

SEXUAL HARASSMENT



INTRODUCTION

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 harassment constitutes a barrier to equity in the workplace and may occur between members of the same or opposite sex, gender or sexual orientation.

THE TEST FOR SEXUAL HARASSMENT

The test for establishing whether there has been sexual harassment takes into account the following factors-

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

UNWANTED CONDUCT

An employee may demonstrate that the conduct is unwanted in various ways, including, but not limited to, walking away from the person, not responding, and not complying with a particular sexual request.

Consideration must be given to those circumstances where the conduct is such that the harasser/perpetrator ought to have known that the conduct could be regarded as unwanted. This is particularly important when the complainant finds it difficult to communicate that it is unwanted conduct.

The complainant may also seek assistance from someone that they trust to help him or her to communicate that the conduct is unwanted.

The fact that the complainant may have previously engaged in consensual sexual relationship with the harasser/perpetrator should not mean that subsequent sexual conduct is acceptable to him or her.

NATURE AND EXTENT OF THE CONDUCT

The unwanted conduct must be of a sexual nature and includes unwanted physical, verbal or non-verbal conduct (including written messages), 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.
- *Strip searching*, including by a person of the same or opposite sex in the presence of the opposite sex, or with appropriate privacy.
- *Stalking*, including following, watching, pursuing or accosting an employee.
- *Sexual attention*, advances or proposals; or other behaviour, whether explicit or implicit, including suggestions, messages, advances, attention or proposals of a sexual nature.
- *Implied or express threats* of reprisals or actual reprisal to comply with sexually oriented requests, advances, attention or proposals.

- *Verbal* forms of sexual harassment include unwelcome innuendoes, suggestions and hints, sexual advances, comments with sexual overtones, sex-related jokes or insults, graphic comments about a person's body, 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

Sexual harassment may include, but is not limited to, victimization, *quid pro quo* harassment, sexual favouritism and creating or permitting a hostile working environment.

Victimization occurs where an employee is victimized or intimidated for failing to submit to sexual advances, attention or proposals or for complaining about gender-insensitive conduct.

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. E.g. sex in favour of a promotion.

Sexual favouritism is a form of *quid pro quo* harassment which occurs where a person in authority in the workplace uses his or her power to reward only those who respond to his or her sexual advances.

SEXUAL HARASSMENT



A single incident of unwelcome sexual conduct may constitute sexual harassment.

IMPACT OF THE HARASSMENT

The Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace (2022) 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.

SITUATIONS IN WHICH PEOPLE WORK OR RELATED TO WORK

The protection of employees against harassment applies not just to the physical workplace which includes public and private spaces, but also to other situations related to work, including, but not limited to –

- places where the employee is paid, takes a rest break or a meal, or uses sanitary, washing or changing, breastfeeding and medical facilities;
- work-related trips, travel, training, events, or social activities;
- work-related communications, including those enabled by information and communication technologies and internet-based platforms;
- employer-provided accommodation, including housing;

- when commuting to and from work in transport provided or controlled by the employer;
- for those who work in the residence of their employer, or residence of the person to whom they are providing care, the residence is the workplace; and
- in the case of employees who work virtually from their homes, or any place other than the employer's premises, the location where they are working constitutes the workplace.

SEXUAL HARASSMENT POLICY (AS PART OF A HARASSMENT POLICY)

Employers need to put protective policies, procedures and practices in place that provide for a safe working environment in which the dignity of employees (including job applicants and volunteers) is respected.

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

- Sexual harassment will not be tolerated in the workplace;
- Sexual harassment is a form of unfair discrimination which infringes the rights of the complainant and constitutes a barrier to equality in the workplace.
- Grievances about sexual harassment will be investigated and handled in a confidential manner.
- Complainants in sexual harassment matters have the right to follow the procedure in the policy and appropriate action must be taken by the employer.

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

The policy should also set out procedures to be followed by a complainant about sexual harassment and the availability of any counseling, treatment, care and support programs for employees. The employer's harassment policy and/or collective agreement should outline the steps to follow and time frames when lodging a formal grievance. This includes the rights of both the complainant and the alleged harasser/perpetrator.

GENERAL OBLIGATIONS OF EMPLOYERS

Employers are required to follow the guidelines provided by the Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace (2022).

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.

SEXUAL HARASSMENT



- 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 procedures, where applicable; and take the necessary steps to eliminate the sexual harassment.

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.

ADVICE AND ASSISTANCE

The employer should provide advice and assistance, including counselling, where required.

As far as practically possible, the employer should designate a person outside of line management to whom complainants may approach for confidential advice and or counselling. The Code suggest that such a person could be someone specifically employed to fulfil such a function, a trade union representative, a co-employee or a professional engaged to offer such a service. The designated person should preferably have

appropriate knowledge, skills and experience in counselling and labour relations.

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, that it is related to a prohibited ground and its impact on the complainant. For example, that it interferes with the complainant's work, makes him or her feel uncomfortable, etc.

In some instances, the identity of the complainant may be kept confidential while the appropriate person takes the alleged perpetrator through the complaint.

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.

FORMAL PROCEDURE

The *formal procedure* should set out information regarding –

- 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 (or a bargaining council); 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.

Survivors 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.

In circumstances where 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

SEXUAL HARASSMENT



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 Prevention and Elimination of Harassment in the Workplace (2022).
- Employment Equity Act 55 of 1998, as amended.

