VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL
HUMAN RIGHTS DIVISION
HUMAN RIGHTS LIST

A249/2012

Applicant	Mahendra Karan
Respondent	Hotondo Building Pty Ltd
Intervener	Victorian Equal Opportunity and Human Rights Commission

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SUBMISSIONS OF THE VICTORIAN EQUAL OPPORTUNITY AND HUMAN RIGHTS COMMISSION

A. INTRODUCTION

1. The Victorian Equal Opportunity and Human Rights Commission (**Commission**) sought leave to intervene in these proceedings pursuant to section 159 of the *Equal Opportunity Act 2010* (Vic) (**EOA 2010**) by way of letter dated 9 October 2013. Section 159 of the EOA 2010 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. These proceedings involve claims of discrimination based on race and physical features and victimisation in the area of employment.

2. The Victorian Civil and Administrative Tribunal (**Tribunal**) granted the Commission leave to appear as an intervener, and directed the Commission to file written submissions by 18 November 2013, by way of Orders dated 25 October 2013.

3. As an intervener, the Commission acts as an independent party, exercising its functions under section 155 of the EOA 2010. These functions include promoting and advancing the objectives of the EOA 2010, and to act as an advocate for the EOA 2010.

4. The Commission does not assume the facts as alleged are proven, nor does it propose to make submissions about the allegations of discrimination and victimisation in the context of the facts of the case. Rather, the Commission

seeks to confine its involvement in these proceedings to providing the Tribunal with guidance on principles relevant to remedies under section 125 of the EOA 2010, in the event the Tribunal finds there has been a contravention of the EOA 2010.

5. In particular, the Commission provides submissions on:

   (a) The framework for remedies under the EOA 2010;

   (b) General principles relevant to awarding compensation under the EOA 2010;

   (c) The Victorian context for remedies with a focus on general damages;

   (d) Federal case law examples from which the Tribunal may wish to draw guidance; and

   (e) Remedies which address systemic discrimination.

6. The Commission is able to provide oral submissions to the Tribunal on the application of these principles to the proceedings, if this assists the Tribunal at the hearing.

B. BACKGROUND

7. The Applicant, Mahendra Karan, alleges that he was discriminated against on the basis of his race and physical features and victimised during the course of his employment with the Respondent, Hotondo Building Pty Ltd (the **Application**), by his colleagues Michael Renwick and Sam Tucker.

8. The Applicant makes a number of allegations in relation to the conduct of Mr Renwick, including that:

   (a) in conversation about who would win in the cricket, stated "you blacks won't win, we the whites will win. Blacks are no good";[1]

   (b) made remarks about his race, for example, calling him "call centre" and comments about having to change his name to Max because Mahendra was an Indian name;[2]

   (c) touched his stomach in public on several occasions saying, "what's this big thing, get it off";[3]

[1] Numbered Particulars of Claim (as provided by the Respondent), paragraph 2
[2] Numbered Particulars of Claim, paragraphs 4, 12-13, 21, 27
[3] Numbered Particulars of Claim, paragraph 5

(d) made comments about the smell of the food he ate at lunch;[4]

(e) said he did not want ugly people in front of customers and that the builders would not want a black guy from a call centre to teach them stuff, when the Applicant asked to be based at franchise sites to train them to sell;[5]

(f) said that he remembered something that represented the Applicant, a set of clubs called "Black Max", that the Applicant was also black and called Max;[6]

(g) commented when a staff photo was taken that he hoped that the Applicant would not spoil the photo, "as you are the only black one here"; when the photo was put on the notice board, commented that because the Applicant was the only black one in the photo, he really stood out from all the white people;[7] and

(h) while the Applicant was re-filling his water bottle, asked whether he would try and sell it, as Indians normally try to sell everything.[8]

9. The Applicant makes allegations in relation to the conduct of Mr Tucker, including that:

(a) Mr Tucker asked him to change his name to an English name for cold-calling builders and to use that name on company letters, otherwise people would think he was an Indian calling from a call centre in India;[9] and

(b) When the Applicant complained about the behaviour of the Mr Renwick, Mr Tucker told him that he could not change Mr Renwick's behaviour and that he had two options: to ignore the racist remarks or look for another job.[10]

10. The Applicant alleges that the behaviour of Mr Tucker and Mr Renwick made him feel degraded and humiliated. The Applicant states that he has found it hard to cope, has been stressed, anxious, had panic attacks, insomnia, become depressed and has attempted suicide on several occasions and been admitted as

