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OFFENCE & VULNERABILITY

Jane Austen and unwelcome sexual conduct at work

INTRODUCTION

Recent Federal Circuit Court (FCCA) and Full Federal Court (FCAFC) decisions¹ have emphasised the importance of addressing sexual harassment in the workplace and the seriousness of breaches of the *Sex Discrimination Act 1984* (Cth). The FCAFC upheld the earlier decision awarding a paralegal \$170,000 in damages after she had been subjected to ongoing sexual harassment which exploited her vulnerability and took advantage of a substantial power imbalance. The significant amount of damages awarded, which Mr Hughes appealed was 'manifestly excessive',² shows the reinforcement of the recent upward trend in damages in sexual harassment cases. The current sexual harassment issues facing our society, along with this key decision, serves as a timely reminder to employers to minimise and avoid any liability attaching to harassment within the workplace by taking all reasonable steps to ensure that all employees act and behave appropriately.

THE FACTS

Mr Hughes was a senior legal practitioner and owner of a small law firm, Beesley and Hughes in NSW. In 2015, he employed Ms Hill as a paralegal, promising that he would eventually train her as a solicitor. Not long into the employment relationship, Mr Hughes acted as Ms Hill's legal representative at a family law mediation. As Ms Hill's lawyer, Mr Hughes gained confidential and personal information about her including her relationship with her former husband, relationships with other men after her separation, apprehended violence orders and Ms Hill's suffering from an anxiety disorder.

THE SEXUAL HARASSMENT

Throughout her employment, Ms Hill received numerous emails from Mr Hughes, professing his eternal romantic feelings. His persistent emails inappropriately and unprofessionally ended with the word 'love' and 'xoxo'. Ms Hill persistently rejected the sexual advances.

The most unnerving facts arising from this case involve a work trip to Sydney in which both parties stayed with the brother of Mr Hughes. While Ms Hill was out ordering takeaway food, Mr Hughes entered her room and when Ms Hill returned, she was subjected to the distress of seeing Mr Hughes lying on her mattress wearing only his underwear. When Ms Hill requested that he immediately leave, Mr Hughes tried to guilt trip her in allowing him to stay by saying that he would have to sleep outside on the veranda. Mr Hughes then refused to leave unless she gave him a hug. This refusal to leave without a hug carried on into their employment relationship when Mr Hughes physically prevented Ms Hill from leaving her office without first hugging him. Not only did he enter her room once but again the next morning Ms Hill returned to her room after showering and found Mr Hughes lying on her mattress.

The persistent emails from Mr Hughes continued, some even in French to give off his perpetual love for her and even expressed himself as a 'wild and passionate man.'³

Ms Hill directly confronted Mr Hughes in October 2015, expressing that his behaviour was harassment, however, he continued to send her consecutive emails without any reply on her part. He then, in a 'thinly veiled fashion'⁴ threatened the security of Ms Hill's employment by saying that her output of work was not good since they were not lovers, implying that she would have problems at work if she did not fulfil his sexual advances.

¹ Hill v Hughes [2019] FCCA 1267 and Hughes trading as Beesley and Hughes Lawyers v Hill [2020] FCAFC 126

² Hughes trading as Beesley and Hughes Lawyers v Hill [2020] FCAFC 126, 42.

³ Hughes trading as Beesley and Hughes Lawyers v Hill [2020] FCAFC 126, 13.

⁴ Hughes trading as Beesley and Hughes Lawyers v Hill [2020] FCAFC 126, 32

Relevantly, the key issue which was considered by the FCCA was whether sexual harassment has occurred. That is, according to section 28 of the *Sex Discrimination Act 1984* (Cth) whether there were **unwelcome sexual advances** or requests for sexual favours, that a **reasonable person, having regard to all the circumstances**, would anticipate the possibility of **causing offence, humiliation or intimidation**.⁵

FINDINGS

“Sexual Advances”?

The FCCA found that the persistent sexual advances through email communication, directly in person and the conduct that occurred on the Sydney trip amounted to sexual harassment, despite Mr Hughes describing the conduct as merely a proposal for a romantic relationship. Mr Hughes, in his actual submissions compared his romantic gestures to those of famous Mr Darcy in *Pride and Prejudice*. The FCAFC was ultimately not persuaded by the unusual analogy as the Court thankfully pointed out, to the pleasure of Jane Austen lovers and hopeless romantics, that ***‘the facts of this case are about as far from a Jane Austen novel as it is possible to be’***⁶ and that these submissions were insulting.⁷

The FCCA found that ***‘it was obvious to the Respondent that these emails were harassing, not just because he had been told they were not wanted, but also due to the sheer number and quick succession in which they arrived.’***⁸

Ultimately, the FCAFC expressed that aspects of Mr Hughes’ evidence were clearly delusional and his pursuit for Ms Hill to be his ‘platonic lover’ constituted sexual harassment.⁹

“Unwelcome”

In determining whether the advances were unwelcome, the FCCA applied a subjective assessment and found the conduct was clearly unwelcome.

