EMPLOYER LIABILITY FOR SEXUAL HARASSMENT IN THE WORKPLACE REVISITED

by

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Submitted in partial fulfilment of the requirements for the degree of MAGISTER LEGUM in the Faculty of Law at the Nelson Mandela Metropolitan University

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Due Date: January 2014
ACKNOWLEDGEMENTS

This is the day that the Lord has made, let us rejoice and be glad in it. Ps 118:24. All praise and worship to God Almighty without whom none of this would have been possible.

My thanks go to my understanding husband, Ronald, who unstintingly and unselfishly supported me during the writing of this work and studies. To my children Teri-Anne, Deeno and Brynn thank you for their understanding and patience.

A debt of gratitude is owed to Prof. Adriaan Van Der Walt and Mrs Erina Strydom for without them I would not have persevered.

To Colin Burton and Herbert Fischat thank you gentlemen for always being there for me and encouraging me when faced with the many obstacles that have been placed in my path.

To my sisters Delene, Berenice and Deidre thank you for your support, encouragement and pushing me to the limit of my endurance. Love you all.
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Over the last two decades our courts have become inundated with cases relating to sexual harassment in the workplace. Sexual harassment has become a major problem in the workplace hence the decision by parliament and our courts to implement policies in the workplace to try and curb the problem. The effects of sexual harassment on a victims’ job and career can be profound. It has been proven that many employees simply decide to leave their jobs or to request a transfer than to endure the harassment until they are psychologically destroyed by the embarrassing situation.

The Employment Equity Act explicitly in section 6 prohibits unfair discrimination in very specific terms. It states that no person may unfairly discriminate directly or indirectly against an employee in an employment policy or practice on one or more of the grounds listed in section 6. Section 6(3) further states that harassment of an employee is a form of discrimination where the harassment is based on any one or more of the grounds listed in section 6 (1) which includes sexual harassment.

Section 60 deals with the liability of employees for the conduct of their employees committed whilst the employees are at work, where such conduct contravenes the provisions of the EEA. If the conduct is brought to the attention of the employer he or she is obliged to take the necessary steps to eliminate the alleged conduct and to comply with the provisions of the EEA. Section 60(3) renders an employee vicariously liable for the conduct of an employee who contravenes the provisions of the EEA. An employee who cannot prove that reasonable steps were taken to ensure that the provisions of the EEA are not contravened will be held liable for the actions or their employees. An employer who can prove that reasonable steps were taken will not be held liable for the actions of the employee.

The provisions of the EEA were applied in the case of Ntsabo v Real Security wherein an employee had been sexually harassed over a period of six months by a
fellow employee. The employee had reported the incidents of sexual harassment to the corporation she was employed with which failed to take action against the senior employee. Instead of taking action the corporation moved her to a different work station and placed her on night shift. This gave her the impression that she was being punished for the deed of the senior employee which resulted in her resigning from the corporation and instituting a claim for constructive dismissal and damages for sexual harassment. The court found that she had been constructively dismissed and that the senior employee had contravened section 6(3) of the EEA. The court further held that the employer (corporation) was also liable for the conduct of the senior employee in contravening the Act.

In terms of the doctrine of vicarious liability on the other an employer may be held vicariously liable for the actions of its employees committed during the course and scope of their employment. The test for vicarious liability is therefore whether at the time of the alleged act of sexual harassment the employee was acting within the course and scope of his employment. The doctrine came before the court in the case of *Grobler v Naspers*. In this case Grobler who was employed at Naspers alleged that has had been sexually harassed by her immediate supervisor Mr Samuels. Samuels acted as trainee manager for seven months. Grobler suffered a mental breakdown as a result of the harassment and contented that she was no longer fit to work. She approached the High court for relief and alleged that Naspers (employer) was vicariously liable for the actions of Mr Samuels and the damages she suffered.

In *Naspers* the court had to decide whether Samuels was indeed responsible for Grobler’s condition and if so whether Naspers were vicariously liable for his actions. In coming to its decision various cases were cited by the court as authority that recognised underlying policy considerations of vicarious liability. This included considerations that the employer is in a better position to pay compensation than the employee and to render the employer liable, serves as a deterrent against similar conduct in the future. The court also remarked that the common law courts acknowledge that the evolution of the doctrine continues to be guided by policy. The court ruled that policy considerations justified the finding that Naspers was vicariously liable for the sexual harassment of Grobler. It held further that both Naspers and Samuels were jointly and severally liable for the compensation to be paid.
The Code of Good Practice on the Handling of Sexual Harassment Cases which was published as an annexure to the Labour Relations Act was implemented in an attempt to eliminate sexual harassment in the workplace, to provide appropriate procedures to deal with the problem and to prevent its occurrence and to promote and to encourage the development and implementation of policies and procedures which will assist in creating workplaces free from sexual harassment.

The cases quoted above demonstrate the different approaches adopted by the courts in seeking to grant relief to victims of sexual harassment. It is clear that policies and procedures should be in place in the workplace that will ensure that employers are not held liable for the actions of their employees committed during the course and scope of employment. The same can however not be said when there are no policies and procedures in place in the workplace.
CHAPTER 1
GENERAL INTRODUCTION

Sexual harassment in the workplace can be described as one of the most controversial issues in the workplaces despite the fact that it is the least talked about. It is one of those issues which have been constantly placed under a microscope due to the ever increasing cases that came to the fore and which have been tried before our courts during the past two decades. The reason for this is that the victims of workplace sexual harassment have mostly been afraid of taking action and this mostly due to the fear of reprisal. The subjective nature of sexual harassment makes it particularly difficult to prove; hence individuals who feel harassed often opt not to report the harassment.

Sexual harassment has in many instances been described as inappropriate and unacceptable behaviour in the workplace. It refers to the forwarding of innuendo laden jokes or emails, flirting and inappropriately touching as well as promises of reward to victims for sexual acts. Sexual harassment is not gender based but in the workplace mostly refers to female employees who are being harassed by male employees in positions of authority and otherwise. This occurs mostly where females have to bear the brunt of being unfairly harassed by males in the workplace who are abusing their positions of authority. More male employees are also now coming to the fore in airing their displeasure at being harassed by female employees, and by fellow males. It has now been accepted that sexual harassment in South Africa constitutes misconduct which warrants the penalty of dismissal. Harassment is classed as an unfair discrimination and only results in the violation of human rights.

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poor morale among employees, causes unexplained absenteeism, late coming and poor concentration at work.\(^2\)

If sexual harassment persists in the workplace the employee has no other option than to bring it to the attention of the supervisor who will follow it up. Should the supervisor however be the cause of the harassment it should be reported to a higher level and even legal action may be considered by the victim. If legal action is to be considered by the aggrieved employee it would be prudent for the employee to be prepared with all the necessary evidence be it in the form of printed e-mails, eyewitness statements as well as all other supporting documentary proof.

There is a legal duty on an employer to ensure that the workplace is free of sexual harassment. It is for this reason that an employer should have a sexual harassment policy in place in the workplace which clearly sets out what will be regarded as sexual harassment (definition of sexual harassment), clear procedures for the filing of complaints and the investigation of such complaints as well as the penalties which the perpetrator faces should he be found guilty of such an offence committed whilst at work. The employer should also ensure that proper communication channels are available in order for an aggrieved victim to be able to talk about his or her ordeal. The issue of sexual harassment should also be raised at any staff meetings held in order that the topic can be freely debatable. It would also be feasible for the employer to conduct regular training sessions on the issue and to be proactive in the workplace which would enable him to avoid unnecessary law suits.

In terms of our Constitution\(^3\) everyone has the rights to dignity, equality and the right to fair labour practices. In this treatise I have sought to in brief discuss the relevant statutes which are applicable to sexual harassment in South Africa. These statutes are The Employment Equity Act,\(^4\) The Labour Relations Act\(^5\) and well as the Code of

\(^2\) The South African Labour Guide – Harassment in the workplace
  www.labourguide.co.za\general\harassment-in-the-workplace-374 accessed on the 21/10/2013.
\(^3\) Act 108 of 1996.
\(^4\) Act 55 of 1998.
Practise on the handling of Sexual Harassment cases well as the Promotion of Equality and Prevention of Unfair Discrimination Act.\textsuperscript{6}

In this treatise I will briefly discuss the differences between the statutory liabilities of an employer as opposed to the common law liability. An in depth discussion of the relevant case law and their applicability will also be undertaken. In order for an employer to escape statutory liability there must be a harassment policy in place in the workplace which sets out the guidelines applicable to acts of sexual harassment. Should there be no policy in place in the workplace the employer will find it difficult to escape liability. The same can however not be said when it comes to the common law. An employer will be held vicariously liable for the actions of an employer if it can be proved that these acts were committed whilst the employee acted within the course and scope of his or her employment.

The different procedures in place in the workplace when it comes to sexual harassment policies will also be discussed and the procedure applicable when a case of sexual harassment is reported.

Sexual harassment in the workplace has become an ever-increasing problem in South Africa and one which needs to addressed and eradicated as soon as possible. This can only be achieved by employers having proper policies and procedures in place that deals with this issue. It will also assist greatly if instances of sexual harassment is not just wiped under the carpet but rather brought out in public and addressed head on. Victims of sexual harassment should not be afraid to air their complaints due to the fact of being victimised and reprimanded. It is exactly for this reason that we have a Constitution that protects human rights.

\textsuperscript{6} Act 4 of 2000.
CHAPTER 2
WHAT IS SEXUAL HARASSMENT?

2.1 INTRODUCTION

The previous chapter contains a general introduction into sexual harassment. This chapter will focus on what constitutes sexual harassment and the impact thereof as well as the various definitions ascribed thereto in court decisions and the Code of Good Conduct on the handling of Sexual Harassment cases and its contribution to the law in relation to sexual harassment cases.

2.2 DEFINING SEXUAL HARASSMENT

Sexual harassment in the workplace is ever present throughout South Africa. This usually happens were male tries to exert power over a female worker who is not in a position to deny him due to the pressure from him that she will lose her job and will also not get an increase unless she succumbs to his advances. This is usually true where the male is in a supervisory position. The following remark was made by MacKinnon.\(^7\)

“Economic power is to sexual harassment as physical force is to rape ... Sexual harassment, so conceptualized, would be an abuse of hierarchal economic (or institutional) authority, not sexually.”

It should also be borne in mind that sexual harassment is not only directed at women but it is accepted that more women than men are victims. Harassment also occurs between members of the same sex. Irrespective of what form the harassment takes, the after effects are always devastating.

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\(^7\) MacKinnon Sexual Harassment of Working Women (1979) 217–218.
Before the coming into operation of the new dispensation there existed no legislative definition for sexual harassment. It was left to the courts to find an acceptable definition or to look at overseas judgements in relation thereto.\(^8\) Neither the Constitution,\(^9\) nor the Employment Equity Act\(^10\) (hereinafter referred to as EEA) provided for a definition for sexual harassment. Section 9(3) of the Constitution however contains and express prohibition on unfair discrimination and that section 10 recognises that “every person shall have the right to respect for and protection of his or her dignity”. The EEA on the other hand in section 6(3) expressly states that harassment of an employee constitutes a form of unfair discrimination without however defining the term “harassment”.

\(J v M Ltd\)\(^11\) is the first ever reported case on sexual harassment in South Africa. This case came before the Industrial Court in February 1989. In this case sexual harassment was described as “unwanted sexual attention in the employment environment”. The court went further to state “Sexual harassment, depending on the form it takes, violates that right to integrity of the body and personality which belongs to every person and which is protected in our legal system both criminally ad civilly”.

These sentiments were however echoed in \(J Mampuru v PUTCO,\)\(^12\) where the Industrial Court held that sexual harassment discloses a total disregard for the feelings and the integrity of the recipient.

It is thus clear from the above that sexual harassment in the workplace can never be considered as normal as it clearly states it to be unwanted sexual attention. One can never agree to such behaviour or conduct taking place in the workplace. The court in \(J v M Ltd\) largely relied on an article written by Mowatt\(^13\) for his definition in recognising different forms of sexual harassment in which he defined it as follows:

“[I]n its narrowest form sexual harassment occurs when a woman (or man) is expected to engage in sexual activity in order to keep employment, or obtain

\(^8\) For an overview, see Garbers (2002) \textit{SA Merc LJ} 393-395.
\(^12\) Unreported, Industrial Court No NH11/2/2136.
\(^13\) Mowatt “Sexual Harassment – New Remedy for an Old Wrong” (1986) \textit{ILJ} 637 638.
promotion or other favourable working conditions. In its wider view it is however, any unwanted sexual behaviour or comment which has a negative effect on the recipient.”

