

## THE RISKS OF SEXUAL HARASSMENT IN THE WORKPLACE

In terms of the *Employment Equity Act, 1998* ('EEA') harassment of an employee is regarded as a form of unfair discrimination and prohibited on the grounds listed in the Act (e.g. race, gender and sexual orientation). Sexual harassment remains one of the most common forms of discrimination in the workplace.

In terms of the *Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace* sexual harassment is defined as unwanted conduct (whether physical, verbal or non-verbal) of a sexual nature that violates the rights of an employee. The unwanted nature of sexual harassment distinguishes it from behaviour that is welcome and mutual.

So what does the law require an employer to do when an employee claims that s/he has been sexually harassed? The employer should inform the employee that s/he has a choice of either addressing the matter in an informal or formal manner.

The informal approach entails the complainant personally, or through an intermediary (without disclosing the complainant's identity should the complainant request this), confronting the alleged offender and explaining that the conduct in question is not welcome, that it offends the complainant, makes him/her uncomfortable or interferes with his/her work. The employer should confirm and discuss with the employee what assistance, if any, the employee requires from the employer in order to address the matter in an informal manner.

If the informal approach fails to provide the desired outcome, the complainant chooses to follow the formal route, or where the harassment is of such a nature and gravity that the informal approach would be inappropriate, the formal approach should be embarked upon. The formal approach entails that a formal grievance is lodged by the complainant, with the result that the company has to become formally involved in the matter, including investigating the matter. Should the investigation show that sexual harassment was likely to have occurred, the employer will have to take appropriate disciplinary action against the offender, which, depending on the nature and severity of the harassment, could result in the offender's dismissal if found guilty on a balance of probabilities.

Employers should ensure that the utmost confidentiality is maintained during any investigation into an allegation of sexual harassment. Any information concerning the matter should only be shared, as is reasonably required, with people involved in the investigation.

The consequences of sexual and other forms of harassment can be dire for employers.

If an employee can prove that s/he resigned because sexual harassment has made continued employment 'intolerable', s/he can pursue a claim for constructive dismissal under the *Labour Relations Act*. This will usually be the case where the employer didn't take appropriate action to deal with the problem. If successful, the employer could face a claim for compensation up to a maximum of 24 months' remuneration.

The employee could also have a separate claim under the *Employment Equity Act*. If it is proved that an employer failed to take reasonable steps to prevent, or deal with, sexual harassment after it came to the employer's attention, the employer will be deemed to have contravened the EEA. Should the employee be successful in his/her claim the labour court can award an amount of compensation to the employee it deems fit and appropriate under the circumstances.

Finally, where one employee sexually harasses another, or, for example, an employee harasses a member of the public or a customer, and this happens while the harasser goes about his/her employer's business, the employer may face an additional claim for damages on the basis of so-called 'vicarious' liability in terms of the common law.

It is important to note that an employee can in appropriate circumstances institute an unfair dismissal claim, an unfair discrimination claim, and a claim under the common law for the same harassment and receive compensation in respect of each claim if successful.

The harasser faces not only disciplinary action, including possible dismissal, but also a potential civil claim by the victim. In appropriate cases, criminal proceedings may also be pursued against the harasser. These actions however have no direct impact on the employer.

Finally, where an employer investigates a complaint of sexual harassment and establishes that the complainant made false accusations against the alleged offender, the employer may take disciplinary action against the complainant. This may include dismissal.

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