



## Sexual harassment in the workplace: Australia's first stop sexual harassment case

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On 11 November 2021, the Fair Work Commission's (**FWC**) anti-sexual harassment jurisdiction commenced operation. Section 789FF of the *Fair Work Act* provides that a "worker" (as defined under work health and safety legislation) can apply to the FWC for orders to stop sexual harassment if, while they are at work, one or more individuals sexually harasses them and there is a risk of future sexual harassment.

### What is workplace sexual harassment?

A person sexually harasses another if:

- they make an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed; or
- they engage in other unwelcome conduct of a sexual nature in relation to the person harassed;

in circumstances in which a reasonable person would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.

Matters such as the gender, age, sexual orientation, gender identity, marital or relationship status, race, colour or national origin of the person allegedly harassed are relevant to assessing whether sexual harassment has occurred. Also relevant is the relationship between the person allegedly harassed and the person who allegedly made the sexual advance or request.

In the recent decision of [THDL \[2021\] FWC 6692](#), the FWC published its first decision in relation to its new anti-sexual harassment jurisdiction.

## The case of THDL

In *THDL*, a worker, THDL, operated a business located in a warehouse. THDL alleged that she had been sexually harassed by two men who worked in a neighbouring business in the same warehouse complex. In response, the two men claimed that:

- they had not sexually harassed THDL;
- THDL was not a “worker” as defined in the *Fair Work Act* (**FW Act**) and under work health and safety legislation;
- THDL was not at work when the alleged sexual harassment occurred; and
- they had reported THDL to the police and had an intervention order against them.

On this basis, the two men asserted that the application should be dismissed.

## Application dismissed due to no risk of future sexual harassment

The FWC decided to dismiss THDL’s application. However, this was not because of the points argued by the two men. The FWC found that it was not required to make a determination on those points, or on whether THDL had been sexually harassed.

Instead, the FWC confined its attention to whether there was a risk of THDL being subject to any *future* sexual harassment at work.

By the date of the FWC’s hearing, THDL no longer operated a business in the same warehouse complex as the two men. On this basis, the FWC concluded that “*there is no likelihood that the parties will cross paths while at work.*” On this basis, the FWC dismissed THDL’s application.

## Conclusion

In *THDL*, THDL accused two men of sexually harassing her at work. On one view, it would be reasonable to assume that the FWC would consider whether THDL was, in fact, sexually harassed.

The FWC, however, did not undertake this inquiry. Instead, the FWC focused on the importance that the FW Act places on the risk of *future* sexual harassment to exist for the FWC’s anti-sexual harassment jurisdiction to be enlivened. Given THDL was no longer working in the same warehouse complex as the two men, this risk was removed.

The FWC’s decision in *THDL* does little to assist in relation to determining what behaviour may be captured by the FWC’s anti-sexual harassment jurisdiction.

Instead, *THDL* demonstrates that even if an employee believes they have been sexually harassed in the past, the FWC may dismiss their application for an order to stop sexual harassment on the basis that there is no risk of future sexual harassment.

# Get help

If you, or someone you know, is experiencing sexual harassment in the workplace and you'd like advice or assistance about your legal options, our [employment law](#) teams across the country, are able to assist.

You can contact us by phone or email to arrange your consultation; either face-to-face at one of our offices, by telephone or by videoconference consultation.

Phone: [1800 659 114](tel:1800659114)

Email: [general@hallpayne.com.au](mailto:general@hallpayne.com.au)

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