



## **An Innangard Report on Sexual Harassment in Key Jurisdictions**

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If you have any questions in relation to sexual harassment, or any other employment law questions, **ASK INNANGARD:**

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# AUSTRALIA

## Cultural Background

Sexual harassment is a significant focus for employers in Australia, due to the publicity that is generated around such claims and the potential adverse impact on an employer's brand and reputation. The Australian Human Rights Commission conducted a national survey in 2012 which found that, over the previous five-year period, one in four women and one in six men were sexually harassed in the course of their employment.<sup>1</sup> Sexual harassment has been described as prevalent and pervasive in Australian workplaces, but is not often pursued through the courts system due to the heavy burden this involves, the stigma associated with the making of complaints, and the confidential settlement of many claims.

## Recent Examples of Sexual Harassment Scandals

A high profile sexual harassment scandal in Australia is the litigation involving the up-market retailer David Jones. A female employee of David Jones made complaints of sexual harassment by the then CEO. Her complaints included that when at a lunch function the CEO recommended a dessert to her by describing the food as "having a f\*\*\* in your mouth". She alleged he turned a kiss on the cheek into a kiss on the lips, after which he felt inside her shirt and flicked her bra strap. In addition, she claimed that in the ensuing weeks he sent her a number of text messages, unambiguously inviting her to come to his apartment, implying that such a visit would be for the purpose of having sexual intercourse. Her claim was for \$37 million in damages (an amount unheard of in Australian sexual harassment case law). This included a claim for punitive damages on the basis that the employer and the Board of directors knew or ought to have known that there was a risk of these behaviours occurring. The matter was not fully litigated as the parties settled the matter on a confidential basis.

One area that Australian employers tend to experience difficulties managing in the context of their responsibilities in relation to sexual harassment is romantic relationships between colleagues. In 2017 there has been intense interest in a number of high profile situations involving workplace relationships. Two recent examples are as follows: a television network seeking an urgent court order to stop a former executive assistant from disclosing details about her relationship with the company's CEO; and secondly the CEO of a large insurance business forfeiting a significant part of his bonus for delaying the disclosure of a personal relationship with an employee.

In the Seven Network proceedings, while much of the media attention (and also the comments on social media by the former executive assistant) centred around the work relationship, there was no judicial comment about an employer's role relating to work colleagues conducting a consensual, personal relationship.

However, what the national industrial tribunal has recently said about an employer's ability to govern personal relationships at work is as follows:

*"Employers cannot stop their employees forming romantic relationships. However, in certain circumstances, such relationships have the potential to create conflicts of interest. This is most obviously the case where a manager forms a romantic relationship with a subordinate especially where the manager directly supervises the subordinate. It is virtually impossible in such circumstances to avoid at the very least the perception that the manager will favour the subordinate with whom they are in a romantic relationship when it comes to issues such as performance appraisals, the allocation of work, and promotional opportunities".*

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<sup>1</sup> Working without fear: Results of the 2012 sexual harassment national telephone survey, Australian Human Rights Commission, 2012

## Legal Definition of Sexual Harassment

While the precise requirements vary across jurisdictions in Australia, a person is taken to have sexually harassed another person if that person behaves in a way that fulfils the core elements of what constitutes sexual harassment. Under the *Sex Discrimination Act 1984* (Cth) ("**SD Act**") the three elements that define sexual harassment are as follows:

- the behaviour must be unwelcome;
- it must be of a sexual nature; and
- the conduct must have taken place in circumstances where a reasonable person would have anticipated the possibility that the person who was harassed would be offended, humiliated and/or intimidated.

Whether the behaviour is **unwelcome** is a *subjective test*: i.e. the issue is how the conduct in question was perceived and experienced by the recipient rather than the intention behind it.

Whether the behaviour was **offensive, humiliating or intimidating** is an *objective test*: whether a reasonable person would have anticipated the possibility that the behaviour would have this effect.

## Sexual Harassment in the Workplace

Most Australian workplaces have policies and procedures around discriminatory behaviour and sexual harassment in order to show that they have taken all reasonable steps to prevent or eliminate the conduct, and thereby avoid vicarious liability for the harassment by a workplace participant or another worker. However, many such policies have been found by the courts to be inadequate because they do not exhibit sufficient commitment and proactive engagement with the issue.

It is far less common for employers to have policies and procedures that address situations and potential liability where a customer or client acts in a discriminatory or harassing manner towards an organisation's employees. Some Australian employers in the retail sector have taken action to protect their employees from inappropriate conduct engaged in by customers in order to avoid accessorial liability for "permitting" unlawful conduct where they are aware that it is happening and they do not intervene.

Sexual harassment under Australian law can occur in any work based-relationship. It does not have to involve a person in a position of greater authority and applies irrespective of gender. It is also subject to regulation where it occurs away from the work premises, such as a conference or off-site event, where there is a connection between the two parties that is work related. It is not necessary for the behaviour to be repeated to constitute sexual harassment.

## Potential Liabilities and/or Sanctions that could arise from sexual harassment in the Workplace (for both the harasser and the employer)

Liability for sexual harassment in Australia amounts to a civil breach that gives rise to a claim for damages. There is no criminal liability or penalty regime that applies under anti-discrimination legislation. However, employers have obligations under work health and safety legislation to ensure the health and safety of workers, and can be liable under this legislation if the harassment causes risks to the health and safety and the employer has not taken any steps to eliminate the risks.

Sexual harassment may be considered an offence under criminal law if it takes the form of an actual or threatened assault, indecent exposure, stalking or intimidation or an obscene communication.

### **Interesting Developments or Cases to Report in Australia**

Australian courts set a new benchmark regarding the amount of compensation that should be awarded for sexual harassment (*Richardson v Oracle Corporation Australia Pty Ltd* [2014] FCAFC 82). This changed the long-standing approach of awarding minimal damages for the pain and suffering caused to victims of workplace sexual harassment in order to mirror community attitudes about the harm of sexual harassment. Ms Richardson's sexual harassment case was based on allegations that she was subjected to multiple humiliating comments and sexual advances from a male colleague during her employment with Oracle in 2008. The alleged harassment included comments such as; "Gosh, Rebecca, you and I fight so much, I think we must have been married in our last life", and, "So, Rebecca, how do you think our marriage was? I bet the sex was hot".

On this basis, the Full Court held that the initial award of damages of \$18,000 did not adequately compensate Ms Richardson for the psychological and reputational damage that she suffered. The Full Court also awarded Ms Richardson compensation for the detriment the harassment caused to the sexual relationship with her partner. As a result of these findings, damages were increased from \$18,000 to \$100,000.

Further, the Full Court found that there was a connection between Ms Richardson's resignation from Oracle and the unlawful sexual harassment. It held that the sexual harassment was a material cause of Ms Richardson's decision to resign and accept a lower paid position. The Full Court awarded Ms Richardson \$30,000 for economic loss.

### **TOP TIPS for International Employers with a Workforce in Australia:**

- Courts in Australia have found it is not enough for employers to "say all the right things" in policies and procedures - they must take complaints seriously and act on and enforce the policies.
- This is not a "set and forget" space – on-going training and policy reviews are essential.
- Senior staff must be seen to be modelling appropriate conduct in the workplace for a culture of respect to prevail.

# CHINA

## Cultural Background

In China, sexual harassment is a sensitive topic. Under the influence of the traditional conservative culture, women feel ashamed to talk about it and remain silent. With the flourishing feminist consciousness and improvement of women's social status, women tend to increasingly seek justice and protect themselves. Nowadays, the issue of sexual harassment is becoming more and more serious and widely discussed in the whole society.

## Recent Examples of Sexual Harassment Scandals

In 2010, the founder and former president of Shenzhen Sunmoon Education Group was sentenced to four years in jail for raping his subordinate and pay the victim about 600 USD in "compensation". However, employees disclosed that there are more silent victims.

In 2016, a senior manager at the China Minsheng Bank Corp Beijing branch was accused of trying to force a female subordinate to make a sexual encounter. As a result, the manager was dismissed on the grounds of disciplinary punishment and asked to apologise.

## Legal Definition of Sexual Harassment

According to *the Law of the People's Republic of China on the Protection of Women's Rights and Interests*, sexual harassment against women is banned. The victims shall be entitled to complain to the employer or relevant administrative persons.

The legal definition of sexual harassment is contained in provisions of some local regulations. For example, according to *the Measures of Beijing Municipality for Implementing the Law of the People's Republic of China on the Protection of Rights and Interests of Women (2009 Revision)*, any sexual harassment of a woman against her will in forms of language, text, image, electronic information or physical act that contain Sexual content or relate with sex is prohibited.

It is worth mentioning that there is still a blank space for the protection of men from sexual harassment.

## Sexual Harassment in the Workplace

There is no legal definition of sexual harassment in the workplace. According to the local regulation in Shenzhen, it is prohibited to annoy, insult or have indecent behaviours towards women with the advantages of position, employment and other conditions.

A woman who suffered from sexual harassment may file a complaint with the employer, the employer of the perpetrator, the women's federations at various levels of municipality and the department concerned, or directly file a lawsuit to the people's court. After receiving the complaint, the woman's employer, the women's federations at various levels of this municipality and the department concerned shall take measures to criticise and educate the person being accused, to mediate the two sides or to support the complainant to file a lawsuit. Employers and public places shall, according to needs, take measures to prevent and stop sexual harassment of women.

