Worklaw's October 2022 Subscriber Webinar

Contents

Complying with the Code of Good Practice - the Prevention & Elimination of Harassment in the Workplace

In 3 March 2022 a new Code was gazetted under the Employment Equity Act entitled *The Prevention and Elimination of Harassment in the Workplace*.

1. **Why a new code covering harassment?**

   South Africa was re-admitted as a member of the International Labour Organisation (ILO) on 26 May 1994, following 30 years of isolation after the country withdrew from the ILO in 1964 as a result of political pressure.

   On 29 November 2021 South Africa ratified the ILO Violence and Harassment Convention, 2019 (No. 190). Ratification is a process which follows the submission of an ILO Convention to the SA parliament. Ratifying countries undertake to apply the Convention in national law and practice and to report on its application at regular intervals.

   The Code can therefore be seen as compliance with SA's obligation to enforce the ILO Convention.

2. **What is the significance of a code of good practice?**

   Section 203 of the LRA places an obligation on disciplinary chairpersons, arbitrators and judges. It requires that any person interpreting or applying any employment law must take into account any relevant code of good practice. The failure to do so could result in the decision being found to be unfair, or if it is an arbitration award, reviewable by the Labour Court.

3. **What types of harassment are covered?**

   The Code replaces the previous sexual harassment-specific Code and incorporates other aspects of harassment - general harassment and bullying, and 'racial, ethnic and social origin' harassment. This means that there is now a single new harassment Code, but which repeats much of what was contained in the previous sexual harassment Code.

4. **What is harassment?**

   The objective of this code is to eliminate all forms of harassment in the workplace and in any activity linked to or arising out of work.

   The term *"harassment"* is not defined in the EEA. Item 4 of the Code says harassment is generally understood to be –

   - unwanted conduct, which **impairs dignity**;
   - which **creates a hostile or intimidating work environment** for employees or has the effect of inducing submission by actual or threatened adverse consequences; and

- is related to one or more grounds in respect of which discrimination is prohibited in terms of section 6(1) of the EEA (more on this later).

Harassment includes violence and physical, psychological, emotional, sexual, gender-based and racial abuse. All forms of harassment must be eliminated, and specifically-

- sexual harassment;
- gender-based violence and harassment;
- bullying; and
- racial, ethnic or social origin harassment

A wide range of conduct in the workplace may constitute harassment, and the Code gives the following examples:

- slandering and maligning an employee or spreading rumours maliciously;
- conduct which humiliates, insults or demeans an employee;
- withholding work-related information or supplying incorrect information;
- sabotaging or impeding the performance of work;
- ostracising, boycotting or excluding the employee from work-related activities;
- persecution, such as threats and the inspiration of fear and degradation;
- intolerance of psychological, medical, disability or personal circumstances;
- surveillance of an employee without their knowledge and with harmful intent;
- use of disciplinary or administrative sanctions without objective cause, explanation, or efforts to problem solving;
- demotion without justification;
- abuse, or selective use of, disciplinary proceedings;
- pressurising an employee to engage in illegal activities and not to exercise legal rights;
- pressurising an employee to resign;

The Code goes further to signal that sometimes 'normal' or 'humorous' reactions can be a form of harassment. The Code says that *"passive-aggressive or covert harassment may include negative gossip, negative joking at someone's expense, sarcasm, condescending eye contact, facial expression, or gestures, mimicking to ridicule, deliberately causing embarrassment and insecurity, invisible treatment, marginalisation, social exclusion, professional isolation, and deliberately sabotaging someone's dignity, well-being, happiness, success, and career performance."*

What the Code makes clear is that the workplace should be a kind and supportive environment. Sensitivity to the consequences of unthinking harassment is required.

4.1 Bullying

The Code describes bullying as harassment which involves the abuse of coercive power by an individual or group in the workplace. Bullying involves intimidation, causing fear of harm, and may involve aggressive behaviour causing injury or

discomfort.

Bullying may include threats, shaming, hostile teasing, insults, constant negative judgment, and criticism, or racist, sexist, or LGBTQIA+phobic language. Bullying is usually psychological harassment causing emotional abuse.

Bullying is not just managerial behaviour. The term *'mobbing'* is used to describe harassment by a group – often co-employees – against an individual. Harassment can also be online cyber-bulling.

