***Ruby Haines****

# NOT ALL THAT GLITTERS: EXPLORING THE ADEQUACY OF COMPENSATION IN *TAYLOR V AUGUST & PEMBERTON PTY LTD* (2023) 328 IR 1

## I Introduction

It is increasingly recognised that workplace sexual harassment can have devastating consequences for victims.[1] While experiences differ, sexual harassment at work can have adverse impacts on a person's physical and psychological health, negatively affect their employment and career development, and have significant financial consequences.[2] It is known that women are sexually harassed in the workplace at a higher rate than men,[3] an issue the *Sex Discrimination Act 1984* (Cth) ('*SDA*') seeks to rectify.[4] The significance of the impacts of sexual harassment were recognised by the Federal Court in *Taylor v August and Pemberton Pty Ltd* ('*Taylor*').[5] After finding that the complainant had been subject to 'unwelcome and unsolicited' sexual conduct by her employer and colleague,[6] Katzmann J awarded a landmark payout of $140,000 in general damages for sexual harassment, the largest award of its kind under the *SDA* to date.[7]

As noted by Katzmann J, '[t]he purpose of damages is to compensate the applicant … not to reflect the community's appreciation of the extent of harm that can be

---

* LLB Candidate, BIntR Candidate (Adel); Student Editor, *Adelaide Law Review* (2024).

1 See, eg: Australian Human Rights Commission ('AHRC'), *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Report, 29 January 2020) ('*Respect@Work*'); Law Council of Australia, Submission No 249 to AHRC, *National Inquiry into Sexual Harassment in Australian Workplaces* (26 February 2019); Equal Opportunity Commission (SA), *Review of Harassment in the South Australian Legal Profession* (Report, 9 April 2021).

2 *Respect@Work* (n 1) 257–8.

3 AHRC, *Time for Respect: Fifth National Survey on Sexual Harassment in Australian Workplaces* (Report, 30 November 2022) 50 [3.2] ('*Time for Respect*').

4 *Sex Discrimination Act 1984* (Cth) ('*SDA*') s 3.

5 (2023) 328 IR 1 ('*Taylor*').

6 Ibid 15 [61].

7 Max Mason, 'Sydney Jeweller Hit with Record Sexual Harassment Damages', *Australian Financial Review* (online, 6 November 2023) <https://www.afr.com/work-and-careers/workplace/sydney-jeweller-hit-with-record-sexual-harassment-damages-20231103-p5ehia>.

occasioned by sexual harassment'.[8] While this is not an extraordinary observation, in light of recent reforms to the *SDA* to bring it in line with community standards,[9] this case note explores the historical emphasis on compensating the harm caused by sexual harassment. Ultimately, it concludes that the decision in *Taylor* acts as a timely reminder of the need for a more robust and preventative legal framework to address workplace sexual harassment.

## II Background

The applicant, Fiona Taylor, was employed by the respondent company, August and Pemberton Pty Ltd trading as Grew & Co, a small business which manufactures and sells fine jewellery.[10] Simon Grew, the second respondent, established the business in 2007 and is the manager and sole director of the company.[11] He is 10 years Ms Taylor's senior.[12] During Ms Taylor's employment, the business had no human resources department, meaning employees had to raise any issues with Mr Grew directly.[13]

While working at what she once considered her 'dream job', Ms Taylor complained of being sexually harassed by Mr Grew for a period of more than 22 months.[14] In 2020, she lodged a complaint with the Australian Human Rights Commission ('AHRC'), which was terminated due to a lack of reasonable prospects for resolution through conciliation.[15] Ms Taylor later commenced proceedings in the Federal Court against Mr Grew, alleging that he had contravened s 28B(2) of the *SDA*, which provides that it is unlawful for one employee to sexually harass another.[16] The initial AHRC complaint made by Ms Taylor also attracted an 'intimidatory and vindictive' response from Mr Grew's solicitors, which became the subject of a victimisation claim made by Ms Taylor in the Federal Court proceedings.[17] The scope of this case note, however, is limited to the sexual harassment claim only.

