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David and Goliath the match of the day

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Grand final season is over. But a match being played out in a different arena - the Federal Court of Australia - has all the elements of a classic David v Goliath struggle. Given we've reached the mid-point, with the trial due in December, a half time match analysis seems appropriate.

Facing off are Kristy Fraser-Kirk (David) and Goliath in the guise of David Jones, former CEO Mark McInnes, and the DJs board. The stakes are high: \$37 million. Oh, and of course, a potentially seismic shift in how damages are calculated for sexual harassment in Australia. More about that later.

No question, Fraser-Kirk has dominated the first half. Her team's savvy media engagement has kept the story alive. Goliath on the other hand has assumed a gritty defensive "no comment, let's leave it to the ref to decide" style that would make St George's coach proud.

That was, of course, until McInnes broke his silence, albeit unintentionally. Embarrassingly, the Court elected to make public a series of text and voicemail messages passing from McInnes to Fraser-Kirk just prior to the commencement of proceedings.

Salacious and titillating, but was it a game changer? What do the texts and voicemail messages tell us? Well, we do have an admission in there - "I no my attempt to kiss u was wrong [sic]". But McInnes had made that admission already hadn't he? It also appears there is some contrition "I am so sorry", indeed "so so so sorry".

And then there's the arguably genuine attempt to settle "I will come to any arrangement u deem appropriate [sic]". Perhaps he should have typed "without prejudice" to save some of the blushes.

Actually no, it's hard to see any of that affecting the outcome in reality, but it makes great copy.

McInnes apparently did engage in conduct of a sexual nature. Unless he can demonstrate the conduct was welcome, or a reasonable person would not have anticipated that Fraser-Kirk would be offended, humiliated or intimidated, his conduct amounts to sexual harassment. To avoid vicarious liability, DJs will need to show it took all reasonable steps to prevent the conduct. Workplace policies, the training employees received, and the extent to which complaints, both formal and informal, were investigated or ignored will be subject to Court scrutiny.

That much is unremarkable. What is remarkable is the \$37 million price tag. Let's put this in context: general damages in sexual harassment decisions are generally in the range of \$5,000 to \$20,000. A woman raped by a co-worker was awarded \$100,000. Commentators have long argued that damages in sexual harassment decisions need to be re-calibrated, but surely a claim for \$37 million is going too far. The fact that the \$37 million claimed is apparently for punitive damages (designed to punish), rather than general damages (to compensate), makes it no more digestible. Nor does Fraser-Kirk's advertised intent to give the money to charity. Let's not forget that the maximum penalty for a workplace death under NSW occupational health and safety legislation is \$825,000.

But back to the match. If Fraser-Kirk's objective was to put the issue of sexual harassment at Item 1 on the agenda for corporate boards, she has already won. But if her objective is to do better than the \$850,000 reportedly already offered to settle her claim, I don't like her chances. If I was the betting type, my money would be on Goliath.

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