4.2 Sexual Harassment

The new Code substantially repeats the 2005 Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace, although there are some amplifications and changes.

There is a new paragraph which seems to be an attempt to capture aspects of cases decided since 2005. Item 5.3.1 reads:

"Sexual harassment is unwelcome conduct of a sexual nature, whether direct or indirect, that the perpetrator knows or ought to know is not welcome. Sexual harassment may be offensive to the complainant, make the complainant feel uncomfortable or cause harm or inspire the reasonable belief that the complainant may be harmed. Sexual harassment may interfere with the work of the complainant although it need not necessarily do so. Sexual harassment violates the rights of an employee and constitutes a barrier to equality in the workplace."

Note that the victim's subjective perception of harassment has to be reasonable, and that the informal and formal dispute resolution processes found in the earlier Code are retained and apply to all forms of harassment. Racial, ethnic or social origin harassment

4.3 Forms of racial harassment

- Abusive language and racist jokes, cartoons, or memes, including communications that amount to hate speech;
- Racially offensive written or visual material, including on-line harassment;
- Racist name calling or negative stereotyping impacting on a person's dignity;
- Offensive behaviour in the form of open hostility to persons of a specific racial or ethnic group;
- Subtle or blatant exclusion from workplace interaction and activities and other forms of marginalisation;
- Threatening behaviour, which intimidates a person or creates a hostile work environment.

Factors to consider include an assessment if the conduct is abusive, if it impairs the dignity of another employee, if it is directed at a specific employee, and if it has an impact on an employee.

Racial harassment must be assessed objectively with reference to the reaction of a normal or reasonable person. It has to be established on a balance of probabilities that the conduct complained of was related to race, ethnic or social origin, or a characteristic associated, or assumed to be associated with such group.

5. The Code in 5 sentences

- Employers must have a Harassment policy which is communicated to employees.
- Employers must take proactive and remedial steps to prevent all forms of harassment.
- Employers should create and maintain a working environment in which the dignity of employees is respected.
- The duty not to harass applies to employers, employees and trade unions.
- There must be clear procedures for resolving harassment disputes.

6. Practical steps to implementing the Code

In paragraph 4 above, we highlighted key steps in respect of which action plans will be required. We have attempted to summarise below important aspects or principles to be covered under each heading.

6.1 Develop a harassment policy

- The Code can be used as the main guide to capture the general definition of harassment (Clause 4), to incorporate the revised definitions of sexual harassment (Clause 5) and racial, ethnic or social origin discrimination (Clause 6).
- A policy MUST contain the statements listed in Clause 9(4).
- The informal and formal procedures set out in Clause 10 should be included.
- The availability of counselling, treatment, care and support programmes should be outlined.

6.2 Take proactive and remedial steps to prevent harassment

- The Code requires employers to conduct a risk assessment of harassment faced by employees (Clause 8(1)).
- The contents of the Harassment policy must be effectively communicated to employees (Clause 9(2)).
- Managerial employees must be educated about the policy and instructed how to handle allegations of harassment.
- Employers should ensure there are facilities for counselling, treatment, care and support (Clause 9(6)).

6.3 Create and maintain a working environment in which the dignity of employees is respected.

- Beyond communicating with employees about the policy, employers must be seen to take seriously alleged harassment.
- Senior management should be seen to 'live' the values expressed in the Code, and take steps to develop a respectful organisational culture.

- Management should, in conjunction with the union where appropriate, arrange ongoing awareness training programmes.
- Disciplinary procedures should be used to reinforce the employer's commitment to a harassment-free working environment.

6.4 Establish clear procedures for resolving harassment disputes

- Reporting on harassment should be facilitated through clear guidelines.
- Advice and assistance procedures should be available.
- Informal, mediatory procedures should be used where appropriate.
- Formal procedures, including disciplinary hearings and referring the grievance to the CCMA, should also be used.

7. Problems with enforcing the Code

The Code's clear message is that workplaces must be free from all kinds of harassment, and that in itself is an important landmark in our law and practice. But there are problems.

