

What women don't want

MOIRA RAYNER JUNE 22, 2010

It is no new thing that men with power very readily assume that the ordinary rules of conduct do not apply to them. Such seems to have been the belief of the recently departed CEO of David Jones, whose career has been devoted, he said in a recent *Age* interview, to knowing what women want. Sometimes the power is slight — like Troy Buswell's, who led the WA Liberal Party in opposition, but had to stand down in tears after sniffing a staffer's chair in his Parliament office. Sometimes, too, the lessons are not learnt. Buswell had to give up his political power a couple of years later when his affair with a Greens MP became public.

One was sexualised bullying, the other a consensual dalliance. One was a misuse of power over his employees, the other a breach of his wife's trust and of a political leader's sense of what the public will no longer wear. Still, there are similarities: in both instances, the women involved copped one hell of a belting from the media.

Let us, then, feel for the young woman who blew the whistle on Mark McInnes (pictured) to the David Jones Board.



Sexual harassment has always been hard to talk about. The first reported decision on harassment was on a young woman's complaint that the head of her department had made constant sexual advances. He denied it, and she fought a court case over it. In the end it was decided on a technicality, which brought her no joy, even if it did lead to a change in the law to distinguish between sex discrimination (which required proof of detrimental treatment based on sex) and harassment by sexual conduct (which should be accepted as detrimental *per se*).

About ten years ago I lost my firm a very big client. The CEO of a very well-known business asked me for advice on how to respond to a complaint against him by one of his staff. He told me she'd complained that he had fondled and kissed her in a hotel lift on the way to a meeting. He showed every sign of outrage about it: she was mad, how could anyone believe such a thing? She had made an immediate complaint to a third party, a female friend, and had taken sick leave.

I told him the facts could easily be disproved: we could call for the security camera film. I made the call, and learned that the security cameras did not operate — they were just for show, and there was no film. I told my client and his face lit up. Well actually, he said, he had done it, but it was just a moment of madness, and would I please draft a response denying such an incident had ever occurred, because he could not possibly admit such behaviour to his board.

I said I could not possibly draft a statement for him that contradicted his explicit admission to me, especially since her complaint had been made to the Equal Opportunity Commission. His face darkened. What would I recommend? Consult another solicitor, I told him. He stormed out in fury. We lost all the company's business.

The law has a long history of disbelieving women who make claims of sexual behaviour against men. Over the years it has changed, so that a woman who seeks maintenance for an ex nuptial child no

longer has to provide corroboration of her evidence in a material particular, or to satisfy the so-called 'Briginshaw' test. This requires a heavier evidential burden than mere vague and ambivalent facts to tip the 'balance of probabilities'.

In recent years tribunals hearing sexual harassment claims have adopted the Briginshaw test, because of the seriousness of the consequences of the allegations for those they are made against. But anti-discrimination tribunals have come to accept, perhaps because so many more women are now members of such panels, that sexual bullying at work is almost invariably conducted in private and that 'corroboration' is not easy to find.

The woman who made the complaint against McInnes and David Jones has been named by the weekend papers, and is in full retreat from the media. She is said to be most distressed. Of course. What it must have already cost her to raise the matter at all! No wonder she went to lawyers.

The most common outcome of a sexual harassment complaint is, these days, that the harasser leaves (often by consent, and paid his contractual entitlements), and that the woman is resented as a gold-digger. Most complainants leave their jobs. Most hardly ever get what they need — support, involvement in any action taken against the harasser, and the dignity of acknowledgement.

David Jones acted promptly with its commercial interests in mind, having regard to its responsibilities under equal opportunity laws. But most women pay in blood for making sexual harassment complaints against powerful men in high places, under intense media, personal and professional pressure. There are massive disincentives to making these complaints. There is good reason for the Sex Discrimination Act to protect the women from being publicly lynched. But the media interest is such that they will always sniff them out.

Let us not forget that all great power is misused, eventually, and that a turning organisational wheel always crushes the whistleblower. No wonder so many women just leave.



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