VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

HUMAN RIGHTS DIVISION

HUMAN RIGHTS LIST

VCAT REFERENCE NO. H11/2013

CATCHWORDS

Application for compensation under s 125(a)(ii) of the *Equal Opportunity Act 2010* (the EOA); Applicant's substantive claim of sexual harassment found proven in an earlier decision; Jurisdiction of *Accident Compensation Act 1985* (the ACA) and/or *Workplace Injury Compensation Act 2013* to these proceedings; Whether either Act restricts compensation which can be awarded under the EOA; Victorian Equal Opportunity and Human Rights Commission joined as intervener under s 159 of the EOA to make submissions; Application for costs by both parties pursuant to s 109 of the *Victorian Civil and Administrative Tribunal Act 1998*.

APPLICANT	Amanda Jayne Collins
RESPONDENT	David Donald Smith
INTERVENER	Victorian Equal Opportunity and Human Rights Commission
WHERE HELD	Melbourne
BEFORE	Judge Jenkins, Vice President
HEARING TYPE	Hearing as to Compensation and Costs
DATE OF HEARING	8 October 2015
DATE OF APPLICANT'S WRITTEN SUBMISSIONS	10 September 2015, 1 October 2015 [x2] and 16 October 2015 [x2]; and 2 November 2015
DATE OF RESPONDENT'S WRITTEN SUBMISSIONS	21 September 2015 [x2]; and 23 October 2015
DATE OF COMMISSION'S WRITTEN SUBMISSIONS	10 December 2015
DATE OF ORDER	23 December 2015
CITATION	Collins v Smith (Human Rights) [2015] VCAT 1992

ORDERS

1 Pursuant to s 125(a)(ii) of the *Equal Opportunity Act 2010* (the EOA), the Respondent is ordered to pay to the Applicant compensation for the injury, loss and damage suffered as a consequence of the Respondent's proven contraventions of the EOA, in the amount of $332,280, comprising:

(a) General damages of $180,000;

(b) Aggravated damages of $20,000;

(c) Past loss of net earnings and superannuation of $60,000;

(d) Future loss of net earnings and superannuation of $60,000; and

(e) Out of pocket expenses, incurred or to be incurred, of $12,280.

2 Pursuant to s 109(2) of the *Victorian Civil and Administrative Tribunal Act 1998*, and being satisfied that it is fair to make such an order, the Respondent is ordered to pay the Applicant's costs of this proceeding from 16 January 2014, in accordance with the County Court Scale standard basis, excluding costs referable to the Applicant's claims relying upon ss 15, 103 and 104 of the EOA, such costs to be assessed by the Costs Court in default of agreement.

Judge Jenkins
Vice President

APPEARANCES:

For Applicant	Ms T McCarthy of Counsel
For Respondent	Ms S M Kelly of Counsel

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REASONS

NATURE OF APPLICATION

1 The Orders and Reasons of the Tribunal dated 10 July 2015[1] set out in some detail the factual findings and proven acts of sexual harassment by the Respondent in contravention of ss 92 and 93 of the *Equal Opportunity Act 2010* (the 'EOA') (the 'Tribunal's Initial Reasons').

2 These Supplementary Reasons now deal with:

(a) The Applicant's application for compensation, pursuant to s 125(a)(ii) of the EOA;

(b) The application of the *Accident Compensation Act 1985* (Vic) ('ACA') and/or the *Workplace Injury Rehabilitation and Compensation Act 2014* (Vic) ('WIRCA') to an award of compensation under s 125(a)(ii) of the EOA; and

(c) The parties' respective applications for costs of the proceeding pursuant to s 109 of the *Victorian Civil and Administrative Tribunal Act 1998* (the 'VCAT Act').

3 In relation to compensation, the Applicant relies on the further evidence and expert opinion contained in:

(a) The Affidavit of Amanda Collins dated 17 August 2015;

(b) The Affidavits of Tara Paatsch dated 17 August 2015; and

(c) The Report of Cumpston Sarjeant, Consultant Actuaries, dated 17 August 2015.

4 In relation to costs, submissions provided by both parties were retained in sealed envelopes and not opened or inspected by the Tribunal until a determination had been made in relation to compensation.

5 In relation to the application of the ACA and/or WIRCA to an award of compensation under the EOA, the Victorian Equal Opportunity and Human Rights Commission (the 'Commission') was invited to intervene pursuant to s 159 of the EOA by way of a letter dated 2 November 2015 from the Applicant.

6 Section 159 of the EOA empowers the Commission to seek leave to intervene in and be joined as a party to proceedings that involve issues of equality of opportunity, discrimination, sexual harassment or victimisation. After consideration, the Commission sought leave to intervene by letter dated 18 November 2015.

7 On 19 November 2015, the Tribunal granted leave to the Commission to intervene and make written submissions addressing whether:

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[1] *Collins v Smith* (Human Rights) [2015] VCAT 1029.

(a) Sections 134AA[2] and 134AB of the ACA; and/or

(b) Sections 326 and 327 of the WIRCA[3]

can operate to fetter the Tribunal's power to award pecuniary and non-pecuniary loss under s 125 of the EOA, and any other matters relevant to the Commission's functions under s 155 of the EOA.

8 Written submissions of the Commission were received on 10 December 2015 and to the extent relevant, are incorporated in these Reasons.

BACKGROUND

9 By Orders dated 10 July 2015, the Tribunal made the following findings:

(a) Complaints in relation to sexual harassment by the Respondent, as employer of the Applicant, in contravention of ss 92 and 93 of the *Equal Opportunity Act 2010* (the EOA), as described in a series of incidents between 5 January 2013 and 4 April 2013, inclusive and identified in the Reasons at paragraphs 380 and 381, are proven.

(b) The complaint of victimisation, in reliance on ss 103 and 104 of the EOA is not proven, and is therefore dismissed.

(c) The complaint, as it relates to the Respondent failing to eliminate discrimination, sexual harassment or victimisation in compliance with s 15 of the EOA is misconceived, and is therefore dismissed.

10 The proceeding was to be listed for a further hearing on a date and time to be fixed, for the purpose of hearing submissions on the question of compensation payable to the Applicant for loss, damage or injury suffered in consequence of the proven contraventions.

11 Counsel for both parties submitted written submissions and a hearing was held on 8 October 2015.

12 Counsel for each party have also made further written submissions, as detailed in the following Reasons.

COMPENSATION UNDER THE EOA.

13 The Tribunal, having found that the Respondent contravened s 93(1)(b) of the EOA, may now make an order for compensation. Section 125 of the EOA provides, so far as it is relevant to the payment of compensation:

> **125 What may the Tribunal decide?**
>
> After hearing the evidence and representations that the parties to an application desire to adduce or make, the Tribunal may—
>
> (a) find that a person has contravened a provision of Part 4, 6 or 7 and make any one or more of the following orders—
>
> …

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[2] The Tribunal orders referred to s 134A of the ACA which the Commission, it its written submissions, correctly assumed should have been a reference 's 134AA' of the ACA.

[3] The Tribunal orders referred to the *Workplace Injury Rehabilitation and Compensation Act **2014*** which the Commission, in its written submissions, correctly pointed out should have read '2013'.

(ii) an order that the person pay to the applicant, within a specified period, an amount the Tribunal thinks fit to compensate the applicant for loss, damage or injury suffered in consequence of the contravention;

…

14 The nature of the damages which the Tribunal has the power to award are entirely compensatory. The purpose of an award of damages under the EOA is to attempt to measure, in monetary terms, the loss, damage and injury that has been suffered by the Applicant in consequence of the acts of sexual harassment of the Respondent.[4] However, compensation can extend to future losses and incapacity.

15 The Tribunal concurs with the Commission5 that in the EOA, the term 'in consequence of' is not to be construed as meaning loss caused only by the sexual harassment contravention. Rather, the expression emphasises loss as the result or effect of the contravention. Accordingly, the contravention does not need to meet the test for legal causation or be the sole or dominant reason for the loss.

> It is enough to demonstrate that contravention of a relevant provision of the Act was *a* cause of the loss or damage sustained.[6]

16 This is consistent with the approach of Garde J in *GLS v PLP*,[7] concerning a monetary award for sexual harassment.[8]

17 The expression 'in consequence of' may be contrasted with the expression 'because of' used in the AHRC Act. The former expression is not limited to causal connections.[9] In *Insurance Commission of Western Australia v Container Handlers Pty Ltd*,[10] Justice McHugh noted that:

> The word "consequence" is an ordinary English word and should be interpreted as such. *The Australian Oxford Dictionary* defines "consequence" as "the result or effect of an action".
>
> … in the context of the Act the expression 'a consequence of' emphasises the result or effect of the driving rather than the driving causing the result. This distinction is important in an insurance context where cause is frequently — perhaps usually — equated with 'proximate' or 'dominant' cause. Although 'consequence' involves notions of causation, the term 'consequence' — with its emphasis on effect — places less emphasis on the proximity of cause and effect than the term 'cause' may do in various contexts.

18 Consequently, the Tribunal arguably has greater flexibility to consider the consequences of the contravening conduct on the Applicant in the

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4 *GLS v PLP* (Human Rights) [2013] VCAT 221 at [259] per Garde J.
5 Paragraph [84] of the Commission's submission.
6 *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109 at [57].
7 (Human Rights) [2013] VCAT 221.
8 The case concerned s 136(a)(ii) of the *Equal Opportunity Act*, which was in materially the same terms as s 125(a)(ii) of the EOA.
9 Pearce & Geddes: **Statutory Interpretation in Australia** (Seventh ed), 2011 at 279.
10 [2004] 218 CLR 89 at [42]-[43].

circumstances of this case than might have been applied in comparable cases in which compensation was awarded under the Commonwealth AHRC Act. In any event, notwithstanding that the compensation provisions under the AHRC Act and the EOA are not expressed in identical terms, the anti-discrimination cases emanating from the Federal Court provide a useful approach and analysis of factors to be taken into account.

19 It is also appropriate to clarify the relevance, if any, of the statutory objects to the approach to compensation. This was considered by the High Court in *Waters v Public Transport Corporation*.[11]

20 In the *Waters* case the complainants (comprising individuals and organisations representing disabled persons) alleged discrimination by the Public Transport Corporation, under s 44 of the *Equal Opportunity Act 1984* (Vic), in relation to the proposed introduction of a new 'scratch' ticketing system and the removal of tram conductors. While that case was also concerned with the interaction between powers conferred under the *Transport Act 1983* (Vic) and the objectives and prohibitions prescribed under the *Equal Opportunity Act 1984*, the High Court endorsed the following approach:

> [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.[12]

21 These above comments in the *Waters* case were subsequently endorsed by the Full Court of the Federal Court in *Richardson v Oracle Corporation Australia Pty Ltd*,[13] where the Court was concerned with the objects of the *Australian Human Rights Commission Act 1986* (Cth) ('AHRC'). The Court affirmed that:[14]

> 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...[15]

22 It follows from the analysis in the *Waters* case that the Tribunal may have regard to the objects of the EOA when undertaking the task of awarding compensation in this proceeding.

23 The EOA is directed to protecting people from discrimination on the basis of various attributes (including, for example race, sex, age, sexual orientation, religious belief, marital status and political opinion) and from sexual harassment and victimisation. This is reflected in the objects of the Act, set out in s 3, which relevantly include the following:

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11 (1992) 173 CLR 349.
12 At 359 per Mason CJ and Gaudron J.
13 [2014] FCAFC 82 at [26].
14 At [130].
15 Citations omitted.

(a) to eliminate discrimination, sexual harassment and victimisation, to the greatest possible extent;

(b) to further promote and protect the right to equality set out in the Charter of Human Rights and Responsibilities;

(c) to encourage the identification and elimination of systemic causes of discrimination, sexual harassment and victimisation;

(d) to promote and facilitate the progressive realisation of equality, as far as reasonably practicable, by recognising that—

(i) discrimination can cause social and economic disadvantage and that access to opportunities is not equitably distributed throughout society;

(ii) equal application of a rule to different groups can have unequal results or outcomes;

(iii) the achievement of substantive equality may require the making of reasonable adjustments and reasonable accommodation and the taking of special measures;

…

24 To further these objectives, the EOA prohibits discrimination and sexual harassment in a number of areas including employment. For the purpose of the current case, s 93 of the EOA prohibits sexual harassment by employers and employees.

25 *Richardson's* case is also instructive as to principles applicable to determining statutory compensation generally. This case will be considered in more detail below. However, consistent with such authority, this Tribunal has adopted the approach that compensation available under the EOA is to be determined in accordance with common law principles for the assessment of damages.

26 It has long been recognised that the assessment of general damages is not an exact science capable of arithmetic calculation.[16] Furthermore, in assessing compensation, the Tribunal must not take into account the legal fees expended by the Applicant in the pursuit of the litigation. Significantly, in the Second Reading Speech for the Equal Opportunity Bill 2010, the then Attorney-General, Rob Hulls MP, acknowledged the harmful consequences of discrimination:

> We are diminished not just by the breakdown of trust and respectful relationships; but also by the very tangible effects that unfavourable treatment, violence or harassment can have on a person's mental and physical health; on their economic or educational security; on their basic capacity to participate… Ill-health comes at a cost to the public, as well as the individual purse…[17]

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16 *Hall & Ors v A. & A. Sheiban Pty Ltd & Ors* (1989) 20 FCR 217, 256 (Wilcox J); *Erwin v Vergara (No 3)* [2013] FCA 1311 per Bromberg J at [658].

17 Hansard, Victorian Parliament: Legislative Assembly 10 March 2010 at p 784.

PRELIMINARY ISSUE RAISED BY RESPONDENT

Application of Workers' Compensation Legislation

27 Respondent's Counsel submitted that ss 134AA or 134AB of the ACA and/or ss 326 and 327 of the WIRCA operate to fetter the power of the Tribunal, under s 125 of the EOA, to award pecuniary or non-pecuniary loss arising from an injury sustained in the course of employment. Specifically, any compensation awarded to the Applicant ought to be limited to hurt, humiliation and distress.

Sections 134AA and 134AB of the ACA:

28 In relation to limitations on the right to recover damages, ss 134AA and 134AB relevantly currently provide as follows:

> **Division 8A—Actions in respect of injuries arising on or after 20 October 1999 but before 1 July 2014**
>
> **134AA Actions for damages**
>
> A worker who is or the dependants of a worker who are or may be entitled to compensation in respect of an injury arising out of or in the course of, or due to the nature of, employment on or after 20 October 1999 but before 1 July 2014 shall not, in proceedings in respect of the injury, recover any damages in respect of pecuniary loss except—
>
> (a) in proceedings in respect of an injury or death arising out of a transport accident within the meaning of the **Transport Accident Act 1986** on or after 20 October 1999—
>
> (i) otherwise than under Part III of the **Wrongs Act 1958**, against the employer or any other person, subject to and in accordance with the **Transport Accident Act 1986**; or
>
> (ii) under Part III of the **Wrongs Act 1958** against the employer or the employer and any other person, subject to and in accordance with the **Transport Accident Act 1986**; or
>
> (iii) under Part III of the **Wrongs Act 1958** against a person other than the employer, subject to and in accordance with the **Transport Accident Act 1986**; or
>
> (b) in proceedings to which the employer is not a party where, by reason of section 83(1), the injury is deemed to have arisen out of or in the course of employment, if the worker's place of employment is a fixed place of employment and the injury did not occur while the worker was present at that fixed place of employment.
>
> **134AB Actions for damages**
>
> (1) A worker who is, or the dependants of a worker who are or may be, entitled to compensation in respect of an injury arising out of or in the course of, or due to the nature of, employment on or after 20 October 1999 but before 1 July 2014—

(a) shall not, in proceedings in respect of the injury, recover any damages for non-pecuniary loss except—

(i) in accordance with the **Transport Accident Act 1986** and subsections (25)(b), (26) and (36)(b) of this section; or

(ii) in proceedings of a kind referred to in section 134AA(b) and in accordance with subsections (25)(b), (26) and (36)(b) of this section; or

(iii) if subparagraphs (i) and (ii) do not apply, as permitted by and in accordance with this section; and

(b) shall not, in proceedings in respect of the injury recover any damages for pecuniary loss except—

(i) in proceedings of a kind referred to in a paragraph of section 134AA and in accordance with subsections (25)(a), (26) and (36)(a) of this section; or

(ii) if subparagraph (i) does not apply, as permitted by and in accordance with this section.

A worker may recover damages in respect of an injury arising out of, or in the course of, or due to the nature of, employment if the injury is a serious injury and arose on or after 20 October 1999 but before 1 July 2014.

(3) Subject to subsection (4A), a worker may not bring proceedings in accordance with this section unless—

(a) determinations of the degree of impairment of the worker have been made under section 104B and the worker has made an application under subsection (4); or

(b) subject to any directions issued under section 134AF, the worker elects to make an application under subsection (4) on the ground that the worker has a serious injury within the meaning of this section.

