

Case Alert

Shaping the future of insurance law

Landmark decision upholds trend of higher damages for sexual harassment

***Hughes trading as Beesley and Hughes Lawyers v Hill* [2020] FCAFC 126; *Hill v Hughes t/a Beesley and Hughes Lawyers* [2019] FCCA 1267; 28 IR 86**

5 AUGUST 2020

AT A GLANCE

- With this landmark decision, the Full Federal Court has confirmed that it will take a strong stance against sexual harassment in the workplace by appropriately reflecting society's intolerance to such conduct when awarding damages.
- Insurers can expect this case to be referenced by claimants seeking damages of more than \$100,000 in sexual harassment claims.
- The matter involved a solicitor who was found to have sexually harassed a paralegal who worked in his small regional law firm.
- The trial judge awarded general damages of \$120,000 and aggravated damages of \$50,000. He was highly critical of the solicitor, describing his evidence as "delusional" and his conduct "appalling".
- The solicitor's appeal to the Full Federal Court was dismissed, with the Court noting that, had it been required to re-assess damages, it would have increased the aggravated damages award.
- This case evidences a continuing upward trend in general damages for sexual harassment, as well as the judiciary's willingness to award aggravated damages in appropriate circumstances.

BACKGROUND

The respondent, Ms Hill, was employed as a paralegal in a small law firm in regional New South Wales. The appellant, Mr Hughes, was the principal of the firm and undertook to train the respondent as a solicitor. He also acted for the respondent as her legal representative in a family law dispute with her ex-husband.

During Ms Hill's employment between May 2015 and June 2016, Mr Hughes relentlessly attempted to pursue an intimate relationship with her. His attempts were rejected. In November 2016, Ms Hill lodged a complaint

against Mr Hughes with the Australian Human Rights Commission, alleging that he had engaged in conduct which amounted to sexual harassment for the purposes of section 28 of the *Sex Discrimination Act 1984* (Cth) (**the Act**). Mr Hughes contended that his advances were 'romantic' in nature, but not sexual for the purposes of the Act.

The complaint was unable to be resolved by the Australian Human Rights Commission. Ms Hill

commenced proceedings in the Federal Court of Australia.

At first instance, the trial judge found that Mr Hughes' conduct towards Ms Hill amounted to sexual harassment for the purposes of the Act and ordered him to pay \$170,000 in damages, comprised of \$120,000 in general damages and \$50,000 in aggravated damages.

Mr Hughes appealed the decision. The Full Federal Court dismissed the appeal, indicating that a higher award for aggravated damages would have been appropriate.

THE SEXUAL HARASSMENT CONDUCT

The trial judge found that Mr Hughes' conduct was a serious form of sexual harassment that was "persistent, unwarranted and threatening". The conduct included Mr Hughes:

- entering Ms Hill's bedroom on two separate occasions during a work trip and lying on a mattress waiting for her to arrive. On the first occasion, Mr Hughes was wearing only his underwear and when asked to leave the room, requested a hug before he would leave. On the second occasion, Ms Hill had gone to take a shower and had returned to her room dressed only in a towel;
- coercing Ms Hill to hug him, by physically preventing her from leaving her office unless she first gave him a hug;
- professing his love and proposing an intimate relationship to Ms Hill, verbally and by sending numerous emails with comments such as:
 - "I am a sleek kangaroo and you are my Welsh Dragon..."
 - "...if you and I were together we would change the world", and
- insinuating that unless Ms Hill agreed to enter into an intimate relationship with him, her employment would be at risk.

Despite Ms Hill expressly telling Mr Hughes that his behaviour constituted harassment, the conduct continued. Further, Mr Hughes attempted to dissuade Ms Hill from complaining about his conduct by:

- promising to train her as a solicitor, but only if she assured him that she would not make a complaint about him, stating "I always fight the good fight btw", and
- telling her that expressing his feelings did not constitute harassment.

THE TRIAL JUDGE'S REASONING

In finding that Mr Hughes had engaged in sexual harassment within the meaning of the Act, the trial judge examined the conduct as a whole, rather than separately assessing each individual instance of conduct.

The judge was highly critical of the appellant, describing his evidence as "delusional" and his conduct "appalling".

In awarding Ms Hill general damages of \$120,000, the trial judge considered:

- expert medical evidence by her treating psychologist and psychiatrist;
- the power imbalance between the parties, given that Ms Hill was a paralegal and needed to retain her job as she was unable to move from the area for family reasons – a fact known to Mr Hughes, and
- the fact that Mr Hughes was a solicitor.

The aggravated damages award of \$50,000 was made to reflect:

- the threats made by Mr Hughes to prevent Ms Hill from making a complaint about his conduct, which he knew to be unlawful; and
- the manner in which Mr Hughes conducted himself at trial, including:
 - using information which he had obtained by virtue of acting for Ms Hill in her family law matter against her in the course of the trial; and
 - blaming Ms Hill for his own conduct by suggesting that she had encouraged his behaviour by wearing perfume or a particular dress.

ON APPEAL

Mr Hughes appealed the trial judge's decision on the following three grounds:

1. The evidence did not support the finding that he had sexually harassed Ms Hill because he saw himself as Mr Darcy in *Pride and Prejudice* and his conduct was not sexual as the term is defined in the Act;
2. The general damages award of \$120,000 was manifestly excessive; and
3. Aggravated damages should not have been awarded.

On the first ground, Mr Hughes conceded that he had sought to establish an 'intimate relationship' with Ms Hill, but submitted that his advances were romantic and not sexual. He attempted to liken their 'relationship' to that of Mr Darcy and Ms Bennett in *Pride and Prejudice*. This argument was rejected, with the Court concluding that the conduct was properly characterised as sexual and that "the facts of this case are about as far from a Jane Austen novel as it is possible to be".

On the second ground, Mr Hughes submitted, amongst other things, that the Court should have considered those authorities which had come before the landmark case of *Richardson v Oracle Corporations Australia Pty Ltd* [2014] FCAFC 82; 223 FCR 334 (*Oracle*). The general damages award in *Oracle* was \$100,000. This proposition was rejected. It was affirmed that awards pre-*Oracle* are not useful in considering damages.

On the third ground, Mr Hughes argued that the trial judge was wrong to have awarded aggravated damages. The Full Federal Court disagreed, upholding the award and remarking that a higher award for aggravated damages would have been appropriate.

THE SIGNIFICANCE OF THIS DECISION FOR INSURERS

Insurers can expect this case to be referenced by claimants seeking damages of more than \$100,000 in sexual harassment claims. The Court has sent an unequivocal message that sexual harassment will not be tolerated in the workplace and it will not entertain any attempt to romanticize this type of conduct.

Employers (and their insurers) can expect the upward damages trend to continue. While damages for sexual harassment were historically significantly less, this decision and the decision of Oracle in 2014 clearly signal that the current benchmark for sexual harassment at this level is \$100,000 and above.

The other message is that the judiciary is willing to award aggravated damages where the manner in which the claim is defended causes additional harm to the claimant. Any suggestion of victim blaming may put the defendant at risk of an award of aggravated damages.

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