According to the No 619 Order of the State Council *the Special Rules on the Labour Protection of Female Employees*, adopted in 2012, employers shall prevent and prohibit the sexual harassment of female employees in their workplaces. Based on the local regulations, it is compulsory for companies to take measures such as constructing appropriate environment or establishing necessary investigation and complaint mechanism to prevent and stop sexual harassment against women.

The employer has the responsibility to provide a healthy and safe workplace for the employees. There is no doubt that sexual harassment is harmful to the harmony of the workplace.

## Potential Liabilities and/or Sanctions that could arise from sexual harassment in the Workplace (for both the harasser and the employer)

The employer is liable to undertake the civil compensation responsibility in case of the employer's fault, if the employee suffers physical, and/or mental and reputational damage.

On the basis of laws and regulations, work rules and the employment contracts, the harasser's employment can be terminated unilaterally on the grounds of serious violations of labour discipline or the employer's rules and regulations, no matter if he is a repeated offender or not. According to *the Public Security Administration Punishments Law*, if the harasser has sent obscene or offensive data several times, the harasser shall be detained for no more than 5 days or shall be fined no more than 500 yuan (79.54 USD). If the circumstances are relatively serious, he shall be detained for no less than 5 days but no more than 10 days, and may be concurrently fined no more than 500 yuan.

## Interesting Developments or Cases to Report in China

The Jiangsu province drafted amendments in March 2017 to the *Measures on Implementation of the Special Rules on the Labour Protection of Female Employees*. Article 20 provides that the employer should take the following measures to protect female employees from sexual harassment.

- ✓ Set up rules and regulations to forbid sexual harassment in the workplace;
- ✓ Launch a training program of sexual harassment prevention;
- ✓ Provide a safe workplace against sexual harassment;
- ✓ Deal with compliance immediately and protect the employee's privacy;
- ✓ Other measures to protect female employees.

## TOP TIPS for International Employers with a Workforce in China:

- It is the employers' legal responsibility to prevent and stop any sexual harassment. If the employer has not fulfilled his duty, the employer may be liable to pay compensation.
- Once the employer receives a complaint or report, the employer should start an investigation, stop the harassment immediately, and punish the harasser on the basis of the work rules, such as warning, salary cut, position transfer, suspension or termination.
- Employers should protect employees from all sources of sexual harassment and transfer the employee to another job position when requested by the employee.
- Employers should inform employees of the definition of sexual harassment in the workplace, the sanctions towards the harassers, the mechanism of compliance and disputes resolution, the protective mechanism for the witnesses and whistle-blowers, and responsible institutions for education.
- Monitoring systems are widely used in enterprises nowadays and surveillance video can be used as evidence. However, it is also the employer's responsibility to check the appropriate use of the monitoring system and protect the privacy of all the employees.

## ENGLAND

### Cultural Background

Sexual Harassment in the workplace in the United Kingdom has historically been widely unreported. A third of people believe sexual harassment has become less frequent over the last decade. However, a recent poll reported in the Daily Telegraph newspaper suggests that significant numbers of women, and also a lesser number of men, consider that they have been sexually harassed at work. The stark reality of sexual harassment in the workplace needs to be addressed to prevent such acts occurring in the future, but also, to encourage those affected to come forward and have their voices heard.

Previously, employees were not coming forwards in reporting incidents of sexual harassment due to the aspects of shame and the fact that they may not be believed as well as fearing that this may impact on their job security or progression.

There was a problem with how institutions were responding to employees coming forward in terms of not having the relevant resources in effectively dealing with the situation and supporting employees through what could be fairly a traumatic experience.

### Recent Examples of Sexual Harassment Scandals

- Claims of sexual harassment at the BBC have spiked after the Harvey Weinstein scandal.
  - The Corporation says it has received 25 complaints so far this year as bosses encourage staff to come forward
- A number of sexual harassment allegations have been made about senior parliamentary figures from across the UK's political parties in Westminster. One of the more high profile cases involved the UK defence secretary, Sir Michael Fallon, who recently resigned after admitting to repeatedly touching a female journalist's knee at a conference dinner 15 years ago.
  - Leaders of the main political parties have agreed to new cross-party proposals to address sexual harassment, which will include an independent grievance process, improved human resources support, and the establishment of a working group to implement the changes.
  - The prime minister has since launched an inquiry to see whether the reported actions break the ministerial code.
- The President Club charity dinner in London, where 130 women workers were presented with NDAs following the event where the women were groped, propositioned and sexually harassed.
  - The use of NDAs has been put under the spotlight. The event sparked criticism that such agreements and provisions allow powerful employers to avoid scrutiny and continue abusive or risky practices.

### Legal Definition of Sexual Harassment

Section 26 of the Equality Act 2010 provides a general definition: unwanted conduct which has the purpose or effect of violating someone's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment. Unwanted conduct of a sexual nature can include conduct that could be wanted and then become unwanted. Once unwanted, it is likely to constitute harassment e.g. relationship between two colleagues could break down and conduct which might have been acceptable could become unwanted and constitute harassment.

Less favourable treatment because of a worker's rejection of or submission to harassment of a sexual nature or harassment related to sex or gender reassignment, also constitutes as harassment.

The key element is, purpose OR effect:

- If it is intended to create e.g. hostile environment but does not have that effect – then it meets the “purpose” test.
- If it is not intended to create e.g. hostile environment but does – then it meets the “effect” test.

### **Sexual Harassment in the Workplace**

- It is not compulsory for companies to implement an internal policy against sexual harassment in the workplace, but it is strongly recommended and common practice. If implemented, it can form part of a defence against a claim for sexual harassment.
- From a Health and Safety perspective, sexual harassment is considered a risk in the workplace as there is an obligation to protect the health and safety of employees and a failure to prevent sexual harassment can be a failure to protect health and safety. This can result in physical safety being compromised (in the form of assault) or mental wellbeing suffering.
- An employer may be liable when an employee sexually harasses a co-worker, unless they can demonstrate that they took all reasonable steps to prevent harassment, e.g. the implementation of a policy, staff training and a process for dealing with complaints. However, a policy is not enough on its own and it should be noted that a high bar is in place for employers to limit liability.
- The harasser does not have to be a supervisor; it can be anyone e.g. a co-worker of the same level or inferior level.
- In order to terminate the harasser’s employment contract for cause (fair disciplinary dismissal) the sexual harassment can be a one off instance and does not need to be a repeated behaviour.
- Statute limitation for the victim to file a complaint against the harasser: from 3 months to 6 years depending on which legislation, most commonly 3 months.
- There are no specific provisions in Collective Bargaining Agreements against sexual harassment in the workplace as this does not apply in the United Kingdom.

### **Potential Liabilities and/or Sanctions that could arise from sexual harassment in the Workplace (for both the harasser and the employer)**

For the harasser: financial liability is at the discretion of the tribunal (if employer and employee are liable, they are jointly and severally liable)

- Regulatory report if person works in regulated sectors;
- Potential criminal liability if assault or the harassment falls within the Protection from Harassment Act 1997 - liability may include a fine, community service or prison.

For the company: financial liability is at the discretion of tribunal (if employer and employee are liable, they are jointly and severally liable).

Compensation for discrimination and harassment is based on loss suffered by the victim.

- Financial loss (past and future earnings; pension loss; loss of benefits);
- Non-financial loss – injury to feelings – usually up to around £42,000 but can be higher. However, the amount awarded is usually lower;
- Potential liability for personal injury e.g. psychiatric damage; aggravated damages; exemplary damages.



## **Interesting Developments or Cases to Report in the United Kingdom**

Acas has published new guidance for employers on how to identify and support people who face sexual harassment at work. Acas highlights a number of behaviours that could be interpreted as sexual harassment, including the display of explicit images, verbal or written sexual comments or innuendos, unwanted touching and inappropriate jokes or questions about a colleague's sexual behaviour. In addition, the report encourages employers to have sexual harassment policies in place to ensure any incidents are quickly resolved and explains what action to take when historical allegations are reported.

The guidance follows a recent YouGov poll that suggested the majority of British female workers (76%) were confident that if reported, their employer would take a sexual harassment claim seriously.

### **TOP TIPS for International Employers with a Workforce in the United Kingdom:**

- Implement appropriate policies and ensure all the employees receive training on such policies.
- Seek to create an open culture where employees can raise concerns.
- If sexual harassment is reported, the employer must investigate thoroughly and fairly, giving consideration to the victim.
- The recommended steps, if taken, may amount to a 'reasonable steps' defence. Thus, failure to take such actions may mean the employer is more likely to be liable in respect of the alleged victim. However, the employer could be liable even if they have taken such actions as it may not be considered enough.

## FRANCE

### Cultural Background

There are significant cultural differences between France and Anglo-Saxon societies in relation to sexual harassment.

Flirty relationships are commonplace among co-workers, and the “freedom” to compliment a female co-worker on her looks is deeply rooted in French mentalities. This may come as a shock for Anglophone women accustomed to no-nonsense intermingling in the workplace. The same comment on the attractiveness of a female employee, while seen as flattering in France, may be resented as insulting in the USA.

