Bullying in the workplace: towards a uniform approach in South African labour law

Abstract
Bullying in the workplace is a kind of aggression that occurs where an individual or group intimidates, excludes, harasses, insults, mistreats or demeans another individual or group at work, either directly or indirectly. A complex power imbalance presents itself, in that the perpetrator uses formal or informal power over his or her victim to such an extent that the victim is almost powerless to defend him or herself. Bullying can occur from the top to the bottom, from the bottom to the top, or horizontally. Not all kinds of bullying give rise to illegal acts, but even if menial bullying continues over time, it can give rise to severe negative effects. Due to new digital developments in employment, the management of cyberbullying, as a form of workplace bullying, complicates the legal dilemma even further. Not only do bullied victims have to continue in a working relationship where the bullying took place, but depression, stress, anxiety, post-traumatic stress disorder and a plethora of physical illnesses also take their toll, as reflected in abnormally high turnover and absenteeism figures. If no timeous intervention occurs early during the bullying, severe psychological problems have been reported by bullied victims, which render them incapable to continue with work, or lead to summary resignations accompanied by claims for constructive dismissal. Low morale and negativity have been shown to be linked to workplace bullying and impact negatively on the organisation as a whole, and vicarious liability for the employer may follow. Due to the fact that there is no universally accepted definition for bullying and different jurisdictions place bullying on different continuums, it adds to the problem of regulating and preventing workplace bullying. The question has been asked whether there is a need to legislate employees into being “nice” to one another, but that merely shows the lack of knowledge about the notion and effects of workplace bullying. Sexual harassment is a form of human behaviour and is regulated extensively. With bullying four times more prevalent than sexual harassment, there is no reason why bullying should not be regulated also. Many countries, such as Sweden, Germany and France, have legislated bullying and there is a strong drive in the USA to have the Healthy Workplace Bill passed. Many states have introduced different versions thereof, but none have been passed. The USA treats bullying as a form of harassment, and no protection exists for employees who fall outside the scope of certain “classes”, unless, of course, the bullying amounts to criminal actions or tort action. The UK treats workplace bullying as a dignity violation and extensively uses antistalking law, in the form of the Protection from Harassment Act of 1997, to curb bullying. Australia views bullying from a health and safety perspective and, in South Australia, it is currently dealt with by means of Codes. There is a drive to eradicate bullying from the workplace on a national level through a new Code (dealing with workplace bullying), for which public commentary has recently closed. Little has however been done in South Africa to create awareness of, or deal with, this peril. The country is in dire need of a uniform approach to workplace bullying. It is not clear on which continuum bullying should be placed, but as our discrimination laws are not limited to certain “classes”, it is not suggested that separate legislation should be passed. The new Protection from Harassment Act could be used, as in the UK. Employers should embark on the creation and implementation of zero-tolerance policies in the workplace to deal with this pervasive problem. For too long the victims of workplace bullying have suffered silently at the hands of bullies.
The two most important considerations in South African employment law is that of substance and procedure. These two factors must be considered in all decisions and especially when a dismissal is involved. Substance - This deals with the cause. South Africa is a very unionised country; unions play a large role in many workplaces and there are numerous strikes that often get violent. The LRA governs the formation of trade unions, its membership and their activities. PwC offers a wide range of employment law services. We have a qualified labour law attorney on our team, with the requisite expertise and knowledge to assist with all labour related matters to ensure compliance with legislation and to avoid risk. Some of our services include See Hahlo South African Company Law, above at note 3 at 10. 9 See id at 4. See also Burchell, E, Hunt, P, Milton, J and Burchell, JSouth African Criminal Law and Procedure General Principles of Criminal Law (vol 1, 1983, Juta) at 395; R v Oudtshoorn Municipality (1908) 25 SC 257 at 261. These cases are discussed in Nana, C “Sexual harassment in the workplace in South Africa: The unlimited vicarious liability of employers?” (2008) 52/2Journal of African Law 245. 65 See also Minister v Khoza 1966 1 SA 410. 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.