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Sexual Harassment at Workplace: An Analysis of the Selected Dismissal Cases in Malaysian Companies

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ABSTRACT

Sexual harassment has become one of the important issues in workplace and has started the eye of public since a couple decades ago. Linking this topic to Malaysian organizations is complicated and is not completely understood. The main obstacle is in realizing the role of employers in handling dismissal cases due to sexual harassment misconduct. The main purpose of this paper was to analyze Industrial Court awards related to dismissal cases due to sexual harassment at workplace in Malaysian context. Finally the paper highlights the role of employers in handling dismissal cases due to sexual harassment. The qualitative analysis was employed on the five selected cases based on convenient sampling from the selected journals. The analysis revealed that from four of the five cases, the Court decided to the favor of the claimant and one in favor to company. The analysis also revealed that the role of employer is important in managing dismissal cases due to misconduct sexual harassment. Findings, implications and recommendations for future research from this analysis are discussed.

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INTRODUCTION

Sexual harassment has attracted a great deal of interests among scholars and emerged as one of the challenging issues in organizations. Sheffey and Tindale (1992) stated that sexual harassment is an important problem in the workplace. Previous study revealed that sexual harassment exists in various settings such as in hospitality industry (Ineson *et al.*, 2013); in hospital setting that involved nurses, physician and patients (Lamesoo, 2013). Sexual harassment has been experienced by both male and female as well as lesbian, gay, bisexual and transgender (LGBT) workers (Wright, 2013).

Lilia *et al.* (2008) revealed that sexual harassment has been recognized as a serious organizational problem and a violation of US law. This is no exception in Malaysia. Previous research indicated that there was a negative impact of sexual harassment on individuals (Bingham *et al.*, 1993) and organization directly or indirectly (Fitzgerald & Shullman, 1993). Further according to Sandroff (1992) past studies has generally indicated that companies that tolerate sexual harassment tend to have personnel problems. Victims of sexual harassment are exposed to multiple abnormal stressors (Stockdale, 1006) which in long term will impact to their well being (Burton and Hoobler, 2006; Lutgen-Sandvik *et al.*, 2007). This according to Lim, *et al.* (2008), Lutgen-Sandvik (2006) and Rospenda (2002) will ultimately reduce the performance of employee in organization. Managers therefore have a responsibility to prevent sexual harassment and, if this is not possible, to respond effectively when a complaint is made (Equal Opportunities Commission, 2006).

Several factors are related to sexual harassment. A study conducted in Malaysia revealed that workplace, knowledge of grievance procedure for sexual harassment, sexist attitudes among co-workers, privacy of workspace, physical attractiveness, dress manner of victims, job status, and sex roles were associated to sexual harassment (Ismail *et al.*, 2007). Several factors are related to sexual harassment. A study conducted in Malaysia revealed that workplace, knowledge of grievance procedure for sexual harassment, sexist attitudes among co-workers, privacy of workspace, physical attractiveness, dress manner of victims, job status, and sex roles were associated to sexual harassment (Ismail *et al.*, 2007). The fact that sexual harassment is complicated and not easily understood implies that sexual harassment needs to be managed and tackled professionally to ensure effectiveness in organization. Therefore according to Israelstam (2013) employers cannot ignore sexual

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harassment of their employees and must act swiftly, although this does not mean that dismissal is appropriate in every case.

This paper aims at analyzing how the Industrial Court awards related to dismissal cases due to sexual harassment incidence at workplace are handled in Malaysian context.

In Malaysia sexual harassment cases are always linked with the Code of Practice on the Prevention and Eradication for Sexual Harassment in the Workplace (Code of Practice) which was introduced in 1999. The purpose of this code was to guide the private sector and companies to manage sexual harassment cases. The overall message in the above code is clear that sexual harassment violates a person's dignity and safety. This suggests that sexual harassment is to be seriously prevented and eradicated. Sexual harassment is unwanted. It is unreciprocated. It is uninvited and it is one sided. It is imposed. These characteristic completely distinguish sexual harassment from flirtatious or romantic behaviour which is freely and mutually entered into. Rubenstein (1989) stressed that sexual attention becomes sexual harassment when it is unwelcome.

