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#METOO in the workplace: how to prevent and address sexual harassment

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INTRODUCTION

Awareness of sexual harassment in the workplace has become particularly pronounced over recent years due to rising awareness on social media platforms following the #METOO movement. The #METOO movement began gaining prominence on social media during October 2017. The movement aims to highlight the prevalence of sexual assault and harassment, especially in the workplace.

The recent spotlight cast by the #METOO movement should act as a stark reminder to employers of the importance in complying with the laws regarding sexual harassment, in particular the Employment Equity Act 55 of 1998 (the "**EEA**") and its amended Code of Good Practice on Sexual Harassment cases in the workplace (the "**Code**").

A brief overview of the Amended Code is discussed below.

THE APPLICABILITY OF THE CODE

The first Code of Good Practice on the Handling of Sexual Harassment Cases was issued in 1998 (Government Notice R1367 of 17 July 1998) (the "**LRA Code**"). The Labour Relations Act 66 of 1995 (the "**LRA**") required that consideration be given to the LRA Code when considering how to address sexual harassment in the workplace. In contrast, the EEA requires that consideration be given to the Code. The LRA Code and Code differ in a number of respects. When the Code was enacted the legislature neglected to repeal the LRA Code. Instead both codes applied simultaneously. On 19 December 2018 the Minister of Labour repealed the LRA Code. When considering sexual harassment in the workplace consideration now need be given only to the Code.

OBJECTIVE AND APPLICATION

The objective of the Code is to eliminate sexual harassment in the workplace. Item 1(3) of the Code provides that it "encourages and promotes the development and implementation of policies and procedures" that will create work environments free of sexual harassment in which both employers and employees are equally respected.

The Code applies to employers, employees as well as applicants for employment. However, it should be noted that the perpetrators and victims of sexual harassment may also include non-employees (owners, managers, supervisors, clients, suppliers, contractors etc.). A non-employee who has been sexually harassed may lodge a complaint with the employer if the harassment occurred in the place of the employer's business or in the course of the harasser's employment.

UNFAIR DISCRIMINATION

Sexual harassment is a form of unfair discrimination and is prohibited on the grounds of sex and/or gender and/or sexual orientation. For this reason, the provisions regulating discrimination in the EEA also apply to instances of sexual harassment.

DEFINITION OF SEXUAL HARASSMENT

The Amended Code defines sexual harassment as any unwanted conduct of a sexual nature that violates the rights of an employee and which constitutes a barrier to equity in the workplace.

The Code provides a test to determine when discrimination as a result of sexual harassment has occurred. The following factors are to be taken into account:

- whether the harassment is on the prohibited grounds of sex and/or gender and or sexual orientation;
- whether the sexual conduct was unwelcome;
- the nature and extent of the sexual conduct; and
- the impact of the sexual conduct on the employee.

FACTORS TO ESTABLISH SEXUAL HARASSMENT

Sexual harassment can take the form of physical, verbal or non-verbal conduct. Non-verbal conduct includes unwelcome gestures, indecent exposure as well as the display or sending, by electronic or other means, of sexually explicit pictures or objects. Sexual harassment may also take the form of victimisation, quid pro quo harassment and sexual favouritism.

Previous consensual participation in sexual conduct does not mean that such conduct continues to be welcome. In addition, a single incident may amount to a sexual harassment.

The Amended Code provides that factors such as harassment on a prohibited ground, unwelcome conduct, the nature and extent of the conduct and the impact of the conduct are also to be considered when establishing whether sexual harassment has occurred.

EMPLOYER'S OBLIGATIONS

The Code provides guiding principles for employers which include that they create and maintain a working environment in which the dignity of all employees are respected. In addition, item 11.2 of the Code provides for information and education which includes the obligation that employers should include sexual harassment in their orientation and training programmes.

Employers should prepare a sexual harassment policy which takes cognisance of and is guided by the provisions of the Code. Management has a positive duty to implement the policy. The policy should state that sexual harassment is a form of unfair discrimination and that it will not be permitted or condoned in the workplace. The Code states further that the employer should make it a disciplinary offence to victimise an employee who lodges a sexual harassment complaint in good faith.

