

Statement of claim

No. of 2012

Federal Court of Australia
District Registry: Victoria
Division: General

Serene Teffaha

Applicant

Commissioner of Taxation and Ors

Respondent

Overview

1. The First Respondent is the head of the Australian Taxation Office ('ATO') and is capable of suing and being sued.
2. The Applicant graduated with a degree in law from Deakin University in October 2001.
3. The Applicant commenced full-time work as an employee of the ATO in or about June 2000.
4. During the Applicant's employment at the ATO in the period 2000 to 2010, the Applicant received uniformly positive performance reviews and was promoted three times.
5. In the period 2000 to 2010, the Applicant never made any kind of formal complaint about ATO work processes or personnel.
6. In November 2010, the Applicant was promoted to the position of Senior Tax Technical Specialist at the ATO.
7. As a Senior Tax Technical Specialist, the Applicant had an annual salary of \$115,000.
8. Pursuant to the new role, from December 2010, the Applicant worked in the Small and Medium Enterprises division of the ATO under the supervision of the Second Respondent ('Susanna Lombardi').

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9. In 2011, the Applicant made several written complaints to her superiors at the ATO about issues in the Small and Medium Enterprises division of the ATO.
10. The main subject matter of the Applicant's complaints was:
 - (i) improper pressure to make taxation decisions otherwise than in accordance with law; and
 - (ii) under-resourcing in the Applicant's section of the ATO, which had the effect of denying taxpayers meaningful review of their tax liabilities.
11. The Applicant's first written complaint was made on 8 February 2011.
12. On 18 February 2011, the Applicant was told by her superior, Susanna Lombardi, that the Applicant's work and leadership behaviours were unsatisfactory.
13. On 21 February 2011, Susanna Lombardi transmitted an email to the Applicant's work colleagues, stating that all leadership and pastoral responsibilities had been removed from the Applicant and henceforth the Applicant would be performing case work only.
14. From February 2011 onwards, the Applicant suffered an ongoing period of victimisation and bullying from the Applicant's superiors at the ATO, the particulars of which are provided herein.
15. On 8 June 2011, the Applicant suffered a breakdown while at work.

Particulars

- (i) The Applicant lost consciousness at her workstation and then suffered a prolonged period of vomiting.
16. After 8 June 2011, the Applicant did not return to work.
17. From 9 June to 6 July 2011 the Applicant was on paid leave from her job at the ATO.
18. Since 7 July 2011 the Applicant has been on unpaid leave from her job at the ATO, but has not been formally terminated as an employee.
19. Since 7 July 2011, the Applicant has been certified by her medical practitioner as unfit for work for reasons of stress and anxiety.
20. On 11 August the Applicant's psychologist diagnosed the Applicant with Situational Affective (Adjustment) Disorder and Reactive Anxiety/Depression and symptoms of Post-Traumatic Stress Disorder.

Background

21. At all relevant times the Applicant, as well as the Second, Third and Fourth Respondents, were employed under the *Public Service Act 1999* and were 'APS Employees' within the meaning of the *Public Service Act 1999*.
22. At all relevant times, section 16 of the *Public Service Act 1999* was styled 'Protection for Whistleblowers' and proscribed the victimisation and bullying of APS employees who report breaches or alleged breaches of the APS Code of Conduct.
23. At all relevant times, subsection 15(3) of the *Public Service Act 1999* required the maintenance of appropriate procedures for the investigation of reported breaches of the APS Code of Conduct and Regulation 2.4 of the *Public Service Regulations* required the ATO to investigate such breaches.
24. At all relevant times, the terms and conditions of the Applicant's employment were defined by the ATO (Executive Level 2) Agreement 2009.
25. At all relevant times, the Applicant's section of the ATO was responsible for determining tax objections, where objections were lodged by taxpayers to income tax assessments raised by the Active Compliance section of the ATO.

Particulars

- (i) The liability of each taxpayer to Commonwealth income tax is fixed by reference to tax returns lodged by the taxpayer, under a process known as 'self-assessment'.
- (ii) As a matter of administrative practice, in each division of the ATO the Active Compliance section is responsible for auditing taxpayers and reviewing whether taxpayers have correctly self-assessed their tax liability.
- (iii) Upon the conclusion of an audit the relevant audit officers may either amend a taxpayer's assessments for identified income years, under section 170 of the *Income Tax Assessment Act 1936*, or raise original assessments under section 166 of the *Income Tax Assessment Act 1936*, based on the audit officers' view about the correctness of the position taken by each taxpayer.
- (iv) Taxpayers are entitled to object to the correctness of assessments or amended assessments.
- (v) Under section 14ZY of the *Taxation Administration Act 1953*, the ATO has an obligation to determine each taxpayer's objection by evaluating whether the assessments or amended assessments have been made in accordance with law.

