Abstract

Sexual harassment in the work place is receiving serious attention of all concerned in Malaysia in recent years. Besides the attempts to implement the Government initiated "code of practice on the prevention and eradication of sexual harassment in the work place", this article considers the other avenues open for the victims of sexual harassment to seek redress. While listing sexual harassment cases adjudicated by the Malaysian Industrial Courts in the past, the celebrated case of the alleged sexual harassment of a senior female executive by her boss which had gone on appeal from the High Court to the Court of Appeal is critically analysed.

Introduction

Sexual harassment in the work place is receiving serious attention of all concerned in Malaysia in recent years. Its deleterious effects are not just on the victims but on the enterprise as well. For example, it adversely affects employee morale and job performance. It reduces productivity and increases the rate of sick leave and absenteeism among the affected employees. Furthermore, many victims chose to resign from their jobs rather than fight or endure the offensive conditions. This results in a higher rate of employee turnover with all the associated costs of recruitment, training and in lost production. The greatest danger of sexual harassment is that when it goes unchecked, it can spread throughout the organization like an infectious disease. Quite ironically sexual harassment in itself has undergone an evolution of sorts in the computer age; it can also take the form of sending pornographic pictures through the internet in addition to the more traditional wolf whistles, suggestive comments and leering looks. In this sense information technology has indeed added insult to injury!

The response
The response to this increasing concern voiced by Wanita [Women's] Organizations was the Government initiated "Code of Practice on the Prevention and Eradication of Sexual Harassment in the Work Place" in August 1999 n2. This code is to serve as a guide which employers in the public and private sectors could use as the basis for announcing a company policy against sexual harassment in the work place. The announcement of policy would enable the management to take disciplinary action against the harasser on the grounds of a breach of company policy. The machinery recommended is to be different from the existing grievance procedures in view of the delicacy of the issue, and disciplinary action like dismissal should be only after domestic inquiry. The aggrieved employee can go to the industrial court for redress under section 20 of the Industrial Relations Act 1967 n3.

Plea for enactment of law

Nevertheless, Women's Organizations nation wide n4 called on the government to enact a law on sexual harassment as they felt that the existing code introduced by the Human Resources Ministry is ineffective. The organizations which gave their endorsement for a law embarked on a signature campaign to back their demand for a law on sexual harassment in the work place n5. The Joint Action Group Against Violence Against Women presented a memorandum carrying 12,000 signatures from 64 interest groups to the Human Resources Minister n6. The Women's Development Collective (WDC) and All Women Action Society felt that the enactment of a law would ensure that all companies heeded the procedure instead of only 4500 firms out of 400,000 that have implemented this code n7.

Survey findings

In the mean time, the 15-month research project undertaken by the WDC covering six pioneering companies that implemented the code brought to light the seriousness of sexual harassment issue n8. The study has found that women experienced a disproportionately higher rate of the problem than the males. Survey figures showed that between 40 and 80 percent of female employees were sexually harassed by their male colleagues or supervisors. It also revealed that 35% of respondents reported that they had experienced one or more forms of sexual harassment in their workplace, the most common being verbal. Finally, although, in general there appeared to be a decrease in incidents since the companies policy on sexual harassment were launched, the study pointed to the need for more awareness among women employees of their rights since only less than half of the respondents were aware of the policy in their companies. Needless to say, this led to the proposal by the Human Resources Ministry and Women and Family Development Ministry to hold nation wide briefings on the prevention and eradication of sexual harassment in the work place n9. This campaign aims to inform workers on the definition and forms of sexual harassment n10.

Concepts of Direct, Indirect & Constructive Dismissal

Direct dismissal is the dismissal of the employee by the employer on the ground of misconduct (among other grounds) whereas constructive dismissal denotes dismissal not by the employer but by the employee by reason of employer's conduct. It is well established that such employer's conduct should constitute fundamental breach of either the express or implied terms of the contract of employment. On the other hand, indirect dismissal covers a grey area between direct dismissal and constructive dismissal. The set of circumstances in
which the employee leaves his employment which would constitute a "forced
resignation" has been described as an "indirect dismissal" by industrial
tribunals.

"The underlying basis of the doctrine of "forced resignation" is the
existence of facts showing that an employee was put under compulsion to resign;
and that if he declined to do so, the employer would proceed to dismiss him in
any event. The employee might have been compelled to hand in his letter of
resignation upon the request or invitation of his employer or at the dictation
of the latter. He might have done so upon receiving a demand or an ultimatum
from his employer. There might be disclosed in the evidence, elements of
persuasion, for example, that it would be better for the employee to resign with
a record unblemished by a dismissal or even the provision of a favourable or at
least, a neutral letter of reference of prospective employers" n11

Forced resignation or indirect dismissal like direct dismissal and
constructive dismissal, is a species of dismissal upon which the threshold
jurisdiction to invoke s20 of the Industrial Relations Act 1967 may be founded
to proceed upon the inquiry into the issue whether a dismissal of an employee
had been for just cause or excuse.

