

Sexual harassment at the workplace in the hospitality industry

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Abstract

This research paper is a conceptual analytical one which discusses the issue of employee sexual harassment in the hotel industry and the legal avenues open to victims. By unpacking and analyzing the issue, a better understanding of what can be done to obviate sexual harassment can be obtained. The article thus strives to make important information available to those who are employed in the industry and also makes suggestions as to what policies should be implemented by hotel managers to make the workplace safer and more ethical in orientation for employees. The article sets out the various bases of claim or causes of action that are at the disposal of an employee who has been sexually harassed at work. The article sets out under what circumstances each cause of action is applicable and the amount and type of compensation that can be awarded in each case in terms of South African labour law.

Keywords: Sexual harassment, hotels, hospitality, employees, policies, ethical practices, constructive dismissal, vicarious liability, automatically unfair dismissal.

Introduction

The hospitality industry has become a global economic and social phenomenon as it demonstrates above average growth year after year since the 2009 economic calamity and is currently creating millions of new jobs. Women comprise roughly 70% of the global hotel workforce and the result is that sexual harassment is an issue that is afflicting the workplace of today's hospitality industry. Women are employed in a wide assortment of roles, including inter alia, as front-line customer service, food and beverage operations employees, cleaning services workers, human resources administration, accounting, housekeeping, marketing, general workers and some are at senior management levels. Travel and tourism, including hospitality, is generally estimated to lead to at least 120 million jobs by 2022, thus reaching a total of tourism employment positions worldwide of as many as 328 million jobs. This is equivalent to nearly one in 10 jobs in the global workforce (WTTC: ILO presentation at the T20 Ministerial meeting 2012 in Mexico). The intrinsic features of service organisations make them fertile ground for sexual harassment. Viewed worldwide, the general percentage of women's involvement in the hospitality and tourism labour force accounts for up to at least 55.5 per cent of all employees (ILO Laborsta, <http://laborsta.ilo.org/>).

The very nature of the service production practices are inextricably related to the close involvement of guests, and behavioural norms are usually established around the notion of satisfying a guest's expectations and ideally exceeding their expectations. Research demonstrates that ethical practice is a critical issue in the hotel business and, specifically, in human resources management related issues. How employees' view their organization's ethical climate is related to their job satisfaction, organizational commitment, and even their organizational performance (Pettijohn, Pettijohn, & Taylor, 2008). Thus where there is sexual harassment, this will have a huge negative impact on the employee and the workplace. Sinclair (1997) asserts that women in hospitality comprise up to 70% of the total workforce and undertake more than 70% of all work in the informal hospitality sector as well (Sinclair, 1997)

There is an immense cost to business when it comes to sexual harassment. As early as 1988, *Working Women* magazine surveyed 160 of the "Fortune 500" manufacturing and service companies in the USA, representing at least 3.3 million employees (Sandroff, 1992). The magazine ascertained that the average company lost about \$6.7 million a year in decreased productivity, increased absenteeism and higher employee turnover which was a direct result of sexual harassment. This does not of course, consider the human anguish and utter distress to victims. Hotel front line staff often find themselves bearing the brunt of abusive and sexual behaviour from guests. When the renowned Dominique Strauss-Kahn was accused of assaulting a maid Nafissatou Diallo, who was sent to clean his hotel room, hospitality workers considered the story to be highly credible. In addition in a *New York Times op-ed*, Jacob Tomsky, an ex-hospitality employee stated that housekeepers are assaulted by guests "more often than you'd think," and that their employers don't offer much protection (Robb, 2014).

Workplace sexual harassment on the basis of an employee's age, disability, gender, race, colour, religion, and sexual orientation is unlawful and must be prevented at all costs. Unfortunately sexual harassment remains the most prevalent type of harassment that takes place and forms the basis of countless lawsuits. It is so pervasive that many women try to cope with the problem by developing a coordinated strategy which for example, may often include appealing to other housekeepers to be with them when they are assigned to clean the room of a perverted guest (Robb, 2014). Unfortunately, the true extent of sexual harassment in the workplace is very often cloaked in a 'conspiracy of muteness' which veils the issue. The victims often leave the company to escape any further harassment from either guests or colleagues. The hotel never really knows the real reason at any time.