- (vi) As a matter of administrative practice, in each division of the ATO there is a section that is responsible for determining taxpayer objections, such as the section in which the Applicant worked from December 2010 until 6 July 2011.
26. The integrity of the review process described in the previous paragraph is essential to Australia's tax administration.
27. In the absence of meaningful administrative review of ATO audit decisions, a taxpayer is forced to resort to litigation in order to secure correct treatment under the tax legislation.
28. Susanna Lombardi was at all relevant times a National Director of the Small and Medium Enterprises division of the ATO and the Applicant's immediate superior.
29. At all relevant times, the Third Respondent ('David Diment') was the First Assistant Commissioner at the ATO and the person responsible for the protection of the Applicant from victimisation and bullying after lodgement of the complaints.

Particulars

- (i) David Diment was the head of a section styled as 'ATO People', and thereby held a position broadly equivalent to that of Human Resources Manager.
30. At all relevant times, the Fourth Respondent ('Margot Rushton') was a Senior Executive Service officer who worked in the Small and Medium Enterprises division of the ATO.

Whistleblower Complaints

31. The Applicant commenced work in the Small and Medium Enterprises division of the ATO in December 2010.
32. From 8 February 2011, the Applicant, and other personnel from the Applicant's section at the ATO, made several complaints about the conditions and general practices in the Small and Medium Enterprises division.

Particulars

- (i) On 8 February 2011, the Applicant and a colleague transmitted a number of emails to the National Directors of the Small and Medium Enterprises division, including Susanna Lombardi. The emails canvassed the concerns pleaded below.
- (ii) On 23 March 2011, at a meeting of the Advice Network of the Small and Medium Enterprises division, attended by over 12 people, the Applicant and a colleague outlined various concerns about how the process for independent review of

taxpayer objections was being compromised, which the Applicant had summarised in a two page written document.

- (iii) On 25 March 2011, the Applicant, along with four other senior colleagues from the Applicant's section at the ATO, presented a nine (9) page written complaint that elaborated the concerns raised on the two occasions, mentioned above. The National Directors of the Applicant's section, along with the Senior Executive Service Officer and Assistant Deputy Commissioner of the Small and Medium Enterprises division ("Executive Directors"), were identified as the subject of the complaint.

33. The central concerns advanced by the Applicant on the occasions pleaded in the previous paragraph were as follows:

- (a) One concern was that the Applicant and members of her section were being pressured by their superiors to affirm audit decisions without any consideration of the merits of each individual taxpayer's objection.

Particulars

- (i) A specific feature of the Applicant's complaint was that on 31 January 2011 she had been instructed by Ms Lombardi that the ATO's audit decisions should receive a 'tick and flick' from the Applicant at the objection stage.
 - (ii) A further subject of the Applicant's complaint was an internal ATO policy paper, styled the 'AC & IA Working Together' paper, which adopted a formal goal of ensuring that taxpayer objections to audit decisions were upheld in less than 20% of cases, regardless of the merit of these objections.
 - (iii) The Applicant expressed a related concern about members of the Active Compliance section exerting influence over the ATO officers with responsibility for determining objections with the intention of procuring disallowance of these objections.
- (b) A second concern was that the Applicant's section of the ATO was significantly understaffed, and the existing staff lacked the technical training and knowledge to handle the complexity of the work, with the consequence that it was impossible for objection officers to give appropriate consideration to taxpayer objections, and ensure these objections were determined in accordance with law.

Particulars

- (i) In October 2009 an internal ATO minute stated that 26 full-time staff were necessary to cope with the volume of objections being received by the Applicant's section.
 - (ii) There were less than 8 full-time staff assigned to work on objections in the Applicant's section at the time of the Applicant's complaints.
34. The Applicant's actions in airing the above complaints were performed in good faith.
35. The Applicant's complaints were grounded in fact, and identified genuine problems in the Small and Medium Enterprise division of the ATO.
36. The complaints identified breaches or alleged breaches of the APS Code of Conduct, set out in the *Public Service Act 1999*.

Particulars

- (i) The APS Code of Conduct is set out in section 13 of the *Public Service Act 1999*.
- (ii) The complaints identified breaches or alleged breaches of the standards of conduct articulated by subsections 13(1), (3), (4), (8), (10) and (11) of the *Public Service Act 1999*.

Failure to investigate the Whistleblower complaints

37. As pleaded above:
- (a) On 25 March 2011 the Applicant and four work colleagues presented a nine (9) page complaint about practices in the Small and Medium Enterprises division of the ATO ('the Main Whistleblower Complaint'); and
 - (b) The Main Whistleblower Complaint alleged breaches of the APS Code of Conduct.
38. On or about 18 April 2011, the Applicant was informed that the Applicant's future return to the ATO was dependent on the outcome of the ATO's investigation of the Main Whistleblower Complaint.

Particulars

- (i) This was communicated to the Applicant by David Diment in an email, dated 18 April 2011.