Sexual Harassment Cases

The following table lists the cases involving allegations of sexual
harassment in the work place adjudicated by the Malaysian Industrial Court
under section 20 of the Industrial Relations Act 1967, either as direct,
indirect or constructive dismissal. It is needless to say that all these cases
predate the Government's attempt to address the problem of sexual harassment in
the work place through the announcement in august 1999 of the code to prevent
and eradicate sexual harassment in the work place.

Sexual Harassment : Routes for Redress

S.Sivalingam v Northern Alleged molestation of the
Telekom Industry Sdn. cleaning woman in the Dismissal of the
Bhd. Penang[1980] 1 ILR toilet by her supervisor
[96] want of corroborative
evidence.

Lam Soon (M) Bhd v Cik Victimised for rejecting
Chong Siew Yuan [1986] the amorous advances of
1 ILR 1425 her supervisor want of corroborative
evidence.

Plaat Rubber Sdn. Bhd v Case of a Male worker
Goh Chok Guan [Award Dismissal upheld on the
go.30 of 1995] [1995] peeping into the female
toilet from the opening
1 ILR 79. in the ceiling

Insco Sdn. Bhd v Swan Victimised by her boss
Hui for
Mooi [Award no 195 of not continuing her
account executive was
1995] [1995] 1 ILR 685 personal involvement with held unjust.

him after she found a new boy friend.

Pamol Plantation Sdn Bhd, Outrageous behavior of the Dismissal of the
Johor v Lim Cheng Guan supervisor towards a supervisor upheld on the
[Award no 183 of 1998]; married woman subordinate.

The Project Leburaya Harrasement of the female Dismissal of the
Utara Selatan Bhd v subordinate by the toll supervisor upheld on the
Azahar Ahmad [Award no plaza supervisor. basis of corroborative
183 of 1998]; [1998] 2 evidence
ILR 51.

Aru Hotel Sdn. Bhd v Restaurnt manager Side stepped sexual
Eble Stanislaus [1998] 1 LNS harassing cocktail harassment allegation
403. attendee. but upheld the dismissal of the manager on some

other ground.

Shangri-La-Hotel v Leow Female masseuse in the Her dismissal was upheld
Yoke Sim [Award o 475 of in the hotel health club on the basis of written
1995]; [1995] 2 ILR soliciting clients for complaints of foreign
847. sexual favours for a clients.

price.

Melewar Corporation Bhd v Complaint by five female The managers demotion and
v Abu Osman [Award no 378 employees of physical transfer were upheld in
of 1994]; [1994] 2 ILR molestation by the Group an ex-partee decision.
807 Human Resoure Managemer

Implementation of the code

Among the several routes for redress for victims of sexual arrasement in the
work place, the one through the implementation of the aforementioned code is one
of them. Primarily, the Government in announcing the code on the prevention and
eradication of sexual harassment in the work place visualizes that companies
adopting the code would follow it up with a statement of policy against sexual
harassment in the work place and formulate organizational rules based on
definitions and forms of sexual harassment found therein and also establish a
machinery to deal with such misconduct.

Collective agreement

Secondly progressive organizations could include in their collective
agreement with their unions a commitment to enforce the code. As such, not only the victim of sexual harassment in the workplace finds a definite avenue open for redress but any unfairly accused employee also finds a way to make a representation for reinstatement to the Director-General of Industrial Relations under S20 of the Industrial Relations Act 1967, and to have access to the industrial court, if need be, for adjudication of the alleged unjust dismissal n12. It is indeed noteworthy that Bumiputra-Commerce Bank Berhad and Bumiputra-Commerce Bank Berhad Executive Staff Union, Peninsular Malaysia have under article 39 of their collective agreement recognized the problem of sexual harassment in the workplace and are committed to eradicate it n13.

Constructive dismissal

A third route for seeking redress for sexual harassment is for the victim to walk out of her job claiming constructive dismissal. In his paper, "Legal Remedies on Sexual Harassment in the Workplace" n14 Lawyer Muhendra Suppiah said that the victim should tell the harasser to stop the unwanted behaviour, and if all else fails, present a report to her superior or Human Resource Department about what has happened. The report should document instances, the time, date and other relevant information related to the harassment incidents. It is important that the victim should not wait too long before making a report when harassed by a co-worker n15.

Once a report has been presented, the employer is duty bound to properly investigate the allegation and act against the proven misconduct; it is because it is fundamentally implied into the contract of employment that there is a duty on the employer to provide the employee with a safe work environment n16. The other hand, if the victim finds that her employer is not taking action, she has the right to walk out of her job and claim constructive dismissal on the ground that the employer's conduct violated the implied term of the contract of employment. Breach of the implied term of the contract of employment was recognized by the industrial court as a ground for constructive dismissal following its adoption of the Wood's test n17.

