Half-baked Policies Won't Do

Under the Sex Discrimination Ordinance (SDO), not only is sexual harassment between employees unlawful, but their employer can also be held liable for the harassing act, unless reasonably practicable steps have been taken to prevent it.

The Complaint

Kay was employed by a global insurer (the Insurer) with office in Hong Kong. Five years into Kay's employment, her colleague Mr X was assigned to the workstation next to hers, with only a neck-level partition between them.

Kay alleged that over the subsequent eight months, Mr X sexually harassed her on multiple occasions by spreading his legs open towards her, staring at her chest, putting a piece of body hair on her desk, and sending her lewd and vulgar texts on SMS, among other acts. She expressed her disgust and repulsion every time they occurred.

When she filed a complaint to senior management of the Insurer, however, it was dismissed without any internal investigation. She was only given the option of swapping seats with another colleague, who previously sat directly behind her.

What the EOC did

Kay lodged a complaint with the EOC, alleging that Mr X had sexually harassed her in the workplace, and that the Insurer should be held vicariously liable for his acts. After the parties failed to reach a settlement through conciliation arranged by the EOC, Kay applied successfully for legal assistance from the EOC.

On behalf of Kay, the EOC's Legal Service Division (LSD) took part in negotiations with a law firm that represented both Mr X and the Insurer. The firm argued that even if Mr X's primary liability was proven, the Insurer could raise a defence under the SDO as it had issued an internal employee handbook, a business conduct policy and a whistle-blowing policy (collectively "the Documents") that covered issues of sexual harassment, which would constitute "reasonably practical" steps to prevent the alleged acts.

On examining the Documents, the LSD took the view that they were inadequate. For instance, they did not provide any definition or examples of sexual harassment, nor had they established procedures or designated personnel to handle complaints. The Insurer also had not provided any relevant training for its employees. The mere fact that Kay and Mr X had confirmed their receipt of the Documents could not plausibly amount to the Insurer having taken reasonably practicable steps to prevent Mr X's alleged acts.

Furthermore, the Documents were dated after the occurrence of some of the alleged acts. In other words, the measures taken by the Insurer after the alleged incidents had occurred were at best remedial in nature, rather than preventive. They would not be sufficient for the Insurer to avail itself of the statutory defence and discharge its vicarious liability.

Eventually, Kay agreed to settle her complaint against both Mr X and the Insurer, with the latter paying her monetary compensation on a "without admission of liability" basis.

📌 Points to Note:

- Employers should note that having an inadequate and out-of-date anti-sexual harassment policy, and with no proper relevant training provided to their employees, may fall a long way short of establishing that "reasonably practicable" steps were taken to prevent employees from engaging in acts of sexual harassment. The statutory defence is therefore unlikely to be available in these circumstances.

- The EOC provides anti-sexual harassment training for both public and private organisations on an ongoing basis. For details, please visit the EOC website.