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SQUARING UP WITH WORKPLACE BULLYING

by

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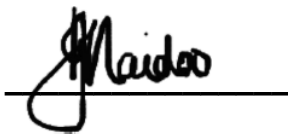
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LIST OF ACRONYMS

Basic Conditions of Employment Act	BCEA
Compensation for Occupational Injuries and Diseases Act	COIDA
Commission for Conciliation Mediation and Arbitration	CCMA
Employment Equity Act 55 of 1998	EEA
Employment Rights Act of 1996	ERA
Health and Safety at Work Act of 1974	HSWA
International Labour Organisation	ILO
International Labour Standards	ILS
Labour Appeals Court	LAC
Labour Court	LC
Labour Relations Act 66 of 1995	LRA
Occupational Health and Safety Act	OHS Act
Protection from Harassment Act 17 of 2011(SA)	POHA
Protection from Harassment Act 1997 (UK)	PHA
Promotion of Equality and Prevention of Unfair Discrimination Act	PEPUDA
South Africa	SA
Supreme Court of Appeal	SAC
United Kingdom	UK
United Nations	UN
World Health Organisation	WHO

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1.1 Introduction

Bullying – a term synonymous with playground conduct – has recently become prevalent in the workplace. This form of harassment did not receive the attention it deserves until the International Labour Office (ILO) adopted Convention 190 of 2019 on Violence and Harassment, which came into effect in June 2021.¹ The Convention, together with Recommendation 206,² aims to provide a future world of work free from violence and harassment. It requires all member states that ratify it, to employ systems which will prevent and eradicate any and all forms of harassment and ensure a workplace grounded on dignity and respect for all.³

As a result of this notion, South Africa has enacted the Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace (The Code) under the Employment Equity Act 55 of 1998 (EEA), which took effect on 18 March 2022.⁴ In accordance with the Code, an employer has a duty to address and prevent violence and harassment in the workplace.⁵ The Code is supplementary to current legislation and was enacted to achieve certain fundamental rights in the South African Constitution.

It is legally required for the employer to provide reasonable care for its staff members and to protect their health and safety at work.⁶ This obligation includes the rights of an

¹ Violence and Harassment Convention, 2019 (No. 190).

² Violence and Harassment Recommendation, 2019 (No. 206).

³ Article 6 of the Violence and Harassment Convention, 2019 (No. 190) states that: 'Each Member shall adopt laws, regulations and policies ensuring the right to equality and non-discrimination in employment and occupation, including for women workers, as well as for workers and other persons belonging to one or more vulnerable groups or groups in situations of vulnerability that are disproportionately affected by violence and harassment in the world of work.'

⁴ EEA 55 of 1998: Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace, 2022.

⁵ EEA 55 of 1998: Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace, 2022. 39.

⁶ Occupational Health and Safety Act 85 of 1993.

employee to a workplace, where reasonably practical, which is free from dangers and hazards that could compromise their physical and mental well-being.⁷ Failure or refusal to accommodate or assist an employee with their mental health, even if it is not related to workplace stress, can be deemed as an infringement of the employee's rights.⁸ An employer who fails to take adequate steps may be found liable in terms of section 60 of the EEA.⁹ This section also provides the conditions under which liability may be avoided.¹⁰ In accordance with section 60, an employer is not liable if it did not know about the harassment, was made aware of the harassment and took appropriate action to stop the behaviour after consulting with the appropriate parties, or took all reasonably possible precautions to stop the discriminatory behaviour.¹¹

1.2 Background to the study

Although South Africa became a democratic society in 1994, violence and intimidation are legacies from the not so distant past that continue to leave a damaging effect on society. It cannot be denied that the modern workplace remains fraught with instances of violence, harassment and bullying.¹²

The South African Constitution guarantees every employee [citizen] the right to equality, human dignity and fair labour practices in the workplace.¹³ While the EEA does not define harassment, it states that it is a form of unfair discrimination which is prohibited on any one or a combination of the grounds as provided for by section 6(1) of the Act.¹⁴

Beyond the Constitution, South Africa is also party to several international law agreements and treaties that govern the right to dignity and equality. Examples are Article 5 of the African Charter on Human and People's Rights,¹⁵ the Preamble and

⁷ Occupational Health and Safety Act 85 of 1993.

⁸ *Mogomatsi v Goredema* (2022) 43 ILJ 2063 (LC) para 12.

⁹ Sec 60 of the EEA 55 of 1998.

¹⁰ A Van Niekerk *et al. Law@work* 5th ed (2019). 129.

¹¹ Sec 60 (2) – (4) of the EEA 55 of 1998.

¹² D Smit. 'The double punch of workplace bullying/harassment leading to depression: legal and other measures to help South African employers ward off a fatal blow' (2021) 25 *Law, Democracy and Development* 24.

¹³ Sec 9, 10 and 23 of the Constitution of the Republic of South Africa, 1996.

¹⁴ Sec 6(3) of the EEA 55 of 1998.

¹⁵ Organisation of African Unity (OAU), *African Charter on Human and Peoples' Rights* ('Banjul Charter'), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), specifically Article 5 which states that: 'Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.'

Article 1 of the Universal Declaration of Human Rights¹⁶ and the Preamble of the International Covenant on Civil and Political Rights which incorporate these rights into treaty law.¹⁷

Even though citizens are constitutionally protected, direct reliance on the constitution is prohibited by the subsidiary principle, which states '[w]here there is legislation giving effect to a right in the Bill of Rights, a claimant is not permitted to rely directly on the Constitution.'¹⁸ Therefore, the individual must rely either on the provisions in the applicable legislation or challenge its validity, but is not allowed to rely directly on certain constitutional provisions such as section 10 of the Constitution.¹⁹ By implication, the Constitution will play a role in the adjudication since section 39(2) requires that a provision be interpreted to 'promote the spirit, purport and objects of the Bill of Rights'.²⁰

The Constitution necessitates the legislature to uphold the achievement of equality by promulgating legislation to prevent or prohibit unfair discrimination.²¹ According to Fouche and Du Plessis, constitutional equality shapes the framework of the EEA and must always be taken into consideration when looking into employment equity.²²

Recent developments in the law must be assessed to understand how it may impact the current gaps that exist in the law when addressing violence and harassment in the workplace. While violence and harassment are dealt with as a single concept in the new Code, the context may differ from country to country as each may interpret and define it differently. In this analysis, the concept of violence and harassment will be utilised, but refers to and includes victimisation, bullying, emotional distress, harassment, violence, mobbing, a hostile work environment and cyberbullying.

¹⁶ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), with reference to the Preamble which [recognises], 'the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.' and further states in Article 1 that: 'All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.'

¹⁷ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999 172, which provides for the 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world'.

¹⁸ *South African National Defence Union v Minister of Defence* 2007 5 SA 400 (CC) para 51 (*South African National Defence Union*).

¹⁹ *South African National Defence Union* para 52.

²⁰ Constitution of the Republic of South Africa, 1996.

²¹ Sec 9(4) Constitution of the Republic of South Africa, 1996.

²² MA Fouche & JV Du Plessis *A Practical Guide to Labour Law* (2020) 97.

1.3 Research questions

The objective of this research paper study is to assess the current position of a bullied employee and establish their rights as well as the employer's role and obligations in the South African workplace. In this study, the adequacy of the South African labour legislation and procedures dealing with violence and harassment and, by implication, bullying in the workplace will be considered. In order to gauge the scope of legislative protection, the following questions need to be raised to find the answers relevant to this study:

1. Based on the current South African legislation, what are an employee's rights and the employer's role when addressing bullying in the workplace?
2. Is South Africa's current legislation adequate to address bullying in the workplace?
3. What is the correlation between the intolerability of continued employment and workplace bullying within the ambit of section 186(1)(e) of the Labour Relations Act 66 of 1995 (LRA)?
4. Can the employer be held liable for harassment or bullying in the workplace?
5. What lessons can South Africa derive from comparative developments?

In answering these questions, the study evaluates the existing South African position by assessing legislation and case-law that regulate the employer-employee relationship. The study also explores ethical and constitutional imperatives which obligates the employer to provide a safe workplace in accordance with sections 8 and 9 of the Occupational Health and Safety Act (OHS Act).²³ It further evaluates the position in the United Kingdom against the international labour standards of the ILO to assess whether South African law can adequately address workplace bullying.

1.4 Significance of the study

The Code acknowledges bullying as a form of harassment and defines it as

the abuse of coercive power by an individual or group of individuals in the workplace which may involve aggressive behaviour in which someone repeatedly causes another person injury or harm.²⁴

²³ Occupational Health and Safety Act 85 of 1993.

²⁴ EEA 55 of 1998: Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace, 2022. 18.

Bullying not only encroaches on the victim's physical and mental health but also has an adverse impact on the work environment and affects co-workers. It could also lead to an individual leaving the organisation.²⁵

According to Einarsen and Mikkelsen, the mental and physical effects of bullying range from anxiety, depression, and sleep disturbances to other mental disorders.²⁶ The employee or the victim of workplace bullying may find any individual act a menace.²⁷ However, when subjected to all these acts at once, the behaviour becomes unbearable and traumatic due to excessive stress, which may result in decreased job satisfaction, disengagement, inability to concentrate and lower productivity.²⁸

Intolerability in the workplace is colloquially referred to as constructive dismissal.²⁹ Constructive dismissal occurs when the employer's behaviour or actions create such an intolerable or hostile work environment that an employee feels compelled to resign.³⁰ This resignation is effectively treated as a dismissal by the employer due to the employee's breach of the employment contract. Acts that may lead to an employee instituting a claim of constructive dismissal include:

- harassment or continuous bullying behaviour from supervisors and co-workers;
- a hostile work environment that affects an employee's well-being and ability to perform their job; or
- changes to employment terms, reduction in pay or benefits without proper justification or consultation.

This also includes actions that fundamentally breach the employer-employee trust, such as a deliberate attempt to undermine an employee's position, constant criticism,

²⁵ D Smit 'Labour law, the queen bee syndrome and workplace bullying: A contribution to the shattering of at least one glass ceiling for female employees' (2016) 37 *Industrial Law Journal* 792.

²⁶ S Einarsen. & EG Mikkelsen 'Individual effects of exposure to bullying at work' in S Einarsen, H Hoel, D Zapf & CL Cooper (eds) *Bullying and emotional abuse in the workplace: international perspectives in research and practice*. (2003) 127–144.

²⁷ S Suggala, S Thomas, S Kureshi. Impact of Workplace Bullying on Employees' Mental Health and Self-Worth. In: Dhiman, S. (eds) *The Palgrave Handbook of Workplace Well-Being*. (2020) 9.

²⁸ S Suggala, S Thomas, S Kureshi. Impact of Workplace Bullying on Employees' Mental Health and Self-Worth. In: Dhiman, S. (eds) *The Palgrave Handbook of Workplace Well-Being*. (2020) 10.

²⁹ In *September & others v CMI Business Enterprise CC* (2018) 39 ILJ 987 (CC) para 51, Theron J explained that 'the concept of constructive dismissal is legalese and is generally foreign to non-lawyers'.

³⁰ Sec 186(1)(e) of the LRA 66 of 1995.

or setting unattainable targets.³¹ Du Toit *et al.* state that constructive dismissal can take several forms.³²

The burden of proof is placed on the employee to establish that the reason for the termination of employment is due to the conduct of the employer and that to remain in service would have been unbearable and intolerable.³³ In the case of *National Health Laboratory Service v Yona & Others*, the Court had to decide whether an employee can claim constructive dismissal due to work-related stress in terms of the LRA.³⁴ While the test for intolerability is strict, the Court stated that the 'reasonable' employee standard must be applied flexibly, considering the effect of the employer's actions on an employee suffering from a mental health condition.³⁵

Another judgment in the Labour Court (LC)³⁶ relating to intolerability and bullying in the workplace will also be discussed in detail. In this case, two employees instituted a claim of constructive dismissal with the Commission for Conciliation, Mediation and Arbitration (CCMA) arising from, *inter alia*, bullying they had allegedly suffered from their manager.³⁷ The Court held the commissioner's finding was correct as it relates to continued employment being rendered intolerable.³⁸ The employees had been unfairly dismissed even though a grievance had not been lodged.³⁹

On the contrary, in the case *HC Heat Exchangers (Pty) Ltd v Araujo*, the LC set aside the award made by the Bargaining Council, stating that an employee's resignation must be a last resort and that they should have exhausted all the internal grievance procedures.⁴⁰ Therefore, the merits of each case need to be carefully considered before making a judgment. Courts have approved the two-stage test to determine the existence of constructive dismissal. Firstly, if it was not for the employer's conduct, the

³¹ UNISON 'Tackling bullying at work: A UNISON guide for safety reps'5 available at <https://www.unison.org.uk/content/uploads/2013/07/On-line-Catalogue216953.pdf> (accessed 22 June 2024).

