

UNIVERSITY OF KWAZULU-NATAL



**SEXUAL HARASSMENT IN THE WORKPLACE: A CRITICAL
ANALYSIS OF THE UNWELCOME ELEMENT**

BY

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DECLARATION

I, **Kerrie-Lee Amanda Olivier**, hereby declare that this dissertation is my original work, and other works cited or used are clearly acknowledged. This work has never been submitted to any University, College or other institution of learning for the fulfilment of the requirement of a Master's Degree.

Signed:

Date:

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ABOVE ALL, praise and honour go to the Almighty Father. My study journey is a representation of the strength I have drawn from God.

DEDICATION

This dissertation is dedicated to my amazing mother who has, and I know will continue to be my pillar of strength. I love you always mum.

ABBREVIATIONS AND ACRONYMS

CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CCMA	Commission for Conciliation Mediation and Arbitration
1998 Code	Code of Good Practice on Handling Sexual Harassment Cases, 1998
2005 Code	Code of Good Practice on Handling Sexual Harassment Cases, 2005
COIDA	Compensation for Occupational Injuries and Disease Act 130 of 1993
EEA	Employment Equity Act 55 of 1998
EEOC	Equal Employment Opportunity Commission
ILO	International Labour Organisation
LAC	Labour Appeal Court
LC	Labour Court
LRA	Labour Relations Act 66 of 1995
PEPUDA	Promotion of Equity and Prevention of Unfair Discrimination Act 4 of 2000
PHA	Protection from Harassment Act 17 of 2011
PTSD	Post Traumatic Stress Disorder
SA	South Africa
US	United States
USA	United States of America

DEFINITIONS

Harasser – the perpetrator or defendant in the sexual harassment incident, who, by their conduct, creates unwelcome sexual advances and/or the alleged perpetrator or defendant in the sexual harassment incident.

Harassed – the complainant, victim or recipient of the unwelcome sexual advances in the sexual harassment incident and/or the alleged complainant, victim or recipient in the sexual harassment incident.

ABSTRACT

Sexual harassment is one of the most prominent forms of harassment encountered in the working world globally. This has resulted in a plethora of laws being enacted, whereby, the definition of sexual harassment was provided, and the legal remedies available to the harassed, were established. Of particular importance, regarding the laws, is the different definitions which provide the elements that need to be satisfied before the conduct of the harasser can constitute sexual harassment.

The unwelcome element is apposite in almost all jurisdictions when defining sexual harassment which undoubtedly indicates the importance of the unwelcome element. However, this element is difficult to establish in practice, and there is judicial inconsistency as to whose perspective the conduct should be considered unwelcome from, namely that of the harasser or harassed. Furthermore, studies indicate that men are more likely to find sexual connotations in the responses of women, yet women often use less confrontational responses to show that the conduct was unwelcome.

The above simply adds to the difficulties in the determination of the unwelcome element which is further fueled by the underdeveloped literature in South Africa on this element. Therefore, this dissertation endeavours to make a contribution to the limited knowledge in the area of sexual harassment by critically analysing and deconstructing the unwelcome element.

Thus, the main objective of this dissertation is achieved through a legal comparative study to American jurisprudence, whereby the scholar, Joan Weiner, identified factors that the US courts consider in the determination of whether the conduct of the harasser was unwelcome. The relevance of these factors, in the determination of the unwelcome element, were compared and contrasted to South African case law.

The findings from the analysis conducted revealed that even though these factors are seen by courts as an attempt to ensure that liability without fault is not attributed to the harasser, especially where sexual harassment is dealt with as a misconduct, the unwelcome element essentially acts as a roadblock to the harassed in sexual harassment cases. This element is used by harassers, as a defence, to show that the harassed's conduct if scrutinised closely, indicates that she was welcoming of the conduct of the harasser resulting, in courts analysing the conduct

of the harassed for signals to establish the unwelcome element. The main implication is that the harassed is placed on trial detracting from the behaviour of the harasser in sexual harassment cases.

TABLE OF CONTENTS	PAGE NO.
DECLARATION	II
ACKNOWLEDGMENTS	III
DEDICATION	IV
ABBREVIATIONS/ACRONYMS	V
DEFINITIONS	VI
ABSTRACT	VII
TABLE OF CONTENTS	IX
CHAPTER 1: INTRODUCTION	1
1.1 Background	1
1.2 Statement of purpose	5
1.3 Rationale	5
1.4 Research Questions	6
1.5 Research Methodology	6
1.6 Theoretical Framework	6
1.7 Research Outline	6
CHAPTER 2: THE LEGAL FRAMEWORK ADDRESSING SEXUAL HARASSMENT	8
2.1 Introduction	8
2.2 International Instruments	8
2.2.1 CEDAW	8
2.2.2 ILO	10
2.3 The SA Constitution	11
2.4 General Laws	14
2.4.1 Health and Safety Legislation	14
2.4.1.1 Compensation for Occupational Injuries and Diseases Act	14
2.4.2 PEPUDA	16
2.4.3 PHA	18

2.4.4 The Common Law	20
2.4.4.1 Vicarious Liability	20
2.4.4.2 Direct Liability	22
2.5 Labour Laws	23
2.5.1 LRA	23
2.5.1.1 Unfair Dismissal	23
2.5.2 EEA	25
2.5.3 The 1998 and 2005 Codes of Good Practice on Handling Sexual Harassment Cases	27
2.5.3.1 The 1998 Code	27
2.5.3.2 The 2005 Code	29
2.5.3.3 Comparison of the 1998 and 2005 Codes	29
2.6 Conclusion	31
CHAPTER 3: UNPACKING THE UNWELCOME ELEMENT	32
3.1 Introduction	32
3.2 Defining the Unwelcome Element	32
3.3 US Law	33
3.4 South African Law	36
3.4.1 1998 Code of Good Practice on Handling Sexual Harassment Cases	37
3.4.2 2005 Code of Good Practice on Handling Sexual Harassment Cases	38
3.5 The Test for Sexual Harassment	40
3.5.1 Subjective Test	42
3.5.2 Purely Objective Test	43
3.5.3 A Possible New Formulation of the Objective Test	43
3.5.4 Compromise Test	44
3.6 The Problematic Unwelcome Element	45
3.7 Conclusion	46

CHAPTER 4: FACTOR CONSIDERATION FOR THE DETERMINATION OF THE UNWELCOME ELEMENT	48
4.1 Introduction	48
4.2 Express Rejection	48
4.3 Ambivalent Responses	52
4.4 A Sexualised Work Environment	56
4.5 The Sexual History or Past Conduct of the Harassed	60
4.5.1 Sexual History of the Harassed	60
4.5.2 Past Conduct of the Harassed	61
4.6 Office Romance	64
4.7 Conclusion	67
CHAPTER 5: RECOMMENDATIONS AND CONCLUSIONS	68
5.1 Introduction	68
5.2 Identification of Problems and Recommendations for Chapter 2	68
5.3 Identification of Problems and Recommendations for Chapter 3	71
5.4 Identification of Problems and Recommendations for Chapter 4	72
5.5 Conclusion	74
5.5.1 Contributions of the Study	76
BIBLIOGRAHPY	78

CHAPTER 1

INTRODUCTION

1.1 Background

Harassment takes different forms in the workplace; it can be sexual, racial, pregnancy-related harassment and workplace bullying.¹ However, sexual harassment is one of the most prevalent forms of harassment encountered in the working world.² It is also considered one of the most controversial issues in the workplace.³

Sexual harassment is a significant problem affecting the workplace globally, of which the South African labour market is no exception.⁴ According to Frances Beasley, a 1990 survey was conducted which indicated that 76% of South African women in their career path have been subjected to some form of sexual harassment, yet would rather resign instead of reporting the incident.⁵ It is well recognised that women are subjected to sexual harassment more so than their male counterparts.⁶

Therefore, reference is often made to the harassed in the feminine gender, whilst the harasser is referred to in the masculine gender.⁷ These references do not wish to depict sexist views, but rather a depiction of reality.⁸ However, it must be noted that courts have set precedents providing that men may also be sexually harassed at work and that such harassment can occur between persons of the same sex.⁹

According to Mowatt, when a women's sex role or gender receives more attention at work from men, it leads to sexual harassment.¹⁰ In a limited manner, when a female is forced to participate in sexual activities to remain employed or obtain some benefit, sexual harassment

¹ R le Roux, T Orleyn, A Rycroft *Sexual Harassment in the Workplace Laws, policies and processes* (2005) 1.

² S Gaibie 'Employment Equity and Anti-Discrimination Law: The Employment Equity Act 12 Years on' (2011) 32 *ILJ* 41.

³ Note 1 above, 1.

⁴ A Basson 'Sexual harassment in the workplace: an overview of developments' (2007) 18(3) *Stell LR* 425.

⁵ P Halfkenny 'Legal and Workplace Solutions to Sexual Harassment in South Africa (Part 2): The South African Experience' (1996) 17 *ILJ* 214.

⁶ N Hadjifotiou *Women and Harassment at Work* (1983) 23.

⁷ C Wood 'Inviting Sexual Harassment: The Absurdity of the Welcomeness Requirement in Sexual Harassment Law' (2000) 39 *Brandeis L.J* 423.

⁸ *Ibid.*

⁹ J Pretorius, M Klinck & C Ngwenya *Employment Equity Law* (2016) 6-29.

¹⁰ J G Mowatt 'Sexual Harassment – New Remedy for Old Wrong' (1987) 7 *ILJ* 638.

exists.¹¹ Broadly speaking, sexual harassment results from any unwanted sexual advances made toward the victim which has a negative effect.¹²

The above was relied upon by the Industrial Court in *J v M*,¹³ South Africa's (SA) first sexual harassment case, which defined sexual harassment broadly:

“...[I]n its narrowest form sexual harassment occurs when a woman (or a man) is expected to engage in sexual activity in order to obtain or keep employment or obtain promotion or other favourable working conditions. In its wider view it is, however, any unwanted sexual behaviour or comment which has a negative effect on the recipient. Conduct which can constitute sexual harassment ranges from innuendo, inappropriate gestures, suggestions or hints or fondling without consent or by force to its worst form, namely, rape. It is 'in my opinion also not necessary that the conduct must be repeated. A single act can constitute sexual harassment.’”¹⁴

Sexual harassment is a stress contributor in the workplace, which could lead to depression, anxiety, and a decline in job performance.¹⁵ This form of harassment also impacts upon the victim's, particularly women's, advancement in the workplace.¹⁶ The latter arises as victims of sexual harassment either take days off from work, transfer or leave the job all together which has a detrimental effect on long-term prospects of success at work.¹⁷ Further, the effect of sexual harassment on the victim could result in a violation of certain rights, such as the right to dignity,¹⁸ equality,¹⁹ privacy,²⁰ and freedom of bodily integrity.²¹

From the above, it becomes evident that laws combating sexual harassment in the workplace are essential. The legal framework addressing sexual harassment has local and international influences. Internationally, the Convention on the Elimination of All Forms of Discrimination

¹¹ Ibid.

¹² Ibid.

¹³ *J v M* (1989) 10 ILJ 755. Hereinafter referred to as *J v M*.

¹⁴ Ibid 757F.

¹⁵ Note 6 above, 20.

¹⁶ Note 10 above, 652.

¹⁷ Note 6 above, 21.

¹⁸ Section 10 of the Constitution of the Republic of South Africa Act 108 of 1996 (hereinafter referred to as the Constitution).

¹⁹ Section 9 of the Constitution.

²⁰ Section 14 of the Constitution.

²¹ Section 12 of the Constitution.

Against Women (CEDAW) regards sexual harassment as a form of violence against women.²² The International Labour Organisation (ILO) Committee of Experts on the Application of Convention and Recommendations further notes that even though sexual harassment is not expressly mentioned in Convention 11 of 1958, it is a form of sex discrimination.²³ Locally, section 9(3) of the Constitution prohibits discrimination on the basis of sex and gender and sets the model for legislation which prohibits discrimination.²⁴ The above have paved the way for SA's labour laws in respect of gender inequality and related aspects of sexual harassment.²⁵

Section 6(3) of the Employment Equity Act²⁶ (EEA) provides that harassment on any one of the listed grounds, which includes sex, is a "form of unfair discrimination".²⁷ The Labour Relations Act²⁸ (LRA) also prohibits discrimination in terms of section 187(1)(f). The Code of Good Practice on Handling Sexual Harassment Cases, 1998 (1998 Code) was attached to the LRA, and the Code of Good Practice on Handling Sexual Harassment Cases, 2005 (2005 Code) is attached to the EEA.

It must be highlighted that as of 19 December 2018, the Minister of Labour issued a notice formally repealing the 1998 Code. The effect of the repeal is that, moving forward, the 2005 Code should only be relied upon in relation to sexual harassment incidents in the workplace.

Notwithstanding the repeal, the 1998 Code will still be referred to and/or analysed throughout this study. The reason for this is due to the fact that the 1998 Code reflects the legislature's first attempt at setting guidelines in relation to incidents of sexual harassment in the South African working environment. Therefore, reference and/or discussion on the repealed Code aims to depict a holistic understanding of the history on the handling of sexual harassment incidents in the workplace. Furthermore, the jurisprudence on sexual harassment provided through case law refer to the 1998 Code and the findings of the cases are based on the enforcement of both Codes being in play. Lastly in relation to the objective of this study both Codes entrench and therefore

²² F Banda 'Building on a global movement: Violence against women in the African context' (2008) 8(1) *AHRLJ* 11.

²³ A Botes 'Identifying Sexual Harassment in the Workplace? Do Not Forget to Remember the Code of Good Practice' (2015) 36 *ILJ* 1722.

²⁴ Note 2 above, 22.

²⁵ Note 1 above, 12.

²⁶ 55 of 1998.

²⁷ Note 2 above, 26.

²⁸ 66 of 1995.

confirm the importance of the unwanted or unwelcome element as a prerequisite for determination of sexual harassment in the workplace.

From the above the importance of the inclusivity of the 1998 Code in this study must yet again be noted. However, all references to the 1998 Code should not be construed or understood to mean that the 1998 Code is still in effect and as such applied.

Therefore, both Codes are still important, as they provide key elements that need to be established in sexual harassment cases,²⁹ clarify the conduct that establishes sexual harassment and provides guidance to employers on accounting for sexual harassment in the workplace.³⁰

In both the 1998 and 2005 Codes, it states that the conduct, which is of a sexual nature, must be unwelcome/unwanted by the victim. This is important, as a distinction is drawn between mutual and wanted sexual advances by consenting adults in the workplace.³¹

Therefore, it becomes apparent that the unwelcome element lies at the centre of importance in the determination of sexual harassment.³² However, this particular element in sexual harassment cases has presented difficulties in practice.³³ The difficulties are presented by the test for the determination of sexual harassment, particularly when considering from whose perspective the conduct of the harasser is regarded as unwelcome, namely, whether it is subjective, from the harassed's point of view, or objective from the harasser's point of view.³⁴

Further, the enquiry into the unwelcome element presents difficulty in practice, as the court's attention is focused on the victim for signs of whether he or she welcomed the conduct of the harasser, as opposed to the court's assessment of the harasser's conduct to determine if it was welcomed.³⁵

²⁹ Note 23 above, 1719.

³⁰ Ibid 1723.

³¹ Ibid 1725.

³² L Fitzgerald 'Legal and Psychological Constructions of Women's Resistance to Sexual Harassment' in C Mackinnon & R Siegal *Directions in Sexual Harassment Law* (2004) 103.

³³ Note 4 above, 430.

³⁴ Ibid 432.

³⁵ Note 32 above, 95.

1.2 Statement of Purpose

The objective of this dissertation is to critically analyse the unwelcome element which is one of the prominent elements necessary for the establishment of sexual harassment, with particular reference to American jurisprudence and the South African judicial interpretation thereof.

1.3 Rationale

Sexual harassment is considered to be a controversial issue in the workplace because what constitutes sexual harassment differs between persons.³⁶ This essentially stems from the fact that in the eyes of the harassed, the conduct of the alleged harasser may be unwelcome and offensive, yet from the viewpoint of the alleged harasser, his or her conduct may seem welcomed.³⁷ The latter links to an interesting study that was conducted which indicated that men are less likely to identify sexual conduct as sexual harassment when compared to women.³⁸

Therefore, even though the unwelcome element has proved to be problematic,³⁹ its importance cannot be understated due to the fact that in almost all jurisdictions the unwelcome element is a prerequisite for the determination of sexual harassment.⁴⁰ It is for this reason that the aim of this dissertation is to critically define and explore the unwelcome element in order to consider what was relied upon to negate this element and in doing such, extract, from case law, what factors the courts include or exclude in making a determination as to whether the conduct of the harasser was unwelcome by the harassed.

It goes without saying that human interaction in the workplace is inevitable and it is likely that workplace romances could occur between employees.⁴¹ Moreover, it is well established that the unwelcome element distinguishes behaviour which is mutual and welcomed between consenting adults in the workplace.⁴² Therefore, this dissertation will consider the extent to which a consensual office relationship negates the unwelcome element.

³⁶ Note 1 above, 1.

³⁷ Note 32 above, 96.

³⁸ Note 5 above, 216.

³⁹ Note 4 above, 430.

⁴⁰ C Cooper 'Harassment on the basis of Sex and Gender: A form of Unfair Discrimination' (2002) 23 *ILJ* 10.

⁴¹ C Sanger 'Consensual Sex and the Limits of Harassment Law' in C Mackinnon & R Siegal *Directions in Sexual Harassment Law* (2004) 78.

⁴² Note 23 above, 1725.

1.4 Research Questions

This paper seeks to address the following research questions:

- 1.4.1 What is the legal framework addressing sexual harassment in the workplace, a local and international analysis?
- 1.4.2 What is the unwelcome element in sexual harassment matters?
- 1.4.3 What factors do courts consider when determining whether the conduct of the harasser was unwelcome?
- 1.4.4 Does an office romance negate the unwelcome element?

1.5 Research Methodology

The main approach that will be employed in this dissertation is desktop research. The desktop research approach will require an extensive reliance upon both primary and secondary sources including case law, legislation, the Codes, journal articles, as well as textbooks.

1.6 Theoretical Framework

Since this dissertation undertakes to assess the law relative to sexual harassment in the workplace, with particular emphasis on the unwelcome element, which will frequently include a critical analysis on law reports, as well as legislation, the theory of positivism is the main theoretical framework of choice. Positivism rejects natural law.⁴³ This was prominently made known by one of the earliest positivist theorists, Jeremy Bentham.⁴⁴ He believed that the law should be described as it is by considering judgments and decisions of the legislative branch, and not merely as it ought to be.⁴⁵

1.7 Research Outline

The structure of this dissertation will consist of 5 chapters.

Chapter 1 includes the background and the research questions. A literature review is not considered separately here, as the literature on sexual harassment is addressed throughout the following chapters.

⁴³ D Johnson, S Pete & M du Plessis... et al *Jurisprudence A south African perspective* (2005) 65.

⁴⁴ Ibid 66.

⁴⁵ Ibid.

Chapter 2 assesses the law in relation to sexual harassment, internationally and locally, with an emphasis on the definition of sexual harassment and the remedies available to the harassed.

Chapter 3 critically analyses and defines the unwelcome element, with particular reference to the United States of America (USA/US) model, the test for sexual harassment and the problems associated with the unwelcome element.

Chapter 4 examines the judicial interpretation of the unwelcome element in order to identify the factors used by courts to determine whether the conduct of the harasser was unwelcome. Further, the chapter will also assess whether an office romance is considered such a factor in order to negate the unwelcome element.

Chapter 5 provides recommendations to the problems identified in each of the aforementioned chapters and the concluding remarks.

CHAPTER 2

THE LEGAL FRAMEWORK ADDRESSING SEXUAL HARASSMENT

2.1 Introduction

In this chapter, a discussion of the legal framework addressing sexual harassment will ensue. Sexual harassment from an international perspective will be considered. Further, the constitutional impact in relation to sexual harassment, as well as the model it sets for the development of further legislation on the issue, will be explored. Thereafter, general laws on sexual harassment broadly, not necessarily labour-specific, will be analysed with particular emphasis on defining sexual harassment and the legal remedies available to the harassed in terms of the legislation and the common law. Finally, the labour laws that are designed to eliminate sexual harassment in the workplace will be examined, with particular reference to both the 1998 and 2005 Codes.

