FEDERAL COURT OF AUSTRALIA

Richardson v Oracle Corporation Australia Pty Limited [2013] FCA 102

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| Citation: | Richardson v Oracle Corporation Australia Pty Limited [2013] FCA 102 |
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| Parties: | **REBECCA RICHARDSON v ORACLE CORPORATION AUSTRALIA PTY LIMITED (ACN 003 074 468) and RANDOL TUCKER** |
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| File number: |  |
|  |  |
| Judge: |  |
|  |  |
| Date of judgment: | 20 February 2013 |
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| Catchwords: | **HUMAN RIGHTS** – discrimination – allegations of sexual harassment – repeated inappropriate remarks and invitations – vicarious liability – whether employer took all reasonable steps to prevent sexual harassment**HUMAN RIGHTS** – discrimination – indirect discrimination on the ground of sex – whether employee required to make a formal complaint**HUMAN RIGHTS** – victimisation – whether employee demoted or subjected to a detriment after making complaint of sexual harassment**CONTRACTS** – employment contract – whether employer repudiated contract – whether employee demoted**DAMAGES** – general damages relating to sexual harassment – expert opinion discounted in light of findings of fact – damages awarded for psychological injury – economic loss not established  |
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| Legislation: | *Australian Human Rights Commission Act 1986* (Cth)*Sex Discrimination Act* *1984* (Cth)  |
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| Cases cited: | *Employment Services Australia Pty Ltd v Poniatowska* [2010] FCAFC 92*Lee v Smith* [2007] FMCA 59*Poniatowska v Hickinbotham* [2009] FCA 680  |
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| Date of hearing: | 19, 20, 21, 22, 23, 26, 27 March, 24, 25, 26, 27 September, 2, 3, 8, 9, 15, 16, 29, 30, 31 October, 1 November 2012 |
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| Place: |  |
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| Division: |  |
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| Category: | Catchwords |
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| Number of paragraphs: | 259 |
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| Counsel for the Applicant: | Ms R Francois |
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| Solicitor for the Applicant: | Harmers Workplace Lawyers |
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| Counsel for the First Respondent: | Ms E Raper |
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| Solicitor for the First Respondent: | Baker & McKenzie |
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| Counsel for the Second Respondent: | Ms A Perigo (19, 20, 21, 22, 23, 26, 27 March 2012). Mr Tucker thereafter appeared in person. |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| NEW SOUTH WALES DISTRICT REGISTRY |  |
| GENERAL DIVISION | NSD 669 of 2010 |

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| BETWEEN: | REBECCA RICHARDSONApplicant |
| AND: | ORACLE CORPORATION AUSTRALIA PTY LIMITED (ACN 003 074 468)First RespondentRANDOL TUCKERSecond Respondent |

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| JUDGE: | BUCHANAN J |
| DATE OF ORDER: | 20 FEBRUARY 2013 |
| WHERE MADE: | SYDNEY |

THE COURT DECLARES THAT:

1. The second respondent engaged in conduct contrary to s 28B(2) of the *Sex Discrimination Act 1984* (Cth) by sexually harassing the applicant between April and November 2008 while both the applicant and the second respondent were employees of the first respondent.
2. The first respondent is vicariously liable for the aforesaid conduct of the second respondent, pursuant to s 106 of the *Sex Discrimination Act 1984* (Cth).

THE COURT ORDERS THAT:

1. The first respondent is to pay to the applicant within 21 days the sum of $18,000 by way of damages as compensation for breach of s 28B(2) of the *Sex Discrimination Act* *1984* (Cth).
2. The application filed on 9 June 2010 is otherwise dismissed.
3. The parties will be heard on costs.

THE COURT DIRECTS THAT:

1. Any application for an order for costs (other than an order that the first respondent pay the applicant’s costs as taxed if not agreed) be filed by 4.00 pm on 6 March 2013, together with any additional evidence relied on in support of the order sought.
2. Any evidence in response by any party be filed by 4.00 pm on 13 March 2013.
3. All parties who wish to make submissions about costs do so in writing by 4.00 pm on 27 March 2013.
4. Written submissions in reply be filed by 4.00 pm on 3 April 2013.
5. The question of costs be dealt with thereafter on the papers.

Note: Entry of orders is dealt with in Rule 39.32 of the Federal Court Rules 2011.

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
|  DISTRICT REGISTRY |  |
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| BETWEEN: | REBECCA RICHARDSONApplicant |
| AND: | ORACLE CORPORATION AUSTRALIA PTY LIMITED (ACN 003 074 468)First RespondentRANDOL TUCKERSecond Respondent |

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| : | BUCHANAN J |
| DATE: |  |
| PLACE: |  |

**REASONS FOR JUDGMENT**

# introduction

The resolution of this case principally requires consideration of allegations that the applicant (Ms Richardson) was sexually harassed in 2008 by the second respondent (Mr Tucker) for which conduct the first respondent (Oracle) was alleged to be vicariously liable. During 2008, Ms Richardson and Mr Tucker were both employed by Oracle. I am satisfied that Mr Tucker did sexually harass Ms Richardson within the meaning of that term as it is defined in s 28A of the *Sex Discrimination Act 1984* (Cth) (“the SD Act”) and used in
s 28B(2) of that Act. I am satisfied that Oracle is vicariously liable for Mr Tucker’s conduct.

A second allegation made by Ms Richardson is that Oracle indirectly discriminated against her on the ground of sex, within the meaning of s 5(2) and s 14(2) of the SD Act. That allegation was only pressed in the alternative, but in any event was not established. A third allegation is that Oracle victimised Ms Richardson within the meaning of s 94 of the SD Act. I reject that allegation. Finally, various allegations were made that Oracle breached its contract of employment with Ms Richardson by either repudiating that contract, or breaching certain suggested implied terms of it. To the extent that it is necessary to address them, I reject those allegations also.

The factual assertions which were relied upon to sustain the pleaded causes of action may be briefly summarised as follows: Ms Richardson was sexually harassed by Mr Tucker over a period of some months; when she eventually brought her concerns to the attention of her manager she was forced to make a formal complaint against her wishes; Oracle’s Human Resources (“HR”) staff mishandled the investigation; Ms Richardson was forced to keep working with Mr Tucker during the investigation; when the investigation was over Ms Richardson was demoted (or had her responsibilities reduced) by being withheld from projects in Victoria which would otherwise have been within her sphere of responsibility; to protect her own career Ms Richardson was compelled to seek other employment; she suffered economic loss as a result; she also suffered physical and psychological injury as a result of both Mr Tucker’s sexual harassment of her and as a result of the need to change employment, which resulted in a punishing travel schedule that disrupted her personal life and her personal relationships.

A substantial (indeed very optimistic) claim for damages was based upon the pleaded allegations. I am satisfied that Ms Richardson did suffer both physical and psychological consequences as a result of Mr Tucker’s conduct. Accordingly, compensation by way of damages must be assessed and awarded in her favour taking those matters into account. I will discuss separately whether Oracle is also liable to pay general damages for Mr Tucker’s conduct.

However, most of the claim for damages concerned alleged future economic loss, said to arise from Oracle’s conduct towards Ms Richardson after she complained about Mr Tucker’s conduct and from Mr Tucker’s conduct itself. The essential elements of this claim were not established. Ms Richardson left Oracle’s employ after some of her complaints against Mr Tucker were found to be substantiated, and Mr Tucker had been given a first and final warning. In my view, Ms Richardson resigned her employment voluntarily. It was not established that Ms Richardson was demoted, that Ms Richardson would have suffered in her employment if she had remained with Oracle, or that Oracle was responsible for any financial loss to Ms Richardson arising from her change of employment. Nor was it established that various complaints made by Ms Richardson about the physical and psychological consequences for her of a change in her employment were ones for which Oracle could be held responsible.

# Work roles

At the time of the events with which this case is concerned Ms Richardson was working for Oracle in its Sydney office as a “consulting manager”. Ms Richardson’s area of responsibility was described by her as “assigned to manage the project office for the technology consulting practice”. While initially Ms Richardson’s geographical area of responsibility encompassed the Asia Pacific region, from around June 2008, when Ms Richardson started working under Ms Amanda Swan, it was focussed particularly on Australia and New Zealand.

Ms Richardson, then a citizen only of the United States of America, where she also worked for an Oracle company, was recruited to work for Oracle in Australia on 17 December 2002 in the temporary two year position of E-Architect. She commenced work with Oracle in Australia in January 2003. Ms Richardson was thereafter employed by Oracle as a “senior principal consultant”, was promoted in 2005 to “managing principal consultant” and again in 2007 to her final position. Each of these positions was in the “IC” (individual contribution) stream at Oracle, rather than the “M” (management) stream. In keeping with her classification, Ms Richardson had no “direct reports”. Ms Richardson’s final position was graded by Oracle as IC4 (broadly equivalent in status and remuneration to M3).

Mr Tucker was a sales representative employed in the Melbourne office of Oracle. His task was to obtain commitments for the provision of Oracle’s products and services. One organisation from which he was attempting to secure a major financial commitment was the ANZ Banking Group (“ANZ Bank”).

ANZ Bank was exploring ways of enhancing identity management and security. Oracle wished to secure a multi-million dollar contract with ANZ Bank for a project which was at one time identified as the “Secure Access” project. Oracle put together a bid team to attempt to secure a commitment from ANZ Bank. The bid team was largely based in Melbourne. From about April 2008 until December 2008 Ms Richardson (who was based in Sydney) was a member of the bid team. She was the bid manager until about October or November 2008. During this period Ms Richardson travelled as required to Melbourne. Although some early billable work was done, in late November 2008 ANZ Bank directed that work on the project stop. Thereafter efforts were made to re-invigorate the project and ultimately work of a less financially significant amount was carried out. The reasons why Oracle’s initial expectations from the project were not ultimately realised are not relevant to the issues raised in the present proceedings and will not be pursued in this judgment.

However, it is relevant and important to mention that, in Oracle’s attempts to win a commitment from ANZ Bank, the perspectives brought to the bid team by Ms Richardson and Mr Tucker were far from identical; indeed their perspectives were in many respects in tension, and in some respects in conflict. It is also relevant to understand that Oracle’s capacity to deliver the technology and services it was proposing to ANZ Bank depended on the participation of two companies sub-contracting through it: “Infosys” and “443”.

Ms Richardson described the position in the following way:

From a sales’ perspective, Randol wanted to take an approach, a fixed price project for the entire implementation from start to finish that involved Oracle taking what we call the prime position. The prime position means that the entire contract is written under Oracle as the delivering agent and we call that delivering as prime or delivering on Oracle paper. The problem with that approach was I felt that Oracle was only taking 25 per cent of the work of that project; 75 per cent of the work was being done by subcontractors, primarily [Infosys] and partially by 443. [Infosys] was taking on the largest bulk of that work and to me it meant that we were taking on a significant amount of delivery risk in an area where the customer had already tried twice to implement an identity management system and it failed and as it was a fixed price from what I had seen the requirements were not as clearly defined as they should have been to take on a multimillion dollar fixed price proposal especially in the consideration that Oracle Consulting had never successfully delivered a fixed price identity management engagement in Australia.

Ms Richardson had other concerns. She felt the cost of the project would be seen as “excessively high” from the perspective of ANZ Bank. She felt Oracle would have insufficient technical control of the project, compared to its subcontractors. Her assessment was, having regard to the risks she had identified, that Oracle’s global risk management committee would not approve the bid as it was proposed. At her first face to face meeting with Mr Tucker tensions and disagreements emerged and persisted. This meeting also marked the beginning of the course of sexual harassment Ms Richardson has alleged against Mr Tucker. It is relevant to note that their relationship began on a note of tension and potential hostility, even if not at that time acrimony. It did not improve.

Ms Richardson’s sexual harassment case is based on the allegation that, from the time of her first face to face meeting with Mr Tucker in April 2008, she was subjected to a humiliating series of slurs, alternating with sexual advances, from Mr Tucker which built into a more or less constant barrage of sexual harassment. Ms Richardson’s evidence described humiliation and slurs in front of other people and sexually motivated advances in more private settings. I have come to the view that the picture she painted should, in substance, be accepted as an accurate one. I say “in substance” because there is some room for debate about matters of detail, particularly so far as the accusations of sexually motivated advances are concerned. However, making appropriate allowance for such matters, which I will discuss in greater detail, I reject Mr Tucker’s denials and his attempts to defend his conduct as unintended, misunderstood or innocuous.

Before the reasons for those conclusions are more fully explained it will be necessary to identify the allegations of sexual harassment which were made in the present proceedings; deal with the circumstances leading to Oracle’s investigation into some of Ms Richardson’s complaints; and explain the events which led Ms Richardson to leave Oracle and commence employment with EMC Australia (“EMC”). EMC, like Oracle, has operations globally and, in particular, in Australia, New Zealand and the Asia Pacific region. It will be important to note in later discussion that Ms Richardson’s role with EMC became one which was very similar to her role with Oracle.

# Allegations made in the present proceedings

In the present case, Ms Richardson claimed that there had been eleven separate incidents of sexual harassment over the course of some months, representing a pattern of conduct by Mr Tucker. Those specific allegations represent a more extensive series of complaints than Ms Richardson made while still at Oracle, when she complained initially to her manager and then more formally about Mr Tucker’s conduct.

The allegations against Mr Tucker which were pressed in the proceedings were set out in the final written submissions made on behalf of Ms Richardson. I shall set them out in full, as they there appear:

### First incident & Pattern

9 During their first *face to face* meeting in Melbourne in late April, and after a disagreement regarding the deliverability, quality control and price of the proposed ANZ Bank Project, Mr Tucker said to Ms Richardson in front of their male colleagues, *“Gosh, Rebecca, you and I fight so much ... I think we must have been married in our last life”*. She did not respond, but gave Mr Tucker a “look”.

10 Ms Richardson was shocked that a man that she had just met was making a comment of this nature in a business meeting in front of colleagues. It made her feel cautious about Mr Tucker. Ms Richardson also perceived the comment as a “barb” and intended to reduce her in some way.

11 A couple of days after this meeting, during another meeting, Mr Tucker again said in front of their male colleagues, *“So, Rebecca, how do you think our marriage was? I bet the sex was hot”.* Ms Richardson recalls that it was said in such a way as to be offensive and embarrassing. She told Mr Tucker that he was disgusting and to shut up. Mr Tucker said in reply, *“Come on, can’t you take a joke?”* As a result of this incident, Ms Richardson felt confused, angry, embarrassed and humiliated, and began to feel a strong visceral dislike of Mr Tucker.

12 After this, Ms Richardson observed a pattern whereby Mr Tucker behaved in a sexualised manner towards her: he would make comments about what she was wearing and how she looked in the things she was wearing, taking any opportunity at meetings to put a sexual connotation to comments made to her. For example, if somebody said, *“I’ll give it to her”*, Mr Tucker would say, *“You will give it to her”*. Mr Tucker made comments to the effect of their being *“married in our last life”* at least once a week throughout the duration of the ANZ Bank Project. Mr Tucker’s conduct crossed between public ridicule in an aggressive sexualised manner to smiling and trying to talk her into going out to dinner with him alone.

### Second incident

13 During early June 2008, Mr Tucker attended a sales conference in Sydney. On one of the nights of the conference an after-conference party was held. Ms Richardson was working from home late that evening as she had work to do and a deadline for submissions the following morning. Mr Tucker knew the deadline she was working towards.

14 At about 6pm, Mr Tucker started calling and texting Ms Richardson’s mobile phone. When Ms Richardson did not take his calls, Mr Tucker left a voicemail message on her phone saying, *“I’m going to the conference after-party. You should come”*. Mr Tucker also sent Ms Richardson a text message to the effect: *“The Hoodoo Gurus are playing. Come and join me”*. The other messages were all along the vein of *“Come and join me”*. There were approximately 15 text messages and calls. Ms Richardson felt harassed by the constant ringing and buzzing. Mr Tucker knew Ms Richardson was working but wouldn’t respect that fact, even though part of his responsibility in the project relied on this. Eventually, Ms Richardson sent him a text back that said words [to] the effect, *“I’m working on the bid. I have a deadline. I’m not coming out. Leave me alone.”*

15 The following week after the sales conference, Ms Richardson returned to Melbourne to work further on the bid for the ANZ Bank Project. Ms Richardson went to a meeting with Mr Tucker, Mr Samson, and Mr Vlachiotis. When Ms Richardson walked into the meeting room Mr Tucker said to her words to the effect: *“Gosh, it’s a good thing you didn’t come out because I think if I were drinking with you I would wind up in the corner with my arms around you kissing you”*. Ms Richardson responded by saying *“You would have had broken arms if you had tried it.”*

16 Mr Tucker made this comment publicly and Ms Richardson felt embarrassed that Mr Tucker would say this to her in front of the team. By this point Ms Richardson knew that Mr Tucker was married and had young children and felt very offended by his comment.

### Third incident

17 About late June 2008, Ms Richardson and Mr Tucker were in a meeting in Melbourne discussing the ANZ Bank Project. Only Ms Richardson and Mr Tucker were in the conference room. At the end of the meeting, Mr Tucker was trying to set something up for Friday, and Ms Richardson said, *“Well, I’m on leave on Friday”*. Mr Tucker responded, *“we should go away for a dirty weekend sometime”*. Ms Richardson replied, *“Not a chance”*, and walked out of the conference room. Ms Richardson was quite upset as she felt that she could not get Mr Tucker to back off, take ‘no’ for an answer or stop the constant comments.

18 It was around this time that Ms Richardson started to become very stressed being around Mr Tucker and working on the ANZ Bank Project. She noticed her hair began falling out and that her knuckles were becoming swollen and sore.

### Fourth incident

19 Around early August 2008, Ms Richardson and Mr Tucker were discussing the ANZ Bank Project on the telephone. During the conversation, Mr Tucker said words to the effect of *“Next time you’re in Melbourne we need to go out to dinner, just the two of us”*. Ms Richardson said *“Randol, I keep telling you that I don’t date married men. I am never going out to dinner with you. Now back off.”* Mr Tucker said, *“Well, you don’t have to be like that,”* and Ms Richardson replied, *“Well, yes, I do. I’m not having dinner with you.”*

20 Ms Richardson began to notice an effect on her motivation to continue working. She was struggling to maintain focus on the ANZ Bank Project and experienced difficulty getting out of bed, which had never happened to her before in her professional career.

### Fifth incident

21 Around September or October 2008, Ms Richardson and Mr Tucker were in a conference room in Melbourne. While they were working through a spread sheet or a work plan, Mr Tucker leaned over and said *“Come on, let’s go sneak off into a corner.”* Ms Richardson said, *“Randol, you’re disgusting. Go away and leave me alone”*. Mr Tucker laughed and got up and left the room. Ms Richardson felt sick and angry. She felt humiliated that she could not make it stop.

### Sixth incident

22 Again around September or October 2008, an ANZ Bank Project meeting was being held at the ANZ Bank offices in Melbourne. Ms Richardson was sitting in a conference room when Mr Tucker came in and sat down. Mr Tucker said to Ms Richardson words to the effect of, *“I love your legs in that skirt. I’m going to be thinking about them wrapped around me all day long.”* Ms Richardson replied, *“Randol, my legs are none of your business. Now go away and do your job.”* While there were other people in the room when Mr Tucker made the comment, he said it quietly and she does not know whether others heard it. Ms Richardson got up and left the room.

23 As result of the comment, Ms Richardson was blushing furiously and shaking, and felt a tension in her back and a surge of adrenalin. Ms Richardson went to the bathroom and splashed some water on her face to try and get her colour down, as she did not want to stand in front of a room of people to give a presentation with a bright red face.

### Seventh incident

24 In about October 2008, Ms Richardson and Mr Tucker were on the phone discussing the ANZ Bank Project. In the middle of the conversation Mr Tucker said, *“Oh, you know you love me, you know you want me.”* Ms Richardson ignored the comment and continued talking about the project, however this comment made her feel offended, frustrated and humiliated.

### Eighth incident

1. Again in about October 2008, Ms Richardson was in Melbourne helping to finish one of the billable workshops for the ANZ Bank Project. Following completion of the workshop, a party was held for all the people who had been involved in the workshops in Melbourne. At the party, Ms Richardson was standing in a group which included Mr Tucker and Steve Martin from the ANZ Bank. At one point, Mr Tucker said to Mr Martin, “*You know, Rebecca and I have this really hot love/hate thing going on*”. Ms Richardson replied, “*Shut-up, Randol*”. Ms Richardson then walked away and Mr Tucker started following her. Ms Richardson recalls that every group she went to, Mr Tucker would follow her into the group, and when she would leave to go to another group, he would also follow her there. Ms Richardson found this conduct to be quite scary and creepy, and again felt that she was being harassed by Mr Tucker.

### Ninth incident

26 Ms Richardson was in a meeting room in Melbourne shortly prior to an ANZ Bank Project meeting that included internal Oracle people and the ANZ Bank. Ms Richardson was preparing for the meeting and writing some notes when Mr Tucker came in and sat down next to her. Ms Richardson said, *“Good morning,”* and Mr Tucker said, *“Good morning.”* Ms Richardson recalls Mr Tucker said ‘something stupid’ that she was not in the mood for, causing her to say *“Randol, just go away.”* Mr Tucker replied, *“I love it when you’re mean to me. It just makes me think how hot you would be in bed,”* and got up and walked away. Ms Richardson did not believe anyone heard the remark, as Mr Tucker said it quietly and there was no one immediately around them.

27 Following this comment, Ms Richardson felt humiliated, frustrated and embarrassed to the extent that she went to the ladies room and cried; something she found embarrassing in and of itself.

### Tenth incident

28 In early November 2008, Ms Richardson and the ANZ Bank Project team were having issues with subcontractors (Infosys and 443) in relation to getting a partnering agreement signed. There was a team meeting with Michael Walters (an Infosys Senior Manager), Joe Fallia (a partner in 443), two other employees of Infosys and 443, Mr Tucker and Ms Richardson. Ms Richardson was the only woman attending the meeting. At the end of the meeting, everyone was standing around. Some of the men had brought fishing lures and were talking about fishing and the lures. Mr Walters said to Mr Tucker words to the effect of *“Randol, you know, when this is over, you really should take the team out fishing on your boat.”*  Ms Richardson said, *“How big is your boat Randol?”* and Mr Tucker said words to the effect of *“It has got a cabin that’s just big enough for you and me.”* Mr Tucker made this comment in front of the entire room of men.

29 Ms Richardson did not know what to say to Mr Tucker’s comment and blushed. Ms Richardson recalls there was a large proportion of men in the room that she didn’t know, and she felt she couldn’t respond, given she was in front of the subcontractors and delivery partners. One of the partners present also had a shocked look on his face and said to Ms Richardson, *“if I were you, I would go and make an official complaint to HR of sexual harassment.”*

### Eleventh incident

30 The next day, there was another meeting. This time Mr Tucker’s supervisor, Florence Douyere, was in attendance and it was the first time Ms Richardson had met her. The meeting was attended by Ms Douyere, Mr Salvas, Mr Tucker and Ms Richardson.

