

Sexual harassment in employment: Recent judicial and arbitral trends

Jane AEBERHARD-HODGES *

The decision in the spring of 1996 by the Equal Employment Opportunity Commission (EEOC) of the United States to file suit against Mitsubishi Motor Manufacturing of America for “continued physical and verbal abuse against women” at its car assembly plant in Normal, Illinois, has given rise to a wave of media attention. Press coverage of the case, to be heard by a United States district court as one of the EEOC’s largest sexual harassment suits, stressed not only the gross offence (the sex parties allegedly occurring at the factory), but also the reaction of the factory’s management to the filing of the suit (calling a staff meeting to encourage workers to deny the allegations; alleged seeking out of private records, including gynaecological and divorce records, of the 28 women who have also filed suit against the company). This has led to speculation over the amount of damages that might be awarded if the company is found guilty of sexual harassment in employment.¹

Recent intense debate over the outcome of sexual harassment claims, such as the foregoing, has prompted the current article. Over the last ten years a broad literature – of an academic, legal and sociological nature – has become available on sexual harassment.² Most commentators on this subject start by tracing the emergence of the concept through development of the civil rights legislation in the United States in the 1970s. Most then mention the adoption, on 27 November 1991, of the European Commission’s Recommendation on the protection of the dignity of women and men at work and associated Code of Practice on measures to combat sexual harassment,³ and go on to analyse national legislation concerning sexual

* Equality and Human Rights Coordination Branch, International Labour Office.

¹ See, for example, *The Economist* (London), 13 Apr. 1996; *Financial Times* (London), 13 May 1996; *International Herald Tribune* (Zurich), 19 Apr. 1996; *Le Figaro* (Paris), 9 Aug. 1996.

² See, for example, Collier (1995), Collins (1992), Hauck and Pearce (1992), Martell and Sullivan (1994), Monat and Gómez (1986) and Rubenstein (1993).

³ *Official Journal of the European Communities* (Brussels), Vol. 35, No. L49, 24 Feb. 1992, annex, pp. 3-5.

harassment in employment. It is pointed out that sexual harassment can be dealt with either through equal employment opportunities and human rights legislation, labour legislation, civil remedies such as torts and negligence and, in at least one country, criminal law. Some commentators add the jurisdiction of health and safety legislation as another area where sexual harassment can be attacked (see, for example, Escudero, 1993, and Serna Calvo, 1994, on the situation in Spain; Halfkenny, 1996, on that in South Africa; Pose, 1995, on Brazil; and Schucher, 1995, on Canada).⁴ Yet others look at it from the point of view of a claim for workers' compensation, and examine the difficulties of double recovery in compensating sexual harassment victims (see Vance, 1993, and Lewis, Goodson and Culverhouse, 1993-94, considering the situation in the United States). All appear to seek a clear definition of sexual harassment which would allow actions in the greatest number of alleged cases.

The definition most regularly cited is that of the European Commission's 1991 Recommendation mentioned above, namely:

Article 1. It is recommended that the Member States take action to promote awareness that conduct of a sexual nature and other conduct based on sex affecting the dignity of women and men at work, including conduct of superiors and colleagues, is unacceptable, if:

- (a) such conduct is unwelcome, unreasonable and offensive to the recipient;
- (b) a person's rejection of, or submission to, such conduct on the part of the employers or workers (including superiors or colleagues) is used explicitly or implicitly as a basis for a decision which affects that person's access to vocational training, access to employment, continued employment, promotion, salary or any other employment decisions; and/or
- (c) such conduct creates an intimidating, hostile or humiliating working environment for the recipient.

This definition is repeated in the European Commission's recommendation on the protection of the dignity of women and men at work.

In the Code of Practice itself, the definition is given as follows (section 2):

Sexual harassment means unwanted conduct of a sexual nature, or other conduct based on sex affecting the dignity of men and women at work. This can include unwelcome physical, verbal or non-verbal conduct. Thus, a range of behaviour may be considered to constitute sexual harassment. It is unacceptable if such conduct is unwanted, unreasonable and offensive to the recipient; a person's rejection of, or submission to, such conduct on the part of the employers or workers (including superiors or colleagues) is used explicitly or implicitly as a basis for a decision which affects that person's access to vocational training or employment, continued employment, promotion, salary or any other employment decisions; and/or such conduct creates an intimidating, hostile or humiliating working environment for the recipient (op. cit., supra note 3, p. 4).

⁴The American Psychiatric Association recognized sexual harassment as a "severe stressor" in its *Diagnostic and statistical manual of mental disorders*, 3rd ed., Vol. II, Chicago, 1987.

Most commentators attempt to reflect key court cases that have contributed to definitions and to sanctions and remedies for the distinct legal wrong of sexual harassment in the workplace. This article seeks, at one level, to help readers assess which countries and which jurisdictions in those countries are advancing the law (for better or for worse) through legal interpretation of statutes relating to sexual harassment in employment. At another level, it aims to demonstrate that sexual harassment in employment now attracts the full attention of the law. The focus is on decisions taken since 1990 in the United States and Canada; in France, Ireland, Spain and the United Kingdom; in Japan, Australia and New Zealand; and in South Africa and Côte d'Ivoire.

National and international legal background

Before turning to a description of specific recent cases and arbitral awards, it is important to set the legislative framework in which cases are filed and decisions taken. In *Conditions of Work Digest: Combating sexual harassment at work* (ILO, 1992), the ILO published comprehensive comparative data on 23 industrialized countries. Husbans (1992) and Halfkenny (1995) analysed yet further countries, this time touching on certain developing countries' treatment of sexual harassment in the workplace. In the last few years there has been a major increase in legislative attention to the question, with several countries adopting – particularly in 1995 – specific legislation declaring sexual harassment to be a prohibited activity, or general legislation covering sexual discrimination under which protection from sexual harassment can be provided.

- In Argentina, the Presidential Decree of 18 November 1993 penalizes sexual harassment in the public service.
- In Chile, a Bill on sexual harassment (No. 77-332 of 29 May 1995) is still awaiting enactment.
- In Costa Rica, Act No. 7476 of 3 February 1995 on sexual harassment in employment and education has proved to be a milestone in the outlawing of sexual harassment in the workplace.
- In the Philippines, the Anti-Sexual Harassment Act No. 7877 of 8 February 1995, represents a similar breakthrough; it followed on earlier administrative attention to the matter evidenced by the Department of Labor and Employment Administrative Order No. 80/1991 “Policy against sexual harassment” amended by Administrative Order No. 68/1992, which both suffered from enforcement weaknesses as the policy did not contain penalties for violations.
- In New Zealand, a 1993 amendment (in force in 1994) to the Human Rights Act, 1993, specifically covers sexual harassment.

- In South Africa, Government Notice 804 of July 1996 entitled “Green Paper on Employment Equity” proposes to ban sexual harassment on the job (section 4.1.1).⁵

The many European countries to have taken specific action in this field include:

- Austria, where the Equality of Treatment Act, 1979 (which did not explicitly cover sexual harassment) was amended by Act No. 833/1992, in force on 1 January 1993, to include sexual harassment by an employer or a third party within the concept of prohibited sexual discrimination for which damages can be claimed. Still in Austria, Federal Act, No. 100/1993 of 13 February 1993 concerning the federal public service equates sexual harassment with prohibited sexual discrimination.
- Belgium, also, where the Royal Order of 18 September 1992 concerning protection of workers against sexual harassment in workplaces is complemented by the Royal Order of 9 March 1995 concerning federal ministries; both texts specifically prohibit such behaviour.
- Finland, where Act No. 206 of 17 February 1995 amends the Equality Act, 1986.
- Germany where the Second Act on Equality for Men and Women of 24 June 1994, in section 10, comprises several Acts including the Employee Protection Act to safeguard the dignity of women and men by protecting against sexual harassment.
- Ireland, where the Employment Equality Bill No. 38 of 1996 contains a comprehensive ban on sexual harassment.
- Italy, where a Senate Labour Commission Bill to combat sexual harassment in the workplace is currently under discussion.
- Malta, where amendments to the employment legislation were to be tabled in Cabinet in 1995; they were to include protection of the dignity of all employees against unacceptable behaviour, including sexual harassment.
- Switzerland, where the Federal Act on Equality between Women and Men, dated 24 March 1995 and in force on 1 July 1996, deems sexual harassment to be a case of prohibited sexual discrimination.
- The United Kingdom, where the Sexual Discrimination and Employment Protection (Remedies) Regulations of 22 November 1993 removed the previous £1,000 ceiling on damages to be paid to victims of sexual discrimination, so as to bring the situation in the United Kingdom into compliance with the decision of the European Court of

⁵ Some commentators argue that the South African Interim Constitution (Act No. 200 of 1993) already contains a basis for suit in its guarantee of fair labour practices and prohibition of discrimination based on, *inter alia*, sex, as does the requirement of the Occupational Health and Safety Act (No. 85 of 1993) that employers take such steps as may be reasonably practicable to mitigate or eliminate any hazard or potential hazard to the safety or health of employees (section 8(2)(b)).

Justice in *Marshall v. Southampton and South-West Hampshire Area Health Authority*.⁶

The most important development in Europe concerns the passage in France of legislation on abuse of authority and sexual matters in employment relations (Act No. 92-1179 of 2 November 1992 amending the Labour Code and the Code of Criminal Procedure), implemented by Circular No. 93-88 of 1 December 1993 to apply the Act in the public service; the new law specifically refers to sexual harassment in the workplace as a penal offence punishable under s.152-1-1 of the Labour Code with one year's imprisonment and fines of up to 25,000 French francs. The same harassment can carry sanctions under the Penal Code of a maximum of two years' imprisonment and a fine of up to 100,000 French francs. This cumulative guilt of an employer (or its representative) is commented on by Roy-Loustaunau (1993, 1995). As Earle and Madek (1993) and Mas (1996) point out, there has as yet been no resort to these new penal provisions.

Despite this plethora of new laws on sexual harassment, it is courts' interpretation of these statutes which can give reality to the concept of sexual harassment as a prohibited practice in employment. So how have the courts in these various jurisdictions reacted to the new laws? To date research has uncovered decisions in very few cases – but this is not surprising given that many of the above-mentioned Acts were adopted only in 1995 and that other new legislation was to come into force in the same year. There have, however, been several major cases in jurisdictions mentioned in ILO (1992). A key year was 1993, when both the Supreme Court of the United States and certain lower-level jurisdictions in European countries (including France and the United Kingdom) as well as in Japan arrived at significant decisions on various aspects of sexual harassment.