Incidentally, it is quite interesting to know that Lord Denning, in deciding the claim of constructive dismissal in the Western Excavation Case n18 considered fundamental breaches of only express terms of the contract of employment as a necessary condition for upholding the claim of constructive dismissal. The question of breaching the implied term of employment contract was not in the picture at that point in time. Furthermore, Lord Denning refused to consider unreasonable behaviour on the part of the employer as constituting a ground for constructive dismissal. However Lawton LJ, in the same Western Excavation Case, argued to include unreasonable behaviour of the employer as a basis for upholding constructive dismissal on the ground of common sense. In his view, unless it is allowed to be included, sexual harassment in the workplace could not be a ground for constructive dismissal. Specifically he stated that "persistent and unwanted amorous advances by an employer to a female member of the staff would be the kind of behaviour which would be regarded as so intolerable that the employee could not be expected to put up with it... there is no denying the fact that it must be rightly decided as a conduct justifying the employee repudiating the contract, even if no breach of contract would have been involved" n19.

Direct dismissal
While the well established law governing constructive dismissal could very well accommodate allegation of sexual harassment as a ground for constructive dismissal claims, we have to explain how the industrial courts in Malaysia gained jurisdiction, in the past, to adjudicate allegations of sexual harassment in the workplace as misconduct in a few cases of direct dismissals, especially in the context of there being no definition of misconduct in the Industrial Relations Act 1967.

Two possible explanations could be offered: one is the attempt by the industrial court to classify misconduct into three categories and bringing sexual harassment under one of them.

This was attempted by the industrial court in Kannan v National Land Finance Co-Op society Ltd [Award no 95 of 1977] where it adopted Malhotra's classification of misconduct into three broad categories as (a) misconduct relating to duty; (b) misconduct relating to discipline and (c) misconduct relating to morality. It could be argued that "moral turpitude" coming under the category of "misconduct relating to morality" is the type of misconduct that could accommodate sexual harassment within its meaning. It includes conduct violative of moral norms of the society in which such an action has taken place. Secondly the action should involve turpitude. "In other words, the conduct should not merely be contrary to moral norms but it should involve a violation of the moral code in such a manner that it indicates baseness or depravity of character. Sexual harassment in the workplace, quite appropriately, could be brought under this form of misconduct since the perpetrator could be considered to be a depraved character." 

This interpretation of sexual harassment in the workplace could help the industrial court to gain jurisdiction to decide on such misconduct referred to it under s20 (1) of the Industrial Relations Act 1967. But the author has not come across other cases, other than Kannan's case in which the industrial court had mentioned the classification explicitly.

C.P. Mills' caveat

However, it may be of interest to know that C.P Mills was of the view that "it was a mistake to attempt to categorise misconduct thus, for any 'misconduct' becomes relevant to the contract of employment only if it is a breach of the duty owed by the workman to his employer under the contract of service. To distinguish "misconduct relating to morality" from "misconduct relating to duty" suggests that immoral conduct per se will justify summary dismissal, and that it is not so." 

In pursuance of this line of thinking, Mills would be possibly confine the implied conditions of service mentioned under s14(1) of the Employment Act 1955 to the obligation on the part of the employee to serve loyally and faithfully, to obey rules, to show fidelity, to exercise reasonable care in carrying out duties and the like during employment. It follows, therefore, that the definition of misconduct we find in the Employment Act 1955 could not accommodate sexual harassment in the workplace either under the express or implied conditions of service. Notwithstanding C.P Mills caveat, in two cases, one in 1995 and the other in 1998, the industrial court has brought immoral act under conditions of service. Specifically in Plaat Rubber Sdn Bhd v Goh Chok Guan [Award no 30 of 1995; [1995] 1 ILR 79] as well as in Pamol Plantations Sdn Bhd, Johor v Lim Cheng Guan [Award no 95 of 1998; (1998) 1 ILR 410], the
Industrial Court justified its inclusion by approvingly citing the following observation of the Indian Supreme Court: "And if the servant's conduct is so grossly immoral that all reasonable men would say that he cannot be trusted the master may dismiss him" [vide Madhosingh Daulat Singh v State of Bombay, [1960] 1 LLJ 291; AIR 1960 Bom 285].

Organizational rules

The second explanation also owes its source to Malhotra and the Indian experience. The expression "misconduct" covers a large area of human conduct. In India, under the Industrial Employment [Standing Orders] Central rules 1946 framed under the Industrial Employment [Standing Orders] Act 1946, the Central Government has prescribed the model standing orders which provide a list of acts and omissions to be treated as misconduct. The employers may frame their own standing orders [equivalent to organizational rules governing misconduct in Malaysia] suited to peculiar exigencies of their industries and establishments. However, it is not possible to provide for every type of misconduct in the standing orders for justifying disciplinary action against the workman. In other words, the standing orders of an establishment only describe certain cases of misconduct and the same cannot be exhaustive of all species of misconduct which a workman may commit. Even though an act may not come within the specific terms of misconduct described in the standing orders, it may still be misconduct, in the special circumstances or facts of the case, which it may not be possible to condone and for which the employer may take appropriate action. Whether a particular act of misconduct has been committed or not, even though it may not be prescribed, in so many words, in the standing orders, will be a matter for the industrial tribunals to consider. Likewise, whether a particular misconduct will entitle the employer to punish the employee with dismissal will also be a matter in an appropriate case for decision by the tribunal. But the mere mention of certain types of misconduct in the standing orders would not entitle the tribunal to completely shut its eyes to the act of misconduct and to hold the order of dismissal as unjustified for that reason.

