GRIEVANCE MANAGEMENT COMMUNIQUE

VOLUME 10

SEXUAL HARASSMENT IN THE WORKPLACE

1. INTRODUCTION

In the face and growth of global movements such as "#MeToo", "The Silence Breakers";' "NotInMyName" and "#BalanceTonPorc" or "Out Your Pig", there is a greater need for sensitisation on the scourge of sexual harassment in the workplace.[1] The employment relation is primarily based on the common law contract of employment within the broad limits of legality and *boni mores*[2].

Whereas the common law contract of employment imposes on all employers a duty of fair dealing at all times with their employees – even those that the Labour Relations Act (LRA), 1995, does not cover,[3] it is expected of both employers and employees to act professionally towards each other, and ensure that they comply with their common law duty not to break trust and confidence in their employment relationship. They are also expected not to make the continued employment relationship intolerable for one another or for fellow employees. A safe and conducive work environment which is free of harassment or discrimination is required to enable optimum productivity, and to sustain a relationship based on trust and confidence. To this end a number of legislation and other measures have been put in place to safeguard a decent work environment, where people's dignity is respected.

[1] Rustenburg Platinum Mines v UASA obo Steve Petersen (Case No: JR641/2016)

[2] Good moral; *https://www.oxfordreference.com/view/10*."(1) Virtue; high standards of ethical behavior.(2) A term broadly denoting good public policy, proper moral sentiment,…"

[3] Murray v Minister of Defence (383/2006) [2008] ZASCA 44 (31 March 2008).

The Employment Equity Act, 1998, is one of the pieces of legislation put in place to protect the dignity of all employees in the workplace.

Section 6(1) provides that "*No one may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth*."

This volume of Communique deals with aspects of sexual harassment in the workplace, as well as case law relating to sexual harassment covering both the 1998 and 2005 Code of Good Practice in Handling Sexual Harassment Cases. An attempt is also made to provide guidance on how to approach sexual harassment matters and to clarify the role of labour relations officers (LROs) in dealing with sexual harassment cases. The article concludes with a brief overview on the consequences of not dealing with sexual harassment cases and the importance of developing a sexual harassment policy as a measure that departments must put in place in order to avoid liability of the acts of the employees.

2. LEGISLATIVE FRAMEWORK

Issues of dignity are embodied, *inter alia*, in the Constitution of the Republic of South Africa, 1996 (The Constitution). At S7 and S9 the Constitution states:
"*Rights*

S7 (1) this Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.

Equality
S9 (1) everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or category of persons, disadvantaged by unfair discrimination may be taken."

The employment legislative framework in the Republic of South Africa provides employer with an obligation to deal with sexual harassment and other forms of employment discrimination. In particular, the EEA provides at S54 that "*The Minister may, on the advice of the Commission-*

(a) issue any code of practice; and
(b) change or replace any code of good practice.

(1)Any code of good practice, or any change to, or replacement of the code of good practice must be published in the Gazette."

S60 of the EEA 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.

In pursuance of the provisions of the EEA, in 2013, the Department of Public Service and Administration (DPSA) developed the Policy and Procedure on the Management of Sexual Harassment in the Public Service ("Public Service Policy"). The policy statement at paragraph 1.1 states that the public service is obliged to provide a safe, healthy and amicable working environment and shall take steps to maintain this, either by adhering to legal obligations or in terms of what amounts to fair practice. Therefore it shall neither permit nor condone sexual harassment. The Public Service Policy also deals with aspects of sexual harassment and the responsibilities of different role players in departments. Departments may adopt the policy or develop their own policies to suit their specific contexts.

3. WHAT CONSTITUTES SEXUAL HARASSMENT?

In terms of S54(1), in 1998 the Minister of Labour ("the Minister') gazetted the Code of Good Practice on the Handling of Sexual Harassment (1998 Code). The 1998 Code was amended and subsequently repealed on 19 December 2018 by the 2005 Code that provides, among others, as follows:

- Sexual harassment in the working environment is a form of unfair discrimination and is prohibited on the grounds of sex and/or gender and/or sexual orientation (*Item 3*).

