

Sexual Harassment In Malaysia

Sarvinder Kaur Sandhu

ABSTRACT

A major problem at workplace is sexual harassment. Currently, the alternatives available are complaining to the employer or to the Labour Department, pursue criminal proceedings under the Penal Code and commencing action under the law of tort. All of these options are not conducive. In August 1999, the Ministry of Human Resources launched the Code of Practice on the Prevention and Eradication of Sexual Harassment in the workplace. The aim is to provide guidelines to employers on the establishment of in house mechanisms at the enterprise level to prevent and eradicate sexual harassment in the workplace. While the Code has been the first concrete step towards recognising the seriousness of the issue, it is a voluntary code and the Ministry cannot compel companies to adopt it. A proposed Sexual Harassment Bill was submitted by J.A.G. The Bill was to give effect to the United Nations Convention on the Elimination of All Forms of Discrimination against Women. However the Bill was rejected by Parliament. In the absence of a particular statute dealing with sexual harassment, sexual harassment at workplace is often dealt with as dismissal cases under the Industrial Relations Act. Many sexual harassment cases are unreported because of unawareness on the part of the victim as to what constitutes sexual harassment and where to complaint or what to do. This study found that among employed women, sexual harassment at workplace affected their well being.

INTRODUCTION

In Malaysia, the first survey on sexual harassment was conducted by the women's section of the Malaysian Trade Union Congress (MTUC) in 1987. The study reported that as high as 90% of the female respondents experienced sexual harassment in the workplace¹. In the 1990s, a survey of 586 public administrators (422 men and 164 women) in the northern states of Peninsular Malaysia reported that 43.4% of the men and 53% of the women faced at least one form of sexual harassment².

At present, Malaysia does not have specific laws to address the issue of sexual harassment. Sexual harassment is dealt with by lodging a complaint to the employer or the labour department. If complained to the Labour Department, the Department normally reverts the matter to the employer and requests that an investigation be carried out.

Alternatively the victim can pursue the matter under the law of tort. However, this is an expensive option as the victim has to hire a lawyer herself and go through a lengthy litigation process.

The most common way of pursuing a sexual harassment action is under Criminal law. Though sexual harassment is not a crime per se, complaints are dealt under the Penal Code, which includes assault (s351), outraging of modesty (s354), rape (s376), outraging of decency (s377), criminal intimidation (s503) and using words or gesture to insult the modesty of a woman (s509).

Under the Criminal Procedure Code, the victim is imposed with a heavy burden of proof that is proving beyond reasonable doubt and proving the harasser's intentions.

Under the Industrial Relations Act 1967, a worker who has been dismissed due to her/his failure to respond to the sexual advances of a superior or co-worker or an employee who herself/himself resigns as a result of the uncomfortable or hostile work environment due to sexual harassment, may lodge a complaint of unfair dismissal and a request for re-instatement with the Director-General of Industrial Relations within sixty days of the dismissal. Steps will be taken to settle this matter but if this fails then the Minister of Human Resources is notified, who will exercise his discretion in referring the matter to the Industrial court for an award.

¹ Sabita Marican, Persepsi gangguan seksual antara lelaki dan wanita di tempat kerja. Paper presented at National Seminar on Malaysian Women in the New Millenium, 16-17 September 2000, Petaling Jaya, Malaysia

² Sabita Marican, The Perception of Sexual Harassment Among Public Administrators at the Workplace. School of Social Development, Universiti Utara Malaysia 1999

In Malaysia the first attempt by the government to address the issue of sexual harassment was the launching of the Code by the Ministry of Human Resources in August 1999. The Code was the result of collaboration between many organisations, including the MTUC and the Malaysian Employer's Federation (MEF) under the auspices of the Ministry of Human Resources³.

The Code lays down several guidelines for employers and ultimately leaves it to the employers to keep their workplace free from sexual harassment. For instance, the Code requires employers to provide in-house mechanism including a policy statement prohibiting sexual harassment, a complaint/grievance procedure and remedies.

A survey⁴ on the implementation of the Code by six pioneer companies in Malaysia found that about 35% of the 483 respondents surveyed reported that they had experienced one or more forms of sexual harassment in their place of work. In terms of occupational categories, a larger proportion of production operators (39%) and clerical workers (36%) said they experienced sexual harassment compared to the supervisory (34%) and management (23%) levels. This survey shows that those who are harassed are generally in subordinate positions and in gender-specific occupations. The survey also revealed that the perpetrators were mainly male superiors or co-workers of the victims, with some male harassers even lower in rank than their female victims.

