

**LLM DISSERTATION**

**THE REGULATION OF HARASSMENT AND VIOLENCE IN THE SOUTH  
AFRICAN WORKPLACE**

By

Julius Alexander Wehncke

20804033

submitted in partial fulfilment of the requirements for the degree

MAGISTER LEGUM

in the

FACULTY OF LAW  
UNIVERSITY OF PRETORIA

SUPERVISOR: PROF BPS VAN ECK

Pretoria

October 2021

## TABLE OF CONTENTS

---

DECLARATION	3
ACKNOWLEDGEMENTS	4
SUMMARY	5
<b>CHAPTER 1: INTRODUCTION.....</b>	<b>6</b>
1. CONTEXTUAL BACKGROUND	6
2. RESEARCH QUESTIONS	9
3. SIGNIFICANCE OF THE STUDY	9
4. RESEARCH METHODOLOGY	10
5. OVERVIEW OF CHAPTERS	10
<b>CHAPTER 2: INTERNATIONAL STANDARDS.....</b>	<b>12</b>
1. INTRODUCTION	12
2. ILO CONVENTION 190 AND RECOMMENDATION 206 ON VIOLENCE AND HARASSMENT	13
3. SOUTH AFRICA’S RESPONSE TO CONVENTION 190	15
4. CONCLUSION	16
<b>CHAPTER 3: PROTECTION OF WORKERS IN SOUTH AFRICA AGAINST VIOLENCE AND HARASSMENT .....</b>	<b>17</b>
1. INTRODUCTION	17
2. THE EMPLOYMENT EQUITY ACT, 1998	18
3. CODE OF GOOD PRACTICE ISSUED IN TERMS OF THE EEA	22
4. REMEDIES FOR UNFAIR DISCRIMINATION IN TERMS OF THE EEA	25
5. COMMON LAW AND THE DOCTRINE OF VICARIOUSLY LIABILITY	26
6. THE LABOUR RELATIONS ACT, 1995	27
6.1 <i>Protection against unfair labour practices</i>	28
6.2 <i>Protection against automatic unfair dismissal</i>	29
7. The PROTECTION FROM HARASSMENT ACT, 2011	30
8. THE OCCUPATIONAL HEALTH AND SAFETY ACT, 1993	31
9. THE COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT, 1993	32
10. DRAFT CODE OF GOOD PRACTICE ON PREVENTION AND ELIMINATION OF VIOLENCE AND HARASSMENT IN THE WORLD OF WORK	34
11. CONCLUSION	36
<b>CHAPTER 4: COMPARATIVE ANALYSIS.....</b>	<b>38</b>
1. INTRODUCTION	38
2. STATUTORY FRAMEWORK	38
2.1 <i>The Equality Act, 2010</i>	39
2.2 <i>Statutory Code of Practice: Employment’</i>	43
2.3 <i>Protection from Harassment Act, 1997 and Protection from Freedoms Act 2012</i>	45
3. VICARIOUS LIABILITY IN TERMS OF THE COMMON LAW	46
4. CONCLUSION	48
<b>CHAPTER 5: CONCLUSION.....</b>	<b>50</b>
BIBLIOGRAPHY	56

## DECLARATION

---

I, Julius Alexander Wehncke, declare that the work presented in this dissertation is original. It has not been presented to any other University or Institution. Where the work of other people has been used, references are provided. It is in this regard that I declare this work as originally mine, and it is hereby presented in partial fulfilment of the requirements for the award of the LLM Degree in Labour Law.

Signature: -----

Date: -----

Supervisor:

Signature: -----

Date: -----

---

## ACKNOWLEDGEMENTS

---

If someone were to ask me when would be a ‘good time’ to embark on an LLM, I would probably have advised them that there will never be a ‘good time’. Postgraduate studies require immense sacrifice, perseverance, and dedication and this would have been impossible without support from those around me. I would like to thank my wife, Elmien, and my two children, Alex and Elmé, for supporting me in reaching my goals.

I am indebted to Professor Stefan van Eck, my study leader for his guidance, patience and input throughout the process.

Finally, I would also like to thank two colleagues who supported me during the process.: Doctor Adriette Dekker who acted as a sound board and editor and Mr. Phillip Havenga, who alleviated the pressure at the law firm during my studies. Thank you both.

## SUMMARY

---

South Africa has a brutish history with violence and harassment in the workplace. Patriarchal views and traditions exacerbate the suffering of woman. Though legislative interventions provide some recourse for victims, the legal framework is complex, proliferated, and inaccessible to the most vulnerable in society. It is argued that South Africa should rather adopt a preventative approach by tackling the root causes of violence and harassment as opposed to merely relying on punitive measures to eradicate these ills.

The Draft Code of Good Practice on the Prevention and Elimination of Violence and Harassment in the World of Work can be lauded for defining the different types of harassment that an employee may experience in the workplace. It however casts the net too wide by burdening employers with third-party liability.

If it is nevertheless passed in its current form, South Africa can borrow from earlier UK jurisprudence that found claims for direct discrimination apply only in those instances where employers could have reasonably prevented third party harassment from occurring, or if the employer's failure to protect employees from harassment by third parties was discriminatory in itself.

This dissertation proposes that redress for victims of violence and harassment would be better suited under occupational health and safety legislation and the common law. Great scope exists for maximising preventative activities under the statutory workplace compensation scheme as it has already been held that psychological injuries are as much a personal injury as physical injuries.

Finally, it is proposed that the legislator engage with the idea of broadening the definition of 'employee' in line with modern work arrangements and international norms to ensure that all workers are protected in the workplace.

# CHAPTER 1

## INTRODUCTION

---

‘Our lives begin to end the day we become silent about things that matter.’

- Martin Luther King, Jr.<sup>1</sup>

### 1. CONTEXTUAL BACKGROUND

The global outcry against violence and harassment in the world of work have coincided with the mobilisation of millions of women behind the #MeToo and other movements.<sup>2</sup> It prompted an urgent need to understand the prevalence, meaning and reasons for violence and harassment in the workplace as well as its effects on the victims, the work environment, and the economy.

The International Labour Organisation (ILO) treats ‘workplace violence and harassment’ as a single concept and acknowledges that it is a threat to equal opportunities and constitutes a human rights violation.<sup>3</sup> It therefore adopted the ‘Convention Concerning the Elimination of Violence and Harassment in the World of Work’<sup>4</sup> which together with Recommendation No. 206,<sup>5</sup> support the ideal of ‘decent work for all based on dignity and respect, free from violence and harassment’.<sup>6</sup>

This is a significant development because never has protection against harassment and violence been as clearly articulated in an international treaty.<sup>7</sup> Sexual harassment as a concept has received some attention in the past, but the specific protection of employees against the broader scope of harassment, bullying and violence in the workplace, is ensured by this Convention. It came into force on 25 June 2021 – two years after being adopted by the ILO’s International

---

<sup>1</sup> Martin Luther King, Jr. was a social activist who played a key role in the American civil rights movement from the mid-1950s and received the Nobel Peace Prize in 1964 available at <https://www.history.com/topics/black-history/martin-luther-king-jr>, accessed on 28 February 2021.

<sup>2</sup> See <https://www.endvawnow.org/en/articles/1921-overview.html>, accessed on 28 February 2021.

<sup>3</sup> International Labour Organisation (ILO) available at [https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS\\_711891/lang--en/index.htm](https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_711891/lang--en/index.htm), accessed on 11 August 2021. In *Nkabinde and Aveng Trident Steel (Pty) Ltd* (2020) 41 *ILJ* 507 (CCMA) the Commissioner explained that the ‘#MeToo’ movement was founded in 2006 to raise awareness about the pervasiveness of sexual abuse and assault in society. It gained worldwide recognition in 2017 when Alyssa Milano shared her story of sexual assault by the well-known Hollywood film producer, Harvey Weinstein.

<sup>4</sup> ILO Convention 2019 (No 190).

<sup>5</sup> ILO Violence and Harassment Recommendation 2019 (No. 206).

<sup>6</sup> *Idem* at 2.

<sup>7</sup> *Ibid.*

Labour Conference (ILC).<sup>8</sup> To date, however, only six countries have ratified it, namely Argentina, Ecuador, Fiji, Namibia, Somalia, and Uruguay. Ratifying countries are legally bound by the provisions of the Convention a year after ratification.<sup>9</sup>

Terminology in the context of harassment and violence differ because different institutions and countries understand and define it in different ways.<sup>10</sup> In this study, the term ‘harassment and violence’ will be used, but it refers to / include bullying, victimisation, harassment, violence, emotional distress, hostile work environment, disrespectful / rude behaviour, gaslighting, exclusion & collusion and GBV. The emergence of this concept will be further explored in Chapters 2 and 3.

The United Nations (UN) reports that an estimated 35% (818 million) of women worldwide have experienced sexual or physical violence at home, in their communities and/or in the workplace.<sup>11</sup> Statistically, South Africa’s gender-based violence (GBV) rate is equal to that of a country at war.<sup>12</sup> The prevalence of GBV is exacerbated by high levels of poverty and poor education.<sup>13</sup> A 2014 study by KPMG found that more than 1% of South Africa's annual gross domestic profit (GDP) is lost as a direct consequence of GBV.<sup>14</sup> It is said that men who are unable to provide financially towards their basic needs, or those of their families, are more likely to perpetrate GBV to regain feelings of masculinity.<sup>15</sup>

---

<sup>8</sup> International Labour Organisation Newsroom available at [https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS\\_806022/lang--en/index.htm](https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_806022/lang--en/index.htm), accessed on 11 August 2021.

<sup>9</sup> Ibid.

<sup>10</sup> International Labour Organisation 2017 ‘Report of the Meeting of Experts on Violence against Women and Men in the World of Work’ available at [https://www.ilo.org/gender/Informationresources/Publications/WCMS\\_546303/lang--en/index.htm](https://www.ilo.org/gender/Informationresources/Publications/WCMS_546303/lang--en/index.htm), accessed on 12 September 2021.

<sup>11</sup> Uni Global Union ‘Historic victory in battle for gender equality: ILO Convention to End Violence and Harassment in the Workplace, adopted 21 June 2019’ at <https://uniglobalunion.org/news/historic-victory-battle-gender-equality-ilo-convention-end-violence-and-harassment-workplace>, accessed on 05 September 2021.

<sup>12</sup> Rosen, ‘Sexual Terrorism’ Wiley-Blackwell Encyclopaedia on Gender and Sexuality (2016), the term ‘sexual terrorism’ has been used in this context, which is a form of violence employed officially or informally in wars and civil conflicts. The International Criminal Court (ICC) recognizes it as a war crime. At <http://onlinelibrary.wiley.com/doi/10.1002/9781118663219.wbegss004/full>, accessed on 28 February 2021.

<sup>13</sup> Stats SA ‘Report 03-40-05: Crime against woman in South Africa’ KPMG Insights (2018) 22 available at <https://www.statssa.gov.za/publications/Report-03-40-05/Report-03-40-05June2018.pdf>, accessed on 14 October 2021.

<sup>14</sup> Gahan, ‘Too costly to ignore – the economic impact of gender-based violence in South Africa’ KPMG Insights (2017) available at <https://assets.kpmg/content/dam/kpmg/za/pdf/2017/01/za-Too-costly-to-ignore.pdf>, accessed on 14 October 2021.

<sup>15</sup> Ibid.

Internationally, the phenomenon of bullying has been investigated and laws have been passed to regulate the issue separately from harassment.<sup>16</sup>

The approaches by foreign jurisdictions to provide remedies for victims of harassment and bullying range from mechanisms relating to anti-harassment legislation to occupational health and safety protection.<sup>17</sup> The United Kingdom (UK), for example treats bullying as a form of harassment in terms of its Protection from Harassment Act.<sup>18</sup> The United States of America (USA) also regards bullying as a form of harassment if it is perpetrated based on one of the protected, absolute characteristics, including race, sex, national origin, religion, disability or age.<sup>19</sup> Australia approaches bullying from an occupational health and safety perspective.<sup>20</sup>

In South Africa, section 6(3) of the Employment Equity Act (EEA)<sup>21</sup> determines that harassment is a form of unfair discrimination, and the Protection from Harassment Act (PHA)<sup>22</sup> deals with harassment in general. Apart from that, there is currently no legislation that caters specifically for other forms of workplace harassment.<sup>23</sup>

The psychological consequences suffered by a victim of workplace violence and harassment have been held to amount to a disability,<sup>24</sup> but did not qualify as an occupational injury.<sup>25</sup>

As a member state of the ILO, South Africa is obliged to adopt, in accordance with national law and practice, an inclusive, integrated and gender-responsive approach for the prevention and elimination of workplace violence and harassment.<sup>26</sup>

---

<sup>16</sup> 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) *Law, Democracy and Development* 24 at 25-26.

<sup>17</sup> Smit (2021) *Law, Democracy and Development* 34.

<sup>18</sup> Protection from Harassment Act 1997 c 40.

<sup>19</sup> Harthill ‘Workplace bullying as an occupational safety and health matter: a comparative analysis’ (2011) *Hastings International and Comparative Law Review* 253 at 293.

<sup>20</sup> Smit *Law, Democracy and Development* (2021) 34. See also Safe Work Australia ‘Bullying’ available at <https://www.safeworkaustralia.gov.au/bullying>, accessed on 13 August 2021.

<sup>21</sup> 55 of 1998.

<sup>22</sup> 17 of 2011.

<sup>23</sup> Van Eck et al *Celebrating the ILO 100 years on: reflections on labour law from a Southern African perspective* (Juta 2020) 14.

<sup>24</sup> *Idem* at 21. See also *Jansen v Legal Aid South Africa* (2018) 39 *ILJ* 2024 (LC) where it was found that depression would amount to disability if such impairment is long-term or recurring, and substantially limits the employee’s ability to work.

<sup>25</sup> *PE v Dr Beyers Naude Local Municipality and Another* [2021] 2 All SA 839 (ECG).

<sup>26</sup> Commission for Employment Equity ‘CEE Annual Report 2020’ available at [http://www.labour.gov.za/DocumentCenter/Reports/Annual%20Reports/Employment%20Equity/2019%20-2020/20thCEE\\_Report\\_.pdf](http://www.labour.gov.za/DocumentCenter/Reports/Annual%20Reports/Employment%20Equity/2019%20-2020/20thCEE_Report_.pdf), accessed on 12 October 2021.

Consequently, the Minister of Employment and Labour published a Draft Code of Good Practice on the Prevention and Elimination of Violence and Harassment in the World of Work (Draft Code) for public comment.<sup>27</sup> This expands significantly on the different types of violence that an employee may experience at work. It states that all forms of violence and harassment, sexual harassment, GBV and bullying amounts to unfair discrimination. Employers are required to take various steps to ensure a safe working environment, and adverse consequences await those who are found to be wanting.<sup>28</sup> The South African Amended Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace, 2005 is there to ‘help employers and employees understand their rights and obligations, promote certainty, and reduce disputes’.<sup>29</sup>

## 2. RESEARCH QUESTIONS

This dissertation will explore whether the current regulatory framework in South Africa is sufficient to address ‘violence and harassment’ in the workplace. This includes an evaluation of the South African legislative instruments and the courts’ evaluation regarding the duties of employers.

Attention is given to the position of the ILO and a brief comparison is drawn between the protection of victims in a developed country like the UK and South Africa.

## 3. SIGNIFICANCE OF THE STUDY

The Commission for Employment Equity (CEE) noted in its 2019/20 Annual Report that discrimination management is a task which requires tapping through even the toughest and long-standing ‘traditions’.<sup>30</sup> It therefore came as no surprise that the Commission for

---

<sup>27</sup> Government Gazette (GG 43630) of 20 August 2020. See Code of Good Practice on Prevention and Elimination of Violence and Harassment in the World of Work available at <https://www.gov.za/documents/employment-equity-act-code-good-practice-prevention-and-elimination-violence-and#>, accessed 13 August 2021.

<sup>28</sup> See *PE v Dr Beyers Naude Local Municipality and Another* [2021] 2 All SA 839 (ECG) where the victim (a female) was awarded almost R4 million in damages for sexual assault by a male superior on The Court found that the employer failed in its legal obligation to cultivate a safe working environment.

<sup>29</sup> Smit *Law, Democracy and Development* (2021) 25. See for example s 1(3) of the Employment Equity Act, 55 of 1998.