Eller (1990) asserted decades ago that the maintenance of a stable workforce is a critical success factor in supporting a competitive advantage. The hotel industry as then now also faces high staff turnover, and thus high labour costs, and a shrinking supply of employees. Sexual harassment has had a significant role to play in this situation and presents severe economic, social and competitive issues for a hotel. A successful hotel needs employees to work in harmony and to feel safe in the workplace. Where there is sexual harassment this invariably creates poor working relationships which negatively impact on the hotel either directly or indirectly. In a recent article in the journal *Gender, Work & Organization*, a team of researchers interviewed female employees of 5-star hotels on the Gold Coast, and discovered that of 46 women who participated in the study, at least 44 had experienced some kind of improper advance from a male guest and this ranged from jokes to suggestions to even assaults (Robb, 2014).

When women secure 'decent work' this is crucial and it makes it possible for them to build a more promising future for themselves, their families and the wider community. Sustainable development is achieved through the contributions of both women and men. The socially

created gender roles and the biological differences between the sexes and how people interact in the world of work are thus at the centre of the concept of decent work (ILO, 2009). The hotel industry is especially susceptible to incidents of sexual harassing behaviours as a result of its social characteristics. Anything which negatively impacts on decent work and breaks it down is unacceptable, unethical and probably illegal. Sexual harassment is, on the basis of any protected status, deemed to be unlawful and should be clearly explicated in a hotel's employment policies, as well as in any internal employee training that employees may undertake.

It is not only guests who are problematic when it comes to sexual harassment. Very often managers in restaurants will intentionally require female employees such as waitresses to be flirty with customers and reserve better shifts and tables for waitrons who will be willing to dress a certain manner. It seems that for waitrons, sexual harassment is simply a part of the job. In fact eighty percent of women working in the restaurant industry have reported that they have being harassed by customers at some point and sixty six percent said they experienced some kind of sexual harassment from managers on a monthly basis. Often whimsical customers feel unconstrained to receive more than they're owed, and they thus have a big say in how much waitrons get paid via tips (Berman, 2014). In many restaurants, waitrons rely on the munificence of customers to make a living, so they have a need to be liked by them. In a survey conducted with 688 restaurant workers, women working in tipped eateries in states in America using the federal tipped minimum wage unsurprisingly reported the highest rates of sexual harassment. In such restaurants waitrons only receive a fixed rate of \$2.13 per hour and customers need to furnish the rest of their wages. Guest-initiated sexual harassment is insidious and normalized within the hotel workplace due to the relatively low status of hospitality employees. This causes them to be particularly vulnerable to instigators of sexual harassment which engenders a devastating impact on individuals that are affected by it and may lead to a severe loss of morale and efficiency and ultimately also impact on the sustainability of a hospitality industry business.

Towards a definition of sexual harassment

Sexual harassment is difficult to define but Palmer asserts that:

Sexual harassment is usually defined as unwelcome sexual advances, requests for sexual favours, or other verbal or physical conduct of a sexual nature, when submission to or rejection of such conduct is used as a basis for employment decisions affecting an individual, or where such conduct has the purpose or effect of interfering unreasonably with the individual's work performance, or creates an offensive, hostile or intimidating working environment (Palmer, 1997).

The European Commission Code of Practice has defined sexual harassment as:

Unwanted conduct of a sexual nature, or other conduct based on sex affecting the dignity of women and men at work. This can include unwelcome physical, verbal or nonverbal conduct.

There are essentially two types of sexual harassment namely "tradeoffs" and "hostile environment". "Tradeoff" harassment takes place for example, when a hotel employee in a position of authority makes employment decisions based on an employee's compliance to, or

rebuffing of either sexual advances or behaviour. This may thus relate to *inter alia* hiring of employees, dismissals, pay rises, task selection for employees, promotion and work shifts.

The "hostile environment" harassment arises when either verbal or non-verbal hostile behaviours or statements are directed at another person on a sexual basis. Such statements or behaviours are unwelcome, demeaning and generally negatively impact on an employee's ability to work effectively and efficiently. Such harassment may comprise of jokes or teasing with a sexual innuendo, suggestion, offers to date, speaking about another person's body parts or sexual activities, images of scantily clad women or men, inappropriate touching and unpleasant or menacing e-mail or electronic messages.