[4] Numbered Particulars of Claim, paragraph 6
[5] Numbered Particulars of Claim, paragraph 9
[6] Numbered Particulars of Claim, paragraph 16
[7] Numbered Particulars of Claim, paragraphs 18-19
[8] Numbered Particulars of Claim, paragraph 43
[9] Numbered Particulars of Claim, paragraph 12
[10] Numbered Particulars of Claim, paragraph 30

an involuntary patient several times.[11] The Applicant says he was made redundant whilst on leave receiving treatment for his medical conditions.[12]

11. The Particulars of Defence, filed by the Respondent, deny the allegations made by the Applicant, save that they admit that (in relation to the above summarised conduct):

    (a) Mr Tucker suggested that the Applicant use an abbreviation of his name when leaving phone messages to avoid using a long name.[13]

    (b) Mr Renwick said that he had a set of golf clubs named "Black Max", but that this did not constitute unfavourable treatment, as it was intended as humour and the Applicant laughed.[14]

C. FRAMEWORK FOR REMEDIES UNDER THE EOA 2010

12. Section 125 of the EOA 2010 provides that after hearing the evidence and representations that parties to an application may adduce or make, the Tribunal has a the following options available to it:

    (a) find there has been a contravention of Part 4, 6 or 7 of the EOA 2010 and make orders for remedies;

    (b) find that there has been a contravention of Part 4, 6 or 7 of the EOA 2010 but decline to take any further action; or

    (c) find that there has not been a contravention of Part 4, 6 or 7 and make an order that the application or part of the application be dismissed.

13. If the Tribunal considers that the Applicant has proven on the balance of probabilities that a breach of Part 4, 6 or 7 of the EOA 2010 has occurred by the actions attributable to the Respondent, and decides to make orders for remedies, the Tribunal has the power under section 125(a) to make one or more of the following orders:

    (a) that the person refrain from committing any further contravention of this Act;[15]

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[11] Numbered Particulars of Claim, paragraphs 44, 46-47 and 53-54
[12] Numbered Particulars of Claim, paragraph 49
[13] Particulars of Defence, paragraph 12(b)
[14] Particulars of Defence, paragraph 16(a) and (b)
[15] Equal Opportunity Act 2010 (Vic) (**EOA 2010**), section 125(a)(i)

(b) 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;[16] and/or

(c) that the person do anything specified in the order with a view to redressing any loss, damage or injury suffered by the applicant as a result of the contravention.[17]

14. The onus is on the Applicant to make a claim for applicable remedies and provide evidence of any loss, damage or injury. Such a claim could be supported by the Applicant's own testimony or the testimony of his medical providers, or by providing evidence of lost income or employment benefits, travel expenses, medical expenses, or copies of relevant medical reports.[18] It is for the Tribunal to determine what weight should be given to the evidence provided by the Applicant regarding remedies.

15. In making any order for remedies under section 125, the Commission submits that the Tribunal have regard to the objects of the EOA 2010 as set out in section 3, and in particular the objective to eliminate discrimination, including systemic discrimination, within the covered areas of public life.

16. The Commission further submits that in circumstances where an applicant is unrepresented, including at the time of filing his or her material to be relied upon, the Tribunal should approach its assessment of remedies with section 98(1) of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) in mind. In particular, the Tribunal is not bound by the rules of evidence and the Tribunal may inform itself on any matter it seems fit, including, for example, the extent of the Applicant's loss.

D. PRINCIPLES REGARDING COMPENSATION PAYMENTS

17. The Tribunal has the power under section 125(a)(ii) of the EOA 2010 to award an applicant payment of an amount which the Tribunal thinks fit "to compensate the complainant for loss, damage or injury suffered in consequence of" the contravention of the EOA 2010. The Tribunal has no power to award damages

[16] EOA 2010, section 125(a)(ii)
[17] EOA 2010, section 125(a)(iii)
[18] See, e.g. *Qantas Airways Ltd v Gama* (2008) 167 FCR 537, 569-570 [100]-[104]

under section 125(a)(ii) of the EOA 2010 for causes of action it has no jurisdiction to hear, or for aspects of the case which do not amount to unlawful conduct for the purposes of the EOA 2010.[19]

18. The Commission submits that the focus in awarding compensation under this section is therefore on what "loss, damage or injury" has been suffered by the Applicant. The Applicant must show a causative link between the conduct in contravention of the EOA 2010, and the loss, damage or injury.[20] This is because the purpose of an award of damages is to attempt to measure, in monetary terms, the loss, damage and injury that has been suffered as a result, or "in consequence of" the unlawful conduct.[21]

