Decoding the enemy:
Developing a language for sexual harassment in the workplace

Former US vice president Joe Biden's entry into the 2020 presidential race caused many to recall his unfortunate chairing in 1991 of the Senate Judiciary Committee that heard allegations of sexual harassment by Anita Hill against then Supreme Court nominee, Clarence Thomas. By chairing the meeting in the hostile manner that he did, he allowed secondary harassment to occur. This secondary harassment is what is feared by so many victims when they dare to speak out against the primary evil. One can only wonder whether Biden's recent apology was sincere or whether it was simply electioneering and whether, on a broader front, a better understanding of all the aspects of sexual harassment and its dynamics has developed during the intervening years.

Alas, sexual harassment pervades all spheres of society: the workplace, with all its overt and covert hierarchies, is no exception. If sexual harassment is perpetrated in the workplace, the consequences can be severe and far-reaching for the victim, and, if reported, also for the perpetrator and even the employer. For this reason, it is vitally important to understand what constitutes sexual harassment and not to confuse it with other (possibly) socially acceptable conduct.

Just ask the dismissed employee (S) in the widely reported Labour Appeal Court (LAC) matter, *Campbell Scientific Africa v S*. S claimed that his inquiry after dinner to an employee of a company contracted by his own employer and working on the same project in Botswana – namely, whether she 'wanted a lover' that night – was simply modern sexual banter and socially acceptable conduct. The recipient of the invitation did not agree with S's explanation, and nor did his employer. After the matter had worked its way through the court system, neither did the LAC. But along this legal route, the Labour Court, when it reviewed the Commission of Conciliation, Mediation and Arbitration's decision that S's dismissal was fair, saw it differently and ordered his reinstatement, hence the appeal to the LAC. This lack of unanimity in the various courts is in the nature of jurisprudence and by itself unremarkable. However, more significantly, this saga revealed that, as recently as 2015, when *Campbell* was decided by the LAC, there was in South Africa still no universal legal definition – a gold standard, so to speak – of sexual harassment in the workplace.

Various laws have been passed to address sexual harassment in the workplace. Yet, commentators continue to lament the fact that courts are like a cat on a hot tin roof when confronted with workplace sexual harassment. It is not that the courts do not come down hard on the perpetrators; most of the time, they actually do. However, it is difficult to distil principles and trends from jurisprudence, ie the substance of predictability, which is the fibre of our legal system. My purpose here is not to unpack the meaning of sexual harassment in the workplace, or to criticise a particular legal approach to this malaise, or to debate whether there is a lack of legislative will. In fact, as I shall demonstrate shortly, legislative attention has gone somewhat overboard. Rather, my objective here is to plead for certainty and clarity, because sexual harassment in the workplace can clearly be combatted, at least on the legal front, only if there is a universal understanding of what it is.

In South Africa, the pre-eminent post-constitutional labour legislation, the Labour Relations Act 66 of 1995 (LRA), is silent on workplace sexual harassment. Nonetheless, lawmakers did not dither: shortly after the LRA came into force in November 1996, the National Economic Development and Labour Council (NEDLAC) used its powers in terms of the LRA to issue the first Code of Good Practice on the Handling of Sexual Harassment Cases of 1998 (1998 Code). (Legislation often permits the publication of codes of good practice to provide detailed guidance on a particular aspect of labour law, and while these codes do not have the same status as legislation, decision-makers are still obliged to consider

their terms.) It is important to bear in mind that when the 1998 Code was issued by NEDLAC, the Employment Equity Act 55 of 1998 (EEA) had not yet come into effect and, until its commencement in August 1999, workplace discrimination disputes (including harassment) were processed through a schedule of the LRA. However, with the coming into force of the EEA, these matters, except dismissal for discriminatory reasons, were henceforth regulated by the EEA.

However, the EEA still did not address sexual harassment by name. The EEA provides that 'no person may unfairly discriminate, directly or indirectly, against an employee, in any employment practice, policy or practice on one or more' of a number of grounds, including gender, sex and sexual orientation, and that harassment of an employee is a form of unfair discrimination and is prohibited on any one, or a combination, of the listed grounds of unfair discrimination. The only guidance on the more nuanced meaning of sexual harassment at the time of the passing of the EEA were the guidelines provided by the 1998 Code. But, in June 2005, the then Minister of Labour, this time in terms of the EEA, issued a second code on the handling of sexual harassment in the workplace (2005 Code). Significantly, the 2005 Code is titled 'Amended Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace'. As no code of good practice on sexual harassment had previously been issued in terms of the EEA, the only code capable of amendment was the 1998 Code. But this was apparently not the case, as the 1998 Code was not formally withdrawn at that stage. This resulted in an untenable situation, where two codes were applicable whenever workplace sexual harassment came under scrutiny. Some argued that this was intentional and that the 1998 Code applied to disputes (eg dismissals) under the LRA, while the 2005 Code applied to disputes under the EEA (eg employee complaints and/or employer liability regarding workplace sexual harassment). In a strict legal sense there was perhaps merit in this argument: the LRA, in terms of which the 1998 Code was issued, provides that such a code may also apply to other employment law. As the 1998 Code was not extended to apply to other employment laws, some argued that it thus applied only to LRA disputes. But the fallacy of this approach is illustrated by a simple example: if an employee was sexually harassed by a fellow employee in circumstances where the employer should have taken pre-emptive steps and the perpetrator is disputing the fairness of his subsequent dismissal, the (mis)conduct of the perpetrator and his dismissal would then be judged by the 1998 Code and the liability of the employer for not acting appropriately by the 2005 Code, opening the door for conflicting outcomes.

