

Employment & Benefits

Dealing with Workplace Harassment – Duties and Liability of Employers

Introduction

Health and safety in the workplace is a key concern for all employers. With the rise of the global #MeToo movement, a spotlight has been shone on an area of health and safety which has till now received less attention – harassment in the workplace.

Workplace harassment is proving to be a very real problem for employees in Singapore. The Association of Women for Action and Research reported that their Sexual Assault Care Centre recorded 108 cases of workplace-related incidents in 2017, up from 91 cases in 2016 and 66 cases in 2015.

With increasing awareness of the issue, employers cannot afford to turn a blind eye. In this Client Update, we examine what employers should know about workplace harassment in Singapore. What are the duties of employers with regard to curbing harassment in the workplace? When is an employer liable to an employee for workplace harassment? What measures should be taken, and what systems should be put in place?

No Specific Harassment Legislation

While workplace harassment has been discussed in Parliament, it is noteworthy that there is no specific legislation in Singapore that deals with harassment at the workplace, nor does existing legislation specifically address the issue of what is required of an employer in this regard. Legislation does exist to protect employees, but it may be seen that such legislation does not function to inform the employer of the necessary protective measures, or to inform the employee of their remedies against the employer.

Employers should however be aware of the Tripartite Advisory on Managing Workplace Harassment issued by the Tripartite Partners: the Ministry of Manpower, the National Trades Union Congress, and the Singapore National Employers Federation (“the **Advisory**”). The Advisory provides a fairly comprehensive overview of what constitutes harassment, and the principles to be adopted in managing workplace harassment. Importantly, the Advisory prescribes preventive measures for creating a safer workplace, as well as remedial actions in the event of workplace harassment. While these guidelines do not have the effect of imposing legal duties on the employer, the measures and standards contained therein are still important in providing direction for the employer in setting up an effective system to protect against workplace harassment.

Protection from Harassment Act

The law of harassment in Singapore is relatively new, and is still undergoing development, both in terms of legislation and case law.

In Singapore, there was no legislation that specifically addressed harassment until 2014, when the Protection from Harassment Act (“**PHA**”) was introduced. The PHA criminalises harassment, stalking, and other anti-social behaviour. It also provides for protection orders for the victims of harassment.

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However, the PHA does not specifically address workplace harassment. In particular, while the PHA provides for remedies against the harasser, it does not set out measures or standards which an employer must comply with to prevent or deal with workplace harassment.

This is in contrast to legislation which specifically deals with and imposes legal duties on the employer, such as the Workplace Safety and Health Act (“**WSHA**”) which covers the safety, health, and welfare of persons in a workplace. The WSHA sets out the responsibilities of the employer to protect their employees, and to ensure a safe working environment.

While the WSHA does not specifically address the issue of workplace harassment, it can be argued that because the WSHA requires employers to take such measures as are necessary to ensure the safety and health of their employees at work; and workplace harassment clearly poses a threat to an employee’s safety and health, therefore, the standards and measures prescribed in the Advisory would be relevant or may be taken into account by a Court when assessing compliance with the WSHA. An employer in breach of the WSHA is liable, in certain cases, to a fine or imprisonment. This is especially because the Advisory explicitly makes the link between the risk of harassment and the measures an employer ought to take to ensure a safe, healthy and harmonious workplace.

Civil Liability of the Employer

Apart from potential liability under the WSHA, can an employer be liable to an employee for workplace harassment suffered by the employee, and in what situations can an employee successfully make a claim against an employer?

Statutory Liability under the PHA is Presently Unlikely

The tort of harassment is provided for in section 11 of the PHA, which states that the victim “may bring civil proceedings in a court against the respondent.” The “respondent” here refers to the person or entity which has committed the act of harassment.

