# Hogan Lovells: Our thoughts on sexual harassment in any workplace

Hogan Lovells

# If it's unwanted it's harassment

"I think one of the great innovations of sexual harassment law was that it did not use the word 'consent'. It used the word 'welcome'."

Gloria Steinem
*Activist and author*

"The change I want to see is a start-up environment where everyone, regardless of gender and background, feels welcome and safe; where sexual harassment or discrimination will not impede great talent from producing great impact."

Christine Tsai
*Businesswoman*

"Sexual harassment in the workplace confuses rewards for performance with rewards for attractiveness and sexual availability."

Warren Farrell
*Activist and author*

"In all societies, both women and men are powerfully conditioned to repress the daily realities of (sexual harassment and workplace glass ceilings) and to collude with the rest of society in keeping these dimensions of shared experiences hidden."

William Keepin
*Author*

"Sexual harassment is as difficult to prove as it is to disprove."

Kellyanne Conway
Businesswoman

"Even though we have laws against it and HR departments to handle it, a woman – especially if she is young and just starting out – can never be sure that reporting harassment won't hurt her career.

Gretchen Carlson
*Journalist*

# Introduction

Sexual harassment has recently been making headlines with revelations from the USA, Europe and parts of Asia. This is a scourge in the modern workplace and deserves attention in being routed out.

In this booklet we have compiled our writings on this difficult topic, drawing from our experience in practice over the years.

Before proceeding on any course of action, please take advice from one of the employment attorneys at Hogan Lovells.

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# What is sexual harassment?

Is your supervisor, peer or subordinate making unwelcome advances towards you? Have these advances made the workplace a hostile environment? Has the conduct interfered with work effectiveness and productivity? Then you could be experiencing sexual harassment. The law and our courts provide protection for employees who are being sexually harassed.

Sexual harassment is defined as “unwanted sexual behaviour or comment, which has a negative effect on the recipient”. A single act could constitute sexual harassment.

The focus of this article is on sexual harassment in its narrowest form, which occurs when a man or woman is expected to engage in sexual activity in order to get or keep his or her employment, or to be promoted or to have favourable working conditions. This can be done in the form of indirect comments or proposals, or even suggestions to meet after work with implications of engaging in sexual intercourse.

The effects of sexual harassment on a victim’s job and career can be intense, often resulting in some employees leaving their jobs or requesting a transfer. Enduring the harassment can eventually have a psychological impact that can be destructive.

Section 6(3) of the Employment Equity Act provides that “harassment of an employee is a form of unfair discrimination and is prohibited on any one”. Section 60 places a duty on employers to protect employees against harassment. If an employer has knowledge of this type of unacceptable conduct, he has the right and is under an obligation to take steps against the perpetrator because of the duty to ensure a safe work environment.

Sexual harassment amounts to misconduct and the perpetrator can be dismissed from work. Such conduct diminishes and even destroys the trust requisite in the employment relationship. Our courts have held that unless the harassed employee agrees to any other way of resolving the issue, the employer is obliged to hold a disciplinary hearing against the perpetrator.

It is important to know that sexual harassment can take place even if the harassed employee is not offended by the conduct. Our courts have held that the conduct in this instance, although not offensive, has to be unwelcome. In one case, our courts found that even though the complainant had said that she had enjoyed a good working relationship with the perpetrator and referred to him as a ”modern gentlemen”, his conduct still amounted to sexual harassment.

In the same breath, our courts have held that sexual harassment goes to the root of one’s being and must therefore be viewed from the point of view of the victim, how she or he perceives it, and whether or not this is reasonable.

Conduct amounting to sexual harassment somehow also relates to bullying. For instance, where a superior, peer or subordinate makes comments or proposals suggesting engagement in sexual activities in order to gain an advantage or benefit of some sort, and the employee refuses, resulting in him or her being subjected to hostile treatment, that can constitute sexual harassment in that the employee’s work efficiency, productivity and environment will obviously be affected by such treatment.

Bullying is defined as “the use of force, threat, or coercion to abuse, intimidate, or aggressively impose domination over others”. A sexual element has to exist for the conduct to constitute sexual harassment.

When a person is being sexually harassed, he or she has a duty to report it, and the employer has a duty to protect the employee against it. Sexual harassment does not only happen between a male and a female. Men can also sexually harass other men.

**By Lavery Modise and Phetheni Nkuna, 2014**

# Sexual harassment – the silent scourge

Sexual harassment is not only a legal issue. It is also a practical problem. And it is fraught with social connotations that have subjugated women in the workplace for decades.

