Employment Law

ALERT | 24 February 2025

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EMPLOYMENT LAW ALERT

Workplace harassment

One may be forgiven for thinking that this has become a worn-out topic with so much written and spoken about the subject since the #MeToo movement began. The topic was reignited in South Africa around March 2022 when the Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace (Code) came into effect, and the subject remains relevant.

Since the Code came into effect, there has been an increase in the number of harassment claims, particularly relating to sexual harassment, harassment based on arbitrary or prohibited grounds, racial discrimination, gender-based bullying and mobbing. Harassment is not limited to the physical workplace but also extends into the remote work environment and into other workplace-related digital spaces.

Recent global developments in this area also indicate an ever-growing need for employers to continue to foster safe and respectful working environments, or face liability.

Questions of whistle-blower rights and protection, retaliation against whistle-blowers or malicious whistle-blower complaints often arise in the context of uncovering workplace harassment, and we also briefly look at this topic in this alert.

ILO Convention

The International Labour Organization's Violence and Harassment Convention No. 190 (Convention) has set the global standard for the prevention of harassment in the workplace by requiring employers to create safe workplaces that have zero tolerance policies for violence and harassment.

The Convention also recognises these acts as human rights violations or abuses which threaten equal opportunity and negatively impact the importance of a work culture based on mutual respect and dignity. Where a claimant employee can show that equal opportunity was affected as a consequence of workplace harassment, that person has an actionable claim against the employer.

South Africa and Namibia

In late November 2024, the South African Commission for Employment Equity (CEE) hosted a conference in which discussions centred around steps taken by both South Africa and Namibia to align their national legislation with the Convention.

South Africa has taken great strides in establishing a comprehensive legal framework that is aligned with the objectives of the Convention by implementing the Code under the Employment Equity Act, 55 of 1998 (EEA). In short, these instruments recognise harassment as unfair discrimination and oblige an employer to prevent and deal with complaints regarding such discrimination,

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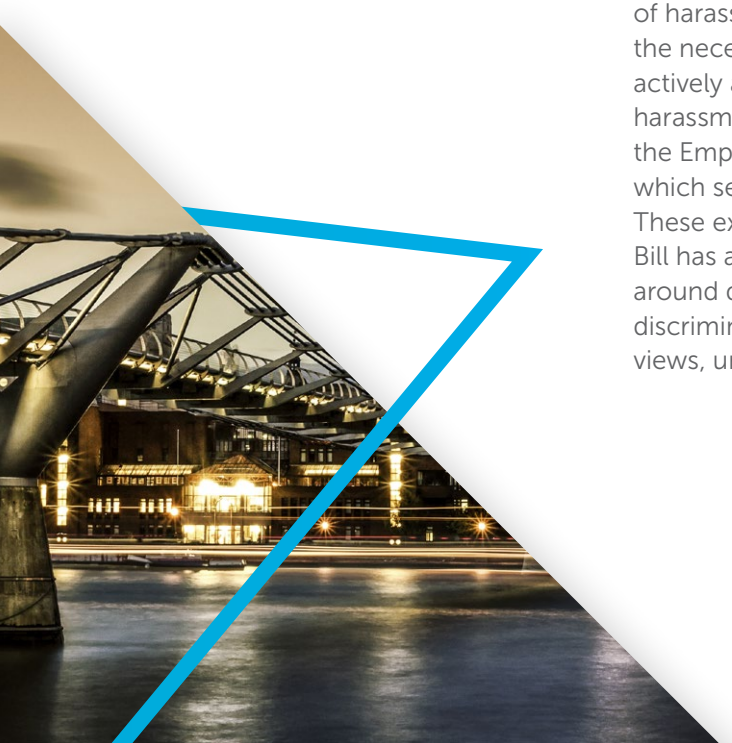

failing which an employer may be sanctioned for non-compliance. Like South Africa, the Namibian Constitution guarantees rights such as equality and dignity, forming the foundation for anti-discrimination protections under its Labour Act and Affirmative Action Act.

However, unlike South Africa, Namibia's existing legal framework is less specific in defining and addressing workplace harassment. To remedy this, Namibia is undergoing a process of reforming its Labour Act by developing its Draft Occupational Safety and Health Bill as well as the Draft Employment Equity Bill. A key initiative that these introduce is the "*change agents*" programme, which is intended to train employers and employees to combat workplace harassment.

What was evident from the CEE engagement is that global trends are shifting towards recognising the seriousness of harassment and there is a push for employers to take the necessary steps to safeguard their employees and to actively and promptly address complaints of violence and harassment. Another example is the UK, which introduced the Employment Rights Bill (Amendment Paper) (UK Bill) which seeks to extend an employer's existing obligations. These extensions already exist in South African law. The UK Bill has also sparked questions regarding issues of fairness around dismissing employees for matters pertaining to discrimination when dealing with opposing but protected views, under the UK Equality Act 2010.