The factors outlined by the Court which pointed to this finding was that Ms Hill asked Mr Hughes to leave her bedroom on both occasions, and due to the language in some of Mr Hughes’ emails stating ***‘I know I said I was not going to write to you again’ and ‘I have been very careful not to harass you’***.

The FCCA concluded the conduct was not only subjectively unwelcome; it was also objectively unwelcome, and that Mr Hughes knew so.¹⁰

ABUSING A VULNERABLE PERSON

In considering whether the elements of sexual harassment were made out, the FCCA considered the personal ‘circumstances’ and vulnerabilities of Ms Hill known to Mr Hughes.

The ‘circumstances’ are defined very broadly in section 28A(1A) of the *Sex Discrimination Act 1984* (Cth) and most importantly include the relationship between the harasser and the harassed. Not only was Mr Hughes the employer of the Ms Hill which already indicated an imbalance in their relationship, but Mr Hughes was very advanced in the legal profession while Ms Hill was new to the profession as a paralegal. The competition in gaining alternative employment in the industry, along with the difficulties in raising two children as a single parent, meant that Ms Hill was ‘socially and individually vulnerable’.

This imbalance was further evident due to the lawyer/client relationship of Mr Hughes when representing Ms Hill at the family law mediation. He was aware of the apparent stresses Ms Hill was going through in life yet continued to sexually harass her which was made worse by threatening her position at the firm.

To top off the relentless advances for a sexual relationship, Mr Hughes sent an email to Ms Hill stating, ***‘assure me you will not make a complaint or sue me’*** followed by ***‘I always fight the good fight btw’***.¹¹ The FCCA interpreted the email as a threat and the FCAFC relevantly added ***‘that it was a threat made by an experienced lawyer to a less experienced employee whose employment options were limited and who, to his knowledge was suffering from an anxiety disorder.’***¹² Mr Hughes was well aware that she was both financially and socially disadvantaged and to make any threat of the kind was exploitative of the significant imbalance between the two of them.

⁵ Sex Discrimination Act 1984 (Cth) s 28A

⁶ Hughes trading as Beesley and Hughes Lawyers v Hill [2020] FCAFC 126, 40.

⁷ Hughes trading as Beesley and Hughes Lawyers v Hill [2020] FCAFC 126, 17.

⁸ Hill v Hughes [2019] FCCA 1267, 163.

⁹ Hughes trading as Beesley and Hughes Lawyers v Hill [2020] FCAFC 126, 40.

¹⁰ Hill v Hughes [2019] FCCA 1267, 183.

¹¹ Hughes trading as Beesley and Hughes Lawyers v Hill [2020] FCAFC 126, 13

¹² Hughes trading as Beesley and Hughes Lawyers v Hill [2020] FCAFC 126, 58.

The FCCA concluded that despite the fact that the Respondent may have thought his actions were romantic, to Ms Hill *'it was a daily nightmare that occurred because the Respondent, as a man, was targeting her sexually, as a woman and as his inferior'*.¹³ Further, his knowledge of her anxiety disorder made his repeated and relentless behaviour even more sinister.

The FCAFC summed up Mr Hughes' abusive and exploitive conduct by stating that the sexual harassment *'would have exposed Ms Hill to almost intolerable stress as any decent person would have realised and particularly so in the case of Ms Hill given that he knew she had an anxiety disorder. It is conduct of the most reprehensible kind'*.¹⁴

CONSIDERATIONS FOR EMPLOYERS

The case serves as a significant and urgent reminder that sexual harassment is becoming increasingly recognised, complained of and condemned within society and such attitudes are being upheld to a high degree in Australian courts.

Successful sexual harassment claims will have substantial consequences for employers if it is found that they did not take all reasonable steps to prevent the sexual harassment from taking place.

Employers play the greatest role in minimising sexual harassment within the workplace, stemming from the creation of an appropriate workplace culture.

While having effective policies relating to sexual harassment are important, recent cases have highlighted that the mere presence of a policy is often insufficient in showing reasonable steps have been taken by the employer to prevent sexual harassment.¹⁵

The timely, sensitive and thorough handling of a complaint or observed instance of sexual harassment is equally important.

Further steps that employers could take include:

- / Conducting regular training sessions on sexual harassment and how to manage situations involving harassment;
- / Ensuring an effective complaints system is in place, allowing employees to raise their concerns;
- / Taking appropriate steps to address the complaints and ensure employee safety; and
- / Making changes to workplace culture which may include rectifying gender inequalities/imbbalances.

¹³ Hill v Hughes [2019] FCCA 1267, 173.

¹⁴ Hughes trading as Beesley and Hughes Lawyers v Hill [2020] FCAFC 126, 14.

¹⁵ Menere v Poolrite Equipment Pty Ltd [2012] QCAT 505.