

Since December 2022, employers have a positive duty under the Sex Discrimination Act 1984 (Cth) (SDA) to take reasonable and proportionate measures to eliminate, as far as possible, sex discrimination, sexual/sex-based harassment, conduct conducive to a hostile workplace environment, and acts of victimisation against complainants and whistleblowers.

An employer's failure to meet its positive duty may result in various statutory contraventions, including those of the SDA itself. These consequences were recently illustrated in the landmark Federal Court decision of *Taylor v August and Pemberton Pty Ltd* [2023] FCA 1313, which saw the highest amount of general damages awarded in a sexual harassment claim under the SDA.

### Background

Ms. Taylor was employed by the respondent company, which traded as Grew & Co, a small business that manufactured and sold fine jewellery. Mr. Grew was Grew & Co's manager and sole director.

Ms. Taylor alleged that Mr. Grew engaged in unwelcome conduct, including:

- Declaration over text message of his (romantic) "feelings" for Ms. Taylor, who had then made clear that those feelings were not reciprocated (January 2020 confession)
- Reviving the subject of his feelings for Ms. Taylor when driving her home from work (June 2020 confession)
- Making unsolicited statements about Ms. Taylor's physical appearance, such as "I like petite curvy brunettes," "You have a really nice body," "You have a beautiful body," and "You have bedroom eyes."
- Slapping Ms. Taylor's bottom
- Making unsolicited expensive gifts, such as jewellery, cash, a gift card and massage

After the June 2020 confession, Ms. Taylor's working relationship with Mr. Grew deteriorated. Notably, Ms. Taylor received an inadvertent text message from Mr. Grew containing criticisms of her that had been intended for another recipient. Thereafter, Ms. Taylor went on a period of sick and annual leave without ever returning to the office.

On 28 August 2020, Ms. Taylor's lawyers sent a letter to Mr. Grew, claiming that he had made "persistent unwelcome advances to her of a sexual nature in an attempt to lure [her] into a romantic relationship with [him]!" In response, Mr. Grew, through his lawyers, sent a letter seeking Ms. Taylor's immediate return of "company property," including some of the jewellery gifts he had made to her, an iPhone 11, and a platinum band. In a further letter (15 October Letter), Mr. Grew's lawyers:

- Pressed for the return of this company property
- Demanded AU\$460 cost of labour for a silver and black ring that Ms. Taylor had allegedly put into production for a friend "which was treated, hallmarked and passed off as a Grew & Co product"

Further, in response to Ms. Taylor's complaint of sexual harassment with the Australian Human Rights Commission (Commission), Mr. Grew accused Ms. Taylor of theft and threatened to report her to the police. After resigning from Grew & Co, Ms. Taylor sought, among other forms of relief, AU\$250,000 general damages for sexual harassment and AU\$50,000 for victimisation.

### Decision

The Federal Court found that Mr. Grew (and thus Grew & Co) sexually harassed Ms. Taylor by slapping her on the bottom and making the January and June 2020 confessions. It also found that Mr. Grew, by way of the 15 October Letter, victimised Ms. Taylor by subjecting her to a "detriment" in response to her allegations and complaint that he had done acts in contravention of the SDA. Similarly, Mr. Grew's accusation of theft against Ms. Taylor and threat to report her to the police "was a vindictive act, taken in large part, if not entirely, in retribution for lodging her complaint to the [Commission]!" Though the iPhone 11 and platinum band had been company property, there was no apparent urgency in their return when Ms. Taylor was, at the time, a Grew & Co employee whose employment had not ended by way of termination or resignation, on an authorised period of leave.

According to Justice Katzmann, however, the amounts of general damages claimed by Ms. Taylor were "manifestly excessive" to the point of being punitive. In line with the compensatory nature of general damages, Ms. Taylor was awarded AU\$140,000 general damages for the sexual harassment, and AU\$40,000 for the victimisation. While acknowledging that Ms. Taylor's health has since improved and that she has returned to the workforce, the judge awarded the general damages in recognition of the chronic psychiatric disorder that Ms. Taylor had suffered due to Mr. Grew's conduct.

Indeed, the judge found that Ms. Taylor had experienced “depression and anxiety, disturbed sleep, reduced energy, poor concentration, lack of motivation, loss of appetite and a reduction in social contact,” as well as grief for the loss of her career and perceived damage to her reputation.

Additionally, Justice Katzmann awarded AU\$15,000 in aggravated damages due to the intimidatory conduct of Mr. Grew’s lawyers, who, in various forms of correspondence:

- Attacked Ms. Taylor’s character by alleging that she had “manipulated Mr. Grew during the course of her employment” and “[taken] advantage of their relationship for pecuniary gain,” neither of which were put to her in cross examination
- Made an unjustified threat against Ms. Taylor’s lawyers
- Described Ms. Taylor’s case as “frivolous, vexatious and lacking in merit,” which the judge regarded as unwarranted
- Made unfounded claims that Ms. Taylor repeatedly acted in a flirtatious way towards Mr. Grew

## What Does This Mean for Employers?

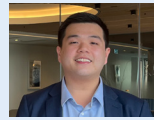
While the decision concerned conduct prior to the introduction of the positive duty, it indicates the court’s willingness to award significant damages (including aggravated damages) against employers who contravene the SDA. If this case had involved conduct that arose after the introduction of the positive duty, there can be little doubt that Grew & Co would have failed to comply with the duty. To this end, employers have only a matter of weeks to design and implement appropriate measures before the Commission will be legislatively empowered to inquire into an organisation’s compliance with the positive duty. For more information, read our previous [article](#) summarising the guiding principles and standards the Commission expects organisations to incorporate into their compliance measures. The case is also a reminder that we are likely to see a continuation of more significant damages being awarded in successful sexual harassment claims.

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