It was also found that most of the victims of sexual harassment, irrespective of whether they lodged formal complaints, encountered adverse consequences in the workplace. Such negative impact ranged from their personal security being threatened to experiencing stress at work, as well as emotional and psychological trauma, facing an intimidating and hostile work environment and felt that their employment opportunities were threatened.

The survey reported that only 47.6% of the total respondents were aware of the sexual harassment policy in their company, reflecting a relatively low awareness of the existence of the policy. Those companies that were more committed to distributing their policies registered a much higher level of awareness compared to those companies which were less interested.

Most of the informants interviewed were of the opinion that legislation was important if the Code of Practice were to be more effective and to be taken seriously by employers and employees alike. After all, failure to adopt the Code or adherence to it bears no legal repercussions. This fact has been clearly stated by the courts.

³ Cecelia Ng, Zanariah Mohd Nor & Maria Chin Abdullah. A pioneering Step: Sexual Harassment and The Code of Practice in Malaysia. Women's Development Collective, Kuala Lumpur, 2003.

⁴ Ng et al, (2003)

The High Court has held in *Penang & S Prai Textile & Garment Industry Employees Union v. Dragon & Phoenix Bhd. Penang & Anor*⁵ that the Code of Conduct had no legal force or sanction. This approach has also been adopted by the Industrial Court in *Firex Sdn. Bhd. V Ng Shoo Wa*⁶. In the absence of any express agreement, the Company would not be obliged to adhere to the Code nor would it be binding on employees of the Company.

Most of the respondents interviewed by AWAM & WDC⁷ were of the opinion that making the Code of Practice a law would be extremely effective in getting employers and employees to take the issue of sexual harassment seriously. Further, the Star on line poll also conducted in 2001 reported that out of the 3,132 votes cast, 87% supported having a sexual harassment law⁸.

More people are now aware of what is sexual harassment at workplace, with this many are now pursuing the matter legally. In *Melewar Corporation Bhd .v. Abu Osman*⁹ the domestic inquiry found the claimant to be guilty of sexual harassment including physically molesting female staff by touching part of their bodies and lewd suggestions and verbal advances, sexual in nature. Pursuant to this the claimant was demoted and transferred to another company, on the recommendation of a panel of inquiry.

Although the Claimant's case was struck off on account of his absence at the hearing of this matter, the Learned Chairman nevertheless emphasised the contractual obligations of the employer towards the employee to provide a safe and conducive working environment. Therefore the failure to stop acts of sexual harassment which has been brought to the attention of the employer would amount to a breach of contract. If the aggrieved employee leaves his/her job, then the employer would have deemed to have constructively dismissed the employee who will then be entitled to seek remedies in law.

In *Projek Lebuhraya Utara Selatan Bhd. v. Azahar Ahmad*¹⁰, the Claimant had been dismissed on the ground that he had sexually molested the Complainant who was his subordinate. An investigation by the Company resulted in the Claimant's eventual dismissal. In Court the Claimant alleged that he merely touched her shoulder which in the past she had allowed, and that only on that occasion that her attitude had changed.

The difficulty of the above decision is that the perceptions of each individual would differ and therefore what may constitute sexual harassment to one may

⁵ *Penang & S.Prai Textile & Garment Industry Employees Union v. Dragon & Phoenix Bhd. Penang & Anor* [1989] 1 MLJ 481

⁶ *Firex Sdn Bhd v Ng Shoo Wa* [1990] 1 ILR 226

⁷ *Ng et., al.,* (2003)

⁸ *The Star*, 8th June, 2001

⁹ *Melewar Corporation Bhd v Abu Osman* [1994] 2 ILR 807

¹⁰ *Projek Lebuhraya Utara Selatan Bhd v Azahar Ahmad* [1991] 2 ILR 841

only be deemed as harmless flirtation to another. For example, a hypersensitive person may construe an innocent comment about her dressing as sexual harassment, while others may just take it as a mere comment. Accordingly, to avoid such situations, it is the responsibility of the complainant to make known to the harasser that such conduct is unwelcome. The above case was decided as a dismissal case; otherwise this would have been a good case to discuss on the definition of 'unwelcome' conduct.

