

A COMPARISON OF HARASSMENT AND SEXUAL HARASSMENT IN THE CZECH REPUBLIC AND IN THE UNITED KINGDOM AS A POINT OF DEPARTURE FOR FUTURE EUROPEAN POLICIES

Dr. Lucie Cviklová

Charles University, Faculty of Humanities, **Czech Republic**

ABSTRACT

In its analysis of various legal regulations and data from the United Kingdom and the Czech Republic concerning harassment, and namely sexual harassment, the article highlights how sociological discourses and legal decisions have reflected upon this specific form of discrimination, which is regulated by international, European as well as national means. The article first considers two major principles of sexual harassment – 'quid pro quo' and a 'hostile working environment'; later, international, European as well as national provisions such as conventions, directives and various other acts are presented. In the Czech Republic, the most important measures to protect prospective victims against harassment and sexual harassment are the Charter of Fundamental Rights and Freedoms and the Labour Code, and in the United Kingdom respective measures are the Sex Discrimination Act 1975, the Equality Act 2010 and the Protection from Harassment Act 1997. The central part of the article is an elucidation of the differences concerning the settlement of harassment and sexual harassment cases in the two countries; they are explained in the context of sociological data and relevant case law. Firstly, while in the United Kingdom sociologists as well as ordinary citizens are more or less aware of the negative effects of the phenomenon, in the Czech Republic, media discourses as well as decision makers of the judicial system have tendencies to underestimate it or even to ridicule prospective victims. Secondly, despite sharing similar structural features of international, European and national provisions concerning harassment and sexual harassment, examples of case law in the Czech Republic and in the United Kingdom have demonstrated substantial differences between the nature of complaints adjudicated by the national courts.

Keywords: Anti-Discrimination Law, the Czech Republic, Discrimination, the European Court of Human Rights, Harassment, Sexual Harassment, the United Kingdom

INTRODUCTION

The American scholar and lawyer, Catherine MacKinnon, – who helped to shape American legislation regarding sexual harassment – claimed that sexual differences are a major source of domination of men over women and substantially contribute to discriminatory practices. These inequalities – very often mistakenly seen as a manifestation of attraction – have been apparent in the workplace (labour market) where men have opportunities to use their power and thus also become initiators of sexual harassment as the result of their superior economic status [1]. According to Catherine MacKinnon, sexual harassment has increased social inequalities between men and women and should be understood as a specific form of sex discrimination according

to Title VII of the Civil Rights Act of 1964 (the title prohibits employment discrimination based on race, colour, religion, sex and national origin). In her publications she has argued that sexual harassment has two elementary sources: the 'quid pro quo' principle in which an employment advantage is offered by a person having higher status to a person having a lower one in the hierarchy of the given organization, and the 'hostile working environment' in which the initiator and victim have more or less the same status in the organizational hierarchy and the harassment results from more general patterns of the dominance of men over women [2].

METHODOLOGY

Through a perspective differentiating between the quid pro quo principle and the hostile working environment the article explains the nature of harassment and sexual harassment not only in a European context but also in two specific countries: the Czech Republic and the United Kingdom. Apart from international and European provisions, in the Czech Republic the most important measures for protecting prospective victims against harassment and sexual harassment are the Charter of Fundamental Rights and Freedoms as well as the Labour Code, and in the United Kingdom respective measures are the Sex Discrimination Act 1975, the Equality Act 2010 and the Protection from Harassment Act 1997. Despite common features of international, European and national provisions concerning harassment and sexual harassment, examples of case law in the Czech Republic and in the United Kingdom have demonstrated substantial differences between the nature of complaints and also in success rates in trials adjudicated by both national courts

RESULTS

International, European and Czech Legislation concerning Harassment and Sexual Harassment as a Point of Departure for Their Critical Assessment

International norms concerning harassment and sexual harassment have been effective as soft law; they have been monitored by United Nations bodies and their enforcement by means of courts has not been possible. At the international level, sexual harassment has been conceptualized as a specific form of sex discrimination and the most important provision regulating sexual harassment is the Convention on the Elimination of All Forms of Discrimination against Women (Article 1 concerning discrimination and Article 5 concerning stereotyping and prejudice). The Convention ascribes importance to various aspects of sexual harassment related to working conditions and employment and constitutes sufficient basis for monitoring or reporting such phenomena as a hostile working environment, favouritism based on sex inequalities as well as other criteria [3].

