

EMPLOYMENT LAW ALERT

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Changing the narrative: Addressing 'justified' sexual harassment in the workplace

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In the case of *UNTU obo Nicholas Peter Nel v Transnet National Ports Terminal, a Division of Transnet SOC Ltd TNBC 59 (29 March 2022)*, an unfair dismissal dispute was referred to the Transnet Bargaining Council for arbitration following Nel's dismissal due to breaches of Transnet's Culture Charter (Charter) and Anti-harassment, Discrimination and Anti-Bullying Policy (Policy).

Nel, a senior employee, was charged with "*malicious gossip and humiliating comments*" under the Policy following a closed-door conversation in which sexual comments and remarks were exchanged between six male employees regarding fellow female employees. This conversation was – unbeknown to those present – recorded and widely circulated in the workplace. All but one of these employees were charged and subsequently dismissed for participating in the conversation and failing to report it to management.

Dissatisfied with his dismissal, Nel referred an unfair dismissal dispute to the bargaining council. During the arbitration proceedings, Nel stated that the conversation was acceptable within the Coloured community, and that this was how men liked to talk about women. Such a statement blatantly showed a lack of remorse for the comments he made. Shockingly,

the arbitrator found that the dismissal was unduly harsh as conversations such as the one under scrutiny are commonplace amongst dockyard workers globally and Nel was unaware of his duty to report the conversation. The arbitrator therefore awarded reinstatement, together with a written warning and a requirement that Nel submit a written apology and receive corrective training.

This case represents an example of the backdrop against which the new Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace (Code) was introduced. Under the Code, this type of conduct would not be tolerated. The Code clearly defines the different forms of harassment within the workplace – with sexual harassment defined in clause 5.1 – and sets out obligations for employers to follow, to ensure the achievement of the Code's objectives.

One such objective is the elimination of harassment in the workplace. Had the Code been in place sooner, then the award in the current matter might have been different. Notwithstanding this, the arbitration award clearly disregarded the experiences of the victims, their ostracisation within the workplace and the broader effect of harassment. It further rendered the employer's Policy futile.

These circumstances would, however, be addressed by the Code, due to the obligations placed on an employer to adopt harassment policies, to comply with the Code and to set out procedures through which instances of harassment will be addressed. The Code specifically focuses on the effects that harassment has on the victims, with strict procedures that are needed to be implemented in order to identify and address reported instances of harassment.

Changing the narrative: Addressing 'justified' sexual harassment in the workplace

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It is clear that the Code is a shift in the treatment of harassment in the workplace, and it shall ensure that a perpetrator cannot escape liability for their actions. Against the backdrop of the Code, Transnet had complied with its obligations as it had introduced a policy with a clear obligation on Nel to report the incident of harassment. Furthermore, Transnet had imposed a sanction of dismissal, which, taking into account the lack of remorse displayed by Nel, could not be faulted.

Transnet had a clear policy in place which set out the obligation of an employee to report instances of harassment, however, the arbitrator's award subsequently resulted in Nel circumventing the employer's policies.

The Code provides a new setting against which cases of sexual harassment and other forms of harassment need to be considered and adjudicated. It has become clear that cases like this represent intolerable and inexcusable behaviour, which can be eradicated under the auspices of the Code, to avoid arbitration blunders such as this one.

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