31 They were working through the project plan, and Ms Richardson asked Mr Salvas to give her the document by the end of the day. Mr Salvas said, *“Yes, I will give it to you”*. Mr Tucker then stated, again, *“Yes, you will give it to her”* in a suggestive tone. This was Ms Richardson’s last straw, and she looked at Mr Tucker and quietly and vehemently told him to *“fuck off”*. Ms Richardson was horrified that she had done that and was blushing and shaking.

32 The meeting finished shortly after, and Ms Richardson went to her hotel, packed her bag, went to the airport and flew back to Sydney. Ms Richardson was scheduled to stay in Melbourne for the remainder of the week, but left on the day of that meeting.

(Footnotes omitted.)

Although it does nothing to lessen the seriousness of Ms Richardson’s allegations, it is apparent that before the last incident referred to above Ms Richardson had chosen not to complain about Mr Tucker’s conduct, but had instead attempted to deal with it herself and wait for her contribution to the ANZ Bank project to finish naturally. Her attempts to deal with the issue did not include confronting Mr Tucker directly about his conduct.

Ms Richardson’s direct manager when the matter came to a head was Ms Amanda Swan, who was based in Sydney. Ms Richardson had previously worked under Mr Andrew Ward. After consulting with Mr Ward, she moved to Ms Swan’s group in June or July 2008 where her focus was projects in Australia and New Zealand (rather than Asia Pacific generally). At this time Ms Richardson was already working on the ANZ Bank bid. She had been exposed to Mr Tucker’s conduct for some time. Ms Richardson accepted that she did not raise the matter with Mr Ward, with whom she shared a good rapport, because she had expected her involvement with Mr Tucker to end soon after. Ms Richardson said that in August 2008 she asked to be taken off the project but gave no reason. As there is no issue that Ms Richardson was making a valuable contribution to the project, it does not seem surprising that her request was declined. Ms Richardson’s explanation for her eventual decision to raise the matters with Ms Swan, which I accept, was that she finally had to face the fact that her performance at work was being affected, and that she could no longer control her own responses to Mr Tucker or manage the situation on her own.

Ms Richardson had difficulty identifying exactly when some of the incidents occurred, but I am satisfied on the basis of the evidence available that the last incident identified above probably occurred on Wednesday 12 November 2008. Shortly after the last incident occurred Ms Richardson left Melbourne abruptly and returned to Sydney. Earlier that day, and before the last incident occurred, Ms Richardson had sought and obtained Ms Swan’s approval to be in Melbourne again during the week commencing on Monday 17 November 2008.

On either 13 or 14 November 2008 (but probably 14 November 2008) Ms Richardson spoke directly to Ms Swan in Sydney and explained that she had “walked off the [ANZ] project” unexpectedly. She told Ms Swan that Mr Tucker had been making inappropriate comments and bothering her in various ways since April 2008. While it does not appear that Ms Richardson shared many details with Ms Swan, she appears to have alluded to at least three or four separate comments or incidents, including Mr Tucker repeatedly asking her out. Ms Richardson said she had been trying to cope on her own but did not know how to manage the situation and needed Ms Swan’s guidance. Ms Swan had no experience dealing with issues of this kind and she immediately sought the advice of Ms Edweena Stratton, the Senior Director of Human Resources (“HR”) for Oracle in Australia and New Zealand. Ms Stratton was also based in Sydney.

# oracle’s investigation and its aftermath

## Complaint and immediate outcomes

As I mentioned earlier, when Ms Richardson decided to raise her concerns about Mr Tucker’s behaviour she did not disclose all the matters pressed in the present proceedings. At first Ms Richardson expressed her concerns to Ms Swan in reasonably general terms. As will be seen shortly, when Oracle’s HR staff became involved Ms Richardson provided more detail, but did not make all the specific allegations which were made in the present proceedings. I shall deal in due course with a submission made by both Oracle and Mr Tucker that some of the incidents set out above should be discounted for that reason.

After she was contacted by Ms Swan, Ms Stratton delegated investigation of Ms Richardson’s complaints to Ms Rachna Sampayo, a member of Oracle’s HR staff in Melbourne. Ms Swan spoke to Ms Sampayo who then arranged for Ms Richardson to meet with her on Monday 17 November 2008 in the Melbourne office.

Ms Richardson and Ms Sampayo did meet in Melbourne on 17 November 2008. Ms Richardson at first explained the nature of her concerns. There is some dispute about the terms and intent of the discussion at that point, although not about its outcome. The outcome of those initial exchanges was that Ms Richardson made a “formal” complaint. Ms Richardson accepted in her evidence that this was the position she adopted, but she said she felt pressured by Ms Sampayo to follow a formal path, even though her distinct preference was for the matter to be handled “informally”. Ms Richardson’s contention is that she acquiesced in the course urged on her by Ms Sampayo because she was effectively left with no choice. I will deal in greater detail with that question, although I think that the distinction which Ms Richardson attempted to draw misunderstood the nature of the steps which were then necessary to respond effectively to the complaints she had raised.

During their discussions, a summary of what Ms Richardson alleged against Mr Tucker was made by Ms Sampayo in writing. Her summary was typed up, given to Ms Richardson to correct and settle and then incorporated in a document signed by Ms Richardson. It said the following:

This is a formal complaint being raised by Rebecca Richardson against Randol Tucker who has made inappropriate comments to her on various occasions that have been sexual in nature.

…

* Rebecca Richardson and Randol Tucker have been working together on a project since April 2008. Rebecca is based in Sydney but travels to Melbourne quite frequently as the project is Melbourne based and Randol is a Melbourne based employee.
* Rebecca stated that she and Randol have clashed on various occasions during the meetings whereby Randol has pushed for project related information, which Rebecca felt that she was not in a position to provide.
* Rebecca has made the following allegations against Randol Tucker:
1. Rebecca’s Allegations: Randol made some inappropriate comments during their third meeting which was around late April along the lines “Rebecca, you & I fight so much, I think we were husband and wife in our last life.” Several days later he said to her, ‘How do you think our marriage was, I bet the sex was hot’. Rebecca was quite offended and reacted with a smirk on her face and said probably not.
2. Rebecca’s Allegations: Randol makes comments which have sexual overtones in front of other team members during the meetings. During a meeting on 2nd November, a team member advised Rebecca that he would “give me (Rebecca)” a document and Randol then said “Yeah, you’ll give it to her,” in an inappropriate tone of voice. According to Rebecca, Randol has made these types of comments many times.
3. Rebecca’s Allegations: The Sales Organization had a sales conference in Sydney in early June and a party afterwards, which Rebecca decided not to go for due to work pressure. She received various sms and telephone calls from Randol asking her to come and attend the event. She reacted by telling him to leave her alone. Next week when they met in the office, Randol commented “Good you didn’t come out. I think if I was drinking with you, I would wind up with my arms around you, kissing you in the corner”. Rebecca’s comment was “you would have had broken arms if they were around me”.
4. Rebecca’s Allegations: Randol has asked Rebecca out on various occasions when she visited Melbourne office during her official trips. Rebecca has declined these invitations by advising him that she does not go out with married men.
5. Rebecca’s Allegations: Randol has made inappropriate comments during a team meeting which took place on 11th November 2008, which had the presence of 2 external partners. After the meeting, Randol suggested fishing as he has a boat of his own and everyone including Rebecca liked that idea. When Rebecca asked Randol the size of his boat, his answer was “only just big enough for you and me”. The partners present in the meeting had a shocked look on their face and one of them told Rebecca that “If I were you, I would go and make an official complaint to HR for sexual harassment”.
6. Rebecca’s Allegations: Rebecca feels that these comments are made towards her with the intention of undermining her position as a project manager in the team and to make her feel uncomfortable.
* Rebecca feels that these comments have put her under enormous pressure and as a result her disposition in the meetings where Randol is present has changed. She feels that she has become very aggressive and at times that has resulted in angry outbursts and on one particular instance she has used inappropriate language.
* Rebecca does not want to further confront Randol herself, as she believes that he will not stop his behaviour and may take a more negative approach towards her.
* When asked what was her expectation in terms of outcome, her response was that she would not want to work with Randol Tucker and she would like him to stop this behaviour.
* Rebecca has not seen him behaving in this manner with other female colleagues except her.

I am satisfied that while Ms Richardson had no enthusiasm for making a formal complaint against Mr Tucker, she made it clear to Ms Swan and Ms Sampayo that she wanted his conduct to stop and she did not want to work with him again. In her evidence she insisted that she was left with no real choice by Ms Sampayo but to make a formal complaint, or let the matter drop. Ms Sampayo, on the other hand, was equally insistent that Ms Richardson was not subject to any pressure to make a formal complaint. Although Ms Sampayo in her evidence insisted that she discussed a number of possible “informal” steps with Ms Richardson, who then rejected them, I am prepared to assume in Ms Richardson’s favour that the options she was given were much narrower than Ms Sampayo suggested. In particular, I will assume that she was, as she suggested, left effectively with a choice amongst making a formal complaint, some form of mediation facilitated by Ms Sampayo or letting the matter drop entirely.

Nevertheless, were it necessary to reach a firm conclusion about these matters I could not feel a sufficient sense of persuasion that Ms Richardson was pressured by Ms Sampayo to take one particular course over another, although I accept that Ms Sampayo took Ms Richardson’s statements seriously and I think it is unlikely she would have given any encouragement to just letting the matter drop.

I think it is clear from this and a later conversation between Ms Richardson and Ms Sampayo that Ms Sampayo always thought some form of mediated resolution might be appropriate if both parties were willing. She also thought that Ms Richardson lodging a “formal” complaint was an appropriate procedure. Ms Richardson, for her own part, seemed to think, then and later, that some “informal” approach to Mr Tucker’s immediate or more senior manager should have been an available option. In particular, Ms Richardson apparently wished the matter to be taken up with Mr Paul Pinn, Mr Tucker’s manager once removed, with a view to facilitating her departure from the ANZ Bank project and relieving her from any future need to work with Mr Tucker. One suggestion was that Mr Tucker and his conduct did not specifically need to be mentioned and that senior management could simply be informed that “there has been an incident and we need to take Rebecca off the project”. The alternative course, as I understood it, was for HR, Ms Richardson’s superiors and Mr Tucker’s superiors to be made aware of her accusations, accept them as well-founded and act on them. I understood that Mr Tucker need not be made privy to the accusations or the fact that they had been made in such a scenario. Presumably, it was thought that his interests would be sufficiently protected by the fact that his position would not be disturbed on the ANZ Bank project or, theoretically at least, more generally.

In my view, any suggestion or expectation of this kind was unrealistic. It is antithetical to the whole of the case put before the Court that Oracle could simply ignore what Ms Richardson had said about Mr Tucker’s conduct. Therefore, on Ms Richardson’s own case, some way had to be found to address that matter, as well as to address the question of how to look after Ms Richardson’s interests. It may not have been a realistic option in any event that Mr Tucker’s conduct simply be ignored, even if Ms Richardson had chosen to do no more about it and to simply return to her role on the project. That matter need not be pursued because Ms Richardson, understandably, was not prepared to countenance any continuation of the situation.

Neither was it, in my view, realistic to expect that the matter could be addressed without Mr Tucker knowing about the accusations against him. Both an attempt at mediation and a more formal investigation had the common feature that Ms Richardson’s allegations would be disclosed to Mr Tucker. That seems to me to have been inescapable. It also seems to me to be a mistake to concentrate on whether the steps to be taken after Ms Richardson had spoken to Ms Sampayo were to be “formal” or “informal”.

Ms Richardson was not interested in any form of negotiation with Mr Tucker, or in a mediated outcome. She wanted her complaints to be acted on in a way that would free her from the necessity of working with Mr Tucker, although she made it plain that she did not seek Mr Tucker’s removal from his position. She wished to be released from the ANZ Bank project herself and spared the disagreeable prospect of working with Mr Tucker again.

That left only some process of investigation. No firm conclusion could be reached without hearing from Mr Tucker. For the HR department, represented by Ms Sampayo, proceeding without drawing the complaints to Mr Tucker’s attention for his response was, unsurprisingly, not thought to be an appropriate procedure to follow. At some level Ms Richardson understood and accepted this, even though it did not necessarily accord with her hope that the matter could be dealt with more discreetly. She showed her acceptance of the procedure then followed by: giving detailed examples of her complaints to Ms Sampayo; amending and correcting a draft statement of complaint prepared by Ms Sampayo to ensure it truly reflected the nature and terms of her complaints; and co-operating in the process and accepting its character by accepting, without change, the introductory words of the statement – “This is a formal complaint …”. In all these circumstances, I reject the proposition that Ms Sampayo unreasonably pressured Ms Richardson into making a formal complaint against her own wishes.

Another complaint made by Ms Richardson was that she was told by Ms Sampayo that she should not discuss her complaints against Mr Tucker with other people, including those whom she had identified as witnesses to some of the events she recounted to Ms Sampayo. In fact, Ms Richardson did speak a short time later to two of those people (Mr Avi Samson and Mr Tony Salvas) notwithstanding Ms Sampayo’s statement that she should not do so. There were no adverse consequences for Ms Richardson. She had not acted in accordance with Ms Sampayo’s desires but that was the end of it. Ms Sampayo was told but did nothing. She did not even remonstrate with Ms Richardson.

During their meeting, Ms Richardson provided Ms Sampayo with the names of various people who may have witnessed or knew about the nature of her exchanges and interactions with Mr Tucker. Three of those people were employees of Oracle, and Ms Sampayo spoke to each of them, and Mr Tucker. She chose not to speak to people outside Oracle, preferring to deal with the matter internally. One of the Oracle employees could contribute nothing and Ms Sampayo made no written record of the conversation. Two others however, Mr Samson and Mr Salvas, provided direct or indirect support for some aspects of Ms Richardson’s complaints.

Mr Tucker was interviewed by Ms Sampayo on Friday 21 November 2008, later in the same week that Ms Richardson made her written complaint. As will be seen shortly, Ms Sampayo came to the view that Mr Tucker should be censured for his conduct, but she also formed the view that he was contrite and remorseful. That had some consequences for events occurring shortly thereafter. During their interview Mr Tucker indicated that he wanted to apologise to Ms Richardson, but Ms Sampayo instructed him that he was not to approach Ms Richardson directly or indirectly about her complaints.

I shall discuss the responses Mr Tucker provided to Ms Sampayo in more detail later. His responses to Ms Sampayo were made without any knowledge of what either Mr Samson or Mr Salvas would say. However, their statements to Ms Sampayo were available to Mr Tucker in the present proceedings. Mr Tucker’s pleaded case, and the evidence he finally gave, appear to me to have taken into account that additional material with the result that some things that he denied when asked by Ms Sampayo were ultimately not put seriously in issue, or put in issue at all in the present proceedings.

Mr Samson and Mr Salvas were each interviewed by Ms Sampayo in the following week, on Thursday 27 November 2008. In relation to the first incident in Ms Richardson’s complaint, Mr Samson’s recorded response was:

* Avi confirmed that this conversation took place.
* He could not remember the exact words as this conversation took place [a] few months back though he confirmed that Randol definitely said something along the lines ‘we are married in our last life, “I bet the sex was hot’.
* Avi stated that Rebecca did not joke back but went completely silent and [it] was quite obvious that she was offended.

and in relation to the alleged invitations to dinner was:

Avi Sampson [sic] who is aware of the above only does so because Rebecca has told him however he did not personally witness this himself.

Mr Salvas’ contribution was largely confined to events at a meeting on 11 November 2008. Ms Sampayo recorded the following:

* Tony was part of this meeting, which took place at a customer site and in the presence of 2 external partners.
* Tony stated that Randol made the comment about the boat “only just big enough for us” and “you will be my boat girl”.
* Tony stated that after hearing the comment, Rebecca was very quiet.
* Tony stated on their way back to the office from customer site, Rebecca who was alone in the car with him asked him if he felt the comments made by Randol were inappropriate.
* Tony stated that he affirmed to Rebecca that the comments made by Randol were inappropriate.

Neither Mr Samson nor Mr Salvas gave evidence in the present proceedings.

Ms Sampayo’s findings were as follows:

**Rebecca’s Allegations: Randol made some inappropriate comments during their third meeting which was around late April along the lines “Rebecca, you & I fight so much, I think we were husband and wife in our last life.” Several days later he said to her, ‘How do you think our marriage was, I bet the sex was hot”.**

Findings

* Randol disputed the exact words especially the word ‘sex’. He agreed to making comments along the lines “we were married in our last life”.
* Avi Sampson [sic] confirmed the above allegation raised and also confirmed that Randol used the word ‘Sex’ in the above statement.
* Avi [Samson] confirmed that Rebecca did not joke back and took a silent approach to this comment contrary to what Randol stated.
* Based on the information provided by the witness, it is obvious that Randol has made the above comments, which is deemed as offensive language in the work environment.

**Rebecca’s Allegations: Randol makes comments, which have sexual overtones in front of other team members during the meetings. During a meeting on 2nd November, a team member advised Rebecca that he would “give me (Rebecca)” a document and Randol then said “Yeah, you’ll give it to her,” in an inappropriate tone of voice. According to Rebecca, Randol has made these types of comments many times.**

Findings

* Tony Salvis [sic] who is referred to as the team member above could not ascertain any negativity in the comment and was completely unaware of any underlying strain at this meeting.
* Avi [Samson] was not part of this meeting however he has witnessed Randol making comments such as ‘come on honey’ or ‘come on darling’ to Rebecca which in his opinion were made to diffuse the strain caused during the meetings and had no other intention. However he did feel that these comments were inappropriate especially given the strained professional relationship Rebecca and Randol shared.
* Based on the information gathered I have come up with the assumption that Randol has made some comments during the meetings which could be deemed as sexual in nature taking into consideration the environment they were spoken in. However hearing the witnesses’ description it looks like Randol was trying to lighten up a stressful meeting and what could have been a lighthearted exchange in his eyes was not perceived by Rebecca in the same way.

**Rebecca’s Allegations: The Sales Organization had a sales conference in Sydney in early June and a party afterwards, which Rebecca decided not to go for due to work pressure. She received various sms and telephone calls from Randol asking her to come and attend the event. She reacted by telling him to leave her alone. Next week when they met in the office, Randol commented “Good you didn’t come out. I think if I was drinking with you, I would wind up with my arms around you, kissing you in the corner”.**

Both Randol and Rebecca narrated different versions of the story & in the absence of any witnesses it is very difficult to substantiate whose version is true. There is no evidence of any sort.

**Rebecca’s Allegations: Randol has asked Rebecca out on various occasions when she visited Melbourne office during her official trips. Rebecca has declined these invitations by advising him that she does not go out with married men.**

This allegation could not be substantiated. Avi [Samson] who is aware of the above only does so because Rebecca has told him however he did not personally witness this himself.

**Rebecca’s Allegations: Randol has made inappropriate comments during a team meeting which took place on 11th November 2008, which had the presence of 2 external partners. After the meeting, Randol suggested fishing as he has a boat of his own and everyone including Rebecca liked that idea. When Rebecca asked Randol the size of his boat, his answer was “only just big enough for you and me”.**

Findings

* Randol disputed the above allegation, however he accepted saying ‘just big enough for us’. He claims that this was said in a lighthearted manner and to which Rebecca responded by saying ‘good one’.
* But according to the witness Tony [Salvas], Randol had made the comment ‘just big enough for you and me’ and ‘you are my boat girl’ and he found those comments inappropriate.
* Also according to the witness, Rebecca did not joke back and went completely silent.
* Taking into account the witnesses statement, it is quite clear that Randol has made these inappropriate comments to a colleague and has done so at a customer site and in the presence of external customers.
* According to Rebecca’s complaint, where in she states that one of the partners did notice the remark being made and jockularly [sic] asked her if she would be taking this matter to her HR as a sexual harassment case.
* Such instances occurring at the customer site does not portray a good image of Oracle and needs to be dealt with in an appropriate way.

**Rebecca’s Allegations: Rebecca feels that these comments are made towards her with the intention of undermining her position as a project manager in the team and to make her feel uncomfortable.**

Findings:

* Looking at the facts provided by witnesses, it is evident that Randol has made some inappropriate comments during meetings not realizing the impact they had on Rebecca and the rest of the team present during those meetings.
* Randol says he is very embarrassed and ashamed that what he thought was a lighthearted exchange had a different impact on Rebecca.
* Randol stated that he would like to apologize to Rebecca and is genuinely remorseful about his lighthearted comments.
* I believe that Randol has taken a very valuable lesson from this incident and he will be careful with this conduct in future.

Ms Sampayo’s findings were sent to Ms Stratton, together with some recommendations, on Tuesday 2 December 2008. There was some delay, during which Ms Stratton said she discussed the matter with Ms Sampayo, before Ms Stratton approved the outcomes on Monday 8 December 2008. The repercussions for Mr Tucker were more serious than Ms Sampayo first recommended. Ms Sampayo initially recommended a first written warning but, after she conferred with Ms Stratton, Mr Tucker was given a first and final warning. Ms Sampayo initially suggested that Ms Richardson be offered conflict resolution training, however, no mention was made of this in the letter finally sent to Ms Richardson. This suggestion was probably well-intended but it upset Ms Richardson, to whom it had obviously been mentioned at some stage. While it is not clear now, Ms Richardson’s antipathy to the suggestion may explain its absence from the letter ultimately sent. I infer from the changes made in both cases that Ms Stratton and Ms Sampayo made some final adjustments when they spoke together. Ms Stratton confirmed in her evidence that this was likely. Ms Sampayo then spoke with Ms Richardson and prepared formal letters advising Ms Richardson, Mr Tucker and others of whole or part of the outcome. Ms Sampayo arranged to meet Mr Tucker on 11 December 2008 and had a meeting arranged with Ms Richardson for the following week.

Mr Tucker was told formally that “[his] behavior [sic] was inappropriate in the workplace”. He was issued with a first and final warning. During her evidence Ms Sampayo indicated that the next most serious response from Oracle would have been termination of Mr Tucker’s employment. Ms Richardson and Mr Tucker’s manager, Ms Douyere, were each advised of the finding of inappropriate conduct and the first and final warning. Ms Swan was told that “appropriate disciplinary action” had been taken against Mr Tucker. Mr Samson and Mr Salvas were told that “appropriate actions” had been taken. Each person was directed that confidentiality was to be maintained, although Ms Swan and Ms Douyere were permitted to discuss the future working relationship between Ms Richardson and Mr Tucker in connection with any current or upcoming projects. Nobody except Ms Stratton appears to have been made privy to Ms Sampayo’s actual findings.