Until recently social forces, fear and archaic legal notions conspired to conceal this malignancy. In most instances, women are victims and men are perpetrators of sexual harassment in the workplace. This does not mean, however, that men are not victims of sexual harassment, the more so now that same-sex relationships are becoming increasingly acceptable. And it is worth noting that men are still ashamed to come forward to report sexual harassment against them, be it perpetrated by a man or a woman.

In March 2005, the Cape High Court ordered Media 24 and Gasant Samuels jointly and severally to pay almost ZAR777 000 to Mrs Sonja Grobler, a secretary formerly employed by Nasionale Tydskrifte. The Appeal Court has since upheld Judge Nel's finding that Samuels had sexually harassed Mrs Grobler over a period of six months at the premises of Nasionale Tydskrifte and, on one occasion, near her apartment in Brackenfell.

It was as a result of this harassment that Grobler suffered chronic emotional problems that prevented her from working. The judge also found that Media 24 Limited, which had employed Samuels was vicariously liable for his conduct in sexually harassing Grobler.

The Appeal Court left open the question as to whether Media 24 was liable for the harassment because it found that Nasionale Tydskrifte, for whose obligations it had assured liability, had negligently breached the legal duty it owed Grobler to take reasonable steps to prevent her from being sexually harassed in her working environment.

This judgment comes out at a time when approval is awaited of the Code of Good Practice on Handling of Sexual Harassment Cases (2005 Code).

The 2005 Code has been drafted by a committee under the auspices of NEDLAC. It is understood that the NEDLAC drafting committee has signed off its final draft which has been referred to the Employment Equity Commission for ratification. The date of implementation of the 2005 Code is not certain but we are assured it is imminent.

The 2005 Code and the judgments in the Grobler case will, I believe, add impetus to moves intended to ensure that sexual harassment cases are afforded the same seriousness as other disputes and grievances in the workplace.

What is sexual harassment? It is very difficult to define. In our book* we have analysed sexual harassment based on international experience and the legislative and case law development in our country. The 1998 Code defines sexual harassment as "unwanted conduct of a sexual nature." On the other hand, the 2005 Code defines sexual harassment as "unwelcome conduct of a sexual nature that violates the rights of an employee and constitutes a barrier to equity in the workplace, taking into account all of the following factors:

- whether the harassment is on the prohibited grounds of sex and/or gender and/or sexual orientation;
- whether the sexual conduct was unwelcome;
- the nature and extent of the sexual conduct; and
- the impact of the sexual conduct on the employee."

Based on this definition and the jurisprudence that has emerged, there is clear guidance on how employers must address cases of sexual harassment. Systems and policies must be put in place to deal extensively with the prevention and management of sexual harassment and employers must give clear guidelines and direction to managers.

In preventing and managing sexual harassment in the workplace, the employer must adopt functional workplace policies. Not only does a policy create awareness, it also alleviates employer liability in terms of the Employment Equity Act. Section 60 of that Act renders an employer liable for sexual harassment perpetrated by one employee against another, if the employer fails to take steps to eliminate sexual harassment that has been duly reported.

Alternatively, the employer can escape liability if it can show that it did all that was reasonably practicable to ensure that the employee would not perpetrate sexual harassment. This view is repeated in the 2005 Code which says that the "adoption of a sexual harassment policy and the communication of the contents of the policy to employees, should, amongst other factors, be

taken into consideration in determining whether the employer has discharged its obligations in accordance with the provisions of section 60(2) of the Employment Equity Act."

The Code requires the creation and maintenance of a working environment in which the dignity of employees is respected. The common law has always been the custodian of dignity. The Constitution has now elevated human dignity to a fundamental right.

The 2005 Code urges employers to sustain a working climate in which complaints of sexual harassment are not ignored or trivialised and where complainants do not fear reprisals. The significance of dignity has always been underscored by the Labour Court and labour tribunals and has often been a critical factor in determining the fairness of a dismissal. This has now been reinforced by the Supreme Court of Appeals.

The most transparent way of ensuring this is for employers to adopt a statement of intent, to adopt policies and procedures relating to the treatment of sexual harassment cases and to put in place continuous training and sensitisation programmes.

In addition to the possible advantage of escaping liability, the benefits of such programmes are that there is no better way to create a culture which makes sexual harassment disfavoured; to encourage employees to utilise the reporting procedure and, therefore, actually give management the opportunity to promptly stop and correct the behaviour, and to prove the harasser, and later disciplined employee, was given prior notice of the probable consequences of engaging in the prohibited conduct.