This definition given by Mowatt is also in line with the or similar in scope and nature to the Equal Employment Opportunity Committee’s (EEOC) “Guidelines on sexual Harassment” adopted in the United States of America. The guidelines define sexual harassment as:

“Unwelcome sexual advances, requests for sexual favours, and other verbal or physical conduct of a sexual nature … when (1) submission to such conduct is made either explicitly or implicitly a term of condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as a basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.”

The first two points of the definition deal with what has become known as quid pro quo harassment. This type of harassment occurs when specific employment opportunities or benefits are withheld as a means of forcing the victim of the harassment to perform sexual favours. This would usually occur where an individual in power uses his authority, either explicitly or impliedly, to hire or fire, promote or demote employees in order to persuade them to engage in sexual activities. It would also include complying with requests for dates or sex, being fondled or touché, or responding positively to sexual comments and flirtations. The latter part of the definition deals explicitly with direct power in employment relationships and focuses on the employment environment. One can thus argue if the working environment is made unpleasant or uncomfortable on the basis of sexual preference or sex it constitutes sexual harassment. This type of harassment, therefore, can include sexist or homophobic joke or comments, unwelcome verbal and/or physical advances of a sexual nature, offensive sexual flirtations, graphic comments about an individual's body, sexually degrading words used to describe and individual, and the public display or sexually suggestive objects or pictures. In a “working conditions sexual harassment” case, an employee must demonstrate that a superior has either “create [d] or condone [d]” such an atmosphere.

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14 Mowatt (1986) ILJ 638.
16 Welzenbach 4.
In *J v M Ltd*, De Kock recognised both the wide spectrum of activities that constituted sexual harassment, and the fact that these actions could be of a physical or verbal nature. He further argues that these acts need not be repeated to constitute harassment:

“Conduct which can constitute sexual harassment ranges from innuendo, inappropriate gestures, suggestions or hints or fondling without consent or by force to its worse form, namely rape. It is in my opinion also not necessary that the conduct must be repeated. A single act can constitute sexual harassment.”

Three elements come to the fore in both of these definitions mainly that these acts must be of a sexual nature, the harassment may either be verbal or physical and it must be unwanted.

### 2.3 THE CODE OF GOOD PRACTICE ON THE HANDLING OF SEXUAL HARASSMENT CASES 1998

The first attempt to define sexual harassment legislatively was contained in the Code of Good Practice on the Handling of Sexual Harassment Cases (referred to hereinafter as “the 1998 Code”). The object of the Code was the elimination of sexual harassment in the workplace, the provision of appropriate procedures to deal with the problem of sexual harassment and to prevent its occurrence, and the promotion of the development and implementation of policies and procedures to assist in the creation of workplaces which are free from sexual harassment, and where employers and employees will respect one another’s integrity and dignity, privacy and right to equity in the workplace.

The 1998 Code was applicable to owners of businesses, employers, managers, supervisors, employees, job applicants, clients, suppliers, contractors and others having dealings with a business. Although the 1998 Code created the impression

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19 Item 1.
20 Item 2.
that its ambit was wide, item 2(2) qualified its application to exclude disciplinary action against non-employees.\textsuperscript{21}

- Item 3 of the 1998 Code defined sexual harassment as follows:

“(1) Sexual harassment is unwanted conduct of a sexual nature. The unwanted nature of sexual harassment distinguishes it from behaviour that is welcome and mutual.

(2) Sexual attention becomes sexual harassment if:
   (a) The behaviour is persisted in, although a single incident of harassment can constitute sexual harassment: and / or
   (b) The recipient has made it clear that the behaviour is considered offensive: and / or
   (c) The perpetrator should have known that the behaviour is regarded as unacceptable.”

This definition has been criticised by Cooper.\textsuperscript{22} She argued that the definition was awkwardly written and identified one of the problems as the “and/or” terminology which linked the three paragraphs of sub item 2. She argued that as a result of this terminology, each of the three paragraphs could, on its own, constitute sexual harassment. If paragraph (a) is read on its own, it would appear that sexual harassment could be established by a single incident of harassment even without the recipient having made it clear that the behaviour is unwelcome. The same problem arises in the case of paragraph (b) if read alone, it would be sufficient if the recipient has made it clear that the behaviour is considered offensive. Apart from the fact that it is not always possible for the recipient to indicate that the conduct if offensive, this section does also not show what standard such conduct must meet before it will be regarded as harassment. Lastly paragraph (c) introduces the requirement of fault. In other words, for a claim of harassment to succeed, the victim must be able to show that the perpetrator should have known that the conduct was unacceptable. This she points out is consistent with the approach followed in discrimination law that fault is not a requirement for a claim of unfair discrimination:

“It is integral to the notion that the enquiry into sexual harassment should focus on the effects of the conduct on the recipient and not on the individual moral

\textsuperscript{22} Cooper “Harassment on the Basis of Sex and Gender: A Form of Unfair Discrimination” (2002) 23 ILJ 1 27.
blameworthiness of the perpetrator is the ameliorative and educative role of equality legislation …. Discrimination law, therefore, involves a shift away from examining conduct from the perspective of the individual perpetrator to focus on the harm done to the individual. This is a substantive enquiry, taking fully into account the context in which the conduct takes place. It includes a focus on the systematic nature of discrimination, in other words, the existence of deeply embedded patterns of disadvantage within society which discrimination laws seek to identify and eliminate."23

These remarks are however based on the assumption that sexual harassment is a discrimination issue. In view of the discrimination levelled at the 1998 Code, it was revised and published with a completely new definition in 2005.24 Item 4 of the 2005 Code provides as follows:

- **Test for Sexual Harassment**

  "Sexual harassment is 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:

  4.1 whether the harassment is on the prohibited grounds of sex and / or gender and/or sexual orientation;
  4.2 whether the sexual harassment conduct was unwelcome;
  4.3 the nature and extent of the sexual conduct; and
  4.4 the impact of the sexual conduct on the employee."

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CHAPTER 3
THE LAWS GOVERNING SEXUAL HARASSMENT IN SOUTH AFRICA

3.1 INTRODUCTION

Sexual harassment in South Africa was not legally allowed post 1994 and was also legally unthinkable. Working women had to constantly battle with having sexual harassment recognised as a form of abuse in the working environment. Daily they had to toil under the misguided sense of responsibility in order to put food on their tables and while their abusers got off scot free.

It is also a topic that one should not talk about as it is both unacceptable and taboo. It has been aptly pointed out by Catharine MacKinnon\(^\text{25}\) that it is acceptable for men to behave in a sexually harassing fashion and taboo for women to confront the issue.

Sexual harassment has now found its way into our legal terminology, our courts and our legislation. The laws regulating sexual harassment in South Africa is derived from the common law, the Constitution of the Republic of South Africa\(^\text{26}\) (hereinafter referred to as “the Constitution”), the Labour Relations Act\(^\text{27}\) (LRA), the Employment Equity Act\(^\text{28}\) (EEA), the Promotion of Equality and Prevention of Unfair Discrimination Act\(^\text{29}\) (PEPUDA) the Code of Good Practice on the Handling of Sexual harassment Cases.\(^\text{30}\)

\(^{25}\) MacKinnon Sexual Harassment of Working Women (1979) 1.
\(^{26}\) Act 108 of 1996.
\(^{27}\) Act 66 of 1995.
\(^{28}\) Act 55 of 1998.
\(^{29}\) Act 4 of 2000.
3.2 STATUTORY LIABILITY

3.2.1 THE CONSTITUTION

The Bill of Rights\textsuperscript{31} which embodies the South African Constitution also applies to the exercise of private power in some instances. It is also possible that harassment in the workplace can infringe upon these fundamental rights provided for in the Bill of Rights. These rights would include the right to equality as contemplated in section 9. Section 9(3) of the Constitution which provides that:

“(1) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.”

Although section 9(3) does not expressly list sexual harassment as a prohibited ground of discrimination it is clear from the context of the section that it forms part of gender and sex. This error has now been corrected by section 6(3) of the EEA, which expressly provides for sexual harassment as a form of discrimination.

Section 10 on the other hand recognises that “every person shall have the right to respect and protection of his right to dignity”. It is clear that harassment as such totally disregards the feelings, integrity and dignity of the victim. This was recognised by the Industrial Court in \textit{J v M Ltd}\textsuperscript{32}:

“... In its narrowest form sexual harassment occurs when a woman (or man) is expected to engage in sexual activity in order to keep employment or to obtain promotion or other favourable working conditions. In its wider view it is, however, any unwanted sexual behaviour or comment which has a negative effect on the recipient ... Sexual harassment, depending on the form it takes, will violate that right to integrity of body and personality which belongs to every person and which is protected in our legal system both criminally and civilly.”

These sentiments were echoed in \textit{J Mampuru v PUTCO}\textsuperscript{33} where it was held that

\textsuperscript{31} Chap 2 of the Constitution of South Africa (referred to hereafter as the Bill of Rights).
\textsuperscript{32} (1989) 10 \textit{ILJ} 755 (IC) at 757.
\textsuperscript{33} Unreported, Industrial Court No NH11/2/2136.
sexual harassment may take many forms. It may be trivial, it may be verbal but gross, or it may be physical, again varying from trivial or gross. It may be a single act or the act may be repeated. The actions as such disclose a total disregard for the feelings and integrity of the recipient.

Of equal importance is section 23 which affords everyone the right to fair labour practices.

The EEA and PEPUDA are pieces of legislation that give effect to the right to equality. For instance whenever it is alleged that an employee has been unfairly discriminated against, the courts will not apply the Constitution directly but will go via the EEA which reaches into the domain of workplace. In the case of unfair discrimination outside the workplace, a court will apply the PEPUDA. Similarly the LRA is the legislation that gives effect to the fundamental right to fair labour practices and whenever this right is infringed the court will apply the LRA.

The test for unfair discrimination was set out in the case of *Harksen v Lane*. The test comprises three stages. Firstly, one must ask whether the conduct amounts to differentiation, and if so, whether it amounts to discrimination. Secondly, one must determine whether the discrimination is found to be unfair. Thirdly, if the discrimination is found to be unfair, then one must establish whether the discrimination can be justified in terms of section 36 of the Constitution. The test for unfairness relating to sexual harassment is however not applied in the same way.

### 3.2.2 THE LABOUR RELATIONS ACT (LRA)

Before the enactment of the EEA the LRA served as legislation to deal with matters relating to unfair discrimination. If an employee was sexually harassed in the workplace the employer could be accused of unfair labour practice as sexual harassment was then seen as a form of discrimination.

The LRA in the context of sexual harassment is of particular relevance in relation to claims of unfair dismissals and unfair labour practice. If an employee should be dismissed on one of the grounds listed in section 187 then the dismissal is deemed
automatically unfair irrespective of whether it is listed as one of the prohibited grounds as the EEA explicitly states that sexual harassment constitutes a form of unfair discrimination. According to authors Le Roux, Rycroft and Orleyn\textsuperscript{35} harassment in dismissal cases is likely to arise in one of three ways. Firstly, the harassing employee may be dismissed for misconduct.

Secondly, the harassed employee may be dismissed as part of an act of harassment. In \textit{Christian V Colliers Properties}\textsuperscript{36} the employee was dismissed as retaliation for refusing to accept her employer’s sexual advances. The same act of sexual harassment amounted to unfair discrimination under the EEA as well as an automatically unfair dismissal under the LRA. She was awarded 24 months full compensation. Another example is an employee who is dismissed after making a protected disclosure as contemplated in the PDA (section 187(1)(h)).

In \textit{Ntsabo v Real Security}\textsuperscript{37} which preceded the judgment in \textit{Christian} the Labour Court followed a different approach. The court accepted that the failure of the employer to address the victim’s complaints of sexual harassment by her supervisor had led to an intolerable or hostile employment environment and that her subsequent resignation amounted to a constructive dismissal but declined to find that the constructive dismissal amounted to an automatically unfair dismissal. Thirdly, the victim may resign because of the employer’s failure to address harassment that he or she has been subjected to. Termination of these circumstances may be regarded as a form of dismissal so called constructive resignation amounted to a dismissal. This will require the employee to show that he or she terminated the contract of employment because the conduct of the employer made continued employment intolerable and all reasonable options short of termination had been considered. In the matter of \textit{Pretorius v Britz}\textsuperscript{38} the employee resigned from her position as a personal secretary to Mr Britz after having been subjected to constant sexual harassment from Mr Britz. She claimed constructive dismissal and succeeded in her claim. She was awarded an amount equal to nine month’s salary.

