

## THE TORT OF SEXUAL HARASSMENT

The Malaysian Federal Court in the case of *Mohd Ridzwan bin Abdul Razak v Asmah bt Hj Mohd Nor*<sup>1</sup> recently delivered a landmark judgment, ruling that victims of sexual harassment will now be able to seek civil remedies under the tort of sexual harassment. This is the first case involving a sexual harassment victim at a workplace who sought remedy from the civil court. There was previously no avenue for a civil action for sexual harassment under Malaysian law.

In this article, we examine the facts, issues and rulings of the case.

**INTRODUCTION** The law on sexual harassment is contained in a non-binding guideline, namely the Malaysian Code of Practice on the Prevention and Eradication of Sexual Harassment in the Workplace (“the Code”). In addition to the Code, a recent amendment to the Malaysian Employment Act 1955<sup>2</sup> merely imposed a duty on employers to adequately deal with sexual harassment complaints at their workplace.

**THE FACTS** The plaintiff and the defendant were employees of a company (“the Company”). The defendant reported directly to the plaintiff. In July 2009, the defendant lodged a complaint (“the Complaint”) to the Chief Executive Officer of the Company claiming sexual harassment by the plaintiff. An inquiry was conducted, and although there was insufficient evidence to warrant disciplinary action, a strong administrative reprimand was issued to the plaintiff.

The plaintiff, in December 2011 issued a writ against the defendant seeking, *inter alia*, a declaration that he had not sexually harassed her and that he had been defamed by the Complaint made by the defendant. The defendant filed her defence and also a counterclaim against the plaintiff. In her counterclaim, the defendant particularised the sexual harassment. The defendant also pleaded that her allegations were upheld by their employer and that a serious disciplinary warning was issued to the plaintiff pursuant to the Complaint. The defendant counterclaimed for damages predicated on sexual harassment.

The High Court found that the plaintiff failed to prove his defamation claim against the defendant and allowed the defendant’s counterclaim. This was upheld by the Court of Appeal. Dissatisfied, the plaintiff appealed to the Federal Court.

**THE ISSUE** The main issue for consideration was whether the defendant had a valid cause of action in a civil claim on the grounds of sexual harassment.

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<sup>1</sup> [2016] 4 MLJ 282

<sup>2</sup> Employment (Amendment) Act 2012

**THE DECISION** In the High Court, the plaintiff's claim was dismissed as he had failed to prove that the defendant had defamed him through the contents of the complaint letter. The defendant's counterclaim, however, was allowed and she was awarded damages amounting to MYR120,000 since there was a direct link between her mental, physical and emotional pain and suffering, and the sexual harassment committed by the plaintiff. However, no clarification was made as to the pleaded tort of sexual harassment.

The decision of the High Court was upheld by the Court of Appeal. It was further held that where acts of sexual harassment are serious to cause adverse psychological effect on the victim, those acts would fall within the tort of intentionally causing nervous shock. Therefore, since the plaintiff's actions did amount to sexual harassment, and that the plaintiff had knowledge of the defendant's vulnerability which had adversely affected her, the plaintiff's actions fell within the tort of intentionally causing nervous shock.

On further appeal to the Federal Court, it was held that since the tort of sexual harassment was pleaded at the High Court, coupled with the fact that there was ample evidence to establish it, the introduction of the tort of harassment was justified.

**CONCLUSION** The Federal Court decision proves to be significant as the recognition of the tort of sexual harassment provides an avenue for victims, both women working in the formal and informal working sector, to seek civil remedy, which goes beyond the remedies provided under the Code and the Malaysian Employment Act 1955.