Before adopting a sexual harassment policy, employers should engage in a consensus-seeking process with employees either directly or through their trade union representation.

The 2005 Code requires that the policy includes a statement that sexual harassment constitutes a form of unfair discrimination on the basis of sex and/or gender and/or sexual orientation and that it constitutes a barrier to equity; that sexual harassment will not be permitted or condoned; that the complainants of sexual harassment have a right to follow procedures in the policy; that the employer must take appropriate action

The 1998 Code defines sexual harassment as "unwanted conduct of a sexual nature."

and finally, that the victimisation of a complainant will be a disciplinary offence.

After adoption, the policy has to be communicated effectively and should be included in orientation, education and training programmes.

These guidelines may sound laborious but dealing with such a widespread and silent scourge needs desperate measures. The culture change in our society also requires that these measures be adopted. Some small consolation is that this is not only a South African phenomenon – studies show it is a world-wide challenge.

**By Thandi Orleyn (past partner), 2006**

**Sexual Harassment in the Workplace: Law, Policies and Processes* is co-authored by Alan Rycroft, Thandi Orleyn and Rochelle le Roux

# An employer's duty

Sexual harassment is defined as unwanted conduct of a sexual nature. Our labour legislation places a duty on employers to ensure that complaints of sexual harassment are properly dealt with. Failure to do so may lead to the employer being held vicariously liable for the acts of sexual harassment committed towards its employee/s.

The Employment Equity Act (EEA) read together with the Amended Code of Good Practice on the Handling of Sexual Harassment (the Code) sets out the employers' obligations when faced with a sexual harassment complaint.

The Code also sets out the guidelines that an employer should follow in order to prevent sexual harassment in the workplace and the steps to follow when presented with a sexual harassment complaint. In addition, the Code stipulates that employers should have a sexual harassment policy in place.

The employers' obligations when a complaint of sexual harassment is brought to its attention are threefold. It is to consult with all relevant parties, address the complaint in terms of the Code and the employers' sexual harassment policy, and take steps to eliminate sexual harassment. Employers have a duty to not only deal with complaints of sexual harassment committed by its employee towards another employee, but also by an outsider committing an act of sexual harassment towards one of its employees at its workplace.

The EEA provides that should an employer fail to fulfil its obligations and it is proved that its employee/s committed sexual harassment, then the employer is deemed to have committed sexual harassment. In addition to this the constitutional right to fair labour practices also requires an employer to adequately deal with complaints of sexual harassment that are not committed by its employee/s but by an outsider. Failure to do so may open the employer up to a possible monetary claim for damages.

A case in point is *Piliso vs Old Mutual Life Assurance*. In this case an Old Mutual employee found a photograph of herself with a crude note written on it at her workstation. The following day a similar note was affixed to her workstation. She reported the incident to management. The employee felt that Old Mutual did not adequately deal with her complaint and referred the matter to the Labour Court. The Labour Court agreed with the employee and found that there was a duty on the employer to adequately and speedily investigate her complaint, and to provide assistance to the affected employee in the form of adequate counselling, something which Old Mutual failed to do. It awarded damages of ZAR45 000 against Old Mutual.

Our courts have awarded significant amounts of money to victims of sexual harassment, where it has been shown that the employer failed to fulfil its obligation in terms of the EEA and the Code. An employer would be well advised to ensure that it complies with the obligations imposed by the law in order to ensure it doesn't find itself paying for the perpetrator/s behaviour.

**By Jean Ewang and a past partner, 2009**

# Sexual harassment by a non-employee

Section 3 of the Code of Good Practice on the Handling of Sexual Harassment Cases defines sexual harassment as the "unwanted conduct of a sexual nature".

The Employment Equity Act 55 of 1998 places a high responsibility on an employer when one of his employees is sexually harassed by another employee. However, there is no obligation placed on the employer where the harasser is not an employee.

Where an employee (the victim) is sexually harassed by a non-employee, the victim will have a claim against the harasser in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 and against the harasser's employer in terms of the law of delict. Such a situation may arise where the harasser is a client of the employer.

In order for the victim to establish a successful claim against the harasser, he/she will have to prove that:

- The conduct of the harasser falls within the definition of harassment. This is, in terms of section 1(1); and
- That a case of harassment is proved on the face value of the facts. This is in terms of section 13.

Section 21(2) of the Act gives the Equality Courts the jurisdiction to order a variety of remedies including payment of damages; issuing a restraining order; or ordering the harasser to apologise to the victim.