Do French co-workers intermingle more than in other countries? Probably not, but they certainly are more open about it. A bragging womanizer will arouse admiration and jealousy in France, but may risk his career on a sexual harassment trial in a less open-minded country.

The Harvey Weinstein scandal is forcing a rethink of attitudes toward sexual harassment even in France, a country that cherishes its self-image as the land of seduction and romance.

More than 3,000,000 accounts of sexual harassment or abuse have been published under the French equivalent of #MeToo on Twitter, though some conservatives say that the new trend amounts to an attack on the French “way of life” in the name of US-style puritanism.

France might have been behind certain countries in the area of protection against sexual harassment but has hopefully reached a turning point, with the Weinstein scandal as a trigger.

### Recent Examples of a Sexual Harassment Scandals

In May 2011, Dominique Strauss Kahn, then France’s likely future President, was arrested and charged with the sexual assault and attempted rape of a housekeeper in a New York hotel. This widely publicized case led to the downfall of one of France’s most prominent politicians. A settlement was signed and all charges were dropped, but in the aftermath allegations of sexual misconduct including attempted rape surfaced and soon “DSK” was prosecuted in France. For many in this country, where privacy, even for public figures, is considered sacrosanct, these revelations crossed a threshold beyond other politicians’ escapades.

Although this is the most striking affair of the past decade, many other prominent figures have been caught in similar scandals in the wake of the Weinstein tsunami.

### Legal Definition of Sexual Harassment

In France, we had to wait until 1992 for a statutory act to expressly prohibit sexual harassment, which definition was restricted to cases involving abuse of professional hierarchical power and the use of “orders, threats, constraint, or serious pressure”.

Outside of this specific fact pattern, the behaviour would fall under the classification of moral harassment.

Back then, the legislator refused to extend the definition of sexual harassment to any sex-related behaviour bound to offend a person’s dignity, such as offensive statements or bad taste jokes. Absent the intention to obtain sexual favours, there was no sexual harassment. Any inappropriate behaviour, such as the display of pornographic material, was likely to qualify under certain conditions as moral harassment, but not sexual harassment. Sending romantic poems to a co-worker with no offensive content also did not qualify as sexual harassment, according to the ruling of an Appellate Court.

Even this restrictive prohibition raised concerns that the door was opened to frivolous claims, such as those supposedly filed in the USA. Though illegal in France, sexual harassment was

still a kind of joke the French liked to cite when making fun of their supposedly up-tight, cross-Atlantic neighbours.

The *2002 European Directive* adopted a more extensive definition of sexual harassment which includes any inappropriate behaviour referring to sex and creating a hostile working environment. The harasser, under such Directive, does not necessarily have to be a superior and does not have to seek sexual favours. The concept of sexual harassment is therefore here subjective.

This Directive also states that sexual harassment constitutes gender discrimination, thereby adopting the Anglo-Saxon concept of sexual harassment: had the victim been a man rather than a woman or a woman rather than a man, she/he would not have been harassed.

The penal code, as revised in 2002, qualifies sexual harassment as sexual violence, stating “no employee can be penalized nor dismissed for having submitted or refusing to submit to act of harassment of any person whose goal is to obtain favours of sexual nature for his own benefit or for the benefit of a third party”.

### **Sexual Harassment in the Workplace**

A new statutory law was adopted in France in 2002, which widens the scope of sexual harassment by eliminating the prerequisite according to which the harasser must be a superior: “horizontal” harassment (among two co-workers on the same level of the org. chart) and even harassment from a subordinate towards a superior are now admitted. The harasser must have a sexual goal in mind, but the victim’s career is not necessarily at stake.

This statutory law also creates an evidentiary system favourable to the victim in order to take into account the particular difficulties faced in order to prove a subjective situation: the plaintiff must come up with some evidence establishing a presumption of sexual harassment. The plaintiff must then reverse the presumption.

### **Potential Liabilities and/or Sanctions that could arise from sexual harassment in the Workplace (for both the harasser and the employer)**

The harasser is facing a two-year imprisonment sentence and a fine of 30.000 euros, in addition to damages for the victim. The statute of limitation is six years after the last aggression. Compared with the U.S., monetary damages are typically so small as to only have symbolic value; moreover, punitive damages do not exist.

The victim can also obtain damages from the employer for not having prevented the sexual harassment; in other words, for failure to provide a safe working environment.

A far as prevention is concerned, France is in compliance with European law and, like Anglo-Saxon countries, tends to place a quasi-automatic responsibility on the employer who does not prevent sexual harassment from happening at the workplace.

This is because the employer’s duty to provide a safe working environment is an “obligation de résultat”, i.e. duty to achieve a result, as opposed to a simple duty to do one’s best efforts.

When the sexual harassment has culminated in termination of their employment, sexual harassment victims can ask the labour court to declare that the termination is void and obtain back pay for the period between the date of termination and the court’s decision, on top of damages for wrongful termination.

Despite a heavy cultural activism, and thanks to the influence of European law, France has finally recognized the seriousness of sexual harassment issues and taken appropriate actions.

## **Interesting Developments or Cases to Report in France**

The number of claims based on sexual harassment is increasing; such claims being usually brought jointly with a claim for unfair dismissal. According to a recent survey, one out of five women declared to have been victim of sexual harassment.

However, criminal complaints for sexual harassment are not prosecuted in more than 90 % of the cases for lack of sufficient evidence. In addition, most of the women that complain about sexual harassment end up losing their employment.

As a result of the widely publicized recent scandals in both the U.S. and here, the Ministry of Labour has announced a new Act for the end of 2018, aiming at reinforcing the protection of victims that report their harasser.

### **TOP TIPS for International Employers with a Workforce in France:**

The French Labour Code requires that employers include prevention of sexual harassment in the company's internal regulations and to post the internal regulation in the firm and places of recruitment.

Since January 1<sup>st</sup>, 2018, companies with more than 50 employees must put in place a whistleblowing scheme aiming at ensuring whistle-blowers protection when they report an offence such as, but not limited to, sexual harassment.

When an offence is reported under the scheme, the company has a duty to carry out an internal investigation. Failure to do so, when the reported facts appear to be *prima facie* serious, exposes the recipient of the alert to a one-year prison sentence and a 15,000 euros fine.

# GERMANY

## Cultural Background

For a long time, sexual harassment was more or less a non-issue in Germany. During the seventies the feminist movement tried to get public attention for this topic and started to encourage the persons concerned. However, affected employees were afraid to lose their job, of receiving the blame themselves and being accused of damaging the reputation of a colleague or boss.

## Recent Examples of a Sexual Harassment Scandals

With the mass harassment incident in Cologne on New Year's Eve 2016 and with lots of scandals all over the world the topic got more and more public awareness, also in politics.

A recent example of a sexual harassment claim that got a lot of public attention is the case of Ms. Sawsan Chebli, a German undersecretary of state. Ms. Chebli was invited to a conference as a speaker, but the chairman, a former German ambassador failed to recognize her and then said to Ms. Chebli and the audience that he had not expected the speaker to be such a young and beautiful woman. While Ms. Chebli and one part of the public complained about apparent sexism, others regarded this as just a somewhat awkward reaction and old-fashioned compliment to ease the situation.

While a lot of reports on sexual harassment and individual stories can be found in the media, huge sexual harassment scandals seldom occur. A statistic published by the Federal Statistical Office shows that in 2015 there have been 16 % who felt harassed, mostly through verbal action.

## Legal Definition of Sexual Harassment

In Germany, there are in essence two legal definitions of sexual harassment. The civil law concept is broader than the criminal law one. Before the introduction of sec. 184i StGB was introduced into the Criminal Code in November 2016, prosecution could only be based on sec. 177 StGB ("sexual assault by use of force or threats; rape") and insult (sec. 185 StGB). Sec. 177 StGB requires a breaking of the physical resistance of a woman. By contrast, sec. 184i StGB merely requires a physical (not only verbal) "contact" that is sexually determined. An indication for this determination is the motivation of the offender. This is presumed if the perpetrator touches the victim on the genitals or takes actions that typically require sexual intimacy between those involved. In addition, this touching must result in the victim feeling sexually harassed.

Sexual harassment in the workplace is defined in sec. 3 (4) AGG as a discrimination, when an unwanted conduct of a sexual nature, including unwanted sexual acts and requests to carry out sexual acts, physical contact of a sexual nature, comments of a sexual nature, as well as the unwanted showing or public exhibition of pornographic images, takes place with the purpose or effect of violation the dignity of the person concerned, in particular where it creates an intimidating, hostile, degrading, humiliating or offensive environment.

## Sexual Harassment in the Workplace

While it is not compulsory for employers to implement an internal policy (or code of conduct) against sexual harassment in the workplace, they have to establish and announce a complaints office, sec. 13 AGG. Consequently, if an employee calls the complaints office because of sexual

harassment, the employer has to safeguard that the allegations are reviewed and that the complainant is informed about the outcome. Should the complaint be found to be correct, there are several options: admonition, written warning, relocation and termination of the offender. Depending on the individual case and the intensity of the intervention, the employer has to consider and choose the appropriate measure. Where the employer takes no or obviously unsuitable measures, pursuant to sec. 14 AGG the affected employee has the right to refuse work without loss of pay insofar as this is necessary for her/his protection.

