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EMPLOYMENT

Sexual harassment: employers beware

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ISSUE(S)

In what circumstances an employer may be held liable for sexual harassment committed by one of its employees in terms of the Employment Equity Act 55 of 1998 ("EEA").

COURT'S DECISION

In the case of *Liberty Group limited v Margaret Masango* (07 March 2017) the Labour Appeal Court had to determine whether the employer, Liberty Group Limited ("Liberty") should have been held liable for sexual harassment committed by one of its employees. This required a determination of, among others, the legal provisions of section 60 of the EEA.

The facts of the matter are briefly as follows. Ms Margaret Masango ("Masango") was employed as an insurance clerk by Liberty. She lodged a complaint that she had been subjected to sexual harassment by her manager, Mr Andrew Mosesi ("Mosesi"). She alleged that she had been harassed on no less than four separate occasions. Her allegations in this regard were reported to Mr. Haines ("Haines"). Ultimately and despite Haines making the allegations known to Liberty's human resource consultant no action was taken against Mosesi.

As a result Masango tendered her resignation on 28 September 2009. Upon learning of her resignation Ms Nyathi ("Nyathi"), Masango's team leader, contacted her. She was sympathetic to Masango's plight and asked her not to resign so that the matter could be dealt with. Masango agreed to do so. However, in the following two weeks no steps were taken by Liberty to investigate Masango's complaint of sexual harassment. She then tendered a second resignation on 13 October 2016 and, one week later, referred a dispute to the Commission for Conciliation Mediation and Arbitration ("CCMA"). It was only after the second resignation letter, and on 26 October 2016, that Mosesi was suspended. Upon the matter being unsuccessfully resolved at the CCMA Masango approached the Labour Court.

Section 6(3) of the EEA provides that "harassment of an employee is a form of unfair discrimination and is prohibited on any one, or a combination of grounds of unfair discrimination listed in" section 6(1). Item 4 of the Code of Amended Good Practice on the Handling of Sexual Harassment Cases ("Code") establishes the following test for the determination of sexual harassment:

"...unwelcome conduct of a sexual nature that violated the rights of an employee and constitutes a barrier to equity in the workplace, taking into account all of the following factors:

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

The Labour Court found in Masango's favour holding that she had indeed been sexually harassed. The Labour Court also found that Liberty was made aware of the sexual harassment before she had resigned and failed to take the necessary steps at such time. As a result Liberty was held to be liable in terms of section 60 of the EEA. Section 60 of the EEA provides for an employer to be held liable for the misconduct of an employee in certain circumstances. The section provides as follows;

(1) If it is alleged that an employee, while at work, contravened a provision of this Act, or engaged in any conduct that, if engaged in by that employee's employer, would constitute a contravention of a provision of this Act, 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.

(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.

The Labour Court found that Liberty had failed to take reasonable steps in terms of section 60 of the EEA to protect Masango upon becoming aware of her complaint. Rather, Liberty only took the necessary steps after Masango had tendered her second resignation. As a result, the Court found that Liberty had failed to protect Masango as required by section 60.

Liberty appealed against the Labour Court's judgement. Liberty alleged, among a number of other grounds of appeal, that the Labour Court misdirected itself by finding that it, Liberty, had failed to take the necessary steps set out in section 60(2) of the EEA. Liberty argued further that the Labour Court had misdirected itself by failing to find that Liberty did all that was reasonably practicable to ensure that Mosesi, as its employee, would not act in contravention of the EEA.

In setting out the legal principles applicable, the Labour Appeal Court referred to the decision of *Potgieter v National Commissioner of the SA Police Service and Another* (2009) 30 ILJ 1322 (LC) where the Labour Court set out the requirement for employer liability. They are as follows:

a. The sexual harassment conduct complained of was committed by another employee;

b. It was sexual harassment constituting unfair discrimination;

c. The sexual harassment took place at the workplace;

d. The alleged sexual harassment was immediately brought to the attention of the employer;

e. The employer was aware of the incident of sexual harassment;

f. The employer failed to consult all relevant parties, or take the necessary steps to eliminate the conduct; and

g. The employer failed to take all reasonable and practicable measures to ensure that employees did not act in contravention of the EEA.

The Labour Appeal Court applied this test and upheld the decision of the Labour Court and found that Liberty had failed to take the necessary steps to eliminate the conduct as required by section 60(2). In addition, Liberty had failed to do all that was reasonably practicable, as required by section 60(4), to ensure no act in contravention of the EEA occurred.

IMPORTANCE OF THIS CASE

This case highlights the need for an employer to respond appropriately when allegations of sexual harassment have been reported to it by its employees. This requires that an employer must consult all relevant parties and must take the necessary steps to eliminate the alleged conduct and comply with the provisions of the EEA and the Code. Should the employer fail to do so it may be held liable for the acts of the employee(s) who committed the acts of sexual harassment. Should you require any further information on the processes and procedures available please do not hesitate to contact us.



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