

2023



Management's Ultimate HR Solution

AGENDA.

Collective Agreements
Strike Action
Harassment
Sexual Harassment
Racial Harassment
Workplace Bullying

MINING SECTOR AND LABOUR LAW

Technological advance in the mining sector has a positive impact on productivity. Where the repetitive task is done by employees' automation over human labour can reduce cost and provides for a safer working environment. This however may result in job losses in the industry and needs to be assessed in light of the current unemployment within South Africa. Legislation is crucial in these changes, especially regarding collective bargaining, strike action, skills development, and occupational health and safety. With the moving over to automation the need for proper collective bargaining, a safe working environment and the training of employees on technological advances is now more critical than ever.



Collective agreements



Collective agreements are the end result of successful collective bargaining. In the *AMCU v Royal Bafokeng* case, it is stated that “[t]he voluntary nature of our labour relations system is held together by collective agreements”. In order for an agreement to be valid, it must be in writing. It binds the parties to the collective agreement, “members of every other party to the collective agreement”, as well as the members of the trade union and members of the employers’ organisation who “are party to the collective agreement” if it deals with terms and conditions of employment or the conduct of employers towards employees or *vice versa*. It can bind non-members of the trade union if they were identified in the agreement, if “the agreement expressly binds the employees” and if the trade union has the majority of employees as members.

Strike action Strike action



Part of the concept of collective bargaining is the right to strike. Violence might become part of the strike action when the employer hires replacement labour to continue operations. Strike action is fuelled by “service delivery protest”, vigilante action, xenophobic violence, Zama mining operations, taxi violence, and other forms of community-based conflict in South Africa”.

Therefore, the employer needs to ensure that they have a strike plan in place setting out the duties and protocol in the event of a protected and unprotected strike action.

With a protected strike action, the employer and relevant parties (trade unions) need to ensure valid picketing rules are in place, this goes hand in hand with collective bargaining.

The employer also needs to ensure that the correct protocol is followed in unprotected strike action to ensure the health and safety of staff and any action to be taken against participating employees in the unprotected strike.

Harassment



What is Harassment

- Persistent and unwelcome conduct :
 - Which is hostile or **offensive** to a reasonable person
 - **Induces a fear of harm**
 - Demeans, humiliates or **creates a hostile or intimidating** environment



Sexual Harassment



Sources of the Law on Sexual Harassment

- The Employment Equity Act:
 - No person may unfairly discriminate directly or indirectly against an employee in any employment policy or practice on one or more grounds.
 - 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
 - For purposes of Section 6, 7, and 8, “employee” includes an applicant for employment.



Sources of the Law on Sexual Harassment

- The Code defines sexual harassment 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:
 - 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.



Unwelcomeness

- Proof of unwelcomeness is a question of fact to be determined in light of all circumstances.
- To determine whether the conduct was unwelcome, the following factors may be relevant:
- Whether the complainant willingly participated in the conduct.
- Whether the complainant made the perpetrator aware that in the future such conduct would be considered unwelcome.



Unwelcomeness

- Whether the time that elapsed between the occurrence of the conduct and the complaint indicates a specific reaction.
- How the complainant responded - with outright rejection, with initial rejection and later acceptance, with initial acceptance followed by later rejection or 'soured romance', or coerced submission.
- Unwelcomeness is not necessarily precluded by participation in prior sexual banter.



Forms of Sexual Harassment



The Employer's Liability for Sexual Harassment

- If it is alleged that an employee, while at work, contravened a provision of this Act, or engaged in any conduct that, if engaged in by that employee's employer, would constitute a contravention of a provision of this Act, **the alleged conduct must immediately be brought to the attention of the employer.**
- The **employer must consult** all relevant parties and must take the necessary steps to eliminate the alleged conduct and comply with the provisions of this Act.



The Employer's Liability for Sexual Harassment

- If the **employer fails** to take the necessary steps referred to in subsection 2, and it is proved that the employee has contravened the relevant provision, the **employer must be deemed also to have contravened that provision.**
- Despite subsection (3), an **employer is not liable for the conduct** of an employee if that employer is able to prove that it did all that was reasonably practicable to ensure that the employee would not act in contravention of this Act.



