



Sharifullah Majeed
Partner

**Employment
& Industrial Relations**
E: sha@lh-ag.com



Nurul Aisyah Hassan
Senior Associate

**Employment
& Industrial Relations**
E: nah@lh-ag.com

10 October 2023

Wake Up Call Amidst Claims of Sexual Harassment

Sexual harassment remains a pervasive and global issue that transcends borders and affects people from all walks of life. The recent incident involving Luis Rubiales, a prominent figure in the world of sports administration as President of the Royal Spanish Football Federation, and one of the vice presidents of the Union of European Football Association (UEFA), who had kissed a female player, Jennifer Hermoso, on the mouth after the Spain football team won the Women's World Cup, has drawn attention to the importance of investigating sexual harassment allegations rigorously and without bias.

The incident serves as a stark reminder that sexual harassment allegations can surface in any culture, country, and in any industry. It is crucial to address such allegations seriously and to ensure that a thorough investigation takes place whenever necessary. After the Federation Internationale de Football Association (FIFA) Disciplinary Committee had suspended him, Rubiales finally did resign three weeks following the incident¹, despite initially defying calls to step aside.

Clear Unwanted Conduct

The Anti-Sexual Harassment Act 2022 defines sexual harassment as “any unwanted conduct of a sexual nature, in any form, whether verbal, non-verbal, visual, gestural, or physical, directed at a person which is reasonably offensive or humiliating or is a threat to his well-being.”, extending the definition of sexual harassment to include acts outside of the course of one's employment.

In the case of Luis Rubiales, he insisted that the kiss had occurred with the consent of Ms. Hermoso. This, she had denied as categorically false and said no such conversation had taken place. In fact, it was reported that Hermoso has repeatedly stated that the kiss was unwanted and that

¹ <https://time.com/6312552/luis-rubiales-spain-football-chief-resigns-kiss-scandal/>

she felt like a victim of aggression, though Rubiales has alleged the kiss was consensual. However, clearly, what is important is what the victim perceives the act to be, and in this instance, it was clearly an unwanted and offensive sexual conduct on his part.

Victim's Conduct

In considering claims of sexual harassment, as the conduct in question depends on the perspective of the recipient, the courts would consider among others the victim's reaction to the conduct, including whether there is any delay in reporting the same. The courts will scrutinise the facts of the case and may find that the conduct of the complainant and the surrounding circumstances point to an unsubstantiated claim of sexual harassment.

For example, the High Court in the case of **Jennico Associates Sdn Bhd v Lilian Therera De Costa & Anor**² analysed the conduct of an employee, who had claimed constructive dismissal on the grounds of sexual harassment. The learned Judge opined that the employee's cumulative conduct of not informing her husband of the harassment she experienced, the fact that she went partying that night after the alleged incident had occurred, and her subsequent failure to lodge a police report against the alleged perpetrator was suspicious and did not indicate the behaviour of someone who had been afraid or traumatised.

In the case of Hermoso, it was reported that she did immediately express her disgust at Rubiales' conduct in the locker room³, and subsequently filed a police report against him. However, it does not mean that every delay on the part of the victim in reporting the matter must indicate lack of credibility or an afterthought.

It is recognised that there are instances where the victims of sexual harassment would suffer in silence. In **Akmal Hidayat Zamhari v BHIC Marine Technology Academy Sdn Bhd**⁴, an assistant to a senior staff, had been harassed by her superior for a number of years. It included him touching her and commenting on her physique. However, she felt that if she complained, the company would be on his side. Then came a time when her superior had arranged for them to go on a business trip together, where he then tried to force himself on her. The subordinate immediately reported the incident to a colleague and thereafter, filed a police report against the perpetrator.

Although there had been previous incidences of harassment that the victim had not reported, the Industrial Court found that it did not mean that all her statements are fictitious as it must be borne in mind that the victim is a subordinate of the accused and naturally, she was fearful of reporting the matter, and fearful that she will not be believed.

Further, in the landmark case of **Mohd Ridzwan Abdul Razak v Asmah Hj Mohd Nor**⁵, the Federal Court held that although cases have

² [1998] 3 CLJ 583

³ <https://www.breakingnews.ie/world/kiss-for-world-cup-winner-jenni-hermoso-criticised-by-spanish-ministers-1517184.html>

⁴ [2019] 2 LNS 0480

⁵ [2016] 6 CLJ 346

established that an allegation of sexual harassment must be adequately established, corroboration is not mandatory in all cases of sexual harassment, and that it depends on the facts of each case, given that the complaint is so private in nature.

Therefore, in cases of sexual harassment, silence, or passivity does not necessarily mean acquiescence. In *Harry Wong Wei Chen v Petroliaam Nasional Berhad (Petronas)*⁶, the employee who was dismissed on the grounds of sexual harassment, submitted that the complainant had remained silent after the alleged incidents, and that it did not in any way affect her attitude or performance in continuing to work with him. It was also submitted that there was no evidence at all put forth by the Company to show that the complainant had avoided him or that she declined any outings and/or conversation where he was also present.

The Court reiterated that in most cases involving sexual harassment, the victim would remain silent hoping to weather the storm, until they could not tolerate it any further. Nevertheless, at all times, the complainant did relate the unwanted incidents to her friends, as evidenced from the WhatsApp messages produced by the Company. Those messages clearly showed that the complainant did not welcome the dismissed employee's untoward behaviour.

Conclusion

One of the key takeaways from the Rubiales incident is the importance of conducting investigations into sexual harassment allegations transparently and impartially. Regardless of the accused person's position or influence, the integrity of the investigation process must be upheld. Fairness in investigations, considering both conducts of the alleged perpetrator and the complainant, is not only a matter of justice but also a way to restore public trust and confidence in the institution involved.

The issue also punctuates the importance of employers addressing potential claims of harassment at the workplace head-on, without delay and in an effective manner. The Employment (Amendment) Act 2022 further dictates that employers need to display a notice at the workplace to raise awareness on sexual harassment, albeit not providing any details of what such notices should contain. It also still does not provide that an employer has an obligation to implement any sexual harassment policies in the workplace. However, it would be prudent for employers to draft and implement a comprehensive, transparent, and effective policy on handling complaints of sexual harassment, as part of carrying out their duty to ensure a safe working environment.

By establishing clear protocols, and maintaining independence in investigations, employers can create a safer and more respectful environment within its organizations and the broader society. Sexual harassment should never be tolerated, and investigations into such allegations must be conducted with the utmost diligence and fairness, regardless of the accused person's status or reputation.

⁶ [2021] 1 ILR 340

If you have any queries, please contact Senior Associate, **Nurul Aisyah Hassan** (nah@lh-ag.com), or her team Partner, **Sharifullah Majeed** (sha@lh-ag.com).

Head Office

Level 6, Menara 1 Dutamas
Solaris Dutamas
No. 1, Jalan Dutamas 1
50480 Kuala Lumpur
Malaysia
Tel: +603 6208 5888
Fax: +603 6201 0122

Johor Office

Suite 21.01
21st Floor, Public Bank Tower
No.19, Jalan Wong Ah Fook
80000 Johor Bahru, Johor
Tel: +607 278 3833
Fax: +607 278 2833

Penang Office

51-12-E, Menara BHL Bank,
Jalan Sultan Ahmad Shah,
10050
Penang
Tel: +604 299 9668
Fax: +604 299 9628

Email

enquiry@lh-ag.com

Website

www.lh-ag.com