A works council has no co-determination rights regarding the establishment of a complaints office; however, it does concerning the details of the complaints procedure. This can also be regulated in a Works Agreement (*Betriebsvereinbarung*). Such collective agreement are often beneficial for both sides: The employees find clear procedures and information on what to do while the employer ensures to be informed at an early stage about potential misconduct and is enabled to take appropriate actions (the latter point being important to mitigate the risk of claims for damages and compensation).

### **Potential Liabilities and/or Sanctions that could arise from sexual harassment in the Workplace (for both the harasser and the employer)**

#### **For the employer**

- Unlawful discrimination amounts to a breach of contract and an employee may be able to bring a claim for damages against the employer under sec. 15 AGG.
  - o Such a claim for damages will cover any material loss incurred by the employee.
  - o An employee can also claim reasonable compensation for any non-financial damage suffered. Such claims may arise irrespective of whether the employer is at fault.
  - o One fact that has been criticized in the public discussion is that sec. 15 (4) AGG requires the victim to assert the claim in writing within a period of two months (from learning of the discrimination), unless different provisions in a collective bargaining agreement apply.
  - o Another problem is that if the harasser is the employer himself the only remedy for the person concerned may be to claim compensation. In these cases, the employee often chooses to terminate the employment relationship.
  - o Furthermore, the regulations of the General Act on Legal Treatment (AGG) don't apply for freelancers. They have to rely on the limited remedies of the Civil Code.
- In severe cases the employer's management may also be subject to criminal prosecution for insult and/or defamation (sec. 185 ff. StGB), if the situation has been grossly mishandled.

#### **For the harasser**

- Sexual harassment can justify the dismissal of the perpetrator, including extraordinary i.e. immediate termination (depending on the severity of harassment and consideration of the whole situation).
- Besides, the victim can claim damages against the harasser in a civil law procedure.
- Furthermore, in case of physical harassment, the harasser also has to expect criminal prosecutions (fines or up to five years imprisonment).

### **TOP TIPS for International Employers with a Workforce in Germany:**

- The complaints procedure should be recorded in written form, e.g. in a Code of Conduct or guideline or in a works agreement.
- The employer should improve general awareness among management and staff about what may constitute sexual harassment and about the rights and obligations of the employees. Internal professional development and/or coaching should be offered. Documentation of the employer's compliance efforts can be used to mitigate risks of damages and compensation.

## IRELAND

### Cultural Background

Since achieving independence in 1922, Ireland has had a notoriously conservative cultural reputation, largely stemming from close ties between the State and the Roman Catholic Church. Until relatively recently women were not permitted to work in the public sector after marriage (1973), and discussion about sexual issues was relatively taboo. In addition, for historical reasons, a culture of silence subsisted for some time, which made individuals reluctant to speak up about colleagues' wrongdoing. The combination of these factors led to a society where sexual harassment largely came to public awareness only through innuendo and rumour.

The Church's waning influence over the last 20 years and Ireland's evolution into a more global and outward-looking society have resulted in discussion of sexual assault and harassment becoming less taboo. Much like the rest of the world, recent high-profile cases/accusations have spurred further discussions such that prominent individuals about whom (at most) long-standing rumours have circulated are now being expressly identified as serial sexual harassers.

### Recent Examples of Sexual Harassment Scandals

This year, the former artistic director of Dublin's Gate Theatre has been the recipient of a number of historic allegations ranging from verbal harassment to inappropriate behaviour towards staff and colleagues in the arts community. This has resulted in the Gate Theatre initiating internal investigations, the results of which are unlikely ever to be made public.

An up-and-coming radio and television comedian has also been accused by a number of colleagues and third parties of inappropriate behaviour, including sexual assault and harassment, resulting in the termination of his employment by TodayFM and the cancellation by the national broadcaster of a television series in which he was involved. Criminal investigations are apparently also ongoing.

### Legal Definition of Sexual Harassment

The Employment Equality Acts 1998-2015 protect employees from employment-related sexual harassment. The Acts describe sexual harassment as any form of "unwanted verbal, non-verbal or physical conduct of a sexual nature". In both cases it is defined as conduct which "has the purpose or effect of violating a person's dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for the person" and it is prohibited under the Acts.

The "unwanted conduct" includes spoken words, gestures or the production and display of written words, pictures and other material. This includes offensive gestures or facial expressions, unwelcome and offensive calendars, screen-savers, e-mails and any other offensive material.

The harassment can be by a fellow worker, employer or someone in a superior position, a client, a customer or any other business contact. It can take place at work or on a training course, on a work trip, at a work social event or any other occasion in respect of which the employer ought reasonably to have taken steps to prevent it.

While general harassment is a criminal offence, as is sexual assault (including at very low levels where "*in circumstances of indecency*"), sexual harassment in and of itself is not a specific criminal offence.

## Sexual Harassment in the Workplace

Companies are heavily encouraged to implement internal policies to address harassment on any of the 9 protected grounds of discrimination, including and perhaps in particular sexual harassment. They are also heavily encouraged to put in place an equality/dignity at work policy, which puts employees on notice of their own obligations.

An approved code of practice is available from the Workplace Relations Commission (Statutory Instrument 208 of 2012 Employment Equality Act 1998 (Code of Practice) (Harassment) Order 2012). The matter is also considered a health and safety risk, which can and does on occasion lead to High Court claims for personal injury, and a code of practice is available from the Health and Safety Authority.

Employers can be held vicariously liable when an employee sexually harasses a co-worker and, where they do not address sexual harassment matters, this can result in their being respondents to either claims pursuant to the Employment Equality Acts or for constructive dismissal or even High Court claims. Where employers do not have any policy in place, this drastically reduces their ability to defend such claims. A defence for an employer is if it has taken steps that are reasonably practicable to prevent sexual harassment. The Labour Court has made clear that employers must be conscious of the possibility of sexual harassment occurring and show, at a minimum, that a clear anti-harassment or dignity at work policy was in place before the harassment occurred, that the policy was effectively communicated to all employees, and that management personnel have been trained to deal with incidents of harassment and to recognise its manifestations.

### Potential Liabilities and/or Sanctions that could arise from sexual harassment in the Workplace (for both the harasser and the employer)

#### For the Employer:

As above, employers can face actions pursuant to the Employment Equality Acts or the Unfair Dismissals Acts (the latter where the harassment has resulted in the recipient's resignation). In both cases, compensation is up to two years of the employee's remuneration, although this is limited to actual losses (ie loss of earnings) in the case of constructive dismissal. Gender discrimination claims, which can arise from sexual harassment, may also be issued in the Circuit Court, where compensation is unlimited. These claims must be brought within 6 months of the cause of action. However, if a continuum of the alleged harassment can be demonstrated, the Labour Court have found that it can change the time limit for consideration.

Employers can also face High Court proceedings for personal injury, where the recipient of harassment can establish that he/she has sustained a psychiatric injury as a result of the harassment. If the claim is successful, compensation for injury, loss of earnings and loss of future earnings may be awarded. General damages for injury are generally no more than €60,000 and, in practice, loss of earnings is not often awarded (although this may change and depend on the individual circumstances of the case). These claims must be brought within 2 years of the cause of action.

#### For the Harasser:

Sexual harassment can result in the dismissal of the harasser, whether with or without notice, provided the employer has used a fair and thorough procedure, including an investigation of whether the harassment, on the balance of probabilities, occurred.

Cases of physical harassment could also be reported to the Garda Síochána (the Irish police force) and may be prosecuted accordingly. The recipient can pursue the harasser for damages in a civil claim but, in practice, the employer is the more frequent target for such claims.



## Interesting Developments or Cases to Report in Ireland

The majority of cases involving sexual harassment appear to be settled before hearing, presumably for fear of reputational damage, and one of the last widely reported case before the Workplace Relations Commission was in 2016, involving the employee of a “major retailer” (such cases are reported anonymously) who was continuously subjected to offensive remarks of a sexual nature by colleagues between 2010 and 2012. The employer had a written policy in place, which was in English only and was deemed inadequate where the harassers appear not to have been proficient English speakers. The employees’ manager was untrained and had only the vaguest understanding of what constituted sexual harassment; he allegedly dismissed the harassers’ behaviour as their being “just young lads”. The employee was awarded €15,000.

A recent High Court judgment, *Lyons v. Longford Westmeath Education and Training Board* [2017] IEHC 272, has potentially troubling ramifications for sexual harassment complaints in the workplace. *Lyons* does not pertain to sexual harassment but rather to an employer’s bullying investigation, in respect of which the High Court found that the alleged perpetrator of bullying ought to have been permitted legal representation during the investigation process and, furthermore, that he or his lawyer ought to have been permitted to cross-examine the complainant. Because the alleged perpetrator had not been afforded these entitlements, the process was deemed in breach of his Constitutional right to fair procedures and the employer consequently had no right to proceed to disciplinary hearing. The case to an extent turns on its particular facts, and on the particular High Court judge. However, there are some concerns about the potential dampening effect it could have on complaints of sexual harassment. The decision is currently under appeal.