³² D Du Toit *et al Labour Relations Law: A Comprehensive Guide* 6th ed (2015). 430.

³³ *Jooste v Transnet Ltd t/a South African Airways* [1995] 5 BLLR 1 (LAC).

³⁴ (2015) 36 ILJ 2259 (LAC) (*Yona*). See also CI Tshoose 'Constructive Dismissal Arising from Work Related Stress' (2017) *Journal of Juridical Sciences* 121–138.

³⁵ *Yona* para 16.

³⁶ *Centre for Autism Research and Education CC v CCMA and others* [2020] 11 BLLR 1123 (LC) para 51 (*Centre for Autism Research*).

³⁷ *Centre for Autism Research* para 45.

³⁸ *Centre for Autism Research* para 51.

³⁹ *Centre for Autism Research* para 46.

⁴⁰ *Centre for Autism Research* para 42.3. See also C Okpaluba & TC Maloka 'Employee's incompatibility as a ground for dismissal in contemporary South African Law of Unfair Dismissal: A Review of *Zeda Car Leasing, Mjijima and Watson*' (2021) (2) *South African Mercantile Law Journal* 238–259.

employee would not have intentionally ended the employment relationship.⁴¹ Secondly, if the answer is yes, dismissal is eliminated and if not, the enquiry continues to assess whether the employer's actions amount to constructive dismissal or not.⁴²

Conduct that impairs an employee's dignity can turn into a hostile, intimidating and humiliating work environment for the victim.⁴³ The psychological impact of workplace bullying can be devastating and debilitating for the victim; substantially limiting an employee's ability to work.⁴⁴ Contrary to harassment, bullying has not been defined as a separate form of unfair conduct in the EEA.⁴⁵ However, the new Code explicitly lists it as a form of harassment or unfair discrimination.⁴⁶ Harassment – as in workplace bullying – amounts to discrimination as it creates an analogous barrier to equal enjoyment of a person's rights in the workplace and consequently infringes on the person's dignity.⁴⁷

Additionally, an employee may also lodge an unfair discrimination dispute with the CCMA should they not be satisfied with the steps taken by the employer. The study also explores the concept of unfair discrimination in relation to workplace bullying according to section 6 of the EEA. This provision identifies bullying as a form of unfair discrimination.

Against the backdrop of the prevalence of violence in South Africa, this research explores several ways in which to lessen the harmful effects of violence and harassment in the workplace, together with the associated psychosocial risks, stress and impact of workplace bullying on victims. It further examines whether intolerable conduct should only be that of the employer or whether it also includes the intolerable conduct of others, which the employer should have prevented, possibly resulting in the discontinuation of the employment relationship.

⁴¹ Du Toit *et al Labour Relations Law: A Comprehensive Guide* 6th ed (2015). 430.

⁴² Du Toit *et al Labour Relations Law: A Comprehensive Guide* 6th ed (2015). 430.

⁴³ EEA 55 of 1998: Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace, 2022. 25.

⁴⁴ *Jansen v Legal Aid South Africa* (2018) 39 ILJ 2024 (LC).

⁴⁵ A Van Niekerk *et al. Law@work* 5th ed. (2019). 129.

⁴⁶ EEA 55 of 1998: Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace, 2022. 18.

⁴⁷ Van Niekerk *et al. Law@work* 5th ed (2019) 129.

1.5 Research methodology

This dissertation is a doctrinal methodological framework, including analyses of legal precedent and legislative considerations. It involves analysing the legislation that should be taken into consideration; applicable South African and international case-law; journal articles, and ILO conventions.

The research follows a comparative and investigative methodology regarding the governance of violence and harassment in the South African workplace. Case-law as well foreign legislation will be explored, with specific reference to the United Kingdom.

1.6 Structure of the dissertation

A brief introduction to the topic in Chapter One explains the research questions and the methodology used to answer those questions.

Chapter Two will focus on the South African Constitution and the ILO standards' role in identifying the international standards when evaluating bullying in the workplace.

The legislative framework in South Africa, particularly legislation prohibiting bullying in employment and unfair discrimination, is analysed in Chapter Three. The chapter sets out the duties expected of the employer when bullying and unfair discrimination in the workplace have occurred, the appropriate remedies against the employer who fails to properly execute these duties, and the employer's Occupational Health and Safety obligations. Further attention is given to the intolerance and psychological consequences emanating from violence and harassment in the workplace.

Chapter Four adopts a strong comparative stance focusing on a comparative analysis of the regulatory framework in the United Kingdom, relative to workplace violence and harassment, compared to South Africa.

The conclusion of the dissertation in Chapter Five will explore recommendations for how the employer and an employee should approach bullying in the workplace and how it can be avoided or eliminated.

CHAPTER 2: INTERNATIONAL LABOUR ORGANISATION STANDARDS

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2.1 Introduction

Workplace violence and harassment can take many different forms and have become a widespread phenomenon, not only in South Africa, but globally.⁴⁸ This chapter will assess the International Labour Organisation's (ILO) approach to combat this conduct which can be discriminatory. The ILO is recognised as a system of international law through its conventions and it provides minimum labour standards that member states should abide by.⁴⁹

The then Union of South Africa, as part of the League of Nations, was one of the founding members of the ILO, which was established by the Treaty of Versailles in 1919.⁵⁰ Due to the country's former apartheid policies, a resolution was adopted to officially bar South Africa from ILO in 1961.⁵¹ However, to avoid being officially barred, South Africa withdrew from the ILO and was only re-admitted after a 30-year hiatus, on 26 May 1994.⁵²

The International Labour Standards (ILS) and conventions set out core principles and rights in the workplace pertaining to the protection of specific categories of employees, non-discrimination, occupational health and safety, fair working arrangements and other employment protections.⁵³ To date, South Africa has ratified eight core conventions. When a member state ratifies a convention, there is an obligation to implement the convention in accordance with its national law and practice.⁵⁴ Section

⁴⁸ D Du Toit & M Potgieter *Unfair discrimination in the workplace* (2014) 33.

⁴⁹ ILO 'Rules of the game: A brief introduction to international labour standards' *Revised edition* (2013).

⁵⁰ Van Niekerk *et al. Law@work 5th ed* (2019). 23.

⁵¹ Van Niekerk *et al. Law@work 5th ed* (2019). 23.

⁵² <https://libguides.ilo.org/c.php?g=657806&p=4649132> (accessed 15 June 2023).

⁵³ <https://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm> (accessed 15 June 2023).

⁵⁴ <https://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm> (accessed 15 June 2023).

39(1) of the Constitution specifically provides for the consideration of international law when interpreting the law.⁵⁵

According to the ILO, workplace violence comprises of insults, threats of violence at work, homicide, mobbing, assault and bullying.⁵⁶ The ILO's dedication to preserving an employee's dignity at work and ensuring a healthy workplace is also reflected in a number of key conventions.⁵⁷ In terms of this study, the Discrimination (Employment and Occupation) Convention 111 of 1958 and the Violence and Harassment Convention 190 of 2019 are the most pertinent as they relate to violence in the workplace.⁵⁸

2.2 Discrimination (Employment and Occupation) Convention, 1958 (No. 111)

Every employee has an unalienable right to human dignity and is entitled to fair treatment in the workplace.⁵⁹ The ILO places specific obligations and duties on the employer to ensure that an employee's rights are taken into consideration at all times. South Africa ratified the ILO's Discrimination (Employment and Occupation) Convention C111 on 5 March 1997 and is still in operation.⁶⁰ This Convention affirms that human rights are violated by any form of discrimination, as outlined in the Universal Declaration of Human Rights.⁶¹ Additionally, Article 1 of the Universal Declaration of Human Rights states that all persons have equal rights and dignity.⁶²

Consistent with Convention No.111, discrimination denotes

- a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.⁶³

⁵⁵ Constitution of the Republic of South Africa, 1996.

⁵⁶ D Chappell & V Di Martino *Violence at work* 3rd ed (2006). 3.

⁵⁷ D Chappell & V Di Martino *Violence at work* 3rd ed (2006). 266.

⁵⁸ D Chappell & V Di Martino *Violence at work* 3rd ed (2006). 266.

⁵⁹ *FA and University of Witwatersrand* (2023) 44 *ILJ* 929 (CCMA) at para 82.

⁶⁰ https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C111 (accessed 18 June 2023).

⁶¹ <https://www.un.org/en/universal-declarationhuman-rights/index.html> (accessed 18 June 2023).

⁶² Article 1 of the Universal Declaration of Human Rights, <https://www.un.org/en/about-us/universal-declaration-of-human-rights> (accessed 18 June 2023).

⁶³ Discrimination (Employment and Occupation) Convention, 1958 (No. 111) which further states that

- b) such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organisations, where such exist, and with other appropriate bodies.

Using measures suited to national conditions and practice, Article 2 compels member states to enact and proceed with a national policy aimed at promoting equality of opportunity and treatment in work and occupation to eliminate all discrimination in these areas.⁶⁴

The ILO earmarked the prevention of discrimination as a fundamental labour right, hence, the inference can be made that all member states should prioritise discrimination-related issues.⁶⁵

2.3 Violence and Harassment Convention 190 of 2019

The Violence and Harassment Convention 190 of 2019 is the ‘first international treaty to recognise the right of everyone to a world of work free from violence and harassment, including gender-based violence and harassment.’⁶⁶ This Convention concedes that workplace violence and harassment are human rights infringements, which jeopardises equal opportunities globally which as a result, is undesirable and inconsistent with the decent work agenda.⁶⁷

In terms of Convention 190, ‘violence and harassment’ refer to a ‘range of unacceptable behaviours, practices or threats, either a single or repeated occurrence resulting in – or likely to result in – physical, psychological, economic or sexual harm, gender-based violence and harassment.’⁶⁸ The notion of violence and harassment is accordingly accepted as a singular concept and is broad enough to encompass bullying.⁶⁹

The Convention’s objective is to also draw attention to ‘the importance of a work culture that is based on mutual respect and dignity for all human beings to prevent violence and harassment.’⁷⁰ Accordingly, Members who have ratified the Convention are required to create procedures to deal with harassment and violence, support the prevention of such behaviour, and encourage a zero-tolerance environment toward it.⁷¹ It is recognised that violence and harassment in the workplace have an impact on

⁶⁴ Article 2 of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111).

⁶⁵ D Collier *et al.* *Labour Law in South Africa: Context and Principles*. Revised ed (2019) 56.

⁶⁶ <https://www.ilo.org/global/topics/violence-harassment/lang--en/index.htm> (accessed 25 June 2023).

⁶⁷ Violence and Harassment Convention, 2019 (No. 190).

⁶⁸ Article 1(a) of the Violence and Harassment Convention, 2019 (No. 190).

⁶⁹ KB Calitz ‘Bullying in the Workplace: The Plight of South African Employees’ (2022) 25 *Potchefstroom Electronic Law Journal* 20.

⁷⁰ Violence and Harassment Convention, 2019 (No. 190).

⁷¹ Violence and Harassment Convention, 2019 (No. 190).

a person's psychological/mental health, dignity, physical and sexual health as well as familial and societal environments.⁷²

If Convention 190 is ratified by member states, they have the option to define 'violence and harassment' as a single concept or as two separate concepts.⁷³ According to article 4 of Convention 190, member states need to adopt 'an inclusive, integrated and gender-responsive approach for the prevention and elimination of violence and harassment in the world of work.'⁷⁴

Therefore, members should adopt regulations and enact legislations to encourage equality and abolish discrimination; these would include the prohibition of violence and harassment in the workplace.⁷⁵ As such, they have an obligation to create a national policy that necessitates the employer to implement policies in the workplace to combat violence and harassment.⁷⁶

Recommendation 206⁷⁷ describe the elements that contribute to an increase in violence and harassment, which are most likely caused by unsafe work environments, societal and cultural norms, or poorly designed workplaces.⁷⁸ Member states must include provisions against violence and harassment in their national anti-discrimination, health and safety, and immigration laws.⁷⁹ It is imperative that they raise awareness and provide training on workplace violence and harassment.