In terms of the law of delict, an employer may be vicariously liable for the sexual harassment caused by an employee against a non-employee. Vicarious liability makes the employer liable for the wrongs committed by his employee. For the victim to have a successful claim against the harasser's employer he/she must prove that:

- All the elements of a delict are present, ie a wrongful act, fault, causation and damages;
- The sexual act must be committed within the harasser's scope of employment; and
- The harasser must be an employee of the employer.

In terms of the scope of employment, the employee must act within the duties laid down in his employment contract. Where an employee acts outside the scope of his employment contract, the employer will not be liable for such an act. However, in the case of *Grobler v Naspers* 2004(4) SA 220(C) the court held that the employer is liable for the wrongs of his employees, where the risk that they may perform a wrong is foreseeable. Sexual harassment in the workplace would be a foreseeable risk, and thus, the employer would be vicariously liable for such an act.

Essentially, the route a victim of sexual harassment would take would depend on the relief sought. In order to be successful in a vicarious liability claim, the victim, in proving the elements of a delict, would need to prove some type of loss, either monetary or emotional. However, the second route, in terms of the Promotion of Equality and Prevention of Unfair Discrimination, requires the victim to establish a case of harassment on face value. Where the victim merely requires an apology, the second route would be the easier option.

**By Lavery Modise, 2010**

# An overview

Sexual harassment is often described as persistent, unsolicited and unwanted sexual advances or suggestions by one person to another. Within the employment context our courts have held that sexual harassment, even between members of the same sex, was a serious matter that required employers to take action.

The amended Code of Good Practice on the Handling of Sexual Harassment Cases in the workplace, promulgated in terms of the Employment Equity Act, has objectives such as:

- The elimination of sexual harassment in the workplace.
- The provision of appropriate procedures to deal with sexual harassment and prevent its recurrence.
- The encouragement and promotion of the development and implementation of policies and procedures that will lead to the creation of workplaces that are free of sexual harassment, where employers and employees respect one another's integrity and dignity, their privacy and their right to equity in the workplace.

The Code applies to owners, employers, managers, supervisors, employees, job applicants, clients, suppliers, contractors and others having dealings with the business.

Sexual harassment in the working environment is a form of unfair discrimination and is prohibited on the grounds of sex and/or gender and/or sexual orientation.

The grounds of discrimination to establish sexual harassment are sex, gender and sexual orientation. Same sex harassment can amount to discrimination on the basis of sex, gender and sexual orientation.

## Unwelcome conduct

There are varied ways in which an employee may indicate that sexual conduct is unwelcome, including non-verbal conduct such as walking away or not responding to the perpetrator. Previous consensual participation in sexual conduct does not necessarily mean that the conduct continues to be welcome. Where a complainant has difficulty indicating to the perpetrator that the conduct is unwelcome, such complainant may seek assistance and intervention of another person such

as a co-worker, superior, councillor, human resource official, family member or friend.

## Nature and extent of the conduct

The unwelcome conduct must be of a sexual nature, and includes physical, verbal or non-verbal conduct.

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

Verbal conduct includes unwelcome innuendos, suggestions, hints, sexual advances, comments with sexual overtones, sex related jokes or insults, graphic comments about a person's body made in their presence or to them, inappropriate enquiries about a person's sex life, whistling of a sexual nature and sending by electronic means or otherwise of sexually explicit text. Non-verbal conduct includes unwelcome gestures, indecent exposure and the display or sending by electronic means or otherwise of sexually explicit pictures or objects.

Sexual harassment may include but is not limited to, victimisation, quid pro quo harassment and sexual favouritism. Victimisation occurs where an employee is victimised for refusing to give in to the lecherous advances of the harasser.

*Quid pro quo* harassment on the other hand, occurs where a person who occupies a position of power in relation to the complainant threatens to withhold a tangible benefit like a promotion if the complainant does not give in to his or her advances. It is not necessary that instances of sexual harassment occur over a sustained period of time. Even a single incident is enough to fall within the purview of sexual harassment.

Employers are required to create and maintain a working environment in which the dignity of employees is respected. A climate in the workplace should also be created and maintained in which complainants of sexual harassment will not feel that their grievances are ignored or trivialised. Employers are required to, subject to any existing collective agreements and applicable statutory provisions in respect of sexual harassment, to adopt a sexual harassment policy which should take into consideration and be guarded by the provisions of the Code.

The contents of sexual harassment policy should be communicated effectively to all employees. The adoption of a sexual harassment policy and the communication of the contents of the policy to employees should, among other factors, be taken into consideration in determining whether the employer has discharged his obligations in accordance with the provisions of section 60 subsection 2 of the Employment Equity Act.

