# SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY

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| **Case Title:** | **Reid v Dukic** |
| **Citation:** | **[2016] ACTSC 344** |
| **Hearing Date:** | 14 October 2016 |
| **Decision Date:** | 25 November 2016 |
| **Before:** | Burns J |
| **Decision:** | See [69]-[71] |
| **Catchwords:** | **DEFAMATION** – Assessment of Damages – default judgment entered against defendant – defamatory statements published on social media – statements baseless – directed towards plaintiff in professional capacity – compensatory damages awarded – aggravated damages awarded – injunctive relief granted. |
| **Legislation Cited:** | *Civil Law (Wrongs) Act 2002* (ACT) ss 139E, 139F<br>*Civil Law (Wrongs) Non-economic Loss Declaration 2016* |
| **Cases Cited:** | *Ali v Nationwide News Pty Ltd* [2008] NSWCA 183<br>*Anderson v Mirror Newspapers (No 2)* (1986) 5 NSWLR 735<br>*Bickel v John Fairfax & Sons Ltd* [1981] 2 NSWLR 47<br>*Carson v John Fairfax & Sons Ltd* [1993] HCA 31; 178 CLR 44<br>*Cairns v Modi* [2012] EWHC 756 (QB)<br>*Cripps v Vakras* [2014] VSC 279<br>*Fielding v Variety Inc* [1967] 2 QB 841<br>*French v Fraser (No 3)* [2015] NSWSC 1807<br>*Grobbelaar v News Group Newspaper Ltd* [2002] UKHC 40; [2002] 1 WLR 3024<br>*Hockey v Fairfax Media Publications Pty Ltd & Ors (No 2)* [2015] FCA 750; (2015) 237 FCR 127<br>*Mickle v Farley* [2013] NSWDC 295<br>*Triggell v Pheeney* (1951) 82 CLR 497<br>*Zwambila v Wafawarova* [2015] ACTSC 171 |
| **Parties:** | Heather Reid (AM) (Plaintiff)<br>Stan Dukic (Defendant) |
| **Representation:** | **Counsel**<br>Mr M J Lewis (Plaintiff)<br>No Appearance (Defendant)<br>**Solicitors**<br>Mills Oakley (Plaintiff)<br>No Appearance (Defendant) |
| **File Number:** | SC 8 of 2016 |

**BURNS J:**

1. The present proceedings commenced by way of Originating Claim and Statement of Claim filed on 12 January 2016. The claim is one for compensatory and aggravated damages in defamation following nine defamatory posts on the defendant's Facebook page. The plaintiff also seeks that the defendant be permanently restrained from publishing the nine defamatory posts and the imputations and false allegations that arise from those posts or any matter to the same effect.

2. At the time of the defamatory statements the plaintiff was the Chief Executive Officer at Capital Football Pty Ltd (Capital Football) and had held that position for approximately 12 years. She had a long history of involvement in football and had been the recipient of a number of awards. In 2015 she was appointed a Member of the Order of Australia for her significant service to sports administration and gender equity in sport, particularly to football in Canberra.

3. On 12 May 2016, judgment in default was entered in favour of the plaintiff following the defendant's failure to file a Notice of Intention to Respond or Defence. As a result, the defendant is taken to have admitted the allegations in the plaintiff's claim: *Stewart v Coughlan* (1885) 11 VLR 279.

4. On 19 April 2016, the defendant was notified by court registry staff via email that the plaintiff's application for default judgment would be heard on 6 May 2016. The defendant acknowledged that email on the same date and effectively indicated that he did not wish to take part in the proceedings. Court registry staff notified the defendant on 22 April 2016 that if he did not attend on 6 May 2016 the Court may make orders in his absence. On 6 May 2016, Mossop AsJ adjourned the hearing of the application to 12 May 2016 and directed that the plaintiff give notice to the defendant of the listing via email. On 12 May 2016, the defendant did not appear and Mossop AsJ entered judgment in default in favour of the plaintiff. On that date his Honour also noted that the Originating Claim and Statement of Claim were served on the defendant on 11 February 2016.

5. On 20 July 2016, a sealed copy of the default judgment was served on the defendant. This was acknowledged by the defendant on 21 July 2016. The matter proceeded to an assessment of damages before me on 14 October 2016 and the defendant was made aware of this date by email from court staff. The defendant did not attend and I noted on that date that it was clear the defendant was aware of the present proceedings, as he had corresponded with court staff on a number of occasions in relation to them, and as recently as the day the matter was listed for hearing before me. I noted that the defendant had taken no part in any of the proceedings and the matter proceeded without the defendant.

## The defamatory statements

6. There are nine defamatory statements particularised in the plaintiff's Statement of Claim and copies of those defamatory statements were attached to the Statement of Claim. In each case the defendant had posted those statements on the "wall" of his Facebook Page (Wall). The defendant's Facebook page is in his own name and he was the author and publisher of the content on his Wall. This content is made available for publication by the defendant and he permits and controls third party comment and response to the content that he posts on his Wall.

7. While I have read and considered the contents of those defamatory statements, I do not consider it is appropriate to republish them in the body of this judgment. I will instead detail the imputations that can be drawn from those defamatory statements, as particularised in the plaintiff's Statement of Claim:

**First Matter Complained Of**

(a) The plaintiff, in her role as CEO of Capital Football, fraudulently ensured tenders were given to board members of Capital Football who were undeserving recipients.

(b) The plaintiff, in her role as CEO of Capital Football, is dishonest in that she habitually misleads the public in Canberra.

(c) The plaintiff, in her role as CEO of Capital Football, is dishonest in that she consistently misleads the public in Canberra into believing that Canberra United's budget is less than it actually is.