As this was surely not the intention, in the absence of the withdrawal of the 1998 Code, the only way to make sense of this situation, so the LAC stated in *Campbell*, was to regard both codes as relevant. This is a most unenviable task. Both these codes comprise a few pages and provide guidance on the test for sexual harassment, processes and policies, and while they overlap to a large degree, there are nuanced differences between the two codes, both in terms of procedure and substance. Expecting decision-makers to nit-pick through both codes to allow for the 'real' code to reveal itself is simply not in the interests of justice. No wonder that the jurisprudence on sexual harassment often side-steps both codes and instead opts for outcomes based on pragmatism. Many of these outcomes cannot be disputed but, as a result, a strong guiding body of workplace sexual harassment law has failed to emerge. Challenging even the most blatant forms of sexual harassment often results in character assassination and confusion about the meaning of sexual harassment prevents victims from challenging more subtle manifestations.

Fortunately, although not widely publicised, the forced co-existence of the two codes ended when the 1998 Code was repealed by the Minister of Labour in December 2018. Remarkably, the reason given for the repeal - deeply hidden in a Gazette- was the fact that it was replaced by the 2005 Code. With the repeal of the 1998 Code, albeit thirteen years late, ended the argument that there were always meant to be two codes. Clearly the repeal should have occurred when the 2005 Code was issued and

the fact that it did not occur at the time could not have been anything but an oversight. Judicial activism has become something of a cult phrase, but it is of course dangerous for a court to venture into the domain of the legislature. At the same time, it can justifiably be asked whether the courts should not at least have questioned more forcefully the co-existence of the not so identical twin codes at a much earlier stage. Still, good on the judge in *Campbell* for hinting at the anomaly; yet it took another three years to repeal the 1998 Code.

Sexual harassment in the workplace is a multifarious monster and cannot be foiled by words alone. Hopefully, the existence of a single code will promote a more universal understanding of workplace sexual harassment and provide a useful basis from which to develop a firm and influential body of law. But the withdrawal of the 1998 Code might not be enough. Although the terms of the 2005 Code are deliberately malleable to accommodate diverse forms of conduct, it is perhaps time to evaluate whether it has in fact withstood the test of time, or whether it can be improved upon or even replaced by dedicated legislation. Not only does technology provide new clandestine platforms for perpetrators, but with the improved understanding of the psychology of patriarchy (and other socially sanctioned regimes of baseless power), it is now easier to identify the hitherto surreptitious and nameless forms of harassment, often sexual in nature, based on these unfounded assumptions of supremacy. Lawmakers will therefore do well to stress test the 2005 Code to ensure that it is still appropriate for addressing 'upskirting', coercive control, voyeurism and other, not necessarily new, but now better understood, forms of (sexual) harassment, for which the workplace is fertile ground.

In this regard, international help is on the horizon. The International Labour Organisation (ILO) is an international tripartite body that has played a well-documented role in establishing basic workplace standards through its instruments. In the case of South Africa, the ILO has a special significance as the Constitution and labour laws effectively oblige courts in labour matters to interpret labour legislation with due regard to ILO instruments. Apparently prompted by the #MeToo movement, the ILO has set up a Standard Setting Committee to do preparatory work on violence and harassment in *the world of work*, with a view to adopting a dedicated instrument on the subject. The Committee will meet again at the end of May 2019 and its deliberations, even prior to the adoption of a formal instrument, provide useful guidance for domestic lawmakers on the not new, but more recently recognised, forms of sexual harassment. The shift from the 'workplace' to 'the world of work' is significant. Although perhaps testament to a broader recognition that work is no longer confined to bilateral employment or to a place, the terminology also signals an understanding that sexual and other forms of harassment experienced by those who are working often originate in contiguous power relationships.

To repeat: the question here is not whether the 1998 Code is better than the 2005 Code, or vice versa. The 2005 Code is probably better, but the confusion created by the co-existence of the two codes is a far greater evil. Of course, having certainty about the meaning of sexual harassment does not guarantee that those who behave like the dismissed employee in *Campbell* will on each occasion be dismissed, but removing the confusion about which code to apply makes it possible to develop legal consistency.

My co-authors and I dedicated our 2010 publication, *Harassment in the Workplace*, to Eva, the victim of the earliest recorded South African example of sexual harassment that we could trace. Eva was a slave woman who belonged to a Graaff-Reinet settler. In 1826 she successfully claimed her freedom from a local magistrate after her owner reneged on a promise that she would be freed after having sexual intercourse with him. Of course, then it was not called sexual harassment; in fact, it was not until the early 1970s that the term sexual harassment started being used for such deeds. Joe Biden could therefore perhaps be forgiven for not at the time understanding the complexities of the

investigation that he was chairing in 1991. But we no longer lack the language for this terrible, albeit both complex and silent, condition of employment and owe it to the victims, mostly women, to at least make sure that we call it out for what it is and decode it appropriately and effectively.

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