Sexual harassment thus assumes a wide range of forms and may be displayed by a multiplicity of employees and management. Verspreij (1995) explains that sexual harassment includes suggestive remarks, any teasing or taunting of a sexual nature, unwelcome physical conduct or sexual advances, sexual joking, boasting about one's sexual prowess, office or locker-room posters of a sexual nature and compliments with sexual connotations.

Women in the hotel industry are invariably at an amplified risk for sexual harassment due to the feminine role nature of their work, for example as housekeepers and their deficiency of power relative to their guests. Many work cleaning bedrooms which are generally considered to be intimate places and this triggers a negative response in some male guests. In addition to this, women servicing rooms are usually isolated. A hotel may be deemed to be vicariously liable for sexual harassment of any employees if a general manager has prior knowledge of such conduct that utterly contaminated the employee's work environment. In addition, hotels require effective anti-harassment policies and simple complaint procedures to be in place. It must be made clear to guests that this type of behaviour cannot be tolerated and is a criminal offence.

Sherry (1995) says that:

A hostile environment exists wherever employees are exposed to persistent and unwelcome lewd remarks, sexual taunting, talking in seductive tones, queries about one's personal life, suggestive sounds, obscene gestures, pinching, touching and references to anatomy and physical appearance by anyone entrusted with control of company policy if the acts were performed in the execution of a corporate function.

Hotels thus need to take steps to address sexual harassment in the workplace. The organization that has an ethical climate reduces turnover, enhances service quality and visitors' service experience, and increases the hotels' productivity and profit margins. Integrity in service is reported by hotel managers to be the second most important dimension of leadership, following professionalism (Wong & Chan, 2010). It is crucial that hospitality ethics education strives to create an ethical basis for all work activities in the hotel industry (Lee & Tsang, 2013). Given the high incidence of sexual harassment globally in hotels, managers should be promoting far more ethics education and training for hospitality students before they embark on their careers in the industry. This training should include aspects related to sexual harassment and possible procedures and policy principles. In a study in China, Yeung and Pine (2003) reported that hospitality students state that sexual harassment is definitely an important ethical issues in the hotel industry and thus requires addressing. In the hotel sector, scant attention has been paid to

the ethical issues and dilemmas which employees face in the hospitality sector, especially sexual harassment. Ethical issues such as sexual harassment should be a major concern area due to the intrinsic characteristics of the hospitality sector (Jung, Namkung, & Yoon, 2010).

In another study by Stevens (2001), students as well as human resources managers viewed sexual harassment as a highly unethical act needing attention. Hotels thus need to establish effective formal written policies and procedures which are designed to educate employees about sexual harassment issues. Where there are relatively high degrees of social contact in the hotel workplace, coupled with unusual hours of employment and often irregular hours involving evenings and involvement with many guests in the course of delivering service, strong anti-sexual harassment policies must be in place.

The main reasons for urgent action concerning effective sexual harassment policies other than the most obvious attacks on one's rights and physical being, include the huge waste of time and money which may be needed for involved employees to focus on lawyers and lawsuits, rather than on the operation of a hotel. Secondly, a workplace in which there is inappropriate sexual harassment will surely impact employee morale negatively and result in inefficiency and lower productivity. Thirdly, once a sexual harassment issue becomes public knowledge it will be devastating for a hotel's future business. Fourthly, where there are lawsuits, the financial impacts can be huge. A hotel can be held liable in certain scenarios for the acts of its supervisors, thus there are strategic decisions that must be made early on to proactively combat the scourge of sexual harassment. Effective codes of conduct need to be crafted and applied to the intent and letter of the law.

Where there are effective codes of conduct in place the issue of sexual harassment can be reduced as employees will know what to do. However a lack of an ethics code of conduct may exacerbate the problems faced by an employee (Beck, Lazer, & Schmidgall, 2007). Ethical guidelines are critical to guide employees in the workplace to identify what is a question of ethics and how to handle ethical any issues that may arise in all operations. The ILO (2010) states that gender equality needs to go beyond the workplace since gender inequalities and discrimination against women is huge globally, but women should also be treated well in the workplace. Harris et al (2011) state that: "Traditionally women are employed in roles that are considered representative of their domestic roles, using the same skills base", but this does not mean that they should be harassed and molested by guests or maltreated in their jobs, for example by undertaking heavy duty cleaning, including floor polishing in large public areas, and also operating "heavy" equipment and pool cleaning and maintenance, even the cleaning of outdoor areas such as the hotel's driveways that should be done by stronger men (Knox, 2008).

