

# Women taking back the workplace

Countrywide celebrations recently held to mark national Women's Day have come and gone but the problems facing women in their communities and at work remain. **Thandi Orelyn** re-examines the status of sexual harassment, which she argues remains fraught with social connotations that have subjugated women in the workplace for decades.

Until recently social forces, fear and archaic legal notions conspired to conceal this malignancy. In most instances, women are victims and men are perpetrators of sexual harassment in the workplace. This does not mean, however, that men are not victims of sexual harassment, the more so now that same-sex relationships are becoming increasingly acceptable. And it is worth noting that men

are still ashamed to come forward to report sexual harassment against them, be it perpetrated by a man or a woman.

It is a general principle of employment law that the employer has a duty of care to ensure that the workplace is an environment free from sexual harassment. To ensure this, the employer must appropriately communicate to employees that sexual harassment will not be tolerated. Where necessary, the employer must educate and counsel employees with regard to the workplace policies on sexual harassment. When incidents of sexual harassment are brought to the attention of the employer, the employer must take firm and decisive steps to address the problem.

The Employment Equity Act (EEA) creates vicarious liability for the employer for sexual harassment in the workplace about which the employer is aware but has failed to take the appropriate steps to eliminate. This vicarious liability has also been recognised by the South African courts.

It is not uncommon for co-workers to enter into welcome and mutual relationships in the workplace. However, when such sexual attention, even though once welcomed, becomes unwanted, it can become sexual harassment.

The 1998 Code of Good Practice on the Prevention of Sexual Harassment defines sexual harassment as 'unwanted conduct of a sexual nature'. In this definition, the word 'unwanted' is of particular importance. On the other hand, the 2005 Code defines sexual harassment as '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:

- whether the harassment is on the prohibited grounds of sex and/or gender and/or sexual orientation;
- whether the sexual conduct was

- unwelcome;
- the nature and extent of the sexual conduct; and
- the impact of the sexual conduct on the employee'.

A single incident of unwanted conduct of a sexual nature can constitute sexual harassment. Such conduct is deemed to be unwanted and/or unwelcome where 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.

Examples of sexual harassment in the code include unwelcome physical, verbal or non-verbal conduct, such as unwelcome innuendoes, suggestions and hints, sexual advances and comments with sexual overtones.

## VICARIOUS LIABILITY OF THE EMPLOYER

The common law doctrine of vicarious liability and section 60 of the EEA, regulate the liability of an employer for sexual harassment. Section 60 of the Act also states that the 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 its employees would not act in contravention of this Act. The purpose of section 60 therefore is to penalise an employer who fails to address equity in the workplace.

In terms of the common law doctrine of vicarious liability, the victim must prove that:

- A person who committed the act of sexual harassment was an employee of the employer.
- The person who committed the act of sexual harassment committed a delict against the victim.
- He/she did this while acting within the course and scope of his/her employment.



# on the **shopfloor**

## **WHERE THERE WAS A PREVIOUS RELATIONSHIP**

In *Ahmod and Fire Appliances Limited [2004] 5 BALR 529 (MEIBC)*, the employee, a technician, was dismissed for pursuing a relationship with a female colleague despite her indicating that his advances were unwanted. The employee and his colleague had previously had a relationship, which she had ended. The employee had also previously promised management that he would desist from communicating with the colleague.

The employer, not wanting to be vicariously liable for the conduct of the employee had no option but to take disciplinary action in the form of a dismissal. The employer reasoned that by communicating with the colleague, the employee had breached his undertaking to the employer. The employee's conduct was persistent and unwanted and was therefore covered by the definition of sexual harassment in the Code of Good Practice. The colleague or 'victim' was emotionally upset. She claimed that she was stressed and felt that her reputation was being lowered. People were asking her questions about the relationship and it was interfering with her dignity. She had brought these concerns to the employer on more than one occasion.

Apart from the written undertaking not to communicate with the victim, the employee also verbally undertook that he would resign should he breach the written undertaking. His communication with the victim included sending her gifts, telephoning her, writing to her and sending her a map of how to get to his office for non-business purposes. On one occasion he had telephoned her at one o'clock in the morning.