- (ii) The Applicant also refers to the email from Greg Williams to Margot Rushton dated 23 June 2011.
39. On or about 19 May 2011, the Main Whistleblower Complaint was given to the Australian Public Service Commission ('APSC') for investigation.
40. On or about 1 July 2011, the APSC referred the Main Whistleblower Complaint back to the ATO.
41. In referring the complaint back to the ATO, the APSC said the complaint was something the Commissioner of Taxation should address.
42. Upon referral of the Main Whistleblower Complaint back to the First Respondent, the ATO Director of Employee Relations, Mr Graeme Henderson, by email dated 1 July 2011, proposed the following course of action to David Diment, the First Assistant Commissioner of Taxation:
- (a) an external service provider called Marilyn Roche should be formally appointed to investigate the complaint;
 - (b) Marilyn Roche should be instructed to interview only the individuals named in the Main Whistleblower Complaint (rather than the complainants, of whom the Applicant was one); and
 - (c) Marilyn Roche should be instructed to make a finding that the complaint had no substance and the allegations were incapable of constituting misconduct.
43. On 1 July 2011, by email sent at 11:30 am, David Diment specifically directed Graeme Henderson to implement the course of action pleaded in the previous paragraph.
44. On or about 15 August 2011, Marilyn Roche was appointed to investigate the Main Whistleblower Complaint.
45. On 8 September 2011 Marilyn Roche handed down a report in which she determined that the Main Whistleblower Complaint had no substance.
46. The conclusions pleaded in the previous paragraph were communicated to the complainants by a letter dated 8 September 2011.
47. The complainants were at no stage interviewed by Marilyn Roche about the content of the Main Whistleblower Complaint.

48. The other complaints aired by the Applicant, pleaded in Paragraph 32 were not investigated or actioned.

Particulars

- (i) On 9 February 2011 Susanna Lombardi informed the Applicant that her email of 8 February 2011 was inappropriate. No action was taken.
- (ii) On 24 March 2011 the Applicant was instructed by Susanna Lombardi to take no further action in relation to the Applicant's concerns about the independence of the objection process, which the Applicant had raised during the 23 March 2011 meeting.
49. The treatment of the Main Whistleblower Complaint and the Applicant's other complaints constituted a breach of section 16 of the *Public Service Act 1999*.
50. The treatment of the Main Whistleblower Complaint and the Applicant's other complaints constituted a breach of subsection 15(3) of the *Public Service Act 1999*.
51. David Diment was aware of his obligation under the *Public Service Act 1999* to investigate the Main Whistleblower Complaint.

Particulars

- (i) By email dated 18 April 2011 David Diment acknowledged that he was responsible for a 'thorough and independent' investigation of the complaints.

Victimisation and bullying of the Applicant

52. As noted herein:
- (a) the Applicant commenced working as a Senior Tax Technical Specialist role in December 2010;
- (b) the Applicant first expressed concerns about work practices and resourcing on 8 February 2011; and
- (c) at all relevant times, the Applicant's immediate manager was Susanna Lombardi.
53. On 18 February 2011 the Applicant received a lengthy email from Susanna Lombardi.
54. The effect of the 18 February 2011 email pleaded in the previous paragraph was that the Applicant's work and leadership behaviours were unsatisfactory and that the Applicant's responsibilities would henceforth be restricted.

Particulars

- (i) The email purported to be about the Applicant's work performance since being promoted.
 - (ii) The email foreshadowed a meeting between the Applicant and the National Directors to discuss the Applicant's performance.
 - (iii) The email described the Applicant as variously: shouting at other ATO officers, contacting ATO staff outside of normal working hours, and being unduly aggressive at meetings with key stakeholders.
 - (iv) The email indicated that a new person would be brought in to take over many of the Applicant's leadership and mentoring responsibilities.
55. The work concerns pleaded in the 18 February 2011 email were not legitimate and were intended to victimise the Applicant in the aftermath of the Applicant's complaint on 8 February 2011.
56. In February 2011, Susanna Lombardi initiated conversations with a number of the Applicant's work colleagues and managers, both past and present, about the Applicant's work performance and behaviour.
57. Two of the individuals with whom Susanna Lombardi initiated conversations about the Applicant were Simon Matthews and Ben Kelly.
58. Simon Matthews had been the Applicant's former manager at the ATO, and Ben Kelly had been the Applicant's manager after Simon Matthews.
59. On 18 February 2011 and 21 February 2011, Susanna Lombardi informed the other Executive Directors of the Small and Medium Enterprise division by email that she had serious concerns about the Applicant's work performance and behaviour.
60. The emails pleaded in the previous paragraph purported to communicate what Susanna Lombardi had learned from the Applicant's two former work managers, Simon Matthews, and Ben Kelly.

Particulars

- (i) The email sent from Susanna Lombardi on 18 February 2011 in part provides, with reference to the Applicant, that: *'putting her position forward strongly' at meetings was consistent with Serene's previous behaviour and discussions had occurred in attempts to manage this with Serene. The previous managers also found that Serene doesn't change her mind easily and has 'frankly rubbed people up the wrong way'.*

- (ii) The 18 February email continued: *Serene is an emotional and passionate type of person who can easily 'tip over the edge'.*
- (iii) The email sent from Ms Lombardi on 21 February 2011 in part provided, with reference to the Applicant that: *Simon confided that he had a number of conversations with Serene about her behaviour and some had ended in tears.*
61. The assertions made about the Applicant in the 18 February and 21 February 2011 emails were misrepresentations of what Susanna Lombardi had been told by Simon Matthews about the Applicant.