This reasoning applies to industrial relations practice in Malaysia as well. Organizational rules framed by the employer spell out the acts of misconduct. But this does not restrict him from taking disciplinary action against the employee for an act of misconduct not described in his organizational rules, and whether such misconduct will entitle the employer to punish the employee with dismissal is also a matter for decision by the industrial court.

Using the language of Malhotra, we may say that the mere omission of a certain type of misconduct, sexual harassment in the workplace for example, in the Organizational Rules would not entitle the industrial court to completely shut its eyes to the act of misconduct and to hold the order of dismissal as unjustified for that reason.

The aforementioned reasoning provides the rationale for some employers taking disciplinary action including dismissals against workmen sexually harassing co-workers in the workplace and industrial courts readily assuming jurisdiction to investigate and adjudicate complaints of unjust dismissals by the alleged harasser. In this context the author is not averse to recommending to both the employers and the industrial courts the Malhotra's classification of misconduct as a guideline for taking action against misconduct including sexual harassment.
The Celebrated Case

One or two of the direct dismissal cases discussed have references to claimants having been forced to resign n28. But there has not been any combined constructive dismissal and forced resignation case by any victim of sexual harassment except the only case of Jennico Associates n29. This case was prominently featured in "New England International & Comparative Law Annual" in 1997 n30. According to Jennie M. McCarthy, the author of the article, this case parallels the Anita Hill sexual harassment charge against Supreme Court justice nominee Clarence Thomas. In fact she claimed that "the Malaysian Industrial court, relying on [United States] case law, decided in favour of a former hotel executive who claimed she was sexually harassed by her boss, in what Malaysian lawyers are calling the first case of its kind in the country" n31. In fact, West's Legal News captioned it as "Malaysian woman wins country's first ever sexual harassment suit n32.

The author in this presentation on sexual harassment in the workplace would like to highlight this case and its aftermath for two reasons: one reason is that this internationally celebrated decision by the Malaysian industrial court was quashed by certiorari by the High Court on judicial review and when the ruling of the High court went on appeal to the Court of Appeal, the High Court ruling was upheld. Secondly since the concept of corroborative evidence played a critical role in the proceedings of all these courts, the author has taken the liberty of critiquing the High Court view on the industrial court decision n33. Even at the risk of being labelled as speculative, the author's analysis of the reasoning of the High Court vis-a-vis that of the industrial court is aimed at raising questions to examine whether or not justice has been done in this landmark case of women's rights in the workplace.

The allegations

In this case, Lilian De Costa, Director of Operations of the hotel complained of two incidents of physical sexual harassment and one of verbal harassment and fault finding by her boss, Major Zulkifli, the Managing Director of the Hotel n34.

Specifically, the complainant alleged that on 31st December 1993 at about 1 p.m. when she entered the office room of the Major and extended her hand to wish him a happy New Year, he pulled her to him and gave her a kiss on the lips. When she told him, "please don't ever do that again", he said "well you know, it is New Year, ok. I won't do it again".

Secondly, on the 7th of February 1994 she alleged that the Major called her to his office room, and instead of discussing her work, made verbal remarks to her to the effect that "you are very beautiful. I wish I can make you my second wife". When frightened and embarrassed the claimant went into the pantry to get a glass of water "the Major followed me, suddenly grabbed me from behind and molested me; he put his arms around my waist and moved his arms around me. He started moving his hand around my breast with both his hands. He then turned me around. I tried pushing him away. I could not as he was stronger. He started kissing me on my neck and towards my face. I said "stop it". I managed to put my glass down and I ran towards my office. I took my things and left."

Thirdly, the claimant complained that from her return to work after absenting without leave till the date on which she handed in her resignation [on 22nd
February 1994] as demanded by the Major, she was subjected to verbal harassment and fault finding by him; on 22nd February he asked her to go to his room where he was alleged to have said, "since all these things have happened, I don't like your face anymore. I want you to resign on your own accord and I will pay what is owing to you".

Analysis of the High Court review

Citing the license given to it by the Federal Court in the landmark case of Ramachandran v Industrial Court n35, the High Court went into the merits of the case and quashed the industrial court decision by certiorari. In reviewing the High Court ruling in Lilian De Costa case, the author is of the view that it should be examined from different angles.

1. First of all, it should be examined whether it was a fit and proper case for the High Court to invoke its powers to extend its review jurisdiction to go into the merits of the case n36. More seriously, in negating the fact finding role to the industrial court, it might have exposed itself to the warning sounded by Lord Brighton in the House of Lords n37.

2. Alternatively what would have been the role of the High Court if in the exercise of its supervisory jurisdiction, it confined itself to reviewing the industrial court decision not for substance but for process alone? It is needless to say that from this restricted perspective, High Court would be required to examine whether the industrial court has functioned within the framework of law: whether it has decided the dispute on a balance of probabilities discharging its mandatory duty to act according to equity, good conscience and substantial merits of the case without regard to technicalities or legal form under s30 of the Industrial Relations Act 1967.

