The law, sexual harassment and the best way to go

Laws and codes now exist to allow victims to get redress for their sexual harassment. But do employers know what sexual harassment is and how to deal with it? And do their workers understand how the law defines harassment and how best to get redress? **Rochelle Le Roux** gives some valuable information.

For years lawyers have debated whether or not sexual harassment is unfair discrimination and whether sexual harassment in the workplace by, for instance, a co-employee should be of any concern to the employer. An employee after all, so it was (and sometimes still is) argued, is not employed to harass. Why should employers intervene on a matter not related to employment?

In South Africa this debate has been settled by subsections 6(1) and (3) of the Employment Equity Act which, read together, states very clearly that harassment on the basis of sex, gender or sexual orientation is unfair discrimination.

Recently the media giant, Media 24, discovered at their expense that our courts are quite prepared to regard sexual harassment as an unlawful act. They are also prepared to order the payment of vast amounts of damages should the victim suffer severe emotional injuries as a result of the harassment. More importantly, the courts will hold the employer liable for such damages if it failed to take steps to provide a working environment free of sexual harassment.

DEFINITION OF SEXUAL HARASSMENT

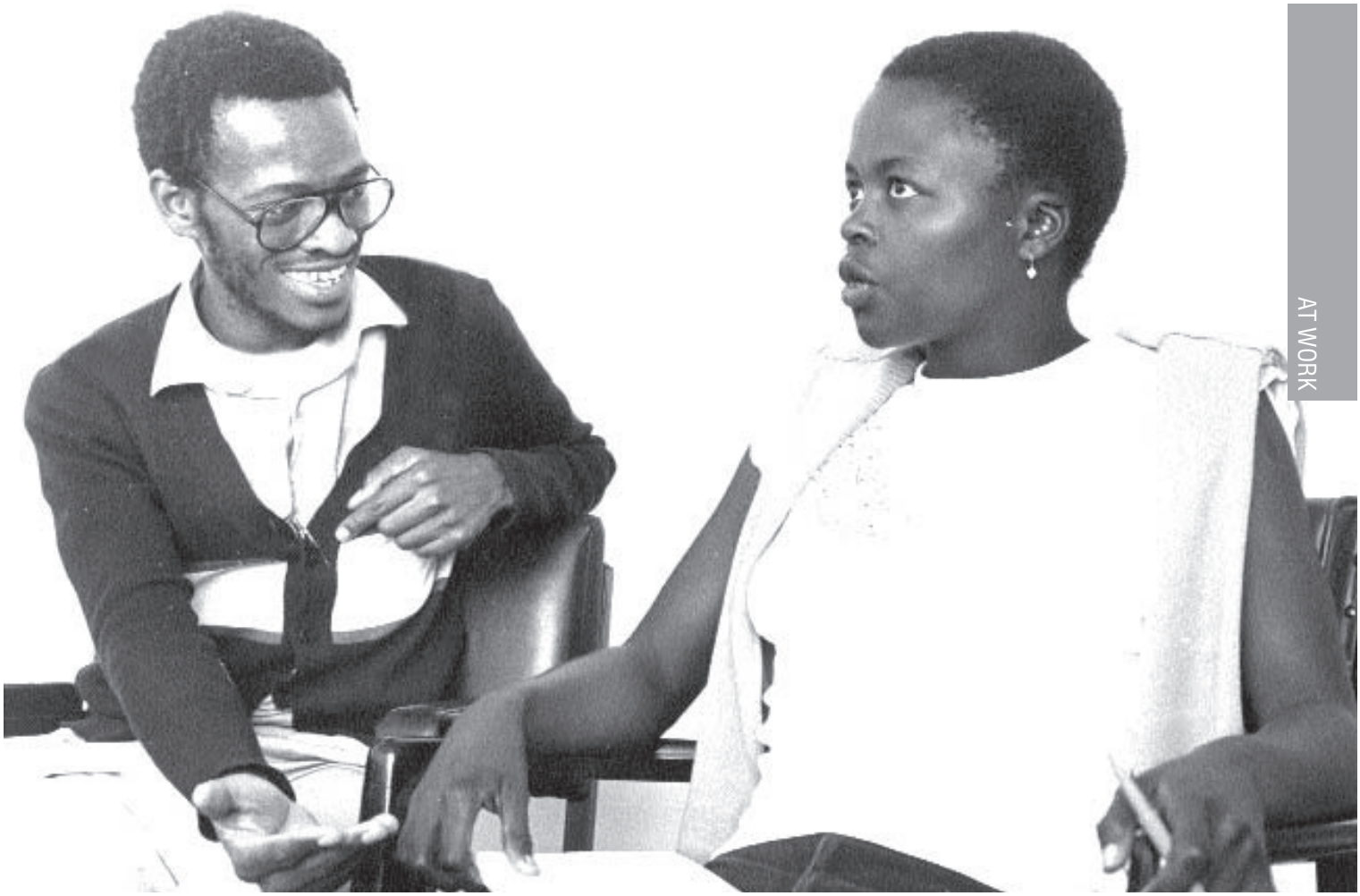
However, the first concern of employees who are harassed, will not be the technical legal nature of their experience. It will rather be their fear, angst and humiliation. Empowering employees to deal with this should begin, not with a lecture on the law, but information to help understand the definition of sexual harassment.

