



WORKPLACE BULLYING: REMEDIES AND RECOURSE IN SOUTH AFRICAN LAW

By Bradley Workman-Davies, Director

LEGAL BRIEF JULY 2019

South African labour law has developed a rich body of case law since the Labour Relations Act was first introduced in 1995, and most employees are well aware of their rights to not be unfairly dismissed, and to not be subject to unfair labour practices. Additionally, it is usually easy to determine when an act on the part of the employer has taken place, which constitutes a dismissal or action that might be an unfair labour practice. However, when it comes to bullying in the workplace, the path towards a resolution is less clear. Although statistical data relating to the South African workplace is sparse, it is not unreasonable to assume that statistics from the United States would not have a fair correlation to the South African experience; in this regard a 2013 Workplace Bullying Institute (WBI) poll showed that 68% of executives considered “workplace bullying a serious problem” and the 2014 Survey showed 48% of Americans are affected by workplace bullying.

In terms of existing labour laws, bullying is not specifically defined or referred to in any of the legislation, including the Labour Relations Act, the Basic Conditions of Employment Act, or the Employment Equity Act. However, the Employment Equity Act in section 6(1) does contain a prohibition against unfair discrimination, such that “No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more 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 on any other arbitrary ground.” Section 6(2) also provides that “Harassment of an employee is a form of unfair discrimination and is prohibited on any one, or a combination of grounds of unfair discrimination listed in subsection (1).” Generally, bullying will be recognised as harassment, and therefore unfair discrimination. Even if the reason for the bullying is not one of the listed grounds (race, gender, etc.) provided that the reason can be demonstrated, a case for harassment can be made out.

In the case of *Mkhize and Dube Transport (2019) 40 ILJ 929 (CCMA)*, in which the employee referred a complaint for bullying to the CCMA as an unfair dismissal claim, the CCMA exercised its discretion to assess the real reason for the employee’s referral, and determined that although the employee had referred a dispute for unfair dismissal, the true complaint was about victimisation in the workplace. The employee had alleged that the HR manager of the employer was bullying and victimising her, both inside and outside of the workplace, and that although she had ultimately been dismissed for medical incapacity, the employer had actually sought to use this as a convenient method to get rid of her, after having lodged a grievance about the bullying allegations. Although the CCMA didn’t have to contend with the facts of the matter, it confirmed that where an employee has a dispute about bullying, victimisation or harassment, although the CCMA can always conciliate the dispute, if the parties fails to agree on a resolution, the next step (arbitration) must be at the Labour Court, as the dismissal then could be an automatically unfair dismissal, which the Labour Court has exclusive jurisdiction to determine. This approach, that bullying is a form of harassment, and to be dealt with in terms of the

EEA as unfair discrimination, was also recently confirmed in *Private Sector Workers Trade Union on behalf of Opperman and Gerrie Ebersohn Attorneys (2019) 40 ILJ 1159 (CCMA)*.

If the employee has not been dismissed and remains employed, the appropriate referral would be for unfair discrimination in terms of the EEA; if the employee has been dismissed, the appropriate referral would be for automatically unfair dismissal (based on unfair discrimination). Interestingly, in the case of *Simmadari v Absa Bank Ltd (2018) 39 ILJ 1819 (LC)*, the Labour Court found that these two referrals are not mutually exclusive, and a dismissed employee may refer both claims simultaneously.

As such, employers should be aware that instances of workplace bullying should be dealt with quickly and decisively and that bullying should not be tolerated in the workplace, as a failure to do so may

expose the employer to up to 24 months remuneration if the employee is found to have been dismissed due to the bullying, and unlimited compensation claims if the employee is found to have been the victim of unfair discrimination due to the bullying.

Legal notice: Nothing in this publication should be construed as legal advice from any lawyer or this firm. Readers are advised to consult professional legal advisers for guidance on legislation which may affect their businesses.

© 2019 Werksmans Incorporated trading as Werksmans Attorneys. All rights reserved.

CONTACT THE AUTHOR



BRADLEY
WORKMAN-
DAVIES

Title: Director
Office: Johannesburg
Direct line: +27 (0) 11 535 8315
Fax: +27 (0) 11 535 8615
Email: bworkman-davies@werksmans.com

Click [here](#) for his profile

> Keep us close

The Corporate & Commercial Law Firm
www.werksmans.com

A member of the LEX Africa Alliance

ABOUT WERKSMANS ATTORNEYS

Established in the early 1900s, Werksmans Attorneys is a leading South African corporate and commercial law firm, serving multinationals, listed companies, financial institutions, entrepreneurs and government.

Operating in Gauteng and the Western Cape, the firm is connected to an extensive African legal alliance through LEX Africa.

LEX Africa was established in 1993 as the first and largest African legal alliance and offers huge potential for Werksmans' clients seeking to do business on the continent by providing a gateway to Africa.

With a formidable track record in mergers and acquisitions, banking and finance, and commercial litigation and dispute resolution, Werksmans is distinguished by the people, clients and work that it attracts and retains.

Werksmans' more than 200 lawyers are a powerful team of independent-minded individuals who share a common service ethos. The firm's success is built on a solid foundation of insightful and innovative deal structuring and legal advice, a keen ability to understand business and economic imperatives and a strong focus on achieving the best legal outcome for clients.

