

6 October 2020



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## Sexual Harassment in the Workplace: The Past, Present and Future

*"I am turned on by your body hair."*<sup>1</sup>

*"Would you prefer married man."*<sup>2</sup>

*"JJ you look sexy today."*<sup>3</sup>

*"Thank you sayang. Have a safe drive. I'm waiting to see my sayang's smiling face."*<sup>4</sup>

These are the sexually connotative expressions that were alleged to have been uttered by the perpetrators to the victims as evidenced in several Malaysian cases.

Worryingly, incidents like these are not uncommon in Malaysia, as research has shown that 1 in 3 women and 1 in 6 men have faced sexual harassment.<sup>5</sup> The research does not set out the places where the incidents of sexual harassment had taken place, but it is likely that the workplace, being where most people would spend the most of their day, is one of the common places.

Bearing in mind the prevalence of sexual harassment in the workplace, this alert discusses the existing laws on sexual harassment in Malaysia and highlights the importance of having an adequate in-house policy and procedure to ensure a workplace free from the scourge of sexual harassment.

<sup>1</sup> Md Salehuddin bin Othman lwn New Straits Times Sdn Bhd [2013] 3 ILJ 526.

<sup>2</sup> Mohd Ridzwan bin Abdul Razak v Asmah bt Hj Mohd Nor [2016] 4 MLJ 282, Federal Court.

<sup>3</sup> Yahya Talla v Petroliaim Nasional Berhad [2017] ILJU 171.

<sup>4</sup> Loganathan Maniam v Murphy Sarawak Oil Co Ltd [2020] 2 ILR 275.

<sup>5</sup> YouGov, 'Over a third of Malaysian women have experienced sexual harassment' (6 August 2019) <<https://my.yougov.com/en-my/news/2019/08/06/over-third-malaysian-women-have-experienced-sexual/>>.

## **Sexual Harassment: A form of Serious Misconduct**

Sexual harassment in all forms represents a contemptuous violation of the victim's personal and bodily integrity and should not be tolerated by anyone nor condoned in the workplace by any employer. Such conduct has negative impacts on the aggrieved victim's emotional and psychological well-being. Perpetrators who go unpunished will continue intimidating, humiliating, and traumatising the victims, thus resulting in a hostile and unhealthy workplace environment.<sup>6</sup>

### **What is Sexual Harassment?**

*The Code of Practice on the Prevention and Eradication of Sexual Harassment in the Workplace (the "Code of Practice")<sup>7</sup> defines sexual harassment as "any unwanted conduct of a sexual nature having the effect of verbal, non-verbal, visual, psychological or physical harassment:*

- (a) *that might, on reasonable grounds, be perceived by the recipient as placing a condition of a sexual nature on her/his employment; or*
- (b) *that might, on reasonable grounds, be perceived by the recipient as an offence or humiliation, or a threat to his/her well-being, but has no direct link to her/his employment".<sup>8</sup>*

However, under the **Employment Act (EA) 1955**, the "sexual harassment" means "*any unwanted conduct of a sexual nature, whether verbal, non-verbal, visual, gestural or physical, directed at a person which is offensive or humiliating or is a threat to his well-being, arising out of and in the course of his employment*".

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<sup>6</sup> *Ibid* (n1).

<sup>7</sup> Ministry of Human Resource, Malaysia, 'Code of Practice on the Prevention and Eradication of Sexual Harassment in The Workplace' (August 1999).

<sup>8</sup> Paragraph 4 of the Code of Practice.

This begs the question of whether the Malaysian government has introduced adequate laws and regulations to tackle and stamp out the scourge of sexual harassment in the workplace. To answer this question, the relevant provisions of the Malaysian Penal Code, the Code of Practice and the EA 1955 will be scrutinized.

### **Penal Code**

Pre-1999, there was no legislation governing sexual harassment at the workplace in Malaysia. Hence, victims had no option but to resort to the Penal Code, for instance, under section 354 (assault or use of criminal force to a person with intent to outrage modesty), section 355 (assault or criminal force with intent to dishonour a person, otherwise than on grave provocation), section 375 (rape), and section 509 (word or gesture intended to insult the modesty of a person).

