

**NEW CHALLENGES:
SHIFTING POWER IN
UNCERTAIN TIMES**
12-14 August 2009



22nd ANNUAL LABOUR LAW CONFERENCE

Sexual harassment Case law update

Jointly organised by:



The Institute of
Development and
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Centre for Applied
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University of
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The Faculty of
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Focus of the paper

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1. (Sexual Harassment) Discriminatory Dismissals
2. Employer liability
3. Some provisions of the Sexual Offences Act 2007

Section 186(1)(e) of the LRA

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A dismissal also means that:

an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee.

(constructive dismissal)

187(1)(f) of the LRA

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*A dismissal is automatically unfair. . . if the reason for the dismissal is—
that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility;*

Section 195 of the LRA

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An order or award of compensation made in terms of this Chapter is in addition to, and not a substitute for, any other amount to which the employee is entitled in terms of any law, collective agreement or contract of employment.

Sections 5 of the EEA

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Every employer must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice.

6(1) and (3) of the EEA

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6 (1) No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.

(3) Harassment of an employee is a form of unfair discrimination and is prohibited on any one, or a combination of grounds of unfair discrimination listed in subsection (1).

Section 10(1) of the EEA

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In this section, the word 'dispute' excludes a dispute about an unfair dismissal which must be referred to the appropriate body for conciliation and arbitration or adjudication in terms of Chapter VIII of the Labour Relations Act

Section 60 of the EEA

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- 60 (1) If it is alleged that an employee, while at work, contravened a provision of this Act, or engaged in any conduct that, if engaged in by that employee's employer, would constitute a contravention of a provision of this Act, the alleged conduct must immediately be brought to the attention of the employer.*
- (2) The employer must consult all relevant parties and must take the necessary steps to eliminate the alleged conduct and comply with the provisions of this Act.*
- (3) If the employer fails to take the necessary steps referred to in subsection (2), and it is proved that the employee has contravened the relevant provision, the employer must be deemed also to have contravened that provision.*
- (4) Despite subsection (3), an employer is not liable for the conduct of an employee if that employer is able to prove that it did all that was reasonably practicable to ensure that the employee would not act in contravention of this Act.*

2005 Code of Good Practice

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Sexual harassment is 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:

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

Ntsabo v Real Security CC (2003) 24 ILJ 2341 (LC)

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“In terms of the LRA, this section would be applicable if her dismissal was related to discrimination. From an LRA perspective, I do not think that the applicant’s dismissal can be described as being based on discrimination. Indeed discrimination was not alleged as a basis for dissatisfaction and consequent resignation. Her case was framed on completely different principles.”

Ntsabo

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- Held that there is no clear persuasive direction to the debate that sexual harassment is a form of sex discrimination
- Court declined to find that the constructive dismissal amounted to an automatically unfair dismissal based on unfair discrimination

Christian v Colliers Properties [2005] 5 *BLLR 479 (LC)*

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- Dismissal of employee for refusing to accept the employer's advances constituted an automatically unfair dismissal
- The same act of sexual harassment amounted to unfair discrimination under the EEA as well as an automatically unfair dismissal under the LRA

Discriminatory dismissal claims

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- S 6(1) EEA discrimination claims
- S 187(1)(f) LRA dismissal claims

Discriminatory dismissal claims

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Kroukam v SA Airlink (Pty) Ltd (2005) 26 ILJ 2153 (LAC), Davis AJA:

“In my view, s 187 imposes an evidential burden upon the employee to produce evidence which is sufficient to raise a credible possibility that an automatically unfair dismissal has taken place. It then behoves the employer to prove the contrary, that is to produce evidence to show that the reason for the dismissal did not fall within the circumstance envisaged in s 187 for constituting an automatically unfair dismissal.”



Discriminatory dismissal claims

“An anomaly appears to exist in labour legislation pertaining to discriminatory dismissals in that the incidence of onus differs according to whether the dispute is categorized as an automatically unfair dismissal in terms of the LRA or an unfair discrimination dispute in terms of the EEA. If the interpretation of the court in Janda is to be followed, the burden of proving the non-discriminatory reason for the dismissal rests upon the employer as opposed to an unfair discrimination claim where the employee is required to prove that the discrimination has taken place.”

- Cohen, T “Onus of Proof in Automatically Unfair Dismissals...” (2007) 28 ILJ 1465



Reconciling legislative provisions

- S 6(3) read with s 6(1) EEA
- S 10(1) EEA
- S 186(1)(e) LRA and/or 187(1)(f) LRA
- S195 LRA
- Therefore, fairness of (sexual harassment) discriminatory dismissals adjudged to the EEA, whereas the procedure to LRA to be followed

Mokoena v Garden Art (Pty) Ltd [2005] 5
BLLR 428 (LC)

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Claim founded in EEA

Not a delictual claim founded in common law

Claim must be read with s 60 of the EEA

Mokoena . . . and s 60

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1. *The conduct must be by an employee of the employer.*
2. *The conduct must constitute unfair discrimination (ie it must constitute sexual harassment).*
3. *The conduct must take place while at work.*
4. *The alleged conduct must immediately be brought to the attention of the employer.*
5. *The employer must be aware of the conduct.*
6. *There must be a failure by the employer to consult all relevant parties, or to take the necessary steps to eliminate the conduct or otherwise to comply with the EEA. And*
7. *The employer [has failed to take all] reasonably practicable [steps] to ensure that the employee would not act in contravention of the EEA.*

But what does this mean?

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- *“Where there is one incident of sexual harassment, which is brought to the attention of the employer immediately after the incident, an employer will not be held liable in terms of [section 60](#) of the EEA. The aggrieved employee may then have to consider a different basis to hold the employer liable either in terms of common law, etc. . . It would therefore appear to me that [section 60](#) of the EEA really applies where it has been brought to the attention of the employer that sexual harassment has taken place and, as a result of the employer’s inaction, further sexual harassment takes place, which renders the employer liable.”*

Potgieter v National Commissioner of the SAP
[2008] JOL 22672 (LC)

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- *'[t]he liability for damages suffered by the employee flew from the sexual harassment itself and the failure by the employer to take reasonable steps to deal with the employee's complaint'*

Potgieter . . .

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- *‘where the employer reacted to employee’s report of sexual harassment by issuing a written warning, and where no further incidents had occurred the employer was no liable in damages to the employees’.*



But what if there are further incidents of sexual harassment?

S 45 of the Sexual Offences Act 2007

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45 Obligations of employers in respect of employees

(1) Any employer who-

(a) at the date of commencement of this Chapter, has in his or her employment any employee, may from the date of establishment of the Register, in the prescribed manner, apply to the Registrar for a prescribed certificate, stating whether or not the particulars of the employee are recorded in the Register; or

(b) from the date of establishment of the Register, intends employing an employee, must, in the prescribed manner, apply to the Registrar for a prescribed certificate, stating whether or not the particulars of the potential employee are recorded in the Register.

(2) (a) An employer shall-

(i) subject to paragraph (d) not continue to employ an employee contemplated in subsection (1) (a); or

(ii) not employ an employee contemplated in subsection (1) (b),

whose particulars are recorded in the Register.