29 Section 129MB of the ACA provides as follows:

129MB Claims to which Division Applies

(1) This Division applies only to a claim for damages or recovery of contribution brought against a worker's employer in respect of an injury that was caused by –

(a) the negligence or other tort (including breach of statutory duty) of the worker's employer; or

(b) a breach of contract by the worker's employer.

…

(3) Subsections 1(a) and (2) apply even if damages resulting from the negligence or other tort are claimed in an action for breach of contract or other action.

Sections 326 and 327 of the WIRCA:

30 Sections 326 and 327 of the WIRCA are found in Division 2 of Part 7 and relevantly provide:

> **326 Actions for damages**
>
> A worker who is, or the dependants of a worker who are, or may be, entitled to compensation in respect of an injury arising out of, or in the course of, or due to the nature of, employment must not, in proceedings in respect of the injury, recover any damages for pecuniary or non-pecuniary loss except—
>
> (a) if the injury arises from a transport accident—
>
> (i) in accordance with the **Transport Accident Act 1986** and sections 343 and 347(1) of this Act; or
>
> (ii) in accordance with Part III of the **Wrongs Act 1958**, subject to and in accordance with the **Transport Accident Act 1986** and section 366(7)(a) and (b) of this Act; or
>
> (b) in proceedings, in accordance with sections 343 and 347(1), to which the employer is not a party if—
>
> (i) by reason of section 46(1), the injury is deemed to have arisen out of, or in the course of, employment; and
>
> (ii) the worker's place of employment is a fixed place of employment; and
>
> (iii) the injury did not occur while the worker was present at that fixed place of employment; or
>
> (c) as permitted by and in accordance with this Division, Division 3 or section 366.
>
> **327 Actions for damages—serious injury**
>
> Subject to this Division, a worker may recover damages in respect of an injury arising out of, or in the course of, or due to the nature of, employment if the injury is a serious injury.
>
> **318 Claims to which this Division applies**
>
> (1) This Division applies only to a claim for damages or recovery of contribution brought against a worker's employer in respect of an injury that was caused by—
>
> (a) the negligence or other tort (including breach of statutory duty) of the worker's employer; or
>
> (b) a breach of contract by the worker's employer.

31 In summary, Respondent's Counsel submits that the Applicant falls within the provisions of the workers compensation legislation by reason that:

(a) The Applicant was a worker;

(b) She made a claim for and was paid benefits under the ACA;

(c) Her injury arose out of or in the course of employment;

(d) Although she now makes a claim pursuant to a statutory entitlement created under the EOA, the nature of the proceeding is in respect of personal injury; and

(e) Accordingly, the Applicant can only recover damages for the injury in accordance with the scheme of the ACA or the WIRCA (as the case may be).

32 Furthermore, Respondent's Counsel submitted to the effect that Applicant's Counsel's reliance upon exclusionary provisions in s 129MB in the ACA and s 318 in the WIRCA is misplaced, as each section is located within a different Division to the operative provisions relied upon by the Respondent.

33 In conclusion therefore, Respondent's Counsel submits that the compensation available to the Applicant under the EOA must be read down as the Tribunal does not have power to award the Applicant pecuniary or non-pecuniary loss arising from the injury, its powers being limited to loss or damage sustained other than because of the injury.

The Tribunal's findings on the application of workers' compensation legislation

34 In the Tribunal's view, the submissions of Respondent's Counsel are misconceived and without merit. A synopsis of the submissions made by Applicant's Counsel and the Commission, which the Tribunal endorses, are set out below.

35 In its submission, the Commission provides a concise summary of the changes which have been made over time to a worker's right to recover damages under the ACA:[18]

36 By way of background, the ACA was first enacted in 1985 to provide for a statutory workers' compensation regime. In summary, the ACA:[19]

(a) required that an employer hold a WorkCover insurance policy that indemnified it for liability 'in respect of an injury to a worker arising out of or in the course of, or due to the nature of, employment'[20] (hereafter, a **workplace injury**);

(b) provided for a statutory entitlement to compensation for a worker who suffered a workplace injury;[21] and

(c) limited the worker's right to recover damages for a workplace injury.

37 In summary, a worker's right to recover damages under the ACA have undergone the following changes:[22]

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18 Paragraphs [17]-[19] of the Commission's submission.

19 Subject to amendments over time and since 1993, together with the *Accident Compensation (WorkCover Insurance) Act 1993* (Vic) (the ACWIA**)**.

20 ACA, s 134, repealed in 2004 by Act No 102/2004. Subsequently WorkCover insurance policies were dealt with by ss 7 and 9 of the ACWIA.

21 ACA, s 82.

22 Paragraphs [17]-[19] of the Commission's submission.

(a) **Prior to 1 December 1997**, ss 135 and 135A of the ACA precluded recovery of damages for pecuniary or non-pecuniary loss in relation to a workplace injury, with certain exceptions — including an exception for non-pecuniary damages in relation to a serious injury and in accordance with a detailed statutory regime.[23] That is, common law claims for damages in relation to workplace injuries were permitted in relation to a serious injury;

(b) **From 1 December 1997 to 20 October 1999**, ss 135 and 135A were amended to preclude recovery of damages for pecuniary or non-pecuniary loss in relation to a workplace injury, with only a limited exception for certain claims involving transport accidents.[24] That is, all common law claims for damages in relation to a workplace injury were precluded;

(c) **From 20 October 1999 to 1 July 2014** the regime was restored, in general terms, to that applying prior to 1 December 1997. Sections 134AA and 134AB (set out above) were introduced and permitted common law claims for damages in relation to workplace injuries where the injury was a serious injury.

38 Sections 134AA and 134AB were inserted into the ACA by the *Accident Compensation (Common Law and Benefits) Amendment Act 2000* (Vic) (the **Amending Act**). Section 1 of the Amending Act relevantly set out the purpose of that Act as follows:

> The purpose of this Act is to—
>
> (a) provide for the restoration of common law actions for damages with effect from 20 October 1999; …

39 Clause 26 of the Amending Act also inserted new provisions into the ACA that dealt specifically with certain forms of statutory compensation. Section 138B of the ACA (which remains in the current ACA) operates to prevent a court from making an order for payment of compensation for pain and suffering under the *Sentencing Act 1991* (Vic) if the pain and suffering arises from an injury or death in relation to which the person has an entitlement to compensation under the ACA and where the offence related to certain specified Acts.

40 The WIRCA was enacted in 2013.[25] Its purposes were relevantly set out in s 1 as follows:

> The purpose of this Act is to—
>
> (a) simplify the provisions applying to the rehabilitation of injured workers and compensation in relation to injuries or deaths arising out of accidents and diseases in the workplace on or after 1 July 2014; and
>
> (b) streamline the provisions of the Accident Compensation Act 1985 which continue to apply in respect of injuries or deaths

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23 See ACA version 71.
24 See ACA version 83.
25 The Tribunal acknowledges the Commission's submission at [20]-[24].

arising out of accidents and diseases in the workplace before 1 July 2014; …

41 Like the ACA, the WIRCA provides for a statutory workers' compensation scheme whereby:

(a) an employer has a statutory contract of insurance (s 435) under which the Victorian WorkCover Authority indemnifies the employer in relation to compensation and damages in accordance with the ACA or the WIRCA for workplace injuries (s 71);

(b) a worker who suffers a workplace injury (s 39) has a statutory entitlement to compensation; and

(c) sections 326–338 of the WIRCA limit the worker's right to recover damages for a workplace injury, in a similar manner to s 134AA and 134AB of the ACA.

42 Part 7 of the WIRCA is headed 'Actions and proceedings for damages'.

43 Division 1 of Part 7 deals with choice of law in relation to claims for damages in tort and contract (see s 318).

44 Division 2 of Part 7 is headed 'Actions for Damages'. The first section in Division 2 is s 324, which is headed 'Flow-chart 8—common law process'. As its title suggests, it sets out a flow chart that shows the processes applicable to a claim for common law damages. The second section in Division 2 is s 325, which contains definitions relevant to the Division.In addition, ss 328-338 of the WIRCA in effect replicate the various sub-s of s 134AB of the ACA.

45 Division 6 of Part 7 is headed 'Other actions and rights'. Section 371 (found in Division 6) is to similar effect as s 138B of the ACA.[26] It operates to prevent a court from making an order for payment of compensation under certain provisions of the *Sentencing Act 1991* (Vic) if the pain and suffering arises from an injury or death in relation to which the person has an entitlement to compensation under the ACA and where the offence related to certain specified acts. Section 371 relevantly provides as follows:

Compensation for pain and suffering

(1) Despite anything to the contrary in Subdivision (1) of Division 2 of Part 4 of the Sentencing Act 1991, a court must not exercise the powers conferred by that Subdivision to make a compensation order within the meaning of that Subdivision if the compensation would be for—

(a) a matter arising from discriminatory conduct that constitutes an offence against section 575; or

(b) a matter—

[26] See the Explanatory Memorandum to the Workplace Injury Rehabilitation and Compensation Bill 2013 at p 178.

(i) arising from an injury or death in respect of which it appears to the court that the person has an entitlement to any compensation under this Act; and

(ii) arising from an event that constitutes an offence only against the Dangerous Goods Act 1985 , the Occupational Health and Safety Act 2004 or the Equipment (Public Safety) Act 1994 or any regulations made under any of those Acts.

46 In summary, ss 134AA and 134AB of the ACA impose a limitation on when a worker may recover damages for pecuniary and non-pecuniary loss arising from an injury arising out of or in the course of or due to the nature of employment on or after 20 October 1999, but before 1 July 2014. The equivalent provisions of the WIRCA are to the same effect and apply to workplace injuries from 1 July 2014. In addition, the WIRCA applies to a workplace injury 'by way of a gradual process over a period beginning before, and continuing on or after 1 July 2014'.

47 In each case, the corresponding provisions impose a bar on the recovery of damages other than in accordance with the relevant section.

48 In this case, the Applicant suffered sexual harassment in the period from 5 January 2013 to 4 April 2013. In such circumstances, the ACA is the relevant Act. However, if the injury to the Applicant is considered to be one arising by way of a gradual process over a period of time beginning before 1 July 2014 and continuing, then ss 326 and 327 of the WIRCA may be relevant.

49 Sections 134AA and 134AB of the ACA and ss 326-338 of the WIRCA are not in identical terms. However, the relevant sections of both Acts limit the recovery of damages in respect of pecuniary and non-pecuniary loss in respect of a workplace injury, with some exceptions including a 'serious injury'; and 'serious injury' is defined in the same way in each Act.[27] The Tribunal concurs with the Commission that the analysis in relation to the relationship between s 125(a)(ii) of the EOA and the ACA and/or the WIRCA is the same.[28]

50 **Applicant's Counsel** submits that ss 134AA and 134AB of the ACA (or ss 326 and 327 of WIRCA) do not apply to an action for damages for physical or mental injury under ss 93, 94 and 125 of the EO Act, in summary, by reason that:

(a) The claims to which the workers' compensation provisions apply do not relate to the special statutory regime under the EO Act and accordingly there is no limitation on compensation for damages under the EO Act;[29]

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27 See ACA, s 134AB(37) and WIRCA, s 325(1).

28 The Commission noted that both the Applicant and the Respondent accept that any differences between the laws are not relevant for the present purposes.

29 Paragraphs [8]-[13] of Applicant Counsel's submission dated 2 November 2015.

(b) Beneficial legislation, such as the EOA, is to be interpreted beneficially in order to give effect to its objects;[30] and

(c) Where there is a tension between two Acts, in the context of the current case, the specific provisions, such as the EOA, prevail over the general, as contained in the workers' compensation regimes.[31]

51 The Tribunal endorses each of the above propositions for the reasons more fully set out below.

Submissions of the Commission

52 The question addressed by the Commission was whether the ACA and/or the WIRCA operate to limit or fetter the power of the Tribunal to make an order for the payment of compensation under the EOA?

53 The Commission answered the above question with a definitive 'No'. For the reasons more fully contained in the submission, relevant extracts of which are incorporated in these Reasons, the Tribunal agrees.

54 In summary, the Commission contends that neither the ACA nor the WIRCA operates to fetter the power conferred on the Tribunal by s 125(a)(ii) of the EOA to make an order for the payment of an amount of money, for the following reasons:[32]

(a) Acts of a Parliament are to be construed as operating harmoniously wherever possible. Implied repeal or limitation of one Act by another is not lightly to be assumed;

(b) Section 125(a)(ii) of the EOA confers an express power on the Tribunal to award a monetary sum to compensate a person for loss, damage or injury suffered in consequence of a contravention of the EOA;

(c) It is possible to construe the ACA and/or the WIRCA harmoniously with the EOA so that the power conferred by s 125(a)(ii) is able to operate according to its terms and is not fettered by the ACA and/or the WIRCA. As a consequence, s 125(a)(ii) need not be read down or construed as impliedly partially repealed;

(d) The two regimes operate in different fields. The relevant sections of the ACA and/or the WIRCA preclude the recovery of damages in respect of a workplace injury, other than in accordance with a detailed regime.[33] In contrast, the power conferred on the Tribunal by s 125(a)(ii) is a power to award an amount of money in compensation for contravention of the EOA. That power is not properly construed as one to award "damages in relation to a workplace injury". The power

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30 Paragraphs [14]-[17] of Applicant Counsel's submission dated 2 November 2015.

31 Paragraphs [18]-[29] of Applicant Counsel's submission dated 2 November 2015.

32 Paragraphs 8-9 of Commission's submission. The Tribunal acknowledges that Applicant's Counsel made similar submissions, parts of which are also incorporated hereunder.

33 The Tribunal also acknowledges that Applicant's Counsel expanded upon this point in paragraphs 8 and 9 of the written submissions dated 2 November 2015.

conferred by s 125(a)(ii) of the EOA thus falls outside the terms of the ACA and/or the WIRCA. In effect, the EOA provides an entirely different regime for compensation for breach of the law that is outside the scope of the ACA and/or the WIRCA;

(e) This approach to the scope and effect of the relevant legislation is supported by the following matters:

i. the text, context and purposes of the relevant legislation, which demonstrate that the two regimes are directed at different matters and that the ACA and/or the WIRCA are not directed to claims for contravention of the EOA;

ii. the proposition that general statutory provisions (such as the relevant provisions of the ACA and/or the WIRCA, which deal generally with the damages for workplace injury) are not to be construed as limiting a specific statutory provision (such as s 125 of the EOA, which deals specifically with compensation for breach of the EOA);

iii. legislative history and relevant extrinsic materials, which demonstrate that the relevant provisions of the ACA and/or the WIRCA were directed to restoring a worker's right to recover common law damages for workplace injury — and that Parliament gave no consideration to the effect of those amendments on the separate remedies available under the EOA;

iv. the consequences of a particular construction, which are significant not simply for cases of sexual harassment, but for all cases of discrimination in the workplace; and

v. the *Charter of Human Rights and Responsibilities 2006* (Vic), which requires a construction be adopted that best ensures protection against discrimination.

In relation to the calculation of amounts under s 125(a)(ii), the Commission contends that the Tribunal ought to have regard to contemporary community standards when determining the amount of compensation payable, in accordance with the judgment of the Full Federal Court in *Richardson v Oracle Corporation*.[34]

55 The Commission expanded upon its submissions by analysing the nature and purpose of the EOA on the one hand and the workers' compensation legislation on the other; applying relevant principles of statutory construction; and considering the ramifications of beneficial legislation, such as the EOA and the Charter. Following is a somewhat abridged version of the Commission's submissions.

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[34] [2014] FCAFC 82.

Apparent Inconsistency between two laws of the same legislature

56 For the purpose of this proceeding the EOA and the workers' compensation legislation may appear to be inconsistent: s 125(a)(ii) of the EOA confers on the Tribunal a power to make a monetary award in relation to an injury suffered in consequence of discrimination or sexual harassment in the workplace; whereas, the relevant provisions of the ACA and/or the WIRCA restrict the ability of a worker to obtain damages in respect of a workplace injury.

57 The principles which emerge from case law provide clear guidance in the current context.

58 In *Commissioner of Police v Eaton*,[35] Gageler J referred to the common law principle of construction that requires:

> ….that statutory texts enacted by the same legislature are to be **construed so far as possible to operate in harmony and not in conflict**. That principle of harmonious construction applies to the construction of provisions within different statutes of the same legislature to create "a very strong presumption that the … legislature did not intend to contradict itself, but intended that both … should operate".

59 Gageler J further observed that application of the principle to the construction of provisions within different statutes: [36]

> …can be difficult where a legislature does not state an intention either that the two statutory regimes should both apply ... or that [one] regime should apply to the exclusion of the [other].[37]

60 Where there is an inconsistency between the provisions of two statutes, the later enactment will be taken to have impliedly repealed the earlier to the extent of the operative inconsistency. In *Goodwin v Phillips*, Griffiths CJ said:[38]

> where the provisions of a particular Act of Parliament dealing with a particular subject matter are wholly inconsistent with the provisions of an earlier Act dealing with the same subject matter, then the earlier Act is repealed by implication … if the provisions are not wholly inconsistent, but may become inconsistent in their application to particular cases, then to that extent the provisions of the former Act are excepted or their operation is excluded with respect to cases falling within the provisions of the later Act.

