



## FURTHER NOTES ON LEGAL CONUNDRUMS ON CASES OF SEXUAL HARASSMENT

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In Advocate Tanya Venter's podcast on Legal Conundrums, included elsewhere in this Toolkit, she lays out the issues involved in difficult areas:

1. Often the complainant who has alleged the sexual harassment is the one who needs to give the evidence during a disciplinary inquiry and this needs to be managed in a very sensitive manner.
2. A fundamental principle which is often lost is that sexual harassment is not determined by the intent of the perpetrator, it is determined by how it is received by the victim. A subjective test is used, did the victim reasonably receive it as sexual harassment and if so, it is sexual harassment. The perpetrator's intent, in determining his/her guilt, is not a factor. So, the intent of the perpetrator is relevant, but it is relevant in so far as it speaks to the sanction, not in so far as it speaks to determining guilt.
3. There is a reasonableness element to an allegation of sexual harassment. The Chair of an inquiry would need to determine whether the behaviour has or has not been reasonably received, and if there is no reasonableness in the manner in which it was received by the victim, then it cannot constitute sexual harassment.

In addition, there are two other legal issues that can cause problems:

4. In all Sexual Harassment Policies, it is stated that the dignity of both parties must be protected and here confidentiality is given as an important principle. But in real life situations, many other colleagues may already know which parties are involved, because it is common knowledge or because one or both parties have spoken to their workmates about the harassment to drum up support for themselves. And so, even though the employer may try to preserve confidentiality within the grievance/disciplinary process, facts, gossip, speculation and rumours may abound and cause damage to either party.
5. In law, a party who has been accused of something is "innocent until proven guilty", the corollary of which may be that the alleged victim can be thought to be making up what happened until the point where her version is found to be the most probable one. This can have deep implications for the alleged victim, particularly where the investigation and disciplinary process become drawn out, and can give rise to a great deal of hostility towards

him/her at conscious and unconscious levels from fellow employees, thus rendering their continued presence within the current work environment very tough.