

Colloquium on “Gender and the Law”, Castries, St Lucia, November 17-18 2011

[1] This paper seeks to address the topic of sexual harassment as an aspect of gender inequality in employment in the OECS and within the context of an acknowledged weak statutory framework for anti-discrimination. The topic has been the subject of much research and study in the past decade¹. However, despite encouragement and recommendations, that concern has not translated into legislative action. A search of the website of the **Eastern Caribbean Supreme Court** reveals only one case² in which the term “sexual harassment” is even mentioned, and then only as an aside. It is perhaps not surprising that this activity has been the subject of so little judicial pronouncement within the sub-region served by the Eastern Caribbean Supreme Court. The lacuna is evident elsewhere. A search of the website³ of the **Trinidad and Tobago Supreme Court** does not reveal one case dealing specifically with the topic. A similar search of the website⁴ of the **Supreme Court of Jamaica** is no more productive. We have to assume that there has been no litigation on the subject in either of those two Commonwealth Caribbean States.

[2] In a 2006 paper⁵ published on the website of the CCJ, **Justice Desiree Bernard** provided us with a thorough description and analysis of the phenomenon of sexual harassment in the West Indian workplace in these terms,

“Sexual harassment in the workplace is a not too unfamiliar scenario in our Region. While victims of sexual harassment can be male or female, women suffer disproportionately. Many young women are exploited and forced into sexual liaisons with their male employers to obtain or retain employment. Sexual favours are the “quid pro quo” for permanent job security or advancement. This type of harassment in the workplace frequently destroys a productive working environment and the self-esteem of those who experience it.

However, sometimes sexual harassment is difficult to identify particularly in our Region where women regard a touch on the buttocks or risqué jokes as part of our normal social intercourse,

1 See for example the 2005 ILO paper: “Sexual harassment at work: National and international responses” by Deirdre McCann: <http://www.ilo.org/dyn/gender/docs/RES/429/F1845214041/Sexual%20harassment%20at%20work.pdf>

2 Bank of Antigua v Errol Williams (Antigua and Barbuda Civ App 23 of 2001) unreported decision of 31 March 2003

3 <http://www.ttlawcourts.org/index.htm>

4 <http://supremecourt.gov.jm/judgments>

5 “Confronting Gender-based Violence in the Caribbean” by The Hon Mme Justice Desiree Bernard, OR, CCH, Judge of the Caribbean Court of Justice. <http://ccj.org/papersandarticles/07-Confronting%20Gender-Based%20Violence%20%2029%2011%2006.pdf>

and may only treat it as serious when the harassment develops into more aggressive conduct. In less formal employment situations such as domestic service any sexual suggestion or gesture by a male employer will constitute sexual harassment because of the advantageous position and dominance he enjoys in his household.

Overall, the key ingredient in sexual harassment is the authority which the harasser wields over the victim who is usually at a disadvantage owing to her fragile economic position, the current employment being in most cases her only means of livelihood. With this foremost in her mind a victim may be reluctant to confront her harasser or report any unwelcome advances."

- [3] The lack of relevant legislation has long been the subject of complaint in the region. A 2003 paper by **Linden Lewis**⁶ reveals that only two Caricom countries, Belize and the Bahamas, have established specific sexual harassment legislation. As Mr Lewis writes,

"For the most part, sexual harassment is widespread in the region. Many men in the Caribbean fail to recognize the import of this problem. Indeed, many do not view it as a problem at all. Though some men would stop short of sexual battery, they see no harm in engaging in sexual banter in the workplace or creating an uncomfortable environment for women, lesbians and gay men. It is reasonable to argue that in the Caribbean as a whole, sexual harassment represents behaviour which is largely normalized. The patriarchal culture of the region nurtures this type of behaviour. Sexual harassment is an extension of behaviour associated with public harassment of women and gay men. Hegemonic men in the region retain the right to shout remarks at women in public spaces. These remarks are sometimes complimentary, often sexually suggestive, and other times very insulting, humiliating and embarrassing to women in public. Subordinate men do not escape such public taunting. Often these disparaging remarks directed to gay men are accompanied by the threat of violence or backed up with actual violence. Ironically, men who raise the issue of sexual or public harassment are seen as strange or confused or are believed to have lost their way socially."

He points out that common and sexual assault criminal charges are inadequate to provide the protection from this type of harassment that employees are entitled to. His urging that more of our countries should adopt the model Caricom sexual harassment Bill⁷ to seems to have fallen on deaf ears.

- [4] In 2006, **Justice Bernard**, in a second paper⁸ delivered on the occasion of the 60th anniversary of the UN Commission on the Status of Women, repeated Mr Lewis' hope that the Caricom model Bill will

6 "Gender Tension and Change in the Contemporary Caribbean" delivered at an Expert Group Meeting on "The role of men and boys in achieving gender equality", 21-24 October 2003, Brasilia, Brazil.