## Working arrangements during the investigation

Apart from the fact that Ms Richardson was instructed not to discuss her complaint or the fact that she had made one with members of the bid team, Ms Sampayo’s directives about confidentiality while she carried out her investigation had a further consequence. Ms Sampayo was evidently keen to maintain a high level of discretion and confidentiality. She attempted to impress this aspect of the investigation and its outcome on all involved, including her own superior, Ms Stratton. In one sense, that was in the interests of both Mr Tucker and Ms Richardson herself. Ms Richardson did not want her complaint to become common knowledge. However, it led to a strained and artificial working arrangement between Ms Richardson and Mr Tucker while the investigation took place, a period eventually of almost four weeks. During that period Ms Richardson was required to remain a member of the bid team. As a result she was obliged to remain in contact with Mr Tucker. Although she was relieved from the necessity of any face to face exchanges with him, frequent contact in telephone conferences and by email as necessary was required.

Ms Richardson’s evidence about the reason for this arrangement included the following:

And when you spoke to her [Ms Sampayo] about whether or not you could speak to others, did you explain to her why you wanted to speak to anyone else?---…Yes, I did. I very much wanted to be taken off the project, particularly now that the formal investigation was taking place. So I said to her, “I cannot work on this project any more, but I cannot be removed from the project without giving some sort of explanation to the senior managers.” And she said, “Like I told you, it is inappropriate to involve senior managers at this point because I’m obligated to protect Randol’s privacy and the impact of this investigation on his reputation.” And she said, “I will speak with Amanda [Swan] and see if we can work out some way that you can remain on the project without having to speak with [him].” And I said, “Well, who is going to protect me?” And she said, “Well, HR is here to assist and you may speak to Amanda or I if you have any concerns.”

and:

Now, what did you understand to be the reason why Ms Swan wanted to keep you on the project?---Because Steve Simmick [sic] had mandated to Ms Swan that I be on this project and she couldn’t take me off the project without giving him a reason. And we were told that we were not allowed to give him a reason. So HR effectively stopped Ms Swan from taking me off the project.

The arrangement appears to have developed without any particular co-ordination between Ms Sampayo and Ms Swan. Ms Swan did not know the details of Mr Tucker’s conduct beyond what Ms Richardson had told her when she raised her concerns with Ms Swan initially, but she did know that Ms Richardson was concerned about having to see Mr Tucker. Ms Swan’s evidence was that she had some discussions with both Ms Sampayo and Mr Salvas about Ms Richardson being able to work on the ANZ Bank project from the Melbourne office in the week commencing 17 November 2008. At first it was arranged, as Ms Swan understood it, that Ms Richardson would remain in Melbourne, work from her own temporary office and that Mr Salvas, who was also a member of the bid team, would act as an intermediary when necessary. In fact, although Ms Richardson was not required to deal with Mr Tucker face to face, she was still involved in regular conference calls which included Mr Tucker. It must have seemed an unusual arrangement to those involved. After that week in Melbourne Ms Richardson reported to Ms Swan that the arrangement was artificial and unsatisfactory. Ms Richardson indicated to Ms Swan at that time that she did not need to go to Melbourne to continue to make an appropriate contribution to the project, and Ms Swan consequently told her to remain in Sydney for that purpose. Thereafter Ms Richardson remained in Sydney but continued to deal with Mr Tucker as required in conference calls or by email.

Ms Sampayo knew the details and nature of Ms Richardson’s allegations (to the extent they were reported to Oracle) but appears not to have appreciated that Ms Richardson and Mr Tucker would remain in direct contact. Ms Sampayo said in her evidence that she understood that Ms Richardson did not want to continue to work with Mr Tucker, in the sense that she wished to have no face to face contact with him and no direct communication. She said she did not learn until later that Ms Richardson and Mr Tucker had, in fact, both been parties to discussions by way of telephone conference. Her evidence was that if she had known that this was happening she would have queried the arrangement and made sure that Ms Richardson did not feel that she had been placed in an awkward situation. Ms Sampayo’s evidence was that Ms Richardson did not inform her that she wished to be taken off the ANZ Bank project.

It appears that Ms Richardson’s continued involvement on the project at this time was primarily concerned with ensuring that Mr Salvas was fully equipped to take over the bid management role for future aspects of the project. Mr Salvas (presumably as bid manager) arranged a series of conference calls commencing on 18 November 2008 involving Ms Richardson, Mr Tucker, himself and others. Ms Richardson claimed to be involved in daily conference calls of this nature. Mr Tucker eventually conceded that during the investigation period there might have been about six calls in which both he and Ms Richardson participated. Beyond this, there was no objective record or other witness to assist. There was evidence that on 24 November 2008 the project was interrupted when ANZ Bank ceased funding the project, prompting Oracle to stand down its delivery team. At this point the whole future of the project was in jeopardy. Oracle prevailed on the ANZ Bank to allow some aspects of the work to continue and some further contribution was required of Ms Richardson until the outcome of the investigation into her complaints was known.

While the evidence was ultimately unclear about the frequency with which Ms Richardson was involved in ongoing contact with Mr Tucker, I am prepared to accept that, as matters developed, there was regular contact between Ms Richardson and Mr Tucker until the investigation was complete and its findings were provided to Ms Richardson and Mr Tucker. As late as 10 December 2008 Ms Richardson dealt by email directly with Mr Tucker about aspects of the project.

The requirement for Ms Richardson to remain in contact with Mr Tucker after she had revealed the nature of her complaints about him, even while they were being investigated, was criticised in the proceedings. Although there was no suggestion that Mr Tucker committed any further acts of sexual harassment during this period, I am satisfied that these arrangements contributed to some extent to the psychological impact on Ms Richardson of Mr Tucker’s conduct. Whether Oracle is liable to pay compensation in respect of those matters is a different question which requires later attention.

## Mr Tucker’s apology and Ms Richardson’s reaction

After his meeting with Ms Sampayo on 11 December 2008, and the receipt by him of his warning letter, Mr Tucker sent the following email to Ms Sampayo:

Rachna,

 I would like to apologize to Rebecca personally in whatever way is comfortable to her. Ether [sic] in writing as I offer below, or in-person so that she can gauge my sincerity. Please feel free to pass what I have written on to her if that is the best course of action.

Rebecca, I am offering my sincere apology.

Reflecting on the conversations and exchanges between us that you have outlined it is easy to see how they would have offended you. I can assure you that my intentions were never anything other than light-hearted banter, however I can plainly see that my comments and actions were reckless and that I was insensitive to the impact they were having on you. For that I am both embarrassed and ashamed of myself.

Most importantly, I recognize my recklessness and I am sincerely sorry for having offended you, or in any way undermining your stature amongst other members of our project team.

This is a life-lasting lesson for me.

Randol

Ms Sampayo had previously discussed with Ms Richardson Mr Tucker’s professed desire to apologise and knew that Ms Richardson took the view that Mr Tucker was not sincere, a view that Ms Sampayo did not share. According to her evidence, which I accept, Ms Sampayo thought seriously about whether she should provide Mr Tucker’s apology to Ms Richardson, or keep it from her. Ms Sampayo sought advice from Ms Stratton. Ms Stratton saw the apology as probably sincere and thought there was no harm providing it to Ms Richardson. Ms Sampayo therefore sent the apology to Ms Richardson on Monday 15 December 2008, saying:

Hello Rebecca

FYI, a written apology from Randol. I decided to send this to you after a long deliberation over it. Please do not hesitate to contact me should you need to discsus [sic].

Kind regards

Rachna

Ms Richardson reacted very strongly. Part of her reaction seems to have been a response to Ms Sampayo’s continued suggestions that mediation might be helpful. Ms Richardson drafted a response to Ms Sampayo. However, she decided to share it first with Ms Swan. In fact, it was never sent to Ms Sampayo. Ms Richardson wrote:

Rachna,

I understand that **you** are of the opinion that Randol deserves to have his apology heard. However, I specifically said to you last week that I doubt his sincerity (based on six months of almost daily experience working with him and many examples of his lack of sincerity in his words and actions). I also said that I would consider whether or not I wanted to read his apology, that I was not inclined to read it, but that we could discuss it over coffee on Thursday. I am very offended that you took it upon yourself to send it to me anyway.

Quite frankly, Randol’s sexual harassment was easier to deal with than HR’s treatment of my complaint has been. As I also said to you last week, I regret having ever involved HR in this situation for the following reasons:

1. I was told that my initial conversation with HR regarding this matter would be confidential, unofficial, and that the decision to proceed with a formal complaint would be my choice. You recorded every bit of our first meeting, and told me that you were required to report on it to your manager. How is that unofficial? I felt pressured to make the complaint formal, and was repeatedly assured by you that I was doing the right thing and that HR was there to look after me.

2. While the HR investigation was ongoing, I was told that I was not to have any direct contact with Randol, that all communication would go through my manager or Tony Salves [sic]. However, I was not removed from the [ANZ] bid and was required to attend daily conference calls with Randol and the team, almost all of whom were involved in this investigation in one way or another. This was incredibly uncomfortable for me and I felt I was put into an untenable situation as it also prevented me from being able to properly do my job. When I discussed this with you, you recommended that I attend counseling (which I am doing) to assist me in coping with the situation. No solutions to actually resolve the situation were ever discussed with me.

3. Although I very clearly and repeatedly said to you that I do not want to work with Randol again, you are currently encouraging me to attend mediation with Randol to enable us to work together in the future. You have said that people deserve the opportunity to change, and I agree with you, they do indeed, and I sincerely hope that Randol will not repeat the behaviour. However, I deserve the right to feel supported by my organisation that I have worked in for over ten years. To me, that means not having to work with someone who has repeatedly and publicly degraded me to the point I had to seek assistance to make it stop. I do not wish Randol ill, nor am I complaining about his ‘punishment’, I simply wish to never have to sit in a meeting with that man again. I have been quite clear about this from the beginning and yet I’m still having to attend daily conference calls with him. The suggestion of mediation is preposterous and – again – offensive.

My opinion is that HR, in the guise of supporting me, has placed me in an extremely uncomfortable position. This has been continuing for over a month and I’m starting to wonder when it will ever end. In taking it upon yourself to send that email from Randol to me against my wishes, I feel that HR is more supportive of Randol in this situation than of me.

Rebecca

Ms Swan’s evidence was that she was shocked to see this draft email. She had not appreciated the strength or nature of Ms Richardson’s feelings, or known any of the details of the investigation and its outcome apart from the formal email she received from Ms Sampayo referred to above. I accept Ms Swan’s evidence about these matters. It is clear from both her evidence and that of Ms Richardson that the two women had enjoyed a mutual regard and a friendly working relationship before this time. I think Ms Swan was genuinely concerned for Ms Richardson’s welfare. She rang Ms Stratton and a meeting between the three of them was organised. Ms Swan also shared Ms Richardson’s draft email with Ms Stratton. This prompted Ms Stratton to contact Ms Sampayo and seek an explanation regarding Ms Richardson’s concerns. Ms Sampayo explained her actions in an email to Ms Stratton that evening. Nevertheless, Ms Sampayo was soon thereafter removed by Ms Stratton from any further involvement in the matter.

## Oracle’s further response

Ms Richardson, Ms Swan and Ms Stratton met on Wednesday 17 December 2008. By this time Ms Stratton had been in some contact with Mr Paul Pinn, Mr Tucker’s manager once removed, who was at that time based in Singapore. Mr Pinn had decided that Mr Tucker would remain in his role. That is not inconsistent with the warning Mr Tucker had been given. However, there is evidence that neither Mr Pinn nor Mr Tucker’s immediate manager, Ms Douyere, were made privy to Ms Sampayo’s specific findings about Mr Tucker’s conduct. They knew only that Mr Tucker had been warned about inappropriate workplace conduct.

The meeting on 17 December 2008 seems to have been largely devoted to an opportunity for Ms Richardson to ventilate her dissatisfaction with the handling of her complaints by Ms Sampayo, and Ms Stratton’s efforts to mollify her concerns. Ms Richardson made it clear she wished to have no further dealings with Ms Sampayo, and her wishes were accommodated, although I do not see any substantial objective foundation for complaint against Ms Sampayo.

During the meeting on 17 December 2008, I am satisfied Ms Swan maintained her concern about Ms Richardson’s well-being. I accept Ms Swan’s evidence that after Ms Richardson returned from the week in Melbourne, commencing on 17 November 2008, she accepted Ms Richardson’s assessment that the arrangements put in place to minimise her contact with Mr Tucker, namely placing her in a separate office and having Mr Salvas act as an intermediary, were unsatisfactory.

During the meeting on 17 December 2008 Ms Stratton indicated that a decision had been taken by Mr Pinn that Mr Tucker would stay in his role. At that time Mr Tucker still had a key role on the ANZ Bank project, which was moving forward again. It is common ground that after 11 December 2008 Ms Richardson was not required to have any further dealings with Mr Tucker. Obviously, that meant, as she wished, that she was off the ANZ Bank project altogether.

Ms Swan’s evidence was that she remained very concerned that Ms Richardson not be required to go to the Melbourne office and be exposed to the possibility of encountering Mr Tucker. Mr Pinn’s decision that Mr Tucker would retain his role on the ANZ Bank project meant necessarily that Ms Richardson could not remain on the project if that aim was to be achieved. In fact, Ms Richardson had made it clear on a number of occasions that she harboured no desire that Mr Tucker be removed from the ANZ Bank project. Her desire was that she not be required to continue with it. To that extent, her disengagement from that project cannot be seen as contrary to her own expressed wishes. However, that part of the solution did not address the larger question of her future possible contact with Mr Tucker.

In her submissions in the present case Ms Richardson’s counsel attempted to emphasise that Ms Richardson’s chief desire was no longer to actually work with Mr Tucker. However, I am satisfied that Ms Richardson left a stronger impression with Ms Swan, namely that she wished to avoid any further contact with Mr Tucker in any form, even by way of an accidental encounter. After receiving Ms Richardson’s draft email of 15 December 2008, Ms Swan was particularly anxious to do what she could to ensure that Ms Richardson need have no further contact with Mr Tucker. Ms Swan’s recollection was that she made clear to Ms Richardson during the meeting on 17 December 2008 that, in light of the fact that Mr Tucker’s position was unchanged, it was her view that it would be better for Ms Richardson not to go into the Melbourne office at all. I accept without reservation Ms Swan’s evidence that she had only Ms Richardson’s interests in mind at this time.

Ms Richardson’s evidence (to which I refer hereunder) was that she was told by Ms Swan, before her meeting with both Ms Stratton and Ms Swan, that she would no longer be required to work on any projects in Victoria. I do not accept this suggestion. On this issue I prefer the clear recollection of both Ms Swan and Ms Stratton.

Ms Swan’s evidence was that after the meeting concluded on 17 December 2008 she discussed with Ms Stratton the fact that she would like to involve her own manager (Ms Richardson’s manager once removed), Mr Steve Simek, in a decision about Ms Richardson’s future sphere of action, by informing him of the outcome of the investigation. Ms Stratton agreed. Ms Swan and Ms Stratton went together to Mr Simek’s office where they discussed the outcome of the investigation and Mr Pinn’s decision. Ms Swan said:

…I had said to Steve in that meeting and indicated to him Rebecca doesn’t want to see Randol, she doesn’t want to work with him, she doesn’t want to hear his voice and I indicated to Steve, I said, you know, “I don’t think she should go into the Melbourne office. I want you to be aware of that in case there is anything that comes up in that particular aspect.” And look, I think that was – that was the end. I don’t recall any specific other actions coming out of the end of that particular meeting.

A little later in her evidence Ms Swan said:

I said to her…again, I reinforced, “I don’t think you should go into the Melbourne office.” We did talk about a Melbourne project at a very high level. I – I knew from the conversation with Avi Samson that there was a potential requirement for Fosters and I said to Rebecca, “I think you can still go down to Melbourne if you’re required for this, but not go into the Melbourne office and go straight to the customer site. Would that work?” and she said, “Yes, that would work.”

Ms Swan said in her evidence that she was uncomfortable with the fact that she was directed by HR to not discuss matters with Mr Simek during Ms Sampayo’s investigation, or until 17 December 2008. Ms Richardson had also been directed by Ms Sampayo that she could not disclose her specific complaints to others. Ms Richardson’s understanding of why she was required to maintain her involvement on the ANZ Bank project while the investigation was carried out was that she could not be taken off it without an explanation being given to Mr Simek, which was impossible in light of Ms Sampayo’s directives. It certainly seems probable that in mid-November 2008 a concentration on confidentiality and the “integrity” of the investigation process took precedence over more immediate attention to Ms Richardson’s particular needs or personal interests. The fact that Ms Richardson, due to her continued involvement on the ANZ Project, remained in contact with Mr Tucker throughout the investigation period seems to have been, in hindsight, unsatisfactory. The direction that Ms Richardson’s own manager once removed (Ms Swan’s own direct manager) could not know of her allegations seems too rigid in the same context. These are criticisms easily made with the benefit of hindsight. It does not appear that Ms Richardson really complained about the underlying need for her continued participation in the ANZ Bank project at the time, although she certainly made her feelings known in her draft email of 15 December 2008 and she had earlier complained to Ms Swan about the artificiality of working out of a separate room in the Melbourne office. There seems no doubt that Ms Richardson’s contribution was thought to be a valuable one but, in my view, the arrangement was unsatisfactory. It could have done little for confidentiality. It was bound to be the subject of comment and speculation. However, none of those criticisms amounts to a finding that anybody in Oracle was acting in any intentional sense against Ms Richardson’s interests.

What is of more immediate significance to Ms Richardson’s present case is her accusation that she was demoted as a result of the decisions taken after the findings of the investigation were made available. Ms Richardson said:

And do you recall what happened that day in relation to this meeting with Ms Stratton and Ms Swan?---Yes, I do. Before we went into the meeting, I was in the office in Sydney and Amanda called me into her office and she said, “Look,” she said, “I’ve talked to Steve Simmick [sic] about what we’re going to do moving forward,” and she said, “A decision has been made to keep Randol in his role,” and she said, “but you’re going to be moved into a new role and you will be removed from all responsibility for working on Victorian projects.” And I said – and she said, “Steve wants you to work on the architecture initiative which was an internal project. And I said, “Amanda, this is not okay. This is a diminishment of my role.” And she said, “Well, I don’t think you should look at it like that.” And I said, “Well, the vast majority of the work that we’re doing is in Victoria. All the big deals are in Victoria. So if I don’t have the opportunity to work on those, how is that not a diminishment of my role?” And she said, “Well, I don’t think you should look at it that way.” And I said, “Well, what other way is there to look at it?”

Ms Richardson’s evidence about this exchange was that it occurred on 16 December 2008, shortly before the meeting with both Ms Swan and Ms Stratton. I am satisfied, however, that the meeting probably took place on 17 December 2008 and that nothing was said by Ms Swan to the effect alleged by Ms Richardson before that meeting. Ms Swan was adamant that she learnt of Mr Pinn’s decision to retain Mr Tucker in his role from Ms Stratton in their joint meeting. Ms Swan said that she, along with Ms Stratton, only spoke to Mr Simek after that meeting to obtain his acceptance that Ms Richardson would not be required to work in the Melbourne office where she might come into contact with Mr Tucker. Ms Stratton confirmed that after their meeting with Ms Richardson she and Ms Swan went to see Mr Simek together. I accept Ms Swan’s and Ms Stratton’s evidence about these matters and prefer it to Ms Richardson’s.

Shortly after Ms Richardson resumed giving evidence the following day I asked her the following:

HIS HONOUR: Would it have been possible to keep Mr Tucker in his role and for you to also perform a role in Victoria?---Maybe not the exact role that I had been in, but the consulting organisation was quite flexible, and Randol’s background was in CRM. It would have been possible to shift him into a role that was equivalent to the role that he was in in the tech practice and leave me in the practice if they had decided to go that way. Alternately - - -

You have just said in your evidence that you have no issue with the idea of Mr Tucker being left in his existing role?---I didn’t. I’m just trying to work through the options. They could have left him - - -

What I want to understand is, if that had happened, would it have been possible for you to continue to play your previous role in Victoria or not?---It would have required some juggling, but I believe it would have been possible.

Ms Richardson said she complained in the meeting itself about a reduction in her responsibilities, but this evidence makes it apparent that the position was not, on any view, as straightforward as she wished to suggest once a decision was made to keep Mr Tucker in his role, a decision to which Ms Richardson said she was never opposed. In any event, I do not accept that she did make any such complaint at the meeting on 17 December 2008.

Ms Stratton, like Ms Swan, was clear in her recollection that the meeting on 17 December 2008 was primarily concerned with Ms Richardson’s complaints about Ms Sampayo and the way the investigation had been handled. I am satisfied that the meeting was prompted by Ms Richardson’s draft email to Ms Sampayo of 15 December 2008, and was largely concerned with the matters that email referred to. Ms Stratton confirmed that after the meeting she went with Ms Swan to see Mr Simek. Ms Stratton was also firm in her evidence that nothing was said in the meeting while Ms Richardson was present to reflect any view by Ms Richardson that her responsibilities had been reduced. Ms Stratton said that if anything along those lines had been said she would have immediately sought legal advice about Oracle’s position, which is what she did as soon as the suggestion was later made in a letter from Ms Richardson dated 5 March 2009. I accept Ms Stratton’s evidence about this matter. It reinforces my view that nothing was said by Ms Richardson at this time, or until March 2009, to the effect that her role had been diminished or that she had been demoted.

Ms Swan’s primary motivation, I am satisfied, was to find a way to protect Ms Richardson, about whom she was very concerned. In my view, Ms Swan simply did her best to find a way to accommodate Ms Richardson’s desire to have nothing further to do with Mr Tucker or to risk any further encounter with him. The steps she took, with Ms Stratton’s knowledge and Mr Simek’s approval, were not intended to be, and did not represent, a demotion or a reduction in Ms Richardson’s role or responsibilities.

The “architecture initiative” to which Ms Richardson referred in the first extract above appears not to have been as insignificant as she tended to suggest. Later evidence showed that the project was being sponsored and developed at a high level within Oracle. It was in fact proposed in early December to Mr Simek that Ms Richardson be involved in a senior capacity. Ms Swan sent Ms Richardson an email on 16 December 2008 drawing the project to Ms Richardson’s attention and foreshadowing her potential involvement in it. These developments appear to be unrelated to the issues with Mr Tucker. I reject the contention that they disclose any diminution of Ms Richardson’s role.

Ms Richardson was due to go on leave on 19 December 2008. When she returned she was to act in Ms Swan’s position while Ms Swan took leave, which is what happened. Ms Richardson accepted that as at 19 December 2008 she was not working on any Victorian projects and no Victorian projects had previously been identified as ones to which she would formally be assigned. However, Richardson accepted in her evidence that in a discussion with Ms Swan shortly before she went on leave she was alerted to the fact that she might be required to attend a meeting or conference concerning Fosters, a project based in Victoria. Ms Swan’s proposal was that if that was necessary, Ms Richardson would go directly to the client’s office without the need to go to Oracle’s Melbourne office.