The majority of employees and managers in hotels are still relatively unsure about what constitutes sexual harassment in the workplace since what may be considered sexual harassment to one employee may be simple social interaction to another. This is where the law is important.

Sexual harassment at the workplace and the law in South Africa

There are two pieces of legislation that deal directly with sexual harassment: The Employment Equity Act 55 of 1998 (EEA) and the Promotion of Equality and the Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA). The EEA deals with unfair discrimination including sexual harassment at the workplace whereas PEPUDA deals with unfair discrimination including sexual harassment that takes place outside of the workplace. Since PEPUDA deals with unfair

discrimination that takes place outside of the workplace its provisions are beyond the scope of this article.

The Labour Relations Act 66 of 1995 (LRA) deals with sexual harassment as a form of unfair discrimination in a more indirect manner. Section 187 of the LRA provides that a dismissal is automatically unfair if the reason for the dismissal is unfair discrimination based on any arbitrary ground including *inter alia* gender or sex.

The common law provides for liability on the part of the employer in the form of vicarious liability of the employer for the wrongful or unlawful acts of its employees and employer liability for its failure to provide a safe work environment for its employees. In addition the general principles of the law of contract can be of assistance to an employee who is sexually harassed at work. If the sexual harassment is a consequence of the employer's breach of contract the employer will be liable on the basis of the contract of employment. Finally, a victim of sexual harassment can also lay criminal charges against the perpetrator provided the particular act of sexual harassment also constitutes a crime. The discussion that follows explains all the above mentioned sources of liability for sexual harassment at the workplace in more detail.

The EEA

The South African Code of Good Practice on the Handling of Sexual Harassment cases in the Workplace (2005) is intended to provide guidance to a court and other persons in applying the provisions of the EEA. According to the Code sexual harassment in the working environment is a form of unfair discrimination and is prohibited on the grounds of sex and/or gender and/or sexual orientation. The Code provides that the following factors are relevant in determining whether an act constituted sexual harassment:

- Whether the sexual conduct was unwelcome;
- The nature and extent of the sexual conduct; and
- The impact of the sexual conduct on the employee.

Sexual harassment can take the form of physical conduct, verbal conduct, non-verbal conduct, victimization.

Section 6(1) of the EEA provides that no person may unfairly discriminate against an employee, or an applicant for employment, in any employment policy or practice, on the basis of inter-alia sex and gender. Section 6(3) of the EEA provides that harassment of an employee is a form of discrimination where the harassment is based on any one of the grounds listed in section 6(1) of the EEA.

An "employment policy and practice" is defined in section 1 of the EEA as including but not limited to the following:

- a) recruitment procedures, advertising and selection criteria;
- b) appointments and appointment process;
- c) job classification and grading;
- d) remuneration, employment benefits and terms and conditions of employment;
- e) job assignments;
- f) the working environment and facilities;
- g) training and development;
- h) performance evaluation systems;
- i) promotion;

- j) transfer;
- k) demotion;
- l) disciplinary measures other than dismissal; and
- m) dismissal.

The definition of employment policy or practice therefore refers to human resources processes starting from the interview process of the employee right through to dismissal or the end of the relationship of employment. This prohibition of discrimination therefore is not directly relevant where for example an employee is sexually harassed by client.

Section 60 of the EEA provides that if an employer directly encourages or even by its inaction allows or condones conduct which is in breach of the EEA, it will be vicariously liable for damages flowing from such breach. The section reads as follows:

- 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 any 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."

In order to avoid liability on the basis of the section an employer is obliged to put in place policies and procedures to prevent unfair discrimination of all forms including sexual harassment. In situations where employees sexually harass fellow employees, the employer must "take the necessary steps to eliminate the collegiate conduct."

Again section 60 does not assist an employee who is sexually harassed by a client as opposed to a fellow employee.

Regarding the amount of compensation an aggrieved employee who has been sexually harassed may claim in terms of the EEA, section 50(1) (d) and (e) provide that the Labour Court may make any appropriate order, including awarding compensation and damages "in circumstances contemplated in this Act". Section 50(2) of the EEA further provides that where an employee has been unfairly discriminated against the Labour Court may make "any order that is just and equitable in the circumstances" including payment of compensation and payment of damages by the employer to the employee.