In such a review, it should surely be examined whether the inconsistencies recognised by the industrial court in the testimony of the claimant Lilian and her other witnesses were really material contradictions or inconsequential to affect the substance of the case since they had been attributed by the Industrial court "to normal human frailties such as faulty memories and bona fide mistakes" n38.

Let us take one such alleged inconsistency in the testimony of the claimant to examine whether or not it is serious enough to constitute a material contradiction. For instance, the claimant claimed that she informed her friend Jacqueline of the first incident the very next day whereas it was established that she did so only after the second alleged incident. This evidence, according to the High Court, had lost its probative value since it was not an evidence "at or about the time" of the first alleged incident. The high court ruled that the industrial court had committed an error of law failing to rule that such testimonies should be ignored n39.

However it is the author's submission that when the first and the second alleged incidents are viewed from Lilian's point of view, a rationale may emerge to make this inconsistent testimony credible enough despite the time-bar.

Having spent the first month of her appointment working from home, Lilian had hardly been in the hotel for two months before the first incident. She knows
that Zulkifli had been generous to the fault in choosing her as the Director of Operations with a view to making her eventually the first lady General Manager of the hotel. With this backdrop, we could imagine Lilian walking into her boss' room with all smiles and gratitude extending her hand to wish him happy New Year on the afternoon of 31st December 1993.

Even if we were not to attribute any motive to the Major in hand picking her for the post notwithstanding her lack of qualifications for her job, he was taking this beautiful married woman for granted and drawing her towards him across the table and kissing her on the lips. What is Lilian's reaction? Why there were no theatrics, no crying or running out frightened and shocked? She is a mature married woman and experienced manager to boot; and so she says, "Never do it to me again". That expression conveyed to him and to her a clear message that what her boss did was wrong. Since he sought to rationalise his behaviour blaming it on the New Year spirit and promised not to do it again, his conduct could be ignored though not excused. "Let us forget the incident" could be her attitude since the matter was closed then and there by mutual consent ["don't do it to me again; I won't do it again"]: Therefore she left for home that afternoon as a normal person wishing everyone happy new year, not as a shocked or frightened person as was expected. As a consequence, Zulkifli's personal secretary testified that Lilian's composed demeanour did not indicate that the first alleged incident happened. Furthermore, in view of her balanced reaction to Zulkifli's conduct, there was no need for Lilian to tell anyone of this incident, be it her friend Jacqueline or Hardeep or her brother or even husband.

The next six weeks after the first incident were uneventful till the second incident occurred on the 7th of February 1994. The second incident was a deliberate physical harassment involving molestation though it followed Zulkifli's expression of his dubious intention of making her his second wife. Naturally, the claimant links the first incident with that of the second and recalls the first incident not as an impulsive or misguided act on his part but a premeditated feeler to gauge her response to his amorous intentions. Understandably Lilian informs of these two incidents to Hardeep on the same day and Jacqueline a fortnight later, by the end of February. The foregoing scenario according to the author attests to the credibility of the claimant's testimony though it was not "at or about the time" of the first incident.

3. Secondly, we could examine another reported inconsistency in the claimant's testimony to prove that it was not a material contradiction. According to the Managing Director, Zulkifli and his private secretary, he left his office just after 5 pm for Tahlil prayers and was not there in his office where according to the claimant the second incident occurred after Simon left by 5.15 to 5.20 pm. This inconsistency could not be sustained because according to the industrial court, in his evidence-in-chief, Simon was asked nothing about his whereabouts prior to the second alleged incident of sexual harassment although the claimant had testified to his presence at Major's office n40.

4. The third issue to be examined is whether, in the context of its stated position vis-a-vis self-corroboration n41, the industrial court had committed an error of law by buttressing the self-corroborative testimony of the claimant and her other witnesses with circumstantial evidence n42.

5. Connected with the aforementioned issue is another question relating to the claim of constructive dismissal. It is well-established that the onus of
proving constructive dismissal lies with the complainant. The high court is of the view that the claimant should not use company evidence to prove her claim of constructive dismissal n43. Against this view is the contention that when the company leads an evidence and during cross examination a fact favourable to the claimant's allegation surfaces, it could be used to support her claim of constructive dismissal.

If this latter view is acceptable, it follows that in this instant case, the claimant has convincingly proved that she has been constructively dismissed, and subsequently the onus shifts to the company to establish that the dismissal has been for a just cause or excuse. It should be emphasised that in arriving at this second-stage decision in constructive dismissal cases, the industrial court is perfectly free to decide whether the dismissal was for a just cause or excuse taking into account the totality of the circumstances of the case.