19. The Commission further submits that the unlawful conduct need not be the only cause of the loss, damage or injury. In relation to this issue, in *GLS v PLP (Human Rights)* [2013] VCAT 221 (***GLS v PLP***), Justice Garde quoted with approval from the High Court decision *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109, where Gaudron, Gummow and Hayne JJ stated the following as to the award of damages under other statutory provisions:

> There may be many acts or omissions that could be said to have contributed to the happening of an event. As has often been mentioned in learned articles on the subject of causation, the decision of a tortfeasor's great-great grandmother to have children can be identified as one factual cause for an event which is the subject of litigation. To search for the single cause of an event is, therefore, to pursue an illusion. And, much more often than not, to speak of the "effective cause" or the "proximate cause" (or to use some similar expression) is to hide important assumptions that are made, or conclusions that are reached, about the attribution of responsibility for particular kinds of act or omission. That is why it is necessary to understand the purpose for making some inquiry about causation. Only when the purpose of the inquiry is known is it possible to identify and articulate how and why some circumstances are extracted "out of the whole complex of antecedent conditions of an event" and identified by the law as a cause of it.
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> In light of these considerations, it is hardly surprising that it is now well established that the question presented by s 82 of the Act is not what was the (sole) cause of the loss or

[19] For example, defamation, breach of duty of care, and failure to provide a safe working environment, all of which are claimed by the Applicant in his Particulars of Claim.
[20] *Coyne v P&O Ports* [2000] VCAT 657, 35
[21] EOA 2010, section 125(a)(ii); *GLS v PLP (Human Rights)* [2013] VCAT 221 [259], [274]

> damage which has allegedly been sustained. It is enough to demonstrate that contravention of a relevant provision of the Act was a cause of the loss or damage sustained. [22]

Types of damages available

20. Compensation for "loss, damage or injury" generally falls into one of two broad categories:

    (a) special damages, as compensation for past or future economic losses, such as loss of wages or medical expenses; and

    (b) general damages, as compensation for loss caused by hurt, humiliation or injury to feelings such as a diagnosed psychological injury caused or exacerbated by discriminatory conduct.

21. A third category of damages is aggravated damages. These may be awarded in circumstances where there is clear evidence that the person who committed the discrimination was acting in a high handed, malicious, insulting or oppressive manner, or has acted in a way calculated to increase the hurt and suffering of the applicant.[23]

22. As financial compensation under section 125(a)(ii) is intended to remedy the "loss, damage or injury" suffered by an applicant, it is accepted that punitive awards of damages (exemplary damages) are generally not available in discrimination and equal opportunity cases.[24]

Principles for calculating damages

23. The principle method for calculating an award of damages was articulated in *Hall & Ors v A. & A. Sheiban Pty Ltd & Ors* (1989) 20 FCR 217 ***(Hall)***. In *Hall,* Lockhart J stated 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

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[22] *Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109, 128 [56]-[57], quoted in *GLS v PLP (Human Rights)* [2013] VCAT 221 [275]-[276]

[23] *Hall & Ors v A. & A. Sheiban Pty Ltd & Ors* (1989) 20 FCR 217, 239 (Lockhart J), citing *Alexander Home Office* [1988] 2 All ER 118, 122 (May JL); *Spencer v Dowling* [1997] 2 VR 127; *Laverdue v Jayco Caravan (Recreational Industries) Pty Ltd and anor* [2001] VCAT 1706 [16]-[17]

[24] *Spencer v Dowling* [1997] 2 VR 127; *Hall & Ors v A. & A. Sheiban Pty Ltd & Ors* (1989) 20 FCR 217, 240-241; *Phillis v Mandic* [2005] FMCA 330 [26]; *Maxworthy v Shaw* [2010] FMCA 1014 [192]

conduct had not occurred with the situation in which they were placed due to the conduct of the respondent.[25]

24. To assist with the assessment, both Lockhart and Wilcox JJ adopted as a statement of principle, what was said by May LJ in a racial discrimination case of the English Court of Appeal, *Alexander v Home Office* [1988] 2 All ER 118:

> 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 duration, is less serious than physical injury to the body or the mind which may persist for months, in many cases for life.[26]

25. This principle from *Hall* has been followed in subsequent discrimination and equal opportunity cases in Victoria and the Federal jurisdiction, and was adopted recently in a decision of the Tribunal, *Galea v Hartnett Blairgowrie Caravan Park (Anti-Discrimination)* [2012] VCAT 1049.[27] The Commission submits that the Tribunal should also adopt the approach of *Hall* in assessing the situation of the Applicant.

