

Conciliation Case

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Power Imbalance

THE COMPLAINT

Miss C never imagined that she would leave the trading company she had worked with for over 10 years in such a way. "My performance was always consistently good and I was promoted three years ago. Due to the nature of my job, I had to engage in social activities outside the office, as well as overseas business trips with Mr. Cheung, my boss who is the manager of the company. Mr. Cheung frequently asked me to sit next to him, and he made every chance to touch me. He even described the shape of my body in front of the others. I gave him hostile looks and it should be obvious to him that his behavior was totally unwelcome. Later I avoided seeing him but he threatened that I would be demoted if I did not talk to him face to face," said Miss C.

Miss C was distressed and suffered from insomnia. She could no longer concentrate on her work. Her complaint to the Personnel Department was ignored. She then sought help from the senior manager, who promised to transfer her to work in a subsidiary, holding a post similar to her present job. However, she was eventually offered a junior post with lesser pay. She then left the company.

WHAT THE EOC DID

Miss C lodged a complaint with the EOC against her boss Mr. Cheung for sexually harassing her, and against the company for (a) victimizing her, i.e. treating her less favourably, and (b) being held vicariously liable for the unlawful act of its employee.

The EOC's case officer explained to Miss C the complaint handling and conciliation procedures. The provisions of "sexual harassment" and "victimization" under the Sex Discrimination Ordinance (SDO) were also explained to Mr. Cheung and the company. After rounds of negotiations, the three parties agreed to conciliate the matter at early stage. The trading company agreed to give Miss C a work reference letter and a monetary payment approximately equal to her 3 years' salary (including annual leave, long service payment and ex-gratia payment). Mr. Cheung stressed he never had any intention of offending Miss C. However, he did apologise in writing for his insensitivity to Miss C's feelings.

WHAT THE LAW SAYS

Sexual harassment interferes with a person's work performance, can cause stress and sometimes forces people to leave their jobs. Under the SDO, sexual harassment in employment is unlawful. Sexual harassment includes any unwelcome behavior of a sexual nature which a reasonable person regards as offensive, humiliating or intimidation. Acts of sexual harassment may be direct or indirect, physical or verbal. Examples of such acts could be indecent or suggestive remarks, inappropriate touching and demands for sexual favours, etc.

While employees of an organization are personally liable for their own acts of sexual harassment under the law, an employer is also vicariously liable for the unlawful acts of sexual harassment committed by employees in the course of their employment, whether with or without knowledge or approval of such behavior. It is also unlawful for employers to treat a person less favourably because he or she has lodged a discrimination complaint under the SDO. This treatment is defined as "victimization" in the SDO. In this case, the trading company was at risk of being regarded as having victimized Miss C by asking her to take up a junior post with lesser pay.

和解案例

通訊 2008 年 4 月 第 45 期

權力失衡

投訴內容

阿詩從未想過會在這情況下離開她服務超過十多年的貿易公司。她說：「我一向工作表現良好，三年前獲得晉升。由於工作需要，我經常跟上司張經理出外應酬或到外地公幹，其間他多次要求與我同坐然後借故觸碰我的身體，還當眾對我評頭品足。從我厭煩的目光，他是清楚知道我絕不接受他這些行為，後來我更迴避他，他於是對我說如果我不肯跟他『面對面溝通』，便可能被降級。」

阿詩長期面對這種威脅，導致失眠、精神不能集中。她向人事部投訴卻不受理。後來她向高層求助，公司承諾會調派她到另一分公司擔任一個與現時工作相約的崗位，結果卻只獲配一個職級和待遇都更低的職位。阿詩最後選擇了離開公司。

平機會的行動

阿詩認為張經理及這間貿易公司是基於她曾作出性騷擾的投訴而給予她較差的待遇，所以她除了向平機會投訴張經理性騷擾外，同時投訴該公司對她作出「使人受害」的歧視行為，並要求僱主為張經理的性騷擾行為負上轉承責任。