At first view, these decisions appear to echo well-established concepts of sexual harassment in the various jurisdictions. In the United States, sexual harassment has recently again been confirmed as sexual discrimination in employment. In France, sexual harassment continues to be treated as an abuse of authority or power and compensated as such. In Spain, it is perceived more as a violation of the right to health and safety at work under the Worker's Statute, 1980, and of the General Ordinance of Safety and Health at Work, 1971. The few, but telling, cases dealt with by the Japanese jurisdictions have judged harshly harassment of young female workers by male supervisors in situations of *quid pro quo* harassment.

At the same time, several decisions have confirmed those of lower-level jurisdictions which held that there was no sexual harassment either on the basis of the facts presented to them or on the basis of those facts in the context of the current legislation. For example, in France the Versailles Court of Appeal⁷ confirmed the decision of a labour court of 23 October

⁶ *Equal Opportunities Review* (London), No. 51, Sep.-Oct. 1993, pp. 51-55.

⁷ *Mlle. X c. Sté. Y, Onzième Chambre social de la Cour d'appel de Versailles*, Paris, 30 June 1993.

1991 that passionate poems and love-letters containing no indecent or obscene terms did not constitute a sufficient factual basis for harassment to be established and that therefore the non-renewal of the recipient's contract was equivalent to the resignation of the employee and did not amount to unjustified or constructive dismissal. Likewise in Chile, the Supreme Court of the Province of Santa Fe⁸ confirmed the finding of the Court of First Instance that, despite the testimony of several women concerning the lascivious behaviour of a judge, there was no proof of sexual harassment, and that the testimony was all based on hearsay. The judge, who had been suspended during the appeal, was consequently allowed to resume his position. Yet again, a labour tribunal of Abidjan, Côte d'Ivoire,⁹ granted the claim of a victim of harassment that his dismissal was unfair and ordered the employer to pay 2 million CFA francs in damages plus termination indemnities, concluding that the employer's reason for dismissal (40 minutes absence from post) was merely a pretext and that the real reason for dismissal was the victim's membership of a committee recently formed in the undertaking to complain about homosexual abuse by one of the managers there. But, on appeal the decision was reversed, the finding being that the reason for dismissal had in fact been the 40 minutes' absence from post (even though the appeal court acknowledged that the absence was linked to the employee's membership of the anti-harassment committee).¹⁰

And yet, in Belgium, in a 1991 decision turning again on whether the facts could be seen as a sexual harassment case, the Labour Appeal Court of Liège confirmed a labour court's decision holding to be unfair the dismissal of a woman worker who had claimed that the real reason for the termination of her contract was her written complaint about the sexual harassment she alleged she had been suffering at the hands of the manager. The Court held that, as the employer did not bring evidence to refute her claim or supply any real reason for the dismissal, the woman deserved redress.¹¹

Another initial comment of a general nature is the fact that few court decisions in the jurisdictions researched make any reference to international standards which might be of relevance in deciding sexual harassment cases. While there has been a tendency in the last decade to use international law, in particular ILO standards, in national case-law (Bronstein and Thomas, 1995), the same trend is not discernible in the area under discussion here. Commentators generally point out that the law is not always clear in the domestic jurisdictions they write on (Rubenstein, 1994; Roszkowski and Wayland, 1993; Johnson, 1994), but do not call for the United Nations and

⁸ Reported in *Mujer/Fempres* (Santiago de Chile), No. 143, Sep. 1993.

⁹ Tribunal du travail d'Abidjan, *Kouame Koffi c. La librairie de France*, Arrêt No. 1119, 8 May 1991.

¹⁰ Cour d'appel d'Abidjan, *Kouame Koffi c. La librairie de France*, Arrêt No. 643, 22 May 1992.

¹¹ Cour d'appel de Liège: *Chambre de droit social*, decision dated 16 Jan. 1991.

regional bodies that might pay attention to sexual harassment in their standard-setting agendas to do so. Thus the absence of international standards specifically on this subject could be one reason for the lack of reliance on international standards in domestic decisions concerning sexual harassment.

But an end to the dearth of international attention to the matter is in sight. Whether this is because more women are visibly active in public life and in the labour market generally, because of women's non-governmental organizations' active presence in the various international fora, because of the thaw in the Cold War during which attention had been concentrated on other aspects of human rights, or because of the growing impact of pre-existing instruments concerning women's rights, who can tell? These factors are often cited (e.g. MacKinnon, 1979) to explain the increased attention to sexual harassment in employment at the domestic level, but they appear to be equally valid at the international level.

While the Universal Declaration of Human Rights adopted on 10 December 1948 set out the general ban on discrimination of any kind, including on the basis of sex (article 2), and the two international Covenants adopted on 16 December 1966 likewise prohibited discrimination on that basis in general terms,¹² it was not until the adoption by the General Assembly of the United Nations on 18 December 1979 of the Convention on the Elimination of All Forms of Discrimination against Women that the broad definition of discrimination specifically against women gained international acceptance.¹³

Article 11.1 of the Convention requires ratifying States to "take all appropriate measures to eliminate discrimination against women in the field of employment". It was against this general background that the Committee on the Elimination of Discrimination against Women (CEDAW), set up under the Convention, adopted in January 1992 General Recommendation No. 19 on violence against women.¹⁴ While general recommendations of this sort are not binding on ratifying States, it is worth citing the clarification of sexual harassment given by CEDAW in order to show how useful it is for national courts faced with claims where the domestic laws might not be clear. This states the following.

¹² International Covenant on Economic, Social and Cultural Rights (which entered into force on 3 January 1976), articles 2.2 and 3; International Covenant on Civil and Political Rights (which entered into force on 23 March 1976), articles 2.1, 3 and 26.

¹³ Article 1 of the Convention states: "For the purposes of the present Convention, the term 'discrimination against women' shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field." As at 30 June 1996, the Convention had received 153 ratifications.

¹⁴ See United Nations: *Report of the Committee on the Elimination of Discrimination against Women: Eleventh Session*, General Assembly, Official Records, Forty-seventh Session, Supplement No. 38, A/47/38, New York, 1992, pp. 1-6.

(Para.) 17. Equality in employment can be seriously impaired when women are subjected to gender-specific violence, such as sexual harassment in the workplace.

(Para.) 18. Sexual harassment includes such unwelcome sexually determined behaviour as physical contact and advances, sexually coloured remarks, showing pornography and sexual demands, whether by words or actions. Such conduct can be humiliating and may constitute a health and safety problem; it is discriminatory when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment, including recruiting or promotion, or when it creates a hostile working environment.

...

(Para.) 24. In light of these comments, the Committee on the Elimination of Discrimination against Women recommends that

...

(j) States parties should include in their reports information on sexual harassment, and on measures to protect women from sexual harassment ... in the workplace;

...

(t) States parties should take all legal and other measures that are necessary to provide effective protection of women against gender-based violence, including, inter alia:

- (i) Effective legal measures, including penal sanctions, civil remedies and compensatory provisions to protect women against all kinds of violence, including ... sexual harassment in the workplace;
- (ii) Preventive measures, including public information and education programmes to change attitudes concerning the roles and status of men and women;¹⁵

There could be no clearer statement on the matter. However, a perusal of the States' reports submitted to CEDAW under the Convention over the last five years reveals that very few governments do in fact include information about sexual harassment either in general or in employment.¹⁶ Likewise, the experts sitting on CEDAW make few comments concerning sexual harassment in general or in the workplace.

In addition to the United Nations treaty bodies' treatment of sexual harassment, its functional commissions, notably the Commission on Human Rights, have dealt with the question – albeit in an oblique way. At its Fiftieth Session, the Commission adopted a resolution¹⁷ in which it decided to

¹⁵ *ibid.*, pp. 3-6.

¹⁶ Examples of the type of references made, usually by the Government representative who introduces the State's report to CEDAW on the day allotted to examination of that report, are as follows: on Canada, see United Nations: *Report of the Committee on the Elimination of Discrimination against Women: Ninth Session*, General Assembly, Official Records, Forty-fifth Session, Supplement No. 38, A/45/38, New York, 1990, para. 413; on Australia, Colombia, Madagascar, New Zealand and the Federal Republic of Yugoslavia (Serbia and Montenegro), see United Nations: *Report of the Committee on the Elimination of Discrimination against Women: Thirteenth Session*, General Assembly, Official Records, Forty-ninth Session, Supplement No. 38, A/49/38, New York, 1994, paras. 371, 465, 213, 612 and 768, respectively.

¹⁷ Resolution 1994/45 of 4 March 1994 entitled "Question of integrating the rights of women into the human rights mechanisms of the United Nations and the elimination of violence against women". See United Nations: *Report of the Commission on Human Rights on*

appoint, for a three-year period, a Special Rapporteur on violence against women, including its causes and consequences. In her preliminary report to the Commission on Human Rights, the Special Rapporteur on violence against women gave particular prominence to the problem of sexual harassment of women by placing it in a separate section.¹⁸ Her second report concentrated on domestic violence against women and therefore sexual harassment in employment was referred to more in the context of violence against domestic workers.¹⁹

Amongst the specialized agencies of the United Nations system, the International Labour Organization has been in the vanguard in addressing discrimination against working women, particularly through the adoption of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111).²⁰ In examining States' reports on Convention No. 111 over the years, the ILO Committee of Experts on the Application of Conventions and Recommendations has often noted with interest the advances made in the elimination of sexual harassment in employment. In its 1988 *General Survey* on the Convention,²¹ the Committee of Experts lists a number of examples of sexual harassment in employment. These include insults, remarks, jokes, insinuations and inappropriate comments on a person's dress, physique, age, family situation, and a condescending or paternalistic attitude undermining dignity, unwelcome invitations or requests that are implicit or explicit whether or not accompanied by threats, lascivious looks or other gestures associated with sexuality, unnecessary physical contact such as touching, caresses, pinching or assault. The Committee of Experts stressed that in order to be qualified as sexual harassment, an act of this type must also be justly perceived as a condition of employment or a precondition for employment; or influence decisions taken in this field or prejudice occupational performance; or humiliate, insult or intimidate the person suffering from such acts. In short, the Committee of Experts postulated that any act, the unwanted nature of which could not be mistaken by its author,

its Fiftieth Session, 31 Jan.-11 Mar. 1994, E/CN.4/1994/132, Official Records of the Economic and Social Council, 1994, Supplement No. 4, E/1994/24, New York, 1994, pp. 140-145.

¹⁸ See United Nations: *Preliminary report of the Special Rapporteur on violence against women to the Commission on Human Rights*, Commission on Human Rights, E/CN.4/1995/42, 22 Nov. 1994, Geneva, 1994, paras. 190-204. The Special Rapporteur included some examples of legislative and judicial action concerning sexual harassment in general, but also specifically in employment, and outlined other strategies, particularly on the part of women's non-governmental organizations, in combating sexual harassment.

¹⁹ United Nations: *Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights resolution 1995/85*, Commission on Human Rights, E/CN.4/1996/53, 5 Feb. 1996, Geneva, 1996, paras. 77-85.