While there is no precedent in Singapore, it may be possible for a corporate entity to be held liable to an employee under section 11 provided that acts of harassment on the part of the entity’s officers can be equated to acts of the entity itself. For example, in the Australian case of *Trolan v WD Gelle Insurance and Finance Brokers Pty Ltd* [2014] NSWDC 185, a company was held liable for acts of sexual harassment at the workplace committed by one of its directors, as the director was the “controlling mind, will and embodiment of the company”.

However, primary liability on the part of the employer is unlikely to be easily established, as it would depend upon a specific confluence of circumstances. It may not be easy to equate the acts of the offending officer with acts of the company, particularly where the officer is not a director, manager, or otherwise the “controlling mind, will and embodiment of the company”.

If an employer does not incur *primary* liability for acts of workplace harassment, could it incur *vicarious* liability for the acts of its employees?

In the UK, the House of Lords has held that an employer may be vicariously liable for an employee’s statutory breach under the UK Protection from Harassment Act, provided such breach was committed in the course of his employment (*Majrowski v Guy’s and St Thomas’ NHS Trust* [2007] 1 AC 224). However, the position may be different in Singapore.

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This is because while the UK Protection from Harassment Act explicitly considers statutory claims against an employer, while the Singapore PHA does not. Further, Section 11 of the PHA may be argued to exclude vicarious liability on the part of the employer as it only provides for civil claims against the “respondent”. It should also be noted that Section 14 of the PHA abolishes the common law tort of harassment, prohibiting civil actions for harassment except for those brought under the PHA. Therefore, if an employee is unable to bring a claim against an employer for vicarious liability for harassment, they may have to allege vicarious liability for alternative common law torts. Consequently, in order to make a civil claim against an employer for harassment suffered in the workplace, an employee may have to turn to common law.

Vicarious Liability for Other Torts

An employer may be vicariously liable for the acts of an employee if such acts are committed in the course of their employment, and are so connected with their authorised duties that they may be regarded as a mode of doing them.

In jurisdictions such as the UK and Malaysia, the courts have allowed claims for vicarious liability against an employer in situations where employees were subject to harassment and assault or battery at the hands of other employees.

In *Roshairree bin Abdul Wahab v Mejar Mustafa bin Omar* [1996] 3 MLJ 337, certain military officers-in-charge had harassed a recruit in various ways, including assaulting him. The Malaysian government – as the employer of the officers-in-charge – was held to be vicariously liable for the acts of assault.

In *KD v Chief Constable of Hampshire* [2005] EWHC 2550, a police officer had committed acts of harassment and battery against a person whom he had interviewed as part of an investigation. His employer was held to be vicariously liable for both the harassment and the battery.

In Singapore, the courts have not considered a claim for vicarious liability for harassment, but they have allowed claims for vicarious liability on the part of the employer for assaults carried out by their employee.

In *Yu Hanjia v Kuah Thiam Seng (t/a Hock Star Engineering & Trading Co)* [2015] SGDC 277, a construction worker was assaulted by his supervisor in a disagreement over instructions. The employer was held to be vicariously liable for the injuries caused due to the close connection between the supervisor’s wrongful act and his employment.

In *Goel Adesh Kumar v Resorts World at Sentosa Pte Ltd (SATS Security Services Pte Ltd, third party)* [2015] SGHC 289, a casino was held vicariously liable for acts of assault and battery carried out by its security officers in the process of detaining a patron.

However, even in these cases, this would mean that an employee would only be able to allege vicarious liability of an employer for workplace harassment if the facts give rise to another actionable tort (such as assault or battery in the examples above). This may be seen as a fairly roundabout method of making a civil claim for harassment. Further, it does not provide for situations where harassment is the only tort complained of.

Negligence

Apart from vicarious liability, workplace harassment suffered by an employee may give rise to claims of negligence against the employer. Examples of successful claims of this nature may be seen in the UK courts.

