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A REVIEW ON THE PROVISIONS PERTAINING TO SEXUAL HARASSMENT UNDER THE EMPLOYMENT ACT 1955

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Sexual harassment in the workplace is an apparent problem that has a substantial influence on people in the worldwide labour market. Sexual harassment includes a wide range of behaviours, including but not limited to unwelcome sexual approaches, solicitation of sexual favours, and a variety of verbal or physical expressions of sexually charged behaviour. Employment Act 1955 has been amended to tackle the issue of sexual harassment, and it has been amended several times to strengthen the law to combat this issue. However, the question whether the amendments made to Employment Act 1955 were good enough to settle the issue. There might be more action and changes needed to be done to strengthen the Employment Act 1955 in order to help both employers and employees in reducing the case of sexual harassment in workplace. The sexual harassment provision in the Employment Act 1955 needs to be objectively reviewed as to the right of the complainant and also the justice that follow through investigation towards the complaint. This is important as Employment Act 1955 is the one of the statutes that regulates relationship between employer and employee, with addition to its function to protect the employee.

Keywords:

Employment Act 1955, Sexual Harassment, Employer, Employee

Introduction

Background and Context of the Employment Act 1955

The Employment Act 1955 (EA 1955) regulates the relationship between employers and employees in Malaysia (Hassan et al., 2023). The EA 1955 has been amended over time to follow the constant development of the workforce.

EA 1955 was first introduced on June 1, 1957. It governs the relationships between employers and employees. The EA 1955 protect employees in regards to their terms and conditions of service. Several amendments have been made to the Act over the years, with the latest being the Employment (Amendment) Act 2022, which took effect on January 1, 2023.

Definition of Sexual Harassment under the EA 1955

The original EA 1955 contained no specific provisions regarding sexual harassment in the workplace. In 2010, Section 2 of the EA 1955 was amended to include a new definition of "sexual harassment" 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"¹. The latest amendments to the Employment Act of 1955² include provisions regarding sexual harassment on the job. Employers have been required to establish notice for sexual harassment under this amendment to raise awareness among employees. This amendment is being made to provide better protection against sexual harassment in the workplace for employees and ensure that employers take appropriate steps to prevent tackle the issue of sexual harassment in the workplace.

Overview of Sexual Harassment in the Workplace

Prevalence of Sexual Harassment in the Workplace

Sexual harassment in the workplace is a serious issue that affects employees across the world (Mallow, 2013). Sexual harassment encompasses a wide range of behaviours, such as unwelcome sexual advances, solicitation of sexual favours, and many forms of verbal or physical sexual activity (Mallow, 2013). Sexual harassment in workplace can occur between employees, or between employer and employees.³ Sexual harassment in the workplace can be classified into three interrelated dimensions: gender harassment, sexual coercion, and unwanted sexual attention (Yie & Ping, 2021). Gender harassment encompasses a broad spectrum of verbal and non-verbal actions that belittle and demean women, without the intention of fostering sexual cooperation (Fitzgerald, Lauren, Gold, & Ormerod, 1988). Unwanted sexual attention includes both verbal and non-verbal actions that are hurtful and unwelcome. Sexual coercion can be described as the act of demanding sexual compliance in exchange for job-related considerations (Aina-Palemo, Oke, & Alade, 2021).

Effects of Sexual Harassment on Victims and the Workplace

Sexual harassment can have serious negative effects on victims, including emotional distress, decreased job satisfaction, and decreased productivity (Mallow, 2013). Sexual harassment can exert many repercussions on female employees, encompassing both physical and mental dimensions. These may manifest as adverse impacts on physical performance and mental well-being, characterised by feelings of embarrassment, shame, sadness, diminished self-esteem, reduced job satisfaction, and compromised sense of safety (S. Baqutayan, et al., 2021). Sexual harassment can give rise to several negative consequences, such as detrimental health outcomes, less dedication, increased absenteeism, subpar job performance and resignation (Hamin et al., 2022).

¹ Section 2 of Employment Act 1955.