The LRA

In terms of section 186(1)(e) of the LRA the following constitutes a dismissal:
"an employee terminated the contract of employment with or without notice because the employer made continued employment intolerable for the employee." This is commonly known as a "constructive dismissal". An employee's employment can become intolerable by the acts or omissions of an employer which result in the employee being harassed. In such a situation the dismissal will be construed as being automatically unfair. In terms of section 187(f) of the LRA 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”. The consequence of a dismissal being automatically unfair is that the maximum compensation which an employee may be awarded is 24 months’ salary calculated at the employees rate of remuneration on the date of dismissal (section 194(3) of the LRA). The maximum compensation that can be awarded if the dismissal is unfair but does not qualify as an automatically unfair dismissal is 12 months’ salary (section 194(1)). Furthermore in terms of section 193(3) of the LRA if a dismissal is automatically unfair, “the Labour Court may make an order that it considers appropriate in the circumstances.” For example, the Labour Court may in the case of a dismissal that constitutes an act of discrimination issue an interdict obliging the employer to stop the discriminatory practice in addition to another remedy it may grant.

In the case of *Intertech Systems (Pty) Ltd v Sowter* (1997) 18 ILJ 689 (LAC) Ms Sowter was sexually harassed at work by a fellow employee. The harassment consisted of unwanted telephone calls unwanted visits, been followed to her car, attempts at physical contact, declarations of affection, physical intrusions upon her person possessive conduct relating to who she talked to, how she dressed and how she conducted herself generally. As a result of Ms Sowter’s complaints to her employer about the sexual harassment an agreement was reached in terms of which the perpetrator would resign. The employer then used the services of the perpetrator on a consultancy basis. Consequently the harassment continued at the workplace because the perpetrator was at the workplace premises while working as a consultant for the employer. Ms Sowter consequently resigned. The Labour Appeal Court held that this constituted a constructive dismissal and that the dismissal was also automatically unfair because the reason for the dismissal was discrimination based on sexual harassment.

A constructive dismissal can be as a result not only of an employer’s acts but also of an employer’s inaction or omissions. The lack of an effective sexual harassment policy at the workplace or an employer’s inaction with regard to sexual harassment of employees by fellow employees or even clients may render continued employment intolerable for the employee. The resignation of an employee in such a situation within constitute a dismissal. Furthermore since the dismissal is based on discrimination in the form of sexual harassment the dismissal would be automatically unfair. In order to prevent liability for unfair dismissals, including automatically unfair dismissals employers would be well advised to take measures to put effective sexual harassment policies in place to protect employees against sexual harassment by not only the fellow employees but also by clients of the enterprise.

An employer can also commit an unfair labour practice by its acts or omissions which result in sexual harassment of any employee. In terms of section 186(2) of the LRA and unfair labour practice is defined as including “any unfair act or omission that arises between an employer and an employee involving promotion, demotion, probation, training, the provision of benefits, suspension, disciplinary action short of dismissal and the failure to re-employ or reinstate an employee contrary to the terms of an agreement”. As discussed above this kind of conduct also constitutes a breach of the provisions of section 6(1) of the EEA as the conduct would constitute an “employment policy or practice” as defined in section 1 of the EEA. Should the employer commit an unfair labour practice because its acts or omissions resulted in the employee being sexually harassed, the employee can claim a maximum of 12 month’s salary as compensation from the employer. (section 194(4) of the LRA.) Another example where sexual harassment could result in an unfair labour practice in terms of the LRA or a breach of section 6(1) of the EEA is if an employee is demoted because he or she refused to have sex with

manager or even a client. Alternatively the employee is not promoted or not given benefits that other employees are given because the employee was unwilling to provide a manager or client with sexual favours.

The Common Law

In terms of the common law an employer has a duty to take reasonable care of employee safety. Once again an employer's breach of this duty can take the form of an omission. Brassey explains that since employers "can be held liable for omissions, employers can be liable for failing to prevent people, such as suppliers, customers or employees, from causing the employees harm. They are likely to be held liable if they provided the opportunity or conditions for the injurious act or had the power to prevent it." (Brassey, 2000 : E 4:30) Therefore in situations where a reasonable employer would have foreseen the possibility of harm or injury to an employee and fails to take reasonable steps to avoid such harm or injury, the employer will be in breach of its common law duty to take reasonable care of employee safety.