The conduct complained of by Ms Taylor fell into 'relatively discrete categories [including] the provision of numerous gifts; the making of certain comments and

8 *Taylor* (n 5) 86 [520].

9 See *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022* (Cth) ('*Respect at Work Amendment Act*').

10 Ibid 6–7 [3]–[4].

11 Ibid 6 [3].

12 Ibid 7 [5].

13 Ibid 7 [9].

14 Ibid 6 [1], 7 [10].

15 Ibid 9 [24]. Under s 46PO(1) of the *Australian Human Rights Commission Act 1986* (Cth) ('*AHRC Act*'), if a complaint is unsuccessful with the AHRC, an applicant can commence proceedings in the Federal Court or Federal Circuit Court.

16 *Taylor* (n 5) 10 [35], [38].

17 Ibid 74 [453].

"declarations of feelings"'.[18] Shortly after separating from his wife, Mr Grew started giving Ms Taylor gifts, which included jewellery, $2,000 in cash, a booking for a massage, a MECCA gift voucher, a Chanel coin purse, and a Michael Kors jacket.[19] Ms Taylor alleged that Mr Grew gave her a total of 19 gifts, all of which were both unsolicited and unwelcome.[20] She also contended that Mr Grew made unsolicited and unwelcomed comments to the effect of: 'I like petite curvy brunettes'; 'You have a really nice body'; 'You have a beautiful body'; and 'You have bedroom eyes'.[21] The conduct complained of also included Mr Grew's initial declaration of his feelings towards Ms Taylor, and when he revived the subject some months later.[22] Ms Taylor also alleged that Mr Grew had slapped her on her bottom while at work.[23]

### A *Sexual Harassment Under The* SDA

Liability for sexual harassment under the *SDA* is broad; it is not limited by 'temporal considerations',[24] nor the intention of a respondent.[25] Sexual harassment is defined under s 28A of the *SDA*. The elements of sexual harassment are: (1) the perpetrator 'makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed'[26] or the perpetrator 'engages in other unwelcome conduct of a sexual nature in relation to the person harassed';[27] and (2) in the circumstances, 'a reasonable person … would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated'.[28] The *SDA* only makes sexual harassment unlawful in particular contexts.[29] In the case of *Taylor*, the relevant context was the conduct occurring in the workplace, therefore falling within the scope of s 28A, by virtue of s 28B of the *SDA*.

---

18 Ibid 10 [35].

19 Ibid 16 [70], 23 [121], [126], 26 [148], 28 [161].

20 Ibid 15–16 [61].

21 Ibid 32 [185].

22 Ibid 37 [219]–[222], 42 [255]–[256].

23 Ibid 35–6 [209]–[213].

24 Section 28B of the *SDA* does not expressly require that sexual harassment occur 'during working hours or while the participants were working', and therefore liability is not restricted to these circumstances: *Ewin v Vergara [No 3]* (2013) 307 ALR 576, 585 [37] (Bromberg J).

25 *Vitality Works Australia Pty Ltd v Yelda [No 2]* (2021) 105 NSWLR 403, 425 [98] (Bell P and Payne JA) ('*Vitality Works*').

26 *SDA* (n 4) s 28A(1)(a).

27 Ibid s 28A(1)(b).

28 Ibid s 28A(1).

29 In addition to the workplace, div 3 of the *SDA* provides that sexual harassment is unlawful in other contexts such as: educational institutions (s 28F); goods, services and facilities (s 28G); provision of accommodation (s 28H); land (s 28J); clubs (s 28K); and Commonwealth laws and programs (s 28L).