26. The Commission further submits that if the Tribunal determines an award of damages is appropriate, it must consider the specific public policy behind the EOA 2010, which can be seen in the objects of the Act. This includes recognition that discrimination can cause social and economic disadvantage and that access to opportunities are not equitably distributed through society.[28] It is widely accepted in the community and in judicial decision-making that racial

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[25] *Hall & Ors v A. & A. Sheiban Pty Ltd & Ors* (1989) 20 FCR 217, 239 (Lockhart J)
[26] *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)
[27] *Galea v Hartnett - Blairgowrie Caravan Park (Anti-Discrimination)* [2012] VCAT 1049 [83]
[28] EOA 2010, section 3(d)(i); Also see Hansard, *Legislative Assembly*, 10 March 2010, 783

discrimination and racial abuse can have tangible and intangible effects on a person, with Scarlett FM stating in 2011:

> Remarks which are calculated to humiliate or demean an employee by reference to race, colour, descent or national or ethnic origin, are capable of having a very damaging effect on that person's perception of how he or she is regarded by fellow employees and his or her superiors.[29]

Relevant factors in assessing special damages

27. 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 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.

28. 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.[30]

29. An amount of economic loss may be set off against other income or benefits that an applicant may have received in the relevant period.[31]

30. The Commission submits that relevant factors for assessing special damages include whether the Applicant is currently working, and if so, whether he is earning less than he did when working for the Respondent. If the Applicant is not working, then the Tribunal should consider any evidence of the Applicant's capacity to work, and whether he has reduced capacity by reason of any conduct found to be unlawful by the Tribunal under the EOA 2010.

Relevant factors in assessing general damages

31. The Commission submits that the starting point for assessing general damages is as stated by Justice Garde in *GLS v PLP*, that each case must be assessed on its own merit and an award of general damages should be made as appropriate for

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[29] *Trapman v Sydney Water Corporation & Ors* [2011] FMCA 398 [87], relying on *Qantas Airways Ltd v Gama* (2008) 167 FCR 537, 564 [78]
[30] See e.g. *Gama v Qantas Airways Ltd (No.2)* [2006] FMCA 1767 [129]-[130]
[31] See e.g. *Howe v Qantas Airways* [2004] FMCA 242 [133]

the individual case, having regard to the facts and circumstances and the contraventions proved.[32]

32. However, the difficulty in assessing non-economic loss was acknowledged by Wilcox J in *Hall*:

> Where it appears that a claimant has incurred particular expenditure or lost particular income as a result of the relevant conduct, that economic loss may readily be calculated. But damages for such matters as injury to feelings, distress, humiliation and the effect on the claimant's relationships with other people are not susceptible of mathematical calculation.[33]

33. The Commission submits that if the Tribunal finds a breach of the EOA 2010 has occurred, and there is evidence that the Applicant has suffered "loss, damage or injury" as a result of that conduct and an award of general damages is appropriate, then the Tribunal should consider the following factors to assist in its assessment of the quantum of damages:

(a) how severe the impact of the conduct has been on the Applicant;

(b) whether the unlawful conduct is repeated and ongoing over a period of time;

(c) whether the employer knew about the unlawful conduct and failed to act or take steps to prevent the conduct;

(d) whether the perpetrator of the unlawful conduct is in a position of power over the Applicant by reason of their age or their job;

(e) whether a psychological injury has been suffered as a result of the conduct, how severe that injury is and whether it is short-term or long-term;

(f) whether there is medical evidence of that psychological injury (although the Commission submits that failure to provide medical evidence is not fatal to a claim for compensation); and

(g) whether the conduct occurred in front of others, so as to worsen any hurt or humiliation suffered.

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[32] *GLS v PLP (Human Rights)* [[2013] VCAT 221 [273]-[274]
[33] *Hall & Ors v A. & A. Sheiban Pty Ltd & Ors* (1989) 20 FCR 217, 256 (Wilcox J)

34. In our submissions below, the Commission draws to the Tribunal's attention relevant case law in Victoria and in the Federal jurisdiction in which these factors arise.