<http://www.un.org/womenwatch/daw/egm/men-boys2003/EP11-Lewis.pdf>

7 The model "Protection against Sexual Harassment Act" drafted in 1991.

8 Published on the CCJ website and entitled "Advances Made on Gender Equality and Women's Human Rights in the Caribbean Region":

<http://www.caribbeancourtofjustice.org/papersandarticles/06-Advances%20Made%20on%20Gender%20Equality%20%2010%2011%2006.pdf>

soon be enacted by our legislatures. As she expressed it then,

“In the Caribbean, conduct which is now regarded as harassment was endured without complaint by women with few options who were seeking or were desirous of retaining employment. A number of states in the Region have enacted sexual harassment legislation, but no statistics are available to ascertain how effective they have been.”

This Caricom model Bill would prohibit sexual harassment in the workplace, as well as in education and accommodation, and would include provisions which would empower officers to conduct investigations and establish a tribunal to hear complaints. This draft Bill is now almost exactly 20 years old.

- [5] In 2007 the Grenadian Education and Labour Minister, **Claris Charles**⁹, declared open a one-day consultation on creating a policy framework for developing sexual harassment legislation in Grenada. She questioned then what sort of society was being built on the island when women accept violence in their homes, as well as being harassed at work, and the abuse of their children at home. She complained,

“There is need for the public-at-large to become more aware of what is happening around them through education. We do not have a public that would inform on those things. Everything they hide it. So a woman is sexually harassed, she goes home, she tells her friend and that's it. A woman is abused, she accepts it because she is emotionally dependant.”

What is true for Grenada is no less true for each of the States and Territories in our sub-region.

- [6] The time for us to be treating sexual harassment as a private wrong is long past. In a 2009 United Nations Development Fund for Women (UNIFEM) article¹⁰ published in the Stabroek Newspaper, Senior Lecturer at UWI **Tracy Robinson** explained,

“Many of us remember when **domestic violence** was dismissed as ‘cultural’, ‘man and woman business’, even though most of the violations were already in theory crimes. The passage of legislation naming and defining domestic violence in law has played a key role in altering the way we now understand and address domestic violence. Like the domestic violence law, the sexual harassment legislation will introduce crucial new remedies, and send a message about the seriousness of the violation.”

- [7] The jurisprudence in the Eastern Caribbean is negligible. We have seen the dearth of reported cases.

9 Article in Grenada Today: <http://www.belgrafx.com/gtoday/2007news/Oct/Oct13/Combatting-sexual-harassment.htm>

10 Entitled “Why we need sexual harassment laws in the Caribbean”
<http://www.baiganchoka.com/why-we-need-sexual-harassment-laws-in-the-caribbean/>

I have found one journal article on a 1994 ground-breaking **Industrial Court** case¹¹ from **Trinidad and Tobago** where sexual harassment was for the first time upheld as good grounds for dismissing a senior employee who had provided 25 years of commendable service to his company. This was the first case on sexual harassment to go as far as the Industrial Court. In providing the rationale for its decision, the court advised:

"It is therefore left largely to employers to establish a reasonable framework for addressing problems associated with sexual harassment at the workplace. The unions, too, have an obligation to their members to work towards elimination of these problems. It is to be hoped that until Parliament enacts legislation, the parties would find it possible to co-operate in the formulation of an appropriate policy on the subject."

[8] And, so, in the absence of a legislative framework, it is left for those of us concerned about limiting the opportunities for sexual harassment in the workplace to find ways to take private initiatives. The USA has led in the corporate field in promoting active policies at Board level to discourage sexual harassment and to provide mechanisms for employees who feel harassed to be able to make a complaint and to have their grievance heard and dealt with in a fair and impartial matter. For several years in the 1980s, I was a representative of the **Caribbean Family Planning Affiliation** on the Board of Directors of a New York-based not-for-profit corporation with hemisphere-wide branches. This was the **International Planned Parenthood Federation (Western Hemisphere Region) Inc**, or IPPF(WHR). While I was on its Board, IPPF(WHR) adopted a sexual harassment policy for all of its employees. It was quite extensive and read as follows:

"B. SEXUAL HARASSMENT POLICY

Sexual harassment is a violation of local, state and federal law, as well as of this policy. Although all forms of discrimination and harassment are treated with equal seriousness, sexual harassment is often difficult to define, so it is addressed in further detail in this Handbook. The Equal Employment Opportunity Commission has issued guidelines which define sexual harassment as any unwelcome sexual advances, requests for sexual favors, sexually motivated physical contact and other verbal or physical conduct, or visual forms of harassment of a sexual nature when submission to such conduct is either explicitly or implicitly made a term or condition of employment or is used as the basis for employment decisions, or when such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment. Sexual harassment is a general term and includes more than overt physical or verbal intimidation. It can occur among co-workers as well as from supervisors or managers. Lewd or vulgar remarks, suggestive comments, pressure for dates or sexual favors and unacceptable physical contact are examples of what can constitute harassment. It is important to realize that what may not be offensive to one employee, may be offensive to other employees.

¹¹ Dell Mohess v Republic Bank. See article in "Executive Time Magazine, Caribbean Edition": <http://www.angelfire.com/journal/executivetime/sexual.htm>

All employees are expected to know the procedure to follow if sexual harassment occurs so that the problem can be corrected quickly and effectively. Any employee who believes he or she has been subjected to sexual harassment or has any knowledge of such behavior should report it at once to his/her supervisor or Department Head or to the Director of Human Resources. The Department Head or supervisor must consult with the Director of Human Resources related to a complaint.