However, a victim who intends to seek justice through criminal law has an immediate obstacle to overcome, that is, meeting the standard of proof. One must be able to prove beyond reasonable doubt the alleged acts of sexual harassment, failing which the perpetrators would walk away a free man. The difficulty is compounded when it comes to sexual harassment allegations as such acts of harassment usually happen in private and would end up being a matter of he-say, she-say with no corroboration by any witness.

### **The Code of Practice on the Prevention and Eradication of Sexual Harassment in the Workplace (the “Code of Practice”)**

In 1999, the Ministry of Human Resources had introduced the Code of Practice as a guideline to employers for the establishment of in-house framework at the enterprise level to prevent and eradicate sexual harassment in the workplace.<sup>9</sup>

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<sup>9</sup> Paragraph 1 of the Code of Practice.

- ***Inadequacy of the Code of Practice***

The Code of Practice was a good first step to ensure that procedures are available to deal with the issue of sexual harassment in the workplace and to prevent its recurrence. However, the Code remains grossly inadequate as it merely serves as a guideline which employers may choose not to adopt and implement, and has no force of law.

### **Employers' Duties under the Employment Act (EA) 1955**

In addition to the Code of Practice, sexual harassment in the workplace is covered in the EA 1955 under Part XVA since the addition of this Part in 2012.<sup>10</sup> Notably, although the EA generally applies to employees who earn monthly wages which do not exceed RM2000, Part XVA applies to all employees employed under an employment contract in Malaysia irrespective of the quantum of their monthly salary.<sup>11</sup>

Pursuant to Part XVA, employers are required to inquire into any complaint made by their employees<sup>12</sup> and, if they are satisfied that sexual harassment is proven, to take disciplinary action against the perpetrator.<sup>13</sup> If the employers refuse to inquire into the complaint of sexual harassment, they shall inform the complainant of their refusal and the grounds for such refusal.<sup>14</sup> Employers who fail to do so commit an offence and upon conviction, will be liable to a fine not exceeding RM10,000.<sup>15</sup>

The insertion of part XVA into the EA 1955 is welcomed, as it imposes an obligation on employers to establish procedures for dealing with complaints of sexual harassment in the workplace fairly and adequately. Further, it has provided an avenue to the victims of sexual harassment by

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<sup>10</sup> *Ibid* (n2).

<sup>11</sup> Section 81G of the EA 1955.

<sup>12</sup> Section 81B of the EA 1955.

<sup>13</sup> Section 81C of the EA 1955.

<sup>14</sup> Section 81B(2) of the EA 1955.

<sup>15</sup> Section 81F of the EA 1955.

enabling them to make complaints, and have their complaints inquired into. If the employers refuse to inquire into the matter, they may refer their complaints to the Director General of Labour Department.

- ***Lacuna under the EA 1955***

However, the EA 1955 does not provide the aggrieved victim a right to maintain a legal suit against the perpetrator. Dismissal of the perpetrator by the employer is a potential remedy for the victim, but the EA 1955 has also provided for a light punishment in the form of a suspension without wages not exceeding a period of 2 weeks.<sup>16</sup> What is more glaring is that, the law neither requires any compensation to be given to the victim nor provides any protective mechanism to safeguard the victim from potential harassment or retaliation in the future.

The relief provided under the EA 1955 appears unsatisfactory as it fails to provide security and remedy to the victims who are struggling emotionally and psychologically as a result of the harassment. This further discourages the victims from reporting or lodging any complaints against the perpetrators, considering that making a complaint is already inherently difficult especially when it is against the victims' superiors at the workplace.

### **A lawsuit in the Civil Court: Filling Up the Lacuna**

Timeously, in the case of *Mohd Ridzwan bin Abdul Razak v Asmah bt Hj Mohd Nor*, the apex court of Malaysia had decided to import the tort of harassment, including sexual harassment into Malaysia's legal and judicial system, to fill up the lacunae in the statutory provisions discussed earlier

In that case, the court held that sexual harassment is unwelcomed, may be verbal and even physical, includes sexual innuendos, comments and remarks, suggestive, obscene or insulting sounds, implied sexual threats, leering, ogling, displaying offensive pictures, making obscene

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<sup>16</sup> Section 81C(a)(iii) of the EA 1955.

gestures and so on. Further, the Federal Court had also affirmed the decision of the High Court which had granted general and aggravated damages amounting to RM120,000 in favour of the victim.