6. The high court seemed to support its surmise that the claimant was untruthful and unreliable because she did not behave as she was expected to under several circumstances n44. To start with, she did not lodge a police report of her allegation or inform her husband of them in spite of the advice to do so from her friend, Hardeep. Secondly her reticence to talk about the incident with her colleagues during lunch time was another behaviour cited as odd. Thirdly while the claimant initially testified that she remained at home all night on the day of the second incident, she was in fact seen at that night in the Ming Court car-park helping her brother lodge a police report on the fight he had with a group of people in the Ming Court. The High Court speculated that instead of remaining at home confused and frightened as she has claimed, she was having fun partying with her brother at the entertainment outlet in the Ming Court. Finally using the information that Zulkifli handpicked Lilian from Ipoh Hotel, though she lacked equipment to perform as the Director of Operations in the start up company, the High Court came to the conclusion that it was her inability to carry out the duties and responsibilities in her own position rather than verbal harassment or fault finding by Zulkifli that was the reason for her resignation. On the basis of the foregoing interpretation of the claimant's behaviour, the High Court branded the claimant a liar and as capable of any deceit. The high court thus turned the table on her stating that it was she who fabricated the entire allegations against Zulkifli to serve her own interest.

7. On the other hand, it should be underscored that the industrial court, on its own understanding of the same circumstances, asserted that there was nothing unreliable about her testimony. Specifically, it averred that there was no evidence to support Lilian's alleged inability to perform. On the other hand the industrial court was convinced that, in fact, it was Zulkifli who visited Lilian's house when she did not return to work and influenced her brother to persuade her to return to work; he also seemed to have referred to the allocation of company shares to employees which could benefit Lilian if she returned to work. The industrial court argued that the fact that Zulkifli visited her house to persuade her to return to work and the offer of share allocation as an additional incentive to return to work did not support the allegation of poor performance on the part of Lilian.

8. It is quite interesting that it could be argued that Zulkifli was indeed walking on thin ice when he claimed that he visited Lilian's house not to persuade her to return to work but only to see her brother. This story line lacked credibility for the following reason. It is a fact that it was Lilian who
introduced her brother Antony De Costa to Zulkifli and got him to supply a home sound system to him n45. As a beneficiary of this lucrative deal, Antony would have readily gone to the hotel to meet Zulkifli, if he was asked to and there was no need for Zulkifli to go to Lilian's house to meet him. It could therefore be surmised that Zulkifli's visit was obviously to persuade Lilian to return to work.

The industrial court asserted that "The claimants evidence on the substance of two incidents and the subsequent events leading to the tendering of her letter of resignation, in contrast with the evidence of the company's witnesses is substantially consistent, convincing and credible" n46. In other words, while considering the weight of the evidence of the claimant and the company, the industrial court perceived the balance tilting in favour of the claimant. The High Court, however, pinned its faith on Simon's testimony to shatter the credibility of all the evidence of the claimant and her other witnesses n47.

9. According to the High Court, Simon, the Finance Director of the Hotel testified that Lilian and her husband approached him and offered to give 25% of the claim she would obtain in her case against the company, if he [Simon] agreed to give evidence in favour of the claimant n48.

No doubt Simon's testimony, if true, constitutes an incriminating evidence. However, it seems to have surfaced only during the High Court proceedings, and its failure to emerge during industrial court proceedings is intriguing. Moreover, had his evidence been led during the court proceedings, the credibility of his evidence would have been tested during cross examination. There is no reference to Simon's testimony in the award of the industrial court. In these circumstances how could the High Court rule that the industrial court has committed an error of law for failure to taking into account Simon's testimony?

CONCLUSION

As noted at the outset, the High Court ruling was upheld when it went on appeal to the Court of Appeal. In the absence of the written judgement, we are at a loss to know the grounds on which the ruling was found.

Nevertheless, in the context of our analysis of the case - the industrial court decision and the High Court ruling - it may not be wrong to conclude that it is not really a open and shut case. We are not saying that Lilian was right or Zulkifli was wrong or the other way about. Our plea is that this case involving Women's rights in the workplace has to be pursued, if necessary, with the financial assistance from the Malaysian Trade Union Congress and women's organizations [for they have a stake in the final outcome], and the Federal Court should be invoked to find the truth and render justice one way or the other.

Return to Text

FOOTNOTES:

n1 New Strait Times, April 7, 2003. These adverse effects were voiced by participants at the seminar on "sexual harassment in the work place" organised by the National Union of Newspaper Workers.
n2 This code was drafted by the National Technical Committee chaired by the Director-General of Labour. The Committee consisted of representatives of the Human Resource Ministry, Welfare Services Department, Women's Affairs Department, Malaysian Employers Federation, Malaysian Trade Union Congress, Malaysian Agricultural Producers' Association, Federation of Malaysian Manufacturers, Non-Governmental Organizations and Institutions of Higher Learning.

n3 Code of Practice on the Prevention and Eradication of Sexual Harassment in the Work Place

n4 New Strait Times, May 26, 2000, p. 9. Those giving their endorsement for a law were All Women's Action Society (AWAM), Malaysia Women in Ministry and Theology, Persatuan Sahabat Wanita Selangor, Sahabat Perkeja, Sisters in Islam, Women's Agenda for Change Committee, Women's Aid Organisation and Women's Development Collective (WDC).