Ms Richardson’s position in the present proceedings amounts to a contention that, although she had not been assigned to work on any Victorian project, although there had not been any reduction in her remuneration and although there had been no change in her status within Oracle or her employment level, she was demoted by Ms Swan’s advice to her that she should not go to the Melbourne office.

I do not accept this contention, or anything which depends upon it. Ms Richardson accepted that Ms Swan had generally been supportive of her. So far as I am able to judge matters, including with the benefit of hearing and watching Ms Swan give her evidence, that was a proper and accurate concession to make. In my view Ms Swan was very concerned about Ms Richardson and solicitous of her welfare. She was upset, on Ms Richardson’s behalf, about the investigation process and concerned to take steps which would protect Ms Richardson’s psychological well-being in the period which followed. I am satisfied that the decisions which were taken in Sydney by Ms Swan and Mr Simek were not taken with a view to protecting or advancing Mr Tucker’s interests. Rather they were taken with a view to protecting Ms Richardson’s interests. Ms Richardson had made very clear in her draft email on 15 December 2008 that the prospect of having anything further to do with Mr Tucker was unacceptable to her. In my view Ms Swan set out to spare Ms Richardson the possibility of such an encounter, and that is all.

## Ms Richardson’s resignation

Ms Richardson began considering the question of her future employment after she made her complaint against Mr Tucker and before the investigation was complete. She said in her evidence that she thought she would be stigmatised for having made a complaint and was losing confidence in Oracle. Those matters are consistent with her initial determination not to make a complaint, but to attempt to deal with matters herself. Ms Richardson held the view that a complaint of this kind works against the complainant, as much as the accused. She apparently soon had second thoughts about the course she had taken in making a complaint. She began to make inquiries about the state of the jobs market in the IT field in November, after she had made her complaint, and made at least one unsuccessful job application at about this time. A friend and neighbour, Ms Ann O’Toole, who gave evidence about Ms Richardson’s demeanour and apparent distress between April and November 2008 also said that Ms Richardson had indicated to her after November 2008 that “she made a decision that she would probably have to leave the company, that she didn’t have any future with them.”

I do not discount the possibility that Ms Richardson, who was clearly very upset about aspects of the investigative process, also made her own assessment at some stage that her professional prospects at Oracle might be affected by the decision that she should avoid the Melbourne office. It is likely that she considered the practical outcome of the investigation, therefore, to have been very unjust and that her career would suffer while Mr Tucker’s, apparently, would not. I am far from sure that such an assessment was accurate. It was certainly not objective. There is no evidence that Ms Richardson ever made an attempt to talk about these matters with Ms Swan after the latter had returned to work following her own period of leave when Ms Richardson filled in for her. On the contrary, when Ms Swan and Ms Richardson did discuss Ms Richardson’s position in a formal performance review in January 2009 the issue was not mentioned. I am satisfied that, by this time, Ms Richardson was pursuing other initiatives.

While on leave Ms Richardson decided to pursue the question of alternative employment with a greater focus. Shortly before Christmas she rang Mr Ward who was then working from Singapore for EMC. Mr Ward, as earlier indicated, had previously worked at Oracle where he had been Ms Richardson’s immediate superior. Mr Ward had designed the position Ms Richardson held at Oracle in Australia. That position was a little unusual in that it incorporated a large component of non-billable hours. Despite that feature, Ms Richardson had managed to achieve successful allocations of bonus to herself at Oracle from a pool, broadly speaking, provided on the basis of results. Mr Ward thought very highly of Ms Richardson. They had worked well together. Mr Ward’s work for EMC was in the same general field as Oracle. Mr Ward was bound by a non-solicitation agreement when he spoke with Ms Richardson. He was, according to his evidence, conscious of the need to respect that obligation and made sure that he did so. Nevertheless, in due course when Ms Richardson left Oracle she went to work for EMC and, by the time of the proceedings, was reporting directly to Mr Ward in a position very similar to that which he had designed for her at Oracle.

According to Mr Ward, in their telephone conversation shortly before Christmas 2008, after exchanging Christmas greetings and other pleasantries, Ms Richardson informed him that she was “looking for something” to which Mr Ward responded positively, although he emphasised in his evidence that he observed the limits of his restraint. On 19 January 2009 Ms Richardson sent Mr Ward an email in the following terms:

Hi there,

Just a quick check-in to say Happy New Year – hope you had a nice holiday! I had a long think over the holidays and am very much looking forward to talking to you more about a move to EMC.

Keep me posted.

Cheers,

Rebecca

Mr Ward responded later that day. His response commenced:

Hi Rebecca – great to hear from you. I was getting around to sending you an update but you beat me to it. We have the requisition for the position approved and Lawrence is now raing [sic] the letter of offer request. I am hopeful that we can clear this within a week but this is one area where EMC is pretty similar to Oracle – two phase process, lots of approvers, so its not immediate. But the LOO process is the shorter of the two so I am confident of moving quickly.

Ms Richardson replied:

Hi,

Thanks for the update – look forward to talking with you!

R.

In the light of subsequent events the significance of this exchange is, in my view, plain enough. Ms Richardson had decided to canvass for another position. In fact she made at least one further formal application (in addition to November 2008) on 2 February 2009 but again, apparently, without success. The approach to Mr Ward was immediately more promising. Although it may be true to say that Ms Richardson had no guarantee at that stage of a position, she had an influential ally, and steps were obviously taken with a view to creating a position which would be suitable to her and to which she would be suited.

Immediately before replying to Mr Ward Ms Richardson forwarded a copy of her exchange with him to her partner, Adrian Dunphy, saying:

Things are moving with EMC …… think good thoughts about this because if the money is ok, I’m thinking it would be a good move. What do you think?

Mr Dunphy replied:

sounds very promising - I would also move on your Oracle issues pronto

It is clear, in my view, that by this time Ms Richardson had sought some legal advice about her situation. Ms Richardson insisted in her evidence that she did not seek legal advice until after she returned to work in January. Dr Jonathan Phillips (a consultant psychiatrist to whose expert evidence I refer later) recorded that Ms Richardson told him that she had sought legal advice before returning to work after the Christmas break. In my view this neutral record of Ms Richardson’s statements is likely to be more reliable than her memory in the witness box under cross-examination, but nothing will turn on the few days’ difference. Ms Richardson returned to work on 12 January 2009. On 19 January 2009 Ms Richardson printed a copy of Ms Sampayo’s email advising her of the outcome of the investigation. On 22 January 2009 a copy of the signed statement provided to Ms Sampayo by Ms Richardson was sent by facsimile to Harmers, the solicitors acting for Ms Richardson in the present case. I infer that not only was Ms Richardson actively seeking another position at this time, but she was also actively seeking legal advice with a view to considering action against Oracle. In my view that process probably commenced before 12 January 2009 but in any event was sufficiently advanced by 19 January 2009 to give Ms Richardson and Mr Dunphy some confidence that she had a good foundation for legal action against Oracle. I infer that Ms Richardson decided about that time to proceed on the basis that she had a good cause of action against Oracle and because she was confident, as a result of her discussions with Mr Ward, that a position at EMC would in all likelihood be made available for her.

The formalities for the establishment of the position at EMC which Ms Richardson and Mr Ward had discussed were in the hands of Mr Lawrence Maynard. Ms Richardson’s evidence was that she had an interview with Mr Maynard in late January 2009. Mr Ward, however, was confident that Ms Richardson had been interviewed by Mr Maynard before the email exchange on 19 January 2009. Whatever the true position, Ms Richardson had a further interview with someone at EMC, probably in February 2009. In due course a formal offer of employment with EMC, reporting to Mr Maynard, was made on 13 March 2009. As events transpired, Ms Richardson did not wait for such a formality before resigning her employment with Oracle on 5 March 2009. I am satisfied that there was a clear understanding before Ms Richardson resigned from Oracle that the job at EMC would be available to her. On 11 March 2009 Mr Ward informed two of his colleagues (Mr Maynard and a HR executive in Sydney) that Ms Richardson had resigned from Oracle and asked them if there was “any chance of getting her the letter today or tomorrow”.

Ms Richardson’s case is that her demotion, said to be constituted by the advice to her that she had lost all responsibility with respect to Victorian projects, was confirmed in practice by the fact that she was put “on the bench” in January and February 2009. The facts do not bear out this contention. First, Ms Richardson did fill in for Ms Swan during Ms Swan’s own period of leave. Secondly, there was some evidence that January and February is not uncommonly quiet in the consulting business and that January and February 2009 was no exception. Thirdly, Ms Richardson was unable to identify any particular work or project from which she was kept or to which she would otherwise have been assigned. Her efforts in that regard were completely speculative. Suggestions that others were assigned work that should have been hers were not supported by objective facts.

Ms Richardson complained in her evidence that she was under-utilised from the time she returned to work in January and through February 2009 and that she was increasingly anxious about it. These complaints are unconvincing. First, for two weeks from her return to work on 12 January 2009 Ms Richardson was filling in for Ms Swan. Secondly, Ms Swan has no recollection of any suggestion of this kind. Thirdly, on 29 January 2009, shortly after Ms Swan returned from leave, Ms Richardson met with Ms Swan for her performance review. This was a periodic review which was required under Oracle’s HR policies and practices. It provided an obvious opportunity for Ms Richardson to ventilate any concerns that she had about the allocation of work to her or any other matter likely to impinge upon her ability to meet her performance targets for the coming period. These were the matters upon which her remuneration would most likely depend. I infer that Ms Richardson treated the occasion as more or less a formality because by then her own plans for leaving Oracle and moving to EMC were well advanced. I am satisfied that she made no complaint to Ms Swan, and sought no adjustment in her working arrangements or in the assignment of work to her.

In preparation for the meeting on 29 January 2009, Ms Richardson was required to record her comments concerning the extent to which she had been successful in meeting the objectives set for her in her role. These comments together with any which Ms Swan might make formed part of the official record in Oracle’s performance appraisal system. In her own contribution Ms Richardson explained that she had been distracted or diverted from the performance of some aspects of her core objectives by her involvement in the ANZ Bank project, but that she expected to be able, in the quarterly periods to follow, to concentrate again on those aspects of her work. There was no suggestion in this material that Ms Richardson was under-utilised, unhappy with the allocation of her responsibilities or felt that her responsibilities had been reduced. In Ms Swan’s evidence she said no complaint or suggestion of this kind was made to her at the meeting on 29 January 2009 either. Ms Swan’s own comments were very complimentary of Ms Richardson. She obviously remained concerned about Ms Richardson, however, and arranged for weekly catch ups thereafter to ensure continued liaison. Ms Swan said she was never told by Ms Richardson that she was under-utilised or working on matters which were inappropriate to her role or status.

In my view there is no objective support for the suggestion in the present case, which was critical to some aspects of Ms Richardson’s claims for relief, that she was demoted in December 2008 or that her career prospects were adversely affected by any decision taken at that time or later. There is no reason to think that her ability to earn discretionary income by way of bonus had been reduced or that her prospects for future promotion had been reduced. There is no reason, either, to think that the security of Ms Richardson’s employment with Oracle had been affected. Ms Richardson’s own assessment, recorded in her counselling journal, was that Oracle would take no step to bring her employment to an end. In my view the steps which Ms Richardson then took were voluntary ones.

Ms Richardson, in consultation with her lawyers, decided to resign her employment with Oracle in a way that suggested that she had no choice but to do so. She signed the following letter to Ms Stratton dated 5 March 2009:

Dear Edweena,

**MY EMPLOYMENT WITH ORACLE CONSULTING**

As you [are] aware, I have been very disappointed with the manner in which Oracle Corporation has dealt with my complaint about the conduct of Mr Randol Tucker. Ultimately, as a result of me lodging a complaint about Mr Tucker’s sexual harassment of me, my position was changed. That change constitutes a fundamental breach of my employment. As such, it has now reached a point where it has become untenable for me to continue to carry out the role of Consulting Technical Manager and I give notice that I am ceasing our employment contract relation due to Oracle’s breach of my contract and its obligations to me. While not required to do so (as it is Oracle’s conduct that has led to the cessation of my employment), I give notice that my employment with Oracle will cease on 3 April 2009.

I have been incredibly disappointed at the manner in which my complaint about the sexual harassment of me by Mr Tucker was handled by Oracle.

In my role as Consulting Technical Manager (prior to the fundamental change to that role made after my complaint) the projects that I was responsible for spanned across Australia and New Zealand. Mr Tucker is a Consulting Account Manager in Victoria, and as such, I was regularly required to interact with him. Mr Tucker’s behaviour toward me was often highly sexually-charged and aggressive, and left me feeling uncomfortable and humiliated. I did not witness Mr Tucker behaving in this manner towards any other female at Oracle, which leads me to believe that Mr Tucker’s behaviour was targeted. Many of these incidents were witnessed by independent third-parties, and as outlined in my written complaints of 17 August [sic] 2008, several of these witnesses communicated to me that the seriousness of the behaviour warranted me taking further action.

However, once my written complaint was lodged, the manner in which the complaint was investigated, and the lack of action taken despite my complaint having been substantiated, leads me to believe that Oracle only pays lip service to the policies regarding sexual harassment it professes to abide by. In its policies, Oracle states that it requires its employees to demonstrate high moral and ethical standards in performing their work, as well as interact fairly and respectfully with each other.

However, despite the findings of the investigation, the disciplinary action taken against Mr Tucker was not commensurate to the seriousness of his conduct, and subsequent events suggest that this was because Oracle was concerned about not compromising a deal that Mr Tucker was involved in.

Instead, as a result of lodging a formal complaint, I have suffered a significant change and diminution in my role and responsibilities. I have been removed from involvement in the Victorian bids and projects, which constitute the largest body of work for the Technical Consulting practice. These opportunities have been given to a colleague with less tenure at Oracle and less experience in the Consulting organisation. However, I am expected to mentor this colleague in his work on these projects, suggesting that he is less qualified than I am to drive that body of work. I have been assigned to program manage minor internal projects and low-cost consulting engagements, effectively sidelining me from the large projects and reducing the monetary value of the projects I am involved in and my ability to grow my skills and experience as a program manager. In contrast, Mr Tucker has experienced no change in his status or position. My employment with Oracle Consulting has been made untenable because of this situation.

I understand that victimisation for lodging a sexual harassment complaint is prohibited under relevant legislation. The substantial change in my role and responsibilities amount to a detriment to which I have been subjected to by compromising my career path and, as a result, it is clear that not only have I been subjected to sexual harassment, I have also been victimised by Oracle for lodging a formal sexual harassment complaint. You may recall that I initially only wanted a less formal form of intervention from Human Resources, however, I was convinced by members of the Human Resources team into lodging a formal complaint. In addition, I also feel that I was victimised by Oracle Human Resources throughout the course of the investigation as the manner in which the investigation was conducted was outside Oracle’s stated Diversity Policy. For example, Oracle required me to continue working with Mr Tucker on a daily basis throughout the course of the investigation, which was exceedingly difficult and in direct violation of the Diversity Policy.

I have loyally and faithfully served Oracle for 10.75 years. It is extremely unfortunate that Oracle has mismanaged this situation to such an extent that I have been compelled to issue this letter confirming the termination of our employment relationship.

Only after careful consideration did I lodge the formal complaint, and I would have expected Oracle to treat this complaint with the utmost professionalism due to the seriousness of the complaint. By its own admission, Oracle mismanaged the situation and sacrificed my career path to close a $1.4 million deal.

Yours faithfully,

Rebecca Richardson

I think this letter was probably drafted (at least in part) by Ms Richardson’s lawyers. One indication of that is that it incorporated the wrong date which by mistake appeared on Ms Richardson’s signed statement (17 August 2008), a copy of which Ms Richardson had provided to her lawyers on 22 January 2009. The letter is, in any event, clearly a “positioning” letter. I give no real weight to any of the representations made within it. They may, in part, represent real grievances but they are advanced in this context in an argumentative attempt to create an occasion for future litigation. Ms Stratton’s evidence was that she immediately sought legal advice. Presumably with the benefit of that advice Ms Stratton replied on 6 March 2009:

Dear Rebecca,

I have received your letter dated 5 March 2009. I do not agree that as a result of your complaint there has been any change in your position. There has been no fundamental breach of your contract of employment.

I am aware that Mr Tucker accepted the need for counselling and provided you an apology. I see no basis for your claim that as a result of the complaint that it is untenable for you to carry out your role.

I note your comment about your disappointment as to the manner in which your complaint was handled by Oracle. Whilst you are entitled to your opinion, I believe that the matter was properly investigated and that appropriate corrective measures were taken. I reject entirely your claim that Oracle “only pays lip service to its policies”.

You have not been victimised and I would urge that you reconsider your resignation.

To this end I would like the opportunity to meet with you with the view to convincing you that your resignation is not the way to deal with this issue.

If it is the case however that you wish to resign Oracle must accept your resignation however I would hope that this will be unnecessary.

I understand that from your discussion with Ms Swan, your manager that you expected to be paid out in lieu of notice and released from your employment.

In the circumstances and in view of my wish to continue to discuss this matter it is not appropriate that you be paid out in lieu. It is my expectation that you will attend work throughout the notice period which we accept will end on 3rd April 2009 in accordance with your letter dated 5th March 2009, and that you and I will have the opportunity to discuss your concerns.

Sincerely,

Edweena Stratton

**Human Resources, Senior Director**

**Australia and New Zealand**

Although Ms Stratton’s letter was presumably written with a view to the protection of Oracle’s interests, I do not regard the request that Ms Richardson reconsider her decision as an insincere one. This exchange of correspondence was followed by a meeting attended by Ms Richardson, Ms Stratton and Ms Swan on 9 March 2009. Ms Richardson was asked again by Ms Stratton to reconsider her decision but Ms Richardson declined. This, in my view, is a further reason why Oracle may not be held responsible for Ms Richardson’s decision to leave her employment with Oracle. The reality is that Ms Richardson had decided to go for reasons of her own. Those reasons do not match the suggestion that her career had been damaged, much less that Oracle had repudiated her contract of employment. Although I think there is a case that Oracle’s response during the investigative process may have failed Ms Richardson in certain respects, that did not amount to repudiation of Ms Richardson’s ongoing employment relationship with Oracle, nor repudiation of her contract of employment.

Ms Richardson thereafter worked out her notice period. Not surprisingly she was not assigned to any new major project in Victoria or elsewhere during this time. Her employment with Oracle ceased, as she had stipulated, on 3 April 2009.

## Employment by EMC

In a conversation with Mr Ward, which he reported to his colleagues on 11 March 2009 when informing them that Ms Richardson had resigned from Oracle, Ms Richardson indicated that she would be available to commence work at EMC, after a short break, on 20 April 2009. The letter of offer to her from EMC, dated 13 March 2009, accommodated this position and offered Ms Richardson a starting date that corresponded with her wishes, 20 April 2009.

Ms Richardson was employed initially in the position of “Senior Consultant”, based in the North Sydney office of EMC and reporting to Mr Maynard who was the “Professional Services Manager” for Australia and New Zealand. Accordingly, Ms Richardson’s nominal geographical sphere of operations was formally stated to be the same as it had been at Oracle at the time her employment ended. Earlier in her career at Oracle Ms Richardson had much wider responsibilities in the Asia Pacific area. She accepted in her evidence that travel had been an integral part of her job at Oracle at various times. Notwithstanding the terms of her initial appointment to EMC Ms Richardson knew that there were plans to use her services in Japan and she shared with Ms Swan the fact that she was learning Japanese in preparation. It is obvious that some level of travel was forecast, however, with the passage of time and events it developed into much more than had been anticipated.

Ms Richardson complained in the proceedings that she had been forced to undertake a very high level of international travel with EMC; that it was dislocating to her personal life and personal relations; and that Oracle was ultimately responsible for these adverse consequences as it had effectively forced her to leave her employment. She sought compensation and damages for these disadvantages and consequences, as well as for alleged future economic loss for a period of at least 15 years.

There is no doubt that Ms Richardson was required in due course at EMC to travel far more than in her concluding period of employment at Oracle. In a general sense this was part of the terms which she agreed, which were explicit that business travel might be required. In part the requirement arose from the circumstances of the time, which had not been forecast.

It is clear that at EMC Ms Richardson soon came directly under Mr Ward’s wing, as she had been at Oracle shortly before he left to go to EMC. Her role at EMC developed, on Mr Ward’s evidence, to be substantially the same as the role Ms Richardson had performed at Oracle with respect to the Asia Pacific region when she reported to him. Mr Ward’s evidence was that the role Ms Richardson had at the time he gave evidence (March 2012) encompassed the Asia Pacific and Japan region. That role, as at Oracle, was substantially non-billable. It was primarily, but not exclusively, an oversight role concerned with consistent delivery of services across a range of projects, rather than being focussed on specific delivery of outcomes or services for only a particular project. The role was created by Mr Ward for Ms Richardson at EMC as it had earlier been created by him for her at Oracle. Although Mr Ward was keen to emphasise that it was not the role in which Ms Richardson was initially employed at EMC (perhaps conscious of his own obligations under a restraint arising from his resignation from Oracle) it seems clear that Ms Richardson learning Japanese before she even left Oracle owed something to her expectations about what the future might hold at EMC.

In mid-2010 an unexpected requirement arose for Ms Richardson to undertake extensive travel to Malaysia for a period of six months. Overall results for EMC were below expectations, EMC had a project in difficulty in Malaysia and Mr Ward judged that it was not possible to take on the expense of an additional project manager. In those circumstances, he decided that Ms Richardson should act as the project manager (presumably fully billable) for the necessary six months in Kuala Lumpur, Malaysia. Inevitably, a lot of travel was involved for Ms Richardson who continued to reside in North Sydney.

It appears that this was a temporary arrangement. It was accepted by Ms Richardson as part of the job. It was unexpected. In any event, it arose after Ms Richardson had progressed in EMC to a position of her choice, and one which she may always have had in mind. Apart from any other difficulty with a claim based on unforeseen events more than a year after Ms Richardson left Oracle, I do not see any foundation for a claim that Oracle should be held responsible, and be required to compensate Ms Richardson, for any personal difficulties which this particular period of travel might have imposed on her. The suggestion involves the proposition that Oracle was bound to underwrite her fortunes and guarantee a degree of personal amenity of life, regardless of intervening circumstances. I do not accept that. In my view, any dislocation arising from this period of unanticipated travel was due to new and supervening circumstances for which Oracle was not responsible, whatever period might be appropriate to consider for the purpose of calculating compensation or damages for a proven case of sexual harassment or other cause of action.

Ms Richardson also sought the calculation of compensation or damages upon the basis that (as expressed in final written submissions) she might have expected a promotion at Oracle within four to five years, and a further promotion within a further seven years, each opening up the prospect of bonuses higher than 25% of base salary. By contrast, it was argued “it is likely to take a longer period of time for Ms Richardson to be promoted at EMC”. The comparison thus offered is delightfully vague.