<sup>30</sup> Commission for Employment Equity ‘Annual Report 2020’ 8 available at [http://www.labour.gov.za/DocumentCenter/Reports/Annual%20Reports/Employment%20Equity/2019%20-2020/20thCEE\\_Report\\_.pdf](http://www.labour.gov.za/DocumentCenter/Reports/Annual%20Reports/Employment%20Equity/2019%20-2020/20thCEE_Report_.pdf), accessed on 12 October 2021.

Conciliation Mediation and Arbitration (CCMA) had to deal with more than 3000 unfair discrimination disputes per year over the last 3 years. It is fair to infer that workplace violence and harassment is rife in South Africa.<sup>31</sup>

Although legal recourse should be a last resort, it is important to assess how recent developments are likely to impact the *lacuna* which exists in the laws dealing with violence and harassment in the workplace, and whether proposed legislative instruments will be effective in eradicating these societal ills.

Notwithstanding an abundance of case law on the topic, it seems that employers are still uncertain about their legal obligations and how to deal with incidents of violence and harassment by its employees.

#### **4. RESEARCH METHODOLOGY**

This study follows an investigative and comparative approach to the regulation of harassment and violence in the South African workplace. It takes the form of a literature review. The information presented was collected from various sources including, legislation, South African and international case law and conventions. Foreign legislation and case law are explored with specific reference to the UK. In addition to reviewing the regulatory framework concerning workplace violence and harassment, existing literature from journal articles, books, papers and web articles are reviewed.

The South African Mercantile Law Journal (SAMLJ) house style is used for referencing. Footnotes are used and the complete reference to each book, journal article, legislative instrument, case law and international instrument can be found in the bibliography at the end of the dissertation.

#### **5. OVERVIEW OF CHAPTERS**

---

<sup>31</sup> Ibid.

Chapter 1 contains the general introduction and provides the motivation for choosing to explore this specific research question. It expounds on the significance of this study, the research methodology and referencing methods.

Chapter 2 deals with the ILO standards on the regulation of violence and harassment in the workplace and the relevant legal conventions, protocols and recommendations.

Chapter 3 contains an in-depth study of the legislation and case law regulating issues around violence and harassment in the South African workplace.

Chapter 4 is a comparative analysis, where the protections offered to workers in the UK are outlined and compared with the South African position.

Chapter 5 contains the conclusion and summary of the answers to the research question. Recommendations on what further reforms are necessary to protect vulnerable employees against violence and harassment in the workplace are made.

## CHAPTER 2

### INTERNATIONAL STANDARDS

---

#### 1. INTRODUCTION

Workplace violence and harassment is a global phenomenon, and this chapter will assess the approach adopted by the ILO.

In *National Union of Metal Workers of South Africa & Others v Bader Bop (Pty) Ltd & Another*<sup>32</sup> the Constitutional Court specifically stated that the jurisprudence of the ILO's Freedom of Association Committee of Experts was an important resource in developing labour rights.<sup>33</sup> This viewpoint of the Constitutional Court confirms the importance of the work and findings of ILO's various work groups and Committees of Experts.<sup>34</sup> The ILO has a Committee of Experts comprising 20 eminent jurists appointed by the Governing Body for a three-year term and they come from different geographic regions, legal systems and cultures. They examine government reports on ratified conventions and provide an impartial and technical evaluation of the application of international labour standards in ILO member states.<sup>35</sup>

In creating labour legislation, governments are guided by universally accepted standards such as those supplied by the various conventions and recommendations of the ILO, which are subsequently ratified and implemented by member countries.<sup>36</sup>

Since its inception, the ILO has adopted some 189 conventions and made some 200 recommendations to give effect to a host of fundamental employment rights.<sup>37</sup> Of significance to this dissertation, is Convention 190 on Violence and Harassment that was adopted on 21 June 2019 and the provisions of Recommendation No. 206.

---

<sup>32</sup> [2003] 2 BLLR 103 (CC).

<sup>33</sup> *Idem* para 30.

<sup>34</sup> Van Eck et al (Juta 2020) 30.

<sup>35</sup> International Labour Organisation (ILO) available at <https://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-of-experts-on-the-application-of-conventions-and-recommendations/lang--en/index.htm>, accessed 05 September 2021.

<sup>36</sup> Bendix *Labour Relations: A Southern African perspective* 7 ed (Juta 2019) 85.

<sup>37</sup> Van Eck et al (Juta 2020) 26.

## 2. ILO CONVENTION 190 AND RECOMMENDATION 206 ON VIOLENCE AND HARASSMENT

The Convention applies to all sectors individuals in the ‘world of work’, whether private or public, both in the formal and informal economy, and whether in urban or rural areas.<sup>38</sup> According to the ILO Committee of Experts, the ‘world of work’ is to be broadly understood and does not cover only the traditional physical workplace, but also commuting to and from work, work-related social events, public spaces (for informal workers such as street vendors) and the home (for homeworkers, domestic workers and teleworkers).<sup>39</sup>

The ILO chose to use the term ‘violence and harassment’ as opposed to ‘violence’ only, to ensure that the full range of unacceptable behaviour is adequately understood and addressed.<sup>40</sup> Member states are free to treat it as single or separate concepts. Experts however agree that it is important to distinguish between the various forms of violence and harassment and the context in which they occur, as different responses may be needed.<sup>41</sup>

Convention 190 states that everyone in the world of work has the right to be free from violence and harassment,<sup>42</sup> including GBV,<sup>43</sup> and it requires governments to implement measures to protect all workers from violence and harassment, especially women.<sup>44</sup> Violence and harassment should be treated as a continuum of unacceptable behaviours and practices.<sup>45</sup>

---

<sup>38</sup> Article 2.

<sup>39</sup> ILO, 2017, ‘Report of the Meeting of Experts on Violence against Women and Men in the World of Work’ 34. The Convention includes protection against domestic violence as perpetrators of domestic violence can be colleagues, where life partners work for the same employer, and perpetrators can follow or stalk their partners at their workplace. In South Africa domestic violence is regulated by the Domestic Violence Act 116 of 1998.

<sup>40</sup> ILO, 2017, ‘Report of the Meeting of Experts on Violence against Women and Men in the World of Work’ 33.

<sup>41</sup> *Idem* 40.

<sup>42</sup> Article 1 of the Convention defines ‘violence and harassment’ as ‘a range of unacceptable behaviours and practices, or threats thereof, whether a single occurrence or repeated, that aim at, result in, or are likely to result in physical, psychological, sexual or economic harm, and includes gender-based violence and harassment.’

<sup>43</sup> The International Trade Union Confederation states that violence and harassment against women because of their gender would be gender-based violence and harassment. Available at [https://www.ituc-csi.org/IMG/pdf/c190\\_mini\\_guide\\_en.pdf](https://www.ituc-csi.org/IMG/pdf/c190_mini_guide_en.pdf), accessed 10 September 2021. The Convention defines ‘gender-based violence and harassment’ as ‘violence and harassment directed at persons because of their sex or gender or affecting persons of a particular sex or gender disproportionately and includes sexual harassment.’

<sup>44</sup> ILO, 2017, ‘Report of the Meeting of Experts on Violence against Women and Men in the World of Work’ 32.

<sup>45</sup> *Ibid*.

Though everyone can be affected by violence and harassment in the world of work,<sup>46</sup> certain sectors, occupations and work arrangements may expose workers to a higher risk.<sup>47</sup> Article 6 of the Convention therefore recognises that female workers and workers who belong to one or more vulnerable groups, often experience discrimination and inequality, and are also disproportionately affected by violence and harassment in the world of work.<sup>48</sup> Therefore, Article 7, adds that governments should adopt laws and policies to ensure the right to equality and non-discrimination in employment as it plays an important part in preventing and eliminating violence and harassment in the workplace.<sup>49</sup>

Article 9 of the Convention compels governments to legally force employers to take appropriate steps to prevent violence and harassment in the world of work. The Committee of Experts specifically proposed that laws must be focused and at the same time, be flexible enough to address the different contexts of employers and employees. Not only do workplaces and enterprises differ but also socio-economic realities and the forms of violence and harassment. Legislation should be able to adapt to new challenges for example those arising from changing forms of work and technology.<sup>50</sup>

Victims of violence and harassment should have recourse to remedies and governments must ensure easy access to effective remedies.<sup>51</sup> These could include the right to resign with compensation, reinstatement, compensation for damages, orders to interdict certain conduct or orders to mandate that policies or practices are changed.<sup>52</sup> Victims of violence and harassment should further have access to compensation in cases of psychosocial, physical or any other injury or illness which results in incapacity to work.<sup>53</sup>

---

<sup>46</sup> *Idem* 40.

<sup>47</sup> Examples of such sectors, occupations and work arrangements include night work, work in isolation, health, hospitality, social services, emergency services, domestic work, transport, education, and entertainment. Article 9(c) of ILO Convention 2019 (No. 190), read with Items 8 and 9 of the Recommendation Concerning the Elimination of Violence and Harassment in the World of Work 2019 (No. 206) available at [https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms\\_721160.pdf](https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_721160.pdf), accessed on 20 October 2021.

<sup>48</sup> ILO, 2017, 'Report of the Meeting of Experts on Violence against Women and Men in the World of Work' 32, 40.

<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid.*

<sup>51</sup> Article 10(b) ILO Convention 2019 (No. 190).

<sup>52</sup> Recommendation Concerning the Elimination of Violence and Harassment in the World of Work 2019 (No. 206) Item 14, available at [https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms\\_721160.pdf](https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_721160.pdf), accessed on 20 October 2021.

<sup>53</sup> *Idem*, Item 15.

### 3. SOUTH AFRICA'S RESPONSE TO CONVENTION 190

South Africa's National Development Plan (NDP) aims to reduce inequality by 2030 by building a united, prosperous, non-racial, non-sexist and democratic society that is committed to economic integration and human rights.<sup>54</sup> It is evident that workplace violence and harassment would not have a place in such a society, even though South Africa is yet to ratify ILO Convention 190.<sup>55</sup>

On 19 September 2019 President Ramaphosa announced an emergency plan to deal with the violence against women and children in the country. The plan will prevent gender-based violence; strengthen the criminal justice system, and enhance the legal and policy framework. It will also focus on support for victims of violence, and the improvement of the economic power of women.<sup>56</sup>

This heeds to the ILO's call that governments, amongst others, should take measures to address the impact of violence against women,<sup>57</sup> as it cuts through every cultural, religious and socio-economic sector and should be eliminated at all costs.<sup>58</sup>

South Africa also published a Draft Code of Good Practice on the Prevention and Elimination of Violence and Harassment in the World of Work.<sup>59</sup> This Draft Code outlines the legal framework and principles; and offers guidelines on elimination and strategies to deal with violence and harassment in the world of work. It recognises that violence and harassment is not only physical but can include psychological and emotional abuse committed through other means, such as online bullying. Moreover, it also includes workers in the informal economy.<sup>60</sup>

---

<sup>54</sup> National Planning Commission, 2012, Executive Summary, *National Development Plan 2030 Our future – Make it work* available at <https://www.gov.za/sites/default/files/Executive%20Summary-NDP%202030%20-%20Our%20future%20-%20make%20it%20work.pdf>, accessed on 10 September 2021.

<sup>55</sup> This was confirmed by Commission for Employment Equity (CEE). 'Labour addresses Gender-based Violence and Harassment at the Workplace' *South African Government News Agency* 9 October 2020 available at <https://www.gov.za/nr/node/801609>, accessed on 10 September 2021.

<sup>56</sup> 'Emergency plan to protect women and children' *South African Government News Agency* 19 September 2019 available at <https://www.sanews.gov.za/south-africa/emergency-plan-protect-women-and-children>, accessed on 10 September 2021.

<sup>57</sup> Preamble to ILO Convention 2019 (No. 190). See also Van Eck et al (Juta 2020) 32.

<sup>58</sup> Glasman 'Stamping out the scourge of domestic violence' *The Australian Jewish News* 25 November 2019 available at <https://www.australianjewishnews.com/stamping-out-the-scourge-of-domestic-violence/>, accessed on 10 September 2021). See also Van Eck et al (Juta 2020) 32.

<sup>59</sup> Draft Code of Good Practice on the Prevention and Elimination of Violence and Harassment in the World of Work (GG 43630) 20 August 2020.

<sup>60</sup> 'Labour market stakeholders urged to make submission to address gender-based violence and harassment at the workplace' *Department of Employment and Labour* 9 October 2020 available at <http://www.labour.gov.za/labour->

According to the Draft Code, elimination of violence and harassment should form part of a general occupational health and safety strategy; and employees who misconduct themselves must be dealt with in terms of the Labour Relations Act (LRA).<sup>61</sup> The South African legal approach will be alluded to in more detail in Chapter 3.

#### **4. CONCLUSION**

The ILO condemns workplace violence and harassment and aims to ensure better protection in the world of work through Convention 190. The convention throws the net of protection very wide by including a wide range of conduct being labelled as violence and harassment and it also covers different types of workplaces. Convention 190 requires governments to align national policies to a world free from violence and harassment. This entails tackling the root causes of violence and harassment and showing zero tolerance for discriminatory practices. It also provides for recourse for victims such as support and compensation.

Unfortunately, the Convention does not have any force and effect of member states do not ratify it and choose to translate these principles into law. South Africa has not ratified the convention, but it is evident that South Africa aligns itself with the principles of the convention. The emergency plan to deal with the violence against women and children as well as the Draft Code of Good Practice on the Prevention and Elimination of Violence and Harassment in the World of Work are testimony to this.

It remains to be seen whether the intention to protect vulnerable workers translates into sufficient legally enforceable measures to achieve these goals. The relevant South African legal framework is therefore investigated in the next chapter.

---

market-stakeholders-urged-to-make-submission-to-address-gender-based-violence-and-harassment-at-the-workplace, accessed on 10 September 2021.

<sup>61</sup> 66 of 1995.

## CHAPTER 3

# PROTECTION OF WORKERS IN SOUTH AFRICA AGAINST VIOLENCE AND HARASSMENT

---

### 1. INTRODUCTION

The founding provisions of the Constitution<sup>62</sup> ascribes to human dignity, equality, and the advancement of human rights and freedoms as one of its core values.<sup>63</sup>

Section 9(3) of the Constitution prohibits unfair discrimination by the state or any other person, whether directly or indirectly on the grounds listed in that section. It requires the enactment of national legislation to prevent and prohibit unfair discrimination.<sup>64</sup> It further guarantees all persons' right to dignity<sup>65</sup> and fair labour practices.<sup>66</sup>

Protection of employees against harassment and violence is directly and indirectly regulated by various legal instruments. The Employment Equity Act<sup>67</sup> (EEA) protects employees against unfair discrimination and harassment which is regarded as a form of discrimination.<sup>68</sup> The Labour Relations Act<sup>69</sup> (LRA) allows for automatic unfair dismissal<sup>70</sup> claims where an employee is dismissed for a discriminatory reason such as harassment. Dismissal includes so-called constructive dismissals where an employee resigns as a result of harassment and/or victimisation.<sup>71</sup> If an employee does not resign or is not dismissed but is harassed or victimised an employee would have recourse in the form of a claim for an unfair labour practice, if the conduct of the employer falls under the definition.<sup>72</sup> Victimisation or harassment of an employee after having made a protected disclosure is specifically covered by the Protected

---

<sup>62</sup> Constitution of the Republic of South Africa, 1996.

<sup>63</sup> *Idem* s 1.

<sup>64</sup> *Idem* s 9(5) provides that discrimination on one or more of the grounds listed in s 9(3) is unfair unless it is established that the discrimination is fair.

<sup>65</sup> *Idem* s 10.

<sup>66</sup> *Idem* s 23.

<sup>67</sup> 55 of 1998.

<sup>68</sup> Constitution s 6(3).

<sup>69</sup> 66 of 1995.

<sup>70</sup> s 187.

<sup>71</sup> s 186 (1)(e).

<sup>72</sup> s186(2).

Disclosures Act<sup>73</sup> (PDA) and also under the definition of an unfair labour practice<sup>74</sup> and the automatic unfair dismissal provisions<sup>75</sup> in terms of the LRA.