Many people believe that sexual harassment only involves a physical act and while it often does, sexual harassment can show itself in a more discreet fashion.

Also, many see sexual harassment as something that only happens to women. Again, in a patriarchal society such as ours with its deeply entrenched gender divide this is the most likely scenario, but men can also be sexually harassed. What is more, sexual harassment can occur between the same sexes and need not always be of a heterosexual nature. For instance, the victimisation of a gay employee by a colleague of the same or opposite sex could constitute sexual harassment whether or not it is motivated by desire or dislike of the victim's sexual orientation.

So what is sexual harassment? Recently Nedlac (National Economic Development and Labour Council) published a new Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace[1]. This Code provides a definition of sexual harassment for the purposes of the Employment Equity Act. It also encourages employers to implement workplace policies on sexual harassment. The essence of the definition in the Code is that the conduct must be unwelcome and of a sexual nature. This may include physical, verbal or non-verbal conduct.

Rape is perhaps the most



extreme form of physical conduct, but it may also include touching or a strip search by, or in the presence of, the opposite sex. Verbal conduct may range from unwelcome innuendos and suggestions to e-mails of a sexually explicit nature, to wolf whistling and ridiculing, for instance, the size of a man's penis. Indecent exposure or gestures of a sexual nature are examples of non-verbal conduct.

These, however, are only examples. The essential issue remains whether it is unwelcome conduct of a sexual nature. Unwelcome conduct in isolation, however, is not enough to constitute sexual harassment for the purposes of the Code.

The Code also requires that conduct must impact on the dignity of the victim. In other words, the sexual harassment reduces the victim to an object and results in feelings of humiliation. The Code seems to suggest that it is not whether an outsider believes that the victim should or should not experience feelings of indignation, but whether the victim has such feelings.

This, however, is still not the end of the inquiry. The Code further requires that the sexual harassment must constitute a barrier to equity in the workplace. This implies that the sexual harassment is used at work as a basis for harmful employment decisions which impact on the position of the victim in the workplace.

For instance, the victim does not get an increase or a promotion because s/he rejected the sexual advances of the boss. At first sight this seems problematic since sexual harassment may in some instances advance rather than undermine job opportunities. For instance, the secretary gets a promotion because she slept with the boss.