South Africa's response to Conventions 111 and 190

The South African Constitution stipulates that international law must be considered while interpreting the Bill of Rights, recognising the significance of international standards.⁸⁰ Binding and non-binding international law should be taken into consideration when interpreting the Bill of Rights, this was clarified and confirmed in the Constitutional Court (CC) case of *State v Makwanyane and another*.⁸¹

⁷² Violence and Harassment Convention, 2019 (No. 190).

⁷³ Calitz (2022) 25 *Potchefstroom Electronic Law Journal* 21.

⁷⁴ Article 4 of the Violence and Harassment Convention, 2019 (No. 190).

⁷⁵ Article 7 of the Violence and Harassment Convention, 2019 (No. 190).

⁷⁶ Article 9(a) of the Violence and Harassment Convention, 2019 (No. 190).

⁷⁷ Violence and Harassment Recommendations, 2019.

⁷⁸ Article 8 of the Violence and Harassment Convention, 2019 (No. 190).

⁷⁹ Article 11(a) of the Violence and Harassment Convention, 2019 (No. 190).

⁸⁰ Sec 39(1) of the Constitution of the Republic of South Africa, 1996.

⁸¹ 1995 (3) SA 391 (CC) para 35.

When South Africa ratified Conventions 111 and 190, all member states were required to declare national policy and enact legislation in acceptance of this policy.⁸² Hence, the Employment Equity Act (EEA) should align its interpretation and application with international legal standards, particularly those set out in the International Labour Organization (ILO) Convention 111 on Discrimination (Employment and Occupation).⁸³ This involves ensuring that the EEA's provisions on employment equity, affirmative action, and non-discrimination are consistent with the standards and requirements set out in Convention 111. The Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA) is also an important legislative intervention designed to give effect to section 9 of the Constitution.⁸⁴ Due to its ratification of Convention 190 on 29 November 2021, South Africa is required to adopt and implement this Convention by enacting laws.

Subsequent to the ratification, the country published the Code of Good Practice on the Prevention and Elimination of Harassment in the workplace.⁸⁵ The Code outlines the legal framework and principles to assist with preventing and eliminating violence and harassment in the world of work.⁸⁶ As such, it further offers guidelines to eliminate violence and harassment as well as strategies for an employer to deal with violence and harassment in the workplace.⁸⁷ The Code acknowledges that violence and harassment can also incorporate psychological and emotional abuse caused by cyberbullying.⁸⁸

2.4 Conclusion

Bullying at work should be acknowledged in South Africa as a breach of an employee's human right to equality, freedom, security, and dignity as well as fair labour practices, which should be protected.

⁸² Art 2 and 3(b) of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111).

⁸³ Sec 3 (d) of the Employment Equity Act 55 of 1998.

⁸⁴ Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2001.

⁸⁵ EEA 55 of 1998: Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace, 2022.

⁸⁶ EEA 55 of 1998: Item 3 of the Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace, 2022.

⁸⁷ EEA 55 of 1998: Item 8 of the Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace, 2022.

⁸⁸ EEA 55 of 1998: Item 1 of the Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace, 2022.

International labour law and employment standards affect states and governments all around the world.⁸⁹ Globalisation and the expansion of international trade, necessitates that international rules be adopted to safeguard vulnerable employees from discrimination and mistreatment.⁹⁰ Although there is a need for standardised norms, the diversity of the states makes their implementation difficult.⁹¹

The diverse interpretation of case-law by member states, as well as international courts and tribunals, need to be taken into consideration because they may directly affect how domestic legislation is interpreted and carried out. When evaluating the responsibility of the employer in dealing with workplace bullying, not only should South African law be considered, but international law should also be looked at for solutions and guidance.

Convention 190 and Recommendation 206 acknowledge that workplace violence and harassment constitute a breach of human rights that may jeopardise equal opportunities for decent work.⁹² These regulations ensure that all employees are treated with dignity and any conduct causing harm – including ‘bullying and mobbing’ – is categorised as ‘violence at work’. Whilst bullying is not specifically addressed in Convention 190, it can be inferred from the term ‘unacceptable conduct’ to include physical and psychological harm.⁹³

Besides the newly adopted 2022 Code of Good Practice giving effect to Convention 190, there is no legislation or codes to provide explicit protection to an employee against bullying in South Africa.⁹⁴ The South African statutory framework will be discussed in more detail in the next chapter.

⁸⁹ Collier *et al. Labour Law in South Africa: Context and Principles*. Revised ed (2019) 53.

⁹⁰ Collier *et al. Labour Law in South Africa: Context and Principles*. Revised ed (2019) 53.

⁹¹ Collier *et al. Labour Law in South Africa: Context and Principles*. Revised ed (2019) 65.

⁹² Calitz (2022) 25 *Potchefstroom Electronic Law Journal* 21.

⁹³ Calitz (2022) 25 *Potchefstroom Electronic Law Journal* 21.

⁹⁴ Calitz (2022) 25 *Potchefstroom Electronic Law Journal* 6.

CHAPTER 3: LEGISLATIVE FRAMEWORK PROTECTING EMPLOYEES

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3.1 Introduction

According to the World Health Organisation (WHO), health refers to ‘a state of complete physical, mental and social well-being, and not merely the absence of disease’.⁹⁵ A healthy workplace should embody this definition. The advancement of a healthy workplace has been defined over the years to include physical health, lifestyle and psychosocial well-being.⁹⁶

Harassment can have detrimental repercussions on a person, including behavioural, psychological and social issues.⁹⁷ Loss of personal safety, job loss, insomnia and a change in work or social routines are some of the risks that harassment victims may face.⁹⁸ Workplace bullying is often linked to harmful behaviour which includes harassment, discrimination and victimisation. Therefore, protection against such behaviour necessitates legal clarity.

There are several legal instruments that directly and indirectly regulate the protection of an employee against violence and harassment in the workplace. According to

⁹⁵ World Health Organization & J Burton ‘WHO healthy workplace framework and model: background and supporting literature and practices’ (2010) 15.

⁹⁶ World Health Organization & J Burton ‘WHO healthy workplace framework and model: background and supporting literature and practices’ (2010) 90.

⁹⁷ A Rycroft ‘Workplace Bullying: Unfair Discrimination, Dignity Violation or Unfair Labour Practice?’ (2009) 30 *Industrial Law Journal* 1439.

⁹⁸ BH Earle & GA Madek ‘An International Perspective on Sexual Harassment Law’ (1994) 12(1) *Law and Inequality: A Journal of Theory and Practice* 65.

common law, the employer needs to ensure that an employee has ‘reasonably safe and healthy working conditions.’⁹⁹

This chapter will consider the employer’s duty to provide a safe workplace. It will also reflect on the employer’s liability for workplace bullying and whether direct reliance on a constitutional right, including the right to equality, is possible.

Accordingly, the legislation under analysis includes but is not limited to, the Constitution of South Africa as well as the Occupational Health and Safety Act 85 of 1993 (OHS Act), Labour Relations Act 66 of 1995 (LRA) and the Employment Equity Act 55 of 1998 (EEA). By conducting this analysis, we will establish whether workplace bullying infringes on an employee’s fundamental rights and if the labour legislation mentioned will protect an employee against workplace bullying.

3.2 South African Constitution and workplace bullying

Human rights and freedoms, equality and human dignity are all fundamental elements and principles of the Constitution.¹⁰⁰ Accordingly, protection must be provided in terms of South African law, otherwise several constitutional rights of the victims of workplace bullying may be violated.¹⁰¹ Hence, national legislation was passed to deter and prohibit unfair discrimination.

Section 10 of the Constitution stipulates that ‘everyone has a right to dignity and the right to have that dignity respected and protected.’¹⁰² In the case, *S v Makwanyane*,¹⁰³ O’Regan J ruled that respect and consideration should be accorded to all people because dignity is ‘an acknowledgement of the intrinsic worth of human beings’.¹⁰⁴ Dignity – a person’s right to be themselves – includes independence, individualism, identity, self-realisation, self-esteem, and self-worth.¹⁰⁵ A person’s dignity is compromised when a person is subjected to degrading and humiliating behaviour.¹⁰⁶

⁹⁹ M McGregor et al. *Labour Law Rules!* 3rd ed (2017) 45.

¹⁰⁰ Constitution of the Republic of South Africa, 1996.

¹⁰¹ Sec 9, 10, 12 and 23 of the Constitution of the Republic of South Africa, 1996.

¹⁰² Sec 10 of the Constitution of the Republic of South Africa, 1996.

¹⁰³ 1995 2 SACR 1 (CC) para 328.

¹⁰⁴ 1995 2 SACR 1 (CC) para 328.

¹⁰⁵ *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) para 28.

¹⁰⁶ *Advance Mining Hydraulics (Pty) Ltd and Others v Botes NO and Others* 2000 (2) BCLR 119 (T) 127.

The concept of dignity, according to Rycroft, is not about being degraded or subjected to public humiliation. In this instance, it will almost certainly endanger, or badly harm, the trust and confidence between the employer and an employee.¹⁰⁷

Section 9(1) of the Constitution states that ‘everyone has the right to be treated equally and entitled to equal protection and benefit from the law’.¹⁰⁸ Section 9(3) of the Constitution prohibits unfair discrimination by the state or any other person, whether directly or indirectly, on the grounds listed.¹⁰⁹ Therefore, if an employee alleges discrimination on a listed ground, the employer must prove that the discrimination was fair.¹¹⁰

On the other hand, if the differentiation is not based on a listed ground, section 9(3) will not assist the victim. If the bullying occurred on arbitrary grounds, the burden will be on the employee to prove that the differentiation was unfair¹¹¹ and had a negative effect on them. An employee must also show that this differentiation will impair their fundamental dignity and could be difficult to prove.¹¹²

A person must first prove that such legislation does not protect their right and that it should be protected under the Constitution. The infringed constitutional right may then form the basis of relief sought and could directly challenge the constitutional right in question.¹¹³

In the case, *Piliso v Old Mutual Life Assurance Co*,¹¹⁴ an employee was harassed by an unknown person and suffered psychological injury due to the employer’s inaction. Since non-employees also had access to the workplace, Ms Piliso could not establish that the harasser was a co-worker when she filed the claim for damages against her employer. Therefore, Section 60 of the EEA and common law vicarious liability were

¹⁰⁷ Rycroft (2009) *Industrial Law Journal* 1440.

¹⁰⁸ Sec 9(1) of the Constitution of the Republic of South Africa, 1996.

¹⁰⁹ Sec 9(3) of the Constitution of the Republic of South Africa, 1996.

¹¹⁰ Sec 9(3), (4) and (5) of the Constitution of the Republic of South Africa, 1996.

¹¹¹ A Smith ‘Equality constitutional adjudication in South Africa’ (2014) 14 *African Human Rights Law Journal* 616.

¹¹² *Jordan & Others v S* (2002) 6 SA 642 (CC) 7, the Court contended that in order to enquire about the constitutional validity of a provision, it requires the Court to engage in a two-step process. The two-stage enquiry is first to determine whether the impugned provision limits a constitutional right. If so, whether the right is justifiably limited in terms of section 36(1).

¹¹³ KB Calitz ‘The liability of employers for the harassment of employees by non-employees’ (2009) 20(3) *Stellenbosch Law Review* 408.

¹¹⁴ (2007) 28 ILJ 897 (LC) (*Piliso*).

both rejected by the Labour Court (LC) as inadequate defences – the employer can only be held liable for the conduct of its employees.¹¹⁵

The Court did not consider the possibility that the employer could be held directly responsible for discrimination in terms of Section 6(1) of the EEA.¹¹⁶ According to the LC, awarding an employee damages for the infringement of their constitutional right to fair labour practices was appropriate in the absence of common law and statutory remedies.¹¹⁷

It can be argued that a bullied employee is not protected because the legislation enacted does not currently protect a harassed employee's right to dignity and equality. The only recourse available to such an employee would be to contest the EEA's constitutionality or to seek redress directly from the Constitution.