(d) The plaintiff, in her role as CEO of Capital Football, has performed with such gross incompetence that Capital Football has become distant from the very people it is supposed to help.

(e) The plaintiff, in her role as CEO of Capital Football, has performed with such gross incompetence that the Minister for Sport should intervene and replace her.

(f) The plaintiff, in her role as CEO of Capital Football, has so negligently managed Capital Football, that it is a national disgrace.

**Second Matter Complained Of**

(a) The plaintiff, in her role as CEO of Capital Football, is dishonest in that she has falsely stated in public that the budget for Canberra United is $400,000.

(b) The plaintiff, in her role as CEO of Capital Football, has performed with such gross incompetence that she should be replaced.

(c) The plaintiff, in her role as CEO of Capital Football, has negligently managed Capital Football to the extent that it is in a disgraceful state.

(d) The plaintiff, in her role as CEO of Capital Football, is so gender biased that when the Football Federation of Australia offered Canberra a National Youth Team 5 or 6 years ago, she knowingly turned it down because it would take the emphasis off Canberra United.

(e) The plaintiff, in her role as CEO, lied when she claimed that the Canberra United license was always owned by the Football Federation of Australia.

(f) The plaintiff is such a habitual liar that she forgets what lies she has told.

(g) The plaintiff, in her role as CEO of Capital Football, is so knowingly gender biased in favour of the women's football code that the Men's football code is at its lowest point in history.

**Third Matter Complained Of**

(a) The plaintiff, in her role as CEO of Capital Football, has knowingly lied when Capital Football stated it follows the Football Federation of Australia regulations.

(b) The plaintiff, in her role as CEO of Capital Football, is so knowingly gender biased in favour of the women's football code that the Men's football code has been considerably damaged.

(c) The plaintiff, in her role as CEO of Capital Football, is racist in that she did not want any more ethnic teams in the National Premier League.

(d) The plaintiff, in her role as CEO of Capital Football, has acted improperly in that she pushed all of her favourite football clubs into the National Premier

League at the expense of many of the great, and more deserving, clubs in Canberra.

(e) The plaintiff, in her role as CEO of Capital Football, has performed with such gross incompetence, that the fan interest and sponsorship in the league is at the lowest in history and children are uninspired to play the game.

(f) The plaintiff, in her role as CEO of Capital Football, has so negligently managed Capital Football that she needs to be replaced.

**Fourth Matter Complained Of**

(a) The plaintiff, in her role as CEO of Capital Football, has deceived the Australian public into believing that she is a virtuous person when she is not.

(b) The plaintiff in her role as CEO of Capital Football has defrauded Capital Football.

(c) The plaintiff, in her role as CEO of Capital Football, appointed, and then considered with, her friend to defraud Capital Football.

(d) The plaintiff, in her role as CEO of Capital Football, has misappropriated funds belonging to Capital Football.

(e) The plaintiff, in her role as CEO of Capital Football, has misappropriated from Capital Football $150,000, which was meant to grow men's elite football in Canberra, in order to look after a few mortgages.

(f) The plaintiff, in her role as CEO of Capital Football, has been so cunning in misappropriating funds belonging to Capital Football that independent accountants agree that Capital Football's books are the most creative and unreliable books they have seen for years.

(g) The plaintiff, in her role as CEO of Capital Football, is so grossly gender biased in favour of the women's football code that she is responsible for elite men's league in Canberra dying.

(h) The plaintiff, in her role as CEO of Capital Football, is such a despicable person that she will not only refuse to accept how obviously disgruntled the Canberra community is with her performance but she will falsely label them all misogynists.

(i) The plaintiff is a liar.

(j) The plaintiff, in her role as CEO of Capital Football, dishonestly stated the Canberra United budget is $400,000.

(k) The plaintiff, in her role as CEO of Capital Football, has performed with gross incompetence.

(l) The plaintiff, in her role as CEO of Capital Football, has negligently managed Capital Football.

**Fifth Matter Complained of**

(a) The plaintiff, in her role as CEO of Capital Football, is so knowingly gender biased in favour of the women's football code that the men's football code has been considerably damaged.

(b) The plaintiff, in her role as CEO of Capital Football, is only knowingly gender biased in favour of the women's football code in order to further her own ambitions.

(c) The plaintiff, in her role as CEO of Capital Football, has knowingly misappropriated funds belonging to Capital Football.

(d) The plaintiff, in her role as CEO of Capital Football, has negligently managed Capital Football.

**Sixth Matter Complained Of**

(a) The plaintiff, in her role as CEO of Capital Football, is so desperate to retain her position at Capital Football that the exercise of her power is akin to a communist dictator.

(b) The plaintiff, in her role as CEO of Capital Football, has improperly appointed her own friends to not only the board of Capital Football but as coaches.

(c) The plaintiff, in her role as CEO of Capital Football, is so self interested that she knowingly takes advantage of the football community in Canberra.

(d) The plaintiff, in her role as CEO of Capital Football, financially takes advantage of parents.

(e) The plaintiff, in her role as CEO of Capital Football, has so negligently managed Capital Football that someone in power should urgently replace her.

(f) The plaintiff, in her role as CEO of Capital Football, has performed with such gross incompetence that she should be replaced.

**Seventh Matter Complained Of**

(a) The plaintiff, in her role as CEO of Capital Football, has performed with gross incompetence by appointing inexperienced and inappropriate employees.

(b) The plaintiff, in her role as CEO of Capital Football, has performed with such gross incompetence, that people living in Canberra are not interested in soccer anymore.

(c) The plaintiff, in her role as CEO of Capital Football, has performed with such gross incompetence, that she should be sacked.

(d) The plaintiff, in her role as CEO of Capital Football, has acted so negligently in the management of Capital Football that she should stand down or be replaced.