Use of case law to assist with assessing general damages

35. The Commission acknowledges care needs to be taken in drawing comparisons to ensure that particular acts of discrimination are not "rated" or ranked against each other.[34] Similarly, the Commission is not seeking to encourage the Tribunal to find a "norm or standard" award of general damages arising out of this group of decisions.[35]

36. The Commission submits that it is reasonable for the Tribunal to consider other cases involving similar issues to those alleged in these proceedings (i.e. allegations of race discrimination or racial abuse), and draw guidance from the method in which other Courts or Tribunals have assessed the appropriate level of general damages, and the amount of damages they ultimately award.[36]

E. VICTORIAN CONTEXT

37. The Commission submits that the Tribunal may wish to consider Victorian jurisprudence to assist in its assessment of damages for the Applicant if his case is proven. However, we note that the level of general damages awarded in successful discrimination cases in Victoria has varied significantly from case to case.

38. By way of illustration, in the past five years, the awards of general damages by the Tribunal have ranged from $800 for humiliation and emotional distress in *Stern v Depilation and Skincare Pty Ltd* [2009] VCAT 2725, to $100,000 awarded in March this year to an applicant who had suffered serious psychological injury in *GLS v PLP.*

39. The highest award of general damages prior to *GLS v PLP* was in *McKenna v The State of Victoria* [1998] VADT 83, where the Victorian Anti-Discrimination Tribunal awarded $125,000 for discrimination in employment where the applicant suffered "considerable pain and suffering", extreme depression, stress

[34] *GLS v PLP(Human Rights)* [2013] VCAT 221 [273]-[274]; *Phillis v Mandic* [2005] FMCA 330 [26]
[35] *Gama v Qantas Airways Ltd (No.2)* [2006] FMCA 1767 [126]-[127]
[36] *Qantas Airways Ltd v Gama* (2008) 167 FCR 537, 568 [96] (French and Jacobson JJ)

and anxiety, culminating in a complete breakdown and suicide attempts.[37] The amount of general damages was not altered on appeal in *State of Victoria and Ors v McKenna* [1999] VSC 310.

40. One relevant Victorian decision where general damages were awarded for race discrimination is the case of *Laverdure v Jayco Caravan (Recreational Industries) Pty Ltd & Anor* [2001] VCAT 1706 (***Laverdure***). In *Laverdure,* the Tribunal upheld a claim of discrimination involving racist abuse in the workplace over a period of eight years, including the applicant being called a "black prick" and "black bastard".[38]

41. The Tribunal considered that the circumstances of the racial comments and the derogatory tone of those comments, observed by witnesses, indicated that their aim was to cause humiliation and denigration to the applicant.[39] The Tribunal awarded $5,000 in compensation for general damages for emotional hurt and humiliation, and $2,500 for aggravated damages. This level of compensation was awarded despite the applicant not requiring intervention of expert medical or psychological assistance.[40]

42. The circumstances leading to the award of aggravated damages were:

    (a) Continuation of the racial abuse by the second respondent despite being alerted to the inappropriate and illegal nature of his conduct, and his attendance at an educative program sponsored by his employer on this issue; and

    (b) Failure by the first respondent to monitor and prevent the conduct, in circumstances where it was aware of the second respondent's behaviour and was on notice of the nature of the conduct. [41]

43. The Commission submits that, in addition to the factors listed above in paragraph 33, where there is evidence that an employer is on notice that unlawful conduct is occurring, and takes no steps to stop the conduct or prevent it, and where that conduct is ongoing and intended to humiliate an applicant, this

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[37] *McKenna v The State of Victoria* [1998] VADT 83 [6.1]
[38] *Laverdure v Jayco Caravan (Recreational Industries) Pty Ltd & Anor* [2001] VCAT 1706 [2]
[39] *Laverdure v Jayco Caravan (Recreational Industries) Pty Ltd & Anor* [2001] VCAT 1706 [7]
[40] *Laverdure v Jayco Caravan (Recreational Industries) Pty Ltd & Anor* [2001] VCAT 1706, [16]-[17]
[41] *Laverdure v Jayco Caravan (Recreational Industries) Pty Ltd & Anor* [2001] VCAT 1706, [16]-[17]

may constitute appropriate circumstances in which to award aggravated damages.

F. FEDERAL CASE LAW EXAMPLES

44. The Commission submits that given the wide variation in the Victorian jurisdiction in the awarding of general damages, and the lack of directly analogous Victorian factual scenarios where damages have been awarded, the Tribunal may take guidance from other jurisdictions when assessing a claim for general damages by the Applicant.

Examples under the Racial Discrimination Act 1975

45. The Commission submits that there are cases under the *Racial Discrimination Act 1975* (Cth) (**RDA**) relating to racial abuse which provide a useful comparison to the case of the Applicant, if his claims are proven. While the test for racial discrimination in section 9 of the RDA is different than the tests for discrimination in the EOA 2010, the Commission submits that parallels may nevertheless be drawn between the conduct that is proven, the relevant factors taken into account by the Court or Tribunal (including those as set out in paragraph 33 above), and the amount of damages awarded.