There is also possible protection in terms of the common law where an employer can be held vicariously liable for the delictual damages caused by an employee to another. In order to succeed with such a claim the claimant would have to prove that there was an employment relationship and that the employee committed a delict during the course and scope of employment.<sup>76</sup>

The Occupational Health and Safety Act<sup>77</sup> (OHS Act) and Compensation for Occupational Injuries and Diseases Act<sup>78</sup> (COIDA) also contain provisions relevant to workplace violence and harassment. The OHS Act places a duty on the employer to provide safe and healthy working conditions to everyone at the workplace, which is also a common law duty of the employer. The COIDA allows employees who were injured on duty or who contracted a workplace disease to claim compensation from the Compensation Fund, created in terms of the Act.

This chapter will provide an overview of the above legislation and analyse whether they sufficiently address the pressing issues highlighted by the Draft Code of Good Practice on Prevention and Elimination of Violence and Harassment in the World of Work.

## **2. THE EMPLOYMENT EQUITY ACT, 1998**

The EEA requires employers to promote equal opportunities in the workplace and to eliminate any unfair discrimination in any policy or practice.<sup>79</sup> Section 6 deals with the actual prohibition of discrimination and contains the non-discrimination and equality provisions.<sup>80</sup> Notably, section 6(3) of the EEA specifically states that harassment is a form of unfair discrimination if it happens on a combination of any of the listed grounds.

---

<sup>73</sup> 26 of 2000.

<sup>74</sup> s 186(2)(d).

<sup>75</sup> s187(1)(h).

<sup>76</sup> Van Niekerk et al *Law@Work* (Juta 2019) 91.

<sup>77</sup> 85 of 1993.

<sup>78</sup> 130 of 1993.

<sup>79</sup> s 5. Where unfair discrimination takes place outside the employment relationship, a victim has recourse in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA). PEPUDA establishes Equality Courts who have wide powers ranging from making declaratory orders, ordering interdicts, and awarding damages.

‘No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or on any other arbitrary ground.’

The EEA does not define ‘harassment’, it may be understood to mean

‘treating a person in a manner that has the effect of violating that person’s dignity or creating a degrading environment.’<sup>81</sup>

It follows that sexual violence, racial, ethnic, or social origin violence and harassment, workplace bullying and retaliation against whistle-blowers, as defined in the Draft Code, will all be recognised ‘arbitrary grounds’ upon which employers may not discriminate.<sup>82</sup>

South Africa understands ‘workplace harassment’ as a range of unacceptable behaviours that can impact on a victim’s dignity.<sup>83</sup> A core element of harassment the exercise and abuse of power, as was found by the Labour Appeal Court in *Campbell Scientific Africa (Pty) Limited v Simmers and others*.<sup>84</sup> The court held further that sexual harassment labelled as discrimination because it ‘poses a barrier to the achievement of substantive equality in the workplace’.<sup>85</sup>

In *F v Minister of Safety and Security and another (Institute for Security Studies, Institute for Accountability in Southern Africa Trust and Trustees of the Women's Legal Centre as Amici Curiae)*<sup>86</sup> the court similarly stated the broader interest and need to stop sexual harassment.

‘Sexual violence and the threat of sexual violence goes to the core of women's subordination in society. It is the single greatest threat to the self-determination of South African women...South Africa also has a duty under international law to prohibit all gender-based discrimination that has the effect or purpose of impairing the enjoyment by women of fundamental rights and freedoms and to take reasonable and appropriate measures to prevent the violation of those rights.’

---

<sup>81</sup> Van Niekerk et al *Law@Work* (Juta 2019) 126.

<sup>82</sup> Rabolao ‘4 main forms of violence and harassment in the workplace’ *Chief Human Resource Office Organisation Insight* 31 August 2020 available at <https://chro.co.za/articles/4-main-forms-of-violence-and-harassment-in-the-workplace/>, accessed on 14 September 2021.

<sup>83</sup> In *Du Plessis and Rickjon Mining & Engineering* (2018) 39 *ILJ* 1665 (CCMA) it was held that an arbitrary ground is one that has no rational justification and impairs the dignity of the victim of the harassment.

<sup>84</sup> [2015] JOL 34906 (LAC).

<sup>85</sup> Para 28.

<sup>86</sup> (2012) 33 *ILJ* 93 (CC) para 37.

In *Marsland v New Way Motor & Diesel Engineering*<sup>87</sup> the conduct of the employer constituted abuse and is an example of ‘workplace bullying’ although the court did not specifically use that term. The court stated that the verbal abuse got progressively worse to the point where it was so pervasive and severe that it could only be described as a form of harassment based on the employee’s mental illness.<sup>88</sup> In this case, a sales manager had a nervous breakdown following the collapse of his marriage. He was hospitalised as a result and upon his return to work, he perceived a distinct change in attitude towards him. He was deliberately and systematically side-lined and victimised to the extent that he was completely shut out of the company's operations. He suffered constant verbal abuse by the managing director and was demoted to a junior position. Finally, when the managing director lost his temper during a staff meeting, he feared for his physical safety and resigned and claimed he was constructively dismissed and that such dismissal was automatically unfair as it was as a result of discrimination. The court found that the employer’s conduct was calculated to destroy the employment relationship and that it unfairly discriminated against the employee based on his mental illness which took the form of a nervous breakdown which required hospitalization, and his subsequent ongoing treatment for depression. The dismissal was held to be automatically unfair.<sup>89</sup>

Employers are obliged to have policies in place to make its staff aware of the relevant equality and discrimination issues. They must take prompt action when employees unfairly discriminate against one another and should an employer fail to act appropriately, it could also be liable in terms of the provisions of section 60 of the Act. Section 60(3) and (4) state the following:

‘(3) If the employer fails to take the necessary steps referred to in subsection 2, and it is proved that the employee has contravened the relevant provision, the employer must be deemed also to have contravened that provision.

(4) Despite subsection (3), an employer is not liable for the conduct of an employee if that employer is able to prove that it did all that was reasonably practicable to ensure that the employee would not act in contravention of this Act.’

In *Samka v Shoprite Checkers (Pty) Ltd and Others*<sup>90</sup> the employee suffered verbal racial abuse by a customer. The issue before the court was whether the employee can hold the employer liable in terms of section 60 of the EEA. In this case the employee alleged that the employer

---

<sup>87</sup> (2009) 30 ILJ 169 (LC).

<sup>88</sup> Per Stein AJ.

<sup>89</sup> Ibid.

<sup>90</sup> (2020) 41 ILJ 1945 (LAC).

failed to provide a protective work environment which facilitated the impairment of her human dignity.<sup>91</sup>

The court held that the employer cannot be held liable in terms of s 60 of EEA. Her recourse would be to pursue a delictual claim or an unfair discrimination claim in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act<sup>92</sup> (PEPUDA).

In *Biggar v City of Johannesburg, Emergency Management Services*<sup>93</sup> the children of the employee in question, were subjected to racial abuse by the children of white colleagues who also resided in the same complex. This harassment continued even after numerous complaints were raised by the employee and his wife. The employee had a number of serious clashes with some of his colleagues, whereafter he requested a transfer. His request was ignored and he was charged with misconduct for fighting with colleagues and bringing the reputation of the employer into disrepute. He was found guilty and issued with a warning. Neither of his two white colleagues who were part of the altercations was charged.

The employee took the matter to the Labour Court on the basis of harassment and used s 60 of the EEA to hold the employer accountable. The employee alleged that the employer should be held liable for the racial harassment because of its failure to take necessary and reasonable steps to prevent the racial harassment. The court found that there was ‘a systematic pattern of racial harassment’ that was exacerbated by the employer’s one-sided and inconclusive view on the matter.<sup>94</sup> The employer was consequently held liable in terms of section 60 of the EEA.

In a similar matter, *Mokoena and another v Garden Art (Pty) Ltd and another*<sup>95</sup> the court held that it makes sense that s 60 only holds employers liable for conduct of employees since an employer exercises authority over an employee but not over a customer.<sup>96</sup>

In *Du Plessis and Rickjon Mining & Engineering*<sup>97</sup> a female employee’s male co-workers posted derogatory remarks about her on Facebook. The arbitrator found that such amounted to

---

<sup>91</sup> Para 7.

<sup>92</sup> 4 of 2000.

<sup>93</sup> (2011) 32 *ILJ* 1665 (LC).

<sup>94</sup> Per Lagrange, J para 19.

<sup>95</sup> [2008] 5 *BLLR* 428 (LC) para 40.

<sup>96</sup> Per Francis, J para 42.

<sup>97</sup> (2018) 39 *ILJ* 1665 (CCMA).

harassment; and because the employer failed to take action against the perpetrators, it was liable to the victim in terms of section 60 of the EEA.

In all of the above instances, the harassment was sufficiently linked to the workplace and the employers' failure to act, to hold the employer's liability. For an employer to escape liability, it must prove that it did all that was reasonably practicable to ensure that its employees would not act in contravention of the EEA.<sup>98</sup>

In *Mokoena and another v Garden Art (Pty) Ltd and another*,<sup>99</sup> the Labour Court set out the requirements before s 60 will apply as follows:

- The conduct must be by an employee of the employer, the conduct must constitute unfair discrimination.
- The conduct must take place while at work.
- The alleged conduct must immediately be brought to the attention of the employer.
- The employer must be aware of the conduct.
- There must be a failure by the employer to consult all relevant parties, or to take the necessary steps to eliminate the conduct or otherwise to comply with the EEA.
- The employer must show that it did all that was reasonably practicable to ensure that the employee would not act in contravention of the EEA.

It is evident from the above that the employer will only escape liability under section 60 of the EEA if there was no way of foreseeing the occurrence of harm, or if it was impossible to take steps or measures to prevent such an occurrence.<sup>100</sup>

### **3. CODE OF GOOD PRACTICE ISSUED IN TERMS OF THE EEA**

Section 54 of the EEA provides that the Minister of Employment and Labour may, on the advice of the CEE,<sup>101</sup> issue any Code of Good Practice and change or replace any Code of

---

<sup>98</sup> *Matambuye v MEC for Education & others* [2015] ZALCJHB 455.

<sup>99</sup> [2008] 5 BLLR 428 (LC) para 40.

<sup>100</sup> *Moatshe v Legend Golf and Safari Resort Operations (Pty) Ltd* [2014] 12 BLLR 1213 (LC). In this case an employee was badly assaulted and raped by her superior during the course of her employment. The court found that the event could not reasonably have been anticipated by the employer.

<sup>101</sup> The Commission for Employment Equity is established in terms of s 28 of the EEA.

Good Practice, provided that it must first published in the Government Gazette. Codes issued under the act are intended to provide employers with information that may assist them in navigating the EEA. Even though they are meant to be mere guidelines, section 3(c) compels courts and tribunals to consider these, and any other relevant codes of good practice when interpreting the EEA.

In the context of workplace harassment, ‘sexual harassment’ received the most attention as far as the issuing of Codes are concerned.<sup>102</sup> The 1998 Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace issued in terms of the EEA has been replaced by the Amended Code of 2005.<sup>103</sup>

The Draft Code of Good Practice on Prevention and Elimination of Violence and Harassment in the World of Work incorporates extracts of the codes dealing with sexual harassment. It however goes a bit further by defining different kinds of harassment that an employee may experience in the workplace. Therefore, if it is passed in its current form, the Draft Code will likely replace the Amended Sexual Harassment Code.

The Amended Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace, 2005 propagates for a workplace free from sexual harassment, where employers and employees respect one another’s integrity and dignity, their privacy, and their right to equity in the workplace.

Item 5 of the Amended Code provides a definition of the kind of conduct that could be seen to be sexual harassment.<sup>104</sup> Sexual harassment may include, but is not limited to, victimisation, *quid pro quo* harassment and sexual favouritism.<sup>105</sup>

---

<sup>102</sup> Du Toit et al *Labour Relations Law: A Comprehensive Guide* 6 ed (Juta 2015) 700.

<sup>103</sup> The 1998 Code was only repealed in 2018. See Government Gazette (GG 42121) of 19 December 2018.

<sup>104</sup> Kubjana ‘Understanding the law on sexual harassment in the workplace (through a case law lens): a classic fool’s errand’ (2020) 41 *Obiter* 88.

<sup>105</sup> See also Le Roux et al *Harassment in the workplace: Law, Policies and Processes* (LexisNexis 2010) 37-38, where the authors point out that although not specified in the Code, ‘hostile work environment harassment’ also occurs when a person is robbed of his or her dignity, but not of tangible benefit. In this regard there is no visible harm to the victim’s career, but the workplace environment has a negative impact on him or her. Due to the complex nature of this type of harassment, a precise definition does not exist, and each case must be judged on its own merits. In this context, victimisation occurs where an employee is victimised or intimidated for failing to submit to sexual advances. *Quid pro quo* harassment occurs where a person in authority influences or attempts to influence an employee’s employment circumstances (for example, engagement, training, promotion, discipline, dismissal, salary increments or other benefits) by coercing or attempting to coerce an employee to surrender to sexual advances. According to the Code, this could include sexual favouritism, which occurs where a person in authority in the workplace rewards only those who respond to his or her sexual advances.

It further contains a test of ‘sexual harassment’ in item 4:

‘Sexual harassment is unwelcome conduct of a sexual nature that violates the rights of an employee and constitutes a barrier to equity in the workplace, taking into account all of the following factors:

- 4.1 Whether the harassment is on the prohibited grounds of sex and/or gender and/or sexual orientation;
- 4.2 Whether the sexual conduct was unwelcome;
- 4.3 The nature and extent of the sexual conduct; and
- 4.4 The impact of the sexual conduct on the employee.’

The Code applies to employers, employees as well as applicants for employment.<sup>106</sup> A non-employee who has been sexually harassed may lodge a complaint with the employer if the harassment occurred in the place of the employer’s business or in the course of the harasser’s employment.<sup>107</sup> Conceivably, the employer would then have to take disciplinary steps against the employee in terms of the LRA.

The Amended Code requires employers to adopt a sexual harassment policy to give effect to the principles of the Code.<sup>108</sup> Employers, management and employees have a role to play in creating a safe working environment in which sexual harassment is unacceptable, that they should ensure that their standard and conduct does not cause offence and should discourage unacceptable behaviour on the part of others.<sup>109</sup>

Judges and Commissioners should also be aware of the underlying foundations of sexual harassment disputes. In *Old Mutual Life Assurance SA (Pty) Ltd v Makanda & others*<sup>110</sup> it was held that even ILO Conventions place several duties on commissioners. Primarily, it requires commissioners (and litigating parties) to be alive to the fraught nature of sexual harassment, and to conduct arbitrations with the requisite degree of sensitivity. More importantly, it requires commissioners to ‘shed patriarchal predispositions in their assessment of the evidence’.<sup>111</sup>

Similarly, in *Jordaan and Capitec Bank Ltd*<sup>112</sup> the CCMA held that sexual harassment is considered from the victim’s perspective. It cannot be said that a female employee who was

---

<sup>106</sup> s 4 read with s 9 of the EEA.

<sup>107</sup> Item 2.

<sup>108</sup> Item 7.1.

<sup>109</sup> Item 6. Salt & Lopes ‘You say it best when you say nothing at all’ (2018) September *Without Prejudice* available at <https://www.withoutprejudice.co.za/free/article/6201/view>, accessed on 28 September 2021.

<sup>110</sup> (2020) 41 *ILJ* 444 (LC).

<sup>111</sup> Per Sibanda AJ para 4-5

<sup>112</sup> (2018) 39 *ILJ* 1364 (CCMA).

flirtatious invited sexual harassment. This was also the position in *Bandat v De Kock and Another*<sup>113</sup> where the court said, with specific reference to the definition in item 4, that a core element of sexual harassment is the concept of ‘unwelcome conduct’ and this requires an objective test ‘because conduct that may be subjectively unwelcome to one person may not be unwelcome to another’.

In most cases, dismissing the perpetrator would be appropriate. The employer’s reach is however limited to the existence of an employment relationship.<sup>114</sup>

Until then, it is submitted that the same principles can be adopted to determine whether there has been harassment on any of the other prohibited grounds.