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In *Waters v Commissioner of the Police of Metropolis* [2000] 1 WLR 1607, a police officer alleged that a fellow officer had sexually assaulted her, and that the defendant commissioner had been negligent in failing to properly deal with her complaint and allowing fellow officers to harass and victimise her. The UK House of Lords held that the defendant commissioner owed a duty of care to a police officer in his employment, which may be breached if he knew that acts being done (or which might foreseeably be done) to the officer by fellow officers might cause her physical or mental harm and did nothing to protect her.

In *Helen Green v DB Group Services (UK) Ltd* [2006] IRLR 764, an employee alleged that she had been harassed and bullied by her fellow employees, causing psychiatric injury. The court held that the employer was in breach of its duty of care to the employee in failing to take any or adequate step to protect her from such behaviour despite being aware of the harassment. The court stated that a reasonable and responsible employer would have intervened to make clear that such behaviour was unacceptable and warned of disciplinary action, and could have moved the offenders to a different department or branch if necessary.

In Singapore, it is accepted that an employer has a duty to provide a safe place of work and a safe working system. It may therefore be argued that this extends to a duty to protect an employee from harassment. However, the Singapore courts have not issued a judgment on such a claim. The Courts have however, considered related factual scenarios of an employer's potential negligence.

In *China Construction (South Pacific) Development Co Pte Ltd v Shao Hai* [2015] 2 SLR(R) 479, a construction worker brought a claim in negligence against his employer for injuries suffered during a fight with a fellow worker, alleging that the employer had failed to provide a safe system or work or proper supervision. Initially, the District Judge allowed the claim, finding that there had been inadequate levels of supervision at the worksite and a culpable failure to take steps to intervene and suppress the fight expeditiously. However, the High Court overturned the decision, finding that the fight could not have been anticipated, and that the relevant standard of care did not require the permanent presence of a supervisor at the worksite.

In *XU v XV* [2008] SGDC 220, an employee brought a claim in negligence against her employer as she had been sent on a work trip where she was raped by a business associate of the employer. However, the court dismissed the claim, holding that the employer had not breached its duty to provide a safe place of work as it had taken adequately reasonable steps to ensure the employee was not exposed to a dangerous or unsafe system of work.

It would thus appear from local case law that a claim of negligence could possibly succeed but that it arguably would be restricted to instances where such damage from or instances of harassment would be "anticipated" (as per *China Construction*) and where "adequate steps" (as per *XU v XV*) had not been taken. Of course, what would constitute "adequate steps" for the purposes of preventing an instance of harassment has not been tested in the local courts yet.

Implied Terms

An employer may also be liable for breach of contract for failing to adequately manage workplace harassment. In particular, it is an implied term of the contract of employment that an employer will not conduct itself in a manner calculated and likely to damage the relationship of confidence and trust between employer and employee.

In *Bracebridge Engineering Ltd v Darby* [1990] IRLR 3, an employee had complained to her employer of an incident of sexual harassment by a fellow employee, but it was decided that no action would be taken. The UK Employment Appeals Tribunal held that the employer had breached its implied term of trust and confidence by failing to take the

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complaint seriously, highlighting that trust and support is extremely important for female staff where sexual discrimination and investigation is concerned.

From a brief review of the existing state of the law in Singapore, there does seem to be a lacuna in the statutory regime on harassment, as workplace harassment and the relevant duties and liabilities of the employer are not specifically addressed. In addition, employees may lack an avenue to pursue a civil claim of vicarious liability against an employer for acts of harassment. While alternative common law remedies may technically be available to an aggrieved employee, these remedies require the complainant to first bring suit against his/her employee and navigate the judicial system—a route that employees may find too intimidating and financially prohibitive.

Managing Workplace Harassment; Building Frameworks for the Future

It is important for employers to develop a system which adequately addresses workplace harassment. The benefits of properly implementing such a zero tolerance of harassment framework and policy at the workplace are clear—a working culture which values and protects mutual respect, people-centeredness and understanding will sustain and generate a much more productive workforce.

