



## **Employers: be aware – discrimination in the workplace might end up costing you more than you would expect**

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What is an employer's duty when an employee complains about sexual harassment (or for that matter any other kind of discrimination) in the workplace?

Harassment on any of the grounds listed in s 6(1) of the *Employment Equity Act 55 of 1998* ('EEA'), including sexual harassment, is regarded as a form of discrimination in terms of the EEA. Section 60 of the same Act states that when an employee has contravened a provision of the EEA, such contravention must immediately be brought to the attention of the employer and the employer must then consult all relevant parties and take all necessary steps to eliminate the alleged unfair conduct. If the employer fails to act accordingly s 60(3) of the EEA then provides that '*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*'. This creates potential personal liability for the employer resulting from the conduct of one of its employees, which might include some serious financial ramifications. Apart from the above, it now further seems from the recent labour court decision in the matter of *Dial Tech CC v Hudson & another [2007] JOL 19639 (LC)* that the financial implications for an employer could be even more damaging than initially thought.

During June 2004 Ms. Hudson, an ex-employee of Dial Tech CC ('the employer'), referred two disputes to the CCMA, i.e. a discrimination dispute arising from alleged sexual harassment and a constructive dismissal dispute. Keep in mind that both disputes arose from the same set of facts. It was common cause that the MD of the employer downloaded pornographic material from the internet at the office and as his computer was linked to that of the employee, the material also popped up on the employee's screen. After the employee complaint about this, the pornographic pop up was removed, but was replaced by a pornographic screen saver. To aggravate the situation even more, the employee alleged that after she had lodged the complaint, the MD started to ignore her, refused to speak to her and ignored her work and related correspondence. As a result of this 'intolerable' work situation the employee resigned and instituted the aforementioned two claims against the employer.

The claims were based on an alleged failure by the employer to take reasonable steps to prevent pornographic material from appearing on the employee's computer screen and as such failing to take reasonable steps to safeguard her from sexual harassment in the workplace. The employer failed to attend any conciliation hearing and the discrimination dispute was thereafter referred to the LC, whereas the unfair dismissal dispute was referred for arbitration. The employer again failed to attend any of these processes, as a result of which the LC granted default judgment against the employer in the amount of R58 080.00. The CCMA also granted a default arbitration award against the employer in the amount of R58 080.00, being a maximum of 12 months' compensation. The employer at a very late stage decided to join the party and argued that the award granted by the LC was erroneously granted as compensation had already been awarded to the employee by the CCMA in the unfair dismissal dispute.

The LC should therefore not have awarded compensation to the employee for the discrimination claim as well, as it arose out of the same set of facts as the dismissal claim. The employer averred that the MD and the employee had viewed pornographic material together on a number of occasions, during which the employee never complained about it. However, when the employee did complain, the MD immediately took steps to remove the material from the computer screen. The MD admitted that he must have failed to remove it properly as the material thereafter appeared as a screen saver. This was not a deliberate omission, but merely an 'error' on his part. The employer placed reliance on the so-called '*once and for all*' common law principle, which in general provides that an employee has to claim all damages already sustained and still to be sustained, flowing from the same cause of action, in one action.

The court held that the '*once and for all*' principle did not apply in this case and as such an argument that the constructive dismissal and discrimination claims should have been instituted in one claim did not have any merit. With the introduction of the EEA, sexual harassment was now deemed to be a form of unfair discrimination which afforded employees relief, whether they resigned or not. Whilst the cause of action in both the constructive dismissal and sexual harassment cases arose from the same set of facts and circumstances, their remedies were located in completely different and separate statutes, in this case the LRA and the EEA. In the present matter the constructive dismissal dispute arose out of the failure by the employer to correct the intolerable environment that had been created by its MD. The dispute concerning unfair discrimination arose out of the failure by the employer to take reasonable steps to prevent sexual harassment in the workplace. There was no provision in the LRA and the EEA that required the court, in awarding compensation for sexual harassment, to take into account any compensation that might have been awarded by the CCMA for an unfair dismissal dispute.

The employer was therefore ultimately faced with two awards against it, both in the amount of R58 080.00 for the same transgression. So what should employers learn from this case?

Employers should realize that there is a fairly stringent duty on them to create a safe and discrimination free working environment (in terms of the EEA). Employers should thus be aware of the fact that where an incident of discrimination, whichever form it may take, is brought to their knowledge, they need to act quickly to remedy the situation. This includes prompt investigation of the complaint, instituting disciplinary action if the facts support this, and offering assistance to the victim.

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