#### **4. REMEDIES FOR UNFAIR DISCRIMINATION IN TERMS OF THE EEA**

In terms of section 10 of the EEA, an employee has the option in all cases involving sexual harassment to refer the dispute to the CCMA,<sup>115</sup> instead of to the Labour Court (which remains an option if the employee chooses this route).<sup>116</sup> For lower-earning employees (i.e., employees earning less than the threshold specified by the Minister of Labour in terms of the Basic Conditions of Employment Act (BCEA)<sup>117</sup>), other unfair discrimination disputes may also be referred to the CCMA for arbitration as an option instead of pursuing the Labour Court route.<sup>118</sup> Finally, all the parties may consent in writing to the arbitration of the dispute (for example, in a case involving a high-income earner alleging unfair discrimination on other grounds), in which case any party to the dispute may refer it to the CCMA for arbitration.<sup>119</sup>

---

<sup>113</sup> (2015) 36 *ILJ* 979 (LC) para 72.

<sup>114</sup> See *Gaga v Anglo Platinum Ltd & others* [2012] 3 *BLLR* 285 (LAC) para 48, where it was held that employers may regard sexual harassment by an older superior on a younger subordinate as serious misconduct which justifies dismissal. In *SA Broadcasting Corporation Ltd v Grogan NO & another* (2006) 27 *ILJ* 1519 (LC) it was observed that sexual harassment by older men in positions of power has become a plague in the workplace and senior managers who make themselves guilty of such conduct should be harshly penalised. In cases of sexual harassment the court will look at the nature and gravity of the infringement; the impact on the victim; the relationship between the perpetrator and victim; the position and responsibilities of the perpetrator; and whether or not there is a pattern of behaviour evidenced by prior misconduct.

<sup>115</sup> s 10(6)(aA)(i).

<sup>116</sup> s 10(6)(a).

<sup>117</sup> 75 of 1997.

<sup>118</sup> s 10(6)(aA)(ii).

<sup>119</sup> s 10(6)(b).

Section 48 of the EEA provides that a commissioner of the CCMA may, in any arbitration proceedings under the EEA, make any appropriate arbitration award that gives effect to a provision of the EEA. An award made by a commissioner of the CCMA may include payment of compensation by the employer to that employee; payment of damages by the employer to that employee; an order directing the employer to take steps to prevent the same unfair discrimination or a similar practice occurring in the future in respect of other employees.<sup>120</sup>

A commissioner may thus award a combination of the aforesaid remedies if that is to give effect to the EEA. The only *caveat* is that the amount to be awarded in respect of damages is limited to a maximum of the amount stated in the determination made by the Minister in terms of section 6(3) of the BCEA.

In terms of section 50 of the EEA, the Labour Court may make any appropriate order that is just and equitable, including awarding compensation in any circumstances contemplated in the EEA; awarding damages in any circumstances contemplated in the EEA; imposing a fine in accordance with Schedule 1 for a contravention of certain provisions of the EEA; an order directing the employer to take steps to prevent the same unfair discrimination or a similar practice occurring in the future in respect of other employees; and the publication of the court's order.

## 5. COMMON LAW AND THE DOCTRINE OF VICARIOUSLY LIABILITY

In terms of the common law, an employer is vicariously liable for the wrongful conduct, albeit an act of sexual harassment or any other discriminatory conduct, towards an employee, which was committed in the course and scope of his/her employment or while engaged in any activity incidental thereto. The basis for this liability is founded in the notion that an employee is an extension of the employer.<sup>121</sup>

In *Media 24 Ltd and Another v Grobler*<sup>122</sup> a male manager sexually harassed a female co-worker. The incident took place near a flat owned by the latter. Notwithstanding a complaint, the employer did nothing to remedy the situation. The employer contended that it could not be

---

<sup>120</sup> s 48, read with s 50(2)(a)-(c).

<sup>121</sup> *Grobler v Naspers* (2004) 25 ILJ 439 (C).

<sup>122</sup> [2005] 3 All SA 297 (SCA).

held vicariously liable for its employee's actions that occurred off work premises because the perpetrator did not act within the scope of his employment. The Supreme Court of Appeal held that an employer has a legal duty to maintain a working environment in which employees are not subject to sexual harassment and failing to address the employee's complaint in effect allowed the harassment as part of the course and scope of the manager's employment. For the culpable breach of its legal duty, the court awarded damages against both the employer and the perpetrator.

In *PE v Dr Beyers Naude Local Municipality and Another*,<sup>123</sup> a 23-year-old female was sexually assaulted by her 45-year-old immediate supervisor. She reported the matter to the municipal manager but the employer did not have any clear guidelines in place, failed to take proper action against the perpetrator and forced the employee to continue to report to him . When she could no longer cope with her work situation owing to post-traumatic stress disorder (PTSD), she resigned. She subsequently pursued a delictual claim in the High Court and claimed damages for past and future medical related expenses, past and future loss of income, general damages and *contumelia*, arising from the assault committed upon her by her male co-worker during the course of his duties. She held the employer and the perpetrator jointly and severally liable. The court criticised the employer's conduct in dealing with the perpetrator especially since sexual assault is often gender-specific and an abuse of power that '*sexualize control*' and enforces '*patriarchal dominance*'.<sup>124</sup> The employer did not suspend the perpetrator and failed to ensure that the perpetrator had no more contact with the victim.<sup>125</sup> A disciplinary hearing was held more than six months after the assault, where the perpetrator was found guilty and given a mere two weeks' unpaid suspension.<sup>126</sup> The court ultimately found in her favour and awarded an amount of R4 million in damages. It held that the employer had effectively supported the perpetrator by not sanctioning him. It was said that the stance adopted by the employer demonstrated a disturbing lack of appreciation of its legal obligation to provide a safe working environment.<sup>127</sup>

## 6. THE LABOUR RELATIONS ACT, 1995<sup>128</sup>

---

<sup>123</sup> [2021] 2 All SA 839 (ECG).

<sup>124</sup> The first judgment was reported as *PE v Ikwezi Municipality & another* 2016 (5) SA 114 (ECG) paras 72-74.

<sup>125</sup> Per Kroon AJ para 44.

<sup>126</sup> The unrepentant perpetrator was allowed to roam free in the workplace with unfettered access to the victim. Per Kroon AJ para 41.

<sup>127</sup> Per Kroon AJ paras 51-52.

<sup>128</sup> 66 of 1995.

## 6.1 Protection against unfair labour practices

In terms of section 185 of the LRA, every employee has the right not to be unfairly dismissed and not to be subjected to an unfair labour practice. Section 186(2) of the LRA defines an unfair labour practice as

‘any unfair act or omission that arises between an employer and an employee involving (a) 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); (b) the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee; (c) a failure or refusal by an employer to reinstate or re-employ a former employee in terms of any agreement; and (d) an occupational detriment, other than dismissal, in contravention of the Protected Disclosures Act, 2000 on account of the employee having made a protected disclosure defined in that Act.’

Section 186(2)(d) specifically protects employed whistle-blowers against ‘occupational detriments’ after having made a protected disclosure defined in that Act. That means that an employee who makes a disclosure is protected against a wide range of victimisation such as unwarranted disciplinary action, suspension, demotion, harassment, intimidation. Workplace violence and bullying is not used in the definition of an unfair labour practice but the definition and the specific inclusion of ‘harassment’ which is wide enough to protect whistle-blowing employees against harassment.

Despite the existing legal protection of whistle-blowers, the press often paint a different picture showing the violence and harassment which they still suffer. A 2015 report by the Deputy Public Protector, Adv K Malunga, stated the following:

‘Not too long ago there has been the case of senior official Jimmy Mohlala who was shot after he had blown the whistle on perceived corrupt practices in a 2010 Soccer World cup construction project. Some other whistle blowers, who provided information on corrupt housing practices, were also threatened and murdered. King Winner Maluleka, an inmate of C-Max in 2004 who blew the whistle on the former prison warder and fellow inmates on an attempted escape, has been victimised in jail. In 2013 Roberta Nation was fighting dismissal from the State Security Agency (SSA) after she reported on alleged fraud in the SSA’s medical scheme more than a year ago. Solly Tshitangano, was dismissed from the Limpopo Department of Education, continues to suffer the consequences of highlighting the malfeasances leading to the 2012 textbook scandal. In 2013 it was reported that Icasa official Joseph Lebooa was abducted and beaten by individuals who demanded that he halt his investigation into Wireless Business Solutions, a private company allegedly owing license fees to Icasa.’<sup>129</sup>

---

<sup>129</sup> Adv K Malunga Deputy Public Protector South Africa ‘Whistle-blowing in South Africa’ 28 January 2015 available at [http://www.aepf.co.za/Documents/Whistleblowing\\_in\\_SouthAfrica\\_Kevin\\_Malunga.pdf](http://www.aepf.co.za/Documents/Whistleblowing_in_SouthAfrica_Kevin_Malunga.pdf), accessed on 4 October 2021.

## 6.2 Protection against automatic unfair dismissal

The definition of a dismissal is contained in section 186 of the LRA and the definition is quite wide. It includes constructive dismissal where an employee resigns because the employer made continued employment intolerable.<sup>130</sup>

Section 187(1)(f) of LRA provides that a dismissal is automatically unfair if the reason for such dismissal is because the employer unfairly discriminated against an employee, directly or indirectly, 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.

Only the Labour Court has jurisdiction to determine the fairness of an alleged automatic unfair dismissal and an employee may thus pursue a claim under the EEA in addition to one of automatically unfair dismissal.<sup>131</sup>

The remedies available to employees under the LRA are relatively open-ended in that the Labour Court may make any order that it deems appropriate where a dismissal is found to have been automatically unfair.<sup>132</sup> However, compensation is limited to the equivalent of 24 months' remuneration calculated at the employee's rate of remuneration at the date of dismissal.<sup>133</sup> The Labour Court can award any reasonable relief, including reinstatement, re-employment, or compensation up to 12 months remuneration. An arbitrator may determine any unfair labour practice dispute on terms that the arbitrator deems reasonable, which may include ordering reinstatement, re-employment, or compensation. Compensation in this regard is capped at 12 months remuneration.<sup>134</sup>

In *Simmadari v Absa Bank Ltd*<sup>135</sup> the court held that an employee will be able to pursue an unfair labour practice claim under the LRA if he or she was denied a promotion, was demoted, excluded for training, denied benefits or subjected to disciplinary action short of dismissal on account of discrimination on any of the prohibited grounds, and will also have a separate claim

---

<sup>130</sup> s 186(1)(e).

<sup>131</sup> *Brilliant & others v Gauteng Gambling Board* [2015] ZALCJHB 379.

<sup>132</sup> s 193(3).

<sup>133</sup> s 194(3).

<sup>134</sup> s 193(4) read with s 194(4).

<sup>135</sup> (2018) 39 *ILJ* 1819 (LC).

for unfair discrimination under the EEA. It was further held that the same facts can give rise to multiple causes of action and that an employee is not precluded from referring a claim under both the EEA based on unfair discrimination; and a separate claim under the Labour Relations Act (LRA)<sup>136</sup> for automatically unfair dismissal for adjudication by Labour Court.<sup>137</sup>

In *Private Sector Workers Trade Union on behalf of Opperman and Gerrie Ebersohn Attorneys*<sup>138</sup> it was held that if the employee was not dismissed and remained in employment, the appropriate referral would be for unfair discrimination in terms of the EEA; if the employee was dismissed due to harassment, the appropriate referral would be for automatically unfair dismissal (based on unfair discrimination). The Commissioner confirmed that ‘harassment’ can constitute a form of unfair discrimination. To be successful however, an employee making such a claim must prove why the harassment amounted to unfair discrimination.

## 7. THE PROTECTION FROM HARASSMENT ACT, 2011<sup>139</sup>

The Protection from Harassment Act is not specifically designed for the employment relationship although it could apply. The PHA seeks to address harassment and stalking behaviours which violate the fundamental rights to privacy, equality, and dignity of individual persons. It specifically recognises that the right to personal freedom and security incorporates the right to be free from all forms of violence from either public or private sources. It provides for the issuing of protection orders.<sup>140</sup> This is an inexpensive civil remedy to protect a person from behaviour which may not constitute a crime but may impact negatively on various rights of an individual.<sup>141</sup>

---

<sup>136</sup> 66 of 1995.

<sup>137</sup> See *Evans v Japanese School of Johannesburg* (2006) 27 ILJ 2607 (LC), *Dial Tech CC v Hudson & another* (2007) 28 ILJ 1237 (LC) and *Atkins v Datacentrix (Pty) Ltd* (2010) 31 ILJ 1130 (LC) the court confirmed that it is competent to bring a claim under both the LRA and EEA when a dismissal was allegedly unfairly discriminatory.

<sup>138</sup> (2019) 40 ILJ 1159 (CCMA).

<sup>139</sup> 17 of 2011.

<sup>140</sup> Preamble.

<sup>141</sup> ‘Harassment’ means ‘directly or indirectly engaging in conduct that the respondent knows or ought to know— (a) causes harm or inspires the reasonable belief that harm may be caused to the complainant or a related person by unreasonably—(i) following, watching, pursuing or accosting of the complainant or a related person, or loitering outside of or near the building or place where the complainant or a related person resides, works, carries on business, studies or happens to be; (ii) engaging in verbal, electronic or any other communication aimed at the complainant or a related person, by any means, whether or not conversation ensues; or (iii) sending, delivering or causing the delivery of letters, telegrams, packages, facsimiles, electronic mail or other objects to the complainant or a related person or leaving them where they will be found by, given to, or brought to the attention of, the complainant or a related person; or (b) amounts to sexual harassment of the complainant or a related person.’ The term ‘sexual harassment’ means ‘any (a) unwelcome sexual attention from a person who knows or ought reasonably to know that such attention is unwelcome; (b) unwelcome explicit or implicit behaviour, suggestions, messages or remarks of a sexual nature that have the effect of offending, intimidating or humiliating the

The Act provides recourse for victims of harassment and stalking in both domestic non-domestic relationships. It also broadens the categories of harassment to include bullying at schools and cyber-stalking.<sup>142</sup> It applies to everyone and extends beyond the employment relationship. Those workers, such as soldiers, spies and independent contractors who are excluded from the scope of the EEA, LRA and other labour legislation are thus also protected by the law.

## 8. THE OCCUPATIONAL HEALTH AND SAFETY ACT, 1993 (OHSA)<sup>143</sup>

The OHSA imposes a general obligation on employers to provide and maintain a working environment that is safe and without risk to the health of its employees.<sup>144</sup> This is a codification of an employer's common law duty to provide a safe working environment.<sup>145</sup> It must protect employees against physical and psychological harm.<sup>146</sup> This extends to the elimination of harassment which includes workplace bullying, sexual harassment, racial harassment and other forms of unfair discrimination. An employer should for example conduct a proper risk analysis to ensure that sexual harassment is prevented, have a Harassment Policy designed for the specific workplace and alert employees to the content of the Code of Good Practice on the Handling of Sexual Harassment in the Workplace.<sup>147</sup>

Section 8 of the OHSA however limits this duty of the employer duty to that which is 'reasonably practicable'. The inquiry into the reasonableness of conduct thus involves considerations of legal and public policy. Ultimately, in determining rights and relief, the courts will make a value judgement on what is demanded by the legal convictions of society.<sup>148</sup>

---

complainant or a related person in circumstances, which a reasonable person having regard to all the circumstances would have anticipated that the complainant or related person would be offended, humiliated or intimidated; (c) implied or expressed promise of reward for complying with a sexually oriented request; or (d) implied or expressed threat of reprisal or actual reprisal for refusal to comply with a sexually oriented request.'

<sup>142</sup> s 1.

<sup>143</sup> 85 of 1993.

<sup>144</sup> s 8.

<sup>145</sup> Tshoose 'Employer's duty to provide a safe working environment: a South African perspective' 2011 *Journal of International Commercial Law and Technology* 174.

<sup>146</sup> *Media 24 Ltd and Another v Grobler* [2005] 3 All SA 297 (SCA).

<sup>147</sup> Calitz 'Sexual harassment: why do victims so often resign? E v Ikwezi Municipality 2016 37 *ILJ* 1799 (ECG)' 2019 *Potchefstroom Electronic Law Journal* 22 available at <https://doi.org/10.17159/1727-3781/2019/v22i0a5169>, accessed on 10 September 2021.

<sup>148</sup> Tshoose, *Employer's duty to provide a safe working environment: a South African perspective* (2011) 168.