n5 Ibid p.9

n6 . New Strait Times, July 2, 2001

n7 New Strait Times, 22 Sept, 2001

n8 New Strait Times, 22 Sept, 2001

n9 New Strait Times, 22 April, 2002

n10 . Under the code, sexual harassment is defined as:

verbal harassment such as offensive or suggestive remarks, making sounds and comments; non-verbal/gestural harassment such as leering or ogling with suggestive overtones and sign language denoting sexual activity; visual harassment like sexual exposure or showing pornographic material; psychological and physical harassment such as repeated unwanted social invitations; and, physical harassment such as inappropriate touching, patting, pinching, stroking, kissing and fondling. Summing up the various forms of sexual harassment defined in the code, a New Strait Times journalist [Abdul Razak Ahmad] sometime back humorously stated that "the next time you lick your lips suggestively, eat food provocatively, flirt persistently or engage in relentless proposals for dates with a co-worker, you might end up being charged with sexual harassment".


n12 Section 20 of the Industrial Relations Act 1967.

Representation on dismissals

1. Where a workman, irrespective of whether he is a member of a trade union of workmen or otherwise, considers that he has been dismissed without just cause or excuse by his employer, he may make representations in writing to the Director General to be reinstated in his former employment; the representations may be filed at the office of the Director General nearest to the place of employment from which the workman was dismissed.

1A. The Director General shall not entertain any representations under
subsection (1) unless such representations are filed within sixty days of the dismissal:

Provided that where a workman is dismissed with notice he may file a representation at any time during the period of such notice but not later than sixty days from the expiry thereof.

2. Upon the receipt of the representations the Director General shall take such steps as he may consider necessary or expedient so that an expeditious settlement thereof is arrived at; where the Director General is satisfied that there is no likelihood of the representations being settled, he shall notify the Minister accordingly.

3. Upon receiving the notification of the Director General under subsection (2), the Minister may, if he thinks fit, refer the representations to the court for an award.

n13 Article 39: Sexual Harassment

The Union and the Management recognise the problem of sexual harassment in the work place and are committed to eradicate it.

As a guide, reference will be made to the Code of Practice on the Prevention and Eradication of Sexual Harassment in the Work Place issued by the Ministry of Human Resources.

A grievance under this Clause will be handled with all possible speed and confidentiality. In settling the grievance, disciplinary action will be taken against employees and supervisors who are found to have engaged in any activity prohibited under this Clause.

n14  New Strait Times, April 7, 2003

n15 Among the criteria to determine constructive dismissal, it is important that the workman makes up his mind and acts at the appropriate point in time soon after the employer's repudiatory conduct of which he complains. "If the workman continues for any length of time without actively rejecting or protesting against the act or conduct of the employer, he would be regarded as having elected to affirm the contract, and would lose the right to treat himself as discharged". [MPH Book Store Sdn. Bhd v Lim Jit Seng Industrial Court Award no 175 of 1987].

n16 The implied term of contract of employment is more inclusively stated by Lord Browne-Wilkinson in Woods v WM Car Services [Peterborough] Ltd [1982] 1 RLR 347 as under:

This implied term of the contract of employment requires the employer not to conduct himself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.

In this case Lord Brown-Wilkinson J also said, "It is to be emphasised that this implied term of contract is an overriding obligation independent of, and in addition to, the literal terms of contract". This implied term of the contract of employment found expression in various forms in sexual harassment cases adjudicated by the industrial court. For example, the industrial court in "Melewar Corporation Bhd v Abu Osman [Award no 378 of 1994;[1994] 2 ILR 807]"
stated that the employer owes a contractual obligation to the employee, female or otherwise to ensure that he provides a safe and conducive working environment in which they can function". In Jennico Associates Sdn. Bhd v Lilian Therera De Costa, [Award no 606 of 1996][1996] 2 ILR 1765, the court observed that "there is an implied essential term in all contracts of employment that an employer has the obligation to respect an employee's person, dignity and esteem and that he will not violate the same. [per page 1768].


n18 Western Excavating [ECC] Ltd v Sharp [1978] 1 RLR 127

n19 Lawton LJ in Western Excavating Case. Supra n.18, p.772


Malhotra and Malhotra follow their own classification of misconduct in industrial employment under the following headings

a. Misconduct relating to duty includes acts of misconduct like non-observance of duty, non-performance of work, negligence of duty, engaging in work similar to that of the employer, absence without leave, late attendance and illegal industrial action.

b. Misconduct relating to discipline includes acts subversive of discipline such as abusing a superior officer by using vulgar and filthy language, sleeping in the office while on duty, rowdy conduct during working hours, etc.; other acts of misconduct relating to discipline are insubordination or disobedience, riotous and disorderly behaviour and damage to employer's property and reputation.

c. Misconduct relating to morality (morality meaning good and upright behaviour) include theft, dishonesty and fraud, disloyalty, corruption and moral turpitude implying depravity and wickedness of character or immoral acts;

d. Arrests and convictions for criminal offences, including all offences under criminal law. (p.754-793).