PROCEDURES

Section 60(1) of the EEA provides that any conduct contravening the EEA should be brought to the employer's attention “immediately”. Item 8.1.2 of the Amended Code provides that “immediately” means as soon as reasonably possible having due regard to the nature of the sexual harassment, the complainant's fear of reprisals and the relative positions of the complainant and the perpetrator in the workplace.

When an instance of sexual harassment has been brought to the employer's attention, the employer should consult with all the relevant parties; address the complaint in accordance with the Code and the employer's sexual harassment policy and take the necessary steps to eliminate the sexual harassment. Importantly, where an employer fails to do so the employer, in addition to the individual actually perpetrating the sexual harassment, may also be deemed to have contravened the EEA and may be held liable.

The Code provides for formal and informal procedures to deal with sexual harassment cases. A formal procedure includes:

- with whom the employee can lodge a complaint;
- the internal grievance procedures to be followed which should also include provision for the complainant's desired outcome;
- time frames which will allow complaints to be dealt with expeditiously;
- allowance for matters do be referred to the Commission for Conciliation, Mediation and Arbitration (“**CCMA**”) if not dealt with satisfactorily; and
- that it will be a disciplinary offence to victimise employees who lodge complaints in good faith.

The perpetrator should be informed that the conduct is unwelcome, offensive and / or makes the complainant feel uncomfortable or interferes with work. The perpetrator can be informed by either:

- the complainant or another appropriate person;
- an appropriate person who does not reveal the complainant's identity; or
- the employer.

An employer should always consider any possible further steps which may assist the complainant. The steps to be taken by employers include but are not limited to the following:

- advising the complainant of the formal and informal procedures as set out in the Code and explaining the nature thereof;
- advising the complainant that he or she may choose which procedure the employer should follow;
- re-assure the complainant that he or she will not face any consequences as a result of choosing either a formal or informal procedure; and
- advise the complainant that the matter will be dealt with confidentially.

The employer's sexual harassment policy should specify the range of disciplinary sanctions that may be imposed on a perpetrator. Each sanction must be proportionate to the seriousness of the type of harassment.

CONFIDENTIALITY AND ADDITIONAL SICK LEAVE

Employers and employees should ensure that instances of sexual harassment are dealt with confidentially. This entails management, employees and the parties themselves committing themselves to ensure the confidentiality of the disciplinary inquiry.

Furthermore, if an employee's sick leave has been exhausted, the employer should give due consideration when granting additional paid sick leave in serious cases of sexual harassment. This is when an employee may require medical advice such as trauma counselling. Item 10.2 of the Code places a burden on employers to assist with the cost of such medical advice and trauma counselling if the amounts are not covered by any applicable medical aid scheme.

CASE LAW

Specific jurisprudence has provided clarity as to what the Code requires of employers:

In *Campbell Scientific Africa (Pty) Ltd v Simmers and Others* (Unreported CA 14/2014 23/10/2014), the victim was asked by a fellow employee ("**Simmers**") whether she wanted a "lover for the night" after various other proposals of a sexual nature were rejected. As a result of this comment, Simmers was subjected to disciplinary proceedings and was subsequently dismissed. Simmers referred an unfair dismissal dispute to the CCMA which held that he had been fairly dismissed. He then lodged a review application at the Labour Court which held that it was not sexual harassment because the victim had declined his advance and he did not pursue the matter further. Thus dismissal was an unjustified sanction. The Labour Court established the principle that "inappropriate conduct does not automatically constitute sexual harassment". The Labour Court held further that the employee's conduct was an "inappropriate sexual one" but that it had not crossed the line to constitute sexual harassment".

The victim appealed to the Labour Appeal Court ("**LAC**"). The LAC held that the Labour Court had erred in deciding that Simmers' proposals did not constitute sexual harassment. The LAC made reference to the "power relations within society" which lie at the core of sexual harassment. It was of the view that the Labour Court overlooked the impact that this played in the matter. The LAC noted that sexual harassment creates an "offensive and intimidating work environment which undermines the dignity, privacy and integrity of the victim". The LAC added further that such unwanted sexual conduct creates a barrier to substantive equality in the workplace and subsequently overruled the Labour Court's decision.