Particulars

- (i) By an email dated 29 April 2011, Simon Matthews stated the following:

It is pointed out that in my reference I failed to mention that 'Ms Teffaha is disruptive in the workforce and will fly into child-like tantrums in order to have her views accepted'. I did not mention this because during the time I was Ms Teffaha's manager I never observed such behaviour nor did I have any reason to even suspect that she ever exhibited such behaviour either during or before the time I was her manager.

It is asserted that I privately conceded that I was fully aware of Serene's alleged disruptive behaviours and inability to complete work under pressure. This is not true (nor could it be true, given that I never observed, nor received reports of, such behaviours). I had two conversations with Serene's current manager about Serene's recent alleged behaviour in the workplace (I assume the allegation is that my private conceding occurred during the course of one or both of these conversations).

I never observed (nor privately conceded) Serene to:

- *shout at anyone in the workplace*
- *have a tantrum and storm out of a meeting*
- *burst into tears when her views have not been accepted*
- *threaten to raise bullying complaints (in particular, I never gave cause to anyone to suppose that Serene used such behaviour frequently in her*

dealings with me to gain her way – needless to say, I would not have tolerated such behaviour myself)

- *engage in intimidating behaviour towards other staff*
- *launch any accusations (false, vexatious or otherwise) against staff members.*

(ii) By an email dated 15 February 2012, Simon Matthews re-iterated that his assessment of the Applicant's work performance and character had not been accurately represented by Susanna Lombardi.

62. The assertions made about the Applicant by Susanna Lombardi in the 18 February 2011 and 21 February 2011 emails were misrepresentations of what Ben Kelly had said about the Applicant.

Particulars

(i) By an email dated 29 April 2011, Simon Matthews stated he had been present at the meeting between Susanna Lombardi and Ben Kelly, and that Ben Kelly had endorsed the assessment of the Applicant provided by Simon Matthews and described herein.

(ii) The email sent by Simon Matthews dated 29 April 2011 said in part: *I had two conversations with Serene's current manager [ie- Susanna Lombardi] about Serene's recent alleged behaviour in the workplace ... the first was instigated by the manager, and Ben Kelly (Serene's manager immediately after me) joined us for the conversation. Both Ben and I expressed surprise at the behaviour the manager alleged Serene had engaged in, because neither of us had observed, or was aware of, such behaviour by her before.*

63. The representations made by Susanna Lombardi in the emails sent on 18 February 2011 and 21 February 2011 were deliberately false.

64. On 22 February 2011, Susanna Lombardi transmitted an email to the Applicant's work colleagues, stating that all leadership and pastoral responsibilities had been removed from the Applicant and henceforth the Applicant would do only casework.

65. In or about March 2011, Susanna Lombardi interfered with a work decision of the Applicant.

Particulars

- (i) Susanna Lombardi purported to overturn a decision of the Applicant about a technical tax issue concerning the capital/revenue distinction.
 - (ii) In response to Susanna Lombardi's intervention, the Applicant sought to refer the issue to the ATO's Centre of Expertise, in accordance with normal ATO procedure.
 - (iii) On or about 11 March 2011 Susanna Lombardi asked one of the other National Directors, Judy Attwood, to contact the Centre of Expertise with a request that the referral by the Applicant be ignored by the Centre of Expertise.
 - (iv) The Centre of Expertise refused to ignore the Applicant's referral of the matter.
66. In or about March 2011 Susanna Lombardi encouraged, or instructed, an ATO employee, Sandra Clarke, to bully the Applicant.

Particulars

- (i) Sandra Clarke was an IT systems trainer/administrator at the ATO who reported directly to the Executive Directors of the Small and Medium Enterprise division.
- (ii) Sandra Clarke held a less senior position at the ATO than the Applicant.
- (iii) In March 2011 Susanna Lombardi arranged for Sandra Clarke to conduct a training session for the Applicant and the Applicant's work colleagues.
- (iv) Susanna Lombardi instructed Sandra Clarke to spy on the Applicant and her work colleagues.
- (v) Sandra Clarke conducted a training session on 30 March 2011 with the Applicant.
- (vi) After the training session Sandra Clarke sent a detailed email to the National Directors, including Susanna Lombardi, describing a confrontation with the Applicant. The email was dated 30 March 2011.
- (vii) The email sent by Sandra Clarke, pleaded above, was in part as follows: *'I was not always professional with my language and I went into "mother mode" treating her as a child and told Serene a few home truths of her behaviour i.e. lacked time*

management skills, lacked case management skills, complaining about a situation where she had no need to, management did understand the complexity of the work and has been working at increasing our staff profile of the last 12 months and that she is an EL2 and is expected to deal with complex cases, and the rotatio (sic) of cases was more than fair and she needed to be committed to her tasks and not everyone else.'

(viii) Susanna Lombardi then sent an email to Sandra Clarke that stated: 'Congratulations Sandra.' This email was copied to the other National Directors of the Small and Medium Enterprise division.

