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Dismissal on Grounds of Sexual Harassment Upheld Despite Acquittal from Criminal Prosecution

Akmal Hidayat bin Zamhari v BHIC Marine Technology Academy Sdn Bhd
(Ipoh High Court Application for Judicial Review No AA-25-11-05/2019)

Yesterday (15 October 2020), the High Court affirmed the Industrial Court's findings that the dismissal of an employee on the grounds of sexual harassment was with just cause and excuse.

The victim had been sexually harassed by the perpetrator, who was her immediate superior, on several occasions. This included the latter commenting on the former's physique and touching her hip. However, no formal complaints were ever made to the management and the victim had merely confided in her colleagues.

In August 2014, the victim was instructed to attend meetings with him and a female intern in Langkawi, but was informed at the last minute that the intern would not be joining them. Upon checking in at the hotel, the perpetrator ignored the victim's repeated requests for her room key and instructed her to enter his room. The victim, who did not suspect his ulterior motive, did as he asked. Notwithstanding the victim's demands for her key, the perpetrator then ordered the former to give him a head massage. When the victim refused to comply, the perpetrator then attempted to rape her by aggressively throwing her on the bed and physically imposing himself onto her. Fortunately, the victim mustered the strength to push the perpetrator away and ran out of the room to seek help.

A domestic inquiry was held, after which the perpetrator was dismissed. The Industrial Court held that his dismissal was with just cause and excuse and found, among others, that:

- (a) It is a trite principle of industrial jurisprudence that even where the case involves criminal misconduct, the standard of proof is based on the balance of probabilities. The perpetrator's acquittal from criminal prosecution has no bearing on the case before the Industrial Court;
- (b) Based on the domestic inquiry notes, the inquiry was conducted in a proper manner in compliance with the principles of natural justice; and

- (c) Based on the totality of the evidence, the perpetrator had been planning all along to outrage the victim's modesty.

In finding that the Industrial Court's decision did not suffer from unreasonableness and therefore did not warrant any interference, the High Court reaffirmed the Industrial Court's findings as follows:

- (a) The perpetrator had indeed been afforded a fair hearing at the domestic inquiry. In any event, it is trite that any irregularities in the domestic inquiry is not fatal to the employer's case as the employer is entitled to justify its decision to terminate the employee before the Industrial Court. Further, the perpetrator was afforded every opportunity to be heard and to state his case before the Industrial Court. Importantly, the Industrial Court heard this case "*de novo*" where the parties had put forward their case through evidence and the testimony of witnesses;
- (b) The Industrial Court had rightly applied the standard of proof required in a case involving criminal misconduct, i.e. proof on the balance of probabilities, when it held that the sexual harassment in Langkawi was pre-planned by the perpetrator; and
- (c) The Industrial Court had also taken into account corroborative evidence, previous accounts of sexual harassment as well as the events post the incident in Langkawi and made its decision based on the totality of the evidence presented before it.

While the long-awaited Sexual Harassment Bill, which is slated to be tabled in Parliament by year-end, has yet to materialise, the High Court's decision marks a step in the right direction to empower employers to punish perpetrators of sexual harassment at the workplace proportionately.

The employer was represented by partner Shariffullah Majeed, and associate Arissa Ahrom, of [Lee Hishammuddin Allen & Gledhill](#).

The Industrial Court Award may be viewed [here](#).

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