

constitutional damages for sexual harassment

by susan stelzner

Employers need to be aware that you can be ordered to pay constitutional damages if your employee is sexually harassed at work even if neither you nor the complainant know the identity of the perpetrator. Read more below about the latest case, **Piliso v Old Mutual Life Assurance SA (Pty) Ltd**, and what you need to do to avoid the risk of such an award against you.

Ms Piliso found a note written in Afrikaans on a photograph of herself, pinned to her workstation. The next day she found a similar note, this time written in English. The judgment does not reflect exactly what was written in these notes but does say that the words 'were extremely crude and offensive'. Ms Piliso felt shocked and unsafe and because the notes were anonymous, did not know whom to trust. Although she immediately brought the incidents to management's attention, she felt that such steps as they took were inadequate. She eventually instituted a claim in the Labour Court based on three alternative grounds:

1. that the employer was statutorily liable in terms of sec 60 of the EEA for the discriminatory conduct committed against her by the anonymous author of the notes; alternatively,
2. that the employer was liable at common law (in delict) on the basis of vicarious liability; and, in the further alternative,
3. for the infringement of her constitutional right to fair labour practices.

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The employer (Old Mutual) eventually admitted that sexual harassment had taken place, but argued that it could not be proven that one of its employees was responsible for the incident because no-one was able to identify the perpetrator. Therefore, it argued that it could not be liable in terms of sec 60 of the EEA or on the basis of vicarious liability for the incidents.

The court accepted Old Mutual's argument on the first two alternatives. It said that for any claim based on vicarious liability of an employer either in terms of sec 60 of the EEA or under the common law (a delictual claim) it was essential for the harassed employee to prove that an employee of the company acting in the course and scope of his/her duties was responsible for the harassment. As Ms Piliso couldn't prove this, she could not succeed on the basis of the first two claims.

However, the court granted her further alternative claim for damages based on the infringement of her constitutional right to fair labour practices. This claim is permissible where no statutory remedies are available or no adequate common-law remedies exist. After an analysis of the facts, the court held that Old Mutual's response to the incidents once they were brought to its attention was not sufficient or reasonable. It should as a minimum have done the following once the incidents were brought to its attention:

- acted promptly and started an investigation making every effort to find the perpetrator, keeping Ms Piliso informed about what was being done;
- provided the employee with the best possible support (consultation and counselling sessions) to establish the psychological impact on the employee and what could be done to support her;
- taken reasonable steps to prevent a similar incident from re-occurring.

Old Mutual had failed to meet the minimum fair labour practices that could be expected of it in the circumstances and therefore Ms Piliso's constitutional right to fair labour practices had been violated. Old Mutual's inaction after the incidents had caused her psychological distress (in addition to the stress caused by the incidents themselves). Taking account of the fact that only part of her psychological distress was caused by Old Mutual and the fact that Ms Piliso had fully recovered from the traumatic experience, the court ordered Old Mutual to pay compensation in the amount of R45 000 and to pay Ms Piliso's costs, including the costs of her expert witness.

We will discuss this case in more detail at our client conference in May.

liability for injuries to brokers' staff: a shot in the arm?

by stuart harrison

There are few businesses these days that do not make use of labour brokers. Using staff provided by labour brokers is a seductive alternative for companies that have become weary of the many and varied obligations involved in being an employer nowadays. What is often not appreciated, however, is that while companies that make use of labour brokers are relieved of a wealth of obligations that they would otherwise owe if they were the employer, they also lose some of the statutory protections from liability that employers enjoy.

This was illustrated in a matter that was recently considered by the Supreme Court of Appeal. In **Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Rieck**, Ms Rieck had worked as a cashier in a retail shop attached to a poultry farm run by Rocklands Poultry in Uitenhage. She was employed by a labour broker who made her services available to Rocklands Poultry in return for a fee. One afternoon, a group of armed men entered the retail shop and robbed the staff and customers. Before they left, they became aware that security personnel had been alerted to the robbery and they then seized Ms Rieck and, holding a gun to her head, forced her to accompany them as they fled.

