ENGLISH

Court Case

X v Melvyn Kai Fan Lai and Leigh & Orange Limited

DCEO 4/2016; [2018] HKDC 1485

BACKGROUND FACTS

The Claimant, X, works in the field of architecture. In 2007, she joined an architectural firm Leigh & Orange Limited ("the Firm"). Since April 2011, the 1st Respondent, who was then an Associate Director of the Firm, supervised X.

X alleged against (i) the 1st Respondent for unlawful sexual harassment in the course of employment, and (ii) the Firm for vicarious liability for (i). Regarding (i), X alleged the 1st Respondent committed the following impugned conduct:

a. Touching her buttocks, thighs and hand;
b. Staring and scanning at her;
c. Taking excessive photographs of her; and
d. Sending her uncomfortable text messages.

Both the 1st Respondent and the Firm denied the allegations and claimed:

1. X's claim was time barred;
2. X framed the 1st Respondent to avenge her boyfriend's termination of employment from the Firm; and
3. the Firm had taken reasonably practicable steps to prevent sexual harassment in the workplace and could invoke the statutory defence under s. 46(3) of the SDO.

COURT'S DECISION

X's claim was time barred and thus should be dismissed on the limitation ground alone. Nevertheless, the Court discussed the merits of her case. The Court gave guidance on the test of proving sexual harassment under s. 2(5)(a) of the SDO. The test has three aspects:

a. The evidential aspect: the Claimant had to establish that the event complained actually took place;
b. The subjective aspect: the event must be unwelcome to the Claimant; and
c. The objective aspect: it should have been anticipated as a matter of objective assessment that the Claimant would have been offended, humiliated or intimidated by the event.

Regarding the relationship between the subjective and objective aspects, in addition to proving that the impugned conduct was unwelcome, the Claimant must show that a reasonable person, having regard to all the circumstances, would have anticipated that the Claimant would be offended, humiliated or intimidated. Since it is for each person to define his/her own level of acceptance, it is often necessary (save for conduct that is clearly "sexual") for a complainant of sexual harassment to make known his/her rejection before repetition of a similar conduct could amount to sexual harassment.

Here, X failed to establish any sexual harassment by the 1st Respondent. Her evidence was not cogent enough to establish that the impugned conduct actually took place and/or they constituted sexual harassment.

That said, the Court disagreed with the 1st Respondent's accusation that X framed him. The Court commented that even if the 1st Respondent was exonerated, it did not mean that X had lied. It was more likely that she was over-sensitive to the 1st Respondent' s conduct than for her to deliberately lie and invent evidence to frame him.

Since X had failed to establish that the 1st Respondent committed unlawful sexual harassment in the course of employment against her, there was no basis of vicarious liability against the Firm. Therefore, the Court did not consider whether the steps taken by the Firm to avoid sexual harassment in the workplace were sufficient to satisfy the statutory defence under s. 46(3) of the SDO.

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繁體中文

法庭案例

X 訴 黎啟繁及利安顧問有限公司

DCEO 4/2016; [2018] HKDC 1485

案情背景

申索人從事建築界，於 2007 年加入一間建築公司，名為利安顧問有限公司(「顧問公司」)。自 2011 年 4 月起，第一答辯人(顧問公司當時的副董事)是她的上司。

X 指稱：(i)在她受僱期間第一答辯人向她作出違法性騷擾，以及(ii)顧問公司須就(i)負上轉承責任。就(i)而言，X 指稱第一答辯人作出以下受責難的行為：

a. 觸摸她的臀部、大腿及手；
b. 盯着她和上下打量她；
c. 拍攝過量有關她的相片；以及
d. 向她發出令人不安的文字信息。

第一答辯人及顧問公司皆否認指稱，並聲稱：

1. X 的申索已喪失時效；
2. X 誣蔑第一答辯人，以報復其男朋友被顧問公司解僱；以及
3. 顧問公司已採取合理地切實可行的步驟，以預防在工作間的性騷擾，可以援引《性別歧視條例》第 46(3)條的免責辯護。

法庭的裁決

X 的申索已喪失時效，因此應可單以時效期為由駁回，但法庭討論了其個案的可勝之處。法庭就證明《性別歧視條例》第 2(5)(a)條所指性騷擾的測試提供了指引。測試包含以下三個方面：

a. 證據方面：申索人須證實所投訴事件確實發生；
b. 主觀方面：申索人必須認為事件不受歡迎；以及
c. 客觀方面：從客觀方面的評估必須預期申索人會因事件感到受冒犯、侮辱或威嚇。