平機會向阿詩解釋了處理投訴及調解程序，又向張經理及公司解釋《性別歧視條例》中有關性騷擾及「使人受害」的條文。經平機會個案主任多次與三方磋商後，他們最終同意以提早調解的方式解決問題。公司答應發出一封工作證明書給阿詩，並以相約於阿詩三年薪酬（包括有薪年假補償、長期服務金及特惠金）作為和解條款。至於張經理，雖然他指稱那些冒犯阿詩的舉動只是無心之失，但他願意為忽略了阿詩的感受而致函道歉，個案終於得以解決。

法理依據

性騷擾往往影響員工的工作表現，令人深受壓力，甚至會逼使員工離職。根據《性別歧視條例》，僱傭範疇內的性騷擾實屬違法行為。性騷擾包括任何涉及性而不受歡迎的行徑，而在一名合理的人眼裡，會預期這些行為令人感到被冒犯、侮辱及受威嚇。性騷擾行為可分為直接、間接、身體上或口頭上等等。例子包括：猥褻或挑逗性的言論、不恰當的身體接觸及提出涉及性方面的要求等。

根據法例，僱員需為自己的性騷擾行為負上個人責任；另一方面，不論僱主是否知悉或批准有關行為，僱主亦需為僱員在職期間所作的違法性騷擾行為負上轉承責任。此外，若僱主向提出歧視投訴的僱員作出較差的待遇，即法例中所指的「使人受害」的情況，亦屬違法。在這個案中，阿詩投訴後便被貿易公司要求調往一個薪酬及職級都較差的工作崗位，令阿詩蒙受較差的待遇，這可能是屬於「使人受害」的情況。

和解案例

通讯 2008 年 4 月 第 45 期

权力失衡

投诉内容

阿诗从未想过会在这情况下离开她服务超过十多年的贸易公司。她说：「我一向工作表现良好，三年前获得晋升。由于工作需要，我经常跟上司张经理出外应酬或到外地公干，其间他多次要求与我同坐然后借故触碰我的身体，还当众对我评头品足。从我厌烦的目光，他是清楚知道我绝不接受他这些行为，后来我更回避他，他于是对我说如果我不肯跟他『面对面沟通』，便可能被降级。」

阿诗长期面对这种威胁，导致失眠、精神不能集中。她向人事部投诉却不受理。后来她向高层求助，公司承诺会调派她到另一分公司担任一个与现时工作相约的岗位，结果却只获配一个职级和待遇都更低的职位。阿诗最后选择了离开公司。

平机会的行动

阿诗认为张经理及这间贸易公司是基于她曾作出性骚扰的投诉而给予她较差的待遇，所以她除了向平机会投诉张经理性骚扰外，同时投诉该公司对她作出「使人受害」的歧视行为，并要求雇主为张经理的性骚扰行为负上转承责任。

平机会向阿诗解释了处理投诉及调解程序，又向张经理及公司解释《性别歧视条例》中有关性骚扰及「使人受害」的条文。经平机会个案主任多次与三方磋商后，他们最终同意以提早调解的方式解决问题。公司答应发出一封工作证明书给阿诗，并以相约于阿诗三年薪酬（包括有薪年假补偿、长期服务金及特惠金）作为和解条款。至于张经理，虽然他指称那些冒犯阿诗的举动只是无心之失，但他愿意为忽略了阿诗的感受而致函道歉，个案终于得以解决。

法理依据

性骚扰往往影响员工的工作表现，令人深受压力，甚至会逼使员工离职。根据《性别歧视条例》，雇佣范畴内的性骚扰实属违法行为。性骚扰包括任何涉及性而不受欢迎的行径，而在一名合理的人眼里，会预期这些行为令人感到被冒犯、侮辱及受威吓。性骚扰行为可分为直接、间接、身体上或口头上等等。例子包括：猥亵或挑逗性的言论、不恰当的身体接触及提出涉及性方面的要求等。

根据法例，雇员需为自己的性骚扰行为负上个人责任；另一方面，不论雇主是否知悉或批准有关行为，雇主亦需为雇员在职期间所作的违法性骚扰行为负上转承责任。此外，若雇主向提出歧视投诉的雇员作出较差的待遇，即法例中所指的「使人受害」的情况，亦属违法。在这个案中，阿诗投诉后便被贸易公司要求调往一个薪酬及职级都较差的工作岗位，令阿诗蒙受较差的待遇，这可能是属于「使人受害」的情况。