Outside the shop they called upon the security personnel to back off otherwise they would shoot Ms Rieck. They then bundled her into the rear seat of a vehicle belonging to a customer that was parked outside the shop and, with some of the robbers on either side of her in the rear seat, the vehicle sped away swaying from side to side as the wheels spun on the gravel. Rocklands Poultry's loss control officer had been in his office at the time but when he was alerted to the robbery in progress, he rushed over and saw the three robbers leave the shop with Ms Rieck and force her into the vehicle.

He then ran to the main access gate and, as the vehicle sped past him, he

fired two shots from his handgun at the departing vehicle, intending to strike one of the wheels and prevent its escape.

Two shots were also fired by one of his colleagues for the same purpose. The vehicle continued on its way but one of the shots had struck the rear of the vehicle, penetrating the rear seat and hitting Ms Rieck in the arm. When the robbers became aware that she had been shot, they appeared to panic and abandoned the vehicle (and Ms Rieck in it) in a nearby township, where she was rescued by local residents.

Ms Rieck sued Rocklands Poultry for damages arising from her injury. Rocklands Poultry defended the matter asserting, in the first place, that it was reasonable for its employees to shoot at the vehicle in order to stop it and thereby avoid the risk that Ms Rieck might be killed by the robbers if they managed to escape and, secondly, that the statutory immunity for employers for liability for workplace injuries provided for in Section 35(1) of the Compensation for Occupational Injuries and Diseases Act 130 of 1993, applied with the result that Ms Rieck's claim ought to lie against the Workmen's Compensation Commissioner, and not Rocklands Poultry.

The SCA rejected the assertion that it was reasonable to shoot at the vehicle in the circumstances, finding that it was no less than foolhardy to attempt to prevent the escape of the armed robbers who were holding Ms Rieck hostage as it exposed her to very real and immediate danger from any of a number of causes which far outweighed the possible risk to her safety if the robbers escaped [for example, she could have been struck by a wayward bullet (as she was), she might have been injured if the shots caused the driver to lose control over the car and, indeed, if the shots had achieved their purpose and stopped the robbers' vehicle, she would have been exposed to the risk of again being held with

a gun to her head while the robbers persisted in attempting to escape].

The attempt by Rocklands Poultry to rely on Section 35(1) of COIDA was also rejected by the SCA, which examined the lengthy legislative history of workmen's compensation in South Africa together with the definition of "employee" and "employer" in COIDA and concluded that the legislation had consistently recognized that, for its purposes, a workman has only one employer at any time (there are exceptions that are not material for present purposes), which is the person with whom the workman is in a contractual relationship of employment. Importantly for this case, the SCA held that that person remains the workman's employer even if the workman

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performs his services for another. For purposes of COIDA, therefore, the labour broker was the employer of Ms Rieck, and not Rocklands Poultry, and therefore Rocklands Poultry was not immunized in terms of Section 35 of COIDA against an action for damages. Rocklands Poultry was accordingly liable to Ms Rieck for the damages suffered by her as a result of her being shot in the arm by one of the Rocklands Poultry employees.

Companies who use staff provided by labour brokers should be aware, therefore, that they do not enjoy COIDA immunity from claims by such staff for workplace injuries, deaths or diseases (which claims can be substantial). Apart from paying particular attention to providing a safe workplace for such staff, therefore, such companies may also wish to consider taking out an appropriate insurance to cover their potential liability in this regard.

labour inspection under the bcea

by alex ferreira and lee-ann waterboer

The Basic Conditions of Employment Act ("the BCEA") provides that a labour inspector can enter any workplace at any reasonable time for the purposes of monitoring and enforcing compliance with employment laws. A labour inspector normally gives written notice to employers of such an inspection. Notice is, however, not a requirement as the BCEA makes provision for entry of the workplace without a warrant or notice except in the case where the workplace is a home. A labour inspector may request disclosure of any information on any employment law related matter. These are some of the things you should have in place so that you are able to answer an inspector visits your business.