In *MacDonald v General Motors South Africa (Pty) Ltd*<sup>149</sup> it was held that an employer would only be expected to guard against accidents which are likely to happen in the ordinary course of business. The question is thus whether a reasonable person (employer) would have foreseen the harm from occurring and would have taken steps to prevent it as such.<sup>150</sup>

In two similar cases, *PE v Dr Beyers Naude Local Municipality and Another*<sup>151</sup> (discussed above) and *E v Ikhwezi Municipality and Another*<sup>152</sup> the employer failed to protect the victim after complaints were lodged about the harassment. This conduct by the employer exacerbated their suffering and resulted in Post-Traumatic Stress Disorder (PTSD), eventually leaving them with no option but to resign. The employer was responsible for these victims' psychological safety also after the disciplinary hearing, and did not take reasonably practicable measures to ensure her safety.<sup>153</sup> In both cases the employer did not adequately punish the perpetrator and failed to protect the victim.<sup>154</sup>

A well-developed social security system, of which OHSA forms part, concerns itself equally with preventative and rehabilitative measures.<sup>155</sup> Criticism of the OHSA is well documented and falls beyond the scope of this paper. It is however notable that the Committee of Inquiry into Comprehensive System of Social Security for South Africa previously recommended that a prevention policy must be developed as part of a national strategy and that all compensation agencies should participate in this regard.<sup>156</sup> The Occupational Health and Safety Amendment Bill, 2021 seeks to address this issue by imposing severe administrative fines on employers who fail in their obligations under the Act. It remains to be seen whether this will have the desired effect.

## **9. THE COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT, 1993 (COIDA)<sup>157</sup>**

---

<sup>149</sup> 1973 (1) SA 232 (E).

<sup>150</sup> *Kruger v Coetzee* 1966 (2) SA 428 (AD).

<sup>151</sup> [2021] 2 All SA 839 (ECG).

<sup>152</sup> (2016) 37 ILJ 1799 (ECG).

<sup>153</sup> Ibid.

<sup>154</sup> Ibid.

<sup>155</sup> Tshoose, *Employer's duty to provide a safe working environment: a South African perspective* (2011) 172.

<sup>156</sup> Draft Consolidated Report of the Committee of Inquiry into Comprehensive System of Social Security for South Africa *Transforming the Present – Protecting the Future* (March 2002) Ch 12, para 12.5.

<sup>157</sup> 130 of 1993.

COIDA provides a system of statutory compensation for employees<sup>158</sup> involved in occupational accidents or who contract occupational diseases.

In terms of COIDA, those defined as employees are entitled to compensation regardless of whether their injury or illness was caused by the fault of their employer or any other person. At the same time, however, employees are precluded from instituting claims against their employers and certain co-workers, for damages suffered as a result of the occupational injury or disease.<sup>159</sup>

If an employee suffers from an 'occupational injury'<sup>160</sup> or sustain a disease that can be categorised as an 'occupational disease' which is pursuant to violence or harassment in the workplace, he or she may have a claim in terms of COIDA.<sup>161</sup>

In *Urquhart v Compensation Commissioner*<sup>162</sup> a press photographer for a daily newspaper suffered a mental breakdown as a result of witnessing and photographing a number of traumatic events over many years. He was diagnosed with PTSD which precluded him from continuing to work. His claim for psychological injury as an occupational disease succeeded and the court held the following with regard to PTSD:

'The law has long recognized that for purposes of compensation or damages a psychiatric disorder or psychological trauma is as much a personal injury as a cracked skull, and there is nothing in the definitions of 'accident' and 'occupational injury' in the Act to indicate that this legislation has a contrary intention.'<sup>163</sup>

The matter was remitted to the Compensation Commissioner to determine the appropriate compensation as permitted under the Act.<sup>164</sup>

In the matter of *PE v Beyers Naude*, discussed above in the context of OHSA, the employer added a special plea stating that the employee's harassment constituted a workplace injury and should therefore have been dealt with in terms of COIDA and the employer is exempted from

---

<sup>158</sup> s 1(xix)(a)-(d).

<sup>159</sup> Benjamin *Understanding the Occupational Health and Safety Act and the Compensation for Occupational Injuries and Diseases Act* (Juta 2011) at 128.

<sup>160</sup> s 22. *Nicosia v Workman's Compensation Commissioner* 1954 (3) SA 897 (T) at 900 paras E-F.

<sup>161</sup> s 65.

<sup>162</sup> (2006) 27 ILJ 96 (E).

<sup>163</sup> Per Jones J, *idem* at para 14.

<sup>164</sup> This principle was confirmed in *Odayar v Compensation Commissioner* 2006 (2) SA 202 (N) and more recently in *Marsland v New Way Motor & Diesel Engineering* (2009) 30 ILJ 169 (LC) which dealt with depression arising from the workplace.

liability in terms of section 35.<sup>165</sup> It was argued that the relief sought by the victim was not competent because the claim was not brought under COIDA. The court held that sexual harassment did not fall within the ambit of an incident which constituted an accident arising out of and in the course of employment. According to the court, holding otherwise would be contrary to the public interest, as it would be sending an unacceptable message to employees, especially women, that they are precluded from suing their employer for what they assert is a failure to provide reasonable protective measures against sexual violence or harassment in the workplace. Therefore, even though such claims can still be brought under COIDA, victims retain recourse in terms of the common law. The special plea was therefore dismissed.<sup>166</sup>

## **10. DRAFT CODE OF GOOD PRACTICE ON PREVENTION AND ELIMINATION OF VIOLENCE AND HARASSMENT IN THE WORLD OF WORK**

The Draft Code<sup>167</sup> is aimed at managing and eradicating violence and harassment in line with South Africa's responsibilities as a member state of the ILO<sup>168</sup> but has no legal force.

It provides a framework for human resource policies and practices related to violence and harassment, including GBV and harassment.<sup>169</sup> As such, the Draft Code highlights and defines different types of violence and harassment that an employee may experience, and what steps employers are required to take to deal with these forms of violence. In its current form, Draft Code has no legal force and effect. Item 5 of the Draft Code provides guidance for employers to prevent and eliminate violence and harassment in the world of work.

The Draft Code refers to the 'world of work' and assigns the broadest possible meaning to the term. 'Workplace' is not defined in the EEA. The effect is that if the wider notion of 'world of work' is used it will have significant implications for establishing employer liability in terms of section 60 of the EEA. In this regard an employer has a greater obligation to counteract the

---

<sup>165</sup> s 35 states: 'No action shall lie by an employee or any dependent of an employee for the recovery of damages in respect of any occupational injury or disease resulting in the disablement or death of such employee against such employee's employer, and no liability for compensation on the part of such employer shall arise save under the provisions of this Act in respect of such disablement or death.'

<sup>166</sup> Per Kroon AJ at paras 62 - 63.

<sup>167</sup> Government Gazette (GG 43630) of 20 August 2020.

<sup>168</sup> Preamble.

<sup>169</sup> Item 4.

ill effects of violence and harassment in the workplace.<sup>170</sup> Section 60 only requires consideration as to whether an ‘employee’ has contravened a provision of the EEA while ‘at work’.<sup>171</sup>

The Draft Code casts the net of liability too wide by incorporating ‘commuting to and from work’ as part of the definition. Such can only be justifiable if the employer provides transportation to its employees,<sup>172</sup> or if a victim suffers harm which is relevant to the work relationship.<sup>173</sup> The Labour Appeal Court has found that employees are deserving of protection from sexual harassment when they are on a business trip, at a work-related social event and even after hours.<sup>174</sup> It is not necessary for the perpetrator to be a co-worker for sexual harassment to take place.<sup>175</sup> Sexual harassment does not have to take place at the workplace, or even in South Africa.<sup>176</sup> Neither is a continuing employment relationship or proximity at the workplace required.<sup>177</sup> An employer was also found liable for harassment perpetrated by colleagues after hours at employer-provided accommodation.<sup>178</sup>

Like ILO Convention 190, the Draft Code adopts ‘Violence and Harassment’ in the world of work as a single term which incorporates *a wide range of unacceptable behaviours and practices*.<sup>179</sup> It notes that ‘Violence and Harassment’ is a form of unfair discrimination<sup>180</sup> that includes sexual harassment, racial harassment, harassment related to parental responsibility,<sup>181</sup> gender, and gender-based violence.<sup>182</sup>

---

<sup>170</sup> s 5 of the EEA provides that employers must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination.

<sup>171</sup> s 60(1).

<sup>172</sup> *National Union of Mine Workers & others v East Rand Gold & Uranium Co Ltd* (1986) 7 ILJ 739 (IC).

<sup>173</sup> *Van Zyl v Duvha Opencast Services (Edms) Bpk* (1988) 9 ILJ 905 (IC).

<sup>174</sup> *Campbell Scientific Africa (Pty) Limited v Simmers & others* [2015] JOL 34906 (LAC). In this case the court held that the employer was entitled to discipline the employee for committing sexual harassment.

<sup>175</sup> Per Savage AJA, *idem* at 33.

<sup>176</sup> *Ibid.*

<sup>177</sup> *Ibid.*

<sup>178</sup> *Biggar v City of Johannesburg, Emergency Management Services* (2011) 32 ILJ 1665 (LC).

<sup>179</sup> Item 3.11.

<sup>180</sup> ‘Discrimination’ is defined to mean ‘any act or omission, including a policy, law, rule, practice, condition, or situation which directly or indirectly imposes burdens, obligations or disadvantage on; or withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds, namely: race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, birth and HIV & AIDS status; or any other ground where discrimination based on that other ground causes or perpetuates systemic disadvantage: undermines human dignity; or adversely affects the equal enjoyment of a person’s rights and freedoms in a serious manner that is comparable to discrimination on a ground in s 6(1) of the EEA.’

<sup>181</sup> According to the Draft Code, this refers to a form of Violence and Harassment because of pregnancy, childbirth, surrogacy, maternity or parental leave, parental responsibility or a medical condition related to pregnancy or childbirth or surrogacy, or a worker because of family responsibilities.

<sup>182</sup> Item 6.3.

The Draft Code specifically refers to workplace bullying as ‘psychological violence and harassment’<sup>183</sup> that may be perpetrated through repeated behaviour, of a type, which alone may be relatively minor, but which cumulatively can become very serious.<sup>184</sup>

Item 8 of the Draft Code reiterates that employers are under obligation in terms of Section 60 of the EEA to take proactive and remedial steps to prevent all forms of Violence and Harassment in the World of Work. They are required to have clear rules, policies and procedures prohibiting all forms of violence and harassment and other forms of unfair discrimination in the world of work or violence and harassment which impeded the dignity, health, and safety of all workers.<sup>185</sup>

‘Appropriate’ measures to prevent Violence and Harassment, including Gender Based Violence in the World of Work entails ‘prevention and awareness programs.’ In this regard, employer should take initiative to educate workers at all levels about Harassment and Violence and re-enforce and maintain compliance through ongoing awareness programmes.<sup>186</sup>

The procedures laid down under Amended Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace, 2005 be adapted with the necessary changes, to effectively manage all forms of Violence and Harassment in the workplace.<sup>187</sup>

## 11. CONCLUSION

Violence and Harassment is a social ill that impact many people in society. Victims are protected through various legislative interventions. Employers have a special obligation to ensure a safe working environment that is free from violence and harassment. A failure to take appropriate steps may give rise to a number of claims, arising from inter alia the EEA, LRA and the common law of delict.

Employers cannot rely on COIDA to escape liability for its failure to protect its employees from workplace violence and harassment.

---

<sup>183</sup> According to the Draft Code, ‘Psychological Violence and Harassment’ refers to the prejudicial effects such conduct has on the psychological integrity and well-being of the complainant.

<sup>184</sup> Item 7.3.4.

<sup>185</sup> Item 8.2.

<sup>186</sup> Item 9.1. See also Item 12.

<sup>187</sup> Item 13.

The Draft Code expands significantly on the different types of violence that an employee may experience at work. It goes beyond mere sexual harassment and requires employers to implement measures that will combat all forms of violence and harassment in the workplace. The latter concept is broadly defined. The definition of perpetrator and victim has also been expanded, and so too the definition of what constitutes a workplace. This means that employers must implement additional controls and measures to prevent and eliminate violence and harassment.<sup>188</sup>

From an evidentiary perspective, difficulties may arise in combating online violence and harassment as it may be hard to identify or track down the perpetrator, or to prove that evidence was lawfully obtained. Notwithstanding, if there is evidence of some sort of harassment and violence taking place online, the employer will be expected to take appropriate steps.

The Courts have however held that an employer cannot be held liable for the conduct of non-employees. But even if the Draft Code in its final form does not apply to third parties, the contemplated principles are useful strategies that employers can adopt to safeguard its employees against third-party violence and harassment.

According to Pienaar et al, there is no indication of when the Draft Code will be implemented but employers should consider a review of their internal policies and procedures in respect of violence and harassment in the workplace to ensure all employees, and others in the world of work, are protected and to protect itself from the rule of vicarious liability.<sup>189</sup>

---

<sup>188</sup> Pienaar et al 'Violence and harassment in the workplace: employers' duty-bound to expand protection of victims' *Cliff Dekker Hofmeyer Employment Law Alert* 31 May 2021 available at <https://www.cliffedekkerhofmeyr.com/en/news/publications/2021/Employment/employment-law-alert-violence-and-harassment-in-the-workplace-employers-duty-bound-to-expand-protection-of-victims.html>, accessed on 26 September 2021.

<sup>189</sup> Ibid.

## CHAPTER 4

### COMPARATIVE ANALYSIS

---

#### 1. INTRODUCTION

This chapter aims to provide an overview of the legal basis and instruments to deal with workplace violence and harassment in the United Kingdom (UK) and to compare same with South Africa.<sup>190</sup> This comparison aims to identify other avenues which South Africa could also include into the legal framework to improve the protection of workers against workplace violence and harassment.

The discussion will not entail a detailed overview of the UK legal system but will instead focus on the legislative framework specifically dealing with workplace violence and harassment and related concepts. Like in South Africa, harassment in the UK is regulated by legislation and the common law.

#### 2. STATUTORY FRAMEWORK

The legal basis for protection in the UK is very similar to South Africa in that it forms part of the protective scope of anti-discrimination law. As with the case in South Africa, there is no single all-encompassing piece of legislation which deals with discrimination, violence and harassment and bullying in the workplace. It is also interesting that the term ‘violence and harassment’ is not used as a single term in the UK. The following legislative instruments provide protection for employees against different aspects of violence and harassment and will briefly be discussed below:

- The Equality Act 2010,
- The Code of Practice on Employment issued by the Equality and Human Rights Commission, and
- The Protection from Harassment Act 1997 as amended by the Protection of Freedoms Act 2012.

---

<sup>190</sup> As a former British colony, South Africa has its roots in English law. The UK was thus used as a comparator because the systems of law and justice are similar. The UK is also a member state of the ILO, and like South Africa, it regulates violence and harassment under the banner of ‘discrimination’.

## 2.1 The Equality Act, 2010

### 2.1.1 Purpose

The Equality Act, 2010<sup>191</sup> protects people against discrimination, harassment and victimisation not just in the workplace but in the wider society as well, such as people who are in education, consumers, public services, who buy or rent property, or who are members or guests of a private club or association.<sup>192</sup>

The Equality Act, 2010 covers discrimination and equality aspects that are typically covered in South Africa by the EEA and PEPUDA.

Part 5 of the Equality Act, 2010 deals specifically with discrimination protection in employment and will form the basis of the rest of the analysis of this Act.

### 2.1.2 Definition ‘employment’ and ‘employee’

Section 83(2) specifically includes under the definition of employment the normal contractual work relationship, apprenticeships and learnerships as well as a ‘contract personally to do work’. The definition specifically includes the Crown employees,<sup>193</sup> House of Commons and House of Lords staff<sup>194</sup> and it also includes persons in service of the armed forces.<sup>195</sup>

The South African EEA does not define employment but it has a corresponding meaning to employee. The latter definition includes public servants and people assisting with carrying on the business. The provision in the Equality Act, 2010 of workers who ‘contract personally to do work’ warrants further discussion to determine if this refers to independent contractors. The

---

<sup>191</sup> Legislation.gov.uk 2010 *Equality Act 2010*, available at <http://www.legislation.gov.uk/ukpga/2010/15/contents>, accessed 11 June 2021.

