



The #Me Too movement started out as a way for survivors of sexual harassment and assault to feel that they are not alone, has evolved into a global social movement against all forms of sexual abuse.

Back in 1999, the Ministry of Human Resources sought to address sexual harassment in the workplace by introducing the Code of Practice on the Prevention and Eradication of Sexual Harassment in the Workplace 1999, which provides guidelines to employers to establish mechanisms to prevent and eradicate sexual harassment in the workplace.

In 2012, the Employment Act 1955 (“EA”) was amended to recognise sexual harassment at the workplace. Sexual harassment was defined as 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. It became a statutory requirement for employers to investigate complaints of sexual harassment.

Sexual Harassment Bill is Long Overdue

To date, there is no specific statutory recourse for victims of sexual harassment in Malaysia. It was reported that the Sexual Harassment Bill may be tabled in Parliament this year. Other jurisdictions such as Singapore and Australia have specific statutes addressing sexual harassment. In Singapore, the Protection from Harassment Act 2014 was passed to protect persons against sexual harassment and to create offences and provide civil remedies. In Australia, the Sex Discrimination Act 1984 was passed at the Commonwealth level which made sexual harassment unlawful.

Without a specific statute, the tort of sexual harassment was only introduced in Malaysia in 2016 through common law in the case of Mohd Ridzwan bin Abdul Razak v Asmah bt Hj Mohd Nor (“**FC Decision**”). The Federal Court allowed a victim’s claim for civil remedies under the tort of sexual harassment. The Federal Court affirmed the definition in the EA. The Federal Court further held that the recognisable hallmarks of sexual harassment are that they are unwelcome, taking the form of verbal and even physical.

In civil proceedings, the burden of proof lies with the plaintiff on a balance of probabilities. The alleged victim is required to show the court that it is more likely than not that sexual harassment occurred.

These unwanted acts often happen in private, where it is unlikely to be any documentary or video evidence. When faced with a “he said/she said” scenario, judges have to carefully scrutinise the evidence before them. The trial judge may rely on the demeanour of the witnesses to arrive at a decision.

Generally, corroboration and circumstantial evidence may play an important role in such cases. Someone who witnessed the victim’s contemporaneous reaction after the incident could be helpful in corroborating the alleged victim’s testimony. However, the Federal Court in the FC Decision considered the anxiety and discomfort that the victim would go through against the fear of vindictive complaints. The Federal Court held that there is no necessity for corroborative evidence in a tort of sexual harassment, making it easier for the victims.

On the flipside, how can a civil claim of sexual harassment be resisted? It is important to note that the main element of a sexual harassment claim involves unwanted acts. The conduct complained of may not fall within the legal definition of sexual harassment. In establishing whether the conducts are unwanted, it is necessary to consider the context and the previous interaction between parties.

Whilst the availability of civil action is a breakthrough for victims who are subjected to sexual harassment, the Sexual Harassment Bill is still necessary to criminalise such unwanted acts. Following the global #MeToo movement and the show of solidarity with survivors of sexual harassment, will Malaysians finally see a comprehensive Sexual Harassment Bill?

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