In *Utusan Melayu (M) Bhd. v. National Union of Journalists, Malaysia*¹¹, the Claimant was dismissed by his employer for failure to provide explanations to allegations of sexual harassment and for the adverse publicity caused as a result of press reports concerning the Claimant's alleged misconduct in Japan which had seriously affected the image of the Company.

The court held that the Claimant's dismissal was made without just cause or excuse. The Company did not act reasonably in forming its views of the facts in the sense that it had not drawn certain factual conclusions upon reasonable grounds and it had not made reasonably diligent investigation to ascertain the facts and evidence in relation to the incidents of sexual harassment. The Company also failed to hold a sufficient domestic inquiry as the principal witness refused to attend. The Company should have obtained sworn affidavits instead.

Subsequently, in *Permint Plywood Sdn. Bhd. Kuala Terengganu v Kesatuan Pekerja-Pekerja Perakayuan Semenanjung Malaysia*¹². The Claimant admitted that he had invited a female employee of the Company to have sexual relations with him when his wife was away. Pursuant to a domestic inquiry the Claimant was punished with a reduction in pay. The Union argued that the employee's immoral behaviour in his private life could not be considered misconduct in his working life. The Court found that the Claimant's conduct had tarnished the Company's reputation and was bound to affect it adversely in a small town such as the present one. The reduction of salary was found to be fair and reasonable bearing in mind that he could have been terminated from his job. The Courts as well as employers must be cautious in weighing the evidence as well as all facts and circumstances from both sides as opposed to placing too much reliance on the complainant's words alone, as false allegations can easily be made out.

In *Lam Soon (M) Bhd v. Cik Chong Siew Yoon*¹³, the Claimant was retrenched pursuant to a reorganisation exercise whereby her position was made redundant. She alleged that she had been victimised due to the rejection of her immediate superior's attention on her. The Claimant's dismissal was upheld and the court observed that as in the nature of these allegations, it is one person's

¹¹ *Utusan Melayu (M) Bhd v National Union of Journalists, Malaysia* [1991] 2 ILR 841

¹² *Permint Plywood Sdn. Bhd. Kuala Terengganu v Kesatuan Pekerja-Pekerja Perakayuan Semenanjung Malaysia* [1993] 1 ILR 253

¹³ *Lam Soon (M) Bhd v. Cik Chong Siew Yoon* [1986] ILR 14'25, Award No. 340 of 1986

word against that of another, it is very easy to make allegations of this nature without any foundation in truth.

There are no hard and fast rules as to the measure of evidence expected to be adduced as ultimately it will depend on the facts and circumstances of each case as well as the credibility of the witnesses in court. It is difficult to come up with a definite principle of the measure of evidence to be adduced because as mentioned earlier, the interpretations of individuals differ. For instance a comment may be interpreted as innocent by one but as a sexual harassment by another. Therefore, a reasonable man's test, that is, a person being in the 'shoes of the complainant' would be a preferred test. Then again, who is the 'reasonable man' will still depend on the circumstances.

Many countries already have some kind of legislation and government monitoring mechanism to fight sexual harassment in workplace, for example Australia has The Sex Discrimination Act 1984, Korea has Equal Employment Act 1987 and in India the Complaint Committee reports annually to the Government department concerned.

The United Nations Convention on the Elimination of All Forms of discrimination Against Women (CEDA W) had urged its member states to embody the principle of the equality of men and women through national constitution or legislations or by other appropriate measures¹⁴. In light of this, Malaysia could use CEDA W to enact legislation against sexual harassment as done by other countries, for example in India.

METHODOLOGY

Interviews were conducted in a group of three participants at a time. Ten groups were interviewed altogether, with the total number of participants being 30. Participants were either secretaries or clerks earning RMI,500 and/or below, married with children. The age of the participants ranged from 24 years to 46 years with a mean of 32.40 years and a standard deviation of 5.37 years. Fifty percent of the participants were clerks and the other fifty percent were secretaries. In terms of education level, participants had at least completed form five. Data showed that 18 participants stopped their studies at form five (five were secretaries and 13 were clerks), 11 obtained diploma (nine were secretaries and two clerks) and one (secretary) was a graduate. The diploma and degree holders were mainly secretaries, suggesting that secretaries had higher level of education compared to clerks.