(e) The plaintiff, in her role as CEO of Capital Football, is only interested in her own interests and financial gain rather than any genuine attempt to connect with the football community in Canberra.

**Eighth Matter Complained Of**

(a) The plaintiff, in her role as CEO of Capital Football, has used her position to further her career elsewhere rather than genuinely help develop the game of football in the ACT.

OR

(b) There are reasonable grounds to suspect that the Plaintiff, in her role as CEO of Capital Football, has used her position to further her career elsewhere rather than genuinely help develop the game of football in the ACT.

(c) The plaintiff, in her role as CEO of Capital Football, has acted so negligently that the sport in Canberra is predominately akin to a disaster area.

(d) The plaintiff, in her role as CEO of Capital Football, has acted with such gross incompetence that the sport in Canberra is predominately akin to a disaster area.

**Ninth Matter Complained Of**

(a) The plaintiff, in her role as CEO of Capital Football, knowingly tried to deceive the media into believing that Capital Football wants a youth league restricted so it can have an opportunity to field a team.

(b) The plaintiff, in her role as CEO of Capital Football, is responsible for major dramas at Gungahlin Football Club.

8. In relation to the publication of these defamatory statements the plaintiff relies upon the inference of publication to establish wider publication by reason of the:

(a) popularity of the Facebook Service which is accessed by approximately 1.5 billion users worldwide; and

(b) the defendant having about 400 "friends" on his Facebook Page who may read and comprehend content by the defendant but whom may not "like", "share" or "comment" on that content.

9. I also consider the following matters in relation to each of the nine defamatory posts:

| **Defamatory Post** | **Publication date** | **Recipients (number of persons)** | **Length of time published online** |
|---|---|---|---|
| First post | 8 December 2015 | 5 | 66 days |
| Second post | 6 November 2015 | 5 | 98 days |
| Third Post | 26 October 2015 | 8 | 109 days |
| Fourth post | 23 October 2015 | 12 | 112 days |
| Fifth post | 21 October 2015 | 10 | 114 days |
| Sixth post | 24 March 2015 | 9 | 325 days |
| Seventh post | 23 March 2015 | 23 | 326 days |
| Eighth post | 23 February 2015 | 9 | 354 days |
| Ninth post | 13 January 2015 | 12 | 395 days |

10. I note, in relation to the length of time each defamatory post is said to have been online, all posts were taken down on 12 February 2016. I also note that the number of recipients is based on the number of "likes" and "comments" by other Facebook users that each post received.

11. I will return to the extent of the publication and some observations of Facebook in due course.

## The evidence

12. The plaintiff was called as a witness at the hearing in relation to the assessment of damages before me, as were three reputational witnesses. I will now summarise the evidence of each in some detail.

*Evidence of the plaintiff*

13. The plaintiff is currently a sports consultant to Capital Football and the Fédération Internationale de Football Association (FIFA). At Capital Football she is responsible for running Canberra United in the Women's National League for Capital Football. In relation to FIFA, she delivers sports administration and leadership programs throughout the Oceania Pacific region, which involves educating new leaders about sports management and leadership. She is currently also a mentor on a FIFA women's leadership program and a volunteer member both at the Burns Club in the ACT and the ACT Olympic Council.

14. Prior to this she was the Chief Executive Officer (CEO) at Capital Football, a role which she held for 12 years. She gave evidence that she stepped down as CEO in April of this year. The plaintiff also detailed her previous employment. She described having a wide career in sports management. It is evident from the plaintiff's curriculum vitae that was tendered that this is true. Her experience includes, but is not limited to, being a National Executive Director at the Australian Women's Soccer Association for approximately seven years and being a consultant and employee at the Australian Sports Commission. She has also received numerous awards, which include being an inductee in the ACT Government Walk of Honour and being admitted into the Football Federation Australia's Hall of Fame for distinguished contribution to football. The plaintiff also tendered a number of letters of congratulations from various prominent members of the sporting and political community in relation to awards and honours the plaintiff has received over the years, the contents of which it is unnecessary to repeat here. The plaintiff also gave evidence that she mixes in football, political and artistic circles.

15. The plaintiff gave evidence that she is not a Facebook user nor does she manage any Facebook accounts. She testified that Facebook posts of the defendant were initially brought to her attention by staff at Capital Football in 2014, however, her attention was also drawn to them by people in the "football community". This included club presidents, club representatives and coaches. She considered the posts about her were "quite ridiculous" and completely false. After they continued to occur she felt that they were a relentless and repetitive attack. She gave evidence that there was at least one post per month in 2014 and the frequency of those posts over the summer increased, as her profile over the summer months increased. This was due to the football season. She also gave evidence of an incident in 2011 where four premier league fixtures were held and people who attended behaved badly, and the plaintiff was verbally abused and threatened. She gave evidence that she was the messenger of disciplinary action that needed to be taken against those that had behaved badly in 2011 and 2014. I will not recount the details of those incidents here.

16. I note that a Canberra Times article entitled "Target of abuse Capital Football boss Heather Reid outlines state of the game" dated 10 October 2014 was also tendered. In this article the plaintiff is quoted to say "the job had taken a personal toll, especially in the past three years, revealing an underbelly of abuse that she had experienced in person and on social media". The article also notes that the plaintiff did not attend that year's National Premier League (NPL) Grand Final. There is also a quote attributable to the plaintiff where she says "I don't feel comfortable and I don't feel safe". During the course of her evidence she went into more detail about the reason this was the case, which I will not here repeat. I note that the first defamatory post complained of by the plaintiff in relation to the defendant is dated 13 January 2015.