2.2 International Instruments

South Africa has undertaken certain international legal obligations by becoming a member state to various conventions, specifically from 1994 onwards.⁴⁶ Many of these international approaches were enacted with the aim of the promotion and protection of women, and thus, the furtherance of gender equality.⁴⁷ These international instruments either approach sexual harassment from a gender-based violence aspect or from an anti-discrimination model.⁴⁸ Thus, two international models will be discussed in relation to their role in the development of sexual harassment.

2.2.1 CEDAW

In 1979, CEDAW was adopted which provides protection to women against discrimination, both inside and outside the workplace.⁴⁹ CEDAW is unique, as discrimination on the basis of

⁴⁶ M O' Sullivan and C Murray 'Brooms sweeping oceans? Women's rights in South Africa's first decade of democracy' 2005 *Acta Juridica* 2.

⁴⁷ *Ibid* 2.

⁴⁸ G Ore-Aguilar 'Sexual Harassment and Human Rights in Latin America' (1997) 66(2) *Fordham L. Rev* 638.

⁴⁹ *Ibid* 639.

sex and gender was not simply prohibited,⁵⁰ rather article 2 prohibits discrimination in all forms directed towards women specifically.⁵¹ SA ratified it in December 1995.⁵²

CEDAW's aim is to extend socio-economic rights to women through the promotion of gender equality.⁵³ Article 11.1 of CEDAW obliges member states to "take all appropriate measures to eliminate discrimination against women in the field of employment."⁵⁴ Due to this article, the Committee on the Elimination of Discrimination Against Women (the committee) adopted General Recommendation No. 19.⁵⁵

Recommendation No. 19 provides a definition of sexual harassment.⁵⁶ It must be noted that general recommendations are not binding laws on member states.⁵⁷ However, section 232 of the South African Constitution makes it clear that "customary international law is law in South Africa unless it is inconsistent with the Constitution or legislation."⁵⁸

Two requirements need to be satisfied for the establishment of customary international law; firstly, there must be an established practice, meaning that there must be a "constant and uniform usage"⁵⁹ or the rule must have a general acceptance which is not necessarily universal.⁶⁰ Secondly, the state must feel as if there is an obligation to be bound by the rule.⁶¹ Therefore, even though recommendations do not impose an express mandate on SA, they are still important pieces of customary international law, as it would seem that these requirements lend support to the fact that by the country becoming a member state to CEDAW, SA has a general acceptance of the recommendations provided by the committees and a sense that there is an obligation to be bound by the recommendations.⁶² This is applicable to the ILO recommendations below as well.

⁵⁰ S Fredman 'Engendering socio-economic rights' (2009) 25(3) *SAJHR* 435.

⁵¹ C Beninger 'Combating sexual violence in schools in sub-Saharan Africa: Legal strategies under regional and international human rights law' (2013) 13(2) *AHRLJ* 288.

⁵² 'Convention on the Elimination of All Forms of Discrimination Against Women' available at <http://www.dirco.gov.za/foreign/Multilateral/inter/treaties/discrim.htm>, accessed on 10 June 2018.

⁵³ Note 50 above, 434 and 435.

⁵⁴ J Aeberhard-Hodges 'Sexual harassment in employment: Recent judicial and arbitral trends' (1996) 135(5) *International Labour Review* 505.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ Note 1 above, 27.

⁵⁹ *Asylum case 1950 ICJ Reports* 266.

⁶⁰ J Dugard *International Law A South African Perspective* 4 ed (2015) 26, 28, 29, 52 and 53.

⁶¹ *Ibid* 29.

⁶² See Note 1 above, 27.

Thus, General Recommendation No. 19⁶³ provides that sexual harassment at work can be regarded as a type of gender violence directed towards women that impairs women's employment equality.⁶⁴ Sexual harassment is defined as:

“Sexual harassment includes such unwelcome sexually determined behaviour as physical contact and advances, sexually coloured remarks, showing pornography and sexual demands, whether by words or actions. Such conduct can be humiliating and may constitute a health and safety problem; it is discriminatory when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her employment, including recruiting or promotion, or when it creates a hostile working environment.”⁶⁵

General Recommendation No.19 requires that member states construct measures, such as the submission of reports, to ensure the protection of women in employment against gender-based violence such as sexual harassment.⁶⁶

2.2.2 ILO

The second international model that will be considered is the ILO, with reference to its conventions and recommendations. This is one of the specialised agencies in terms of the United Nations, which has been at the forefront of combating discriminatory practices against women.⁶⁷ SA became a member state of the ILO in 1919, with its first convention ratified in 1921 and has since ratified over 20 conventions.⁶⁸ One of the main conventions of the ILO addressing discrimination of women in the workplace is the Discrimination (Employment and Occupation) Convention 111 of 1958⁶⁹ which SA ratified on the 5 March 1997.⁷⁰

This Convention, like CEDAW, makes no reference to sexual harassment directly.⁷¹ However, the ILO Committee of Experts on the Application of Conventions and Recommendations

⁶³ UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No. 19: Violence against women*, 1992, available at: <http://www.refworld.org/docid/52d920c54.html>, accessed 17 June 2018.

⁶⁴ Paragraph 17 of General Recommendation No. 19. See Note 54 above, 506.

⁶⁵ Note 54 above, 506.

⁶⁶ *Ibid.*

⁶⁷ *Ibid* 507.

⁶⁸ SA's ratification of ILO conventions' available at <https://www.gilesfiles.co.za/ratification-of-ilo-conventions-south-africa-a-good-performer-john-brand/>, accessed on 11 June 2018.

⁶⁹ Note 54 above, 507.

⁷⁰ Note 68 above.

⁷¹ Note 23 above, 1722.

remedied this silence.⁷² The Committee of Experts' General Survey⁷³ of the Convention No.19 included various examples of sexual harassment, such as physical contact, gestures and looks of a sexual nature, insults, and inappropriate statements regarding a person's physique, dress and age.⁷⁴

Moreover, the Committee of Experts in the General Survey highlighted two conditions that need to be satisfied to constitute sexual harassment. Firstly, the harassed employee must regard the conduct of the harasser as a continued case at work.⁷⁵ Secondly, the conduct of a sexual nature must affect the harassed employee's decision-making ability, impact on the employee's work performance, or humiliate or injure the dignity of the harassed.⁷⁶

Furthermore, the ILO Committee's Special Survey⁷⁷ on the application of Convention 111 of 1958 provided a comprehensive definition of sexual harassment:

“Any insult or inappropriate remark, joke, insinuation and comments on a person's dress, physique, age, family situation, etc.; a condescending or paternalistic attitude with sexual implications undermining dignity; any unwelcome invitation or request, implicit or explicit, whether or not accompanied by threats; any lascivious look or gesture associated with sexuality; and any unnecessary physical contact such as touching, caresses, pinching or assault.”⁷⁸

2.3 The SA Constitution

Even though these two international bodies seek to address sexual harassment, few courts make reference to these international standards in case law.⁷⁹ Therefore, an analysis of the Constitution as it relates to sexual harassment through various provisions will ensue. There is a link between the Constitution and international law, explained above, which is evident from section 39(1) of the Constitution, which states that courts “must consider international law” when interpreting the Bill of Rights.⁸⁰

⁷² Note 54 above, 507.

⁷³ ILO: *Equality in employment and occupation*, General Survey by the Committee of Experts on the Application of Conventions and Recommendations, International Labour Conference, 75th Session, 1988. Report III (Part 4B), Geneva, 1988, paras. 45 and 46. See Note 54 above, 507.

⁷⁴ Note 54 above, 507.

⁷⁵ Note 48 above, 637.

⁷⁶ *Ibid.*

⁷⁷ ILO 'Equality in Employment and Occupation: Special Survey on Equality in Employment and Occupation in respect of Convention No. 111' (Geneva 1996) 15.

⁷⁸ Note 23 above, 1723.

⁷⁹ Note 54 above, 504.

⁸⁰ Note 1 above, 27.

Throughout the Constitution, sexual harassment is not stated.⁸¹ However, the right that would be dominant in the context of sexual harassment is the right to equality upheld in section 9 of the Constitution. More specifically, section 9(4) provides for the right to not “unfairly discriminate directly or indirectly” on a number of grounds, such as:

“race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.”⁸²

Section 23(1) provides that “everyone has the right to fair labour practices.” It has been established that sexual harassment is an unfair labour practice.⁸³ Therefore, an extension can be made that employers have a constitutional responsibility of prohibiting the occurrence of sexual harassment at work.⁸⁴

Thus, the right to both equality and to fair labour practices, entrenched in the constitution, have set a mould for other legislation designed to address sexual harassment in the workplace. Section 6(3) of the EEA has linked the grounds listed in section 9(3) of the Constitution to sexual harassment by confirming that harassment is unfair discrimination if it is based on grounds listed in subsection (1) inclusive of sex and gender.⁸⁵ The grounds in section 6(1) of the EEA⁸⁶ mimic the grounds in section 9(3) of the Constitution.

Further, PEPUDA also reinforces the right to equality; however, unlike the EEA which applies to cases of unfair discrimination in the workplace, PEPUDA applies to cases of discrimination which occur outside the workplace.⁸⁷ Both the EEA and PEPUDA will be analysed in greater detail in relation to sexual harassment below.

⁸¹ A Mukheibir & L Ristow ‘An overview of sexual harassment: liability of the employer’ (2006) 27(2) *Obiter* 253.

⁸² Section 9(3) of the Constitution.

⁸³ E Snyman Van-Deventer & J De Bruin ‘Sexual harassment in South African and American law’ (2002) 1 *Acta Academia* 211.

⁸⁴ *Ibid.*

⁸⁵ Note 81 above, 253.

⁸⁶ Section 6 of the EEA states that “No person may unfairly discriminate, directly or indirectly, against an employee... on one or more of the grounds including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or any other arbitrary ground.”

⁸⁷ Note 81 above, 253.

There are other constitutionally entrenched rights, such as the right to dignity⁸⁸ and the right to privacy⁸⁹ in the Constitution that are relevant in the context of sexual harassment.⁹⁰ This was highlighted in *Reddy v University of Natal*⁹¹ when the LAC held that “...in terms of the Constitution, sexual harassment infringes the right to human dignity ... and the right to privacy enshrined in s 14.”⁹²

An infringement of dignity is determined when a person subjectively feels that his or her self-worth and pride are violated.⁹³ *Contumelia*, feelings of humiliation, is an essential requirement when determining the factual violation of dignity.⁹⁴ Thus, there is a correlation between the right to dignity and sexual harassment, as case law has confirmed that sexual harassment is humiliating and demeaning for the harassed.⁹⁵

Privacy refers to the most intimate part of an individual’s life and protects a person from interferences and intrusions.⁹⁶ It must be noted that an invasion of privacy has been taken as a standalone offence without constituting sexual harassment.⁹⁷ However, it would seem that one can easily establish the link between the right to privacy and sexual harassment, especially in cases involving a physical touch which would certainly invade the harassed’s personal space and violate their right to privacy. However, these rights are usually regulated by the common law, specifically the law of delict, which will be discussed further below.⁹⁸

Section 23 of the Constitution is given effect to, by section 186(2) of the LRA, which notes that unfair labour practices should be prohibited.⁹⁹ As stated above, sexual harassment constitutes an unfair labour practice.¹⁰⁰ Further, section 186(2)(b) of the LRA states that an unfair labour practice may be defined as “the unfair suspension of an *employee* or any other

⁸⁸ Section 10 of the Constitution.

⁸⁹ Section 14 of the Constitution.

⁹⁰ Note 1 above, 16.

⁹¹ *Reddy v University of Natal* (1998) 19 ILJ 49 (LAC).

⁹² *Ibid* 52H.

⁹³ M Loubser... et al *The Law of Delict In South Africa* 2 ed (2013) 321.

⁹⁴ *Ibid* 321 and 326.

⁹⁵ See Note 13 above, 757J-758A.

⁹⁶ Note 93 above, 326.

⁹⁷ See *Mokoena & another v Garden Art (Pty) Ltd & another* (2008) 29 ILJ 1196 (LC). See also *Moatshe v Legend Golf & Safari Resort Operations (Pty) Ltd* (2015) 36 ILJ 1111 (LC).

⁹⁸ Note 1 above, 16.

⁹⁹ N Smit & D Van Der Nest ‘When sisters are doing it for themselves: Sexual harassment claims in the workplace’ (2004) (3) *TSAR* 537.

¹⁰⁰ Note 83 above, 211.

disciplinary action of an employee short of dismissal...”¹⁰¹ Therefore, if an employee, namely an alleged harasser, can establish that they have been unfairly suspended or unfair disciplinary action has been instituted, for alleged sexual harassment, such employee may be able to claim an unfair labour practice in terms of the LRA.¹⁰²

Section 187(1)(f) of the LRA regulates the automatic unfair dismissal of an employee if an employer unfairly discriminated against an employee on grounds not limited to “race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility.”¹⁰³ This correlates to the grounds set out in section 9(3).

Therefore, if an employee is dismissed for failing to accept unwelcome sexual advances the dismissal could be deemed automatically unfair.

2.4 General Laws

As can be seen above, the Constitution and international models have set the path for legislation to the enacted,¹⁰⁴ whereby, legislation is either specifically designed to proclaim sexual harassment as a prohibited act in the working environment or general legislation regulating sex discrimination in which remedies for sexual harassment are extracted.¹⁰⁵ The former will be covered further below when analysing labour laws enacted to combat sexual harassment in the workplace. The latter will be assessed directly below, such as general laws including national legislation enacted to address sexual harassment, not necessarily in a workplace setting, and the common law which could be relied upon by the harassed employee for legal remedies against sexual harassment.

2.4.1 Health and Safety Legislation

2.4.1.1 Compensation for Occupational Injuries and Diseases Act

A consideration of whether a victim, who has been sexually harassed and as a result, suffers harm psychologically, can claim from the employer in terms of Compensation for Occupational

¹⁰¹ Note 81 above, 254.

¹⁰² Note 1 above, 24.

¹⁰³ Section 187(1)(f) of the LRA.

¹⁰⁴ Note 46 above, 2.

¹⁰⁵ Note 54 above, 501.

Injuries and Diseases Act¹⁰⁶ (COIDA) will be discussed under general laws. In assessing COIDA's applicability in the context of sexual harassment, the defence raised by the employer in *Ntsabo v Real Security CC*¹⁰⁷ and *Grobler v Nasper Bpk*¹⁰⁸ will be considered.

In the *Grobler* case, the defence raised by Nasper (the employer) was that even if it was accepted that Nasper was liable for the Post Traumatic Stress Disorder (PTSD), then Grobler (the harassed employee) should have claimed damages in terms of COIDA as section 35¹⁰⁹ and 36¹¹⁰ of COIDA barred an employer from being sued as a result of accidents or injuries suffered at work.¹¹¹ Despite the expert medical evidence of injury to the mind of the employee,¹¹² the court was not convinced that sexual harassment may be such an "accident" as required by COIDA.¹¹³ Secondly, the fact the employee had resigned meant she was no longer an employee, and thus, the employer could not enjoy the protection afforded by COIDA.¹¹⁴ Even though the case was taken on appeal to the Supreme Court of Appeal,¹¹⁵ it was held that the court a quo's jurisdiction was not precluded by COIDA.¹¹⁶ However, Farlam JA noted:

"It may well be that employees who contract psychiatric disorders as a result of acts of sexual harassment to which they are subjected in the course of their employment can claim compensation under s 65..."¹¹⁷

¹⁰⁶ 130 of 1993.

¹⁰⁷ *Ntsabo v Real Security CC* (2003) 24 ILJ 2341 (LC). Hereinafter referred to as the *Ntsabo* case or *Ntsabo*.

¹⁰⁸ *Grobler v Nasper Bpk* (2004) 23 ILJ 439 (C). Hereinafter referred to as the *Grobler* case or *Grobler*.

¹⁰⁹ Section 35(1) of COIDA states that "No action shall lie by an employee or any dependant of an employee for the recovery of damages in respect of any occupational injury or disease resulting in the disablement or death of such employee against such employee's employer, and no liability for compensation on the part of such employer shall arise save under the provisions of this Act in respect of such disablement or death."

¹¹⁰ Section 36(1)(a) of COIDA states that "If an occupational injury or disease in respect of which compensation is payable, was caused in circumstances resulting in some person other than the employer of the employee concerned (in this section referred to as the 'third party') being liable for damages in respect of such injury or disease the employee may claim compensation in terms of this Act and may also institute action for damages in a court of law against the third party."

¹¹¹ B Whitcher 'Two Roads to an Employer's Vicarious Liability for Sexual Harassment: S Grobler v Naspers Bpk en 'N Ander and Ntsabo v Real Security' (2004) 25 ILJ 1920.

¹¹² *Ibid*.

¹¹³ Note 1 above, 25.

¹¹⁴ Note 111 above, 1920.

¹¹⁵ *Media 24 Ltd & another v Grobler* 2005 (6) SA 328 (SCA); (2005) 26 ILJ 1007 (SCA).

¹¹⁶ *Ibid* 1027 para 74.

¹¹⁷ *Ibid* 1028 para 77.

Therefore, some argue that this was a significant statement made by the SCA in that the court did not preclude the harassed employee from bringing a claim in terms of section 65¹¹⁸ of COIDA if the sexual harassment incident fell within the course and scope of employment.¹¹⁹

In the *Ntsabo* case, a similar defence was raised by the employer as in the *Grobler* case, namely that the employee who suffered from PTSD should have claimed in terms of Section 16¹²⁰ of COIDA.¹²¹ The Labour Court (LC) held that sexual harassment falls outside the job description of the supervisor and the applicant.¹²² Thus, it was concluded that since COIDA was enacted for injuries that fell within the realm of employment, an incident of sexual harassment fell outside this realm, and thus, COIDA was not applicable.¹²³

It must be noted that there has been no reported case of a successful claim brought in terms of COIDA for a psychological injury caused by sexual harassment.¹²⁴ Therefore, even though there may be a linkage between health and safety legislation and sexual harassment, COIDA is not often relied upon, and thus, other laws will be considered below.

2.4.2 PEPUDA

It was established when looking at the constitutional provisions above that PEPUDA, and the EEA were enacted to give effect to the fundamental right of equality.¹²⁵ Section 11 of PEPUDA expressly prohibits harassment.¹²⁶ In relation to sexual harassment, PEPUDA will only be

¹¹⁸ Section 65(1)(a) and (b) of COIDA states that “Subject to the provisions of this Chapter, an employee shall be entitled to the compensation provided for and prescribed in this Act if it is proved to the satisfaction of the Director-General-

- (a) that the employee has contracted a disease mentioned in the first column of Schedule 3 and that such disease has arisen out of and in the course of his or her employment; or
- (b) that the employee has contracted a disease other than a disease contemplated in paragraph (a) and that such disease has arisen out of and in the course of his or her employment.”

¹¹⁹ K Malherbe ‘The expediency of including claims based on disablement caused by sexual harassment in South Africa's system of workers' compensation’ (2016) 27(3) *Stell LR* 477.

¹²⁰ Section 16(1)(a) of COIDA states that “The compensation fund shall, subject to the provisions of this Act, be under the control of the Director-General and its moneys shall be applied by the Director-General to-

- (a) the payment of compensation, the cost of medical aid or other pecuniary benefits to or on behalf of or in respect of employees in terms of this Act where no other person is liable for such payment.”

¹²¹ Note 111 above, 1922.

¹²² *Ibid.* See also Note 107 above, 2380C-D.

¹²³ Note 1 above, 25.

¹²⁴ Note 119 above, 482.

¹²⁵ Note 81 above, 253.

¹²⁶ Section 11 of PEPUDA states that “No person may subject any person to harassment.” See Note 81 above, 253.

applicable in cases where the EEA does not apply.¹²⁷ Therefore, PEPUDA is limited in relation to harassment in the workplace.¹²⁸

With the latter said, those who were subjected to harassment, such as learners, clients, independent contractors and suppliers, by a subsequent employee, will not be able to bring a claim for sexual harassment in terms of the EEA, as they themselves are not regarded as “employees” in terms of the latter act.¹²⁹ Thus, these “non-employees” would have to rely on the provisions in PEPUDA in support of their sexual harassment claim.