Consequently, an employee not covered by the EEA and PEPUDA can contest their constitutional right directly.

3.3 The doctrine of vicarious liability and workplace bullying

Where legislation is silent, the common law regulates the employment contract.¹¹⁸ The idea of vicarious liability is significant in workplace bullying. It refers to 'strict liability of one person for the harm of another'.¹¹⁹ Alternatively, it means that should an employee violate the law whilst carrying out their duties, the employer would be held responsible for the resulting harm.¹²⁰ Thus, if an employee commits an unlawful act whilst working for the employer, the employer could also be held vicariously responsible.¹²¹ The victim would be able to pursue damages under common law in this situation.

According to Rycroft, there are two legal theories under which the employer may be held vicariously responsible if workplace bullying were to be considered a 'legally recognisable wrong'.¹²² Firstly, *injuria* which is defined as an intentional insult to the

¹¹⁵ *Piliso* para 33, based on the facts of the case, the Court found that non-employees also had access to the victim's workstation.

¹¹⁶ *Piliso* para 80.

¹¹⁷ *Piliso* para 80.

¹¹⁸ J Grogan *Workplace Law* 13th ed (2020) 2-3.

¹¹⁹ J Neethling et al. *Law of Delict* 5th ed (2006) 338.

¹²⁰ *LM and Others v The Mquma Local Municipality and Another* [2022] ZAECMKHC 64 para 37.

¹²¹ Rycroft (2009) *Industrial Law Journal* 1447.

¹²² Rycroft (2009) *Industrial Law Journal* 1447.

worth, reputation, or dignity of another.¹²³ As there is no solid precedent, Rycroft noted that it may open the door to vicarious culpability claims in a civil court based on a co-worker's *injuria* on an employee.¹²⁴ Alternatively, sexual harassment cases are typically cited on the grounds of the employer's 'legal duty to provide a safe working environment'.¹²⁵

The second theory was tested in the case, *Media 24 Ltd & another v Grobler*.¹²⁶ This case emphasised that the employer does have a duty to protect employees against physical and psychological harm during their employment period.¹²⁷ The Supreme Court of Appeal (SCA) ruled that it established a law where the employer has a common-law duty to take 'reasonable care' for their employees' safety.¹²⁸ Therefore, the employer's failure to exercise 'reasonable care' to prevent such conduct, as in this case, may subject the employer to liability for causing the psychological harm.¹²⁹

In two more recent decisions, *E v Ikwezi Municipality*¹³⁰ and *LP v Minister of Correctional Services*,¹³¹ both sexual harassment plaintiffs were successful in suing their employers for damages under the doctrine of vicarious liability.¹³² Using these cases as a precedent, victims of workplace bullying may claim that their employers are vicariously liable for any psychological harm and other harm sustained as a result of being bullied by co-workers.

Although victims of bullying may be successful in a delictual damages suit against their employers under common law, based on negligence or vicarious liability of employers, Calitz noted that there are no judgements in this regard.¹³³

The failure of the employer to stop or prohibit such conduct may, therefore, give rise to vicarious liability. However, the burden of proof rests with the victim, which could be challenging given that workplace bullying is not acknowledged as wrongful conduct.

¹²³ Rycroft (2009) *Industrial Law Journal* 1447.

¹²⁴ Rycroft (2009) *Industrial Law Journal* 1447.

¹²⁵ Rycroft (2009) *Industrial Law Journal* 1447.

¹²⁶ (2005) 26 ILJ 107 (SCA).

¹²⁷ *Media 24 Ltd & another v Grobler* (2005) 26 ILJ 107 (SCA) para 65 (*Media 24*).

¹²⁸ *Media 24* para 65.

¹²⁹ *Media 24* para 65.

¹³⁰ *E v Ikwezi Municipality* 2016 37 ILJ 1799 (ECG).

¹³¹ *LP v Minister of Correctional Services* [2019] ZAWCHC 144 (5 November 2019).

¹³² Calitz (2022) 25 *Potchefstroom Electronic Law Journal* 18.

¹³³ Calitz (2022) 25 *Potchefstroom Electronic Law Journal* 18.

3.4 Protection and liability in terms of South African labour legislation

Several pieces of promulgated legislation effected provisions in the Constitution. As previously mentioned, certain legislative provisions regulating workplace bullying are important to this study. These provisions include

- unfair discrimination and harassment as governed by the EEA¹³⁴ and the Code;
- automatic unfair dismissals and unfair labour practices in terms of the LRA¹³⁵ ; and
- the OHS Act, which regulates health and safety.¹³⁶

In the case of *Media 24 Ltd & Another v Grobler*, the Court held that the complainant could claim on three separate causes of action; namely, in terms of the common law, since an employer has a duty to provide 'reasonable care', which also extend to psychological harm, vicarious liability in terms of the EEA as discrimination was present and lastly (if applicable), in terms of the LRA where unfair dismissal resulted.¹³⁷

Other relevant statutes referred to are the Protection from Harassment Act 17 of 2011 (POHA) and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA), although their applications are limited in the workplace.¹³⁸

3.4.1 Employment Equity Act (EEA)

Section 5 of the EEA, states that an 'employer must take steps to promote equal opportunity by eliminating unfair discrimination in any employment policy or practice.'¹³⁹ The primary objective of the EEA is not employee protection, but to advance economic development, efficiency in the workplace, and to discharge its international obligations in terms of the International Labour Office (ILO).¹⁴⁰

The EEA gives effect to the equality clause of the Constitution and goes further to prohibit discrimination on any arbitrary ground.¹⁴¹ It regards harassment as a form of

¹³⁴ Sec 6(1) & (3) of the EEA 55 of 1998.

¹³⁵ Sec 185, 186 & 187 of the LRA 66 of 1995.

¹³⁶ Sec 8(1) of the OHS Act 85 of 1993.

¹³⁷ (2005) 26 ILJ 1007 (SCA).

¹³⁸ Calitz (2022) 25 *Potchefstroom Electronic Law Journal* 18.

¹³⁹ Sec 5 of the EEA 55 of 1998.

¹⁴⁰ Preamble of the EEA 55 of 1998.

¹⁴¹ Section 9(4) of the Constitution of the Republic of South Africa, 1996.

unfair discrimination and prohibits it on any one, or any combination, of the grounds listed in Section 6(1) of the Act.¹⁴² Harassment, because it constitutes unfair discrimination, falls within the jurisdiction of the EEA.¹⁴³ The LC held that workplace bullying is a type of harassment in the, *Centre for Autism Research and Education CC v CCMA* case.¹⁴⁴

The test for whether conduct amounts to harassment is objective and aims to establish if the conduct unreasonably interfered with the complainant's work performance.¹⁴⁵ Where an employee alleges unfair discrimination, as a minimum requirement, they bear the statutory onus to prove that unfair discrimination took place in terms of Section 11(2) of the EEA.¹⁴⁶

Section 60 of the EEA holds the employer liable for the actions of their employees; unless the employer can prove that it took the required steps to prevent or eliminate the undesired act should an employee contravene any provision of the EEA during the course and scope of performing their duties.¹⁴⁷

In the case, *Public Servants Association of South Africa obo AG v Department of Agriculture, Land Reform and Rural Development*¹⁴⁸, an employee was exposed to an obscene act of sexual harassment during working hours and filed a grievance according to the company's policy. The employer failed to act on the grievance and had to deal with the consequences thereof. The employer's failure to consult with all relevant parties and to take the necessary steps to eliminate the conduct that led to the grievance was in contravention of the EEA.¹⁴⁹ The Court held that the employer failed to act in accordance with its duty as per Section 60 of the EEA. The employee received ten months' compensation, and the employer was also directed to take proactive measures to ensure that such behaviour does not occur again in the workplace.¹⁵⁰

¹⁴² EEA 55 of 1998.

¹⁴³ Sec 6(3) of the EEA 55 of 1998.

¹⁴⁴ [2020] 11 BLLR 1123 (LC) para 39.

¹⁴⁵ *Gerber v Algorax (Pty) Ltd* (1990) 20 ILJ 2994 (CCMA).

¹⁴⁶ Section 11(2) of the EEA 55 of 1998. See also *La Foy v Department of Justice and Constitutional Development and Others* [2023] ZALCJHB 253 para 33.

¹⁴⁷ Sec 60(3) of the EEA 55 of 1998.

¹⁴⁸ [2021] 1 BALR 76 (CCMA) (*Public Servants Association of South Africa obo AG*).

¹⁴⁹ *Public Servants Association of South Africa obo AG* para 29.

¹⁵⁰ [2021] 1 BALR 76 (CCMA) para 24.

An employee who is bullied at work has some protection under the EEA. However, the bullying claim should be based on one or more of the grounds for discrimination listed in Section 6(1) of the EEA.¹⁵¹ The EEA's grounds should, therefore, form the basis for an 'harassment' claim. To seek protection from unfair discrimination, a victim of workplace bullying should base their claim 'on any other arbitrary ground' as opposed to those listed in the EEA.

While the law is well-developed in terms of sexual harassment, it is not comprehensive when looking at other forms of harassment. Nevertheless, cases of harassment based on race, religion, race and an employee's non-disclosure of pregnancy are not new. Therefore, there is no reason why the standards related to sexual harassment cannot be extended to other forms of harassment *mutatis mutandis*.

3.4.2 Code of Good Practice on the Prevention and Elimination of Violence and Harassment in the Workplace (The Code)

According to the Code of Good Practice on the Prevention and Elimination of Violence and Harassment in the Workplace (The Code), harassment does include bullying. It affirms that bullying occurs where 'harassment involves the abuse of coercive power by an individual or group of individuals in the workplace'.¹⁵² It defines harassment as

unwanted conduct, which impairs dignity; 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.¹⁵³

In line with the Code, the concept of violence and harassment – sexual harassment, gender-based violence, racial violence, harassment and bullying – amounts to unfair discrimination.¹⁵⁴ It further defines various forms of violence and harassment while acknowledging that it may include several types of abuse whether physical, psychological, emotional or sexual.¹⁵⁵ Harassment, in this context, is closely linked to

¹⁵¹ Sec 6(1) of the EEA 55 of 1998.

¹⁵² EEA 55 of 1998: Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace, 2022.

¹⁵³ EEA 55 of 1998: Item 4.1 of the Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace, 2022.

¹⁵⁴ EEA 55 of 1998: Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace, 2022. 18.

¹⁵⁵ M Moolla et al 'The role of the International Labour Organization in shaping South Africa's policy on sexual harassment' in S van Eck et al (eds), *Celebrating the ILO 100 years on: Reflections on labour law from a Southern African perspective* (2020) 195.

bullying. Nevertheless, the Code remarks that ‘workplace bullying may involve aggressive behaviour in which someone repeatedly causes another person injury or discomfort’, yet it is not restricted to this.¹⁵⁶

Bullying in the workplace has been linked to despondency, feelings of worthlessness, alienation from co-workers, anxiety about promotions and job security, sentiments of worthlessness, and feelings of incompetence.¹⁵⁷ The essence of dignity is not to be degraded or humiliated and the LC states that publicly humiliating an employee will almost certainly end, or severely harm, the working relationship.¹⁵⁸

The concept and interpretation of harassment in the Code is, therefore, much broader and distinguishes between overt and covert forms of harassment, which has a variety of effects on an employee.¹⁵⁹ In terms of Section 60 of the EEA, the Code emphasises that the employer should take proactive steps to ensure all forms of violence and harassment in the workplace are averted and eliminated.¹⁶⁰

Accordingly, the employer is obliged to adopt measures to prohibit and prevent all forms of unfair discrimination, including the eradication of violence and harassment in the workplace, which may have an impact on an employee’s constitutional rights.¹⁶¹

3.4.3 Labour Relations Act (LRA)

A principal function of the LRA is to implement the conferred basic rights and give effect to this obligation as an ILO member state.¹⁶² As a result, the Constitution’s guarantee of fair labour practices, ILO standards and common-law employment contracts are all considered by South African labour legislation.

