

18 OCTOBER 2021

# EMPLOYMENT LAW ALERT

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### Employee reporting obligations when seeking to hold an employer liable for sexual harassment in the workplace

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## Employee reporting obligations when seeking to hold an employer liable for sexual harassment in the workplace

While the court stressed at the outset of the judgment that sexual harassment is "*heinous and horrendous conduct since it undermines the dignity of women and the values enshrined in our Constitution*", it did not uphold the employee's claim, which sought to hold the employer liable for the acts of sexual harassment perpetrated by two of its employees.

**While employers have a statutory obligation to eliminate unfair discrimination in the workplace, an employer cannot be held liable for sexual harassment perpetrated by one of its employees if the employee who seeks to hold the employer liable has not discharged their obligations under section 60 the Employment Equity Act 55 of 1998 (Act).**

The reporting obligations of an employee who is subjected to sexual harassment in the workplace and who seeks to hold the employer liable were considered in the recent decision of the Labour Court in National Union of Metal Workers of South Africa and Another v Passenger Rail Agency of South Africa JS1071/18 (23 September 2021). While the court stressed at the outset of the judgment that sexual harassment is "*heinous and horrendous conduct since it undermines the dignity of women and the values enshrined in our Constitution*", it did not uphold the employee's claim, which sought to hold the employer liable for the acts of sexual harassment perpetrated by two of its employees.

The case turned on the application of section 60 of the Act, which the court viewed as a codification of the common law principle of vicarious liability i.e. where the wrongful acts of an employee during the course and scope of employment are attributed to the employer. Based on the undisputed evidence of the employee, the court found that the employee had been sexually harassed by two of her managers. Having made this finding, the court then considered the circumstances under which an employer is deemed to be a perpetrator of unfair discrimination under section 60 of the Act, notwithstanding the fact that an employee committed the sexual harassment and not the employer.

The court set out the steps of a section 60 claim as follows: (i) allege a contravention at the workplace, (ii) report the contravention immediately, (iii) prove the alleged contravention, and (iv) allege and prove the employer's failure to take the necessary steps. If an employee proves all four, they are entitled to a deeming order of liability. In order to escape liability, an employer must prove that it took the necessary and preventative steps.

### Reporting obligations and timing

Having found that the employee was subjected to sexual harassment, the court considered the second step and the employee's reporting obligations. In terms of section 60 there is an obligation to ensure that there is an "*immediate bringing to the attention of the employer*". As soon as allegations of sexual harassment have been reported to an employer it has an obligation to eliminate the conduct. Given this resultant obligation on the employer, the court found that an employee must act with the necessary haste. In this instance, there was a dispute as to whether the employee reported the contravention immediately. The court referred to the decision of the Labour Appeal Court in *Liberty Group v M.M* (JA 105/2015) (7 March 2017) in which the court suggested that the word "*immediate*" must be afforded what it termed a "*sensible meaning*", and that a limited delay in reporting would be acceptable (a delay of two months in the Liberty matter).

The court found that, on the employee's own version, she only brought the managers' conduct to PRASA's attention on 28 November 2016 when she lodged a formal grievance. This was some two to three years after the sexual harassment took place. The court found that this could not be construed as a limited delay, as

## Employee reporting obligations when seeking to hold an employer liable for sexual harassment in the workplace

*...continued*

This case is an important reminder to employees who are subjected to sexual harassment in the workplace to comply with internal policies relating to the reporting of sexual harassment and to ensure that incidents are reported as soon as possible.

contemplated and found to be acceptable in Liberty. In this instance and given the delay, the court found that PRASA had been deprived of its statutory duty to eliminate unfair discrimination. The sexual harassment was not immediately brought to the attention of PRASA within the contemplation of section 60(1) of the Act. As a result, the employee failed to demonstrate step (ii), as set out above.

Having made this finding, the court turned to address the related matter of whose attention the conduct was brought to. Section 60 refers to the employer. It was submitted on behalf of the employee that when she discussed the allegations with two PRASA employees, she was bringing it to PRASA's attention and PRASA failed to take the steps it was compelled to take in terms of section 60(2) of the Act. PRASA's witnesses testified that the employee should have utilised PRASA's sexual harassment policy, and that her conduct in sharing the allegations with her colleagues did not constitute a report to the employer. The court found that the reporting must be made to the employer through the mechanisms provided for in its adopted policy, and that confiding in a fellow employee did not amount to bringing the conduct to the employer's attention.

Finally, the court considered whether PRASA had taken steps to eliminate the conduct. It found that once the allegations were brought to the attention of PRASA in November 2016, the allegations were investigated by both internal and external parties. The fact that the employee refused to participate in the investigation (because it only focused on one of the managers) and that this impeded PRASA's ability to deal with the allegations, was not the fault of PRASA and did not mean that PRASA had not discharged its obligations.

In all of the circumstances and while the employee had been subjected to sexual harassment, the court found that PRASA had not contravened section 60. The employee had failed to bring the sexual harassment to PRASA's attention immediately and PRASA had taken reasonable steps to eliminate the conduct when it was finally brought to its attention. This case is an important reminder to employees who are subjected to sexual harassment in the workplace to comply with internal policies relating to the reporting of sexual harassment and to ensure that incidents are reported as soon as possible. In the absence of such steps, an employer can be prevented from discharging its statutory obligation to eliminate sexual harassment in the workplace.

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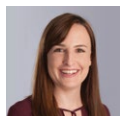
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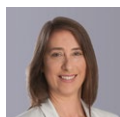
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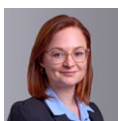
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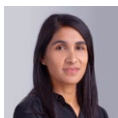
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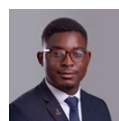
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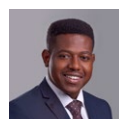
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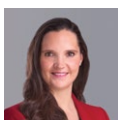
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