Section 28A is therefore limited by an objective requirement that unwelcome conduct occurs in circumstances where a reasonable person would have anticipated that the complainant would be 'offended, humiliated or intimidated' by it.[30] Justice Katzmann in *Taylor* noted that

> it is not enough that the conduct was unwelcome. Nor is it enough that the complainant was offended, humiliated or intimidated by it. If the circumstances were such that a reasonable person would not have anticipated that was a possibility, the definition is not satisfied and the case must fail.[31]

The operation of the provision is otherwise broad. The phrase 'unwelcome conduct of a sexual nature' is subjective in nature, based on the recipient's perception and experience of the conduct.[32] While it includes conduct that invites or explores sexual behaviour, the meaning of 'unwelcome conduct' under s 28A is still 'of broad import' and 'should not be read down or confined by … limits or restrictions which do not appear in the statute'.[33]

### B *Assessing Sexual Harassment in Context*

As noted by Katzmann J in *Taylor*, '[a]part from the slap on the bottom, Mr Grew was not said to have touched Ms Taylor in an inappropriate way'.[34] The conduct complained of was largely not explicitly sexual in nature.[35] However, under s 28A, 'conduct of a sexual nature' may be implicit or explicit. This was recently noted in *Vitality Works Australia Pty Ltd v Yelda (No 2)*.[36] The Court of Appeal held that conduct which, on its face, appears to have no explicit sexual connotation, may still amount to 'conduct of a sexual nature' when assessed in context.[37] Justice McCallum also noted that the sexualisation of female employees by their male colleagues or employers is often implicit, and to suggest otherwise 'overlooks the infinite subtlety of human interaction and the historical forces that have shaped the subordinate place of women in the workplace for centuries'.[38] These gendered dynamics are also explicitly addressed under s 3(a) of the *SDA*, which outlines one of the objects of the Act is 'to give effect to certain provisions of the Convention on the Elimination of All Forms of Discrimination Against Women and to provisions

30 *SDA* (n 4) s 28A(1).

31 *Taylor* (n 5) 13 [48].

32 AHRC, *Sexual Harassment in the Workplace: A Code of Practice for Employers* (Guidelines, March 2004) 10 [1.1].

33 *Vitality Works* (n 25) 425 [97] (Bell P and Payne JA).

34 *Taylor* (n 5) 59 [356].

35 Ibid.

36 *Vitality Works* (n 25) 433 [125] (McCallum JA).

37 Ibid 426 [101] (Bell P and Payne JA), 433 [125] (McCallum JA).

38 Ibid 433 [125] (McCallum JA).

of other relevant international instruments'. The international instruments referred to similarly have goals of eliminating discrimination against women.[39]

## III Decision

Justice Katzmann ultimately held that Ms Taylor was sexually harassed by Mr Grew while she was employed by Grew & Co. Her Honour found that Mr Grew sexually harassed Ms Taylor, contravening s 28B(2), when he: slapped her on the bottom; declared his feelings for her, 'implicitly inviting her to enter into an intimate and personal relationship with him [that] she neither solicited nor welcomed'; and when he later revived the subject of his feelings with her, 'despite knowing she was not interested in such a relationship'.[40]

Ms Taylor was awarded general damages of $140,000 for the sexual harassment claim.[41] In total, she was awarded compensation of $244,284.[42] Prior to *Taylor*, the largest general damages payout under the *SDA* was $120,000 in 2019.[43] While Katzmann J recognised that Ms Taylor had suffered significant losses as a result of the sexual harassment, the general damages of $250,000 claimed by Ms Taylor was deemed 'manifestly excessive' and 'would not be compensatory but punitive'.[44]

Despite setting a new threshold for general damages in respect of sexual harassment claims under the *SDA*, not all of Mr Grew's conduct complained of by Ms Taylor was found to meet the meaning of 'unwelcome conduct of a sexual nature' for the purposes of s 28A. With respect to the gifts, Katzmann J accepted Ms Taylor's contention that all 19 gifts were unwelcome.[45] However, not all the gifts were found to amount to the conduct described in s 28A. Ten gifts were given to Ms Taylor before July or August 2019, with eight more gifted after this time. Justice Katzmann held that the earlier gifts could not be considered a sexual advance or other conduct of a sexual nature due to insufficient evidence of Mr Grew's romantic interest at that time.[46] Conversely, the gifts given after he declared his feelings for her clearly conveyed his affection and were 'part of an attempt to woo her', making them either

---

39 See, eg, *Convention (No 111) Concerning Discrimination in Respect of Employment and Occupation*, opened for signature 25 June 1958, 362 UNTS 31 (entered into force 15 June 1960) art 2; *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 1 March 1980, 1249 UNTS 13 (entered into force 3 September 1981) art 2.

