Hands off women

Malaysia plans to make sexual harassment in the workplace an offence through an amendment to the Employment Act that has been tabled for first reading in Parliament. Women's groups want a separate law altogether but concede that the amendment is a good start. The Malaysian Employers Federation is not so supportive, however.

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Too little bite: Women's groups have been pushing for a separate law on sexual harassment for about nine years now so they are, not surprisingly, not happy with how this has been reduced to a mere amendment to an existing law. — AP

KINABATANGAN MP Datuk Bung Mokhtar Radin is all for the proposal to make it mandatory for employers to look into complaints of sexual harassment at the workplace.

"Some people think I am anti-woman but I am not," he quips.

Bung Mokthar says the amendment would protect employees from sexual harassment and give employers guidelines on how to deal with it.

But what about the infamous sexist comment he made in Parliament back in 2007 about Batu Gajah MP Fong Po Kuan "leaking" every month? The comment, which was in reference to female menstruation, got Fong, other female MPs and women groups all riled up against him.

"I realise I made a mistake, so I apologised for it. Everyone makes mistakes. I am human. *Mana ada* perfect (I am not perfect)," he says.

His only concern, he adds, is that the sexual harassment clause might be abused by some to slander a colleague for some reason or other.

Even so, he is 100% supportive of the amendment because he is confident that companies would investigate a sexual harassment complaint "from all angles".

Way too slow

Women's groups have been pushing for a separate law on sexual harassment for about nine years now so they are, not surprisingly, not happy with how this has been reduced to a mere amendment to an existing law – the Employment Act.

"Why does it take so long when it is an issue that affects women?" asks Betty Yeoh, programme manager of Awam. (It took 11 years for Domestic Violence to be made into an Act.)

"It has taken nine years for sexual harassment to appear in some form of the law. It is as if the thinking is that 'well, it's a women's issue so never mind'," she says.

Women's Aid Organisation executive director Ivy Josiah says offices in Malaysia are run and dominated by men, so she is not surprised there is resistance from employers to the proposed amendment.

"They think it will create an environment where every single flirtation will be complained about and the office will be too occupied addressing it.

"Bosses think flirtation and dirty jokes are harmless and that teasing a woman about her body parts is part and parcel of socialising when it is really disrespectful to women.

"They do not seem to understand that women do not make complaints easily. Men resist everything – there was the same kind of resistance against the Domestic Violence Act," she says.

» Bosses think flirtation and dirty jokes are harmless«

IVY JOSIAH

But both Yeoh and Josiah agree that the amendment is at least better than having nothing at all.

Actually, Malaysia has had a code on sexual harassment in the workplace since 1999.

It is comprehensive (in fact, more comprehensive than the proposed amendment) but the problem with a code is that it is not binding.

So it is entirely up to companies to adopt it.

Going by figures from the Malaysian Employers Federation (MEF), not many have. Only 400 of the 450,000 registered and active companies have adopted and implemented the code.

But, according to MEF executive director Shamsuddin Bardan, the actual figure is "very much higher".

He explains that the low number is simply because there is no formal process for companies to inform the Labour Department when they adopt the code and set up their internal mechanisms.

Shamsuddin himself is against legislating sexual harassment and wants it to remain a code.

He believes legislating sexual harassment and spelling out different types of punishment will only dilute the seriousness of the issue.

"For me, sexual harassment is very serious and only one punishment should be meted out, and that is dismissal."

Disagreeing, Awam's Yeoh stresses that a code – no matter how good or comprehensive – is toothless when it is not backed with enforcement.

And, she adds, you can't have one solution – i.e. dismissal – for all cases because the punishment would have to depend on the gravity of the offence.

"Do you dismiss someone for making dirty jokes or if he hugs someone?" she asks.

The proposed amendment outlines a list

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Divided over penalty imposed

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of the types of punishment the employer can take if the complaint is found to be true.

The company can dismiss the harasser without notice, demote the person, suspend him without wages for up to two weeks, or impose any other lesser punishment that it deems fit and just.

The amendment also comes with a bite.

If an employer fails to look into an employee's complaint of sexual harassment, the company can be fined up to RM10,000.

For Yeoh, the RM10,000 penalty is too minimal and trivialises sexual harassment.

She draws a comparison with the Occupation Safety and Health Act where, if the employer fails to comply with regulations, the penalty is a lot higher, from RM20,000 onwards.

"Sexual harassment is a health and safety issue too. When the person has fear and trauma, it affects her work and health. So why is it only RM10,000?"

False accusations

On the other hand, MEF's Shamsuddin says the penalty is too harsh.

"What happens if, in a year, you have 10 cases in the company and all end up at the Labour Department, which says 'yes, you have not done enough about the complaint and wants to impose that penalty? That is not being fair to the company," he argues.

And what happens if an employee files a complaint against a colleague which turns out to be baseless and untrue?