46. The Federal case law examples are set out below by reference to the amount of damages awarded (with the highest award first). The range of general damages awarded in these cases is $40,000 to $5,000.

47. In *Gama v Qantas Airways Ltd (No.2)* [2006] FMCA 1767, the Federal Magistrates Court accepted that racist remarks may be sufficient to constitute an act of discrimination within the scope of section 9 of the RDA. In this case, the applicant was subjected to racist comments in his employment, including being referred to as an "Indian taxi driver", and being told he walked up the stairs "like a monkey". Mr Gama provided evidence that he had suffered depression as a result of the conduct.

48. Mr Gama was awarded $71,692.70 in compensation by the Federal Magistrates Court, including an award of $40,000 for general damages.[42] Raphael FM stated that the quantum of general damages awarded to Mr Gama was intended to

[42] *Gama v Qantas Airways Ltd (No.2)* [2006] FMCA 1767 [127]-[131]

"reflect the fact that Mr Gama has only been able to persuade me of the existence of a general attitude of racial intolerance and a few unpleasant incidents", as opposed to long term abuse.[43] Mr Gama was also awarded special damages as a contribution towards his medical expenses.[44]

49. The decision was appealed by Qantas, including on the ground that an award of $40,000 for general damages was "manifestly excessive." The Full Federal Court dismissed this ground of appeal, finding the quantum of damages awarded for racial discrimination was appropriate given the Federal legislative scheme provided for "discretionary and compensatory" remedies, and confirmed the decision below in respect of the racial discrimination complaint.[45]

50. In *Rugema v Gadsten Pty Ltd & Derkes* [1997] HREOCA 34, the complainant was subjected to racial abuse at work over a period of six years including being called "black cunt", "black bastard" and "lazy black". The complainant was born in France, and was of black African origin and appearance. He had complained about the conduct, but his employer took no steps to stop or prevent the behaviour continuing. As a result, the complainant suffered a major depressive disorder and "significant pain and suffering and loss of enjoyment of life", was at times, suicidal, and spent three weeks in a psychiatric hospital.[46] The long term effects of the abuse were considered significant enough by the Human Rights Commission to award $30,000 in general damages and $25,000 in special damages for loss of earning capacity.

51. In *Carr v Boree Aboriginal Corporation* [2003] FMCA 408, Raphael FM made a finding that the respondent employer, through its agents, unlawfully discriminated against the applicant and dismissed her because of her race or 'non-Aboriginality' pursuant to sections 9 and 15 of the RDA. Raphael FM awarded the applicant $11,848.61 for loss of earnings together with interest.[47] Raphael FM also awarded $7,500.00 for general damages, taking into account the evidence that the applicant had suffered hurt, humiliation and distress, as a

[43] *Gama v Qantas Airways Ltd (No.2)* [2006] FMCA 1767 [127]
[44] *Gama v Qantas Airways Ltd (No.2)* [2006] FMCA 1767 [129]-[130]
[45] *Qantas Airways Ltd v Gama* (2008) 167 FCR 537, 568-569 (French and Jacobson JJ)
[46] *Rugema v Gadsten Pty Ltd & Derkes* [1997] HREOCA 34 [6]
[47] *Carr v Boree Aboriginal Corporation* [2003] FMCA 408 [10]-[11]

result of her treatment by the respondent employer, even though no medical evidence was produced.[48]

52. In *House & Anor v Queanbeyan Community Radio Station* [2008] FMCA 897, the Federal Magistrates Court accepted a claim by two Aboriginal women that their applications for membership of a local community radio station were rejected on the ground of their Aboriginality, amounting to discrimination based on race under section 9 of the RDA.[49] Following the principles in *Hall,* damages of $6,000 were awarded to each applicant. One of the applicants gave evidence that she felt insulted, distressed, a feeling of shame as a result of the membership refusal, and that she had "lost face" in the Aboriginal community as a result.[50] The Magistrate accepted that their feelings of distress and concern as a result of the rejection were genuine, although noted that medical evidence would have been useful.[51]