\textsuperscript{35} \textit{Harassment in the Workplace} (2010) 14.
\textsuperscript{36} [2005] 5 BLLR 479 (LC).
\textsuperscript{37} (2003) 24 ILJ 2341 (LC).
\textsuperscript{38} [1997] 5 BLLR 649 (CCMA) 652H – 653B.
Similarly in the case of *Intertech Systems (Pty) Ltd v Sowter*,\(^{39}\) the employer reneged on a tripartite agreement between the employer, the victim and the harasser (both of whom were employed by the employer) to accept the resignation of the harasser after he admitted to having sexually harassed the victim. The company not only continued to use the services of the perpetrator on a consultancy basis, but also instructed him to undertake a sensitive and damaging investigation of alleged security breaches by the victim. It was held that the continued solicitation of the victim by the harasser and the side-lining of the victim by the employer amounted to a constructive dismissal. The court found that the employer’s conduct was reprehensible and insupportable.\(^{40}\) The court held that the employee had to be compensated for the egregious invasion of her employment security and her dignity with the company perpetrated. The employer was ordered to pay an amount equivalent to 12 month’s salary.

Section 186(2)(b) describes an unfair labour practice as the unfair suspension of an employee or any other unfair disciplinary action short of dismissal. Therefore, if an employee alleges that he or she has been unfairly suspended or has been unfairly disciplined (but not dismissed) after having been found guilty of sexual harassment, such employee will be entitled to refer an unfair labour practice dispute in terms of the dispute resolution mechanisms of the LRA.\(^{41}\)

### 3.2.3 THE PROMOTION OF EQUALITY AND PREVENTION OF UNFAIR DISCRIMINATION ACT, ACT 4 OF 2000

The Equality Act has been enacted in order to give effect to section 9 of the Constitution which deals specifically with discrimination and identifies the prohibitions and prevention of discrimination and its aims. This Act came into operation on the 1 September 2000.

The Equality Act defines harassment as follows:

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\(^{39}\) (1997) 18 *ILJ* 689 (LAC).

\(^{40}\) 705H.

“Unwanted conduct which is persistent or serious and demeans, humiliates or creates a hostile or intimidating environment or is calculated to induce submission by actual or threatened adverse consequences and which is related to sex, gender or sexual orientation; or a person’s membership or presumed membership of a group identified by one or more of the prohibited grounds or characteristics associated with such group.”

The definition section also defines discrimination as

“any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly -
(a) imposes burdens, obligations or disadvantages on; or
(b) withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds”.

Section 11 provides that no person may subject any person to harassment. This is in direct contrast to EEA in that a definition is given for harassment as seen above. In terms of section 15 of PEPUDA, harassment does not have to be unfair to qualify as discrimination.

### 3.2.4 THE CODE OF GOOD PRACTICE ON THE HANDLING OF SEXUAL HARASSMENT CASES

The Code of Good Practice on the Handling of Sexual Harassment Cases (hereinafter referred to as the Harassment Code) was published as an annexure to the Labour Relations Act 66 of 1995 (LRA) in June 1998. The object of the code was to eliminate sexual harassment in the workplace; to provide for appropriate procedures to deal with the problem of sexual harassment and to prevent its occurrence; and to encourage and promote the development and implementation of policies and procedures which will assist in creating workplaces which are free from sexual harassment and where employers and employees will respect one another’s integrity and dignity, privacy and their right to equity in the workplace.

The Code did not seem to grasp the discriminatory nature of sexual harassment and much criticism was levelled at it. One of the criticism were the test concerned for sexual harassment as it was not clear whether the test should be objective or

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42 S 1: Definition.
subjective in nature. The 2005 NEDLAC Code of Good Practice on the Handling of Sexual harassment cases attempted to rectify this by giving an explicit definition for sexual harassment.

3.2.5 THE EMPLOYMENT EQUITY ACT (EEA)

The EEA came into operation on the 9 August 1999 and the purpose thereof was to remedy and redress disadvantage and discrimination and to achieve equality in the workplace through the promotion of equal opportunities and the implementation of affirmative action measures. An employer is required to conduct an analysis of its employment policies, practices, procedures and working environment in order to eliminate unfair discrimination. In terms of section 5 of the EEA places a positive duty on an employer to ensure that the workplace is free from unfair discrimination.

Section 6 of the Act prohibits unfair discrimination. The section states as follows:

“(1) 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 or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth,”

Section 6(3) goes further and states:

“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).”

Section 60 regulating to employer liability in terms of the EEA will be discussed in chapter 5 where an in depth discussion will be tabled.

3.3 COMMON LAW

In the workplace all employees were afforded the right to privacy, dignity and equal treatment as dictated in terms of the common law. Employers were thus entitled to act in terms of the common law as no other legislation was in place to govern the working environment. In terms thereof two important obligations were placed on the
employer namely; to develop a safe work environment which is free of hostility and conducive to work and to show respect to employees.43

Before any legislation was passed to regulate sexual harassment there was a general duty on employers to create a safe workplace and to actively take steps to eliminate sexual harassment. In J v M Ltd44 it was found that sexual harassment violated the right to integrity of body and personality where “victims of harassment find it embarrassing and humiliating and creates an intimidating, hostile, and offensive work environment”.

An employer can be held vicariously liable it can be proved that he neglected is duty towards an employee by not taking the steps to safeguard an employer where he knew of sexual harassment taking place. The employer could also be vicariously liable if the harassment took place during working hours. It is trite law in South Africa that a person who has been sexually harassed has various options under which to proceed with the matter. The accused person can be charged in terms of criminal law for various forms of assault or at its worse for rape or attempted rape. A civil claim can also be instituted against the perpetrator for damages in terms of the law of delict.

In order for a claim to succeed with both direct and vicarious liability, the elements of delict have to be proven.

3.3.1 VICARIOUS LIABILITY

According to Neethling, Potgieter and Visser vicarious liability may be described as the strict liability of one person for the delict of another.45 The former is thus indirectly liable for the damage caused by the latter. The liability is only applicable if there is a particular relationship between two persons such as employer – employee. Thus where an employee acts within the course and scope of his employment and he

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44 1989 10 ILO 755 (IC).
commits a delict his employer will be fully liable for any damages arising there from.
No fault is required on the part of the employer, and therefore this is a form of strict liability. This principle was non-existent in our common law and was received from English.

The position is such that a person now wishing to claim from his employer for harassment based on vicarious liability will have to prove the following:46

- There must be an employer – employee relationship
- The employee must commit a delict
- The employee must act within the course and scope of his employment

The test for vicarious liability is portrayed in the various cases that came before our courts and will be discussed later on in the treatise.

### 3.3.1.1 REQUIREMENTS OF VICARIOUS LIABILITY

(a) **There must be an employer – employee relationship**

This relationship must be present at the time that the alleged delict is committed. Such a relationship normally exists when a person enters into an employment agreement with another, whereby he makes his services available to another for remuneration. The employer must be in a position to exercise control over the employee. A contract of mandate (service), involving independent contractors, are excluded from this relationship, and does, therefore not found vicarious liability. The question of control (or authority) was considered to be the most important and therefore decisive factor or test in determining whether the wrongdoer is an employee or an independent contractor came before the court on various occasions.

In *Smit v Workmen’s Compensation Commissioner* 47 the Appellate Division employed the “dominant – impression” test, *i.e.* whether the dominant impression is that of a contract of service or a contract of mandate. Later, in *Midway Engineering*

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46 Neethling *et al* 366 – 368.
47 1979 1 SA 51 (A) 62- 63.
& Construction Services v Transnet Bpk it was held that in determining the relationship between the parties, a multifaceted test should be utilised, taking into account all relevant factors and the circumstances of the specific case.

The state is in the same position as other employers and may only escape liability by showing that the official involved was not pro hac vice (for that particular case) an employee of the state at the time the delict was committed. In Minister of Police v Rabie, however, Jansen JA made the following remark concerning police officers:

“It would seem that instances of a policeman momentarily ceasing to be a servant pro hac vice because of, e.g., an exercise of discretion, if they do occur at all, are now exceptional.”

This will also be the case where the state did not have the power to control the employee at the particular time.

(b) The employer must commit a delict

In this instance all the elements of a delict must be proven with regard to the employee. The elements to be proven are an act, wrongfulness, fault, harm and causation. There will be no question of a delict if these elements are not present. This requirement implies that the employer may raise any defence which is available to the employee. The employer and employee are in actual fact regarded as joint wrongdoers given the fact that the employee is also delictually liable. A right of recourse is however only available to the employer.

(c) The employee must act within the course and scope of his employment

It is clear that an employee acts within the course and scope of his employment if he acts in the execution or fulfilment of his duties in terms of his employment contract. However, he acts outside such scope if he disengages himself completely from his employment and promotes his own objectives or interests exclusively. The test in

48 1998 3 SA 17 (SCA) 23.
49 1986 1 SA 117 (A) 132.
50 In Mhlongo v Minister of Police 1978 2 SA 551 (A) 568 the court declared: “the essential criterion is whether his employer, the State, has the power to direct or control him in the execution of his duty or function, including the exercise of the discretion, if any”.
51 Neethling et al 368.
determining whether or not an employee acted within the scope of his employment is both objective and subjective.

This test was formulated in the case of *Minister of Police v Rabie*\(^52\) where the court explained the so called standard test as follows:

"It seems clear that an act done by the by a servant solely for his own interest and purposes, although occasioned by his employment, may fall outside the course or scope of his employment, and that in deciding whether an act by the servant does so fall, some reference is to be made to the servant's intention ...The test is in this regard subjective. On the other hand, if there is nevertheless a sufficiently close link between the servants' acts for his own interest and purposes and the business of his master, the master may yet be liable.\(^53\) This is an objective test. And it may be useful to add that '... a master ... is liable even for acts which he has not authorized provided that they are so connected with acts which he has authorized that they may rightly be regarded as modes although improper modes – of doing them ..."\(^54\)

The employer will thus only escape vicarious liability if the employee, viewed subjectively, has not only exclusively promoted his own interest, but viewed objectively, has also completely disengaged himself from the duties of his contract of employment. The application of this principle is well illustrated in cases where an employee, during the execution of his duties with a service vehicle, deviates from his route for his own purpose \(\text{s}\) and then commits a delict.

In *Feldman (Pty) Ltd v Mall*\(^55\) an employee had to deliver parcels with service vehicle and afterwards return it to his work premises. After the delivery he, however, deviated from his route to a place where he drank alcohol. Thereafter he caused an accident during his return journey and killed the plaintiff's breadwinner. The employer was held liable because the employee's deviation did not amount to a total dereliction of his duties in terms of his contract of service.

In *Viljoen v Smith*\(^56\) an employee, while busy with his work in his employer's vineyard, climbed through a fence contrary to the instructions of his employer, and relieved himself in the bushes on a neighbouring farm. There he attempted to light a cigarette

\(^{52}\) 1986 1 SA 117 (A).

\(^{53}\) In *Feldman (Pty) Ltd v Mall* 1945 AD 733 742 it was in fact required that the actions of the employee must be completely "unconnected with those of his master" to exculpate the employer.

\(^{54}\) 1945 AD 733 742.

\(^{55}\) 1997 1 SA 309 (A).
but the head of the match broke off and caused a fire which resulted in damage to the neighbouring farm. The court held the degree of digression of the employee from his work was not sufficiently material that it could rightly be said that the temporarily abandoned his work and therefore did not act in the scope of his employment during his excursion. The employer was accordingly held liable.

It is of particular importance that a sufficiently close connection did not exist between the employee’s conduct and his employment as was the case in the trend setting case of *K v Minister of Safety and Security*. In this case the plaintiff, a young woman, became stranded late at night. Three police officials dressed in full uniform, offered to take her home in a police vehicle. On the way she was raped by all three of them. The Supreme Court of appeal dismissed the claim, on the ground that the policemen had not been acting within the course and scope of their employment. Contrary to *K v Minister of Safety and Security*, O’Reagan J held that the state was vicariously liable for the conduct of the policemen. She said that if the standard test as formulated in *Minister of Police v Rabie* and informed by the Bill of Rights, was applied, a “sufficiently close connection” existed between the conduct of the policemen and their work to hold their employer vicariously liable: there was a statutory duty on the policemen to prevent crime and to protect the members of the public: the policemen offered to help the plaintiff and she acted reasonably by accepting the offer and trusting them; and the conduct of the policemen consisted simultaneously of a *commissio* (the brutal rape) and the *ommissio* (their failure to protect her against the rape).

