

SEXUAL HARASSMENT



INTRODUCTION

The Code of Good Practice on Handling Sexual Harassment in the Workplace, 2015 (“the Code”) states that 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 a variety of factors-

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

Sexual harassment in the working environment is a form of unfair discrimination and is prohibited on the grounds of sex and/or gender and/or sexual orientation. Sexual attention becomes sexual harassment if:

- the behaviour is persisted in, although a single incident of harassment can constitute sexual harassment; and/or
- the recipient has made it clear that the behaviour is considered offensive; and/or
- the perpetrator should have known that the behaviour is regarded as unacceptable.

While women are often the targets of sexual harassment any person may be a victim of sexual harassment, no matter what his or position is within an organisation.

FORMS OF SEXUAL HARASSMENT

The Code states that sexual harassment may include unwelcome physical, verbal or non-verbal conduct, but is not limited to the examples listed as follows:

Physical conduct of a sexual nature includes all unwanted physical contact, ranging from touching to sexual assault and rape, and includes a strip search by or in the presence of the opposite sex.

Verbal forms of sexual harassment include unwelcome innuendoes, suggestions and hints, sexual advances, comments with sexual overtones, sex-related jokes or insults or unwelcome graphic comments about a person’s body made in their presence or directed toward them, unwelcome and inappropriate enquiries about a person’s sex life,

whistling of a sexual nature and the sending by electronic means or otherwise of sexually explicit text directed at a person or group of persons.

Non-verbal conduct includes unwelcome gestures, indecent exposure and the display or sending by electronic means or otherwise of sexually explicit pictures or objects.

VICTIMISATION, QUID PRO QUO HARASSMENT AND SEXUAL FAVOURITISM

The Code states that sexual harassment may include, but is not limited to, victimization, *quid pro quo* harassment and sexual favouritism.

Victimization occurs where an employee is victimized or intimidated for failing to submit to sexual advances.

Quid pro quo harassment occurs where a person such as an owner, employer, supervisor, member of management or co-employee, influences or attempts to influence an employee’s employment circumstances (for example engagement, promotion, training, discipline, dismissal, salary increments or other benefits) by coercing or attempting to coerce an employee to surrender to sexual advances, including sexual favouritism.

Sexual favouritism occurs where a person in authority in the workplace rewards only those who respond to his or her sexual advances.

IMPACT OF THE HARASSMENT

The Code states that the conduct should constitute an impairment of the employee’s dignity, taking into account:

- the circumstances of the employee; and
- the respective positions of the employee and the perpetrator in the workplace.

It is not always easy for an employee to tell the alleged perpetrator that his or her behaviour is unwanted. It may be enough for the employee to use non-verbal communication including walking away or not responding to the person.

GENERAL DUTIES OF EMPLOYERS

The Code states that employers should create and maintain a working environment in which the dignity of employees is respected. A climate in the workplace should also be created and maintained in which complainants of sexual harassment will not feel that their grievances are ignored or trivialized, or fear reprisals.

Implementing the following guidelines can assist in achieving these ends:

- Employers/management and employees are required to refrain from committing acts of sexual harassment.
- All employers/management and employees have a role to play in contributing towards creating and maintaining a working environment in which sexual harassment is unacceptable.
- Employers/management should attempt to ensure that persons such as customers, suppliers, job applicants and others who have dealings with the business are not subjected to sexual harassment by the employer or its employees.
- Employers/management should take appropriate action in accordance with the Code where instances of sexual harassment occur in the working environment.

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 the Code and the employer’s policy; and take the necessary steps to eliminate the sexual harassment.

SEXUAL HARASSMENT POLICY

The Code states that sexual harassment policies should substantially comply with the provisions of the Code and include at least the following statements:

- Sexual harassment is a form of unfair discrimination on the basis of sex and/or gender and/or sexual orientation which infringes the rights of the complainant and constitutes a barrier to equity in the workplace.
- Sexual harassment in the workplace will not be permitted or condoned.
- Complainants in sexual harassment matters have the right to follow the procedures in the policy and appropriate action must be taken by the employer.

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- It will be a disciplinary offence to victimize or retaliate against an employee who in good faith lodges a grievance of sexual harassment.

