

Understanding the Employment Equity Act and Harassment Code: Empowering Women in the Workplace

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Topics

- The broad statutory context
- The Employment Equity Act
- The Old Code
- The New Code
 - Objectives
 - Who does it apply to?
 - What is harassment?
 - The test for harassment
 - Sexual harassment



The broad statutory context

- Section 23 of the Constitution: *“Everyone has the right to fair labour practices”*.
- Section 9(1) of the Constitution: *“Everyone is equal before the law and has the right to equal protection and benefit of the law”*.
- Section 10 of the Constitution: *“Everyone has inherent dignity and the right to have their dignity respected and protected”*.
- There are statutes outside of the employment context prohibiting discrimination and harassment
- Employment Equity Act 55 of 1998



The Employment Equity Act

- **Purpose**

“The purpose of this Act is to achieve equity in the workplace by—

(a) promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination; and

(b) implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational levels in the workforce.”



The Employment Equity Act

- **Section 6 of the Employment Equity Act**

“(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, birth or on any other arbitrary ground.”

“(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).”



The Employment Equity Act

- **Definitions (section 1)**

“code of good practice” means a document issued by the Minister in terms of section 54;

- **Section 54**

“The Minister may, on the advice of the Commission... issue any code of good practice; and change or replace any code of good practice.”



The Old Code

- **Amended Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace (4 August 2005)**
- **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:

- ***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.”***



The New Code

- **The new code was published on 18 March 2022**
- **Objectives of the Code (item 1)**
 - The objective of this Code is aimed at eliminating all forms of harassment in the workplace and in any activity link to, or arising out of work.
 - This code identifies the steps an employer must take to eliminate harassment, including development and implementation of policies, procedures and practices that will lead to the creation of workplaces that are free of harassment and in which employers and employees respect one another's integrity, dignity, privacy and their right to equality in the workplace.



The New Code

- **Who does the code apply to? (item 2)**
 - The Code applies to all employees and employers as provided for in the EEA. This includes applicants for employment and volunteers, both in the formal or informal sector.
 - Potential perpetrators include third parties (clients, customers, suppliers and contractors, and others having dealings with a business).
 - The protection afforded by the Code applies in any situation where an employee is working or which is related to their work



The New Code

- **What is harassment? (item 4)**

- Unwanted conduct which impairs dignity;
- Which creates a hostile or intimidating work environment for one or more employees or is calculated to, or has the effect of, inducing submission by actual or threatened adverse consequences; and
- Is related to one or more grounds in respect of which discrimination is prohibited in terms of section 6(1) of the EEA.



The New Code

- **What is harassment? (item 4)**
 - Harassment includes violence, physical abuse, psychological abuse, emotional abuse, sexual abuse, gender-based abuse and racial abuse. It includes the use of physical force or power, whether threatened or actual, against another person or against a group or community.



The New Code

- **Types of harassment**

- Physical harassment includes physical attacks, simulated or threatened violence, gestures (such as raising a fist or throwing of objects)
- Verbal bullying includes threats, shaming, hostile teasing, insults, constant negative judgement and criticism, racist, sexist or LGBTQIA+ phobic language
- Psychological harassment may be associated with emotional abuse and involves behaviour that has serious negative psychological consequences, such as verbal abuse, bullying and mobbing



The New Code

- A wide range of conduct may constitute harassment. Examples include:
 - slandering or maligning an employee or spreading rumours maliciously;
 - conduct which humiliates, insults or demeans an employee;
 - withholding work-related information or supplying incorrect information;
 - sabotaging or impeding the performance of work;
 - ostracising, boycotting, or excluding the employee from work or work-related activities;
 - persecution such as treats, and the inspiration of fear and degradation;
 - intolerance of psychological, medical, disability or personal circumstances;
 - surveillance of an employee without their knowledge and with harmful intent;
 - demotion without justification;
 - abuse, or selective use of, disciplinary proceedings;
 - Pressuring an employee to do something illegal; and
 - Pressuring an employee to resign.