17. The plaintiff also drew my attention to a Facebook post from the page of "NSW NPL Banter Page", which is an unofficial website. The plaintiff was unaware of who the administrators of this Facebook page were. The post referred to is dated 13 October 2014 and expresses outrage at some Canberra FC supporters being banned in the dozens due to "inappropriate comments" against the federation and the CEO, being the plaintiff. There are then a number of unsavoury comments referring to the plaintiff and one of them is from the defendant to the effect that the plaintiff has "no idea" and should step down. The plaintiff also referred in some detail to several Facebook posts by the defendant in 2014, which made comments about the plaintiff.

These were referred to as "contextual publications" in the plaintiff's submissions. However, given these matters were not complained of or particularised in the Statement of Claim it is not necessary for me to set them out in any greater detail. Although, I note the plaintiff gave evidence that she was becoming increasingly concerned that people were starting to believe bits of what the defendant was saying. My attention was also drawn to a letter dated 18 November 2014 and addressed to the defendant from a representative of Football Federation Australia, as a result of the defendant's 2014 Facebook posts. The letter informed the defendant that these allegations were incorrect, encouraged the defendant to apologise to the plaintiff and remove the offending content. This did not occur.

18. In relation to the Facebook posts complained of, the plaintiff gave evidence that they were brought to her attention by her staff, either her media manager or the competition manager. She gave evidence that her staff were monitoring the defendant's Facebook page quite regularly as a result of the content he published in 2014. She said that they were shown to her on someone else's computer. She also said the method of bringing these posts to her attention by staff was to usually say words to the effect "Here is another post from [the defendant]".

19. The plaintiff, during the course of her evidence, went through each post in some detail. The defendant's posts in the plaintiff's Statement of Claim and in the table at [9] are in reverse chronological order. The plaintiff went through the defendant's posts in chronological order, for the sake of consistency I will use the same numbering. In relation to the ninth post she described her initial reaction as "dismayed and upset". This post again referred to the Canberra Times article in 2014 and the plaintiff also said that she found the defendant's post to be generally offensive and that she felt quite defenceless. She testified that the allegations made against her in that Facebook post were totally false. She also gave evidence that that particular post was raised by people from other clubs, such as the president of the Monaro Panthers. She described having to defend her position to them and that it made her feel annoyed as she felt people were questioning her reputation and integrity.

20. In relation to the eighth post, the plaintiff commented that she saw part of it as a compliment. This was in relation to the defendant's comment that "The CEO has implemented everything to the letter of what the FFA asks States to do". In relation to the balance of the post she described her reaction as frustrated and said that she felt defenceless. In this post the defendant also makes a comment about the plaintiff receiving the Member of the Order of Australia, which the plaintiff said she felt hurt by, as it took a bit of the joy and pride out of having received that honour. She testified that the allegations were false.

21. The plaintiff also described feeling upset and annoyed at the defendant's seventh post, particularly as the defendant had commenced attacking her staff. She also said that the comments were offensive and insulting. In relation to the sixth post, the plaintiff described feeling defenceless, disgusted and appalled. She also referred to the defendant "displaying his naivety and ignorance". She testified that the allegations were false. She spoke to the president of Capital Football and others about this post, which she described as upsetting and nauseating.

22. In relation to the defendant's fifth post, he again makes comment about the honour the plaintiff received as a Member of the Order of Australia, which the plaintiff described as hurtful. She also said she felt helpless as the defendant's comments were baseless

and false. She considered some of the comments contained within that post to be a slur on her integrity and professionalism and going to the heart of her reputation as a competent and professional CEO. She also said that the post highlighted the defendant's "naivety". She described discussing this post with staff members and the financial officer as it was becoming fairly common that staff were talking about the latest posts from the defendant. The plaintiff also felt that there were very few people that she could trust during this time.

23. The defendant's fourth post makes reference to the plaintiff misappropriating funds. The plaintiff recalled speaking with coaches and technical staff about this post and recalled having a "laugh" about it as it was another example of the defendant's naivety. She considered the post annoying and another example of not being able to defend or refute what the defendant was saying. She also considered the post questioned her integrity and reputation. The third post was several days prior to the fourth and the plaintiff described it as upsetting and false. She spoke about this post with her staff.

24. In relation to the defendant's second post, the plaintiff described it as insulting and quite offensive. She said that she felt bullied and the allegations were false. She thought it was at this time that a cease and desist letter had been written to the defendant and she was looking into commencing legal proceedings. In relation to the first post, the defendant calls for the ACT Minister for Sport to take action against the plaintiff, alleging that she is no longer in touch with the football community and that she has misled the community. The plaintiff felt worried about the implications for herself and her reputation. She was concerned, as a result of a call for the Minister for Sport to intervene, that the funding or status of Capital Football may have been affected and other bureaucrats would have to be involved.

25. The plaintiff gave evidence that the effect of the defendant's posts confirmed her decision to consolidate the strategy that she would step down as CEO, take 12 months leave without pay and be brought back as a consultant to look after Canberra United because of her expertise. She said that this was originally her plan but "this sort of stuff" confirmed that she did not want to remain in her position as CEO. She said that if these posts had never happened she probably would have transitioned out on her own terms without being pushed out by "this rubbish and this harassment".

26. I have gone though the general effect that these publications have had on the plaintiff, however, she also described the effect that these posts have had on her professionally. She considered that she had withdrawn and is not in touch with the football community as she could have been since stepping down as CEO. She said that to some extent she lost a bit of confidence in her capacity. She testified that she would have liked to have gone out on a happier note at the end of March this year, that there has been no celebration for her 12 years of service, and she does not want one. She also said it was not just about the defendant but the other people that "like" his posts and the "faceless people" that say things.