Sexual harassment policies should substantially comply with the provisions of the Code and include at least the following statements:

- Sexual harassment is a form of unfair discrimination on the basis of sex and/or gender and/or sexual orientation which infringes the rights of the complainant and constitutes an area to equity in the workplace. Sexual harassment in the workplace will not be permitted or condoned. Complainants in sexual harassment matters have the right to follow the procedures in the policy and appropriate action must be taken by the employer.
- It is a disciplinary offence to victimise or retaliate against an employee who in good faith lodges a grievance of sexual harassment. The procedures to be followed by a complainant of sexual harassment and by an employer, once sexual harassment has occurred, should be outlined in the policy.

A complainant of sexual harassment may choose to follow either of the following informal procedures:

- The complainant or another appropriate person explains to the perpetrator that the conduct in question is not welcome, that it offends the complainant, makes him/her feel uncomfortable and that it interferes with his/her work or an appropriate person may approach the perpetrator, without revealing the identity of the complainant and explain to the perpetrator that certain forms of conduct constitutes sexual harassment, are offensive and unwelcome, and make the employees feel uncomfortable and interfere with their work.
- An employer should consider any further steps, which can be taken to assist in dealing with the complaint.

– A complainant may choose to follow a formal procedure, either with or without first following an informal procedure. In the event that a complainant chooses not to follow a formal procedure, the employer should still assess the risk to other persons in the workplace where formal steps have not been taken against the perpetrator. In assessing such risk the employer must take into account all relevant factors, including the severity of the sexual harassment and whether the perpetrator has a history of sexual harassment. If it appears to the employer after a proper investigation that there is a significant risk of harm to other persons in the workplace, the employer may follow a formal procedure, irrespective of the wishes of the complainant, and advise the complainant accordingly.

The employer's sexual harassment policy and/or collective agreement should outline the following in respect of a formal procedure:

– With whom the employee should lodge a grievance.
– The internal grievance procedures to be followed, including provision for the complainant's desired outcome of the procedures.
– Time frames which allow the grievance to be dealt with expeditiously.
– That should the matter not be satisfactorily resolved by the internal procedures outlined above, a complainant of sexual harassment may refer the dispute to the Commission for Conciliation, Mediation and Abitration (CCMA). An alleged perpetrator of sexual harassment may refer a dispute arising from disciplinary action taken by the employer to the CCMA.
– That it will be a disciplinary offence to victimise or retaliate against the complainant who in good faith lodges a grievance of sexual harassment.

The employer's sexual harassment policy should specify the range of disciplinary sanctions that may be imposed on a perpetrator. The sanction must be proportionate to the seriousness of the sexual harassment in question, and should provide that:

– Warnings may be issued from minor instances of sexual harassment.
– Dismissal may follow for continued minor instances of sexual harassment after warnings, as well as for serious instances of sexual harassment.
– Inappropriate circumstances upon being found guilty of sexual harassment, a perpetrator may be transferred to another position in the workplace.

*Excerpts of the Amended Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace courtesy of LexisNexis Butterworths publications*

**Compiled by a past partner, 2014**

# How many times does the sexually harassed employee have to say no?

Early in 2014 the Labour Court in SA Metal Group (Pty) Ltd handed down an important judgment dealing with sexual harassment in the workplace. The dismissed employee was employed as a divisional director. He was charged with sexual harassment of a subordinate female employee in the company's human resource department. He was dismissed at the internal enquiry. The dismissal was found to be substantively unfair by the CCMA.

On review it was argued that it was unreasonable of the arbitrator to find that there was no sexual connotation in the messages sent by the employee to the complainant The commissioner found that the evidence presented did not contain any explicit sexual connotation and that the complainant's views to the contrary were "purely subjective". In other words, the commissioner found that the complainant was being oversensitive.

Here is a glimpse of some of the emails from the employee to the complainant:

- "Can't wait for summer to see you strut your stuff."
- "Listen, we had better stop 'shoe flirting' before we get into trouble with my other girlfriends."
- "We are going to get into trouble for flirting hey."
- "It's okay you can come to my house tonight if you get Scott out."
- "Are you offering to complain with me?"

At arbitration, it was also led in evidence that the employee informed the complainant that he had a dream about her and that the dream had been "hectic".

The commissioner held that the complainant was to have made it explicit to the employee that the banter and hugging constituted sexual harassment (in her view). A higher bar was imposed upon her as she was an HR practitioner.