²⁰ As at 30 June 1996, Convention No. 111 had been ratified by 120 member States. Article 1 gives a broad definition of the term "discrimination" to cover any distinction, exclusion or preference made on the basis of, inter alia, sex, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.

²¹ ILO: *Equality in employment and occupation*, General Survey by the Committee of Experts on the Application of Conventions and Recommendations, International Labour Conference, 75th Session, 1988, Report III (Part 4B), Geneva, 1988, paras. 45 and 46.

shall be deemed sexual harassment. In its recent *Special Survey* on the Convention,²² the Committee of Experts also provides examples of what constitutes sexual harassment in employment, stressing that it is the unwelcome nature of such behaviour and the direct or indirect impact it has on the working relationship that makes it an element of prohibited sexual discrimination under Article 1 of the Convention.

The ILO also has the distinction of being the only international body to have adopted an instrument containing protection against sexual harassment. The Indigenous and Tribal Peoples Convention, 1989 (No. 169), states that governments shall do everything possible to prevent any discrimination between workers belonging to the peoples concerned and other workers, in particular through measures which would ensure that workers belonging to these peoples enjoy equal opportunities and equal treatment in employment for men and women, and protection from sexual harassment (article 20(3)(d)).²³

The ILO's attention to the issue is also evident in a number of non-binding instruments: the 1985 International Labour Conference resolution on equal opportunity and equal treatment for men and women in employment;²⁴ the conclusions of the 1989 ILO Meeting of Experts on Special Protective Measures for Women and Equality of Opportunity and Treatment, categorizing the personal security of workers (notably sexual harassment and violence arising from work) as a safety and health problem; the conclusions of the 1992 Tripartite Symposium on Equality of Opportunity and Treatment for Men and Women in Employment in Industrialized Countries, referring specifically to sexual harassment;²⁵ as well as the 1991 International Labour Conference resolution concerning ILO action for women workers, requesting the International Labour Office to develop guidelines, training and information materials on issues of specific and major importance to women workers, such as sexual harassment in the workplace.²⁶ Internally, the International Labour Office worked in the 1980s on a draft guide of practice for equal opportunity and treatment in

²² ILO: *Equality in employment and occupation*, Special Survey by the Committee of Experts on the Application of Conventions and Recommendations, International Labour Conference, 83rd Session, 1996, Report III (Part 4B), Geneva, 1996, paras. 39 and 40.

²³ As at October 1996 there were ten ratifications of this Convention, but the first reports received by the International Labour Office and examined by the Committee of Experts on the Application of Conventions and Recommendations have not reported any judicial or arbitral decisions giving effect to that Article.

²⁴ ILO: *Official Bulletin* (Geneva), Vol. LXVIII, Series A, No. 2, 1985, pp. 85-95. Section 6 states: "Sexual harassment at the workplace is detrimental to employees' working conditions and to employment and promotion prospects. Policies for the advancement of equality should therefore include measures to combat and prevent sexual harassment."

²⁵ ILO: *Conclusions and Recommendations: Tripartite Symposium on Equality of Opportunity and Treatment for Men and Women in Employment in Industrialized Countries: Report*, SEEIC/1990/2, Geneva, 1990, paras. 24 and 25.

²⁶ ILO: *Official Bulletin* (Geneva), Vol. LXXIV, Series A, No. 2, 1991, pp. 81-83. Examples are: Husbands (1992), ILO (1994), O'Regan and Thompson (1993), Solano and Badilla (1993), Thomas and Taylor (1994), ILO (1996).

employment which, in its section entitled “Terms and conditions of employment”, recommended policies and action so as to protect employees against harassment or pressure on the basis of their particular group or sex in any term or condition of employment. While not published for general distribution, promotional documents of this kind should, in the opinion of the ILO Committee of Experts on the Application of Conventions and Recommendations, be developed by the secretariat.²⁷ It is also interesting to note that the Director-General of the International Labour Office distributed to each member of staff Circular No. 6/543 of 2 November 1995 entitled “Sexual harassment policy and procedures”. However, this has not served as the basis for a published decision of internal disciplinary bodies, in that the Administrative Tribunal has not had to rule on any ILO cases turning on this circular, or been involved in any of the domestic cases researched for this article.

Other international agencies have also addressed the problem, notably the International Monetary Fund, the World Bank, and UNESCO.²⁸

Will greater impetus be given to the use of these various international standards on the subject in the wake of the United Nations Fourth World Conference on Women held in Beijing in September 1995? After all, the Conference’s Platform for Action calls on governments, trade unions, employers, community and youth organizations, as well as non-governmental organizations, to eliminate sexual harassment.²⁹

Recent key cases in various jurisdictions

Northern America

In the United States, sexual harassment is not defined in federal law but is recognized as a form of discrimination based on sex under Title VII of the Civil Rights Act, 1964.³⁰ Judicial decisions on the subject appear to move forward in time-periods of a decade: in the mid-1970s there were the first reported cases

²⁷ ILO: *op. cit.*, supra note 22, para. 307.

²⁸ See ILO (1992) for the internal policy of the International Monetary Fund (p. 200) and of the World Bank (p. 201); and UNESCO: Draft Recommendation concerning the Status of Higher Education Teaching Personnel in which para. 49 clarifies that dismissal of such staff should only be for just and sufficient cause related to professional conduct, including sexual or other assaults on students, colleagues or other members of the community, sexual blackmail and demanding sexual favours from subordinate employees or colleagues in return for continuing employment.

²⁹ See United Nations: *Report of the Fourth World Conference on Women (Beijing, 4-15 September 1995)*, A/CONF.177/20, 17 Oct. 1995, New York, 1995, para. 126(a).

³⁰ While it is clear that in the United States the distinct tort of sexual harassment does not exist, some commentators have stressed that victims can invoke various torts such as negligent hiring, negligent retention, intentional infliction of emotional distress, assault, battery, invasion of privacy (Vance, 1993). In all these cases, however, there is the problem of the employer defence that the harasser acted outside the scope of the employment relationship. Vance (1993) also argues that fraud could cover sexual harassment, in cases where the employer misrepresents the workplace environment to a prospective employee.

of attempts to use Title VII protection against repeated verbal and physical advances on the part of supervisors against female employees (*Barnes v. Train*, *Corne and De Vane v. Bausch & Lomb, Inc.* and *Barnes v. Costle*).³¹ While the lower courts were conservative, the appeal jurisdictions were prepared to find in favour of harassment victims on condition that they could prove they suffered repercussions in their employment. In *Corne and De Vane v. Bausch and Lomb, Inc.* the Arizona District Court refused to hold the employer liable because the harassing supervisor's conduct served no policy of the employer and in no way benefited the employer; it viewed the behaviour as a "personal proclivity, peculiarity or mannerism". Two years later in *Barnes v. Costle*, the District of Columbia Circuit Court of Appeal, however, held that dismissal of a female employee for refusing sexual advances did amount to sexual discrimination because it adversely affected a job condition. Introducing the famous "but for her womanhood" test (but for the female employee's sex her participation in sexual activities would never have been solicited), the Court of Appeal ushered in recognition of sexual harassment as sexual discrimination, but still required actual employment repercussions before coming to a finding of unlawful discrimination. The same court advanced the law again in 1981 by holding in *Bundy v. Jackson*³² that sexual harassment can be actionable without proof of loss of any tangible job benefits.

The first breakthrough case at the level of the Supreme Court came a decade after the first attempts to use Title VII. In *Meritor Savings Bank, FSB v. Vinson*³³ the Supreme Court unanimously recognized two types of sexual harassment in employment: "quid pro quo" sexual harassment (literally "this for that", i.e. job-related sexual blackmail) where there is a demand by a hierarchical superior directed to a subordinate that the subordinate grant the supervisor sexual favours in order to keep or obtain certain job benefits (this type of harassment involves abuse of authority); and a broader type of sexual harassment involving unwelcome sexual advances or other verbal or physical conduct of a sexual nature which have the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, abusive, offensive or poisoned working environment (commonly termed "hostile working environment" sexual harassment). The second, broader type of sexual harassment does not require the complainant to show a tangible economic loss in terms of losing a promotion, etc., because of refusal to accede to sexual advances. But on the same occasion the Supreme Court commented that sexual harassment must be sufficiently severe or pervasive as to alter the conditions of the victim's employment.

In 1991, in *Ellison v. Brady*,³⁴ the decision of the Court of Appeal of San Francisco made some progress on sexual harassment by granting the appeal

³¹ Respectively, 13 Fair Employment Practice Case (BNA) 123 D.C.C. of 9 Aug. 1974; 390 F. Supp. 161 (D. Arizona, 1975); and 561 F.2nd 983 (D.C.C. 1977).

³² 641 F.2nd 942 (D.C.C. 1981).

³³ 477 US 57 (1986).

³⁴ 9th C-A, 23 Jan. 1991.

of a woman who had filed suit because she had not been consulted on the internal sanction taken against her harasser by the employer company, when that sanction had included temporary transfer away from the joint place of work with a warning to the harasser not to engage in any sexual harassment of the victim on pain of dismissal, and then his return to the same joint place of work. This case introduced the concept of the “reasonable woman’s” appreciation of the behaviour involved, a concept that has been widely discussed in the United States in academic writings on sexual harassment in employment. Again in the early 1990s, an advance was made on a different aspect of sexual harassment, namely the importance of public policy against sexual harassment. In *Strochmann Bakeries Inc. v. Teamsters Local 776*³⁵ the Court of Appeal of California was faced with the difficult task of reviewing an arbitration decision to reinstate a harasser who had claimed that procedural weaknesses leading up to his dismissal were contrary to negotiated procedural protections. The Court decided to move away from the traditional respect accorded by courts to the negotiated terms of agreements, given the weight of the public policy against sexual harassment in employment, and found that despite the procedural weaknesses the dismissal had been justified.

Seven years on from the key Supreme Court case of *Meritor*, in 1993 another unanimous decision of that Court advanced the law yet again: in *Harris v. Forklift Systems Inc.*,³⁶ the judges held that the victim need not prove tangible psychological breakdown in justifying a claim of hostile environment sexual harassment. This decision also heralded a return to the reasonable person test in deciding whether behaviour was unwanted. Yet the decision has been criticized by commentators. Robinson, Fink and Allen (1994) claimed it does not go far enough in defining what conduct could satisfy the “severity or pervasiveness” criterion enunciated in *Meritor*. Estes and Futch (1994) argued it does not give enough guidance on whether conduct is to be judged in relation to a reasonable person or a reasonable woman (the latter apparently being preferred by federal courts). Halfkenny (1995) would have liked more clarity on the question of just how much misconduct qualifies as “creating a hostile sexual harassment environment”. Campanella (1994) lauded the decision and saw it as a model for other jurisdictions where the recognition of sexual harassment as a distinct cause for suit is just emerging. Also in 1993, the Supreme Court of New York, in *Starishevsky v. Hofstra University*,³⁷ examined the elimination of sexual harassment at work in the context of a claim for prohibitive action under legislation concerning education. It held on the facts that the internal procedures were tainted by procedural defects and improprieties so that the dismissal of the harasser member of the academic staff was invalid. It tempered the trend towards severe sanctioning of harassers who abuse their

³⁵ 969 F.2nd 1442 (CA-3, 1992).