27. The plaintiff also described withdrawing from some of the staff at Capital Football, partly because she was not feeling confident and was more wary about who to trust. She also described an office policy at Capital Football, where staff would put a "yellow card" on their door to indicate that you can approach with caution and a "red card" to indicate do not enter. She considered that she increasingly used these cards as a result of the defendant's posts and she was more abrupt and intolerant with her staff. She also described feeling more stressed as a result of the defendant's posts. She

gave evidence that the posts affected her general demeanour at home with her partner last year.

28. The plaintiff referred to a post about the defendant in April of this year, following the commencement of these proceedings and also the day after she had stepped aside as CEO. The plaintiff gave evidence that the defendant was a coach within the football community and some of the people that "liked" or "commented" on the defendant's Facebook posts were known to her and members of the football community.

29. During the plaintiff's evidence her counsel drew her attention to correspondence between the defendant and her instructing solicitors, and the defendant and court staff. These emails were brought to her attention by her solicitors. The plaintiff gave evidence that she felt quite distressed by this correspondence, although then went on to say that in response to some of the emails she felt "bemused", as the defendant clearly did not understand the severity of the legal proceedings. I will refer to them in more detail later, as they are said to aggravate the plaintiff's claim.

*Evidence of Christopher Doyle*

30. Christopher Doyle is the competitions manager for Capital Football and has been in that role since February 2014. He has known the plaintiff since 2013, when he first applied for a role within Capital Football. He worked one office away from the plaintiff and would see her regularly. He gave evidence that he continues to maintain contact with the plaintiff and would describe his relationship with her as open, honest, friendly and trustworthy. He gave evidence that he holds her in high regard both as a sports administrator and as a person. He testified that he moves within political and sporting circles and described being involved in some animal welfare groups. He described the plaintiff's reputation within those circles as "very, very good". He said that in terms of the political circles the plaintiff was held in high regard, particularly for all the things she had achieved for football and mentoring women in sport.

31. Mr Doyle is a Facebook user and has an account in his own name. He does not have the defendant as a "friend" on Facebook. He does not personally know the defendant and was made aware of him in 2014 in relation to a number of comments that the defendant had made on his Facebook page in relation to Capital Football and the CEO. He recalled the media manager brought those posts to his attention. He gave evidence that he read the defendant's posts, as he had a public profile, which means anyone can visit the defendant's page and look at his posts. He recalled the nature of the defendant's posts and bringing them to the attention of the plaintiff on some occasions. He said that the plaintiff was, at the beginning, stoic about the posts. However, as they continued and became more personal towards the plaintiff she was emotionally and physically affected by them. In terms of the plaintiff being physically affected by the posts, he described her as being a bit teary and frustrated.

32. Mr Doyle gave evidence that the defendant's posts were discussed internally in Capital Football, particularly by those who were the subject of the defendant's commentary. He was unable to say how often the defendant's posts would be discussed, however, he considered that they were not discussed overly extensively. He also gave evidence that the Board put out a press statement in February 2015, which reminded everyone of their obligations in relation to social media.

33. He gave evidence that he was concerned about the plaintiff's well-being, as the defendant's posts were a sustained personal attack on her, which showed no sign of

abating. He said that he noticed a difference in the persona of the plaintiff and that she seemed to lack confidence. He gave evidence that the defendant's posts wore her down and considered that they were a key component in her resigning her tenure as CEO of Capital Football.

*Evidence of Peter Hugg*

34. Peter Hugg is the head of football at Football NSW and commenced that role in April 2016. Prior to that, he was the CEO of Football West in Western Australia and had held that role for approximately six years.

35. Mr Hugg first met the plaintiff when they were students at the Canberra College of Advance Education in 1982. He described his relationship with the plaintiff from that date as professional colleagues in the field of sports administration and, in particular, football. He gave evidence that he would hold the plaintiff in the highest regard and described her as a true professional, a pioneer in the sport and a survivor. Mr Hugg gave evidence that he mainly moves in football and professional sporting circles. He considered that the plaintiff was held in the highest regard in those circles and is respected and recognised for her performances, achievements, professionalism and integrity.

36. Mr Hugg is a Facebook user, although does not know the defendant and is not a "friend" of his on Facebook. He gave evidence that he knows of the defendant as a player of some quality in the mid-80s. He was aware of the defendant's posts on Facebook. He was unsure when they were initially brought to his attention but considered it was one and a half to two years ago. He gave evidence that it was at a meeting at the Football Federation of Australia, where people took it in turns to raise issues of concern. He gave evidence that he had similar issues with his position at Football West and on that basis he asked for the plaintiff's assistance. He gave evidence that between 2014 and 2015 he saw the plaintiff three or four times a year in Sydney at national team matches, however, they did not specially talk about the posts on each occasion. He observed the plaintiff to be clearly distressed at those meetings and that this was evident in her mannerisms. He described the plaintiff as shaking and tears welling up in her eyes.

37. Mr Hugg gave evidence that it did not take him by surprise that the plaintiff stepped down as CEO of Capital Football in April of this year. He said that while they never specifically discussed her stepping down there were generic conversations to the effect of "I don't know how much more I can take of this. It's getting to me".

*Evidence of Raenne Dower*

38. Raenne Dower is currently the assistant technical director with Capital Football in relation to women's football. She first met the plaintiff in Canberrra in 1983 and has stayed in touch with her over the years. She moved to Canberra three years ago and since that time has come to know the plaintiff on a more personal level. She sees the plaintiff as both a friend and a mentor. Ms Dower gave evidence that she holds the plaintiff in the highest regard in relation to her integrity. She described her standing in football and in women's sport as unrivalled and is a good leader and manager.

39. In Canberra Ms Dower mainly mixes in football circles. She described the plaintiff's reputation in those circles as unrivalled and unparalleled. She said that she is known as an advocate for women and equality.