67. On 14 April 2011, the Applicant made the first of several requests for transfer to a different part of the ATO, on the basis that the Applicant felt she was being bullied and discriminated against.
68. David Diment was in a position to grant the Applicant's requests but did not do so.
69. On 18 April 2011, David Diment sent the Applicant an email.
70. The 18 April email, pleaded in the previous paragraph, referred specifically to the Main Whistleblower Complaint and stated that the Applicant was being placed on miscellaneous leave and the Applicant was not permitted to enter ATO premises for two weeks.
71. On 20 April 2011, the Applicant, by email, pointed out to David Diment that he was not affording her protection under section 16 of the *Public Service Act 1999*.

Particulars

- (i) The observation was made by email from the Applicant to David Diment, sent at 3:52pm.
72. On 20 April 2011 David Diment stated that he was withdrawing the decision to place the Applicant on miscellaneous leave.
73. On 4 May 2011, the Applicant was told by the ATO to attend an assessment with a psychologist.
74. On 16 May 2011, the Applicant was advised that the requirement to attend an assessment with a psychologist arose because of the Applicant's threats of self-harm.

75. The Applicant at no time expressed any threats of self-harm.
76. On 8 April 2011, without the Applicant's knowledge, a psychiatric medical examination was scheduled for the Applicant on 9 May 2011.
77. On or about 29 April 2011 somebody in the Small and Medium Enterprise division encouraged, or instructed, the ATO employee, Elizabeth Pavan, to lodge a bullying complaint against the Applicant.

Particulars

- (i) At all relevant times Elizabeth Pavan worked in the Marketing and Communications section of the ATO, which was geographically proximate to the area where the Applicant worked.
 - (ii) On 7 April 2011 the Applicant and Elizabeth Pavan had an argument about Elizabeth Pavan's behaviour towards the Applicant.
 - (iii) On 29 April 2011 Elizabeth Pavan made a formal complaint that she had been bullied by the Applicant.
 - (iv) The Applicant relies on the improbability that an individual would wait three weeks before complaining about a single incident to support an inference that the Pavan complaint was intended to put pressure on the Applicant.
 - (v) The Applicant further relies on the fact that the Pavan complaint was never determined to support an inference that the complaint was intended to pressure the Applicant.
78. On 31 May 2011, the Applicant learned she had been denied access her case files on the ATO's data management system.
 79. No explanation was provided to the Applicant for why she was no longer able to access her case files until 2:48pm the following day, being 1 June 2011.

Particulars

- (i) By email on 1 June 2011, the Applicant was informed that the Applicant need not concern herself with the details of case completion.

80. The decision to deny the Applicant access to the ATO data management system was made by the National Directors of the Small and Medium Enterprise division, including Susanna Lombardi.
81. On 3 June 2011, three of the Applicant's case files (to which the Applicant had been denied access) were designated on the ATO system as 'Failed Completion Standard'.
82. On 6 June 2011, Margot Rushton communicated the following to the Applicant:
- (i) The Applicant was the subject of a bullying complaint from Elizabeth Pavan, which was being investigated by an external law firm that had been engaged by the ATO;
 - (ii) Margot Rushton was formally directing the Applicant to attend a psychiatric medical examination at the Victoria Clinic; and
 - (iii) If the Applicant did not agree to undergo a psychiatric examination then immediate consideration would be given to instituting formal action against the Applicant for a suspected breach of the APS Code of Conduct.
83. On 7 June 2011 the Applicant was advised that she would not be granted a permanent transfer out of the Small and Medium Enterprise division.
84. On 8 June 2011 the Applicant suffered a breakdown while at work.

Particulars

- (i) The Applicant lost consciousness at her workstation and then suffered a prolonged period of vomiting.
85. From 9 June to 6 July 2011 the Applicant was on paid leave from her job at the ATO.
86. Since 7 July 2011 the Applicant has been on unpaid leave from her job at the ATO, but has not been formally terminated as an employee.
87. Since 7 July 2011, the Applicant has been certified by her medical practitioner as unfit for work for reasons of stress and anxiety.
88. On 14 November 2011, Margot Rushton, wrote to the Applicant, and communicated a formal direction for the Applicant to attend a psychiatric medical examination.

89. On 8 December 2011, Ms Rushton issued the Applicant a Notice of Suspected Breach of the APS Code of Conduct for failing to attend a psychiatric medical examination and bullying Elizabeth Pavan.
90. The Notice of Suspected Breach stated that information about the breach of APS Code of Conduct breach could be disclosed by the ATO to any new or prospective future employer of the Applicant.
91. In or about February 2012, the Applicant requested a resolution of all investigative actions and complaints against the Applicant.
92. On 16 February 2012, the Applicant was advised that the First Respondent had permanently discontinued all investigative actions against the Applicant, including any breach of the APS Code of Conduct occasioned by the Applicant's refusal to attend a psychiatric medical examination.