As mentioned earlier, prior to the promulgation of the tort of harassment by the Federal Court in the case of *Mohd Ridzwan*, the only avenue for complainants of sexual harassment lies with their employers. With this landmark ruling, the tort of sexual harassment is recognized and accepted as a cause of action in Malaysia, and victims of sexual harassment will now be able to seek civil remedies thereunder against the perpetrators by filing a civil claim.

- ***Vicarious Liability on the part of the Perpetrator's Employer?***

It is noted that, in the case of the *Mohd Ridzwan*, the victim did not name the employer of her sexual assaulter as the defendant. Hence, as of the date of this article, there is no local judgment where employers are held vicariously liable for acts of sexual harassment committed by their employees.

Nonetheless, if such acts of sexual harassment are committed during the course of employment, employers should be mindful that they may be held vicariously liable for such tort of their employees. In fact, there have been instances where the Courts from other jurisdictions, such as New Zealand<sup>17</sup>, had held employers liable for acts of sexual harassment committed within the course of employment by their employees.

### **Prevention is Better than Cure: A Respectful Workplace Policy**

That said, to minimize exposure to fines and civil liabilities, it is prudent for employers to design and formulate an internal framework and policy to prevent, tackle and deal with incidences of sexual harassment. The policy should, amongst others, reflect the firm's zero tolerance towards any

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<sup>17</sup> Proceedings Commissioner v Hatem [1998] 2 ERNZ 502.



form of harassment and outline adequate protocols including a confidential complaint channel and severe disciplinary consequences to ensure that employees feel supported by their employers.

Additionally, having a framework and clear policy will raise awareness and help employees to identify potential harassment issues and thereafter take steps to report them to the top-level management as and when they arise. This will provide affirmation to all employees, regardless of length of service and seniority, that the company or firm is serious in addressing the issue and will take swift and appropriate actions to protect them from sexual harassment in the workplace, thereby contributing to the uprooting of sexual harassment in the workplace environment and fostering a professional atmosphere, free from any inappropriate behavior.

### **Conclusion: What does the Future Hold?**

Notwithstanding that the decision of *Mohd Ridzwan* provides an additional avenue for the aggrieved victims to take tortious actions against the perpetrators, sexual harassment remains a major persistent problem in the workplace. This is evident from the research conducted in 2019, which has shown that only 53% of the victims have reported or told someone about the sexual harassment incident, and the other half are suffering in silence for fear of embarrassment, repercussion, and due to societal pressure.

The need for the enactment of a Sexual Harassment Act is obvious, and the Malaysian government is endeavouring to introduce such Act soon. According to the Women, Family and Community Development Ministry (**KPWKM**), the Sexual Harassment Bill, which was first pushed forward by the previous Pakatan Harapan (**PH**) government, will provide thorough and extensive definitions on what constitutes sexual harassment, improve the nation's legal system to allow for sexual harassment victims to come forward and effectively report their cases, as well as reforming the

punishment and penalties for sexual assaulters and predators.<sup>18</sup>

As suggested by various organizations, the proposed Sexual Harassment Act should, inter alia: (i) tackle sexual harassment in a wide range of scenarios – whether verbal or non-verbal and across multiple mediums ranging from the physical world to virtual platforms and text-messaging applications; (ii) establish a Sexual Harassment Tribunal to give survivors a more viable avenue to bring complaints and seek remedies expeditiously; and (iii) impose a mandatory requirement on all employers/organisations to implement in-house policy against sexual harassment, so as to address incidences of sexual harassment proactively and not reactively.<sup>19</sup>

While such an Act may not be a panacea, and cannot possibly put a halt to the problem of sexual harassment, it could surely send a clear message that harassment of all forms will not be tolerated, thereby reducing their occurrence in the workplace and also to provide more adequate protection and remedies to survivors of sexual harassment.

Authored by Ooi Bee Hong, Louis Liaw and Shera Chuah<sup>20</sup>

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<sup>18</sup> The Rakyat Post, 'Long Anticipated Sexual Harassment Bill To Be Tabled In Parliament In 2020' (27 June 2020) <<https://www.therakyatpost.com/2020/06/27/malaysias-very-own-sexual-harassment-bill-to-be-tabled-in-2020/>>.

<sup>19</sup> New Straits Times, 'Hoping for a Comprehensive Sexual Harassment Bill' (3 July 2020) <<https://www.nst.com.my/opinion/letters/2020/07/605737/hoping-comprehensive-sexual-harassment-bill>>.

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## How can we help you?

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