"a labour inspector can enter any workplace at any reasonable time"

Statement of employee rights in terms of Section 30 of the BCEA

Section 30 of the BCEA requires an employer to display at the workplace, where it can be read by the employees, a statement setting out the rights provided to employees by the BCEA. Such statement must be in the official languages spoken in the workplace.

Attendance register in terms of Section 31 of the BCEA

An employer is obliged to keep a record of each employee for a period of 3 years from the date of the last entry in the record. One of the reasons for this requirement is presumably to ensure that if an employee lodges a civil claim against an employer within the 3-year prescription period, the evidence will remain on record.

Each record must contain:

- the employee's name and occupation;
- the time worked by each employee;
- the remuneration paid to each employee;
- the date of birth of any employee under the age of 18 years; and
- any other prescribed information.

An employer who keeps records in terms of this section is not required to keep any other record of time worked and remuneration paid that may be required by any other employment law. An employer must create such an attendance register containing the above information, should such a register not exist at the workplace.

Written particulars of employment in terms of Section 29 of the BCEA

The BCEA requires employer to provide written particulars of employment to an employee as soon as the employee commences employment. These written particulars must include:

- the full name and address of the employer;
- the name and occupation of the employee, or a brief description of the work for which the employee is employed;
- the place of work and, where the employee is required or permitted to work at various places, an indication of this;
- the date on which the employment began;
- the employee's ordinary hours of work and days of work;
- the employee's wage or the rate and method of calculating wages;
- the rate of pay for overtime work;

- any other cash payments that the employee is entitled to;
- any payment in kind that the employee is entitled to and the value of the payment in kind;
- how frequently remuneration will be paid;
- any deductions to be made from the employee's remuneration;
- the leave to which the employee is entitled;
- the period of notice required to terminate employment, or if employment is for a specified period, the date when employment is to terminate;
- a description of any council or sectoral determination which covers the employer's business;
- any period of employment with a previous employer that counts towards the employee's period of employment;
- a list of any other documents that form part of the contract of employment, indicating a place that is reasonably accessible to the employee where a copy of each may be obtained.

The above information must be updated when necessary and an employee must be given a copy of the document reflecting the change(s). An employer must ensure that the employee understands the written particulars, for example, by supplying them in a language that the employee understands. The

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employer is obliged to keep these particulars for a period of three years after termination of the employee's employment. An employer must collect and collate all the above written particulars and keep them on record for the purposes of a labour inspection.

“the employer is obliged to keep these particulars for three years after termination of employment”

Information about remuneration in terms of Section 32 and Section 33 of the BCEA

Remuneration in money should be paid in South African currency either daily, weekly, fortnightly or monthly. Such remuneration should either be paid in cash, by cheque, or by direct deposit into a bank account designated by the employee. Payment must take place no later than seven days after the completion of the period for which the remuneration is payable or after termination of employment. Any payment in cash or by cheque must be made at the workplace or at a place agreed to by the employee. The payment must be made during the employee's working hours or within 15 minutes of the commencement or conclusion thereof. The payment must be in a sealed envelope. It then becomes the property of the employee.

An employer must supply an employee with certain information in writing on each pay day. It usually takes the form of a pay slip. The following information must be supplied:

- The employer's name and address;
- the employee's name and occupation;
- the period for which the payment is made;
- the employee's remuneration in money;
- the amount and purpose of any deduction made from the remuneration;
- the actual amount paid to the employee; and
- if relevant to the calculation of that employee's remuneration—
 - the employee's rate of remuneration and overtime rate;

- the number of ordinary and overtime hours worked by the employee during the period for which the payment is made;
- the number of hours worked by the employee on a Sunday or public holiday during that period; and
- if an agreement to average working time has been concluded in terms of section 12, the total number of ordinary and overtime hours worked by the employee in the period of averaging.

