SEXUAL HARASSMENT IN THE WORKPLACE

This topic has been covered in our articles severally and extensively in the past, and generally under 'harassment in the workplace' in terms of the Code of Good Practice on the Prevention and elimination of Harassment in the Workplace. We had the sixteen days of activism against violence on women and children (from 25 November 2023 to 10 December 2023). Therefore, it is appropriate that we produce an article on sexual harassment in the workplace.

In line with the International Labour Organisation (ILO), sexual harassment refers to any behaviour of a sexual nature that affects or impairs the dignity of women and men. Sexual harassment is considered unwanted, unacceptable, inappropriate and offensive to the recipient. Furthermore, it creates an intimidating, hostile, unstable or offensive work environment. It is important to note that sexual harassment can be perpetrated by either of the genders on the other, however, women happen to be most adversely affected in most cases. To put the topic into proper perspective, the ILO further defines the workplace as the (1) locations where work is performed (e.g. office, factory…), (2) locations where work-related business is conducted such as conferences and training sessions, official business travel, work-related social activities, and work-related communication.

However, according to the ILO, the following instances do not constitute sexual harassment:

- Occasional compliments that are socially and culturally acceptable, and appropriate.
- Any interaction of a sexual nature which is consensual, welcomed or reciprocated (except for those prohibited by the law, such as sexual intercourse with children).

Sexual harassment can take any of the following forms (ILO): **Physical**: intentionally touching, caressing, pinching, hugging to sexual assault or rape. **Verbal**: socially and culturally inappropriate and unwelcome comments with sexual overtones, persistent proposals and unwelcome requests or persistent personal invitations to go out. **Non-verbal**: unwelcome gestures, suggestive body language, indecent exposure, repeated winks, unwelcome display of pornographic materials. **Quid Pro Quo**: when a job benefits such as a pay rise, a promotion, employment or continued employment – is made conditional on the victim acceding to demands to engage in some form of sexual behaviour. Generally, everyone should have a pretty good understanding/knowledge of what constitutes sexual harassment. Therefore, it is appropriate to only provide relevant case law (decided labour law cases) showing how the relevant tribunals such as Commission for Conciliation, Mediation and Arbitration (CCMA), Bargaining Councils (BC), Labour Courts (LC), Labour Appeal Courts (LAC), Supreme Court of Appeal (SCA), and the Constitutional Court (CC) have dealt with the problem of sexual harassment in the workplace.

For instance, in *Amathole District Municipality v Commission for Conciliation, Mediation and Arbitration and others (PA9/2018) [2022] ZALAC 119; (2023) 44 ILJ 109 (LAC); [2023] 2 BLLR 103 (LAC) (10 November 2023)*, an employee employed as an Administrative Assistant (the employee) filed a complaint of sexual harassment against an Operations Manager (OM). The Presiding Officer of the Grievance Hearing, after evaluating the available evidence, could not find any basis for the sexual harassment complaint. The employee, dissatisfied with the outcome, referred the dispute to the CCMA. The commissioners rejected the OM's attempt to swerve the entire arbitration to the employee's work performance for which she had received negative appraisal from him. In terms of the Arbitration Award issued, the OM was found guilty of committing sexual harassment and unfair discrimination on an employee. As a result, the Employer (Amathole District Municipality) was held vicariously liable to pay a total amount of

R150 000.00 for its failure to take appropriate steps to protect the employee against being sexually harassed.

The Employer, dissatisfied with the award, appealed it to the LC in terms of section 10(8) of the Employment Equity Act. The said appeal was filed six months late, with the condonation application (for late filing). The condonation application was dismissed by the LC on the basis that the explanation proffered for the delay was inexcusable and not convincing. Further, it was indicated that the totality of the evidence had not been considered during the (evidence) evaluation process. Additionally, allowing the award to stand would have to be measured against the prejudice which the Employer would suffer, taking into consideration the fact that the employee did not report or bring the issue to its attention (employer's attention) when it first occurred. The Employer escalated the matter to the LAC on appeal on the grounds, amongst others, that the Employer could not have dealt with a matter that had not been reported or brought to its attention. The said matter was reported to the Employer some four months after the alleged sexual harassment had ended, upon which the Employer immediately attended to the matter. The LAC was of the view that due to the nature of the case and the prospects of success on merits, the LC should have granted condonation for which the Employer had applied, hence the LAC handled the appeal.

The employee had the onus to prove that sexual harassment had taken place, however the LAC when analysing the evidence adduced in the trial found that not only was the employee's evidence internally contradictory but was externally contradictory as well. The veracity of her evidence, tested against the documentary evidence submitted by the accused, demonstrated that in her communication with the OM, she sent him friendly and almost flirtatious text messages using honey coated words, in seductive language and affectionate terms such as *"sweetie"*, *"ok my love"*, *"honey"*, when addressing him. The evidence presented also showed that they even got themselves involved in inappropriate conduct (which would not be mentioned in this article due to its vulgarity). The available evidence proved that the conduct complained of was all along being reciprocated by the employee which, in itself, indicated that the sexual conduct complained of was not unwelcome.

In fact, discrimination and harassment cases are grounded within the legal framework of section 6 of the Employment Equity Act (EEA), as well as the Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace. However, the LAC, in regard to this case, found that the Employer did in fact take steps immediately after the complaint was reported or brought to its attention. Notwithstanding negative findings of the grievance tribunal, the Employer did recommend that the employee be relocated to keep her away from the alleged perpetrator, and also offered the employee the opportunity to attend the stress problems management program. Therefore, there was no evidentiary basis to hold the Employer liable in terms of section 60 of the EEA to compensate the employee in the sum of R150 000.00. In essence, on the balance of probabilities, the employee appeared to have been a willing participant in the sexual harassment conduct of which she later complained.

This article will be continued in the next quarter, due to space limitations, with a view to providing analytical presentation of case law with different outcomes. It is imperative to know when the relevant tribunals, particularly, the appellate courts consider the conduct as constituting sexual harassment.

(An opinion from the Labour Desk
Q3 employee relations article for 2023/24 Financial Year)
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