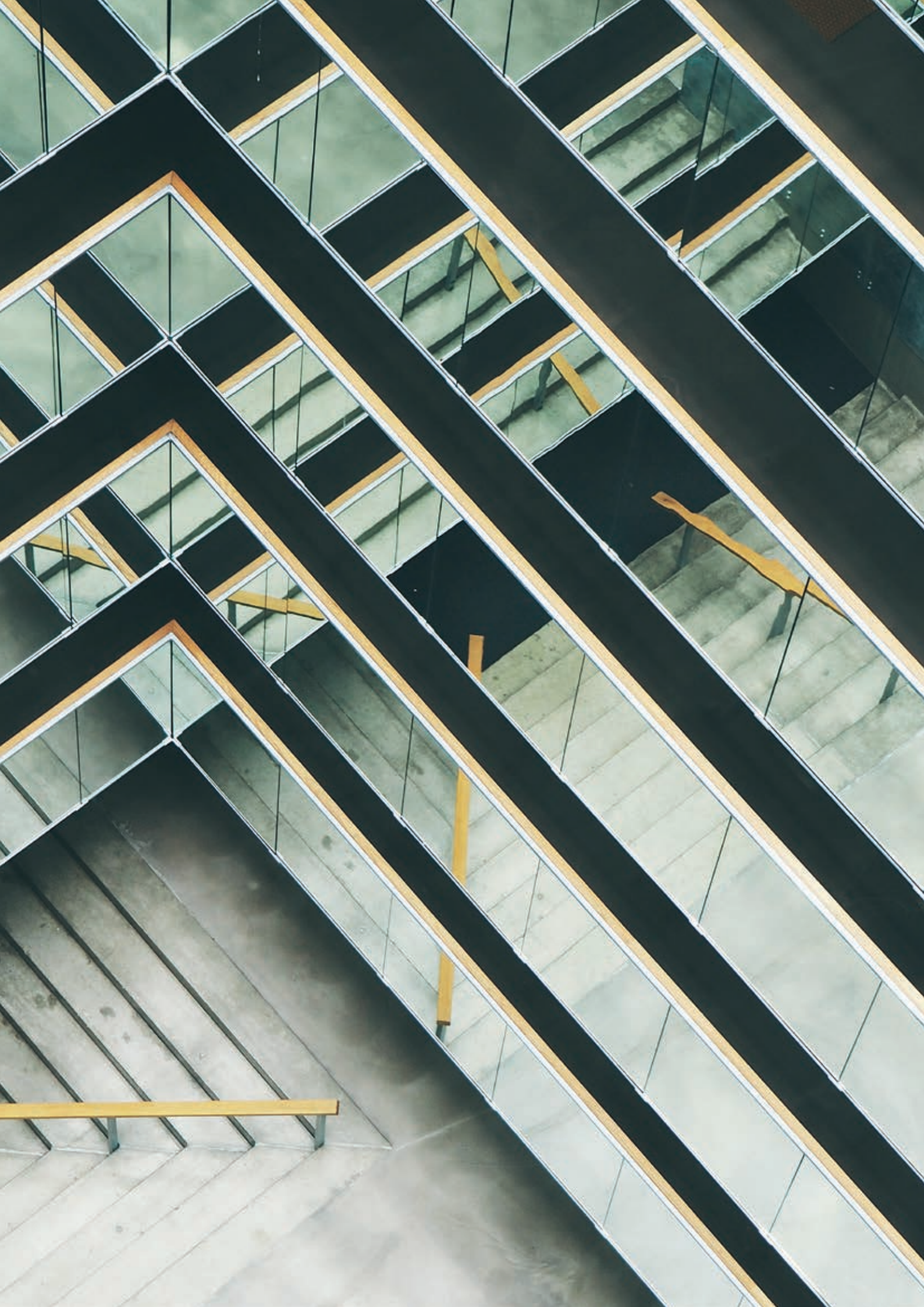
The court on review:

- Paid attention to the power imbalances between the complainant and the employee.
- Emphasised the complainant's evidence that she failed to report the harassment earlier as she was trying to preserve her position (as a newcomer to the applicant's employ).
- Took into account that the employee had an obligation placed on him in his senior managerial position to refrain from any conduct that would contribute to a hostile work environment. This obligation became stronger in circumstances where the complainant signalled her discomfort and advised him that contact was unwelcome.
- Dismissed the notion that if a person works in HR he/she would be expected to take more needed action in reporting sexual harassment.