² Employment (Amendment) Act 2022

³ Section 81A of Employment Act 1955

Studies have shown that sexual harassment affects all employees, not just the victims (Au, Dong, & Trembley, 2023). It can harmfully affect organizational culture by creating a stressful environment for all workers (Yie & Ping, 2021). Victims may have the perception that organisations exhibit a lack of concern towards their well-being, hence fostering unfavourable presumptions towards organisational conduct and principles pertaining to justice and equity. The outcome may manifest as a decline in confidence and loyalty towards the organisation and its management, leading to a decrease in production and an increase in absenteeism.

Provisions of the Employment Act 1955 On Sexual Harassment

Complaints Procedure for Sexual Harassment

Complaint of sexual harassment means any complaint relating to sexual harassment made by an employee against another employee, by an employee against any employer, or by an employer against an employee⁴.

EA 1955 explain in detail the complaint procedures for sexual harassment in the workplace, where once a complaint of sexual harassment is made, the employer needs to investigate it. Any refusal needs to be accompanied with reason in writing within 30 days of the complaint. The complainant will still be able to make a complaint to Director General of Labor (Director), where the Director may agree with the decision of the employer or instruct employer to carry out investigation⁵.

If the employer proceeds with the investigation, and it is proven that the sexual harassment did happen, the employer can take disciplinary action which include dismissal without notice, downgrading the employee, or any other lesser punishment⁶. This is in line with section 14 of EA 1955 where the same disciplinary actions are provided for misconduct by the employee.

There is also procedure if a complaint made against an employer. The complaint can be made directly to the Director, where the Director will inquire to such complaint himself. However, the Director can may refuse to inquire of such complaint if the complaint has previously been inquired into by him and no sexual harassment has been proven, or he is of the opinion that the complaint of sexual harassment is frivolous, vexatious or is not made in good faith. The refusal shall be informed to the complainant within 30 days in writing⁷.

The Ministry of Human Resources has introduced the Code of Practice on the Prevention and Eradication of Sexual Harassment in the Workplace (the Code) in 1999. Its purpose is to offer employers guidance on creating internal mechanisms within their organisations to effectively address and eliminate instances of sexual harassment in the workplace. In regard to complaint procedure of sexual harassment in workplace, the Code has urged a workplace to create a complaint or grievance procedure to deal with the problem. Since there are various types of sexual harassments, employers are encouraged to establish separate complaint procedure to deal specifically to each complaint. The Code had determined that normal complaint procedure is proved to be unsuitable for sexual harassment complaint. (Ministry of Human Resources, 1999).

⁴ Section 81A of Employment Act 1955

⁵ Section 81B of Employment Act 1955

⁶ Section 81C of Employment Act 1955

⁷ Section 81D of Employment Act 1955

Obligations of Employers under EA 1955

When an employer receives a complaint of sexual harassment, they are obligated to initiate an investigation into the matter⁸. However, there are circumstances under which they can refuse to investigate, but this refusal must be justified in writing. Reasons for refusal could include a belief that the complaint is frivolous, vexatious, or not made in good faith. Any refusal to investigate need to be given reasons in writing such as the employer is in the opinion that the sexual harassment is frivolous, vexatious or is not made in good faith⁹. This requirement for written justification ensures transparency and accountability in handling such sensitive matters.

In the event that the employer declines to investigate and provides written reasons, the complainant retains the option to escalate the matter to the Director¹⁰.

The Director will then evaluate the situation and may instruct the employer to proceed with an inquiry if they determine that the complaint warrants further investigation. This additional layer of oversight helps safeguard against unjust dismissals of valid complaints.

Conversely, if the Director concurs with the employer's decision not to investigate, they will communicate this decision to the complainant, indicating that no further action will be taken. This procedural framework aims to balance the rights of both the complainant and the accused while ensuring that legitimate cases of sexual harassment are appropriately addressed and providing a mechanism to challenge unjustified refusals to investigate. Ultimately, it fosters a fair and equitable workplace environment.

Under the latest Employment (Amendment) Act 2022, an employer is required to prominently display notice to raise awareness about sexual harassment at all times at the place of employment.

Penalties for Non-Compliance with the EA 1955

Under the stipulations outlined, employers are legally bound to adhere to certain responsibilities concerning complaints of sexual harassment in the workplace. Failure to meet these obligations can result in significant penalties, with employers potentially facing fines of up to RM50,000¹¹.