The essence of the employment contract is that an employee makes himself / herself available to the employer to perform the work agreed by contract, and unless an instruction is either illegal, unsafe or unreasonable, the employee must act in accordance with the instructions. Employers have the right to discipline employees for misconduct - with warnings, progressive discipline, and dismissal. Employers have the right to manage poor performance through 'evaluation, instruction, training, guidance and counselling'. These managerial functions are seldom welcomed and often resented. To do their jobs, managers have to ensure that operational requirements - including efficiency, collegiality, competence, honesty, reliability - are managed well.

This difficult and often contested role is given little recognition or weight in this Code, which, through its multiple examples of what could be harassment, opens the door to dispute every instruction, look or gesture. An example: an employer is entitled to resolve incapacity and disability, particularly where reasonable accommodation cannot be made, and this process invariably comes with frustration and awkwardness. How close is that to *"intolerance of psychological, medical, disability or personal circumstances"?* A fair decision to dismiss could arguably be interpreted as harassment, and it is unfortunate that the Code does not recognise this and provide the balance required.

But the main conceptual problem is that issues which are already covered by the unfair dismissal concept and unfair labour practice definition are now also a form of discrimination. Specifically, from Item 4.7.5 –

- use of disciplinary or administrative sanctions without objective cause, explanation, or efforts to problem solving
- demotion without justification
- abuse, or selective use of disciplinary proceedings

These sort of allegations are dealt with routinely as 'unfair dismissal' or 'unfair labour practice' disputes, but through their incorporation into the Code are likely to

result in more than one dispute arising out of the same set of facts. This is not an entirely new problem - the LAC in *ARB Electrical Wholesalers (Pty) Ltd v Hibbert (DA3/13) [2015] ZALAC 34; [2015] 11 BLLR 1081 (LAC); (2015) 36 ILJ 2989 (LAC) (21 August 2015)* held there is no bar to an employee claiming compensation for unfair dismissal under the LRA and compensation for unfair discrimination under the EEA, although the employer must not be penalised twice for the same wrong. We hope wisdom prevails as found in *Feni v Commission for Conciliation, Mediation and Arbitration and Others (JA30/2019) [2020] ZALAC 24; (2020) 41 ILJ 1899 (LAC)* where the LAC held that where there is one dispute, there should be one set of proceedings. It is not the *reason* for a dismissal which is referred to conciliation but its *unfairness*.

An additional jurisdictional issue also needs to be considered. If an employee for example frames an unfair dismissal dispute as unfair discrimination in the form of harassment, the CCMA may lack jurisdiction to arbitrate the harassment dispute (unless all the parties agree), which may then have to be referred to the Labour Court.

We think a further significant problem for employees alleging harassment will be caused by the Code in item 4 effectively linking harassment to the discrimination grounds prohibited in terms of section 6(1) of the EEA (race, gender, sex etc). In the same way that it has in practice been very difficult for applicants to allege and prove 'arbitrary' discrimination, with the courts requiring applicants to pin their discrimination allegations on grounds analogous to those already listed in section 6(1), so it may also prove difficult for an applicant to succeed in a harassment claim, where these actions cannot be clearly linked to grounds listed in section 6(1).

8. Legal reasons to comply with the Code

Aside from the obvious human resource reasons why it's a good idea to comply with the Code, employers need to be aware of their potential legal liability for damages under section 60 of the EEA.

Recent examples of damages being awarded against employers for not doing "*all that was reasonably practicable*" under section 60(4) to ensure that harassment did not occur:

Nthabiseng Chautsane v Ison Xperiences (Pty) Ltd [Arb] CCMA case number GAJB11017-22 – **R200 000** damages awarded

Shoprite Checkers (Pty) Ltd v JL and Others (C886/17; C627/2018) [2021] ZALCCT 95; (2022) 43 ILJ 903 (LC) (10 December 2021) – **R50 000** damages awarded by CCMA arbitrator, reduced on appeal to **R25 000**

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Compiling effective evidence to support disciplinary charges

A. Evidence generally

What do we mean by the 'rules of evidence'?

Generally regarded as those rules and principles that govern how facts are proved in legal proceedings. They govern –

- what evidence is allowed to be used – ie **admissibility** of evidence; and
- how to assess the evidence led, to give you the best chance of arriving at the truth – ie **credibility** of evidence.

Do we need to apply the 'rules of evidence' at internal hearings?

