Schreuder Attorneys

news

1st Floor, North Block, 20 Zulberg Close, Bruma

Tel: 011 622 8156/ 7

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Newsletter

1 SEXUAL HARASSMENT IN THE WORKPLACE

Sexual harassment undermines the dignity, integrity and self – worth of the employee harassed. It goes to the root of one's being and must be viewed from the point of view of a victim; firstly how she/he perceived it and whether the perception is reasonable.[1] Employers have a duty to ensure that the working environment is one where the dignity of employees is respected and should develop a code of conduct on harassment in consultation with the employees and employee representatives.

At Common law an employer has a duty to provide its employees with a safe and healthy working environment. Failure to

[1] Motsamai v Everite Building Products (pty) Ltd [2011] 2 BLLR 144 (LAC); [20]

provide a safe working environment, free of sexual harassment, could lead to termination of the employment contract by the employee and a claim for constructive dismissal[2]. The onus would then be on that employee to show that she/he was "forced" to resign due to the intolerable circumstances within which she/he found him/herself. The mere fact that the employer had failed to discipline the harasser and the fact that the employer had no policy in place would be insufficient, the employee must link this to the "intolerable" circumstances of his or her employment and show that she/he had attempted to exhaust his or her internal remedies prior to resigning. The dismissal would be automatically unfair in terms of the Labour Relations Act[3], due to the fact that the resignation would be as a result of discrimination on the basis of sex and/or gender.

The Constitution[4] prohibits discrimination against any person on the grounds of gender or sex. Although sexual harassment is not listed as a prohibited ground in the Constitution sections 9 and 23 allows for the right to equality, which includes the right not to be unfairly discriminated against and the right to fair labour practices.

Sexual harassment in the workplace falls under the auspices of the Employment Equity Act[5], which specifically cites sexual harassment as being prohibited.

Section 60 of the EEA deals with the employer's liability and there is a further duty and obligation on an employer to investigate complaints and allegations of unfair discrimination. Section 60 (1) of the EEA states that If it is alleged that an employee, while at work, contravened a provision of this Act, or engaged in 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."[6] The Labour Court in the case of *Ntsabo v Real Security CC*, found in this regard that immediately should be interpreted to mean: "as soon as is reasonably possible bearing in mind the context of sexual harassment"[7].

In the *Mokoena and A v Garden Court Art* case[8] the court held that an employer could not be held liable under this act if only one instance of sexual harassment had occurred. Liability could only be imputed to the employer only if the conduct of the harasser had been brought to the attention of the employer and if the harassment continued as a result of failure of the employer to take the necessary steps to prevent, eliminate, or prohibit sexism.

In *Grobler v Naspers*[9] the court found vicarious liability on the basis that the common law had to be developed as sanctioned by section 173 of the *Constitution* and the inherent power of the Supreme Court. The court ruled that vicarious liability existed because it was a constitutional duty to protect the right to dignity.

> The Code of Good Practise on sexual harassment cases in the workplace in terms of the Employment Equity Act envisages both formal and informal procedures to be followed when dealing with sexual harassment cases. It also encourages and promotes the

[2] Le Roux, Orleyn and Rycroft *Sexual Harassment* 14.
[3] Labour Relations Act 66 of 1995
[4] *Constitution of the Republic of South Africa,* 1996
[5] *Employment Equity Act* 66 of 1995
[6] *Employment Equity Act* 66 of 1995
[7] Ntsabo v Real Security (2003) 24 ILJ 2341 (LC) at 2384G-H
[8] *Mokoena v Garden Court Art (Pty) Ltd* 2008 29 ILJ 1196 (LC) 1196.
[9] *Grobler v Naspers BPK 2004 5 BLLR 455 (C) 527.*

development and implementation of policies and procedures that will lead to workplaces that are free of sexual harassment.

The Code addresses what conduct constitutes sexual harassment and distinguishes it from sexual attention by affording a proper definition in item 3:

1. Sexual harassment is unwanted conduct of a sexual nature. The unwanted nature of sexual harassment distinguishes it from behaviour that is welcome and mutual.

2. Sexual attention becomes sexual harassment if –

   2.1 the behaviour is persistent, although a single incident of harassment can constitute sexual harassment; and/or

   2.2 the recipient has made it clear that the behaviour is considered offensive; and/or

   2.3 the perpetrator should have known that the behaviour is regarded as unacceptable.