至於主觀及客觀兩個方面的關係，申索人除了須證明受責難的行為屬不受歡迎外，還須證明合理的人在顧及所有情況後，應會預期申索人會感到受冒犯、侮辱或威嚇。由於個人的接受程度因人而異，性騷擾投訴人通常須明確表示拒絕接受某行為，才能證明某持續發生的同類行為構成性騷擾(明顯涉及性的行為除外)。

在本案中，X 未能證實第一答辯人作出任何性騷擾行為，其證據因此不足以證實受責難的行為的確曾經發生及 / 或構成性騷擾。

儘管如此，法庭不同意第一答辯人稱 X 誣蔑他的指控。法庭認為即使第一答辯人無須負上法律責任，但並不表示 X 說謊，較大的可能是她對第一答辯人的行為過於敏感，而並非故意說謊和編造證據以誣蔑他。

由於 X 未能證實第一答辯人在她受僱期間作出違法性騷擾行為，針對顧問公司的轉承責任申索便缺乏基礎，因此法庭沒有考慮顧問公司避免工作間性騷擾的步驟是否足以符合《性別歧視條例》第 46(3) 條的免責辯護。

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简体中文

法庭案例

X 诉 黎启繁及利安顾问有限公司

DCEO 4/2016; [2018] HKDC 1485

案情背景

申索人从事建筑界，于 2007 年加入一间建筑公司，名为利安顾问有限公司(「顾问公司」)。自 2011 年 4 月起，第一答辩人(顾问公司当时的副董事)是她的上司。

X 指称：(i)在她受雇期间第一答辩人向她作出违法性骚扰，以及(ii)顾问公司须就(i)负上转承责任。就(i)而言，X 指称第一答辩人作出以下受责难的行为：

e. 触摸她的臀部、大腿及手；
f. 盯着她和上下打量她；
g. 拍摄过量有关她的相片；以及
h. 向她发出令人不安的文字信息。

第一答辩人及顾问公司皆否认指称，并声称：

4. X 的申索已丧失时效；
5. X 诬蔑第一答辩人，以报复其男朋友被顾问公司解雇；以及
6. 顾问公司已采取合理地切实可行的步骤，以预防在工作间的性骚扰，可以援引《性别歧视条例》第 46(3)条的免责辩护。

法庭的裁决

X 的申索已丧失时效，因此应可单以时效期为由驳回，但法庭讨论了其个案的可胜之处。法庭就证明《性别歧视条例》第 2(5)(a)条所指性骚扰的测试提供了指引。测试包含以下三个方面：

d. 证据方面：申索人须证实所投诉事件确实发生；
e. 主观方面：申索人必须认为事件不受欢迎；以及
f. 客观方面：从客观方面的评估必须预期申索人会因事件感到受冒犯、侮辱或威吓。

至于主观及客观两个方面的关系，申索人除了须证明受责难的行为属不受欢迎外，还须证明合理的人在顾及所有情况后，应会预期申索人会感到受冒犯、侮辱或威吓。由于个人的接受程度因人而异，性骚扰投诉人通常须明确表示拒绝接受某行为，才能证明某持续发生的同类行为构成性骚扰(明显涉及性的行为除外)。

在本案中，X 未能证实第一答辩人作出任何性骚扰行为，其证据因此不足以证实受责难的行为的确曾经发生及 / 或构成性骚扰。

尽管如此，法庭不同意第一答辩人称 X 诬蔑他的指控。法庭认为即使第一答辩人无须负上法律责任，但并不表示 X 说谎，较大的可能是她对第一答辩人的行为过于敏感，而并非故意说谎和编造证据以诬蔑他。

由于 X 未能证实第一答辩人在她受雇期间作出违法性骚扰行为，针对顾问公司的转承责任申索便缺乏基础，因此法庭没有考虑顾问公司避免工作间性骚扰的步骤是否足以符合《性别歧视条例》第 46(3) 条的免责辩护。

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