40 *Taylor* (n 5) 63 [394].

41 Ibid 86 [522].

42 Ibid 86 [522], 89 [539], 90 [548], 91 [557]. Interest is not included in this figure.

43 *Hill v Hughes* (2019) 382 ALR 231.

44 *Taylor* (n 5) 86 [522].

45 Ibid 59 [369].

46 Ibid 60 [370]–[374].

an unwelcome sexual advance or other relevant sexual conduct.[47] However, in light of Mr Grew's 'generous nature', evidenced by the giving of gifts to other employees, her Honour was not satisfied that 'a reasonable person would have anticipated the possibility that Ms Taylor would be offended, humiliated or intimidated by this aspect of Mr Grew's behaviour'.[48] The gifts therefore did not constitute conduct within the meaning of s 28A.

When considering the comments made by Mr Grew about Ms Taylor's appearance, Katzmann J observed their close personal and professional relationship, noting their 'conversations were not confined to work-related matters' and often discussed health, fitness and diet.[49] Her Honour therefore found that, in this context, a reasonable person would not anticipate that Mr Grew's comments about her appearance would cause Ms Taylor to feel 'offended, humiliated or intimidated'.[50]

## IV Comment

While at first glance the outcome in *Taylor* seems to reflect the significant 'price' which courts acknowledge sexual harassment victims pay, it also highlights problematic aspects of the *SDA*. First, there is an explicit rejection by Katzmann J in *Taylor* that damages awarded in sexual harassment cases should be greater so as to reflect a change in community values; and second, irrespective of the damages awarded, the decision raises questions regarding the focus on compensation under the *SDA*.

### A *Community Values*

In 2014, compensation for sexual harassment under the *SDA* underwent a seismic change when the Federal Court handed down its decision in *Richardson v Oracle Corporation Australia Pty Ltd* ('*Richardson*').[51] In a primary judgment written by Kenny J, with Besanko and Perram JJ agreeing, the Full Court held that the orthodox 'general range' of non-economic damages in sexual harassment jurisprudence was no longer consistent with changing community values.[52] The appellant, who was awarded $18,000 in the first instance, had been persistently sexually harassed at work, resulting in significant psychological injury.[53] On appeal, the initial award was deemed 'manifestly inadequate' as it did not adequately compensate the loss and damage sustained by the appellant, and was 'out of step with the general standards prevailing in the community'.[54] The appellant was instead awarded $100,000 in

47 Ibid 60 [375].

48 Ibid 63 [391].

49 Ibid 8 [13], 63 [392].

50 Ibid 63 [392].

51 (2014) 223 FCR 334.

52 Ibid 363 [109], 366 [117] (Kenny J, Besanko and Perram JJ agreeing at 367 [119]).

53 Ibid 337 [2], 338–9 [6]–[12] (Kenny J).

54 Ibid 367 [118] (Kenny J).

damages.[55] Although *Richardson* is not uniformly followed, sexual harassment complainants have since received relatively generous compensation awards for psychological harm resulting from sexual harassment.[56]

*Richardson* is often cited as authority for awarding complainants more substantial compensation in sexual harassment claims, and makes litigation under the *SDA* 'considerably more attractive' for complainants.[57] The benefit of incentivising complaints under the *SDA* through larger damages awards cannot be understated. In 2022, the AHRC conducted its fifth national survey regarding sexual harassment in Australian workplaces, finding that only 18% of people who were sexually harassed at work made a formal report or complaint.[58]