- Although the Code applies to the working environment, the perpetrators and victims of sexual harassment may include owners, employers, managers, supervisors, employees, job applicants, clients, suppliers, contractors, and other parties who have dealings with a business; but this does not confer the authority or obligation on employers to take disciplinary action in respect of non-employees (*Item 2*).

- Test for Sexual harassment (*Item 4*): Sexual harassment is an unwelcome conduct of a sexual nature that violates the rights of an employee and constitutes a barrier to equity in the workplace, taking into account the following factors:
  - ✓ 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 (*Item 5)*

Item 5.1 - *Harassment on a prohibited ground*: The grounds of discrimination to establish sexual harassment are sex, gender and sexual orientation. Same-sex harassment can amount to discrimination on the basis of sex, gender and sexual orientation.

- Item 5.2 - *Unwelcome conduct*: There are different ways in which an employee may indicate that the sexual conduct is unwelcome, including non-verbal conduct such as walking away or not responding to the perpetrator. Previous consensual participation in sexual conduct does not necessary mean that the conduct

continues to be welcome. Where a complainant has difficulty indicating to the perpetrator that the conduct is unwelcome, such complainant may seek the assistance and intervention of another person such as a co-worker, superior, counsellor, human resource official, family member or friend.

- Item 5.3 - *Nature and extent of the conduct*: The unwelcome conduct must be of sexual nature, and includes physical, verbal or non-verbal conduct. Physical conduct of a sexual nature includes all physical contact, ranging from touching to sexual assault and rape, as well as strip search by or in the presence of persons of opposite sex. Verbal conduct includes unwelcome innuendo, suggestions, hints, sexual advances, comments with sexual overtones, sex-related jokes or insults, graphic comments about a person's body made in their presence or to them, inappropriate enquiries about a person's sex life, whistling of a sexual nature and the sending by electronic means or otherwise of sexually explicit text. Non-verbal conduct includes unwelcome gestures, indecent exposure and the display or sending by electronic means or otherwise of sexually explicit pictures or objects.

It should be noted that the element of "persistent" sexual advances is specified in the 1998 Code, but it is not present in the 2005 Code. The 2005 Code is broader and requires a general consideration of the conduct and the impact of these advances on the employee or the victim of sexual harassment.

The 2005 Code also does not contain the provision of the 1998 Code which states that the victim must make it 'clear' that the behavior is considered offensive.

In Rustenburg Platinum Mines v UASA obo Steve Petersen (Case No: JR641/2016) the Court held that [33] "*As shall be more evident in the reasoning of the Commissioner, he had placed too much emphasis on the provisions of Item 2(a), (b) and (c) of the 1998 Code to the exclusion of the test set out in Item 4 of the 2005 Code. This was the first material error of law committed by the Commissioner. There is nothing in both Codes that states that all elements of sexual harassment must be established.*" The abstract succinctly provides that not all the factors at 4.1 to 4.4 of the 2005 Code must be present. The availability of a single factor is sufficient to render an act as a sexual harassment. The Court held further that "*if the Court allows that all factors be present as provided in the 1998 Code, such would require the complainant to prove the state of the harasser's mind which would put an element of subjectivity on the onerous of proof on the complainant. The amended 2005 Code does not require any one singular factor to take precedence over others. To do so would have the result of the test being pigeon-holed, which would have led to absurdity.*"

In Campbell Scientific Africa (Pty) Ltd v Adrian Simmers (Case No: CA 14/2014), it was held that sexual harassment concerns itself with the exercise of power and in the main reflects the power relations that exist both in society generally and specifically within a particular workplace. While economic power may underlie many instances of harassment, a sexually hostile working environment is often "…*less about the abuse of real economic power, and more about the perceived societal power of men over women. This type of power abuse often is exerted by a (typically male) co-worker and not necessarily a supervisor*." The exercise of power in the employment relationship is not the reason that a person may feel sexually harassed, it is its impact that, when subjectively considered, would make the employee to feel that his/her dignity is

undermined. The extract affirms that the impact of the conduct or advances on the victim is taken into account in determining whether the conduct is regarded as sexual harassment, and not whether the perpetrator ought to have known that the conduct is unwelcome. This therefore shows that even a single conduct could be considered sexual harassment.