In Kannan v National Land Finance Co-op. Soc. Ltd (Award no 95 of 1997) the Industrial Court in Malaysia followed this classification.

n21 Ibid p.785-786

n22 Supra n.20.


n24 The Employment Act 1955

Section 14 (1) An employer may, on the grounds of misconduct inconsistent with the fulfilment of the express or implied conditions of his service, after due inquiry-

a) dismiss without notice the employee;
b) downgrade the employee; or

c) impose any other lesser punishment as he deems just and fit

n25 Malhotra. Supra n.20, p. 751-752

n26 Ibid p. 751

n27 Ibid p. 751


n34 Jennico Associates Supra n.29, p.1775-1777.

n35 R. Ramachandran v The Industrial Court of Malaysia Court of Malaysia, & Anor. [1997] 1 MLJ 145-240 .F.C. The Federal Court ruling, in this case, following the liberal traditions of Indian Supreme Court, liberated, so to say, the High Court and empowered it to extend its supervisory jurisdiction to examine the decision of the Industrial Court on its merits, substitute its own decision to that of the Industrial Court and to order consequential relief, as well, if need be. The Federal Court ruling in Ramachandran's case seemed to have led to a debate on judicial activism v judicial excessivism. One may find the articulation of the debate in the following publications:


c. Dr. Venkatiyer, The Importance of Judicial Review, Insaf, vol. xxxi no 4. p.60

d. Petroliam Nasional Bhd v Nik Ramli Nik Hassan f.c [2003] 4 CLJ 625

The Federal Court in this case ruled that this case as decided by the Industrial Court is not a fit and proper case for the High Court and the Court of Appeal to invoke the exercise of the extended power of judicial review. The
Federal Court's analysis of the role of the Industrial Court under the law is illuminating.

n36 It is the author's opinion that in sexual harassment cases, especially those involving physical harassment, High Court should be wary of exercising this power. For example, the High Court, in justifying the exercise of the extended powers of judicial review in Lilian De Costa case, argued that the allegation against Zulkifli, if not true, would cause enormous embarrassment and damage to the social status of Major Zulkifli; Similarly, one could argue that if the Industrial Court were to decide in favour of the Major and against Lilian De Costa the High Court would also be justified in invoking the power to go into the merits of the case on the same rationale that the decision, if not true, would cause enormous damage and injustice to Lilian but more particularly to the cause of women's rights in the work place. In other words, the point that is sought to be driven home is that since serious injustice is the likely result of any decision by the Industrial Court, certainly affecting one party or the other of the dispute, it follows that High Court would have to be extending its power of judicial review and going into the merits in every case of sexual harassment, especially when physical harassment is alleged as in this case. If this line of argument is tenable, the role of the Industrial Court in factual determination of the issue, which is within its jurisdiction under the law, would become, in such cases, redundant and superfluous.

n37 The limited scope of judicial review has been established in "Chief Constable of Wales Police v Evans [1982] 1 WLR 1115]. According to this ruling of the House of the Lords, "judicial review is concerned not with the decision but with the decision-making process". It is pertinent to emphasis that Lord Brighton in the same case warned that "unless restrictions are imposed and observed... the court will, under the guise of preventing abuse of power, by itself be guilty of usurping power".

n38 Supra n.29, p. 1786
n39 Supra n.33, p. 594
n40 Supra n.29, p. 1781
n41 Jennico Associates Case, Supra n.29, p. 1792

In the award on the Lilian De Costa case of sexual harassment, the position taken by the Industrial Court on the need for some corroborative evidence was succinctly stated by its Chairman as under: "There would rarely be cases of physical sexual harassment where the court would have the benefit of hearing direct testimony of independent witnesses. It would often be the word of the complainant against that of the alleged harasser ....... The general principle in the trial of criminal sexual offences is that as a rule of prudence, the court normally looks for some corroboration of the complainant testimony to satisfy its conscience that the complainant is telling the truth and the accused is not falsely implicated .... Where corroborative evidence is required and relied upon, however, it would invariably be circumstantial in nature. The court would look for additional evidence of relevant circumstances which render it possible that the story of the claimant is true and it is reasonably safe to act upon it, interalia, the conduct of the parties and their motives.

n42 Some of the circumstantial evidence relied upon by the Industrial Court in support of the self-corroborative evidence of the claimant and her other
witnesses include the following

a. On the very first day of the hearing the company took the position that Zulkifli was not an employee of the company. That was exposed as an evasionary tactics at its best or a lie at its worst. The company then modified its position and accepted that he was the Managing Director of the company. [Supra n.29, p.1788]

b. Secondly, while the Major flatly denied that there was any physical contact on the date of the first alleged incident beyond a mere hand shake, it was put to the claimant earlier that it was she in the spirit of the New Year kissed Zulkifli. [Supra n.29, p.1788]

c. There was sufficient corroboration of the substance of the claimant's testimony in the subsequent conduct of Zulkifli in the aftermath of the alleged third complaint of the claimant, namely, that she was harassed and found fault with by Zulkifli. [Supra n.29, p. 1789-1791]

n43 Supra n.33, p. 590
n44 Supra n.33, p. 593-594
n45 Supra n.29, p. 1788
n46 Supra n.29, p. 1793
n47 Supra n.33, p. 593
n48 Ibid p.593