Sexual harassment has been defined differently by scholars, practitioners and policy makers according to certain factors and reasons such as social, culture and background of the country. In US sexual harassment is defined as unwelcome sexual advances, requests for sexual favours, and other verbal or physical conduct of a sexual nature constitute sexual harassment when: 1) An employment decision affecting that individual is made because the individual submitted to or rejected the unwelcome conduct; or 2) The unwelcome conduct unreasonably interferes with an individual's work performance or creates an intimidating, hostile, or abusive work environment. (US Department of State, 2013). In Malaysian context, the Industrial Court in the *Fuchs Petrolube (ILR 845; Award No.692/2003)* a case referred to the Code of Practice, defined sexual harassment, as any unwanted conduct of sexual nature having the effect of verbal, non verbal, visual, psychological or physical harassment:

- i) That might, on reasonable grounds, be perceived by the recipient as placing a condition of a sexual nature on her/his employment; or
- ii) That might, on reasonable grounds, be perceived by the recipient as an offence or humiliation, or a threat to her/his well-being, but has no direct link to her/his employment. This is in line to Malaysian Code of Practice which categorized sexual harassment into two categories as follows (Ministry of Human Resource, 1999):
 - i) Sexual coercion is sexual harassment that results in some direct consequence to the victim's employment. An example of sexual harassment of this coercive kind is where a superior, who has the power over salary and promotion, attempts to coerce a subordinate to grant sexual favours. If the subordinate accedes to the superior's sexual solicitation, job benefits will follow. Conversely, if the subordinate refuses, job benefits are denied and
 - ii) Sexual annoyance, the second type of sexual harassment, is sexual-related conduct that is offensive, hostile or intimidating to the recipient, but nonetheless has no direct link to any job benefit. However, the annoying conduct creates a bothersome working environment which the recipient has to tolerate in order to continue working. A sexual harassment by an employee against a co-employee falls into this category. Similarly harassment by a company's client against an employee also falls into this category.

It was reported that the chairman of Industrial Court in the case of *Fuchs Petrolube (Malaysia) Sdn Bhd* also highlighted that the Code of Practice specifies that sexual harassment in the workplace includes any employment related to harassment (*ILR 845; Award No.692/2003*). As stated in Code of Practice that: "within the context of this Code, sexual harassment in the workplace includes any employment-related harassment occurring outside the workplace as a result of employment responsibilities or employment relationships. Situation under which such employment-related sexual harassment may take place includes, but is not limited to: at work-related social functions; in the course of work assignments outside the workplace; at work-related conferences or training sessions; during work-related travel; over the phone; and through electronic media".

The Code of Practice also encompasses the forms of sexual harassment into various conducts of a sexual nature which can manifest themselves in five possible forms, namely:

- i) verbal harassment : e.g. offensive or suggestive remarks, comments, jokes, jesting, kidding, sounds, questioning;
- ii) non-verbal/ gestural harassment: e.g. leering or ogling with suggestive overtones, licking lips or holding or eating food provocatively, hand signal or sign language denoting sexual activity, persistent flirting;
- iii) visual harassment: e.g. showing pornographic materials, drawing sex-based sketches or writing sex-based letters, sexual exposure;
- iv) psychological harassment: e.g. repeated unwanted social invitations, relentless proposals for dates or physical intimacy and
- v) physical harassment : e.g. inappropriate touching, patting, pinching, stroking, brushing up against the body, hugging, kissing, fondling, sexual assault.

In summary the Industrial Courts in Malaysia has been referring to the 'The Code of Practice on the Prevention and Eradication for Sexual Harassment in the Workplace' in defining, identifying and managing sexual harassment cases.

This paper analyses the selected cases of sexual harassment from Industrial Relations Reports. It also examines the extent that employers handled cases of sexual harassment that involved Industrial Court in the Malaysian workplace. A qualitative approach was employed in order to answer these objectives. Five Industrial Court cases were selected from Industrial Relations Reports. These Industrial Court cases were selected based on convenient sampling. Discussions and analyses of the selected Industrial Court Cases are as follows:

Analysis of Cases:

Case 1 – (Award No.1171 of 2008):

The claimant commenced employment with Airline Company on June 1986 as a Trainee Flight Steward. On November 1992, the claimant was appointed a Leading Steward. On May 2003, a flight stewardess named COW2 reported to the management that the claimant had sexually harassed her on May 2003 while she was on duty.

