Short notes on:

#METOO – WHAT COMES NEXT?

Introduction

It is the unfortunate state of affairs that sexual harassment in the workplace constantly rears its ugly head, and while it may be near impossible to be rid of it entirely, it is by no means an indication that it should continue. It is for that reason that it is important for you to know your rights and the necessary remedies that you can rely upon.

What is sexual harassment?

Up until recently, two laws co – existed with one another in determining the 'definition' of what sexual harassment entailed. The initial authority relied on was that of the 1998 Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace ("the 1998 Code"). This code was later amended in 2005 ("the Amended Code"). However, as addressed in the case of *Campbell Scientific Africa (Pty) Ltd v Simmers and Others (CA 14/2014) [2015] ZALCCT*, the Amended Code did not supersede the 1998 Code but rather, both Codes were to be relied upon. This inevitably created confusion in the interpretation of what constituted sexual harassment. This was further illustrated in the case of *Rustenburg Platinum Mines Limited v UASA obo Steve Pietersen and Others [2018] ZALCJHB*.

The most notable aspect of the Pietersen case is that the Commissioner erred in its interpretation of what constitutes sexual harassment. The Court held that "*the significance of the 1998 and 2005 Codes is that they essentially spoon-feed Commissioners in terms of what they must look for in determining such disputes, and it is in this regard that the Commissioner in this case was found lacking. His starting point was to refer to John Grogan's exposition of the 'Code of Good Practice on Sexual Harassment' and 'case law and the elements of the offence'. It is apparent that the Commissioner only looked at the 1998 Code in this regard. The Commissioner then found that the implications of the elements identified was that should any of them be 'lacking', then no sexual harassment would have occurred, with special emphasis being placed on whether the accused employee must have been aware or should have reasonably been aware that his or her conduct was unwanted by and deemed offensive to the complainant.*"

© Kathleen Mukheibir | SchoemanLaw Inc 2019

What is the current position in our law?

On 19 December 2018, a notice was issued by the Minister of Labour formally repealing the 1998 Code. This explicitly indicates that the Amended Code is to be the source of what constitutes sexual harassment.

The Amended Code reads as follows:

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:

1. Whether the harassment is on the prohibited grounds of sex and/or gender and/or sexual orientation;
2. Whether the sexual conduct was unwelcome;
3. The nature and extent of the sexual conduct; and
4. The impact of the sexual conduct on the employee.

The following should also be noted and read with the Amended Code:

As held in the Pietersen case:

1. There is *no* requirement that *all* elements are to be satisfied in order for sexual harassment to have occurred;
2. It is not a requirement that the accused is to be aware / should be reasonably aware of the fact that their conducted is unwanted or that the complainant is to indicate that the accused's behaviour is offensive;
3. Silence, no matter how prolonged, does *not* constitute any form of consent.

Who can be the perpetrators / victims of sexual harassment?

Owners, employers, managers, supervisors, employees, job applicants, clients, suppliers, contractors and other persons having dealings with the business. However, this is not an exhaustive list.

© Kathleen Mukheibir | SchoemanLaw Inc 2019

A non – employee of sexual harassment may lodge a complaint with the employer of the perpetrator, provided that the harassment took place in the workplace or while the perpetrator was in the employ of the employer.

Liability of the employer

Upon an employee laying a complaint with the employer, the employer is duty bound to consult all applicable parties and if necessary, ensure steps are taken to eliminate the behaviour complained of.

If the employer fails to follow the above procedure and thereby cannot prove that it did all that was required of them in order to ensure that an employee was not in contravention of the Employment Equity Act 55 of 1998 ("the EEA"), the employer will be deemed to be liable for contravention.

What are the Complainant's causes of action?

As held in *Media 24 Ltd & Another v Grobler (2005) 26 ILJ 1007 (SCA)* the complainant can claim on three separate causes of action namely; vicarious liability; in terms of the EEA (as discrimination was present) and lastly; if applicable, in terms of the Labour Relations Act 66 of 1995 ("the LRA") in instances where unfair dismissal resulted.

Conclusion

There are various reasons as to why persons do not always report instances of sexual harassment in the immediate instance that it takes place. This should by no means put a hindrance on their case, and forums, tribunals and Courts would do well to take a deeper look into why there was no immediate reporting of the harassment.

It must be constantly borne in mind that it is the law's as well as the employer's duty to protect someone in instances of sexual harassment.

Contact SchoemanLaw Inc. for labour related issues.

© Kathleen Mukheibir | SchoemanLaw Inc 2019

t +27 (0) 21 425 5604 f +27 (0) 21 421 8913 e enquiries@schoemanlaw.co.za w www.schoemanlaw.co.za