Under section 23(1) of the Constitution, the right to fair labour practices is guaranteed and intended to protect an employee against unfair treatment by their employer.¹⁶³

¹⁵⁶ EEA 55 of 1998: Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace, 2022.

¹⁵⁷ [2020] 11 BLLR 1123 (LC) para 39.

¹⁵⁸ [2020] 11 BLLR 1123 (LC) para 41.

¹⁵⁹ EEA 55 of 1998: Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace, 2022.

¹⁶⁰ EEA 55 of 1998: Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace, 2022.

¹⁶¹ EEA 55 of 1998: Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace, 2022.

¹⁶² Preamble of the LRA 66 of 1995.

¹⁶³ Sec 23 of the Constitution of the Republic of South Africa, 1996.

Section 23(1) of the Constitution was implemented through the enactment of the LRA, hence, a person who is considered an 'employee' has protection under both pieces of legislation. However, should the employer treat someone not deemed an 'employee' unfairly, the employee may seek redress under section 23(1) of the Constitution.¹⁶⁴ Furthermore, an employee may need to seek specific relief under LRA sections 186 and 187 since bullying at work is not recognised as a basis for protection in terms of the LRA.

The relief provided by the LRA is crucial, as it is well known that many victims of workplace harassment eventually feel compelled to resign, stating that their situation has become untenable.¹⁶⁵

3.4.3.1 Unfair labour practices

According to section 186(2) of the LRA, unfair labour practice is any unfair act or omission that arises between the employer and an employee involving

- unfair conduct by the employer relating to the promotion, demotion, probation (excluding dismissals of probationers) or training of an employee or relating to the provision of benefits to an employee;
- unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee;
- failure or refusal by the employer to reinstate or re-employ a former employee in terms of any agreement, and
- occupational detriment, other than dismissal, in contravention of the Protected Disclosures Act 2000 on account of an employee having made a protected disclosure as defined in that Act.¹⁶⁶

The LRA provides a recourse for claims of 'unfair labour practice,' even though bullying in the workplace is not specifically mentioned as an 'unfair act or omission'.¹⁶⁷ Consequently, this provision will be used to support the claim that 'unfair labour practices' could give the impression of bullying in the workplace in matters relating to benefits, demotion, promotion and training.¹⁶⁸ An employee must establish that the act or practice, links to the grounds stated in the legislative definition in order to successfully institute an unfair labour practice claim.¹⁶⁹ Where the conduct does not fall under this definition, an employee who has been the victim of workplace bullying

¹⁶⁴ Sec 23 of the Constitution of the Republic of South Africa, 1996.

¹⁶⁵ Sec 186(1)(e) of the LRA 66 of 1995.

¹⁶⁶ Sec 182(1) of the LRA 66 of 1995.

¹⁶⁷ Rycroft (2009) *Industrial Law Journal* 1446.

¹⁶⁸ Rycroft (2009) *Industrial Law Journal* 1446.

¹⁶⁹ J Grogan *Workplace Law* 13th ed (2020) 137.

cannot rely on the remedy.¹⁷⁰ Since conduct can be unfair, without being discriminatory, the definition of unfair conduct is far broader than that of unfair discrimination.¹⁷¹

A broader interpretation is required to link unfair labour practices to workplace bullying. Therefore, it may be argued that section 23(1) of the Constitution is broader in scope than the closed list of unfair labour practices defined in the LRA.

3.4.3.2 Automatically unfair dismissal

'Every employee has the right not to be unfairly dismissed.'¹⁷² The LRA is applied in all cases where dismissal is allegedly unfair, including claims of sexual harassment.¹⁷³ Automatic unfair dismissals often include the violation of a fundamental right as per section 187(1)(f) of the LRA where

an employer directly or indirectly, unfairly discriminates against an employee on any arbitrary ground, including, but not limited to, race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility.¹⁷⁴

Of significance to this study is the provision in the Code that refers to a hostile work environment, which links to the constructive dismissal provision of the LRA, particularly in cases of workplace bullying. With reference to section 186(1)(e) of the LRA, constructive dismissal occurs when 'an employee terminates employment with or without notice due to the employer making continued employment intolerable for the employee'.¹⁷⁵ To ascertain if the conditions for constructive dismissal are met, the circumstances of each case must be determined, understood and compared to the overall principles.¹⁷⁶

In order for an employee to institute a claim of constructive dismissal, they must prove that

- an employment relationship existed at the time the employee resigned from the employer's service;¹⁷⁷

¹⁷⁰ Calitz (2022) 25 *Potchefstroom Electronic Law Journal* 18.

¹⁷¹ J Grogan *Workplace Law* 13th ed (2020) 59.

¹⁷² Sec 185 of the LRA 66 of 1995.

¹⁷³ Sec 23 of the Constitution of the Republic of South Africa, 1995.

¹⁷⁴ Sec 187(1)(f) of the LRA 66 of 1995.

¹⁷⁵ Sec 186(1)(e) of the LRA 66 of 1995.

¹⁷⁶ N Whitear-Neal & M Rudling 'Constructive dismissal: a tricky horse to ride *Jordaan v CCMA* 2010 31 ILJ 2331 (LAC)' (2012) *Obiter* 193.

¹⁷⁷ Sec 186(1)(e) of the LRA 66 of 1995.

- the employee chose to end the relationship;
- continued employment would have been 'intolerable',¹⁷⁸ and
- once the criteria have been proven, 'the onus shifts to the employer to prove that it did not act unfairly'.¹⁷⁹

The second phase of the inquiry demands that the unfairness of the dismissal be established.¹⁸⁰ In a situation where an employee feels that continued employment has become untenable, but in which the employer was not the cause, would constitute a fair constructive dismissal.¹⁸¹ As established in the case, *Maharaj v CP De Leeuw (Pty) Ltd*,¹⁸² constructive dismissal may be deemed automatically unfair if the circumstances indicate that the cause for it falls into the purview of section 187 of the LRA.

The employees in the case, *Centre for Autism Research and Education CC v CCMA and others*¹⁸³ resigned and claimed they had been constructively dismissed due to the school's owners' insulting and offensive behaviour. The employees claimed that their employer used disrespectful, demeaning insulting words and treated them in a degrading manner.¹⁸⁴

In this instance, the employer's actions, fit the definition of bullying in the workplace and could possibly be used as a precedent for the CCMA and Labour Court to take appropriate action in cases where constructive dismissal is based on the employer's ongoing mistreatment of employees.

3.4.4 Occupational Health and Safety Act (OHS Act)

Where labour legislation is concerned, the Courts have repeatedly emphasised the employer's duty to provide a safe working environment, which is also in accordance with sections 12(1)(c) and 24(a) of the Constitution¹⁸⁵ and section 8 of the Occupational Health and Safety Act (OHS Act).¹⁸⁶ The OHS Act's primary purpose is

¹⁷⁸ Sec 186(1)(e) of the LRA 66 of 1995.

¹⁷⁹ Sec 186(1)(e) of the LRA 66 of 1995.

¹⁸⁰ N Whitear-Neal & M Rudling (2012) *Obiter* 197.

¹⁸¹ *Daymon Worldwide SA Inc v CCMA* 2009 30 ILJ 575 (LC).

¹⁸² 2005 26 ILJ 1088 (LC).

¹⁸³ The LC in *Centre for Autism Research* referred to 'bullying' stating that the 'employer's conduct amounted to workplace bullying which justifies the claim of constructive dismissal' in terms of section 186(1)(e) of the LRA, the claim for constructive dismissal was upheld.

¹⁸⁴ In *Centre for Autism Research*, the employer created a hostile working environment, which amounted to persistent workplace bullying, which is a form of harassment and making continued employment intolerable.

¹⁸⁵ Sec 12(1)(c) and 24(a) of the Constitution Republic of South Africa, 1996.

¹⁸⁶ Sec 8 of the OHS Act 85 of 1993.

to 'provide for health and safety of persons at work and during use of machinery; protection of persons against hazards in connection with activities at work'.¹⁸⁷

A duty is placed on the employer by the OHS Act, to provide and maintain a 'reasonably practicable', safe and risk-free working environment for staff members.¹⁸⁸ The employer's obligations are summarised in section 8(1) of the OHS Act¹⁸⁹ and should be adhered to ensure a 'psychologically safe' workplace.¹⁹⁰

In terms of health and safety legislation, bullying has never been the subject of a lawsuit. However, due to the physical nature of some bullying acts and the severe emotional suffering caused, Rycroft believes that bullying may be addressed under health and safety legislation, although this may be a reach.¹⁹¹ It is unclear what the policy is, in situations where bullying does not result in severe psychological abuse, but Rycroft seems to think that there is 'clearly the potential to claim compensation, even if health and safety legislation is a tentative basis to deal with workplace bullying'.¹⁹²

It has been shown that bullying in the workplace can have an adverse effect on an individual's health and safety. However, this claim has not been tested in South Africa; hence the proposal for workplace bullying to be classified as a danger to an employee's wellbeing.

3.4.5 Compensation for Occupational Injuries and Diseases Act (COIDA)

Regardless of whether their employer or another individual brought on an employee's illness or injury, the Compensation for Occupational Injuries and Diseases Act (COIDA) offers a statutory compensation system for an employee who becomes disabled as a result of a disease or injury obtained in the workplace.¹⁹³ However, for losses incurred due to an illness or accident sustained at work, an employee is not allowed to institute claims against their employer or co-workers.¹⁹⁴

¹⁸⁷ Preamble of the OHS Act 85 of 1993.

¹⁸⁸ Sec 5(1) of the OHS Act 85 of 1993.

¹⁸⁹ Sec 8(1) of the OHS Act 85 of 1993.

¹⁹⁰ Calitz (2022) 25 *Potchefstroom Electronic Law Journal* 19.

¹⁹¹ Rycroft (2009) *Industrial Law Journal* 1446.

¹⁹² Rycroft (2009) *Industrial Law Journal* 1446.

¹⁹³ Sec 65 of COIDA 130 of 1993.

¹⁹⁴ Sec 35(1) of COIDA 130 of 1993.

In the case, *Ntsabo v Real Security CC*, it was determined that a security guard's resignation, following sexual harassment, constituted an unfair constructive dismissal.¹⁹⁵ Due to the intrusiveness of the sexual harassment, the applicant experienced a variety of psychiatric issues, which included anxiety, post-traumatic stress disorder and severe depression.¹⁹⁶ However, because the applicant's condition did not entail one of the conditions mentioned in Schedule 3 of COIDA or originate from, or within, the course and scope of their job, it was determined that it did not fall under the purview of COIDA.¹⁹⁷

The issue is, should the employer be held vicariously liable under COIDA for injuries or illnesses contracted by their employees during the course and scope of their employment, based on unfair discrimination such as harassment? Although the question was raised in the case, *Media 24 Ltd & Another v Grobler*, the Court stated it could not express an opinion on facts not mentioned in this case as the incident did not occur during the period of employment. However, the Court did not rule out the prospect of a sexual harassment victim filing a COIDA claim should the behaviour that caused the psychiatric condition occur during the course of employment.¹⁹⁸

In the case, *Grobler v Naspers*, the High Court held that for a claim of an accident resulting in harm to be considered valid, evidence was necessary under COIDA. The term 'accident' was interpreted to refer to a particular incident.¹⁹⁹ Nel J stated that actions occurring over a long-term period, such as the harassment in this instance, would not be regarded as accidents.²⁰⁰

However, the Court determined in the case, *Urquhart v Compensation Commissioner* that an employee with a work-related psychiatric condition brought on by witnessing traumatic events is entitled to compensation. The Court interpreted the 'concept of an

¹⁹⁵ (2003) 24 ILJ 2341 (LC) (*Ntsabo*). The Court found that in terms of s 186 (1)(e) of the LRA the security guard was subjected to an intolerable working environment. The applicant, a security guard, reported the incidents but their employer failed to act. S 60 of the EEA formed the basis of the claim.

¹⁹⁶ *Ntsabo* at p2349.

¹⁹⁷ *Ntsabo* at p2380.

¹⁹⁸ (2005) 26 ILJ 1007 (SCA) para 77 (*Grobler*), the Court stated that 'it may well be that employees who contract psychiatric disorders as a result of acts of sexual harassment to which they are subjected in the course of their employment can claim compensation under section 65.'