C. COMPLAINT PROCEDURE- DISCRIMINATION AND HARASSMENT

IPPF/WHR strictly forbids making submission to any harassing or discriminatory conduct a basis for an employment decision and will do its best to keep the work environment free of any conduct that creates an intimidating, hostile or discriminatory work environment for our employees.

Any employee who feels that he or she has been harassed or discriminated against based on any protected personal characteristic in the course of employment should contact his or her supervisor, and report the relevant facts immediately. If an employee feels uncomfortable bringing the matter to the attention of his or her own supervisor or if the supervisor is thought to be involved in the harassment or discrimination, the employee may contact the Director of Human Resources or the Regional Director. Charges of harassment and discrimination will be promptly and thoroughly investigated. Such investigation may include witness interviews and requests for statements concerning the facts of the complaint. Reports of discrimination or harassment will be handled with sensitivity. Confidentiality will be maintained throughout the investigatory process, to the extent practical and appropriate under the circumstances, in light of the important privacy interests of all concerned. However, IPPF/WHR reserves the right to disclose information and take any appropriate remedial and disciplinary action in order to discharge its legal obligations. Records of all discrimination and harassment complaints and investigations will be maintained for at least the same length of time as other personnel records are maintained.

If IPPF/WHR determines that harassment or discrimination has occurred, appropriate relief for the employee bringing the complaint and appropriate disciplinary action against the harasser or discriminating person(s), up to and including immediate discharge, will follow. IPPF/WHR will make follow-up inquiries to ensure that the harassment or discrimination has not resumed.

An employee who remains unsatisfied after the investigation may seek review from the Board of Directors of IPPF/WHR, who may direct or conduct an additional independent investigation and will advise the employee of the results of the second investigation. The Regional Director may take further investigatory remedial or disciplinary action as is appropriate.

No employee may be retaliated against for the good faith exercise of rights under this policy (regardless of the outcome) or for cooperating in an investigation under this policy. Any person who knowingly makes a false or malicious complaint under this policy will be subject to appropriate disciplinary action."

What was admirable about this policy was that it not only prohibited the sexual harassment of employees, but it also set out detailed procedures to be followed by the employee who felt compelled to complain. The one is not much use without the other. I found the IPPF regime so worthwhile that

while I was an attorney in private practice in Anguilla, I had occasion to encourage appropriate clients to adopt it for inclusion in their by-laws and employee handbooks.

[9] As elsewhere in our region, Anguilla's laws on the subject are defective. Sexual harassment by male employers is perfectly acceptable under the criminal law, provided it is directed to an adult employee and not towards a minor. Section 158 of the Criminal Code creates the offence of "sexual harassment of a minor" and imposes a penalty of a fine of \$10,000 or 5 years imprisonment. The offence only exists within the environment of employment or prospective employment. So, interestingly, the section includes sexual harassment of an adult by a minor in the employment environment. It creates the offence of the importuning of an adult in authority by a person between 16 and 18 years of age "who holds out the promise of sexual favours in exchange for any benefit or advantage or the forbearance from the exercise of any right, power or duty relating to that authority". There is no similar offence of sexual harassment of an adult employee.

[10] It has been left to individual corporations and institutions to include in their bylaws and constitutions provisions against sexual harassment. In Anguilla, a number of organisations have begun to include such provisions in their employee handbooks and office manuals. So, for example, the offence is mentioned in the **Anguilla Public Service Code of Ethics**. It is more clearly spelled out in the 2001 **Anguilla Association of Office Professionals Code of Ethics** which I offer up to you as an example of a worthwhile private initiative. Clause 14 reads as follows:

"14 Sexual Harassment

Sexual harassment is any unwelcome sexual advance, request for sexual favours, sexually motivated physical contact, and other verbal or physical conduct, or visual forms of harassment of a sexual nature, when submission to such conduct is either explicitly or implicitly made a term or condition of employment or is used as the basis for employment decisions, or when such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment. Lewd or vulgar remarks, suggestive comments, pressure for dates or sexual favours and unacceptable physical contact are examples of what can constitute harassment. We recognise that a harmonious and productive working relationship is essential in the work place. We shall do what we must to foster harmonious and productive working relationships that encourage mutual employee respect. We recognise that in a few cases there is a degree of sexual harassment in the workplace that has to be faced up to and overcome. We shall not ourselves engage in sexual harassment of our juniors, nor shall we accept it from our seniors."

[11] So long as our legislatures are reluctant to debate and to enact laws criminalising sexual harassment,

it will continue to be the responsibility both of good corporate citizens and of workers' representatives to ensure that their institutions' corporate by-laws, employee handbooks and Board policies contain provisions expressly dedicated to outlawing sexual harassment in the workplace and providing mechanisms for victimised employees to seek redress. I cannot find a better process to recommend to such persons than that adopted by the IPPF for Family Planning Associations of the West Indies.

Anguilla

13 November 2011