I accept that Ms Richardson was a valued employee at Oracle, although she appeared to occupy a unique role which was created specially for her. Her role at Oracle involved no direct supervision of staff. Hers was, therefore, a role which turned particularly on the quality of her individual contribution, about which to that point there had been no doubt. Ms Richardson had in fact been promoted about every two years to that point in Oracle and, notwithstanding that hers was not a fully billable role, had managed to earn bonuses consistently at just under her target level of 25% after being promoted to the IC4 level. Ms Richardson accepted that, at the level she had reached, opportunities for promotion would be fewer. She would have had to assume responsibilities which went beyond her experience to that point, including direct supervision of other staff. Just as an example, Ms Swan who was at a higher relative level (effectively one above Ms Richardson) waited eight years for a promotion from that level. By contrast with Ms Richardson’s assumptions, Ms Swan, who appears to have been successful in her own right, did not achieve target bonus at her level. Inevitably, there is a large element of speculation in Ms Richardson’s claims. The evidence to support them was largely historical, from which extrapolations were attempted on the basis of some presumption that things would go on as before. But there were obvious difficulties in the analysis.

Ordinary base salaries at Oracle moved in response to a range of factors, including economic factors well abroad of Australia. Some years there was no increase, except for very special cases. That was the case in 2008 and 2009. Bonuses were discretionary and depended on a variety of discretions and allocations, themselves based initially on Oracle’s global fortunes. Support from the historical position was obviously subject to the uncertainties of future economic cycles worldwide. No attempt was made to deal with these matters at any real level of rigour except for mathematical extrapolation from variously calculated averages.

Ms Richardson did well at EMC. Although she commenced with a lower base salary ($140,000 rather than $150,000) she made up that shortfall by 2012. She achieved on average higher actual bonuses at EMC, compared to Oracle, also doing better on average than her target of 25% of base salary. The suggestion that her promotion prospects were less at EMC than at Oracle was based on the argument that EMC was a smaller company than Oracle and that the division in which Ms Richardson worked at EMC was not the core of EMC’s business. There was no evidence, however, that over the time frames suggested (four to five years and then seven years) Ms Richardson would not do as well at EMC as she might at Oracle. The only certainty was that for a period of about three years her base salary was lower.

The whole calculation suffered from the basic difficulty, of course, that I do not accept that Ms Richardson’s prospects at Oracle were disturbed by anything other than her voluntary move to EMC. I shall return later to the question of the assessment of damages, after specific conclusions have been stated about each of the causes of action.

# sexual HARASSMENT case

## What constitutes sexual harassment

At the time relevant to these proceedings s 28A(1) and (2) of the SD Act provided:

28A(1) For the purposes of this Division, a person sexually harasses another person (the ***person harassed***) if:

* + - 1. the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed; or

(b) engages in other unwelcome conduct of a sexual nature in relation to the person harassed;

In circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the person harassed would be offended, humiliated or intimidated.

1. In this section:

***conduct of a sexual nature*** includes making a statement of a sexual nature to a person, or in the presence of a person, whether the statement is made orally or in writing.

It is against this statutory standard that Mr Tucker’s conduct must be assessed.

## Reliance on a limitation period

In Mr Tucker’s amended defence he asserted that any conduct alleged against him which occurred prior to 30 October 2008 (ie 12 months before Ms Richardson made a complaint to the Australian Human Rights Commission) could not sustain any cause of action against him, or any claim for relief. He relied on s 46PH(1)(b) of the *Australian Human Rights Commission Act 1986* (Cth) (“AHRC Act”). The point was not taken by Oracle. No submissions were addressed to the point by either respondent.

In my view the point is misconceived. While s 46PH(1)(b) provides that the President of the Australian Human Rights Commission may terminate a complaint where the complaint was lodged more than 12 months after the alleged unlawful discrimination took place, it does not operate as a limitation period barring reliance on conduct that predates a certain point in time in proceedings commenced in this Court. Section 46PH provides a ground for the exercise of a discretion by the President to terminate a complaint. It is not addressed to this Court’s power to determine a claim before it.

In any event, the incidents which occurred after 30 October 2008 would necessarily require evaluation as ones representing the continuation of a course of conduct which commenced in April 2008. No artificial chronological division of conduct into periods before and after 30 October 2008 would have any effect on the outcome of the present case.

## Alleged inconsistencies in Ms Richardson’s accounts

Before I deal in more detail with the allegations of sexual harassment pursued in the present proceedings, it is convenient to deal with two areas where there are apparent inconsistencies in accounts given by Ms Richardson about some of the events in question. The first concerns the fact that the complaints made to Oracle were less extensive than those pursued in the present proceedings. The second concerns the contents of a “counselling journal” kept at one point by Ms Richardson.

It is clear that the matters advanced in the present proceedings as complaints of sexual harassment are more extensive than the complaints made to Oracle (through Ms Sampayo). A proposition advanced by both Oracle and Mr Tucker was that the additional allegations should not be accepted because they were unreliable. The argument was that they would, if of any importance, have been conveyed to Ms Sampayo. I do not accept this criticism.

I am satisfied that Ms Richardson only complained to Oracle when she saw plainly that she had become unable to manage the situation solely through use of her own inner resources. When she did complain she gave, as requested, examples to support her allegations regarding Mr Tucker’s general course of conduct. Her complaints were made, and investigated, as allegations about Mr Tucker’s generally inappropriate conduct in the setting of their respective roles. Her complaints were not then, as they are now, focussed so closely on the precise allegation of sexual harassment, according to the statutory standard set out earlier.

In my view the examples given to Ms Sampayo were presented as illustrations of a course of conduct by Mr Tucker, extending over a period of many months. The illustrations were not, and were not intended to be, exhaustive. This is plain enough from the terms of the written complaint compiled by Ms Sampayo. The written complaint records that Mr Tucker made inappropriate comments of a sexual nature on “various occasions”; that “Randol has made these types of comments many times”; that Randol had asked Ms Richardson out on “various occasions”. This language suggests that the written complaint was not an exhaustive record of the specific detail of every single incident which aggrieved Ms Richardson. Rather, the five specific illustrations of particular conduct set out in the written complaint were indicative examples. I do not accept, therefore, any suggestion that there is a relevant inconsistency between complaints made to Ms Sampayo and the allegations made in the present proceedings.

Ms Richardson was reasonably candid in her evidence about her inability to precisely recall dates and chronological sequences. Often it seemed to me that her professed recollection was the result of some process of reasoning or deduction on her part. The major consequence of this difficulty concerns the use to be made, and the reliance to be placed, on entries made by Ms Richardson in a counselling journal which she commenced to keep after seeing a counsellor at Ms Sampayo’s suggestion. Ms Richardson did not find the services of the counsellor to be particularly useful but she did thereafter make some attempt to write down how she was feeling from time to time. In some instances there is some inconsistency between things recorded by Ms Sampayo and later pressed in the proceedings, and the counselling journal. However, this latter record was, I am satisfied, intended more as an outlet for Ms Richardson to express her feelings than to provide a completely accurate historical account of events, much less to be used in later proceedings. It contains revelations of sufficient candour, and potential embarrassment to Ms Richardson, to exclude the last possibility.

One example of an inconsistency is that in the counselling journal the events in Incident 1 (dealt with hereunder in more detail) are telescoped and described as though they occurred as a single conversation the first time Ms Richardson and Mr Tucker met. Ms Sampayo also initially recorded the exchanges as taking place during a single conversation, but the conversation was attributed to a third meeting between them. In the corrections Ms Richardson made to Ms Sampayo’s notes Mr Tucker’s comments were separated by several days, the first of them being made in the third meeting between them. In both the statement of claim and an amended statement of claim the comments are all said to have been made at a second meeting. In her oral evidence Ms Richardson gave, in substance, the account recorded in the written submissions (set out at [16]), namely that the comment “I bet the sex was hot” followed several days after an initial comment about being married, which was made in their first face to face meeting. This represents a partial return to the version in the counselling journal. Fortunately for Ms Richardson’s case this multitude of versions may be substantially put to one side as a distraction because ultimately there was little dispute that the comments were made.

The entries in the counselling journal were each headed simply “ENTRY”. They were not dated. They show all the signs of entries made under circumstances of distress, and perhaps anger. I infer that they were made fairly quickly, and with little attention to any desire for perfect precision. During her oral evidence Ms Richardson attempted to assign dates, or rough timing, to each entry. I have no doubt she did her best but I am not satisfied that even that attempt was completely reliable.

The contents of the counselling journal do not falsify Ms Richardson’s evidence in the proceedings, nor provide a sufficient reason not to accept that evidence in substance. However, in my view the counselling journal should not be regarded in every instance as, in itself, an accurate historical record. As I said, that was not its purpose. On the other hand, I see no reason to doubt that the counselling journal is a substantially correct account of Ms Richardson’s feelings and physical symptoms.

## The case against Mr Tucker

None of the people (apart from Ms Richardson and Mr Tucker) who were privy to the exchanges between Mr Tucker and Ms Richardson or their working relationship were called by any of the parties to give evidence in the proceedings. Nevertheless, I have had no real difficulty coming to such conclusions as are necessary to decide whether Ms Richardson’s specific allegations (set out in full earlier) should be accepted.

### Incident 1

Mr Tucker admitted in his amended defence that disagreements emerged in the initial meetings between him and Ms Richardson concerning how Oracle would propose to the ANZ Bank that the project be structured. They disagreed also about the risks to Oracle associated with different structures. Mr Tucker admitted in his evidence that the ANZ project was very important to him. It represented his major opportunity at that time for a substantial boost in his earnings by way of commission. He also said that he and Ms Richardson had different, and often competing, priorities from a business point of view, notwithstanding that they each, in their own way, were involved in the ANZ Bank project to represent Oracle’s interests.

As Mr Tucker saw it, his job was to sell Oracle’s products and services while Ms Richardson’s was to keep an eye on risks. Although, in his evidence, Mr Tucker professed willing acceptance of Ms Richardson’s role and contribution I think it likely that he quickly became frustrated by her different perspective and, perhaps, her insistence on it. These matters emerged, it seems, when they first met face to face.

At probably the first such meeting, where a number of representatives of Oracle and its associates were present, Mr Tucker and Ms Richardson found themselves in frequent disagreement about significant matters.

Ms Richardson’s evidence was that during the meeting Mr Tucker said:

Gosh, Rebecca, you and I fight so much…I think we must have been married in our last life.

and in a meeting a few days later said:

So, Rebecca, how do you think our marriage was? I bet the sex was hot.

According to Mr Tucker’s evidence, at the end of the meeting he simply set out to diffuse the developing tension with a joking remark, in front of others. When first confronted with Ms Richardson’s accusations by Ms Sampayo, Mr Tucker repeatedly denied using the word “sex”. His initial defence, filed in the proceedings on 30 July 2010, denied it also. That defence did, however, record Mr Tucker’s admission that he had said:

you and I fight so much we must have been married in a past life

One of the people present at the meetings was Mr Samson. Mr Samson was interviewed during the Oracle investigation. The record of that interview supports Ms Richardson’s assertions about what was said. Mr Tucker did not have access to Mr Samson’s recorded statement until after 22 November 2010. Subsequently, in his amended defence, filed on 2 September 2011, Mr Tucker accepted he had referred to sex, admitting he had said both:

you and I fight so much we must have been married in a past life

and

I bet the make up sex was hot

In the evidence Mr Tucker gave orally at the trial he also admitted using the word sex, but he attempted to draw some distinction between use of the word “sex” and the term “make-up sex”. He attempted to deflect reference to his outright denials of using the word “sex” (during the Oracle investigation and in his initial defence) by saying that there had been some “confusion” about the issue. His attempts, particularly during cross-examination, to maintain those positions were unconvincing.

I see no relevant difference between the comment attributed to Mr Tucker by Ms Richardson, and that which he was finally prepared to accept he had made. The remark about being married in a past life may potentially be accepted as an intended jibe, but it is hard to be so charitable about anything which suggests that sex or make up sex was hot. I think that remark was, and was probably intended to be, humiliating. It was also unmistakeably sexually loaded. That is not to say that it necessarily represented sexual harassment if it had been the only incident to consider. It may have simply been offensive, without possessing the particular elements required to constitute sexual harassment. If it represented an offensive and insulting manifestation of aggression towards Ms Richardson, which was evidently not accompanied by sexual connotations as opposed to simple hostility, it would not become sexual harassment just because the allusions used were gender based or potentially sexually charged language was used. Such language is in everyday use in some quarters without it meeting the statutory tests for sexual harassment.

In the present case, so charitable an explanation is not available. This initial exchange marked the beginning of a pattern which was to continue over a period of months. A repeated pattern in this, and later, encounters was behaviour by Mr Tucker consistent with the thesis that he was trying to get the upper hand in his relationship with Ms Richardson. Some of those attempts were at least smutty, some were offensive and some (expressed more privately) involved initiatives and invitations representing a more direct interest of a sexual kind. When they occurred in the hearing of others they seemed consistently humiliating.

When the remaining incidents discussed hereunder are taken into account I am satisfied that Mr Tucker embarked on a systematic course of conduct that is fairly described as sexual harassment within its statutory meaning. Some of the individual remarks and suggestions constituted sexual harassment in their own right. The first incident fell into that category. Overall, the whole course of conduct did also.

I came to the view that Mr Tucker did not give honest evidence about these matters. His position shifted over time, according to whether there was independent verification of Ms Richardson’s allegations, or he thought that there might be. Where Ms Richardson’s case rested solely on her own evidence, Mr Tucker seemed content to deny outright what she said. Where he was obliged to recognise the existence of some support for her position, his defence was that his remarks had been taken out of context, or were examples of “blue banter” that stopped short of sexual harassment. Over time, the position changed according, apparently, to his assessment of the strength of the allegations against him. Thus, some things were denied outright to Ms Sampayo. Some of those same matters were admitted in the present proceedings. That cannot be the result of a changed recollection. In my view it represents a preparedness to lie and, if necessary, to give false evidence. I am in a better position than Ms Sampayo was at the time of her investigation to resolve any conflict which involves just Ms Richardson’s word against Mr Tucker’s. I have the advantage of more material with which to assess Mr Tucker’s credit overall. In general, where a conflict of that kind must be resolved, I prefer Ms Richardson’s evidence to Mr Tucker’s both as to the facts, and as to context.

### Incident 2

Mr Tucker, who at the time was attending a sales conference in Sydney, admitted making a number of attempts, by telephone and text message, to persuade Ms Richardson to attend an after conference party. Ms Richardson was working from home that evening and ultimately refused the invitation. There was no serious issue surrounding this aspect of the allegation. However, Mr Tucker attempted to deflect the significance of the remarks Ms Richardson attributed to him when they next met in Melbourne (“if I were drinking with you I would wind up in the corner with my arms around you kissing you”) by suggesting that the comment was not directed at Ms Richardson in particular, but was cast more generally and was a “somewhat comical observation about corporate culture”. The explanation deserves immediate rejection. There was no suggestion that anything like that actually happened, or that Ms Richardson’s presence would cause it to happen. The suggestion was in my view a sexual overture. It was clearly unwelcome. I have no reason to doubt Ms Richardson’s evidence that she responded to the suggestion by saying:

You would have had broken arms if you had tried it.

### Incident 3

There is no independent or objective support for Ms Richardson’s allegation that in late June 2008 Mr Tucker suggested to her that they should go away for a “dirty weekend”. However, there is adequate support in the surrounding circumstances. I bear in mind the findings I have made about Incident 2 and the findings which will be made about Incident 4 and the reasons for those findings. This is not a matter which was the subject of any complaint to Ms Sampayo but ultimately I prefer Ms Richardson’s evidence to that of Mr Tucker. I accept therefore that this suggestion was made. Its character is unmistakeable.

### Incident 4

Mr Tucker denied to Ms Sampayo that he had ever asked Ms Richardson out on an individual basis. In the present proceedings he admitted having done so on a number of occasions. His explanation was that he was attempting to build a professional rapport with Ms Richardson. That does not explain why he would lie to Ms Sampayo about it. Mr Tucker attempted to explain away the discrepancy by suggesting that when he had been asked by Ms Sampayo the inquiry was, at least in his mind, directed specifically to whether he had asked Ms Richardson out on a date. However, the response recorded by Ms Sampayo was far more categorical: “he has never asked Rebecca out individually unless part of a group event organized for the project team”. I do not accept the explanation Mr Tucker gave. It is clear, that Mr Tucker did invite Ms Richardson out. Equally clearly she refused. He obviously persisted.

### Incident 5

This is another allegation (“let’s go sneak off into a corner”) which is denied and for which there is no other objective support. If it occurred, its character is again unmistakeable. I accept that something like this happened for similar reasons to Incident 3. However, I should make it clear that, even if disputed individual allegations such as this were left out of account, that would make no difference to the outcome of the proceedings or the character of Mr Tucker’s conduct.

### Incident 6

Mr Tucker denied this allegation in his amended defence. In his oral evidence the position was a little different. He accepted he may have complimented Ms Richardson on her appearance but he denied ever saying anything about Ms Richardson’s skirt or about Ms Richardson’s legs being wrapped around him. The amended statement of claim alleged that this incident occurred in November 2008, but Ms Richardson’s oral evidence placed it in September or October 2008. The lack of precision about the timing does not affect its significance. If anything like this was said it was an openly lascivious comment which was clearly sexual harassment if unwelcome. Like Incidents 3 and 5 there is no way of resolving this conflict except by preferring one version over the other, if there is a sufficient reason for having such a preference. In my view there is such a reason and I prefer the evidence of Ms Richardson. I therefore conclude that she has established that this incident occurred to the requisite standard.

### Incident 7

Mr Tucker admitted saying:

You know you love me

but denied saying:

You know you want me.

He justified his admitted remarks as office banter and tongue in cheek. In the light of my other findings I am not prepared to accept so innocent an explanation. I accept that the denied remarks were also made. I accept that this was another example of overtly, and unwelcome, sexual behaviour.

### Incident 8

Mr Tucker claimed to remember this incident well. He said the reference to a “love/hate” relationship was made in an explanation to a representative of the ANZ Bank about the differing roles played by him and Ms Richardson. I found the explanation unconvincing. If the comment made by him was in the neutral terms he asserted, I think it probably stopped short of an example of sexual harassment. However, Ms Richardson’s allegation was that Mr Tucker said:

Rebecca and I have this really hot love/hate thing going on.

That remark is of a different character than the one asserted by Mr Tucker. It is suggestive of a sexual relationship, or at least of mutual sexual interest. For the reasons given earlier I accept Ms Richardson’s version of the remark. I accept that it was an example of sexual harassment.

### Incident 9

This incident was also denied and I must evaluate it as best I can. Having regard to the accepted level of tension between Ms Richardson and Mr Tucker, and Mr Tucker’s desire to get the upper hand (both of which I am satisfied were actively at work at this time) I think it not improbable that a remark of this character (“I love it when you’re mean to me. It just makes me think how hot you would be in bed.”) was made. It may have been intended to be offensive and humiliating rather than sexual, but in my view it constituted sexual harassment in the context of the relationship at that point. I accept that this remark was made and that Ms Richardson was deeply offended by it.

### Incident 10

Mr Tucker admitted to Ms Sampayo, and in the present proceedings, making a remark in answer to a question from Ms Richardson about the size of his fishing boat, to the effect that it was “just big enough for the both of us”. Mr Tucker said it was meant to be “cheeky” and “fun” but not “sleazy”. The remark was made in front of a number of other people, including Mr Salvas who told Ms Sampayo he thought the remark was inappropriate. That was also Ms Sampayo’s conclusion. In my view the remark was clearly intended to be demeaning and was overtly sexual in its connotation. It was also, in my view, a clear further example of sexual harassment.

### Incident 11

This is the incident that triggered Ms Richardson’s premature departure from Melbourne on 12 November 2008 and her subsequent complaint to Ms Swan on 14 November 2008. That is a tangible indication of the way the remark was received by her, and the significance she attributed to it. Stung by Mr Tucker’s remark to Mr Salvas that he (Mr Salvas) would “*give it* to her”, Ms Richardson lost her composure and told Mr Tucker to “fuck off”. Immediately after the meeting she returned to her hotel, packed and left Melbourne.

Mr Tucker said in his evidence that this was light-hearted banter, admittedly with sexual overtones, but was not directed at Ms Richardson in particular. This was one of the allegations raised with Ms Sampayo. On that occasion Mr Tucker asserted that he had no recollection of the conversation but insisted he would never have said such a thing because such comments “would be considered rude, disrespectful in nature”. His evidence in the proceedings was quite different. I do not think his recollection is likely to have improved. I conclude that he simply chose not to tell Ms Sampayo the truth.

In my view this was another deliberately demeaning and offensive remark. It was sexually harassing.

### Pattern of conduct

Beyond these specific incidents, Ms Richardson alleged a pattern of conduct of a similar nature. She said:

Mr Tucker behaved almost constantly towards me in a very sexualised manner and he made a number of statements about things that I was wearing and how I looked in things that I was wearing. He would take any opportunity in a business meeting in front of customers, partners, Oracle staff or me just alone, that if anybody made a comment he would take any opportunity to switch around and put a sexual connotation to it. So if somebody said, “I’ll give it to her,” he will go, “You will give it to her,” in that type of tone of voice.

I accept that the specific incidents identified by Ms Richardson were part of a more general course of conduct.

### Mr Tucker’s submissions

Mr Tucker submitted that the allegations against him should be evaluated according to three groupings. The first was a group of comments he admitted making, but which he submitted were innocuous or commonplace and did not amount to sexual harassment. Into this group he placed the first comment in Incident 1, the invitations to go out in Incident 2 and Incident 4, the first aspect of Incident 7 and his own version of the comment in Incident 8. The second group was represented by comments Mr Tucker denied making altogether, such as Incident 3, Incident 5, Incident 6, Ms Richardson’s version of Incident 8 and Incident 9. The third group was made up of comments Mr Tucker described as “blue banter”, which comments he accepted were insensitive and inappropriate but which still fell short of sexual harassment when seen in their proper context. Into this group he placed the second aspect of Incident 1, the second aspect of Incident 2 (“wind up in the corner…kissing”), Incident 10 and Incident 11.

Relying on his outright denials, Mr Tucker’s argument about the second group was that Ms Richardson had added them to bolster her case only after she had taken legal advice. It is true that they represent things not said to Ms Sampayo. It is also true that these incidents are clearer examples of conduct amounting to sexual harassment than some of the other incidents. However, Ms Richardson’s complaint to Ms Sampayo was not uniquely focussed on sexual harassment. That was not Ms Sampayo’s sole focus either. Ms Richardson was intent, in my view, once it had become clear to her that she needed to achieve a forced separation between herself and Mr Tucker, to advance examples to support her contention that Mr Tucker had set out to undermine her position as bid manager, and that he did so in front of their colleagues and representatives of the ANZ Bank. I am not prepared to dismiss the allegations in the second group simply because they were not raised with Ms Sampayo.