40. Ms Dower has Facebook, although does not know the defendant and is not a "friend" of his on Facebook. She was aware of the defendant's posts on Facebook and was made aware of them during the course of her employment at Capital Football, due to general discussions in the office. She described the defendant's posts initially as "rants", however, considered that as they went on they became more pointed, targeted and personal towards the plaintiff.

41. She gave evidence that she discussed the defendant's posts with the plaintiff, among other people. She recalled a conversation she had with the senior managers in the office where they noticed the defendant's posts were clearly distressing the plaintiff and they made a conscious decision not to bring them to her attention. She thought this would have been around October 2015. She considered the defendant's posts were distressing the plaintiff as, on occasion, tears would well up in her eyes and the plaintiff would want to try to defend the allegations in the defendant's posts. Ms Dower also considered that it was taking up a lot of the plaintiff's time and energy, and was also affecting her work.

42. Ms Dower recalled some of the defendant's allegations and considered them to be preposterous. She recalled discussing the defendant's posts with the plaintiff on a number of occasions and also discussing them with others outside of Capital Football. She also spoke about the "yellow/red" card system at Capital Football, as referred to by the plaintiff in her evidence. She considered the plaintiff was putting a lot more red cards on her door during this period. She thought the plaintiff became a lot more abrupt in the workplace and very short in her discussions. She considered the plaintiff started to second guess her own judgment, as she did not want her decisions or comments to become the next post on Facebook by the defendant.

43. She also recalled the plaintiff had not gone to a game at Deakin Stadium in 2015 as she did not want to have discussions with people about the posts. She recalled convincing her to go to Deakin Stadium in September 2015 and that they sat at the corner of the grandstand. The plaintiff told her that she felt physically ill being there, which Ms Dower thought was a contrast to how the plaintiff would usually behave where she would be "jovial and cordial" with people. She considered the plaintiff withdrew from the general football community. She also recalled that the plaintiff, in her role as CEO, had to give an opening address at the annual end of season function in 2015 and told her that she felt physically sick, "I don't want to be here. I pretty much think I am done. I've had enough". Ms Dower gave evidence that she attributed that comment to the accrual of the distress the defendant's posts had caused her over that year and her being concerned that someone would leak something from her address and it would become the defendant's next Facebook post.

*Evidence as to aggravation*

44. The plaintiff submitted that the harm she suffered as a result of the matters complained of was aggravated by the defendant's conduct. In support of this submission the plaintiff tendered 21 documents, 2 of which were Facebook posts and the others were emails from the defendant sent to the plaintiff's solicitors or court staff, or a combination of the two. One of those Facebook posts is dated 1 April 2016, which I have referred to earlier. On 4 April 2016, the defendant posted "I havnt [sic] been saying much about someone latley [sic] for a reason and hopefully soon I will tell you in detail why". The defendant's post then goes on and again refers to the plaintiff.

45. On 19 April 2016, the defendant sent an email to court staff stating that he will go into voluntary bankruptcy. On 21 July 2016, the defendant sent an email to the plaintiff's instructing solicitor stating that "as soon as I you [sic] get all your orders I will go bankrupt" and "Have a great day ... and remember don't contact me". The plaintiff submits that I should consider the first statement a threat by the defendant to go bankrupt. The defendant makes further reference in another email to "what ever [sic] judgement [sic] occers [sic] I will gladly file for bankruptcy". In another email the defendant describes going to the privacy commissioner to make a complaint about the plaintiff. He also accuses the plaintiff of "wasting the Court's time". The defendant also effectively accuses the plaintiff of not telling the truth in an email to the plaintiff's instructing solicitors dated 17 August 2016. He also threatened in an email dated 8 August 2016 to the plaintiff's lawyers to release a media statement about the plaintiff "breaking the law". In its context, this can only be seen as a threat to further publish the defamatory material he has already published.

## Damages

46. As a result of the default judgment, the matters complained of are defamatory, and the plaintiff is entitled to an award of damages. Damage to reputation need not be proved as it is presumed.

47. An award for damages in defamation serves three purposes:

    (a) consolation for personal distress and hurt;

    (b) reparation for the harm done to the plaintiff's personal (and where relevant, business) reputation; and

    (c) vindication of the plaintiff's reputation.

48. The first two elements are often considered together. The third, vindication, looks to the attitude of others to the plaintiff. The sum awarded must be at least the minimum necessary to signal to the public the vindication of the plaintiff's reputation: see *Carson v John Fairfax & Sons Ltd* [1993] HCA 31; 178 CLR 44 per Mason CJ, Deane, Dawson and Gaudron JJ at 60.

49. I also consider s 139E of the *Civil Law (Wrongs) Act 2002* (ACT) (Wrongs Act), which provides:

> **139E Damages to bear rational relationship to harm**
>
> In determining the amount of damages to be awarded in any defamation proceedings, the court is to ensure that there is an appropriate and rational relationship between the harm sustained by the plaintiff and the amount of damages awarded.

50. Section 139F of the Wrongs Act limits damages available for non-economic loss to the amount of $250,000. However, s 139F(1) provides that this amount can be adjusted, and the relevant amount of damages under this head is the amount "applicable at the time damages are awarded". This provision limiting the amount of non-economic loss damages was inserted into the Wrongs Act in 2006. Since this time, the amount has increased, and is currently (effective from 1 July 2016) $381,000 pursuant to the *Civil Law (Wrongs) Non-economic Loss Declaration 2016* (ACT). The statutory provision for capping damages for non-economic loss was the result of tort law reforms in most Australian jurisdictions. Kyrou J in *Cripps v Vakras* [2014] VSC 279 considered that the statutory cap was not intended to have a scaling effect but simply provided a cut-off

amount. However, I note that there are differing views on this subject. I also note that an award for aggravated damages can result in an amount being awarded above the statutory cap: see s 139F(2) of the Wrongs Act.