### TOP TIPS for International Employers with a Workforce in Ireland:

- As above, it is not only important to have written policies in place but also to ensure that these are communicated to employees and that managers are trained to deal with complaints in accordance with the policies.
- When a complaint is made, it must be taken seriously and dealt with expeditiously but, at all times, we recommend taking specific advice on the application of the procedure.

# ITALY

## Cultural Background

Article 26 of the Italian Legislative Decree 198/2006 (the so-called "Equal Opportunities Code") defines harassment as *"those unwanted behaviors that are in place for sex-related reasons, with the purpose or effect of violating the dignity of a worker or workers and to create an intimidating, hostile, degrading, humiliating or offensive climate"*.

More specifically, sexual harassment is those *"unwanted behaviors with a sexual connotation expressed in physical, verbal or non-verbal form"* with the same purpose.

Pursuant to that legal provision, any act, agreement or measure relating to the employment relationship of employees who are victims of harassment is null and void if adopted as a result of the employee's refusal or submission to the harassment.

There is nothing more specific about sexual harassment in the workplace in Italy: the cases of sexual harassment in the workplace are normally brought back to the hypothesis of discrimination in the workplace or to the hypothesis of simple harassment or sexual violence provided for by the Italian Criminal Code.

The lack of interest in the issue in Italy is also demonstrated by the fact that the only survey on this topic was carried out by Istat (the Italian National Institute of Statistics) between 2008 and 2009. According to the data obtained, 1,224,000 women (equal to 8.5% of workers) have been sexually harassed or blackmailed in the workplace. In particular, 842,000 women, between the ages of 15 and 65, were subjected to sexual recklessness: 1.7% to be recruited and 1.7% to keep their jobs or to be promoted. On the other hand, those who were asked for "sexual availability" during their job search amount to 500,000. Often, these are harassments which date back in time: 31.8% of sexual harassment received by the same person began more than 10 years before and 38% between 5 and 10 years before.

However, only few of the victims denounced the problem, because of the fear of losing their job, as well as to damage their image.

## Legal Definition of Sexual Harassment

As above said, the only definition of sexual harassment is given by Article 26 of the Italian Legislative Decree 198/2006 which defines sexual harassment as those *"unwanted behaviors with a sexual connotation expressed in physical, verbal or non-verbal form, with the purpose or effect of violating the dignity of a worker or worker and to create an intimidating, hostile, degrading, humiliating or offensive climate"*.

## Sexual Harassment in the Workplace

Pursuant to Article 2087 of the Italian Civil Code, the employer has a general duty of protection of the employee's health. In case of sexual harassment, committed by an employee against a colleague, the behavior carried out by the harasser could be considered as a violation of the victim's health. In case of lack of control by the employer, he could be considered responsible for the damages suffered by the victim of sexual harassment in the workplace.

In light of the above, it is suggested to adopt a policy that contains specific procedures and safety measures against sexual harassment in order to avoid potential damages.

As an example, a recent judgment issued by the Court of Florence on April 20, 2016, has brought the sexual harassment back to Article 2087 of the Italian Civil Code (see an extract of the judgement: *"There is a discrimination for reasons of sex with violation of Article 2087 c.c. in case of repeated sexual, verbal and physical harassment, also ascertained by a criminal Court, by the father of the legal representative of the company, who actually worked as the*

owner of the company, resulting in a just cause for resignation and condemnation of compensation of biological and non-pecuniary damage due to discrimination”.

Normally Collective Bargaining Agreements do not specifically regulate sexual harassment. Otherwise particular procedure can be provided for by the Company’s Ethical Code that could guarantee to the employees the correct way to report the cases of sexual harassment and protect their dignity and privacy.

On April 2016, **Assolombarda** (one of the main Italian entrepreneurial association) **and Cgil, Cisl, e Uil** (the main three Italian Trade Unions) signed an Agreement named “**ACCORDO QUADRO SULLE MOLESTIE E LA VIOLENZA NEI LUOGHI DI LAVORO**” (following the European 2012 Agreement’s contents) in order to prevent harassment and violence in the workplace.

## **Potential Liabilities and/or Sanctions that could arise from sexual harassment in the Workplace (for both the harasser and the employer)**

### Criminal law perspective:

First of all it has to be considered that in Italy criminal liability can be only charged on the subject who committed the crime. This means that the victim of the sexual harassment in the workplace can sue the harasser (and not the employer) before the Criminal Court to ask that he be condemned. In the same proceedings, the victim can ask the harasser to pay compensation for damages.

Sexual harassment can be included, from a criminal law stand point, in the general concept of “harassment”, regulated by Article 660 of the Italian Criminal Code. Pursuant to such Article, the harasser can be condemned to 6 months imprisonment or the payment of a fine up to 516,000 Euro.

In addition to that:

- the Italian Criminal Code also punishes cases of “sexual assault” (article 609-bis), which consists of coercing any person to take part in sexual acts through violence, threats or abuse of authority, or through abuse of the inferior mental or physical state of the victim at the moment of the act or by deception, where the offender claims to be someone else in some way in order to induce any person to commit sexual acts. The punishment is imprisonment ranging from five to ten years.

- the crime of “persecutory acts” (i.e. stalking) has been recently introduced by Law Decree No. 11 of 23 February 2009, converted into Law No. 38 of 23 April 2009. Such new regulations provides for imprisonment ranging from six months up to five years for any person who repeatedly threatens or harasses any other person in such a way as to cause in that other a lasting and grave state of anxiety or fear, or to generate a well-founded fear for one’s own safety or that of a close relative or a person related to the same through a relationship of affection, or to force that person to alter his or her habitual lifestyle.

### Civil and Labor law perspective:

- *for the harasser:* the misbehavior carried out by the harasser may constitute a just cause or a justified reason of dismissal. A repeated harassment is not always necessary: even a single case of sexual harassment or a serious attempt could be considered a reason for a disciplinary sanction or a disciplinary dismissal (depending on the seriousness of the sexual harassment).

The harasser is responsible for all the damages suffered by the victim as consequence of the sexual harassment.

- *for the employer:* in the light of Article 2087 of the Italian Civil Code, the employer could be considered responsible, jointly with the harasser, for the damages suffered by the victim.

- *for the victim*: the sexual harassment could be considered a just cause of resignation from the employment relationship. In this case, the victim is entitled to receive the payment of the indemnity in lieu of notice provided by the National Collective Bargaining Agreement (NCBA) applied by the Company and the reimbursement for the damages (if proved) suffered as a result of the sexual harassment.

On this regard, please note the following significant decision of the Court of Milan about a case of sexual harassment and resignation for just cause.

Court of Milan, June 16, 1999:

*"Sexual harassment towards an employee consisting of acts that damage her personality and dignity, even from a psychological point of view, and suitable to arouse discomfort in a context in which the injured person is in a situation of inferiority, integrate a just cause of resignation".*

A sociological note: It often happens that if the harassers are key-managers, the Company usually doesn't take any measure against their illicit behavior and forces the victims to resign or to move to a different office. This means that, in some cases, the harasser has more protection than the victim.

## Interesting Developments or Cases to Report in Italy

- **Regional counsellor for the "equal opportunities" (*Consigliera di parità regionale*):** in every Italian region there is a counsellor for "equal opportunities": this is an important role introduced by Italian Law N. 125/1991 with a specific function of promoting and monitoring the effectiveness of equal opportunities (i.e. non-discrimination) in many areas, including the workplace. The counsellor has also the possibility to participate as a third part in judicial claims involving discrimination and, of course, sexual harassment.

- **Recent Italian law on Whistleblowing:** the new law was approved by Italian Chamber of Deputies recently (on November 15, 2017) and it concerns *"the protection of the employee who reports any kind of information or activity that is deemed illegal or unfair witnessed during the job relationship both, public or private"*.

For the Italian legal system this is an important step. This new law will represent an important help for the employees to report harassments, even if sexual, mobbing or any kind of illicit behavior they are exposed to.

We look forward to seeing the impact that this new legislation will have on the employment market.

## TOP TIPS for International Employers with a Workforce in Italy:

We always suggest our clients, for a better protection of physical and physiological employees' health, to draft specific policies also providing for detailed procedures to be followed in case of sexual harassment and the measures to be adopted.

# NETHERLANDS

## Cultural Background

Research has been carried out in the Netherlands in 2016 that showed that on average, 16% of employees had to endure/suffer through unwanted behaviour in the workplace, including discrimination, bullying, violence and sexual and other forms of harassment. The sickness-related absences caused by this unwanted behaviour costs Dutch employers around €7 billion in total. Therefore, in June 2016, the Dutch government decided to launch a campaign to raise awareness about unwanted behaviour in the workplace as well to offer companies tips for developing policy to protect the health and safety of employees.

## Recent Examples of Sexual Harassment Scandals

Even in the Netherlands, more and more stories about sexual harassment are emerging in the world of television, film, and theatre with the hashtag #MeToo. In his column for a Dutch newspaper, the critic Jelle Brandt Corstius recently wrote about an incident at the start of his career when, according to him, he was drugged and sexually abused. The report caused a great deal of commotion in the media industry and more people have since come forward claiming that they were victims.