The company conducted an investigation and a Domestic Inquiry (DI) was convened. Two charges were leveled against the claimant at the DI. At the conclusion of the DI, the claimant was found guilty of both charges and dismissed with immediate effect. The role of the Industrial Court in this case is to determine whether the claimant had sexually harassed COW2 and whether his dismissal had been with just cause and excuse. In making the decision Industrial Court referred to the Federal Court decision on a cases of Dreamland Corporation (M) Sdn. Bhd. v. Choong Chin Sooi & Industrial Court of Malaysia [1988] 1 CLJ 1; [1988] 1 CLJ(Rep) 39 pertaining the function of domestic inquiry which stated that if the court finds that a proper inquiry had been held, then it will confine itself only to determining whether or not there was a prima facie case of misconduct justifying dismissal; but if the court finds that a proper inquiry had not been held, then the entire matter would be open before it, and the court will determine for itself: whether or not the employee had indeed committed the misconduct alleged, and if so, whether or not that misconduct justified the extreme penalty of dismissal

In presenting the case, the Industrial Court also quoted the definition of prima facie by Malhotra (2004) which stated that: a prima facie case does not mean a case proved to the hilt but a case which can be said to be established if the material before the court is to be believed. In other words, the relevant consideration is whether on the basis of the material before it, it is possible for the court to arrive at the conclusion in question and not whether that was the only conclusion which could have been arrived at on the basis of that material.

The Industrial Court decided in the favor of the company and the claimant's dismissal had been with just cause and excuse by considering the prima facie justification and considering the definition of sexual harassment by The Code of Practice on the Prevention and Eradication for Sexual Harassment in the Workplace. The court finds the Domestic Inquiry was valid and said notes to be accurate. Basically the company had complied with the principles of Natural Justice and had made out a prima facie case against the claimant. The court upheld the company decision by considering the below even though the claimant argued that this is a false accusation:

- a. COW2 has no reason to fabricate the accusations of sexual harassment against the claimant. Prior to the incident, both of them are total strangers and would not have had any motive to frame the claimant.
- b. Court feels that no reasonable woman would fabricate such accusations of sexual harassment against another man unless she was mentally ill or had an axe to grind with him. COW2's credibility had not been doubted and there had not been any reason for her to have made a false accusation against the claimant
- c. The court also feels that it would have been humanely impossible for her to have recalled the exact words spoken in such a situation especially bearing in mind the fact that COW2 had also been preoccupied with her work at the material time.
- d. The importance of female employee as workforce and the claimant has committed the misconduct of sexual harassment and that the act had indeed been a serious affront to the dignity of any self-respecting woman like the complainant and had deserved the severe punishment of dismissal.

Case 2 – (Award No. 998 of 2001):

The claimant was employed by the company as a Personnel Executive in the Human Resources department. At the material time the claimant's immediate superior was Mr. SM (Senior Manager Human Resource). The claimant claimed she was forced to write a letter of resignation as she felt she was constructively dismissed by acts of sexual harassment by her superior the said Mr SM. The claimant informed that she had approached two senior officers, Mr DY and Mr NM but neither took steps to rectify the situation.

The Industrial Court decided in the favor of the claimant by considering the below:

- a. The incidents reported by the claimant regarding Mr. SM's conduct were a serious misconduct of sexual harassment. But however the two senior officers, Mr. DY and Mr. NM were guilty of their failure to act accordingly. All the incidents were reported to them when the claimant could no longer tolerate the harassments. The facts showed that they had connived and condoned the acts of Mr SM.