<sup>192</sup> Gov UK ‘*Discrimination: your rights*’ at <https://www.gov.uk/discrimination-your-rights>, accessed on 08 October 2021.

<sup>193</sup> Crown employment means employment under or for the purposes of a government department or any officer or body exercising on behalf of the Crown functions conferred by a statutory provision. Employment Rights Act 1996, s 191 (3)

<sup>194</sup> s 83.

<sup>195</sup> Ibid.

distinction between an employee and an independent contractor goes to the heart of labour law since employees are protected by labour law and independent contractors not.<sup>196</sup>

The definition in section 83(2)(a) of the Equality Act, 2010 is not clear on whether independent contractors are included in this term or not. In a recent judgment the English and Wales Court of Appeal in *Secretary of State for Justice v Windle*<sup>197</sup> had to specifically interpret the meaning of ‘a contract personally to do work’.<sup>198</sup> The issue was brought to the Employment Tribunal by two court translators (one a Czech and one an Algerian) who alleged they were paid less than their British counterparts. The Ministry of Justice alleged that they were not employees because they did not have an umbrella agreement with the Ministry and were given a contract per assignment. The claimants argued that those individual agreements per task, amounted to a ‘contract personally to work’ which made them employees. The court held that the translators were self-employed and not employees. According to the court there are true self-employed workers who work for their own account and then there are others who provide services as part of a professional business. These translators formed part of the latter category and were a type of worker ‘in an intermediate state between employment and true self-employment’.<sup>199</sup> A ‘contract personally to work’ therefore refers to an employment relationship and excludes self-employment in any form.

Contract workers are however protected against discrimination by way of inclusion under the definition of ‘employee’ in terms of sections 39 to 41 of the Equality Act, 2010. This definition is very wide and also includes applicants for employment.

This differs from the South African position where contractors and people outside the employment relationship are not covered by the EEA. The OHS Act extends protection indirectly to non-employees in that an employer has a duty to provide a healthy and safe working environment for everyone at the workplace.

### **2.1.3 Definition of discrimination, harassment and victimisation**

---

<sup>196</sup> The Roman Law already distinguished between the *locatio conductio operis* (an independent contractor contract) and the *locatio conductio operarum* (an employment relationship). Du Toit et al *Labour Relations Law: A Comprehensive Guide* 6 ed (Juta 2015) 104.

<sup>197</sup> [2016] EWCA civ 459.

<sup>198</sup> Ohringer ‘What is employment under the Equality Act 2010?’ *Cloisters Employment Blog* 16 May 2016 available at <https://www.cloisters.com/how-is-employment-defined-under-the-equality-act-2010/>, accessed on 20 September 2021.

<sup>199</sup> Per Underhill J.

Less favourable treatment because an employee exhibits a ‘protected characteristic’ amounts to discrimination in terms of the Employment Act, 2010 and is unlawful.<sup>200</sup> Protected characteristics are ‘age, gender reassignment, being married or in a civil partnership, being pregnant or on maternity leave, disability, race including colour, nationality, ethnic or national origin religion or belief, sex or sexual orientation.’ The protection of people with the protected characteristics against discrimination extends to people in employment, work seekers, or when engaged in occupations or activities related to work.<sup>201</sup>

The above provisions correspond with the South African EEA in that employees as well as applicants for employment are protected against discrimination on any one of the listed grounds. The Employment Act, 2010 seems to contain a closed list of protected characteristics and does not make provision for ‘any other arbitrary grounds’ such as is the case in South Africa. This means that the scope of protection is in this respect, more limited than the EEA.

Chapter 2 of the Act includes discrimination,<sup>202</sup> harassment<sup>203</sup> and victimisation<sup>204</sup> under the so-called ‘prohibited actions’. These provisions should be read along with the Statutory Code of Practice issued in terms of the Equality Act, 2010.<sup>205</sup>

‘Harassment’ refers to a situation where a person harasses another if he or she engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of violating the other person’s dignity, or if it creates an intimidating, hostile, degrading, humiliating or offensive environment for the other person. This includes unwanted conduct of a sexual nature.<sup>206</sup> Factors to consider in determining whether the conduct was offensive includes the perception of the complainant, the circumstances of the case, and whether it is reasonable for the conduct to impair the complainant’s dignity.<sup>207</sup>

Sections 40(2) and (3) of the Equality Act used to provide that an employer must protect employees against harassment by a third party in the course of his or her employment as far as reasonably practicable. This did not apply unless the employer knew that the employee has

---

<sup>200</sup> s 13. s 4, ss 5 - 12 defines these individual concepts.

<sup>201</sup> Item 1.5.

<sup>202</sup> Sections 13-19.

<sup>203</sup> s 26.

<sup>204</sup> s 27.

<sup>205</sup> Available at /sites/default/files/employercode.pdf, accessed on 20 September 2021.

<sup>206</sup> s 26(1) - (3).

<sup>207</sup> s 26(4).

been subjected to harassment by a third party on at least two other occasions, whether or not it is the same third party on each occasion.<sup>208</sup> The Enterprise and Regulatory Reform Act, 2013 subsequently omitted these sections.<sup>209</sup> Statutory liability for third-party harassment now only covers contravention of the provisions dealing with protected disclosures.<sup>210</sup>

South African legislation does not allow for liability of an employer for conduct by a third-party, not even when an employee is victimised by a third-party after having made a protected disclosure. General protection for the victim in terms of the Protected Disclosures Act,<sup>211</sup> is the only recourse available.

According to the Employment Act, 2010, ‘victimisation’ would occur where a person subjects another person to a detriment because the other person does a ‘protected act’, or he or she believes that the other person has done, or may do, a ‘protected act’. A protected act would be to (a) bring proceedings under the Act, (b) give evidence or information in connection with proceedings under the Act, to do any other thing for the purposes of or in connection with the Act; to making an allegation (whether or not express) that another person has contravened this Act.<sup>212</sup>

Although victimisation forms part of the Equality Act, where discrimination (differential treatment) can only be proven with reference to a comparator, the Act makes an exception in cases where a person is victimised after having done a protected act. Victimisation does not require a comparator. The worker need only show that they have experienced a detriment because they have done a protected act or because the employer believes (rightly or wrongly) that they have done or intend to do a protected act.<sup>213</sup>

South Africa does not have a specific Act dealing with victimisation. This is included in protection provided by EEA and the LRA.<sup>214</sup> Again, protection for whistle-blowers are specifically regulated in the PDA.<sup>215</sup>

---

<sup>208</sup> Gilzean ‘Third-party Harassment’ 2011(101) *Employment Law Bulletin* 4.

<sup>209</sup> s 65.

<sup>210</sup> s 19.

<sup>211</sup> 26 of 2000.

<sup>212</sup> In terms of s 27(5) this includes committing a breach of an equality clause or rule.

<sup>213</sup> s 27.

<sup>214</sup> s 187(1)(d) and in the context of the PDA s 187(1)(h) and s 186(2)(d).

<sup>215</sup> s 3.

### 2.1.4 *Employer liability*

This part differs from the EEA in that the latter does not make provision for protection against third parties at all. Section 60(1) only refers to conduct by other employees for which the employer can be held vicariously liable.

Earlier case law provided that employees could bring claims of direct discrimination against employers if they could show that the employer could have reasonably prevented third party harassment from occurring.<sup>216</sup> It was however later found that an employer's failure to protect employees from harassment by third parties should not be treated as discrimination unless the failure itself can be said to be discriminatory.<sup>217</sup>

Like section 60 of the EEA, section 109 of the Act provides for the liability of employers and principals. In this regard, anything done by a person in the course of his or her employment must be treated as also done by the employer. Further, anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal. It does not matter whether that thing is done with the employer's or principal's knowledge or approval. An employer may defend itself against a claim by showing that it took reasonable all steps to prevent the wrongdoing or discrimination from occurring.

## 2.2 **Statutory Code of Practice: Employment**

The Statutory Code of Practice: Employment issued by the Equality and Human Rights Commission<sup>218</sup> provides more comprehensive and technical detail to the treatment of discrimination in the workplace and interpretation of the provisions.

The Code further acknowledges that employers will sometimes have to deal with complaints about prohibited conduct that arise between members of staff. They can avoid potential conflicts by noticing problems at an early stage and attempting to deal with them by, for example, talking to the people involved in a non-confrontational way. It is important to encourage good communication between workers and managers in order to understand the

---

<sup>216</sup> Gilzean 'Third-party Harassment' 2011(101) *Employment Law Bulletin* at 5.

<sup>217</sup> Ibid.

<sup>218</sup> The Commission was set up under Part 1 of the Equality Act 2006 to work towards the elimination of unlawful discrimination and promote equality and human rights.

underlying reasons for potential conflicts. Employers should have effective procedures in place for dealing with grievances if informal methods of resolving the issue fail.<sup>219</sup>

According to the Code, it is good practice for employers (irrespective of their size) to have procedures for dealing with grievances and disciplinary hearings together with appeals against decisions under these procedures. Where procedures have been put in place, they should not discriminate against workers either in the way they are designed or how the employer implements them in practice.<sup>220</sup>

According to the Code, employers are liable for prohibited conduct that takes place ‘in the course of employment’. This may extend to discrimination and harassment occurring away from work premises or outside normal working hours where there is sufficient connection with work – for example, at team building days, social events to which all workers are invited, business trips or client events.<sup>221</sup>

To avoid liability for discrimination and harassment outside the workplace, employers should consider taking steps such as: drafting disciplinary and equality policies that refer to acceptable behaviour outside the office; checking dietary requirements to ensure that all workers have appropriate food during work-related events; and making it clear to workers what is required of them to comply with acceptable standards of behaviour. Employers should also consider whether they need to make any reasonable adjustments to accommodate the needs of disabled workers.<sup>222</sup>

A worker affected by a breach of the Act has a right to seek redress through the Employment Tribunal.<sup>223</sup> Employment Tribunals can deal with all unlawful acts pertaining to discrimination, harassment, victimisation, failure to make reasonable adjustments, breach of an equality clause or rule, instructing, causing or inducing and aiding unlawful acts.<sup>224</sup> An Employment Tribunal will, however, not have jurisdiction to hear a case from a member of the armed forces until a ‘service complaint’ has been made and not withdrawn.<sup>225</sup>

---

<sup>219</sup> Item 17.102

<sup>220</sup> Item 17.91.

<sup>221</sup> Item 17.65.

<sup>222</sup> Item 17.66.

<sup>223</sup> Item 15.1.

<sup>224</sup> Item 15.14 read with s 120(1).

<sup>225</sup> Item 15.18 read with s 121.

An Employment Tribunal may make a declaration as to the rights of the parties to the claim; award compensation to the claimant for any loss suffered;<sup>226</sup> make an ‘appropriate’ recommendation, that is a recommendation that a respondent takes specified steps to obviate or reduce the adverse effect of any matter relating to the proceedings on the claimant and/or others who may be affected; award interest on compensation; award costs (expenses in Scotland) if appropriate.<sup>227</sup>

South Africa also have a number of Codes on equality and discrimination matters to guide employers in the application of the law. See for example the Amended Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace,<sup>228</sup> Code of Good Practice on HIV and AIDS and the World of Work,<sup>229</sup> Code of Good Practice on the Employment of People with Disabilities,<sup>230</sup> and the Code of Good Practice on the Protection of Employees during Pregnancy and after the Birth of a Child.<sup>231</sup>

### **2.3 Protection from Harassment Act, 1997 and Protection from Freedoms Act 2012**

This Act, like the South African counterpart, does not apply exclusively to the workplace.

Harassment is a criminal offence under the Protection from Harassment Act 1997, which includes stalking<sup>232</sup> and threatening violence.<sup>233</sup> Every individual has a right to be free from harassment and, accordingly, a person must not pursue a course of conduct which amounts to harassment of another and is intended to amount to harassment of that person; or occurs in circumstances where it would appear to a reasonable person that it would amount to harassment

---

<sup>226</sup> Item 15.40 points out that an Employment Tribunal can award a claimant compensation for injury to feelings, past loss of earnings or other financial loss; future loss of earnings which may include stigma or ‘career damage’, aggravated damages (England and Wales only); and punitive or exemplary damages (England and Wales only).

<sup>227</sup> Item 15.37 read with ss 124(2)(a)-(c) and s 139.

<sup>228</sup> GN 1357 in GG 27865 of 4 August 2005.

<sup>229</sup> GN 451 in GG 35435 of 15 June 2012.

<sup>230</sup> GN 1085 in GG 39383 of 9 November 2015.

<sup>231</sup> GN 1441 in GG 19453 of 13 November 1998.

<sup>232</sup> s 2A. s 2A(3) lists examples of behaviours associated with stalking which includes: ‘[F]ollowing a person, contacting, or attempting to contact, a person by any means publishing any statement or other material (i) relating or purporting to relate to a person, or (ii) purporting to originate from a person monitoring the use by a person of the internet, email or any other form of electronic communication, loitering in any place (whether public or private), interfering with any property in the possession of a person, watching or spying on a person.’

<sup>233</sup> s 4. This provides that a person whose course of conduct causes another to fear, on at least two occasions, that violence will be used against him is guilty of an offence if he knows or ought to know that his course of conduct will cause the other so to fear on each of those occasions.

of that person.<sup>234</sup> This extends to incidents of domestic abuse.<sup>235</sup> ‘Conduct’ includes speech, and ‘harassment’ of a person includes causing the person alarm or distress; and a course of conduct must involve conduct on at least two occasions.<sup>236</sup> Victims have access to the same civil remedies.<sup>237</sup> Upon conviction, a perpetrator can be summarily imprisoned, fined or both.<sup>238</sup> UK nationals or those who are habitually resident in England and Wales who commits such conduct outside the territory will nevertheless be accountable.<sup>239</sup>

In *Majrowski v Guy’s and St. Thomas’s NHS Trust*<sup>240</sup> the employee claimed that he had been bullied by his manager which amounted to harassment under section 1 of the Protection from Harassment Act 1997. He sought to hold the employer vicariously liable for the tort committed by the manager. On appeal the employer contended that that the purpose of the 1997 Act was to protect people against stalkers, which did not apply to the workplace; and furthermore, that vicarious liability in this case placed an unduly large burden on employers.

The court however found that vicarious liability for damages could be applied to statutory obligations breached by an employee in the course of his employment unless the statute expressly indicated otherwise. The Protection from Harassment Act 1997 contained no such exclusion. The appeal was thus dismissed.

### 3 VICARIOUS LIABILITY IN TERMS OF THE COMMON LAW

The term ‘workplace bullying’ is not defined in UK law. In the UK, there is an implied obligation on every employer to take reasonable care and steps to ensure their employee’s safety at work.<sup>241</sup> This implied obligation is not only an implied term of the employment contract, but also is a ‘duty of care’ resulting from law of tort involving negligence.<sup>242</sup>

Most cases in this regard relied on the employer’s breach of its duty of care where the employer failed to take adequate steps to protect the employee from such bullying.

---

<sup>234</sup> s 8.

<sup>235</sup> s 8A.

<sup>236</sup> s 8(3).

<sup>237</sup> s 8(2).

<sup>238</sup> s 2.

<sup>239</sup> s 4B.

<sup>240</sup> [2006] 3 WLR 125.

<sup>241</sup> *Walker v Northumberland County Council* [1995] 1 All ER 737.

<sup>242</sup> *Ibid.*

The first case on harassment and bullying (although not labelled as such at that time) was the Victorian case of *Wilkinson v Downton*<sup>243</sup> which created a tort of doing a wrongful act to cause the intentional infliction of mental shock. The defendant erroneously told Mrs Wilkinson that her husband had been seriously injured as a practical joke. Mrs Wilkinson suffered and was awarded delictual damages even though there was no physical touching of the plaintiff, and she was never under the apprehension that she would be harmed herself. So bullying by words alone, not deeds are covered here.<sup>244</sup>

In *Dowson v Chief Constable of Northumbria Police*<sup>245</sup> the court held that a claim for harassment will only succeed if the conduct occurred on at least two occasions, such conduct was targeted at the claimant, the conduct was calculated in an objective sense to cause alarm or distress, and if judged objectively, it can be seen as oppressive and unacceptable. It was further said that what is ‘oppressive and unacceptable’ may depend on the social or working context in which the conduct occurs.<sup>246</sup> According to the court, a line is to be drawn between conduct which is unattractive and unreasonable and conduct which has been described in various ways as ‘torment’ of the victim.<sup>247</sup>

Wheeler points out that the above will cover bullying and sexual, racial or other discriminatory harassment in the workplace. He points out that unlike common law torts, which result in pure psychiatric injury, one does not need to show a recognised psychiatric injury, but rather (as in the employment law sphere) ‘injury to feelings’ will suffice.<sup>248</sup>

The courts have accepted that tormenting behaviour must be considered in the context which they arise, and that injuries to feelings, as opposed to pure economic loss, deserves redress.<sup>249</sup>

In *Green v DB Group Services (UK) Ltd*<sup>250</sup> a former employee was entitled to damages for psychiatric injury and consequential loss and damage that she suffered as a result of harassment

---

<sup>243</sup> [1897] EWHC 1 (QB).