In *Liberty Group Limited v M.M* [2017] 10 BLLR 991 (LAC) ("*Liberty*") M resigned after 10 years of service with her employer after being sexually harassed by her manager. When M raised the issue with the employer, she was simply referred to the employer's sexual harassment policy and told to consider whether the manager's conduct amounted to sexual harassment.

M was encouraged not to resign however after no action was taken following her complaint, she submitted a second resignation letter. This then prompted the initial investigation into the manager's conduct. M refused to assist with this investigation as she considered it to be "too little, too late". The manager was only suspended after M's second resignation letter.

M referred a dispute to the Labour Court where she claimed compensation from the employer based on the fact that she was unfairly discriminated against. She testified that her manager had harassed her on no less than four occasions during the first six months of 2009. Furthermore, she testified that this, coupled with his level of seniority, was one of the factors that caused her to resign.

The Labour Court concluded that M had established that she had been sexually harassed and the employer was vicariously liable for the manager's conduct in terms of section 60 of the EEA. The Labour Court awarded her R250 000 as compensation. The Labour Appeal Court ("LAC") confirmed the Labour Court's judgment.

The LAC summarised the requirements for vicarious liability for the employer as follows:

- The sexual conduct complained of must have been committed by another employee;
- The alleged conduct constituted unfair discrimination;

- The alleged conduct occurred at the workplace;
- The alleged conduct must be brought to the employer's attention immediately;
- The employer must have been aware of the incident of sexual harassment;
- The employer must have failed to consult all the relevant parties and take the necessary steps to eliminate the conduct or comply with the Codes; and
- The employer must have failed to take all reasonable and practical measures to ensure that the employee did not act in contravention of the EEA.

In *Rustenburg Platinum Mines Ltd v UASA obo Pietersen and Others* (JR 641/2016) ("***Pietersen***") Pietersen was employed as an Engineering Specialist by the employer since 2004. In 2007, at an after hours work braai Pietersen approached the complainant ("**Kgole**") who was employed as a boilermaker and enquired into how she survives on such a low salary. He then offered to move in with her in an attempt to commence a romantic relationship under the guise of helping her save money. She declined the offer however this type of sexual harassment continued for a further eight years until the matter was eventually reported by her husband.

A disciplinary enquiry into his conduct resulted in Pietersen's dismissal. He approached the CCMA for relief. The Commissioner held that the duration of the harassment was significant in that the complainant waited eight years before reporting it. Her reasons for the delay included: she hoped that the conduct would stop as it was not reciprocated; she did not think reporting it would help; she was under the impression that she would be victimised because he was a manager; she thought of his wife whom she deemed to be a "good person" and that she consistently asked Pietersen to cease his conduct. The Commissioner found that her failure to report Pietersen's conduct timeously created some hope for him that she would eventually agree to sleep with him. The CCMA ordered Pietersen's reinstatement with retrospective effect.

The matter was taken on review to the Labour Court. It held that Kgole's reasons as stated above were valid to justify not reporting the harassment immediately. Furthermore, the Labour Court held that in the absence of reciprocation, there was no requirement for the complainant to say "no" in unambiguous terms.

The important principle laid down by this judgement is that silence, no matter how prolonged it may be, does not amount to consent and that a "docile" response to continued sexual harassment can never be equated with an invitation. Accordingly, the Labour Court set aside the CCMA's decision and held that Pietersen's dismissal was substantively fair.

CONCLUSION

The Code provides clear guidelines for employers on how to correctly deal with sexual harassment cases. The *Liberty* case illustrates how employers can be held vicariously liable for not complying with the Code and for failing to act when an employee alleges that sexual harassment has occurred. Additionally, *Pietersen* illustrates that time does not bar a sexual harassment claim. The Code also places an obligation on employers to ensure that they have sexual harassment policies in place which provide for effective relief. Furthermore, employers should ensure that these policies are implemented in a manner which reflects their serious commitment to deal with sexual harassment in the workplace.

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