The different forms of sexual harassment are described in item 4 of the Code:

(4)(1) Sexual harassment may include unwelcome physical, verbal, or non-verbal conduct, but is not limited to the following examples:

(a) Physical conduct of a sexual nature includes all unwanted physical contact ranging from touching to sexual assault and rape, and includes a strip search by or in the presence of the opposite sex.

(b) Verbal forms of sexual harassment include unwelcome innuendoes, suggestions and hints, sexual advances, comments with sexual overtones, sex-related jokes or insults or unwelcome graphic comments about persons' bodies made in their presence or to them, unwelcome and inappropriate enquiries and unwelcome whistling at a person or group of persons.

(c) Non-verbal forms of sexual harassment include unwelcome gestures, indecent exposure, and unwelcome display of sexually explicit pictures and objects.

(d) harassment also occurs when an owner, employer, supervisor, member of management or co-employee undertakes or attempts to influence or influences the process of employment, promotion, training, discipline, dismissal, salary increments or other benefits of an employee or job applicant in exchange for sexual favours.

(2) Sexual favouritism exists where a person who is in a position of authority rewards only those who respond to his or her sexual advances, while other deserving employees who do not submit to sexual advances are denied promotions, merit or salary increases.

Workplace harassment presents a significant barrier to women accessing and progressing through the labour market and erodes decent working conditions." Employers are encouraged to draft policies to create certainty on which types of behaviour would not be tolerated.

2. CHILD MAINTENANCE IN SOUTH AFRICA

Parents have rights and responsibilities towards their children in accordance with the Children's Act 38 0f 2005. Included in those obligations, is the duty to contribute to the maintenance of the child in terms of section 18(2)(d) of the Act.

In terms of the Maintenance Act, 99 of 1998, a parent may make an application in the Maintenance court for the maintenance officer to institute an enquiry in the maintenance court within the area of jurisdiction in which the person resides with a view to enquiring into the provision of maintenance for the child to be maintained. The maintenance application is to enforce the common law duty of parents to support children who are unable to support themselves.

The maintenance officer will investigate the complaint by obtaining statements under oath or affirmation from persons who may be able to give relevant information concerning the subject of the complaint, gather the information necessary for the identification of the whereabouts of any person who is legally liable to maintain the person, the financial position of any person affected by such liability; and any other matter which may be relevant concerning the subject of such complaint. Both parties will have to give evidence of their income expenses and bring evidence in the form of bank statements, till slips, clothing accounts statements, school accounts, lease agreements, and any other documentation that will assist the court in determining a fair amount of contribution.

Maintenance contribution is specifically for the support a child reasonably requires for his or her proper living and upbringing, and includes the provision of food, clothing, accommodation, medical care and education. When making an order as to the amount of contribution reasonably required courts will take into consideration, that the duty to support is an obligation jointly incurred by both parents, it will apportion the obligation between the parents according to their respective means, and such duty exists irrespective of whether the child was born out of wedlock or is born of a first or subsequent marriage. Parties are often encouraged to enter into a settlement agreement regarding maintenance, which agreement will be made an order of court, saving themselves endless hours in court.

It often happens that a person subpoenaed to appear in court does not make an appearance then runs the risk of having a default order taken against them. The maintenance court will gather proof that the party has knowledge of the subpoena, and that the person willfully failed to appear before the maintenance court on the date and at the time specified in the subpoena. The maintenance court will consider the evidence adduced by the applicant and may order it deems appropriate in the circumstances.

In such circumstances, the person against whom a maintenance court has made an order by default, may apply for a variation or setting aside of the order. This application has to be made within 20 days after the day on the person became aware of the default order, or within such further period as the maintenance court may, on good cause shown, allow. The maintenance may confirm the order, or vary the order, if it that good cause exists for such variation, or set aside the order and convert proceedings into a maintenance enquiry.

The parties' circumstances may change from time to time, whether the child's needs increase, or one of the parties financial circumstances change dramatically. In such instance, they may make an application to court for the variation, or all together setting aside the maintenance order. The parties will once again have to show what the needs of the child are, their respective income and expenses, and adduce all evidence necessary to prove their application.

