

EMPLOYMENT

Vicarious liability for unfair discrimination – act now or regret later?

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by Sandile July, Head of Employment and Kwanele Diniso, Candidate Attorney

It is trite that employers are required to act swiftly to deal with grievances of unfair discrimination in the workplace. The failure by the employer to do so may invite a claim of vicarious liability against them.

In the recent labour court judgment in *Solidarity obo A Oosthuizen v South African Police Service and others* [2023] case no: JS1030/17 (unreported) (“**Oosthuizen case**”) the court had to determine whether the first to third respondents were vicariously liable for their failure to deal with the applicant’s grievance of **unfair discrimination** in the form of racial harassment.

Background facts

The applicant was employed by the South African Police Service (“**SAPS**”) at the rank of Lieutenant Colonel. On or about 27 February 2017, the applicant took corrective action against her subordinates, warrant officers (“**WO**”) Tikoe and Mphana, after the former WO signed a Z8 form indicating that he was at work on 24 February 2017 when he was in fact absent, and the latter for frequent absenteeism.

The warrant officers were not happy with the corrective action taken against them and, on 27 February 2017, went to the office of the applicant and threatened and intimidated her. In addition to this, they accused the applicant of referring to them as “kaffirs”.

It soon transpired that the allegation of racism and unfair discrimination by the two WOs were false.

However, despite this, the SAPS failed to take any steps to deal with the **racial harassment** the applicant had to endure as a result of being accused of referring to the two WOs as “kaffirs”. All that the SAPS did was to investigate the two WOs for the complaint of racial harassment and perjury laid by the applicant.

The SAPS failed to speedily implement a recommendation that the two WOs be charged. To make matters worse, when the two WOs were charged, despite a statement by an intern at the SAPS that the two WOs had conspired to falsely accuse the applicant of calling them “kaffirs”, the two WOs were not found guilty of the false accusation of racism they had made.

The applicant brought the matter to the labour court to hold the respondents vicariously liable in terms of section 60 of the [Employment Equity Act 55 of 1998](#) (“**EEA**”) for their failure to deal with the racial harassment and bullying that the applicant had to deal.

Unfair discrimination

Section 60 read with section 6 of the EEA provides that an employer may be vicariously liable together with their employee if the employer fails to take the necessary steps to eliminate any unfair discrimination in the workplace. In this case, the court had to determine whether the two WOs unfairly discriminated against the applicant.

In this regard, the court stated:

“[33] As aptly put by the apex Court in Rustenburg Platinum Mine v SA Equity Workers Association on behalf of Bester and Others, the ‘impact of the legacy of apartheid and racial segregation that has left us with a racially charged present’.”

The use of racial slurs such as 'kaffir' stubbornly persists in the workplace, uttered not only by those with power to subjugate. Notably, there is an emerging trend of false claims of racial or sexual harassment by subordinates against their superiors in order to circumvent being disciplined."

The court characterised the way the respondents handled the matter as unfortunate and the failure of the SAPS to investigate the conduct of the WOs as telling. The court correctly noted that it took the persistence of Solidarity for SAPS to take any disciplinary measures against the two WOs.

Even when the disciplinary action was taken, the SAPS failed to deal with the complaint of racial harassment. The court found that the applicant had been racially harassed by the two WOs.

Vicarious liability

The court cited case law and the **Code of Good Practice on the Prevention and Elimination of Harassment** which confirm that an employer who fails to take adequate steps to eliminate harassment once an employee has alleged same may be held vicariously liable in terms of section 60.

The notion that the fact that the harassment consists of a single incident is not relevant was confirmed. The court noted that even though the SAPS acted swiftly after it became aware of the actionable harassment by the WOs and investigated same, its conduct after the investigation reports recommending disciplinary action came out was telling.

Despite the SAPS alleging that it took all the necessary steps as required by section 60, there was no evidence of this. Ultimately, the court found that the employer had failed to comply with the requirements to escape being held vicariously liable for the actionable discriminatory conduct of the WOs.

As a result, the court found the SAPS vicariously liable and made an order that it give compensation of R300 000 to the applicant.

Conclusion

This case provides a stern warning to employers to take grievances of harassment and unfair discrimination seriously and to act with alacrity to address the harassment. A failure to do so may make them vicariously liable, together with the perpetrator of the harassment. Harassment is a serious issue and it needs to be addressed and stopped from the roots, not when the weed has grown.

On the other hand, this case is a warning for employees to refrain from making false accusations of racism in the workplace. A false accusation of racism is just as abhorrent as the act of racism itself.

Unfair discrimination on "any other arbitrary ground"



Sandile July

Head of Employment

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