"The accused may be a family man and this might break up his marriage," says Shamsuddin, who describes the amendment as lopsided.

"Isn't it only fair that the complainant making a baseless accusation be penalised under the law too?"

But Human Resources Deputy Minister Datuk Maznah Mazlan, who tabled the amendment, feels there is no need to include this in the law.

She points out that in such a situation, the company can take disciplinary action against the employee for making false accusations.

As for the argument from women's groups that the RM10,000 penalty is peanuts for companies, Maznah believes the amount is adequate.

"Even a RM1,000 fine for not doing enough to protect employees in the work place is a slap in the face for the company. It shames them," she says.

There are some concerns among women's groups that the amendments are limited to the lower income group – those earning RM1,500 and below – and would not cover those at management level who do not come under the Employment Act.

But Maznah says this is not the case.

Section 81(g) of the Act states very clearly that it covers "every employee employed" irrespective of wages – local and foreign alike, she stresses.

»If we take action, we are liable to the dismissed employee; if we don't, we are open to penalty from the Labour Department«

SHAMSUDDIN BARDAN

For Shamsuddin, the proposed amendment is really not clear on many aspects, including the Standard Operating Procedure of an investigation.

So companies are left wondering what constitutes a "satisfactory investigation".

What happens, he asks, if the company does investigate a complaint but concludes in its Domestic Inquiry (DI) that there is no truth to the allegation but the employee is not happy and takes it up with the Labour Department?

"Can the Labour Department say that the company has not done enough in the process of investigation and because of that, the company is liable for the RM10,000 penalty?

"How can we as a company be sure that whatever we do will meet the standard as required by the Ministry and Labour Department?"

This legislative effort to rein in sexual harassment is not sincere, holistic, and merely looks like lip service, he adds.

Shamsuddin is also concerned that the sexual harassment clause is going to put companies in a Catch 22 situation.

He says in cases where companies have taken the hard stand on sexual harassment and sacked the perpetrator, the sacked employee has gone to the Industrial Court seeking to be re-instated.

And when the case comes up in the Industrial Court four or five years later, the onus will be on the company to prove its case.

By this time, the complainant might have already left the company or she might have got married, started a family and wants to put the past behind, and is unwilling to testify.

Bung Mokhtar: Concerned that the sexual harassment clause might be abused by some to slander a colleague for some reason or other.

Maznah: 'Even a RMI,000 fine for not doing enough to protect employees in the workplace is a slap in the face for the company.'

Yeoh: 'Sexual harassment is a health and safety issue too. When the person has fear and trauma, it affects her work and health.'

"Sexual harassment is not easy to prove. A company may take the complaint very seriously and act on it, but in the Industrial Court it is left at the mercy of the so-called harasser to prove the case.

"Even if you had something solid at your own inquiry, this may no longer be so when you go to court.

"We may have all the papers and documentation for the domestic inquiry but the problem is documentation does not speak and the DI notes do not answer back.

"It is just a record of what transpired. The Industrial Court proceeding is a hearing all over again and is not based on your earlier findings or DI. You have to prove your case.

"And the court can say 'since you are not bringing witnesses concerned, we don't accept the documents' and, of course, they'll then listen more to the dismissed employee.

"If he wins, we will have to pay all his back wages – compensation in lieu of reinstatement – and it can be very costly.

"And if we win, it will be a hollow win because we have to pay the lawyer's fees. And what about the cost to management, having to go to court and prepare the case?

"So we are caught. If we take action, we are liable to the dismissed employee; if we don't, we are open to penalty from the Labour Department."

But Awam's Yeoh sees no problem there.

She says a witness' testimony in a domestic inquiry is not just verbal and there is proper documentation with each statement signed off by the persons involved. Minutes are also taken and signed at the end of each day.

"There is sufficient documentation. Companies have used the minutes of their domestic inquiry to present to the Industrial Court as evidence. And the court has ruled based on that for other cases of misconduct," she points out.

"So why should it be different with sexual harassment?"

Maznah also argues that even if the sexually harassed employee has left the company's employment, she can still be summoned to testify in the Industrial Court.

Another point highlighted by Shamsuddin are situations in the workplace where a particular behaviour or exchange between colleagues is acceptable at one point in time (for example, when they were going out) but becomes unacceptable later on (like after they have broken up).

The company also has to consider these dynamics when dealing with a sexual harassment complaint if it comes from one of them against the other, he says.

He also questions if action can be taken when an employee enhances herself with botox, plastic surgery and other procedures and then dresses provocatively at the work place, thereby "sexually harassing" those in the work force by enticing them through modifying her looks.

"If it is natural and she is a beautiful woman, there is no problem. Nobody can blame God for giving that body and looks to that person.

"But if it is because of modification, she should be responsible for it. If the way she looks disturbs other co-workers, she can be accused of sexually harassing others," he argues.