



EMPLOYMENT

Employers must timeously take steps to deal with any allegations of sexual harassment raised with them, failing which they may be held liable

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Introduction

In *Independent Municipal and Allied Trade Union obo S and another / Nelson Mandela Metropolitan Municipality*, the Commission for Conciliation and Mediation (“**CCMA**”) had to consider whether the Nelson Mandela Metropolitan University (“**employer**”) was liable in terms of section 60 of the Employment Equity Act 55 of 1998 (“**EEA**”), following two complainants’ allegations that their employer did not respond adequately when made aware of the allegations of sexual harassment/discrimination committed by their colleague (“**accused**”).

Facts (in brief)

The complainants were employed by the employer as library assistants where the accused was also employed. Both complainants raised allegations of sexual harassment with their supervisor (“**Ms Dinie**”) but alleged that they were not met with the requisite concern, sensitivity or urgency.

The complainants proceeded to take their complaint up with their immediate supervisor (“**Mrs Titus**”), who allegedly responded more swiftly and with due regard for the severity of the issue. The matter was thereafter referred to the Labour Relations department for investigation. The accused was suspended and accordingly instructed to leave the premises immediately. The accused objected to the suspension. This all took place within three weeks of the complaints having been initially reported.

In view of ongoing strike action at the Library during this time, (in that the employer was short of working staff), the accused was not suspended but was instead, relocated to a different workplace to that of the complainants.

A formal disciplinary hearing was then held within two months of the allegations having initially been reported. The accused was found not guilty on both counts of sexual harassment against the complainants. Despite the chairperson’s finding, the employer continued to ensure that the accused remained at a different workplace to that of the complainants.

The complainants, nevertheless, remained aggrieved and as such, referred their dispute to the CCMA. The basis for their referral was that their employer’s conduct constituted unfair discrimination per the EEA and that as a result, compensation and/or damages be awarded to them. In essence, the legal question for determination was whether or not the employer took reasonable steps and did all that was “reasonably practicable” in its response to the complaints, in terms of section 60 of the EEA.

Complainant’s submissions

The first complainant informed Ms Dinie on 8 May 2018, of the inappropriate conduct of the accused, but alleged that Ms Dinie did not give her any guidance as to how she should go about reporting the incident. She felt as though the approach of Ms Dinie was nonchalant. Ms Dinie did not take action until the matter was brought to the Mrs Titus’ attention. Once informed, Mrs Titus had requested that she put her statement in writing. The complainant did so, on 9 May 2018.

The second complainant, upon reporting the sexual harassment she had faced to Ms Dinie, felt as though her experience was being minimised and that the allegation was not dealt with in the manner she expected. She had approached Ms Dinie twice, once on 14 May 2018 and again on 16 May 2018, with no action being taken. It was only on 18 May 2018, upon approaching Mrs Titus, that the matter was dealt with more promptly and with greater concern. She too, had been requested by Mrs Titus to put her statement in writing which she did.

Employer’s submissions

On 8 May 2018, the Labour Relations Practitioner of the employer became aware of the report made by the first complainant (the same day the complaint was initially reported by the first complainant) and consulted with Mrs Titus regarding the complainants and the procedure to be followed. The Labour Relations Practitioner became aware of the second complainant’s grievance, on the first day on which she reported it to Ms Dinie, being 14 May 2018.

The complainants were thereafter engaged in a consultative meeting to ascertain how they wished to proceed with the matter, with a choice to follow either a formal or informal procedure. The complainants elected for a formal procedure to be followed which the employer commenced with immediately. Four days after this meeting, the suspension notice was served on the accused. Therefore and in the employer’s view, it took reasonable steps to address the matter.

CCMA Finding

The arbitrator found that the employer had, in fact, acted swiftly and with regard to the severity of the complaints. It was revealed that Ms Dinie had, in addition to raising the complaints with more senior management, raised the first complainant’s grievance with the accused himself. Mrs Titus further ensured to capture both complainants’ allegations in writing. During the course of the CCMA proceedings, neither of the complainants disputed the employer’s evidence as to its promptness in dealing with the allegations.

The arbitrator carefully reviewed the subsections of section 60 of the EEA namely section 60(3) which attributes liability to the employer for the employee’s conduct, where the employer is found not to have taken the necessary steps to remedy a transgression of the EEA, engaged in by one of its employees.

Section 60 of the EEA states as follows –

“(1) If it is alleged that an employee, while at work, contravened a provision of this Act [EEA], or engaged in any conduct that, if engaged in by that employee’s employer, would constitute a contravention of a provision of this Act [EEA], the alleged conduct must immediately be brought to the attention of the employer.

(2) The employer must consult all relevant parties and must take the necessary steps to eliminate the alleged conduct and comply with the provisions of this Act [EEA].

(3) If the employer fails to take the necessary steps referred to in subsection 2, and it is proved that the employee has contravened the relevant provision, the employer must be deemed also to have contravened that provision.

(4) Despite subsection (3), an employer is not liable for the conduct of an employee if that employer is able to prove that it did all that was reasonably practicable to ensure that the employee would not act in contravention of this Act [EEA].”

Section 60(4) of the EEA therefore requires an employer to show that it did what was “reasonably practicable” in the circumstances to ensure the employee in question would not contravene the EEA. Where an employer is able to prove this, then they will escape the liability otherwise imposed by section 60(3).

The import of this section, is that it places a statutory obligation on employers to take more active steps to curtail discrimination in the workplace. The arbitrator made it clear the true essence of the legal test in determining the response of an employer, by holding that it is not about “whether the employer took every possible step to ensure that the discrimination [did] not happen, but simply whether it took reasonable steps” to eliminate the discrimination or harassment, as was the case here. This is a factual determination however, and what is reasonable in one case may not necessarily be reasonable in another.

The concession by the complainants that Mrs Titus did act to remedy the issue, in addition to the fact that the accused was kept at a different workplace even after he was found not guilty of the allegations at a formal disciplinary inquiry, ultimately led the arbitrator to conclude that the employer did take reasonable steps to address the complaints. This evidence as a whole, proved fatal to the complainants’ case. Accordingly, the arbitrator dismissed the claim and found that having regard to how the matter was dealt with, the invocation of Section 60 was without merit.

Conclusion

The key takeaway for employers is to act swiftly, urgently and proactively when complaints or allegations of discrimination committed by its employees are brought to its attention. Through taking reasonable steps and responding timeously, such an employer will not incur any liability under section 60 of the EEA. While this case did not make express reference to the Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace, employer’s should also have regard to same in ensuring they meet their obligations in terms of the EEA.

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