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35 [2013] HCA 2 at [98] (footnotes omitted, emphasis added).

36 Whilst Gageler J delivered a dissenting judgment, his statement of the relevant principles of construction accorded with that expressed by the majority Ibid at [78] (Crennan, Kiefel and Bell JJ); and see *ACN 005 057 349 Pty Ltd v Commissioner of State Revenue* [2015] VSC 76 at [130]-[131] (Sloss J); and *Fonteio v Morando Bros Pty Ltd* [1971] VR 658 at 662 (Full Court).

37 Ibid at [99] (footnote omitted).

38 (1908) 7 CLR 1 at 7.

61 In the same case Barton J adopted the following statement from Hardcastel and Craies on *Interpretation of Statutes* and stated:[39]

> The court must be satisfied that the two enactments are so inconsistent or Repugnant that they cannot stand together, before they can from the language of the later imply the repeal of an express prior enactment, ie, the repeal must, if not express, flow from necessary implication.

62 Similarly, Gummow and Hayne JJ observed in *Minister for Immigration and Multicultural Affairs and Indigenous Affairs* v *Nystrom* that:[40]

> The doctrine [of implied repeal as articulated in *Goodwin v Phillips*] requires that **actual contrariety be clearly apparent and that the later of the two provisions be not capable of sensible operation** if the earlier provision still stands.

63 Accordingly, it is not enough that the provisions of two statutes simply appear to be inconsistent in word. They must be inconsistent in operation. The authorities make clear that courts and tribunals must be cautious in their approach to finding an implied repeal. Gaudron J observed in *Saraswati v R* that:[41]

> It is a basic rule of construction that, in the absence of express words, an earlier statutory provision is not repealed, altered or derogated from by a later provision unless an intention to that effect is necessarily to be implied. There must be **very strong grounds to support that implication**, for there is a **general presumption that the legislature intended that both provisions should operate** and that, to the extent that they would otherwise overlap, one should be read as subject to the other.

64 More recently, in *Ferdinands v Commissioner for Public Employment*, Gleeson CJ adopted the same approach:[42]

> … [it is] a problem that arises only because the legislature did not state an intention either that the two statutory regimes should both apply in such a case, or that the second regime should apply to the exclusion of the first. The legislature may, by necessary implication, manifest an intention of the latter kind, although **partial repeal of an earlier statute by a later statute will only be inferred on "very strong grounds"**.

65 In *Re Beth*, Osborn J (as he then was) observed that a later Act is not to be interpreted as impliedly withdrawing or limiting a conferral of jurisdiction unless the implication appears clearly and unmistakably.[43]

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39 Ibid at 10 (emphasis added).

40 (2006) 228 CLR 566 at [48] (footnotes omitted, emphasis added).

41 (1991) 172 CLR 1 at 17 (footnotes omitted, emphasis added). And see *Channel Pastoral Holdings Pty Ltd* v *Commissioner of Taxation* (2015) 321 ALR 261 at [96] (Allsop CJ, Edmonds, Gordon, Pagone and Davies JJ).

42 (2006) 225 CLR 130 at [4] (footnotes omitted).

43 (2013) 42 VR 124 at [88]. His honour referred to *Shergold v Tanner* (2002) 209 CLR 126 at 136 and *Re Applications of Shephard* [1983] 1 NSWLR 96.

66 In addition, there is a general rule of statutory interpretation that general provisions are not to be taken as derogating from special provisions (encompassed in the maxim *generalia specialibus non derogant*):

> It is not to be supposed that the mind of the legislature continuously deliberating and expressing itself in statutes will, after full special deliberation at one time, subsequently alter the result of that deliberation by mere general words not so expressed as to bring the special matter within their purview. It is not to be supposed that the mind of the legislature so operating and expressing itself will take away the rights previously granted to subjects without compensation and without specific statements to that effect.[44]

General principles of statutory construction

67 General principles of statutory construction are relevant to determining whether two apparently inconsistent statutes can operate harmoniously.[45] In applying such principles it is necessary to have regard to the following:

(a) The text and context of the provisions,[46] including consideration of the statute as a whole;[47]

(b) The legislative history of the provisions and extrinsic materials that may shed light on the meaning and intended scope of the provisions;[48]

(c) An interpretation that would best achieve the statutory purpose is to be preferred over other possible interpretations.[49] In this context, it is appropriate to consider the consequences of adopting one construction over another; [50] and

(d) Purposive construction, which has particular relevance to beneficial or remedial legislation.

68 It is uncontroversial that anti-discrimination and equal opportunity laws and provisions have been long regarded as beneficial and remedial.[51] Thus they are to be interpreted liberally, having regard to their statutory purposes and objects.[52] This principle of statutory interpretation was summarised in *AB v Western Australia*[53] as follows:

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44 *Attorney-General v Exeter Corporation* (1911) 1 KB 1092 at 1100, quoted by Dixon J in *Perpetual Executors and Trustees Association of Australia Ltd v Federal Commissioner of Taxation* (1948) 77 CLR 1 at 29. And see *Smith v The Queen* (1994) 181 CLR 338 at 348 (Mason CJ, Dawson, Gaudron and McHugh JJ).

45 *Ferdinands v Commissioner for Public Employment* (2006) 225 CLR 130 at [18] (Gummow and Hayne JJ).

46 *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41 at [47] (Hayne, Heydon, Crennan and Kiefel JJ).

47 *Project Blue Sky v ABA* 194 CLR 355 at [69]-[70] (McHugh, Gummow, Kirby, Hayne JJ).

48 *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* [2012] HCA 55 at [39] (The Court).

49 *Thiess v Collector of Customs* [2014] HCA 12 (The Court)).

50 *Project Blue Sky v ABA* (1998) 194 CLR 355 at [78] (McHugh, Gummow, Kirby, Hayne JJ).

51 See *Statutory Interpretation in Australia*, 8th edition, Pearce and Geddes, p 361.

52 See for example *IW v City of Perth* [1997] HCA 30; 191 CLR 1; (1997) 94 LGERA 224; (1997) 146 ALR 696; (1997) 71 ALJR 943 (31 July 1997); *Commonwealth v Anti discrimination Tribunal*

> Moreover, the principle that particular statutory provisions must be read in light of their purpose was said in *Waters v Public Transport Corporation* to be 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". It is generally accepted that there is a rule of construction that **beneficial and remedial legislation is to be given a "fair, large and liberal" interpretation**.

Construction consistent with the Charter to be preferred

69 In addition to the general rules of statutory construction, it is appropriate for the Tribunal to construe the relevant provisions in light of the Charter and, in particular, the right to equality and non-discrimination found in s 8(3) of the Charter:

> **Recognition and equality before the law**
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> …
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> (3) Every person is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination.

70 Pursuant to s 32 of the Charter, statutory provisions are to be construed, so far as it is possible to do so, consistently with their purpose, in a way that is compatible with human rights.

Construing the EOA and the ACA/WIRCA Harmoniously

71 The Tribunal concurs with the Commission's submission to the effect that Parliament is presumed to have intended that both the EOA and the workers' compensation legislation would operate according to their terms. Only if that is not possible should one Act be read down.

Text and context: the regimes operate in different fields

72 The Tribunal agrees that s 125(a)(ii) of the EOA can be given effect according to its clear terms consistently with the ACA and/or the WIRCA. The two regimes clearly operate in different fields: the ACA and/or WIRCA regulate damages and compensation for injuries and accidents in the workplace; whereas, the EOA regulates discrimination and includes, as a remedy, monetary compensation for breach of the law.

73 In that regard, the approach of Stephen J in *Ansett Transport Industries Pty Ltd v Wardley*[54] is instructive. The issue in that case was whether there was an inconsistency between the *Equal Opportunity Act 1977* (Vic), which

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(Tasmania) [2008] FCAFC 104; 169 FCR 85; 248 ALR 494; 103 ALD 1 [154] 'Heerey J's proposition that because the Anti-Discrimination Act is beneficial legislation, it ought to be given a generous and liberal construction is obviously correct'.

53 [2011] HCA 42 at [24] per French CJ, Gummow, Hayne, Kiefel and Bell JJ (emphasis added).

54 (1980) 142 CLR 237. *Wardley* concerned the effect of s 109 of the Constitution and the question of inconsistency between State and federal laws; but the Commission contends that the reasoning is nonetheless apt to the present case.

prohibited dismissal of an employee on the basis of sex, and a Commonwealth industrial agreement that gave Ansett an unqualified right to dismiss its pilots on any ground. The High Court found no inconsistency. Stephen J observed as follows:[55]

> The Airline Pilots Agreement 1978 is a memorandum of the terms agreed on for the settlement of matters in dispute between Ansett Transport Industries (Operations) Pty. Ltd. and the Australian Federation of Air Pilots … [and] has the same effect as an award of the Commission for all the purposes of that Act.
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> The *Equal Opportunity Act 1977* (Vict.) is an instrument of a totally different character. An Act of the Victorian Parliament, its long title describes it as making unlawful certain kinds of discrimination on the ground of sex or marital status and as promoting equality of opportunity between men and women. In its attack upon discrimination it concentrates upon the areas of employment, education and the provision of goods, services and accommodation. In each of these areas it makes unlawful various types of conduct which involve discrimination on the ground of sex or marital status.
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> …
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> The question as a whole resolves itself, in the end, into a search for legislative intent. While the Agreement and the Act each deals with aspects of the engagement and dismissal of employees, **they are essentially dissimilar both in character and in general content.** ...
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> …
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> The Victorian legislature has concerned itself quite generally with the social problem of discrimination based upon sex or marital status and occurring in a variety of areas of human activity. It has declared various manifestations of such discrimination to be unlawful. This is a subject matter upon which the Commonwealth's *Conciliation and Arbitration Act* is understandably silent, silent because of its general irrelevance to the subject matter of that Act. That silence will necessarily extend to the factum through which it operates, the present Agreement. The disputes with which *the Conciliation and Arbitration Act* are concerned are disputes as to industrial matters, pertaining to the relationship of employer and employee; they have nothing inherently to do with questions of discrimination on the grounds of sex. No doubt it may happen that in a particular dispute, apparently of an industrial character, some question of discrimination of this sort may appear to be involved. The precise nature of its involvement may then determine whether or not the dispute is indeed an industrial dispute. However in the present case the Agreement gives not the slightest indication of any such involvement and has all the hallmarks of being made in settlement of an entirely orthodox industrial dispute.

74 Stephen J's reasoning may be applied in the present case: the EOA is concerned with the general social problem of discrimination and sexual

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55 (1980) 142 CLR 237 at [244], [249] and [251].

harassment in various areas, including in the sphere of employment. In contrast, the ACA and/or the WIRCA are concerned with the prevention of and compensation for workplace injuries, not with discrimination and sexual harassment. The two regimes are essentially dissimilar in character and content.

75 This understanding of the two regimes is further supported by consideration of the text of the two regimes, which reveals that the rights and remedies conferred by each regime are quite different:

(a) Section 125(a)(ii) of the EOA provides for the Tribunal to award compensation for loss, damage or injury in consequence of a breach of the EOA (in this case, the unlawful conduct of sexual harassment). That is, the EOA fixes upon contravention of the law as the criterion for an award of compensation. Such a contravention may or may not involve a person's employment and may or may not occur in the workplace;

(b) In contrast, the ACA and/or the WIRCA entitle a worker to compensation in respect of a workplace injury and, correspondingly, limit the worker's right to obtain damages for the same injury. That is, those Acts fix upon an injury in the workplace in the course of employment as the criterion for compensation and the corresponding limits on recovery of damages.

76 Furthermore, the ACA and the WIRCA are directed to proceedings in a court. This is apparent from the text of s 134AB and various sections of the WIRCA.[56]

77 Section 134AB contains no such prohibitions or provisions directed to the Tribunal, further indicating that it is not directed to the power of the Tribunal to award compensation for breach of the EOA. Nor does the WIRCA contain such provisions.

78 The Tribunal also agrees with the Commission that the ACA and/or the WIRCA do not, in terms, regulate a statutory action for compensation for breach of the EOA or the Tribunal's power to award monetary compensation in such an action. Each of the two regimes is 'capable of sensible operation'.[57] Hence, there is no occasion to read down the EOA. Nor is it necessary to read down the relevant provisions of the ACA and/or the WIRCA, as they are simply not purporting to regulate the Tribunal's jurisdiction under the EOA.

79 The above understanding of the two regimes is supported by *Owens v University of Melbourne*.[58] That case concerned whether the ACA applied to an action for damages under s 19 of the former *Whistleblowers Protection Act 2001* (Vic) (the 'WPA'). The WPA may also be properly described as beneficial legislation.

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56 Sections 134AB(22), (23), (31) and (34) of the ACA; and ss 340, 341, 344 and 346 of the WIRCA.
57 *Nystrom* (2006) 228 CLR 566 at [585].
58 (2008) 19 VR 449.

80 In *Owens* case, the plaintiff had sought and obtained compensation under the ACA for an anxiety disorder and was paid weekly payments under the ACA. As in this proceeding, the WPA provides for injury including collateral damage to a person's career, profession or trade, all of which His Honour found 'may be apt to describe aspects of loss and damage suffered by employees as well as other classes of person'. The observations of Judd J have equal relevance to the current case:

> … the breadth of the compensable loss and damage under the [WPA] defines the cause of action within an entirely different category to claims under the [ACA], notwithstanding that overlap might occur in the case of injury.[59]

81 His Honour went on to observe that:[60]

> To deny to the plaintiff the right to claim the full range of compensation available under the [WPA], merely because the plaintiff is an employee who suffered detrimental action arising out of or in the course of employment would, in my view, offend the legislative purpose by significantly limiting the objects of the [WPA] as an instrument of protection for persons many of whom will be employees. If the defendant's submission is accepted an employee, in the position of the plaintiff, must dissect from any "injury" the other compensable detriment which may become difficult when the cause of the collateral damage overlaps with the cause of the injury. The injury may be a by-product of the damage to employment and career prospects.
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> …
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> The purpose of the [WPA] would be frustrated if those who suffered detrimental action in the workplace were denied the full range of remedies available under the Act merely because any injury they suffer arose out of or in the course of their employment. In my opinion **the two legislative schemes are designed to and can co-exist** without the need to read down or imply a proviso to s 134AB. **There is no inconsistency**. Section 134AB of the [ACA] does not prohibit a claim for damages for physical or mental injury (not being serious injury) under s 19 even though the injury arose out of or in the course of employment. Nor is the plaintiff precluded from bringing this proceeding for damages, including exemplary damages under s 19 of the Act. Accordingly, I would answer both questions, No.

82 The *Owens* case also supports the principle that the objects of beneficial legislation, such as EOA, would be frustrated if the consequences of wrongful acts could not be appropriately compensated under that Act. In this regard Judd J commented:[61]

> … when a court, faced with a claim for an award of exemplary damages, comes to consider whether the defendant acted in

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59 (2008) 19 VR 449 at [16].
60 (2008) 19 VR 449 at [18], [22].
61 At [18].

> contumelious disregard of the plaintiff's rights[4], the rights under consideration must be all of the plaintiff's rights under the Act. Is a court to disregard the conduct of the employer insofar as it caused injury? Such an outcome could not have been intended by the legislature. In my view, to require a plaintiff to confront such complexity when formulating a claim under s 19 would act as a very great disincentive to disclosure and compromise the purpose of the Act. To deploy, with licence, the words of Ashley J in *Bentley v Furlan*, I am convinced that the two legislative schemes can comfortably co-exist.

83 It is acknowledged that the WPA has some textual differences from the EOA. In particular, the EOA has no counterpart to s 19(4) of the WPA, which provided that the remedy conferred by s 19 did not affect any other right or remedy available to the person arising from the detrimental action.[62] However, while the EOA contains no such express statement, this applies by necessary implication. It is clear from the objects of the EOA and the broad powers conferred upon the Tribunal by s 125 that it is intended to confer rights additional to other rights an injured person might have (whether under the common law or otherwise).

84 The EOA confers jurisdiction on the Tribunal to award remedies; and the ACA and/or the WIRCA ought not to be construed as limiting that conferral of jurisdiction unless the implication appears clearly and unmistakably.[63] No such limitation is expressed in the EOA.

85 Finally, it is notable that the ACA and the WIRCA each have specific provisions dealing with statutory claims for compensation under the *Sentencing Act 1991*. The *Sentencing Act* provides for a court to award a person injured by the commission of an offence, compensation for pain and suffering and various expenses.[64] The ACA and the WIRCA specifically provide that such compensation is not to be awarded in relation to a matter arising from an injury or death in respect of which it appears to the court that the person has an entitlement to any compensation under the ACA or WIRCA (as the case may be) and the offence is one under certain enumerated Acts.[65]

86 Thus, where the Parliament intended, under the ACA and/or the WIRCA, to limit a particular statutory right to compensation, it did so expressly. This was necessary because s 134AA and/or s 134AB (and the corresponding provisions in the WIRCA) did not otherwise achieve that outcome.

