Sexual harassment vs inappropriate comment

By Olivia Eleanor Timothy and Zaryl Bhero

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What would you do if a business colleague at an off-duty dinner said the following to you after dinner: "Do you want a lover tonight?" Would this statement merely be an inappropriate comment, or conduct that constitutes sexual harassment?

It is interesting to note that the Commission for Conciliation, Mediation and Arbitration (CCMA) and the Labour Court (LC) accepted that even though the conduct occurred off-duty, it could still be dealt with by the employer, this being an established principle of labour law.

The very same incident occurred in the case of Simmers v Campbell Scientific Africa (Pty) Ltd (C 751/2013) ZALCCT 9 May 2014. A senior male employee, Simmers, and an external female consultant were on a business trip to Botswana to survey a site in order to install some equipment for the Botswana Power Corporation. While another contractor was paying the bill, Simmers said to the female consultant, "Do you want a lover tonight?" She made it clear that she did not and that she had a boyfriend. He responded, "If you change your mind during the night, come to my room." She did not. He did not pursue it.

Simmers' employer, Campbell Scientific Africa, became aware of his behaviour and dismissed him after a disciplinary enquiry for sexual harassment, unprofessional conduct, and bringing the name and image of the company into disrepute; which he was alleged to have done by inappropriately addressing one of their contractors.

CCMA's finding

The CCMA found that Simmers' dismissal was fair. The arbitrator reasoned that the fact that he had not denied that he made the remarks to the complainant, certainly suggested that he was aware or should have been aware that his remarks would not be welcome and therefore constituted sexual harassment.

The LC, however, came to a different conclusion, finding that the arbitrator's deductions that because Simmers made the remarks he knew that they constituted sexual harassment, did not flow from the premise. The LC emphasised that the issue in question was whether the remarks made by Simmers constituted sexual harassment and not the mere fact that he had made them. In determining whether conduct constitutes sexual harassment, the LC confirmed that the Code of Good Practice on the Handling of Sexual Harassment Cases GN 1357 Government Gazette 27865, 4 August 2005, is an important guideline.

Section 4 of the Code of Good Practice on the Handling of Sexual Harassment Cases sets out the litmus test for sexual harassment as 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:

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

The grounds of discrimination to establish sexual harassment in the Simmers case were sex and gender.

There are different ways in which an employee may indicate that sexual conduct is unwelcome, including non-verbal conduct such as walking away or not responding to the perpetrator. In the Simmers case, the female consultant made it clear that she considered the behaviour offensive and indicated that the sexual conduct was unwelcome by walking away. Simmers did not pursue the female consultant once she told him it was unwelcome.

Important determination

Another important determination when considering unwelcome conduct is the differentiation between an unreciprocated sexual advance and sexual harassment. The LC found in this case that the conduct did not cross the line from the unreciprocated sexual advance to sexual harassment. This will undeniably also be determined by the nature and extent of such conduct.

The unwelcome conduct must be of a sexual nature and includes physical, verbal or non-verbal conduct. Verbal conduct includes unwelcome innuendos, suggestions, hints, sexual advances, comments with sexual overtones, sex-related jokes or insults, graphic comments about a person's body made in their presence or to them, inappropriate enquiries about a person's sex life, whistling of a sexual nature and the sending by electronic means or otherwise of sexually explicit text.

Verbal conduct also includes sexual advances - but they must be unwelcome, and the alleged perpetrator should have known that they would be unwelcome, or the recipient of the advance should have made it clear. In the case before the LC, Simmers did not persist in his overtures once the female consultant told him that his suggestion was unwelcome. The LC indicated that the words he used were certainly inappropriate, but were uttered "more in hope than expectation".

Crude remarks

The LC, applying the Code of Good Practice on the Handling of Sexual Harassment cases, shared the view that Simmers' verbal advances were crude and inappropriate but did not cross the line from a single incident of an unreciprocated sexual advance to sexual harassment. An inappropriate comment is not automatically sexual harassment.

Although a single incident of unwelcome sexual conduct may constitute sexual harassment, the LC indicated that this would only be the case if it was a serious incident. It could only have become sexual harassment if Simmers had persisted in it or if it was a serious single transgression. The conduct should constitute an impairment of the employee's dignity, taking into account the following:

- the circumstances of the employee; and

- the respective positions of the employee and the perpetrator in the workplace.

In the Simmers case, the LC concluded that there was no impairment to the female consultant's dignity and that while the advance was an inappropriate sexual one, it did not cross the line to constitute sexual harassment. Further, it did not lead to a hostile work environment as she had left for Australia shortly after the incident, and it was unlikely that the parties would ever work together again - they did not work for the same employer. Accordingly, the LC was of the view that Simmers should be reinstated with retrospective effect, subject to a final written warning.

Employers need to be more careful before instituting sexual harassment charges against their employees. A clear distinction would need to be made between employees who may just be 'trying their luck' and those whose conduct amounts to sexual harassment. In making this differentiation, the code, as demonstrated above, would be a sound guideline.

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