Losses sustained by the Applicant

93. The events described above effectively terminated the Applicant's eleven (11) year career at the ATO.
94. On or about 11 August 2011 the Applicant was diagnosed with Situational Affective (Adjustment) Disorder and Reactive Anxiety/Depression and symptoms of Post-Traumatic Stress Disorder.
95. In the period subsequent to 7 July 2011, when the Applicant was on leave without pay from the ATO, the Applicant forwent pay and other benefits.
96. From July 2012 the Applicant commenced looking for new employment.
97. The Applicant did not receive employment offers commensurate with the salary and emoluments of a Senior Tax Technical Specialist at the ATO.

Particulars

- (i) Particulars will be provided by way of evidence, including the differential between the Applicant's future earning potential and the earning potential she would have had as an ATO officer.
98. In or about October 2012, the Applicant was offered employment as a lawyer at the firm Merhi & Associates.

99. Under the proposed employment at Merhi & Associates the Applicant is entitled to receive \$25,000 base salary and 50% of any billings the Applicant is able to generate personally.
100. The Applicant has incurred financial expense as a result of the medical treatment necessitated by Situational Affective Disorder, Reactive Anxiety/Depression and symptoms of Post-Traumatic Stress Disorder.

Particulars

- (i) Particulars will be provided by way of evidence.
101. The Applicant experienced personal distress as a result of the events described herein.

Statutory duty: section 16 of *Public Service Act 1999*

102. At all relevant times section 16 of the *Public Service Act 1999* created a statutory duty not to victimise or discriminate against an APS employee.
103. A breach of the statutory duty pleaded above confers a private right of action on the relevant APS employee.

Particulars

- (i) Section 16 of the *Public Service Act 1999* is designed to protect a narrow class of persons, being those APS employees who make whistleblower complaints, rather than the public generally.
- (ii) The *Public Service Act 1999* provides no express remedy for a breach of section 16, indicating a legislative intent for section 16 to create a private right of action.
104. An incident of the private right of action described by the previous paragraph is a right to damages for the economic loss, non-economic loss and personal distress associated with the victimisation and bullying of an APS employee who has made a whistleblower complaint.
105. An incident of the private right of action created by section 16 of the *Public Service Act 1999* is a right to damages in the nature of exemplary damages, for the purpose of deterring the mistreatment of whistleblowers.

Statutory duty: section 15 of *Public Service Act 1999*, Regulation 2.4 of *Public Service Regulations*

106. At all relevant times subsection 15(3) of the *Public Service Act 1999* created a statutory duty to establish and maintain procedures for determining whether there has been a breach of the APS Code of Conduct by an APS employee.
107. At all relevant times Regulation 2.4 of the *Public Service Regulations* created a duty to ensure that whistleblower reports, made under section 16 of the *Public Service Act 1999*, are investigated when they are made by APS employees.
108. A breach of the duties pleaded above confers a private right of action on the relevant APS employee.

Particulars

- (iii) Section 15 of the *Public Service Act 1999* and Regulation 2.4 of the *Public Service Regulations* are designed to protect a narrow class of persons, being those APS employees who make whistleblower complaints, rather than the public generally.
- (iv) The *Public Service Act 1999* provides no express remedy for a breach of these provisions, indicating a legislative intent to create a private right of action.
109. An incident of the private right of action described by the previous paragraph is a right to damages for the economic loss, non-economic loss and personal distress associated with the failure to investigate whistleblower complaints.
110. An incident of the private right of action is a right to damages in the nature of exemplary damages, for the purpose of deterring the mistreatment of whistleblowers.
111. The Main Whistleblower Complaint and the other complaints by the Applicant, pleaded herein, were relevantly within the terms of sections 15 and 16 of the *Public Service Act 1999* and Regulation 2.4 of the *Public Service Regulations* and invoked the duties arising under those provisions.

Susanna Lombardi

Misfeasance in public office

112. At all relevant times Susanna Lombardi held a public office and received remuneration for holding that office.
113. The position held by Susanna Lombardi carried public powers, including the power to:
- (a) allocate responsibilities and give directions to members of the Small and Medium Enterprise division;
 - (b) make and communicate performance evaluations about individuals such as the Applicant, which in the ordinary course would affect the careers of persons such as the Applicant; and
 - (c) make managerial decisions generally.
114. The following actions by Susanna Lombardi were performed with the intent of harming the Applicant, or with reckless indifference to whether the actions would harm the Applicant:
- (a) removing work responsibilities from the Applicant;
 - (b) communicating misleading information about the Applicant's work performance and behaviour;
 - (c) encouraging other ATO employees to bully the Applicant;
 - (d) interfering with the Applicant's decisions about individual cases; and
 - (e) denying the Applicant access to the Applicant's work files.
115. Susanna Lombardi knew that the actions pleaded in the previous paragraph were contrary to law and a mis-use of discretionary power or was recklessly indifferent to the probability that these actions would be harmful to the Applicant.

Particulars

- (i) Knowledge that the actions were wrongful arises as a clear inference from the nature of the actions and also Susanna Lombardi's management position at the ATO.
116. The actions taken caused the loss to the Applicant pleaded at Paragraphs 93 - 101 above.