Further, members of “the National Defence Force, National Intelligence Agency, the South African Secret Services”¹³⁰ *inter alia* are also not regarded as employees, and thus, it seems that if an incident of sexual harassment were to occur in that workplace setting, the claim would need to be challenged in terms of PEPUDA.¹³¹

PEPUDA differs from the EEA in that it does not confine harassment to the scope of unfair discrimination.¹³² PEPUDA also differs from the EEA, as the former act provides a comprehensive definition of sexual harassment in section 1(1).¹³³ Harassment is defined in PEPUDA as:

“harassment means unwanted conduct which is persistent or serious and demeans, humiliates or creates a hostile or intimidating environment or is calculated to induce submission by actual or threatened adverse consequences and which is related to-

- (a) sex, gender or sexual orientation, or
- (b) a person’s membership or presumed membership of a group identified by one or more of the prohibited groups or a characteristic associated with such group.”

¹²⁷ Note 99 above, 520. See Section 5(3) of the PEPUDA which states that “[t]his Act does not apply to any person to whom and to the extent to which the Employment Equity Act, 1998 (Act 55 of 1998), applies.”

¹²⁸ Note 1 above, 20.

¹²⁹ O Dupper... et al *Essential Employment Discrimination Law* (2004) 23. See Note 1 above, 20.

¹³⁰ Section 4(3) of the EEA.

¹³¹ Note 129 above, 24.

¹³² Note 81 above, 255. See Section 15 of PEPUDA, where it states that “harassment not subject to the determination of fairness” in terms of section 14.

¹³³ Note 81 above, 225.

Therefore, in the context of the sexual harassment grounds of sex, gender or sexual orientation would be relevant.¹³⁴ PEPUDA applies to harassment in other sectors such as education, housing, health care.¹³⁵ Thus, it will become apparent that PEPUDA will not be as relevant to sexual harassment in the workplace where such conduct occurs between “employees”, since the EEA, discussed further below, is the leading legislative authority in this regard.¹³⁶ It goes without saying that laws which do not preclude persons who are covered by the EEA would need to be considered in the context of sexual harassment, an example of the latter is the Protection from Harassment Act 17 of 2011 (PHA).¹³⁷

2.4.3 PHA

The preamble of the PHA expressly states that certain fundamental rights entrenched in the Constitution, such as “the right to equality, the right to privacy, the right to dignity [and] the right to freedom and security of the person” are linked to the right to be free from violence.¹³⁸ Sexual harassment, as a form of gender-based violence, has been established internationally. The main objective of PHA is to “afford victims of harassment an effective remedy against such behaviour”.¹³⁹ This remedy is a protection order.

Section 1(1) provides that PHA is applicable to “any person who alleges that he or she is being subjected to harassment”.¹⁴⁰ Further, PHA provides that the complainants of harassment may be subjected to abuse via social media like Facebook, electronic communication, stalking and sexual harassment.¹⁴¹ It is important to note that the PHA is not limited to harassment within the workplace and unlike PEPUDA, the provisions of PHA do not prevent people who can also apply in terms of the EEA, from making an application for a protection order.¹⁴²

¹³⁴ M McGregor “Do You Want a Lover Tonight?” Does this Question Constitute Sexual Harassment? *Simmers v. Campbell Scientific Africa (Pty.) Ltd.* (2014) 35 *ILJ* 2866 (LC); *Campbell Scientific Africa (Pty.) Ltd. & A. Simmers Unreported Case CA 14/2014 (LAC) 23 October 2015* (2016) 79 *THRHR* 325.

¹³⁵ Note 46 above, 11.

¹³⁶ Note 81 above, 225.

¹³⁷ Note 134 above, 325.

¹³⁸ See the Preamble of PHA.

¹³⁹ *Ibid.*

¹⁴⁰ Note 134 above, 325.

¹⁴¹ S Sewsunker ‘Inexpensive civil remedy for harassment: The Protection from Harassment Act’ (2013) *De Rebus* 34-36.

¹⁴² Note 134 above, 325.

Even though the main legal remedy offered by the PHA is a protection order, the PHA differs and goes further than the Domestic Violence Act.¹⁴³ The latter act only allowed for a protection order to be granted to the victim if there was a domestic relationship, and thus, those who were not part of such relations were left without any protection.¹⁴⁴ PHA has, therefore, rectified the shortfall in the Domestic Violence Act, as a protection order may be granted to any person who alleges that they were harassed and it is not a prerequisite to establish a domestic relationship.

A significant feature of PHA is the definition of sexual harassment:

“any-

- (a) unwelcome sexual attention from a person who knows or ought reasonably to know that such attention is unwelcome;
- (b) unwelcome explicit or implicit behaviour, suggestions, messages or remarks of a sexual nature that have the effect of offending, intimidating or humiliating the complainant or a related person in circumstances, which a reasonable person having regard to all the circumstances would have anticipated that the complainant or related person would be offended, humiliated or intimidated;
- (c) implied or expressed promise of reward for complying with a sexually-oriented request; or
- (d) implied or expressed threat of reprisal or actual reprisal for refusal to comply with a sexually oriented request.”¹⁴⁵

Therefore, in finding a link to the workplace in the context of sexual harassment, PHA is relevant because it provides a legal remedy by permitting a harassed employee to approach the court of his or her own accord to obtain a protection order against a co-employee or superior.

However, the above is precisely where the problem arises, as it becomes the responsibility of the harassed employee to initiate steps to address sexual harassment against another co-employee or superior, and yet the employer’s accountability for a failure to create a safe environment for employees is not called into question. Therefore, the last aspect of dealing with a discussion of the general laws is a consideration of the common law for an employer’s liability as a legal remedy for the harassed in the context of sexual harassment.

¹⁴³ Note 141 above, 34-36.

¹⁴⁴ Ibid.

¹⁴⁵ Section 1 of PHA.

2.4.4 The Common Law

An employee who is the subject of sexual harassment by another employee or their superior may invoke the common law of delict to hold the employer liable. This was established in *J v M* which stated that:

“Sexual harassment, depending on the form it takes, will violate that right to integrity of body and personality which belongs to every person and which is protected in our legal system both criminally and civilly. An employer undoubtedly has a duty to ensure that its employees are not subjected to this form of violation within the work-place.”¹⁴⁶

The common law of delict in relation to employer liability in sexual harassment cases has, over the past years, been adjusted in order to bring the law in line with the spirit, purports and object of the Constitution.¹⁴⁷ In terms of the law of delict, the employer may be held liable by the employee who has been sexually harassed by another employee, either directly or through vicarious liability.¹⁴⁸

2.4.4.1 Vicarious Liability

In either direct or vicarious liability, the elements of a delict would firstly have to be proven.¹⁴⁹ In terms of vicarious liability, there are three main requirements that must be satisfied. Firstly, there must be an employee-employer relationship between the harasser and the employer; secondly, the employee (namely the harasser) must commit a delict (sexual harassment) and lastly, the employee (harasser) who committed the delict must have acted in the “course and scope of employment.”¹⁵⁰

The most relevant case in extending vicarious liability to a sexual harassment context is the *Grobler* case.¹⁵¹

In the *Grobler* case, one of the main issues considered was whether Nasper (the employer) should assume vicariously liable for the behaviour of Samuels (the harasser).¹⁵² Whitcher

¹⁴⁶ Note 13 above, 757J-758A.

¹⁴⁷ Note 81 above, 247.

¹⁴⁸ Ibid.

¹⁴⁹ Ibid.

¹⁵⁰ Ibid.

¹⁵¹ Since the LAC’s judgment in the *Grobler’s* case is written in Afrikaans, reference to Whitcher’s journal article will be relied on in the following case discussion.

¹⁵² Note 99 above, 530.

provides the following details of the case:¹⁵³ Grobler was a secretary to Samuels who was a trainee manager. Sexual harassment incidents which Grobler was subjected to included groping, kissing, a finger forced in her mouth and the most serious incident being threatened with rape whilst held at gunpoint. Grobler had attempted on many occasions to report the incidents to persons who stood in higher positions than Samuels, however, no assistance was provided. In fact, some employees in senior positions witnessed certain incidents, yet none reported or made an effort to assist. Finally, assistance was provided when Grobler reported the incidents to labour relations consultants and a disciplinary hearing was conducted resulting in Samuels' dismissal. Thereafter, Grobler developed PTSD and sought to claim her losses and damages associated with the disorder from Samuels, and in terms of vicarious liability from Nasper.

Further, Whitcher states that the court had to address the main requirement, in relation to vicarious liability, namely, whether the unwelcome sexual conduct took place in the course and scope of the harasser's employment. The court relied on foreign case law, whereby, it noted that the term "course and scope of employment" is often given a narrow interpretation and employers are often not held accountable by simply alleging that the conduct of harasser did not fall within the course and scope of employment.

Moreover, Whitcher highlighted that the court relied on the US case of *Faragher v City Boca Raton*,¹⁵⁴ which held that since sexual harassment is such an endemic in the workplace, an employer would foresee such risk occurring at work when employing persons, and thus, it is fair to ensure that the employer should be liable for the risk. The court then applied the foreign precedents and concluded that "course and scope of employment" should be interpreted broadly.

The court held that since sexual harassment is such a common occurrence in most businesses, it is only fair that the harassed be left with recourse against the employer, especially where the harasser holds a senior position of trust, such as a manager.¹⁵⁵ After a consideration of various factors, such as the fact that the relationship between a manager and secretary is more intense, Grobler was subordinate, and thus, more defenceless, it was concluded that there was a strong

¹⁵³ Note 111 above, 1907- 1918.

¹⁵⁴ *Faragher v City Boca Raton* 524 US 775 (1998).

¹⁵⁵ Note 111 above, 1918.

nexus between sexual harassment occurring from the risk created by Nasper in employing Samuels as a trainee manager.¹⁵⁶ Thus, Nasper was held vicariously liable.

2.4.4.2 Direct Liability

However, on appeal to the SCA,¹⁵⁷ the issue of vicarious liability was not decided, as Nasper was held directly liable. Direct liability arose due to Nasper's failure to prevent or act on complaints made by Grobler.¹⁵⁸ Therefore, establishing wrongfulness in a delict requires the employer to have a legal duty to limit or prevent the harm, namely the sexual harassment, from occurring.¹⁵⁹ The legal duty is established when, according to the *boni mores* of society, it would be reasonable for the employer to have taken precautions to prevent sexual harassment.¹⁶⁰

Thus, the SCA found that Nasper had a legal duty to prevent Grobler from being sexually harassed by her manager and to protect her against the psychological injury that arises from sexual harassment.¹⁶¹ Lastly, the court also made it clear that the mere fact that legislation provides for remedies for employer liability does not prevent an employee from exercising common law remedies to hold the employer responsible for the unwelcome sexual acts of their employees.¹⁶²

The general laws were analysed above in order to determine the applicability of the laws in cases of sexual harassment, further, to provide comprehensive definitions of harassment and most importantly, to establish the legal remedies that are available for employees who have been sexually harassed. Notwithstanding the general laws, it will become apparent that there was a need for the enactment of labour legislation designed to address the endemic of sexual harassment manifesting specifically in the workplace. Thus, the LRA and the EEA, along with the Codes attached to the latter, will be assessed below.

¹⁵⁶ Ibid 1919.

¹⁵⁷ Note 115 above.

¹⁵⁸ Note 81 above, 249.

¹⁵⁹ Ibid.

¹⁶⁰ Note 81 above, 249. See *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) 597B.

¹⁶¹ Note 115 above, 1024 para 65. See Note 81 above, 249.

¹⁶² Note 115 above, 1025 para 69. See Note 81 above, 250.

2.5 Labour Laws

2.5.1 LRA

The LRA correlates to sexual harassment through unfair labour practices and more specifically unfair dismissals.¹⁶³

2.5.1.1 Unfair Dismissal

Sexual harassment incidents in the workplace are usually dealt with as a misconduct.¹⁶⁴ In the context of sexual harassment, dismissals may arise in two circumstances. In the first instance, the employee, who is the harasser, is dismissed for a misconduct.¹⁶⁵ Secondly, the harassed employee may resign due to the sexual harassment incidents which the employer did not address.¹⁶⁶ The latter is referred to as constructive dismissal which is regulated by section 186(1)(e). Constructive dismissal arises where the employer created intolerable employment conditions, whereby, the employee's only solution is their resignation.¹⁶⁷ It must be noted that constructive dismissal, in cases of sexual harassment, is common, as the employer created intolerable work conditions due to their inaction to combat the harassment.¹⁶⁸

In cases of unfair dismissal, the employee has the onus to prove that there was a dismissal, and thereafter, the onus shifts to the employer to show it was fair.¹⁶⁹ Thus, the employee in sexual harassment matters who had allegedly been constructively dismissed merely has to establish that the dismissal fell into section 186(1)(e).¹⁷⁰

However, if a dismissal is for any reason listed in section 187, the dismissal would be automatically unfair.¹⁷¹ In relation to sexual harassment, if it can be established that the dismissal was based on the grounds in section 187(1)(f), specifically the grounds of sex or gender, as sexual harassment is not expressly stipulated as a ground, the dismissal would be deemed automatically unfair.¹⁷² It seems that the automatically unfair dismissal may be viewed

¹⁶³ Note 1 above, 21.

¹⁶⁴ Note 4 above, 442.

¹⁶⁵ Note 1 above, 22.

¹⁶⁶ Ibid.

¹⁶⁷ Ibid.

¹⁶⁸ Note 99 above, 526.

¹⁶⁹ Section 192 of the LRA.

¹⁷⁰ Note 1 above, 22.

¹⁷¹ Note 81 above, 254.

¹⁷² Ibid.

as a “third” type of dismissal in relation to sexual harassment. However, this was rejected in the *Ntsabo case*.

In this case, Ntsabo, who was employed by Real Security CC as a security guard, was subjected to various acts of sexual harassment by her supervisor Mr Dlomo which culminated in him assaulting her.¹⁷³ She and her brother, who had laid a complainant separately on her behalf, attempted to report the issue, however, nothing was initiated to address the sexual harassment occurring at work; thus, resignation was the only option, as the inaction of the employer to combat the sexual harassment created intolerable working conditions.¹⁷⁴

Ntsabo sought relief through the provisions of the EEA for patrimonial damages, such as medical fees, and non-patrimonial damages, for *inter alia contumelia*.¹⁷⁵ Additionally, a claim was made in terms of section 187(1)(f) and alternatively in terms of section 186(1)(e) of the LRA.¹⁷⁶

The court rejected the notion that the constructive dismissal amounted to an automatically unfair discrimination in terms of section 187(1)(f) due to the fact that it was not alleged by the employee as a ground for resignation.¹⁷⁷

The Labour Court, however, found that in terms of section 186(1)(e), constructive dismissal was proved by Ntsabo in that the employer failed to address the complaints brought forward by the harassed and her brother and, therefore, created an intolerable work environment which resulted in her resignation.¹⁷⁸ Thus, due to her unfair dismissal, compensation was awarded up to 12 months in terms of the LRA, as well as the damages in terms of the EEA.¹⁷⁹

Since the court rejected that the dismissal was automatically unfair, doubling the compensation in terms of section 194(3) did not occur *in casu*.¹⁸⁰ However, in *Christian v Colliers Properties*,¹⁸¹ the employee claimed that she was dismissed in terms of section 187(1)(f) on

¹⁷³ Note 99 above, 524.

¹⁷⁴ Ibid.

¹⁷⁵ Ibid 526.

¹⁷⁶ Ibid.

¹⁷⁷ Note 1 above, 23.

¹⁷⁸ Ibid.

¹⁷⁹ Note 99 above, 526.

¹⁸⁰ Note 81 above, 254.

¹⁸¹ *Christian v Colliers Properties* (2005) 26 ILJ 234 (LC).

the basis of her failure to accept the unwelcome sexual advances, which amounted to sexual harassment.¹⁸² Since it was established that her dismissal was automatically unfair, she was awarded 24 months compensation in terms of section 194(3).¹⁸³

Notwithstanding the above with regards to section 187(1)(f), there has been a replacement of this section by the anti-discrimination provisions of the EEA.

2.5.2 EEA

One of the main objectives of the EEA is to regulate discrimination in the workplace.¹⁸⁴ This is evident from section 6(1) which notes that no one should discriminate unfairly against an employee on certain grounds which include, amongst other things, sex and gender – the grounds most relevant in cases of sexual harassment.¹⁸⁵ Section 6(3) provides that harassment, thereby, including sexual harassment, “is a form of unfair discrimination” against a harassed employee.¹⁸⁶

Section 60 provides for employer liability and avoidance thereof. It must be noted that employer liability, discussed above, in terms of the common law, which is regulated by the law of delict in terms of vicarious or direct liability differs from liability in terms of the EEA.¹⁸⁷ The difference arises firstly from the requirements under the act as opposed to the common law and secondly, the purposes for employer liability differ between the act and common law.¹⁸⁸ The purpose of employer liability provided by the EEA is essentially to punish employers for their inaction to prevent the harassment resulting, whereas, the purpose of the common law is to penalise employers for the wrongful behaviour of their employee (the harasser).¹⁸⁹

As explained above, the *Grobler* case was brought under the common law in order to hold the employer liable. The *Ntsabo* case, therefore, differed from the *Grobler* case, as the employer was held liable in terms of the EEA for the employer’s breach of its statutory obligation to take action in an attempt to prevent the harassment from culminating in the workplace.¹⁹⁰

¹⁸² Note 1 above, 23.

¹⁸³ Ibid. See also note 181 above, 242B.

¹⁸⁴ Note 1 above, 17.

¹⁸⁵ Note 81 above, 255.

¹⁸⁶ Note 2 above, 26.

¹⁸⁷ Note 81 above, 257.

¹⁸⁸ Ibid.

¹⁸⁹ Ibid 258.

¹⁹⁰ Note 111 above, 1923.

Thus, an employer could attribute liability for cases of sexual harassment in specific circumstances, whereby, the requirements set out in section 60(1)-(4) of the EEA are satisfied.¹⁹¹ Section 60(1) provides that where an employee, “while at work,” is in violation of any provision of the act, such as harassment of another employee, this “must immediately be brought to the attention of the employer.”¹⁹² The requirements, “while at work” and “immediately” will be interpreted further.

Firstly, “while at work” should be interpreted more broadly than the requirement within “course and scope of employment” under the common law.¹⁹³ “While at work” is understood to mean “in the workplace” or where employees are involved in activities which are work-related.¹⁹⁴

Secondly, the word “immediately” was interpreted in *Ntsabo* to mean within a reasonable time which does not simply mean reporting the incident of harassment to the employer within minutes of its occurrence.¹⁹⁵ The Labour Court accepted that the circumstances giving rise to the case are important in the determination of reasonable time.¹⁹⁶ *In casu*, the fact that the harassed reported the incident to her family in order to seek advice before reporting it to the employer did not mean that it was not reported immediately, as this was part of her family custom.¹⁹⁷

Section 60(2) notes that once the employer is made aware of the alleged conduct (of sexual harassment), they must conduct a consultation with the affected parties and take all relevant measures to eradicate the sexual harassment, failure of which, according to section 60(3), liability will be attributed to the employer for contravention of subsection 2.¹⁹⁸ According to section 60(4) of the EEA, the employer may avoid liability where they did what was reasonably necessary to ensure that sexual harassment does not occur at work.

¹⁹¹ Note 1 above, 18.

¹⁹² Ibid 20.

¹⁹³ Note 81 above, 259.

¹⁹⁴ Note 129 above, 54. See Note 81 above, 259.

¹⁹⁵ Note 107 above, 2374B-G.

¹⁹⁶ Note 81 above, 258.

¹⁹⁷ Note 99 above, 525.

¹⁹⁸ Note 1 above, 20.

However, in the *Ntsabo* case, despite the complaints laid by the harassed, as well as her brother, the employer failed to take steps to combat the incidents of sexual harassment of its employee, and was thus in contravention of section 60(2) and held liable.¹⁹⁹

It has been established that the EEA does not provide a precise definition of sexual harassment except that it is a form of unfair discrimination.²⁰⁰ Moreover, the EEA does not provide procedures for handling incidents of harassment in the workplace.²⁰¹ Therefore, a consideration of the 1998 and 2005 Codes will ensue.