87 In contrast, in relation to the EOA there is no such express limitation, indicating that the ACA and/or the WIRCA did not intend to limit the remedies available under the EOA.

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62 See discussion in *Owens* (2008) 19 VR 449 at [17].
63 *Re Beth* (2013) 42 VR 124 at [88] (Osborn J).
64 See Subdivision 1 of Division 2 of Part 4 of the *Sentencing Act*.
65 Refer to analysis above, discussing s 138B of the ACA and s 371 of the WIRCA.

Purposive, beneficial construction to be preferred

88 It has long been recognised that beneficial construction may assist where any ambiguity might exist. This principle was articulated by Isaacs J in *Bull and Others v Attorney- General for New South Wales*:[66]

> In the first place, this is a remedial Act, and therefore, if any ambiguity existed, like all such Acts should be construed beneficially…This means, of course, not that the true signification of the provision should be strained or exceeded, but that it should be construed so as to give the fullest relief which the fair meaning of its language will allow.

89 The beneficial or remedial nature of the EOA is apparent from its objects and purposes set out in s 3, which make clear that the intention of the legislation is to eliminate discrimination, sexual harassment and victimisation. In construing the provisions of the EOA, regard must be had to the objectives of eliminating discrimination and sexual harassment, protecting the right to equality, eliminating systemic causes of discrimination and sexual harassment, and providing direct access to the Tribunal for resolution of disputes about discrimination and sexual harassment. Having made a complaint under s 123 of the EOA, s 125 then empowers the Tribunal to grant a remedy. The Tribunal agrees that any limitation upon the power of the Tribunal to award damages for loss, damage or injury under s 125, by operation of the relevant provisions of the ACA and WIRCA, would be contrary to a beneficial interpretation and inconsistent with the objects of the EOA.

General and specific provisions

90 As noted above, as a general principle of statutory construction, a specific provision prevails over a general provision. The EOA is properly regarded as a specific regime to deal with discrimination and sexual harassment. In contrast, the relevant provisions of the ACA and the WIRCA that preclude claims for damages are in general terms; and they make no express reference to claims for compensation for discrimination and sexual harassment. These provisions ought not be regarded as intended to override or limit the power conferred on the Tribunal by s 125(a)(ii).

91 The Commission contends that any reading down of a specific law such as the EOA requires the clearest expression of intention. There is no such expression of intention in the ACA and/or the WIRCA.

Legislative history and extrinsic materials

92 The Commission's submissions in relation to the construction of the relevant provisions of the ACA and/or the WIRCA are reinforced by the legislative history and extrinsic materials in relation to those Acts. That

66 (1913) 17 CLR 370 at [384]

material reveals no intention to limit the remedies available in relation to unlawful discrimination and sexual harassment under the EOA.[67]

93 The extrinsic materials reveal that Parliament gave no consideration to the proposition that the relevant provisions of those Acts might limit rights in relation to discrimination and sexual harassment arising under a separate statutory regime.[68] Rather, ss 134AA and 134AB of the ACA were introduced in 2000 to 'restore access to common-law damages for seriously injured workers'.[69] That statement is reflected in the express purpose in s 1 of the Amending Act, which was 'to provide for the restoration of common law actions for damages'. The corresponding provisions in the WIRCA substantially re-enact ss 134AA and 134AB and should be understood to have the same purpose.

94 That purpose does not support or require a construction of the relevant provisions of the ACA and the WIRCA that limits the ability of the Tribunal to award compensation to a person who has been injured as a result of unlawful discrimination or sexual harassment in contravention of the EOA. If Parliament had intended to restrict any compensation from a beneficial regime, where it has otherwise conferred such wide powers upon the Tribunal, it would have done so expressly. No clear intention can be evinced from the ACA or its successor, the WIRCA to bar a claim for damages for injury 'in consequence' of sexual harassment, as provided under s125 of the EO Act.

Consequences of reading down the EOA

95 It is also important to consider the consequences of reading down s 125(a)(ii) of the EOA in the manner proposed by the Respondent.

96 Such a reading down in matters of workplace sexual harassment injuries will mean that the complex and detailed requirements of the ACA and/or the WIRCA will need to be followed in relation to all such claims where monetary compensation for injury is sought - including a determination of whether the person concerned has a 'serious injury'[70] and the potential involvement of the County Court or the Supreme Court.[71] If the person subject to sexual harassment has not suffered a serious injury, no compensation will be payable under the EOA. Yet the EOA itself contains no limitation of that kind.

97 This outcome directly contradicts the statutory objectives of the EOA to provide effective protection against, and remedies for, sexual harassment and discrimination and for the effective resolution of disputes of sexual

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67 The Commission notes that Judd J had regard to the legislative history and extrinsic materials in *Owens* (2008) 19 VR 449 at [8]. Applicant Counsel's submission also deals with this point under paragraphs [18]-[22] of the 2 November 2015 submission.

68 As was also the case in *Re Beth* (2013) 42 VR 124 at [90].

69 Parliament of Victoria, *Hansard*, Assembly, Thursday 13 April 2000, p 1001: Accident Compensation (Common Law and Benefits) Amendment Bill 2000, second reading speech.

70 ACA, s 134AB(2); WIRCA, s 327.

71 ACA, s 134AB(16)(b); WIRCA, s 335(2)(d).

harassment matters. Further, the choice of the Tribunal as the forum for resolution of such disputes, with limited procedural requirements, demonstrates a legislative intention that access to a remedy for discrimination ought to be non-technical, timely, cost effective and efficient[72] — not complex and involving the superior courts. To paraphrase Judd J in *Owens*,[73] to require a plaintiff to confront such complexity when formulating a claim under the EOA would act as a very great disincentive.

98 In addition, it is important to note that the approach for which the Respondent contends is not confined to sexual harassment - it will apply to all forms of discrimination in the workplace. That is, a person who claims injury by reason of race or sex discrimination by an employer will be unable to obtain a monetary award under s 125(a)(ii) if they have not suffered 'serious injury'. Such a significant consequence - consideration of which is entirely absent from the extrinsic materials and the Parliamentary debates - are unlikely to have been intended when the Parliament enacted ss 134AA and 134AB of the ACA and ss 326-338 of WIRCA.

99 In the absence of some textual indication that such broad-reaching consequences for workplace discrimination were intended, the Tribunal can safely conclude that s 125(a)(ii) of the EOA operates according to its terms to provide effective redress for unlawful discrimination.

Operation of s 125(a)(ii) of the EOA supported by the Charter

100 Section 8 of the Charter provides that every person has 'the right to equal and effective protection against discrimination'. Section 32 of the Charter requires that legislation be interpreted, where possible, compatibly with human rights. In *Slaveski v Smith*[74] the Court of Appeal explained s 32 as follows:

> If the words of a statute are capable of more than one meaning, the court should give them whichever of those meanings best accords with the human right in question.

101 Further, s 3(b) of the EOA provides that one objective of the EOA is to 'further promote and protect the right to equality' found in s 8 of the Charter.

102 The EOA provides for equal and effective protection against discrimination, which includes the power conferred on the Tribunal to award a monetary remedy for loss or injury. The Tribunal accepts that a construction of the relevant provisions of the ACA and/or the WIRCA that limits the available remedies in relation to discrimination occurring in the workplace would effectively undermine the right to effective protection against discrimination, contrary to the objectives expressed in the EOA and the right to equality found in s 8(3) of the Charter.

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72 VCAT Act, s 98.
73 (2008) 19 VR 449 at [19].
74 (2012) 34 VR 206 at [24] per Warren CJ, Nettle and Redlich JJ.

Cases relied upon by the Respondent do not assist

103 In support of his approach to the relationship between the EOA and the ACA and/or WIRCA, the Respondent relies upon two cases: *Doughty v Martino Developments Pty Ltd*[75] and *Murphy v State of Victoria*.[76] The Tribunal agrees that neither case is relevant to any issue raised by the Respondent:

(a) *Doughty's* case concerned an action for damages '*per actione servitum amisit*' for the loss of services of an employee. This is a common law claim. Further, *Doughty* concerned the operation of the *Transport Accident Act 1986* (Vic), not the ACA or the WIRCA. In particular, *Doughty* did not require the court to resolve any question of inconsistency between two Acts. Rather, the question was whether s 93 of the *Transport Accident Act* had extinguished the right of an employer to obtain damages at common law *per actione servitum amisit*. The Court held that it had.

(b) *Murphy's* case concerned actions for deceit, intentional infliction of injury, negligence and breach of contract arising out of a workplace injury. All were common law claims. Again, this did not require the court to resolve any question of inconsistency between two Acts. Rather, the question was whether s 134AB applied to the claims. The Court held that it did (save for the claim in contract). Accordingly, Ginnane J found that:

> the plaintiff's claim has no real prospects of success because no leave to commence the proceeding under the *Accident Compensation Act* had been sought or obtained.[77]

104 In the Tribunal's view, the result in *Murphy's* case is unsurprising and merely reflected the principle that claims for damages for work place injury under the common law, or tort (including breach of statutory duty) are subject to the procedures set out in the ACA. However, the application of these provisions do not extend beyond those causes of action so prescribed.

105 In conclusion, the Commission submits that, in accordance with the general authorities on inconsistency of legislation, and with the approach adopted in *Wardley* and *Owens*, the power conferred by s 125(a)(ii) of the EOA 'can comfortably co-exist' with the relevant provisions of the ACA and the WIRCA. There is no inconsistency, each operates in a different field and therefore it is not necessary to read down the EOA. The Tribunal agrees.

Ambit of Claim for Compensation

106 Respondent's Counsel raised a further preliminary objection to the effect that the Applicant is limited in her claim for compensation to the amounts and/or basis upon which such claim was first articulated. In my view, such

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75 (2010) 27 VR 499.
76 [2012] VCC 2025.
77 At [32].

submission has neither basis nor merit. Parties were requested to make further submissions in respect of compensation following the Tribunal's findings and determination as to liability. As a consequence, the Applicant has reframed her claim for compensation, having regard to the proven contraventions, under the following heads of damage:

(a) Damages;

(b) Loss of earnings (including loss of future earnings and loss of opportunity);

(c) Particularised out of pocket expenses;

(d) Payment of ongoing out of pocket expenses;

(e) Aggravated damages; and

(f) Costs.

107 In the Tribunal's view, the nature and content of the submissions now made by the Applicant's Counsel, including the affidavit of the Applicant dated 17 August 2015, are consistent with the Orders made by the Tribunal.

RELEVANT CASE LAW

Changed Approach to Compensation for Damages

108 In *Hall v A & A Sheiban Pty Ltd*,[78] Lockhart J held that, generally speaking, the correct way to approach the assessment of damages in discrimination cases is to compare the position in which the complainant might have been expected to be if the discriminatory conduct had not occurred with the situation in which they were placed due to the conduct of the respondent.[79]

109 Lockhart and Wilcox JJ adopted as correct what was said by May LJ (of the UK Court of Appeal) in a racial discrimination case, *Alexander v Home Office*:[80]

> 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 a relatively short

78 (1989) 20 FCR 217.

79 *Hall & Ors v A. & A. Sheiban Pty Ltd & Ors* (1989) 20 FCR 217, 239 (Lockhart J).

80 *Alexander v Home Office* [1988] 2 All ER 118, 122 (May LJ), cited in *Hall & Ors v A & A Sheiban Pty Ltd & Ors* (1989) 20 FCR 217, 238 (Lockhart J) and 256 (Wilcox J).

> duration, is less serious than physical injury to the body or the mind which may persist for months, in many cases for life.

110 This principle has been followed in subsequent discrimination and equal opportunity cases, both in Victoria and under Federal anti-discrimination law.[81] The Tribunal concurs with the Commission that the Tribunal should adopt the same approach in exercising its power under s 125(a)(ii) in relation to the Applicant.

111 In addition, it is now apparent that in the context of a claim for sexual harassment, the courts are taking a more equitable and expansive approach. Following is a summary of recent decisions which inform this Tribunal's approach to the current case.

112 In *Tan v Xenos (No 3)*,[82] Judge Harbison, Vice President, made an award for general damages of $100,000 following a single but very serious incident of sexual harassment by a senior neurosurgeon and supervisor of a trainee neurosurgical registrar. Unlike the current case, there was no expert evidence of injury. In making this award, Her Honour commented as follows:[83]

> 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 be taken if this case were to be heard in a Court instead of a Tribunal.
>
> The complainant has suffered acutely as a result of this harassment. Indeed my observation of her in the witness box was that she has been terribly affected by the incident itself…she has reacted to it as a gross violation of her body and her trust.
>
> I have no medical evidence before me as to how this incident has affected her…
>
> It is my view that the award of damages in this case must be substantial. It is true that the incident itself is not the worst one can imagine of sexual interference of another person. But the Respondent was in a position of power over the Complainant. It was not just that he was senior to her in the hospital. He was in a position of great influence as to her qualification and her future career. Her training assessments were compiled from the observations of all senior neurosurgeons. He was held in great esteem by all of the other surgeons. This is apparent from the evidence led by the Respondent.

113 It is significant that even by 2008, this Tribunal recognised that: there was no distinction to be made between the approach to damages taken in a Court or Tribunal; and the impact of even one serious incident of sexual

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81 See, eg, *Spencer v Dowling* [1997] 2 VR 127 at 144; *Richardson v Oracle Corp Australia Ltd* (2014) 223 FCR 334 at [83]; *Ewin v Vergara (No 3)* (2013) 307 ALR 576 at [607].

82 [2008] VCAT 584.

83 At [556], [557], [558], [560].

harassment can have a devastating effect, both personally and professionally, upon a complainant.

114 In *Poniatowska v Hickinbotham,*[84] the complainant suffered from depression and was awarded $90,000 for pain and suffering in a total award of $466,000 (including interest).

115 In *Amaca v King*,[85] the Court of Appeal was concerned with an award of damages following a jury verdict where the appellant's negligence was found to have caused the respondent to suffer mesothelioma. Although the factual circumstances are very different to a case of sexual harassment, the Court acknowledged that an assessment of damages ought not to be limited to historical assessments. After referring to the sometimes dramatic increases in employee remuneration, the Court observed:[86]

> 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 it seems to us, writes and speaks of the importance of 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?

116 In *Willett v Victoria*,[87] the Court applied the reasoning in *Amaca v King.* Ms Willett, a police officer, was the target of significant bullying and harassment. The jury awarded damages of $108,000 after finding that she had suffered loss of enjoyment of life and that it was caused by the negligence of her employer, Victoria Police. The Court of Appeal substituted an award of damages of $250,000:[88]

> In our opinion, the loss of enjoyment of life experienced by Willett by reason of the respondent's negligence was considerable. Added to that is the pain and suffering associated with a persistent and ongoing major depressive disorder which requires a range of anti-depressant and anti-anxiety medication at a significantly high dosage. While Willett has the capacity to go about some ordinary daily tasks, and engage in some forms of social interaction in which typically her children are the primary focus, this does not detract from the severe loss she has suffered. We consider that the damages awarded – of $108,000 – are 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.[89]

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84 [2009] FCA 680.
85 [2011] VSCA 447.
86 At [177].
87 [2013] VSCA 76.
88 At [81].
89 At [61].

117 Professor Dennerstein, Psychiatrist, undertook a psychiatric assessment and diagnosed Ms Willett as having:[90]

> … a major depressive disorder which was severe and with paranoid features, and panic disorder with agoraphobia. She considered Willett not fit for work. She considered that the longer the symptoms lasted the less likely they were to remit.

118 As in the present case, there was no evidence of any underlying psychiatric condition that pre-dated the injuries caused by the contravening conduct and the Court noted that:

> It was not shown that any part of Willett's psychiatric injury flowed solely from a cause other than the tort committed by the respondent. There was no evidentiary foundation laid for establishing with precision what Willett's pre-existing 'condition' was and what its future would be likely to be. All the medical evidence accepted that the bullying and harassment Willett suffered, when employed by the respondent, was a significant continuing factor to her mental disturbance.[91]

119 In my view, the severe psychological disorder which has afflicted the Applicant in this case, as a consequence of the Respondent's sexual harassment, is consistent with the findings made in the *Willett* case.

120 In *Swan v Monash Law Book Cooperative*,[92] the trial judge assessed damages 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. Prior to her workplace injury Ms Swan was described as 'bubbly, caring and readily able to relate to, and converse with, family, friends and acquaintances alike.'[93] She had no pre-existing or unrelated psychiatric condition or impairment; and there were no prior non-work related stressors affecting her. Justice Dixon found that Ms Swan's injuries were 'extremely onerous and deleterious' and:

> … 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 have already described the consequences for the plaintiff as reported by medical experts…
>
> I am satisfied that the plaintiff remains substantially compromised in most aspects of her life, which has been reduced to one of isolation

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90 At [15].
91 At [43].
92 [2013] VSC 326.
93 At [16].