Designated person

The policy should have clear reporting procedures including the appointment of a trained designated person who can-

- consult the complainant and the alleged perpetrator as well as any relevant witnesses;
- take steps to protect the confidentiality of the complainant and the alleged perpetrator; and
- offer help including advice, counselling and assistance to the complainant.

Complaint procedure.

The policy should allow a complainant to raise a complaint informally (which could be resolved by discussion with or without the assistance of an appropriate third party) or formally.

Informal procedure

- An *informal procedure* should allow the complainant or another appropriate person to explain to the perpetrator that the conduct complained of is not welcome, even in appropriate circumstances, without identifying the complainant. This would be appropriate if the conduct has been directed at more than one person.
- If, after investigation, the conduct raises significant risk of harm, the employer should consider following the formal procedure and initiate disciplinary proceedings against the alleged perpetrator.
- An employer who fails to take the steps necessary to eliminate sexual harassment in the workplace and to comply with its obligations under the Employment Equity Act (EEA), may be held liable for the conduct of its employees, unless it can show that it did all that was reasonably practicable to ensure that the perpetrator would not contravene the EEA.

Formal procedure

The *formal procedure* should include –

- with whom the employee should lodge a grievance and the internal grievance procedures to be followed, including provision for the complainant's desired outcome of the procedures;

- time frames which will allow the grievance to be dealt with expeditiously;
- that should the matter not be satisfactorily resolved by the internal procedures outlined above, a complainant of sexual harassment may refer the dispute to the Commission for Conciliation Mediation and Arbitration (CCMA). Similarly, an alleged perpetrator of sexual harassment may refer a dispute arising from disciplinary action taken by the employer to the CCMA; and that it will be a disciplinary offence to victimize or retaliate against a complainant who in good faith lodges a grievance of sexual harassment.

Victims of sexual assault may lodge separate civil or criminal charges against the alleged perpetrator.

REPORTING SEXUAL HARASSMENT

The employee should report the harassment, 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. The Code states that sexual harassment may be brought to the attention of the employer by the complainant or any other person aware of the sexual harassment, for example a friend, colleague or human resources official acting on the request of the complainant, where the complainant has indicated that she or he wishes the employer to be made aware of the conduct. However, where the sexual harassment is of a particularly serious nature, the complainant should be encouraged to inform the employer.

Where situation is serious or persists and there is no-one else who may be in a position to assist the employee, she or he may refer the matter directly to the CCMA. This typically occurs when the business owner is the alleged perpetrator.

REFERRING THE MATTER TO THE CCMA

A complaint of sexual harassment may be referred to the CCMA for conciliation within **six months** after the act or omission that allegedly constitutes unfair discrimination (sexual harassment). An applicant may apply for condonation where the dispute is referred after six months.

All disputes relating to alleged unfair discrimination, including sexual harassment, are conciliated by the CCMA. Bargaining Councils do not have the jurisdiction to conciliate such disputes.

Where the matter remains unresolved at conciliation, the applicant has a choice between referring the matter to the CCMA for arbitration or to the Labour Court for adjudication. An applicant has **ninety (90) days** in which to refer the matter for arbitration or to the Labour Court. Legal representation is allowed at an arbitration hearing and at the Labour Court, but not in a conciliation hearing. A party has the right to lodge an appeal at the Labour Court against the arbitration award issued by the CCMA.

BURDEN OF PROOF IN UNFAIR DISCRIMINATION CASES

Sexual harassment is a 'listed ground' in terms of section 6(1) of the EEA. Thus, once an allegation of sexual harassment is made, **the employer** must prove that such discrimination did not take place as alleged, or that the conduct was rational and not unfair, or that it was otherwise justifiable.

REMEDIES

If it is found that an employee has been unfairly discriminated against, an arbitration award may include an appropriate order that is just and equitable in the circumstance including payment of compensation, payment of damages and an order directing the employer to take steps to prevent the same unfair discrimination or a similar practice occurring in the future in respect of other employees. The Labour Court has broader powers that also include the publication of the Court's order.

RELEVANT LEGISLATION

- Code of Good Practice on the Handling of Sexual Harassment Cases Notice 1357 of 2005
- Employment Equity Act 55 of 1998, as amended