³⁶ 114 S.Ct.367 (1993).

³⁷ S.Ct. NY, Index No. 15554/93.

positions of power, by explaining that the “at will” doctrine (concerning employers’ right to hire and fire) does not give an employer an unencumbered right to terminate the employment relationship of an employee. Hamilton and Veglahn summed up the decision thus: “The court clearly indicates that due process rights must be observed. An employer cannot resort to employment-at-will status to circumvent the mandated sexual harassment procedures” (1994, p. 591). In 1994 in another case involving a university, the United States Court of Appeals demonstrated a tougher approach towards harassers. In *Karibian v. Columbia University*,³⁸ the female plaintiff had lost at the district court level on counts of both theories of sexual harassment, namely quid pro quo and hostile work environment. In finding in favour of the university, that court held that it could not be liable under the quid pro quo theory because the person had failed to prove any actual economic loss resulting from the harassment by her supervisor; likewise the court rejected the hostile work environment theory because the university did not have notice of the sexual harassment and had in any case provided a reasonable avenue for complaints against harassment. On reversing that decision, the Court of Appeals held, first, that the female employee should not have been required to present evidence of actual, rather than threatened, economic loss in order to win a valid claim of quid pro quo sexual harassment; and that imposing actual economic loss in cases where the employee submits to the supervisor’s unwelcome sexual overtures places an undue emphasis on the victim’s response, whereas the focus should be on the prohibited conduct. Secondly, it held that the lower court had failed to apply the proper legal standard to determine an employer’s liability for the hostile work environment created by a supervisor. It made it clear that it is fair to hold the employer responsible because the supervisor is acting within at least the apparent scope of authority entrusted to him/her by the employer. Some commentators refer to this decision as proof of the need for employers’ comprehensive educational employee workshops on how to avoid sexual harassment (Brown and Codey, 1994).

At this juncture it is worth mentioning the restrictive approach of several district courts towards sexual harassment in employment, even though these are not key cases. For example, in *Sexton v. AT&T*³⁹ a district court rejected the plaintiff’s claims that she had been denied a promotion because she did not accede to her supervisor’s advances and that she had suffered a hostile work environment, arguing on the first ground that she had not asserted that the harasser, whether directly, indirectly or remotely, had suggested his conduct was more than inappropriate advances by a person with whom she had apparently become comfortable in a one-to-one situation. The court opined that the plaintiff fared no better under a hostile environment analysis because, for a hostile environment to be created, the misconduct had to be sufficiently severe or pervasive to alter the conditions

³⁸ 14 F.3rd 733 (2nd Circuit, New York, 1994).

³⁹ No. 90C 4792 of 6 Feb. 1992; reported in 58 FEP cases 1171.

of the alleged victim's employment and to create an abusive work environment. In the case at hand, the harasser's condescending remarks, impatient attitude and teasing about her other relationships, while showing a lack of professionalism, did not amount to evidence that his treatment was so pervasive and debilitating that it became "hostile". The court added that its decision did not rest solely on the insufficient facts of sexual harassment or the lack of job-related detriment, but also took into account the fact that, once notified of the allegations, AT&T had taken the appropriate corrective action.

Also in the United States, certain recent cases have shown a trend towards extremely heavy damages in sexual harassment cases, as well as moves by different jurisdictions to insist on guilty parties adopting and implementing a sexual harassment policy so as to avoid recurrence of such incidents. In *Robinson v. Jacksonville Shipyards, Inc.*,⁴⁰ the female plaintiff won a hostile work environment claim with legal costs and injunctive relief, but no monetary award. The court decided that Jacksonville Shipyards were to take such steps as were within their power to control the work environment on ships, including consultations with shipowners about the removal or covering-up of pictures posted on board and the storage of crew belongings during repair visits; Jacksonville Shipyards were enjoined not only to put an end to the hostile environment which had given rise to the sexual harassment, but also to remedy it by implementing forthwith the sexual harassment policy which the court annexed in total to its judgement. The well-publicized case of *Weeks v. Baker & McKenzie*,⁴¹ was decided by a jury – jury trials being permissible under Title VII claims following the 1991 amendment to the 1964 Civil Rights Act, which also introduced monetary damages of between US\$50,000 to US\$300,000 (depending on the size of the enterprise involved). In this case, the jury awarded punitive damages against the legal firm of 7.1 million US dollars, believed to be the largest such award ever. Although the male partner harasser in the case has since left the company, the decision is on appeal.

In Canada, although the labour legislation at both federal⁴² and provincial levels clearly covers sexual harassment in employment as a distinct actionable wrong, recent cases have shown victims using human rights legislation successfully. The leading case of *Janzen v. Platy Enterprises Ltd.*⁴³ clarified that sexual harassment was a form of sexual discrimination banned by the human rights statutes in all jurisdictions in Canada. The case in question was an appeal under the Human Rights Act of Manitoba. It followed a trend in the use of human rights legislation which began in the

⁴⁰ 760 F. Supp. 1486 (M.D. Fla. 1991).

⁴¹ Supreme Court of California, 1 Sep. 1994.

⁴² The Canadian Federal Labour Code, Division XV.1 of Part III, makes it clear that the employee has the right to employment free of sexual harassment, and requires the employer to take action to prevent it.

⁴³ (1989) 1 SCR 1252.

early 1980s with the case of *Bell and Korczak v. Alders and Flaming Steer Steakhouse*.⁴⁴ French-speaking jurisdictions in Canada have adopted the same approach: in *Commission des droits de la personnes de Québec c. Marotte*,⁴⁵ the Human Rights Commission of Quebec awarded damages to a female victim under the relevant provincial human rights statute, but pointed out that damages would have been higher if the plaintiff had produced expert evidence of the psychological damage she had suffered as a result of the offensive behaviour.

The search for arbitral decisions advancing sexual harassment law in recent years has uncovered a richer seam in Canada than in other jurisdictions. Aggarwal provides an interesting breakdown of arbitration of sexual harassment cases between 1990 and 1993 (1994, pp. 74-76). He estimates there were 34 arbitration cases, of which 14 were reported in *Labour Arbitration Cases* (Aurora, Ontario) and 20 went unreported. Only two cases were brought on behalf of the alleged victims of sexual harassment, in both of which the grievances were denied. As noted in general comments above, the decisions seemed to turn on the question of whether the facts of the case met the requirements of the legal definition and thus whether the behaviour constituted sexual harassment. For example, in *Quality Inn v. UFCW, Local 175*⁴⁶ the arbitrator, even after finding in favour of one complaint against the supervisor's misconduct, declined to hold that the behaviour constituted sexual harassment amounting to sexual discrimination. Although the harasser's behaviour included, for example, the statements that the woman had been sleeping with more than one guest at the hotel and that she "thinks she can open her legs and make a living that way" as well as references to his own sexual experiences, the decision stated "it is surely not discrimination on the basis of sex if the propositions are distributed indiscriminately among employees of both sexes".⁴⁷ Aggarwal suggests that courts examining these facts in a human rights context would not have arrived at the same conclusion. However, in 1991 in *Chaw v. Levac Supply Ltd.*,⁴⁸ an Ontario Board of Inquiry took a broader view of what constitutes sexual harassment. It held that negative and demeaning comments of a sexual nature, together with the comment that women should be at home looking after their children, formed a pattern of conduct which amounted to sexual harassment.

On the question of arbitral decisions based on the provisions of collective bargaining agreements, it is worth pointing out that, in Canada, advances have been made concerning both procedural and substantive aspects of sexual harassment claims: many require that the burden of proof that there was no sexual harassment shall be on the alleged harasser once the

⁴⁴ (Ontario 1980) 1 CHRR D/155.

⁴⁵ (1993) R.J.Q. 203.

⁴⁶ (1990) 14 L.A.C. (4th) 414 (Ontario).

⁴⁷ *ibid.*, at p. 436.

⁴⁸ (1991) 14 C.H.R.D/36.

complainant has made a case.⁴⁹ It will be interesting to see how arbitration based on such agreements decides sexual harassment claims.

What happens in the Canadian jurisdiction if a complainant files both a human rights claim and a civil suit at the same time on the basis of the same alleged sexual harassment? Aggarwal attempts to answer that question (1994, pp. 82-83). While pointing out that, as a general rule, two types of proceedings cannot go forward at the same time, he quotes *Meiklem v. Bot Quebec Ltée*⁵⁰ as demonstrating that the civil suit had to be rejected if the complainant had filed a related human rights cause, because the Human Rights Commission and the court might make different findings of the facts or give different damage assessments for similar compensation, and because the plaintiff could get double recovery. He also points out that in recent cases (for example, *Lehman v. Davies*)⁵¹ the courts have allowed civil suits to proceed on an undertaking by the complainant to postpone the human rights claim pending the resolution of the civil suit. Regarding procedural questions in arbitration cases in Canada, adjudicators appear to take lack of due process extremely seriously and, accordingly, punish employers who do not permit defendants in sexual harassment cases to have access to the full facts so as to prepare their defence properly. For example, in *School District No. 22 v. Chilliwack Teachers' Association*⁵² the arbitrator, in exonerating the griever from the allegation of sexual harassment, stated that the management had failed to investigate properly the complaint made by a student; the investigator had had no training or experience in such matters and the complainant had made no written statement and had never attended a meeting on the matter. The griever had been given no information about the alleged incident or the identity of the complainant and the investigator had only very briefly interviewed the complainant and briefly questioned the griever. In *Hughes v. City of Etobicoke*,⁵³ an Ontario court awarded 180,000 Canadian dollars to the alleged harasser in damages for wrongful dismissal – even where the employer had accepted the truthfulness of the allegations of sexual harassment – because a thorough and proper investigation had not been held. Indeed, the court stated that it had serious doubts as to the credibility of at least one of the complainants whom it believed to feel animosity towards the alleged harasser. In *MacLean v. Canada (Treasury Board)*⁵⁴ the alleged harasser had not been provided with a written copy of the specific allegations made against him and in fact had only been able to obtain a copy by using the access to information process. The adjudicator therefore found in his favour, on the grounds of the basic principle of justice that one has the right to be informed of the specific charges made against one.

⁴⁹ For example, Saskatchewan Association of Human Rights and CUPE Local 3012.

