are designed to remedy some pecuniary, physical, psychological or other type of loss suffered. Most of the anti-discrimination statutes in Australia allow for uncapped awards of damages.<sup>5</sup>

The Courts often compare the current position of the applicant against the position he or she might have been in had the discriminatory conduct not occurred.<sup>6</sup> The Court will take into account mitigation and other countervailing factors. There is no monetary compensation which flows from merely being wronged by an act of discrimination.<sup>7</sup>

Compensation is awarded for loss or damage suffered because of unlawful conduct. There must be the necessary connection between the unlawful conduct and the loss or damage. Any damage suffered because of subsequent conduct which is not in itself unlawful – such as an investigation conducted by an employer – will not sound in damages even if it was handled inappropriately and caused harm or distress to the employee.<sup>8</sup>

The tort law principles for assessing damages are a common reference point for courts and tribunals seeking to award damages in discrimination cases. The tort law principles should, the authorities suggest, inform but not define the approach to compensation. The Courts have consistently warned against slavishly following the tort law path.<sup>9</sup>

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<sup>4</sup> *Qantas Airways Ltd v Gama* (2008) 247 ALR 273 per French and Jacobsen JJ at [94]; *Clarke v Catholic Education Office* (2003) 202 ALR 340 at [83] per Madgwick J.

<sup>5</sup> The exceptions are New South Wales (s 108(2)(a) of the *Anti-Discrimination Act 1977*), Western Australia (s 127(b)(i) of the *Equal Opportunity Act 1984* (WA)) and Northern Territory (s 88(1)(b) of the *Anti-Discrimination Act 1992* (NT) read in conjunction with reg 2(a) of the *Anti-Discrimination Regulations* (NT)).

<sup>6</sup> *Hall v A & A Sheiban Pty Ltd* (1989) 20 FCR 217 at [73] per Lockhart J and followed in numerous cases.

<sup>7</sup> *Wardley v Ansett* (1984) EOC ¶92-002

<sup>8</sup> *Richardson v Oracle* at [34]

<sup>9</sup> *Richardson v Oracle* at [30]; *Qantas Airways Ltd v Gama* (2008) 247 ALR 273; *South Pacific Resort Hotels Pty Ltd v Trainor* (2005) 144 FCR 402 per Kiefel J at [68]; see also *Murphy v Overton Investments Pty Ltd* (2004) 216 CLR 388 at [44] in the context of the *Trade Practices Act 1974* (Cth) which was couched in similar terms to the *Australian Human Commission Act 1986* (Cth).

## Special damages

Special damages usually compensate for loss of income or wages. They may compensate for the cost of medical care. Courts will include reasonable estimates of overtime,<sup>10</sup> holiday pay,<sup>11</sup> long service leave credits,<sup>12</sup> pay in lieu of notice<sup>13</sup> and severance pay.<sup>14</sup>

## Aggravated and Exemplary Damages

Aggravated damages serve to compensate the victim for damage occasioned by conduct which has an element of aggravation or malevolence or spite to it.<sup>15</sup> It is still compensatory in nature. It is not designed to punish the respondent.

An example of aggravated damages being awarded was *Whittle v Paulette*<sup>16</sup> where the Court awarded aggravated damages because the respondent refused to apologise to the complainants.

Exemplary or punitive damages serve to punish the respondent for its conduct. They are designed to express disapproval of, and deter, conduct of a particularly outrageous nature.<sup>17</sup> There is uncertainty as to whether these types of damages are available in discrimination cases. There have been decisions which have disapproved,<sup>18</sup> supported<sup>19</sup> and been unsure about the matter.<sup>20</sup>

## General damages and *Richardson v Oracle*

General damages are awards given for loss suffered for which there is no exact dollar value. The types of loss compensated under this head include pain, suffering, humiliation, loss of enjoyment of life, emotional distress and loss of opportunities.