The above information must be given to the employee at the workplace or at a place agreed to by the employee, during the employee's ordinary working hours or within 15 minutes of the commencement or conclusion of those working hours. The payslips used by the employer should be amended to contain all of the information described above, should this not already be the case.

In our next newsletter we will tell you about your compliance obligations under other pieces of labour legislation and about which you can also be asked by a labour inspector.

possible defences to a compliance order

Here are some **practical tips** that could help you if you are served with a compliance order by a labour inspector.

- A labour inspector can't issue a compliance order dealing with an amount that is payable to an employee under the BCEA if the employee is covered by a collective agreement that provides for disputes of this nature to be resolved by arbitration.
- A labour inspector can't issue a compliance order dealing with

an employee who is a senior manager or an employee who earns more than the threshold which is currently R115 572 per year.

- A labour inspector can't issue a compliance order if other proceedings have been instituted for the recovery of an amount, or if proceedings were previously instituted but withdrawn (which means that an employee can't first try a civil claim and then if that does not work ask the department of labour to issue a compliance order.)

- A labour inspector can't issue a compliance order if the amount has been payable by you to the employee for longer than 12 months before either the date on which the employee first complained to a labour inspector OR the date on which the inspector first tried to secure your written undertaking to pay the amount.

If you want to **object** to a compliance order you must do so in writing to the Director-General within 21 days of receiving the order.

who is an employee?

by itayi gwaunza

A new Code of Good Practice: Who is an Employee ("the Code") was recently issued.

The Code primarily sets out guidelines for determining whether persons are employees as opposed to independent contractors for purposes of employment legislation such as the Labour Relations Act ("LRA") and the Basic Conditions of Employment Act ("BCEA") and is a useful document to refer to for anyone who is required to make the distinction between an employee and independent contractor.

Anyone applying or interpreting employment legislation is required to take the Code into account and the various court decision that have arisen dealing with the distinction between employees and independent contractors. The Code makes reference to some of those cases.

Some of the specific issues that are dealt with in the Code are the following:

- **The Presumption as to who is an Employee**

The Code deals with the presumption as to who is an employee which is referred to in the LRA and the BCEA. The presumption applies to employees who earn below the threshold amount referred to in the BCEA (currently R115 572 gross earnings per annum). The Code confirms that in any proceedings in terms of the BCEA or LRA if a party is able to demonstrate the presence of any one of seven factors listed in the LRA and BCEA then that person is presumed to be an employee and the onus will be on the other party to disprove that the person is an employee. The Code discusses the 7 factors in some detail.

- **Distinguishing between an Employee and Independent Contractor**

The Code goes into some detail on how you can go about distinguishing between an employee and an independent contractor or proving that a person who is presumed to be an employee is in fact

not an employee. For example the Code highlights the various factors that the Courts may take into account when tasked with determining whether a person is an employee or an independent contractor and discusses those factors in some detail.

- **Temporary Employment Services (Labour Brokers)**

The Code also sets guidelines on how to determine whether persons that are supplied to a company by a temporary employment service (or Labour Broker as they are sometimes referred to) is an employee or independent contractor vis-à-vis the temporary employment service and confirms that you must look at the actual working relationship between the worker and the company for whom the worker provides services or works.

The Code will come in handy where you are tasked with determining whether anyone engaged at your establishment or whom you intend to engage is an employee or independent contractor for purposes of our employment law.

the status of medical certificates issued by traditional healers

by fritz malan

Employers are often unsure of the legal status of certificates from traditional healers presented by employees in lieu of medical certificates from medical practitioners to explain absence from the workplace.

