

***Identifying Sexual Harassment in the Workplace? Do Not Forget to Remember the Code
of Good Practice***

ANRI BOTES*

(North-West University, Potchefstroom Campus, South Africa)

Anri.Botes@nwu.ac.za

+ 27 18 299 1052

1 INTRODUCTION

Among other grounds, the Constitution of the Republic of South Africa, 1996 (Constitution) prohibits unfair discrimination in s 9(3) against any citizen based on sex, gender and sexual orientation.¹ Although the Constitution confers on every citizen the fundamental right to equality and non-sexism as core principles,² it also places a duty on the government in terms of s 9(4) to promulgate national legislation in order to thwart unfair discrimination. This duty led to the promulgation of the Employment Equity Act 55 of 1998 (EEA) and the subsequent Employment Equity Amendment Act 47 of 2013 (EEAA), which reflect the right to equality as provided for in s 9 of the Constitution, but render it relevant to the employment realm.³

This is highlighted when s 6(3) of the EEA is considered. According to this section, harassment on any of the grounds listed in s 6(1) is also classified as unfair discrimination.⁴ It therefore follows that sexual harassment, which logically arises because of a person's gender or sex, is a form of unfair discrimination.⁵ Preventing and properly adjudicating sexual harassment in the workplace is not only imperative because committing such acts is immoral and reprehensible, but also in large part because sexual harassment violates an individual's constitutional rights to equality, human dignity and privacy. Sexual harassment has a negative impact on the working environment and may damage the various collegial and trust relationships within that workplace. Therefore a duty rests on employers and presiding

* Lecturer in Law, North West University; LLB LLM LLD (NWU Potchefstroom).

¹ s 9(3) of the Constitution.

² s 1 of the Constitution.

³ s 6(1) of the EEA: '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 any other arbitrary ground.'

⁴ R le Roux 'Sexual Harassment in the Workplace: A Matter of More Questions than Answers or Do We Simply Know Less the More We Find Out?' (2005) *Law, Democracy & Development* 58.

⁵ R le Roux, T Orleyn & A Rycroft *Sexual Harassment in the Workplace: Law, Policies and Processes* (Butterworths Durban 2005) 6.

officers alike to ensure that these rights are realised when dealing with sexual harassment cases.

In order to discharge this duty, presiding officers should properly apply their minds and consider all the relevant principles and guidelines concerning sexual harassment and how it should be identified. Such principles and guidelines have in particular been laid down by the Code of Good Practice on the Handling of Sexual Harassment Cases of 1998 (1998 code) and the subsequent Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace of 2005 (2005 code). Upon closer scrutiny of sexual harassment cases, a disturbing pattern has unfolded, especially among the arbitrations conducted by the Commission for Conciliation, Mediation and Arbitration (CCMA). Many commissioners have failed in the past to take cognisance of the code when determining whether sexual harassment has presented itself in a given situation.⁶ Various judges of the Labour Court and Labour Appeal Court have also been guilty of this lapse.⁷ Furthermore, it was found that in at least one case the presiding officer did apply the relevant code, but interpreted it incorrectly, resulting in an unreasonable conclusion.⁸

This article will firstly focus on a deconstruction of the codes to serve as a reminder of the elements that are of paramount importance when adjudicating cases of sexual harassment. Secondly, a range of court cases regarding sexual harassment in the context of the codes will be analysed, especially concerning the failure to apply the codes correctly, or even at all, and the inevitable consequences that may arise because of it. Some problematic aspects with regard to the various codes will also be identified. The ultimate goal of this article is to indicate why it would be irresponsible to lose sight of the codes.

Although the main aim of this article is to describe the issues that arise when not applying the relevant codes to sexual harassment cases in South Africa specifically and is not intended to be a comparative study, the article will also reference various Canadian legislation and case law regarding sexual harassment in order to draw statutory comparisons.

⁶ *Gregory v Russells (Pty) Ltd* (1999) 20 ILJ 2145 (CCMA); *Motsamai v Everite Building Products* CCMA 16 February 2005 case no GA 25798-04 unreported; *Gaga v Anglo Platinum Ltd* CCMA 6 January 2009 case no GAJB 23292-08 unreported.

⁷ *Motsamai v Everite Building Products & others* LC 14 December 2006 case no JR 1250/05, JR 3100/05 unreported; *Motsamai v Everite Building Products (Pty) Ltd* (2011) 2 BLLR 144 (LAC); *Anglo Platinum Ltd v CCMA & others* (2010) JOL 25372 (LC); *Mokone v Sahara Computers (Pty) Ltd* (2010) 31 ILJ 2827 (GNP).

