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Sexual Harassment Also Includes Non-Physical Acts

Loganatham Maniam v Murphy Sarawak Oil Co Ltd [2020] 2 ILR 275
(Award No. 448 of 2020)

Introduction and Key Issues Discussed

In this case, the Industrial Court highlighted that sexual harassment not only encompasses physical acts but also includes non-physical acts such as the use of terms of endearment and the giving of personal gifts or attention, particularly where they are unwanted and go on repeatedly.

Brief Facts

The Claimant was given a further fixed term contract as a Construction Company Site Representative (“**Construction CSR**”).

Two months after he was stationed at the new office to manage construction works there, the Claimant was issued a show cause letter for charges of sexual harassment towards his secretary. The Claimant responded to the show cause letter and the company proceeded to conduct a domestic inquiry (“**DI**”) against him.

The Claimant was alleged to have committed numerous acts of sexual harassment towards his secretary including:

- (i) addressing her as “*sayang*” (which directly translates to ‘dear’ or ‘love’) in public and via electronic messages;
- (ii) placing his hand on her shoulders and shaking her hands unnecessarily;
- (iii) paying unwelcomed attention to her by giving her gifts (including perfume, a phone cover, chocolates and flowers) and sending her unsolicited messages; and
- (iv) instructing and expecting her to carry out tasks outside her scope of work (such as picking him up from the airport, following him to buy attire for a team building dinner, and expecting her to show him to his hotel room during a team building event).

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At the conclusion of the DI, the Claimant was found guilty of (i) and was dismissed from service.

The Industrial Court Decision

In arriving at its decision, the Industrial Court ("**Court**") was called to consider several issues in determining whether the dismissal had been carried out with just cause and excuse.

Was the DI held in breach of the rules of natural justice?

The Claimant argued that the DI was held in breach of the rules of natural justice on the basis that neither the show cause letter nor the letter of extension of suspension revealed any details of the charges made against him. The Court dismissed this contention on the grounds that the charges made against him were made known to him via the notice of the DI.

On the Claimant's contention that the panel members also acted as prosecutors during the DI proceedings and that the Prosecuting Officer had been the Investigating Officer, the Court held that the evidence established that there were fundamental flaws in the manner in which the DI proceedings had been conducted. Hence, the rules of natural justice had indeed been breached. Since the outcome of the DI was highly unlikely to be independent and impartial, it was declared to be invalid and would not be taken into consideration for the purpose of the Court proceedings.

In light of the above, the Court's findings of this case were based on the evidence that was adduced and admitted during the course of the hearing before the Court.

Was the Claimant a genuine fixed term employee?

In determining whether the Claimant had been on a genuine fixed term contract, the Court referred to the decision in *Sime Darby Auto Selection Sdn Bhd v Lim Boon Leong & Anor* [2019] 1 LNS 1312, and noted that the Claimant was bound by his new contract of employment once he has accepted the new terms of the contract.

With that, the Court held that there was a genuine fixed term contract between the Claimant and the company with the Claimant holding the post of a Construction CSR for a period of two years based on the new terms and conditions stipulated therein. In doing so, the Court drew a distinction between fixed term contracts that are renewed based on identical terms and those that do not.

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Was the Claimant guilty of the charges of misconduct levelled against him?

After having evaluated the evidence adduced and admitted during the course of the hearing including from the Claimant, the secretary and four other co-workers, the Court found the Claimant guilty of misconduct based on the following grounds:

- (i) it was apparent from the evidence (including text messages from the Claimant to the secretary) that the Claimant had indeed addressed his secretary as “*sayang*” more frequently than he was willing to admit. The Court stated that the term “*sayang*” as it is known in the Malay speaking region, is an endearment which generally implies intimacy and / or a relationship beyond friendship between two people. The relationship between the Claimant and his secretary was a professional one and he was her superior and as such, the Claimant should have maintained their relationship at a professional level;
- (ii) as a superior to the secretary, the Claimant should have been aware that giving a female subordinate items of a personal nature (e.g. flowers and perfume on Valentine’s day) is unacceptable and openly displays the giver’s intention for the gifts to be personal;
- (iii) following the decision of *Chen Beng Kwee v St Microelectronic Sdn Bhd* [2012] 6 CLJ 865 where it was held that touching a Muslim female is physically offensive and given that the Claimant’s secretary is a Muslim female, the act of placing his hands around her shoulder and shaking her hands unnecessarily was unacceptable; and
- (iv) the Claimant had committed unnecessary acts that were unacceptable given his position and taking into account the culture and background of his colleague. His actions showed a lack of decorum as a superior and was abusive in nature.

