

NOTICE 1367 OF 1998

NATIONAL ECONOMIC DEVELOPMENT AND LABOUR COUNCIL

LABOUR RELATIONS ACT, 1995

NOTICE OF CODE OF GOOD PRACTICE ON THE HANDLING OF SEXUAL HARASSMENT CASES

Notice is hereby given in terms of section 203 (2) of the Labour Relations Act, 1995 (Act No. 1995), that the National Economic Development and Labour Council has issued under section 203 (1) of that Act a code of good practice on the handling of sexual harassment cases as set out in the Schedule.

SCHEDULE

Code of Good Practice on the Handling of Sexual Harassment Cases

1 Introduction

1. The objective of this code is to eliminate sexual harassment in the workplace.
2. This code provides appropriate procedures to deal with the problem and prevent its recurrence.
3. This code encourages and promotes the development and implementation of policies and procedures that will lead to the creation of workplaces that are free of sexual harassment, where employers and employees respect one another's integrity and dignity, their privacy, and their right to equity in the workplace.

2. Application of the code

(1) Although this code is intended to guide employers and employees, the perpetrators and victims of sexual harassment may include:

1. Owners.
2. Employers.
3. Managers.
4. Supervisors.
5. Employees.
6. Job applicants.
7. Clients.
8. Suppliers.
9. Contractors.
10. Others having dealings with a business.

(2) Nothing in 2(1) above confers the authority on employers to take disciplinary action in respect of non-employees.

(3) A non-employee who is a victim of sexual harassment may lodge a grievance with the employer of the harasser where the harassment has taken place in the workplace or in the course of the harasser's employment.

3. Definition of sexual harassment

(1) Sexual harassment is unwanted conduct of a sexual nature. The unwanted nature of sexual harassment distinguishes it from behaviour that is welcome and mutual.

(2) Sexual attention becomes sexual harassment if:

- a. The behaviour is persisted in, although a single incident of harassment can constitute sexual harassment; and/or
- b. The recipient has made it clear that the behaviour is considered offensive; and/or
- c. The perpetrator should have known that the behaviour is regarded as unacceptable.

4. Forms of sexual harassment

(1) Sexual harassment may include unwelcome physical, verbal or non-verbal conduct, but is not limited to the examples listed as follows:

- a. Physical conduct of a sexual nature includes all unwanted physical contact, ranging from touching to sexual assault and rape, and includes a strip search by or in the presence of the opposite sex.
- b. Verbal forms of sexual harassment include unwelcome innuendoes, suggestions and hints, sexual advances, comments with sexual overtones, sex-related jokes or insults or unwelcome graphic comments about a person's body made in their presence or directed toward them, unwelcome and inappropriate enquiries about a person's sex life, and unwelcome whistling directed at a person or group of persons.
- c. Non-verbal forms of sexual harassment include unwelcome gestures, indecent exposure, and the unwelcome display of sexually explicit pictures and objects.
- d. Quid pro quo harassment occurs where an owner, employer, supervisor, member of management or co-employee, undertakes or attempts to influence the process of employment, promotion, training, discipline, dismissal, salary increment or other benefit of an employee or job applicant, in exchange for sexual favours.

(2) Sexual favouritism exists where a person who is in a position of authority rewards only those who respond to his/her sexual advances, whilst other deserving employees who do not submit themselves to any sexual advances are denied promotions, merit rating or salary increases.

5. Guiding principles

(1) Employers should create and maintain a working environment in which the dignity of employees is respected. A climate in the workplace should also be created and maintained in which victims of sexual harassment will not feel that their grievances are ignored or trivialised, or fear reprisals. Implementing the following guidelines can assist in achieving these ends:

- a. Employers/management and employees are required to refrain from committing acts of sexual harassment.
- b. All employers/management and employees have a role to play in contributing towards creating and maintaining a working environment in which sexual harassment is unacceptable. They should ensure that their standards of conduct do not cause offence and they should discourage unacceptable behaviour on the part of others.

- c. Employers/management should attempt to ensure that persons such as customers, suppliers, job applicants and others who have dealings with the business, are not subjected to sexual harassment by the employer or its employees.
- d. Employers/management are required to take appropriate action in accordance with this code, when instances of sexual harassment which occur within the workplace are brought to their attention.

(2) This code recognises the primacy of collective agreements regulating the handling of sexual harassment cases, and is not intended as a substitute for disciplinary codes and procedures containing such measures, where these are the subject of collective agreements, or the outcome of joint decision making by an employer and a workplace forum. However, collective agreements and policy statements should take cognisance of and be guided by the provisions of this code.

6. Policy statements

(1) As a first step in expressing concern and commitment to dealing with the problem of sexual harassment, employers should issue a policy statement which should provide that:

- a. All employees, job applicants and other persons who have dealings with the business, have the right to be treated with dignity.
- b. Sexual harassment in the workplace will not be permitted or condoned.
- c. Persons who have been subjected to sexual harassment in the workplace have a right to raise a grievance about it should it occur and appropriate action will be taken by the employer.