2.5.3 The 1998 and 2005 Codes of Good Practice on the Handling of Sexual Harassment Cases

The National Economic Development and Labour Council (NEDLAC), due to the provisions in section 203 of the LRA, developed the 1998 Code.²⁰² Yet again, in 2005 a further Code was issued by NEDLAC in terms of section 54 of the EEA to conform to international obligations in terms of certain ILO conventions in combating sexual harassment in the workplace.²⁰³

However, it must be noted that the Codes were/are used as guidelines to shape the law regarding sexual harassment.²⁰⁴ Therefore, what will be analysed below is the definition or test each Code provides to establish sexual harassment, the different forms of sexual harassment, as well as contrasting the similarities and differences between the Codes.

2.5.3.1 The 1998 Code

The 1998 Code has been criticised, as it failed to recognise that sexual harassment constitutes unfair discrimination.²⁰⁵ A further criticism was the uncertainty in the test and definition of sexual harassment.²⁰⁶ Item 3 states that:

- “(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:

¹⁹⁹ Note 111 above, 1922.

²⁰⁰ Note 134 above, 324.

²⁰¹ Note 23 above, 1721.

²⁰² Note 1 above, 19.

²⁰³ Note 23 above, 1721.

²⁰⁴ Note 1 above, 19.

²⁰⁵ Note 81 above, 256.

²⁰⁶ Ibid.

- 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.”

It is apparent that there was a distinction between sexual harassment and sexual attention between consenting adults at work.²⁰⁷ Item 3(2) provided that sexual attention may develop into sexual harassment if the elements in the latter item are met.²⁰⁸ The wording “and/or” implied that a single factor in a-c above only needs to be present for harassment to be established which could mean that the mere fact that the behaviour was continuous, without considering whether it was welcomed by the two parties, could result in conduct amounting to sexual harassment.²⁰⁹ The latter was problematic.

Item 4 of the Code described the different forms that sexual harassment may take which is not a closed list. Non-verbal sexual harassment included “unwelcome gestures, indecent exposure, and the unwelcome display of sexually explicit pictures and objects.”²¹⁰ Verbal harassment included, *inter alia*, unwelcome suggestions, hints and innuendos, sexual jokes and even includes whistling at persons.²¹¹ On the opposite end of the spectrum was the more serious form, namely physical contact,²¹² which included anything from “touching to sexual assault and rape, and includes a strip search by or in the presence of the opposite sex.”²¹³ Moreover, quid pro quo harassment and sexual favouritism were listed as a form of sexual harassment in item 4. However, it seems that a better approach is to define the latter as an effect of harassment instead of classifying it as a form of harassment.²¹⁴

Quid pro quo harassment occurs where someone attempts to influence the employment process, benefits, dismissal or promotions, *inter alia*, in exchange for sexual favours by the employee or job applicant.²¹⁵ This usually occurs where there are power imbalances in the workplace.²¹⁶

²⁰⁷ Note 23 above, 1725.

²⁰⁸ Ibid.

²⁰⁹ Ibid.

²¹⁰ Item 4(1)(c) of the 1998 Code.

²¹¹ Item 4(1)(b) of the 1998 Code.

²¹² Note 23 above, 1727.

²¹³ Item 4(1)(a) of the 1998 Code.

²¹⁴ O Dupper & C Garbers ‘Employment Discrimination: A Commentary’ in C Thompson & P Benjamin (eds) *South African Labour Law* (loose-leaf) (2002) 69.

²¹⁵ Item 4(1)(d) of the 1998 Code.

²¹⁶ Note 214 above, 69.

Sexual favouritism occurs when employees who respond to the sexual conduct of the harasser only receive employment benefits from a person in a superior position, whilst those who reject the sexual advances are denied such benefits in the workplace.²¹⁷

The remainder of the Code namely, items 5-10 focused on the duty of employers to prevent sexual harassment at work, the obligation to establish policies on sexual harassment and to create clear procedures, both formal and informal, to deal with incidents of sexual harassment.²¹⁸

2.5.3.2 The 2005 Code

Due to the criticism above, the main improvements of the 2005 Code were that a new test was developed in item 4 for the determination of sexual harassment and item 3 now clearly states that “sexual harassment in the working environment is a form of unfair discrimination.”²¹⁹

Item 4 states that:

“Sexual harassment is unwelcome conduct of a sexual nature that violates the rights of an employee and constitutes a barrier to equity in the workplace, taking into account all of the following factors:

- 4.1 whether the harassment is on the prohibited grounds of sex and/or gender and/or sexual orientation;
- 4.2 whether the sexual conduct was unwelcome;
- 4.3 the nature and extent of the sexual conduct; and
- 4.4 the impact of the sexual conduct on the employee.”

2.5.3.3 Comparison of the 1998 and 2005 Codes

Unlike the 1998 Code, the element of “persisted sexual advances” does not appear in the 2005 Code for the establishment of sexual harassment. Further, the distinction between sexual harassment and sexual attention also does not feature.²²⁰

The similarities between the Codes are that the objectives stated in item 1 are the same. The different types of harassment are similarly stated to include physical, verbal and nonverbal

²¹⁷ Item 4(2) of the 1998 Code.

²¹⁸ Note 23 above, 1729.

²¹⁹ Ibid 1727.

²²⁰ Note 134 above, 327.

conduct. Moreover, both Codes provide for informal and formal procedures when dealing with incidents of sexual harassment.²²¹

However, the difference arises in that the effect of harassment now extends in the 2005 Code to include victimisation, whereas, the 1998 Code only stated *quid pro quo* and sexual favouritism.²²² Victimisation results when an employee is prejudiced at work for not accepting the unwelcome conduct by the harasser.²²³ Nevertheless, it is noteworthy that both Codes leave out a hostile work environment when considering the effect of harassment.²²⁴ This occurs where a toxic work environment is created through, for example, pornographic images being displayed in the workplace.²²⁵

The 1998 Code in item (3)(2)(c) attributed fault to the harasser by highlighting that “the perpetrator should have known that the behaviour is regarded as unacceptable.”²²⁶ Since sexual harassment is often dealt with as a misconduct in the workplace, fault is an important consideration.²²⁷ On the other hand, in the 2005 Code, the element of fault in the test for sexual harassment is disregarded, as fault is not required in discrimination law, which is in line with the EEA.²²⁸

Even though the 2005 Code is only in force, it must be noted that the 1998 Code was attached to legislation which has a different purpose to the Act in which the 2005 Code is attached. The 1998 Code was attached to the LRA which mainly deals with unfair dismissals, and the 2005 Code is attached to the EEA which is concerned with discriminatory issues in the workplace.

Therefore, it is submitted that when dealing with sexual harassment as a misconduct, which could result in a possible dismissal, the 1998 Code would have been the more suitable Code to rely upon for guidance.²²⁹ This would have ensured that the requirement of fault was considered

²²¹ Item 7 of the 1998 Code and item 8 of the 2005 Code.

²²² Note 23 above, 1729.

²²³ Item 5.3.2.1 of the 2005 Code.

²²⁴ Note 4 above, 428.

²²⁵ Note 214 above, 69.

²²⁶ Note 4 above, 443.

²²⁷ *Ibid* 444.

²²⁸ *Ibid*.

²²⁹ A Botes ‘Sexual Harassment as a ground for dismissal: A critical evaluation of the labour court and labour appeal courts’ decisions in *Simmers v Campbell Scientific Africa* (2017) (4) *TSAR* 790.

when determining sexual harassment, whereas, the guidelines established by the 2005 Code should be relied upon when sexual harassment is handled as an unfair discrimination case.²³⁰

Lastly, it is noteworthy that in both the 1998 and 2005 Codes, for conduct to amount to sexual harassment it must either be unwanted or unwelcome which are viewed as synonyms.²³¹ The latter is considered one of the most important elements in the determination of sexual harassment.²³² Thus, the sexual harassment incident must be unwelcome/unwanted.²³³ For instance, PEPUDA overlaps with the 1998 Code in that the conduct must be unwanted; whereas PHA and the ILO Special Survey²³⁴ overlaps with the 2005 Code which provides that the conduct of the harasser should be unwelcome for the establishment of sexual harassment.²³⁵

Therefore, it will become apposite, in the next chapter, to critically analyse the unwelcome element required in sexual harassment cases, as the unwelcome/unwanted element is the obvious common denominator across the definitions, assessed above, which is necessary for the establishment of sexual harassment.²³⁶

2.6 Conclusion

In closing, this chapter has briefly touched on the law on sexual harassment from an international, general and labour law perspective with particular emphasis on the definition of sexual harassment and the legal remedies available to victims of sexual harassment.

Particular emphasis is placed on the last sentiments of this chapter which highlights that the unwelcome element is seen as a prerequisite in most definitions for establishing sexual harassment and must be analysed further.

²³⁰ Note 4 above, 444.

²³¹ Note 134 above, 325.

²³² Ibid 324.

²³³ Ibid 326.

²³⁴ ILO 'Equality in Employment and Occupation: Special Survey on Equality in Employment and Occupation in respect of Convention No. 111' (Geneva 1996) 15.

²³⁵ Note 134 above, 325-326.

²³⁶ Ibid 326.

CHAPTER 3

UNPACKING THE UNWELCOME ELEMENT²³⁷

3.1 Introduction

In this chapter, a crucial question will be addressed, which will set the tone for the rest of this dissertation, namely, what is the unwelcome element required for the determination of sexual harassment. From the onset of this chapter, it is noteworthy that the term “unwanted” will be used interchangeably with the term “unwelcome”.²³⁸ The latter will collectively be described as the unwelcome element. As noted in chapter 2, it is clear that the unwelcome element sits at the forefront when defining sexual harassment across international and local laws. Thus, it is apposite to unpack this requirement further in which there will be a reliance on US case law.

Further, the test used for the determination of sexual harassment, in which the unwelcome element is a prominent feature, will be assessed with particular reference to whose perspective should be relied upon to establish whether the conduct was unwelcome. Lastly, the problems associated with the unwelcome element will be considered which will provide a causal link to the next chapter.

3.2 Defining the Unwelcome Element

As noted in the previous chapter, the unwanted element is a prominent feature for the establishment of sexual harassment.²³⁹ In fact, in almost all jurisdictions, the unwelcome conduct of the harasser is necessary for the determination of sexual harassment.²⁴⁰ Specifically in relation to SA, the importance of the unwelcome element is evident from case law, such as *Pillay and Old Mutual Property (Pty) Ltd*,²⁴¹ which held that the unwelcome or unwanted component is essential in cases of sexual harassment.²⁴² This is corroborated in *Zaindeen and Clicks Retailers (Pty) Ltd*²⁴³ which held that “[a] very important element of the offence of sexual harassment is that the conduct must have been unwanted, unsolicited and offensive to

²³⁷ Note 32 above, 102 - “What does it mean to welcome being called a bitch, a slut, a whore? Being asked if you’ve lost a pair of underpants, complete with soiled sanitary napkin? Finding used condoms in your locker at work? What does it mean to welcome such behavior? Can it ever be welcome?...”

²³⁸ Note 9 above, 6-32.

²³⁹ Ibid 6-30.

²⁴⁰ Note 40 above, 10.

²⁴¹ *Pillay and Old Mutual Property (Pty) Ltd* (2015) 36 ILJ 1961 (CCMA).

²⁴² Ibid 1980 para 80.

²⁴³ *Zaindeen and Clicks Retailers (Pty) Ltd* (2014) 35 ILJ 2322 (CCMA).

the complainant.”²⁴⁴ Therefore, the importance of the unwelcome element, in relation to sexual harassment cases, provides a legitimate basis for the element to be critically defined.

According to the South African Oxford Pocket Dictionary, “unwelcome” is defined as “not welcome or unacceptable.” Furthermore, “unwanted” is defined by the Oxford English Living Dictionaries as “not or no longer desired.”²⁴⁵ On the contrary, “welcome” is defined in the American Heritage Dictionary as “1. Received with pleasure and hospitality into one’s company. 2. Gratifying 3. Cordially permitted or invited, as to do or enjoy.”²⁴⁶ The dictionary meanings do not provide the definition of unwelcome in the context of sexual harassment.

Therefore, a reliance on US law will be examined, as it is well established that the US was the first country to formally describe sexual harassment as a term and acknowledged it as a form of discrimination against women.²⁴⁷ With particular reference to the unwelcome element, US law has developed extensively through cases, as opposed to legislation.²⁴⁸ Thus, there is literary value in analysing such cases further.

3.3 US Law

Before an analysis of US case law is undertaken, a brief history of how the unwelcome element became the “gravamen” of sexual harassment cases in the US will be provided. It must be noted that the Equal Employment Opportunity Commission (EEOC), a “US federal agency responsible for enforcing Title VII,”²⁴⁹ distinguishes between two forms of harassment namely, quid pro quo and hostile work environment harassment.²⁵⁰ Both forms were explained in the previous chapter. Notwithstanding the distinction between the two forms, for both quid pro quo and hostile work environment harassment, there is a need to establish that the conduct of a

²⁴⁴ Ibid 2328 para 38.

²⁴⁵ ‘English Oxford Living Dictionaries’ available at <https://en.oxforddictionaries.com/definition/unwanted>, accessed on 1 August 2018.

²⁴⁶ Note 32 above, 95.

²⁴⁷ D Zalesne ‘Sexual Harassment Law in the United States and South Africa: Facilitating the Transition from Legal Standards to Social Norms’ (2002) 25 *Harv. Women’s L.J.* 145.

²⁴⁸ M Jackson ‘Different Voicing of Welcomeness: Rational Reasoning and Sexual Harassment’ (2005) 81 *N.D.L. Rev.* 744.

²⁴⁹ J Weiner ‘Understanding Unwelcomeness in Sexual Harassment Law: Its History and a Proposal for Reform’ (1997) 72 *Notre Dame L. Rev.* 623 which also notes that sexual harassment was recognised under Title VII as a form of gender discrimination.

²⁵⁰ Note 248 above, 748.

sexual nature was unwelcome.²⁵¹ However, in terms of quid pro quo harassment, the unwelcome element was not tantamount to the enquiry.²⁵²

Moreover, for some time, only quid pro quo harassment warranted a claim for sexual harassment, however, from 1981, courts in the US started to recognise a hostile work environment as a basis for sexual harassment claims.²⁵³ This was evident in the case of *Henson v City of Dundee*²⁵⁴ which held that there was no need to establish a tangible loss or extension of job benefits in sexual harassment cases, in other words, only claims arising from quid pro quo harassment.²⁵⁵

Apart from advancing the hostile work environment doctrine,²⁵⁶ the *Henson* case provided five elements that needed to be proved by the harassed in order to succeed in a sexual harassment claim due to a hostile work environment, of which the unwelcome requirement is one of the elements.²⁵⁷ The court defined the unwelcome element as follows:

“unwelcome in the sense that the employee did not solicit or incite it, and in the sense that the employee regarded the conduct as undesirable or offensive.”²⁵⁸

Simply put, the above definition notes that the harassed must establish that he or she did not encourage or enjoy the conduct of the harasser.²⁵⁹ The five-part element test set out in the *Henson* case is regarded as the primary test for the determination of sexual harassment in the US.²⁶⁰ However, challenges were faced by courts, as the last part of the definition of the unwelcome element, quoted above, was subjective.²⁶¹ As such, even though the harassed may find the conduct of the harasser subjectively offensive and thus unwelcome; the harassed’s

²⁵¹ P Monnin ‘Proving Welcomeness: The Admissibility of Evidence of Sexual History in Sexual Harassment Claims under the 1994 Amendments to Federal Rule of Evidence 412’ (1995) 48 *Vand. L. Rev.* 1164.

²⁵² Note 248 above, 747.

²⁵³ A Juliano ‘Did She Ask for It?: The Unwelcome Requirement in Sexual Harassment Cases’ (1992) 77 *Cornell L. Rev.* 1558.

²⁵⁴ *Henson v City of Dundee* 682 F2d 897 (CA Fla 1982). Hereinafter referred to as the *Henson* case.

²⁵⁵ Note 253 above, 1568. Note 254 above, 904 para 3.

²⁵⁶ Note 253 above, 1568.

²⁵⁷ Note 249 above, 623.

²⁵⁸ Note 254 above, 903 para 2. See Note 9 above, 6-32.

²⁵⁹ N Bina ‘Employers as Vigilant Chaperones Armed with Dating Waivers: The Intersection of Unwelcomeness and Employer Liability in Hostile Work Environment Sexual Harassment Law’ (1999) 20 *BJELL* 330.

²⁶⁰ Note 253 above, 1571.

²⁶¹ Note 251 above, 1165.

conduct may, nonetheless, still indicate that the sexual behaviour was “welcomed” from the perspective of the harasser.²⁶²

Light was shed four years after the *Henson* case when the US Supreme Court firstly validated sexual harassment as a claim on the basis of hostile work environment²⁶³ in *Meritor Savings Bank, FSB v Vinson ET AL*,²⁶⁴ and most importantly, required the unwelcome element be entrenched as a threshold in the sexual harassment enquiry.²⁶⁵ This was evident when the court held that “[t]he gravamen of any sexual harassment claim is that the alleged sexual advances were “unwelcome.””²⁶⁶ In this case, Ms Vinson had intercourse with her supervisor out of fear that her rejection would result in job loss and was also the victim of certain violent acts inflicted by him.²⁶⁷ She was dismissed for overuse of her sick leave.²⁶⁸

The main argument put forward by the Bank was that since there was a voluntary sexual relationship between the harasser and Ms Vinson, it could not be deemed sexual harassment and the district court accepted this line of argument²⁶⁹ However, the Supreme Court rejected the district court’s understanding of voluntariness in the context of unwelcome element,²⁷⁰ and made it clear that the harassed could engage in sexual conduct, without being forced, or having a gun to her head, nonetheless, it could still not be welcomed.²⁷¹ Therefore, voluntariness is not decisive in the unwelcome enquiry.²⁷² Since the unwelcome element is considered the most problematic requirement for the establishment of sexual harassment,²⁷³ the *Meritor* case will be considered only with particular reference to the unwelcome aspect.

²⁶² Ibid.

²⁶³ Note 253 above, 1558.

²⁶⁴ *Meritor Savings Bank FSB v Vinson ET AL* 477 U.S. 57 (1986). Hereinafter referred to as the *Meritor* case or *Meritor*.

²⁶⁵ L Salmon ‘Whoever Fights Monsters Should See to It That in the Process He Does Not Become a Monster: The Necessity of Maintaining and Narrowing the Welcomeness Requirement in Sexual Harassment Suits’ (2002) 77 *Ind. L. J.* 617.

²⁶⁶ Note 264 above, para 68.

²⁶⁷ Note 249 above, 624.

²⁶⁸ Note 253 above, 1572.

²⁶⁹ Ibid.

²⁷⁰ Ibid.

²⁷¹ Note 264 above, para 68. See Note 32 above, 94.

²⁷² L Ramsini ‘The Unwelcome Requirement in Sexual Harassment: Choosing a Perspective and Incorporating the Effect of Supervisor-Subordinate Relations’ (2014) 55 *Wm & Mary L. Rev.* 1967.

²⁷³ Note 7 above, 426.

The court, in the *Meritor* case, further acknowledged that the unwelcome element will cause problems when it comes to proof and credibility.²⁷⁴ It seems that the court departed from the *Henson* case in that a more objective assessment was used. This was evident when the court stated that the unwelcome element turns on whether the harassed “by her conduct indicated that the alleged sexual advances were unwelcome.”²⁷⁵ Moreover, in determining whether the harasser’s conduct was unwelcome, the “totality of the circumstances” should be considered which includes the nature of the sexual behaviour and context.²⁷⁶

Lastly, with regards to the assessment of the unwelcome element, the court made a profound statement regarding speech and dress by rejecting the district court’s finding that speech and dress was irrelevant evidence.²⁷⁷ The Supreme Court held that indeed speech and dress was admissible evidence when it comes to deciding if the harasser’s conduct was unwelcome.²⁷⁸ The latter, therefore, places specific focus on the harassed’s responses and deflects from the harasser’s conduct.²⁷⁹ This sheds light and is a brief introduction to the problems regarding the unwelcome element which will be discussed further below. Thus, both the *Henson* and *Meritor* cases provide that the harassed conduct is of central importance to the overall sexual harassment claim.²⁸⁰

3.4 South African Law

Since the above has explored US case law in the interpretation of the unwelcome element, an analysis of how the unwelcome element is understood in South African law will ensue, whereby; emphasis will be placed on the Codes of Good Practice due to the fact that they are important when providing guidelines for the determination of sexual harassment.²⁸¹

²⁷⁴ Note 264 above, para 68.

