Unfair discrimination in the Workplace with emphasis on Sexual Harassment.

The law on unfair discrimination and its application was largely reserved for the Labour Courts as the jurisdiction of discrimination disputes lay predominately with the Labour Courts and not with CCMA for final adjudication. This then resulted in many cases of the unrepresented applicant (who could not afford to have his /her matter referred to the Labour Court), ending at Conciliation level at CCMA.

In light of the amendments to the labour laws, and in particular Sections 6 to 10 of the Employment Equity Act 1998 (EEA), these disputes may now be arbitrated by CCMA Commissioners. It is thus foreseeable that more employers will now have to defend unfair discrimination matters as the CCMA is an inexpensive forum for the lower income employees. Section 6 (1) states that 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 of social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth, or on any other arbitrary ground. This article shall focus to a greater extent on sexual harassment in the workplace as this is a growing problem in South African companies.

Section 6 (3) of the EEA states that 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). Sexual harassment is a form of discrimination based on sex and/or gender and/or sexual orientation. Section 10 of the EEA deals with the dispute resolution mechanisms. It stipulates that an employee may refer the dispute to the CCMA for arbitration if the employee alleges unfair discrimination on the grounds of sexual harassment. (See Section aA). This proviso makes no mention as to the earnings of the employee, hence even though the employee is above the BCEA threshold (earning more than R 205 433.30 per annum), the section would still apply. There are no limitations on earnings for cases of sexual harassment that are referred to the CCMA for Arbitration.

Du Toit and Potgieter in their book Unfair Discrimination comment as follows on page 34 with regard to harassment:

‘Though harassment is not defined in the EEA, its general meaning is well known. According to the dictionary it means to ‘torment’ (someone) by subjecting them to constant interference or intimidation, to ‘annoy persistently’ or to create an unpleasant or hostile situation especially uninvited and
unwelcome verbal of physical conduct. The Courts however require a legal definition in order to decide whether the alleged harassment falls within the scope of Section 6 (3).’ …’Sexual harassment is probably the most prevalent form of harassment in the workplace, not only in South Africa but world-wide. Harassment of women is rife because, typically the perpetrator is more senior and the victim is afraid or reluctant to report it.’

The burden of proof is firstly on the applicant (victim), to make out a prima facie case of discrimination. Thereafter, the respondent or employer must prove on a balance of probabilities that such discrimination:- (a) did not take place as alleged; or (b) is rational and not unfair, or is justifiable. See Section 11 of the EEA. This is because the discrimination is on a listed ground.

The Amended Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace (Code) is of significance as the objective of the Code is to eliminate sexual harassment in the workplace. Although the Code does not have the force of law, it serves as an important guideline in interpreting the law and assisting employers in preventing and remedying cases of sexual harassment. The Code encourages and promotes the development and implementation of policies and procedures that would lead to the creation of workplaces that are free of sexual harassment.

Further, as per Clause 4, the test for sexual harassment is defined as the 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: (1) whether the harassment is on the prohibited grounds of sex and/or gender and/or sexual orientation, (2) whether the sexual conduct was unwelcome and the unwelcome nature of the conduct may be also be communicated by non-verbal means, example 'walking away', (3) the nature and extent of the sexual conduct, and (4) the impact of the sexual conduct on the employee. The conduct should constitute an impairment of the employee’s dignity taking into account the circumstances of the employee and the respective positions of the employee and the perpetrator in the workplace.

The unwelcome conduct must be of a sexual nature, and include physical, verbal or non verbal conduct. Physical conduct of a sexual nature includes all unwelcome physical contact, ranging from touching to sexual assault and rape, as well as strip search by or in the presence of the opposite sex.

Verbal conduct includes unwelcome innuendos, suggestions, hints, sexual advances, comments with sexual overtones, sex related jokes or insults, graphic comments about a person’s body made in their presence or to them, inappropriate enquiries about a person’s sex life, whistling of a sexual nature and
the sending of electronic means or otherwise of sexually explicit text. It is also noted that a single incident of unwelcome sexual conduct may constitute sexual harassment.

Hence, what is evident from the definition of sexual harassment or unwelcome conduct, is that it constitutes a rather wide range of behaviour and employees have to be sensitised to what constitutes sexual harassment through the distribution of the harassment policy and proper feedback information sessions for those employees who may not fully understand the policy. The Code specifically states that all employers / management and employees have a role to play in contributing towards creating and maintaining a working environment in which sexual harassment is unacceptable. It is required that management take appropriate action in accordance with this Code where instances of sexual harassment occur in the working environment.

Section 48 (2) of the EEA refers to Section 50 (2) (a) to (c) and permits compensation as well as damages to be awarded for unfair discrimination. Damages however is limited to the Basic Conditions of Employment Act threshold, which currently stands at R205 433.30 per annum. Section 50 (2) (c) permits an order directing an employer to take steps to prevent the same unfair discrimination or a similar practice occurring in the future in respect of other employees. Case law has held that damages would connote a monetary award for patrimonial loss, the actual or potential monetary loss, examples would include past and future medical expenses, past and future loss of income, loss of support etc. Compensation connotes a monetary award for non patrimonial loss including solatium. These are illiquid claims, not immediately capable of determination including claims of pain and suffering, loss of dignity, trauma, disfigurement, humiliation, etc. It is conceivable that cases of unfair discrimination may involve actual loss for the claimant as well as loss for injured feelings. The purpose of an award of damages for patrimonial loss by means of monetary award, is to place the claimant in the financial position he or she would have been in, had the discrimination not happened. In the case of compensation for non-patrimonial loss, the purpose is to redress the insult, injury, humiliation or dignity that was hurt due to the unfair discrimination. The order must be appropriate and ‘just and equitable’ in the circumstances. The Labour Appeal Court has awarded up to R50 000 for solatium (injury to one’s dignity and feelings) and this is over and above compensation for patrimonial losses. (South African Airways (Pty) Ltd v V and Another (CA9/13, C420/2006) ZALAC 27)
It is thus integral that companies have a proper sexual harassment policy in place and that this policy is aligned with the current Amended Code on Sexual Harassment in the Workplace. The policy must be distributed to all employees and relevant employees must undergo proper training in order to deal with complaints of sexual harassment. Failing which, the employer may run the risk of being found liable of improper management of claims of discrimination in the workplace and that can be a costly lesson to learn.

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