It's clear from the Dismissal Code of Good Practice that it's not legally necessary to apply formal rules of evidence: **Item 4(1) of the Dismissal Code of Good Practice** talks of an employer conducting *an investigation* to determine whether there are grounds for dismissal and that this *does not need to be a formal enquiry*.

But is it a good idea to do so? Does it give a chairperson of a hearing the best chance of getting it right?

Although hearings are meant to be relatively informal and rules of evidence don't legally apply, we suggest that by following basic 'rules' of evidence a chairperson has the best chance of arriving at the truth, and also will prevent your decisions being overturned at the subsequent 'de novo' CCMA arbitration hearing. If you are going to lose at the CCMA based on the evidence rules applied there, rather know that up front and apply similar rules at your internal hearing?

Consider 2 separate independent hurdles:

1 is evidence admissible (allowed to be used)**?**

Let's consider a few examples, starting with hearsay evidence – one of the most frequent types of evidence challenged:

(a) Hearsay

What is hearsay evidence? Evidence that cannot be tested through cross examination: a doctor's report for example. Whilst hearsay evidence is generally inadmissible, the 1988 Law of Evidence Amendment Act gives a presiding officer a discretion to allow hearsay evidence is specified circumstances, such as when it's in the interests of justice to do so. Doctor's reports are generally admitted as evidence because of the difficulties in calling doctors to attend hearings.

(b) Affidavits:

Say a manager says he is too busy to attend a hearing, and provides an affidavit as evidence: should the chairperson allow this evidence to be used?

Unless it's the "*best evidence*" available (eg the manager has since died or emigrated), the chairperson should say that if you want me to take this person's evidence into account, you must call the witness to give oral evidence and be cross examined. Otherwise, how else is the chairperson going to assess disputes of fact between the version given by that manager and other witnesses?

If it is the "best evidence" available, it can be admitted but the chairperson would have to decide how much weight to attach to that hearsay evidence: generally direct oral evidence would carry more weight than a contradictory hearsay version.

(c) 'Similar fact' evidence?

Can the fact that the employee committed a similar offence before, be used to prove he/she has now done it again? No – whilst there are some technical exceptions, each case generally has to be assessed on the merits of that case and the evidence presented of that specific misconduct. That evidence would not be admissible.

2 Is the evidence credible/persuasive?

The second hurdle. Credibility depends on a basket of factors, to decide whether someone is –

- telling the truth
- lying
- telling the truth but mistaken (don't forget this 3rd option - often the case)

There is no specific formula to assessing credibility, but a few aspects that may influence a credibility finding are the following:

- significance of open / leading questions that were used to obtain the evidence in the first place;
- a witness' demeanour;
- the independence of the witnesses and whether they may have a motive;
- corroboration from other evidence;
- and most importantly, the probabilities.

Q of the onus and the burden of proof required

If, after hearing all the evidence, you are still uncertain whether the employee committed the offence, can you impose a lesser sanction - eg final warning rather than dismissal? No- deciding on guilt and sanction are 2 independent issues, and can't be blurred. If the evidence is not sufficient to establish guilt on a balance of probabilities, no sanction should be applied.

The onus – what does this mean in practice? – basically the benefit of the doubt should be given to the employee, as the employer has the duty to prove allegations of misconduct.

'Balance of probabilities' vs 'beyond a reasonable doubt' – different levels of proof lead to different outcomes in criminal and civil matters.

B. Linking the evidence to what needs to be proved

Summary - Item 7 of the Dismissal Code of Good Practice:

- Was there a breach of a company rule?
- Was the rule valid reasonable?
- Was the employee aware of the rule, or could reasonably be expected to have been aware?
- Was the rule consistently applied by the employer?
- Is dismissal an appropriate sanction for breaking the rule?

Let's consider what evidence may be available to prove each element if disputed
(note – 'admissions' are a form of evidence)

1. Was there a breach of a company rule?

(note 2 aspects to this – the existence of a rule, and the breach)

Take an obvious example – theft: what evidence would you need to prove this if it was disputed?

- Existence of the rule – a company policy
- Breach of the rule – witnesses who observed the theft, video footage perhaps, witness who saw the stolen goods in the employee's possession etc

Frequently involves major disputes of fact – and it's in these cases that your evidence becomes critical, and all the issues discussed above under section 1 become relevant.

