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HARRASSMENT IN THE WORKPLACE POSES GREAT RISKS FOR EMPLOYERS

Recently, allegations of sexual harrassment in the workplace once again made headlines. Such articles attract public attention because of the element of sensation involved, especially when they involve prominent persons. The recent allegations of sexual harrassment against the former Premier of the Western Cape serve as a good example.

Allegations of sexual harrassment often occur in the context of the employment relationship. In the next few instalments, we will discuss what sexual harrassment entails, specifically in the context of the employment relationship. This article serves as background on sexual harrassment in general and focuses on legal guidelines in this regard in particular.

A General Notice on sexual harrassment was published in terms of the Labour Relations Act in the form of a Code of Good Practice on the Handling of Sexual Harrassment Cases. In this Code, sexual harrassment is defined as unwanted conduct of a sexual nature. The unwanted nature of sexual harrassment distinguishes it from behaviour that is welcome and mutual. The definition further determines that sexual attention becomes sexual harrasment if:

- The behaviour is persisted in (although a single incident may constitute sexual harrassment);
- The recipient has made it clear that the behaviour is considered unwelcome, unacceptable or offensive; or
- The perpetrator should have known that the behaviour is regarded as unacceptable.

Examples of sexual harrassment are cited as:

- Physical conduct, including touching, sexual assault and rape;
- Verbal conduct, including innuendoes, suggestions and hints, sexual jokes, comments and/or advances, graphic comments about a person's body made in the person's presence or to them, enquiries about a person's sex life and even whistling at a person or group of persons;
- Non-verbal conduct, including gestures, indecent exposure and/or the display of sexually explicit pictures and objects.

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According to the Code, harrassment usually occurs in the following contexts:

- So-called “quid pro quo” harrassment where an employee is directly or indirectly compelled to succumb to sexual advances to obtain work-related benefits, or to prevent the loss thereof, usually where a position of authority exists between the parties. This includes sexual favouritism, where only the person who responds to the sexual advances of the person in authority receives rewards;
- Harrassment in the context of a hostile work environment, where a hostile and damaging work environment is created in which it is difficult for the employee to function normally. This can occur in several ways, for example by displaying pornographic material as well as continual conversations or jokes with a sexual undertone. In this case it is not necessary that the conduct be directed at a particular person and it is also not necessary that a position of authority or supervisory position should exist between the perpetrator on the one hand and the aggrieved on the other.

The Code continues to prescribe certain principles, policy directives and procedures to employers on how to address alleged sexual harrassment. Employers are expected to pro-actively institute a policy to combat sexual harrassment and to deal with cases of sexual harrassment. Should an employer fail to comply with these requirements, the possibility exists that he could be liable in common law as well as in terms of the Employment Equity Act for the unlawful actions by his employees, because the employer failed to meet his ohbligation of ensuring a safe work environment.

It may also happen that an employee resigns due to sexual harrassment, declares a dispute on the ground of so-called constructive dismissal (because the continuation of the employment relationship has become unbearable for the employee) and claims the maximum compensation of 24 months’ salary based on automatic dismissal due to unfair discrimination (namely sexual harrassment).

It is evident from the above that sexual harrassment may occur in many forms and that some forms are deemed more serious than other. For this reason, the Code also makes a distinction between the way in which allegations of harrassment are dealt with. The Code makes provision for resolving the problem by means of an informal conversation in which the perpetrator is notified that the conduct is unwanted in case of less serious offences. Where more serious offences are involved, however, a formal procedure in the form of a disciplinary inquiry should be followed. The steps taken by the employer would depend on the circumstances of the case. Dismissal is a suitable punishment in serious cases of sexual harrassment, but certainly not in all cases.

A strong confidentiality obligation rests on the employer to protect the identity of all those concerned in cases of grievances about alleged sexual harrassment.

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The fact that an employer takes steps against an employee on the grounds of sexual harrassment, does not deprive the aggrieved of the right to press civil and/or even criminal charges against the perpetrator in appropriate cases.

In the next article, we will discuss the definition of sexual harrassment, based on practical examples, what the employer policy of harassment should look like and which procedures the employer should have in place in order to reduce or eliminate the risks in this regard.

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