At the European level, among other regulations, the prohibition of sexual harassment has been determined by Directive 2002/73/EC (Article 8) and in accordance with it employers as well as those responsible for vocational training are encouraged to take measures to combat the phenomenon. Sexual harassment is incompatible with the principle of equal treatment of men and women regardless of whether it occurs in the workplace, in the context of access to employment and vocational training, or in employment and occupation [4]. Complaints concerning harassment are decided under the special conditions determined by Directive 97/80/EEC (Article 4); it stipulates a reversal of the burden of proof between plaintiff and defendant (if the party filing the suit proves their preliminary evidence) and the shift can occur on specific factual issues during a trial. In addition, according to Directive 2006/54/EC (Article 6) harassment and

sexual harassment – understood as a violation of the principle of equal treatment of men and women and constituting discrimination on the grounds of sex – should be prohibited not only in the workplace, but also in the context of access to employment, vocational training and promotion.

In the United Kingdom, protection against harassment and sexual harassment was originally regulated by the Sex Discrimination Act 1975 (amended 1986) that was later replaced by the Protection from Harassment Act 1997 as well as by the Equality Act 2010. As stated in Article 1 of the Protection from Harassment Act 1997, a person must not pursue a course of conduct which amounts to the harassment of another (and which they know or ought to know amounts to harassment of the other) and as stated in Article 2, a person who pursues a course of conduct in breach of these principles is guilty of the offence of harassment and is liable on summary conviction to imprisonment or a fine (or both).

Broadly speaking, in the Czech Republic opposition to harassment and sexual harassment has been anchored in the Civil Code, which guarantees that an individual shall have the right to the protection of his or her personhood as well as his or her civic honour and human dignity. Plaintiffs claiming harassment and sexual harassment can refer to the Charter of Fundamental Rights and Freedoms, to the Labour Code as well as to the recently adopted Anti-discrimination Act.

While the United Kingdom as well as the Czech Republic have progressive legislation relating to harassment and sexual harassment, sociological data about their perception and analysis of respective case law have revealed substantial differences between the two countries [5]. It could be said that – compared to the Czech Republic – in the United Kingdom landmark decisions concerning harassment and sexual harassment have not only influenced the number and nature of litigations but also enhanced legal discourses.

Perception of and Case Law Relating to Harassment and Sexual Harassment in the United Kingdom

In spite of the various legislation concerning harassment and sexual harassment in the United Kingdom and in spite of the fact that many legal decisions have recognized victims' allegations concerning unwanted conduct, many workplaces where mostly female workers are likely to be exposed to these undesirable experiences can still be identified[6]. For example, the British Army has been characterized by an uneven ratio of female and male workers and therefore sexual harassment has been more likely to occur than in other important sectors with a similar number of employees. For example, according to the results of a piece of sociological research, 'Sexual Harassment (A Study of Servicemen and Servicewomen: An investigation into the nature, prevalence, prevention and management of sexual harassment within the British Army)', female employees expressed discontent about various types of sexualised behaviours and these can be divided into generalised sexualised behaviours on the one hand and targeted sexualised behaviours on the other.

Sociological data about the British Army revealed generalised sexualised behaviours such as telling sexual jokes or stories, using sexually explicit language e.g. sexual swear words and suggestive language, displaying, using or distributing sexually explicit materials e.g. pornographic photos, calendars and other objects of a sexual nature and making gestures or using body language of a sexual nature. Soft targeted sexualised

behaviours were also identified, such as making unwelcome comments about someone's appearance, body or sexual activities, making unwelcome attempts to talk to someone about sexual matters, sending someone sexually explicit material, making unwelcome gestures or using body language of a sexual nature that are directed at someone and making unwelcome attempts to touch someone. More serious targeted sexualised behaviours occurred in the form of making unwelcome attempts to establish a sexual relationship with someone despite their discouragement, saying or making someone feel that they would be treated better in return for having a sexual relationship with them, saying or making someone feel that they would be treated worse if they did not have a sexual relationship with them or making a sexual assault on someone [7].