> 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.[94]

121 His Honour awarded Ms Swan $300,000 as damages for pain and suffering and loss of enjoyment of life, noting, after citing with approval the cases of *Amaca* and *Willet* 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.[95]

122 In my view, although the consequences for Ms Swan were somewhat more severe, there are many similarities in the psychological profile of Ms Swan and the Applicant in this case, both before and after the relevant contravening conduct.

123 In *Ewin v Vergara (No 3)*,[96] Ms Ewin was found to have been sexually harassed by Mr Vergara. The Federal Court awarded her $110,000 in general damages and $293,000 for loss of past earning capacity. Justice Bromberg found that Ms Ewin's loss of enjoyment of life was acute over the 3 year period to the date of trial. Ultimately, His Honour considered that

> … whilst her loss of amenities will diminish, it will continue to be significant for several years at least…the extent of her pain and suffering and loss of amenities justifies an award of $110,000 as compensation for past and future disadvantage.[97]

124 In *GLS v PLP*,[98] the complaint related to a period in 2011 when GLS was undertaking 80 days of practical legal training, as part of her studies for a Graduate Diploma of Legal Practice, in the law firm of PLP, which PLP conducted as a sole practitioner. GLS had previously completed the degree of Bachelor of Laws. She was 50 years of age and the mother of two adult children and one teenage child. Both PLP and GLS were of similar age, had previously worked in a large city law firm and became friends from about 2006. They got on well together and met occasionally.

125 GLS claimed that she was sexually harassed by PLP on a number of occasions during her placement. PLP denied that the alleged incidents took place, or alternatively said that his actions were not unwelcome and did not amount to sexual harassment.

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94 At [246]-[248].
95 At [261].
96 [2013] FCA 1311.
97 At [666]. *Ewin v Vergara* was decided prior to the appeal in *Richardson v Oracle* being decided.
98 (Human Rights) [2013] VCAT 221 (13 March 2013).

126 After working with PLP for approximately two months, during which time he repeatedly engaged in offensive conduct of a sexual nature, PLP terminated GLS' employment on 12 July 2011. GLS made a complaint of sexual harassment comprising 14 incidents, which she alleged were contraventions of the *Equal Opportunity Act 1995*. Justice Garde P made positive findings in respect of 11 such contraventions. Section 136(a)(ii) of the *Equal Opportunity Act 1995* was in identical terms to the current s 125(a)(ii). Justice Garde P was concerned only with a claim for general damages as no claim was pressed by GLS at the hearing for financial loss, loss of earnings or special damages.

127 There are a number of common features in the current case and the *GLS v PLP* case.

128 First, PLP and the Respondent in this case, were both in a position of significant authority with respect to their respective complainants.

129 Secondly, both PLP and the Respondent in this case chose to vigourously deny any element of sexual harassment, suggesting that the complainant was the provocateur.

130 Thirdly, there was a stark contrast in the personality profile of both complainants before and after the contravening incidents. In the case of GLS:

> Prior to the incidents, Ms GLS was a very social person, with a wide network of family and friends. Since the incidents, Ms GLS rarely leaves her house unless she has to, or is pressured to do so. She no longer enjoys the company of others.[99]

131 Fourthly, both complainants developed a severe psychological reaction which profoundly affected their relationships and capacity to function generally. In the case of GLS, expert evidence of a clinical psychologist confirmed that:[100]

> … Ms GLS is now experiencing symptoms of depression, persistent low moods, feelings of worthlessness and guilt, social withdrawal, lack of motivation, sleep disturbance and increased appetite.
>
> Ms GLS is suffering from post traumatic stress disorder. She is experiencing hyperarousal including inability to fall asleep, intense anger, increased physiological and mental anxiety at reminders of the harassment and the assault she suffered on 17 July 2011, avoidance of places and people that she associates with the harassment and attempts to avoid thinking of the events as these thoughts cause distress…Ms GLS's social and occupational functioning has been impaired.
>
> …
>
> Ms GLS is currently managing to work only two days per week. She is experiencing guilt at the effect on the members of her family, who are experiencing stress over her condition.

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99 At [263].

100 At [261], [262], [264] and [278].

…

> Ms GLS has received psychiatric counselling and treatment and this is likely to continue in the future. Both psychologists acknowledged that she was suffering significantly from post traumatic stress disorder and has extreme levels of depression, anxiety and stress.

132 Justice Garde P was satisfied from the evidence that GLS had suffered severely as a result of PLP's sexual harassment, having found proven eleven incidents of sexual harassment extending over much of the period of GLS's placement with PLP's firm. General damages of $100,000 was awarded.

133 The preceding cases are indicative of a gradual and ongoing reassessment of the approach to damages. The recent Federal Court decision in *Richardson v Oracle*[101] represents a significant milestone in the articulation of the proper approach to the assessment of damages in the context of the sexual harassment cases. The complainant alleged sexual harassment in her workplace by a fellow employee over a period of approximately 7 months, contrary to s 28B(2) of the *Sex Discrimination Act 1984* (Cth). Section 28B(2) provided as follows:

> It is unlawful for an employee to sexually harass a fellow employee or a person who is seeking employment with the same employer.

134 The trial judge declared the employer, Oracle, vicariously liable for the co-worker's unlawful conduct and assessed the damages to be awarded to the complainant Ms Richardson, as compensation for Mr Tucker's [her co-worker] sexual harassment, under s 46PO(4)(d) of the AHRC Act, in terms of non-economic loss and damage and economic loss and damage. The trial judge fixed general damages at $18,000 but rejected the contention that the economic losses that the complainant claimed were suffered 'because' of the co-worker's conduct, on the basis that 'the necessary causal link was not established'.[102]

135 Section 46PO(4)(d) of the AHRC Act provides 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; …

136 On appeal, the Full Court first considered whether the principles applying to the assessment of damages derived from tort or the assessment of statutory compensation under s 46PO(4)(d). After referring to the High

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101 [2014] FCAFC 82 at [96].

102 At [21] referring to *Richardson v Oracle* (first instance) at [248].

Court in *Waters v Public Transport Corporation*, quoted above, the Court noted:[103]

> …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.
>
> 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.

137 As indicated above, having regard to the wording of s 125(a)(ii) of the EOA, I am satisfied that there is no limitation upon the elements of compensation which can be awarded in the nature of general damages for pain and suffering and damages for past and future economic loss.

138 The Full Court then considered the factors which should determine the quantum of compensation in that case and further noted that:[104]

> Ms Richardson relied on a total of 11 incidents, each said to amount to sexual harassment and together evidencing a pattern of unlawful conduct… 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'...

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103 At [26] and [27].
104 At [8], [9] and [20].

> The trial judge ultimately found that an initial exchange in April 2008 'the beginning of a pattern of behaviour which was to continue over the period of months'…

139 Justice Kenny[105] analysed the range of factors that are relevant to assessing an award of damages in a sexual harassment matter. A line of authority involving personal injury and harassment, particularly occurring in the workplace, were considered highly relevant to an assessment of damages. The Full Court ultimately agreed on the need to disturb the award of damages of $18,000 made by the trial judge to $130,000 [which included $30,000 for economic loss].[106] The Court also found that:[107]

> 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.

140 The reasoning adopted by the Court represents a substantial change to the previous approach to damages awarded in sexual harassment proceedings.

141 It is appropriate to refer to certain key passages from the leading judgment. Kenny J rejected the previously identified range for damages as an appropriate reference point:[108]

> …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. ... I consider that, having regard to the nature and extent of Ms Richardson's injuries and prevailing community standards, the low level of damages awarded by the trial judge itself bespeaks error.

142 The Court also acknowledged that the 'conservative' and 'cautious' approach adopted in the award of damages for sexual discrimination had invited adverse comment from commentators to the effect that the beneficial intent of the *Sex Discrimination Act* was not being realised.[109] In response Kenny J observed as follows:

> The real issue is whether, having regard to the facts as found, the amount fixed by the trial judge was so disproportionately low that 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.[110]
>
> In making an award, a court necessarily has regard to the general standards prevailing in the community… Other awards of general damages for injury of the kind suffered by Ms Richardson may

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105 Kenny J wrote the lead judgment with whom Besanko and Perram JJ agreed.
106 At [233].
107 At [64].
108 At [81].
109 At [83]-[87].
110 At [93].

> 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 [citations omitted].[111]
>
> … In the context of damages for personal injury, there is reason to believe that community standards accord a higher value to compensation for pain and suffering and loss of enjoyment of life than before.[112]

143 In support of these observations, Kenny J cited with approval the Victorian cases referred to above of *Amaca*, *Willet*, *Swan* and *Tan*. Kenny J also noted other non-sexual harassment Federal cases and the disparity between compensation for pain and suffering and loss of enjoyment of life awarded in those cases compared to the significantly lower range of damages awarded in cases of sexual harassment, where comparable psychological injuries and distress were suffered.[113]

144 Kenny J observed that damages awards have historically been higher for loss of enjoyment of life and pain and suffering outside the anti-discrimination legislation field. [114] Her Honour stated:[115]

> 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 inprinciple 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.

145 In Her Honour's view, the disparity between the level of awards for damages in other fields and the typical compensatory damages provided to victims of sexual discrimination and harassment revealed that today an award for sexual harassment, though within the accepted historical range for such cases, 'may be manifestly inadequate as compensation for the damage suffered by the victim, judged by reference to prevailing community standards'.[116]

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111 At [95].
112 At [96].
113 In *Swan v Monash Law Book Co-operative* [2013] VSC 326 a victim of workplace harassment and bullying was awarded $300,000; *Willett v Victoria* [2013]VSCA 76 a victim of workplace harassment and bullying was awarded $250,000; *Tan v Xenos (No 3)* [2008] VCAT 584 a victim of sexual harassment was awarded $100,000; *Nikolich v Goldman Sach JBWere Services Pty Limited* [2006] FCA 784 a victim of workplace bullying and harassment was awarded $80,000; and *Walker v Citigroup Global Markets Australia Pty Ltd* (2006) 233 ALR 687 $100,000 was awarded for breach of contract.
114 *Richardson v Oracle Corporation* (2014) 223 FCR 334 at [108]-[109].
115 Ibid at [108].
116 Ibid at [118].

146 Kenny J preferred an approach which reasoned by analogy from other kinds of personal injuries cases:

> 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.[117]
>
> …
>
> Bearing in mind the nature of the injuries in each case [referring to the Victorian and Federal cases cited], 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.[118]

147 Finally, the Court made the following pertinent comments in relation to causation and the relevance of multiple causative factors:[119]

> … 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 s46PO(4)(d).

148 The significance of the decision in *Richardson's* case can be summarised as follows:[120]

(a) It recognises that community attitudes regarding the impact of sexual harassment has changed, in particular, that the adverse consequences of sexual harassment can extend to loss of employment and career; severe psychological illness; and relationship breakdown;

(b) When determining compensation there is no basis for treating differently the consequences of sexual harassment on the one hand and workplace bullying on the other;

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117 At [110].
118 At [116].
119 At [69].
120 I adopt the analysis of Emma Starkey and Jenny Vardi in 'Moving with the Times' Law Institute Journal August 2015 at p 51.

(c) Substantial compensation for sexual harassment is not dependent upon demonstrable incapacity where the evidence otherwise demonstrates a substantial impact upon enjoyment of life;

(d) Provided there is a sufficient connection between an employee's departure from a particular employer and the unlawful conduct, including how the employer deals with that conduct, a court is likely to award compensation for any resulting economic loss; and

(e) The principles applied to sexual discrimination may be equally extended to other forms of discrimination.

149 In my view, a similar analysis relevantly applies under the EOA. As indicated above, the expression 'in consequence of' found in s 125(a)(ii) of the EOA is at least as expansive as the expression 'because of' in the Commonwealth Act. It follows therefore that:

(a) First, where evidence supports a causal connection between the contravening conduct and the damage and loss, the Tribunal only needs to find that it is *one* of the reasons for loss and damage; and

(b) Secondly, by extension, loss of intimacy in a sexual relationship in consequence of sexual harassment is a compensable consequence.

COMPENSATION

Applicant's Pre-Injury Condition

150 Prior to the incidents comprising the sexual harassment, it is not in dispute that the Applicant was happily married and otherwise presented as socially outgoing and a competent and valued employee. In her witness statement she said:[121]

> I did well at my job and enjoyed it greatly. I got along very well with Mr Smith. He was kind to me and I respected him. We soon became good friends. I found it easy talking to him and, as time went on, I felt he became a good friend: rather like a father figure. I asked him for advice on things and trusted him. He asked my husband Leigh Collins to do some carpentry work for him. I felt he was a fantastic boss.

151 In Mr Collins' witness statement he said:[122]

> …I noticed that she had a great, happy personality and a friendly bubbly nature. I observed her working at the bar, talking to all the customers with a smile on her face and never stopping for a second.

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121 Statement of Amanda Collins at paragraph [9].
122 Statement of Leigh Collins at paragraph [2].

Psychological/Psychiatric Injuries and Physical Consequences

Expert Evidence

152 The Applicant relied upon expert evidence of health practitioners which was summarised in the Tribunal's Initial Reasons. For ease of reference, relevant parts of that evidence are set out below.

Dr Francis Maxwell, General Practitioner

153 Following her termination of employment, the Applicant attended her general practitioner, Dr Maxwell, on 13 April 2013. The Applicant attended Dr Maxwell on eight further occasions between April and August 2013.

154 Dr Maxwell records a history of severe mood and anxiety symptoms which had developed in the context of alleged sexual harassment by the Respondent. The Applicant complained of daily panic attacks; being fearful seeing the Respondent; sleep disturbance; recent weight loss; nausea and shaking. Dr Maxwell diagnosed a major depressive episode with significant anxiety features and recommended fortnightly follow-up consultations. In a subsequent consultation on 7 May 2013, Dr Maxwell noted a deterioration in mental state and further 4 kilogram weight loss.[123] She was prescribed antidepressant medication, which she had been previously reluctant to take, and reported a 'definite improvement' by June 2013. By 16 August 2013, the Applicant continued to complain of sleep disturbance, including nightmares involving the Respondent. Dr Maxwell noted that consistent with the symptoms which the Applicant described to him:

> the significant features of mental state examination observed were that Amanda generally appeared anxious, sad and tearful.

155 Dr Maxwell continued to prescribe antidepressant Fluoxetine and the Applicant continued to attend Dr Hill. Dr Maxwell considered that the Applicant's '*current mental state will remain largely unchanged until there is resolution of the situation with Mr Smith*.'

Dr Emily Hill, Clinical Psychologist

156 The Applicant first attended Dr Hill in April 2013 for psychological counselling upon referral by Dr Twycross, a colleague of Dr Maxwell.[124]

157 As at 23 July 2014, the Applicant had attended for 30 sessions with future appointments arranged. Therapy sessions incorporated trauma based treatment strategies and cognitive behavioural therapy.

158 Dr Hill initially took a history similar to that recorded by Dr Maxwell. Dr Hill diagnosed a Major Depressive Disorder and Anxiety Disorder and noted a worsening of symptoms over time. In her second report, Dr Hill

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123 Professor Dennerstein notes at p 9 of her report a weight loss from 62 kgm to 49 kgms.

124 Dr Hill prepared expert reports dated 16 August 2013 and 23 July 2014, at the request of the Applicant's solicitors, which were tendered without objection as Exhibit N.

diagnosed '*Post Traumatic Stress Disorder most likely related to the alleged harassment*'. Dr Hill reported that:

> Ms Collins is an active participant in therapy and strives to maintain moderate activity levels, to reduce her physiological arousal with relaxation techniques and to consciously contain her thinking about current stressors. Ms Collins' psychological functioning can however fluctuate in accordance with her involvement in the Worksafe investigation and litigation process. It seems likely that Ms Collins' condition will improve with the settlement of legal proceedings and her gaining meaningful employment in the future.[125]

Ms Veronica Knox, General Psychologist

159 Ms Knox, Psychologist, was asked to assess the Applicant's psychological and emotional functioning for the purpose of this proceeding. Dr Knox prepared a report dated 5 October 2013[126] and also gave oral evidence at the hearing.

160 Ms Knox conducted a number of tests. Her findings were that the Applicant has moderate depression (Beck Depression Inventory); 30/50 for anxiety and depressive symptoms (Kessler Psychological Distress Scale); and is symptomatic of Post-Traumatic Stress Disorder (Post Traumatic Checklist & Clinician Administered PTSD Scale). At the time of her assessment Ms Knox recommended:[127]

> Given Mrs Collins current difficulties, her level of distress and emotional instability and the severity of symptoms and impact on occupational and social functioning it would not be in her best interest to return to work but rather to attend ongoing weekly counselling sessions with her psychologist with whom she finds helpful and supportive.

Professor Lorraine Dennerstein AO, Psychiatrist

161 Professor Dennerstein performed a forensic psychiatric assessment of the Applicant and prepared an expert report at the request of the Applicant's solicitors[128] and also gave oral evidence. Professor Dennerstein had been provided with previous reports of Dr Von Ammers, Ms Knox and Dr Maxwell.