Firstly, an employer is obliged to conduct a thorough inquiry into any complaint of sexual harassment brought to their attention¹². This is essential to ensure a fair and just resolution to such serious allegations and to maintain a safe and harassment-free work environment.

Additionally, if an employer decides not to conduct an inquiry, they are obligated to provide the complainant with a reasonable reason for this decision¹³. This requirement enhances transparency and accountability in the handling of complaints.

⁸ Section 81B of Employment Act 1955.

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ Section 81F of Employment Act 1955.

¹² *Ibid.*

¹³ *Ibid.*

Furthermore, if the Director issues a directive for an inquiry to be conducted, the employer must comply with the direction¹⁴. This reflects the higher authority's role in overseeing and facilitating the resolution of such complaints.

Lastly, an employer must submit a report of the inquiry if directed to do so by the Director¹⁵. This reporting ensures that the appropriate authorities are kept informed and can take necessary actions to address the situation.

Critical Analysis of the Part XVA of the EA 1955

Preventing sexual harassment

In term of preventing sexual harassment incident, the only provision that can help to do so is section 81H of EA 1955, where it states about the requirement for employer to display notice to raise awareness about sexual harassment at the workplace. Developing a complete sexual harassment policy, as opposed to a simple notification through notice, has the potential to significantly enhance awareness and successfully address the problem of sexual harassment (Heymann, Moreno, Raub, & Sprague, 2023). The formulation of this policy should include provisions for training, support from the organisation, and procedural instructions, with the aim of cultivating a workplace environment that is both safe and respectful (Perry, Kulik, Golom, & Cruz, 2019). By implementing this approach, it imparts knowledge to employees regarding the significance of identifying and mitigating instances of sexual harassment, thereby fostering a workplace environment characterised by reverence and responsibility. A robust policy exhibits a strong dedication to eliminating instances of harassment, safeguarding the welfare of all individuals, and fostering a workplace environment that is more inclusive and equal. (Shivakumar, 2019).

The development of a complete sexual harassment policy, rather than a simple notice, is necessary for various reasons. To begin with, the implementation of such a policy function as a proactive mechanism aimed at educating employees and stakeholders of the gravity of sexual harassment. The provided resource extends beyond a mere cautionary notice, providing comprehensive instructions regarding the definition of harassment, its detrimental effects, and strategies for both prevention and reporting. The inclusion of this educational component fosters a workforce that is more equipped with knowledge and awareness, which is essential for effectively tackling this widespread problem.

Moreover, an effective strategy encompasses not only prescriptive principles but also comprehensive training initiatives. These programmes facilitate employees in comprehending the intricacies of sexual harassment, identifying inappropriate conduct, and acquiring the skills to respond efficiently. Regular training sessions serve to strengthen the organization's dedication to maintaining a safe and respected work environment (Sabitha, 2008).

Furthermore, the implementation of a complete strategy serves as a structured approach to effectively manage and resolve instances of harassment. The document delineates explicit protocols for the submission, examination, and resolution of grievances, thereby guaranteeing an equitable and uniform methodology. The establishment of transparency fosters a sense of

¹⁴ *Ibid.*

¹⁵ *Ibid.*

trust among employees, hence increasing the likelihood of their willingness to express their problems, as they see that their issues will be addressed in a serious and equitable manner.

Furthermore, the provision of organisational support is of utmost importance. In order to effectively address the issue of harassment, it is imperative for leadership to proactively advocate for the policy and exhibit a strong dedication to a zero-tolerance approach. It is imperative to provide comprehensive training to managers and supervisors in order to equip them with the necessary skills to respond correctly and offer supportive measures when occurrences are reported.

The Action of Making a Complaint

Additional requirements outlined in this Part are primarily to the subsequent courses of action that may be pursued following the occurrence of sexual harassment. Individuals who have been subjected to sexual harassment may encounter adverse psychological effects, such as emotional trauma, diminished job satisfaction, and decreased productivity (Yie & Ping, 2021). Individuals may also experience an increase in anti-social behaviour, which can have a negative impact on their professional relationships. The long-term consequences of becoming a victim can endure for a significant duration. This can cause the victim to be reluctant to lodge a complaint of sexual harassment. Reluctance to lodge a complaint may result in the failure of Part XVA of the Employment Act of 1955, as the initiation of the entire process under this Part is contingent upon the submission of a complaint. It is imperative to implement measures that ensure the safeguarding of the victim's rights while filing a complaint against the purported harasser (Fad, 2023).