53. In *Trapman v Sydney Water Corporation & Ors* [2011] FMCA 398 the Applicant made a claim of race discrimination under section 9 of the RDA in relation to eight instances of alleged racist comments by colleagues. Scarlett FM found that one of the claims was made out, relating to a "weak and unfunny racist joke", told by the applicant's supervisor to the applicant, who was Aboriginal, and a group of co-workers. Scarlett FM accepted that the applicant had suffered an "injury" in the form of hurt and humiliation as a result of the racist joke, and although it was at the lower end of the scale it was conduct which should not be permitted in the workplace.[52] Again, following the principles in *Hall*, Scarlett FM considered that a restrained, but not minimal award was appropriate to compensate the applicant, and awarded $5,000 in general damages.[53]

Other Federal examples

54. The Commission considers that it may be useful for the Tribunal to draw some guidance from comparative jurisprudence in the context of or racial abuse in

[48] *Carr v Boree Aboriginal Corporation* [2003] FMCA 408 [12]
[49] *House & Anor v Queanbeyan Community Radio Station* [2008] FMCA 897 [119]
[50] *House & Anor v Queanbeyan Community Radio Station* [2008] FMCA 897 [79]
[51] *House & Anor v Queanbeyan Community Radio Station* [2008] FMCA 897 [89]
[52] *Trapman v Sydney Water Corporation & Ors* [2011] FMCA 398 [146]-[149]
[53] *Trapman v Sydney Water Corporation & Ors* [2011] FMCA 398 [149]

contravention of another law. To this end, it is open to the Tribunal to consider awards of damages under section 18C of the RDA:

- In *Kanapathy v In De Braekt (No.4)* [2013] FCCA 1368, the Federal Circuit Court awarded the applicant $12,500 for a single incident of racial abuse under section 18C of the RDA, comprising $10,500 general damages and $2,000 special damages in relation to medical expenses. In that case, the abuse was carried out by a legal practitioner towards a security officer at his place of employment, after the security officer requested the lawyer undertake a security screening at a law court building.[54]

- In *Barnes v Northern Territory Police & Anor* [2013] FCCA 30 the Federal Circuit Court awarded $3,500.00 general damages to the applicant as well as $1,000.00 for the applicant's expenses for attendance at the hearing, where a police officer shouted offensive words at the applicant due to his race, whilst driving past his home.[55]

- In *Sidhu v Raptis* [2012] FMCA 338, the Federal Magistrates Court awarded $2,000 for hurt and distress to the applicant arising out of the applicant being called a 'coconut' and 'nigger' in public.[56]

55. The Tribunal may also wish to consider examples of recent decisions under other Federal anti-discrimination laws, where damages have been awarded for abusive (but non-racial) conduct. For example:

- In *Burns v Media Options Group Pty Ltd & Ors* [2013] FCCA 79, the applicant was awarded a total of $81,213.46 for a breach of the *Disability Discrimination Act 1992* (Cth) and the *Sex Discrimination Act 1984* (Cth), comprising $31,213.46 in special damages, $40,000 for general damages and $10,000 for aggravated damages.[57] The applicant had experienced less favourable treatment because of his carer and family responsibilities,

[54] *Kanapathy v In De Braekt (No.4)* [2013] FCCA 1368 [63]
[55] *Barnes v Northern Territory Police & Anor* [2013] FCCA 30 [44]-[45]
[56] *Sidhu v Raptis* [2012] FMCA 338 [61]-[62]
[57] *Burns v Media Options Group Pty Ltd & Ors* [2013] FCCA 79, [1789]

including being subjected to abuse about his failure to work overtime and derogatory comments about his sick wife.[58]

- In *Maxworthy v Shaw* [2010] FMCA 1014 the applicant was ordered $25,000 as general damages and $33,394.50 as special damages for lost wages, for a breach of the *Disability Discrimination Act 1992* (Cth) and the *Sex Discrimination Act 1984* (Cth).[59] The respondent was also ordered to pay the applicant $5,000 as interest.[60] The applicant had been subjected to discrimination including detriment in the form of insulting treatment in relation to her disability (Crone's disease) and the requirement that she wear a colostomy bag.[61]

G. REMEDIES ADDRESSING SYSTEMIC DISCRIMINATION

56. Section 125(a)(i) of the EOA 2010 provides that the Tribunal may make orders to prevent further breaches of the EOA 2010. The Commission submits that this provision confers on the Tribunal the power to make orders which could remedy systemic discrimination.

57. Section 125(a)(i) of the EOA 2010 differs in a significant respect to the equivalent provision in section 136(a)(i) of the *Equal Opportunity Act 1995* (Vic) (**EOA 1995**). Section 136(a)(i) of the EOA 1995 provided that the Tribunal may make an order that the person refrain from committing any further breaches of the EOA 1995 'in relation to the complainant'. However, under the EOA 2010 there is no requirement to link the orders that the Tribunal may make to orders under section 125(a)(i) 'in relation to the complainant'.