⁵⁰ (1992) 41 C.C.E.L.51 (Ontario General Division).

⁵¹ (1993) 1 C.C.E.L.(2d) 15.

⁵² (1990) 16 L.A.C. (4th) 1994 (British Columbia).

⁵³ (1991) 92 C.L.L.C.14 (Ontario General Division).

⁵⁴ (7 May 1993) PSSRB file No. 166-2-22580.

Europe

One of the trends in French judicial decisions has already been referred to in relation to the strict examination of the facts and their characterization as unwanted harassment by the labour court. A similar decision was taken in 1991 in *Manpower France c. Defadat*,⁵⁵ where a lower court stated that it was difficult to determine the threshold beyond which jokes and bad-taste rowdiness become sexual harassment. The Court of Appeal approach appears to have been confirmed two years later in the EuroDisney case⁵⁶ where it upheld the company's decision to dismiss a homosexual harasser because of his sexual innuendos and comments which were contrary to decency. Research has been unable to identify any cases as yet brought under the new penal provisions introduced in 1992.

The tendency in compensation cases in France has been for payment of damages, sometimes aggravated and punitive, with interest rather than reinstatement, for example in the cases of *Société bourguignonne de supermarchés c. Pascal* and *SA Rockwell International c. Loiseau*.⁵⁷ The latter was an interesting case in that heavy damages were awarded against an employer not for failing to sanction the harasser and to improve the situation whereby an abuse of power had occurred, but because the employer had moved to dismiss the harasser without providing him with sufficient reasons to allow him to prepare a defence. In 1990 a case also before the Court of Appeal of Nancy – *Risse c. Chardin*⁵⁸ – held that the complacency of the victim (which could be interpreted as being due to a number of factors including fear of making a fuss by complaining of the harassment) should not be counted when assessing evidence that the behaviour complained of amounted to abuse of authority in the terms of prohibited sexual harassment.

No key cases have been identified in Ireland, but it is interesting to note that the labour courts have been noticeably progressive in their decisions. For example, in the case “A company and a worker” (names supplied to the court)⁵⁹ it was held that a sexual relationship between consenting adults does not imply that the consent is unlimited as regards either the time-scale or acts which may take place between the parties subsequently. The woman therefore won her claim under section 3(4) of the Irish Employment Equality Act, 1977. However, when deciding the sum of its compensation award, the Labour Court took into account her “imprudence” in leaving herself at risk by not seeking outside help before bringing the case to court.

A spate of sexual harassment cases in Spain in the 1990s present two marked characteristics: the labour courts have consistently found in the

⁵⁵ RJS, 1992, p. 78, n. 100.

⁵⁶ *Chambre sociale de la Cour d'appel de Paris*, 8 Oct. 1993.

⁵⁷ Reported, respectively, in *Chambre jurisprudentielle BS le Febvre*, 1992/6, Dijon, 1 Mar. 1990, p. 287; and Nancy, 23 Nov. 1992.

⁵⁸ *Chambre sociale de la Cour d'appel de Nancy*, 28 Mar. 1990.

⁵⁹ Labour Court 29 June 1990, Case No. EED 901.

victim's favour on the facts, using both the provisions of the Workers' Statute, 1980 (ss. 4(2)(e), 54 and 55), and the Act on Labour Law Procedure, 1995 (ss. 180 and 181); and the appeal courts have preferred to overturn these findings or lessen the compensation granted. For example, Barcelona Labour Court No. 21, in a 1991 judgement, used sections 4(2)(e) and 50 of the Workers' Statute, 1980, as the basis for finding in favour of a woman subjected to sexual harassment in the workplace, in a factual situation where the manager of the enterprise was regularly spying on the women employees through peepholes hidden in the wall between the men's and women's toilets.⁶⁰ In two separate cases in 1995 (both heard by female judges), the Madrid labour courts declared null and void the dismissals of female employees where the employer companies involved had not proved that dismissal was for a reason other than that claimed by the women, namely sexual harassment at the hands of supervisors. In both cases immediate reinstatement, with full repayment of salaries and allowances from the date of the unjustified dismissals, was ordered.⁶¹ A case⁶² before a Cádiz Labour Court rejected the claim of a dismissed harasser – who protested that the reasons for his dismissal had not been clear in the dismissal notice – since he obviously knew that his behaviour amounted to sexual harassment of his female subordinates. As mentioned above, however, several commentators and the ruling in at least one case equate sexual harassment with a violation by the employer of safety and health obligations. The decision of the Superior Court of Justice of Castille⁶³ reaffirmed that the incapacity suffered by a female worker because of sexual aggression by a co-worker in the workplace had to be seen as temporary incapacity to work arising from a work accident, and not as a common sickness for which incapacity benefits could be claimed under the Workers' Statute.

As regards striking recent decisions by appeal courts on sanctions and remedies, that of 23 August 1994 is perhaps the one most criticized by

⁶⁰ Decision 824/91, Barcelona, 1 Oct. 1991 (*María Jesús Guerrero Sotillo* frente a la *Fundación Silio Marín SA*). Workers' Statute, Act No. 8 of 10 Mar. 1980, as amended by Act No. 3 of 3 Mar. 1989. Section 4(2)(e) states: "As a party to an employment relationship a worker shall have the right . . . to respect for his privacy and proper consideration for his dignity, including protection against offensive behaviour, verbal or physical, of a sexual nature." Section 50 states under "Termination at the workers' request":

"Subsection 1. The following shall afford valid reasons for a worker to request the termination of his contract:

- (a) substantial alterations to his conditions of employment which adversely *affect his vocational training or personal dignity*;
- (b) failure to pay the agreed wage or repeated delay in paying it;
- (c) any other serious failure on the part of the employer to discharge his contractual obligations, except in cases of *force majeure*.

Subsection 2. In such cases the worker shall be entitled to the compensation specified for unlawful dismissal." (Emphasis added.)

⁶¹ Respectively, Decision 65/95, Madrid, 22 Feb. 1995 (*Concepción Canet Ríos* frente a la *Compañía Nacional de Seguros y Reaseguros SA*), and Decision 291/95, Madrid, 30 May 1995 (*María Victoria Manzano García* frente a la *Empresa Tome SA*).

⁶² Decision 74/95, Cádiz, 15 Mar. 1995 (*Fernando Z.G.* frente a la *Empresa H. SA*).

⁶³ Reported in *La Mancha*, 16 Nov. 1989.

commentators.⁶⁴ The Galicia Appeal Court decided – even in a case where the initial finding of sexual harassment was reaffirmed – to reduce from 1,500,000 to 500,000 pesetas the amount of compensation awarded to the female victim of verbal sexual baiting, on the ground that the burden of proof was not on the individual worker, but was rather the responsibility of the undertaking. In that case the female worker had claimed compensation from one of her superiors and from the enterprise on the ground of the sexual harassment she had suffered with resulting temporary incapacity to work through depression. The labour court had sentenced the two defendants to the above-mentioned heavy damages for violation of the victim's fundamental rights, but she appealed for a punitive ruling, with the aim of letting society know that the law punishes this type of behaviour. The Galicia Appeal Court rejected her appeal for exemplary punitive damages, arguing that she herself had admitted satisfaction with the initial compensation order, and partly rejected the counter appeal of the undertaking that its employee alone was to blame according to the law of vicarious liability established under the Civil Code (section 1093.4). Three other decisions⁶⁵ by the Galicia Appeal Court in 1995: (1) reduced an “absolutely disproportionate” 7 million pesetas award for moral damages to 600,000 pesetas and cancelled the 1 million pesetas physical damages award; (2) reduced a 1 million pesetas award to 150,000 pesetas when a female kitchen helper who had won her claim for sexual harassment appealed for an increase in damages of 10 million pesetas; and (3) overturned a 775,000 pesetas award – even where some of the company manager's behaviour was affirmed as sexual aggression – on the ground that the harassment did not produce the mental upset and disturbance alleged, since the female victim had remained on friendly terms with him. This latter case is on appeal.

In the United Kingdom, many commentators have described the use of the Sex Discrimination Act, 1975, and section 55(2)(c) of the Employment Protection (Consolidation) Act, 1978, in pursuing sexual harassment claims. Suffice it here to recall that *Porcelli v. Strathclyde Regional Council*⁶⁶ was the first victory in a sexual harassment case. The Scottish Court of Session (Court of Appeal) found in favour of a female laboratory technician, after she had undergone three different hearings. The initial industrial tribunal had concluded that, although there had been a degree of sexual harassment, the male co-workers would have treated a man they disliked just as unpleasantly as they had treated the female complainant. The Employment Appeals Tribunal had decided that the aspects of the men's conduct (jokes, innuendos, remarks and gestures of a sexual nature) which had sexual

⁶⁴ Appeal No. 3141/94, Sala de lo Social del Tribunal Superior de Justicia de Galicia, 23 Aug. 1994. (*Daniela Vázquez Martínez Herizalde* and counter appeal by *Emilio Toledo Rigote* and *Weldingtec SA*.)

⁶⁵ Respectively, Appeal No. 4522/94, 20 Jan. 1995 (*Alejandra Álvarez Baldomero*); No. 4354/95, 17 Feb. 1995 (*Ana Isabel Durán Vicente*) and counter appeal (*Moisés Piñeiro Fontenla*); and No. 320/95, 9 Feb. 1995 (*Tiendas Galicia SL* and *Salvador Beloso Arenosa*).

⁶⁶ [1985] ICR 177 EAT, affirmed in 1986 [ICR 564] Scottish Court of Session.

overtones “could have no relevance in their conduct towards a man” and found that she had suffered job-related detriment by being forced to seek a transfer from the school at which she worked, but also that just experiencing a hostile environment may well be enough to succeed in a sexual harassment case. Finally, on appeal, the Court of Session made it clear that the issue was the nature of the treatment, and not the motive of the harassers. If the behaviour included elements of a sexual character which would not be used against a person of the same sex as the accused (in this case a man), then a case was made out.

As regards advances in judicial interpretations of sexual harassment at work, 1990 appears to have been a breakthrough year. In *Bracebridge Engineering Ltd. v. Darby*⁶⁷ the Employment Appeals Tribunal dismissed the appeal by the enterprise against an industrial tribunal decision which had found in favour of the woman subjected to offensive behaviour on the grounds of both constructive dismissal and sexual discrimination. It held that a single incident, if sufficiently serious, is enough under the Sex Discrimination Act, 1975, and in the course of employment to constitute a violation. In *James v. Eastleigh Borough Council*⁶⁸ the House of Lords established another general principle for United Kingdom law relating to sexual harassment, namely that a discriminatory motive or intention is not necessary for finding unlawful discrimination. In short, the argument often put forward by harassers that “I did not mean any harm” could be rebuked by reference to the impact that the behaviour had on the victim. This parallels the approach taken by the United States courts, described above, in using the “impact on the victim” test, rather than the *mens rea* (intent) of the accused harasser. However, the Employment Appeals Tribunal did not move sexual harassment law forward in 1994 in the case of *Steward v. Cleveland Guest (Engineering) Ltd.*⁶⁹ It upheld an industrial tribunal ruling that pictures of women in sexual contexts did not amount to less favourable treatment of women because of their sex, arguing that sensitive men would also have been offended, thus following the trend set by other Employment Appeals Tribunals not to interfere with an industrial tribunal finding unless it is irrational, offends reason or is certainly wrong.