In the event that a party has a maintenance order made against them and fails to make payment in accordance with the order, one has a number of options they may exercise. They may make an application for either a warrant of execution to be taken against the defaulter's movable or immovable property, or an application for an attachment of any emoluments at present or in future owing or accruing to the defaulter, or an application for an order for the attachment of any debt at present or in future owing or accruing to the defaulter.

Upon a maintenance order being issued against a party, they have to make the payments in accordance with the order, failing which they shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding one year, or to such imprisonment without the option of a fine.

A parent is not limited to making an application for the monthly maintenance, but may make an application for the payment of arrear maintenance. The court will make an enquiry into the circumstances of the defaulter, and may authorize the issue of a warrant of execution against the movable and immovable property of the defaulter in order to satisfy the order. Parties should always bear in mind that notwithstanding anything to the contrary contained in any law, any pension, annuity or compassionate allowance or other similar benefit will be liable to be attached or subjected to execution under an order granted by the maintenance court.

Resignation takes place when an employee unilaterally either in writing or verbally terminates an employment contract.

It is not necessary for the employer to accept any resignation that is tendered by an employee or to agree with it. However a resignation must be communicated to the employer to be effective.

Nowadays employees can resign by way of SMS. In the matter of ***Jafta v Ezemvelo KZN Wildlife [2008] 10 BLLR 954 (LC)*** the court held that a communication by SMS is a communication in writing in terms of section 12 of the Electronic Communications and Transactions Act 25 of 2002.

Once the employer receives the SMS, the resignation is valid and cannot be withdrawn unless the employer consents to the withdrawal of the resignation.

In the recent case of ***Mafika v SA Broadcasting Corporation Ltd (2010) 19 LC 7.1.1 and [2010] 5 BLLR 542 (LC)*** the employee was employed on a three-year fixed contract. During his contract period he was suspended pending disciplinary action. The employee sent an SMS to the respondent's CEO stating that he had "quit with immediate effect". The employee had second thoughts and informed the CEO weeks later that he was prepared to defend himself at the disciplinary hearing and that his contract had not terminated. However the CEO was away at that time and had written a letter to the employee stating that the resignation had been accepted. The letter reached the employee one day after he had sent the e-mail. The court held that the authorities that a resignation is binding only if accepted by the employer were all obiter "and that none warranted departing from the long-established principle that a resignation is a unilateral act which does not require acceptance by the employer to become binding".

The test for determining resignation was set out in the matter of ***Quinn / Singlehurst Hydraulics (SA) Ltd [2005] 6 BALR 673 (CCMA)***. In his arbitration award, Commissioner P Shangase stated that "The test for determining whether an employee resigned or not is that an employee has to, either by word or conduct, show a clear and unambiguous intention not to go on with his contract of employment in that he has to act in such a way as to lead a reasonable person to the conclusion that he did not intend to fulfill his part of the contract."

- In the recent case of ***Lottering & others v Stellenbosch Municipality (2010) 19 LC 6.6.1 and [2010] 12 BLLR 1306 (LC).*** The Labour court summarised the common law

requirements for different types of resignation as follows:
- Notice of termination must be unequivocal.
- Once communicated, a notice of termination cannot be withdrawn unless agreed.
- Termination on notice is a unilateral act – it does not require acceptance by the employer.
- Subject to the waiver of the notice period and the possible summary termination of the contract by the employer during the period of notice, the contract does not terminate on the date the notice is given but when the notice period expires.
- If the employee having given notice, does not work the notice, the employer is not obliged to pay the employee on the principle of no work no pay.
- If notice is given late (or short), that notice is in breach of contract entitling the employer to either hold the employee to what is left of the contract or to cancel it summarily and sue for damages.
- If notice is given late (or short) and the employer elects to hold the employee to the contract, the contract terminates when the full period of notice expires. In other words if a month's notice is required on or before the first day of the month, notice given on the second day of the month will mean that the contract ends at the end of next month.

Our contact details: T 011 622 8156/7; F 011 622 8401; email: kim@schreuderattorneys.co.za; admin@schreuderattorneys.co.za; litigation@schreuderattorneys.co.za

Written by: R Mphela and V Miya of Schreuder Attorneys May 2013