This requirement, barrier to equity, goes to the heart of the argument that sexual harassment is a form of unfair discrimination. Many years ago Catherine McKinnon, sexual harassment's original crusader, argued that sexual harassment is a form of unfair discrimination since it complicates the victim's job because a sexual condition (whether or not accepted by the victim) becomes a condition of employment. It becomes a constraint that does not apply to others in the workplace.[2]

For instance, if the secretary did not sleep with the boss she would not get promotion. Workplace equity, however, is not only determined by the conduct of a senior person. Sexual harassment by, for instance a peer, may result in poor work performance, which in turn impacts on opportunities for promotion or salary increases.

The workplace is often the birthplace of many happy relationships resulting in marriages and long term relationships. These

courtships certainly at some stage acquire a sexual undertone, but because they are not unwelcome, nobody complains. An initial advance by a colleague may therefore be nothing more than an innocent attempt to start a courtship. S/he would not know that it is unwelcome until the waters have actually been tested. It is only once the recipient makes it clear that the advances are unwelcome, that continued advances fit the definition of sexual harassment.

On the other hand, some forms of sexual harassment, for instance, indecent touching or rape, are so serious that the perpetrator knows that the conduct will be unwelcome. There is no need for the victim to first communicate its unwelcomeness.

WORKPLACE CODES

Most victims of harassment feel humiliated, but they are not always sure whether equity in the workplace is at risk. It is here that workplace policies consistent with the Code are immensely helpful.

The Code suggests that employers should have formal and informal procedures to address complaints of sexual harassment and that the victim should be able to choose the procedure.

The informal procedure is ideal to address unwelcome courtships or to prevent minor forms of unwelcome sexual conduct from escalating into full blown sexual harassment which impacts on the victim's employment. If the recipient experiences full blown sexual harassment then the formal procedure, resulting in disciplinary action, is more appropriate.

If employers have not put a policy in place, unions or employees should pressurise employers to introduce one. Such a policy has at least two benefits. First, the Code clearly states that the existence of a sexual harassment policy which is effectively communicated to employees, is a factor which an adjudicator will taken into account when determining employer liability for sexual harassment. Secondly, communication of the policy, and employees knowing the consequences of sexual harassment, may serve as a deterrent.

REDRESS: WHICH LAW TO USE

A word of warning. In Media 24 the court ordered the employer to pay about R800 000 damages to the victim. A victim of sexual harassment in the workplace may pursue the matter in terms of the Employment Equity Act or in terms of the common law. The claim in Media 24 was brought in terms of the common law. The Supreme Court of Appeal, however, made it clear that it will only consider a claim for damages for sexual harassment if it resulted in a recognised psychiatric injury such as post traumatic stress syndrome. The common law court requires a severe emotional condition before it will order payment of damages for sexual harassment. The temptation of huge payments should therefore not lure a victim of sexual harassment into pursuing the matter in terms of the common law unless s/he really is suffering from a severe psychiatric condition.

The Employment Equity Act, read together with the Code, requires that the victim proves unfair discrimination. It does not require that the victim must suffer from an illness as a result of it. The Act therefore is often a more effective tool in combating sexual harassment than in using the common law. In any event, the Labour Court's powers are still broad enough for damages to be ordered.

A good example is the recent Labour Court judgement, Christian versus Colliers Properties.[3] Ms Christian only worked for three days when she was fired because she failed to accept her boss' sexual advances. Since the reason for the dismissal was related to sexual harassment, the Labour Court ordered the maximum compensation permitted by the Court for an unfair dismissal. In addition to this, the Labour Court, taking note of the humiliation and impact of the sexual harassment on the career of a young woman, ordered an additional R10 000 damages. If Ms Christian had pursued her case in common law, it is unlikely that she would have received any damages. This is because in her case there was no suggestion that she was suffering from a recognised psychiatric injury.

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[i] Government Notice 1357 of 2005 published on 5 August 2005.

[ii] CA MacKinnon Sexual Harassment of Working Women: A Case for Sex Discrimination (1979).

[iii] [2005] 5 BLLR 479 (LC).

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