

The Scenario¹

You're an employment mediator and your latest case is about sexual harassment in the workplace. The applicant is a 23 year old woman named Marie. The defendant is a large international company.

Background

Marie started working at the company three years ago. After a year, she was transferred to a different department in the company. Her new manager, Steve, is highly regarded and considered a good manager. He seemed friendly and helpful at first but soon Marie started to feel uncomfortable with him. She says he often stood close to her, and put his hand on her shoulder while looking at her computer screen. She says he also told her crude jokes and asked about her sex life. Marie talked to the HR manager about it, but the HR manager told her to toughen up and that, if she wanted to keep her job, she had to handle it 'without making a fuss.'

When an opportunity came up for an employee to go on a training course Steve said he would put Marie's name forward, saying, "one good turn deserves another," and "if you look after me, I'll look after you." Marie's colleagues told her that Steve has done this to other women, and there's no point in complaining because nothing will happen. Marie avoided Steve as much as possible, but at a work drinks function Steve stood next to her and put his arm around her. This made Marie feel extremely uncomfortable around her colleagues. He then tried to kiss her.

The mediation

At mediation, six people represent the company: the HR manager, Steve, two company directors, the company's in-house lawyer, and an external lawyer. Marie brings her cousin Kevin, who is in his final year at law school. You've mediated a number of other sexual harassment cases with this company, and have observed the management doesn't take action or attempt to change the workplace culture. You know the company will want to settle the claim confidentially to avoid damage to its employer brand and reputation.

In her opening statement, Marie says she is attending mediation because she does not want this to happen to anyone else. Kevin is clearly not experienced in employment law. The company lawyer says Marie is incompetent at her job and Steve has to supervise her closely. Marie starts to defend herself, but Kevin motions her to keep quiet, and doesn't say much in response to this allegation.

During the private session, Marie says she wants the company to take sexual harassment seriously, and Kevin has media contacts who will publicise her story - it is very important to her that other young women do not have to go through what she has. She also says she is finding mediation quite stressful, is feeling bullied, and is not sure how long she can continue.

Eventually the company makes an offer Marie considers accepting. The offer is conditional on a confidentiality agreement. You know from experience the offer is significantly less than what Marie might be awarded in the Employment Relations Tribunal. Based on what the parties have said, Marie appears to have a strong case. Kevin appears to have no idea about employment case law and awards in similar cases.

¹ Scenario adapted from Mary and Noone and Lola Akin Ojelabi, *Ethical challenges for Mediators around the Globe: An Australian Perspective*, 45 WASH. U.J.L. & POL'Y 145 (2014)