162 The Professor's report outlines the Applicant's personal development including: family, education, relationship and occupational history, social and sporting interests, past medical and psychiatric history. Prior to January 2013, she had no problems with mental health and there was no other relevant medical or social history.

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125 Report of Dr Emily Hill dated 23 July 2014 at p 2.

126 Exhibit M. Ms Knox confirmed the date of the report in cross-examination. The report itself does not have a date visible.

127 Exhibit M. p 6.

128 Exhibit L.

163 The report also provides a description of the harassment as recounted by the Applicant to her and the impact the harassment has had on her. She diagnosed the Applicant with Chronic Post Traumatic Stress Disorder and Major Depressive Disorder in partial remission with treatment; and considered that her current treatment regime of psychological counselling and antidepressant medication is reasonable and appropriate:

> The disorders are related in timing and content to the repeated sexual harassment she described occurring in her employment… And subsequent loss of her job… Her capacity to work at the moment is very limited because of her continuing psychiatric symptoms. Her condition is still severe and unstable and she should not return to work until better control of her symptoms is achieved.[129]

164 Under cross-examination, Professor Dennerstein was provided with a copy of a medical report prepared by Consultant Psychiatrist Dr Wendy Triggs, prepared for the purposes of assessing the Applicant's workers' compensation claim.

165 Dr Triggs conducted her assessment of Ms Collins on 30 October 2013. Dr Triggs gives the opinion that the Applicant's mood would improve if she were to return to work and notes that initially it would be best for the Applicant to have a female boss.

166 Professor Dennerstein confirmed she had not read the report of Dr Triggs. If she had been provided the report, she would have read it, but would still have made her own independent assessment of the Applicant.

167 Respondent's Counsel sought to tender the report of Dr Triggs through Professor Dennerstein with the intention of inviting the Tribunal to draw an inference as to why this report was not provided to Professor Dennerstein. I refused the tender and advised that there was no basis for drawing such inference.

168 I also note that although Professor Dennerstein was not provided the report of Dr Triggs, the Applicant informed Professor Dennerstein of the existence of the report and the conclusion.[130] Professor Dennerstein's report states:

> She said Workcover payments were denied because of the report of psychiatrist, Dr Wendy Triggs, in October 2013 who said that she could go back to work in another post office despite having had letters from Amanda's psychologist and doctor contrary to this.

169 In accordance with the Tribunal's Initial Reasons, the assessment of damages now proceeds on the basis that the Tribunal is satisfied that the Applicant has given a history to the reporting experts consistent with her account of alleged sexual harassment. Furthermore, the Tribunal is satisfied that the opinions of her treating health practitioners and medico-legal

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129 Exhibit L, p 13, para 3 and 4.

130 See page 8 of Professor Dennerstein's report.

experts are consistent with a nexus between the alleged sexual harassment and consequent psychological trauma.[131]

Evidence of Applicant's Husband

170 Mr Collins' statement refers to the day on which the Applicant told him '*I think David just came on to me*'. He described the Applicant as being serious, surprised and shocked.

171 Between January and March 2013, Mr Collins noticed that the Applicant was not herself. She had lost weight and became moody. She told him that the work situation with Mr Smith '*keeps repeating itself*'. She was reluctant to talk about it, rather she would brush him off and indicate the situation was under control.

172 Mr Collins said that the Applicant's mental state has deteriorated rapidly. She is withdrawn and rarely wishes to socialise. She appears traumatised. There is a lack of affection in their relationship. He wishes things would return to how they were before January 2013.

173 In his witness statement and confirmed in oral evidence, Mr Collins said that the Applicant remained withdrawn and depressed and that there remained a lack of physical affection in their relationship, which in turn has impacted on the Applicant's ability to conceive a child:

> Mandy flinches away from me when I touch her and she will only show affection when initiated by her. Our plans to try and have children are off the table now as she cannot handle intimacy and appears to find it deeply traumatic. I find it very difficult to see my wife the way she is now.[132]

Further Evidence of Applicant

174 In her affidavit of 17 August 2015, the Applicant updates her current status as follows:[133]

> I have been struggling with anxiety and depression recently and suffering from aggravated nightmares. My ability to sleep has decreased again, particularly due to the nature of my nightmares and panic attacks. My intimacy with my husband has not yet returned and I feel terrible about that, but he continues to be extremely supportive.
>
> Given my relocation, I feel safer knowing that I'm not in the same place as the Respondent. The counselling that I am receiving is assisting me and I am continuing to paint my artwork and I have been attempting to provide some massage depending on how I am feeling.
>
> I would like to achieve a full recovery and I am working towards this. I am trying to be positive but I just want the nightmares to stop and I hate that I have to rely on medication to not feel so low.

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131 At [345].
132 Statement of Leigh Collins dated 24 January 2014 at [10].
133 Paragraphs [10]-[12] of the Applicant's affidavit dated 17 August 2015.

General Damages - Conclusion

175 In finding the incidents of sexual harassment proven, as detailed in the Initial Reasons, the Tribunal was satisfied that in the circumstances faced by the Applicant:

(a) A reasonable person would have anticipated that she would be offended, humiliated, insulted and intimidated by the incidents of proven sexual harassment by the Respondent; and

(b) She did not at any time welcome or condone the Respondent's sexual advances or requests for sexual intercourse with her. Indeed, she did many things to dissuade him from such conduct.

176 I am further satisfied that there is compelling evidence of the following:

(a) The Applicant has suffered severely as a result of the Respondent's sexual harassment, having been diagnosed with chronic post-traumatic stress disorder, major depressive disorder and anxiety disorder;

(b) The Applicant's personality profile has been significantly adversely impacted to the effect that her social relationships are inhibited and her marital relationship has come under severe stress;

(c) The expert evidence as detailed above is strong and consistent with the account given by the Applicant;

(d) The Applicant has endeavoured to address the adverse psychological impact upon her by immediately seeking medical assistance and ongoing psychotherapy. She has been a cooperative patient who has taken advice and endeavoured to maintain a constructive outlook;

(e) The Applicant has also endeavoured to mitigate her economic loss by retraining in therapeutic and remedial massage, which she can undertake in her own business; and by pursuing her artwork, which although not significantly remunerative, has provided an important therapeutic benefit;

(f) The Applicant has reasonably required ongoing psychological counselling and treatment for depression, which is likely to continue for some time;

(g) Save to the extent otherwise disclosed, the Applicant has been to date and remains incapacitated for work by reason of the severe adverse psychological impact and associated physical distress, as a consequence of the sexual harassment; and

(h) The loss of intimacy in her marital relationship is consistent with her ongoing psychological trauma and has been the source of significant distress and guilt within that relationship.

177 Having regard to the objects set out in the EOA, it is incumbent upon the Tribunal to have particular regard to the need to eliminate sexual harassment, to the greatest possible extent, in the workplace; and to encourage the identification and elimination of sexual harassment.

178 In my view, the circumstances of the Applicant reflect a particularly vulnerable employee. Her trust and confidence in the Respondent and their pre-existing positive working relationship, was shattered by the Respondent's initial sexual advance and propositioning. Although shocked, embarrassed and humiliated, her response to the Respondent was measured and designed to facilitate a prompt return to a professional working relationship. The harassment could have ended at this early stage and the Applicant may have been satisfied with a simple apology. In my view, the Applicant took all reasonable steps available to her to make her position known and dissuade the Respondent from further harassment. In the circumstances, although the Applicant ostensibly voluntarily resigned, she clearly did so in circumstances where she was effectively forced out by the Respondent's behaviour. There is no question that she loved her job, was good at it and would have chosen to remain in her position, but for the harassment.

179 In reaching an appropriate quantification of general damages in this case, I have had particular regard to:

(a) Awards of general damages for sexual harassment in workplace settings;

(b) Relevant objectives under the EOA, as outlined above; and

(c) The clarification of approach to compensation generally, in discrimination cases, as articulated in the *Richardson* case, which emphasises the importance of having regard to the general standards prevailing in the community for loss of enjoyment of life, and the experience of pain and suffering.

180 For the reasons given, I regard the incidents, many individually and particularly in aggregate, to constitute a grave example of sexual harassment which warrants an award of compensation in excess of that considered appropriate in the cases of *Tan, GLS, Richardson* and *Irwin*; and something approaching the awards made in the cases of *Willet* and *Swan.*

181 In all of the circumstances, the appropriate figure for general damages is $180,000. This amount does not include a component for aggravated damages, addressed below, which I also consider appropriate in this case.

AGGRAVATED DAMAGES

182 Section 125 of the EOA provides that the Tribunal may order a respondent to pay compensatory damages, being 'an amount the Tribunal thinks fit to compensate the applicant for loss, damage or injury suffered in consequence of the contravention'. The section does not spell out how damages may be measured. For this purpose, it is noted that aggravated damages are not punitive damages; they are but a part of compensatory damages. At common law, they are 'awarded for injury to the plaintiff's feelings caused by insult, humiliation and the like'[134] In my view, there is

[134] *Lamb v Cotogno* (1987) 164 CLR 1 at 8; *Myer Stores Ltd v Soo* [1991] 2 VR 597.

no question that aggravated damages may be a component of the compensation awarded under the EOA, having regard to the conduct of the contravening party.[135]

183 In *Spencer v Dowling*[136] Winneke P observed as follows, in the context of the earlier *Equal Opportunity Act 1984*:

> Because it is the Act's intention to provide a sum of damages to "compensate" the complainant for her loss, it seems clear to me that the damages have to be compensatory, as distinct from punitive, in nature ... Because aggravated damages have emerged over the years as an aspect of the measure of compensatory damages for some torts, it has been held in certain jurisdictions that, by analogy, it is appropriate to award such damages, where the circumstances demand it, in claims made under the equal opportunity legislation.
>
> ...
>
> Because the analogy to such torts has been drawn it has been suggested that, in an appropriate case, an award of compensatory damages can be swollen by an amount of aggravated damages where the conduct of the respondent has added to the hurt or humiliation on account of its malice or high handed nature: see *Hall v Sheiban*, at 239; *De Simone v Bevacqua*, at 269; *Alexander v Home Office* [1988] 1 WLR 968 at 875-6 per May L.J.
>
> …
>
> Because, however, an award of compensation under the Act will often comprehend an award for hurt, humiliation and injured feelings caused by the discriminatory conduct of the respondent, there is little doubt that, contained within the board's power, is a capacity to aggravate such compensation where the conduct, in committing the discriminatory act, has been high handed, malicious or oppressive (see *Alexander v Home Office*, at 975), and has been calculated to increase the hurt suffered by the Complainant.

184 I accept the submission of Applicant's Counsel that the following circumstances significantly aggravated the Respondent's offending conduct:

(a) The Respondent was not only the employer but in a position to exercise and did exercise direct supervision of the Applicant;

(b) The Respondent was the person to whom any complaint of sexual harassment would ordinarily be made. Hence, the Respondent's behaviour created an intolerable situation for the Applicant in which to perform her work, where she had no independent party to whom she could complain;

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135 See *Hall v Sheiban* [1989] FCA 72; (1988-89) 85 ALR 503 (Full Court); *De Simone v Bevacqua* (1994) 7 VAR 246 at 269 (McDonald J); *Spencer v Dowling* [1997] 2 VR 127; *Coyne v P & O Ports* [2000] VCAT 657 (31 March 2000) at p 34-35; *Ewin v Vergara* (No 3) [2013] FCA 1311 at [676].

136 [1997] 2 VR 127 at 144-145.

(c) The prolonged period over which the wrongful conduct continued;

(d) The wrongful conduct occurred mostly within a confined office environment;

(e) Ignoring the Applicant's requests to maintain a professional working relationship, the Respondent embarked upon a relentless course of sexual harassment,[137] principally at the workplace but including attempts to meet outside the workplace, blatantly disregarding the Applicant's happy marital relationship and otherwise act in defiance of the Applicant's requests and increasing distress;

(f) The impact of the Respondent's behaviour during employment was such as to create fear in the Applicant and continuing apprehension following termination of her employment as to likely unwelcome contact;[138] and

(g) In the face of objective written communications of a compromising nature, consistent with the Applicant's account of events, the Respondent persisted in his denials or lack of recall, while purporting to paint the Applicant as provocative and flirtatious.

185 In regard to the Applicant's fear of being confronted by the Respondent and her decision to relocate her home in order to reduce the risk of contact, I acknowledge that there is no evidence that the Respondent did, or attempted to, stalk the Applicant outside of the workplace or pose any physical threat to her.

186 In my view, the above circumstances are also rendered more aggravating by reason of the previous amicable and professional working relationship between the parties. The Applicant gave credible evidence, which I accept, to the effect that she endeavoured to manage an unwanted situation in a manner which would not upset or offend the Respondent. She confided in her husband that she wanted to handle the matter herself. I also accept that she felt trapped and powerless to prevent the Respondent's behaviour, particularly where she felt a financial dependency upon her employment.

187 In the circumstances, I consider that an amount of $20,000 is appropriate compensation to award for the additional aggravating factors.

PECUNIARY LOSS

188 In the Tribunal's view, the principles relevant to the calculation of pecuniary loss, which falls under the general heading of special damages, is uncontroversial. The Commission in its submission provided the following succinct summary:[139]

> Special damages, are calculated by reference to the economic loss suffered by an applicant as a consequence of the unlawful conduct. In the employment context, special damages usually focuses on lost

137 The Initial Reasons at paragraphs 380; 381(d), (r) (s), (z) and (dd).
138 The Initial Reasons at paragraph 381 (h), (i), (j) and (ee).
139 Paragraphs 88-90 of the Commission's submission.

> wages (both past and future), as well as other employment benefits the employee would have been entitled to such as a redundancy payment, expected pay rises, loss of superannuation payments, overtime payments or allowances.
>
> Special damages can also cover other non-employment related financial loss, including past and future medical expenses (cost of appointments and medication), travel expenses or other expenses for attending the hearing.[140]
>
> An amount of economic loss may be set off against other income or benefits that an applicant may have received in the relevant period.[141]

189 Each of the above components of pecuniary loss are addressed in the Applicant's affidavit of 17 August 2015.

190 Brief mention will be made to two relevant cases which are instructive as to the tailored approach which must be adopted in each case for quantifying damages for past and future economic loss.

191 In *Trolan v WD Gelle Insurance and Finance Brokers Pty Ltd*,[142] Ms Trolan brought a claim for damages for injury against her employer who breached his duty of care by subjecting her to bullying, intimidation and sexual harassment. The plaintiff worked in the defendant's employ from August 2008 until December 2008. The plaintiff was assessed by Dr Moore, Consultant Psychiatrist who was of the view that:

> … the plaintiff had developed an adjustment disorder with predominant anxiety and depression as a result of the serial harassment of a sexual nature in the workplace, which had resulted in her being unfit for work. Whilst Dr Moore considered the condition was temporary, she also noted the plaintiff had not yet reached a state of maximum medical improvement.[143]

192 When reassessed by Dr Moore in 2010, at the request of the worker's compensation insurer, Dr Moore concluded that the plaintiff had:

> …a diagnosis of chronic adjustment disorder with depression and anxiety … symptoms still due to the psychological condition directly related to her reported sexual harassment.[144]

193 The Court assessed Ms Trolan's losses in terms of past economic loss; loss of future economic loss and future loss of superannuation and fixed a sum of $733,723. In assessing the future loss, the Court was faced with a particularly complex calculation, which took account of an allowance for the plaintiff's likely improved residual earning capacity as well as the plaintiff's disabilities.

194 Similarly in *Cosma v Qantas Airways Ltd*,[145] Heerey J calculated the loss of wages from the date of dismissal from employment until the hearing date;

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140 See, eg, *Gama v Qantas Airways Ltd (No.2)* [2006] FMCA 1767 [129]-[130].
141 See, eg, *Howe v Qantas Airways* [2004] FMCA 242 [133].
142 [2014] NSWDC 185.
143 At [161].
144 At [165]-[166].

and future loss of wages from the hearing date until a notional retirement date. Past loss of wages was calculated by making an assessment of projected gross earnings, if he had continued to be employed by the respondent from the date of dismissal until the date of trial, deducting any income actually received. In relation to future loss of earnings, Heerey J used the Australian Life tables to identify the value of an adult male's gross weekly earnings until the date of notional retirement.

195 Taking account of the approaches taken the cases of *Trolan* and *Cosma*, in the context of the current case, I am satisfied that the methodology employed in the report of Cumpston Sarjeant, which was not otherwise challenged, provides a useful guideline for the Tribunal to assess past and future loss of earnings.

Loss of Employment and Employment Opportunity

196 The Applicant has not returned to full-time employment since her employment at the Respondent's Post Office ceased. Evidence in support of the Applicant's continued inability to undertake suitable employment, comprise the following:

(a) Expert evidence as outlined above; and

(b) The evidence of the Applicant as further confirmed and updated in her affidavit dated 17 August 2015.

197 As indicated above, in my view, the expert evidence was compelling and consistent with the evidence given by the Applicant.

