

New workplace codes of good practice to ensure employees keep their hands to themselves

 By [Johan Botes](#)

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Let's be clear, an employee would certainly have been dismissed for misconduct in most jurisdictions for slapping the presenter of an award show, or anyone else for that matter. Employee conduct at social gatherings and events generally does not escape the reach of their employer's right to discipline and terminate for cause. Employees are routinely disciplined and even have their employment terminated for poor conduct at staff year-end functions or client events. Acting poorly (pardon the pun) in front of a global television audience certainly aggravates the matter.



Image source: Getty Images

In South Africa, the Minister of Employment and Labour recently released subordinate legislation, the Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace (Code). South Africa promulgated this legislation in compliance with its obligations as a member state of the International Labour Organisation. As the name suggests, this Code serves to guide employers and employees in managing the scourge of harassment at work. It clarifies that the use of physical force or power is a form of harassment, albeit not its only manifestation. Permitting it to continue has a high likelihood of resulting in social injustice, as well as economic, physical and psychological harm. It has no place in the modern workplace.

Discrimination vs arbitrary harassment

The Code further confirms the statutory prohibition against harassment (as found in section 6(1) and 6(3) of the Employment Equity Act). However, harassment in terms of the EEA presupposes that the unwanted conduct (harassment) is related to one or more of the protected grounds against which discrimination is prohibited. If one employee bullies another because of the colleague's race, ethnicity, gender, sex, marital status, sexual orientation or other protected characteristics (or any arbitrary ground), the offending employee has patently committed harassment as prohibited in the EEA and the Code. But what is the situation where one employee bullies or harasses another for non-discriminatory

reasons?

The protected grounds cover arbitrariness as well. Where an employee harasses another for an arbitrary reason, the misconduct could still qualify as the type of harassment prohibited in the EEA and the Code. Our courts have held that excluding permanent residents from permanent teaching positions - merely because they were not South African citizens - constituted unfair discrimination on an arbitrary ground. Similarly, discrimination on the basis of Type 1 diabetes status was held to be akin to discrimination on the basis of HIV. The court even found that, on particular facts, pay differentiation on the basis of provincial or geographical location constituted unfair discrimination. Does it mean, though, that a complainant must show that harassment or bullying was arbitrary if the misconduct was not motivated (directly or indirectly) by a protected characteristic?

That would seem to place too great an onus on complainants (and, by extension, employers seeking to rid their organisations of harassers and bullies). It cannot be expected of an employer to show that its troublesome employee's attack on another employee was motivated by the victim's race, gender, ethnicity or similar protected characteristics, or by the perpetrator's arbitrary conduct. Would the employer have to prove that slapping another employee out of rage constitutes harassment for arbitrary reasons? Surely, that cannot be the requirement as it will place too great a burden on employers to prove the misconduct.

Internal workplace rules

Employers may determine their own reasonable workplace rules. These rules will generally reflect the views of the society within which the employer is located. In our society, where we say violence, harassment and bullying are unacceptable to us, the employer may readily adopt rules to prevent such conduct in the workplace. It can determine that employees may not harass or bully one another for any reason, irrespective of the motivation. The employer need not prove that a complainant committed statutory harassment before terminating an employee's service for workplace bullying.

The employer's internal rules can be more stringent than those suggested in the EEA and the Code. The company may instruct its staff that it is unacceptable to slander or malign a colleague, perform any act which humiliates, insults or demeans a colleague, withhold work-related information or supply incorrect information, ostracise or exclude the employee from work, or any of the other examples of harassment mentioned in item 4.7.5 of the Code.

However, the employer may clarify that such conduct is prohibited irrespective of whether it constitutes discrimination or not - the mere act of committing such conduct will constitute workplace misconduct. Thus, where an employee assaults another because the employee was offended by a colleague's remarks, it would not matter that the victim's race, gender or other protected characteristics or any arbitrary grounds played no role in the perpetrator's motivation. The prohibited conduct need not constitute discrimination under the EEA and Code for it to constitute workplace misconduct.

Misconduct is misconduct

Where employees misbehave because their conduct is motivated by or influenced by their base views of people of different

categories than themselves, such conduct should be eradicated from the workplace with the full might that the EEA and Code offers employers. However, employers should not hesitate to exit employees from the workplace who assault, bully or harass others under circumstances where it may be difficult to prove that the reason constitutes unfair discrimination. Employers may rely on their own workplace rules, the common law and various other guidelines on unacceptable behaviour to frame the allegations against the employee. Misconduct by any other name would dismiss as sweetly.

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