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<sup>10</sup> *McCarthy v Metropolitan (Perth) Passenger Transport Trust* (1993) EOC ¶ 92-478

<sup>11</sup> *Jamal v Secretary, Department of Health & Anor* (1986) EOC ¶92-162

<sup>12</sup> *Kordos v Plumrose (Australia) Limited* (1989) EOC ¶ 92-256

<sup>13</sup> *Kordos v Plumrose (Australia) Limited* (1989) EOC ¶ 92-256

<sup>14</sup> *Kordos v Plumrose (Australia) Limited* (1989) EOC ¶ 92-256

<sup>15</sup> *Lamb v Gotogno* (1987) 164 CLR 1 at 8; *McNeill v Commonwealth of Australia* (1995) EOC ¶ 92-714

<sup>16</sup> (1994) EOC ¶ 92-621

<sup>17</sup> *Hall v A & A Sheiban Pty Ltd* (1989) 20 FCR 217 at [78] per Lockhart J

<sup>18</sup> *Frith v The Exchange Hotel* (2005) 218 ALR 560

<sup>19</sup> *Font v Paspaley Pearls* [2002] FMCA 142

<sup>20</sup> *Employment Services Australia Pty Ltd v Poniatowska* [2010] FCAFC 92 at [132]-[133]

Overall, awards of general damages must be fair and reasonable in the circumstances of each case.<sup>21</sup>

Medical or psychological evidence is often adduced but is not routinely required in order to demonstrate loss.<sup>22</sup>

The unofficial 'scale' that had developed prior to *Richardson v Oracle* was that in instances of 'run of the mill' discrimination without any aggravating features an award of up to \$20,000 was generally considered acceptable. Those cases where individuals had suffered prolonged and sustained discrimination or physical sexual harassment generally received more.<sup>23</sup>

The judgment of Kenny J in *Richardson v Oracle* (cited with approval by Besanko and Perram JJ) has now re-calibrated the general scale.

The facts of the case were that Ms Richardson worked with Mr Tucker during 2008. She was subjected to a constant barrage of sexual harassment over a six month period. Oracle investigated the matter, upheld the complaint, required Mr Tucker to apologise and attempted to relocate Ms Richardson. She resigned shortly thereafter.

In the decision at first instance,<sup>24</sup> Buchanan J found that Oracle had contravened section 28B(2) of the *Sex Discrimination Act 1984* (Cth). He awarded \$18,000 in general damages. Ms Richardson appealed the finding.

On appeal, Kenny J noted the remarks of commentators that awards for general damages were set conservatively when the legislation was introduced around 30 years ago. This has, in part, impeded the deep social reform that was intended.

After traversing several personal injury cases where amounts in the vicinity of \$250,000 to \$300,000 had been awarded as general damages, the Court concluded that a greater value on the loss of enjoyment of life has been placed on matters outside the anti-

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<sup>21</sup> *Ritossa v Gray & Anor* (1992) EOC ¶ 92-452

<sup>22</sup> *Walker v Citigroup Global Markets Australia Pty Ltd* (2006) 233 ALR 687; *Crellin v Kent*[2000] VSCA 165 at [15]-[17].

<sup>23</sup> \$100,000 was awarded in *Lee v Smith* [2007] FMCA 59; \$90,000 was awarded in *Poniatowska v Hickinbotham* [2009] FCA 680.

<sup>24</sup> *Richardson v Oracle Corporation Australia Pty Ltd* [2013] FCA 102

discrimination legislation field.<sup>25</sup> The current general standards of the community, it held, now warranted a revisit of the general range. The Court's concern appeared to be that the general range which had developed in this jurisdiction had become stuck in a 'time capsule' set 20 or 30 years ago.

Kenny J concluded that while \$18,000 had been within the previously accepted general range, it was a wholly inaccurate estimate of the actual damage suffered by Ms Richardson. The conduct of Mr Tucker resulted in injuries to Ms Richardson including change in demeanour, change in physical condition and decline in sexual intimacy with her partner.

For those reasons, it increased the amount awarded to Ms Richardson in general damages to \$100,000. An additional \$30,000 was awarded for economic loss.

### **Consequences**

The amount awarded in *Richardson v Oracle* belies what the Court thinks the public sees as the deeper appreciation of hurt and humiliation that victims of discrimination suffer. Although it arose in the context of a sex discrimination claim, it will almost certainly be cited by advocates in support of greater awards in all instances of discrimination.

It also opens the possibility for the Court to raise the bar when considering general damages for breaches of the general protection provisions of the *Fair Work Act 2009* (Cth). This legislation, like much of the anti-discrimination legislation, provides the Court with a general discretion to award compensation as it sees fit.<sup>26</sup> It would be surprising if, in these cases, the Courts were not influenced by the words of Kenny J. A new, and more generous, scale for general damages is on the horizon.

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<sup>25</sup> *Richardson v Oracle* at [104]

<sup>26</sup> Section 545(1) of the *Fair Work Act* permits the Court to make 'any order the court considers appropriate'