Porcelli versus Strathclyde

The first landmark case in the UK – comparable to the landmark decision *Michelle Vinson versus Meritor Savings Bank* in the United States – was initiated by the complaint of a laboratory technician and was adjudicated by the Court of Session in 1986. According to the testimony of Mrs. Porcelli, after the departure of two female employees and their replacement by two male colleagues, the newcomers adopted manipulative strategies and thus indirectly wanted her to leave her job. In spite of the fact that the respondents argued that they would have behaved in a similar way to any male worker and therefore sexual harassment was not an issue, the Court of Session interpreted their conduct as a violation of the Sex Discrimination Act 1975 and ruled in favour of Mrs. Porcelli. Thus, in the case *Porcelli versus Strathclyde* representatives of judicial power in the UK decided – for the first time – that sexual harassment should be seen as a form of direct discrimination and considered to be an unacceptable form of action or conduct; harassment and sexual harassment offences in the workplace thus became part of ordinary case law and were commonly adjudicated by employment tribunals and employment appeal tribunals.

Arun Estate Agencies Ltd. versus Sheridan

In the decision in the *Arun Estate Agencies Ltd. versus Monika Sheridan* (2000) case, the judges declared that a company manager with a higher status sexually abused his female colleague with a lower status; in the decision-making process subsequent facts were taken into consideration. Mr Robert Allen (31) exposed himself three times to Ms Sheridan (45) and showed her pornographic materials instead of discussing the monthly accounting of the company. Ms Sheridan adopted a negative attitude to this conduct but was so scared by the repeated incidents of sexual harassment that during four consecutive years she was not able to make any complaint; only later did she sue the company, Arun Estate Agencies of Chatham, Kent, for sexual harassment, personal injury and unfair dismissal. During sessions relating to the case it came out that the management of the enterprise had been regularly informed about the inappropriate conduct of Mr Allen and those complaints were not properly investigated. In 1998 – as the result of this negligence of the company's management – Ms Sheridan suffered a nervous breakdown and finally she left her job since the company forced her to move to another office after her return from sick leave.

Majrowski versus Guy's and St.Thomas' NHS Trust

The *Majrowski versus Guy's and St.Thomas NHS Trust* case of 2006 dealt with a controversy between a manager (the harasser) and a homosexual man (the harassed victim). In this case the employer was held responsible for the harassment of their male

employee; Mr Majrowski complained about the conduct of his female head of department; according to his testimony she bullied and harassed him in front of other workers. According to his allegations she set unrealistic goals regarding working hours and threatened him with disciplinary procedures with reference to their prospective infringement. In addition, she denied him regular communication because of his sexual orientation/homosexuality; through his own perspective he interpreted this type of conduct as a specific form of vexation. In 1998 Mr Majrowski submitted a complaint claiming harassment; a representative of Guy's and St. Thomas' NHS Trust investigated the case and admitted that Mrs Freeman had initiated harassing conduct. In June 1999, Guy's and St. Thomas' NHS Trust dismissed Mr Majrowski for reasons which – according to representatives of the organization – were not related to the circumstances of the above mentioned investigation. Four years later Mr Majrowski sued Guy's and St. Thomas' NHS Trust for stress and anxiety and eventually for further losses brought about when he was employed by the Trust. He did not accuse Mrs Freeman and Guy's and St. Thomas' NHS Trust for a breach of employment contract but for violation of the laws forbidding harassment. The Court of Appeal ruled in favour of Mr Majrowski and later the House of Lords held that there was a new statutory tort for harassment making employers vicariously liable (in agreement with the Protection from Harassment Act 1997).

The Perception of and Case Law Relating to Harassment and Sexual Harassment in the Czech Republic

To understand harassment and sexual harassment issues in the Czech Republic it is useful to mention the broader cultural context; Czech society is sensitive neither to gender issues nor to gender discrimination and as the result conduct involving harassment and sexual harassment has been tolerated [8]. Certain importance should also be ascribed to the socialisation process during which children learn to accept certain forms of behaviours as inherent parts of female and male identities and this process can lead to harassment and sexual harassment being invisible. The cultural ignorance of the phenomenon has been the major reason for the low number of submitted complaints as well as the low level of their success.