Furthermore, the submission on behalf of the employee that until such time as he was made aware that the conduct was unwelcome there could be no sexual harassment was wrong, given the definition of "sexual harassment" in the 2005 Code of Good Practice. In terms of the Code a single incident of harassment can constitute sexual harassment and it is not necessary that the recipient make it clear that the behaviour is considered offensive. The failure by the commissioner to take proper account of the 2005 Code was unreasonable and the award was set aside and replaced with an order that the dismissal of the employees was substantively fair.

This is a welcome decision in seeking to stem the tide against the scourge of sexual harassment suffered in the workplace.

**By Imraan Mahomed, 2014**



# The Labour Appeal Court has the final say on how harassment will be frustrated

In June 2014, I wrote an article called *Sexual harassment – how many times does the sexually harassed employee have to say no?* The article dealt with the 2014 Labour Court decision in *SA Metal Group (Pty) Ltd* which I believed at the time was an important judgment dealing with sexual harassment in the workplace. In *SA Metal* the CCMA dismissed a claim of sexual harassment. This was overturned on review where the Labour Court found that the failure of the commissioner to take proper account of the 2005 Code of Good Practice was unreasonable.

Co-incidentally, around the same time the Labour Court in Cape Town was considering a separate review application of a CCMA award relating to sexual harassment. In this case, the employee Mr Adrian Simmers made advances towards a work colleague from another company while on a business project in Botswana. Surprisingly, his dismissal for sexual harassment and unprofessional conduct was found to have been substantively unfair by the Labour Court (on review) and his retrospective reinstatement ordered subject to a final written warning valid for 12 months. It is the October 2015 decision of the Labour Appeal Court in this case, being *Campbell Scientific Africa (Pty) Ltd v Adrian Simmers and Others* (as yet unreported, 23 October 2015), that I want to focus upon in this article. The LAC judgment is a natural follow on, after the *SA Metal* decision and provides employers with some useful guidance on navigating the often advanced defence of employers that the conduct amounts to "sexual attention" and not "sexual harassment".

The facts are simplistically the following:

Mr Simmers was employed by Campbell Scientific. He was on a business trip in Botswana in 2012 with Ms X who worked for Loci Environmental (Pty) Ltd. On the last night of their trip Mr Simmers, Ms X and Mr Simmers' colleague Mr Le Roux had dinner. At the end of the evening, Mr Simmers told Ms X that he felt lonely. He made advances towards her and asked her to come to his room. She refused. He asked her if she had a boyfriend, which she confirmed. Mr Simmers then asked Ms X to phone him in the middle of the night if she changed her mind.

According to Mr Simmers, he joked with Ms X when he said to her, "Do you want a lover tonight?" And, after Ms X rebuffed the request, he said to her, "Come to my room if you change your mind." This was a once-off incident according to Mr Simmers and he did not persist. When Mr Simmers' employer learned of the incident, it began disciplinary proceedings. Mr Simmers was subsequently dismissed. Aggrieved, Mr Simmers approached the CCMA, which found that his dismissal was fair.

## The Labour Court review decision

Mr Simmers admitted having said to Ms X "do you want a lover tonight?" and "come to my room". The court was to determine whether this constituted sexual harassment and, if so, whether this was sufficiently serious to warrant his dismissal. The Labour Court in justifying its finding that the dismissal was unfair took the following factors into account:

- Mr Simmers and Ms X were not co-workers and they would probably not work together again because Ms X had emigrated to Australia, and there was no disparity of power between them.
- Mr Simmers' conduct related to a once-off incident and it occurred after hours and outside the workplace.
- Mr Simmers' conduct "did not cross the line from a single incident of an unreciprocated sexual advance to sexual harassment". Once Ms X made it plain to Mr Simmers that his conduct was not welcome, he backed off.
- Mr Simmers' comments, crude and inappropriate as they may have been, were not a demand for sex and they could only have become sexual harassment if he persisted in them or if they constituted a serious single transgression, which they did not.
- The comments amounted to "sexual attention" and, in blunt terms, Mr Simmers was "trying his luck".
- A single incident of unwelcome sexual conduct can constitute sexual harassment, but such an incident must be serious. It should constitute an impairment of the complainant's dignity, taking into account his or her circumstances and the respective positions of the parties in the workplace. This nearly always

involves an infringement of bodily integrity, such as touching, groping or some other form of sexual assault, or quid pro quo harassment.

– Misunderstandings are frequent in human interaction and an inappropriate comment does not automatically constitute sexual harassment.

## The Labour Appeal Court

The full bench of the LAC agreed with the CCMA that Mr Simmers' dismissal for sexual harassment was fair.