In *Media 24 Ltd & Another v Grobler* (2005) 26 ILJ 1007 (SCA) the Supreme Court of Appeal held that it was "well settled" that employers owe their employees a duty to take reasonable care of their safety. The court went further and stated that this duty is not confined to protecting employees from physical harm but that it includes a duty to protect their employees against psychological harm as well. The court found that the legal convictions of the community required an employer to take reasonable steps to protect its employees against acts of sexual harassment by other employees. Failure to do so would result in employer having to pay compensation to the victim of such harassment. The employer's common law duty to take reasonable care of employee safety includes the prevention of harm caused by persons other than employees of the employer and it includes harm caused by clients and suppliers.

The common law duty of an employer to protect the safety of its employees is further cemented by the Constitution. For example, section 173 of the Constitution provides the High Courts, the Supreme Court of Appeal and the Constitutional Court with the inherent jurisdiction to develop the common law "taking into account the interests of justice."

There are various provisions in the Constitution that may broaden and certainly act to cement the employer's duty to take care of the safety of its employees:

- Section 173 of the Constitution provides the High Courts, the Supreme Court of appeal and the Constitutional Court with inherent jurisdiction to develop the common law "taking into account the interests of justice".
- Section 39(1)(a) obliges to promote the "values that underlie an open and democratic society based on human dignity, equality and freedom.
- Section 39(2) obliges the courts to develop the common law in line with the spirit, purport and object of the Bill of Rights.
- Section 9(3) provides that no person may unfairly discriminate against anyone on one or more grounds including sex.
- Section 10 provides that "everyone has the right to have their dignity respected and protected".

Just as the EEA provides for the vicarious liability of an employer in terms of section 60, so too does the common law. In terms of the common law an employer is liable for the wrongful acts of its employees. The court in *Grobler v Naspers Bpk* 25 ILJ 439 (C) found the employer

vicariously liable for the acts of sexual harassment of one of its employees. After considering the doctrine of vicarious liability in other common law jurisdictions, the court concluded that policy considerations justified its finding. However, as is the case with the legislative liability contained in section 60 of the EEA, liability is limited to the wrongful acts of employees and cannot be extended to clients or suppliers of the enterprise.

As discussed above, there is legislative provision for a constructive dismissal in terms of the LRA. In terms of the common law general principles of contract, in situations where a material term of a contract is breached, the other party will be entitled to cancel the contract. (Christie, 2006: 514) The term is material if it goes to the very root of the contract. If an employer by its acts or omissions renders employment conditions intolerable for an employee it constitutes a material breach of contract, entitling the employee to cancel the contract or resign. This amounts to a constructive dismissal. Since the resignation was a cancellation as a result of the breach of contract of the employer, the employee is entitled to claim compensation for such breach of contract. Implied in every contract of employment is a duty of mutual trust and confidence. (Bosch, 28). This implied term of trust and confidence is derived from English law. The term demands that “the employer will not, without a reasonable and probable cause, conduct itself in a matter calculated or likely to destroy or damage the relationship of confidence and trust between the parties”. (*Council for scientific and Industrial Research v Fijn* (1996) 17 ILJ 18 A at 26). Failure by an employer to take reasonable steps such as the implementation of effective policies and practices to reduce the risk or even eliminate the risk of sexual harassment of its employees by fellow employees or third parties such as suppliers and clients, may be construed as a material breach of the implied term of trust and confidence by the employer. Such breach would render the employees work intolerable and the resignation of the employee as a consequence thereof would amount to a constructive dismissal. As a result of the employers breach of contract the employee of compensation which an employee may claim. The court is at liberty to award an amount of damages that is just and reasonable in the circumstances and that places the aggrieved employee in the position he or she would have been in had the employer not breached the contract of employment.