The nature of the employee's written undertaking was also considered during

the proceedings. The undertaking was compared to a warning. It was found that if the undertaking amounted to a warning then it would have expired through the passing of time, however, the actual wording of the undertaking made it a timeless undertaking. After taking into account the employee's admission, the nature of the undertaking and the fact that the employee's conduct was a series of unwanted communications with the victim, the dismissal for sexual harassment was upheld.

Unlike most other cases of sexual harassment, this case involved employees who had engaged in a mutual relationship that had turned sour. In cases such as these once welcomed sexual attention becomes sexual harassment.

Sexual harassment is an invasion of a person's dignity and privacy, irrespective of whether the harassment is physical or verbal. The negative consequences of sexual harassment can include hostility in the work environment, negative and emotional repercussions and/or an impairment of the employees' work performances.

#### VICARIOUS LIABILITY UPHELD

In the case of *Media 24 Limited and Gasant Samuels v Sonio Grobber*, the Supreme Court of Appeal (SCA) addressed the question as to whether the employer, in this case Media 24 Limited, was vicariously liable for the sexual harassment of Grobber by Samuels. The judgment handed down on 1 June 2005 by the SCA upheld the findings of the trial court – the Cape High Court. Media 24 Limited had assumed liability for the obligations of *Nasionale Tydskrifte Limited* and on this basis the trial court had found that Media 24 Limited was vicariously liable for the sexual harassment.

Media 24 appealed the Trial Court's decision that it had negligently breached the legal duty owed to Grobber to take reasonable steps to prevent her from being sexually harassed in her workplace. The company took the matter on appeal to the SCA, which dismissed its appeal. In delivering the judgment the court held that

'It is clear that the legal convictions of the Community require an employer to take reasonable steps to prevent sexual harassment of its employees in the workplace and to be obliged to compensate the victim for the harm caused thereby should it negligently fail to do so. I do not think that the fact that the legislature has enacted legislation providing a statutory remedy for unfair labour practices involving sexual harassment justifies a holding that ... the common law is defective in failing to provide a remedy in a situation which cries out for one.'

#### AVOIDING VICARIOUS LIABILITY

In *Zimema vs CCMA 2001 2 BLLR 251 (LC)* the dismissed employee had brought an application for leave to refer the matter directly to the Labour Court after he was dismissed on charges of various allegations of misconduct, including sexual harassment. He then filed a further application to review the decision of the presiding officer of the disciplinary inquiry. The background to this case was that an employee of the CCMA had reported being sexually harassed by the perpetrator. The perpetrator apologised and had subsequently stopped the sexual harassment. The perpetrator started harassing and victimising the employee a while thereafter, causing the employee to resign on the basis of constructive dismissal. Upon investigation the employer found that the perpetrator had indeed sexually harassed the employee and following a disciplinary action he was dismissed. The court did not address the issue of sexual harassment as the matter was dismissed on the jurisdictional point.

In the above case the complaints of sexual harassment were brought to the attention of the employer. The employer, after consulting the relevant parties, took necessary steps to eliminate the alleged conduct. An apology was elicited from the employee with the employee's promise to desist from further such conduct. When the employee resumed the alleged conduct, he was formally charged and, following a disciplinary enquiry, he was dismissed. In

these circumstances vicarious liability as set out in the Act, would not attach to the employer as the employer had done all that was reasonably practicable to ensure that the employee did not contravene the Act.

#### VERBAL SEXUAL HARASSMENT

In the case of *PSA on behalf of Ferreira & Another/Department of Labour (2004) 8 BALR 1001 [JPSSBC]* the employees were involved in a breakaway training session. The session lasted a week, during which time lewd comments and remarks were made to a female employee. The comments were in bad taste and had sexual references. Most of these comments were made in public and were demeaning to a female employee. As a result of the comments she felt distressed and traumatised and required medication and counselling from both a psychiatrist and psychologist. She had felt disgusted and insulted by the comments. Despite her being upset, the other employees persisted in their verbal sexual harassment. They did not show any remorse.

Verbal sexual harassment was prohibited in terms of the employer's policy and the relevant code of good practice. In reaching a decision the arbitrator stressed that every person has the right to dignity and to be treated with respect and therefore every person has a right to accept some advances and to reject others. The arbitrator accordingly found that the comments were unwelcome, had a negative effect on the female employee and that the manner in which they were made constituted sexual harassment. The dismissal of the employees who had made these comments was found to be substantively fair.

