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SEXUAL HARRASMENT IN THE WORKPLACE: WHEN SHOULD THE MISCONDUCT BE REPORTED?

Sexual harassment is one of the most atrocious forms of misconduct that exist in the work place. This form of misconduct is seldom reported by the victims to their superiors due to a number of factors, such as fear. The question that has to be answered here is whether there is a time frame within which victims of sexual harassment are required to adhere to when reporting this form of misconduct, and the duty of the Employer in such cases.

Section 3 of the 2005 Code of Good Practice on Sexual Harassment provides that sexual harassment is unwanted conduct of a sexual nature, including sexual attention. The Code provides that sexual attention becomes sexual harassment if/when the behaviour is persisted in, although a single incident of harassment can constitute sexual harassment; and/or the recipient has made it clear that the behaviour is considered offensive; and/or the perpetrator should have known that the behaviour is regarded as unacceptable. It is important to note that sexual harassment may include unwelcome physical, verbal or non-verbal conduct. However, the list of types of harassment is not exhaustive.

The Labour Appeal Court has characterised sexual harassment as "the most heinous misconduct that plagues a workplace" [***Motsamai v Everite Building Products (Pty) Ltd [2011] 2 BLLR (LAC)***]. The ***Employment Equity Act 55 of 1998*** specifically prohibits all forms of unfair discrimination in the workplace. According to ***Section 6(3)*** of the Act, sexual harassment of an employee is a form of unfair discrimination and is strictly prohibited.

Section 60 of the Act provides for the liability of Employers when sexual harassment is reported by an employee. The Act provides that the alleged sexual harassment must be *immediately* brought to the attention of the employer by an employee. Thereafter, the employer must consult all relevant parties and must take the necessary steps to eliminate the alleged conduct. If the employer fails to take the necessary steps, as provided, the employer is deemed to have also contravened the provisions of the Act. However, an employer is not liable for the conduct of an employee if the employer is able to prove that it did all that was reasonably practicable to ensure that the employees concerns were addressed and personally dealt with which would then not warrant a contravention of this Act.

The Labour Court in ***Rustenburg Platinum Mine Ltd v UASA obo Steve Pietersen & Others ZALCJHB 72 (2018)*** found the Commissioner to be misogynistic and patriarchal to conclude that the employee's failure to report the incidents of sexual harassment *timeously* was an indication that she had encouraged the accused. Furthermore, in ***SA Metal Group (Pty) Ltd v CCMA and Others [2014] ZALCCT15*** the Labour Court found that the Code requires that "i*mmediately*" be construed as "*as soon as reasonably possible*" taking into account the power imbalances that exist in the workplace, in particular, the complainant's fear of reprisal. In both cases the dismissals were upheld and were found to be fair.

Having regard to recent controversies that have shone

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the spotlight on the prevalence of sexual harassment in the workplace, employers should always be aware that matters of sexual harassment can be reported anytime, provided that it is as soon as reasonably possible, taking into consideration the surrounding circumstances that resulted in the delay thereof.

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