Breach of statutory duty

117. The Applicant refers to the statutory duty created by section 16 of the *Public Service Act 1999*.
118. The following actions by Susanna Lombardi constituted one or more breaches of the duty not to victimise and discriminate against the Applicant:
- (a) removing work responsibilities from the Applicant;
 - (b) communicating misleading information about the Applicant's work performance and behaviour;
 - (c) encouraging other ATO employees to bully the Applicant;
 - (d) interfering with the Applicant's decisions about individual cases; and
 - (e) denying the Applicant access to the Applicant's work files.
119. The actions pleaded in the previous paragraph caused the loss pleaded at Paragraphs 93 - 101 above.

Negligence

120. Susanna Lombardi owed the Applicant a duty of care not to victimise or discriminate against the Applicant.
121. The duty of care arose from:
- (a) the Applicant's status as a person who had made whistleblower complaints within the meaning of the *Public Service Act 1999*; and
 - (b) Susanna Lombardi's position as a National Director of the Small and Medium Enterprises division;
122. The following actions by Susanna Lombardi constituted one or more breaches of the duty of care pleaded above:
- (a) removing work responsibilities from the Applicant;
 - (b) communicating misleading information about the Applicant's work performance and behaviour;

- (c) encouraging other ATO employees to bully the Applicant;
- (d) interfering with the Applicant's decisions about individual cases; and
- (e) denying the Applicant access to the Applicant's work files.

123. It was foreseeable that the breaches pleaded above would result in harm to the Applicant.

124. The breaches pleaded above caused loss to the Applicant, as pleaded in Paragraphs 93 to 101 above.

David Diment

Misfeasance in public office

125. At all relevant time David Diment held a public office and received remuneration for holding that office.

126. The position held by David Diment carried public powers, including the power to:

- (a) investigate whistleblower complaints; and
- (b) make personnel decisions, including the transfer of ATO personnel between areas of the ATO.

127. The following actions and omissions by David Diment were performed with the intent of harming the Applicant, or with reckless indifference to whether the actions would harm the Applicant:

- (a) failing to properly investigate the Main Whistleblower Complaint, and procuring the ultimate disallowance of the Main Whistleblower Complaint;
- (b) the decision to place the Applicant on two-weeks miscellaneous leave;
- (c) ignoring the Applicant's requests for a transfer to a different part of the ATO.

128. David Diment knew that the acts and omissions pleaded in the previous paragraph were contrary to law and a mis-use of his discretionary power or was recklessly indifferent to the probability that these actions would be harmful to the Applicant.

Particulars

- (i) Knowledge that the actions were wrongful arises as a clear inference from the nature of the actions and also David Diment's position at the ATO.
- (ii) In an email dated 18 April 2011 David Diment acknowledged his obligation to investigate the Main Whistleblower Complaint.

129. The act and omissions caused the loss to the Applicant pleaded at Paragraphs 93 - 101 above.

Breach of statutory duty

130. The Applicant refers to the statutory duty created by sections 15 and 16 of the *Public Service Act 1999*, as well as Regulation 2.4 of the *Public Service Regulations*.
131. The following actions by David Diment constituted one or more breaches of the duty not to victimise and bully the Applicant:
- (a) failing to properly investigate the Main Whistleblower Complaint, and procuring the ultimate disallowance of the Main Whistleblower Complaint;
 - (b) making a decision to place the Applicant on two-weeks' miscellaneous leave; and
 - (c) ignoring the Applicant's requests for a transfer to a different part of the ATO.
132. The actions taken by David Diment to procure the dismissal of the Main Whistleblower Complaint also constituted a breach of the duty to ensure the proper investigation of complaints about breaches of the APS Code of Conduct.
133. The actions pleaded in the previous paragraph caused the loss pleaded at Paragraphs 93 to 101 above.

Negligence

134. David Diment owed the Applicant a duty of care not to victimise or discriminate the Applicant and also to prevent the Applicant from being victimised and discriminated against.
135. The duty of care arose from:

(a) the Applicant's status as a person who had made whistleblower complaints within the meaning of the *Public Service Act 1999*; and

(b) David Diment's position as First Assistant Commissioner of Taxation and the head of 'ATO People'.

136. The following actions by David Diment constituted one or more breaches of the duties of care pleaded above:

(a) failing to properly investigate the Main Whistleblower Complaint, and procuring the ultimate disallowance of the Main Whistleblower Complaint;

(b) the decision to place the Applicant on two-weeks miscellaneous leave;

(c) ignoring the Applicant's requests for a transfer to a different part of the ATO.

137. It was foreseeable that the breaches pleaded above would result in harm to the Applicant.

138. The breaches pleaded above caused loss to the Applicant, as pleaded in Paragraphs 93 to 101 above.

Margot Rushton

Breach of statutory duty

139. The Applicant refers to what is said above, about the statutory duty created by section 16 of the *Public Service Act 1999*.

140. The following actions by Margot Rushton constituted one or more breaches of the duty not to victimise and discriminate against the Applicant:

(a) the two formal directions requiring the Applicant to attend a psychiatric examination;

(b) the issue of a Notice of Suspected Breach of the APS Code of Conduct to the Applicant; and

(c) the threat to tell future employers that the Applicant had breached the APS Code of Conduct.

