

GUIDELINES FOR EMPLOYERS TO REDUCE THE RISKS OF SEXUAL HARRASSMENT

In die previous instalment, we looked at what sexual harrasment involves, specifically in the context of the relationship between the employer and employee. This article offers guidelines on what an employer policy on sexual harrasment should look like in order to prevent its occurrence and how sexual harrasment should be dealt with when it does occur in order to reduce or eliminate risks in this regard.

It would be in an employer's best interest to obtain and study the General Notice on sexual harrasment published under the Labour Relations Act in the form of a Code of Good Practice on the Handling of Sexual Harrasment Cases.

In that Code, sexual harrasment is defined as unwanted conduct of a sexual nature. The unwanted nature of sexual harrasment distinguishes it from conduct that is welcomed and mutual. The definition continues and stipulates that sexual attention becomes sexual harrasment when:

- The behaviour is persisted in (although a single incident may constitute sexual harrasment);
- 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.

Harrasment does not include conduct or occasional compliments that are acceptable to the recipient. Various people may experience conduct that may possibly constitute harrasment in different ways. Conduct should therefore always be judged within the context of the above definition. Whether conduct constitutes harrasment depends on whether the recipient subjectively experiences it in that way. The potential for harrasment in a specific situation may also, among other things, depend on the following circumstances:

- the recurring nature thereof and the circumstances under which it occurs;
- whether a relationship of authority exists between the parties;
- how the alleged offender normally treats the aggrieved; and
- the impact of the conduct on the working conditions of the aggrieved.

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

- so-called "quid pro quo" harrasment where an employee is directly or indirectly forced to succumb to sexual advances to obtain work-related rewards, or to

- prevent the loss thereof, usually where a relationship of authority exists between the parties;
- where the employee is expected to accept the alleged behaviour or to participate in it as if it forms part of his/her duties in terms of the employment contract;
- harassment in the context of a hostile work environment, where a disadvantageous work environment is created in which it is difficult for the employee to function normally. Viewed thus, harassment can also occur between colleagues, without the existence of a relationship of authority between the parties.

The Code further prescribes certain principles, policy guidelines and procedures to employers on how to address cases of alleged sexual harassment.

Employers are expected to pro-actively institute a policy to combat sexual harassment and to deal with cases of sexual harassment. There are various reasons why an employer should have a written policy on harassment. Employers are not only expected to create and maintain a safe work environment, free from sexual harassment for employees, but should also issue a policy statement to ensure that a culture of mutual respect for the integrity, dignity and privacy of individuals is created. This enables an employer to effectively deal with harassment. Employees are reassured that grievances would be dealt with expeditiously and sensitively and it further grants protection to the employer against possible legal liability that may arise from the indecent actions of employees.

It is important to note that harassment of employees may also happen with applicants for employment, clients, contractors, service providers and any other person with whom the employer has contact in the course of business and that employers also have an obligation in this regard to protect their employees.

Any policy on harassment should also address the following aspects:

- a policy statement prohibiting harassment and setting out the employer's view on harassment in the workplace;
- an obligation on management to implement the policy and to take disciplinary steps against employees who transgress the policy;
- confirmation that employees have the right to lodge grievances about harassment and informing employees on how to lodge such grievances;
- clearly setting out the rules and responsibilities of all employees, supervisors and management;
- ensuring that all employees understand what harassment is;
- setting out that allegations on harassment will be dealt with sensitively and confidentially and be thoroughly and expeditiously investigated;
- ensuring and confirming that supervisors and managers are equipped to take appropriate steps if complaints about harassment are received, and
- confirming that complainants will be protected against victimisation, reprisal and false allegations.

Any policy on harrasment should make provision for effective procedures to deal with harrasment in a sensitive and effective manner. It could, among others, include the following:

- employees should preferably have access to someone outside the management corps with whom to lodge a grievance. Such a person could be specifically assigned and must have the skills and knowledge to provide advice and support in this regard;
- employees should be advised that there are two options of dealing with harrasment, namely an informal and formal approach, and that the employee has the choice of following either the one or the other;
- the informal approach entails that the aggrieved take up the matter with the alleged perpetrator directly, or even with the intervention of a facilitator – it could even be in writing or verbally. If the matter is resolved satisfactorily, it is left at that, otherwise the employee is free to request that the grievance is dealt with formally;
- the formal approach entails that a grievance is lodged according to the employer's grievance procedure with specific guidelines on reaction periods, to whom the grievance should be directed and how it should be dealt with. Normally the alleged incident(s) are then investigated according to disciplinary procedures and, where justified, disciplinary action is taken against the perpetrator, which action, depending on the severity of the conduct, could even involve dismissal.

The employer should impress the following on managers, supervisors and employees: managers and supervisors must be careful of brushing off grievances as insignificant or lame or to accept sexually oriented jokes, comments or pornographic photographs as part of the workplace culture. They should not take any action before an allegation has not been thoroughly investigated and should not transfer employees who lodge grievances in an effort to address the problem. Furthermore, they should not attempt to convince a complainant that the conduct was merely meant as a joke and should not judge the severity of the matter based on hearsay.

Employers who wish to address the reality of harrasment in the workplace in a proactive manner in the interest of all employees, as well as good corporate governance, should establish a policy in accordance with the above guidelines and should ensure that employees are informed and that supervisors and management are sensitive to and skilled at managing this matter. Numerous recently published claims related to harrasment in the workplace could have been avoided in this way.