In *Themba Prince Motsamai V Everite Building Products (Pty) Ltd (Case No: JA21/08),* it was held that sexual harassment is the most heinous misconduct that plagues a workplace; not only is it demeaning to the victim, it undermines the dignity, integrity and self-worth of the harassed employee. The harshness of the wrong is compounded when the victim suffers it at the hands of his/her supervisor. The latter part does not take away the seriousness of the act of sexual harassment by a co-worker who is not the supervisor. As stated in the *Simmers case* above, at its core, sexual harassment concerns itself with dignity of the victim and the impact of the sexual harassment act on the victim's dignity, and not whether the perpetrator knew or ought to have known that his/her actions constitute an act of sexual harassment.

4. REQUIREMENT OF CONFIDENTIALITY IN THE HANDLING OF SEXUAL HARASSMENT MATTERS

Sexual harassment matters are very sensitive in nature, and a little mistake of leaking information may aggravate the whole situation to the point where the victim has to deal with gossip and intimidation by colleagues and or the perpetrator. The same could be said against the perpetrator whom if the matter is not treated with confidence could lead to embarrassment and being judged by fellow colleagues without a fair hearing.

Item 9 of the 2005 Code stipulates that employers and employees must ensure that grievances about sexual harassment are investigated and handled in a manner that ensures that the identities of the persons involved are kept confidential. This requirement also applies in the disciplinary inquiry. The 2005 Code provides that only appropriate members of management as well as the aggrieved person, representatives, alleged perpetrator, witnesses and interpreter if required, should be present in the disciplinary inquiry. It further provides that the employer may disclose such information as may be reasonably necessary to enable the parties to prepare for any proceedings in terms of the 2005 Code.

5. DO LABOUR RELATIONS OFFICERS (LROs) HAVE A ROLE IN THE HANDLING OF SEXUAL HARASSMENT COMPLAINTS?

In terms of item 8.4.2 of the 2005 Code employers should designate a person outside of line management, whom complainants may approach for confidential advice and/or counselling. Such a person should have the appropriate skills and experience, including counselling and labour relations skills; and should be properly trained and given adequate resources. The Public Service Policy provides that the Head of Department (HOD) shall appoint a Sexual Harassment Advisor to deal with sexual harassment complaints in the department, and that this appointment may be done per case or for a fixed period. It further provides that the following criteria should be used in the appointment of a sexual harassment advisor:

- ✓ Knowledge and understanding of general policy development and its implementation; and knowledge of department policies;
- ✓ Psychological and emotional stability;
- ✓ Integrity;

- ✓ Compassion;
- ✓ Ability to maintain confidentiality;
- ✓ Objectivity;
- ✓ Good communication skills (verbal and writing);
- ✓ Good listening skills; and
- ✓ Investigative skills.

The responsibilities of the sexual harassment advisor are listed in item 13 of the Public Service Policy, and include advising the complainant of the choice of procedure to be followed (formal or informal procedure); and investigation of the complaint within the stipulated timeframe. ***From the 2005 Code and the Public Service Policy it is apparent that LROs are not necessarily responsible for the investigation of sexual harassment complaints, unless if they are appointed as sexual harassment advisors and trained as such***. In other words, LROs may also be appointed as sexual harassment advisors if in the view of the HOD, they meet the criteria set in item 11.2.2 of the Public Service Policy.

According to item 12 of the Public Service Policy, HODs may in addition to the sexual harassment advisor, also appoint a sexual harassment committee, which should be equitably reflective of the demography of the department. The sexual harassment committee is not mandatory but is ideal for large departments.

