

Case Reports

2016/9

Employee lawfully dismissed for poor behaviour during investigation of her harassment claim (CY)

CONTRIBUTOR Panayiota Papakyriacou*

Summary

An employee's behaviour during the investigation of a sexual harassment complaint that she had made against her manager was a crucial factor in the Court's decision to dismiss her application for damages for unlawful termination and discrimination.

Facts

The applicant was employed by the Union of Technical Personnel of the Electricity Authority since 1 November 2000. On 19 June 2008 she submitted a sexual harassment complaint against her manager (the respondent) to the employer's executive committee. The applicant's manager was also a member of the executive committee, but was excluded from the examination of the complaint made against him.

After considering the complaint, the executive committee asked the applicant to provide evidence in writing to support the allegations, but she refused, stating that she was not required to produce evidence in writing. A repeated request to provide evidence was also met with a refusal. Despite the executive committee's assurances that the matter would be examined confidentially and objectively, in accordance with the employer's code of conduct in place at the time, the applicant was unconvinced by the executive committee's intentions and said she would only provide evidence in the presence of

three persons of her choice. The reason for her request to be accompanied by three people was to ensure that no bribery took place. The executive committee refused to accept this condition, which it said was not acceptable and the behaviour and attitude shown by the applicant towards the examination of her complaint was unjustified and/or unreasonable.¹ The applicant's behaviour was so abusive and she behaved so disrespectfully towards the committee that the executive committee considered it impossible to investigate the complaint in her presence. As a result, the applicant was suspended for six weeks, during which time the complaint was investigated.

The executive committee informed the respondent of the sexual harassment complaint filed against him and asked for his position regarding the allegations to be submitted in writing. The respondent submitted his reply on 2 July 2008. He denied the allegations, supporting the denial with evidence obtained by third parties. The executive committee forwarded the respondent's reply to the applicant with a letter dated 10 July 2008, again requesting her to provide evidence in support of her complaint. The committee repeated its request in a letter dated 22 July 2008. However, the applicant ignored the executive committee's requests.

As a result, on 22 July 2008 the executive committee examined the complaint without the applicant's evidence and dismissed it on the grounds that it was false, unfounded and unsubstantiated. The applicant was called to appear before the executive committee on 31 July 2008 to apologise for the false complaint, but she refused. It was decided to fire the employee without notice, i.e. with effect from 31 July 2008, for:

- denouncing an executive member of her employer without any supporting evidence;
- refusing or ignoring requests to provide evidence in support of her complaint; and
- behaving in an abusive and unacceptable manner when asked to provide supporting evidence.

The applicant brought proceedings before the Court of Industrial Disputes, claiming damages on the basis of sex discrimination within the meaning of Law 205(I)/2002 on the equal treatment of men and women in employment, which transposes Directives 76/207 and 97/80.

* Panayiota Papakyriacou is a lawyer with George Z. Georgiou & Associates LLC in Nicosia, Cyprus, www.gzg.com.cy.

1. In fact, the employer had no sexual harassment code in place. It had made up its own rules of procedure.

Judgment

In reaching its decision, the Court of Industrial Disputes examined whether:

- the applicant’s termination was due to the sexual harassment complaint that she had submitted or due to her abusive behaviour in refusing to appear before the executive committee and provide further supporting evidence; and
- the applicant had been discriminated against under Law 205(I)/2002.

Unlawful termination

In considering the lawfulness of the termination, the court referred to the principle of mutual trust and confidence which underpins an employment relationship. The court specifically highlighted the employee’s duty to behave in a way that facilitates mutual cooperation with the employer, which is achieved by displaying good faith and proper manners and showing respect to company executives.

Further, the court applied the reasonable employer test based on the circumstances. With reference to case law, the court confirmed that abusive behaviour on the part of an employee can justify the termination of employment without notice. On this ground, the court was satisfied that the applicant’s refusal to provide supporting documentation amounted to abusive behaviour and breached the duty of mutual trust and confidence required for the employment relationship to continue. Hence, the harassment complaint was not the cause of the termination.

On this reasoning, the termination of the applicant’s employment was found to be lawful and the applicant was not entitled to damages for unlawful dismissal.

Discrimination

In deciding whether the applicant had been a victim of sexual harassment that amounted to discrimination, the court referred to European Court of Justice case law, which confirms that sexual harassment constitutes:

- unwanted behaviour of a sexual nature with the purpose or effect of offending a person’s dignity; and
- the creation of an intimidating, hostile, humiliating, degrading or offensive environment during employment, vocational training or efforts to access employment or enrol in training.

These elements must coexist for sexual harassment to be proven.

According to the evidence before the court, the applicant had accepted the respondent’s behaviour for several years and did not file the harassment complaint until after something personal happened in her relationship with the respondent. On this ground, no incidence of sexual harassment or discrimination against the applicant had been proven and the application was dismissed.

Commentary

Sexual harassment claims are rare in Cyprus. Although the allegedly harassed lady in this case was dismissed and subsequently lost her case, this judgment is a welcome precedent for victims of sexual harassment, because they now know that the courts in Cyprus apply the EU definition, currently in Article 2(1) of Directive 2006/54: “*where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment*”. This judgment should warn employers that they need to have a sexual harassment code in place.

The decision to dismiss the applicant was based on three reasons, briefly:

1. denouncing her manager without evidence;
2. refusing to provide evidence;
3. behaving abusively.

If I had had to advise the employer in this case, I would have thought twice before mentioning the first reason as a ground for dismissal. Admittedly, Directive 2006/54 on Equal Treatment of men and women in employment does not include an explicit prohibition against ‘victimization’, such as in Article 9 of the Race Directive 2000/43 and Article 11 of Framework Directive 2000/78. The latter provision states, “*Member States shall introduce into their national legal systems such measures as are necessary to protect employees against dismissal or other adverse treatment by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment*”. However, I would say that any form of victimization is unlawful. Of course, one can wonder how far this goes. In this case it would appear that an employee had intentionally accused her manager falsely. Should such behaviour be protected under the guise of victimization? A negative answer is risky. Surely an employee should feel free to lodge a harassment complaint without fear of being unable to substantiate the complaint with solid evidence and then losing her or his job. The court in this case did not rule explicitly on the subject of victimization.

Comments from other jurisdictions

The Netherlands (Peter Vas Nunes): Although the prohibition against (sexual and other forms of) harassment at work, including a prohibition against victimization, are included in the Dutch anti-discrimination laws, harassment is generally dealt with in the context of the rules on occupational health and safety. Those rules require employers to (i) have and publish a harassment policy; (ii) provide training aimed at preventing harassment; (iii) have a sufficient number of adequately

trained harassment counsellors; and (iv) have a complaints procedure that includes effective sanctions.

Subject: sexual harassment

Parties: *Vasso Papagregoriou* – v – Union for Technical Personnel of the Electricity Authority and *Iakovos Charalambous*

Court: Court of Industrial Disputes

Date: 29 January 2015

Case number: 273/2009

Publication: none (Cypriot judgments other than those of the Supreme Court are not published)