198 The Applicant tendered an expert report prepared by Cumpston Sarjeant Consultant Actuaries for the purpose of providing professional calculations of her past and estimated future loss of earnings and superannuation. Against the objection of Respondent's Counsel, I allowed this report to be tendered. I accept that it is not relied upon as evidence of the Applicant's probable economic loss of future earnings or future incapacity to work. Rather, once the Tribunal has found an entitlement, it provides an actuarially sound basis for the calculation of past and assessment of future loss of earnings and superannuation.

199 As indicated above, I am satisfied that but for the Applicant's termination of employment with the Respondent, she would have continued in such employment or in equivalent suitable employment.

200 In relation to her future income earning capacity, the expert opinions are consistent in predicting that the Applicant will likely resume her capacity for full-time employment, with the assistance of continued psychotherapy and once legal proceedings have been concluded. In my view, given the delayed recovery to date, notwithstanding the Applicant's effort's to retrain herself and engage in limited private employment, it is appropriate to allow

145 [2002] FCA 640.

a period of a further 18 months compensation for loss of future earning capacity.

201 I now turn to the specific calculations for these heads of loss.

Past Loss of Earnings

202 The Applicant gave evidence that she would have continued working at the Post Office for the foreseeable future, but for the sexual harassment. The Respondent acknowledged that she was a competent worker and he appreciated her performance. I accept the Applicant's evidence to the effect that she was assured by the Respondent that her employment was secure, subject only to the return of his son to the Post Office. Accordingly, the position cannot be treated as a permanent position. Although the Respondent did give evidence to the effect that economic conditions were such that the Applicant's position could no longer be maintained, there was no objective evidence produced to that effect and there was no evidence that the Applicant had ever been advised that her position was no longer financially viable for the business. In all the circumstances, I am satisfied that but for the occurrence and impact of the sexual harassment, the Applicant would have continued her employment with the Respondent for an indefinite period and thereafter have secured alternative employment, at least at an equivalent level of remuneration.

203 Having regard to the experience and vocational skills which the Applicant had acquired from past employment together with her demonstrated capacity to secure continued employment in the past, I am satisfied that she would have had very good prospects of securing further suitable employment.

204 The Applicant's affidavit calculates her loss of gross income up to 16 August 2015 as follows: $872 per week x 123 weeks = $107,256.00.

205 The Applicant's income receipts total $41,974.50 comprising:

(a) WorkCover payments received between 5 April 2013 and 31 May 2014, totalling $37,349.00;

(b) Invoices issued for professional massage services totalling $1,470.50; and

(c) Invoices issued for the sale of her artwork totalling $3,110.00.

206 Accordingly, past gross loss of earnings to 16 August 2015, calculated by the Applicant, after adjustment for WorkCover and income received or due is $65,326.50 ($107,256.00 - $41,974.50). I note that the Applicant has given pre-tax figures and has not allowed any amount for superannuation or increase in wages.

207 In the report of Cumpston Sarjeant, the relevant calculation for lost gross earnings from 4 April 2013 to 8 October is $120,900.00 plus $11,300.00 for superannuation, totalling $132,200.00. The after tax figure is $111,000.

208 After taking into account WorkCover, art and massage invoices totalling $41,974.50, the gross loss of earnings is $90,225.50. The difference between the two figures derived from the calculations by the Applicant and Cumpston Sarjeant (namely, $65,326.50 against $90,225.50) is attributable to three factors: superannuation ($11,300.00); the annual wage increase applied by Cumpston Sarjeant, in accordance with average weekly earnings of Victorian females; and the Cumpston Sarjeant report also takes into account an additional three weeks of lost earnings, as it calculates up to 8 October 2015, whereas the Applicant's affidavit calculates up to 16 August 2015.

209 According to the above analysis, the Cumpston Sarjeant report is within a reasonable approximation of the Applicant's own less generous estimation of her loss of income, in her affidavit of 17 August 2015.

210 I am satisfied that the net value of lost earnings calculated in the Cumpston Sarjeant report, including superannuation ($111,000.00), is a fair estimate of actual lost net earnings before WorkCover, art and massage invoices are deducted. After deducting $41,974.50, I find that the value of lost earnings from 4 April 2013 to 8 October 2015 is approximately $69,025.50. I propose to award the discounted sum of $60,000, taking account of the risk of the Applicant not securing continuous employment for that period.

Future Loss of Earning Capacity and Earnings

211 As indicated above, and having regard to the expert evidence and the admissions of the Applicant, it is appropriate to make a relatively modest allowance for loss of future income earning capacity based upon the Applicant's inability to resume full-time employment for up to 18 months.

212 Having regard to tables 4.1 and 4.2 in the Cumpston Sarjeant report and allowing a discounted net earnings for 18 months of $60,000, and net superannuation of $11,250, together discounted by 15% for vicissitudes of life, I propose to award the sum of $60,000 on account of lost future net earnings and superannuation.

Out of Pocket Expenses

<u>To Date</u>

213 In her affidavit dated 17 August 2015, the Applicant details expenses, excluding legal fees, necessarily incurred in connection with:

(a) The services of health professionals, after allowing for any Medicare rebate, comprising:

i. $69.90 for appointments with Dr Phoebe Kok;

ii. $65.20 for appointments counselling appointments with Barbara Dickson; and

iii. $164.13 for appointments with Dr Emily Hill.

(b) Cost of medication in the sum of $282.90 including anti-depressants and sleeping tablets;

(c) Fees charged for medical reports tendered in this proceeding, comprising:

i. $445.50 for the report from Dr Frances Maxwell;[146] and

ii. $2,750.00 for the report from Professor Lorraine Dennerstein.[147]

(d) Fees charged for recovery of mobile phone data tendered in this proceeding, comprising:

i. $880.00 paid to National Surveillance and Intelligence;[148]

ii. $106.78 paid to MyCommerce;[149]

iii. $462.00 paid to Data Recovery Express;[150] and

iv. $72.63 paid to DRI Wondershare Data.[151]

(e) Relocation expenses as a result of the Applicant relocating to a suburb three hours away from Geelong, comprising:

i. $1,457.50 for removalist;[152]

ii. $250.00 for Truck Hire;

iii. $228.00 for return Ferry Trips to and from Geelong; and

iv. $1,548.08 in fees associated with the Applicant and her husband breaking a lease for a business premises in Geelong.[153]

214 The aggregate of the expenses, detailed above, is $8,782.62. In addition, the Applicant estimates that the fee for the report of Cumpston Sarjeant, will be between $1,500 and $2,000. I will allow $1,500.

Future Expenses

215 The Applicant continues to receive psychotherapy at least twice per month from her Counsellor and anticipates that she will need to continue to do so for the foreseeable future. Monthly fees for the two sessions total $130.40.

216 In addition, the Applicant continues to incur approximately $37.45 per month for the cost of antidepressant medication and sleeping tablets.

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146 Tax Invoice from Kardinia Health Ltd marked as 'AJC1'.
147 Tax Invoice from Platinum Medico-Legal marked as 'AJC2'.
148 'AJC3' shows two emails from National Surveillance and Intelligence regarding fees paid.
149 'AJC4' shows an email from MyCommerce regarding the data recovery fees paid.
150 'AJC5' shows a Tax Invoice from Data Recovery Express.
151 'AJC6' shows Billing Information for DRI Wondershare Data.
152 'AJC7' shows a copy of a Tax Invoice from Geelong Furniture Removals and Storage for removalist costs.
153 'AJC8' shows two Tax Invoices from Maxwell Collins with lease break fees.

217 Expenses for psychotherapy and medication for 18 months would slightly exceed $3,000. I propose to award the sum of $2,000 on account of such future expenses.

SUMMARY OF COMPENSATION

218 Accordingly, compensation to be awarded to the Applicant totals $332,280.00 comprising the following components:

(a) Damages, including aggravated damages of $200,000;

(b) Past loss of net earnings and superannuation of $60,000;

(c) Future loss of net earnings and superannuation of $60,000;

(d) Out of pocket expenses, incurred or to be incurred of $12,280.[154]

COSTS

219 Section 109 of the VCAT Act prescribes the general rule in proceedings before the Tribunal that each party bears their own costs. Nevertheless, the Tribunal may order a party to pay all or a specified part of the costs of another party, but only if the Tribunal is satisfied that it is fair to do so after having regard to the matters set out in sub-s (3).

220 Section 111 of the VCAT Act provides:

> If the Tribunal makes an order for costs, the Tribunal—
>
> (a) may fix the amount of costs itself; or
>
> (b) may order that costs be assessed, settled, taxed or reviewed by the Costs Court.

221 In the Human Rights jurisdiction of the Tribunal, it has sometimes been expressed to the effect that an order for costs will only be made in special and limited circumstances.[155] This is because, being a protective jurisdiction, cost orders might operate as a discouragement, preventing complaints from being made to the Tribunal.[156]

222 Similar sentiments have been expressed in discrimination matters in the Federal Magistrates' Court. In *McKenzie v Department of Urban Services*, Raphael FM said:[157]

> Anti-discrimination matters are generally considered to be a type of dispute which do not attract orders for costs. There was no provision for costs in the inquiry system previously operated by HREOC. In State tribunals there is provision to award costs but this is not often done. The Federal Court and the Federal Magistrates Court are courts of law and not tribunals and the *HREOC Act* does not contain any

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154 Rounded down from $10,282.62.

155 *Atkins v State of Victoria* [1999] VCAT 271; *Deckert v Victorian Institute of Dryland Agriculture* [2006] VCAT 299 [35]-[38] per McKenzie DP; *Tan v Xenos* [2008] VCAT 1273 [16]-[20] (Judge Harbison VP); *Morros v Chubb Security Personnel Australia* [2009] VCAT 1845 [18]-[19] (Megay SM).

156 See also *GLS v PLP* at [280].

157 [2001] FMCA 20 [95].

> prohibition on the award of costs. In previous matters … I have indicated that I think an award of costs is appropriate where otherwise a party may have the benefit of his or her award of damages totally eliminated by the cost of the proceedings.

223 The purpose of the general rule is to promote access to justice generally and to minimise the overall level of costs in Tribunal proceedings as far as practicable.[158]

224 Nevertheless, while an award of costs may be made in limited and special circumstances, consistent with the public policy interest in not discouraging complaints in the human rights jurisdiction of the Tribunal, the test in making an award of costs, in human rights matters, as in all matters in the Tribunal, is whether 'it is fair to do so' having regard to relevant matters in s 109(3)

225 In *Tan v Xenos*,[159] Judge Harbison VP discussed some of the cost issues that can arise in cases under the former *Equal Opportunity Act 1995* (Vic). The case before Her Honour involved a fifteen day hearing which resulted in an award to the complainant of $100,000. The complainant's solicitor estimated her actual legal costs to be over $180,000, including counsel's fees of $65,000, solicitor's fees of over $12,000 and various disbursements. The respondent's legal costs were estimated by his solicitor at over $200,000.

226 As to the making of costs orders in complex equal opportunity cases, Her Honour said:[160]

> The Complainant has relied on the manner in which this proceeding was conducted, in similar fashion to that in a court, to justify an award of costs. In particular the Complainant points to the power in section 109 to take into account the nature and complexity of the proceedings.
>
> This argument was successful before His Honour Judge Dove in *Bryce v City Hall Albury Wodonga Pty Ltd trading as City Hall Hotel* (2004) VCAT 2013. He described the trial as follows:
>
> > The proceeding was a strongly contested action. Very much like a civil claim in negligence, both liability and damages were in issue. In all, fourteen witnesses were called, and the majority of those were cross-examined in detail and at length. During the hearing, it became apparent to me that neither side was willing to make any concession to the other. In sporting terms, it was a bruising battle. It has been stated, correctly, that it ran for four days. Expedition, which is a cornerstone of the Tribunal, as opposed to the often cumbersome and protracted hearings in courts of law, was not in the minds of the parties or their legal representatives here.

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158 *Stonnington CC v Blue Emporium Pty Ltd* [2004] VCAT 1441 [13] (Justice Morris P).
159 (Anti-Discrimination) [2008] VCAT 1273.
160 At [11], [12], 14], [15].

> In that case, as recognition of the complexity of the matter and its commercial importance to the parties, His Honour awarded costs to the successful Complainant.
>
> This approach has also been followed in cases at the Tribunal in several of its lists, particularly in relation to complex commercial disputes. A long, complex commercial dispute is, however, very different to a long, complex dispute in the anti-discrimination list. In this list, further considerations apply.

227 Her Honour then expressed her opinion as to whether costs should follow the event in equal opportunity cases:

> Decisions regarding costs in the Anti-Discrimination list of this Tribunal have emphasised the objective set out in section 3 of the Equal Opportunity Act, to provide redress for people who have been sexually harassed or discriminated against, and that it is important that potential claimants are not deterred from seeking redress by the prospect of a significant costs order against them. [161]
>
> The basis for the generally cautious approach to awarding costs is to preserve access to the Tribunal for claimants. The Tribunal is also concerned not to discourage litigants from presenting their claims in person, without legal representation. If costs were generally awarded for successful claims, or against unsuccessful claimants, the issue of costs would become a significant barrier to issuing in this forum. In this case, it is the successful claimant who stands to lose if costs are not awarded, but this will not always be the case. If costs orders were made as a matter of course, to "follow the event" as is the case in the Courts, a significant advantage of access to this Tribunal would be neutralised.[162]

228 I endorse Her Honour's comments. There is no special rule for awarding costs to successful claimants in sexual harassment cases. However, there may still be compelling reasons to award costs, wholly or in part, in special circumstances. In *Tan v Xenos*, Harbison J was satisfied that certain special circumstances rendered the case more complex by reason that the Respondent had led irrelevant material thus unreasonably protracting the hearing. As a consequence the respondent was ordered to pay one third of the complainant's taxed costs.[163] Consistent with the sentiment expressed in the *McKenzie* case above, Her Honour was also minded that the costs incurred by the applicant would significantly diminish, if not eliminate, any award of damages.

Costs of the proceeding generally

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161 At [16].

162 At [19].

163 In *Styles v Murray Meats Pty Ltd* (2005) VCAT 2142 the Tribunal awarded costs to the complainant after taking into account that the respondent's defence to the claim of sexual harassment was very weak.

229 The Tribunal's jurisdiction under s 109 was considered by Gillard J in *Vero Insurance Ltd v The Gombac Group Pty Ltd,*[164] His Honour said as to the power in s 109(3) of the VCAT Act:[165]

> It can be seen that the general rule to apply in all proceedings is that "each party is to bear their own costs in the proceeding." Despite the general rule, the Tribunal may at any time order a party to pay costs to another party. The general rule expressed in s.109(1) must yield to a finding by the Tribunal pursuant to s.109(3). However, the Tribunal may not make an order unless it is "satisfied that it is fair to do so", and in arriving at that decision the Tribunal is bound to have regard to a series of matters set out in s.109(3). Despite the fact that the various matters are listed, s.109(3)(e) operates to extend the relevant matters if the Tribunal considers that some other matter is relevant. That is, the listed matters are not exhaustive.
>
> It follows that the general rule applies and the Tribunal may only make an order for costs if it is satisfied that it is fair to do so. That finding is an essential prerequisite to making an order for costs.
>
> In approaching the question of any application for costs pursuant to s.109 in any proceeding in VCAT, the Tribunal should approach the question on a step by step basis, as follows –
>
> (i) The prima facie rule is that each party should bear their own costs of the proceeding.
>
> (ii) The Tribunal may make an order awarding costs, being all or a specified part of costs, only if it is satisfied that it is fair to do so. That is a finding essential to making an order.
>
> (iii) In determining whether it is fair to do so, that is, to award costs, the Tribunal must have regard to the matters stated in s.109(3). The Tribunal must have regard to the specified matters in determining the question, and by reason of paragraph (e) the Tribunal may also take into account any other matter that it considers relevant to the question.
>
> ...Whilst it is appropriate for the Tribunal to consider each of the specified matters in s.109(3) and express a view as to the weight that should be attached to the particular matters relied upon, in the end it is important that the Tribunal consider all the matters together and determine whether it is fair to make an order for costs. When dealt with in isolation, each of the matters may lead to the conclusion that it is not fair to make an order for costs, but when taken together, the Tribunal may be satisfied that it is fair to do so. It is the totality of all relevant matters under s.109(3) that must be considered in the context of the prima facie rule.
>
> Some of the matters specified in s.109(3) provide guidance to the Tribunal as to what orders should be made. For example, findings based on s.109(3)(a) and (b) would lead to an order being made against the party guilty of the conduct identified. Section 109(3)(c)

164 [2007] VSC 117.
165 Ibid [18]-[20] and [22]-[23] (emphasis in original).

> provides some guidance in that if the party makes a claim that has no tenable basis in fact or law, then that party should pay costs. On the other hand, s.109(3)(d) does not provide any guidance as to how a finding in relation to the nature and complexity of the proceeding should result in an order for costs. In this sense the paragraph is neutral, and in considering and having regard to the nature and complexity of a proceeding, the Tribunal may in all the circumstances conclude that a costs order should be made, or it may conclude that by reason of the nature and complexity of the proceeding no costs order should be made. But it must be steadily borne in mind that whatever findings may be made, having considered the matters set out in s.109(3), an order can only be made if the Tribunal is "satisfied that it is fair to do so.