Number of years in employment in the present occupation showed a range of one to 20 years with a mean of 6.67 years and a standard deviation of 4.53

¹⁴ Article 2

years. Total number of years of employment showed that participants had worked in the range of one to 25 years in total with a mean of 10.77 years and a standard deviation of 5.54 years. Participants' hours spent at workplace ranged from seven to 11 hours per day with a mean of 8.53 hours and a standard deviation of 0.90 hours. All participants earned between RM1,000 to RM1,500 per month. Most participants earned a combined salary (salary of husband and wife) between RM3,000 to RM5,000 per month.

Every participant had at least one child, with the maximum being four children. In relation to this 26.7% of participants had one child, 30% of participants had two children, 33.3% of participants had three children and 10% of participants had four children. The ages of the children were between four months old and 12 years old (only 13.3% of participants had children below one year old whereas 43.3% of participants had children aged between one to six years and another 43.3% of participants had children between seven to 12 years old). Participants mainly relied on parents/in-laws to take care of their child(ren) when they were at work (46.67% participants), 23.33% of participants relied on other methods of child care (example children who were not taken care of by parents, child care centres or maids for example children who were taken care of by their elder siblings, neighbours, friends or others), maids (16.67% of participants) and child care centres (13.33% of participants).

Among questions asked, were whether they or someone they know have experienced sexual harassment, the awareness of sexual harassment and policy available at their workplace, what they would do if subjected to sexual harassment, how can the problem of sexual harassment be solved and by whom and finally if they were subjected to sexual harassment, how will it affect them and their job.

RESULTS

Twenty two of thirty participants reported knowing someone who had experienced sexual harassment and two participants admitted experiencing it themselves. When asked what actions were taken by the victims, all reported that they only confided the incidents to their close friends and dismissed it as being not serious because they did not want to create a hostile work environment. However, participants who have experienced sexual harassment reported experiencing it only once.

All participants reported that their company had a policy against sexual harassment but only six participants reported that apart from the company policy on sexual harassment, their company also gave awareness about sexual harassment. The other participants reported that they only knew of the sexual harassment policy when they read the company regulation book forwarded to them when they started employment in that company. An interviewee admitted as below:

An interviewee, aged 35 years with two children, a secretary who has been in employment for 12 years admitted that if she was subjected to minor sexual harassment she would ignore it, unless it persisted, then she would take action as mentioned in the company's sexual harassment policy. However, if the sexual harassment was serious, then she would not hesitate to proceed immediately as per the policy. She considered sexual harassment involving touching or verbal comments directed particularly to her as 'serious' harassment but mere verbal comments directed to women generally as 'minor' harassment.

All participants were happy that their company had sexual harassment policies, however since there had not been any reported cases on sexual harassment so far, they were unable to determine the effectiveness of the policies. Apart from their company policies sexual harassment, all participants were unaware of any other policies or regulations or laws that protected women directly against sexual harassment.

Although participants were happy with their company policies on sexual harassment, they were worried of the outcome of the complaints if the act of sexual harassment was done by a person of a high ranking to a person of a low ranking in the company.

An interviewee, aged 36 years, with four children, has been in employment as a clerk for the past 16 years, raised her concern about the application of the policy. She said that since the policy was made by the company, the company may bend the policy or apply it according to its convenience depending on who was involved. Therefore, she believed that an Act of Parliament would be preferred as compared to policies.

Participants reported that if they were subjected to sexual harassment they would feel uneasy, worried, scared, embarrassed, disgusted, unsecured, lack of respect and feel like changing their jobs. One participant commented that it would trouble her a lot, and when asked what that would lead to, her reply was "*eating disorder*".

CONCLUSION

Sexual harassment is an important issue as it can have a negative impact on one's emotional, social, and physical sense of well-being¹⁵. In one study, adolescent females who had been sexually harassed reported feelings similar to those identified by rape victims¹⁶. Decreased feelings of competence and

¹⁵ Lumsen, "Getting Serious about sexual harassment," *Eric Digest*, (1992)

¹⁶ Susan Strauss, "Sexual harassment in the school: Legal implications for Principals," *NSSP bulletin* 72, (1998): 506

confidence and increased feelings of anger, frustration, depression and anxiety all can result from harassment and a sense of self-blame, especially among women with traditional sex role beliefs¹⁷. These emotions in turn can leave in their wake a decreased ability to concentrate and a sense of listlessness¹⁸.