I do not accept Mr Tucker’s characterisation of the first group of comments as “innocuous” or “commonplace”. I prefer Ms Richardson’s recollection of the content and nature of the comments and conduct. When the incidents are viewed as part of a course of conduct, Mr Tucker’s comments and actions should be regarded as deliberate, offensive and sexual harassment. I reject Mr Tucker’s characterisation of the remaining incidents as simply “blue banter”.

### Conclusions concerning Mr Tucker’s conduct

Mr Tucker’s conduct was persistent and ultimately callous. It was, I am satisfied, intended at least to demean Ms Richardson and perhaps to humiliate her. Perhaps it was Mr Tucker’s way of attempting to get the upper hand in their disagreements, or before their colleagues and representatives of the ANZ Bank. If so, it was an offensive way of doing so, and ultimately cruel. Mr Tucker denied the essential elements of his conduct altogether to Ms Sampayo. Ms Sampayo rejected Mr Tucker’s version of events where there was independent support for Ms Richardson’s complaints. In the present proceedings Mr Tucker’s position was more sophisticated, although it exposed the dishonesty of his earlier outright denials. In the proceedings Mr Tucker attempted to narrate various versions of particular events designed to portray them as “banter” or as innocently intended. I do not accept his explanations. In my view they were an attempt to deflect responsibility for his behaviour. The explanations he proffered exposed clearly the falsity of his earlier denials to Oracle. They were insufficient to excuse his conduct. They afford no reason to question the elements and essentials of Ms Richardson’s complaints against him.

I accept the factual elements of Ms Richardson’s evidence about her encounters with Mr Tucker. Where their evidence is in conflict I prefer Ms Richardson’s evidence about those matters. I accept her evidence about matters which were not witnessed by others. I accept her evidence even though, on this occasion, no witness was called to directly corroborate her allegations. The corroboration upon which Ms Sampayo acted was rendered unnecessary in the present case by Mr Tucker’s change in position. The only resistance to Ms Richardson’s account came from Mr Tucker himself and I reject it. I am satisfied to the statutory standard that Ms Richardson was sexually harassed by Mr Tucker. I am satisfied that it was distressing for her, that her distress manifested in physical symptoms over a period of time, and that she suffered an “adjustment disorder” as a result, as the expert psychiatrists agreed.

**The case against Oracle**

A corporate employer would normally be regarded as liable for the conduct of its employees and agents occurring in the course of their actual or ostensible authority. In the present case liability would, under ordinary principles, certainly extend to Oracle for the actions of Ms Sampayo, Ms Swan, Ms Stratton and others connected with the investigation into Ms Richardson’s complaints, the decisions taken as a result and the actions which ensued.

However, Oracle may not normally be responsible for actions of its employees outside their actual or ostensible authority. Mr Tucker’s conduct would arguably fall into this category. It is not necessary to decide whether it would or not because the SD Act provides a statutory code dealing with vicarious liability for the unlawful conduct of others. Section 106 of the SD Act provides:

106(1) Subject to subsection (2), where an employee or agent of a person does, in connection with the employment of the employee or with the duties of the agent as an agent:

* 1. an act that would, if it were done by the person, be unlawful under Division 1 or 2 of Part II (whether or not the act done by the employee or agent is unlawful under Division 1 or 2 of Part II); or
	2. an act that is unlawful under Division 3 of Part II;

this Act applies in relation to that person as if that person had also done the act.

 (2) Subsection (1) does not apply in relation to an act of a kind referred to in paragraph (1)(a) or (b) done by an employee or agent of a person if it is established that the person took all reasonable steps to prevent the employee or agent from doing acts of the kind referred to in that paragraph.

Having regard to the existence and operation of s 106, Oracle will be liable for Mr Tucker’s conduct towards Ms Richardson unless it proves the elements of the exception to liability stated in s 106(2), namely that it took all reasonable steps to prevent Mr Tucker from sexually harassing Ms Richardson. Self-evidently, the test is a difficult one to satisfy. It may be inferred that Parliament intended that to be so.

Oracle relied, in its attempts to satisfy the requirements of s 106(2) of the SD Act, on both direct and indirect evidence of its reasonable steps. It pointed first to the fact that all employees receive a copy of Oracle’s “Code of Ethics and Business Conduct” when they join Oracle. Specific reference is made to the need to adhere to the Code in contracts of employment. The Code provided, at the relevant time:

**Harassment** Oracle’s policy is to provide a work environment free from harassment. Although “harassment” most frequently refers to sexual harassment, workplace harassment may also include harassment based upon a person’s race, religion, national origin, gender, sexual orientation, age, physical disability or any other inappropriate or illegal basis. Oracle prohibits harassment in any form, whether physical, verbal, or non-verbal.

You are encouraged to report instances of harassment to your manager or, as appropriate, to your Human Resources Representative. Your report will be kept confidential to the greatest extent possible, and no complainant or witness will suffer retaliation because of a report made in good faith.

Every two years Oracle employees were required to complete online sexual harassment training. Mr Tucker did so in October 2007, shortly after he started working for Oracle and only about six months before the offending conduct commenced. This training was a global package which applied to Oracle employees worldwide. It was apparently designed in the USA and was said to be based on “global standards” of how to interact in a workplace. There were a number of criticisms made of this training by counsel for Ms Richardson. One criticism was that the training was capable of manipulation because it used yes/no answers which could be readily revised such that it was possible to work through the course without any real attention being paid to it. Another criticism, of the same general kind, was that no face to face sexual harassment training was provided. The implications in these criticisms were that Oracle’s employees either could not be trusted to take their obligations seriously, or would give them so little attention that they required the discipline of a classroom. I do not accept the validity of criticisms of this kind. In my view they are misplaced. The two Oracle employees in the present case were mature adults with serious responsibilities involving the commitment of large sums of money and other resources. They were each, in their own way, well-educated and professional. I would not be prepared to proceed on the basis of any assumption, or find that Oracle should have done so either, that they (and others in Oracle’s employ) would not take this part of their responsibilities seriously. I will return shortly to other criticisms which, in my view, have more substance.

Oracle also relied on the fact that it had effective investigative policies in place, that an investigation was promptly commenced once Oracle became aware of Ms Richardson’s complaints, and that Mr Tucker was dealt with sternly by having visited upon him the next most serious sanction short of dismissal. Oracle also relied on the fact that there was no evident culture of sexual harassment in its operations. All these matters were relied on to displace any suggestion that events before or after the conduct complained about served to reveal any inadequacy in the steps which Oracle already had in place. Oracle submitted therefore that it had taken all reasonable steps to prevent what Mr Tucker did and that it bore no responsibility for his conduct.

So far as they are relevant to an evaluation of the reasonableness of the steps which Oracle had in place at the time of Mr Tucker’s conduct, I accept that the matters to which Oracle drew attention provide some support for its position.

There was some criticism of Oracle for not having punished Mr Tucker by withholding or reducing his commission or by giving him adverse performance reviews, but the evidence did not make out a persuasive case that these were appropriate steps to be taken, in addition to a first and final warning. There was also some criticism of the fact that neither Mr Salvas nor Mr Samson were reminded of their responsibilities to report sexual harassment, or sanctioned for not having done so. Again, there was insufficient evidence to suggest that either of those actions was appropriate in the circumstances. I take it that the criticisms were intended to suggest a lack of real commitment by Oracle to the avoidance of sexual harassment, but I do not accept them as evidence of that.

However, notwithstanding the matters on which Oracle relied, in my view Oracle did not take all reasonable steps to prevent Mr Tucker’s conduct. There were some serious inadequacies in Oracle’s own training packages, as its own subsequent actions acknowledged. In November 2008, although not in response to Mr Tucker’s conduct or Ms Richardson’s complaints, Oracle introduced in Australia a new “Workplace Diversity Policy”. As part of the roll out of the new policy all employees, including Mr Tucker, were required to complete mandatory face to face training before 31 January 2009. Mr Tucker was explicitly required to enrol in this new training before 31 January 2009, as part of remedial steps required of him which accompanied his first and final warning. The new policy and accompanying training was introduced in order for Oracle to be considered by the Equal Opportunity for Women in the Workplace Agency (as it then was) to be an “employer of choice” for women. The new policy was specific to the Australian workplace environment. Ms Stratton explained the introduction of the new policy to a colleague in an email on 24 November 2008 in the following terms:

There was no specific trigger for this new policy, other than the absence of one meant that within ANZ [Australia and New Zealand] we were falling way short of legislative requirements and best practice.

The new policy was complementary to, and not in substitution for, the existing global Code of Ethics and Business Conduct. I think I may infer that the new policy was intended to comply with guidelines published by the then Human Rights and Equal Opportunity Commission pursuant to s 48(1)(ga) of the SD Act. The guidelines were published in 2004 and were called “Sexual Harassment in the Workplace: A Code of Practice for Employers” (“the 2004 Code”).

Section 48(1)(ga) provided:

48(1) The following functions are hereby conferred on the Commission:

…

(ga) to prepare, and to publish in such manner as the Commission considers appropriate, guidelines for the avoidance of discrimination on the ground of sex, marital status, pregnancy or potential pregnancy and discrimination involving sexual harassment;

Amongst the criticisms available of the contents of the global online training package which Mr Tucker undertook in October 2007 are the fact that it made no reference to the legislative foundation in Australia for the prohibition on sexual harassment stated by Oracle; made no clear statement that such conduct was unlawful; and made no statement that an employer might also be vicariously liable. The 2004 Code made an explicit reference to the desirability of attending to those matters, saying:

**A statement that sexual harassment is against the law**

The policy should make it clear that sexual harassment is against the law. Reference should be made to the federal, State or Territory anti-discrimination laws that apply to the organisation. Staff need to know that legal action could be taken against them for sexual harassment and that they could also be exposing the company to liability.

The new policy introduced by Oracle in November 2008 deals with the first two of those matters in plain terms. It is less definite about the third.

In my view, advice in clear terms that sexual harassment is against the law, and identification of the source of the relevant legal standard, is a significant additional element to bring to the attention of employees in addition to a statement that sexual harassment is against company policy, no matter how firmly the consequences for breach of company policy might be stated. I take the same view about advice that an employer might also be liable for sexual harassment by an employee. That is an additional element emphasising the lively and real interest that an employer will have in scrupulous adherence to its warnings. These elements were absent from Oracle’s global online training package. The fact that they could reasonably have been in place before April 2008 is demonstrated by the existence of the 2004 Code and their introduction by Oracle in November 2008.

The omission of these important and easily included aspects from Oracle’s statements of its own policies is a sufficient indication that Oracle had not, before November 2008 at least, taken all reasonable steps to prevent sexual harassment. I do not need to decide if the new policy is now adequate. The previous training package was not. It follows that Oracle did not make out its defence under s 106 of the SD Act and is vicariously liable for Mr Tucker’s conduct.

# other causes of action

There are other causes of action which arise from complaints by Ms Richardson about how matters were handled by Oracle when she finally complained about Mr Tucker’s behaviour. Before I deal with them as pleaded, it is convenient to deal with the factual foundation for various criticisms made of the manner in which Oracle and its staff handled the investigation into Ms Richardson’s complaints about Mr Tucker’s conduct.

In order to succeed in obtaining any measure of compensation arising from these matters it was necessary for Ms Richardson to make good some cause of action against Oracle in which these complaints could properly be seen to identify a breach by Oracle of some duty or legal obligation owed by it to Ms Richardson. Oracle’s vicarious liability for Mr Tucker’s conduct does not, in my view, without more provide a sufficient foundation for recovery of compensation for added distress caused by Oracle in the conduct of the investigation, to the extent the criticisms were made good.

## Complaints about Oracle’s investigation

Ms Richardson’s complaints about the investigation and its aftermath concern the conduct of Ms Sampayo, Ms Stratton and, to a lesser extent, Ms Swan. I am satisfied, as a starting point in the analysis, that each of them attempted to deal conscientiously with Ms Richardson’s complaints. I am not satisfied that any of them was motivated by any form of animus towards her. Neither am I satisfied that any lack of empathy perceived by Ms Richardson resulted from anything other than a perceived obligation to investigate Ms Richardson’s allegations dispassionately and with appropriate balance. I am satisfied that each of Ms Sampayo, Ms Stratton and Ms Swan was an honest witness, who did her best to recall and explain the way in which she discharged her own responsibilities relating to Ms Richardson’s complaints. Each of them accepted that Ms Richardson had been sexually harassed by Mr Tucker. Each of them recognised that Ms Richardson should be protected by Oracle. There is a vigorous debate about whether what followed the investigation actually disadvantaged Ms Richardson and actually punished her, but the debate does not find support in any evidence of an intent to harm her, harm her interests or disregard her interests.

The four issues which seem to be at the heart of the complaints about the investigation are: the alleged need for a “formal complaint”; the requirement that Ms Richardson continue to work with Mr Tucker while the investigation was carried out; restrictions on Ms Richardson discussing the matter with colleagues while the investigation was being carried out; and Ms Sampayo’s action in sending Mr Tucker’s apology to Ms Richardson.

### The “formal complaint” procedure

In the present case, Ms Richardson persisted in her complaints against Ms Sampayo. A central complaint by Ms Richardson is that she was bullied by Mr Sampayo into making a “formal” complaint. I am not satisfied that any such thing happened. Indeed, I think Ms Richardson insufficiently appreciated the factors which were necessarily in play.

When Ms Richardson finally shared her concerns with Ms Swan, Ms Swan sought professional guidance. She cannot be criticised for doing so. Things were generally put in the hands of the HR department and, in particular, into the immediate charge of Ms Sampayo. Again, there is no foundation for criticism in that course being followed. In an organisation the size of Oracle it is almost inevitable that allegations as serious as those of sexual harassment will be dealt with by such a method. Real anonymity is unlikely at that point.

As I mentioned earlier, I am prepared to assume, contrary to Ms Sampayo’s evidence, that Ms Richardson was effectively offered only a choice amongst mediation, a formal complaint and Ms Richardson deciding to let the matter drop. In the last event, however, I am satisfied that it was understood between Ms Richardson and Ms Sampayo that the matter might not necessarily end there. It could not without some further consideration by Oracle of its own responsibilities.

In any event, Ms Richardson was not interested in letting the matter drop. She had reached the point where she perceived (correctly, in light of the medical evidence) that she had to bring Mr Tucker’s conduct to an end in one way or another. Neither was she at all interested in mediation, although Ms Sampayo continued to have that in mind as a possible technique even after her findings had been made. Ms Sampayo cannot be criticised for that. It was a respectable technique to contemplate for someone in her position, provided it could be used in a manner that was consistent with Oracle’s own obligations. She was obliged to respect Ms Richardson’s ultimate wishes about this issue, but not to subordinate her own judgment to them.

Ms Richardson’s allegations were serious in their own right. At one level they involved conflict between two individuals, but at another level they raised much larger questions about Oracle’s own obligations towards Ms Richardson, and towards its employees generally. If the conflict could have been resolved more or less directly between Ms Richardson and Mr Tucker under the auspices of the HR department that may have provided the foundation for an overall solution, although it would probably not have absolved Oracle from examining whether any solution reached between Ms Richardson and Mr Tucker also dealt sufficiently with Oracle’s wider obligations.

It is relevant also to bear in mind that, as Ms Sampayo correctly perceived, it was not a practical option that the complaints against Mr Tucker be ventilated and acted upon without him having a chance to respond. I have already explained why I give little weight to the suggestion that it would have been open to Ms Sampayo to pass on Ms Richardson’s complaints to senior management without adequate disclosure to Mr Tucker of the things that were said against him, which were serious in their nature. Despite any apparent cogency or force in Ms Richardson’s complaints, that would not permit Oracle to take unilateral action without any chance for Mr Tucker to defend himself. The allegations themselves were of such a nature as to permit the possibility of misunderstanding about their intent, even if not about Ms Richardson’s reaction to them.

Once the practical obligation to notify Mr Tucker of the accusations against him is taken into account, in my view, the suggestion that Ms Richardson was bullied or pressured into some unnecessary formality cannot be accepted. Choice of a less formal approach, such as mediation, which Ms Sampayo favoured, would still have involved the necessary disclosures. Rejection of mediation narrowed the options considerably. If Ms Richardson was not prepared to engage in mediation (where her complaints would in that way be conveyed to Mr Tucker for his response), and she was not prepared to let them drop (where Ms Sampayo would be left to consider whether anything further should be done having regard to the record she had taken), the only sensible step was to obtain from Ms Richardson a reliable written account of her complaints, verified by her as accurate, with which to confront Mr Tucker. It is beside the point to label this as “formal”. Of course it was. But it was a formality in keeping with the seriousness of the situation. A less “formal” or more casual approach may have exposed Oracle to even more criticisms than were levelled at it in the proceedings.

In my view there can be no criticism of Oracle for taking Ms Richardson’s complaints seriously, requiring them to be stated precisely, investigating them and taking formal action in relation to them. A requirement for a precise written statement and an opportunity for explanation were minimum requirements consistent with prudence and fairness. I reject any part of the case against Oracle which depends on the suggestion that Ms Richardson’s legal rights were infringed by the investigation carried out by Ms Sampayo.

### Continued contact with Mr Tucker

In my view it is clear that the contribution of each of Ms Richardson and Mr Tucker to the ANZ Bank bid was important to Oracle. Ms Richardson said she asked in August 2008 to be taken off the ANZ Bank project, without explaining why. The request was ineffective. Ms Richardson herself accepted that Oracle might want to keep Mr Tucker involved in the project and always disclaimed any intent or desire that his participation in it should cease. When Ms Richardson approached Ms Swan, and for the first time shared with her the distress she felt as a result of Mr Tucker’s conduct, Ms Swan did not know what to do, as she candidly conceded in her evidence. Ms Swan said she had never dealt with this sort of issue previously. I may assume, I think, that it did not occur to Ms Swan that the problem could be resolved simply by taking Ms Richardson off the project. I infer that it was, from Ms Swan’s point of view, not a practical possibility within her sole discretion to deal with the matter that way, in any event.

Ms Sampayo’s view, having heard Ms Richardson, was that for the period of the investigation Ms Richardson and Mr Tucker should not be in direct contact. Indeed, Mr Tucker was explicitly directed, when he was interviewed by Ms Sampayo, to make no contact with Ms Richardson, even to attempt to apologise. This, at least temporary, restraint would also, I have no doubt whatsoever, been preferred by Ms Richardson. It was not to be.

One of the consequences of Ms Sampayo’s well-intentioned, but perhaps misguided, attempts to maintain maximum confidentiality appears to have been that Mr Tucker’s managers were not informed of the accusations against him and of Ms Richardson’s distress, and that only Ms Swan in Ms Richardson’s chain of command was aware of the general nature of the complaints. It certainly seems possible that no one else on the business side appreciated why it would be desirable that Ms Richardson and Mr Tucker have no contact until the investigation into her allegations was complete. That said, it would normally be desirable that an investigation into accusations of this kind be carried out in a way that involved no step to pre-empt the outcome. Such an approach would normally be necessary to protect the interests of both protagonists against the possibility that their position was vindicated. Nevertheless, in the present case, it did lead to continued contact between Ms Richardson and Mr Tucker which, with the benefit of hindsight, appears to have compounded Ms Richardson’s distress.

While arrangements were put in place to ensure that Ms Richardson was not required to interact with Mr Tucker on a face to face basis, regular contact by way of conference calls and email was required. It is a little difficult to identify exactly how it came about that Ms Richardson was required to maintain contact with Mr Tucker. It appears to have been, in an immediate sense, due to instructions from Mr Salvas that Ms Richardson attend conference calls involving both Mr Tucker and Ms Richardson amongst others. Mr Salvas was not called to give evidence and his perspective on the need for these arrangements was not available. Ms Sampayo said she had left it to Ms Swan to ensure that there was no interaction between Mr Tucker and Ms Richardson during the period of the investigation and would have queried the arrangement had she known about it. Ms Swan, in her evidence, did not take responsibility for the interim arrangements that were put in place. She said that, at the time, she knew only that Ms Richardson did not wish to have any face to face contact with Mr Tucker, but was not aware that Ms Richardson did not want to have to deal with Mr Tucker at all. None of Mr Simek (Ms Richardson’s manager once removed) Ms Douyere (Mr Tucker’s manager) or Mr Pinn (Mr Tucker’s manager once removed) gave evidence and I have no way of knowing what, if any, contribution any of them made to the arrangement. The only explanation which might explain why this arrangement was adopted was that given by Ms Richardson in the evidence referred to at [43]. Notwithstanding those matters, I do not understand why the interim arrangement was necessary once the complaints had been made, and ultimately little attempt was made to justify it.

The emotional toll on Ms Richardson of this arrangement seems to have been more than trivial. Nevertheless, the question remains whether Ms Richardson has identified some specific breach by Oracle of its legal obligations which would permit and justify some measure of compensation. I address that question shortly.

### Requirement for confidentiality

I referred earlier to the fact that Ms Richardson was directed by Ms Sampayo that she should not discuss her complaints against Mr Tucker with her work colleagues. I also referred to the fact that Ms Richardson spoke to both Mr Samson and Mr Salvas despite this directive, without any adverse consequence. It was not established by Ms Richardson’s evidence or otherwise that a temporary requirement for confidentiality, while the investigation was actually carried out and findings were made, acted adversely to Ms Richardson’s interests. It seems to me to have been far from unreasonable of Ms Sampayo to ask Ms Richardson to do nothing which might pre-empt the findings which she might make, and do nothing which would publish her allegations against Mr Tucker or the fact that they had been made, until the allegations had been investigated.

### Mr Tucker’s apology

I reject any suggestion that Ms Richardson’s rights were infringed by Ms Sampayo’s actions in passing on Mr Tucker’s apology to her, or that Ms Sampayo may fairly be criticised for having done so. There are a number of reasons for that conclusion. First, Ms Sampayo was not disabled from making her own evaluation of Mr Tucker’s likely sincerity or disentitled from doing so by the apparent strength of Ms Richardson’s own assessment of Mr Tucker’s character, even though Ms Richardson had been dealing with him for much longer and thought she knew him better. Ms Richardson could not expect to dictate to Ms Sampayo what she should or should not do. Ms Richardson’s opinions did not act as some form of constraint on Ms Sampayo’s actions or the formation of her own judgment. Secondly, Ms Sampayo only forwarded the apology to Ms Richardson after deliberation and after obtaining Ms Stratton’s express approval for her action. Thirdly, I cannot see any reason, despite the strength of Ms Richardson’s feelings about Mr Tucker, why she could not deal with his apology in any way she wished, without demanding that someone else act as her surrogate. There was nothing in Ms Sampayo’s email which indicated in any way that any action was required or expected on Ms Richardson’s part. Ms Richardson did not have to read the apology much less respond to it in any way.