- b. The Court in view that the claimant was left with no other alternative but to consider herself constructively dismissed and she had lawfully done so. The Court viewed the four conditions which have to be met in order for any employee to be able to claim constructive dismissal.
- c. The Industrial Court in the case of *Secure Guards Sdn Bhd v. Her Bhajan Kaur* [1996] 2 ILR at p. 1342 set out the conditions to be met before an employee can successfully claim that he/she had been constructively dismissed namely:
- i. Must be a breach of contract by the employer. This may be either an actual breach or an anticipatory breach;
 - ii. That breach must be sufficiently important to justify the employee resigning or else it must be the last in a series of incidence, albeit erroneous interpretation of the contract by the employer, will not be capable of constituting a repudiation in law;
 - iii. He must leave in response to the breach and not for some other, unconnected reason; and
 - iv. He must not delay too long in terminating the contract in response to the employer's breach, otherwise he may be deemed to have waived the breach and agreed to vary the contract ...If the employee leaves in circumstances where these conditions are not met, he will be held to have resigned and there will be no dismissal within the meaning of the legislation at all.
- d. The breach is the failure on the part of Mr. DY and Mr. NM to react positively to establish a formal internal/domestic inquiry to determine the guilt and/or innocence of these complains a negation of that implied duty of a management over his staff.
- e. The claimant was awarded back wages and compensation in lieu of reinstatement totaling RM49, 680.

Case 3 – (Award No. 1032 of 2006):

The claimant (Mr. AA) was employed by the Hotel XY as an Executive Chef. Whilst he was in the company's employ, two staff members brought allegations of sexual harassment against him. A domestic inquiry (DI) was conducted and by way of letter dated 21 February 2002 (Termination Letter), the company terminated the claimant's contract of employment alleging immoral conduct of the claimant by his sexual harassment of two staff members.

The claimant alleged that he had been unfairly dismissed and a reference under s. 20(3) of the Industrial Relations Act 1967 was brought before this court. The company failed to file an appearance and a statement of reply and despite repeated notifications to attend court, failed to do so culminating in this matter being heard ex parte the company. The Industrial Court decided in the favor of the claimant by considering the below:

- a. The court in the view that the termination letter was not transparent enough in managing the alleged report from the hotel school trainee that the claimant had invited him to sleep with him. The Hotel XY did not give any details of this complainant and the nature of the complaint for the claimant to answer the allegation. It goes against natural justice. There were no material particulars provided to substantiate the allegation and no new Domestic Inquiry (DI) was held for this particular charge.
- b. The Chairman has viewed many reference on conducting ex parte hearing such as the *Ike Video Distributor Sdn. Bhd. v. Chan Chee Bin* [2004] 2 ILR 687 (Award No. 636 of 2004) the learned Chairman referred to *The Law of Industrial Disputes by Malhotra* (2004):
"A rule empowering the tribunal to proceed ex parte if a party is absent and sufficient cause is not shown for his absence, would not enable it either to do away with the enquiry or straightway pass an award without giving a finding on the merits of the disputes. In other words, the absence of a party does not entail the consequence that an award will straightaway be made against him".
- c. The Court also in the view that the first DI was held improperly without summoning the said Mr AA for the claimant to cross examine thereby rendering the DI procedurally unfair. It was unconscionable for the company not to call MR AA to give evidence during the DI when the basis of the 1st and 2nd charges rested on his allegation. The claimant had even made a police report denying the allegation against him.
- d. By the claimant action initiating cost cutting activity; this made him unpopular amongst certain staff members who were then lining their own pockets in certain unscrupulous practises at the expense of the company. Therefore the court finds that the claimant's case possesses merit and the repeated absence of the company's representatives in court to rebut his claim and their failure to file an appearance and statement of reply only fortifies the court's findings on his claim.
- e. The court found that the termination of the claimant by the company was without just cause or excuse and the court orders the claimant to be reinstated to his former position with arrears of wages from the date of dismissal to the date of reinstatement.

Case 4 – (Award No. 1229 of 2011):

The Claimant is the Vice President; Head Direct Sales of Bank ZZ was dismissed on 2 June 2005 due to accusation of sexual misconduct at workplace. The claimant was issued show cause letter and upon receiving his reply the Bank ZZ issued the dismissal letter. The claimant was dismissed on 2 June 2005. The complainant

(LJT) was unable to be located and has left the Bank 2 years ago. Base on the show cause, statement and case presiding, the Court comes to the conclusion of that the respondent failed to establish the misconduct.

The Industrial Court referred section 20(3) of the Industrial Relations Act was described by the Federal Court, per Mohd. Azmi FCJ, in the classic case of Milan Auto Sdn. Bhd. v. Wong Sen Yen [1995] 4 CLJ 449 as follows:

“the functions of the Industrial Court in dismissal cases on a reference under Section 20 is twofold; first to determine whether the misconduct complained of by the employer has been established and secondly whether the proven misconduct constitutes just cause or excuse for the dismissal.”