Regarding the amount of compensation that can be awarded to an employee for a breach of contract or constructive dismissal the case of *Pretoria Society for the care of the Retarded v Loots* (1997) 18 ILJ 981 LAC at 985 is instructive. This case dealt with a constructive dismissal but because the previous Labour Relations Act (28 of 1956) was applicable there was no legislative cap on the amount of compensation a court could award. The Labour Appeal Court listed a number of factors that should be considered in determining the amount of an award for compensation. They are as follows:

- there must be evidence before the court of actual financial loss suffered by the person claiming compensation;
- there must be proof that the loss was caused by the dismissal;
- the loss must be foreseeable, in other words not to remote or speculative;
- the award must endeavour to place the applicant in monetary terms in the position in which he would have been had the dismissal or unfair Labour practice not been committed;
- in making the award the court must be guided by what is reasonable and fair in the circumstances. It should not be calculated to punish the party;
- there is a duty on the employee to mitigate his damages.

Criminal liability of the perpetrator

In order for sexual harassment to constitute a criminal offence the conduct must comply with the legal definitions of the possible crimes that coincide with sexual harassment. Sexual assault can also constitute the criminal offence of rape, assault, sexual assault and *crimen injuria*. Discussion of criminal liability with regard to sexual harassment is limited to a brief definition of all the different forms of sexual harassment which can also amount to a crime. Details of matters such as the onus of proof and what needs to be proved in each instance beyond the scope of this article.

Section 3 of the Sexual Offences and Related Matters Act 32 of 2007 (SORM) defines rape as follows: an act where a person unlawfully and intentionally commits an act of sexual penetration with a complainant without the consent of the complainant.

Sexual penetration includes “any act which causes penetration to any extent whatsoever by:

- a) the genital organs of one person into or beyond the genital organs, anus of another person;
- b) any other part of the body of one person or, any object, including any part of the body of an animal, into or beyond the genital organs or anus of another person; or
- c) the genital organs of an animal, into beyond the mouth of another person.”

Assault is defined as the unlawful and intentional application of force to the person of another, or inspiring belief in that the other person that forces immediately to be applied to him or her.(Burchell and Milton 680)

In terms of section 5 of SORM sexual assault occurs when a person unlawfully and intentionally inspires the belief in a complainant that the complainant will be sexually violated. Sexual violation is a term that is wider than rape and it includes sexual behaviour which does not necessarily involve penetration.

Crimen injuria is the unlawful and intentional impairing of the dignity or privacy of another person (Burchell and Milton, 2011: 747).

Conclusion

It is ironic that the most important piece of legislation enacted for the purpose of protecting an individual's constitutional right to equality and the right not to be discriminated against unfairly at the workplace provides no direct protection for an employee who has been sexually harassed at the workplace by someone other than an employee, such as a client or a supplier. This is because the EEA provides for the vicarious liability of the employer in terms of section 60 only for the acts of sexual harassment of employees. If the acts of sexual harassment are committed by anyone else the employer cannot be held liable. If the sexual harassment was committed by someone other than an employee the victim cannot base his or her claim on the basis of the EEA and will have to resort to the provisions of the LRA, the common law or criminal law, depending on the circumstances. The EEA only provides for indirect protection against sexual harassment in terms of section 6(1) of the EEA because the cause of action is based on discrimination in relation to a “policy or practice” at the workplace. Therefore the basis of the employee's claim will have to be some kind of occupational detriment such as a demotion or a failure to be promoted and not the sexual harassment itself. Therefore a deserving employee

who is overlooked for promotion because she will not have sex with the manager can claim on the basis of an unfair labour practice in terms of section 186(2) of the LRA or on the basis of unfair discrimination in terms of section 6(1) of the EEA. However, if she does not suffer any occupational detriment she has no basis upon which to base her claim in terms of the EEA or the LRA.

Recourse to the LRA is possible if the sexual harassment renders the employee's work situation so intolerable that he or she has no choice but to resign. In this case the employee has to prove that the sexual harassment is a result of an act or omission of the employer. In other words the employer's act or omission rendered the employee's work situation so intolerable that he or she had no choice but to resign. This will constitute a dismissal and it will also be an automatically unfair dismissal because the sexual harassment amounts to discrimination. If the employee bases his or her claim on this cause of action the amount of compensation he or she may claim is limited to 24 month's salary.