The Traditional Health Practitioners Act is intended to regulate the practice of traditional healing. Only some sections of this Act have come into operation. The Basic Conditions of Employment Act provides in section 23(2) that a medical certificate presented by an employee to explain absence from work resulting from ill health "must be issued and signed by a medical practitioner or

any other person who is certified to diagnose and treat patients and who is registered with a professional council established by an Act of Parliament."

The position at present is that those provisions of the Traditional Health Practitioners Act that have been put in operation have not brought the envisaged Interim Traditional Health Practitioners Council of South Africa, which is the professional council to be established for regulation and registration of traditional healers, into full operation and does not yet allow for registration of Traditional Health Practitioners with "a professional council established by an Act of Parliament".

"employers are therefore at present under no legal obligation to accept certificates from traditional healers and should inform employees accordingly"

Although regulations have been passed to appoint members of the Interim Traditional Health Practitioners Council of South Africa, the Council is not yet in a position to accept any registrations of traditional healers.

Employers are therefore at present under no legal obligation to accept certificates from traditional healers and should inform employees accordingly. In future, and when traditional healers become registered, employers will only be obliged to accept certificates from registered traditional healers.

the uia: calculating benefits (or the case of the magically disappearing days)

by anton steenkamp and annie erwin

"Knowing what to measure and how to measure it makes a complicated world much less so. If you learn how to look at data in the right way, you can explain riddles that otherwise seem impossible. Because there is nothing like the sheer power of numbers to scrub away layers of confusion and contradiction." – Steven D Levitt and Stephen J Dubner: Freakonomics p14

On 5 February 2007, the Minister of Labour published regulations to give effect to section 13 of the Unemployment Insurance Act, which sets out the method for determining the benefits to which a contributor to the Unemployment Insurance Fund (UIF) is entitled.

In terms of section 13(3), the benefits payable to UIF contributors accrue at the rate of one day's benefit (the daily remuneration rate) for every six completed days of employment as a contributor. This is subject to a maximum of 238 days' benefits in the four-year period preceding an application for benefits. A contributor will therefore be eligible to claim 238 days' benefits after being continuously employed for four years.

Where a contributor has worked for four years continuously, the number of days employed equals 1460. Divided by 6, this works out at 243.33 days, which is

5.33 days in excess of the maximum prescribed by section 13.

To get around this anomaly, the regulations outline the method to correctly calculate the number of days' benefits, interpreted from its original tabular form as follows:

1. 238 days per four-year cycle equates to 34 weeks per four-year cycle;
2. This in turn equates to 8.5 weeks per each year of the four-year cycle;
3. 8.5 weeks per year equates to 59.5 days per year; and
4. 59.5 days per year x 4 years equals 238 days.

Voila! 5.33 days have disappeared. Has the riddle been solved or are you more confused than ever?

to EE or to BEE - what is the question?

by adam ismail*

Employers are familiar by now with the Employment Equity Act (EEA) but the question that arises is how does the Employment Equity Act interact with the Broad-Based Black Economic Empowerment Act (BEE Act), as well as the recently promulgated Codes of Good Practice on Black Economic Empowerment, which came into effect on 9 February 2007?

The BEE Act, as read with the Codes, is government's attempt to create a framework, amongst other things, to promote the economic transformation of South Africa and enable meaningful participation of black people in the economy. The Codes provide the framework created by the BEE Act with the necessary detail for businesses to determine the degree to which they are transforming, by making provision for a balanced scorecard. The balanced scorecard is made up of 7 elements of various weightings which add up to 100 points. The elements are ownership, management control, employment equity, skills development, preferential procurement, enterprise development and socio-economic development initiatives.

Employment equity contributes up to 15 points of the balanced scorecard. The introduction of the Codes has not in any way affected the obligation to comply with the EEA. But whereas the EEA caters for all black people, females and people with disabilities, whether black or white, the BEE Act is restricted to black persons, which is defined as the "generic term which means Africans, Coloureds and Indians,

who are citizens of the Republic of South Africa by birth or descent, or are citizens of the Republic of South Africa by naturalization before the commencement of the Constitution, or after the commencement date of the Constitution, but who, without the apartheid policy, would have qualified for naturalization before then". In other words the BEE Act is restricted to those who are genuinely previously disadvantaged as a result of apartheid, including those who were in exile as a result of apartheid and does not cover black people from other countries.