The Industrial Court decided in the favor of the claimant by considering the below:

a. The complaint by LJT on sexual harassment found to be in valid since the similar conduct of sending SMS, MMS and emails was also made by the complainant. The Court is mindful of the fact that element of harassment must be present; however LJT also shared similar SMS with the claimant.

b. The Court found that the credibility of the complainant is questionable, thus everything she has stated in her letter is also questionable and her letter should be treated with caution.

c. Even though the claimant has provided details and names to support his reply of the show cause, the respondent failed to conduct investigation to establish the misconduct according to the changes levelled to the claimant.

d. Court viewed the case Bata (M) Bhd Kelang v. Ch'ng Soon Poh [1994] ILR 227 the learned President of the Industrial Court (at that time), Justice Harun Hashim, at page 229 of the Award, made the following pertinent observations:

“We are in no doubt that the duty of the Court is to make a finding whether the dismissal was without just cause or excuse as it is clearly so stated in section 20(1) of the Act. In arriving at its finding, the Court must first identify the employer's reason for the dismissal. The next issue, which the Court must consider, is whether in the circumstances that dismissal was fair or unfair.

Base on Court observation, noted that the letter of dismissal does not specify the ground of dismissal and which item from the show cause relied on as the ground for dismissal.

e. The Court has carefully and meticulously considered and evaluated the totality of the evidence before it on a balance of probabilities, bearing in mind Section 30(5) of the IRA 1967. Having considered and evaluated all the facts, the totality of the evidence both oral and documentary and the submissions, being guided by the principles of equity and good conscience and the substantial merits of the case, without regard to technicalities and legal form this Court finds that the dismissal was without just cause and excuse.

f. As such, back wages and compensation in lieu of reinstatement amounting RM 178,728 been awarded upon deducting 40% as contributory factor.

Case 5 – (Award No. 549 of 2010):

The claimant has been employed as FB Executive in SY Company since April 1999 and on May 2004 received a show cause letter indicating his involvement in sexual harassing another female employee. The claimant replied the show cause letter and domestic inquiry was conducted and the claimant was found guilty and dismissed by the respondent. The Industrial Court decided in the favor of the claimant by considering the below:

a. Industrial Court role as per the case Milan Auto Sdn. Bhd. v. Wong Sen Yen [1995] 4 CLJ 449 is to determine whether there is misconduct and if the respondent has proved the misconduct than whether dismissal is the right action. In this case Court in opinion that the respondent fail to establish the misconduct towards the claimant.

b. To define the sexual harassment, Court referred to The Code of Practice on the Prevention and Eradication for Sexual Harassment in the Workplace (Code of Practice) and the book on by @A Guide to the Malaysian Code of Practice on Sexual Harassment, in the Workplace” by Tengku Omar and Maimunah (2000)page 38 – 39 as follows:

The Code provides a definition which is in three parts whereby the main clause which describes the general nature or characteristics of sexual harassment. There are 3 characteristics provided in the definition, i.e.

i. Sexual harassment is unwanted conduct - unwanted by the victim;

ii. The conduct must be of a sexual nature; and

iii. The conduct may be of the following kinds: verbal harassment; non-verbal harassment (gestures); visual harassment; psychological harassment; or physical harassment.

c. The respondent was found unable to link the evidence to the claimant's misconduct in sexual harassment. Base on the DI notes, the details are more to Mr. MN rather than the claimant. The DI notes failed to show the Court there was sexual harassment involvement by the claimant.

d. As the above findings, the Court was with the view that the dismissal was without just cause and excuse and awarded back wages and compensation in lieu of reinstatement amounting RM 56,125.

