

Employment Services Australia Pty Ltd

v

Poniatowska [2010] FCAFC 92

Employment Services Australia (“ESA”) appealed a 2009 Federal Court decision that found a previous employee, Ms Poniatowska, was the victim of sexual harassment and discrimination. The appeal was dismissed and Ms Poniatowska was awarded \$466,000 in addition to legal costs. Ms Poniatowska had made allegations against two former fellow employees.

Allegation One

The first allegation related to the receipt of sexually explicit emails. A fellow employee of Ms Poniatowska sent her numerous emails, which contained requests for sexual relations. Ms Poniatowska rejected the first email and did not respond to the second. Some time later, several text messages were sent with similar sexual references. Ms Poniatowska received a final message requesting her not to report the matter to ESA. However, she did report the matter to the Team Leader of ESA, who in turn responded, “What do you expect with a face like that?”

Allegation Two

The second allegation began with Ms Poniatowska receiving a sexually explicit MMS from a different former fellow employee with the caption, “U have 2 b better.” The following week she received phone calls that contained requests for sexual relations. Ms Poniatowska did not formally report the matter, however, she did confide in a colleague, who in turn reported the communications to the Team Leader. The Team Leader informed the managing director, who pledged to investigate. A meeting was held and the fellow employee explained that he had sent the MMS to Ms Poniatowska inadvertently. Satisfied with this response, the managing director did not investigate further. He made no attempt to keep the matter confidential and it quickly became common knowledge in the office.

ESA Response

The employer did not have any formal process or policy for dealing with complaints of sexual harassment or sexual discrimination. During the course of these allegations, Ms Poniatowska was sent three written warning letters relating to her supposed poor performance. These were soon followed by a suspension letter. Ms Poniatowska was terminated for poor performance. She alleged that the termination was a direct result from her complaints of sexual harassment and discrimination. She claimed that her termination was in no way relevant to any poor performance on her part. Since her termination and until the date of the first instance judgment Ms Poniatowska was unable to work due to anxiety and depression; flowing from the alleged sexual harassment.

First Instance:

The Federal Court of Australia in South Australia found in favour of Ms Poniatowska on 3 August 2009. Particular emphasis was placed on ESA's slow response to the complaints and the lack of a formal procedure for dealing with such complaints. Despite this, the Federal Court stopped short of awarding exemplary damages and instead awarded \$466,000. ESA appealed to the Full Court of the Federal Court ("FCAFC").

Held:

On 27 July 2010 the appeal was dismissed by the FCAFC and the first instance award of \$466,000, in addition to costs, was upheld. The amount largely reflected the personal circumstances of her case, including for pain and suffering; past loss of earning capacity; future loss of earning capacity; and future medical expenses. Ms Poniatowska's anxiety, depression and her inability to work for a number of years were significant factors that the court took into account when determining the appropriate award.

The court held that Ms Poniatowska was dismissed because she did not 'fit' into the 'robust working environment' of ESA and that she was a 'female who would not tolerate' that environment and the subsequent sexual harassment. The majority also agreed with Mansfield J's first instance decision that Ms Poniatowska was treated less favourably than ESA would have treated a male employee in similar circumstances. This was based on evidence from, among other things, the sympathetic treatment afforded to the two male perpetrators as opposed to the victim, Ms Poniatowska.

ESA did not investigate Ms Poniatowska's legitimate concerns; instead they perceived her not as a 'victim of sexual harassment but as a problem to be dealt with.' The court refused to award exemplary damages, despite ESA not having appropriate mechanisms in place to deal with sexual harassment complaints.

Comment:

Even though the inadequate response by ESA did not amount to sexual harassment, the case reinforces the need for employers to have a formal process and policy of dealing with sexual harassment and sexual discrimination complaints. These processes and policies should be clearly explained and available to all employees. Employees should be familiar with the process and understand who they can contact should they choose to lodge a complaint. Employers should be quick to respond to any allegation. Appropriate

mechanisms must be in place and enforced as soon as possible. This includes investigating thoroughly and keeping the matter private so as not to cause any greater suffering to the alleged victim.

The case also highlights the need for caution when employers terminate employees for poor performance, especially when a complaint of harassment has been made. Clear reasons need to be given and writing formal warning letters may not always be sufficient.

It is relevant to note in the David Jones sexual harassment claim currently before the Courts exemplary damages are being sought. In this case that aspect of the damages claim was rejected. Nevertheless, the amount awarded in this case is believed to be the largest for a case of its kind in Australia. It demonstrates the benefits of taking preventative action before allegations of this kind have the opportunity to arise.

If you are concerned about your companies sexual harassment and discrimination policy; or alternatively if you feel you have been discriminated or harassed in the workplace, contact the specialist workplace lawyers, Nevett Ford.

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