## Legal Definition of Sexual Harassment

Dutch legislation was amended towards the end of 2006 in order to implement the European Directive 2002/73/EC. The definition of sexual harassment in the Netherlands is included in the equality legislation:

*'any form of verbal, non-verbal or physical conduct of a sexual nature with the purpose or effect of affecting the dignity of the person, and in particular, if an intimidating, hostile, degrading, humiliating or offensive environment is created.'*

The word 'unwanted', which is included in the European Directive, is absent in this definition. The Dutch government left it out in order to offer the victim better legal protection. It has, after all, a subjective connotation that can lead to undesirable discussions in court about whether the victim had given the impression that they had consented to certain conducts. The feelings and motives of parties must be regarded as objectively as possible. The subjective perception of those involved must not be the decisive factor in a dispute about sexual harassment.

## Sexual Harassment in the Workplace

In the explanation of the law, numerous types of sexual harassment in the workplace are given, such as ambiguous remarks, unnecessary touching, peeping and pornographic images in the workplace, however, it can also include assault, rape, and sexual blackmail; such as making decisions or the chance of promotion dependent on performing sexual services.

In the Netherlands, employers have a duty of care towards employees under the Working Conditions Act (Arbeidsomstandighedenwet) to ensure that the workplace is free from sexual harassment. Therefore it is irrelevant whether the sexual harassment is from a manager or a colleague. The workplace must be free of sexual harassment. If, however, misconduct is performed by a manager, it will be an aggravating factor when the employer imposes disciplinary measures.

In order to comply with the statutory duty of care, the employer must take responsibility for:

1. Preventative policy  
The obligation to draw up a preventative policy arises out of the equality legislation and the Working Conditions Act. An employer must respond properly and promptly and correct the situation.
2. A complaints procedure

A complaint about sexual harassment must be dealt with properly. Having a complaints procedure and a confidential adviser in place is therefore advisable, not just in order to comply with the statutory duty of care, but also to provide employers and employees with guidelines as to how they should handle a complaint. An employer will ultimately be held liable for a complaint that is handled carelessly.

3. Sanctions policy

The employer must also have a policy in respect of the sanctions to be applied to sexual harassment. The chosen measure must be in proportion to the severity of the misconduct, and the disciplinary measures that are most appropriate will depend on the circumstances. The employer must strike a balance between the interests of the offender, the reputation of the company and the protection of employees. Examples of disciplinary measures include a warning, a reprimand, a fine, a transfer or even termination of the employment contract for a sufficiently serious reason.

4. Measures aimed at restoring working relationships

If a complaint about sexual harassment was justified but both parties decide after consultation that they can both remain working at the company, the employer must make sure that the colleague in question really has stopped exhibiting transgressive behaviour. The employer must also ensure that the working relationships are sufficiently repaired.

The employer is then obliged to apply a policy that aims to create a safe working environment. He or she must also expressly publicise this policy within the company, including any disciplinary measures for a transgression. This is naturally a preventative measure, but it is also important if the employer must apply a sanction due to sexual harassment. According to case law, the transgression will weigh more heavily if employees have been warned. Anyone who continues to exhibit unwanted behaviour/sexual misconduct despite having been told that it is unwanted, must face a more serious disciplinary measure.

**Potential Liabilities and/or Sanctions that could arise from sexual harassment in the Workplace (for both the harasser and the employer)**

Sexual harassment is not a criminal offence in the Netherlands, because in criminal law, the term covers every approach or sexual behaviour that the victim deems unwanted. This is a subjective concept and therefore difficult to criminalise. A perpetrator can only be punished in the Netherlands if the sexual intimidation is accompanied by unwanted indecent acts. The criminality is mostly found in the indecency and/or actual assault, punishable by a maximum prison sentence of eight years or a fine of up to €82,000.

This is why victims of sexual harassment in the workplace usually make a claim against their employer under civil law. If the employer fails to fulfil his or her duty of care, then he or she is acting contrary to the equality legislation and the obligation to act as a responsible employer (Article 7:611 of the Dutch Civil Code). The employer is also failing to fulfil his or her obligation to prevent the employee from suffering any injury as a consequence of carrying out his or her work (Article 7:658(1) of the Dutch Civil Code). The employee may then make a claim against the employer for damages. The amount of compensation is difficult to set and depends on the facts and circumstances of the case.

Sexual harassment can be grounds for terminating an employment contract if the perpetrator is accused of serious misconduct.

It is also possible to initiate a complaint procedure at the Netherlands Institute for Human Rights because sexual harassment is a form of gender-based discrimination. The Institute also decides if sexual discrimination has taken place. It first tests whether there has been conduct that can be regarded as of a sexual nature by objective standards in the given context. The Institute also states, like other bodies, that it is not the intention to argue about the personal perception of those involved. It must be about behaviour that any reasonable person would consider as sexual. The Institute then tests whether the sexual behaviour had the purpose or

effect of affecting the dignity of the victim. It also looks at the context in which the behaviour took place. The balance of authority, the tone and intensity are important, as is the location, any difference in age, and whether there was repeated misconduct.

The Netherlands Institute for Human Rights is accessible and free. Its judgement is influential but it is not binding, so a victim must apply to the court for a binding decision or compensation. It is therefore possible to allow the Institute to investigate the dispute before applying to the court for judgement. The Institute's decision is then also included in the deliberations.

### **Interesting Developments or Cases to Report in the Netherlands**

A consequence of the #MeToo campaign is that more attention is being paid to sexual harassment in politics in the Netherlands too. It has led to an employee being dismissed from the municipality of The Hague after complaints of sexual harassment in 2017 and another employee receiving a reprimand. It was revealed, following questions from a councillor, that six complaints of sexual harassment were dealt with by the Municipality of The Hague in 2017, demonstrating that sexual harassment was far more common than people think.

The Dutch government has developed numerous activities in recent years to encourage and help companies to develop an effective approach. The Ministry of Social Affairs and Employment actively initiate campaigns regarding unwanted conduct, including sexual harassment, in order to encourage more discussion about the subject in the workplace. Tools have also been developed and made available and meetings are being organised, including those aimed at employers. In 2018, an Action Team will be launched that will actively advise a number of companies so that they can put measures into practice that will lead to tangible results with regard to the reduction of sexual harassment at work.

### **TOP TIPS for International Employers with a Workforce in the Netherlands:**

- Draw up a policy that aims to create a safe working environment.
- In doing so, involve the works council or the employees' representatives.
- Publicise the policy within the organisation, for example, by including it in the employee handbook, and include an internal complaints procedure.
- Appoint a confidential adviser and complaints committee.
- Put the policy into practice and take complaints seriously.

# PORTUGAL

## Cultural Background

In Portugal, harassment is defined as *"unwanted behaviour, notably based on discrimination that occurs in a recruitment stage or in the context of employment, with the purpose or effect of disturbing or violating dignity of a worker or to create an intimidating, hostile, degrading, humiliating or offensive climate"*.

More specifically, sexual harassment can be defined as *"an unwanted, verbal, non-verbal or physical, behaviour with a sexual connotation that is unwanted by the worker against whom it is directed"* with the purpose of disturbing or violating dignity of a worker or to create an intimidating, hostile, degrading, humiliating or offensive climate."

Portugal is a very catholic country, and therefore the population's perception of sexual harassment is highly regarded through one's religious standpoint. As a result, in cases of sexual harassment, individuals often presume that the victims are the ones at fault. This is due to the fact that the victim exposed/placed herself/himself in such a situation, which some believe could have been avoided. Not only does this affect the perceived understanding of the population and institutions regarding harassment, however, it also socially stigmatizes the victims, and therefore, leading them to avoid reporting these cases, fearing not only job loss, but also, have their reputations ruined.

Significant efforts have been made to create and provide a more stable and safe environment for employees at the workplace in hopes of fighting sexual harassment. This is having a profound effect on companies on a global scale.

## Legal Definition of Sexual Harassment

Article 29 of the Portuguese Labour Code defines sexual harassment as *"An unwanted, verbal, non-verbal or physical, behaviour with a sexual connotation that is unwanted by the worker against whom it is directed with the purpose of disturbing or violating dignity of a worker or to create an intimidating, hostile, degrading, humiliating or offensive climate"*.

Harassment provisions apply irrespective of the job position or sex of the harasser or the victim.

## Sexual Harassment in the Workplace

As stated above, significant efforts fighting against harassment at work have recently skyrocketed, leading to a significant impact on companies.

In fact, a very recent amendment to the Portuguese Labour Code, which came into force on the 1<sup>st</sup> of October 2017, strengthens the legislation to prevent harassment at work in both public and private sectors.

The Portuguese Labour Code provides:

- An express provision of (i) the right to compensation for financial and non-financial loss and damage whenever there is a situation of harassment (ii) a special set of rules to protect the complainant and the witnesses in proceedings relating to assault situations.
- A requirement to adopt a code of good conduct to prevent and combat assault at work, whenever the company has at least seven employees.
- A requirement to begin disciplinary proceedings whenever the employer becomes aware of alleged situations of assault at work.
- An assumption that any dismissal or other sanction applied allegedly to punish a breach of the rules is abusive, up to one year after the complaint or other form of exercising rights relating to equality, non-discrimination and assault.



Apart from these changes, the labour code holds the employer responsible for compensating loss or damage arising from occupational diseases that result from assault.