The LAC noted that harassment is a form of unfair discrimination in terms of the Employment Equity Act, 1998 (the EEA). The court also had regard to the definition of "sexual harassment" in the applicable Codes of Good Practice, namely:

– The Code of Good Practice on the Handling of Sexual Harassment Cases under the Labour Relations Act, 1995 (the LRA Code), in terms of which sexual harassment is defined as unwanted conduct of a sexual nature, which is distinguished from behaviour that is welcome and mutual. Furthermore, sexual attention becomes sexual harassment if (a) the behaviour is persisted in, although a single incident of harassment can constitute sexual harassment; and/or (b) the recipient has made it clear that the behaviour is considered offensive; and/or (c) the perpetrator should have known that the behaviour is regarded as unacceptable.

– The Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace under the EEA (EEA Code), in terms of which sexual harassment is defined as unwelcome conduct of a sexual nature that violates the rights of an employee and constitutes a barrier to equity in the workplace, taking into account (a) whether the harassment is on the prohibited grounds of sex and/or gender and/or sexual orientation; (b) whether the sexual conduct is unwelcome; (c) the nature and extent of the sexual conduct; and (d) the impact of the sexual conduct on the employee.

Acting Justice of Appeal Savage writing for the LAC made the following poignant point: At its core, sexual harassment reflects the power relations that exist both in society generally and specifically within a particular workplace. While economic power may underlie many instances of harassment, a sexually hostile working environment is often less about the abuse of real economic power, and more about the perceived societal power of men over women. This type of power abuse is often exerted by a male co-worker and not necessarily a supervisor. By its nature, such harassment creates an offensive and often intimidating work environment that undermines the dignity, privacy and integrity of the victim and creates a barrier to substantive equality in the workplace. The LAC goes on to characterise sexual harassment as the most heinous misconduct that plagues a workplace.

While economic power may underlie many instances of harassment, a sexually hostile working environment is often less about the abuse of real economic power, and more about the perceived societal power of men over women.

The LAC went on to hold that:

– Both the LRA and EEA Codes record that a single act may constitute sexual harassment. The treatment of harassment as a form of unfair discrimination in section 6(3) of the EEA recognises that such conduct poses a barrier to the achievement of substantive equality in the workplace. This is echoed in the 1998 Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace, issued under the LRA, and the subsequent 2005 Amended Code on the Handling of Sexual Harassment Cases in the Workplace (the Amended Code), issued under the EEA.

- Both the LRA Code and the EEA Code provide that victims of sexual harassment may include not only employees, but also clients, suppliers, contractors and others having dealings with a business. In spite of it being termed the "Amended" Code, the EEA Code does not replace or supersede the LRA Code, which to date has not been withdrawn. The result is that in terms of section 203(3) of the LRA, both Codes are as "relevant codes of good practice" to guide commissioners in the interpretation and application of the LRA.
- Mr Simmers' unwelcome and inappropriate advances were directed at Ms X, a young woman close to 25 years his junior, whose employment had placed her alone in his company in a rural area. Underlying such advances lay a power differential that favoured Mr Simmers due to his age and gender. Ms X's dignity was impaired by the insecurity caused to her by the unwelcome advances and by her clearly expressed feelings of insult.
- Sexual harassment by older men in positions of power has become a scourge in the workplace. The rule against sexual harassment targets, among other things, reprehensible expressions of misplaced authority by superiors towards their subordinates. Sexual harassment is founded on the pervasive power differential that exists in our society between men and women and between older men and younger women.
- The fact that the conduct was not physical, that it occurred during the course of one incident and was not persisted with thereafter, did not negate the fact that it constituted sexual harassment and this was not a case of Mr Simmers merely "trying his luck". Mr Simmers opportunistically singled out Ms X to face his unwelcome sexual advances in circumstances in which she was entitled to expect and rely on the fact that within the context of her work this would not occur.
- In treating this conduct as sexual harassment, Ms X and others like her are assured of their entitlement to engage constructively and on an equal basis in the workplace without unwarranted interference upon their dignity and integrity.

In short, the LAC concluded that it would test Mr Simmers' conduct against the definition of sexual harassment, as defined in both Codes as follows:

1. Was the conduct unwelcome and unwanted?
2. Was it offensive?
3. Did it intrude upon Ms X's dignity and integrity?
4. Did the conduct cause Ms X to feel both insulted and concerned about her personal safety?

Sexual predators in the workplace should be warned that the LAC has clearly made the point that the sanction of dismissal sends out an unequivocal message that employees who perpetrate sexual harassment do so at their peril and should expect to face the harshest penalty.

**By Imraan Mahomed, 2016**

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