Employment Law update

Is your workplace "a lonely hearts club?"

In *Rustenburg Platinum Mines Limited v UASA obo Steve Pietersen* the Labour Court, delivered a scathing judgement wherein it criticised a CCMA commissioner for taking a "misogynistic, patriarchal and insensitive approach" towards allegations of sexual harassment.

This judgement demonstrates the seriousness with which the Labour Courts are viewing sexual harassment in the workplace and is a precautionary tale for all employers to review the wording of their sexual harassment policies accordingly. This is especially important considering that an employer may be held liable for damages in terms of section 60 the Employment Equity Act in circumstances where it has failed to take proactive steps to guard against sexual harassment

In this case Steve Pietersen ("**Pietersen**"), who held a senior position as an engineering specialist, was dismissed in 2015 after he was found guilty of sexually harassing Ms Jane Kgole ("**Kgole**") for a number of years. Kgole alleged that in 2007, Pietersen laid charges of misconduct against her. She was issued with a final written warning despite Pietersen calling for her dismissal. On the same day as Kgole's disciplinary enquiry, she alleged that Pietersen and herself attended a braai event hosted by the company wherein Pietersen committed sexual harassment by:

- Suggesting that she stays with Pietersen to help her with expenses; and
- Proposing to her that they should sleep together.

Despite Kgole's rejection of these advances, Kgole alleged that Pietersen continued with similar conduct for a number of years. Kgole testified that at one stage Pietersen informed her he would help her get promoted if she agreed to sleep with him.

These allegations of sexual harassment went unreported for numerous years. Kgole testified that she had not immediately reported the matter as she was concerned she would ruin Pietersen's life. She was also concerned about the impact this would have on Pietersen's wife, who also worked for the same employer.

Pietersen denied that he made any sexual advances towards Kgole and accused her of fabricating her version of the events as she held a grudge against him as a consequence of him disciplining her in 2007.

Pietersen was nonetheless dismissed whereafter he referred an unfair dismissal claim to the CCMA. The commissioner described Pietersen's conduct as "at best, they appear to be a love proposal". The commissioner further took issue with the fact that Kgole didn't out rightly say "no" to Pietersen's advances, but found that she was docile in rejecting them. The commissioner found that although

Pietersen may have made advances of a sexual nature towards, it did not constitute sexual harassment and therefore held that his dismissal was unfair.

On appeal, the Labour Court expressed horror at the findings of the CCMA and overturned the commissioner's decision, ruling that the dismissal was substantively fair. The judge held that "A workplace is exactly that and should not ordinarily be confused with…a lonely hearts' club for love-sick employees".

In relation to Kgole's failure to report the incidents timeously, the Labour Court held that by concluding that this encouraged further advancements sent the message that harassers can persist with the unbecoming conduct, hoping they will succeed and not get reported. To this end, the Labour Court held that conclusions of this nature were "patriarchal and misogynistic in the extreme". Moreover, Kgole's docile conduct was deemed irrelevant. The Labour Court made it clear that "Silence, no matter how prolonged it may be, does not amount to consent".

In the face of the global #MeToo movement against sexual harassment, this judgement was necessary to align South African labour law with the current worldwide social opinion. Employer's should consider updating their sexual harassment policies and consider training their employee's in this regard to safeguard them against sexual harassment in the workplace.

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