



## POSSIBLE LEGAL CLAIMS ARISING OUT OF COMPLAINTS OF WORKPLACE SEXUAL HARASSMENT

Note: the contents of this article are extracted from the book Harassment in the Workplace: Law, policies and processes<sup>1</sup>. The contents do not constitute legal advice, the purpose is to indicate the extent of potential exposure of the employer and employees to claims of various types.

### Common law

#### *Damages for issues such as assault, injuria and/or defamation*

An employee may lay a claim against the alleged perpetrator for damages, which could be substantial.

#### *Damages for breach of contract*

An employee may claim breach of contract by the employer for failing to provide a safe workplace (protection against psychological or physical injury), terminate employment (resign) and claim damages from the employer for breach of contract. [This is in addition to, not in place of, a claim for constructive dismissal under the Labour Relations Act]

#### *Vicarious liability*

Damages may be claimed against an employer by anyone who is a victim of sexual harassment perpetrated by an employee (thus, a client, visitor, member of the public for example).

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<sup>11</sup> LexisNexis, 2010

In terms of common law, an employer may be deemed liable for the acts of sexual harassment committed by its employee. The test for such liability is whether the unlawful conduct (act of sexual harassment) is sufficiently connected to the conduct authorised by the employer to justify the imposition of vicariously liability. The existence of high likelihood of the risk of the commission of the unlawful act and resultant wrong could indicate a sufficient relationship for imposition of vicarious liability. Some of the factors that have been considered by courts as relevant in establishing the sufficient relationship are (i) the opportunity presented to the harasser to abuse his authority (the opportunity presented by the work environment to facilitate the harassment), (ii) the ambit of the abuser's authority and (iii) the vulnerability of the potential victim to the abuse<sup>2</sup>.

### The Employment Equity Act ("the EEA")

Unfair discrimination claims against the employer under the EEA are permissible in conjunction with, also in addition to, claims in terms of the Labour Relations Act (i.e. for unfair dismissals / resignations resulting from sexual harassment). Additional damages and compensation may be awarded, on top of the Labour Relations Act compensation.

An employee may elect to refer a sexual harassment claim to the CCMA, which may issue an order to rectify the issue or may award damages and compensation for unfair discrimination. This may be in addition to a claim for unfair dismissal. The dispute can also be referred directly to the Labour Court.

Section 6(1) read with section 60 of the Employment Equity Act places a positive duty on employers to consult with all relevant parties and take the steps necessary to eliminate sexual harassment after an allegation of sexual harassment has been made. Failure to do so renders the employer liable for damages (for patrimonial loss) and the employer could at the same time be liable to pay the employee compensation (as solace for the humiliation and hurt suffered). A court determining an employer's liability will consider, amongst others, (i) that the sexual harassment conduct complained of was committed by another employee; (ii) the sexual harassment constituted unfair discrimination; (iii) it took place at the workplace; (iv) it was immediately brought to the attention of the employer; (v) the employer was aware of the sexual harassment; (vi) the employer failed to consult all relevant parties, or take the necessary steps to eliminate the conduct and (vii) it failed to take all reasonable and practical measures to ensure that employees do not contravene the EEA.

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<sup>2</sup> PE v Ikwezi Municipality and others 2016 (5) SA 114 (ECG)

## The Labour Relations Act (“the LRA”)

### *Constructive dismissal*

A victim may resign and bring a claim for constructive dismissal where the employer’s failure to properly address harassment has rendered continued employment untenable. This could be considered an automatically unfair dismissal and attract the maximum compensation of 24 months’ remuneration.

### *Unfair labour practice*

An employee who believes he/she has been unfairly suspended or otherwise unfairly treated during a disciplinary process related to harassment could refer an unfair labour practice dispute to the CCMA, and if successful, the CCMA may provide redress for the unfair labour practice on any terms which the arbitrator deems reasonable.

### *Unfair dismissals*

A victim who has been dismissed following a claim of harassment may claim for unfair dismissal, which would probably constitute an automatically unfair dismissal, and the employer may be liable to reinstate the employee or to pay them compensation of up to 24 months, if the dismissal is found to have been automatically unfair.

An alleged perpetrator who has been dismissed may also bring a claim for unfair dismissal, and if the dismissal is found to have been unfair, the employer could be liable for up to 12 months compensation.

## The Promotion of Equality and the Prevention of Unfair Discrimination Act

If an employee perpetrates harassment against anyone other than another employee in the course of his or her duties (so that could include clients, visitors and members of the public), the victim may be able to claim damages against the employer on the grounds of vicarious responsibility.

## The Protected Disclosures Act

If an employee is subjected to victimisation (occupational detriment) as the result of having made a complaint of harassment, the employee can apply to the High Court for an interdict, or for reinstatement after dismissal or for compensation. The court order may be against the employer as an organisation, or against specific individuals.

The authors of the Harassment in the Workplace book make the point that many findings against employers have to do with either the lack of an appropriate Policy on Sexual Harassment, or the inadequate implementation of the existing policy. These findings can be very expensive, far exceeding typical LRA unfair dismissal compensation costs. A proper risk analysis and development of an appropriate Policy followed by extensive awareness and education campaigns will be a good investment against such potentially expensive and disruptive claims.

If an employee is dismissed for blowing the whistle on discrimination, that dismissal would constitute an automatically unfair dismissal and may render the employer liable to pay up to 24 months compensation.

Employees who in good faith believe that they are being unfairly disciplined as a result of blowing the whistle on sexual harassment may require their disciplinary enquiry to be presided over by an independent Commissioner in terms of the 'enquiry by arbitrator' procedure established by the Labour Relations Act.

## Protection from Harassment Act

The Protection from Harassment Act permits victims to obtain protection orders against perpetrators.

While the act applies to natural persons, it is possible that employers could be impacted where one employee obtains a protection order against another which affects existing working arrangements. The failure of an employer to take appropriate steps in terms of a protection order may give rise to other liability (i.e. in terms of the Employment Equity Act).

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