¹⁹⁹ *Grobler* para 32.

²⁰⁰ (2004) 25 ILJ 439 (C).

accident' to include 'the cumulative effect of a series of specific incidents giving rise to post-traumatic stress disorder.'²⁰¹

It is evident that the Compensation Fund was not created to pay an employee's psychological damages. In light of these rulings, bullied individuals may claim that they are entitled to compensation for any short or long-term psychological impairment brought on by bullying. However, as psychological illnesses (such as post-traumatic stress disorder) are difficult to link to a specific cause, it would be up to the victim to show that their employment brought on the ailment.

3.4.6 Protection from Harassment Act (POHA)

The concept of harassment in the Protection from Harassment Act (POHA) covers 'direct and indirect conduct that causes harm, including mental, psychological and economic harm', which is a much broader definition. The Act's recognition that both psychological trauma and physical harm can be inflicted is commendable.

POHA allows for the issuance of protection orders against accused harassers.²⁰² However, the Act's suggested remedy of a protection order against the alleged harasser in the workplace seems impractical. A workplace where one employee has a restraining order against a co-worker, or even a superior, cannot be practical. Furthermore, police involvement is likely to occur if such an order is disregarded, which may cause interference in the workplace, resulting in additional complications.

Therefore, POHA's provision of protection from workplace sexual harassment is more theoretical than practical. It is contended that this legislation may make it more difficult to comprehend the scope of the protection because it does not specifically protect an employee from harassment by their employer or co-workers.

3.4.7 Promotion of Equality and Prevention of Unfair Discrimination (PEPUDA)

The Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA) was enacted in line with the equality clause of the Constitution to achieve this objective outside of the employment field.²⁰³ It defines harassment as 'unwanted conduct which

²⁰¹ (2006) 27 ILJ 96 (E) para 18.

²⁰² Sec 2 of POHA 17 of 2011.

²⁰³ Du Toit D & Potgieter M *Unfair discrimination in the workplace* (2014) 11.

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.²⁰⁴

Although this definition is unambiguous, the issue lies with PEPUDA's applicability to bullying in the workplace as it does not 'any person' that is protected under the EEA.²⁰⁵ In this situation, harassment is limited to only cases of discrimination as PEPUDA does not apply in a workplace environment. A bullied employee may file a claim under PEPUDA against co-workers or outside parties (customers), but they cannot lodge a claim against their employer for their co-worker's actions.²⁰⁶

Due to PEPUDA's limited reach in the workplace, a bullied employee cannot pursue an unfair discrimination claim in this instance.

3.5 Conclusion

This chapter's goal was to explore South Africa's legal system to identify the measures currently in place for an employee who is the target of workplace bullying. Chapter Three also assessed where an employee can rely directly on the Constitution to seek [legal] recourse.

Without a doubt, South Africa has made significant progress in its legal system to regulate workplace harassment. Several laws have been adopted to mitigate and prevent harassment, which is crucial to address the bullying issue, particularly in the workplace. Victims of harassment have several remedies at their disposal, but there needs to be consistency with reference to the assessed case-law.

The Constitution affords every citizen several fundamental rights. The right to dignity, to not be unfairly discriminated against (equality), to freedom and security, and to fair labour practices are extremely important.²⁰⁷ However, direct reliance on the Constitution is prohibited. Unless remedies do not exist in the statutory or common law, a person may only rely on the Constitution as a last resort.²⁰⁸

²⁰⁴ Sec 1 of Pepuda 4 of 2000.

²⁰⁵ Sec 5(3) of Pepuda 4 of 2000.

²⁰⁶ Calitz (2022) 25 *Potchefstroom Electronic Law Journal* 19.

²⁰⁷ Sec 9, 10, 12 and 23 of the Constitution of the Republic of South Africa, 1996.

²⁰⁸ Du Toit D & Potgieter M *Unfair discrimination in the workplace* (2014) 119.

In terms of the common law, if the victim can prove that the employer failed to prevent such conduct, damages may be claimed directly on the ground that the employer is vicariously liable.²⁰⁹

In line with South Africa's international obligations, the 2022 Code was amended to provide guidelines on addressing violence and harassment in the workplace. The 2022 Code acknowledges that violence and harassment also involve psychological and emotional abuse carried out through various channels, it does not necessarily have to be physical acts only.²¹⁰

The EEA considers workplace bullying as a form of harassment. However, unfair discrimination is prohibited on listed grounds or 'any other arbitrary' ground and it is proposed that victims of workplace bullying be protected on the basis of 'any other arbitrary' ground. Accordingly, a claim may be based on statutory liability in terms of section 60 of the EEA, which stipulates that the employer should be held liable for the harassment from one employee to another employee.²¹¹

Under the LRA, where a broad interpretation is applied, it is proposed that an employee who is a victim of workplace bullying seek redress regarding unfair labour practices. An employee may also assert that they were constructively dismissed if continued employment was found untenable.

While physical safety was the intention with the formation of the OHS Act, safety could also be interpreted to include psychological health and safety.²¹² Employers have an obligation to provide a safe and healthy working environment in terms of the OHS Act; failure to do so may subject the employer to being held liable for damages.

A claim may be instituted against COIDA for work-related psychological illnesses, but only if the illness developed while employed. This may afford workplace bullying victims the option to claim against the fund.

²⁰⁹ Du Toit D & Potgieter M *Unfair discrimination in the workplace* (2014) 105.

²¹⁰ EEA 55 of 1998: Preamble of the Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace, 2022.

²¹¹ Du Toit D & Potgieter M *Unfair discrimination in the workplace* (2014) 105.

²¹² Calitz (2022) 25 *Potchefstroom Electronic Law Journal* 19.

Although relevant to workplace bullying, the issuance of protection orders against co-workers for harassment, as provided for by POHA, may become problematic in the work environment.

PEPUDA is not applicable where EEA is applied and a victim of workplace bullying would not be able to obtain recourse.

According to Rycroft, there are clear repercussions for employers emanating from harassment, including decreased morale, reduced production and possible delictual liability.²¹³

This chapter intended to illustrate the protection and remedies currently available to employees who are victims of workplace bullying. It showed there are also instances whereby victims can rely directly on the Constitution, particularly where the legislation available does not provide adequate relief.

The next chapter will address workplace bullying in the United Kingdom and evaluate South Africa and the United Kingdom's statutory frameworks that govern bullying in the workplace.

²¹³ Rycroft (2009) *Industrial Law Journal* 1432.

CHAPTER 4: COMPARATIVE ANALYSIS – UNITED KINGDOM

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4.1 Introduction

According to section 39(1)(b) of the Constitution, Courts must consider international law when interpreting the Bill of Rights.²¹⁴ Furthermore, '[w]hen interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.'²¹⁵

The United Kingdom does not have a codified Constitution; instead, an amalgamation of various documents, statutes, conventions and legal principles form its Constitution.²¹⁶ Some key components are: Acts of Parliament, common law and constitutional conventions.²¹⁷

This uncodified Constitution has evolved over centuries, incorporating historical documents, legal precedents and agreements, which makes it more flexible and adaptable to changing circumstances.²¹⁸

The comparison will not contain an in-depth discussion of the United Kingdom's legislative system; the aim is to rather identify alternative possibilities which South Africa could implement to protect employees against violence and harassment in the workplace.

²¹⁴ Sec 39(1)(b) of the Constitution of Republic of South Africa, 1996.

²¹⁵ Sec 233 of the Constitution of the Republic of South Africa, 1996.

²¹⁶ <https://www.judiciary.uk/about-the-judiciary/our-justice-system/jud-acc-ind/justice-sys-and-constitution/> (accessed 25 November 2023).

²¹⁷ <https://www.judiciary.uk/about-the-judiciary/our-justice-system/jud-acc-ind/justice-sys-and-constitution/> (accessed 25 November 2023).

²¹⁸ <https://www.judiciary.uk/about-the-judiciary/our-justice-system/jud-acc-ind/justice-sys-and-constitution/> (accessed 25 November 2023).

4.2 United Kingdom common law

In the United Kingdom, common law provides a foundation for legal principles and decisions made by judges over time.²¹⁹ However, it is important to mention there is no specific common law that directly addresses workplace bullying. While common law does not explicitly define workplace bullying, it does play a role in shaping the legal principles related to the employer's responsibilities, duty of care and breach of contract, which could be relevant where cases involve workplace bullying.²²⁰

According to the law of tort, common law principles relating to negligence might be relevant in cases where the employer fails to take reasonable care to prevent bullying, resulting in harm to an employee's mental or physical health.²²¹

In the case, *Walker v Northumberland County Council*, Mr Walker was a social worker who suffered a mental breakdown because of a caseload of emotionally taxing cases.²²² When Mr Walker returned to work, he continuously requested assistance which the employer failed to provide. This led to another mental breakdown.²²³ The employee filed a lawsuit against the employer for failing to fulfil their duty of care to make sure he had a manageable burden after being dismissed due to illness.²²⁴ It was held that

where it was reasonably foreseeable to an employer that an employee might suffer a nervous breakdown because of the stress and pressures of his workload. The employer was under a duty of care, as part of the duty to provide a safe system of work, not to cause the employee psychiatric damage by reason of the volume or character of the work which the employee was required to perform.²²⁵

The employer has a common law duty of care towards its employees.²²⁶ This duty encompasses providing a safe and healthy work environment, which includes protection from bullying and harassment.²²⁷ In the case, *Waters v Commissioner of Police of the Metropolis*, Ms Waters was employed as a police officer.²²⁸ She alleged

²¹⁹ <https://libguides.bodleian.ox.ac.uk/law-uklaw/legalsystem> (accessed 22 June 2024).

²²⁰ GKY Chan 'Finding common law duty of care from statutory duties: All within the Anns framework.' (2016) 24(1) *Tort Law Review* 14.

²²¹ *Walker v Northumberland County Council* (1995) 1 All ER 737 (QB), this decision has often been cited in cases on mental illness caused by stress at work.

²²² *Walker* page 740.

²²³ *Walker* page 740.

²²⁴ *Walker* page 740.

²²⁵ *Walker* page 757. See also CI Tshoose (2017) *Journal of Juridical Sciences* 133.

²²⁶ GKY Chan (2016) 24(1) *Tort Law Review* 14.

²²⁷ *Waters v Commissioner of Police of the Metropolis* [2000] UKHL 50.

²²⁸ *Waters* [2000] UKHL 50.

that a fellow police officer had harmed and raped her.²²⁹ Her complaint regarding the officer was not given due consideration or thoroughly examined and after reporting the complaint, she was harassed and intimidated by her co-workers for reporting a fellow officer.²³⁰ Due to the complaint not being investigated and the bullying that ensued, Ms Waters suffered psychological trauma.²³¹

In this case, the House of Lords unanimously ruled that the employer owed the employee a duty of care to investigate rape allegations made against a co-worker.²³² It is also apparent that the commissioner breached that duty by neglecting to investigate the matter and was vicariously liable under section 48 of the Police Act 1964 for the subsequent activities of police officers who intimidated and harassed the claimant.²³³ According to Lord Hutton, an individual with a valid employment contract has a legitimate negligence claim against the employer should the latter neglect to protect an employee from harassment and victimisation resulting in physical or psychological harm.²³⁴

Despite the lack of explicit common law on workplace bullying, it is the combination of statutes, regulations, case-law and common law principles which form the legal framework. This framework indirectly addresses the issue by emphasizing the employer's duty to provide a safe and healthy work environment free from harassment and bullying.

The common law of the United Kingdom and South Africa is comparable in that both countries compel the employer to implement reasonable safety measures for their employees at work.²³⁵ However, the common law in South Africa is supported by legislation, which requires the employer to ensure that reasonable and practical are steps taken to guarantee a healthy and safe workplace.²³⁶

²²⁹ *Waters* at 1607.

²³⁰ *Waters* para 1607.

²³¹ *Waters* para 1609.

²³² *Waters* at 1611 A.

²³³ *Waters* para 1611 D.

²³⁴ *Waters* para 1615, Lord Hutton further states that this obligation results from both the employment contract and the common law negligence doctrines.

²³⁵ C Tshoose 'Employer's Duty to Provide a Safe Working Environment: A South African Perspective' (2011) 6(3) *Journal of International Commercial Law and Technology* 165.