The commission of a delict during the performance of a forbidden act should also be seen in this light. If the forbidden act is connected to the general character of the employees’ work and thus falls within the scope of his employment, the employer will still be vicariously liable. There has been decided case law where it has been decided that the question as to whether or not an employee acted within the course and scope of his employment may be decided on the basis of the creation of risk by

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56 2005 6 SA 419 (CC).
57 2005 3 SA 179 (SCA).
58 1986 1 SA 117 (A) 134 (*supra* 368).
59 Neethling *et al* 370.
the employer. In Feldman (Pty) Ltd v Mall the court explained liability on the ground of the creation of risk as follows:

“[A] master who does his work by the hand of a servant creates a risk of harm to others if the servant should prove to be negligent or inefficient or untrustworthy; that he has created this risk for his own ends he is under a duty to ensure that no one is injured by his servant’s improper conduct or negligence in carrying out his work.”

Jansen JA however declared in Minister of Police v Rabie that:

“By approaching the problem whether [an employee’s] acts were done ‘within the course or scope of his employment’ from the angle of creation of risk, the emphasis shifted from the precise nature of his intention and the precise nature of the link between his acts and [his] work, to the dominant question of whether those acts fall within the risk created by [his employer].”

In later judgments the Appellate Division was to develop risk creation as an independent basis for vicarious liability. The courts however emphasise that risk creation is directly relevant to the inquiry whether the employee acted within the course and scope of employment and is a factor to be taken into account. It therefore does not replace the standard test. In Ess Kay Electronics Pty Ltd v First National Bank of Southern Africa Ltd, the court goes even further, by declaring that the risk theory is merely an explanation of the principle of vicarious liability and not the formulation of the principle itself. The judgment of Nel J in Grobler v Naspers Bpk is in direct contrast to this approach. In this case the court correctly took risk creation into account in finding that the employee acted within the scope of his employment and that the employer was vicariously liable.

3.3.1.2 GROBLER v NASPERS BPK

In this landmark case the Cape High Court held an employer vicariously liable for sexual harassment perpetrated by one of its employees. The employer and the perpetrator appealed and in its judgement reported as Media 24 Ltd and Another v Grobler (Media 24), the Supreme Court of Appeal (SCA) confirmed the liability of the
employer although on different grounds (to be discussed under direct liability of an employer). According to the article written by Rochelle Le Roux\(^\text{64}\) it seems that while these cases provide many answers they also highlight many new questions that need to be answered in the light of the decisions handed down in these cases.

### 3.3.1.3 THE TRAIL COURT (GROBLER v NASPERS)

Sonia Grobler was employed by Nationale Tydskrifte Ltd (Tydskrifte) as a secretary to Grant Samuels, a manager in training. She alleged that over a period of six months during 1999 she was sexually harassed by Samuels. Grobler alleged that at least five incidents of sexual harassment were perpetrated by Samuels. The last and most traumatic of these incidents (the flat incident) occurred away from work while Grobler was showing her flat to Samuels, and also involved a firearm. By the time the matter came before the trial court, Tydskrifte had disposed of its undertaking and Grobler was its only remaining employee.

Media 24 however, accepted liability in respect of any of Tydskrifte’s obligations towards Grobler. Hence Media 24’s liability was alleged on two grounds: First, on the basis of its vicarious liability for Samuels conduct, and second, on Tydskrifte’s failure (for which it assumed liability) to provide a working environment free from sexual harassment. Grobler also claimed that, as a result of the harassment, she suffered from severe psychological trauma manifesting in PTSS.

Unsurprisingly, Samuels and Media 24 denied almost all of the above allegations and also raised two jurisdictional defences. First, that by virtue of section 35(1) of the Compensation for Occupational Injuries and Diseases Act (COIDA),\(^\text{65}\) Grobler was precluded from proceeding against Media 24 and second, that sexual harassment, by

\(^{64}\) Le Roux “Sexual Harassment in the Workplace: A Matter of More Questions than Answers or Do We Simply Know Less the More We Find Out?” (2009) *Law, Democracy and Development* (reproduced by Sabinet Gateway under licence granted by the publisher).

\(^{65}\) Act 131 of 1993 - s 35(1) of COIDA provides that no action shall lie by an employee or any dependent of an employee for the recovery of damages in respect of any occupational injury or disease resulting in the disablement or death of such employee against such employee’s employer, and no liability for compensation on the part of such employer shall arise save under the provisions of this Act in respect of such disablement or death.
virtue of the Labour Relations Act (LRA)\textsuperscript{66} the read with item 2(1) (a) of Schedule 7 to the LRA and the Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace of 1998 is a matter in respect of which the Labour Court has exclusive jurisdiction. The jurisdictional defence relating to COIDA was obviously raised on the assumption that sexual harassment is in one way or another covered by that Act.

The trial court was satisfied that the five alleged incidents of sexual harassment perpetrated by Samuels had in fact occurred\textsuperscript{67} and that Grobler suffered severe emotional stress as a result of these incidents. Nel J did not decide whether or not Grobler’s condition could be classified as PTSS, instead he considered whether Samuels’ conduct was responsible for her condition and concluded that it was. On the matter of Media 24’s vicarious liability for Samuels’s conduct, Nel J argued that nobody would actually be employed to perform their duties by means of sexual harassment and that such deeds by an employee - even at the workplace would ordinarily be regarded as “a frolic of his own”, thus providing any employer with an almost perfect defence.\textsuperscript{68} However since such an interpretation of vicarious liability does not take cognisance of the wide occurrence of sexual harassment in the workplace and its far reaching emotional and psychological consequences.\textsuperscript{69} Nel J argued that the use of vicarious liability for sexual harassment against women in the workplace and children in the context of schools, clubs and churches ought to be extended. In justification of such development of the South African common Law on vicarious liability, the judge relied on recent developments of the common law in foreign jurisdictions, alternatively on the constitutional duty to develop the common law and held Media 24 vicariously liable for Samuels conduct.

The two jurisdictional defences were both primarily dismissed on the basis that Grobler was not employed by Media 24.\textsuperscript{70} In the case of the defence based on the COIDA, it was also held that sexual harassment is not an accident as contemplated by the Act. The trial court did not consider whether PTSS could possibly be a

\textsuperscript{66} Act 66 of 1995.
\textsuperscript{67} 465G.
\textsuperscript{68} 495 B C.
\textsuperscript{69} 494D.
\textsuperscript{70} 516D and 517C.
disease covered by COIDA. In respect of the jurisdictional defence, the court also held that the cause of action was an alleged delict and that does not fall within the exclusive jurisdiction of the Labour Court.

3.4 DIRECT LIABILITY OF AN EMPLOYER

In order for an employer to be held directly liable for damages sustained as a result of sexual harassment the elements of delict must be established with regard to the employer. Such liability will in most instances result from an omission, due to the employer’s failure to take the necessary precautions, or to respond to complaints made by victims.

As a general rule, a person does not act wrongfully for purposes of the law of delict if he omits to prevent harm to another person. The point of departure is that a person is generally not liable where his omissio or comissio - his failure to act positively to prevent loss – factually infringes the interest of another. According to our law no general duty rests on an individual to prevent an infringement of another person’s interests and the latter consequently suffering loss. In Minister of Polisie v Ewels\(^\text{71}\) it was stated:

"As uitgangspunt word aanvaar dat daar in die algemeen geen regsplig op 'n persoon rus om te verhinder dat iemand anders skade ly nie, al sou so 'n persoon maklik kon verhinder dat die skade gely word en al sou van so n persoon verwag kon word, op suiwre morele gronde, dat hy daadwerklik optree om die skade te verhinder."

In the case of Carmichele v Minister of Safety and Security\(^\text{72}\) the applicant was viciously attacked by a person awaiting trial but out on bail. The applicant argued that there was a legal duty upon the investigating officer and state prosecutors to ensure that the attacker did not get bail and stayed in captivity. Both the court a quo and the SCA\(^\text{73}\) decided that the police and the prosecutors did not act wrongfully because in the circumstances there had been no legal duty upon them to protect the applicant. This case went back and forth until eventually a fresh trial was ordered and it was held that the state was liable and an appeal to the SCA was dismissed.

\(^{71}\) 1975 3 SA 590 (A) 596.
\(^{72}\) 2001 4 SA 938 (CC).
\(^{73}\) 2001 1 SA 489 (SCA).
This is an appeal against the judgement of Nel J, sitting in the Cape High Court, in which the first and second appellants were held jointly and severally liable to pay the respondent a total amount of R776 814.00. This was the figure at which the trial court quantified the damages which she had suffered as a result of sexual harassment to which it held she had been subjected over a period of approximately five months by the second appellant and for which it held that the first appellant was vicariously liable.

The judgment of the court a quo has been reported: See Grobler v Naspers Bpk.

(a) Factual findings
Despite some inconsistencies in Grobler’s evidence, the court concluded that she was sexually harassed by Samuels. Farlam JA regarded the suggestion that the claim of harassment was fabricated by Grobler at the time of the disciplinary enquiry as unlikely since the uncontested evidence was that she asked for Media 24’s sexual harassment policy after the first incident (the lift incident). The court specifically found that the final incident at her flat did not occur in the course and scope of her employment, but while she was pursuing a private activity, namely trying to sell her flat to the second appellant. The court also accepted that none of the four incidents preceding the flat incident was sufficiently severe to result in a psychiatric injury qualifying for legal redress and that only the flat incident had the potential of resulting in damages qualifying for such redress. The court also noted that Van As (a manager at Tydskrifte) whom Grobler advised of the harassment by Samuels at an early stage (a week after the lift incident) and who claimed that he failed to deal with it as a result of her reluctance to pursue the matter, had no reason to disbelieve Grobler’s assertions “and should have realised (even if he actually did not) that her

74 2005 6 SA 328 (SCA).
75 Par 50.
76 Par 77.
77 Par 60 read with par 22.
78 Grobler at 452A.
reluctance to take the matter further in no way cast doubt on the genuineness of her complaints”. 79

(b)  Damages
On the question of Grobler’s damages, Media 24 argued that Grobler failed to establish that she suffered from a recognised psychiatric injury. In this regard heavy reliance was placed on an earlier decision of the SCA. In *Barnard v Santam Bpk* 80 it was ruled that damages can be recovered for emotional shock (senuskok) only if it manifests in a recognised psychiatric injury. In this case the court however accepted that such an injury need not always be the result of emotional shock. Media 24 argued that since the trail court declined to find that she was in fact suffering from PTSS, Grobler failed to establish that she suffered from a recognised psychiatric injury. 81

Farlam J proceeded to consider whether Grobler suffered from PTSS. The court accepted the diagnostic features of PTSS to be as set out in the Diagnostic and Statistical Manuel of Mental Disorders published by the American Psychiatric Association. The court relied on the following paragraph:

“The essential feature of Post-Traumatic Stress Disorder is the development of characteristic symptoms following exposure to an extreme traumatic stress or involving direct personal experience of an event that involves actual or threatened death or serious injury to one’s physical integrity; or witnessing an event that involves death, injury, or a threat to the physical integrity of another person; or learning about unexpected or violent death, serious harm, or threat of death or injury experienced by a family member or other close associate (Criterion A1). The person’s response to the event must involve intense fear, helplessness, or horror (or in children, the response must involve disorganised or agitated behaviour) (Criterion A2). The characteristic symptoms resulting from the exposure to the extreme trauma include persistent re - experiencing of the traumatic event (Criterion B), persistent avoidance of stimuli associated with the trauma and numbing of general responsiveness (Criterion C), and persistent symptoms of increased arousal (Criterion D). The full symptom picture must be present for more than 1 month (Criterion E), and the disturbance must cause clinically significant distress or impairment in social, occupational, or other important areas of functioning (Criterion F).” 82

79  Par 71
80  1999 (1) SA 202 (SCA) 208J.
81  Par 23.
82  Par 56.
The parties agreed that Criterion A2 and B to F were present but it was disputed as to whether Criterion A1 was present. Farlam J concluded that the flat incident (involving the firearm) was sufficiently traumatic to have complied with A1 and held that Grobler in fact suffered from PTSS and thus a recognised psychiatric injury as contemplated in *Barnard*. While this conclusion confirmed the liability of Samuels, *Media 24*’s liability did not necessarily follow, since the incident occurred during a private pursuit.