Based on these considerations, the Court found the Claimant’s acts of misconduct amounted to breaches of the company’s Code of Business Conduct and Ethics; Equal Employment Opportunity; Harassment. The dismissal was upheld by the Court.

Key Takeaways from the Decision of the Court

1. Sexual harassment is not limited to physical actions. Using terms of endearment, gifting personal presents or imposing unwelcomed attention toward another colleague (particularly from superior to a subordinate) can be construed as sexual harassment that warrants termination.
2. Unwelcomed behaviour which has the effect of offending, humiliating or intimidating another person is also harassment, even if there were no express objections to such behaviour.

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3. What a person perceives as acceptable in a certain context may not necessarily be appropriate to another from a different cultural background. It is therefore crucial for employers to educate their employees to be sensitive to other cultures in the workplace.
4. Although the perception is that non-physical sexual harassment may not be as harmful or damaging as physical sexual harassment, employers should be mindful of such conduct occurring in the workplace, and should ensure that every employee is made properly aware about their sexual harassment policies.
5. Employers should be mindful that failure to provide a safe (sexual harassment-free) working environment may lead to constructive dismissal of the victim. In fact, it is worth noting that sexual harassment victims have the right to initiate a civil claim under the tort of sexual harassment against the perpetrator and may be entitled to damages. This tort was newly introduced in the Federal Court decision of *Mohd Ridzwan Abdul Razak v Asmah Hj Mohd Nor* [2016] 4 MLJ 282.
6. Curbing sexual harassment requires the joint effort of all parties. Employers should start by taking steps to ensure that the employees are aware about sexual harassment (and policies relating to the same) and more importantly, the employer's zero tolerance toward sexual harassment.

Contacts



Han Li Meng
Partner

T +60 3 2267 2622
F +60 3 2273 8310
li.meng.han@christopherleeong.com



John Rolan
Senior Associate

T +60 3 2267 2664
F +60 3 2273 8310
john.rolan@christopherleeong.com

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Our Regional Contacts

RAJAH & TANN | *Singapore*

Rajah & Tann Singapore LLP

T +65 6535 3600
sg.rajahtannasia.com

CHRISTOPHER & LEE ONG | *Malaysia*

Christopher & Lee Ong

T +60 3 2273 1919
F +60 3 2273 8310
www.christopherleeong.com

R&T SOK & HENG | *Cambodia*

R&T Sok & Heng Law Office

T +855 23 963 112 / 113
F +855 23 963 116
kh.rajahtannasia.com

RAJAH & TANN | *Myanmar*

Rajah & Tann Myanmar Company Limited

T +95 1 9345 343 / +95 1 9345 346
F +95 1 9345 348
mm.rajahtannasia.com

RAJAH & TANN 立杰上海

SHANGHAI REPRESENTATIVE OFFICE | *China*

Rajah & Tann Singapore LLP Shanghai Representative Office

T +86 21 6120 8818
F +86 21 6120 8820
cn.rajahtannasia.com

GATMAYTAN YAP PATACSIL

GUTIERREZ & PROTACIO (C&G LAW) | *Philippines*

Gatmaytan Yap Patacsil Gutierrez & Protacio (C&G Law)

T +632 8894 0377 to 79 / +632 8894 4931 to 32
F +632 8552 1977 to 78
www.cagatlaw.com

ASSEGAF HAMZAH & PARTNERS | *Indonesia*

Assegaf Hamzah & Partners

Jakarta Office

T +62 21 2555 7800
F +62 21 2555 7899

Surabaya Office

T +62 31 5116 4550
F +62 31 5116 4560
www.ahp.co.id

RAJAH & TANN | *Thailand*

R&T Asia (Thailand) Limited

T +66 2 656 1991
F +66 2 656 0833
th.rajahtannasia.com

RAJAH & TANN LCT LAWYERS | *Vietnam*

Rajah & Tann LCT Lawyers

Ho Chi Minh City Office

T +84 28 3821 2382 / +84 28 3821 2673
F +84 28 3520 8206

RAJAH & TANN | *Lao PDR*

Rajah & Tann (Laos) Co., Ltd.

T +856 21 454 239
F +856 21 285 261
la.rajahtannasia.com

Hanoi Office

T +84 24 3267 6127
F +84 24 3267 6128
www.rajahtannlct.com

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