²⁷⁵ Note 264 above, para 68. See note 272 above, 1967.

²⁷⁶ Note 264 above, para 69. See Note 248 above, 750.

²⁷⁷ Note 264 above, para 68 and 69.

²⁷⁸ Ibid para 69 –“...it does not follow that a complainant's sexually provocative speech or dress is irrelevant as a matter of law in determining whether he or she found particular sexual advances unwelcome. To the contrary, such evidence is obviously relevant.” See also Note 253 above, 1573.

²⁷⁹ W Pollack ‘Sexual Harassment: Women’s Experience vs. Legal Definitions’ (1990) 13 *Harv. Women’s L.J.* 58.

²⁸⁰ Note 251 above, 1166.

²⁸¹ Note 129 above, 235.

3.4.1 1998 Code of Good Practice on Handling Sexual Harassment Cases

The unwelcome element stood out explicitly in item 3(1) of the 1998 Code when defining sexual harassment as “unwanted conduct of a sexual nature.” The Code explained that “the unwanted nature of sexual harassment distinguishes it from behaviour that is welcome and mutual.”²⁸² The distinction implied that there can be sexual conduct between persons who consent²⁸³ and recognised that interaction amongst sexes is highly probable in the workplace.²⁸⁴

Thus, this distinction supports the argument in favour of the unwelcome element in that its biggest justification lies in the fact that legal action should not be taken for consensual sexual relations occurring in the workplace.²⁸⁵ This is linked to US law whereby the EEOC provides that sexual harassment claims should not be a mechanism, whereby, a party to consensual workplace sexual relationship punishes the other, such as an employee who was dismissed or an abandoned lover.²⁸⁶

Moreover, reference to the unwelcome element was provided in item 3(2) in which requirements are set out to determine when sexual attention (considered welcomed sexual advances) progresses into sexual harassment (considered unwelcome sexual advances).²⁸⁷ Thus, welcomed sexual advances would be considered unwelcome when the harassed “has made it clear that the behaviour is considered offensive; and/or”²⁸⁸ the harassed “should have known that the behaviour is regarded as unacceptable.”²⁸⁹ With regards to the terms “offensive” or “unacceptable”, used in item 3(2) (b) and (c) above, it would seem, according to the dictionary meaning, that the terms “offensive” or “unacceptable” could be used interchangeably with the word unwelcome.²⁹⁰

²⁸² Note 23 above, 1725.

²⁸³ Ibid.

²⁸⁴ Note 129 above, 244.

²⁸⁵ Note 272 above, 1968.

²⁸⁶ Note 272 above, 1969.

²⁸⁷ Note 23 above, 1725.

²⁸⁸ Item 3(2) (b) of the 1998 Code. See also Note 23 above, 1725.

²⁸⁹ Item 3(2) (c) of the 1998 Code.

²⁹⁰ See Note 23 above, 1726 – “(which both included a reference to the unwelcome nature of the attention, by respectively using the words ‘offensive’ and ‘unacceptable.’)”

With particular reference to item 3(2)(b), it could be argued that the requirement implied that true sexual harassment can only occur when the harassed did not welcome, encourage, promote or participate in the sexual attention.²⁹¹

Item 3(2)(b) is supported in *Sadulla v Jules Katz & Co*,²⁹² whereby, an employee was dismissed for sexual harassment, however, the arbitrator found that sexual harassment did not result, as the harassed female employee did not indicate that the sex talk was offensive, despite subjectivity feeling uncomfortable, and further, reciprocated the conduct by answering the questions posed equally in a sexual manner.²⁹³ Cloete C held that:

“In a case of sexual harassment proper, one would not expect the victim to initiate certain new trends in the conversation, or to introduce fresh material and notions, especially about her/his own sexual life or private bodily parts. There can of course be circumstances that justify a victim in doing this, but they would have to be exceptional, as the primary object of the victim should be discouragement and protestation.”²⁹⁴

Further, the words “made it clear” in item 3(2)(b) implied that the harassed should have expressly stated to the harasser that he or she finds the sexual conduct offensive/ unwelcome.²⁹⁵ This requirement of active confrontation was problematic due to the fact that the harassed may respond differently depending on the personality of the harassed or power imbalance between the harassed and harasser in the workplace.²⁹⁶ Some personalities result in the harassed opting for a more subtle approach, such as ignoring or brushing off the behaviour, whereas, others would express their discomfort head-on.²⁹⁷ Light is shed on the latter in the next chapter.

3.4.2 2005 Code of Good Practice on Handling Sexual Harassment Cases

As noted in the previous chapter, the 2005 code was implemented and of importance was that it set out the test for sexual harassment in item 4, whereby, *inter alia*, a factor of the test for the establishment of sexual harassment asks “whether the sexual conduct was unwelcome.”²⁹⁸ To

²⁹¹ Ibid 1724.

²⁹² *Sadulla v Jules Katz* (1997) 18 ILJ 1482 (CCMA). Hereinafter referred to as the *Sadulla* case.

²⁹³ Note 229 above, 766.

²⁹⁴ Note 292 above, 1487B-C. See Note 23 above, 1724.

²⁹⁵ Note 229 above, 770.

²⁹⁶ Note 23 above, 1730.

²⁹⁷ Ibid.

²⁹⁸ Item 4.2 of the 2005 Code.

ensure that the test was articulated clearly, so as to avoid any confusion - item 5 was inserted which elaborates on the factors listed in item 4.²⁹⁹

Item 5.2 breaks down the requirement of unwelcome conduct. Firstly, item 3(2)(b) of the 1998 Code was phrased ambiguously and did not provide for the type of behaviour that would indicate that the harasser's conduct was unwelcome.³⁰⁰ The 2005 Code aimed to remedy this by highlighting that there are various methods that can be used by the harassed to indicate to the harasser that their conduct is unwelcome which includes a nonverbal form of communication, such as ignoring the harasser or simply walking away.³⁰¹ However, if it was a single occurrence of unwelcome sexual advances in which the harassed was unable to communicate that it was unwelcome, then the test would turn on whether the harasser should reasonably have been aware that the sexual advances were unwelcome.³⁰²

Further, the Code provides that previous sexual conduct that was once welcomed does not imply that such conduct will be welcomed in the future.³⁰³ This sheds light on the fact that a consensual sexual office romance which occurred in the past cannot negate the fact that the sexual conduct may be unwelcome in the future.³⁰⁴ Thus, it can be concluded that previous participation in sexual advances does not mean that they remain welcome in the future which arises the moment that the harassed holds the conduct to no longer be welcome.³⁰⁵

However, because it has been recognised that sexual conduct is ambiguous,³⁰⁶ and since a previous consensual sexual workplace relationship could add to the ambiguity, it has been suggested that the harassed must communicate clearly that the conduct is unwelcome to avoid uncertainty and the harasser arguing differently.³⁰⁷

With the above said, evidence of consensual past conduct should not simply be brushed aside due to the insertion of the provision and still plays a role in instances where for example, the victim alleges that jokes of a sexual nature amount to sexual harassment yet she subsequently

²⁹⁹ Note 23 above, 1729.

³⁰⁰ Ibid.

³⁰¹ Item 5.2 of the 2005 Code.

³⁰² Note 1 above, 32 and 33.

³⁰³ Item 5.2.2

³⁰⁴ Note 9 above, 6-34.

³⁰⁵ Note 23 above, 1732.

³⁰⁶ Note 272 above, 1969.

³⁰⁷ Note 1 above, 33. See also Note 9 above, 6-34.

participated in such behaviour.³⁰⁸ Issues of an office romance and past conduct, in the context of the unwelcome element, will be analysed further in the next chapter.

Lastly, where it is challenging for the harassed to effectively express that the conduct is unwelcome, the harassed may ask another such as “a co-worker, superior, counsellor, human resource official, family member or friend” to communicate this.³⁰⁹

3.5 The Test for Sexual Harassment

Understanding the test will provide clarity as to whose perspective should be considered to determine if the conduct was unwelcome.

As alluded to in the previous chapter, one of the most problematic aspects of the 1998 Code which arose from the definition in item 3, was whether sexual harassment should be determined from a subjective or objective perspective.³¹⁰ It has been confirmed that item 4 of the 2005 Code is the test for sexual harassment which contains both subjective and objective elements.³¹¹ The 2005 formulation results in, as it has been termed, “the rub” of the sexual harassment enquiry due to the fact that the harassed may subjectively find the conduct of a sexual nature, yet in the eyes of the harasser or other co-workers, the conduct may seem welcomed.³¹² With that said, there is a correlation between how women respond to sexual harassment and moreover, how males, who are likely to be the harassers, interpret the responses.

Women’s responses to unwelcome sexual advances depend on what is available in the circumstances which are decided based on what is at risk, such as fear of losing their job and how it would affect their children.³¹³ This is referred to as rational based reasoning, a response associated with women which is less confrontational.³¹⁴

The problem arises in regard to the unwelcome element³¹⁵ because courts expect women to follow the right-based reasoning, a response associated with men, to show that the conduct of

³⁰⁸ Note 4 above, 431.

³⁰⁹ Item 5.2.3 of the 2005 Code.

³¹⁰ Note 1 above, 31.

³¹¹ Note 2 above, 42.

³¹² Note 251 above, 1155 and 1166. See also Note 32 above, 96.

³¹³ Note 32 above, 96.

³¹⁴ Note 248 above, 752-754.

³¹⁵ Ibid 741.

the harasser was not welcome, such as following the formal route of reporting the incident, which is farfetched from the reality of how women actually show that the advances are unwelcome.³¹⁶

Furthermore, studies indicate that men sexualise responses given by women and find that women are sexually interested even when this is obviously not the case.³¹⁷ This can be explained by assessing different gender perceptions regarding sexual harassment. Therefore, studies show that men hold what women view as harassment as simply “good fun”.³¹⁸ Further, research indicated that men were more inclined to believe that offence should not be taken as quickly if a person were to express their sexual interest in another and that men were more inclined to rate sexual harassment as overly exaggerated in modern day society.³¹⁹ Thus, due to how females respond to unwelcome sexual advances and how males’ perceptions differ from females it becomes imperative when assessing the test for sexual harassment, to determine from whose perspective the conduct should be considered unwelcome.³²⁰

It is noteworthy that the confusion relating to whose perspective the conduct should be considered unwelcome from mainly arises in cases of sexual harassment involving a hostile work environment and where conduct is verbal.³²¹ This is so because it is easier to detect sexual harassment in quid pro quo harassment cases where a tangible benefit for the job is lost or where the unwelcome advances were physical in nature.³²²

The unwelcome element is a prominent feature in the test for sexual harassment, in fact, there seems to be a blur between the test for sexual harassment, and the test for whether the conduct was unwelcome, as the enquiry evokes a similar question.³²³ Originally, Halfkenny highlighted that the enquiry asks whether the harassed found the conduct of the harasser to be unwelcome – the subjective test and secondly, whether the harasser reasonably believed that his conduct

³¹⁶ Ibid 754 and 755.

³¹⁷ Note 32 above, 96.

³¹⁸ J Ekore ‘Gender Differences in Perception of Sexual Harassment among University Students’ (2012) 10 *AJOL* 4360.

³¹⁹ B Dietz-Uhler & A Murrell ‘College students’ perceptions of harassment: Are gender differences decreasing?’ (1992) *Journal of College Student Development* 33, 540-546. See Note 318 above, 4360.

³²⁰ Note 4 above, 432. See also Note 129 above, 242.

³²¹ Note 129 above, 242.

³²² Ibid.

³²³ Note 5 above, 217 and 218.

was unwelcome – the objective test.³²⁴ The objective test holds firm in the 1998 Code which noted that sexual attention only transpires into harassment if *inter alia* the harasser should have known that his behaviour was unwelcome.³²⁵

3.5.1 Subjective Test

Courts seem to be inconsistent in applying the test for sexual harassment; however, three tests have been recognised, whereby, different perspectives either from the harasser, harassed or both are considered.³²⁶ Firstly, the subjective test focuses solely on the feelings or perspective of the harassed.³²⁷ The case of *Motsamai v Everite Buildings Products*³²⁸ is supportive of a subjective a test which is evident below:

“Sexual harassment is the most heinous misconduct that plagues a workplace; not only is it demeaning to the victim, it undermines the dignity, integrity and self-worth of the employee harassed. The harshness of the wrong is compounded when the victim suffers it at the hands of his/her supervisor. Sexual harassment goes to the root of one’s being and must therefore be viewed from the point of view of a victim: how does he/she perceive it, and whether or not the perception is reasonable.”³²⁹

Even though sexual harassment is a personal experience and there must be a consideration of the harassed’s perspective, a purely subjective test has raised caution, as the harassed may be overly sensitive which can result in a senseless claim against the harasser.³³⁰ Moreover, this could result in liability without fault, yet fault is an important factor in cases where sexual harassment is treated as a misconduct in the workplace.³³¹

³²⁴ Ibid 217.

³²⁵ Item 3(2) of the 1998 Code. Note 1 above, 31.

³²⁶ Note 4 above, 432.

³²⁷ Note 4 above, 432.

³²⁸ *Motsamai v Everite Building Products (Pty) Ltd (JA21/08) [2010] ZALAC 23; [2011] 2 BLLR 144 (LAC) (4 June 2010)*

³²⁹ Ibid 10 para 20. See Note 23 above, 1734.

³³⁰ Note 4 above, 432. See Note 1 above, 31.

³³¹ Note 4 above, 432.

3.5.2 Purely Objective Test

Secondly, a purely objective test asks whether the harasser knew or “ought reasonably to have known” that the sexual conduct was unwelcome.³³² This approach was evident in the case of *Gerber v Algorax (Pty) Ltd*³³³ which states:

“I am also of the view that the test to be applied to determine whether the conduct of the alleged perpetrator constitutes sexual harassment, should be an objective one. Campanella & Brassey in their article entitled ' . . . To Refrain From Embracing' in *Employment Law* vol 10 part 4, suggested that the test is whether the advances were welcome or whether the accused reasonably believed them to be so. So much was clear to the drafters of the Ontario Human Rights Code. They defined harassment as 'engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome.’”³³⁴

Further, in *Gregory v Russells (Pty) Ltd*,³³⁵ a subjective test was acknowledged; however, the court held that given the different cultural perceptions of what constitutes flirtation and sexual conduct in South Africa – an objective test will be the decisive factor in sexual harassment cases.³³⁶

3.5.3 A Possible New Formulation of the Objective Test

It clear from the above cases that the courts have endorsed, what has been coined, a “purely” objective test³³⁷ and even though the purely objective test ensures that there will be no frivolous claims for sexual harassment, as a result of a hypersensitive victim, caution is raised.³³⁸ The reason is due to the studies explained above which indicate that males are less likely than females to recognise that their conduct constitutes sexual harassment, and thus, the objective test supports the all too often defence used by males that they did not know that their conduct was harassment and accepts the traditional norm of behaviour amongst males.³³⁹

In an attempt to remedy the above, it seems as if there has been a change regarding the perspective of the purely objective test and the “new” formulation of the objective test now asks if a reasonable person would not consider the conduct of a sexual nature hostile, if so then

³³² Note 4 above, 433. See Note 1 above, 31.

³³³ *Gerber v Algorax (Pty) Ltd* (1999) 20 ILJ 2994 (CCMA). Hereinafter referred to as *Gerber* or the *Gerber* case.

³³⁴ *Ibid* 3005F-G. See also Note 229 above, 771.

³³⁵ *Gregory v Russells (Pty) Ltd* (1999) 20 ILJ 2145 (CCMA).

³³⁶ *Ibid* 2168B-E. See also Note 1 above, 31.

³³⁷ Note 1 above, 31.

³³⁸ Note 4 above, 433.

³³⁹ Note 1 above, 31.

sexual harassment did not occur.³⁴⁰ Therefore, even though the perspective is now viewed from a reasonable person, which on the face of it seems impartial, the reality of our patriarchal society results in what is referred to as the reasonable man test.³⁴¹ Thus, despite the change in perspective, the new formulation of the objective test has been criticised as still being viewed from a male perspective which neglects a female's point of view.³⁴² The US has recognised such which is evident in the case of *Ellison v Brady*³⁴³ where the court held that “the perspective of a reasonable woman primarily because we believe that a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experience of women.”³⁴⁴

3.5.4 Compromise Test

From the above, the subjective and objective tests either view whether the sexual conduct was unwelcome or hostile from the perspective of the harassed or harasser (the reasonable person) and both tests present challenges. In an attempt to rectify the latter, a balanced perspective was developed which is seen as a compromise between both the subjective and objective test.³⁴⁵ This test has often been referred to as the “reasonable victim” test and ensures that the perceptions or the feelings of the harassed are considered (subjective component) whilst at the same time ensuring that the encompassing circumstances are accounted for so as to balance the perspective of the harasser (objective component).³⁴⁶

The reasonable victim test ensures that the perspective of women, are considered,³⁴⁷ and the fact that the circumstances are considered means that any element necessary to establish the surrounding circumstances, such as fault on the part of the harasser will be examined.³⁴⁸ Therefore, a result will be arrived at that is inclusive of all parties in the sexual harassment enquiry.³⁴⁹

³⁴⁰ Note 129 above, 245. See also Note 4 above, 433.

³⁴¹ Note 129 above, 244.

³⁴² Ibid 245. See also Note 4 above, 433.

³⁴³ *Ellison v Brady* 1991 924 F 2d 872 (9th Cir).

³⁴⁴ Ibid 879.

³⁴⁵ Note 229 above, 772.

³⁴⁶ Note 129 above, 246. See Note 4 above, 434.

³⁴⁷ Note 129 above, 246.

³⁴⁸ Note 4 above, 434.

³⁴⁹ Note 229 above, 772.

A compromise for both the subjective and objective test is evident in the case of *Taljaard and Securicor*³⁵⁰ where Jamodien C held that the test is not based on whether the harasser reasonably believed that his conduct of a sexual nature was welcomed but rather asks, whether, from the harassed's perspective, the conduct was unwelcome (subjective component) and additionally, assesses whether a reasonable person, placed in the shoes of the harassed, considers the conduct unwelcome (objective component).³⁵¹ It is submitted that the latter aspect of the compromise test is more in line with the new formulation of the objective test stated above. This is further corroborated by the fact that the purely objective test was adopted in older cases as noted above, whereas, the *Taljaard* case is more recent.

3.6 The Problematic Unwelcome Element

Notwithstanding the fact that the "reasonable victim" test is considered the better approach, it is not short of criticism. The biggest criticism of the test is that it scrutinises the conduct of the harassed.³⁵² This is causally connected to the *Meritor* case which notes that in determining whether the conduct of a sexual nature was unwelcome, speech and dress are relevant to the enquiry and, as such the conduct of the victim becomes central to the unwelcome element. This results in the harasser, as part of his defence, introducing evidence of the harassed's speech, clothes, and lifestyle which is inclusive of sexual history and past conduct.³⁵³ This gives rise to the stereotype that women's true intentions can only be determined from their speech, dress or past behaviour.³⁵⁴

Thus, the onus shifts to the harassed due to admission of the above evidence in an attempt to show that she was more accepting and inviting of the alleged unwelcome sexual conduct.³⁵⁵ The harassed is essentially put on trial³⁵⁶ which turns into an evidentiary issue³⁵⁷ and the consequence is that the focus is no longer on the conduct of the harasser which should be the heart of the issue.³⁵⁸ The unwelcome element is considered the "roadblock" for the harassed in sexual harassment cases³⁵⁹ which seem to be linked to the fact that the enquiry regarding the

³⁵⁰ *Taljaard and Securicor* (2003) 24 ILJ 1167 (CCMA). Hereinafter referred to as the *Taljaard* case.

³⁵¹ Ibid 1174B. See also Note 229 above, 772.

³⁵² Note 4 above, 434.

³⁵³ Note 214 above, 71.

³⁵⁴ Note 32 above, 98.

³⁵⁵ Note 1 above, 109.

³⁵⁶ Note 265 above, 630.

³⁵⁷ Note 251 above, 1168.