⁸ *Beasley v SA Metal Group* CCMA 25 March 2013 case no WECT 20103-12 unreported.

2 UNDERSTANDING THE CODES OF GOOD PRACTICE ON THE HANDLING OF SEXUAL HARASSMENT CASES

Harassment, as identified in the EEA as unfair discrimination in s 6(3), was unfortunately the only reference to harassment in this Act and did not provide any clarity on sexual harassment specifically. No statutory definitions or procedures for the handling of such cases were provided, creating the possibility of a victim being left defenceless should a particular case of sexual harassment be misinterpreted or ill-managed.

Descriptions of sexual harassment had however been formulated by academics even before the EEA was promulgated. Decades ago Mowatt articulated a definition for sexual harassment in the workplace, which definition was drawn from a number of American sources. In his article Mowatt says as follows:⁹

‘Sexual harassment occurs when a woman's sex role overshadows her work role in the eyes of the male, whether it be a supervisor, co-worker, client or customer; in other words, her gender receives more attention than her work. It may take the form of innuendo, inappropriate gestures or physical touching. In its narrowest form sexual harassment occurs when a woman is expected to engage in sexual activity in order to obtain or keep her employment, or obtain promotion or other favourable working conditions. Inherent in this form is the element of coercion, or the abuse of power by the male. The wider view is that any unwanted sexual behaviour or comment which has a negative effect on the recipient constitutes sexual harassment.’

Since this was the first comprehensive definition of sexual harassment in South Africa within the employment context, the then Industrial Court referred to and applied the definition in *J v M*,¹⁰ but the need for a codified, authoritative definition with clear guidelines still lingered. To fill the void the National Economic Development and Labour Council (NEDLAC) issued the 1998 code, in terms of s 203 of the Labour Relations Act 66 of 1995 (LRA). In 2005 a further code was drawn up in terms of s 54 of the EEA. Both sections accord the Minister of Labour the power to institute any code of good practice in order to give effect to the rights granted in terms of those Acts. It should be emphasised that any codes issued by NEDLAC are not considered equivalent to legislation, but only aim to guide, among others, employers, supervisors and employees in a particular matter and should not be viewed as law.¹¹

⁹ J G Mowatt ‘Sexual Harassment — New Remedy for an Old Wrong’ (1986) 7 *ILJ* 638. See also *Gerber v Algorax* (1999) 20 *ILJ* 2994 (CCMA) 3004, 3005; *Gregory* n 6 above 2161; *Taljaard v Securicor* (2003) 24 *ILJ* 1167 (CCMA) 1175.

¹⁰ (1989) 10 *ILJ* 755 (IC) 757.

¹¹ item 2 of the 2005 code. Also see *Le Roux* n 5 above 19.

The 2005 code specifically is a useful and very valuable instrument as it firstly identifies sexual harassment in particular as unfair discrimination, as opposed to the EEA which only refers to harassment in broader terms.¹² By attempting to prevent sexual harassment, it similarly attempts to uphold the right not to be discriminated against on grounds of gender, sex and sexual orientation. Furthermore, it provides an all-inclusive definition for sexual harassment, describes the nature and different guises of sexual harassment, and most importantly, how the presence of sexual harassment should be tested. The application of the code to a situation of alleged sexual harassment is of the utmost importance, since it has to be ascertained with reasonable certainty whether sexual harassment did in fact occur. The protection of the rights of the alleged victim, but by the same token also the protection of the alleged perpetrator against false accusations, will depend on this verdict.

The duty resting on the South African government to ensure equal treatment in the workplace and consequently prevent unfair discrimination arises from South Africa's membership of the International Labour Organisation (ILO). The ILO issued its Declaration on the Fundamental Principles and Rights at Work in 1998, placing a duty on member countries to respect the four core rights of the ILO and the conventions that give effect to them, and to uphold the relevant standards in their laws. The right not to be discriminated against is one of these four core rights. By specifically prohibiting unfair discrimination in the EEA, the Department of Labour clearly attempted to comply with this obligation.