The employee may also sue the employer for breach of contract in terms of the common law. The employee will have to prove that the sexual harassment suffered by him or her is a result of the employer's breach of the implied term of trust and confidence inherent in every contract of employment. In other words the employer did not do enough to prevent sexual harassment or alternatively encouraged the sexual harassment thus breaching the implied term of trust and confidence. The employee need not prove that his or her work situation was so intolerable that he or she had no choice but to resign. The resignation is a cancellation of the contract. The employee is entitled to cancel the contract because the employer breached a material term of the contract. In such a situation the court is not limited by a legislative cap on the amount of compensation it may award. Since this is a breach of contract the aggrieved party is entitled to be put in the position he or she would have been in had the employer fulfilled its duty to refrain from or prevent wrongful act.

An employee can also base a claim on the employer's common law duty to provide a safe working environment. This duty can extend to protecting an employee against sexual harassment by someone other than an employee such as a client or a supplier. A failure by an employer to provide safe working conditions for its employees constitutes a material breach of contract. Once again there is no legislative cap on the amount of compensation that a court may award. The court is required to make a value judgement as to what is fair and reasonable in the circumstances.

Finally an employee who has been harassed by a fellow employee or someone else can lay criminal charges against the perpetrator provided the conduct falls within the definition of a criminal act such as rape or sexual assault.

If the employee was sexually assaulted by a fellow employee the liability for compensation to the employee may be based on more than one cause of action. In the case of *Ntsabo v Real Security CC* [2004]1 BLLR 58 (LC) the employee resigned because despite reporting incidents of severe sexual harassment to the employer, the employer remained complacent and did nothing to prevent continued sexual harassment of the employee. The Labour Court held that the employee had been constructively dismissed and awarded compensation for unfair dismissal. The court also awarded the employee a further amount of compensation in terms of the EEA for future medical costs for psychiatric treatment and another amount for general damages including pain and suffering. The employer's liability for future medical costs and general damages was based on their employers vicarious liability in terms of section 60 of the EEA. In addition the employer was ordered to pay the costs of the application. *Christian v*

Colliers Properties [2005] 5 BLLR 479 (LC) is another case where compensation was awarded for sexual harassment in terms of the EEA in addition to compensation for automatically unfair dismissal in terms of the LRA. It must be noted however that awards of compensation in terms of both the EEA and the LRA are only possible where a fellow employee is the perpetrator of the sexual harassment. This is so because in terms of the EEA an employer can only be vicariously liable for the acts of its employees and not someone such as a client who is not employed by the employer.

Awards against inactive employers who fail to take reasonable steps to protect employees against sexual harassment from both fellow employees and people from outside the enterprise are potentially very high. This is especially the case where the claim is based on the common law and there is no cap on the compensation that can be awarded or if the perpetrator is a fellow employee and the claim is based on the legislative vicarious liability of the employer in terms of section 60 of the EEA. However it should be noted that awards of compensation in favour of sexually harassed employees are not the only financial repercussions for an employer that fails to provide protection for its employees. The financial repercussions of high labour turnover and a poor public image as a result of such complacency are incalculable and potentially very high. All employers would be well advised to ensure that reasonable positive action is taken in order to ensure that sexual harassment of employees is at best prevented altogether and at worst diminished.

Recommendations

It is clear that the ethics that governs the conduct of employees and which are exuded in the ambience of the workplace, evolve from the policies and procedures which are implemented in an organization and which are promoted by the examples which are set by senior management who are required to serve as role models to their employees. Managers need to demonstrate their commitment to ethical practices and be armed suitably in terms of knowledge so that they can deal more effectively with human behavioural problems such as sexual harassment issues which may manifest in the workplace. The prohibition of any form of sexual harassment must be clearly visible in policy and must apply to the actions of all employees, customers and even suppliers. The policy that is in force must be reiterated in illustrations such as posters and also in the organizational code of conduct and in all the facilities. Regular meetings must be held with employees and surveys should be conducted from time to time to ascertain the extent of the problem of sexual harassment assuming that it is found to exist. Clear guidelines and grievance procedures for complainants are non-negotiable and both informal and formal resolution mechanisms should exist depending on the nature of an offence. Where sexual harassment occurs, investigations must be thorough and appropriate discipline needs to be meted out to guilty parties. The administration of all measures taken in dealing with sexual harassment needs to be thorough with appropriate documentation filed in personnel files. All complaints should be investigated. Essentially then, a critical management task is to prevent as far as possible the corrosion of the workplace and to promote the inviolability of labour.

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