Nonetheless the court to confirm *Media 24*’s liability, not on the basis of vicarious liability for Samuels’ conduct, but on the basis of Tydskrifte’s failure to provide a working environment free from sexual harassment by other employees.

(c) *Media 24*’s liability
On the basis that it assumed the responsibilities of the now defunct Tydskrifte, and disregarding its possible vicarious liability for Samuels’ conduct, *Media 24*’s liability depended on whether it could be said that Tydskrifte was in any manner liable to Grobler.

It is trite law that an employer owes a common law duty to its employees to take reasonable care for their safety and this duty. Farlam J held that it also extends to the protection of employees ‘from psychological harm caused for example, by sexual harassment by co employees’. This is consistent with what was stated in *Van Deventer v Workman’s Compensation Commissioner*. On the face of it and relying on a strict or statutory definition of an employee, this should have been the end of the inquiry, since Samuels was not employed by Tydskrifte and was thus not a co-employee of Grobler. It should be noted that the judge was merely using an example to illustrate the extent of the employer’s duty, and this statement should not be interpreted to suggest that employers are excluded from observing this duty in the case of sexual harassment by those who are not co-employees of the victim.

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83 Par 58 59.
84 Le Roux: *Sexual Harassment in the Workplace: A Matter of More Questions than Answers or Do We Simply Know Less the More We Find Out?* Par 65.
85 1962 (4) SA 28 T at 31 B – C.
86 See fn 77 at 53.
Media 24 argued that if it owed such a duty, it was founded in contract and not in delict and since Grobler's claim was premised on a delictual legal duty it should fail.\textsuperscript{88} Farlam J made short shrift of this argument and emphasised that this is a common law duty cot founded in contract or statute.\textsuperscript{89}

The SCA then considered whether a negligent breach of this duty had been established. The court held that the legal convictions of the community are such that an employer is required to take reasonable steps to prevent sexual harassment and further that an employer would be liable to compensate a victim for harm suffered should it negligently fail to provide such protection.\textsuperscript{90} It is in this regard that Van As' failure to deal with Grobler's complaints despite her reluctance to pursue the harassment becomes relevant. The court stated the following:

"If Van As had acted earlier in the way I have suggested I am satisfied that Wager should (and on the probabilities would) at least have informed the second appellant that his conduct vis – a – vis the respondent had not gone unnoticed and have warned him that, if such conduct persisted, not only his ambition of rising to a senior managerial position in the company would come to nought but there was a very real danger of his being dismissed. I think it overwhelmingly probable, knowing what we do about the personality of the second respondent and his relationship with Wager, that such a warning would in all probability have done the trick and prevented the flat incident from taking place. I have already found that, if the flat incident had not taken place, the respondent would not have suffered the psychological injury on which her claim is based."\textsuperscript{91}

The SCA found that Van As' failure to address Grobler's claim was culpable and held that Tydskrifte was clearly vicariously liable for his failure to act in this regard.\textsuperscript{92} According to Rochelle Le Roux the approach applied is rather strained in that the employer is held liable in terms of a duty to provide a safe working environment for something that did not happen in the workplace at all. This occurred under the assumption that the perpetrator would have responded in a certain fashion had the employer reprimanded him for his conduct in the workplace.

\textsuperscript{88} Par 26.  
\textsuperscript{89} Par 70.  
\textsuperscript{90} Par 68.  
\textsuperscript{91} Par 72.  
\textsuperscript{92} Par 71.
(d) Jurisdictional defences

Some very interesting observations were made by Farlam JA regarding the jurisdictional defences raised by Media 24. Media 24 argued that because sexual harassment in the workplace has been regulated since 1998 by Code of Good Practice\(^93\) published in terms of the LRA, and since it came into operation during August 1999, also by the EEA, sexual harassment is a matter that should be dealt with exclusively by the Labour Court, who has exclusive jurisdiction to deal with these cases. At the time of the alleged sexual harassment committed by Samuels the EEA was not yet in operation but the rules applicable to unfair discrimination in the workplace formed part of the definition of unfair labour practice as indicated in Schedule 7 to the LRA. In terms of this Schedule disputes of sexual harassment were to be adjudicated on by the Labour Court. Media 24 argued that the Labour Court had exclusive jurisdiction in terms of section 157(1) of the LRA and that the High Court therefore had no jurisdiction to entertain the matter. This objection was rejected to by Farlam JA on two grounds: Firstly the Code is clear that that it does not limit the rights of a victim to proceed with a civil claim for damages.\(^94\) The Supreme Court of Appeal referred to Item 7(6) of the 1998 Code which reads as follows:

“A victim of sexual assault has the right to press separate criminal and / or civil charges code.”

The court found that although the references to “sexual assault” and “civil charge” were not clear, it was safe to assume that “sexual assault” included “sexual harassment”, and that “civil charge” meant a civil action for damages.

Secondly the court relied on the dictum of the SCA in *Fedlife Assurance Ltd v Wollaardt*\(^95\) where the court held that a dispute about the unlawfulness of an employer’s conduct (in that case a dismissal) as opposed to its unfairness is not a “matter” required to be adjudicated by the Labour Court as contemplated by section 157(1) and accordingly the High Court’s jurisdiction is not excluded. According to the

\(^{93}\) The Code of Good Practice on the Handling of Sexual Harassment Cases,1998. This code was replaced by a code with the same name published in terms of the EEA under Government Notice 1357 of 2005 published on 5 August 2005.

\(^{94}\) Par 75.

\(^{95}\) 2002 1 SA 49 (SCA) 261 E – H par 27.
laws of delict, the question of fault can only arise once wrongfulness has been established.96

Farlam J also dismissed Media 24’s argument that, as PTSS is a disease covered by the provisions of section 65(1) (b) of the COIDA, the matter had to be referred to the Compensation Commissioner. Section 65(1) reads as follows:

“Subject to the provisions of this Chapter, an employee shall be entitled to the compensation provided for and prescribed in this Act if it is proved to the satisfaction of the Director-General –

(a) That the employee has contracted a disease mentioned in the first column of Schedule 3 and that such disease has arisen out of and in the course and scope of his or her employment, or

(b) That the employee has contracted a disease other than a disease contemplated in paragraph (a) and that such disease has arisen out of an in the course of his or her employment.”

Because the incident that resulted in the PTSS occurred during a private pursuit Farlam JA declined to express an opinion on whether it was a disease as contemplated in section 65(1) but held that the COIDA did not apply.97

In this case the court had to deal with the issue of negligence, and found that the employer had in fact been negligent because despite the fact that the harassment had been reported, the official to whom it in fact had been reported negligently failed to do anything about it.

The court ordered that appeals of both appellants be dismissed with costs.

96 Neetling et al 123.
97 Par 77.
CHAPTER 4
PROCEDURE FOR REPORTING AND INVESTIGATING SEXUAL HARASSMENT

4.1 INTRODUCTION

It is vital that employers take the necessary steps in the workplace to eliminate claims of sexual harassment and in so doing they will also be in a position to escape and or to avoid liability for harassment by co employees. Failure by an employer to investigate claims of sexual harassment will definitely result in them being held liable for the damages suffered by the victim if the sexual assault took at the workplace and during the course and scope of the perpetrators employment.

Provision is made therefore in the 2005 Code (Sexual Harassment) which urges employers to create an environment which is safe from sexual harassment and in which complainants of sexual harassment will not feel intimidated, ignored and that their complaints are of a trivial nature. They should also not be fearful of reprisals from the employer and the perpetrator. It is of the utmost importance that appropriate action be taken where a complaint of sexual harassment is received in the workplace. An appropriate reporting structure should be in place as well as a procedure to be applied when investigating these claims. This should be done promptly and not waited until the next claim of sexual harassment is brought to the fore.

4.2 REPORTING SEXUAL HARASSMENT

In terms of section 60(1) of the EEA any conduct in contravention of the Act must immediately be brought to the attention of the employer. This is amplified by Item 8.1.2 of the 2005 Code which states as follows:

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98 Item 6 of the 2005 Code.
“In instances of sexual harassment, the word ‘immediately’ shall mean, as soon as is reasonably possible in the circumstances and without undue delay, taking into account the nature of sexual harassment, including that it is a sensitive issue, that the complainant may fear reprisals and the relative positions of the complainant and the alleged perpetrator in the workplace.”

When sexual harassment has been brought to the attention of the employer, the employer should:

- Consult all relevant parties;
- take the necessary steps to address the complaint in accordance with this code and the employer’s policy; and
- take the necessary steps to eliminate the sexual harassment.\(^{99}\)

In terms of Item 7.4.4 of the Code it is considered a disciplinary offence to victimise or retaliate against an employee who in good faith lodges a grievance of sexual harassment. The procedure to be followed by a complainant and the employer should clearly be set out in the sexual harassment policy that should be in place in the workplace.

4.3 CHOICE OF PROCEDURES

The 2005 Code recommends that a complainant be given a choice to decide on the procedure to be used and this should also be clearly stipulated in the sexual harassment policy adopted by the employer. The Code distinguishes between an informal and a formal process.

(a) Informal procedures

The informal procedure envisages an approach to the perpetrator by either the complainant or an appropriate third party and explaining to him or her that his attentions are unwelcome, that it makes the complainant feel uncomfortable and that it is offensive. The identity of the complainant need not be made available to the

\(^{99}\) Item 8.2 of the 2005 Code.
perpetrator if he is confronted by a person other than the complainant. In the case of Siwela and North West Development Corp (Pty) Ltd,\textsuperscript{100} it was held that by failing to consult the alleged harasser after receiving the complaint of sexual harassment, the managing director had not complied with the company’s sexual harassment policy and this contributed to a finding that the dismissal was procedurally unfair.

Our courts have also recognised the value of conciliation and apology in these cases. In \textit{Daymon Worldwide SA Inc. v CCMA},\textsuperscript{101} the court described the informal conciliatory meeting to be a “very responsible and appropriate action”, which went some way towards the court finding that there was no constructive dismissal.

The following guidelines can be applied when taking informal action:

- Talk to the abuser and ask him to stop the behaviour that makes you the complainant feel uncomfortable.

- If the complainant should feel uncomfortable about being alone with the perpetrator he or she can ask someone they trust to come along.

- The complainant can also write to the perpetrator advising him that his actions are making her uncomfortable and ask him to stop. Mention should be made of the things done by the perpetrator creating the uncomfortable feeling.

- A copy of the letter should be kept.

- The letter should be sent by registered mail in order to prove dispatch thereof.

- A shop steward or work colleague can speak to the perpetrator.\textsuperscript{102}

\textsuperscript{100} [2007] 7 BLLR 655 (CCMA).
\textsuperscript{101} (2009) 30 ILJ 575 (LC).
(b) **Formal procedures**

The formal procedure can be followed without having first followed the informal procedure. Where the formal procedure is not applied, the employer should still assess the risk to other persons in the workplace. The employer must take into account all relevant factors, including the severity of the sexual harassment and whether the perpetrator has a history of engaging in sexual harassment.\(^{103}\) The employer may however follow the formal procedure where after a proper investigation it transpires that there is significant risk of harm to other employees irrespective of the wishes of the complainant as indicated Item 8.7.2 of the 2005 Code. In *Media 24 Ltd v Grobler*\(^{104}\) the employer’s failure to investigate the complaints of a victim of sexual harassment was held to be “culpable” despite the victim’s refusal to lay charges.

In terms of Item 8.6.2 of the 2005 Code an employee should consider any further steps, which can be taken to assist in dealing with the complaint. The employer may thus refuse to withdraw disciplinary action in instances where the matter has been settled between the parties or where the complainant withdrew the action. There is still a duty on the employer to proceed with disciplinary action. The employer is not in any way bound by the views of the complainant / employee in order to curb sexual harassment in the workplace. The employee would have the right to institute action against the employer based on unfair conduct, discrimination or constructive dismissal where an employer fails to take disciplinary action against a perpetrator. Where formal procedures have not been dealt with in an applicable collective agreement it must be outlined in the sexual harassment policy adopted in the workplace.