³⁵⁸ Note 265 above, 616.

³⁵⁹ Note 272 above, 1965.

unwelcome element is never based on whether the conduct of a sexual nature was unwelcome; rather the courts critically analyse the harassed's conduct for any piece of evidence to demonstrate that the conduct of the harasser was welcomed.³⁶⁰

According to Joan Weiner (Weiner), in determining whether the conduct was unwelcome, four themes or factors ought to be considered.³⁶¹ Firstly, the harassed must expressly state clearly and consistently that the sexual advances were unwelcome, failure of which the harasser may be justified in continuing his conduct.³⁶²

Secondly, mixed responses which can be associated with friendly behaviours, such as a simple lunch date with the harasser or visiting the harasser in hospital can be seen as welcoming or inviting of sexual harassment.³⁶³ Thirdly, courts have been open to accepting that the harassed's sexual history which is inclusive of consensual sexual workplace relations is relevant in the unwelcome enquiry.³⁶⁴ Lastly, participation in office banter and vulgar speech, regardless of whether the harassed was simply trying to fit in, is relevant to determine if she welcomed the jokes or innuendoes of a sexual nature.³⁶⁵

Thus, the above factors firmly entrench gender bias³⁶⁶ by supporting the false notion that women welcome such behaviour.³⁶⁷ It is noteworthy that the specific problems identified above are mainly based in American cases. Therefore, the next chapter will assess, through a legal comparative study, whether the factors provided in the *Meritor* case and the factors detected by Weiner play a role in South African case law when determining whether the conduct of the harasser was unwelcome.

3.7 Conclusion

This chapter has briefly defined the unwelcome element with reference to US law and the South African 1998 and 2005 Codes. Further, the unwelcome element was understood from three perspectives which constitute the different tests used for the determination of sexual

³⁶⁰ Note 32 above, 95.

³⁶¹ Note 249 above, 628.

³⁶² Ibid 629.

³⁶³ Ibid 630.

³⁶⁴ Ibid 630 and 631.

³⁶⁵ Ibid 631.

³⁶⁶ Note 253 above, 1559.

³⁶⁷ Note 272 above, 1975.

harassment. Lastly, the problems regarding the unwelcome element, as well as the factors detected in American jurisprudence to determine the unwelcome element have been discussed which provides a causal link to the next chapter.

CHAPTER 4

FACTOR CONSIDERATION FOR THE DETERMINATION OF THE UNWELCOME ELEMENT³⁶⁸

4.1 Introduction

It was alluded to in the previous chapter that the scholar, Weiner, investigated common themes or factors that American courts would often rely upon when establishing the unwelcome element. Moreover, in the *Meritor* case, the US Supreme Court also provided certain factors which play a role in the unwelcome enquiry.

Therefore, this chapter will critically analyse South African case law, inclusive of CCMA and bargaining council decisions, in order to compare whether the identified factors have been considered by courts and the probative value attached to each factor. Furthermore, in this chapter, the extent to which an office romance can be considered as a factor in negating the unwelcome element will be assessed.

For structural purposes, the four factors provided by Weiner are rephrased into themes as follows: express rejection; ambivalent responses; a sexualised work environment and the sexual history or past conduct of the harassed. The factors provided in the *Meritor* case will be considered from the aspect of past conduct.

4.2 Express Rejection

“Why didn’t she just tell him the harasser to stop?”³⁶⁹ is a well-known criticism that the harassed is subjected to when express rejection is not the method used to show that the conduct of the harasser was unwelcome.³⁷⁰ As noted by Weiner, one of the factors to negate the unwelcome element is that the harassed must express unequivocally to the harasser that the sexual advances are unwelcome, failure of which the harasser is permitted to continue. In fact, it has been confirmed that one of the initial steps of a presiding officer is to consider the response of the harassed to the alleged unwelcome sexual advances.³⁷¹ Thus, it seems that

³⁶⁸ Note 248 above, 751 - “Although the lack of clear guidance for determining when conduct is unwelcome has resulted in inconsistent case law, certain principles have been established for interpreting whether a plaintiff’s behavior welcomed the complained-of conduct.”

³⁶⁹ Note 318 above, 4362.

³⁷⁰ Ibid.

³⁷¹ Note 229 above, 765.

courts prefer the harassed to respond by vocalising rejection to the harasser to show that the behaviour was unwelcome.³⁷²

Even though it has been argued that at times the harassed expressed rejection only enhances the harassment,³⁷³ it is undisputed that expressing disapproval in a direct manner to the harasser helps strengthen the case of the harassed. Further, since research has confirmed that males are less likely to recognise their behaviour as sexual harassment as compared to women, express rejection to such behaviour will ensure that the different perspectives in relation to sexual harassment are curbed.³⁷⁴

Moreover, it must be noted that the personality of the harassed results in and/or evokes different responses, be it the passive or active route.³⁷⁵ Possibly the most dominant influence in terms of whether the victim would expressly reject the advances of the harasser in order to satisfy the unwelcome element - is based on the power imbalance between the harasser and the harassed in the workplace.³⁷⁶

It is imperative to mention that this “imbalance” is not merely limited to positions of authority in the workplace but also aspects such as age differentials, race or culture.³⁷⁷ Further, Bond highlights that this “imbalance” can also result from disparity regarding gender.³⁷⁸ Therefore, the cases discussed below make it clear that South African courts have in fact acknowledged the impact that power imbalances can have on the harassed’s ability to expressly state to the harasser that their behaviour is unwelcome.

In the case of *Gerber*, a quality assurance manager sexually harassed his female subordinates, was dismissed and challenged the fairness of his dismissal. The commissioner noted that sexual harassment would affect victims differently.³⁷⁹

The commissioner quoted from the case of *J v M* which held that:

³⁷² Note 259 above, 335.

³⁷³ Note 318 above, 4362.

³⁷⁴ Note 5 above, 216.

³⁷⁵ Note 23 above, 1729 and 1730.

³⁷⁶ *Ibid* 1730.

³⁷⁷ Note 9 above, 6-33.

³⁷⁸ C Bond ‘Shattering the Myth: Mediating Sexual Harassment Disputes in the workplace’ (1997) 65 *Fordham L. Rev.* 2527.

³⁷⁹ Note 333 above, 3005B.

“Inferiors who are subjected to sexual harassment by their superiors in the employment hierarchy are placed in an invidious position. How should they cope with the situation? It is difficult enough for a young girl to deal with advances from a man who is old enough to be her father. When she has to do so in an atmosphere where rejection of advances may lead to dismissal, lost promotions, inadequate pay rises, etc - what is referred to as an tangible benefits in American law - her position in unenviable.

Fear of the consequences of complaining to higher authority whether the complaint is made by the victim or a friend, often compels the victim to suffer in silence.”³⁸⁰

J v M importantly recognises that power imbalances are precisely the reason for the harassed choosing to not expressly communicate to the harasser that the conduct is unwelcome, and thus, follow the all too common response of suffering in silence. It is clear from *Gerber* that express rejection should not be seen as the only way of the harassed showing to the harasser that the conduct is unwelcome.

Four years later, in the case of *Taljaard*,³⁸¹ Mr Taljaard (the harasser) was influential in securing Ms Paulse’s (the harassed) re-employment.³⁸² The harassed did not specifically reject the advances of the harasser which persisted for eight months.³⁸³ The unwelcome sexual advances took the form of visits to her workplace and telephone calls to the harassed up to four times a day, whereby, the harasser would ask the harassed to go on dates with him and made comments regarding her underwear.³⁸⁴

The commissioner accepted that the harassed failed to explicitly reject the harasser’s advances, however, noted that what would be expected from the harassed in a social setting is not necessarily what occurs in a workplace environment.³⁸⁵ Moreover, the commissioner highlights that:

“Inferiors who are subjected to sexual harassment by their superiors in the employment hierarchy are placed in an invidious position. In this case Mr Taljaard was her benefactor, the person to whom she owed her employment. Furthermore, in a fractured society such as ours, it is pertinent to note that Mr Taljaard is a middle-aged white male, well-to-do, educated, a senior

³⁸⁰ Note 13 above, 758B-D. See Note 333 above, 3005C-E.

³⁸¹ Note 350 above.

³⁸² Ibid 1169G-H.

³⁸³ Ibid 1167-1168J.

³⁸⁴ Ibid 1167F, 1170A-B and 1172J.

³⁸⁵ Ibid 1179F.

manager and seemingly powerful. Ms Paule, on the other hand, is a young coloured woman, of limited means, low education, a menial worker on the lowest rung of the social ladder. It is difficult enough for her to deal with his advances, given this huge imbalance of power, which is amplified by socially determined discrepancies, not only around gender roles, but also classist and racial notions of superiority. When she has to do so in an atmosphere where her slightest hint of discontent may perceptibly result in her employment prospects being under threat, the position is unenviable. It is within this context that her failure to explicitly inform him that his conduct is unwanted is made all the more understandable.”³⁸⁶

The above clearly notes that power imbalances are seen through race, gender, class and of course positions of authority at work which *in casu* resulted in the harasser having power, as he secured the harassed’s re-employment. Therefore, due to fear of reprisal, the commissioner understood the harassed’s failure to express rejection of the harasser.

Further, it is noteworthy that if one considers the 2005 Code, NEDLAC seemed to take cognisance of the difficulties of express rejection in the workplace setting, and thus, acknowledges that weaker confrontation methods “such as walking away or not responding” to the harasser can show unwelcomeness.³⁸⁷

Upon consideration of the above two cases, it is apparent that commissioners have rightfully become more sympathetically aware of the fact that even though express rejection is viewed as the ideal method of response for the harassed to show that the conduct of the harasser was unwelcome; power imbalances in the workplace are rife, and as such it is indeed a consequential factor for the harassed resulting in a weaker confrontation method to satisfy the unwelcome element. This is now codified within the 2005 Code.

However, the weaker confrontational methods used by the harassed to show that the conduct is unwelcome could have the converse effect of being interpreted by the harasser as a mixed or ambivalent response which was identified by Weiner in the previous chapter.

³⁸⁶ Ibid 1179F-H.

³⁸⁷ Item 5.2.1 of the 2005 Code.

4.3 Ambivalent Responses

As noted by Weiner, mixed/ambivalent responses were seen as inviting or welcoming of the advances made by the harasser, and thus, did not satisfy the unwelcome element. According to The South African Pocket Oxford Dictionary, the word “ambivalence” means “coexistence of opposing feelings.”

It was stated above that the harassed may respond differently in order to show that the advances were unwelcome. Further, it was alluded to in the previous chapter that courts are inconsistent as to whose perspective the conduct should be considered unwelcome from. Thus, the problem arises where the harassed through certain actions, such as being flattered or entertaining the harasser, displays uncertainty to the harasser as to whether the sexual conduct is welcomed. A comparison of case law, whereby, ambivalent responses were either considered an important aspect regarding the unwelcome element or disregarded will be analysed below.

The case of *SABC Ltd v Grogan NO & another*³⁸⁸ involved a review by SABC (the company) of an arbitration award of a senior sales manager who was charged with multiples counts of misconduct.³⁸⁹ The most serious charge was that of sexual harassment of two female subordinates.³⁹⁰ The arbitrator found him guilty of sexual harassment of one of his subordinates which culminated in two incidents of physical contact in the harasser’s car namely gripping her thigh and, attempting to kiss her on the mouth.³⁹¹ The sanction imposed was a final warning with directions to undergo counselling.³⁹²

Under review to the Labour Court (LC), the company did not dispute the finding of the arbitrator that the harassed was guilty of sexual harassment; but rather the sanction imposed.³⁹³ The LC specifically made mention of the arbitrator’s findings that the harassed went willingly into the car of the harasser without justification or reason.³⁹⁴ The LC noted that:

³⁸⁸ *SABC Ltd v Grogan NO & another* (2006) 27 ILJ 1519 (LC). Hereinafter referred to as the *Grogan* case

³⁸⁹ *Ibid* 209 para 2-4 and 210 para 4.

³⁹⁰ *Ibid* 209 para 4.

³⁹¹ *Ibid* 214 para 28.

³⁹² *Ibid* 210 para 6.

³⁹³ *Ibid* 214 para 25.

³⁹⁴ *Ibid* 215 para 34.

“While the complainant’s willingness to be in the employee’s company when she had no need to be does not excuse his conduct, it may well have been interpreted by him as a sign that his attentions were not as unwelcome as she later made out.”³⁹⁵

The above is significant, as it indicates the causal connection between ambivalent responses and the unwelcome element. Thus, it becomes clear that since ambivalent responses could result in uncertainty from the perspective of the harasser, as to whether his conduct is welcomed, it was seen as a mitigating factor *in casu* when imposing a sanction for sexual harassment and he was given a final warning as opposed to dismissal.³⁹⁶

The sanction also correlates with the company’s policy on sexual harassment, which the arbitrator considered in imposing an appropriate sanction.³⁹⁷ The policy notes that victims must quickly and unequivocally disapprove the advances of the harasser.³⁹⁸ The LC upheld the sanction awarded by the arbitrator, as it was rationally connected to the facts.³⁹⁹

In *Gaga v Anglo Platinum Ltd & others*,⁴⁰⁰ the harasser was a senior human resources manager.⁴⁰¹ He appealed to the Labour Appeal Court (LAC) against the judgment of the LC who set aside the award of the CCMA and found that the harasser’s dismissal was substantively fair.⁴⁰²

He was charged with sexually harassing his personal assistant over a period of two years when he made innuendos and comments suggesting that he and the harassed should have sexual intercourse.⁴⁰³ The harassed decided to resign alleging that she wanted to move to Cape Town; however, during her exit interview, when questioned by HR whether the harasser made advances, she outlined the harassment incidents, and when she read the sexual harassment

³⁹⁵ Ibid 216 para 38.

³⁹⁶ Ibid 216 para 41.

³⁹⁷ Ibid 215 para 31.

³⁹⁸ Ibid 215 para 31.

³⁹⁹ Ibid 219 para 52.

⁴⁰⁰ *Gaga v Anglo Platinum Ltd & others* (2012) 33 ILJ 329 (LAC). Hereinafter referred to as the *Gaga* case or *Gaga*.

⁴⁰¹ Ibid 332F.

⁴⁰² Ibid 332G.

⁴⁰³ Ibid 330I and 332I.

policy for the first time at the interview she became offended.⁴⁰⁴ It is common cause that the harassed was somewhat ambivalent in her responses to the harasser.⁴⁰⁵

She further admitted that she respected him professionally and that they had a good relationship at work; moreover, she admitted that she would communicate with the harassed on personal matters.⁴⁰⁶ She conceded that her responses may have been viewed as soliciting.⁴⁰⁷ However, it was accepted that the harassed did indicate unequivocally that his conduct was not welcomed.⁴⁰⁸

It was argued that the ambivalent responses of the harassed did not satisfy the requirements that the advances were unwelcome or that she was offended, and thus, did not amount to sexual harassment.⁴⁰⁹ The CCMA noted that their good working relationship described by the harassed and the high regard in which she held harasser only strengthened that she was not offended and welcomed the attention.⁴¹⁰

However, on appeal to the LAC it became apparent that the power imbalance between superiors and subordinates, in terms of ambivalent responses, needs to be considered:

“The fact that the subordinate may present as ambivalent, or even momentarily be flattered by the attention, is no excuse; particularly where at some stage in an ongoing situation she signals her discomfort.”⁴¹¹

Thus, the LAC upheld that dismissal was the appropriate sanction.⁴¹² The court sought to send out a message to superiors who are placed in positions of authority that sexually harassing their subordinates only diminishes their high authority with which the employer entrusted them; dismissal is, therefore, justified on the basis that the level of trust between the superior and the employer has disintegrated.⁴¹³

⁴⁰⁴ Ibid 334E-H.

⁴⁰⁵ Ibid 336B.

⁴⁰⁶ Ibid 336B-C.

⁴⁰⁷ Ibid 336E.

⁴⁰⁸ Ibid 336H.

⁴⁰⁹ Ibid 337J.

⁴¹⁰ Ibid 330C and 339H-I.

⁴¹¹ Ibid 343E.

⁴¹² Ibid 347C.

⁴¹³ Ibid 346F-G.

The *Grogan* case differs from the *Gaga* case. The former considers ambivalent responses of the harassed as a mitigating factor in the imposition of a sanction due to fault being a requirement on the part of the harasser.⁴¹⁴ The *Gaga* case, however, particularly in the circumstance of a superior and subordinate imbalance, does not view ambiguity in relation to whose perspective the conduct is viewed as unwelcome from as a consideration for sanction purposes.

On the basis of precedent, *Gaga* holds more weight, as it is a LAC decision, whereas, the *Grogan* case is an LC decision. In addition, *Gaga* is also a more recent case. Moreover, *Gaga* corroborates with the above factor namely express rejection, as it highlights the importance of power imbalances which could result in fear of reprisal on the part of the harassed which renders ambivalent responses. Even though it would seem that *Gaga*, for reasons listed above, should be followed, it is noteworthy that each case is determined on a case by case basis.⁴¹⁵

On the other hand, one should take heed of the fact that where sexual harassment is dealt with as a misconduct, the importance of fault on the part of the harasser is paramount. Thus, it is submitted that the *Grogan* case should still be considered in the imposition of an appropriate sanction for the harasser in cases where the harassed gave ambivalent responses. The *Gaga* case is important, as it notes that the actual determination of the unwelcome element should not be dependent on the ambivalent responses. Therefore, both cases show the distinct enquiries between the determination of the unwelcome element and the determination of an appropriate sanction.

It is noteworthy that the factors of express rejection and ambivalent responses could overlap in that the harassed may give mixed responses to the harasser to avoid express rejection of the harasser's sexual advances. Based on case precedent, highlighted from the above factors, it can be concluded that South African courts do not place much emphasis on these factors as a means of negating the unwelcome element as opposed to Weiner's investigation which notes that American courts did. Therefore, it is necessary to consider Weiner's third factor, namely a sexualised work environment.

⁴¹⁴ See Note 4 above, 444.

⁴¹⁵ Note 400 above, 346G.

4.4 A Sexualised Work Environment

As noted by Weiner, participation in office banter of a sexual nature and vulgar speech by the harassed are necessary to establish whether he or she welcomed the sexual harassment, especially when the harassment is verbal. For ease of reference, office banter and vulgar speech have collectively been described as a sexualised work environment. The word “banter”, according to the South Africa Pocket Oxford Dictionary, refers to “good-humoured teasing.” The Dictionary provides the meaning of “vulgar” as “coarse; indecent; tasteless.”

This factor will closely correlate to the factor of past conduct. The cases discussed below will indicate how a workplace covered by office banter consisting of sexual remarks and ribald language becomes necessary in the establishment of the unwelcome element.

In *Solidarity on behalf of Van Rensburg and Rustenburg Base Metal Refineries (Pty) Ltd*,⁴¹⁶ Mr van Rensburg was charged with “sexual harassment, abusive language and assault,” which resulted in an arbitration.⁴¹⁷

The harasser was not found guilty of sexual harassment by the initial chairperson; rather guilty of abusive language which comprised of “off-colour and suggestive statements with overt sexual connotations...”⁴¹⁸ The main reason advanced for not finding the harasser guilty was the culture of ribald language in the workplace which was corroborated by a colleague who testified that the harassed participated, and further, that no one was particularly offended.⁴¹⁹

One of the main arguments put forward by the company for the new chairperson at the private arbitration was that the charges of sexual harassment and abusive language align with each other, and thus, the harasser cannot be guilty of one without the other.⁴²⁰

The private arbitrator found this argument to be “fallacious” and held that:

“The wealth of evidence before the disciplinary chairman, that there was a culture of ribald conversation with sexual connotations, which was at least to some extent mutual, renders it

⁴¹⁶*Solidarity on behalf of Van Rensburg and Rustenburg Base Metal Refineries (Pty) Ltd* (2007) 28 ILJ 2888 (ARB). Hereinafter referred to as the *Van Rensburg* case (arbitration).

⁴¹⁷ Ibid 2891D.

⁴¹⁸ Ibid 2897B.

⁴¹⁹ Ibid 2897C-E.