As such, employers would be well advised to consider formally adopting the principled terms of the Tripartite Partners' Advisory, which gives a reasonably detailed guide to managing harassment. In particular, employers ought to implement the recommendations of the Advisory:

- (i) Develop a harassment prevention policy, and communicate it clearly to all levels of the organisation.
- (ii) Provide information and training on workplace harassment, including what constitutes harassment, and what to do if faced with potential harassment.
- (iii) Implement reporting and response procedures, including a harassment reporting line, investigation procedures, and proper closure.

Complaints should be taken very seriously, and should be followed up with comprehensive and fair investigations. If an employer is aware that an employee is in any way being harassed by a fellow employee, or third party such as a client, customer or vendor, they should take all possible measures to ensure that the victim receives sufficient support and protection from such behaviour.

Concluding Words

There is a rising tide of awareness of and retaliation against harassment in the workplace, and in order to protect themselves as well as their employees, employers must ensure that their organisations are properly outfitted with the appropriate legal frameworks, processes and training to prevent and manage workplace harassment.

For further questions, please feel free to contact our team below.

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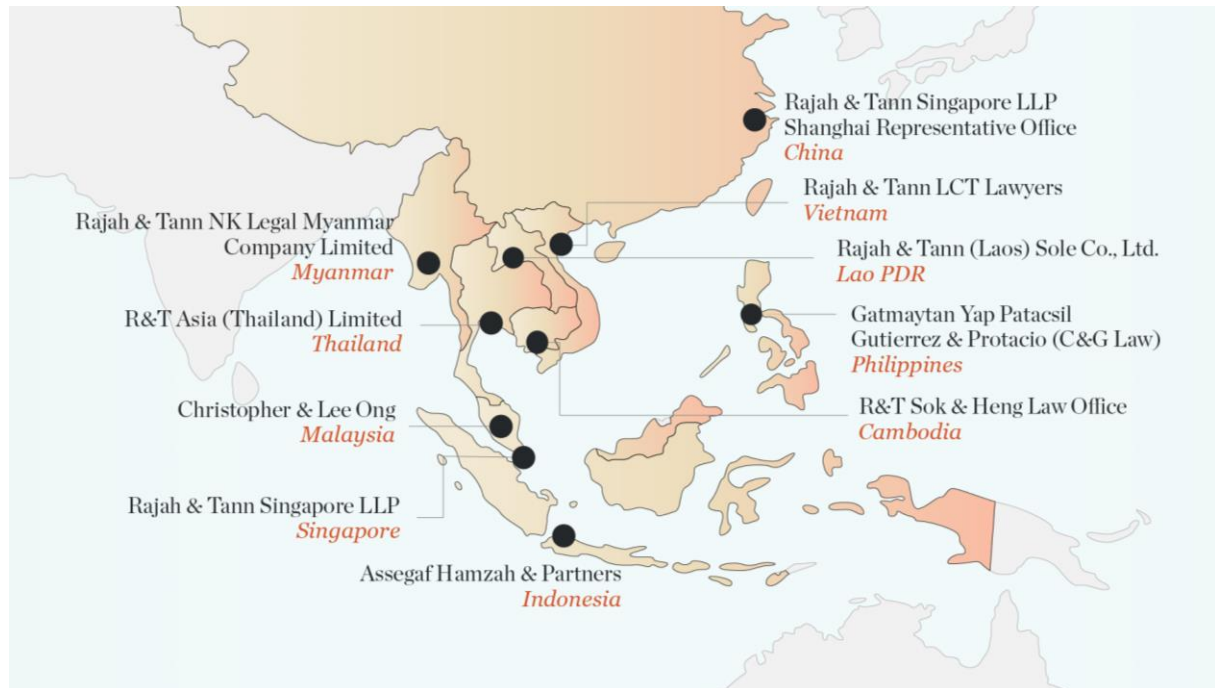
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