The New Code

- Bullying – where harassment involves the abuse of coercive power by an individual or group of individuals in the workplace. Intimidation – this is intentional behaviour that would cause a person of ordinary sensibilities to fear injury or harm.
- Harassment may be referred to as being “vertical” or “horizontal”. Vertical harassment refers to harassment between the employer/manager and employee. Horizontal harassment refers to harassment between employees in the same position or on the same level.
- Passive-aggressive or covert harassment may include negative gossip, negative joking at someone’s expense, sarcasm, condescending eye contact, facial expression, or gestures, mimicking to ridicule, deliberately causing embarrassment and insecurity, invisible treatment, marginalisation, social exclusion, professional isolation, and deliberately sabotaging someone’s dignity, well-being, happiness, success, and career performance.
- Mobbing is a form of harassment by a group of people targeted at one or more individuals.
- Online harassment is harassment which is committed, assisted, or aggravated in part or fully, by the use of information and communications technology such as mobile phones, smart phones, the Internet, social media platforms or email. Bullying when conducted online is referred to as cyber-bullying.



The New Code

- **A subjective or objective test?**
- **Whose perspective counts?**
- **Three possible tests:**
 - A subjective test
 - An objective test
 - A reasonable victim test



The New Code

- **A subjective or objective test?**
 - The alleged harasser must have known that the conduct was unwanted, or it must be a case where he should have known that the conduct was unacceptable.
 - Whether or not conduct constitutes harassment, should be assessed on an objective basis from the perspective of the employee who alleges harassment. The primary focus of the inquiry as to whether there has been harassment, is on the impact of the conduct on the employee. However, there may be circumstances in which the perceptions of the person harassed are not consistent with the views of a “reasonable person” in the situation of the complainant. In such circumstances, a person or employer charged with harassment, may seek to establish that the complainant’s perceptions are not consistent with societal values or reflective of our constitutional ethos.
 - Unnecessary to establish the intention of the harasser for purposes of proving harassment



The New Code

- **Sexual Harassment**

“Sexual harassment is a form of unfair discrimination and is prohibited on the grounds of sex, and/or gender and/or sexual orientation”

- **Same definition as old code**
- **Previous consensual participation in sexual conduct does not necessarily mean that the conduct continues to be acceptable to the employee**
- **The fact that the complainant does not indicate that the conduct is unwanted does not entail that there has been no sexual harassment, if the conduct is such that the harasser/perpetrator ought to have known it could be regarded as unwanted**



The New Code

- Sexual Harassment may include:
 - Victimization
 - Quid pro quo harassment
 - Sexual favouritism
- A single incident of unwelcome conduct may constitute sexual harassment



The New Code

- Examples of sexual harassment:
 - Physical conduct of a sexual nature ranging from touching, kissing, to sexual assault and rape
 - Strip searching, including by a person of the same sex in the presence of the opposite sex, or with appropriate privacy
 - Following, watching, pursuing or accosting of 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 reprisal or actual reprisal to comply with sexually orientated requests, advances, attention or proposals
 - Verbal conduct such as innuendos, suggestions, hints, sexual advances, comments with sexual overtones, sex-related jokes or insults, inappropriate enquiries about a person's sex life
 - Non-verbal conduct such as unwelcome gestures, indecent exposure and the sending of sexually explicit pictures or objects



The New Code

- The test for sexual harassment:

“Unwelcome conduct of a sexual nature, whether direct or indirect, that the perpetrator knows or ought to know is not welcome. Sexual harassment may be offensive to the complainant, make the complainant feel uncomfortable or cause harm or inspire the reasonable belief that the complainant may be harmed. Sexual harassment may interfere with the work of the complainant although it need not necessarily do so. Sexual harassment violates the rights of an employee and constitutes a barrier to equality in the workplace.”

- Factors: whether harassment is on prohibited grounds of sex and/or gender and/or sexual orientation; whether it was unwanted; the nature and extent of it; and the impact on the employee