Cases throwing light on the courts’ approach to employer liability predate the period researched for this article, but a brief description is merited since it shows the advances made in this area. Section 41(1) of the Sex Discrimination Act, 1975, makes it clear that the employer’s mere ignorance of the occurrence of sexual harassment is not sufficient to escape the vicarious liability test (*Aldred v. Nacanco*)⁷⁰ where the Court of Appeal decided that the employer is responsible for acts actually authorized by him and also for the way the employee performs those acts. However, in *Balgobin*

⁶⁷ [1990] IRLR 3.

⁶⁸ [1990] IRLR 288.

⁶⁹ [1994] IRLR 440.

⁷⁰ [1987] IRLR 292.

& others v. London Borough of Tower Hamlets⁷¹ the Employment Appeals Tribunal allowed a Sex Discrimination Act section 41(3) defence, where an employer could prove that he took such steps as were reasonably practicable to prevent his employee from acting in violation of the Sex Discrimination Act, 1975.

The United Kingdom courts' approach to sanctions and remedies, typified in *Alexander v. The Home Office*⁷² in which the Court of Appeal set non-pecuniary damages where the employer was shown to have acted in a "high-handed, malicious, insulting or oppressive manner", was followed in two interesting industrial tribunal cases in 1993. In *Pedely v. Rotherham Metropolitan Borough Council* the Industrial Tribunal decided that the female victim's co-workers had made her "feel like a leper" for having brought the sexual harassment claim under examination and equated this with unlawful victimization under section 4 of the Sex Discrimination Act, 1975; in *Knox v. Lurgan Community Workshop & McConville*, the Belfast Industrial Tribunal awarded aggravated damages under section 66(4) of the Sex Discrimination Act, 1975, in a sexual harassment case where a 16-year-old girl had been forced to recount in an open tribunal the behaviour she had suffered and was cross-examined on her evidence.⁷³

Asia and Pacific

Although the landmark case on sexual harassment in Japan was lodged in 1989, just before the time-period researched for this article, the well-publicized decision by the Fukuoka District Civil Court of 16 April 1992 merits attention here as it appears to be the only major decision in recent years. The female plaintiff, using article 14 of the Japanese Constitution which prohibits discrimination on the basis of sex, and article 13 which guarantees the pursuit of happiness in respect, as well as basic labour rights, was able to prove her claim that her employer (a publishing company) and one of its executives had created a hostile work environment based on sexually offensive behaviour (spreading of slanderous rumours about her in the office). The Court ordered the company and the harasser to pay a total of 1.65 million yen in compensation (the woman had sought 3.6 million yen in damages). The judge appeared to accept that both types of sexual harassment (*quid pro quo* and hostile environment) had been involved when he ruled that the forced resignation of the plaintiff by tarnishing her reputation as a female worker and aggravating her working conditions in the office had been the result of the harasser's remarks. It should be noted the judge avoided using the words "sexual harassment" (*seku hara*, as it is now known in Japanese). It is also worth noting that the Court blamed not only

⁷¹ [1987] IRLR 401.

⁷² [1988] IRLR 190.

⁷³ Respectively, I.T. case No. 62051/93 of 21 Sep. 1993 and I.T. case No. 452/93 of 7 Sep. 1993.

the supervising editor who circulated the false stories, but also the publishing company concerned whose only corrective action had been to attempt to restore company harmony by pressurizing the victim to resign. Newspaper reports tell of a case lodged in 1991 in Kumamoto District Court by a young woman alleging sexual harassment by her supervisors.⁷⁴ According to another press source, in 1995 an Osaka court ordered a company president to pay 1.5 million yen in damages to a 19-year-old female employee whom he had pestered for sexual favours. This is the first time a Japanese woman won a suit for sexual harassment that did not involve touching or defamation.⁷⁵

The Industrial Relations Court of Australia, in *Andrew & Another v. Linfox Transport (Aust.) Pty. Ltd.*⁷⁶ (judgement delivered on 4 December 1995) held that the dismissal of a delivery driver for an act of sexual harassment was harsh and unjust, and thus contrary to the Industrial Relations Act, 1988, since the employee had not been provided with any education on sexual harassment. Other reasons for this decision were the lengthy unblemished employment record of the driver and the failure of the employer to follow an agreed disputes procedure. This is an example similar to the above-mentioned cases in the United States and Canada, where respect for due process overrides punishment of a harasser. Interestingly, the employee's trade union, in a meeting with the employer over the incident, had threatened industrial action if the harasser was dismissed. Moreover, it emerged in the trial that the employer's staff handbook for employees did state that sexual harassment was unlawful and would not be tolerated, but the Court evidently gave weight to the employer's admission that its sexual harassment policy was new and that the company's education programme on the subject had not yet reached the provincial city where the harasser was based. In a decision delivered on 19 January 1996, the Queensland Anti-Discrimination Tribunal in *Hambleton v. Gabriel the Professional Pty Ltd. & Another*⁷⁷ found the company vicariously liable for the offensive words and actions of its employee, the harasser of a female job applicant, and found the employee guilty under the Queensland Anti-Discrimination Act, 1991, since the facts (his luring the applicant to an apartment for an interview; his ascertaining that she was anxious to re-enter the workforce) showed that a reasonable person could have anticipated that the other person would be offended, humiliated or intimidated by the conduct. Despite this, the Tribunal refused to include a component for economic loss in its award of damages, referring to the victim's confused presentation of her case on this issue; the award against both the company and the employee amounted to a

⁷⁴ "Accused accept harassment finding", in *The Japan Times* (Tokyo), 2 May 1992; "Kumamoto city assembly woman collapses while fighting sexual harassment suit", in *Asahi Evening News* (Tokyo), 19 June 1992.

⁷⁵ "Feminism reaches Japan", in *The Economist* (London), 1 June 1996, p. 90.

⁷⁶ Reported in *Australian and New Zealand Equal Opportunity Law and Practice* (North Ryde, Sydney), 92-807, pp. 78,966-78,968.

⁷⁷ Reported in *Australian and New Zealand Equal Opportunity Law and Practice* (North Ryde, Sydney), 92-791, pp. 78,834-78,836.

mere \$3,000 Australian dollars for hurt and humiliation. In a judgement delivered on 20 February 1996, *Drew & Others v. The Delegate of the Anti-Discrimination Commission & Another*,⁷⁸ the Supreme Court of the Northern Territory overturned certain procedural decisions taken by the Anti-Discrimination Commissioner in a sexual harassment complaint lodged by a female employee against her employer, a bookshop company, and two of the company directors. This is another example of higher courts giving precedence to procedural fairness where a piece of legislation (in this case, the Northern Territory Anti-Discrimination Act, 1992) lays down rules concerning the handling of complaints.

In Australia, the annual reports of the Human Rights and Equal Opportunity Commission (HREOC) contain case-studies relevant to the mandate of that Commission, including sexual harassment cases. In every year in the period under review, its reports have included a number of such case-studies. For example, the 1989-90 annual report describes the case of a woman employed as a secretary who alleged sexual harassment by her supervisor, including an uninvited visit to her home and an occasion of sexual intercourse against her will. The woman was frequently threatened with the loss of her job if she refused the supervisor's advances or told anyone of his behaviour. On returning from vacation and after refusing the continued advances of her supervisor, the woman was denied work. Following her complaint to the employing company's board of administration, the supervisor resigned his position and the woman was provided with employment. However, the woman claimed that on her return to work she suffered victimization by her replacement supervisor, and that this eventually resulted in her dismissal. While the respondent company denied that the woman had been dismissed in an act of victimization, she was paid 17,500 Australian dollars in damages by way of compensation.⁷⁹ Likewise, the 1990-91 annual report tells of the complaint of a woman employed by a statutory authority as a word-processing operator: she had been dismissed from her position for poor work performance but alleged that the real reason was her rejection of the sexual advances of the head of her section. The authority carried out an internal investigation and concluded that there was no evidence of sexual harassment, although it did find that the dismissal may have been unfair as the appropriate counselling procedures had not been followed. The authority agreed to pay the complainant the equivalent of four weeks' pay in settlement of the complaint.⁸⁰

Annual reports of state-level human rights and equality offices also regularly summarize sexual harassment complaints. For example, a company sought the assistance of the Human Rights Office in resolving

⁷⁸ Reported in *Australian and New Zealand Equal Opportunity Law and Practice* (North Ryde, Sydney), 92-823, pp. 79,058-79,072.

⁷⁹ Human Rights and Equal Opportunity Commission: *Annual Report, 1989-90*. Canberra, Australian Government Publishing Service, 1990, pp. 84-85.

⁸⁰ Human Rights and Equal Opportunity Commission: *Annual Report, 1990-91*. Canberra, Australian Government Publishing Service, 1991, pp. 85-86.

allegations of sexual harassment made by a female employee against a co-worker, a man with whom she was required to work in a situation where no one else was present. In conciliation the defendant did not acknowledge that the events had occurred, yet at the same time maintained that there would be no cause for concern in the future; the complainant was satisfied with this response, as was the company, and the company made it clear to the alleged harasser employee that if other allegations were made in the future more serious action would be taken.⁸¹ While it is interesting to note that the various jurisdictions are reporting on their conciliation actions, it should also be pointed out that most of these procedures are bound by the Privacy Act, 1988, and cannot provide feedback to the employer about individual complaints unless these go to a hearing. Moreover, the HREOC has stated that even if it could provide feedback, successfully conciliated complaints rarely result in clear admissions of guilt by respondents; typical outcomes include rather apologies “without prejudice”, undertakings to change or reinforce sexual harassment policies, and financial settlements.⁸²

In Australia, recent amendments to the Industrial Relations Act, 1988,⁸³ notably to section 93 thereof, provide that “in the performance of its functions, the [Industrial Relations] Commission shall take account of the principles embodied in the ... Sex Discrimination Act, 1984 ... relating to discrimination in relation to employment”. Likewise, its section 111A provides that “if an award is referred to the Industrial Relations Commission under section 50A of the Sex Discrimination Act, 1984, the Commission must convene a hearing to review the award. In a review under this section: (a) the parties to the proceedings in which the award was made are parties to the proceedings on the review, and are entitled to notice of the hearing; and (b) the Sex Discrimination Commissioner is a party to the proceedings.”⁸⁴ It will be interesting to see whether the Industrial Relations Commission will be called upon to convene hearings concerning alleged violations of the Sex Discrimination Act, and whether such procedures will cover sexual harassment claims.