Investigation of Sexual Harassment Complaint

Section 81C of EA 1955 indicates that the disciplinary action that can be taken in sexual harassment cases is the same as ones in section 14 of EA 1955. Section 14 of the EA 1955 states that before disciplinary action can be taken, an inquiry need to be done.

Although the absence of inquiry under section 14 of EA 1955 is not fatal in regard to the dismissal without notice due to misconduct¹⁶, it is very fortunate that under Part XVA, the employer shall investigate whenever they receive sexual harassment complaint. The presence of commonalities in the disciplinary measures applicable to section 14 and Part XVA of EA 1955 does not imply that complaints of sexual harassment will not undergo investigation. Ensuring the absence of unfounded sexual harassment allegations is of vital importance.

While acknowledging the need of addressing sexual harassment accusations, it is also imperative to conduct comprehensive investigations into each complaint to prevent any potential instances of false allegations of sexual harassment victimisation.

It is important to acknowledge that the employer and director possess the authority to determine whether to initiate an investigation into a sexual harassment allegation. In order to safeguard against potential misuse, it is incumbent upon the employer or director to furnish a justifiable reason when opting not to pursue the complaint¹⁷.

¹⁶ Dreamland Corporation (M) Sdn Bhd v Choong Chin Sooi & Anor [1988] 1 MLJ 111.

¹⁷ Part XVA of Employment Act 1955.

Conclusion

The EA 1955 is a significant statutory framework in Malaysia that regulates the relationships between employers and employees. Over the course of its existence, the subject matter has been subject to modifications in order to align with shifts in the labour market. The most recent revisions, which took effect on January 1, 2023, pertain to the issue of sexual harassment within the workplace. Sexual harassment is characterised as the occurrence of undesired sexual conduct within the context of professional responsibilities. It is now mandatory for employers to develop institutional processes to manage complaints pertaining to sexual harassment.

The complaint procedures pertaining to cases of sexual harassment necessitate comprehensive investigations, wherein any rejections must be accompanied by written justifications within a specified timeframe of 30 days. In the event that harassment is substantiated, disciplinary measures such as termination may be implemented. Employees have the option to lodge complaints against their bosses, which can be subject to internal investigation or investigation by the Director.

The Code offers guidance, while also asserting the insufficiency of the traditional complaint method. It is imperative for employers to conduct thorough investigations in response to complaints, as failure to do so may result in the initiation of an inquiry by the Director in order to prevent unwarranted dismissals of legitimate concerns. The objective of the process is to achieve an equitable equilibrium between the rights of complainants and the rights of accused parties.

According to Section 81H of the EA 1955, companies are required to prominently post notices regarding sexual harassment in order to promote and increase awareness among employees. Nevertheless, the implementation of a thorough sexual harassment policy accompanied by training programmes is of utmost importance. It is imperative for organisational leaders to actively endorse and uphold this policy, thereby exhibiting an unwavering commitment to zero tolerance.

The examination of the long-term consequences for victims is of utmost importance. Section 81C of the EA 1955 delineates the disciplinary procedures that are to be implemented in cases of sexual harassment, which bear resemblance to the provisions stipulated in Section 14 EA 1955. Upon receipt of complaints, employers are obligated to carry out investigations, so differentiating this procedure from the termination without notice as outlined in section 14. To provide a concise overview, it is noteworthy that the EA 1955 has undergone revisions aimed at effectively tackling the issue of workplace sexual harassment. These amendments have entailed the introduction of structured mechanisms for lodging formal complaints. It is imperative for employers to conduct thorough investigations into complaints, thereby fostering a work atmosphere that prioritises safety and provides support to victims. In order to effectively address the issue of sexual harassment, it is imperative to prioritise awareness, implement comprehensive policies, and exhibit strong leadership.

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