In terms of item 6(2) of the 2005 Code, all employers/managers and employees have a role to play in contributing towards the creation and maintenance of a working environment in which sexual harassment is unacceptable. They should ensure that their standards of conduct do not cause offence and they should discourage unacceptable behaviour on the part of others.

Employers and managers are also expected to ensure that persons such as customers, suppliers, job applicants and others who have dealings with the departments are not subjected to sexual harassment by the employer or its employees (Item 6(3) of the 2005 Code).

6. REPORTING OF SEXUAL HARASSMENT

The 2005 Code at item 8 provides that conduct in contravention of the EEA must immediately be reported to the employer. In item 8.1.2 the Code describes "immediately" as "*soon as is reasonably possible in the circumstances and without undue delay, taking into account the nature of sexual harassment including that it is a sensitive issue, that the complainant may fear reprisals arid the positions of the complainant and the alleged perpetrator in the workplace*."[4] Reporting of sexual harassment may be done in two forms, namely; formal and informal procedures. The two forms are discussed below.

6.1 Informal Procedure

The informal procedure involves the discussion or mediation of the matter between the complainant/victim and the respondent/perpetrator, where the victim will explain to the perpetrator that his/her conduct is unwelcome, that it offends or makes him/her uncomfortable and that it interferes with his/her work. If the complainant is not satisfied with the informal procedure, he/she may follow the formal route. The perpetrator may also be approached, without revealing the identity of the victim(s), to explain to him/her that certain forms of his/he conduct constitute sexual harassment.

Item 8.7.2 of the 2005 Code provides that in a case where the complainant opted not to follow

[4] The Amended Code of Good Practice on Handling of Sexual Harassment Cases in the Workplace, GOVERNMENT GAZETTE No.27865, 4 August 2005

a formal process, but the employer upon assessing the risk of the perpetrator's conduct finds that there is a significant risk of harm to other persons in the workplace, the employer may follow a formal process, irrespective of the complainant's wishes; and the complainant must be advised accordingly. Furthermore, the 2005 Code provides that the employer may take any step to assist in dealing with the complaint. This therefore means that the employer is not absolved from their responsibility whether the victim has opted for informal or formal process.

In *Themba Prince Motsamai v Everite Building Products (Pty) Ltd (Case No: JA21/08*) at paragraph 20 it was held that "*….. A disciplinary hearing must however be proceeded with, with the victim's cooperation, where the victim, having raised the complaint, is uncomfortable with proceeding with any process whether formal or informal the employer must find a way to deal with the issue lest he be found culpable for failing to deal with the matter."* The quotation affirms the employer's obligation to deal with sexual harassment matters as provided for in section 60 of the EEA, and that failure to do so may result in the employer being found liable for the employee's conduct.

6.2 Formal Procedure

Lodging a formal procedure is not subject to compliance with the informal procedure, a victim may follow either procedure as they deem it fit. A formal complaint of sexual harassment must be lodged in a grievance form, in line with the employer's policy.

The 2005 Code provides at item 8.7.3 what the policy should cover with regard to a formal complaint; and of utmost importance is the provision at item 8.7.3.5 that states that it would constitute a disciplinary offence to victimise or retaliate against a complainant who in good faith lodged a grievance of sexual harassment. This abstract aims at guarding against victimisation on whether the sexual **harassment complaint was valid or not.** It demonstrates that if the victim believes that the act constitutes sexual harassment and laid a complaint on that basis, and for not ulterior motives, and later the complaint is found not to constitute sexual harassment, the complainant must not be victimised because the complaint was lodged in good faith. The policy of the Department must provide for measures to deal with a complaint that is lodged in bad faith, such measure must not intimidate employees to refrain from lodging complaints of sexual harassment.