⁴²⁰ Ibid 2897J.

difficult to conclude on the evidence before the disciplinary chairman, that Mr van Rensburg's utterances were to his knowledge unwanted...⁴²¹

This shows that the enquiry to determine whether the conduct of the harasser was unwelcome may be negated where there is a sexualised work environment. *In casu*, it seems that the sexualised environment had become a typical occurrence in the workplace, that the private chairperson recognised that the harasser possibly viewed this as a norm, and as such did not fully comprehend that his advances of a sexual nature were unwelcome. This was further confirmed when the arbitrator held that the type of humour which is considered acceptable in a particular job setting, such as a workshop, may not be viewed as acceptable in another workplace such as the monastery.⁴²² The arbitrator noted that:

“An employee who believes that a ribald and even a suggestive brand of humour is acceptable, because it is between consenting adults, may reasonably have misjudged the position. It is then incumbent on the employee who is offended by this conduct to make it known and if it persists, to lay a grievance or take some other appropriate action.”⁴²³

Thus, it would appear in a sexualised work environment, the conduct of the harasser is presumed to be welcomed, and the harassed must overturn this by indicating that it was unwelcome. It is submitted that this is problematic which will be discussed in the next chapter.

Finally, the private arbitrator notes that the charge of abusive language for failure to maintain proper etiquette does not equate to the charge of sexual harassment in these circumstances.⁴²⁴ Thus, the private arbitrator found that the findings of not guilty for sexual harassment by the initial arbitrator and the sanction of a final warning was justifiable.⁴²⁵ It is noteworthy that the factor of a sexualised work environment, unlike the *Grogan* case above, played a role for the determination of the unwelcome element itself not only for the imposition of an appropriate sanction.

In *Rustenburg Base Metal Refiners (Pty) Ltd v Solidarity & others*,⁴²⁶ the LC recognised a sexualised work environment as a possible factor for establishing the unwelcome element.

⁴²¹ Ibid 2898D-E.

⁴²² Ibid 2898G.

⁴²³ Ibid 2898G-H.

⁴²⁴ Ibid 2899B-C.

⁴²⁵ Ibid 2899C-D.

⁴²⁶ *Rustenburg Base Metal Refiners (Pty) Ltd v Solidarity & others* (2009) 30 ILJ 378 (LC).

In *National Union of Metal Workers of SA on behalf of Africa and Market Toyota – A Division of Unitrans Automotive (Pty) Ltd*,⁴²⁷ the harasser was charged with sexual harassment of a junior employee, Ms X (the harassed), which included physical touching, sexual jokes, gestures and insults, as well as enquiries into the harassed's sexual life.⁴²⁸

The union, who represented the harasser, contended that the current case is similar to the *Van Rensburg* case (arbitration) discussed above namely, one involving a culture “of ribald language with sexual connotations,”⁴²⁹ and as such the harasser considered his actions as a norm in the workplace.⁴³⁰ Thus, the harasser argued that what he said were merely jokes of a sexual nature.⁴³¹ The harassed admitted that while she told sexual jokes, she knew the difference between a joke and sexual harassment.⁴³²

The arbitrator held that the reliance on the *Van Rensburg* case (arbitration) does not correlate to the case at hand in that it was not a case involving a culture “of ribald language with sexual connotations.”⁴³³ The reasons advanced by the arbitrator were that the harasser essentially bullied the harassed and abused his seniority status and power which was regarded by the arbitrator as a dominant aspect of sexual harassment.⁴³⁴ This clearly went further than a sexualised work environment case.

The bargaining council acknowledged the fact that where there are power imbalances in the workplace, and males hold positions of authority, sexual harassment is commonly experienced by female subordinates.⁴³⁵ Therefore, the arbitrator acknowledged that the harassed felt that she had to simply accept this culture created by the male environment.⁴³⁶ The arbitrator accepted that even if this environment was based on sexual banter, the harassed was the only female and the male employees should have curbed their behaviour accordingly.⁴³⁷ Essentially,

⁴²⁷ *National Union of Metal Workers of SA on behalf of Africa and Market Toyota – A Division of Unitrans Automotive (Pty) Ltd* (2009) 30 ILJ 458 (BCA). Hereinafter referred to as the *Africa and Market Toyota* case.

⁴²⁸ Ibid 458F and 473E-F.

⁴²⁹ Ibid 459. See Note 416 above, 2898D-E.

⁴³⁰ Note 427 above, 467A.

⁴³¹ Ibid 460E-F.

⁴³² Ibid 461B.

⁴³³ Ibid 471G.

⁴³⁴ Ibid 471H and 472C.

⁴³⁵ Ibid 472A.

⁴³⁶ Ibid 472B.

⁴³⁷ Ibid 470G.

the factor of a sexualised work environment was not taken into account for the negation of the unwelcome element and ultimately the determination of sexual harassment.

The *Africa and Market Toyota* case differed from the *Van Rensburg* case based on the facts, as stated above, the former case went beyond mere ribald language and sexual banter but crossed the realm of sexual harassment. Further, observations also include the fact that in the *Van Rensburg* case (arbitration) there was a culture of sexualised banter which was considered the norm evident from witnesses (namely other female employees) who testified that they were not offended.⁴³⁸ This differed from the *Africa and Market Toyota* case, as no further witnesses were called to indicate that the jokes were not perceived in the context of sexual harassment at work and unlike the *Van Rensburg* case (arbitration), Ms X was the only female in the male-dominated workshop.

Moreover, the main reason why the initial chairperson in *Van Rensburg* accepted that this case did not amount to sexual harassment was that the harassed participated in the sexualised work culture and was not offended.⁴³⁹ This differed from the current case, as the arbitrator held that Ms X did tell the harasser to not communicate with her in a sexual manner even though she may have used foul language.⁴⁴⁰ Further, Ms X did not initiate or encourage any sexual jokes.⁴⁴¹

However, as noted above, the LC accepted the findings of the initial chairperson in the *Van Rensburg* case (arbitration); it would seem that a sexualised work environment may be relevant to South African courts to determine if the conduct of the harasser was unwelcome. This essentially requires courts to consider the extent to which the harassed participated in the sexualised work culture as well as her role in using ribald language. The latter encourages the defence for the harasser to shift the onus onto the harassed in order to analyse her conduct and whether she was welcoming of such behaviour.⁴⁴² With that said, another example of shifting the onus to the harassed is where the sexual history and past conduct of the harassed are scrutinised, which is the fourth and final factor detected by Weiner.

⁴³⁸ See Note 416 above, 2897D.

⁴³⁹ Ibid 2897D-E.

⁴⁴⁰ Note 427 above, 470H-I.

⁴⁴¹ Ibid 471A-B.

⁴⁴² Note 1 above, 109.

4.5 The Sexual History or Past Conduct of the Harassed

As noted by Weiner, the sexual history of the victim may be relevant in the establishment of the unwelcome element. The US Supreme court, in *Meritor*, held that speech and dress of the harassed are also relevant for the unwelcome element which will be assessed from the aspect of past conduct. According to Basson:

“A further issue often raised under the heading of unwelcomeness relates to the relevance of past conduct by the victim of harassment. It is, for example, relevant in deciding whether a hostile working environment existed that the plaintiff herself used foul language, that she herself participated in discussions of a sexual nature, or dressed in a provocative way?”⁴⁴³

The term “sexual history” is usually alluded to in rape cases, however, in cases of sexual harassment - sexual history refers to an investigation into the harassed’s past sexual conduct or behaviour, which may not necessarily involve intimacy with the harasser.⁴⁴⁴

Society still promotes the stereotype that a woman probably “asked for it” due to her dress or that the harassed’s sexual history supports the contention that she is a promiscuous woman, and thus, was more welcoming and solicited the conduct of the harasser.⁴⁴⁵ Thus, the acceptance of evidence regarding the harassed’s sexual history, speech, dress and past conduct are used to show that the harassed welcomed the harassment and, therefore, negates the unwelcome element.

With that said, a distinction is drawn between the admission of evidence regarding the harassed’s sexual history to display her as promiscuous, and thus, welcoming of the advances; as opposed to her past conduct which has a direct relation to the sexual harassment at hand.

4.5.1 Sexual History of the Harassed

In *Lynne Martin-Hancock v Computer Horizon*,⁴⁴⁶ the Industrial Court sought to admit the sexual history of the harassed as evidence, and due to this the court described her as a “worldly, streetwise and experienced woman.”⁴⁴⁷ The interrogation into the sexual history of the harassed

⁴⁴³ Note 4 above, 431.

⁴⁴⁴ L Krieger & C Fox ‘Evidentiary Issues in Sexual Harassment Litigation’ (1985) 1 *Berkeley Women’s L.J.* 115 and 119.

⁴⁴⁵ *Ibid* 116.

⁴⁴⁶ *Lynne Martin-Hancock v Computer Horizon* unreported case no NH 11/2/14268 (October 1994.) Hereinafter referred to as the Lynne Martin- Hancock case. See Note 5 above, 218 and footnote 31.

⁴⁴⁷ Note 5 above, 220.

essentially focused on the conduct of the harassed as opposed to the conduct of the harasser. The Industrial Court supported this by characterising the harassed as a promiscuous woman, thereby, shifting the onus to show that she would have been more welcoming of the conduct of the harasser in an attempt to negate the unwelcome element.

Apart from the fact that the harassed's previous conduct was under scrutiny as opposed to harasser's conduct which led to the sexual harassment incident, there are further reasons to reject the admission of the sexual history of the harassed. Firstly, the sexual history of the harassed may have been unknown to the harasser, meaning that from his perspective he would have been unaware that she would be more welcoming to his conduct; secondly, her past cannot be an insinuation that she would be more accepting and welcoming of current unwelcome sexual advances.⁴⁴⁸

It is noteworthy that the precedent set by the *Lynne-Martin Hancock* case would not likely be followed due to advances made in legislation regarding the admission of evidence, with particular regard to section 227 of the Criminal Procedure Act.⁴⁴⁹ This section only allows for questioning of past sexual conduct if permitted by the court or if the court acknowledges that such questioning is relevant to the issue at hand.⁴⁵⁰ Even though this evidentiary rule regarding character evidence applies to criminal cases, it may be useful in civil cases, and as such, the admission of sexual history of the harassed may only be necessary if the harassed had sexual relations with the harasser; cognisance should not be placed on other persons outside the sexual harassment incident in the determination of the unwelcome element.⁴⁵¹

4.5.2 Past Conduct of the Harassed

Another evidentiary rule that must be recognised is the cautionary rule which has often been applied in sexual offences cases. Sexual offences, such as sexual harassment, do not usually involve witnesses; therefore, this rule notes that a presiding officer must exercise caution when assessing the evidence of a single witness who was the alleged target *in casu*.⁴⁵²

⁴⁴⁸ Note 253 above, 1581.

⁴⁴⁹ 51 of 1977. See Note 1 above, 110.

⁴⁵⁰ Note 1 above, 110.

⁴⁵¹ *Ibid*.

⁴⁵² Note 5 above, footnote 28. See Note 1 above, 110 and 111.

In the *Sadulla* case,⁴⁵³ the alleged harasser (Sadulla) challenged the fairness of his dismissal for the sexual harassment of the harassed (Kruger).⁴⁵⁴ The alleged sexual harassment incident centred around a discussion, however, the actual content and the initiator of the discussion covered by sexual connotations and comments were disputed between the parties.⁴⁵⁵ Upon analysis of the evidence, the commissioner sought to apply the cautionary rule noting that even though it has been rejected by feminists, if the rule is exercised in a nondiscriminatory and nonsexist manner there should be no reason not to apply this rule.⁴⁵⁶

According to the commissioner, the cautionary rule applied, as there were discrepancies regarding the past conduct of the harassed in terms of whether she initiated the discussion.⁴⁵⁷ The harassed initially stated that the harasser approached her; however, under cross-examination, she admitted that she initiated the discussion by calling the harasser over.⁴⁵⁸ The commissioner highlighted that past conduct as to participation and the introduction of material/ideas (such as the fact that she was lesbian and watches movies of a sexual nature) into discussions are vital considerations in sexual harassment cases.⁴⁵⁹

The past conduct on the part of the harassed in the discussion which was claimed to be unwelcome resulted in the conclusion of the commissioner as follows:

“The point is that Kruger and Sadulla were both engaged in a conversation which I find took place between two willing and consenting adults, and which does not amount to sexual aggression, as there was no real aggressor and real victim.”⁴⁶⁰

The exercise of the cautionary rule by the commissioner did not need to be mentioned and applied as firstly, it has been abolished in rape cases and secondly, it feeds into the stereotype of women.⁴⁶¹ The commissioner could have simply attached less weight to the evidence of the harassed due to discrepancies. However, section 60 of the Criminal Law (Sexual Offences and

⁴⁵³ Note 292 above.

⁴⁵⁴ Ibid 1482D.

⁴⁵⁵ Ibid 1482H-J.

⁴⁵⁶ Ibid 1486G-H.

⁴⁵⁷ Ibid 1486L.

⁴⁵⁸ Ibid 1486J and 1487A.

⁴⁵⁹ Ibid 1487A-C.

⁴⁶⁰ Ibid 1488F.

⁴⁶¹ A Bellengere... et al *The Law of Evidence In South Africa* (2013) 193.

Related Matters) Amendment Act⁴⁶² abolished the cautionary rule.⁴⁶³ It is submitted that labour courts should be guided by this Act in sexual harassment cases.

Despite the application of the cautionary rule, the above case is still important, as it indicates that past conduct which directly relates to the sexual harassment at hand may be relevant to the determination of the unwelcome element. As noted, past conduct which directly relates to the sexual harassment incident, such as participation in the sexual jokes, initiation of new conversational trends play a role in the unwelcome element.

However, the degree of past conduct may also be relevant to determine the degree of sexual harassment – a court may be unconvinced by an alleged harassed who states that sexual jokes were unwelcome yet she herself used ribald language; on the other hand, this does not mean she should endure physical unwelcome sexual advances.⁴⁶⁴

The question of provocative dress, highlighted in *Meritor*, and addressed under the aspect of past conduct, is often raised in order to determine if courts consider the dress code of the harassed in determining whether she was welcoming of the conduct of the harasser. The role that dress plays in general stems from gender stereotypes in which society depicts that women need to dress and speak in a particular reserved manner; failing of which she essentially “asked” for the sexual advances.

South African presiding officers have taken heed of the above which was evident in *Pick & Pay Stores Ltd & An Individual*,⁴⁶⁵ whereby, the court stated:

“Before leaving this issue, I feel constrained to respond to the point made several times on the grievant’s behalf that the complainant’s dress and general demeanour constituted an invitation to the kind of conduct visited upon her on 27 April. While such factors may play some part in exceptional cases when it comes to assessing the sanction to be imposed on the guilty perpetrator in cases of sexual misconduct, they can never, in my view, without more be deemed to constitute the type of “incitement” which was clearly hinted at in evidence. The complainant herself put it trenchantly in her evidence: “Am I to be condemned for what I wear?”⁴⁶⁶

⁴⁶² 32 of 2007.

⁴⁶³ Note 462 above, 193.

⁴⁶⁴ Note 214 above, 71 and 72.

⁴⁶⁵ *Pick & Pay Stores Ltd & An Individual* 1994 Arb Dig 136.

⁴⁶⁶ Note 1 above, 110. See also Note 4 above, 431.

As noted in the discussion regarding ambivalent responses, a distinction was drawn between the determination of the unwelcome element and the determination of an appropriate sanction. The above makes it clear that the dress of the harassed should not be used by the harasser as a means to show that the harassed was welcoming/inviting/inciting to the behaviour of the harasser. However, it could be seen as a mitigating factor in the determination of an appropriate sanction for the harasser.

4.6 Office Romance

The above four factors provided by Weiner were investigated to establish the relevance that South African courts attach to these factors in the determination of the unwelcome element. There is a strong correlation between the unwelcome element and an intimate consensual relationship at work in that the latter is the biggest justification for the former.⁴⁶⁷ In other words, sex between consenting adults in the workplace should not be a means to sue, especially in cases of retaliation where one party to the relationship attempts to sabotage the other.⁴⁶⁸

Therefore, sexual harassment is the only form of harassment which is not presumed to be offensive and unwelcoming due to the possibility of romantic relationships developing in the workplace.⁴⁶⁹

Sanger notes that by definition relationships which are welcomed negate the unwelcome element which is crucial for the determination of sexual harassment.⁴⁷⁰ Therefore, the extent to which an office romance is considered in the establishment of whether the conduct of the harasser was unwelcome will be analysed by relying on case law below.

In *AM / Metso Minerals South Africa (Pty) Ltd*,⁴⁷¹ Mr AM (the harasser) was dismissed for sexually harassing Ms N over a WhatsApp discussion which contained sexual connotations and comments.⁴⁷² The main defence of the harasser was that he was simply “wooing” Ms N in order to see if their work relationship could transpire into a romantic relationship.⁴⁷³

⁴⁶⁷ Note 272 above, 1968.

⁴⁶⁸ *Ibid* 1969.

⁴⁶⁹ Note 32 above, 99.

⁴⁷⁰ Note 41 above, 79.

⁴⁷¹ *AM / Metso Minerals South Africa (Pty) Ltd* [2017] 3 BALR 245 (MEIBC).

⁴⁷² *Ibid* 245.

⁴⁷³ *Ibid* 246 para 8.

Even though the harassed denies that she was welcoming of the advances, the arbitrator held, however, that initially, she was flirtatious in her responses.⁴⁷⁴ Further, her responses were not strictly business but were personal, and on the basis of a witness's evidence, it became clear that the harasser and harassed had a warm relationship at the beginning.⁴⁷⁵ However, the arbitrator alluded to the fact that she started ignoring the comments by the harassed, did not comment on his sexual requests directly and lied in order to put him off pursuing her.⁴⁷⁶ The bargaining council considered this as an indication that the advances of a sexual nature were unwelcome.⁴⁷⁷

Of particular importance is that the arbitrator acknowledged that despite the harassed's initial responses which might have led the harasser to think that a romantic relationship might occur; sexual harassment began the moment that she showed no interest in the advances, and yet the harasser continued to persist in his advances.⁴⁷⁸ This is in line with the 2005 Code which notes that even if the harassed previously participated in the sexual advances of the harasser, this did not mean that it would always remain welcome.⁴⁷⁹ Thus, the defence that the harassed was only exploring his limits to the possibility of the romantic relationship with the harassed amounted to sexual harassment and cannot be a factor to negate the unwelcome element.⁴⁸⁰

However, in the case of *Moboeba/AVBOB Mutual Assurance Society*,⁴⁸¹ an office romance was considered to be a negating factor for the unwelcome element. The district manager, Mr Moboeba (the harasser), was charged with sexually harassing a female subordinate, Ms Moeleso (the harassed)⁴⁸² and was dismissed. The harasser challenged the fairness of his dismissal arguing that he and the harassed were involved in a consensual sexual affair at work.⁴⁸³ However, even though it was common cause that the parties had sexual intercourse, the harassed argued that she only engaged in the latter for purposes of securing her employment,

⁴⁷⁴ Ibid 258 para 58.

⁴⁷⁵ Ibid 258 para 59.

⁴⁷⁶ Ibid 259 para 59.

⁴⁷⁷ Ibid 260 para 64.

⁴⁷⁸ Ibid 260 para 64.

⁴⁷⁹ Item 5.2.2 of the 2005 Code.

⁴⁸⁰ Note 471 above, para 65.

⁴⁸¹ *Moboeba/AVBOB Mutual Assurance Society* 2010 (5) BALR 524 (CCMA).

⁴⁸² Ibid 525 para 8.

⁴⁸³ Ibid 524 and 535 para 35.

as the harasser threatened to terminate her employment if she told anyone about the sexual harassment or failed to participate.⁴⁸⁴

On the basis of evidence, it was accepted by the commissioner that the parties had consensual sex because of their romantic affair in the workplace due to the fact the harassed did not indicate that she was offended or unwelcoming of the advances and only complained one year later after the affair had ended; further, the harasser's defence was corroborated by his wife evidence that there was a romantic relationship between the parties.⁴⁸⁵ Therefore, since the incidents of a sexual nature between the parties were welcomed on the basis of their office romance, sexual harassment was not established.⁴⁸⁶

It is submitted that presiding officers should take the enquiry further in cases involving power imbalances, as noted when looking at factors of express rejection and ambivalent responses above, to consider if there was true consent to satisfy the unwelcome element. The enquiry into power differentials should have been of concern, especially where the alleged harassed testified that she only participated because she was threatened by the harasser and was fearful of losing her job.