51. The New South Wales Court of Appeal in *Ali v Nationwide News Pty Ltd* [2008] NSWCA 183 summarised the relevant principles in detail at [72]-[76] per Tobias and McColl JJA:

> The harm caused to the plaintiff by the publication of the defamation often lies more in his own feelings, what he thinks other people are thinking of him, than in any actual change made manifest in their attitude towards him. Thus *"[a] solatium for injured feelings, however innocent the publication by the defendant may have been, forms a large element in the [general compensatory] damages": Cassell & Co Ltd v Broome* [1972] AC 1027 at 1124 per Lord Diplock.
>
> A person who is defamed receives damages because he or she has been injured in his or her reputation; that is, because he or she was publicly defamed. Damages in a defamation action vindicate the plaintiff to the public, and are consolation for a wrong done: *Uren v John Fairfax & Sons Pty Ltd* [1966] HCA 40; (1966) 117 CLR 118 at 150 per Windeyer J.
>
> The damages awarded in a defamation action have to be regarded as demonstrating that the plaintiff has been vindicated in his or her reputation: *Dingle v Associated Newspapers Ltd* [1964] AC 371 at 396 per Lord Radcliffe; *Carson* at 69 per Brennan J. The level of damages should reflect the high value the law places upon reputation and, in particular, upon the reputation of those whose work and life defend upon their honesty, integrity and judgment: *Crampton v Nugawela* (1996) 41 NSWLR 176 at 195; applied in *John Fairfax Publications Pty Ltd v O'Shane* (No 2) [2005] NSWCA 291 at [3] per Giles JA, Ipp JA agreeing.
>
> The harm done by the defamatory publication for which general compensatory damages are recoverable, does not to come to an end when the publication is made: *Cassell* at 1124 per Lord Diplock. *"It is impossible to track the scandal, to know what quarters the poison may reach": Ley v Hamilton* (1935) 153 LT 384 at 386 per Lord Atkin. Accordingly, the damages awarded for defamation must be such that *"in case the libel, driven underground, emerges from its lurking place at some future date, [the plaintiff] must be able to point to a sum awarded by a jury sufficient to convince a bystander of the baselessness of the charge": Cassell* at 1071 per Lord Hailsham of St Marylebone LC. Mahoney ACJ referred to this statement with approval in Crampton at 193, holding (at 194 – 195) that *"[t]he award must be sufficient to ensure that, the defamation having spread along the 'grapevine' ... and being apt to emerge 'from its lurking place at some future date', it was 'sufficient to convince a bystander of the baselessness of the charge'"*; see also *Carson* at 70.
>
> In assessing damages the tribunal of fact is entitled to take into consideration *"the mode and extent of the publication, that the defamatory statement was never retracted, that no apology was ever offered to the respondent, and that the statement had been persisted in to the end"*. Such circumstances might in the opinion of that tribunal *"increase the area of publication and the effect of the libel on those who had read it or who would thereafter read it, might extend its vitality and capability of causing injury to the plaintiff"*: *Herald & Weekly Times Ltd v McGregor* (1928) 41 CLR 254 at 263 per Knox CJ, Gavan and Starke JJ. The assessment of damages involves an understanding of the nature and seriousness of the imputations and the defendants' conduct: see *Coyne v Citizen Finance Ltd* [1991] HCA 10; (1991) 172 CLR 211 at 241.

52. It has been well noted that defamatory publications made on social media easily spread. I note that Elkaim SC DCJ (as his honour then was) said in *Mickle v Farley* [2013] NSWDC 295 at [21]:

> [social media defamatory publications] are spread easily by the simple manipulation of mobile phones and computers. Their evil lies in the grapevine effect that stems from the use of this type of communication.

53. I also take into account the comments of Penfold J in *Zwambila v Wafawarova* [2015] ACTSC 171 at [80], that defamation of a person who had a particularly good reputation may increase the amount of damages that is appropriate, citing with approval *Bickel v John Fairfax & Sons Ltd* [1981] 2 NSWLR 47 at 483 and *Anderson v Mirror Newspapers (No 2)* (1986) 5 NSWLR 735 at 737.

**Consideration – General Damages**

54. I considered the plaintiff and the other three witnesses that gave evidence before me to be credible witnesses. I was impressed with the observations of Ms Dower. Particularly, that she noticed that the defendant's posts distressed the plaintiff and that they affected her work, the working relationships that she had with her colleagues and that she withdrew from the football community.

55. It is clear the material contained within the defendant's posts are baseless. They were a sustained, repetitive attack on the plaintiff's reputation and character that demonstrated no sign of abating in circumstances where the plaintiff had no opportunity to comment prior to them being published. It is clear, not just from the evidence that the witnesses before me gave, but from the number of awards and honours that have been bestowed upon the plaintiff that she is a person of good reputation.

56. I also consider it relevant that the defendant's Facebook profile was public, as opposed to private. The effect of this is that the defendant's posts on Facebook were accessible to anyone, whether they were a "friend" of the defendant's on Facebook, a Facebook user or someone that was neither. I also note and accept that the number of "likes" or "comments" that the defendant's posts received are not representative of the extent of the publication by any means.

57. The plaintiff referred me to the case of *Cairns v Modi* [2012] EWHC 756 (QB). This was a case where a well known international cricketer sued for libel in relation to a twitter post and an article alleging that he had a past record in match fixing. The Court said at [26]:

> ... that it was a feature of the present case that the readership would almost certainly have been a specialist one, consisting of those with a particular interest in cricket.