The policy should set out the clearly the how and with whom the grievance should be lodged, the internal disciplinary procedure to be applied and the required timeframes within which the investigation should be conducted. The parties should be advised of their right to refer the matter to the CCMA if they are not satisfied with the outcome of the disciplinary procedure. They should also be advised that it is a disciplinary offence to victimise or retaliate against a complainant. The policy should also specify

\(^{103}\) Le Roux *et al* 100.

\(^{104}\) (2005) 26 *ILJ* 1007 (SCA).
the various disciplinary sanctions that could be imposed if found guilty of sexual harassment in the workplace. These sanctions may include the perpetrator being issued with a warning, dismissal being transferred to another branch of the employer should there be one.

The policy should be holistically applied throughout the workplace to create a safe environment free from sexual harassment. All the employees should be made aware of all the elements addressed in the policy in order to put a stop this disease called sexual harassment.

4.4 INVESTIGATION

Care should be taken during any investigation of a grievance of sexual harassment that the aggrieved person is not disadvantaged, and that the position of other parties is not prejudiced if the grievance is found to be unwarranted. The identity of the parties should at all times be protected to guard against victimisation and fear of reprisals.

The potential for a defamation action should always be borne in mind when investigating the claim. The investigation should be done promptly and thoroughly. It would be plausible for a claim of sexual harassment to be investigated within 2 – 3 days after receiving the complaint. It should also be borne in mind that the employer’s liability in terms of section 60 of the EEA will depend on how promptly the employer reacts to the complaint received.

4.4.1 WHO SHOULD INVESTIGATE?

It is commonly known that most if not all of the investigations done in the workplace relating to any type of misconduct fall into the hands of the IR/HR department. The person who conducts such an investigation should have a good working knowledge of what constitutes sexual harassment as well as the policy in place as well as the procedures recommended in the 2005 Code. The investigator should be unbiased
and independent in his investigations and must remain a neutral party at all times. Salisbury and Dominic\textsuperscript{105} states the role of an investigator to include the following:

- Being comfortable with not being liked, because no matter what the outcome of the investigation, someone is likely to be angry or unhappy;

- being able to handle the investigation in a way that does not draw her / him into the role of advocate for either party;

- being able to draw the investigation to speedy resolution; and

- being able to value and understand diversity.

This is a tall order to be complied with and therefore the impartiality of the investigator is of utmost importance.

### 4.4.2 MAINTAINING CONFIDENTIALITY

As mentioned earlier maintaining confidentiality is important, however it is not clear what is meant in the 2005 Code that the employer should advise the complainant that “the matter will be dealt with confidentiality if the complainant so chooses”. This seems to mean that not the utmost of confidentiality will applied but that it will be limited to those only who are involved in the process (witnesses). The identity of the complainant should as a point of departure be withheld from the perpetrator until such time that it needs to be revealed.

The process should be procedurally fair in that all parties to the action or sexual assault should be given the opportunity to state their respective versions. They should also be given the opportunity to properly prepare their cases. No over communication is allowed and all involved should be cautioned about maintaining confidentiality. The investigator should act with discretion towards the complainant and be sensitive towards the reputation of the perpetrator.

It is important that all relevant documentation relating to the offence should be kept in a separate file and should not be kept with the personnel file of the employees. Access to these files should be restricted to those who have a legitimate need to see it. Copying and retention of these files should be prohibited and should be returned intact to the distributor.

4.4.3 DEALING WITH EMOTIONS

It is common knowledge that there will be tears, emotion and accusations levelled between the parties and that the investigator should be wary thereof. To be accused of sexual harassment is a serious complaint and not to be treated lightly. One should also be aware of the repercussions of being criminally charged and convicted.

The following was said by Wagner:106

“Sexual harassment investigations must, by their very nature, involve emotion – laden issues and touch deeply felt chords. The matters’ that must be discussed involve fundamental values and believes about sex – its proper role in life, views on the proper relationship at work between the sexes, what is and is not appropriate sexual conduct, and the relationship of sex in a person’s overall value system. These are highly personalized, intimate issues.”

An investigator should know when to call for a break if the emotions are starting to run too high. He should be in a position to interpret and discern the versions given by the parties which are both likely to be emotional. He must be able to make sense of what is being said by both parties by and constructing a common understanding thereof.

4.4.4 CONDUCTING THE INVESTIGATION

The steps regulating the investigation are set down by Le Roux, Rycroft and Orleyn to be the following:107

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106 Wagner Sexual Harassment in the Workplace: How to Prevent, Investigate and Resolve Problems in Your Organisation (1992) 39 (referred to hereafter as Wagner) at 47.

• The investigation should begin promptly after the complaint is lodged by interviewing the complainant. This could also be done by interviewing the person who laid the complaint if it was not done by the complainant.

• All relevant documentation must be gathered by the investigator.

• The investigator should be in a position to identify the definitional elements of harassment and not solely concentrate on whether the conduct was welcome or not.

• The investigator should be aware of the possibility of a criminal investigation and especially the definition of rape, assault, sexual assault and crimen injuria. It is not the duty of the employer to lay a criminal charge but he should be aware of the seriousness of the alleged misconduct.

• The investigator should try to draw from the complainant what it is she / he wants as an outcome.

• A statement should be written in the presence of the complainant who constructs the story in a chronological ordered way and this statement must be signed by the complainant. The complainant should be made aware that, within the policy of confidentiality, the investigator may have to reveal her / his identity to the alleged harasser.

• A complaint of sexual harassment may require advice and assistance, including counselling. This is provided for in the 2005 Code.

• The alleged harasser should then be interviewed to obtain her / his reaction to the allegations.

• The 2005 Code suggests that the identity of the complainant should only be revealed if the complainant agrees or if it is necessary for the harasser to make sense of the allegations.
• The investigator must at all times remain neutral as there will be angry denials of the allegations coupled with threats to sue the complainant for defamation.

• The alleged harasser should be encouraged to sign a statement capturing his/her reaction to the allegations.

• The investigator will have to keep management informed as far as possible preserving confidentiality, disclosing the identity of the parties only is necessary and warning management to preserve confidentiality.

• If third parties have been identified as potential witnesses by either, the complainant or the alleged harasser, these persons should be interviewed, and their statements taken if the information is relevant. These third parties should also be cautioned about confidentiality.

• If there has been an allegation of physical conduct, the investigator should visit the site of the alleged harassment. This will enable the investigator to assess the proximity to other work spaces and lines available to potential witnesses.

• At this stage, the investigator will probably be in a position to evaluate the probabilities of whether harassment took place and its severity and to advise the complainant of the informal and formal procedures available to deal with the harassment. Depending on the severity of the harassment, an informal procedure such as mediation may be a suitable mechanism to deal with the complaint. If the alleged harassment is severe, the 2005 Code places an obligation on the employer to assess the risk of harm to other persons in the workplace and to institute a formal procedure regardless of the preference of the complainant. Although it is not the duty of the investigator to make a finding of “guilty” or “not guilty”, it is inevitable that some preliminary conclusion is reached. This point is based on which of the two versions is the more probable.
It is clear from the above discussions that once informal procedure has not been successful the formal procedure should apply. The employer should at all times be consistent in the application of its disciplinary code and procedures. This stems from the fact that irrespective of whether or not an agreement has been reached between the parties the employer is still under an obligation to charge the alleged harasser for misconduct in terms of its disciplinary code. It is clear from the Code of Good Practice: Dismissal that the disciplinary process / hearing do not need to be formal. It is sufficient that the employee be notified of the allegations against him in a language that he / she understand. The employee should thereafter be given the opportunity to respond to the allegations and state his case. The employee is entitled to reasonable time to prepare the response and to be assisted by a trade union representative or fellow employee. After the enquiry the employer must communicate the decision to the employee in writing and furnish reasons for the decision.

There are appropriate sanctions provided for in Item 8.8 of the 2005 Code which includes warnings to be issued for minor instances of sexual harassment; dismissal for continued minor instances of sexual harassment after warnings as well as for serious instances; and in appropriate circumstances upon being found guilty of sexual harassment a perpetrator may be transferred to another position in the workplace. It must however be stressed that sanction must be proportionate to the seriousness of the sexual harassment in question.
CHAPTER 5
EMPLOYER LIABILITY IN TERMS OF SECTION 60 OF
EMPLOYMENT EQUITY ACT

5.1 INTRODUCTION

Whenever harassment is followed by a dismissal, whether it is the dismissal of the victim or the perpetrator, there is always the possibility of it being unfair, for which the employer in all probability could be liable to pay both compensation and damages.\textsuperscript{108} Section 60 of the EEA regulates the liability of employers for the harassment of one of its employees by a co-employee in the workplace. Section 60 also provides for two defences that can be raised by an employer in such instances which will be discussed in detail later on in the chapter.

An employer may also be held liable for personal damages suffered by aggrieved employees as a result of sexual harassment committed by a fellow employee. These were the findings of the labour Court in the case of \textit{Ntsabo v Real Security CC}.\textsuperscript{109}

5.2 \textit{NTSABO v REAL SECURITY CC}

Facts
The applicant in this matter, Bongiwe Ntsabo, was employed as a security guard. The evidence accepted by the Labour Court was that she had been sexually harassed by a senior co-employee over a period of some six weeks, which culminated in sexual assault on 15 December 1999. During the six week period preceding the sexual assault, the applicant had reported the incident of sexual harassment to the respondent. The respondent failed to take action against the senior co-employee. Furthermore, after the sexual assault of December 1999, the applicant had again brought the sexual assault to the attention of the respondent,

\textsuperscript{108} Ss 50(2) and 193 of the LRA.
\textsuperscript{109} (2003) 24 ILJ 2341 (LC).
which again failed to assist the applicant. Instead, the respondent exacerbated matters for the applicant by moving her to a different workstation and placing her on night shift. This made her feel penalised, and as a result she resigned from the respondent’s employ. The applicant claimed compensation for unfair constructive dismissal as well as damages for medical costs incurred as a result of the sexual harassment, as well as a claim for damages in respect of pain and suffering.

Findings
Having been found that the applicant had indeed been harassed and that she had sought assistance from the respondent which turned a deaf ear to her plight, the court held that the applicant had been constructively dismissed. Had the respondent taken action to protect her from the sexual harassment, she most probably would not have resigned. That omission by the respondent was unfair and led to her resignation of the applicant. She was awarded twelve months’ compensation for unfair constructive dismissal.

The enquiry however did not end here. The court then had to decide whether it could hold the respondent liable for the damages the applicant claimed from it as a result of the sexual harassment committed by the respondent’s employee. In making a determination in this regard, the court had regard to section 60 of the Employment Equity Act. Accordingly and having regard to section 60(3) read together with section 6(3) of the EEA, the court found that the sexual harassment experienced by the applicant amounted to unfair discrimination in contravention of the EEA. Furthermore, it rejected the respondent’s contention that it ought not to be held liable for the unfair discrimination because the applicant had not reported the sexual harassment to it immediately, as is required in terms of section 60(1) of the EEA. The court found that it was sufficient for the applicant to have reported the sexual harassment to the respondent within a reasonable time. It held that the requirement that the infringement ought to be reported immediately could not be construed to mean within minutes of the incident happening. What will constitute “reasonable time” will differ from case to case.
Having found that sexual harassment constitutes unfair discrimination had been reported within a reasonable time to the respondent which turned a blind eye to it, it held that the respondent had contravened the EEA.

It then turned to consider what remedy, if any, it ought to attach to the respondent’s act of unfair discrimination based on sexual harassment. In this regard, it considered section 50(2) of the EEA which empowers the court, among other things, to award compensation and damages to the applicant.

It awarded the applicant damages of R20 000, 00 for future medical costs which would be incurred by her for treatment of post-traumatic stress disorder. It also awarded her an amount of R50 000, 00 for general damages. In awarding general damages, the court recognised that:

“It becomes difficult to assess damages because, while the experience might be horrifying, rape would have been much worse. Nonetheless the sequelae are not much different from those which one would expect in the case of actual rape.”

Comment

It is clear from the above mentioned case that all employees must be made aware of the company’s sexual harassment policy. When complaints relating to sexual harassment have been made, it must be dealt with promptly, because an employer would be able to avoid liability if it can be shown by the employer that all reasonable steps to eliminate sexual harassment in the workplace have been taken. The complaints should be investigated and disciplinary action must be taken against the alleged perpetrator. One can only imagine what additional costs would have been incurred had the applicant in the above matter also contemplated instituting criminal action against the perpetrator and the repercussions thereof.