Conclusion, Implication and Suggestion:

This main objective of this paper is to analyze sexual harassment cases in Malaysian context. The paper also examines the role of employer in handling Industrial Court cases due to sexual harassment. Four of the five cases, discussed revealed that the Court decided to the favor of the claimant. Based on the analyses the decisions of the court were due to failure of the employers to establish evidence of misconduct or the sexual harassment conduct. This relates to improper behavior with women while on duty as stated by Ghaiye (p. 675, 1997), that "when the worker was found guilty of making indecent gestures towards a women worker, it is subversive of discipline meriting dismissal. When the conductor cut indecent jokes with the lady passengers and made indecent overtures towards her, his dismissal was justified. When a girl employee complained that a worker misbehaved with her and made indecent gestures but as a question of self-respect and honoUr she was not prepared to make statements in front of others it was held that fooling or playing pranks with women workers in the mills would amount to misconduct of riotous or disorderly behavior during working hours on mills premises or any act subversive of discipline and action can be taken against the worker on that basis". Further the case also relates with Ghaiye's (p. 694, 1997) statement that: "when commission of an act or offence involving moral turpitude is misconduct thus: If a workman is found guilty of an offence involving moral turpitude then his services can be terminated".

Based on the cases reviewed and analyzed above, it appears that the Court requires the employers to have been more caution in making the decision on the sexual harassment misconducts. The employers first of all need to establish the misconduct and once proven, then consideration of the misconduct merit for dismissal need to be justified. This is supported by the previous Court case of [1995] 4 CLJ 449, which concluded that the functions of the Industrial Court in dismissal cases on a reference under Section 20 were based on twofold:

- i) To determine whether the misconduct complained of by the employer has been established and
- ii) Whether the proven misconduct constitutes just cause or excuse for the dismissal.

Basically in all cases, misconduct need to be established and supported with the evidence. The next subsequent question arises will be the burden of proof and standard of proof for sexual harassment cases is the need for corroborative evidence. Corroborative simply means to strengthen or support with other evidence or to make more certain. Corroborative requires some additional evidence rendering it probable that the story of the complainant is true and that it is reasonably safe for the Court to act upon the evidence. Corroborative evidence is not necessarily restricted to the oral testimony of an independent witness; it can be equally well afforded by established facts and the logic of established facts sometimes speaks even more eloquently than words

In Malaysia there were no specific provisions relating sexual harassment and on 1999 the Ministry of Human Resources made a firm stand against the form of misconduct by publishing The Code of Practice on the Prevention and Eradication for Sexual Harassment in the Workplace (Code of Practice). However many employers fail to utilize the Code of Practice in workplace and on managing the sexual harassment cases in workplace. For the first time, realizing the need of procedural provisions on the sexual harassment, the government has included a new section 81, in the recent amendment of the Employment Act (amendment 2012 – Act 1219). This act also applies to all employees who are not covered by Employment Act 1955.

The section 81A, caters the definition of sexual harassment, requirement to inquire the details of the harassment, power of the DG Labor to manage sexual harassment complaint and his power to investigate if the employer fails to do so. Also the act cater the action can be resulted due to the sexual harassment misconduct.

Based on the preceding discussion and analysis it is suggested that the Malaysian government has to establish a provision to manage sexual harassment cases and guideline for employers in managing the sexual harassment at workplace. This indicates that employers play key role in handling sexual harassment cases. Laxman *et al* (2003) suggested for employer to have a legal and moral responsibility to maintain a workplace from sexual harassment. This includes providing proper training for employees and employer, educate the managers and supervisors about sexual harassment and explain mechanism to deal with complaints and having proper procedures pertaining to grievances. This is important because according to a survey conducted in UK although 80 percent of the companies are having formal procedure dealing with allegation of sexual procedure but there is still a long way to go before the problem is properly tackled and eliminated (Anonymous, 1995). Employer must be knowledgeable and understand matters pertaining to management of misconduct and court cases especially on sexual harassment including the types of sexual harassment whether quid pro quo (tangible work benefit harassment) or hostile work in environment (Nora and Brian (1992).The question is why some employers failed to deal with dismissal misconduct due to sexual harassment? This question posits unanswered question which offer more research to be conducted.

Findings from the analysis of the paper are very applicable for practical and theoretical purposes. Since previous papers have highlighted the issues more in western setting, it is timely the similar issues in Eastern setting especially in Malaysia are discussed. This paper serves as a starting point for further research in this

topic. Analysis from this paper however provides useful insights for employers in addressing and managing of sexual harassment cases in Malaysian Context.

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