230 Respondent's Counsel detailed certain procedural delays in the commencement or continuation of the hearing, occasioned by: the Applicant's failure to make arrangements for videoconferencing facilities for an interstate expert witness, unexpectedly unavailable in person; illness of Applicant's Counsel; the late filing of additional witness statements by the Applicant; and the Applicant's recusal application. Respondent's Counsel submitted to the effect that the Respondent incurred significant costs as a consequence, which the Applicant ought to be ordered to pay. No particulars of additional costs incurred by the Respondent was provided. However, in my view none of the matters referred to were occasioned by the deliberate or unreasonable action of the Applicant.

231 In regard to the late filing of witness statements by the Applicant, these were filed, with the leave of the Tribunal, only after the Applicant became aware of additional witnesses. The statements of Ms Korondy and Ms Sumner, were specifically procured for the purpose of rebutting certain assertions made in the Respondent's witness statement; and providing evidence of past similar behaviour by the Respondent toward female employees. As indicated in the Initial Reasons of the Tribunal, without regard to the efficacy of such tendency evidence, I was otherwise satisfied to the applicable standard of proof that alleged incidents of sexual harassment, were proven.

232 There is no basis for awarding costs in favour of the Respondent by reason of the above matters.

233 I now turn to relevant considerations under s 109(3) in the context of matters relied upon by the Applicant.

234 **First**, pursuant to s 109(3)(a):

> whether a party has conducted the proceeding in a way that unnecessarily disadvantaged another party to the proceeding by conduct such as—
>
> (i) failing to comply with an order or direction of the Tribunal without reasonable excuse;

(ii) failing to comply with this Act, the regulations, the rules or an enabling enactment;

(iii) asking for an adjournment as a result of (i) or (ii);

(iv) causing an adjournment;

(v) attempting to deceive another party or the Tribunal;

(vi) vexatiously conducting the proceeding.

235 Contrary to s 109(3)(a)(i), the Applicant alleges that the Respondent failed to comply with Orders of the Tribunal in the following respects:

(a) By filing and serving his Witness Statement and submissions on 27 February 2014 instead of by 24 February 2014, as ordered;

(b) By filing and serving his Supplementary Witness Statement on 11 June 2014, instead of on 26 May 2014, as ordered;

(c) By providing to the Applicant employment contracts and documentation relating to the Applicant's sick leave, over two weeks late on 10 June 2014 instead of on 26 May 2014, as ordered;

(d) By filing and serving submissions in reply dated 11 February 2015, to the Applicant's submissions in reply, without the consent of the Applicant or leave of the Tribunal.

236 While each of the above matters strictly constitute non-compliance with Tribunal orders, I am not satisfied that they were either so serious or actually disadvantaged the Applicant as to warrant a costs order in the Applicant's favour.

237 Contrary to s 109(3)(a)(iv), the Applicant alleges that the Respondent caused the hearing listed for 19 August 2014 to be vacated by requesting reasons for the order of the Tribunal dated 11 July 2014 on 25 July 2014.

238 The Respondent was entitled to seek reasons in the circumstances and I am not satisfied that the Applicant suffered additional costs unreasonably, particularly having regard to other concurrent procedural matters.

239 Contrary to s 109(3)(a)(vi), the Applicant alleges to the effect that the Respondent caused unreasonable and avoidable delay by frustrating the Applicant's presentation of her case; and causing unreasonable and avoidable stress upon the Applicant and her solicitors:

(a) By continually refusing to provide Australia Post documents to the Applicant, despite numerous requests;

(b) By giving only one week's notice that the medical experts of the Applicant were required to be available for cross-examination at the hearing; and

(c) By requesting a further independent medical assessment of the Applicant on 2 December 2014, less than two weeks prior to the hearing listed to commence on 15 December 2014.

240 I am satisfied that each of the above matters are likely to have caused unreasonable stress upon the Applicant; and delay and additional costs in the preparation of the Applicant's case.

241 **Secondly**, pursuant to s 109(3)(b), whether a party has been responsible for prolonging unreasonably the time taken to complete the proceeding.

242 The Initial Reasons of the Tribunal set out in some detail the conduct of each party in the proceeding. In my view, the Respondent unreasonably added to the Applicant's preparation of her case and prolonged the hearing by persisting with outright denials and implausible explanations in the face of strong and consistent evidence of the Applicant. In reaching this conclusion I draw upon the findings previously made in the Initial Reasons:[166]

> My overall assessment of the Respondent is that he was an evasive and unreliable witness. In reaching this conclusion, I have had particular regard to:
>
> i. A pattern of apparent selective recollections, in his oral evidence and witness statements;
>
> ii. His implausible explanations for the Applicant's behaviour or apparent change of behaviour;
>
> iii. His failure to provide either any comment or plausible explanation for a number of text messages and the St Valentine's Day Card;
>
> iv. His failure to recall aspects of significant events; and
>
> v. Inconsistencies between his written statements and oral evidence.
>
> …for the reasons given above, taking his evidence as a whole, I am not satisfied that he was a credible or reliable witness in relation to the matters in issue. In particular:
>
> (a) He was frequently evasive and non-responsive in his answers under cross-examination;
>
> (b) Where he could not recall conversations or text messages, he did not always deny that they did occur, but otherwise could not give any explanation for them;
>
> (c) Where there were text messages or phone records produced, he did not contest their content but equally provided no or no plausible explanation for them; and
>
> (d) Where he denied conversations or text messages, his accounts were often implausible and self-serving.

243 I was also satisfied that the Respondent's evidence in relation to the Applicant's alleged change of behaviour toward him was vague and entirely inconsistent with the Applicant's circumstances. Furthermore, I rejected any imputation which might arise from the Respondent's evidence that the

166 Initial Reasons at [8(b)]; [170].

Applicant engaged in flirtatious or provocative behaviour and that such behaviour induced the Respondent to initially '*test the waters*' or otherwise continue his attention toward her.[167]

244 I was further satisfied that the text messages provided highly reliable evidence of the knowledge and state of mind of the parties at various times throughout their interactions and also provided a reliable indication as to what events preceded the sending of the messages. In consequence, a significant amount of the Respondent's narrative was contradicted or became highly implausible when considered in the light of the text messages. Although the Respondent frequently could not recall them or the meaning or intent of the messages, there was no challenge to the veracity of those text messages which had been produced.[168]

245 I was further satisfied that there were numerous occasions, both in his witness statement and cross-examination, when the Respondent had a surprising lack of memory or poor recall of events which were potentially significant. He showed a repeated tendency to recall events in a way which supported his narrative, but without any particularity or detail about exactly what was said or done.[169]

246 Finally, even where the Respondent did not contest certain comments or conversations which the Applicant alleged, he otherwise rejected the connotation of sexualised comment or that such comment could amount to sexual harassment.[170] In my view, the position adopted by the Respondent was untenable in the face of the clear imputations which attached to such comments, in the context in which they were made.

247 **Thirdly**, pursuant to s 109(3)(c), the relative strengths of the claims made by each of the parties, including whether a party has made a claim that has no tenable basis in fact or law.

248 Both parties were represented throughout the proceeding and the hearing, by junior counsel and by legal practitioners. In this respect there was no great disparity in the relative strengths of the parties as might be relevant to a costs order, if one party were unrepresented.

249 However, Applicant's Counsel submitted that the Respondent's case was very weak and that the Respondent's attention had been directed to the documentary evidence upon which the Applicant proposed to rely in a letter of offer to the Respondent dated 16 January 2014.

250 In my view, the documentary evidence relied upon by the Applicant was significant and relevantly probative and entirely consistent with the position put by the Applicant.

251 Furthermore, as detailed in the Initial Reasons, the evidence otherwise presented by the Applicant was credible and reliable:

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167 Initial Reasons at [83].
168 Initial Reasons at [348] and following.
169 Initial Reasons at [359]-[360].
170 Initial Reasons at [376].

> The Applicant was generally consistent in her evidence which was also corroborated to the extent of available text messages and telephone records; I am satisfied that she gave a credible account of events, which were also plausible, having regard to the context and surrounding circumstances; I am also satisfied that her answers under cross-examination were responsive and consistent; and taking her evidence as a whole, I do not consider that there was any reasonable basis to impugn her credibility or reliability in relation to any issue in dispute;[171]
>
> …under cross-examination the Applicant maintained her accounts of the alleged events, in a responsive manner. In my view, no inconsistencies of substance were identified. The Applicant's recall of the events is also entirely consistent with the phone and text messages between the parties.[172]

252 **Fourthly**, pursuant to s 109(3)(d), the nature and complexity of the proceeding.

253 Whilst there were 33 alleged incidents of sexual harassment found proven under the EOA, they were not in any one instance of great complexity, nor did the case call for the determination or construction of legal issues of great complexity. There was compelling expert evidence called by the Applicant and substantial consensus between the experts as to the psychological condition of the Applicant. There was also significant objective evidence in the form of text messages, telephone records and the Valentine's card. Otherwise the case was predominantly one of credit with very different versions being advanced by the Applicant and the Respondent. On the basis of paragraph (d) alone, there is no reason to depart from the prima facie rule set out in s 109(1) that each party should bear their own costs of the proceeding.

254 **Finally**, pursuant to s 109(3)(e), any other matter the Tribunal considers relevant.

255 While Clause 22 of Schedule 1 to the VCAT Act provides that ss 112 to 115[173] do not apply to a proceeding under the EOA, nevertheless the making of settlement offers is an additional matter which may be taken into account under s 109(3)(e).

256 Counsel for each party provided details of the various offers made to settle the Applicant's claim. This information, comprised within the affidavits of Tara Paatsch dated 17 August 2015 (three) and 1 October 2015, and affidavits of Jessica Main dated 21 September 2015 (three), and each parties' submissions as to costs, were held in sealed envelopes and not opened or examined by me until a determination as to compensation had been made.

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171 [8(a)].
172 [377].
173 Dealing with the consequences of rejecting a settlement offer.

257 I propose to only make reference to the written offers, which I summarise as follows:

(e) The Applicant made the following written offers:[174]

i. A First Offer on 26 April 2013, for the sum of $60,344; This Offer was made prior to the commencement of proceedings on 3 July 2013 in an attempt to avoid the need to commence proceedings;175

ii. A Second Offer on 16 January 2014 for the sum of $50,000 plus costs;176

iii. A Third Offer on 16 December 2014, for the sum of $195,000 (inclusive of costs).

(f) The Respondent made the following written offers:

iv. A First Offer on 4 September 2013, the sum of $9,500;

v. A Second Offer on 8 October, 2013, the sum of $20,000;

vi. A Third Offer on 20 December 2013, the sum of $40,000.

vii. A Fourth Offer on 11 February 2014, the sum of $50,000; and

viii. A Fifth Offer on 14 December 2014, the sum of $75,000.

258 The Applicant's Third Offer was also proposed on the basis that the Applicant assessed her likely award of compensation and costs after hearing at: $100,000 general damages; $39,384 loss of net income; $6,459.50 out-of-pocket expenses; and costs, then estimated to be $129,001.85.

259 The Applicant has incurred legal costs and disbursements from the commencement of proceedings until 10 July 2015, being the date of receipt of the Initial Reasons and Orders, totalling $172,387.27.

260 The Respondent's First, Fourth and Fifth Offers each contained a reference to a date upon which the offer lapsed and that the Respondent would rely upon a failure to accept such offer in an application for costs pursuant to s 109(3)(e) of the VCAT Act.

261 The Respondent submitted that the Tribunal cannot determine that the parties intended to be bound by the offers made. I find this to be a somewhat curious submission which flies in the face of the terms of the Offers and the Respondent's assertion that its Offers were made in a genuine attempt to resolve the proceeding.

262 I make the following observations:

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174 The Second and Third Offers were said by the Applicant to have been made in the form of a Calderbank letter pursuant to the principles established in *Calderbank v Calderbank* [1975] 3 All ER 333): Counsel's written submission dated 10 September 2015 at [14] and [16].

175 Affidavit of Tara Paatsch dated 1 October 2015 at [9].

176 Costs were initially estimated to be $21,012.59 and subsequently revised to $14,290.22: Affidavits of Tara Paatsch dated 17 August 2015 at [9]; and 1 October 2015 at [6]-[8].

(g) My orders as to compensation are significantly in excess of the offers made by both parties;

(h) The initial offers made by the Respondent in the amounts of $9,500, $20,000 and $40,000 were low enough in the circumstances to not be regarded as bona fide attempts to settle the claim at the stage at which they were made; and

(i) Each of the offers made by the Applicant, at the stage at which they were made, represented reasonable bona fide attempts to settle the Applicant's claim.

263 In my view, the failure of the Respondent to accept any of the offers made by the Applicant was unreasonable and is a relevant matter to take into account in favour of awarding costs in favour of the Applicant, particularly in view of the substantial costs which have now been incurred.

264 For the reasons given above I am satisfied that it is fair to order costs in favour of the Applicant having regard to the considerations set out in s 109(3)(a)(vi), (b), (c) and (e), from 16 January 2014, being the date of the Applicant's Second Offer, as described above, but excluding costs referable to the claims which relied upon sections 15, 103 and 104 of the EOA.

265 I note from the affidavits of the Applicant's solicitor[177] that, for reasons stated in such affidavits, the Applicant's solicitor waived the Applicant's legal costs for the period 8 April 2014 to 22 April 2014 inclusive. Accordingly, any legal costs incurred by the Applicant associated with the events relating to the Directions Hearing on 12 May 2014 and the application for the reconstitution of the Tribunal, are not included within the ambit of costs claimed in association with the proceeding.

Scale of costs

266 The Tribunal does not have a scale of costs. Under rule 1.07 of the *Victorian Civil and Administrative Tribunal Rules 2008*, the power to award costs in the Tribunal effectively incorporates the rules applying in the County Court, unless the Tribunal orders otherwise. Amendments to the *County Court Civil Procedure Rules 2008* ('the Rules'), which became effective on 6 October 2014, repealed previous rules regarding orders to pay party and party costs, solicitor and client costs or costs on an indemnity basis, and replaced them with power to make an order for costs on a 'standard basis' or on an 'indemnity basis'.

267 The Rules still allow an order for costs to be taxed on a solicitor and client basis, although the 'standard basis' appears similar to the traditional 'solicitor and client' basis in any event. Relevantly, Part 3 of the County Court Rules (comprising rules 63A.27 to 63A.31) is titled 'Costs of Party in a Proceeding'. Rule 63A.27 provides that Part 3:

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[177] Affidavits 2 and 3 of Tara Paatsh dated 17 August 2015.

> applies to costs in a proceeding which by or under any Act or these Rules or any order of the Court are to be paid to a party to the proceeding either by another party or out of a fund.

268 Rule 63A.28 provides that:

> Subject to this Part, costs in a proceeding which are to be taxed shall be taxed on—
>
> (a) a standard basis;
>
> (b) an indemnity basis; or
>
> (c) such other basis as the Court may direct.

269 Rule 63A(30) provides that:

> On a taxation on a standard basis, all costs reasonably incurred and of reasonable amount shall be allowed.

270 This appears very similar, if not equivalent, to the traditional measure of 'solicitor and client' costs. Whereas 'solicitor and client' costs included all reasonable costs reasonably incurred, party and party costs were only necessary and proper costs. Furthermore, in *Gruma Oceania Pty Ltd v Bakar (No 2)*,[178] the Court observed:

> It can be seen from the above amendments to the Rules that from 1 April 2013: the usual basis of taxation became the standard basis; party and party costs and solicitor and client costs were deleted from r 63.28; and the former definition of solicitor and client basis was adopted for the definition of the standard basis. [footnote omitted]

271 The transitional provision for the 2015 amendments is set out in r 63A.28. The regulation provides:

> For the avoidance of doubt, these Rules, as amended by the County Court (Chapter I Costs Amendment) Rules 2014, apply to all things done or required to be done or omitted to be done on or after 6 October 2014 in, or in relation to, any proceeding in the Court, including the Costs court (including all work and all amendments, applications and orders) regardless of the date of commencement of the proceeding.

272 Accordingly, I propose to order costs to be assessed under the applicable County Court Scale taxed on a standard basis, in default of agreement.

CONCLUSION

273 For the reasons set out above, the Tribunal will order that pursuant to s 125(a)(ii) of the EOA, the Respondent pay the Applicant compensation in the aggregate sum of $332,280, comprising:

(a) General damages of $180,000;

(b) Aggravated damages of $20,000;

(c) Past loss of net earnings and superannuation of $60,000;

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178 [2014] VSCA 259, Neave, Santamaria and Kyrou JJA, [5].

(d) Future loss of net earnings and superannuation of $60,000; and

(e) Out of pocket expenses, incurred or to be incurred, of $12,280.

274 I further order the Respondent to pay the Applicant's costs of the proceeding, subject to the limitations contained within the Order.

Judge Jenkins
Vice President