58. Orders to address systemic discrimination would be particularly relevant, for example, in circumstances where the Tribunal found evidence of a culture of discriminatory conduct at the workplace, evidence of ongoing and sustained discrimination against the Applicant, or evidence that the Respondent did not have in place workplace policies or training which set out for its employees appropriate workplace behaviour and their responsibilities in relation to eliminating discrimination, sexual harassment, and victimisation.

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[58] *Burns v Media Options Group Pty Ltd & Ors* [2013] FCCA 79, [1721], [1734]-[1738]
[59] *Maxworthy v Shaw* [2010] FMCA 1014 [192], [196], [201]
[60] *Maxworthy v Shaw* [2010] FMCA 1014 [204]
[61] *Maxworthy v Shaw* [2010] FMCA 1014 [110]

59. Some examples of remedies that could be ordered under section 125(a)(i) of the EOA 2010 which might address systemic discrimination are:

(a) equal opportunity training for staff involved in unlawful conduct or for all staff;[62]

(b) amending a workplace policy to remove discriminatory clauses;[63]

(c) requiring an employer to implement a workplace policy on discrimination and equal opportunity;

(d) requiring an employer to prepare and register with the Commission an action plan that specifies steps necessary to improve compliance with the EOA 2010;[64] or

(e) recommending the employer request the Commission conduct a compliance review of their workplace policies.[65]

H. CONCLUSION

60. The Commission submits that the Tribunal has a broad discretion in determining remedies in cases where a contravention of the EOA 2010 has been proven and sufficient evidence provided in support of a claim for general damages.

61. The Commission submits that, if the Tribunal considers the Applicant's claim is proven and orders for remedies are appropriate under section 125 of the EOA 2010, the Tribunal should apply the principles from *Hall* by comparing the Applicant's current position to that he would have expected to be in, had the unlawful conduct not occurred.

62. In accordance with *Hall,* any award of damages to the Applicant should not be minimal as this would trivialise the public policy behind the EOA 2010, as evidenced by the objects in section 3.

63. In determining an award of special damages, the Commission submits that the Tribunal should consider the financial position of the Applicant and what losses he has suffered as a consequence of any unlawful conduct. Economic loss is not limited to lost wages, but can include any financial loss suffered by the

[62] *Morgan v Dancen Enterprises Pty Ltd (Anti-Discrimination)* [2006] VCAT 2145
[63] *South v RVBA* [2001] VCAT 207
[64] EOA 2010, section 152
[65] EOA 2010, section 151

Applicant such as lost employment benefits, medical and travel expenses, or loss of opportunity for pay rises or promotions. Special damages can be recovered for past and future economic loss, set off by any income or financial gain the Applicant has received since the unlawful conduct.

64. In determining any award of general damages, the Commission submits that the Tribunal should seek guidance from comparable case law in the Federal jurisdiction such as under the RDA, as the Applicant's claim relates to racial discrimination.

65. The Commission considers that in cases where racial discrimination has been proven, an award of general damages below $5,000 would be out of sync with contemporary decisions of the Federal courts, as well as community expectations about the consequences of unlawful conduct, and the public policy purpose of eliminating discrimination and providing equality of opportunity under the EOA 2010.

66. The Commission submits that in order to calculate an award of general damages appropriate to the facts and circumstances of the Applicant's case, the Tribunal should consider the following factors:

- how severe the impact of the conduct has been on the Applicant;
- whether the unlawful conduct is repeated and ongoing over a period of time;
- whether the employer knew about the unlawful conduct and failed to act or take steps to prevent the conduct;
- whether the perpetrator of the unlawful conduct is in a position of power over the Applicant by reason of their age, or their job;
- whether a psychological injury has been suffered as a result of the conduct, how severe that injury is and whether it is short-term or long-term;
- whether there is medical evidence of that psychological injury (although the Commission submits that failure to provide medical evidence is not fatal to a claim for compensation); and
- whether the conduct occurred in front of others, so as to worsen any hurt or humiliation suffered.

67. Finally, the Commission submits that the Tribunal should also consider whether the facts give rise to circumstances where it would be appropriate to make an order of aggravated damages, or an order to address systemic discrimination in the Respondent's workplace.

18 November 2013

Amended 21 November 2013

Victorian Equal Opportunity and Human Rights Commission