<sup>244</sup> ‘Taking on the Bullies: On What Basis and in Which Court?’ 2019 *Jonathan Wheeler Solicitors Journal* available at <https://www.boltburdonkemp.co.uk/wp-content/uploads/2019/04/Jonathan-Wheeler-Solicitors-Journal.pdf>, accessed on 20 September 2021.

<sup>245</sup> [2010] EWHC 2612 (QB).

<sup>246</sup> Per Simon J at 142.

<sup>247</sup> *Ibid.*

<sup>248</sup> *Idem* at 224.

<sup>249</sup> *Ibid* 244 at 132.

<sup>250</sup> [2006] EWHC 1898 (QB).

and bullying by her fellow employees. The Court noted that when viewed individually, many of the aforesaid events would amount to no more than minor slights. It is however the cumulative effect that is of relevance.<sup>251</sup>

In terms of the OHSA, South African employers owes a duty to provide safe working conditions. In addition to statutory penalties, a negligent failure in this regard attracts aquilian liability under the law of delict.

#### 4 CONCLUSION

Jurisprudence on the regulation of workplace violence and harassment is well developed in the UK. Like in South Africa, statutory interventions were introduced under the banner of equity. The Equality Act, 2010 is the most comprehensive piece of legislation which deals with discrimination, harassment and victimisation in the workplace. Bullying and ‘violence and harassment’ are not specifically included. It is unlikely all issues can be regulated in one Act as responses must be formulated in the context in which they occur.

The Equality Act, 2010 extends to a wider scope of working arrangements than South Africa to ensure that vulnerable workers are protected. The Act specifically prohibits discrimination, harassment and victimisation, which incorporates sexual harassment and retaliation against whistle blowers under the definitions. Though the term ‘workplace bullying’ is not defined in UK law, there is an implied obligation on every employer to take reasonable care and steps to ensure their employee’s safety at work. This implied obligation is not only an implied term of the employment contract, but also is a ‘duty of care’ resulting from law of tort involving negligence.

Employers in the UK are no longer responsible for protecting of job applicants and employees from harassment by third parties during the course of employment, but vicarious liability would still be possible if the employer was negligent in protecting the employee. South African law, similarly, does not hold employers responsible for harassment by third parties. It will however still be useful to consider the UK’s earlier approach to liability for third-party harassment and

---

<sup>251</sup> Per Owen J at 71.

discrimination. This included an assessment of whether the harm could have been prevented or whether the employer's omission to protect its employees amounted to discrimination in itself.

Compared to South African law the scope of protection against discrimination in terms of the Equity Act is limited because discrimination is limited to unfair differential treatment based on a protected characteristic. These characteristics form a closed list and does not include 'arbitrary' grounds like the EEA does. For discrimination was omitted from the Act.

In the UK, harassment is a criminal offence under the Protection from Harassment Act 1997, which includes stalking and threatening violence and victims have access to civil remedies as well.

The Statutory Code of Practice: Employment<sup>252</sup> could provide valuable guidelines for South Africa in that it contains detailed guidelines on what proactive steps an employer should take to ensure it takes reasonably practicable steps to protect workers. It clearly sets out the rights and obligations of both employers and employees and provides the particulars of agencies that can assist victims in a time of need.

Effective legal recourse is provided to victims through employment tribunals who have jurisdiction over any type of dispute pertaining to workplace discrimination. They can determine both statutory and common law claims, and award civil remedies. Unlike South African law, members of the military are also protected under the scope of employment legislation, subject to certain conditions.

---

<sup>252</sup> The Commission was set up under Part 1 of the Equality Act 2006 to work towards the elimination of unlawful discrimination and promote equality and human rights.

## CHAPTER 5

### CONCLUSION

---

According to Sachs, intolerance is at the heart of unfair discrimination –

‘Intolerance may come in many forms. At its most spectacular and destructive it involves the use of power to crush beliefs considered alien and threatening. At its more benign it may operate through a set of rigid mainstream norms which do not permit the possibility of alternative forms of conduct.’<sup>253</sup>

After years of neglect, the international community was forced to take action. As such, the ILO attempted to standardise the notion of ‘workplace violence and harassment’ amongst nations. It treats violence and harassment as a single concept that incorporates various forms of violence and harassment that a worker may experience in the workplace. Because sovereign states span the parameters of protection differently, it was recommended that they each formulate appropriate responses in the context which it arises. Whether seen as a single or separate concept, workplace violence and harassment amount to a human rights violation.

South Africa has a brutish history with unfair discrimination, violence and harassment in the workplace. Patriarchal views and traditions exacerbate the suffering of woman. Though legislative interventions provide some recourse for victims, the legal framework is complex, proliferated, and inaccessible to the most vulnerable in society.

In line with its obligations as a member state of the ILO, South Africa issued a Draft Code of Good Practice on the Prevention and Elimination of Violence and Harassment in the World of Work. This provides for clarity on the different types of harassment that an employee may experience in the workplace and might ensure that appropriate responses are formulated in the context in which it occurs.

Harassment is seen as unfair discrimination because it impacts on a person’s human dignity. The legislature was mindful of the prejudices and negative attitudes stemming from the legacy of apartheid and consequently published various anti-discrimination and equality legislation. Almost 30 years later however, certain groups are still vulnerable and prone to be victims to violence and harassment, especially in the workplace.

---

<sup>253</sup> *Prince v President of the Law Society & others* 2002 (2) SA 794 (CC) para 145.

Protection against harassment in the workplace is mainly regulated by the EEA and a few other Acts could also apply as was discussed in Chapter 2 above.

The modern view, as for example in the UK, is that protection against violence and harassment and bullying in the workplace form part of equality legislation. Victimisation is regulated in the context of protected disclosures but not in a broad context.

The regulating protection from harassment under the banner of discrimination is that a victim must demonstrate that the offensive conduct was based on a listed or arbitrary ground and of a certain degree.<sup>254</sup> Harassment and bullying for example might arise for some other irrational reason that is not linked to a protected characteristic.<sup>255</sup> Forcing an employee to prove this link, is problematic.

In the context of constructive dismissals, the test for sexual harassment (as formulated under the 2005 Code of Good Practice) favours a subjective approach which may work against victims of harassment in borderline cases as it may be difficult to prove that continuous employment was objectively intolerable.<sup>256</sup>

The Protection from Harassment Act<sup>257</sup> offers a potential vehicle to action bullying claims without reference to discrimination grounds but does not focus on the workplace primarily.<sup>258</sup> This is there to prevent stalking act and directed at domestic violence, implying the involvement of police.<sup>259</sup> Having police involved in the workplace is however undesirable, so too is having staff taking out protection orders against one another.<sup>260</sup>

Under the current framework, employers owe both a common law and statutory duty, either through themselves or through their employees, to ensure a safe working environment.<sup>261</sup> This

---

<sup>254</sup> Le Roux et al (LexisNexis 2010) 4.

See also item 4 of the Amended Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace, 2005 which requires the nature and extent of the sexual conduct, and the impact of the sexual conduct on the employee to be considered.

<sup>255</sup> Ibid.

<sup>256</sup> Ibid.

<sup>257</sup> 17 of 2011.

<sup>258</sup> Smit *Law, Democracy and Development* (2021) 35.

<sup>259</sup> Ibid.

<sup>260</sup> Ibid.

<sup>261</sup> Idem at 35.

caters beyond physical safety to include psychological safety.<sup>262</sup> In that context it would have made more sense to regulate workplace violence and harassment from an occupational health and safety perspective.

A ‘state of zero risk does not exist’.<sup>263</sup> The OHS Act therefore maintains that an employer must, as far as is reasonably practicable, ensure a working environment that is safe and without risk to the health and safety of its employees.<sup>264</sup> The OHS Act is aimed at prevention with no real recourse for victims who suffer as a result of the employer not complying with the act. The OHS Act focusses on repercussions for the employer should it not comply with the act.

An employee who falls victim to harassment and bullying cannot use COIDA to claim compensation,<sup>265</sup> although it affords compensation to victims of workplace injuries and diseases.<sup>266</sup> Tshoose points out that in general, health and safety legislation are intended to give specific content to the duty of care, and to enhance accountability.<sup>267</sup> Workplace compensation has not maximised its potential to promote preventative activities.<sup>268</sup> Though it is cheaper to run an effective rehabilitation scheme than merely paying long-term cash benefits to victims of occupational accidents or diseases, reintegration measures are still not sufficiently addressed in the South African laws.<sup>269</sup>

There is a need for an overall of the existing legislation to ensure that employers proactively take measures to prevent workplace harassment, violence and bullying. In addition, victims of workplace violence and harassment must have adequate resources to support, in addition to statutory compensation.

Legislation does not take away an employee’s right to hold the employer vicariously liable if that should apply. To claim at common law, an injured employee needs to prove negligence on the part of the employer, thus proving that the employer did not meet the ‘reasonable employer’ test, in order to recoup damages from the employer under the law of delict.<sup>270</sup> COIDA altered

---

<sup>262</sup> *Idem* at 36.

<sup>263</sup> *Ibid.*

<sup>264</sup> *Ibid.*

<sup>265</sup> See fn 166 above.

<sup>266</sup> *Ibid.*

<sup>267</sup> Tshoose, *Employer’s duty to provide a safe working environment: a South African perspective* (2011) 174.

<sup>268</sup> *Idem* at 175.

<sup>269</sup> *Ibid.*

<sup>270</sup> Smit *Law, Democracy and Development* (2021) 36.

the common law position in that the employee no longer has to prove negligence on the part of the employer to claim damages, albeit now stated as only a fixed amount to be claimed.<sup>271</sup>

Like in most civil law jurisdictions, the common law duty of care is being refined and given meaning through judgments of the courts and by the passing of legislation.<sup>272</sup>

Bullying in itself is yet to be recognised as a separate cause for claims in terms of the common law.<sup>273</sup> The Draft Code however defines bullying as a form of harassment, which could lead to depression.<sup>274</sup> Likewise, the courts have regarded depression as a prohibited ground of discrimination where the employer's conduct impaired the complainant's human dignity and where such was caused by harassment or psychological assault.<sup>275</sup> It has also recognised that a psychiatric disorder or psychological trauma was as much a personal injury as a cracked skull that may warrant compensation in terms of COIDA.<sup>276</sup>

The Draft Code however casts the net too wide by burdening employers with the conduct of third parties. If the Draft Code is passed in its current form, South Africa may benefit from UK case law (prior to the 2013 amendments of the Equality Act, 2010) that limited claims for direct discrimination by third parties to those instances where employers could have reasonably prevented third party harassment from occurring, or if the employer's failure to protect employees from harassment by third parties was discriminatory in itself.<sup>277</sup>

South Africa should ideally adopt a proactive preventative approach by tackling the root causes of violence and harassment as opposed to merely relying on punitive measures to eradicate these ills. Even so, recourse should be accessible to those who need it most. As stated by *Madonsela*:

‘The greatest challenge to social transformation towards socio-economic inclusion is inadequacy of systems thinking, impact consciousness and funding for social change seeking to end poverty and eliminate structural inequality exacerbated by a one size fits all paradigm underpinning law

---

<sup>271</sup> *Idem* at 37.

<sup>272</sup> *Ibid.*

<sup>273</sup> *Ibid.*

<sup>274</sup> *Ibid.*

<sup>275</sup> Smit *Law, Democracy and Development* (2021) 49.

<sup>276</sup> *Idem* at 50.

<sup>277</sup> Gilzean ‘Third-party Harassment’ 2011(101) *Employment Law Bulletin* at 5.

reform and policy interventions. If things persist the way they are, poverty and inequality will get worse, which is a threat to democracy, the rule of law and peace.<sup>278</sup>

Whilst it is helpful that the Draft Code articulates the various forms of violence that a worker may experience, it would have made more sense if South Africa formulated a simpler instrument, and one which regulated workplace and non-workplace violence and harassment under the same scope. In this regard the UK legislation is a good example.

Under UK law, employers could escape liability by simply having a policy on harassment; notifying third parties that harassment of employees is unlawful and will not be tolerated, for example by the display of a public notice; inclusion of a term in all contracts with third parties notifying them of the employer's policy on harassment and requiring them to adhere to it; encouraging employees to report any acts of harassment by third parties to enable the employer to support the employee and take appropriate action; and taking action on every complaint of harassment by a third party.<sup>279</sup>

By virtue of the Draft Code, employees will enjoy greater protection from the broader scope of violence and harassment in the workplace. Both compensation and damages can be claimed for acts of unfair discrimination under the EEA, although some will be forced through an expensive and retarded civil justice system to obtain recourse. Same applies to dismissal disputes of a discriminatory nature.

What is clear is that there is misalignment between the EEA, LRA and international norms as far as the definition of 'employee' and 'worker' is concerned. It is anticipated that such would be a major drawback for the protection of those who work in atypical employment or those involved in untraditional work arrangements. They nevertheless retain recourse in terms of the common law. It is time that the legislature started to engage with the idea of changing its policy stance by broadening the scope of employment legislation and in particular the definition of 'employee'.

---

<sup>278</sup> Address on World Social Justice Day by Prof T Madonsela (Law Trust Chair of Social justice University of Stellenbosch) 'Social Justice: What Are We Doing. Wrong?' available at <https://www.sun.ac.za/si/en-za/Documents/Events/Symposium%202018/1%20Madonsela%20-%20Social%20Justice.pdf>, accessed on 18 October 2021.

<sup>279</sup> Gilzean 'Third-party Harassment' 2011(101) *Employment Law Bulletin* 6.

The research question which this dissertation aims to answer is whether the current regulatory framework in South Africa is sufficient to address ‘violence and harassment’ in the workplace. As seen from the above, it is impossible to give a clear and definite answer.

There is protection but there is also definitely room for improvement as per the reasons and suggestions set out herein. This will ensure that all workers are protected against violence and harassment in the workplace – albeit only for purposes of the EEA.<sup>280</sup>

---

<sup>280</sup> In terms of s 1 of the EEA, 'employee' means any person other than an independent contractor who. '(a) works for another person or for the State and who receives, or is entitled to receive, any remuneration; and (b) in any manner assists in carrying on or conducting the business of an employer, and 'employed' and 'employment' have corresponding meanings.'

The Protected Disclosures Amendment Act 5 of 2017 contains the same definition. The Explanatory Memorandum to the latter Bill however proposed that the principal Act be amended by extending the ambit of the Act beyond the traditional employer and employee relationship. It progressively defined ‘business’, ‘worker’ and ‘temporary employment service’. This was unfortunately not achieved in the final version of the PDA.