The US Supreme Court in *Meritor* held that the district court erred in their finding that since the harassed voluntarily participated in the sexual intercourse with the harasser that the advances were welcomed.⁴⁸⁷ The district court noted that since the harassed was not forced to engage in the conduct, there was no need to inquire into the power imbalance namely, the employer-employee relationship or her reliance on the harasser for her employment and that she faced threats and was fearful of reprisals.⁴⁸⁸

However, the US Supreme Court rejected the district court's finding above and held that "the fact that sex-related conduct was "voluntary," in the sense that the complainant was not forced to participate against her will, is not a defense."⁴⁸⁹ Thus, participation without force cannot be seen as a defence, and more than a mere surface level acceptance is required when considering

⁴⁸⁴ Ibid 527 para 15 and 535 para 35.

⁴⁸⁵ Ibid 524 and 535 para 35.

⁴⁸⁶ Ibid 536 para 39-40.

⁴⁸⁷ S Estrich 'Sex at Work' (1991) 43(4) *Stan. L. Rev.* 827.

⁴⁸⁸ Ibid.

⁴⁸⁹ Note 264 above, para 68.

whether the conduct of the harasser is unwelcome in cases of a claimed office romance between parties of unequal power in the workplace.

The above legal precedent aligns with the argument that in a consensual workplace sexual relationship arising out of power imbalances, the employee in a weaker position can never truly consent, and thus, welcome the advances.⁴⁹⁰ Two explanations are provided for the argument, firstly, the individual in a weaker position may be engrossed by the power held by the superior, and it is for this reason that she consents.⁴⁹¹ Secondly, the fear or threat of reprisal by the subordinate for failing to consent propels the subordinate to “consent”.⁴⁹²

Therefore, as presiding officers acknowledged the realities of power imbalances when looking at factors of express rejection and ambivalent responses, so to should they be mindful that office romances between superiors and subordinates may not truly negate the unwelcome element and, as such, investigate further.

4.7 Conclusion

This chapter considered the relevance of the factors that were detected by Weiner, in comparison to South African case law. The factors of express rejection and ambivalent responses play a minor role in courts in the determination of the unwelcome element. Further, the factors of the sexual history and dress of the harassed are not relevant to courts, which ensures that gender stereotypes regarding women are not promoted.

On the other hand, the factors which South African courts have considered as a means to negate the unwelcome element are a sexualised work environment, past conduct of the harassed and an office romance. However, these factors considered by courts are not short of criticism.

Lastly, in cases of an office romance between parties of unequal power, true consent may be disguised due to fear or threat of reprisals which presiding officers have not fully accounted for.

⁴⁹⁰ Note 41 above, 79.

⁴⁹¹ Ibid.

⁴⁹² Ibid.

CHAPTER 5

RECOMMENDATIONS AND CONCLUSION

5.1 Introduction

The focus of this chapter is to identify problems central to chapter 2, 3 and 4 in order to provide recommendations accordingly. Moreover, to bring this study to a close, the findings and concluding remarks regarding the unwelcome element will be discussed.

5.2 Identification of Problems and Recommendations for Chapter 2

Chapter 2 sets out the legal framework addressing sexual harassment. It is undisputed that there are a plethora of laws in place due to international instruments, constitutional obligations, as well as general laws addressing sexual harassment outside the workplace and labour laws designed to combat sexual harassment in the workplace.

However, despite the enactment of laws, sexual harassment continues to be a scourge in the South African workforce due to ineffective implementation of these laws. Therefore, the recommendations for chapter 2 will focus on the implementation of the laws from three aspects firstly, legal awareness for employees, secondly, effective policies and procedures and thirdly, assessing how gender stereotypes hinder the implementation of laws.

Firstly, it is recommended that employers ensure that their employees are not only made aware of internal policies regarding sexual harassment, but all laws enacted to combat sexual harassment, their legal rights, as well as access to courts. This could be initiated by employers holding regular educational programmes and training sessions around what conduct amounts to sexual harassment and how to handle a sexual harassment incident.⁴⁹³

Moreover, it is recommended that since sexual harassment often occurs due to power differentials in age and positions of authority (harassers are often older and occupy a superior position to the harassed), sexual harassment awareness should be promoted during the initial induction of new employees, as they are easy targets.⁴⁹⁴

⁴⁹³ K Miranzi *The effectiveness of the Code of Good Practice in handling the occurrences of sexual harassment in a selected South African Higher Education Institution* (unpublished LLM thesis, University of KwaZulu-Natal, 2016) 88.

⁴⁹⁴ Ibid.

On the opposite end of the spectrum, there should be separate training for senior employees and managers on issues, such as fear of reprisals that employees in a lower position may face which may make it seem that they are more open to their superiors' sexual advances. These training sessions should essentially encourage senior employees and managers to act in a professional and ethical manner, as they hold a position of trust.

Secondly, it is recommended that employers implement internal policies in the workplace which must be guided by the 2005 Codes of Good which sets out the content of the policy,⁴⁹⁵ as well as procedures⁴⁹⁶ for victims to follow when sexual harassment has occurred. Further, issues of confidentiality for the harassed should be included and stressed in the policy to prompt reporting.

Moreover, the manner in which a female responds to sexual harassment – which is non-confrontational, differs from the manner in which men respond who are more inclined to follow formal mechanisms. It is recommended that the policies highlight, provide for and promote informal procedures that attempt to restore peace and allows the co-functioning between parties which is line with the main aim of women's response choice in not following the formal route.⁴⁹⁷

It is recommended that when developing internal policies regarding sexual harassment, the draft team should not only constitute management but also employees who occupy lower positions.⁴⁹⁸ This will ensure that policies are drafted holistically by considering the perspective and concerns from different key persons in the workplace.⁴⁹⁹

Moreover, it is also recommended that copies of these policies are frequently distributed to all employees to promote awareness to employees and reinforcement.⁵⁰⁰ Internal policies should

⁴⁹⁵ See item 7 of the 2005 Code.

⁴⁹⁶ See item 8 of the 2005 Code.

⁴⁹⁷ S Riger 'Gender Dilemmas in Sexual Harassment Policies and Procedures' (1991) 46(5) *American Psychologist* 501.

⁴⁹⁸ E Mabunda *A critical Analysis of the Employers' Obligations in Combating and Eliminating Sexual Harassment at the Workplace or Extension of the Workplace in South Africa* (unpublished LLM thesis, University of KwaZulu-Natal, 2016) 71.

⁴⁹⁹ R Collier *Combating Sexual Harassment in the Workplace* (1995) 83.

⁵⁰⁰ Note 493 above, 88.

be monitored in order to assess if it is been understood and how it is perceived by employees.⁵⁰¹ Most importantly, with labour laws rapidly changing, monitoring and reviewing of these policies should occur to ensure that they are legally compliant.

Thirdly, in analysing the implementation of the laws around sexual harassment, it becomes necessary to address the fact that gender stereotypes which result from societal norms and assumptions can, from a practical standpoint, act as a barrier to implementation of these laws. Notions of patriarchy and male dominance originate from family structures and schools, whereby, girls learn and accept boys as superior.⁵⁰² Therefore, such practices find ways into the workplace and perpetuate into harassment and gender violence.⁵⁰³

Thus, before policies are issued, and legal awareness is created, employers should assess the important issue of gender stereotypes which are indoctrinated in the mindset of employees and seen as a norm. The effect of the latter creates a barrier to proper implementation of laws, as employees do not fully accept and appreciate the importance of preventing sexual harassment through laws.

Therefore, it is recommended that gender stereotypes in the workplace be curbed by promoting inclusivity and employers taking steps to ensure that the workplace is gender neutral. This can be achieved by managers ensuring that they address employees and use appropriate language regardless of gender.

Moreover, diversity training in the workplace around aspects such as age and gender can be useful. It is also recommended that if a work environment is male-dominated, managers should use strategies to change this which include simple acts such as physically removing posters which depict women as sex objects or handling sexual harassment incidents in a serious manner to enable a message to be sent out.⁵⁰⁴

⁵⁰¹ Note 499 above, 89.

⁵⁰² N Modiba 'Managing Gender-Based Violence and Harassment in African Schools to Enable Performance of all Genders' (2018) 7(2) *JGIDA* 186 and 195.

⁵⁰³ *Ibid* 190.

⁵⁰⁴ Note 499 above, 96.

5.3 Identification of Problems and Recommendations for Chapter 3

The chapter sought to analyse the test for sexual harassment, whereby, there is a linkage to the unwelcome element, which asks from whose perspective the sexual harassment incident should be considered. The problem of the test identified from case law is that there seems to be judicial inconsistency as to whether a subjective or objective test should be followed.

It is recommended that the compromise test, often referred to as the reasonable victim test, be applied by courts as it encompasses both subjective and objective elements which ensure that the limitations posed by each test alone are curbed. Moreover, it ensures that the determination of sexual harassment is considered holistically from the perspective of the harassed (subjective element) and the harasser (by considering encompassing circumstances – such as fault on the part of the harasser). Issues of fault, which requires the perspective of the harasser, cannot be overlooked where sexual harassment is dealt with as a misconduct.

Despite judicial inconsistencies regarding the test, the most problematic aspect identified in this chapter is that in sexual harassment cases the enquiry is never limited to whether the conduct of a sexual nature was unwelcome. Instead, courts microscopically analyse the conduct of the harassed for evidence to indicate that she welcomed the behaviour of the harasser. This essentially detracts from the conduct of the harasser and places the harassed on trial.

To rectify the above, courts should keep the focus on the conduct of the harasser. It is, therefore, recommended that the harassed should provide reasons and evidence as to how he knew that his conduct was welcomed before courts shift the focus on to the harassed's conduct for signs that she welcomed the behaviour.⁵⁰⁵ Thus, scholars have suggested that the “welcome” element be used as a defence for the harasser as opposed to an element of proof in the harassed's case.⁵⁰⁶

Simply put, there should be a rebuttable presumption that the conduct of the harasser was unwelcome in sexual harassment cases unless the harasser can contest this. This rebuttable presumption would make the unwelcome element difficult to prove for the harasser in order to remedy the manipulation of the unwelcome element in sexual harassment cases.

⁵⁰⁵ Note 32 above, 105. See Note 249 above, 634.

⁵⁰⁶ Note 265 above, 630.

Apart from the fact that the above approach will keep the enquiry on the focus of the harasser as opposed to the harassed;⁵⁰⁷ it also ensures that fault on the part of the harasser, where sexual harassment is dealt with as a misconduct, is properly assessed, as the harasser does have a defence which should be considered. Further, the rebuttable presumption, whereby, the harasser has to show how he knew that the conduct was welcomed should be implemented considering the psychological study which demonstrated that men are more inclined to read sexual connotations into responses of women.⁵⁰⁸

5.4 Identification of Problems and Recommendations for Chapter 4

Chapter 4 brings to life the factors identified in American jurisprudence.

However, the problem with the factor of a sexualised work environment, as a means to negate the unwelcome element, is that it results in a presumption that the sexual conduct of the harasser was welcomed which places an obligation on the harassed to show otherwise. This, yet again, shifts the onus to the responses of the harassed and detracts from the responsibility of the harasser to know that such conduct is unacceptable.⁵⁰⁹ Moreover, it seems that a sexualised work environment is often male-dominated.⁵¹⁰ Thus, if the conduct is presumed to be welcomed, it perpetuates false gendered assumptions and norms that anything of a sexual nature can be imposed on a woman until she makes her disapproval known.⁵¹¹

To rectify the above, it is yet again recommended that in all cases of sexual harassment, the unwelcome element is considered a rebuttable presumption and the harasser should indicate how he knew that it was welcomed.

It was established that past conduct that has a direct relation to the sexual harassment incident is relevant in the unwelcome enquiry. The problem which arises, yet again; however, is that the behaviour of the harassed is placed under scrutiny.

It has been recommended that when issues of past conduct arise in the unwelcome enquiry, more emphasis should be placed on evidence that the harassed initiated interaction or new

⁵⁰⁷ Note 32 above, 105.

⁵⁰⁸ Note 249 above, 635.

⁵⁰⁹ Note 7 above, 430.

⁵¹⁰ Note 499 above, 35.

⁵¹¹ Note 265 above, 630.

trends in the conversation and less emphasis should be placed on the fact that the harassed participated in it.⁵¹² The reason for this flows from studies on women's responses to sexual harassment, discussed in chapter 3 and 4. Therefore, the harassed may merely participate in an attempt to fit in and avoid confrontation, for example by humour, in order to cope with the harassment.⁵¹³

Lastly, in considering whether an office romance can negate the unwelcome element, a problem identified was whether sexual conduct can truly be welcomed between parties of unequal power in an office romance.

It is recommended that presiding officers should not adopt a mere surface level approach by accepting that conduct was welcome and should take heed of the *Meritor* case which highlights that mere voluntary participation does not mean the conduct is welcome.

Moreover, it is recommended that employers could develop policies prohibiting workplace romances all together, as there seems to be a link between the occurrence of sexual harassment and a previous workplace romance.⁵¹⁴ However, this could be seen as too extreme and infringe certain constitutional rights such as freedom of association.⁵¹⁵

It has also been recommended that a consensual workplace relationship agreement is signed by both parties.⁵¹⁶ The purpose of such is to include provisions that the relationship is voluntary and should unwanted conduct occur, the complaint procedures are set out.⁵¹⁷ Furthermore, the agreement notes that if a problem arises, it is to be resolved internally and not via the legal route.⁵¹⁸ Clearly, the main purpose is to limit the employer's vicarious liability and mainly benefits the superior against the subordinate alleging sexual harassment merely out of retaliation.⁵¹⁹

⁵¹² Note 249 above, 635.

⁵¹³ Ibid.

⁵¹⁴ C Pierce & H Aguinis 'A Framework for Investigating the Link between Workplace Romance and Sexual Harassment (2001) 26(2) *Group & Organization Management* 225.

⁵¹⁵ Section 18 of the Constitution.

⁵¹⁶ A Chen & J Sambur 'Are Consensual Relationship Agreements a Solution to Sexual Harassment in the Workplace?' (1999) 17 *Hofstra Labour and Employment Law Journal* 166.

⁵¹⁷ Ibid 178.

⁵¹⁸ Ibid.

⁵¹⁹ Ibid 190.

Since the above approach is too restrictive, especially regarding the limitation placed on legal action, a better approach to this could be an implementation of a “date and tell” policy in the workplace.⁵²⁰ Once both parties have disclosed their relationship, the employer should undertake to inform and educate them on what constitutes true consent/welcome behaviour, whereby, issues of fear of reprisals and job security are discussed. Therefore, such policy requires information of a relationship status for the sole purpose of educating employees of true consent.

Complaint procedures for conduct that is unwelcome in the relationship must not require the superior to the relationship to be involved. Lastly, the “date and tell” policy should also require parties to inform the employer when the relationship has ended in order for effective monitoring of the employees to ensure that there is a civil non-hostile work environment between them in an attempt to take steps to minimise sexual harassment occurring in the future.

5.5 Conclusion

The main objective of this dissertation was to critically analyse the unwelcome element in the determination of sexual harassment. In doing so, a discussion of the legal framework from an international and local enquiry occurred, whereby, it was highlighted that the unwelcome/unwanted element is the common denominator across legal definitions in different jurisdictions. Therefore, it was apposite to unpack the unwelcome element further, as it proved to be the most important element required in the establishment of sexual harassment, yet it is difficult to prove in practice.

In an attempt to achieve the overall objective, the unwelcome element was defined by relying on US case law. The *Henson* and *Meritor* cases defined the unwelcome element by asking whether the harassed, by her conduct, indicated that she encouraged or welcomed the advances of the harasser. The *Meritor* case made it clear that factors of speech and dress are relevant to the unwelcome enquiry.

From a South African law perspective, the 1998 and 2005 Codes were considered. It becomes clear that both Codes attempted to define the unwelcome element. However, the 2005 Code sought to deconstruct the unwelcome element further by looking to various methods (both

⁵²⁰ Ibid 186.

verbal and non-verbal) that the harassed could use to indicate that the conduct was unwelcome, as well as the fact that previous sexual conduct that was once welcomed, does not imply that such conduct will be welcomed in the future.

The test for sexual harassment, whereby, the unwelcome element is a prominent feature, was analysed in order to provide clarity as to whose perspective should be considered to determine if the conduct was unwelcome. It was revealed, from an analysis of case law, that there are inconsistencies regarding “perspective” in the test for sexual harassment. Thus, the unwelcome element was understood from three perspectives which constitute the different tests used for the determination of sexual harassment namely the subjective, objective and compromise test.

However, in defining the unwelcome element – the problems associated with the element were revealed in that courts focus on the conduct of the harassed for signals that she welcomed the conduct of the harasser. This detracts from the harasser’s unwelcome conduct which should be at the heart of the sexual harassment enquiry.

Therefore, due to the problems stated above, this study sought to assess how South African courts actually determine whether the conduct of the harasser was unwelcome. This was initiated by undertaking a legal comparative study. Therefore, factors identified by Weiner, which American courts rely upon to determine the unwelcome enquiry, as well as issues of speech and dress, identified in the *Meritor* case, were contrasted and compared to South African cases in an attempt to critically analyse factors considered relevant to the unwelcome element.

It was established that the factors of express rejection and ambivalent responses play a minor role in the determination of the unwelcome element. The minimum role such factors play mainly occurs because presiding officers, rightfully so, acknowledge that power imbalances in the workplace result in the harassed’s avoidance of expressly stating to the harasser that the sexual advances were unwelcome and, as such, these avoidances could be depicted as ambivalent responses.

However, it seems that the factor of a sexualised work environment, whereby, the harassed participates or does not take offence to the workplace atmosphere may be viewed as a factor which negates the unwelcome element. Whereas, the factor regarding the sexual history of the

harassed is no longer viewed as relevant by courts to determine if the conduct of the harasser was unwelcome due to legislative advances regarding the admission of character evidence.

On the other hand, past conduct of the harassed which has a direct correlation to the sexual harassment incident, such as participating in sexual jokes or initiating new trends in the conversation with the harasser, is a factor used to show that the advances were welcomed by the harassed. Dress, regardless of how provocative, could not be used as a factor to show that the harassed may have been more welcoming of the sexual advances.

Finally, an office romance may be viewed as a factor to indicate that during the alleged incident of sexual harassment, the parties were in fact in a consensual relationship, and thus, the alleged harassed was welcoming of the sexual advances. However, mere surface level acceptance of an office romance as a means to negate the unwelcome element could be problematic due to power imbalances, as true consent may be disguised as a result of accepting and welcoming the advances out of fear or threat of reprisal.

In summary, factors such as a sexualised work environment, past conduct of the harassed and an office romance are used by courts in the unwelcome enquiry as a means to negate the unwelcome element. On the one end of the scale, it could be argued that these factors result in a balanced approach by providing a defence to the harasser in that liability without fault is not attributed to the harasser, especially in cases where the harassed did welcome the conduct of the harasser.

Even though the above is not disputed, this study hopes to shed light on the reality in sexual harassment cases that acceptance by courts of the identified factors, as negation of the unwelcome element, only shifts the enquiry away from the harasser and focuses on the conduct of the harassed. These factors promote gender stereotypes, place the harassed on trial and are relied upon by the harasser as a means to indicate the conduct was welcomed. Essentially, therefore, the unwelcome element is likely to act as a roadblock to the harassed in sexual harassment cases.

5.5.1 Contributions of the Study

There has been an insufficient analysis of the unwelcome element required for the establishment of sexual harassment. This is evident from the difficulties of proving this element

in practice, as well as the inconsistent application of the test for sexual harassment, whereby, the unwelcome element is a prominent feature. This study has added value in this regard by fulfilling its main objective of critically and coherently analysing the unwelcome element, with particular reference to sexual harassment cases in the workplace. The research explored in this study revealed the major problem of the unwelcome element in that the harassed's conduct becomes the centre of the enquiry for clues that she welcomed the behaviour of the harasser. This is seen as a key strength in the harasser's case but a "roadblock" for the harassed which makes sexual harassment difficult to establish. The recommendations and guidelines suggested in this study above would, with emphasis on the unwelcome element, being considered a rebuttable presumption for the harassed, undoubtedly serves as a solution to this problem.

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