#### GENDER BASED PERCEPTIONS OF SEXUAL HARASSMENT

During the course of my practice I was instructed to investigate and make recommendations in relation to circumstances arising out of a disciplinary inquiry and appeal relating to a sexual harassment matter. Briefly the facts of the matter were that an employee, a man, was

alleged to have sexually harassed his supervisor, a woman. The alleged victim immediately reported the matter to the CEO, to whom she directly reported. The CEO immediately took action to investigate the matter and appointed a person to chair the disciplinary inquiry. The head of the disciplinary inquiry was a woman and after the matter was heard she found the man guilty and dismissed him. The alleged perpetrator then lodged an appeal and the CEO appointed a man to hear the appeal. The man overturned the decision of the head of the disciplinary hearing, finding the alleged perpetrator not guilty. What became very clear to me in this case was the approach adopted by men and women relating to sexual harassment and how one defines sexual harassment. It also indicated the perception that people have of sexual harassment and how it impacts on people based on gender and race.

#### FRAMING A MAN

During the course of last year one of my clients requested that I investigate allegations of sexual harassment. The fact was that the employees were at a social gathering. One of the senior managers was accused of sexually harassing a secretary/administrator in his department. I met the alleged perpetrator, as well as the alleged victim with her husband. Both furnished me with names of people who were present at the function and alleged to have been present during the alleged sexual harassment. I managed to interview all the players in the matter. Only the alleged victim and her husband alleged that sexual harassment had taken place. None of the other people present, in their representations, corroborated the alleged victim's allegations against the alleged perpetrator. On the basis of all the information put before me I concluded that there was no basis to charge the alleged perpetrator. Having heard information that the woman had previously, with the support of her husband, brought a dispute to the CCMA against a previous employer on sexual harassment, I decided that I could

not accept their allegations. This case clearly brought to my mind that there are instances where women can try to frame men on sexual harassment charges.

#### WHERE THE ALLEGED PERPETRATOR IS NOT AN EMPLOYEE

An employer approached me after he received written submissions of an alleged sexual harassment incident perpetrated by a guest of the company. The employee, had spent a weekend with the guest on company business. The employer would have no recourse in terms of charging the guest, but I advised the employer to investigate the matter. We asked the employer to invite comments from the guest. After putting the allegations to the guest, we received a detailed statement from him denying all the charges levelled against him. Having considered both the statement from the employee and the one from the guest, we came to the conclusion that there was no conclusive evidence of sexual harassment and, in any event, the employer could not take the matter any further.

Prior to this incident, the employer had put the employee on terms with regard to her conduct and performance. We came to the conclusion that the employee was trying to divert attention from the issues raised by the employer against her. Having advised the employee that the employer was not going to take any action against the guest and the matter had been closed, we assisted the employer to pursue the matters relating to the employee's conduct and performance. Once again it was clear that the employee used the allegations of sexual harassment as a way to avoid action against her in relation to conduct and performance.

#### CONCLUSION

Both these cases should pose a question on allegations brought by employees of sexual harassment. On the other hand the employer cannot take sexual harassment charges lightly, which is very prevalent in the workplace. Based on my experiences and particularly the aforementioned two

cases, investigators and chairpersons of sexual harassment allegations have to adopt a very cautious yet objective approach. The following are some of the broad guidelines I have adopted:

- guard against over-empathising with either the alleged victim or the alleged perpetrator;
- take the social, cultural and psychological background of both the alleged victim and perpetrator into account;
- bear in mind that each alleged victim's perception of what constitutes sexual harassment may be different;
- take the known historical background of the alleged victim and the alleged perpetrator into account;
- consider all the circumstances surrounding the allegations;
- where possible, obtain representations of employees who know either or both of the alleged victim and alleged perpetrator;
- consider whether a reasonable person in the same circumstances as the alleged victim would have construed the actions of the alleged perpetrator as being sexual harassment;
- consider whether a reasonable person in the same circumstances as the alleged perpetrator would have acted in the manner that he or she allegedly did.

Above all, these considerations should always keep the objective definition of sexual harassment in context.

Based on this definition and the jurisprudence that has emerged, there is clear guidance on how employers must address cases of sexual harassment. Systems and policies must be put in place to deal extensively with the prevention and management of sexual harassment and employers must give clear guidelines and direction to managers.

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