



**SEXUAL HARASSMENT AT THE WORKPLACE: 3 CIVIL
PROTECTIONS FOR VICTIMS**

by

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The long anticipated Sexual Harassment Bill which is expected to be tabled in Parliament this year has met with several delays. The Bill was intended to provide a more effective mechanism for victims of sexual harassment to lodge complaints. In the meantime, victims of sexual harassment may be relieved to know that filing a police report is not the only option available. Below are 3 current protections offered by the law to victims of sexual harassment:

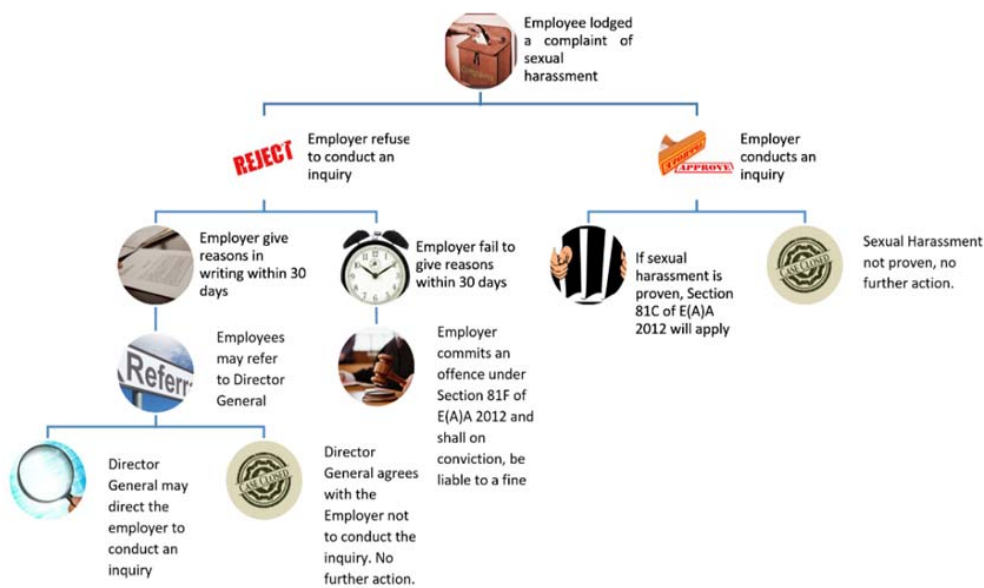
1. The Employment Act imposes employers with a statutory obligation to inquire into sexual harassment complaints at the workplace

Under Section 81B of the Employment Act 1955 (Revised 1981) ("EA"), employers are required to inquire into a sexual harassment complaint raised in the workplace. An employer who refuses to inquire into a complaint must have reasons for his refusal and he must inform the complainant of his refusal in writing.

Should the employer fail and/or refuse to address such complaints, he will be deemed to have committed an offence under the Employment Act

and may be liable to a fine not exceeding RM10,000.00 (Section 81F of the EA).

A brief guide of the complaint and inquiry process provided under the EA is as follows:-



*[Complaints and inquiry process under the Employment Act 1955
(Revised 1981)]*

Crucially, the Act interprets "sexual harassment" widely so as to include '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 wellbeing, arising out of and in the course of his employment' (Section 2 of the EA). Further, the protection afforded by the EA is irrespective of the wages of the employee (Section 81G).



(The Code of Practice on the Prevention and Eradication of Sexual Harassment in the Workplace further elaborates on the type of conducts that may satisfy Sections 81A-81G of the EA.)

2. Complaints of sexual harassment are absolutely privileged from defamation claims

Complainants who worry that they may be susceptible to defamation suits by the perpetrator may be relieved to know that the defence of absolute privilege now applies to sexual harassment complaints.

In 2018, Cynthia Lee Mei Fei had the opportunity to assist in the sexual harassment case of *Ang Shy Teng v. Lim You Yong* [2018] 1 LNS 2311; [2018] MLJU 2046, whereby the High Court established that complaints of sexual harassment are absolutely privileged from defamation suits. This was the first time in Malaysia that victims of sexual harassment are given absolute immunity from defamation claim`s.