It is important to note that since October 1st, 2017, any company with more than seven employees that does not have a code of conduct that covers preventing and combating assault will have to introduce one before this date, or they will be at risk of committing a serious administrative offence.

### **Potential Liabilities and/or Sanctions that could arise from sexual harassment in the Workplace (for both the harasser and the employer)**

- *for the harasser:*

The misconduct carried out by the harasser may constitute a just cause for dismissal. Contrary to moral harassment, sexual harassment does not require an ongoing continued harassment behaviour. One single case of sexual harassment or a serious attempt could be considered a reason for a disciplinary sanction or a disciplinary dismissal (depending on the seriousness of the sexual harassment).

The disciplinary action is conditioned by two types of time limitation:

- Expiry: the employer must start disciplinary proceedings within 60 days as of the knowledge by the person with disciplinary powers of the harassment situation;
- Statute of limitation: the right to disciplinary action is considered extinct once 1 year passes over the misconduct (except if it constitutes a crime, in which case the criminal statute of limitation supersedes this deadline)

The harasser is responsible for all the damages suffered by the victim as consequence of the sexual harassment.

- *for the employer:*

In the light of Article 29 of the Portuguese Labour Code, the employer could be considered responsible, jointly with the harasser, for the payment compensation for financial and non-financial loss and damage of the victim. In addition the employer will also be liable for committing a very serious administrative offence punishable with a fine ranging between EUR 2,040.00 and EUR 61,200.00 for each term employment contract, depending on the annual turnover and degree of severity. In addition, the following ancillary sanctions may apply: (i) publicity of the decision; (ii) prohibition of applying to public tenders; (iii) temporary closure of the facilities where the non-compliances were detected

- *for the victim:*

The sexual harassment could be considered a just cause for termination of employment by the victim. In this case, the victim is entitled to receive the payment of the indemnity between 15 and 45 days of remuneration per year of service and compensation for financial and non-financial loss and damages.

### **Interesting Developments or Cases to Report in Portugal**

Law no. 73/2017, of 16 August 2017, which came into force on 1 October significantly strengthened the legislation to prevent situations of harassment at work in both public and private sectors by making changes to the Employment Code and the General Law on Work in the Civil Service.

It is expected that new regulations will soon come into force. It is expected that the Working Conditions Authority (Autoridade para as Condições do Trabalho) will be granted additional means to enforce the fight against harassment at work notably by having dedicated teams of inspectors to receive complaints about assault in the workplace.

### **TOP TIPS for International Employers with a Workforce in Portugal:**

It is essential to have an internal alignment and understanding between the company and its employees in order to ensure the avoidance of harassment situations at work. This is generally achieved with clear and strong internal policies on harassment, clear procedures on how to react upon a harassment claim, and an external team of legal counsellors ready to conduct swift investigations and launch disciplinary proceedings if and when applicable.

## SPAIN

### Cultural Background

The increase of numbers of women in the labor market has given rise to significant changes both at a cultural and legislative level. When Spain transitioned from a dictatorship to a democracy, concepts such as equality amongst men and women arose with strength, becoming constitutional rights. Such political and legislative changes were not only accompanied by but a consequence of a new way of thinking. Nevertheless, the stigmatization of women in traditional roles and the objectification of women, accompanied by the flirtatious open culture in Spain still lead to situations which develop in sexual harassment conducts in the workplace.

### Recent Examples of Sexual Harassment Scandals

Scandals in this matter have not been made public on a Company level. If there is a claim on this matter, an agreement is usually reached to avoid litigation and bad publicity for the Company or brand, and those agreements are kept strictly confidential. Nevertheless, two sexual harassment scandals on a political level have been publicised:

- i. Ms. Teresa Rodríguez case (2016), Secretary of a political party called “Podemos”: In 2016, the Chamber of Commerce of Seville invited Ms. Rodríguez to their Christmas celebration. Press releases state that Ms. Rodríguez went to the second floor of the building, wanting to greet both the president of the Chamber, Mr. Medina, and its representatives. In the stairway, allegedly Mr. Medina lunged at her, pushing her against the wall and placed his hand over her mouth to pretend he was kissing her. The case is being followed against the Instruction Court number 11 of Seville.
- ii. Ms. Nevenka Fernández case (2001). Ms. Fernández accused Mr. Ismael Álvarez, Mayor of the municipality of Ponferrada (Castilla y León) of sexual harassment. Mr. Álvarez was her superior but in 1999 they had a consensual intimate relationship. Once the relationship ended, Ms. Fernández was subjected to a series of conducts which affected her dignity in the work place, as Mr. Álvarez abused his hierarchical superiority. The court ruled in favor of Ms. Fernández, convicting him of a *crime of sexual harassment*.

### Legal Definition of Sexual Harassment

From a criminal perspective, Organic Law 10/1995, of November 23, of the Penal Code defines sexual harassment as “*whoever requests favors of a sexual nature, for him/herself or for a third party, within the scope of employment, teaching or service provision, in a continued or habitual manner, and with such behavior provokes in the victim an objective and seriously intimidating, hostile or humiliating situation*”.

From an employment viewpoint, Organic Law 3/2007 regarding the effective equality between men and women defines sexual harassment as “*any behavior, verbal or physical, of a sexual nature that has the purpose or produces the effect of impairing the dignity of a person, particularly when creating an intimidating, degrading or offensive environment*”.

### Sexual Harassment in the Workplace

**Definition.** Analyzing the definition above stated, many questions arise. Some of them have been thoroughly analyzed by the Spanish Case Law. Nevertheless, we must take into consideration that sexual harassment cases are highly fact sensitive, thus, we can only refer to certain general guidelines and examples.

- i. **What type of “verbal behaviors” constitute sexual harassment?** Constant telling of sexual jokes; commenting physical aspects; describing sexual fantasies; constant

questions regarding sexual preferences; degradant and obscene ways of addressing people; wide spreading sexual rumors of a coworker; any type of communications with a sexual and/or offensive tone; manners that seek humiliating a person regarding their sexual condition; requesting sexual encounters etc.

- ii. **Does non-verbal conduct constitute sexual harassment?** The use of images, photographs or similar in the work place could constitute sexual harassment.
- iii. **To what extent does physical behavior or physical contact determine sexual harassment?** The main delimitation of physical contact in sexual harassment conducts refers to how such contact affects the dignity of the person and specially, if said contact intimidates, degrades or offends the victim. How the victim feels in the moment of being harassed is a key concept to identify if there is or there isn't harassment.
- iv. **Must the harasser be a supervisor or can you be harassed by a co-worker of the same level / inferior level?** Sexual harassment can be carried out by a hierarchical superior or by co-workers of the same level or inferior level (this is known as environmental harassment).

**Is it compulsory for companies to implement an internal policy against sexual harassment in the workplace?** Organic Law 3/2007 states that "Companies must promote working conditions that prevent sexual harassment and arbitrate specific procedures for its prevention, channeling complaints and claims that may be made by those who have been subject to it".

Additionally, Collective Bargaining Agreements ('CBAs') usually include specific regulations regarding the internal policies that must be adopted against sexual harassment conducts. In practice, these policies are commonly known as "company ethical codes" or "protocols against harassment". These policies must include a specific complaint procedure which guarantees the confidentiality of both the claimant and the victim (which may not always be the same person). Also, these policies must explain how the internal investigation must be carried out, specifying the time frames and terms.

**Is sexual harassment considered as a risk in the workplace from the Health and Safety perspective?** To this extent, Risk Prevention Law states as preventive measures the identification or evaluation of psychological risks; training activities for management positions; health surveillance regarding the mental health of the employees. These obligatory preventive measures demonstrate that sexual harassment is considered a risk in the workplace from a Health and Safety.

**In order to terminate the harasser's employment contract for cause (fair disciplinary dismissal), must the sexual harassment be a repeated behavior?** Case Law study suggests that there are three substantive elements that configure sexual harassment behavior: the request, the refusal and the persistence. Nevertheless, classifying the aggressor's behavior as sexual harassment upon one sole incident is possible, responding on the gravity of the incident.

**Statute of limitation for the victim to file a complaint against the harasser / for the employer to take disciplinary action against the harasser.** If the victim wants to claim for damages (including moral ones) against the Company (solely or jointly against the harasser) or if the victim wants to terminate the contract with right to a severance payment, the general limitation period of 1 year in article 59 of the Spanish Workers Statute applies, counted since the claim could have been brought.

The misconduct carried out by the harasser may constitute a just cause for dismissal. If the Company, after a complaint, decides to dismiss the harasser, the limitation period for taking

such action is 60 calendar days<sup>2</sup>. For top management employees (General Managers or similar) the term is 12 months. This time-limit runs from the moment at which the Company acquires knowledge of the sexual harassment behavior. Please note that sexual harassment conducts are usually continuous conducts, repeated over time, and hidden behaviors, that requires a prior complaint and a subsequent investigation for the Company to have knowledge of it.

### **Potential Liabilities and/or Sanctions that could arise from sexual harassment in the Workplace (for both the harasser and the employer)**

For the harasser, if it is considered a criminal offence<sup>3</sup>, up to 1 year of imprisonment or up to 14 months of fine, calculated over a daily amount which will be determined by the judge. The range of the fine is 2 – 400 daily euros (therefore, €850 – €170,000). Moreover, from an employment perspective, it could constitute grounds for a fair disciplinary dismissal, with no right to severance payment.