The presence of legislation to improve the well-being of employed women is important because decreased well-being is detrimental to these women, their families and their employers, due to symptoms such as poor health, increased stress and decreased job satisfaction. Laband and Lentz¹⁹, found sexual harassment to be negatively related to job satisfaction among female lawyers. Reduced job satisfaction can cause absenteeism lower productivity, high worker tum-over, low morale and the like.

The awareness about sexual harassment should be inculcated in every worker (male and female). Every worker should know what constitutes sexual harassment and what to do in the event they are sexually harassed. Workers especially women should be assured that it is important and necessary to report incidences of sexual harassment. This is because the Asian culture and tradition of women basically encourages women to keep 'low profile' especially in sexual related matters. Precedents have shown time and again the assumption of people that when there is a sexual related problem the woman's reputation if often questioned instead of the acts of the male which were wrong. The upbringing of Asian women is often the main contributory factor of their silence. This is often coupled with lack of support from superiors or the system itself, including the legal system.

¹⁷ Stephanie Riger, "Gender Dilemmas in Sexual Harassment Policies and Procedures," *American Psychologist*, (1991): 46

¹⁸ Kathy Hotelling "Sexual Harassment: A problem shielded by silence," *Journal of counseling and development*, (1991): 69

¹⁹ David N. Laband & Bernard F. Lentz, "The effects of sexual harassment on job satisfaction, Earning, and turnover among female lawyers," *Industrial and labour relations revies*, 51(4), (1998):594-607

BIBLIOGRAPHY

Hotelling, K. (1991). *Sexual Harassment: A problem shielded by silence. Journal of counseling and development*, 69.

Laband, D.N., & Lentz, B.F. (1998). The effects of sexual harassment on job satisfaction, Earnings, and turnover among female lawyers. *Industrial and labour relations review*, 51 (4), 594-607.

Lumsen, (1992). Getting serious about sexual harassment, *Eric Digest*.

Marican, S. (2000, September). Persepsi gangguan seksual antara lelaki dan wanita di tempat kerja. Paper presented at National Seminar on Malaysian Women in the New Millenium, Petaling Jaya, Malaysia

Marican, S. (1999). *The perception of sexual harassment among public administrators at the workplace*. School of Social Development, Universiti Utara Malaysia.

Ng, c., Zanariah Mohd Nor, & Maria Chin Abdullah. (2003). *A pioneering step: sexual harassment and The Code of Practice in Malaysia*. Women's Development Collective: Kuala Lumpur.

Riger, S. (1991). Gender dilemmas III sexual harassment policies and procedures *American Psychologist*, 46.

Strauss, S. (1998). Sexual harassment in the school: Legal implications for principals. *NSSP butletin* 72,506.

The Star. (2001, June 8 & September 21).

LIST OF CASES

Firex Sdn. Bhd. v. Ng Shoo Wa [1990] 1 ILR 226

Lam Soon (M) Bhd. v. Cik Chong Siew Yoon [1986] ILR 1425, Award No. 340 of 1986 Melewar Corporation Bhd. v. Abu Osman [1994] 2 ILR 807

Penang & S.Prai Textile & Garment Industry Employees Union v. Dragon & Phoenix Bhd. Penang & Anor [1989] 1 MLJ 481.

Projek Lebuhraya Utara Selatan Bhd. v. Azahar Ahmad [1991] 2 ILR 841

Permint Plywood Sdn. Bhd. Kula Terengganu v. Kesatuan Pekerja-Pekerja Perkhayasaan Semenanjung Malaysia [1993] 1 ILR 253

Utusan Melayu (M) Bhd. v. National Union of Journalists, Malaysia [1991] 2 ILR 841

LIST OF STATUTES

Malaysia

Penal Code (Act 574)

Criminal Procedure Code (Act 593)

Industrial Relations Act 1967 (Act 177)

Other

The Sex Discrimination Act 1984 (Australia)

Equal Enjoyment Act 1987 (Korea)

Other Instruments

Code of Practice on the Prevention and Eradication of Sexual Harassment in the Workplace Malaysia)
United Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)