Racial Harassment



Racial Harassment

- The United Nations Convention for the Elimination of All Forms of Racial Discrimination defines racial discrimination as:
 - Any distinction, exclusion, restriction, or preference based on race, color, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment, or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural and any other field of public life.
- Racial discrimination can be direct or indirect. It can be deliberate or unintentional.



Racial Harassment

- Examples and allegations of racial discrimination taken from the recent past involve a range of issues:
 - Disproportional wage differentials.
 - Non-appointment because of race.
 - Non-retention of affirmative action appointees in retrenchment.
 - A misapplication of affirmative action policies.
 - Racist remarks.
 - Racist cartoons.
 - Disparities in relocation allowances.
 - A refusal to admit an employee to certain funds.
 - Indirect race discrimination.



Racial Harassment

- The Promotion of Equality and Prevention of Discrimination Act (PEPUDA) defines racial harassment as:
- Unwanted conduct which is persistent or serious and demeans, humiliates, or creates a hostile or intimidating environment or is calculated to induce submission by actual or threatened adverse consequences and which is related to
 - Sex, gender, or sexual orientation; or
 - A person's membership or presumed membership of a group identified by one or more of the prohibited grounds or a characteristic associated with such group.



Objective of Subjective Test

- Clearly, the impact is related to the context in which the conduct takes place, the circumstances of the employee, and the respective positions of the alleged harasser and the employee who feels harassed.
- The impact of racial incidents will inevitably relate to issues of dignity, disempowerment, marginalization, and humiliation.
- Dignity involves the concept of self-respect, mental tranquility, and privacy.



Workplace Bullying



Workplace Bullying



- Workplace harassment impacts in different ways:
 - Sexual harassment impacts an employee's dignity, bodily integrity, job security, and personal safety.
 - Racial harassment impacts on an employee's sense of worth, dignity, and empowerment.
 - Workplace bullying has been linked to a feeling of incompetence in handling the job, to a sense of alienation from colleagues, to anxiety that there will be no promotion or recognition, to job insecurity, to feelings of inadequacy, to knock-on tensions in personal relationships, and to depression.

Where does the Duty not to Bully come from?

- The definition of “occupational detriment” in the Protected Disclosures Act suggests the following:
 - Being subjected to any disciplinary action.
 - Being dismissed, suspended, demoted, harassed or intimidated.
 - Being transferred against his or her will.
 - Being refused transfer or promotion.
 - Being subjected to a term or condition of employment or retirement which is altered or kept altered to his or her disadvantage.
 - Being refused a reference, or being provided with an adverse reference, from his or her employer.



A Definition of Workplace Bullying

- Physical assault and aggression
- Verbal abuse
 - These factors must be taken into account:
 - Extent
 - Degree
 - Location
 - Accompanying malice
 - Aggression
 - Impact
- Intolerance of psychological, medical, or personal problems
- Humiliating or demeaning conduct
- Marginalisation
- Abuse of disciplinary processes
- Demotion or transfer
- Recommendation to resign



Unfair Labour Practice Jurisdiction

- The definition in section 186(2) of the Labour Relations Act (LRA) covers unfair conduct relating to:
- Promotion,
- Demotion,
- Training or relating to the provision of benefits, often areas of contestation, and
- The manifestations of workplace bullying.
- If an employee can link workplace bullying to any of these categories, a dispute can be referred to the CCMA or bargaining council.



Dealing with Bullying

- There are practical ideas on how workplaces can take the initiative in dealing with workplace bullying. The following suggestions have been made:
- Employers can develop their own policy or code of conduct on bullying.
- Employers can educate managers and employees on suitable workplace behaviors.
- Employers must establish or advertise grievance procedures to report and investigate allegations of workplace bullying.



Dealing with Bullying



- Human resource practitioners should be educated in investigation processes.
- Work cultures of private and public sector organisations should be reviewed.
- Long-term absences from work should be monitored to identify any stress-related absence due to workplace bullying.
- Suitable reporting mechanisms should be established between human resource departments and senior management to report on workplace bullying.
- Senior management should actively support the introduction of procedures, policies and practices to alleviate workplace bullying.

THANK YOU. QUESTION?

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