²³⁶ Tshoose (2011) 6(3) *Journal of International Commercial Law and Technology* 165.

South African common law does not include torts; however, harassment is recognised as a delict under South African law.²³⁷ Accordingly, in South Africa, the employer may be subject to vicarious liability for ‘harm’ resulting from their negligence and failure to take appropriate action to stop such behaviour.²³⁸ In both situations, intent is required to file criminal charges. Civil charges may be more appropriate where workplace bullying situations cause psychological harm.

4.3 United Kingdom legislative framework

As previously stated, the United Kingdom’s statutory framework is based on statutes approved by Parliament and the common law, which evolved over the years through court decisions.

Both the United Kingdom and South Africa have legislation aimed at addressing and preventing harassment in the workplace. However, there are differences in their approaches and specific laws. While no specific law is dedicated to workplace bullying, several existing laws and regulations can be applied.

Although common law principles are relevant, statutory laws such as the Equality Act 2010, Employment Rights Act 1996, Health and Safety at Work Act 1974 and the Protection from Harassment Act 1997 are more specific in addressing health and safety, discrimination and workplace bullying.

4.3.1 Equality Act 2010

The Equality Act 2010 covers various forms of harassment, including sexual harassment, and protects individuals from discrimination based on

protected characteristics such as age, disability, gender reassignment, race, religion or belief, sex, sexual orientation, marriage and civil partnership, and pregnancy and maternity.²³⁹

Chapter 2 of this Act states that ‘prohibited conduct’ includes harassment, victimisation and discrimination.²⁴⁰

The United Kingdom’s Equality Act and the South African Employment Equity Act 55 of 1998 (EEA) are legislative measures designed to promote fairness and equality, but

²³⁷ Calitz (2009) 20(3) *Stellenbosch Law Review* 408.

²³⁸ Calitz (2009) 20(3) *Stellenbosch Law Review* 410.

²³⁹ Equality Act 2010.

²⁴⁰ Chapter 2 of the Equality Act 2010.

they apply in different contexts. Both Acts share the goal to create a more inclusive and equitable environment for an employee where the Equality Act has a broader scope which encompasses various aspects of daily life; and the EEA primarily concentrates on employment-related issues and redresses historical disparities within the workplace.

In terms of section 26 of the Equality Act, bullying – as a protected characteristic – in the workplace might amount to harassment.²⁴¹ In order to succeed with a claim for unlawful harassment under section 26, it must be shown that

1. The conduct was unwanted;
2. The unwanted conduct relates to a protected characteristic; and
3. The unwanted conduct infringed on an employee's dignity or had a humiliating or degrading effect, which resulted in creating an offensive work environment.²⁴²

The protection provided by the Equality Act against victimisation, unfair discrimination and harassment in the workplace is relevant to workplace bullying. However, this protection is limited to situations where harassment is directed against a protected group or on specified grounds.²⁴³ Additionally, the Equality Act stands in contrast to the EEA by expressly forbidding the violation of an individual's dignity or the creation of 'a hostile, intimidating, degrading, humiliating, or offensive environment'.²⁴⁴ Unfair discrimination is prohibited in South Africa on both listed and analogous grounds.²⁴⁵ An employee in South Africa, who is a victim of bullying, has the option to file a claim for unfair discrimination based on an analogous ground to obtain redress.

Section 109 of the Equality Act, which is similar to section 60 of the EEA, provides for the liability of employers and principals.²⁴⁶ Both Acts emphasise the responsibility of the employer to create a working environment free from discrimination and harassment. The Equality Act explicitly addresses third-party harassment, which makes the employer accountable to prevent and address such instances, but this provision has been repealed.²⁴⁷ In contrast, the EEA places emphasis on the employer to take steps to prevent unfair discrimination, which indirectly includes addressing any

²⁴¹ Equality Act 2010.

²⁴² Sec 26 of the Equality Act 2010.

²⁴³ Sec 26 (5) of the Equality Act 2010.

²⁴⁴ Sec 26 (1)(b)(i) - (ii) of the Equality Act 2010.

²⁴⁵ Sec 6(1) & (3) of the EEA 55 of 1998.

²⁴⁶ Sec 109 of the Equality Act 2010.

²⁴⁷ Enterprise and Regulatory Reform Act 2013.

harassment that may occur within the workplace, either from internal or external sources. However, the EEA does not specifically address protection against harassment by third parties.

4.3.2 Health and Safety at Work Act 1974 (HSWA)

Provisions provided by the Health and Safety at Work Act (HSWA) include the

health, safety, and welfare of persons at work, protecting others against risks to health or safety-related persons' work activities, controlling and preventing unlawful acquisition, possession and use of dangerous substances, pollution, provision of medical advisory service.²⁴⁸

While the Act does not focus on harassment, it includes provisions that compel the employer to provide a safe working environment, which encompasses protection from harassment.

In terms of section 2(6) of the HSWA, a 'duty of care' is imposed on the employer to provide for the health, safety and welfare of an employee, where reasonable, and this includes an employee's mental health.²⁴⁹

The position is the same in both countries where the employer must take similar precautions for the health and safety of an employee in the workplace in terms of the HSWA's in the United Kingdom and South Africa's OHS Act. In comparison, while both legislations aim to promote workplace health and safety, OHS Act has a more explicit approach regarding psychological hazards, potentially covering bullying as a hazard that the employer should address to ensure a safe working environment.

The HSWA primarily focuses on ensuring an employee's health, safety and welfare at work.²⁵⁰ While it does not distinctly mention bullying, it does require the employer to provide a safe workplace environment, free from physical and mental health risks. The employer should assess and mitigate risks to an employee's health and well-being, which could reasonably include addressing bullying if identified as a hazard to mental health.²⁵¹

South Africa's OHS Act focuses on ensuring a safe and healthy working environment and placing the responsibility on the employer to eliminate, or mitigate, threats in the

²⁴⁸ Preamble of the HWSA 1974.

²⁴⁹ Sec 2(6) of the HWSA 1974.

²⁵⁰ Sec 2(6) of the HWSA 1974.

²⁵¹ The Management of Health and Safety at Work Regulations 1999 requires employers to carry out suitable and sufficient assessments of health and safety risks.

workplace which cause harm.²⁵² The Act is more explicit in addressing psychological hazards which would encompass bullying. Section 8 of the OHS Act mandates the employer to provide and maintain a safe workplace which is free from risk to an employee's health, including psychological well-being.²⁵³

In order to comply with the OHS Act's broader obligations, the South African employer should take proactive measures to prevent and address bullying in the workplace. This will ensure a safe and healthy work environment, particularly in safeguarding an employee's mental well-being.

4.3.3 The Employment Rights Act 1996 (ERA)

The Employment Rights Act (ERA) is a key piece of legislation in the United Kingdom that outlines various employment rights for an employee. It covers aspects such as the right to a written contract, protection against unfair dismissal, redundancy rights, hours of work, wage protection and termination of employment.²⁵⁴ The ERA does not explicitly mention workplace bullying, but it does cover aspects that indirectly relate to it, such as unfair dismissal due to harassment or constructive dismissal in severe cases of mistreatment.²⁵⁵

However, an 'employee' and a 'worker' are defined differently under the ERA. The distinction between an employee and a worker is crucial as it determines an individual's rights, benefits and the nature of their employment relationship.²⁵⁶ An employee has a contract of employment – written, oral, or implied – which outlines the terms and conditions of their work.²⁵⁷ Whilst a worker also has a contractual relationship with the organisation, their contract might not be as comprehensive as an employee's²⁵⁸ as it is only based on a specific task, project or period of work.²⁵⁹

Both employees and workers have legal protection against discrimination and are entitled to certain fundamental rights, but compared to a worker within the United Kingdom's employment framework, an employee has a broader range of rights and

²⁵² Preamble of the OHSA 85 of 1993.

²⁵³ Sec 8 of the OHSA 85 of 1993.

²⁵⁴ Chapter 18 of the Employment Rights Act 1996.

²⁵⁵ Sec 95 of the Employment Rights Act 1996.

²⁵⁶ Chapter 18, sec 230 (1) – (3) of the Employment Rights Act 1996.

²⁵⁷ Chapter 18, sec 230 (1) – (3) of the Employment Rights Act 1996.

²⁵⁸ Chapter 18, sec 230 (1) – (3) of the Employment Rights Act 1996.

²⁵⁹ Chapter 18, sec 230 (1) – (3) of the Employment Rights Act 1996.

benefits.²⁶⁰ This is in contrast to South Africa's Labour Relations Act 66 of 1995 (LRA), which applies to everyone defined as an 'employee' but does not provide protection to those who are not.²⁶¹

Similar to section 185 of the LRA, the ERA provides the right for an employee not to be dismissed unfairly.²⁶² However, section 94 does not apply, unless an employee has been continuously employed for a minimum of one year ending with the effective date of termination.²⁶³ Where a case relates to discrimination, which is one of the few exceptions, no minimum service is required.²⁶⁴

Section 95(1)(c) of the ERA regulates constructive dismissal and outlines situations where an employee can resign and claim that their employer dismissed them due to a fundamental breach of their employment contract.²⁶⁵ It specifically states that an employee has the right to terminate their employment with or without notice 'in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct'.²⁶⁶

An Appeal's Court in the case, *Roger Storer v British Gas PLC*, reinstated a constructive dismissal claim due to the complainant's failure to file within the prescribed time limit.²⁶⁷ The manager had 'victimised and bullied' the complainant, which led to stress and sadness before the symptoms of post-traumatic stress disorder materialised.²⁶⁸ The complainant's mental illness may have prevented him from filing in a timely manner and the Court directed an employment tribunal to investigate this possibility.²⁶⁹ The Employment Appeal Tribunal's ruling in the case, *Ezekiel v The Court Service*, is also encouraging, where it was determined under the ERA that an employee had been rightfully dismissed for severely harassing and abusing multiple co-workers.²⁷⁰ It is important to note that each case is highly fact-specific and the Court

²⁶⁰ Chapter 18 of the Employment Rights Act 1996.

²⁶¹ Sec 213 of the LRA 66 of 1995 provides that an employee is anyone, other than an independent contractor, who works for another person or assists in conducting the business of an employer.

²⁶² Sec 94 of the Employment Rights Act 1996.

²⁶³ Sec 108 of the Employment Rights Act 1996.

²⁶⁴ Equality Act 2010

²⁶⁵ Sec 95(1)(c) of the Employment Rights Act 1996.

²⁶⁶ Sec 95(1)(c) of the Employment Rights Act 1996.

²⁶⁷ *Roger Storer v British Gas PLC* (2000) WL 191091 (CA).

²⁶⁸ (2000) WL 191091 (CA) (*Roger Storer*).

²⁶⁹ *Roger Storer* para A1.

²⁷⁰ [2000] WL 1274032.

considers the unique circumstances of each situation to determine if constructive dismissal has occurred.

In South Africa, employment rights are governed by various laws and acts. The primary legislation governing labour rights in South Africa is the LRA, which covers aspects related to collective bargaining, unfair dismissal and dispute resolution. The LRA contains a statutory definition for unfair labour practice.²⁷¹

Additionally, the Basic Conditions of Employment Act (BCEA) sets out the minimum standards for fair labour practices, including issues like working hours, leave and termination.²⁷² However, the ERA does not have an unfair labour practice provision and only certain actions may be viewed as constructive dismissal, such as a demotion or being forced to accept unreasonable changes to their roles, working conditions or hours.

4.3.4 The Protection from Harassment Act 1997 (PHA)

Although the Protection from Harassment Act (PHA) was primarily enacted to allow victims of stalking to sue their harassers, it has since been recognised as a basis for relief in harassment cases.²⁷³ Apart from the criminal sanctions, the PHA imposes civil liability on defendants who engage in conduct that constitutes harassment of another party, or if the defendant knows, or should know, that their conduct constitutes harassment of another party.²⁷⁴

In the well-known case, *Majrowski v Guy's and St Thomas' NHS Trust*, the Court of Appeal granted protection to employees who were harassed and bullied at work.²⁷⁵ The Court held that section 3 of the PHA might hold the employer vicariously liable for harassment committed by an employee in violation of section 1, and that vicarious liability is not limited to common law grounds.²⁷⁶ The House of Lords unanimously dismissed the appeal and upheld the Court of Appeal's decision that the employer can be vicariously liable under the PHA for harassment committed by an employee in the

²⁷¹ Sec 186(2) of the LRA 66 of 1995.