The EEA and the BEE Act, although born out of a common purpose, have very different objectives, in that the EEA is a tool to promote and measure the advancement of designated groups in businesses while the BEE Act, as read with the Codes, uses such advancement as a measuring tool for BEE compliance.

The Employment Equity scorecard is reflected in the table below.

The adjusted recognition for gender provided for in the Employment Equity scorecard does need some explanation. It is an attempt to load the weighting of the employment of black females by a business calculated in accordance with a formula that gives extra points for the employment of black females.

The two pieces of legislation work together to achieve a similar objective but do so in different ways. However, both pieces of legislation are also dependent on one another in that businesses are required to complete the Employment Equity scorecard in terms of the Codes using the data that is filed with the Department of Labour in terms of the EEA.

measurement category and criteria	weighting points	compliance targets	
		years 0-5	years 6-10
black disabled employees as a percentage of all employees using the adjusted recognition for gender	2	2%	3%
black employees in senior management as a percentage of all such employees using the adjusted recognition for gender	5	43%	60%
black employees in middle management as a percentage of all such employees using the adjusted recognition for gender	4	63%	75%
black employees in junior management as a percentage of all such employees using the adjusted recognition for gender	4	68%	80%
bonus point for meeting or exceeding targets above	3		

* Adam is a director in the firm's corporate department and can be contacted for more information on BEE



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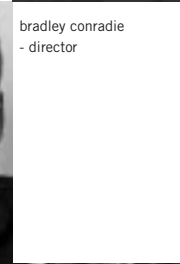
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The employment law team has grown in size since the merger between Edward Nathan and Sonnenberg Hoffmann Galombik. We offer a wide range of services, some in conjunction with colleagues from other teams. Since some of our Edward Nathan Sonnenbergs clients might not realise all the services we offer, here is a summary:

- Recruitment and selection disputes and litigation
- Disciplinary issues and disciplinary enquiries
- Incapacity cases (poor performance and ill health)
- Grievance hearings
- Restructuring exercises and retrenchments (private and public sector)
- Section 197 (transfers of businesses)
- Employee fraud and corruption cases working with forensic services
- Mediating and negotiating the resolution of disputes
- All employment law litigation (CCMA, arbitration and Labour Court)
- CCMA reviews
- Industrial action disputes including strikes (legal and illegal), lock outs, go-slows, picketing, overtime bans and works to rule
- Drafting recognition and collective bargaining agreements
- Immigration services including work permits
- Advising foreign employers on employment issues in South Africa
- Drafting employment contracts, letters of appointment and mutual termination agreements
- Drafting employment policies and codes of conduct
- Advising employers on employee benefit issues including pension law issues and disputes
- Managing executive disputes
- Due diligences on employment law issues
- Occupational health and safety accidents and policies
- Advising on the construction regulations (employment and health and safety aspects)
- Preparing contracts for SA employees operating in Africa and elsewhere
- Unfair discrimination disputes including promotion and appointments
- Drafting restraint of trade and confidentiality agreements and dealing with restraint and confidentiality litigation
- Urgent applications on strikes, suspensions etc.
- Privacy issues in employment
- Telecommunication issues in employment (internet / e-mail abuse)
- Harassment cases (sexual and bullying)
- Advising on and interpreting labour statutes, codes of practice and regulations
- Advising clients in fraud / dishonesty cases
- Preparing applications for exemptions / exclusions
- Protected Disclosure disputes and litigation
- Strategic advice on all employment issues
- Remuneration
- Share Option Schemes
- Employment equity compliance
- Employee assistance programs
- HIV/AIDS and employment