58. The plaintiff submitted that the above passage is similarly applicable to the present case and I agree. I also note the observations of the Court at [27]:

> ... we recognise that as a consequence of modern technology and communication systems any such stories will have the capacity to "go viral" more widely and more quickly than ever before. Indeed it is obvious today, with the ready availability of the world wide web and of social networking sites, the scale of this problem has been immeasurably enhanced, especially for libel claimants who are already, for whatever reason, in the public eye.

59. I accept the plaintiff's submission that in the light of the authorities, many of which I did not recount here, that social media publications have a tendency to spread. I agree that the evidence in the present case establishes that the defendant's posts were not confined to a small pool of people, but had infiltrated, at the least, the wider community in the context of football.

60. It is clear the the defendant's posts have upset the plaintiff and caused her distress. The plaintiff gave evidence that she became concerned that others were starting to believe what the defendant was posting and felt powerless to defend herself. I note

here that all the defendant's post were aimed at the plaintiff's conduct in her role as CEO of Capital Football and were the subject of conversation both inside and outside of the plaintiff's workplace. In relation to, what could be described as the irrational or ranting nature of the defendant's posts, the plaintiff drew my attention to *French v Fraser (No 3)* [2015] NSWSC 1807. In this case, the plaintiff became the "Head of Customer Relations" in the retail division of the Commonwealth Bank of Australia. As a result of that role, the defendant commenced targeting the plaintiff over a period of two years. The imputations against the plaintiff in that matter included gross incompetence, dishonest and unethical practices. All imputations in that matter were entirely false. McCallum J referred to the plaintiff as "the target of a senseless vendetta founded in madness". I note in particular her Honour's comments at [90]:

> I have regard to the fact that, although many people plainly reacted seriously to what they read, the tone and content of the publications would have promoted some to dismiss Mr Fraser's missives as irrational rants. The imputations would not have had the impact of an imputation published in a major newspaper by a respected journalist. Still, the sheer brazenness of the allegations and Mr Fraser's cynical invocation of the noble status of consumer advocate and activist may have sounded compelling to some readers.

61. I also note that at no point has the defendant apologised to the plaintiff.

62. The plaintiff attached to her submissions a table of judgment sums that have been awarded in similar defamation cases. I do not consider it necessary to refer to any of those and consider that each case turns upon its facts. The plaintiff submitted that I should award damages within the bracket of $150,000 to $200,000.

**Aggravated Damages**

63. In considering an award for aggravated damages I need to find the conduct of the defendant toward the plaintiff to be improper, unjustifiable or lacking in bona fides: *Triggell v Pheeney* (1951) 82 CLR 497.

64. A plaintiff is entitled to aggravated damages when the defendant refuses to apologise at the request of the plaintiff: *Fielding v Variety Inc* [1967] 2 QB 841. In the present case, an apology was not sought by the plaintiff's lawyer in their letter of 31 March 2015 to the defendant. While Football Federation Australia encouraged the defendant in its letter of 18 November 2014 to apologise to the plaintiff, I am not satisfied that the defendant's failure to apologise is a circumstance calling for aggravated damages in the light of the terms of the letter of 31 March 2015, which specifically states that the plaintiff was not seeking an apology.

65. I am, however, satisfied that the matter referred to at [44]-[45] do justify the making of an award for aggravated damages.

**Damages**

66. I award damages in the sum of $160,000. In addition, I award aggravated damages in the sum of $20,000. I will allow interest on the aggregate sum at 3% for a period of 6 months, bearing in mind the varying dates of publication, amounting to $2,700.

**Injunctive Relief**

67. In *Grobbelaar v News Group Newspaper Ltd* [2002] UKHC 40; [2002] 1 WLR 3024, Lord Scott of Foscote said that it is "normal for success in a defamation action to be accompanied by an injunction restraining the defendant tortfeasor from repeating the

defamatory remarks". That is not the case in Australia. In *Hockey v Fairfax Media Publications Pty Ltd & Ors (No 2)* [2015] FCA 750; (2015) 237 FCR 127, White J said, after referring to the speech of Lord Foscote:

> Whatever be the position in England, permanent injunctions restraining a repetition of publication of matters found to be defamatory are not usually issued as a matter of course in this country. The authorities show that injunctions are issued only when some additional factor is evident, usually an apprehension that the respondent may, by reason of irrationality, defiance, disrespect of the Court's judgment or otherwise, publish allegations similar to those found to be defamatory unless restrained from doing so: *Higgins v Sinclair* [2011] NSWSC 163; [2011] ASAL 55-214 at [245]; *Royal Society for the Prevention of Cruelty to Animals New South Wales v Davies* [2011] NSWSC 1445 at [63]-[66]; *Polias v Ryall* [2014] NSWSC 1692 at [99]; *Sierocki v Klerck* (No 2) [2015] QSC at [52]-[53].

68. The defendant in the present matter has demonstrated tendencies to act irrationally and with defiance of any judgment that may be entered. He has also made a threat to further to release further material about the plaintiff "breaking the law", as I have identified at [45]. This is a clear case for the granting of injunctive relief.

## Orders

69. Judgment will be entered in favour of the plaintiff against the defendant in the sum of $182,700 inclusive of interest.

70. I order that the defendant be permanently restrained from publishing the first to ninth matters complained of or any matter to similar effect, and that he be permanently restrained from publishing the imputations or false allegations found by me to be carried by the first to ninth matters complained of, of and concerning the plaintiff, and any imputations that do not differ in substance.

71. Unless either party makes an application within 14 days of publication of these orders and reasons for a different costs order, I order the defendant to pay the plaintiff's costs of the proceedings on a party/party basis.

I certify that the preceding seventy-one [71] numbered paragraphs are a true copy of the Reasons for Judgment of his Honour Justice Burns.

Associate:

Date: 25 November 2016