(2) Management should be placed under a positive duty to implement the policy and take disciplinary action against employees who do not comply with the policy.

(3) A policy on sexual harassment should also explain the procedure which should be followed by employees who are victims of sexual harassment. The policy should also state that:

- a. Allegations of sexual harassment will be dealt with seriously, expeditiously, sensitively and confidentially.
- b. Employees will be protected against victimisation, retaliation for lodging grievances and from false accusations.

(4) Policy statements on sexual harassment should be communicated effectively to all employees.

7. Procedures

Employers should develop clear procedures to deal with sexual harassment. These procedures should ensure the resolution of problems in a sensitive, efficient and effective way.

(1) Advice and Assistance

Sexual harassment is a sensitive issue and a victim may feel unable to approach the perpetrator, lodge a formal grievance or turn to colleagues for support. As far as is practicable employers should designate a person outside of line management whom victims may approach for confidential advice. Such a person:

- a. Could include persons employed by the company to perform inter alia such a function, a trade union representative or co-employee, or outside professionals.
- b. Should have the appropriate skills and experience or be properly trained and given adequate resources.
- c. Could be required to have counseling and relevant labour relations skills and be able to provide support and advice on a confidential basis.

(2) Options to resolve a problem

- a. Employees should be advised that there are two options to resolve a problem relating to sexual harassment. Either an attempt can be made to resolve the problem in an informal way or a formal procedure can be embarked upon.
- b. The employee should be under no duress to accept one or the other option.

(3) Informal procedure

- a. It may be sufficient for the employee concerned to have an opportunity where she/he can explain to the person engaging in the unwanted conduct that the behaviour in question is not welcome, that it offends them or makes them uncomfortable, and that it interferes with their work.
- b. If the informal approach has not provided a satisfactory outcome, if the case is severe or if the conduct continues, it may be more appropriate to embark upon a formal procedure. Severe cases may include: sexual assault, rape, a strip search and quid pro quo harassment.

(4) Formal procedure

Where a formal procedure has been chosen by the aggrieved, a formal procedure for resolving the grievance should be available and should:

- a. Specify to whom the employee should lodge the grievance.
- b. Make reference to timeframes which allow the grievance to be dealt with expeditiously.
- c. Provide that if the case is not resolved satisfactorily, the issue can be dealt with in terms of the dispute procedures contained in item 7(7) of this code.

(5) Investigation and disciplinary action

- a. Care should be taken during any investigation of a grievance of sexual harassment that the aggrieved person is not disadvantaged, and that the position of other parties is not prejudiced if the grievance is found to be unwarranted.
- b. The Code of Good Practice regulating dismissal contained in Schedule 8 of this Act, reinforces the provisions of Chapter VIII of this Act and provides that an employee may be dismissed for serious misconduct or repeated offences. Serious incidents of sexual harassment or continued harassment after warnings are dismissable offences.
- c. In cases of persistent harassment or single incidents of serious misconduct, employers ought to follow the procedures set out in the Code of Practice contained in Schedule 8 of this Act.
- d. The range of disciplinary sanctions to which employees will be liable should be clearly stated, and it should also be made clear that it will be a disciplinary

offence to victimise or retaliate against an employee who in good faith lodges a grievance of sexual harassment.

(6) Criminal and civil charges

A victim of sexual assault has the right to press separate criminal and/or civil charges against an alleged perpetrator, and the legal rights of the victim are in no way limited by this code.

(7) Dispute resolution

Should a complaint of alleged sexual harassment not be satisfactorily resolved by the internal procedures set out above, either party may within 30 days of the dispute having arisen, refer the matter to the CCMA for conciliation in accordance with the provisions of section 135 of this Act. Should the dispute remain unresolved, either party may refer the dispute to the Labour Court within 30 days of receipt of the certificate issued by the commissioner in terms of section 135(5).

8. Confidentiality

(1) Employers and employees must ensure that grievances about sexual harassment are investigated and handled in a manner that ensures that the identities of the persons involved are kept confidential.

(2) In cases of sexual harassment, management, employees and the parties concerned must endeavour to ensure confidentiality in the disciplinary enquiry. Only appropriate members of management as well as the aggrieved person, representative, alleged perpetrator, witnesses and interpreter if required, must be present in the disciplinary enquiry.

(3) Employers are required to disclose to either party or to their representatives, such information as may be reasonably necessary to enable the parties to prepare for any proceedings in terms of this code.

(4) The relevant provisions of section 16 of this Act will apply to the disclosure of information in terms of this code.

9. Additional sick leave

Where an employee's existing sick leave entitlement has been exhausted, the employer should give due consideration to the granting of additional sick leave in cases of serious sexual harassment where the employee on medical advice requires trauma counseling.

10. Information and education

(1) The Department of Labour should ensure that copies of this code are accessible and available.

(2) Employers and employer organisations should include the issue of sexual harassment in their orientation, education and training programmes of employees.

(3) Trade unions should include the issue of sexual harassment in their education and training programmes of shop stewards and employees.

(4) CCMA commissioners should receive specialised training to deal with sexual harassment cases