5.3 SECTION 6 - PROHIBITION OF UNFAIR DISCRIMINATION

This section is of particular relevance in that in the above mentioned case of Ntsabo it was held that the sexual harassment of the complainant amounted to unfair discrimination in terms of section 6(3) of the EEA.
Section 6 states as follows:

“(1) 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 or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.

(2) It is not unfair discrimination to-
   (a) Take affirmative action measures consistent with the purpose of this Act; or
   (b) Distinguish, exclude or prefer any person on the basis of an inherent requirement of a job.

(3) 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)."

5.4 SECTION 60 - LIABILITY OF EMPLOYERS

Section 60 of the EEA states 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 employer 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 an 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.”

This section is clearly aimed at encouraging employers to do as much as possible to eradicate discrimination in the workplace, but also reflects a sentiment that there comes a point when diligent employer should be rewarded for its efforts to prevent discrimination and not be held liable for the discriminatory conduct of its employees if, nonetheless, the latter do not respond to the employer’s efforts.\[

\textsuperscript{110} Le Roux, Orleyn and Rycroft \textit{Sexual Harassment in the Workplace: Law, and Policies and Processes} 94-98.
5.5 PURPOSE OF SECTION 60

Section 60 seeks to penalise the employer for failing to address equity in the workplace; the section is not intended to remedy the harm done in the delictual sense.111

In *Mokoena v Garden Art (Pty) Ltd*112 the nature of the claim against the employer was described as follows:

“The applicants are seeking damages against the first respondent only. The claim is founded in terms of the EEA. This is not a delictual claim founded under the common law. In their statements of claim, they are seeking to hold the first respondent liable on the basis that it failed to take proper steps to prevent, eliminate or prohibit sexism and “genderism” being perpetrated at the workplace by certain of its employees including the second respondent that constitutes direct and unfair discrimination against the applicants. It is therefore more appropriate to regard it as a form of direct liability than as a form of statutory vicarious liability. This must be read with the provisions of section 60 of the EEA.”113

This sentiment was also supported in the subsequent matter of *Potgieter v National Commissioner of the SAPS*114 when Molahleli J, commenting on the nature of the employer’s liability in terms of the EEA, said that “[t]he liability for damages suffered by the employee flew from the sexual harassment itself and the failure by the employer to take reasonable steps to deal with the employee’s complaint”.115

The aim of the EEA is therefore to encourage employers to promote and address employment equity. Employers who have addressed this issue have nothing to be concerned about and should not be penalised. In terms of sections 60(3) and (4) an employer can avoid liability by proving that it dealt promptly and adequately with the employee’s complaint of sexual harassment and by proving that it did everything reasonably practicable to ensure that its employees observed and abided by the EEA.

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112 [2008] 5 BLLR 428 (LC).

113 Above par 39.

114 (2009) 30 ILJ 1322 (LC).

115 Above par 56.
5.6 WHEN DOES SECTION 60 APPLY?

In *Mokoena v Garden Art (Pty) Ltd*\(^\text{16}\) the requirements to be applied for section 60 and when it is applicable were summarised as follows:

(a) The conduct must be an employee of the employer;

(b) the conduct must constitute unfair discrimination (i.e. it must constitute sexual harassment);

(c) the conduct must take place while at work;

(d) the alleged conduct must immediately be brought to the attention of the employer;

(e) the employer must be aware of the conduct;

(f) there must be a failure by the employer to consult all relevant parties, or to take the necessary steps to eliminate the conduct or otherwise to comply with the EEA; and

(g) the employer must show that it did all that was reasonably practicable to ensure that the employee would not act in contravention of the EEA.

This section is only applicable if both the complainant and the perpetrator are employees of the employer. In terms of the statutory definition of an employee in section 1 of the EEA, independent contractors are not included under this definition. In *Piliso v Old Mutual Life Assurance Co*\(^\text{17}\) the employee could not rely on the provisions of section 60 since there was no evidence that the harassment was perpetrated by another employee of her employer. Section 60 also does not cover as mentioned above, independent contractors, suppliers, clients and learners.

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\(^\text{16}\) [2008] 5 BLLR 428 (LC).

\(^\text{17}\) (2007) 28 ILJ 897 (LC).
The harassment must have taken place at while at work. In this regard see the case of *Ntsabo v Real Security CC*\(^{118}\) mentioned above. Section 60 will further only apply where the harassment was brought to the attention of the employer. In *Ntsabo*\(^ {119}\) it was held that that this must not be construed to mean “within minutes of the event”. The fact that the applicant’s brother contacted the employer later the same evening after the final incident and only after the applicant confided in her family was held to be reasonable under the circumstances. The standard test is based on what is reasonable under the circumstances in order to ascertain the appropriate time frame within which to advise the employer of the harassment. Similarly in *Mokoena v Garden Art (Pty) Ltd*\(^{120}\) the Labour Court regarded a report on the next day after the incident as sufficient.

Finally, section 60 will apply unless the employer can avail itself of the defences provided for in the section.

### 5.7 THE DEFENCE AVAILABLE UNDER SECTION 60

Section 60 has been referred to as creating a form of statutory vicarious liability for the discriminatory conduct of employees.\(^ {121}\)

In terms of section 60(3) an employer is required to consult with all relevant parties and to take the necessary steps to eliminate the alleged conduct and comply with the EEA once it becomes aware of this conduct. If this is not done by the employer, the employer will be deemed to have contravened the provision and will be held liable for the contravention. It is therefore imperative that reasonable steps be taken by the employer to try and eliminate this conduct in the workplace.

Of particular importance here is the case of *Potgieter v National Commissioner SAPS*.\(^ {122}\) In this case a co employee of the victim who worked as a data processor

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\(^{118}\) *(2003) 24 ILJ 2341 (LC).*

\(^{119}\) *Above 2374E – I.*

\(^{120}\) *Par 57.*


\(^{122}\) *(2009) 30 ILJ 1322 (LC).*
for the SAPS was found guilty of sexual harassing her and was fined R600.00; half of this was suspended. The victim nonetheless proceeded against SAPS and claimed compensation equal to 24 month’s remuneration and a further amount as damages. Her claim was not that the employer did not consult with the affected parties or take the necessary steps. Rather, her sexual concerns were, among others that the SAPS had delayed in addressing her complaint of sexual harassment; that the employer had failed to follow its own disciplinary procedure, that the sentence imposed on the harasser was too lenient, and that he had not been removed from the premises. The court held that the failure to dismiss the harasser did not assist the victim since her rights do not depend on whether he was dismissed or not. It was further held that the dismissal of the perpetrator does not imply that the employer had met the requirements of section 60. It was further held that the failure to remove or suspend the perpetrator could also not be faulted since “there is no general rule that suspension or removal from the workplace is automatic in every sexual harassment complaint”. The victim was also aggrieved that the disciplinary tribunal that conducted the inquiry of the harasser was not chaired by a female. This approach had been suggested in a circular distributed by the employer in respect of cases involving female victims of sexual harassment. The court did not interpret the circular as mandatory and pointed out that, disciplinary codes are in any event only guidelines; ultimately the question is whether the principles of justice were upheld by the tribunal. The victim’s application to court was therefore dismissed.

Upon whether an employer can become liable upon the first reporting of a harassment claim, Francis AJ in Mokoena made the following comment:

“He where there is one incident of sexual harassment, which is brought to the attention of the employer immediately after the incident, an employer will not be held liable in terms of section 60 of the EEA. The aggrieved employee may then have to consider a different basis to hold the employer liable either in terms of common law, etc ... It would therefore appear to me that section 60 of the EEA really applies where it has been brought of the employer that sexual has taken place and, as a result of the employer’s inaction, further sexual harassment takes place, which renders the employer liable.”

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123 Above par 49.
124 Above par 53 and 58.
125 Above par 59.
126 Above par 42.
It is clear from both judgments in *Potgieter* and *Mokoena* that perfection is not expected from employers when responding to claims of sexual harassment. It expects from employers to act immediate in an honest and reasonable attempt to try and deal with the problem at hand.

The second defence available to an employer would be in terms of section 60(4) which requires an employer to prove that it did all that was reasonably practicable to ensure that the employee would not act contrary to the EEA. In order to escape liability in terms of section 60(4) the employer should have a harassment policy in place and this policy should have been effectively communicated to the employees. This should be accompanied by very visible education programmes. This will not only assist the employer in escaping liability but will also promote and enhance a working environment free from harassment.

MacKen JJ\textsuperscript{127} summarised reasonable practicable steps taken by an employer to at least:

(a) develop clear written comprehensive policies on discrimination and harassment – including the consequences of breaching the policies;

(b) disseminate those policies to employees, regularly train employees – particularly managers – on their obligations and duties under discrimination law and keep the policies accessible;

(c) establish clear written procedures for the handling of grievances with a view to ensuring that complaints are dealt with promptly and confidentially and follow the requirements of natural justice; and

(d) monitor the workplace to ensure that the policies are effectively implemented.

When reviewing the conduct of the employer for purposes of section 60(4) it has been suggested that the courts should be cautious about considering the employers conduct only after the incident complained of as this will discourage employers from

\textsuperscript{127} MacKen *The Law of Employment* 5\textsuperscript{th} ed (2005) 645.
taking measures in advance. In the case of *Satawu obo Finca v Old Mutual Life Insurance Company (SA) Limited and Burger*\(^{128}\) which is a case involving racial discrimination, the court did not apply section 60 of the EEA but instead based the employers liability on section 6(1) because the employer discriminated against the victim employee by failing to take action after another employee made a racist remark. The court however found that an employee of old mutual made a racist remark about another employee and that the employer failed to take appropriate action once it became aware of the incident. The court also found that the employer did much by way of “training and other means” to eradicate racism and that it was rather the response to the training that was the problem.\(^{129}\) Section 60(3) clearly did not apply to this case even though it indicated the preventative steps taken by the employer. It is also not clear why section 60(4) did not come to the rescue of the employer and this was not explained in the judgment.

According to Rochelle Le Roux\(^{130}\) the employer can raise the following defences in the context of section 60:

(a) The harasser was not the victim.

(b) The victim was not an employee.

(c) The conduct complained of did not constitute harassment.

(d) The harassment did not occur while at work.

(e) The victim did not immediately (in the broad sense) bring it to the attention of the employer.

(f) The employer consulted with all relevant parties and took steps to eliminate the harassment and took steps to ensure compliance with the EEA.

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\(^{128}\) [2006] 8 BLLR 737 (LC).

\(^{129}\) Above par 44.

\(^{130}\) Presentation by Le Roux “Employer Liability in terms of Section 60 of the Employment Equity Act” (see also Le Roux et al 139).
(g) The employer did all that was reasonably possible to ensure that its employees would not harass.

5.8 LIABILITY IN TERMS OF THE COMMON LAW

The common law liability is not in any way affected by an employer’s liability in terms of section 60 of the EEA regardless of whether it concerns direct liability or vicarious liability. The reason for this is because the common law aims to redress harm caused by unlawful conduct, while the EEA aims to redress unfair discrimination.

To prove vicarious liability the employer must prove that the perpetrator was an employee of the employer, that a delict was committed and that the perpetrator was acting within the course and scope of his employment. The leading case on vicarious liability is the case of Grobler V Naspers that was discussed earlier in chapter 3.

Direct liability of an employer came to the fore in Media 24 Ltd v Grobler which is an appeal against the Grobler v Naspers case, in which the employer’s liability was confirmed, not on the basis of vicarious liability, but on the basis of the employer’s failure to provide a working environment free from sexual harassment. The employer committed a negligent breach of its duty to provide a safe working environment.

For further discussion on the common law liability see Chapter 3.

5.9 OTHER FORMS OF LIABILITY

The big question here is whether an employer will be liable in circumstances where the harassment occurred at the workplace but the identity of the perpetrator is not known? In Piliso v Old Mutual Life Assurance Co (SA) Ltd131 the employee was sexually harassed by an unidentified perpetrator who left obscene photographs at her desk. As a result of this and the failure of the employer to take reasonable steps to address her fears ad general security at the workplace, she suffered post-traumatic

stress disorder. The employer was held not vicariously liable or liable in terms of section 60 of the EEA, since there was no evidence that the perpetrator was another employee. However, Nel AJ found that the employer was liable for constitutional damages since the employee’s constitutional right to fair labour was infringed:

“I am accordingly satisfied that the applicant’s right to fair labour practices in terms of section 23(1) of the Constitution has been violated by the manner in which the first respondent and reacted to the incident of sexual harassment to which the applicant had been subjected in the workplace.”