In New Zealand, not only does the anti-discrimination law form a basis for sexual harassment suits, but also the Employment Contracts Act, No. 22 of 7 May 1991. The ILO describes the personal grievance framework for dealing with such complaints contained in section 27(1)(d) of that statute as “among the most extensive of any legislation reviewed”, with provisions setting out “all relevant matters including the definition, legal protection afforded, employer liability, remedies, and personal grievance procedures”

⁸¹ *ACT Human Rights Office Annual Report, 1992-93*, Canberra, ACT Government Printer, 1993, p. 17.

⁸² *Sex Discrimination Act, 1984: A review of CES Services and Programs*, Sydney, Human Rights and Equal Opportunity Commission, Apr. 1995, p. 34.

⁸³ No. 86 of 1988, commencing on 1 Mar. 1989, as amended by Act No. 132 of 1992, commencing 26 Nov. 1992.

⁸⁴ Amendments to the principal Act by Act No. 179 of 1992, commencing 13 Jan. 1993.

(1992, p. 56). New Zealand is thus the only country to have introduced specific detailed procedures under its labour law for handling claims of sexual harassment. Section 39(1) of the Act makes it clear that the personal grievance procedure is an alternative, not an additional, means to make a complaint under the Human Rights Commission Act, No. 49 of 21 November 1977. Some of the cases in the early 1990s focused on procedural issues concerning the processing of sexual harassment claims under the previous legislation. A recent case also examined an aspect of procedure related to sexual harassment cases, where confidentiality is often vital to both the alleged victim and the alleged harasser. In *M. v. Independent Newspapers Ltd. and Wellington Newspapers Ltd.*,⁸⁵ a male university lecturer accused of harassing a female student (who was later employed as a tutor) denied the allegations but, after an internal meeting, signed certain undertakings; she later made a formal complaint which led, after mediation, to the signing of another agreement resolving the matter; the alleged victim then initiated personal grievance proceedings as she was having problems renewing her contract as tutor but, when the problems were solved, decided not to pursue the grievance. When approached by a journalist over the matter of the complaint against him, the lecturer applied for and won a permanent injunction against both newspapers, since the contents of the informal agreement ending the matter were confidential and thus subject to protection in equity. Another recent case under the new legislation throws light on the courts' assessment of what, on the basis of the facts, constitutes sexual harassment. In *Fulton v. Chiat Day Mojo Ltd.*,⁸⁶ the applicant in the personal grievance procedure who, when hired, had been warned of the off-beat workplace sense of humour, was tricked into repeating obscene puns over the company paging system. The offending staff were spoken to and she received an assurance that the incident would not be repeated. Shortly thereafter her work performance was criticized, to which she responded by referring to the sexual harassment to which she had been subjected, but was told she was overreacting to a joke. When it was suggested that she might want to reconsider continuing with the job, she felt forced to resign and did so the following day. In finding that she had been unjustifiably constructively dismissed, the Employment Court awarded her 3,000 NZ dollars plus costs, but rejected her sexual harassment claim on the grounds that, although the offending words fell within the definition given in the Employment Contracts Act, 1991, the employer had taken all practicable steps to prevent a recurrence of the incident and had warned her that she ought to accept such behaviour if she wanted to fit in.

⁸⁵ [1992] 1 ERNZ, dated 20 Dec. 1991.

⁸⁶ [1992] 1 ERNZ, dated 2 Apr. 1992.

Africa

For French-speaking Africa, apart from the *Koffi* decision in Côte d'Ivoire already referred to (supra notes 9 and 10), no key cases – indeed no cases at all – concerning sexual harassment have been identified.

In English-speaking Africa, however, a number of cases have been decided in South Africa. The four cases on the subject brought before industrial courts have relied on the unfair labour practice provision of the Labour Relations Act, 1956 (recently replaced by the Labour Relations Act, 1995). The leading case of *J v. M Ltd.*,⁸⁷ although slightly prior to the time-period covered in this article, merits discussion as it clearly confirmed certain trends in this area of the law. In that case, an Industrial Court found that dismissal of a harasser for sexual harassment in employment was fair because the man in question knew that his behaviour was unacceptable, had received several warnings from his general manager and yet had continued to harass. It defined sexual harassment broadly as covering both the narrower *quid pro quo* and the hostile environment types. While placing a duty on the employing firm to ensure that its employees are not subjected to such treatment, the Court left to management the task of setting the standard of conduct for employees. Halfkenny (1995) points out that since management is usually male, the standard of conduct thus set might not reflect the interests of female employees. A recent arbitration decision – *Pick'n Pay Stores Ltd. and an individual*⁸⁸ – attempted to give a detailed definition of sexual harassment in employment. However, Campanella (1994) considered this avoided the question (put in argument), that *mens rea* (intent) was an essential element of sexual harassment, and therefore also avoided the question of whether there should be no liability without fault. The arbitrator in that case used both the subjective (victim's viewpoint) and objective (alleged harasser's viewpoint) tests to determine whether the conduct was unwanted. Under both measures, he found that there had been sexual harassment. And yet the arbitration found that dismissal was too harsh a sanction against a harasser, and ordered the company to reinstate him and to issue an internal circular to all employees outlining its future policy on sexual harassment in the workplace. In *Lynne Martin-Hancock v. Computer Horizons*,⁸⁹ an Industrial Tribunal examined an unfair labour practice claim from a woman, in which the company had dismissed her following a disciplinary inquiry's conclusion that her false accusations of sexual harassment against one of its managers were creating an atmosphere of dissension detrimental to the company's business interests. Concentrating on the procedural and substantive fairness of the internal inquiry leading to the dismissal, the Tribunal held that she had been unfairly dismissed and left the relief to the parties to resolve.

⁸⁷ (1989) 10 I.L.J.755 (IC).

⁸⁸ *Independent Mediation Services South Africa (IMSSA) Arbitration Digest* (Johannesburg), Vol. 3, Part 1, Aug.-Nov. 1993, p. 136.

⁸⁹ Case No. 11/2/14268 (Oct. 1994).

Concluding remarks

Despite the dearth of recent, high-level (High Court, Supreme Court, Constitutional Court) decisions in the field of sexual harassment in employment, the cases described do suggest either confirmation of existing trends in various jurisdictions or significant advances in sexual harassment law through the courts and arbitral decisions. It will be interesting to see whether, in ten years' time, such trends have stopped, continued, or advanced in certain major areas, particularly on questions concerning choice of forum, employer liability and sanctions and remedies.

What do the various decisions show about advances in the law concerning sexual harassment in employment? First, that many jurisdictions are adopting the approach taken by the United States courts, namely that sexual harassment should be clearly identified as a form of sexual discrimination and, as such, a barrier to women's integration in the labour market. In that sense, in the United States decisions have exerted a strong influence on those in other jurisdictions. However, national law approaches remain remarkably different: France's recourse to penal sanctions, Spain's use of health and safety legislation, and the ongoing debate in South Africa about the need to prove fault for tort liability show that different legal systems are prepared to experiment with different legal standards in the attempt to establish the unacceptability of certain behaviour.

A second conclusion is that, depending on the type of legal framework used, victims of harassment may obtain widely different results. Employment opportunity laws may be advantageous to complainants because special procedures for judicial action are usually in place and specialized bodies having expertise in discrimination based on sex are better able to judge both the facts presented to them and the law in reaching their findings. In countries where sexual harassment is considered to be a labour law matter, the impact of the law may be confined to instances of *quid pro quo* harassment, thus imposing on the complainant the requirement to prove some actual – or, in more recent cases, threatened – employment disadvantage based on the behaviour. Some European labour law provisions on constructive or unfair dismissal are used to protect against sexual harassment. The use of criminal law in this context can be problematic because of the strictness of the burden of proof and because in most systems espousing the presumption of innocence this rests squarely on the shoulders of the party making the allegation.⁹⁰

⁹⁰ The European Community attempted to address this question in its proposal for a Council Directive on the "burden of proof in the area of equal pay and equal treatment for women and men" (COM.(88)269, final in *Official Journal of the European Communities* (Brussels), C.176, S.7, Vol. 31, 5 July 1988). In sex discrimination cases in general, this would lighten procedures for alleged victims by requiring the complainant simply to produce a plausible case or *prima facie* evidence of discrimination, upon which the burden of proof shifts to the defendant involved. France, Germany, Italy and Switzerland have already opted for similar systems as regards burden of proof. The question is discussed in the 1996 *Special Survey* of the ILO Committee of Experts on the Application of Conventions and Recommendations

Another aspect of the choice of jurisdiction concerns the composition of the body which will hear the case. Many academics comment on the stereotypes applied to cases of sexual harassment by male judges in court systems throughout the world (Bronstein and Thomas, 1995; Chotalia, 1994-95; Conti, 1995; Earle and Madek, 1993; Flynn, 1996; Job, 1993; MacKinnon, 1979). Evidence supporting some of their criticisms may be found in decisions reached as recently as in the 1980s: in the United States case of *Rabidue v. Osceola Refinery Co.*⁹¹ an apparently sex-biased assessment of the testimony of the parties resulted in a sexist application of the law; the fact that the majority judgement referred to the female victim as “troublesome” has been much criticized by academics and commentators. Likewise, in *Peake v. Automotive Products Ltd.*⁹² a judge revealed his own perceptions of the role of the United Kingdom equality legislation in disclaiming a complaint brought by a male applicant alleging discrimination in the employer’s practice of allowing female employees to leave work a few minutes early so as to avoid the crush at the end of the shift. In that case, Lord Denning states: “Although the 1975 Act [Sex Discrimination Act, 1975] applies equally to men as to women, ...[i]t is not discrimination for ‘mankind to treat womankind’ with the courtesy and chivalry which we have been taught to believe is the right conduct in our society.” One Swiss study (Ducret and Fehlmann, 1993) notes that female victims of sexual harassment find it difficult, psychologically, to lodge complaints, probably because such harassment is not recognized as a social phenomenon. Similar criticisms have been made of arbitration systems, which are created by the dominant sex. Is arbitration, which depends on male-dominated lists of arbitrators, institutionally and structurally sexist? Some commentators argue that the arbiters’ neutrality is often more an assumption than a fact. A second criticism of arbitration in this context is that it aims at the peaceful settlement of labour relations questions, rather than the promotion of equality in employment. However, some of the decisions described here have shown that, where sexual harassment is recognized to be a primary public policy issue, judicial and arbitral decisions will be overturned in favour of supporting the alleged victim’s claim. When it comes to the difficult question of the overturning by appeal jurisdictions of industrial tribunal findings – which are sacred in several jurisdictions – most appeal jurisdictions appear willing to put remedying a sexual harassment wrong first.