²⁷² Basic Conditions of Employment Act 75 of 1997.

²⁷³ *Majrowski v Guy's and St Thomas' NHS Trust* [2006] All ER 395 (UKHL) 34 (*Majrowski II*).

²⁷⁴ Sec 1 of Protection from Harassment Act 1997.

²⁷⁵ *Majrowski v Guy's and St Thomas' NHS Trust* [2005] QB (*Majrowski I*).

²⁷⁶ *Majrowski* para 105.

course of employment.²⁷⁷ The Court contended that the ‘bullying’ amounted to harassment under the PHA.²⁷⁸

The application of the PHA, in instances of workplace harassment, was again utilised in the 2006 court ruling of *Green v DB Group Services (UK) Ltd*.²⁷⁹ In this case, Ms Green was subjected to a persistent campaign of emotional abuse by her co-workers.²⁸⁰ They continuously made it more difficult for Green to perform her duties by rearranging her files, concealing her mail, deleting her from document circulation lists as well as ignoring and excluding her from social events and meetings.²⁸¹ Her co-workers would ‘erupt in laughter whenever she passed by and made offensive and rude remarks’.²⁸² She subsequently developed significant depression, resulting in hospital admission and being placed on suicide-watch after her complaints to management remained unanswered.²⁸³ Given these circumstances, the Court determined that Deutsche Bank was vicariously liable under the PHA and granted Ms Green a total damage amount of over £800,000.²⁸⁴

According to section 3 of the PHA, damages may be awarded for anxiety caused by harassment and for any financial loss resulting from harassment.²⁸⁵ As per the Act, in cases where bullying meets the legal definition of harassment – repetitive, unwanted behaviour causing distress or alarm – individuals experiencing workplace bullying might have recourse under this legislation.

It deserves to be mentioned, however, that the PHA was not specifically designed to address workplace bullying. The interpretation of what constitutes harassment within the context of the Act and its applicability to workplace bullying may vary, based on the specific circumstances of each case.

The Protection from Harassment Act of 1997 (PHA) in the United Kingdom and the Protection from Harassment Act (POHA) in South Africa (enacted in 2011) share similarities in their focus on addressing harassment.²⁸⁶ However, there are differences

²⁷⁷ *Majrowski II* para 109.

²⁷⁸ *Majrowski II* para 110.

²⁷⁹ *Green v DB Group Services (UK) Ltd* 2006 EWHC (QB) (*Green*).

²⁸⁰ *Green* para 1.

²⁸¹ *Green* para 70.

²⁸² *Green* para 70.

²⁸³ *Green* para 146.

²⁸⁴ *Green* para 183 & 188 - 190.

²⁸⁵ Sec 3(1) and (2) of Protection from Harassment Act 1997.

²⁸⁶ Sec 1 of PHA 1997. See also Sec 2 of POHA 17 of 2011.

in their scope, application and legal provisions. The United Kingdom's Act includes both civil and criminal provisions for harassment. It criminalises conduct amounting to harassment and stalking, which could lead to criminal charges.²⁸⁷ The South African Act primarily focuses on civil remedies and protection orders. However, it also includes criminal sanctions for serious harassment-related offences.

4.4 Conclusion

The employer in the United Kingdom is encouraged to have clear anti-harassment policies and procedures for handling complaints, including training programmes to educate employees on what constitutes harassment and how to report it. Both countries emphasise the employer's responsibility to prevent harassment, provide a safe work environment and have procedures to address complaints. However, the specific legal frameworks and detailed provisions differ, based on each country's laws and societal needs.

While there are similarities in the protected characteristics covered by both countries, there are some differences. For instance, South Africa's legislation includes additional categories such as HIV status and language; these are not specifically mentioned in the United Kingdom's Equality Act.

Both countries have legal frameworks to indirectly address workplace bullying through various laws related to health and safety, discrimination, and employment rights. The frameworks also highlight the importance of the employer having clear policies and procedures to prevent and address bullying in the workplace.

The specific procedures for reporting and handling harassment cases might differ in terms of timelines, reporting structures and investigative processes. The emphasis in each country's legislation might also differ slightly based on societal needs and historical contexts, but both legislations aim to create safe and fair working environments.

The Employment Rights Act in the United Kingdom and the Labour Relations Act in South Africa are significant pieces of legislation regulating employment relationships to protect an employee's rights and establish fair labour practices. The Employment

²⁸⁷ Sec 2A (4), 3(1) and (2) of Protection from Harassment Act 1997.

Rights Act focuses on individual employment rights and regulations, whilst the Labour Relations Act in South Africa centres on collective labour relations, union activities, and resolving disputes within the labour market.

Whilst both country's Protection from Harassment Acts share the goal of providing legal recourse and protection to victims of harassment, the Acts differ in certain aspects. Differences include the specifics of their definitions, the range of remedies available and the scope of criminalisation of harassing behaviours.

CHAPTER 5: SUMMARY AND CONCLUSION

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5.1 Overview

Workplace bullying is not a form of harassment that is commonly acknowledged, nor does it attract specific legislative protection compared to sexual harassment and racial discrimination, which are clearly categorised as separate forms of undue and offensive behaviour.

The study set out to ascertain the degree to which victims of workplace bullying are protected by South African labour legislation and whether other measures are necessary to ensure that an employee is adequately protected. The comparative analysis between South Africa's and the United Kingdom's legislative framework, which governs workplace violence and harassment, showed that, by implication, bullying is a critical aspect of this inquiry.

While both countries desire to protect employees from bullying, the legal frameworks and approaches differ based on their laws and societal needs. International law sets a clear expectation for South Africa to address workplace bullying. While domestic legislation needs to catch up, existing international frameworks offer valuable support in protecting workers' rights and holding the employer accountable.

5.2 Chapter summaries

Chapter One provided the background knowledge necessary to understand the significance of the subject matter. It also outlined the study's structure, methodology and research questions, which sought answers on whether South Africa's current legal framework could handle 'violence and harassment' in the workplace.

South Africa's obligation as an International Labour Office member state was covered in Chapter Two. Since international labour standards and conventions significantly protect vulnerable employees, case-law and interpretations from international courts and tribunals must be considered. They can influence the interpretation and provide guidelines to enforce domestic legislation effectively. The focus of this chapter was

Convention 190 and Recommendation 206, which acknowledge violence and harassment in the workplace as human rights violations. Although it does not explicitly address bullying in the workplace, it clarifies the different types of harassment employees could experience. However, despite the 2022 Code which gives effect to Convention 190, South Africa lacks legislation explicitly protecting employees against bullying.

The South African labour legislation was discussed in Chapter Three. The chapter aimed to demonstrate available protection and remedies for workplace bullying victims, highlighting instances where constitutional reliance may be necessary.

The Constitution grants citizens several rights, though direct reliance is restricted unless statutory or common law remedies are exhausted. ‘Psychological harm’ caused by another employee ‘during the course of employment’ may provide a recourse for bullied employees under the common law as the employer has ‘duty of care.’²⁸⁸

The 2022 Code, aligning with international obligations, provides guidelines for addressing workplace violence and harassment. The Employment Equity Act provides protection against harassment and prohibits unfair discrimination, which potentially covers workplace bullying. The Labour Court in the *Centre for Autism* case confirmed that harassment does include workplace bullying.²⁸⁹

In terms of the Labour Relations Act, bullying can be addressed as an unfair labour practice or constructive dismissal. However, this proposition has not been tested in a claim for unfair labour practices, but the possibility has been confirmed where continued employment becomes intolerable and the claim for constructive dismissal is upheld.²⁹⁰

The employer is mandated to provide a safe and healthy environment, possibly encompassing psychological health, which may potentially afford relief for a bullied employee in terms of the OHS Act.²⁹¹ Claims under COIDA for work-related

²⁸⁸ (2005) 26 ILJ 107 (SCA) para 65.

²⁸⁹ *Centre for Autism* para 39.

²⁹⁰ It will be recalled that in *Centre for Autism* the employer created a hostile working environment which amounted to persistent workplace bullying which is a form of harassment and making continued employment intolerable. The ‘employer’s conduct amounted to workplace bullying which justifies the claim of constructive dismissal’ in terms of section 186(1)(e) of the LRA.

²⁹¹ Rycroft (2009) *Industrial Law Journal* 1446.

psychological illnesses are possible, but it may be difficult to prove that the ailment was a result of their employment.²⁹²

Chapter Four compared the United Kingdom to South Africa's approach to dealing with workplace bullying. While no specific law against workplace bullying exists in either country, it is indirectly addressed through the common law and legislation related to health and safety, discrimination and employment rights.

The *Walker* decision established the framework for extending the 'duty of care' concept to include mental injury sustained by an employee under United Kingdom common law. Prior to this judgment, there was no duty of care for situations in which workers had experienced stress or other mental health injuries at work.²⁹³ The significant Court of appeal case, *Sutherland v Hatton*, upheld this ruling.²⁹⁴

Both countries have Protection from Harassment Acts to provide legal recourse and protect harassment victims. However, the Acts differ in definitions and available remedies. South Africa's Act mainly focuses on civil remedies and protection orders, whilst the United Kingdom's Act has established that vicarious liability is not confined to common law claims and the employer could be vicariously liable for harassment by an employee.²⁹⁵ The South African Act, enacted later than the United Kingdom's Act, reflects changes in society and technology and includes provisions to address newer forms of harassment such as cyber harassment.

5.3 Conclusion

It is important to note that this is a complex area of law and the specific legal rights and remedies available to victims of workplace bullying will vary depending on the circumstances of each case.

Recent developments in case-law contribute to filling the lacuna where jurisprudence concerning workplace bullying is lacking. This is evident in the LC case, *Solidarity obo A Oosthuizen v the South African Police Service (SAPS)*, where the SAPS were held

²⁹² *Media 24 Ltd & Another & Grobler* (2005) 26 ILJ 1007 (SCA) para 77, the Court did not exclude the prospect of a sexual harassment victim filing a COIDA claim should the behaviour that caused the psychiatric condition occur during the course of employment.

²⁹³ In *Petch v Customs & Excise Commissioners* [1993] ICR 789, a claim based on the employer's liability for mental illness arising from employment was accepted but failed.

²⁹⁴ [2002] 2 All ER 1 para 20.

²⁹⁵ *Majrowski II* para 105.

liable for failing to protect Colonel Oosthuizen from racial abuse by her subordinates.²⁹⁶ This case highlights the employer's duty to take proactive measures against bullying and harassment based on protected characteristics. In the case, *Mkhize and Dube Transport*, the CCMA recognised that bullying may constitute unfair labour practice, even if it is not explicitly filed as such.²⁹⁷

The case, *Simmadari v Absa Bank Ltd*, confirmed that an employee can simultaneously claim both unfair dismissal and harassment arising from bullying in the workplace.²⁹⁸ This offers wider legal options for victims.

While both South Africa and the United Kingdom are committed to preventing workplace violence and harassment, the United Kingdom's more specific legal framework, robust enforcement mechanisms and higher public awareness contribute to a more effective response. In order to address challenges and problems when dealing with workplace bullying, South Africa can learn from the United Kingdom's strengths by

- (a) enacting specific anti-bullying legislation, which would provide clearer legal guidelines and remedies for victims, making it easier to hold perpetrators accountable.
- (b) clarifying the definition of bullying, as the current legal framework needs a specific definition, leading to ambiguity and inconsistency in case rulings.
- (c) increasing penalties for employers who fail to address bullying, incentivising employers to adopt preventive measures and strengthening their accountability.

Building a culture of respect and zero-tolerance for bullying and discrimination is essential for protecting an employee's well-being and promoting productivity and fair treatment within the workplace. An employee in South Africa has various legal tools to fight workplace bullying. While navigating specific laws can be complex, understanding the options available will empower an employee to seek justice and hold the employer accountable.

²⁹⁶ (2023) 44 ILJ 882 (LC).

²⁹⁷ (2019) 40 ILJ 929 (CCMA).

²⁹⁸ (2018) 39 ILJ 1819 (LC).

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