Ms Richardson’s position about this issue appeared to me to be that she was entitled to exercise some right of veto over Ms Sampayo’s judgment, but I think such an approach is misplaced. It was clearly open to Ms Richardson to disregard the terms of Mr Tucker’s apology, not to read it at all or treat it as not sincere in any sense. She could not, however, expect to impose her own assessment of Mr Tucker’s sincerity on Ms Sampayo or direct her not to forward it if Ms Sampayo judged that to be an appropriate thing to do.

In my view, no criticism of Oracle may be derived from this aspect of Ms Richardson’s complaints in the present case.

## Indirect discrimination

The allegation that Oracle subjected Ms Richardson to indirect discrimination on the ground of her sex is based on s 5(2) and s 14(2) of the SD Act, which provided at the relevant time:

5(2) For the purposes of this Act, a person (the ***discriminator***) discriminates against another person (the ***aggrieved person***) on the ground of the sex of the aggrieved person if the discriminator imposes, or proposes to impose, a condition, requirement or practice that has, or is likely to have, the effect of disadvantaging persons of the same sex as the aggrieved person.

…

14(2) It is unlawful for an employer to discriminate against an employee on the ground of the employee’s sex, marital status, pregnancy or potential pregnancy:

1. in the terms or conditions of employment that the employer affords the employee;
2. by denying the employee access, or limiting the employee’s access, to opportunities for promotion, transfer or training, or to any other benefits associated with employment;
3. by dismissing the employee; or
4. by subjecting the employee to any other detriment.

It is a defence to an accusation of this kind if a requirement or condition imposed on a person was reasonable in the circumstances (s 7B of the SD Act).

Ms Richardson’s case was summarised in her written submissions as follows:

158 Ms Richardson pleads that Oracle indirectly discriminated against her within the meaning of section 5(2) of the SDA by imposing the following conditions, requirements or practices:

(a) employees cannot obtain assistance from Oracle to informally resolve complaints about harassment; and/or

(b) employees who make complaints about harassment are required to continue to work with the person the subject of the complaint while it is being investigated; and/or

(c) employees who make complaints about harassment are not permitted to speak about their complaint to colleagues who are already aware of the complaint so as to ease any adverse perceptions; and/or

(d) employees whose complaints of harassment are accepted are required to continue to work with the person who harassed them or be removed from their role and demoted to other work; and/or

(e) employees who have experienced sexual harassment are required to understand that, after having complained about the sexual harassment, their being allocated to projects which have a lesser level of responsibility, are less fee earning and which require less skill, is not a negative indicator of their future career prospects.

When the applicant’s case commenced it was made clear that this cause of action was only relied upon if Oracle was not found to be vicariously liable for sexual harassment committed by Mr Tucker. Be that as it may, there were, in any event, two major problems with this cause of action. The first concerned the need to establish that a condition, requirement or practice had been imposed on women employed by Oracle, including Ms Richardson. The second concerned the factual foundation for the complaints actually made by Ms Richardson.

As to the first matter, in my view, the various contentions advanced as allegations of indirect discrimination were flimsy assertions dressed up to give apparent respectability to the cause of action. There was no evidentiary support for the propositions that Oracle imposed the suggested conditions, requirements or practices upon women who complained about sexual harassment or even that such conditions, requirements or practices were likely to be imposed on others should the circumstances arise. Causes of action should arise naturally from the underlying facts, not be invented by some process of creative pleading bearing no relation to the facts.

So far as the allegations concern Ms Richardson personally, it is only the second allegation that is worthy of any real attention. I have dealt with the first allegation earlier and rejected it. The third complaint would be dismissed on the ground that any directive was reasonable. The fourth and fifth complaints relate to the contention that Ms Richardson was demoted or had her responsibilities reduced. I have dealt with these contentions and rejected them on the facts.

As to the second complaint, there is obviously a factual foundation for the suggestion that Ms Richardson was required to remain in some contact with Mr Tucker while the investigation was carried out, but it cannot be said to be the result of the discriminatory imposition of a condition, requirement or practice on women employed by Oracle.

The result is that the indirect discrimination case deserves rejection, whether or not it was finally pressed. The further result is that there is no independent foundation in that cause of action for a claim for compensation against Oracle in its own right, arising from the conduct of its investigation, including the requirement that Ms Richardson remain in contact with Mr Tucker while the investigation was carried out.

## Breach of contract

The amended statement of claim pleaded that Oracle breached Ms Richardson’s contract of employment in two ways. First, it was pleaded that by breaching the SD Act in the ways alleged in the amended statement of claim Oracle committed fundamental breaches of implied terms of Ms Richardson’s contract of employment. Those implied terms were identified as a “trust and confidence term”, a “good faith term” and a “safe work term” (in written submissions the “good faith” implied term was said to include the “trust and confidence” implied term). Secondly, it was pleaded that Oracle repudiated Ms Richardson’s contract of employment.

I do not need to spend any time on the suggested implied terms. As pleaded they add nothing to the causes of action under the SD Act. They were only relied on, in any event, in an attempt to find a contractual foundation for damages arising from Ms Richardson’s departure from Oracle in the event that compensation for any circumstance of that kind did not arise directly under s 46PO(4)(d) of the AHRC Act. The reasons which cause me later in this judgment to reject any measure of economic loss arising from Ms Richardson’s own resignation would have led to the same conclusion in relation to any suggested implied term of contract.

The repudiation case was pleaded in the amended statement of claim (after reference to the alleged implied terms) as follows:

1. Further and in the alternative, by acting as pleaded:
	1. in paragraphs 25 to 36; and/or
	2. in paragraphs 37 to 40.

Oracle repudiated the contract of employment with the Applicant and that repudiation was accepted by the Applicant on 5 March 2009.

The supporting paragraphs, referred to, were as follows:

1. On or about 10 November 2008 the Applicant was informed by Oracle that:
	1. it could not assist her to resolve her concerns about Tucker informally and if she wished any action to be taken she had to make a formal complaint;
	2. she was required to maintain absolute confidentiality about any such complaint and not discuss it with anyone.

*Particulars*

Meeting between the Applicant and Ms Rachna Sampaya [sic], an employee of Oracle working in its Human Resources department.

1. The investigation by Oracle into the Applicant’s concerns was conducted by Ms [Sampayo].
2. On or about 19 November 2008 the Applicant signed a statement prepared by Ms [Sampayo] briefly outlining her complaint against Tucker.
3. The Applicant’s complaint about Tucker became known to the team working on the [ANZ Bank] Project.

*Particulars*

* 1. Ms [Sampayo] interviewed members of the team about the events the subject of the complaint during the investigation.
	2. The Applicant noticed that her previously good relationship with some members of the team became strained.
1. During the period of the investigation Oracle required the Applicant:
	1. to attend daily team and client conference calls with Tucker on the Project;
	2. to return to the Melbourne office for one week (being the office where Tucker was located);
	3. not to contact Tucker directly but to communicate with him through Tony Salvas, another Oracle employee who was working on the [P]roject; and
	4. not to explain to her team why she had made the complaint about Tucker.
2. Oracle’s requirements at paragraph 29 caused the Applicant further anxiety and distress and adversely impacted upon her relationship with her team.
3. During the investigation Tucker, among other things, denied he made certain of the comments contained in the complaint and alleged that other comments were meant to be light hearted and to which the Applicant had responded positively.
4. On or about 2 December 2008 Ms [Sampayo] finalised her investigation report (**Investigation Report**) in which she, among other things, accepted that Tucker made inappropriate and offensive comments to the Applicant, rejected some of Tucker’s denials and made no findings in relation to other aspects of the complaint.
5. Ms [Sampayo] recommended in the Investigation Report, among other things, that the complaint be resolved by the Applicant accepting an apology from Tucker and attending a meeting with Tucker to “*resurrect the past relationship*”.
6. On or about 12 December 2008 Oracle requested that the Applicant agree to a mediation session with Tucker and accept Tucker’s apology.

*Particulars*

 Conversation between the Applicant and Ms [Sampayo].

1. The Applicant did not agree to attend a mediation with Tucker or accept his purported apology given, among other things, her knowledge of the circumstances of his conduct and that she did not wish to have a further working relationship with Tucker given his past conduct towards her.
2. On or about 17 December 2008 Oracle informed the Applicant that it had decided to retain Tucker in his role and move the Applicant to a new role.

*Particulars*

Conversation between the Applicant and Ms Swan, Senior Director at Oracle.

1. On or about 20 December 2008 Oracle removed the Applicant from her position as the Program Manger of the APAC Technology Practice.

*Particulars*

 Oracle removed the Applicant from her responsibilities for the management of projects in Victoria so she no longer had oversight of projects across all States/Territories in Australia and New Zealand.

1. On or about 20 December 2008 Oracle required the Applicant to resume management responsibility for projects in New South Wales (**NSW Projects**).
2. The NSW Projects:
	1. in so far as they were technical projects, they were, from a monetary perspective, much smaller in value than the [ANZ Bank] Project and other pending Projects in Victoria for which the Applicant would have had responsibility;
	2. in so far as they were internal projects:

(i) they had no measurable financial value;

(ii) already had program managers assigned;

* 1. were of less objective value to Oracle, requiring less skill and involving less responsibility; and
	2. did not afford the Applicant an adequate opportunity to grow and demonstrate her skills and experience.
1. By acting as pleaded in paragraphs 37 to 39 above, Oracle demoted the Applicant and repudiated her employment contract.

There are thus two allegations of repudiation, which are also relied on conjunctively. First, there are the allegations in paragraphs 25 to 36. I do not accept some of the allegations in paragraphs 25 to 36 for reasons which have already been explained. In substance, I accept the allegation in paragraph 29 and for present purposes will accept the contention in paragraph 30. I certainly accept that the requirement to remain in contact with Mr Tucker was distressing for Ms Richardson. The allegation in paragraph 36 is partially correct only. It is clear that Ms Richardson was told that Mr Tucker would be retained in his role. She was not told that she would be moved to a new role. The advice to her that she need not work from the Melbourne office did not have that significance, for reasons which have been explained.

Despite the fact that I accept the substance of Ms Richardson’s complaint about being required to remain in contact with Mr Tucker, and that it was distressing for her to do so, in my view those matters do not make out a case of repudiation of contract. They do not represent either a breach of a fundamental term of Ms Richardson’s contract of employment, or a serious breach of a non-fundamental term. Ms Richardson accepted in her evidence that she was required, under her contract of employment, to perform all tasks and responsibilities assigned to her by Oracle. She appeared to accept that she could legitimately be required to continue to make a contribution to the ANZ Bank project unless and until there was a good reason for her to leave it. I have earlier explained that I think the arrangement was probably the result of a lack of communication at some level, but in any event I do not see any breach of contract amounting to repudiation of the contract in what happened. When, in due course, Ms Richardson resigned her employment I am satisfied she was not acting to accept any repudiation of her contract represented by these circumstances; she was purportedly responding to her alleged demotion.

As to the second group, the allegation in paragraph 37 was not made out on the evidence. Neither the pleading nor the particular in support of it accurately state either Ms Richardson’s previous role or any new role. The allegations in paragraphs 38 and 39 were not made out on the evidence. On no account of the conversations was Ms Richardson told that her responsibilities would be confined to New South Wales or to New South Wales projects. The allegation in paragraph 40 is, accordingly, not made out on the pleadings, insofar as it represents a discrete pleading of repudiation.

More generally, I reject the contention that Ms Richardson was demoted, whatever the foundation for that contention. In my view the evidence does not support it. Ms Richardson chose to resign her employment. She was not constructively dismissed; she was not demoted; she did not need to leave Oracle unless she chose to do so; she resisted the suggestion that she should reconsider her resignation; and she left at a time of her own choosing, for her own reasons.

I do not doubt that Ms Richardson was disaffected by Mr Tucker’s conduct and the events that followed. However, none of the events upon which she relied indicated, upon my assessment of them, that Oracle was unwilling to fully perform its contract of employment with her or had committed some fundamental breach of it. In fact Ms Richardson had no contractual right to work in Victoria or on Victorian projects from time to time. Be that as it may, I am not satisfied that Ms Richardson would not have been assigned to some such work in the future if she was prepared to accept the possibility of encountering Mr Tucker. There is no evidence that Ms Richardson resisted the steps to protect her in the initial period after the completion of the investigation. As I indicated earlier, I am satisfied that the decision that Ms Richardson no longer be required to work out of the Melbourne office was taken with only her interests in mind. I am also satisfied, for reasons that I gave earlier, that Ms Richardson did not indicate at this time or at any point prior to tendering her resignation that she thought her role had been diminished or that she had been demoted.

I therefore reject the allegation that Oracle repudiated its contract with Ms Richardson. It follows that there is no foundation here either for a claim for compensation against Oracle, independent of its vicarious liability for Mr Tucker’s conduct.

## Victimisation

The allegation of victimisation relies on s 94 of the SD Act, which provided at the relevant time:

94(1) A person shall not commit an act of victimization against another person.

Penalty:

(a) in the case of a natural person—$2,500 or imprisonment for 3 months, or both; or

 (b) in the case of a body corporate—$10,000.

 (2) For the purposes of subsection (1), a person shall be taken to commit an act of victimization against another person if the first mentioned person subjects, or threatens to subject, the other person to any detriment on the ground that the other person:

 …

(g) has made an allegation that a person has done an act that is unlawful by reason of a provision of Part II;

…

The factual allegations upon which this cause of action depends are those in paragraphs 37 to 39 of the amended statement of claim set out above. In effect, the allegation of victimisation relies on the contention that Ms Richardson was demoted, or at least that her role was diminished. For the reasons given earlier I reject those contentions, and the allegation that Ms Richardson was victimised.

# damages

It follows from the foregoing conclusions that the damages which must be assessed are in the form of compensation for sexual harassment.

The foundation for the claim by Ms Richardson for an award of damages is s 46PO(4)(d) of the AHRC Act. It provides:

 46PO(4) 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;

 …

The applicant and Oracle agreed that, generally speaking, assessment of damages by way of compensation for sexual harassment under the SD Act would normally follow principles for the assessment of damages in tort. While the principle is not to be strictly applied where a particular case calls for a different approach, I see no reason in the present case to depart from that approach. It is not necessary to discuss the cases which support it.

## Non-economic loss and damage

### The effect of Mr Tucker’s conduct on Ms Richardson

I am satisfied that Mr Tucker’s conduct, over a period of some months, was very distressing for Ms Richardson, who did her best to deal with it alone for some considerable time. Her partner, friends and acquaintances noticed changes in her demeanour. Ms Richardson noticed changes in her own physical condition, including the management of her diabetes, which seemed to her attributable to her heightened feelings of stress and anxiety. There was no medical evidence to make this connection directly but I am prepared to take into account Ms Richardson’s own observations of her psychological and physical responses as being consistent with the medical evidence I discuss hereunder.

Even though her decline appears to have been apparent to others, it was not until Ms Richardson was confronted with unmistakeable evidence that she was no longer able to manage the situation on her own or control her responses to Mr Tucker’s behaviour that she decided to make a complaint about Mr Tucker’s conduct. In that sense I am satisfied that she was driven to take that step.

I am satisfied that Mr Tucker’s conduct was cruel and calculated, but he may not have fully appreciated the effect that it was having on Ms Richardson. I think it is equally likely that Ms Richardson managed to disguise her reactions sufficiently that Mr Tucker simply settled into a systematic form of humiliation and sexually charged aggression as his normal mode of interacting with her. He should be given no credit for his lack of insight. The maintenance, over an extended period of time, of the conduct which the evidence disclosed in this case deserves censure in a way which makes clear that it was unacceptable and unlawful. It was a clear breach of Ms Richardson’s legal rights.

Some of the picture of Ms Richardson’s distress is revealed by her counselling journal, which I regard as a sufficiently reliable contemporaneous record for this purpose. I will not bring to account her reactions and responses to matters for which I have decided Oracle (and Mr Tucker) are not responsible, such as her criticisms regarding the need for a formal complaint and Ms Sampayo’s actions in forwarding Mr Tucker’s apology. I also do not take into account the fact that Ms Richardson was required to continue to interact with Mr Tucker for about four weeks after she made her complaints. I do not doubt that this was a difficult period for Ms Richardson, but it was not a matter for which Mr Tucker was responsible. If that aspect was compensable it would be because Oracle was directly liable, and I have found that it was not.

Ms Richardson’s account is sufficiently supported by the evidence of her partner, some friends and her neighbour, Ms O’Toole, who provided her direct observations of changes in Ms Richardson’s demeanour corresponding to the time of the events in question.

On the other hand, it is difficult to place as much weight on Ms Richardson’s complaints that her interpersonal relations with her partner, Mr Dunphy, were affected in various ways. There are always a variety of factors operating in any relationship and it is often not possible to be confident about the necessary causal relationship. I am not able to reach the necessary confidence about that matter in this case.

It will be clear from findings made earlier that I also put out of account the alleged effects of Ms Richardson’s heavy travel schedule in 2010 associated with her job at EMC, although matters of that kind would be excluded in any event by my conclusion that Ms Richardson left her employment entirely of her own accord.

### The medical evidence

Expert medical evidence was given in the proceedings by two psychiatrists, Dr Phillips and Dr Peter Klug, and by Ms Richardson’s treating psychologist, Dr Ronnie Zuessman.

Until Ms Richardson saw Dr Phillips, who was asked by her solicitors to prepare an expert report for the purposes of her case, she had not sought specific medical, psychological or psychiatric help. Although Ms Richardson saw a counsellor after her meeting with Ms Sampayo in November 2008, she found the experience unhelpful and ceased to attend. She accepted in her evidence that she sought no further help until after the proceedings had been commenced. Ms Richardson saw Dr Phillips on 17 March 2011 and 5 April 2011 for the purpose of an expert report for the proceedings. In his report of 24 May 2011 Dr Phillips recommended psychotherapy. I infer that he had raised the matter in some form before then. Ms Richardson was referred by her General Practitioner to Dr Zuessman in May 2011 and he commenced his consultations with her on 16 May 2011. When Dr Klug saw Ms Richardson on 12 July 2011 she had been to see Dr Zuessman five times. Before a second interview with Dr Klug on 4 August 2011, Ms Richardson had seen Dr Zuessman on a further two occasions.

Apart from a report that each of the experts provided for the purpose of the proceedings, Dr Phillips and Dr Klug met together in conclave on 4 November 2011 and provided a joint report. They met again, initially with Dr Zuessman and then without him, on 1 February 2012. Minutes for each session were prepared. Dr Phillips and Dr Klug gave concurrent oral evidence as independent experts. Dr Zuessman gave affidavit and short oral evidence as Ms Richardson’s treating psychologist. All three experts were reliant on the history given to each of them by Ms Richardson.

Dr Phillips initially diagnosed Ms Richardson as suffering, from about June 2008, from an adjustment disorder with mixed anxiety and depressed mood. This is a recognisable and diagnosable psychiatric disorder. It is a stress-related disturbance not meeting criteria for some other specific disorder, nor operating merely as an exacerbation of a pre-existing disorder. In this sense I understand it to be a somewhat general and generic category of psychiatric disorder not readily classifiable in some other specific category. Some specific requirements must nevertheless be met. An adjustment disorder is related to a specific stressor(s) and has its own specific diagnostic criteria. The diagnostic criteria for an adjustment disorder were set out in Dr Zuessman’s report in the following way:

1. The diagnostic criteria for an Adjustment Disorder involves:
	1. The development of emotional or behavioural symptoms in response to an identifiable stressor(s) occurring within three months of the onset of the stressor(s).
	2. These symptoms or behaviours are clinically significant as evidenced by either of the following:
		1. marked distress that is in excess of what would be expected from exposure to the stressor
		2. significant impairment in social or occupational (academic) functioning
	3. The stress-related disturbance does not meet the criteria for another specific Axis I disorder and is not merely an exacerbation of a pre-existing Axis I or Axis III disorder.
	4. The symptoms do not represent Bereavement.
	5. Once the stressor (or its consequences) has terminated, the symptoms do not persist for more than an additional six months.

Specify if:

Acute: if the disturbance lasts less than six months

Chronic: if the disturbance lasts for six months or longer

Adjustment disorders are coded based upon subtype, which is selected according to the predominant symptoms. The specific stressor(s) can be specified on Axis IV … (DSM-IV-TR p 683).

Dr Phillips initially opined that Ms Richardson’s condition had become chronic. He identified the responsible stressor as initially Mr Tucker’s behaviour. However, he also felt that Oracle’s response, as described by Ms Richardson, made her mental state worse. He said:

87. Even more significantly, Oracle took an administrative decision to leave Mr Tucker in his previous role, yet to remove Ms Richardson from her senior position with the ANZ project and to assign her to less significant (even relatively menial) duties in NSW. This became an additional stressor for her. She felt demeaned and undervalued in the process, she sensed a lack of trust by her superiors in her role within the company, and she was made to pay a significant professional penalty for something she did not set up.

The description of events came from Ms Richardson. It was adopted and relied upon by Dr Phillips and informed his expert opinion. However, it must be borne in mind that if the assumptions on which the opinion was based are not established by the evidence, the opinion itself must either be adjusted or discounted to that extent. I have rejected significant elements of Ms Richardson’s assertions. At this point, in order to understand the foundation for Dr Phillips’ view, Ms Richardson’s account of how she was treated must be borne in mind, but Dr Phillips’ opinion must be treated with some care for the reasons I have given.

As a result of the way she said she was treated by Oracle, in Dr Phillips’ view Ms Richardson’s symptoms became depressive. He said:

90. Ms Richardson moved from suffering an adjustment disorder with mixed anxiety and depressed mood to develop a dysthymic disorder DSM IV TR 300.4. Dysthymic disorder is best described as a middle intensity but chronic depression spectrum disorder. Not uncommonly a person with dysthymic disorder will manage to work, but the fabric of their life will nevertheless be significantly damaged.

After consultation with Dr Klug, Dr Phillips modified his view, as I shall describe. However, he continued to feel that Ms Richardson’s symptoms had not resolved by the time he saw her and that she then still suffered from a chronic adjustment disorder.

Dr Klug initially diagnosed Ms Richardson as having suffered an acute (possibly chronic) adjustment disorder with mixed features of anxiety and depression. His main point of difference from Dr Phillips, which remained after they had met twice in conclave, was that Dr Klug felt Ms Richardson’s symptoms resolved (or at least were in remission) after she left Oracle.

After they had first met in conclave Dr Phillips and Dr Klug produced a very helpful joint report which identified the following matters:

**1. Diagnosis**

 Both of us share the diagnostic view that Ms. Richardson has suffered from a mixed depressive and anxiety state. We both prefer the diagnosis of a **chronic adjustment disorder with mixed features of anxiety and depression**.