It is clear from the above case that employers who fail to attend to complaints of sexual harassment in the workplace will have to bear the brunt thereof. The consequences for them would be dire.
CHAPTER 6
PREVENTING AND MANAGING WORKPLACE

6.1 INTRODUCTION

There is a duty imposed on all employers by the law to prevent harassment in the workplace be it of a sexual nature or otherwise. There are serious implications for non-compliance. It is therefore of paramount importance that workplace policies be implemented and that these policies should be both sensible and educational. These policies will create an opportunity for the employer to explain through training workshops the policies implemented. These policies will also serve to inform managers of their responsibilities in terms of those policies and the workers. The policies can also serve as a form of dispute resolution or to create a culture of solving disputes in the workplace by following the correct procedures.

By following the policies and being aware thereof it might also at the end of the day restrict the liability of the employer in terms of the EEA.

6.2 CREATING AND MAINTAINING A WORKPLACE ENVIRONMENT IN WHICH THE DIGNITY OF THE EMPLOYEES IS RESPECTED

The code of Good Conduct on sexual harassment deals extensively with the prevention and management of sexual harassment in the workplace and also gives clear guidelines and directions to employers in dealing with this type of offence. The Code reaffirms the importance of human dignity and it urges employees to create and maintain a working environment in which the dignity of employees is respected and to sustain a working environment in which allegations of sexual harassment is not ignored and there is no fear for reprisal and victimisation. This has always been the issue in cases before the Labour Court and Labour Tribunals. It has also been the deciding factor in many instances when determining the fairness of a dismissal.
In the case of *PSA obo Ferreira and the Department of Labour*\(^{132}\) the following was stated:

“... sexual harassment in whatever form constitutes grave disrespect for another human being and as such is a very serious form of misconduct. In addition, an employer is required to eradicate sexual harassment and create a working environment that is conducive to …”

Similarly in the case of *CWIU and Coates Brothers SA Limited*\(^{133}\) a matter concerning the fairness of the dismissal of the harasser, Krige C, remarked that “unwanted advantages to the cleaning lady in the cloakroom would amount to an infringement upon her dignity”.

### 6.3 GENERAL DUTIES OF EMPLOYERS AND MANAGERS

Employers and managers play important roles in creating and maintaining an environment in which sexual harassment is taboo. They should not encourage such behaviour and should in actual fact not cause any offence through their conduct. This duty also extends to customers, suppliers and other people who have business dealings with the employer as stipulated in Items 6.1 – 6.4 of the 2005 Code. This does not exclude ordinary workers from exercising such a duty. This duty that falls on the shoulders of employers and managers may at the end of the day minimise or limit the liability of the employer in sexual harassment instances.

For purposes of sanctioning the conduct of employers and managers could also in many instances be an aggravating factor. Some of this was captured by Pillay AJ in *Ntsabo v Real Security CC*:\(^{134}\)

> “In the circumstances, it is clear that the inaction of the respondent was unfair and led to a situation that became an intolerable environment for the applicant to continue employment. She was then compelled to terminate her contract of employment with the respondent. The respondent ought to have foreseen the development of a hostile and intolerable working environment in the circumstances.”

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\(^{132}\) 2004 13 GPSSBC 8.25.3.

\(^{133}\) 1998 7 CCMA 2.9.2.

\(^{134}\) (2003) 24 ILJ 2341 (LC) at par 2376G.
6.4 THE DUTY TO ADOPT A HARASSMENT POLICY

It is imperative that employers should adopt a statement of intent in terms of which policies and procedures are put into place relating to the treatment of cases relating to sexual harassment in the workplace. The policies and programmes should on a continuous basis be presented to the employees by means of training at regular intervals. The programmes should be user friendly and be sensitised to the feelings and needs of the victims. There would be added advantages attached to these programs and not only to help the employer escape liability.

A policy can be made part of part of a contract just as easy as with disciplinary codes. A clause to the effect that there are policies in place regulating certain types of behaviour and the grievance procedure can be inserted into the contract. Where an employer fails to follow the process as set out in a sexual harassment and disciplinary code incorporated into the contract of employment, the employer risks common law breach of contract claim. This is so even if the actual procedure followed is in fact a fair procedure.

In Hendricks v Cape Peninsula University of Technology, the employer, in a matter that concerned sexual harassment, proceeded with a formal process without first resorting to the informal process provided for in its sexual harassment code. The Judge commented as follows:

"I am of the that given the contractual obligations that arise from the policy and the very nature of sexual harassment claims (which the respondent seems to have formulated in a sui generis manner), the respondent's failure to have complied with its own provisions occasioned prejudice to the applicant that justifies the setting aside of the disciplinary hearing. This is not so for the reason that the applicant is entitled to 'procedural niceties' but because, inter alia, such procedures bind both parties to the contract and in particular provide important procedural safeguards for the applicant and/or other persons subjected to such proceedings. More importantly it provides in accordance with the purpose and objectives of the policy an appropriate and sensitive process for complaints in such matters and affords them a necessary voice in the manner of resolving or dealing with such complaints. The informal process must not be understood as trivialising the seriousness of the sexual harassment charges and while the first respondent's retort that it could not 'be seen to be sweeping the issue under the carpet' is understandable, compliance with the informal process is a necessary procedure provided for in the first respondent's own policy. The

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135 (2009) 30 ILJ 1229 (C).
The investigative process in the first respondent’s policy must be viewed holistically as constituting both an informal and formal process especially in cases of serious complaints where appropriate disciplinary action may follow. I am satisfied that the prejudice suffered by the applicant in the first respondent’s failure to have followed the policy was of such a nature that it vitiated the disciplinary proceedings that were instituted.

A sexual harassment policy may also after a process of negotiation, be included in a collective agreement with a trade union. It can also be a free standing policy, either with or without consultation or cooperation with employees, which will lack a contractual basis.\(^{136}\)

The policy is the prerogative of an employee but it would go a long way if there was consensus between all the parties involved. The trade unions should also be consulted if no collective agreement is in existence in the workplace.

In terms of the 2005 Code the sexual harassment policy should include a statement that sexual harassment constitutes a form of unfair discrimination as is indicated in section 6 of the EEA. It is also an explicit requirement in terms of item 7.2 of the 2005 Code that the policy be communicated to all employees. This will be a determining factor in whether an employer has discharged its duties in terms of section 60 of the EEA.

Item 11 suggest that the employer organisations should include the issue of sexual harassment in their orientation, education and training programmes, and that trade unions should include it in their education and training programmes for shop stewards and employees. The Code is however silent on how effective communication to all employees could be ensured.

\(^{136}\) Le Roux et al 96.
CHAPTER 7
CONCLUSION

It is clear from the cases discussed in this treatise that sexual harassment has become a big problem in South Africa and is still on the increase. Sexual harassment in the workplace is not only restricted to women but experience has shown that more women than men are the victims hereof. Sexual harassment can also take place between members of the same sex. Irrespective of what form the harassment takes on the victims, more often than not, has devastating effects on the victims.

The question to be asked in these cases of sexual harassment is “Is it about sex or is it about an abuse of power?”\textsuperscript{137} It seems that the prevailing view seems to be that in most instances, sexual harassment is about the abuse of power rather than some form of sexual gratification. This is particularly true where the harasser is in a position to exert economic power over the victim like for instance a supervisor or manager. In this instance the victim is usually threatened with job loss, withholding of an increase in salary or promotion and can even result in the actual loss of employment if the victim does not comply with the demands of the supervisor.

This is the reason why very few cases of sexual harassment gets reported or even make it to our courts even though it has been shown to be the most prevalent type of harassment in the workplace and even seems to be on the increase in our society, schools, public places and even our prisons. The victims are in most instances afraid to report the harassment for fear of reprisals and reprimands from the employer, harasser and even other co-employees. Victims of sexual harassment find the experience embarrassing and in many instances suffer severe emotional and psychological stress as a result of this traumatic experience. It creates a hostile, intimidating and offensive atmosphere in the workplace. It makes the working

\textsuperscript{137} Dupper \textit{et al} 229.
experience of the victim so unbearable in the workplace that victims are left with no other option than to resign from her job and this resignation at the end of the day may give rise to a claim for constructive dismissal. Section 186(e) of the LRA provides that a constructive dismissal exists where an employee resigns because her employer made continued employment intolerable (see Pretorius v Britz and Intertech Systems (Pty) Ltd v Sowter previously discussed).

Even if the victim does resign the results are still devastating in that she is on a daily basis confronted by the presence of the harasser and this in turn will have a negative effect on her work performance as well as her emotional and psychological wellbeing. The devastating effects of sexual harassment have been explained by Victoria Carter\textsuperscript{138} as follows:

"The effects of sexual harassment disadvantage the harassed employee, because absenteeism and low productivity give employers cause to dismiss or hold back the affected employee. Women are forced out of jobs and are reluctant to enter some fields of employment due to sexual harassment. Women in non-traditional occupations experience more sexual harassment than women in jobs traditionally held by women. These women may feel ‘forced out’ due to discriminatory treatment from male supervisors and co-workers. In fact, they are more than twice as likely to quit a job because of sexual harassment, than women in traditionally ‘female’ occupations. Moreover, expectations of sexual harassment in non-traditional occupations discourage many women from seeking jobs traditionally held by men. The price to break through the gender barrier may be too high for many women."

The treatment received by these victims seriously impact on their dignity and the effects of sexual harassment should be made clear to all employees. It is important to understand that workplace harassment is seen as workplace discrimination and this is expressly provided for in section 6(3) of EEA which declares harassment of an employee to constitute a form of unfair discrimination. One should note that a single act of harassment may be sufficient to constitute sexual harassment and the act need not necessarily be repeated before it becomes harassment.

In order to succeed with a claim for sexual harassment two requirements have to be met. Firstly, the conduct must be unwelcome. The victim must not in any way have encouraged the harasser in her behaviour towards him/her or the manner in which

he/she dresses. As a general rule these consideration are irrelevant in deciding whether the harassment took place or not. In *Pick & Pay Stores Ltd & An Individual*\textsuperscript{39} an arbitrator opined as follows:

‘While such factors may play some part in exceptional cases, when it comes to assessing the sanction to be imposed on the guilty perpetrator in cases of sexual misconduct, they can never, in my view, without more evidence be deemed to constitute the time of “incitement” which was clearly hinted at in the evidence. The complainant herself put it trenchantly in her evidence: Am I allowed to be condemned for what I Wear?’

Secondly, the conduct must be serious enough to constitute harassment and discrimination. The victim’s perspective of humiliation and the infringement of her dignity can never be discounted in cases of sexual harassment. The circumstances surrounding each case will always differ and regard should be had thereto. This is where the 2005 Code comes into play.

Victims of sexual harassment have a range of remedies available to them. This includes grievance procedures, laying a criminal charge against the perpetrator for indecent assault, *crimen inuria* and in the worst case scenario, rape. They may also institute a civil claim in delict or in contract or resignation and a claim for constructive dismissal.

The various decisions handed down by our courts over the years have illustrated the various options available to victims of sexual harassment. In the case of *Ntsabo v Real Security CC*\textsuperscript{40} the victim of harassment resigned and then not only sued the employer successfully for constructive dismissal (for which she was awarded compensation), but was also awarded damages in terms of the EEA. The employer was held liable for such damages in light to section 60 of the Act.

In *Grobler v Nasper Bpk & Another*,\textsuperscript{41} the victim of harassment also resigned but then successfully sued the employer in the High Court for common law damages based on the common law principle of vicarious liability.

\textsuperscript{39} IMMSA Arbitration Digest Vol 3 Pt 1 (Aug/Nov 1993).
\textsuperscript{40} [2004] 1 BLLR 58 (LC).
\textsuperscript{41} [2004] 5 BLLR 455.
However on in appeal in *Media 24 v Grobler*, the applications of the employer and harasser were dismissed and the employer was held to be directly liable for the damages suffered by the victim.

The protection of unfair discrimination is governed by Chapter II of the EEA which is seen as the primary means to combat and redress sexual harassment.\(^{142}\)

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\(^{142}\) *Dupper et al* 257.
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