#MeTooZA - Sexual harassment in the South African workplace

By Bradley Workman-Davies

3 Apr 2018

Recently, and on an ongoing basis, revelations of sexual harassment in Hollywood have made the headlines, and stories of sexual harassment or inappropriate behaviour amongst celebrities and entertainers are being revealed on an almost daily basis. These instances of sexual harassment have also not been limited to inappropriate conduct against female celebrities and entertainers, or restricted to harassment along cisgender lines. The popular #MeToo campaign went viral globally and, perhaps not unexpectedly, the hashtag was adopted and retweeted and circulated by a number of South Africans on social media platforms. In the face of this seemingly rampant pattern of abuse, what, if anything, can South African employees legally do to either deal with historical or current abuse in the workplace?

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A starting point for any employee facing this type of conduct in the workplace is to understand that South African labour law, which is recognised globally as providing a progressive and protected environment for employees, prohibits any form of sexual harassment in the workplace, and provides a number of protections for employees who may be the victims of such conduct. It is material to also note that these protections also apply to applicants for employment.

The Employment Equity Act, 55 of 1998, is the primary piece of legislation which provides a protective mechanism for employees. The Employment Equity Act provides in section 6 that no person may unfairly discriminate against another and that "harassment of an employee is a form of unfair discrimination and is prohibited on any one, or a combination of grounds of unfair discrimination". Such grounds are listed grounds such as gender, or on any other arbitrary ground.

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The Employment Equity Act also sets out further practical details on the handling of sexual harassment cases, primarily through the Code of Good Practice on the Handling of Sexual Harassment, issued under the Employment Equity Act. The Code also gives guidelines as to what type of conduct will be considered to be sexual harassment. These are:

- 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;
- 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 a person's body made in their presence or to them, unwelcome and inappropriate enquiries about a person's sex life, and unwelcome whistling at a person or group of persons;
- non-verbal forms of sexual harassment include unwelcome gestures, indecent exposure, and the unwelcome display of sexually explicit pictures and objects;
- quid pro quo harassment which takes place 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.

The well-established forums available to employees of resolving labour disputes are also available in the case of sexual harassment, in order to provide employees with an affordable, effective and easily accessible mechanism to deal with these issues. An employee may refer a dispute to the CCMA or the Labour Courts for sexual harassment. If the CCMA provides an arbitration award, it can order compensation of up to 12 months remuneration, and damages of up to R205,433.30. The Labour Court can similarly order this level of compensation, but has the discretion to award unlimited damages.

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The CCMA and Labour Courts have shown themselves to be unsympathetic to employers who allow sexual harassment of their employees, and have consistently found that in cases of sexual harassment leading to resignation by the victim, an unfair dismissal (constructive dismissal) has taken place. As such, employers should be aware that they have a positive obligation to ensure that their employers are not victims of this type of conduct.

Employers should adopt a sexual harassment policy which is in line with the Code of Good Practice on the Handling of Sexual Harassment, which should be effectively communicated to all employees. The policy must provide for clear procedures to deal with sexual harassment which enable the resolution of problems in an efficient, effective and sensitive way.

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Another critical issue for employers to consider is that instances of sexual harassment of their employees may lead to direct liability on their part. This could either be on the basis that the employer could be held vicariously liable for the conduct of its employees who committed the acts of sexual harassment against a colleague, or in light of the provisions of the Employment Equity Act which require that all employers must take steps to eliminate unfair discrimination in any employment policy or practice.

Complainants should never feel that their grievances are ignored or trivialised, or fear reprisals. Furthermore, grievances must be handled confidentially to protect the identities of the parties involved.

ABOUT THE AUTHOR

Bradley Workman-Davies is a director at Werksmans Attorneys.