Why is the question of harassment relevant to an employer?

If nothing else, the recently instituted class action against Australian mining giants, BHP and Rio Tinto in December 2024 makes the point plainly. The claimants allege that over a period of two decades the companies failed to adequately investigate claims of sexual harassment and accordingly discipline employees not only prior to, but after allegations of sexual harassment had been made. The claimants also allege that non-disclosure agreements were routinely used to prevent women from speaking out; and that they were discriminated against by their employers when they, *inter alia*, terminated their contracts or offered compensation in exchange for signing non-disclosure agreements pertaining to alleged incidents of sexual harassment.

A class action of this form has not yet been seen in South Africa. However, employer obligations in South Africa are clear, and a failure to comply with such obligations becomes fertile ground for litigation. It is accordingly necessary that a company guard against this risk and in workplaces where this goes unchecked the risk of class action litigation becomes real.

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What should an SA employer do?

Under South African law an employer assumes liability under section 60 of the EEA for unfair discrimination.

Employers are well advised to ensure that they:

- have adopted practices and instituted effective procedures and mechanisms for dealing with claims of violence or harassment;
- have developed and implemented the necessary guidelines, policies and disciplinary rules that govern anti-harassment;
- have ensured that employees are aware of the applicable rules/polices;
- are conducting regular training; and
- within reasonable means, effectively deal with reports of incidents of harassment and ensure the protection of employees after the complaint.

For a detailed discussion on the above, the CDH Guide on Harassment in the Workplace: New Code of Good Practice can be found here.

How enforceable are confidentiality agreements following a case of harassment?

The #MeToo campaign brought into the spotlight the enforceability of non-disclosure agreements concluded with victims of harassment. There have been significant developments in parts of the US and in the UK around this question, with the needle moving in favour of victims being able to lawfully disclose the circumstances of their termination of employment, notwithstanding any non-disclosure agreement.

South African courts have not had occasion to directly deal with this question. However, in the 2022 case of *Jacobs v KwaZulu-Natal Treasury* (2022) 43 ILJ 1286 (LAC) the Labour Appeal Court ruled that the employee did not breach his confidentiality agreement where his disclosure was to expose irregularities and dishonesty, highlighting that confidentiality agreements cannot be used to conceal wrongdoing.

Where is the whistle-blower?

Whistle-blowing is self-evidently important. The Protected Disclosures Act, 26 of 2000 (PDA) provides legal protection for whistle-blowers. Over a decade ago Business Day published an article "*SA whistle-blowing system gets top score*" which showed that South Africa ranked higher than Germany, France, Hong Kong and Australia in whistle-blower protection and was on a par with the laws in the US, UK and China.

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To be protected under the PDA, a disclosure must contain information about specific improprieties listed in the PDA and must be made to the right person. That said, the reality is that there is little real whistle-blower protection for those who make legitimate disclosures. Those who do should receive the necessary legal protections, which have been lacking, and financial benefits.

In his 2025 State of the Nation Address, President Ramaphosa announced that the state would finalise the whistle-blower protection framework and introduce the Whistle-blower Protection Bill in Parliament this year. This is promising.

On the opposite extreme of good faith disclosures are malicious or opportunistic whistle-blower complaints. These 'whistle-blowers' are not deserving of legal protection. Employees often attempt to avoid or delay the initiation of a performance enquiry or disciplinary hearing by lodging an alleged protected disclosure with the intent to invoke the special protections afforded to whistle-blowers under the PDA.

False and malicious whistle-blowing has serious consequences for companies and implicated individuals. In 2017, the PDA was amended to introduce section 9B, which provides that an employee commits an offence if they intentionally make a false disclosure, knowing the information is false, or if they should have reasonably known it was false, and if they intended to harm the affected person who then suffered as a result. If found guilty, the employee could face a fine, up to two years in prison, or both. So, there is on the statue books a consequence for false whistle-blowing, the test will be in its practical implementation.

Conclusion

Confronting false whistle-blowing is as important as rooting out a harassment culture. Employers need to maintain the integrity of whistle-blowing and support a healthy and productive workplace environment that is free of harassment. To achieve this requires a concerted effort from senior management who have the end in sight and a business that drives this goal not merely as a measure of legal compliance.

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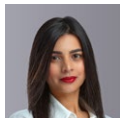

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BBBEE STATUS: LEVEL ONE CONTRIBUTOR
Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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