141. The breaches pleaded above caused loss to the Applicant, as pleaded in Paragraphs 93 to 101 above.

Negligence

142. Margot Rushton owed the Applicant a duty of care not to victimise or discriminate against the Applicant.

143. The duty of care arose from:

(a) the Applicant's status as a person who had made whistleblower complaints within the meaning of the *Public Service Act 1999*; and

(c) Margot Rushton's position as a Senior Executive Service employee at the ATO.

144. The following actions by Margot Rushton constituted one or more breaches of the duty of care pleaded above:

(a) the two formal directions requiring the Applicant to attend a psychiatric medical examination;

(b) the issue of a Notice of Suspected Breach of the APS Code of Conduct to the Applicant; and

(c) the threat to tell future employers that the Applicant had breached the APS Code of Conduct.

145. It was foreseeable that the breaches pleaded above would result in harm to the Applicant.

146. The breaches pleaded above caused loss to the Applicant, as pleaded in Paragraphs 93 to 101 above.

The First Respondent

147. All the acts and omissions pleaded herein were undertaken by officers of the ATO in the course of each respective ATO officer's employment with the ATO.

148. By reason of the foregoing the ATO is vicariously liable for the acts and omissions pleaded herein.

149. The ATO is further vicariously liable for the acts and omissions pleaded herein that were not attributable to the Second Respondent, Third Respondent, or Fourth Respondent.
150. By reason of Regulation 2.4 (2)(e) of the *Public Service Regulations* the First Respondent is directly liable for the failure to investigate the Whistleblower complaints.

Particulars

- (i) David Diment was a person 'authorised' by the First Respondent within the meaning of Regulation 2.4(2)(e).
- (ii) The obligation to create procedures that ensure a proper investigation is a strict statutory duty that was breached when there is failure by the authorised person to investigate.
- (iii) David Diment failed to investigate the Applicant's complaints, as pleaded herein.

Exemplary damages

151. Exemplary damages are not a species of damages for 'non-economic loss', within the meaning of subsection 45(4) of the *Safety, Rehabilitation and Compensation Act 1988*, rather they are a deterrent.
152. David Diment is liable to the Applicant for exemplary damages for reason of conscious wrongdoing in disregard of the Applicant's rights.

Particulars

- (i) Under section 16 of the *Public Service Act 1999* the Applicant had a right to freedom from victimisation and discrimination.
- (ii) David Diment was aware of the Applicant's right under section 16 of the *Public Service Act 1999*.
- (iii) David Diment was aware that by the following acts and omissions he was breaching or having contumelious disregard for the Applicant's rights:
- (a) procuring the dismissal of the Main Whistleblower Complaint;
- (b) attempting to place the Applicant on miscellaneous leave;

- (c) failing to give the Applicant a permanent transfer to a different part of the ATO in circumstances where he knew the Applicant was being victimised because of the Applicant's complaints.

153. In the alternative, David Diment is liable to the Applicant for exemplary damages because his actions constituted an abuse of executive power, within the meaning of *NSW v Ibbett* (2006) 229 CLR 638.
154. Susanna Lombardi is liable to the Applicant for exemplary damages for reason of conscious wrongdoing in disregard of the Applicant's rights.

Particulars

- (i) Susanna Lombardi was aware of the Applicant's rights under section 16 of the *Public Service Act 1999*.
 - (ii) Susanna Lombardi was aware that by the following acts and omissions she was breaching or having contemptuous disregard for the Applicant's rights:
 - (a) removing work responsibilities from the Applicant;
 - (b) communicating misleading information about the Applicant's work performance;
 - (c) encouraging other ATO employees to bully the Applicant;
 - (d) interfering with the Applicant's decisions about individual cases;
 - (e) denying the Applicant access to the Applicant's work files.
155. In the alternative, Susanna Lombardi is liable to the Applicant for exemplary damages because her actions constituted an abuse of executive power within the meaning of *NSW v Ibbett* (2006) 229 CLR 638.
156. The First Respondent is liable to the Applicant for exemplary damages for reason of conscious wrongdoing in disregard of the Applicant's rights; or, in the alternative, for exemplary damages because of abuse of executive power within the meaning of *NSW v Ibbett* (2006) 229 CLR 638.

Particulars

- (i) The actions and omissions of David Diment and Susanna Lombardi were performed within the scope of their employment at the ATO;
- (ii) The balance of the actions and omissions pleaded herein which sound in exemplary damages, were performed by ATO personnel within the scope of their employment; and
- (iii) By reason of the foregoing the First Respondent is vicariously liable for exemplary damages.

Date: 20 November 2012

Signed by Mark J Ord Lawyer for the
Applicant

This pleading was prepared by Mark J Ord lawyer

Certificate of lawyer

I Mark J Ord certify to the Court that, in relation to the statement of claim filed on behalf of the Applicant, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date: 20 November 2012

Signed by Mark J Ord
Lawyer for the Applicant