As a brief background, this case involved a female sales representative who was sexually harassed by her company client over a period of 2 years. The company client had amongst others, proposed to move their meetings to a hotel room, sent pornographic videos, took pictures of her without her knowledge, kissed her as well as touched her breast without her consent at a car park. As a result, the victim`s employer engaged a solicitor on her behalf to issue a letter of complaint to the perpetrator`s employer, who then initiated an internal inquiry. The perpetrator was subsequently dismissed from employment. Aggrieved, the perpetrator



commenced a defamation suit against the victim on the grounds that the letter of complaint constituted defamation against the perpetrator.

The High Court in striking out the perpetrator's claim for defamation reasoned that sexual harassment complaints, like police reports and reports/complaints to the Anti-Corruption Agency, Commercial Crime Department and Registrar of Societies are absolutely privileged from defamation claims.

(The decision of the High Court was later affirmed in the Court of Appeal in or around March 2019.)

This does not mean that victims of sexual harassment are free to launch allegations and insults on alleged perpetrators without any legal repercussions/risks involved, but rather, the complaints when lodged through proper channels are not susceptible to defamation claims since the defence of absolute privilege now extends to complaints of sexual harassment after *Ang Shy Teng v. Lim You Yong*. Indeed, employers are statutorily empowered, if not obligated, to take action against perpetrators.

3. Victims can initiate a claim against the perpetrator under tort of sexual harassment

While previously, victims of sexual harassment can only seek redress by lodging a police report or complaint to the employer, now they are also allowed to initiate court action against the wrongdoer premised on the tort of sexual harassment.

In 2016, the Federal Court of Malaysia had introduced the tort of sexual harassment in the landmark case of *Mohd Ridzwan bin Abdul Razak v. Asmah bt Hj Mohd Nor* [2016] 6 CLJ 346; [2016] 4 MLJ 282.

This case involved a claim for defamation brought by the perpetrator against a sexual harassment complaint lodged by the victim. The victim was a subordinate who reported directly to the perpetrator. In or around July 2009, she lodged a complaint to the CEO of the company concerning sexual harassment by the perpetrator during the course of her employment, which included the following words uttered by the perpetrator:-

‘Kalau you nak tahu ‘benda’ lelaki tu berfungsi ke tak ikut orang-orang tua, ikat ‘benda tu dekat tali. Tali tu sambungkan dengan buah kelapa. Kalau buah kelapa tu terangkat, maksudnya ‘benda’ tu good. ‘Sexual graph of a person, men after 50 is no use. Kalau 20 it shoot up. 30 graf turun. When 40, it shoots up again’

When issued with a strong administrative reprimand by the company, the perpetrator commenced a suit seeking for amongst other, a public apology from the victim of sexual harassment for defaming him. In response to the suit, the victim then counterclaimed and pleaded the tort of sexual harassment for her emotional and mental trauma as a result of the incident.

Crucially, in dismissing the defamation suit, the Federal Court decided to “exercise judicial activism” and introduced the “tort of sexual harassment” into the Malaysian legal system as a cause of action for



victims of sexual harassment to bring a compensatory claim against perpetrators. Here, the victim was awarded general damages in the sum of RM100,000.00 and aggravated damages and exemplary damages in the sum of RM20,000.00.

Advantages

The above civil remedies may be more attractive as compared to criminal remedies which are solely aimed at punishing the wrongdoer, rather than compensating the victim, for the following reasons:

One, the standard of proof in criminal suits is higher than that in civil suits. In a criminal suit against the perpetrator, the prosecutor (or victim) would have to prove beyond reasonable doubt that the wrongdoer had indeed committed sexual harassment, before he/she will be punished. In a civil claim, although the victim may not be able to properly punish the perpetrator (i.e. imprisonment), he/she need only prove on a balance of probabilities that there had been sexual harassment entitling the victim to damages as compensation. In the latter, the standard of proof required is lower.

Two, victims need not wait for nor rely on the government/Attorney-General before he/she can take civil action against the perpetrator. After the case of *Mohd Ridzwan*, victims are entitled to commence a civil action under the tort of sexual harassment on their own, albeit for a completely different remedy.



Conclusion

Until the Sexual Harassment Act comes into force, it is hoped that victims of sexual harassment find comfort in knowing that there are a myriad of avenues in place to seek redress. It is also hoped that the passing of the Sexual Harassment Act will be hastened to further strengthen and secure the rights of such victims.

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