Controversial areas:

(i) essential that the wording of the alleged breach is appropriate to what happened:

Austin-Day v ABSA Bank [2022] LAC – bank manager didn't follow correct procedures but charged with dishonesty and not proved. To substantiate allegations of misconduct, an employer needs to provide evidence that proves the employee is guilty of the specific allegations made.

(ii) conduct outside the workplace

Can you discipline an employee for conduct occurring outside working hours and off company premises?

Yes – if the conduct impacts on the employment relationship

Horn v Beesnaar 2022 LAC assault of a fellow employee outside the workplace after an altercation over a driving incident. "*an employer may discipline an employee's misconduct which occurs away from the workplace, if the*

misconduct has the effect of destroying or seriously damaging the employment relationship".

(iii) testing positive for cannabis vs intoxication

Enever v Barloworld 2022 LC – seemed to mix up the 2. Suggest our remedy to this dilemma - until such time as the *"scientifically validated test"* the Court called for is widely available to test levels of impairment, a distinction perhaps needs to be made between positive alcohol and cannabis test results. Whilst a positive alcohol test is clear proof of impairment, perhaps a positive cannabis test should trigger a second test of some sort, to assess actual levels of impairment?

2. Was the rule valid / reasonable?

Often not challenged, but if it was, what evidence might be applicable to prove this? eg – for theft – witness giving evidence of past estimated losses due to pilferage.

3. Was the employee aware of the rule, or could reasonably be expected to have been aware?

Again, often not challenged, but if it was, what evidence might be applicable to prove this? -eg for theft – HR witness producing employee's signed contract of employment, confirming having agreed to the company's disciplinary policies.

Q of '*ought to be aware'*:
Volkswagen v NUMSA & Others [2022] LC
Employee facilitated serious misconduct by another employee, who staged the hijacking of a company vehicle to avoid being found to have damaged the vehicle: employee introduced the other employee to the highjacker (her boyfriend). The CCMA commissioner found dismissal unfair, saying the company had no written policy dealing with the reasons for the employee's dismissal.

Overturned by LC which confirmed this:
The failure to present a written policy against facilitating the commission of the misconduct is of no relevance, if the employee ought to have been aware it would be a breach of terms and conditions of employment.

4. Was the rule consistently applied by the employer?

Examples - eg for theft – HR witness testifying about previous theft cases.
Burton & Others v MEC Dept of Health E Cape 2022 LAC
Highlighted 2 aspects - *historical* and *contemporaneous* consistency.
Found there was good reason to treat cases differently due to different facts, length of service and disciplinary records. Each case still has to be viewed on its merits.

5. Is dismissal an appropriate sanction for breaking the rule?

Mitigating and aggravating circumstances – example *Ekurhuleni Municipality v SALGBC & others LAC – said "sexual harassment committed by an official employed in the public sector, in the course of providing services to a member of the public, constitutes serious misconduct and an abuse of a position of authority. Where such harassment is committed more than once and directed at the same member of the public, this makes it all the more serious".*

Is it always necessary to lead evidence that dismissal is the appropriate sanction?
No – see
Autozone v Motor Industry Dispute Resolution Centre 2019 LAC
An employer relying on irreparable damage to the employment relationship to justify dismissal should lead evidence on that, unless this is apparent from the nature of the offence.
Rustenburg Platinum Mines v UASA obo Pietersen 2018 LC
Evidence to establish a breakdown in the trust relationship for dismissal may not be necessary - it may be implied from the gravity of the misconduct.

Expired warnings – are they ever relevant?
Yes, in limited circumstances: see-
NUM obo Selemela v Northam Platinum [2013] LAC
Lapsed warnings may be taken into account if the employee has a propensity to commit misconduct at convenient intervals outside the period of applicability of those warnings.
Transnet Freight Rail v Transnet Bargaining Council (2011) LC
Previous expired warnings could be taken into account when they showed a consistently deplorable employment record. An employer is always entitled to look at the cumulative effect of the misconduct of an employee.

Summing up

We have tried to give you practical advice on how compiling effective evidence to support disciplinary charges, and we hope you have found it useful.

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