Justice Katzmann noted the fact that sexual harassment is 'notoriously under-reported'.[59] However, when Ms Taylor sought to rely on *Richardson* in claiming general damages of $250,000, her Honour had 'real difficulty' with the submission.[60] Ms Taylor submitted it had been recognised since *Richardson* that there had been 'a further significant and fundamental shift in community standards' regarding the loss and harm occasioned by sexually harassing conduct,[61] and that an award of $250,000 in general damages would recognise this shift in community values.[62] Justice Katzmann rejected Ms Taylor's submission that damages ought to be awarded in accordance with 'the community's appreciation of the extent of harm that can be occasioned by sexual harassment'.[63] Instead, her Honour outlined that damages for sexual harassment could only be compensatory.[64] They could not be punitive, nor could they use Mr Grew's conduct as a cautionary tale for employers, or be taken to signify the judiciary's alignment with changing community values. Despite awarding general damages within the range endorsed by Kenny J in *Richardson*, Katzmann J emphasised that the compensation should only address the extent of the harm sustained by Ms Taylor, without the need to have regard to the community's appreciation of the harm.[65]

---

55 Ibid.

56 See Elizabeth Shi and Freeman Zhong, 'Addressing Sexual Harassment Law's Inadequacies in Altering Behaviour and Preventing Harm: A Structural Approach' (2020) 43(1) *University of New South Wales Law Journal* 155, 164–5.

57 Madeleine Castles, Tom Hvala and Kieran Pender, 'Rethinking *Richardson*: Sexual Harassment Damages in the #MeToo Era' (2021) 49(2) *Federal Law Review* 231, 231.

58 *Time for Respect* (n 3) 130 [5.1].

59 *Taylor* (n 5) 54 [332].

60 Ibid 86 [519]–[520].

61 Ibid 83 [502].

62 Ibid 86 [519].

63 Ibid 86 [520].

64 Ibid 86 [522].

65 Ibid 86 [520]–[521].

### B *Achieving Justice Through Compensation?*

Following the tabling of the AHRC's National Inquiry into Sexual Harassment in Australian Workplaces ('*Respect@Work*') report in 2020,[66] the *SDA* underwent significant changes.[67] Notably, a positive duty now exists under the *SDA* which requires employers to take proactive measurements to eliminate and prevent sexual harassment, as far as practicable.[68] Should these changes have been in force earlier, Mr Grew would have clearly been found to have breached his duty with respect to his conduct towards Ms Taylor.

These changes to the *SDA*, however, came into effect in December 2022, and therefore were not operative at the time of the conduct complained of in *Taylor*. The approach under the *SDA* applied in *Taylor* frames the regulation of sexual harassment as a private, individual issue rather than a systemic problem.[69] While the *SDA* is designed to compensate victims, historically it was not effective in preventing sexual harassment by changing behaviours and culture in the workplace. Prior to its amendment, the *SDA* adopted a 'corrective justice approach' whereby losses occasioned through sexual harassment were corrected by: (1) establishing 'a rule prohibiting the wrongful conduct'; and (2) 'requiring the wrongdoer to compensate the victim of the wrongful conduct for any loss or damage caused by the conduct'.[70] While this approach aimed to change behaviour on an individual basis, with damages acting as a deterrent to potential perpetrators, it did so in a reactive rather than proactive way, and was accordingly limited. It also failed to address the systemic causes of workplace sexual harassment.[71]

This corrective justice approach is also evident under the *Australian Human Rights Commission Act 1986* (Cth) ('*AHRC Act*'), which provides that sexual harassment claims under the *SDA* may be remedied through proceedings commenced in the Federal Court or Federal Circuit Court. Section 46PO(4) of the *AHRC Act* authorises the relevant court to make 'such orders … as it thinks fit', and provides the following examples:

66 *Respect@Work* (n 1).

67 *Respect at Work Amendment Act* (n 9).

