

EMPLOYMENT

Employer ordered to pay compensation for failing to adequately investigate sexual harassment complaints

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Introduction

An employer's liability in instances where it fails to comply with its statutory duties and its own sexual harassment policy by not adequately investigating an employee's complaints about improper conduct of a colleague was considered by the Commission for Conciliation, Mediation and Arbitration ("**CCMA**") in the recent case of *ZG / Massmart Wholesale (Pty) Ltd* [2024] 3 BALR 350 (CCMA).

Facts

A senior employee ("**Employee**") claimed to have been sexually harassed by a colleague on two occasions. The Employee reported the incidents to her manager who advised her to contact the Ethics Department. The Employee subsequently completed a formal report of the incidents on 29 April 2022, and an investigation was initiated. Months later, in December 2022, the Employee was suspended and issued with a notice to attend a disciplinary hearing. The disciplinary hearing was chaired by an advocate who found that the incidents that occurred in April 2022 were insufficient to constitute sexual harassment for purposes of the Employment Equity Act 55 of 1998 ("**EEA**").

Following this, the Employee referred an unfair discrimination dispute to the CCMA. In terms of section 6(3) of the EEA, harassment of an employee is a form of unfair discrimination and is prohibited on any one or combination of grounds of unfair discrimination listed in section 6(1) which includes, amongst other things, direct or indirect discrimination on the basis of sexual orientation, gender and sex. It is on this basis that the Employee referred the dispute.

CCMA findings

The Commissioner was required to determine whether (1) the Employee was unfairly discriminated against by the employer on the basis of sex, sexual orientation and gender in breach of the EEA; (2) the employer was liable in terms of section 60 of the EEA; and (3) the Employee was entitled to payment of compensation. Section 11 of the EEA provides that if an unfair discrimination allegation is made against an employer, it is the employer who must prove that such discrimination did not take place or that it was justifiable.

Clause 5 of the Code of Good practice on the Prevention and Elimination of Harassment in the Workplace ("**the Code**") provides a detailed definition of sexual harassment. The Commissioner relied on the following excerpt of the Code:

"5.2.5 The unwanted conduct must be of a sexual nature and includes physical, verbal, or non-verbal conduct, whether expressed directly or indirectly. Conduct amounting to sexual harassment may include –

5.2.5.1 physical conduct of a sexual nature ranging from touching, kissing, to sexual assault and rape.

...

5.2.5.3 following, watching, pursuing, or accosting of an employee;" (own emphasis).

The Employee testified that the perpetrator made physical contact with her body, by tapping her on her back (above her bra line) whilst she was busy working on her computer. The Commissioner found her explanation of not reporting this incident plausible. However, the Employee was clearly uncomfortable with the second incident, the pinching of her waist (direct physical contact), and immediately sent an email to her colleague and formally reported the incident. These actions are in line with the conduct described in the Code and the Commissioner thus found that the Employee met the test for sexual harassment.

Section 60 of the EEA provides for liability of employers in instances where an employee, while at work, has contravened a provision of the EEA. Section 60(2) and 60(3) of the EEA provides that the employer must consult all relevant parties and must take the necessary steps to eliminate the alleged conduct and that the failure by the employer to take such steps will render the employer deemed to have also contravened that provision.

The Commissioner held that the Employee's claims pertaining to the perpetrator showing an interest in her movements and that he had touched her to be true. Moreover, it took the employer four months to call a disciplinary hearing, at which the perpetrator's bare denial was accepted. The Commissioner provided that the employer did not follow its own harassment policy when it investigated the incidents and denied the Employee's request for CCTV footage as proof of the incidents. Furthermore, no consideration was taken of the fact that a witness confirmed that the Employee immediately brought to his attention the physical contact that had occurred.

The Commissioner held that the employer failed in its duty to consult all relevant parties to take the necessary steps to eliminate the alleged conduct and comply with the provisions of the EEA. The employer was therefore deemed to have contravened section 60(3) of the EEA and ordered to pay the Employee an amount equivalent to two months' compensation.

Importance of the case

This case underscores the critical importance of upholding workplace harassment policies and conducting thorough investigations into allegations of misconduct, and to do so expeditiously. The Commissioner's ruling highlights how incidents, such as unwanted touching or undue attention, can constitute sexual harassment and thus the failure to promptly address may result in the imposition of liability on the part of the employer. Furthermore, the failure to follow established harassment policies and consult the Employee during the investigation process demonstrates a disregard for statutory obligations and employee well-being.



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