**2. Identified Stressors**

We agreed that the relevant stressors have been as follows:

a. Workplace harassment – we are both confident that this was a stressor for Ms Richardson while employed by Oracle.

b. We considered that administrative and hierarchal issues were pertinent with respect to the bureaucracy’s response to her complaints. We, however, were not comfortable that it is within our areas of expertise to comment on these factors.

**3. Response To Treatment**

 Generally a person with a chronic adjustment disorder responds to treatment. Psychotherapy in one form or another is likely to be the treatment modality of most use. It is of note that Dr. Phillips has not seen Ms Richardson since April 2011, prior to her beginning treatment with her psychologist, Dr. Ronnie Zuessman. Similarly, Dr. Klug has not reviewed her since early August 2011, some three months previously, at which time she had commenced and was continuing in treatment with Dr. Zuessman.

**CONCLUSION**

Given the above, we came to the conclusion that it would be wise for both of us to carry out a short review of Ms. Richardson to assess her current state and her response to treatment. If the relevant parties are in agreement it would also be wise to seek a report from her treating psychologist as well.

(Emphasis in original.)

Notwithstanding their joint recommendation Drs Phillips and Klug were not asked to see Ms Richardson again.

Dr Zuessman took a broader view of Ms Richardson’s situation although he also diagnosed her as suffering from a chronic adjustment disorder with mixed anxiety and depressed mood. Dr Zuessman attributed particular significance to the existence of the present litigation. In his report Dr Zuessman said:

28. In consideration of her current presentation, as well as the stress of continuing involvement with matters related to alleged sexual harassment and consequential involvement with legal processes, Ms [Richardson] can be regarded as experiencing an *Adjustment Disorder With Mixed Anxiety and Depressed Mood, Chronic*.

…

37. The continuation of the stressors of involvement with matters related to alleged sexual harassment and consequential legal processes have a negative impact on Ms Richardson’s mental health and overall health. It is my opinion that the conclusion of these matters and Ms Richardson’s attendance in fortnightly therapy for a period of six months will likely lead to a resolution of the adjustment disorder, though she will remain vulnerable to relapse should she encounter a significant life stressor in the future. Thus, it may be prudent for Ms Richardson to subsequently maintain periodic, supportive contact with a psychologist.

On 1 February 2012 Drs Phillips, Klug and Zuessman first met together and then Drs Phillips and Klug met again in the absence of Dr Zuessman. The minutes of the first meeting record:

On enquiry from Dr. Klug concerning the nature of the chronic stressor necessary for the diagnosis of a chronic adjustment disorder, Dr. Zuessman stated that this was the ongoing process of litigation and matters linked with it …

Dr. Zuessman reiterated that the continuation of the matters related to the legal process is contributing to the maintenance of her adjustment disorder …

Dr. Klug enquired as to whether Dr. Zuessman thought it appropriate to regard ongoing litigation as a relevant ongoing stressor when it was a matter of choice for Ms. Richardson to engage in litigation. Dr. Zuessman responded that she had a strong perception that wrong was done to her in the workplace and that she suffered an injury and it needs to be resolved.

…

Dr. Klug enquired as to whether Ms. Richardson continues to have an adjustment problem or not … Dr. Klug enquired of Dr. Zuessman whether he believes she continues to have an adjustment disorder given her ability to adjust appropriately.

I shall set out in full the minutes from the subsequent meeting between Dr Phillips and Dr Klug:

This conclave was between two independent experts with Dr. Zuessman no longer being present.

Dr. Phillips and Dr. Klug both agree that Ms. Richardson has suffered from an adjustment disorder, probably chronic in nature, indicating that the symptoms were/have been present for longer than six months. Dr. Phillips noted that, in his report of 24 May 2011, he referred to a diagnosis of a dysthymic disorder but regards this as being substantially the same as the diagnosis of an adjustment disorder.

Dr. Phillips noted that on Dr. Zuessman’s evidence Ms. Richardson’s state has improved. Dr. Phillips noted that he had, however, not seen Ms. Richardson for a long time with the last assessment being in May 2011. He is uncertain, in the absence of a recent personal assessment of Ms. Richardson, whether the diagnosis still applies.

Dr. Klug, who most recently assessed the plaintiff in August 2011, diagnosed her as having suffered from an adjustment disorder, probably chronic in nature, which is now in full remission. He based that on his view that the plaintiff had successfully adjusted in that she quickly found a comparable job with a new organization (EMC), and had been functioning well in Australia and in various parts of Asia, which included travelling extensively, living in Kuala Lumpur and monitoring and mentoring various project managers. He also noted that she is [in] a stable long-term relationship.

Both Dr. Phillips and Dr. Klug acknowledge that litigation is an ongoing stressor in its own right.

However, Dr. Klug added that he does not regard litigation, which Ms. Richardson has chosen to engage in, as being an ongoing stressor secondary to the initial work-related stressors. Dr. Klug regards her ongoing litigation as a separate situation.

Dr. Phillips took a different view. Dr. Phillips added that he cannot accurately separate the stressors experienced in the workplace and the consequent stressor of litigation. He believes that both matters should be taken into consideration.

It should be stated, however, that both doctors are in broad agreement regarding diagnosis with a difference as to whether she continues to suffer from that condition now.

These positions were largely maintained when Drs Phillips and Klug gave their evidence concurrently. In addition, Dr Phillips broadly agreed with Dr Zuessman that the process of litigation played an ongoing role in the diagnosis. Dr Klug thought the disorder had resolved. Their differing views may be seen from the following passages:

HIS HONOUR: … Dr Zuessman feels apparently that the conclusion of the litigation and six months further treatment should resolve Ms Richardson’s present symptoms. He regards, I think, from what you’ve recorded in your second joint report, the ongoing litigation as being the stressor which is adding to the chronic characteristic of her present condition. What view do you take about that?

DR PHILLIPS: Your Honour, I broadly agree with that. I think there are in fact three stressors which rather interweave in Ms Richardson’s matter, the first being the alleged harassment in the workplace, the second being the particular nature of the administrative response by the employer and the third being the process of litigation. …

HIS HONOUR: Dr Klug, you have a different view about this, I think.

DR KLUG: Yes. I have some difficulty with the view that litigation is the cause of an ongoing adjustment disorder. I believe that her adjustment disorder had resolved when I last [saw] her. I didn’t regard her as being significantly symptomatic. She may very well be distressed by the ongoing litigation but I believed that her adjustment disorder had ceased. I think the relevant stressors engendering her adjustment disorder had ceased in the sense that she was no longer working at the organisation and she was no longer being harassed and she was no longer being exposed to the administration. I regard litigation as her choice …

Dr Zuessman’s evidence, as treating psychologist, is capable of being understood as saying that it is only the ongoing litigation which is perpetuating Ms Richardson’s condition and that her condition will resolve naturally once the litigation is over.

I do not accept the suggestion that litigation is a stressor which can be added to Mr Tucker’s conduct, or Oracle’s response, for the purpose of calculating damages. In any event, that circumstance cannot be brought satisfactorily within the medical requirements in the present case. In order to sustain a diagnosis of adjustment disorder (whether acute or chronic) it is necessary to identify a relevant stressor, or stressors, and come to a conclusion about whether the relevant symptoms have resolved (as required by the applicable criteria) within six months of exposure to the stressor(s) ceasing.

Any stressor represented by Mr Tucker’s sexually harassing conduct ceased in November 2008. The stress of any requirement to stay in contact with Mr Tucker, even indirectly, ceased in December 2008. Even any stress represented by Oracle’s own conduct (if it was relevant) necessarily resolved within six months of departure from Oracle. If Ms Richardson’s response did not resolve within six months of the cessation of the relevant stressor her condition could not be diagnosed as an adjustment disorder. I do not accept the contention that the “consequences” could continue independently of the cessation of the stressors themselves in the present case, when there is such clear evidence of the definite cessation of the relevant stressors, and such unmistakeable removal of Ms Richardson from them.

It is significant also that Ms Richardson made a choice to actively seek and then accept work with EMC, which I am satisfied she was not forced, directly or constructively, to do. I accept Dr Klug’s evidence as consistent with my own view of the evidence in the case:

DR KLUG: … the essence of an adjustment disorder is a failure to adjust and I believe that Ms Richardson did adjust very quickly. She found an alternative job. As far as I’m aware, she has been functioning normally in that job and it’s an equivalent job.

…

HIS HONOUR: … Dr Klug, you see the necessity to relate the adjustment disorder to an identifiable stressor and you don’t see one after March 2009.

DR KLUG: That’s correct, your Honour.

…

DR KLUG: I think the stressor ceased once she had left Oracle and obtained another job, essentially, and she was no longer in the environment where the stressors occurred.

If the litigation is a stressor in this case, it is a stressor in its own right. It does not contribute to the diagnosis of psychological injury made out in the present case. The diagnosis made of Ms Richardson’s psychological situation contemplates that the symptoms arising from her condition would have resolved well before she saw Dr Phillips or Dr Zuessman (or Dr Klug). Although Ms Richardson made a complaint to the AHRC in October 2009, the present proceedings were not commenced until June 2010. I do not accept Dr Zuessman’s view that the stress of the litigation in which Ms Richardson is now engaged continues seamlessly from the stress occasioned by Mr Tucker’s conduct.

I accept that Mr Tucker’s course of conduct caused Ms Richardson to suffer a psychological injury, agreed by Dr Phillips and Dr Klug to be appropriately described as a chronic adjustment disorder with mixed features of anxiety and depression. Mr Tucker’s conduct came to an end in November 2008, although exposure to him lasted until at least 10 December 2008. I accept the possibility that Ms Richardson’s symptoms extended beyond exposure to Mr Tucker for the six months which the diagnosis accommodates, although none of the medical practitioners who saw her could be satisfied that was so except by accepting her report of her symptoms as accurate, as they each appeared to do. That leaves ample scope for acceptance of a diagnosis that her condition became chronic (because it lasted longer than six months).

The opinions offered by Dr Zuessman, Dr Phillips and Dr Klug must, however, be evaluated in light of my conclusion that Oracle is not independently liable to Ms Richardson for the way in which it responded to her complaint. Furthermore, I would not have been satisfied that Ms Richardson made out a case on the facts about Oracle’s conduct to the level she described to those practitioners. I accept that Ms Richardson developed some sense of injustice regarding the manner in which Oracle handled and responded to her complaints, but I am not satisfied it was objectively justified at the same level as her perception. Counsel for Ms Richardson submitted that she was entitled to have full weight given to her subjective responses. However, in my view that principle (in effect that you take the victim as you find them) has no application to the present issue. Ms Richardson’s subjective sense of dissatisfaction with Oracle, in my view, involved a substantial element of recasting the facts. The immediate and extended consequences of Mr Tucker’s conduct must be taken into account when compensation is being assessed. However, that is not the case with respect to any perceived consequence which the experts may have attributed to Oracle’s conduct.

It is apparent from Ms Richardson’s counselling journal that a good part of the distress which she suffered, and which has been taken into account by Dr Phillips and Dr Klug in finally reaching their joint diagnosis, concerns her reaction to what she regarded as the inappropriate and unsympathetic manner in which the investigation into her complaint was carried out. In particular she was highly critical of Ms Sampayo for sending her an apology from Mr Tucker and of the length of time which the investigation took. This latter aspect is not something for which Ms Sampayo was responsible. It appears to have been the result of the inability of Ms Stratton to give the matter closer attention immediately after Ms Sampayo had reached her own conclusions. These are not matters about which I have made any finding of unlawful conduct. Indeed I am not satisfied that any criticism of Ms Sampayo is fair at all. Ms Richardson appears to have, in part at least, reacted to some feeling that she had lost control of matters once she complained about Mr Tucker’s conduct. That is certainly so. She also appears to feel that her complaints were not treated with the degree of understanding, acceptance and endorsement that they deserved. That reaction is understandable enough but takes no real account of the need for Ms Sampayo to approach the matter more objectively than that if she was to carry out a proper investigation.

All these matters, so far as they are separate from the unlawful conduct which I have earlier identified, play no part in the assessment of general damages. Accordingly some attempt must be made to discount these features of Ms Richardson’s reactions and distress from the compensation to be awarded to her.

In light of my findings that no cause of action other than sexual harassment has been made out, compensation may not be awarded independently against Oracle either for the fact that Ms Richardson remained in contact with Mr Tucker from 17 November to 10 December 2008, although that continued exposure may be taken into account in assessing the consequences for Ms Richardson flowing directly from Mr Tucker’s own conduct.

Finally, I also accept the following evidence from Dr Klug, with which Dr Phillips did not disagree:

I would also like to say that, without in any way minimising what has happened with Ms Richardson, on the spectrum of stressors we are not talking about traumatic stress, and I think it’s easy to refer to what has happened to her as being traumatising but psychiatrically this was not traumatising and an adjustment disorder is a mild condition. It’s not even categorised as a major mood disturbance.

There were helpful submissions made about the quantification of damages and a range of decided cases was referred to. The applicant submitted that the award of general damages should be, at least, commensurate with that in *Poniatowska v Hickinbotham* [2009] FCA 680 (“*Poniatowska”*). In that case, the Court awarded general damages in the amount of $90,000. That award was upheld on appeal (*Employment Services Australia Pty Ltd v Poniatowska* [2010] FCAFC 92). In my view, *Poniatowska* is an inappropriate point of reference. The award of damages in *Poniatowksa* was linked to a finding of sex discrimination as well as specific instances of sexual harassment. The trial judge found that when Ms Poniatowska raised concerns regarding sexual harassment with her employer, she was “not regarded as the victim but as a problem presenter to be managed”. Ms Poniatowska’s employment was ultimately terminated not for reasons related to her work performance, but, on the trial judge’s findings, because she was unwilling to tolerate sexual harassment and a robust work environment. These features were not replicated in the present case.

As the submissions for the second respondent pointed out, cases where the award of general damages for sexual harassment fell outside the range of $12,000 to $20,000 (such as *Poniatowska* and *Lee v Smith* [2007] FMCA 59) involved features of aggravation such as psychological trauma and resulting incapacity for work, which do not feature in the present case.

Any assessment of damages in a case such as the present is bound to be a broad one, not involving any particularly scientific approach. The following matters, in particular, must be taken into account in the present case: Mr Tucker’s conduct was not accompanied by physical elements of sexual harassment which are a feature of some of the decided cases; it is only Mr Tucker’s conduct which is the foundation for an award of damages on the findings I have made; some attempt must be made to discount from Ms Richardson’s account of her feelings, and from the assessment made by the medical experts of her condition, matters which are not a response or reaction to Mr Tucker’s conduct; and, the psychological damage to Ms Richardson while not insignificant, was not debilitating in that it did not prevent Ms Richardson from working or pursuing her career.

At the beginning of the last day of the proceedings counsel for Ms Richardson indicated that, if (but only if) Oracle was found to be vicariously liable for Mr Tucker’s conduct, no monetary relief was sought against Mr Tucker. As there was no complaint from either respondent about this late change of position, I am prepared to confine any order for compensation to one against Oracle alone. However, I can see no basis upon which any order against Oracle for compensation by way of damages for Mr Tucker’s sexual harassment of Ms Richardson could differ from the quantum of any order which might be made against Mr Tucker himself. The matters which defeated Oracle’s defence under s 106 of the SD Act are not ones which would justify any finding of aggravation or provide any reason to inflate any amount that was otherwise proper to order, having regard to the conduct itself.

In my view, an appropriate amount to award in such circumstances, having regard to all the matters referred to above, including particularly the medical evidence (evaluated in the light of the findings of fact which I have made where they are contrary to any assumptions made by the experts) is $18,000, which I fix as general damages.

If I had been satisfied that Oracle was directly liable to Ms Richardson for its own conduct, I would have awarded a further $4,000 as compensation for that conduct. That compensation would have related to the requirement to remain exposed to Mr Tucker for the period from 17 November 2008 to 10 December 2008 and the consequent psychological effects attributable to Oracle’s conduct which were taken into account by the experts. However, on the findings about liability which I have made that is not a course which is open or appropriate.

### Economic loss

The case for economic loss depended in part upon allegations, variously made, that Ms Richardson had been constructively dismissed, demoted in her employment and thereby victimised, or that her contract of employment had been breached (either by way of repudiating an essential term or by breaching one of several suggested implied terms). On the evidence none of those contentions were made good. I also reject the contention that the alleged economic losses were suffered “because of” Mr Tucker’s conduct. In my view, the necessary causal link was not established. Accordingly, no occasion arises to award damages for economic loss, whether past or future.

In my view, this part of Ms Richardson’s case was largely misconceived. In my view, Ms Richardson left her employment with Oracle essentially because it suited her to do so in the circumstances at the time. She resigned. She was not constructively dismissed. Although she commenced steps to find other employment (not just at EMC) she did not actually resign until she was confident she was to receive an offer of employment. What was her loss at that stage? I am satisfied she was not demoted. There was no evidence at all that her remuneration at Oracle was or would have been reduced. There was no evidence that her promotion prospects were or would have been reduced.

It was contended that it was sufficient to find that Ms Richardson’s own motivation for leaving Oracle lay ultimately in Mr Tucker’s conduct and Oracle’s inadequate response to her complaints about it. I have rejected elements of these allegations on the evidence. I do not accept that Ms Richardson’s subjective motivation establishes a relevant foundation for damages. Even if it did she would be obliged to mitigate her loss, which she did very effectively.

One aspect of Ms Richardson’s obligation to mitigate her loss was, in any event, not to abandon her employment with Oracle without good reason, or otherwise expose herself to unnecessary loss. I am not satisfied that Ms Richardson established that she would have been worse off if she had remained at Oracle, or that her job had in fact been substantively reduced in scope or in status. To begin with, Ms Richardson did not give things much time to settle down. Very shortly after her complaints against Mr Tucker had been addressed by Oracle, and notwithstanding that she had been asked to act up in Ms Swan’s more senior position, Ms Richardson set in train the initiatives which led to her employment by EMC. No doubt there was a mixture of motivations at work. Ms Richardson was very upset with the HR Department, and Ms Sampayo and Ms Stratton in particular. She was very put out about the apology sent to her by Ms Sampayo, for example. In my view these reactions were not objectively justified, although I do not doubt the strength of Ms Richardson’s feelings and I do not suggest any lack of sincerity on her part. Subjective responses of this kind do not satisfy the objective tests in question for deciding whether there had truly been at this stage a real or likely diminution in Ms Richardson’s position.

If Ms Richardson had made good some cause of action leading to the assessment of damages for economic loss it would have been necessary to give close attention to the character of any loss alleged and the reason for it. While employed at Oracle Ms Richardson’s base salary was increased in 2007 to $150,000. To that sum was added from time to time bonuses which she earned, calculated on a quarterly basis. The bonuses were not guaranteed; they were discretionary. They fluctuated from time to time from zero to around 25% of base salary for particular quarters of the financial year. Looking back it is possible to say, as the applicant urged, that after being promoted to the IC4 level she appeared to receive, on average, about 23% of her base salary in bonuses. However, that conclusion is based on data from only three quarters and is only available with the benefit of hindsight. The longer term historical position appears to have been less favourable, but any such calculation (whatever the resulting figure) suffers from the same defect.

When Ms Richardson moved to EMC she was engaged, with her agreement, at a base salary of $140,000. That salary was increased to $150,000 in 2012. She also earned bonuses. On some occasions she earned bonuses which appeared to be higher in both actual and percentage terms than those which she had earned at Oracle but, as at Oracle, the bonuses were determined on an entirely discretionary basis having regard to the particular circumstances pertaining to Ms Richardson’s work, and to the circumstances of EMC, at the time they were assessed. The first respondent urged that I should pay regard to the fact that in total, when added to her base salary, Ms Richardson appeared to have received at least as much at EMC as she had at Oracle. With the benefit of hindsight that is true. However, it is not something which could have been reliably forecast from the contractual circumstances applying when Ms Richardson took her position at EMC. The only certainty was that Ms Richardson’s commencing base salary at EMC was $10,000 lower than the salary she had received at Oracle. On the facts that circumstance remained in place for approximately three years.

Had it been necessary to calculate damages for economic loss, my view is that Ms Richardson’s entitlement to damages for economic loss would not be reduced simply by reference to the circumstance that her bonus payment actually earned permitted the gap in base salary to be bridged in the particular, but not forecast and unforeseeable, circumstances of the time. In my view she would have been entitled to damages for economic loss at the rate of $10,000 per year until the point of time in 2012 when her base salary recovered to the amount she had received at Oracle. That would be an appropriate way (if a case had been made out) of putting Ms Richardson as far as possible into a position where she was compensated for the loss of contractual rights which she had at Oracle. The damages would have been a small fraction of those sought. Compensation for three years or so would, in my view, have been the outer limit of any period for which earnings could be maintained.

But that is, as I see it, a best case scenario which has not come to pass. Ms Richardson has not made out a cause of action, or relevant facts, entitling her to damages for economic loss. Her claim for damages of that kind must be dismissed.

### Medical out of pocket expenses

Ms Richardson claimed $9,342.50 for out of pocket medical expenses. These expenses were incurred after Ms Richardson first saw Dr Phillips and after litigation had been commenced. They appear to result from her decision, in consultation with her General Practitioner, to see Dr Zuessman after Dr Phillips had suggested specific psychological treatment would be beneficial. They do not, in my view, arise directly from any unlawful conduct which I have identified. The adjustment disorder with which Ms Richardson was diagnosed by both Dr Phillips and Dr Klug must be taken to have resolved by this time for reasons which I have explained. To the extent that the litigation itself prompted any psychiatric or psychological disturbance which might benefit from treatment, the cost of that treatment is a matter which, in my view, is too remote to be compensated.

# other matters

The application sought declaratory relief against both Oracle and Mr Tucker. The declarations sought were simply to the effect that each of the respondents had engaged in conduct contrary to the SD Act. This aspect of the relief sought was pressed in final submissions against both respondents, notwithstanding withdrawal of any claim for monetary compensation against Mr Tucker. There was no submission made by either respondent to the effect that declaratory relief was inappropriate or not necessary. I have reservations about making declarations which add nothing to the effect of monetary orders and which are expressed in very broad terms. However, as there was no submission to the contrary, with some refinements to add a degree of specificity, I will make declarations about the conduct of the second respondent and the vicarious liability of the first respondent to the extent the findings earlier made support them.

Other orders were sought in the application which would require Oracle to implement various new policies and practices, and to apologise publicly to the applicant. I can see no interest which Ms Richardson might now have in the policies and practices of the organisation she chose to leave. These proposed orders received no attention in the final submissions beyond the bare submission that they should be made. They will not be. I do not regard a forced apology, shared with the staff of Oracle, to be useful either and it was not ultimately pressed.

Both the applicant and the first respondent sought an opportunity to make submissions about costs. No order will be made about costs at this stage. The parties will be heard on costs.

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| --- |
| I certify that the preceding two hundred and fifty-nine (259) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Buchanan. |

Associate:

Dated: 20 February 2013