## BIBLIOGRAPHY

---

### CASE LAW

<i>Atkins v Datacentrix (Pty) Ltd</i> (2010) 31 <i>ILJ</i> 1130 (LC)
<i>Barlow v Borough of Broxbourne</i> [2003] EWHC 50 QB ( <u>United Kingdom</u> )
<i>Biggar v City of Johannesburg, Emergency Management Services</i> (2011) 32 <i>ILJ</i> 1665 (LC)
<i>Brilliant and Others v Gauteng Gambling Board</i> [2015] ZALCJHB 379
<i>Campbell Scientific Africa (Pty) Limited v Simmers and others</i> [2015] JOL 34906 (LAC)
<i>Department of Labour v General Public Service Sectoral Bargaining Council &amp; Others</i> (2010) 31 <i>ILJ</i> 1313 (LAC)
<i>Dial Tech CC v Hudson &amp; another</i> (2007) 28 <i>ILJ</i> 1237 (LC)
<i>Dowson v Chief Constable of Northumbria Police</i> [2010] EWHC 2612 (QB) ( <u>United Kingdom</u> )
<i>Dunnachie v Kingston-upon-Hull City Council</i> [2004] UKHL 36 ( <u>United Kingdom</u> )
<i>Du Plessis and Rickjon Mining &amp; Engineering</i> (2018) 39 <i>ILJ</i> 1665 (CCMA)
<i>E v Ikhwezi Municipality and Another</i> (2016) 37 <i>ILJ</i> 1799 (ECG)
<i>Evans v Japanese School of Johannesburg</i> (2006) 27 <i>ILJ</i> 2607 (LC)
<i>Gaga v Anglo Platinum Ltd and Others</i> [2012] 3 BLLR 285 (LAC)
<i>Green v DB Group Services (UK) Ltd</i> [2006] EWHC 1898 (QB) (01 August 2006) ( <u>United Kingdom</u> )
<i>Grobler v Naspers</i> (2004) 25 <i>ILJ</i> 439 ©
<i>Harksen v Lane</i> 1998 (1) SA 300 (CC)
<i>Jansen v Legal Aid South Africa</i> (2018) 39 <i>ILJ</i> 2024 (LC)
<i>Johnson v Unisys Limited</i> [2001] UKHL 13 ( <u>United Kingdom</u> )
<i>Jordaan and Capitec Bank Ltd</i> (2018) 39 <i>ILJ</i> 1364 (CCMA)
<i>Kruger v Coetzee</i> 1966 (2) SA 428 (AD)
<i>Majrowski v Guy's and St. Thomas's NHS Trust</i> [2006] 3 WLR 125 ( <u>United Kingdom</u> )
<i>Mahlangu and Another v Minister of Labour and Others</i> (2021) 42 <i>ILJ</i> 269 (CC)
<i>Matambuye v MEC for education and Others</i> [2015] ZALCJHB 455
<i>Marsland v New Way Motor &amp; Diesel Engineering</i> (2009) 30 <i>ILJ</i> 169 (LC)
<i>McGregor v Department of Health, Western Cape and Others</i> [2020] ZALAC 61
<i>McGregor v Public Health and Social Development Sectoral Bargaining Council and Others</i> [2021] ZACC 14

<i>Media 24 Ltd and Another v Grobler</i> [2005] 3 All SA 297 (SCA)
<i>Mkhize and Dube Transport</i> (2019) 40 ILJ 929 (CCMA)
<i>Moatshe v Legend Golf and Safari Resort Operations (Pty) Ltd</i> [2014] 12 BLLR 1213 (LC)
<i>Motsamai v Everite Building Products (Pty) Ltd</i> [2011] 2 BLLR 144 (LAC)
<i>National Union of Metal Workers of South Africa &amp; Others v Bader Bop (Pty) Ltd &amp; Another</i> [2003] 2 BLLR 103 (CC)
<i>National Union of Mine Workers &amp; others v East Rand Gold &amp; Uranium Co Ltd</i> (1986) 7 ILJ 739 (IC)
<i>Nkabinde and Aveng Trident Steel (Pty) Ltd</i> (2020) 41 ILJ 507 (CCMA).
<i>Ntsabo v Real Security CC</i> (2003) 24 ILJ 2341 (LC)
<i>Numsa v Vetsak Co-Operative Ltd and others</i> (1996) 17 ILJ 455 (A)
<i>Old Mutual Life Assurance SA (Pty) Ltd v Makanda &amp; others</i> (2020) 41 ILJ 444 (LC)
<i>PE v Dr Beyers Naude Local Municipality and Another</i> [2021] 2 All SA 839 (ECG)
<i>PE v Ikwezi Municipality and Another</i> 2016 (5) SA 114 (ECG)
<i>Pioneer Foods (Pty) Ltd v Workers Against Regression (WAR) and Others</i> (2016) 37 ILJ 2872 (LC)
<i>Potgieter v National Commissioner of the South African Police Service</i> (2009) 2 BLLR 144 (LC)
<i>Prince v President of the Law Society and Others</i> 2002 (2) SA 794 (CC)
<i>Private Sector Workers Trade Union on behalf of Opperman and Gerrie Ebersohn Attorneys</i> (2019) 40 ILJ 1159 (CCMA)
<i>Rustenburg Platinum Mines Ltd v United Association of SA on behalf of Pietersen &amp; others</i> (2018) 39 ILJ 1330 (LC)
<i>S v Makwanyane</i> 1995 (3) SA 391 (CC)
<i>SA Broadcasting Corporation Ltd v Grogan NO and Another</i> (2006) 27 ILJ 1519 (LC)
<i>Shoprite Checkers (Pty) Ltd v Samka &amp; others</i> (2018) 39 ILJ 2347 (LC)
<i>Simmadari v Absa Bank Ltd</i> (2018) 39 ILJ 1819 (LC)
<i>University of Venda v Maluleke and Others</i> (2017) 38 ILJ 1376 (LC)
<i>Van Zyl v Duvha Opencast Services (Edms) Bpk</i> (1988) 9 ILJ 905 (IC)
<i>Walker v Northumberland County Council</i> [1995] 1 All ER 737 ( <u>United Kingdom</u> )

## LEGISLATION

<b><u>South Africa</u></b>	
Compensation for Occupational Injuries and Diseases Act	130 of 1993
Constitution of the Republic of South Africa	1996
Domestic Violence Act,	116 of 1998
Employment Equity Act,	55 of 1998
Labour Relations Act	66 of 1995
Occupational Health and Safety Act	85 of 1993
Promotion of Equality and Prevention of Unfair Discrimination Act	4 of 2000
Protected Disclosures Act	26 of 2000
Protection from Harassment Act	17 of 2011
Amended Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace,	GG7865 4 August 2005
Code of Good Practice on the Integration of Employment Equity into Human Resource Policies and Practices,	GG7866 4 August 2005
Draft Code of Good Practice on the Prevention and Elimination of Violence and Harassment in the World of Work,	GG43630 20 August 2020
Code of Good Practice on HIV and AIDS and the World of Work	GG 35435 15 June 2012
Code of Good Practice on the Employment of People with Disabilities	GG 39383 9 November 2015
Code of Good Practice on the Protection of Employees during Pregnancy and after the Birth of a Child	GG 19453 13 November 1998

<b><u>United Kingdom</u></b>	
Employment Rights Act, 1996	
Enterprise and Regulatory Reform Act, 2013	
Equality Act, 2010	
Human Rights Act, 1998	
Protection from Harassment Act, 1997	
Public Interests Disclosures Act, 1998	
Sex Discrimination Act, 1975	
Statutory Code of Practice: Employment	

## JOURNAL ARTICLES

Calitz K ‘Sexual harassment: why do victims so often resign? E v Ikwezi Municipality 2016 37 ILJ 1799 (ECG)’ (2019) <i>Potchefstroom Electronic Law Journal</i> 22
Eagle G ‘Crime, fear and continuous traumatic stress in South Africa: what place social cohesion?’ (2015) <i>Psychology in Society</i> 49
Gilzean S ‘Third party harassment’ (2011) <i>Employment Law Bulletin</i> 101(Feb) 4
Harthill S ‘Workplace bullying as an occupational safety and health matter: a comparative analysis’ (2011) 34 <i>Hastings International and Comparative Law Review</i> 253
Kubjana L ‘Understanding the law on sexual harassment in the workplace (through a case law lens): a classic fool’s errand’ (2020) 41(1) <i>Obiter</i> 88.
Langa P ‘Transformative Constitutionalism’ (2006) 17 <i>Stellenbosch Law Review</i> 351
Leoschut L ‘The influence of family and community violence exposure on the victimization rates of South African youth.’ (2008) 6(3) <i>Journal of Ethnicity in Criminal Justice</i> 1
Pienaar H, Cramer J & Bailey M ‘Violence and harassment in the workplace: employers’ duty bound to expand protection of victims’ (31 May 2021) <i>CDH Employment Law Alert</i>
Salt L & Lopes L ‘You say it best when you say nothing at all’ 2018 September <i>Without Prejudice</i> 3
Smit D ‘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) <i>Law, Democracy and Development</i> 25
Steinman S ‘Workplace violence in the health sector – country case study: South Africa’, Geneva: Country Case Study’ (2003) <i>World Health Organisation Publication</i>
Tshoose I ‘Employer’s duty to provide a safe working environment: a South African perspective’ (2011) 6(3) <i>Journal of International Commercial Law and Technology</i> 165

## BOOKS AND CHAPTERS IN BOOKS

Bendix S <i>Labour Relations - A Southern African perspective</i> 7th Edition (2019) Juta
Benjamin PS <i>Understanding the Occupational Health and Safety Act and the Compensation for Occupational Injuries and Diseases Act</i> (2011) Juta
Botha A <i>The experience and handling of workplace bullying</i> (unpublished M.Com thesis, North-West University, Potchefstroom Campus) 2012

Du Toit et al <i>Labour Relations Law: A Comprehensive Guide</i> 6 <sup>th</sup> Edition (2015) LexisNexis
Le Roux et al <i>Harassment in the workplace: Law, Policies and Processes</i> (2010) LexisNexis
Van Eck et al <i>Celebrating the ILO 100 years on: reflections on labour law from a Southern African perspective</i> (2020) Juta
Van Niekerk et al <i>Law@Work</i> 5 <sup>th</sup> Edition (2019) LexisNexis

## REPORTS

20 <sup>th</sup> South African Commission for Employment Equity Annual Report 2019/20
21 <sup>st</sup> South African Commission for Employment Equity Annual Report 2020/21

## INTERNATIONAL AND REGIONAL CONVENTIONS, STANDARDS AND RECOMMENDATIONS

ILO Harassment in the World of Work. Convention 2019 (No. 190)
ILO Recommendation Concerning the Elimination of Violence and Harassment in the World of Work 2019 (No. 206)
ILO Memorandum concerning the Obligation to submit Conventions and Recommendations to the Competent authorities, (1995) Geneva
European Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950)
ILO 'Report of the Meeting of Experts on Violence against Women and Men in the World of Work' (2 March 2017) Geneva
ILO 'Report V(2): Ending violence and harassment in the world of work' (12 May 2018) Geneva

## WEBSITES

URL link	Date accessed
<a href="http://www.labour.gov.za/DocumentCenter/Reports/Annual%20Reports/Employment%20Equity/2019%20-2020/20thCEE_Report_.pdf">http://www.labour.gov.za/DocumentCenter/Reports/Annual%20Reports/Employment%20Equity/2019%20-2020/20thCEE_Report_.pdf</a>	27/02/2021
<a href="https://www.history.com/topics/black-history/martin-luther-king-jr">https://www.history.com/topics/black-history/martin-luther-king-jr</a>	28/02/2021
<a href="http://onlinelibrary.wiley.com/doi/10.1002/9781118663219.wbegss004/full">http://onlinelibrary.wiley.com/doi/10.1002/9781118663219.wbegss004/full</a>	28/02/2021

<a href="https://www.endvawnow.org/en/articles/1921-overview.html">https://www.endvawnow.org/en/articles/1921-overview.html</a>	28/02/2021
<a href="https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_711891/lang--en/index.htm">https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_711891/lang--en/index.htm</a>	28/02/2021
<a href="https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_806022/lang--en/index.htm">https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_806022/lang--en/index.htm</a>	11/08/2021
<a href="https://www.saps.gov.za/services/crimestats.php">https://www.saps.gov.za/services/crimestats.php</a>	14/08/2021
<a href="https://workplacebullying.org/wp-content/uploads/2021/04/2021-Full-Report.pdf">https://workplacebullying.org/wp-content/uploads/2021/04/2021-Full-Report.pdf</a>	05/09/2021
<a href="https://workplacebullying.org/2021-wbi-survey/">https://workplacebullying.org/2021-wbi-survey/</a>	05/09/2021
<a href="https://cisp.cachefly.net/assets/articles/attachments/85727_21_cee_report.pdf">https://cisp.cachefly.net/assets/articles/attachments/85727_21_cee_report.pdf</a>	05/09/2021
<a href="http://www.ccma.org.za/advice/Information-sheet">www.ccma.org.za/advice/Information-sheet</a>	05/09/2021
<a href="https://www.lyonsbriviklaw.com/bullyingatwork/">https://www.lyonsbriviklaw.com/bullyingatwork/</a>	05/09/2021
<a href="https://uniglobalunion.org/news/historic-victory-battle-gender-equality-ilo-convention-end-violence-and-harassment-workplace">https://uniglobalunion.org/news/historic-victory-battle-gender-equality-ilo-convention-end-violence-and-harassment-workplace</a>	05/09/2021
<a href="https://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-of-experts-on-the-application-of-conventions-and-recommendations/lang--en/index.htm">https://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-of-experts-on-the-application-of-conventions-and-recommendations/lang--en/index.htm</a>	05/09/2021
<a href="https://www.gov.za/nr/node/801609">https://www.gov.za/nr/node/801609</a>	10/09/2021
<a href="https://www.ituc-csi.org/IMG/pdf/c190_mini_guide_en.pdf">https://www.ituc-csi.org/IMG/pdf/c190_mini_guide_en.pdf</a>	10/09/2021
<a href="https://www.sanews.gov.za/south-africa/emergency-plan-protect-women-and-children">https://www.sanews.gov.za/south-africa/emergency-plan-protect-women-and-children</a>	10/09/2021
<a href="http://www.labour.gov.za/labour-market-stakeholders-urged-to-make-submission-to-address-gender-based-violence-and-harassment-at-the-workplace">http://www.labour.gov.za/labour-market-stakeholders-urged-to-make-submission-to-address-gender-based-violence-and-harassment-at-the-workplace</a>	10/09/2021
<a href="https://www.gov.za/sites/default/files/Executive%20Summary-NDP%202030%20-%20Our%20future%20-%20make%20it%20work.pdf">https://www.gov.za/sites/default/files/Executive%20Summary-NDP%202030%20-%20Our%20future%20-%20make%20it%20work.pdf</a>	10/09/2021
<a href="https://www.ohchr.org/Documents/ProfessionalInterest/eliminationvaw.pdf">https://www.ohchr.org/Documents/ProfessionalInterest/eliminationvaw.pdf</a>	10/09/2021
<a href="https://www.undp.org/about-us">https://www.undp.org/about-us</a>	10/09/2021
<a href="https://doi.org/10.17159/1727-3781/2019/v22i0a5169">https://doi.org/10.17159/1727-3781/2019/v22i0a5169</a>	10/09/2021
<a href="https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=&amp;p_isn=51661">https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=&amp;p_isn=51661</a>	10/09/2021
<a href="https://chro.co.za/articles/4-main-forms-of-violence-and-harassment-in-the-workplace/">https://chro.co.za/articles/4-main-forms-of-violence-and-harassment-in-the-workplace/</a>	14/09/2021
<a href="https://www.justice.gov.za/forms/form_pha.html">https://www.justice.gov.za/forms/form_pha.html</a>	25/09/2021
<a href="https://www.cliffedekkerhofmeyr.com/en/news/publications/2021/Employment/employment-law-alert-violence-and-harassment-in-the-workplace-employers-duty-bound-to-expand-protection-of-victims.html">https://www.cliffedekkerhofmeyr.com/en/news/publications/2021/Employment/employment-law-alert-violence-and-harassment-in-the-workplace-employers-duty-bound-to-expand-protection-of-victims.html</a>	26/09/2021
<a href="https://www.withoutprejudice.co.za/free/article/6201/view">https://www.withoutprejudice.co.za/free/article/6201/view</a>	28/09/2021
<a href="https://www.gov.uk/discrimination-your-rights">https://www.gov.uk/discrimination-your-rights</a>	08/10/2021
<a href="https://www.gov.uk/guidance/equality-act-2010-guidance">https://www.gov.uk/guidance/equality-act-2010-guidance</a>	08/10/2021
<a href="https://www.equalityhumanrights.com/en/human-rights/human-rights-act">https://www.equalityhumanrights.com/en/human-rights/human-rights-act</a>	08/10/2021

<https://www.sun.ac.za/si/en->

[za/Documents/Events/Symposium%202018/1%20Madonsela%20-%20Social%20Justice.pdf](https://www.sun.ac.za/si/en-za/Documents/Events/Symposium%202018/1%20Madonsela%20-%20Social%20Justice.pdf)

18/10/2021