



Handling Sexual Harassment Cases – should we use the normal Disciplinary Processes or are different processes needed?

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Sexual Harassment is one form of Misconduct. The normal route for dealing with any case of alleged misconduct would go as follows:

Step 1: HR is made aware of the alleged misconduct.

Step 2: An investigation would be held. Depending on the nature and severity of the misconduct, this investigation may be done by the line manager with guidance and input of HR, as well by internal or external experts (for example, forensic accountants). Some of the people involved in the investigation may also then be called as witnesses at a formal Disciplinary Inquiry if this is deemed the way to proceed.

Step 3: Depending on the outcome of the investigation, a decision will be made as to whether to handle the case informally and undertake some form of training or counselling for the perpetrator of the offence or perhaps mediation if another party was involved. This is often the route chosen, for example, additional training for breach of safety regulations or mediation for interpersonal conflict such as insubordination. The other choice, based on the investigation, would be to follow formal processes such as a Grievance or Disciplinary Inquiry with possible internal appeal processes.

Step 4: Depending on the outcomes of the Disciplinary Hearing, the employee may choose to refer the matter to the CCMA, Labour Court etc.

The above process may be an appropriate way to deal with some Sexual Harassment cases, usually those where:

- The harassment has been conducted publicly, so there are witnesses, and they are willing to give evidence;
- The complainant is willing to give evidence and be cross-examined.

But many incidents of sexual harassment are tricky and sensitive by nature and require some special considerations. Such cases have occurred in workplaces in the public and private sectors, in NGO's, in Universities and at schools, so no type of workplace is immune to these difficulties.

There are four characteristics of sexual harassment cases that need to be considered. These are:

1. The complex nature of these cases: there are many layers to this but the common ones are:
 - a. The very broad definition of sexual harassment which results in some “grey areas” where it may be contested as to whether or not such behaviour does in fact constitute misconduct.
 - b. The fact that victims often only report incidents long after they have happened and people incorrectly infer this to mean that the behaviour was not construed as serious by the alleged victim, “or they would have spoken up before”.
2. The emotional component of sexual harassment: again, this can be complicated, but this point talks to:
 - a. The emotional effect on the victim which can have long term consequences for their mental and physical health.
 - b. The emotional effects on the alleged perpetrator’s family once his/her conduct is known by them.
 - c. There is a great deal of fear evoked in these cases:
 - a. Fear of the victim that he/she will not be believed;
 - b. Fear of people blaming the victim for the harassment;
 - c. Fear that the perpetrator may lose his/her job;
 - d. Fear of being labelled as a troublemaker on the part of the victim;
 - e. Fear of other people who may have acted similarly to the alleged perpetrator who may also be “reported” or “found out”.
Fear can be exacerbated where the alleged perpetrator is a senior member of staff.
3. The divisive effects of cases of sexual harassment. These include:
 - a. People “taking sides” with one of the parties.
 - b. One or both of the parties “lobbying” colleagues to support their version of what actually happened.
 - c. High levels of disagreement on what actually happened and who should be blamed.
 - d. High levels of disagreement on what is acceptable behaviour at the workplace.
4. The disruptive elements of sexual harassment cases: a lot of this can be inferred from the above 3 points but some other outcomes are noted below:
 - a. There may be a divergence of views, not only those of the perpetrator and the victim, but also co-workers, about the “fairness” of the process and its outcome.
 - b. There may be misunderstandings as to why certain actions were taken against either the perpetrator or the victim. Informal communication channels / gossip can be highly active around sexual harassment cases and incomplete or incorrect information can be widely spread around both internally and externally to the organisation.
 - c. While a great many disruptions are evident before, during and after a sexual harassment case in an organisation, the more worrisome fact is that negative feelings employees may have towards each other can continue for years after an incident – hence our advice which can be found in the Toolkit about “Dealing with the Fallout”.