7. CONSEQUENCE FOR FAILURE TO DEAL WITH SEXUAL HARASSMENT

In terms of section 60(3) of the Employment Equity Act, 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 to have contravened that provision. In *P.E V Ikwezi Municipality (Case no: 828/2011) at paragraph 63* Nel J referred to the Canadian case of Boothman v Canada [1993] 3 FC 381 (TD) where it was stated that "*I can see no difference in law between the case where a servant who, entrusted with the supervision of personnel, abuses that authority in the manner described in these reasons, and that of a servant entrusted with the care of goods who converts those goods for his or her own use. In both cases, the wrong is directly attributable and connected to the duty of responsibility conferred on the servant. In my view, when an employer places an employee in a special position of trust, he or she bears the responsibility of ensuring that the employee is capable of trust. That is the rationale which stands behind the vicarious liability of an employer." T*he Judge went on to state that *Mr*

Stalingsky used the position of trust in which he was placed by his employer to cause harm to the plaintiff. In so doing, he was acting in the course of his employment and the defendant's liability was thereby engaged." This case affirms the implications of contravening the provisions of section 60(3) of the EEA, which state that the employer will be found liable for the action of the employee, unless it is proven that the employer dealt with the matter.

8. CRIMINAL / CIVIL PROCEDURES

The HOD as the accounting officer must ensure that the department's policy is communicated to all employees and make means that visitors are aware of the implications of sexual harassment. The Public Service Policy at item 21.1 provides that "*a complainant of sexual harassment has a right to press separate criminal charges and or/ civil claims against the respondent if they so wish. The legal rights of the complainant are in no way limited by this policy.*"

The departmental processes shall not hinder victims of sexual harassment from exercising any right in terms of legislation or the Constitution. The exercising of the same rights shall not absolve the employer from dealing with sexual harassment complaints.

9. SEXUAL HARASSMENT CASE HANDLED BY THE PSC

In this matter, the overseeing manager (i.e. supervisor of the supervisor) visited the female employee who was on leave and when he arrived at her home, they stood at the gate and he asked the female employee if there was a man visiting at the house. The employee responded that there is one, to which the overseeing manager indicated that the man does not clean the garden very well and that he could do a better job than the man said to be visiting the female employee.

On her return to work, the overseeing manager then asked the female employee if they could work together. He indicated that he has a soft spot for the female employee and that he would make it easy for her at work by approving the government vehicle, which she could travel with to save petrol on her private car. The lady refused all these advances. The overseeing manager then decided to isolate her from all the activities at work, and instructed a general worker/handyman to change the lockers of her office and instituted a transfer for her to another branch.

The PSC in its investigation looked at the incident holistically and not in isolation in order to determine if there was sexual harassment conduct and some form of victimisation by the overseeing manager. The PSC established that the "*cleaning of the garden*" was actually relating to the employee's body and not the garden *per se*. The "soft spot" matter showed persistent by the supervisor of the supervisor and strengthened by the *quid pro quo* form of sexual harassment by offering the employee a government vehicle.

The PSC found that there was *prima facie* case of sexual harassment and found the grievance to be **substantiated**.

10. CONCLUSION

The employer has a responsibility to ensure a safe workplace for its employees and other stakeholders doing business with the employer. On the other hand, all managers and employees have a responsibility to conduct themselves in a professional and ethical manner, and not to engage in conducts amounting to sexual harassment as defined in both the EEA and the Code. The cultivation of a free sexual harassment workplace would educate employees with the hope that lessons will be cascaded down to their families with a broader understanding of reducing the number

of sexual offences in the country, which has become a matter of national concern.

Departments and all other role players must ensure that the right to human dignity as enshrined in the Constitution is protected and employees should treat each other with respect. Contravening the provisions of section 60 of the EEA can have a serious effect on the employer, both financially and in terms of reputation. It is therefore imperative for HODs to familiarise themselves with the requirements for dealing with sexual harassment in order to prevent liability emanating from the acts of their employees. Sexual harassment is a human rights violation; it is socially, ethically and legally unacceptable. Therefore prevention is essential.

Let's talk labour relations

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