68 *SDA* (n 4) s 47C.

69 Margaret Thornton, 'Sexual Harassment Losing Sight of Sex Discrimination' (2002) 26(2) *Melbourne University Law Review* 422, 424.

70 Shi and Zhong (n 56) 160, citing Jules Coleman, Scott Hershovitz and Gabriel Mendlow, 'Theories of the Common Law of Torts' (2022) (Spring) *The Stanford Encyclopedia of Philosophy* 1, 1.

71 See generally: Dominique Allen, 'Remedying Discrimination: The Limits of the Law and the Need for a Systemic Approach' (2010) 29(2) *University of Tasmania Law Review* 84, 88; Paula McDonald, Sara Charlesworth and Tina Graham, 'Developing a Framework of Effective Prevention and Response Strategies in Workplace Sexual Harassment' (2015) 53(1) *Asia Pacific Journal of Human Resources* 41, 42.

> (a) an order declaring that the respondent has committed unlawful discrimination and directing the respondent not to repeat or continue such unlawful discrimination;
> (b) an order requiring a respondent to perform any reasonable act or course of conduct to redress any loss or damage suffered by an applicant;
> (c) an order requiring a respondent to employ or re-employ an applicant;
> (d) an order requiring a respondent to pay to an applicant damages by way of compensation for any loss or damage suffered because of the conduct of the respondent;
> (e) an order requiring a respondent to vary the termination of a contract or agreement to redress any loss or damage suffered by an applicant …[72]

Each of the examples provided under s 46PO(4) are aimed at remedying or compensating wrongful conduct that has already occurred, with the exception of s 46PO(4)(a) which allows for an order to 'direct' a respondent 'not to repeat or continue such unlawful discrimination'. In *Taylor*, Katzmann J considered both ss 46PO(4)(a) and (d) relevant to her discretionary powers under the provision.[73]

Historically, the focus of the *SDA* has been to compensate harm caused by sexual harassment, rather than attempting to mitigate the unlawful conduct of employers and organisations. For what is a systemic issue, however, the legislative framework was arguably limited in its scope for addressing workplace sexual harassment.[74] It was also at odds with the objects of the *SDA*, which aims to 'to eliminate, so far as is possible, discrimination involving sexual harassment … in the workplace'.[75] With the introduction of a positive duty on employers to mitigate workplace sexual harassment, as well as improved regulatory mechanisms and discretions under the *AHRC Act*,[76] we will hopefully see a change to the way in which harm is addressed and prevented under the *SDA*.

## V Conclusion

As Katzmann J did not have the benefit of a reformed *SDA* when handing down her decision in *Taylor*, it is yet to be seen if preventative mechanisms under the new scheme will have a tangible impact on the incidence and litigation of workplace sexual harassment in Australia. What is clear, though, is that compensation alone is not enough to address the systemic issue of workplace sexual harassment. This case note accepts that the trend of more generous damages being awarded to complainants since *Richardson* is important; it reflects a positive shift in community values (whether express or implied by the courts), and makes formal complaints and

72 *AHRC Act* (n 15) s 46PO(4).

73 *Taylor* (n 5) 75 [455].

74 Margaret Thornton, 'Privatising Sexual Harassment' (2023) 45(3) *Sydney Law Review* 371, 373–4.

75 *SDA* (n 4) s 3(c).

76 *AHRC Act* (n 15) s 35L.

litigation under the *SDA* significantly more attractive. This is particularly important when little else exists to incentivise complainants. However, the introduction of reforms such as those prompted by the *Respect@Work* report change the normative approach to addressing sexual harassment claims — incentivising employers to act in a preventive capacity. This case note is therefore not a criticism of Katzmann J's furtherance of the trend of awarding substantial damages for non-economic loss occasioned by sexual harassment. Instead, it queries whether a normative shift in the assumption under the *SDA* would better achieve the objects of the Act in eliminating workplace sexual harassment. With new reforms in place, this remains to be seen.