For the employer, the liabilities depend on the following: if the Company has duly acted to prevent harassment at work. If such measures are not effectively carried out, for instance, if the Company does not evaluate the psychosocial risks in the workplace or does not carry out an internal investigation having received a sexual harassment complaint, article 50 of the Workers Statute could apply.

On the basis of article 50, the victim has the right to terminate his/her contract based on a severe contractual breach of the employer. If a victim claims this right against the Employment Court, and the Company is proven liable, the following compensation would be due to the employee:

- (i) The same compensation as an unfair dismissal, this is, 33 days of salary per year of service with a limit of 24 months. Please note that there are particular rules applied when the employee's contract is prior to the 12<sup>th</sup> of February of 2012.
- (ii) A compensation for damages, including the moral ones, usually quantified using LISOS Law and the scale of compensation in traffic accidents

Additionally, if the sexual harassment conduct leads the victim to a temporary disability, such contingency would be declared as a "*professional work contingency*". Therefore, the employer could be liable, in certain cases, to the payment of a surcharge between 30%-50% over the public subsidy the employee receives from the Social Security National Institute.

Finally, an administrative sanction could be imposed, amounting €6,251 to €187,515.

### **Interesting Developments or Cases to Report in Spain**

Spain was the first Country of the European Union to transpose the Directive 2002/73 CE regarding the implementation of the principle of equal treatment for men and women, though the Organic Law 3/2007.

Additionally, on the 1<sup>st</sup> July of 2015 a reform of the Spanish Penal Code entered into force. As a result of such reform, there is the figure known as the "compliance officer"<sup>4</sup> who must oversee the supervision, monitoring and control of the obligatory "crime prevention plan". Sexual harassment should be included in such plan.

<sup>2</sup> Article 60.2 of the Spanish Workers Statute establishes that: "With respect to the workers, the minor faults will expire after ten days; the serious, at twenty days, and the very serious, at sixty days from the date on which the company became aware of its commission and, in any case, six months after it was committed".

<sup>3</sup> Please note that the Penal code regulates aggravating circumstances, which could lead to higher liabilities.

<sup>4</sup> The "compliance officer" is not defined in Spanish legislation. However, the supervision and surveillance functions are included in article 31 bis of the Criminal Code, after the reform which entered into force on July 1<sup>st</sup>, 2015.

Lastly, Royal Decree-Law 18/2017 of 24 November, has introduced new corporates' obligations in terms of non-financial information and diversity policy, including the compulsory adoption of measures to allow a balanced gender ratio in the Board of Directors in large and listed Companies.

### **TOP TIPS for International Employers with a Workforce in Spain:**

- Favoring positive attitudes towards effective equality amongst men and woman. This could be done by providing employees with training programs and raising awareness.
- Implementing standard procedures for reporting and dealing with sexual harassment in the workplace.
- Providing information to employees regarding the procedures in the company to report sexual harassment.
- Elaboration of company principles which include zero tolerance regarding sexual harassment conduct.
- Elaboration of good practice codes. Where sexual harassment is reported, investigations and the corresponding actions should be carried out.

# SWITZERLAND

## Cultural Background

In our view, the cultural background of sexual harassment in general and at the work place is closely tied to the development of women's rights, as women are by far more likely to be a target of sexual harassment than men. Switzerland has traditionally been a country where women's rights have evolved rather slowly compared to its neighbors and other developed countries. However, in recent years women's rights have evolved rapidly and so has society's perception and awareness of sexual harassment towards women.

## Recent Examples of Sexual Harassment Scandals

There have been two prominent sexual harassment scandals in the past few years. In 2014, a member of the Swiss Parliament sent sexually offensive pictures to a former employee. The same happened in late 2016, when an executive of the Swiss trade union (UNIA) was accused of sexting with a female employee.

Both were heavily criticized by the media and public. They faced consequences for their actions and were either temporarily suspended or laid off entirely.

## Legal Definition of Sexual Harassment

The term "sexual harassment" can be found in the Swiss civil law as well as in the Swiss criminal law. According to article 198 Swiss Criminal Code a person commits a crime in case it "*sexually harasses another physically or through the use of indecent language*". A physical act needs physical contact whilst less intensive approaches and intrusiveness can amount to harassment. In order to be criminally punishable, verbal harassment must happen in a serious way.

The term sexual harassment in the Swiss civil code is much broader than the term used in the Swiss Criminal Code. Article 4 of the Federal Act on Gender Equality (Gender Equality Act, GEA) states that "*Any harassing behaviour of a sexual nature or other behaviour related to the person's sex that adversely affects the dignity of women or men in the workplace is discriminatory. Such behaviour includes, in particular, threats, the promise of advantages, the use of coercion and the exertion of pressure in order to obtain favours of a sexual nature.*"

## Sexual Harassment in the Workplace

Sexual harassment can happen with words, gestures or deeds. Specifically, the following situations can be considered sexual harassment:

- Sexist comments and jokes about sexual characteristics, sexual behaviour and the sexuality of women or men.
- Showing or displaying pornographic material in the workplace.
- Unwanted bodily contact or issuing unwanted invitations with unmistakable intent.
- Stalking employees at work or outside work.
- Sexual assault, coercion or rape.

It is not the intent of the harassing person but the subjective impression which is defensive, i.e. if the harassed person experiences the behavior as unwanted or not.

### Legal basis

An employer is obliged to protect its employees from sexual harassment due to the following legal basis:

1. Article 328 section 1 Swiss Code of Obligation  
The article mentions explicitly that the employer has to protect its employees from sexual harassment and that victims of sexual harassment do not suffer any more disadvantages.

2. Article 6 section 1 Federal Act on Employment and article 2 Regulation 3 to the Federal Act on Employment (Health Protection)

These two articles stipulate the employer's duty to protect employees' health. Sexual harassment is one of the issues discussed under these articles.

3. Gender Equality Act

Protection from sexual harassment is part of the employer's duty of care to its employees. It circumvents prevention measures as well as measures in cases sexual harassment has happened.

In certain Collective Bargaining Agreements, the employer's duty of care expressly includes the employer's obligation to create a working atmosphere free from any discrimination and especially from sexual harassments.

**Potential Liabilities and/or Sanctions that could arise from sexual harassment in the Workplace (for both the harasser and the employer)**

If sexual harassment reaches the threshold of article 198 Swiss Criminal Code, the harasser can be fined. The amount of the fine varies depending on the financial circumstances of the harasser and can amount up to CHF 10'000 which is the equivalent of approximately 8,500 euros.

If the employer does not comply with its legal duty of care the employee is entitled to financial compensation from the employer. The compensation will be calculated by taking all the circumstances into account and on the basis of the average Swiss salary up to a maximum equivalent to six months' salary (article 5 section 3 and 4 GEA).

Consequences

Since in Switzerland a person can even be dismissed without any reason, the harassing person can always be dismissed by adhering to the respective notice period. However, depending on the behaviour of the harasser it is also possible to issue a termination without notice which has to be issued within the short time of only 2-3 working days since the employer took note from the harassing behaviour of the employee.

A victim of sexual harassment can file a claim to the court demanding that (a) discrimination is prohibited or a threatened discrimination is stopped, (b) an existing discrimination is ceased; (c) it is confirmed that discrimination is taking place and/or (d) any due salary must be paid.

If the victim claims financial compensation due to a discriminatory termination of employment it has to challenge the termination before the end of the notice period the latest. If no agreement can be concluded with the employer the employee has to take the case to court within 180 days after the termination of the employment relationship (article 9 GEA in conjunction with 336b Swiss Code of Obligation).

For filing a criminal complaint against the harasser, the Swiss criminal law provides that such complaint has to be filed within three months after the person has identified the suspect.

**Interesting Developments or Cases to Report in Switzerland**

According to the statement of the Federal Office for Gender Equality women still complain about discrimination at the work place and a study of the University of Geneva on behalf of the Federal Office for Gender Equality shows that 83% of the cases with regard to sexual harassment are decided to the detriment of the claimant. Claims relating to dismissals following discrimination are rejected in 90% of the cases (*Study „Analyse der kantonalen Rechtsprechung zum Gleichstellungsgesetz (2004-2015)“*). In order to strengthen the law, the authors of the study suggest that judges, attorneys, and conciliation authorities should focus more on the GEA.



## **TOP TIPS for International Employers with a Workforce in Switzerland**

In order to prevent sexual harassment in the workplace, a company should have a policy outlining the principles in place to prevent sexual harassment in the company. Such a policy should at least include the following points:

- Declaration of the principle that the company is strictly opposed to sexual harassment and will not tolerate such behaviour in the workplace
- A definition of sexual harassment in the workplace. The definition should be abstract. Best practice is to mention some examples that are relevant to the daily business at the company and which the employees will understand.
- Offering support for victims and explaining how they can receive help without needing to worry about reprisals or losing their jobs.
- Stating that perpetrators of sexual harassment are likely to face sanctions.

Besides issuing a policy in writing, the employer should hold events making sexual harassment a subject of discussion. It is important that the information is not only issued or discussed once but is repeated e.g. by distributing the documents once a year with the employee's payrolls.



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