According to the results of empirical research conducted by experts in the Gender & Sociology Department (Institute of Sociology, Academy of Sciences of the Czech Republic), Czech university students consider harassment to be a remote problem that does not relate to them. Moreover, at odds with the legislative definition, students at Czech universities do not differentiate between harassment and sexual harassment and they narrow down sexual harassment to their experiences of power hierarchies established by the organisational structure; they identify sexual harassment with explicit and physical forms of harassment and they do not label a hostile environment as constituting harassment [9].

Mrs Terezie Štorkánová versus Dopravní podnik hlavního města Praha

In the Czech Republic the first legal case relating to sexual harassment occurred in 2001; a female tram driver (an employee of Dopravní podnik hlavního města Praha/Prague public transport company) Mrs Terezie Štorkánová took legal action against her superior relating to his targeted sexual behaviour. Initially the District Court of Prague 9 [Obvodní soud Praha 9] considered the complaint of Mrs Štorkánová as groundless and dismissed the case; only later on, at the request of superior

representatives of the District Court Prague 9 [Obvodní soud Praha 9] were her legal actions recognised and proceedings started. In her complaint the victim referred to the Labour Code, which opposes the violation of human dignity, including unwanted sexual behaviour; thus, on the incentive of the complainer, issues of harassment and sexual harassment were analysed in detail by the offender as well as by individual members of the jury.

After Mrs Štorkánová and the male technician T., who was her superior, had discussed regular work issues and she had been asked to move to another room, he suddenly caught her shoulder and made efforts to drag her away (in the direction of the room where she had been asked to go). Arguing that he was not aware of the fact that he could not touch her he refused to apologise as she requested; after two further steps – an official report and dismissal of her grievance concerning sexual harassment formulated by specialists in the field of labour law – Mrs Štorkánová decided to initiate legal proceedings. The text regarding the final dismissal of the case – after several judicial hearings, rounds of appeals and interventions of the Municipal Court of Prague – denied a component of sexual harassment or sexual behaviour and only briefly mentioned 'inappropriate conduct' of the alleged offender, the male technician T.

Compared to the more or less continuous reluctance of representatives of the Czech judicial system to investigate cases involving harassment and sexual harassment in the workplace, sexual harassment cases regarding the abuse of children have been more successful. For example, in 2016 – as the result of several hearings – the District Court in Přerov recognized the complaints of representatives of the Roma community concerning the abuse of Roma children at a local railway station by a Catholic priest, Vladimír Krejsa; according to the testimonies of more than ten Roma teenagers, he had scheduled appointments with them where he asked for oral sex or sexual contact in return for financial remuneration.

CONCLUSION

Despite the fact that the above presented information has demonstrated common features of generalised and targeted sexualised behaviours in the Czech Republic and in the United Kingdom, it has also revealed substantial differences between these two countries concerning the efficiency of legal systems and legal discourses to deal with the issue. Compared to the absence of case law concerning harassment and sexual harassment of women in the Czech Republic, corresponding landmark cases in the United Kingdom have not only managed to advance the criteria of the decision making of courts but also influenced legal and sociological discourses [10].

It can be concluded that more efficient protection against harassment and sexual harassment in the Czech Republic can be inspired by legislation in the United Kingdom where specific acts have been adopted regarding sex discrimination on the one hand and (sexual) harassment on the other. Other inspirations are, for example, that the Swedish state has managed to establish the agency of the Discrimination Ombudsman and thus in the Czech Republic protection against harassment and sexual harassment could also be improved by appointing an ombudsman with an affiliation to the Ministry of Labour and Social Affairs specialising in discrimination or eventually the sexual harassment of women. Apart from having an ombudsman specialised in sex discrimination it could also be useful to establish an intermediary body comparable to the Equal Employment Commission in the United Kingdom and the Equal Opportunity Commission in the

United States; such a body could contribute to the empowerment of sexually-harassed women and thus also increase the number of litigations regarding sexual harassment.

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