Another element in the choice of forum concerns straightforward procedural matters. First, as regards lodging a complaint, this must usually be done within a certain time-frame. In the United Kingdom, for example, the

mentioned earlier (paras. 230 and 298). That Committee considers that there is a great advantage in shifting the burden of proof from the complainant once a prima facie case has been made, since the substantial difficulty of proving discriminatory practices (which often occur with no witness and involve one person’s word against another’s) makes it extremely difficult for victims to win a case, especially when they accuse their superiors in the hierarchy.

⁹¹ 805 F.2nd 611(6th Circuit 1986).

⁹² [1978] 1 All ER 106.

legislation imposes a three-month time-limit from the date of the alleged incident or behaviour for cases to be taken to industrial tribunals. As regards the length of proceedings, some fora are better than others. The United Kingdom Equal Opportunities Commission cases take an average of two years before reaching the Employment Appeals Tribunal. In Canada, human rights commissions are notoriously slow in handling all cases before them, not just sexual harassment cases. In the United States, claims under Title VII of the Civil Rights Act, 1964, are subject to a statute of limitations of 180 days for filing before the EEOC; that is why Vance (1993) argues that tort actions might be swifter, as they can be filed directly without the need to exhaust administrative remedies as claimants under Title VII have to do. Another procedural aspect is what constitutes admissible evidence in cases to prove the claim: in France, criminal proceedings accept proof such as tape recordings, which may not easily be admitted in other legal systems. The court's approach to open hearings or closed hearings has already been commented on above. Most equal opportunities statutes set out procedures along the following lines: the person files a written complaint; there is investigation by officers of the specialized body; if the case has merit, the officers conciliate between the parties; if that fails, there is referral to a board of the specialized body or to another body such as the courts. Because of the relative simplicity and swiftness of such procedures equal employment avenues find favour with some writers (for example, Thomas and Taylor, 1994). Where labour laws are used, it is often pointed out that the labour inspection services (which are the first to become involved in hearing complaints or detecting violations of a sexual nature in employment) lack the necessary technical capacity to examine impartially and with expertise sexual harassment cases (see, for example, Serna Calvo, 1994). And again, litigation in all jurisdictions is generally costly and time-consuming and the outcomes uncertain. Some commentators claim that case-law has been slow in advancing protection against sexual harassment at the workplace (Van Tol, 1991). Others consider that the legal impetus provided by United States Supreme Court decisions has obliged a great many companies to devise and implement strategies to deal with sexual harassment (Fenley, 1988). Lindemann and Kadue (1992) argue that perhaps the most worrisome aspect of using legislation as the primary tool for eliminating sexual harassment in employment is that it could stunt the progress of women in their long struggle to gain workplace equality because, in an effort to avoid spurious charges, male employees would minimize any contact with female employees. What is clear is that a balance is needed so that sexual harassment law and jurisprudence do not drive a wedge between the sexes at the workplace, but are used to ensure respect for human dignity and to create working environments that are propitious for business.

The question of liability is the third major tendency and point of argument in much of the sexual harassment jurisprudence examined for this article. If employer liability is established, the complainant may have a better chance of recovering monetary damages. The employer may have a stronger

incentive to implement an active no-harassment enterprise policy in that case. If, on the other hand, the liability of the individual harasser is established, this may be perceived as a personal victory for the complainant, which would send a powerful message to potential harassers that they would be personally responsible for any damages awarded were a case to be made out against them; they would therefore be more careful in their behaviour. If the liability of both the harasser and the employer can be established, the advantages of both these situations would be combined. Liability varies according to the type of laws involved: it differs under employment opportunity laws, labour laws, criminal laws, and has been the subject of a rich academic literature in the context of tort law. As the cases described show, under human rights and general sex discrimination laws, the employer would be liable for damage to the victim if the law prohibits sexual discrimination "by the employer", and the harasser would be liable if the law prohibits sexual discrimination "by any person". However, in the latter case, the principle of vicarious liability has often meant that the employer is found liable in any case, regardless of whether the harassment was committed by supervisors, co-workers or non-employees. In some countries the laws are scrupulous on this: section 41(1) of the United Kingdom Sex Discrimination Act, 1975, states that prohibited sexual harassment can be at the hands of an employer or any person under his/her control and, as pointed out above, case-law has held that mere ignorance of the fact that certain behaviour was going on in the workplace was not sufficient to escape the vicarious liability test. Under Spanish labour law, the employer has almost always been found responsible, because the legislative provisions in question are drafted in terms of the employer's responsibility to the employees. In tort, persons are responsible for their own actions but vicarious liability has been successfully argued to extend responsibility to the employer as well as to the harasser in such cases. Though in criminal law the harasser alone is liable, there is the added disadvantage that criminal proceedings are usually long, involve cross-examination of all parties involved, and are instigated by a police force which may not be trained in sensitive handling of such cases. As shown in some of the Canadian cases, certain provincial jurisdictions permit the alleged victim either to sue the harasser directly or to complain to one of the human rights commissions which can pursue the action on behalf of the complainant.

Liability can also depend on the type of harassment. The United States cases show that while employer liability is often found in cases of *quid pro quo* harassment, this is not necessarily so in cases of hostile environment harassment.

In his article on the merits and demerits of dispute resolution processes in Canada, Aggarwal (1994) compares the outcome of sexual harassment cases brought under the statutory route with that reached under arbitration. The advantages in the former are that the commissions of human rights prepare the case, represent the victim, bear the entire costs and give him or her moral support, whereas in arbitration cases where the claim has become a union case, the union provides moral and financial support and bears the legal and

other associated costs, and a range of remedies can be included in collective agreements that may not be available through the statutory route. The disadvantages of both human rights investigations and tribunal proceedings are that they can take considerable time and are public, with the possibly embarrassing and offensive exposure to public scrutiny of the complainant's personal life; the disadvantages of arbitration hearings are that they may also be public, and may not always get enthusiastic support from the person's union (especially from male-dominated unions), or in cases where both the alleged harasser and the alleged victim are members of the same union.

Lastly, the question of remedies and sanctions is one of the most striking common threads in these recent cases, throughout the world. At the internal procedures level, the most common form of sanction is disciplinary action by the employer in the form of reprimand, transfer, salary and/or grade reduction, delay in promotion, withdrawal of annual salary increments (particularly in the public service), demotion, suspension or even actual dismissal. In Canada, collective bargaining agreements often authorize an arbitration board to impose a financial penalty against a harasser;⁹³ agreements in Denmark, Italy, the Netherlands and the United Kingdom are also starting to look at enforcement provisions where they touch on sexual harassment in employment in general terms. Serna Calvo (1994) notes that though a few collective agreements in Spain ban sexual harassment, they often fail to include a definition of such behaviour and do not address the question of enforcement and penalties. In the United States, the use of workers' compensation provisions leaves the employee without a remedy because most victims have negligible or no medical expenses and no loss of wages, particularly in hostile working environment claims, whereas the workers' compensation legislation remedy is linked directly to loss of earnings and medical benefits. Vance (1993) points out another shortcoming to the use of the United States civil rights legislation, since the 1991 amendments which introduced financial awards for victims of job discrimination under Title VII included a cap on those damages of between 50,000 and 300,000 US dollars. Courts, on the other hand, often use the principle of proportionality in assessing damages, as was clear in the 1995 Spanish Appeal Court's decisions. Courts can order reinstatement with or without back pay and benefits, and can also issue injunctions and other writs to enjoin the employer to cease the behaviour complained of, such measures often being paired with an order to carry out certain acts to repair the damage caused. This can take the form of training, and/or adoption and implementation of a specific policy on sexual harassment; or general sensitization of the workforce, as was shown in the US 1991 *Robinson v. Jacksonville Shipyards, Inc.* case. In the United Kingdom, section 65(1)(c) of the Sex Discrimination Act, 1975, also envisages the transfer of the harasser. But by far the most common forms of remedy are damages and financial

⁹³ For example, Fraser Valley Regional Library and CUPE Local 1698; Municipality of Terrace (BC) and CUPE Local 2012.

awards which can be either for actual pecuniary loss or as compensation for moral harm.⁹⁴ This ability to recover immaterial damages is important, for otherwise the victim may have no financial recovery as no tangible pecuniary job benefit was affected; however, as noted in some of the cases described, proof of tangible loss or detriment in the job is no longer required in most English-speaking jurisdictions. There is an interesting development regarding the award of compensatory moral damages in the United States: on 22 May 1996 the House of Representatives approved the Small Business Job Protection Act, one provision of which would amend the Internal Revenue Code so as to allow taxation of emotional distress damages recovered by victims of sexual harassment or other forms of employment discrimination or wrongful employment conduct. Under the present law, any damages (with the exception of some punitive damages) received on account of personal injury or sickness are not taxed under the Internal Revenue Code.⁹⁵ Whether this development was initiated following the huge awards won and reported above in recent United States cases, or whether it is part of a general move towards tighter tax provisions, is for the reader to judge.

Manifestly, it is important to have clear knowledge of what to expect when bringing a sexual harassment complaint, whatever the type of law or forum for complaint involved, and whatever the type of remedy and sanction requested. A recent article reflects just how important those choices can be.⁹⁶ In 1996, the United States Peace Corps agreed to pay 250,000 US dollars to settle a sexual harassment lawsuit, in what is described as perhaps the largest payment ever by the United States Government to a man who accused his female boss of making sexual advances. The settlement was described by the male victim's lawyer as an acknowledgement of the important policy issue that sexual harassment applies to both sexes and as proof that the Government acknowledges that the harm done whether to a man or a woman in a sex power play is totally unacceptable. The Government, however, admitted no wrongdoing by the female supervisor of the Peace Corps managers and the victim agreed to retire and drop the lawsuit.

Will future sexual harassment victims in that jurisdiction prefer to settle out of court, so as to avoid tax on possible compensatory damages, or so as to avoid procedural problems and caps on damages? Will future victims using the French criminal proceedings see harassers imprisoned and hefty pay-outs by guilty employers? Will the Spanish lower courts continue to rule against guilty individuals and employers knowing that their decisions are overturned on appeal even when the factual findings of illegal sexual harassment are confirmed? In future, court and arbitral decisions may well provide answers to these questions.

⁹⁴ In the United Kingdom, section 66(4) of the Sex Discrimination Act, 1975, covers injury to feelings.

⁹⁵ "A new tax on the victims of employment discrimination" at National Employment Lawyers' Association (NELA) Internet resource centre website, <http://www.nela.org/nela/emotdmgs.html>.

⁹⁶ "A man wins a harassment suit", in *International Herald Tribune* (Zurich), 2 Aug. 1996.

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