There are a number of other considerations that have to be taken into account when designing a process that best “fits” some of the tricky and sensitive issues in order to achieve the most appropriate and fair outcome in such cases. For example, one consideration that may not come up in many other cases of misconduct is the fact that, in most sexual harassment cases, there are very different, opposing and competing versions of what happened. This can be tricky to deal with unless there are credible witnesses or bystanders who are able to corroborate one version. So, any investigation needs

to establish this early on. If there are no people able to corroborate, this gives rise to the “He said/She said” scenario when it is one person’s word against the others. Of course, this occurs in many labour disputes and it is known as “a single witness” scenario. It is then up to the Investigator (in an Inquisitorial Approach) or the Chairperson of a Disciplinary Inquiry to interrogate the two versions and make a finding based on the test of a “balance of probabilities”.

Elsewhere in the Toolkit there is a longer explanation of an Inquisitorial Approach versus the Adversarial Approach. Suffice it to say here that for sexual harassment cases the former is often the more appropriate choice. Here an outside independent person (who must have a very thorough knowledge and experience of sexual harassment disputes) would undertake a careful investigation and make a finding based on the outcome of the investigation. As can be seen in the article referred to above, this approach has many of the needed ingredients to handle a sensitive and disruptive case, which include:

- The need to act in the wider public interest. It is argued that it is not in the wider public interest to sweep sexual harassment cases under the carpet nor to allow the perpetrator to have no blemish on their record and so be able to continue his/her harassing behaviour in another employment context. (Simply transferring an alleged perpetrator or allowing him/her to resign may mean that the problem is simply moved somewhere else and some other person may become a victim.)
- To allow a thorough investigation into a complex matter and not be fettered by the rules of evidence and the rigours of cross examination which could have negative consequences for both victim and perpetrator. (The fear of facing an alleged perpetrator and being subjected to a hostile cross-examination is known to prevent many victims from pursuing their complaint, and this can have severe repercussions on their mental health in the future.) This point is worth emphasising. In an Inquisitorial Approach, the investigator can ensure that any evidence given by the alleged victim that emerges during the investigation will be made available to the alleged perpetrator who can then put forward questions for the investigator to pursue with either the complainant or witnesses, thus avoiding a direct confrontation. Thus, the Inquisitorial Approach has better safeguards for the complainant.
- The need to deal with a complaint as quickly as possible to avoid further fall out more widely in the organisation.

This second point above can be a tricky one and highlights some of the legal conundrums in these cases. 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. 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.

Finally, attention has to be given to the Code of Good Practice which says that the alleged victim(s) may choose one of two routes, the Informal route and the Formal route. The formal route simply

means that the victim is prepared to go a Disciplinary Inquiry and give evidence and be willing to be cross-examined. The Code, whose writers understood that this option is a difficult one (not only for sexual harassment but also for other sexual assault cases such as rape), outlines an Informal route that has two possibilities, one in which the victim remains unknown to the alleged harasser and one in which the alleged victim (with someone by their side if this is their choice) confronts the alleged harasser with their unwelcomed behaviour and asks him or her to desist from such behaviour.

From all of the above, it can be seen that the ordinary Disciplinary process of the employer can deal with most sexual harassment cases but some special considerations need to be built in which could assist in handling the difficult challenges. These include:

1. The use of the Inquisitorial Approach to avoid the alleged victim coming face to face with the alleged perpetrator and facing an unnecessary gruelling cross-examination as would happen in an open disciplinary process.
2. HR practitioners and outside independent investigators must have been trained in the dynamics of sexual harassment which would include an understanding of the psychosocial impacts on all of the people affected by the allegation and included in subsequent processes to remedy the situation.
3. The informal processes outlined in the Code of Good Practice need to be shared with the alleged victim as options to dealing with the complaint(s).

Therefore, organisations need to review their Disciplinary Policy and process to ensure that these special considerations may be incorporated in appropriate circumstances. There has been considerable discussion and debate in various media over the last few years on the need to adopt a 'victim-centred approach' for gender-based violence (of which sexual harassment is one manifestation) both in our courts and in our workplace disciplinary and grievance processes. The considerations outlined in this article would ensure that organisations adopt such a victim-centred approach.

This article has concentrated on the issue of Sexual Harassment as this is what we are applying our minds to in this SABPP Toolkit for HR Practitioners; however, we are aware that some of the comments we have made here could pertain also to other forms of alleged bullying and harassment at the workplace as well as allegations of unfair performance management, favouritism in promotions and work assignment and other forms of complex interpersonal conflict related misconduct cases.