

EMPLOYMENT

Sexual harassment in the workplace – a balanced consideration

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On 18 March 2022, the Minister of Employment and Labour (“**Minister**”) published the ‘[Code of Good Practice on the Prevention of Elimination of Harassment in the Workplace](#)’ (“**Harassment Code**”). The Harassment Code has already seen application and been tested in a number of cases before the CCMA and Labour Courts, and it is clear from the consistent approach of these forums that any harassment in the workplace is a serious disciplinary matter. Especially when the harassment is in the form of sexual harassment, employers have stringent obligations to ensure that they respond quickly and appropriately to any allegations that their employees are being harassed, or are harassing third parties, and due to the possibility of vicarious liability and the imposition of unlimited damages against the employer, the stakes are high.

The latest case law, from the Labour Appeal Court in the case of *Amathole District Municipality v CCMA and Others* (2023), shows that South African courts still nevertheless exercise the necessary function of providing a robust system of checks and balances to ensure that all parties are treated fairly.

In this case, the Labour Appeal Court firstly determined on a point of law that when a filing by a party was late and was accompanied by a condonation application, since the delay for the late filing was occasioned by the negligence of the party's attorneys, in order to be fair to the applicant, the court was prepared to excuse the late filing. This outcome is itself a useful point of law that can be relied on in future by litigants who may due to factors beyond their control not be able to meet the strict requirements of filing deadlines or other procedural requirements.

In addition, on the central issue as to whether one of its employees had been sexually harassed, the Labour Appeal Court was asked to reconsider the facts of the matter. The employer had previously been found liable for the payment of damages, on the basis that it had failed to take appropriate action to protect one of its employees against sexual harassment by a colleague. However, the Labour Appeal Court found that the previous courts which had considered the matter had failed to consider critical evidence that the relationship between the parties had been consensual, and that there was evidence of flirtatious messages from the complainant to the colleague. Critically, this element of consent was determined to be prevalent at the time that the alleged sexual harassment took place, and not at any other irrelevant time. As such, the court took cognisance of the fact that consent must be contemporaneous, and that a prior relationship or consent does not negate that consent may be withdrawn. In this case however, the court was convinced that the interactions between the two employees was consensual, and as such “*if conduct is not unwelcome it cannot amount to sexual harassment.*”

[Recognising subtle forms of sexual harassment in the workplace](#)

Employers should be aware that their obligations under the Harassment Code, and the consequences of not taking appropriate action to protect employees are severe, but that every case must be judged on its merits and that an appropriate evaluation of each situation should be made, with the assistance of legal counsel, to determine what intervention may be required.



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