The ILO Convention which has been issued to give effect to the core right to equality is the Discrimination (Employment and Occupation) Convention 111 of 1958. This convention only prohibits unfair discrimination in general terms on a range of specified grounds (sex, gender and sexual orientation inclusive), but makes no reference to harassment or sexual harassment in particular. In contrast the EEA at least recognises harassment as a form of unfair discrimination.¹³ However, to circumvent any uncertainty on the matter, the ILO's Committee of Experts on the Application of Conventions and Recommendations impressed upon all member states in a 1996 special survey on the application of Convention 111,¹⁴ and again in 2003 in its general observation concerning Convention 111 that although sexual

¹² item 3 of the 2005 code.

¹³ It should be noted that, interestingly enough, this convention prohibits discrimination in the broad sense, without distinctly referring to *unfair* discrimination (art 1(1)). It does however state in the same article that it will not be deemed as discrimination when a distinction is drawn or someone is excluded or preferred due to a particular inherent requirement of the job (art 1(2)). In the South African context, such distinction is still considered to be discrimination, but it is deemed to be *fair* discrimination as derived from s 6(2) of the EEA.

¹⁴ ILO 'Equality in Employment and Occupation: Special Survey on Equality in Employment and Occupation in respect of Convention No. 111' (Geneva 1996) 169-85.

harassment is not expressly mentioned in the convention, it should be considered to constitute a form of sex discrimination.¹⁵ It can therefore be deduced that, as the convention proscribes unfair discrimination in the workplace and advocates steps the member states ought to take to eradicate such discrimination, a prohibition on sexual harassment should be read into the convention.

In order to indicate the preferred scope of its member states' legal instruments and which guises of sexual harassment ought to be covered, the Committee of Experts provided a comprehensive definition for sexual harassment in its special survey. According to the committee sexual harassment entails:¹⁶

‘Any insult or inappropriate remark, joke, insinuation and comment on a person’s dress, physique, age, family situation, etc; a condescending or paternalistic attitude with sexual implications undermining dignity; any unwelcome invitation or request, implicit or explicit, whether or not accompanied by threats; any lascivious look or gesture associated with sexuality; and any unnecessary physical contact such as touching, caresses, pinching or assault.’

It is evident from this definition that the committee endeavoured to include as many types of sexual harassment as possible to prevent too narrow an approach to the issue and by doing so to maximise the protection victims might enjoy. Any conduct with a sexual connotation can qualify as sexual harassment, whether in the form of a verbal approach or physical advances. Mere eye contact and gestures could similarly be considered as sexual harassment if they incorporated the necessary required sexual connotation, particularly if such conduct was considered unwelcome by the receiving party.

As South Africa ratified the convention mentioned above in 1997,¹⁷ it then had a duty to implement appropriate instruments to prevent and address sexual harassment in the workplace as required by the ILO.

As previously stated NEDLAC issued the 1998 code in terms of the LRA, prohibiting sexual harassment as a form of sex discrimination and providing clarity on what conduct constitutes sexual harassment and how the employer should address such cases when dealing with matters relevant to the LRA.¹⁸ However, to do away with sexual harassment in the

¹⁵ ILO ‘General Observation on Convention No. 111: Discrimination (Employment and Occupation) of 1958 Report of the Committee of Experts on the Application of Conventions and Recommendations’ (Geneva 2003) 463-4.

¹⁶ ILO n 14 above 15.

¹⁷ Ratification of Discrimination (Employment and Occupation) Convention 111 of 1958 http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312256.

¹⁸ C Cooper ‘The Application of the Promotion of Equality and Prevention of Unfair Discrimination Act and the Employment Equity Act (2001) 22 *ILJ* 1535.

workplace in the context of equality as envisaged by the ILO, NEDLAC drew up the subsequent 2005 code in terms of the EEA and thus its terms place it centrally within prevention of discrimination legislation. Throughout this article both these codes will be referenced concurrently in order to illustrate the progress made to prevent sexual harassment in the South African workplace.¹⁹ However, as will be seen below, that while there are quite a few similarities between the codes, material differences also exist regarding the definitions of sexual harassment and the factors to be considered when determining the existence of sexual harassment in a given situation. It is my submission that having two separate codes, both in force to regulate the same issue but containing different requirements before it will be confirmed that sexual harassment is present might very likely cause confusion in an already difficult situation. Furthermore, the discussion below will indicate that the coverage and protection provided by the 2005 code is wider than that of the 1998 code. Perhaps it would be wise to withdraw the much narrower 1998 code altogether and make the 2005 code applicable to all situations of sexual harassment.

2.1 Code of Good Practice on the Handling of Sexual Harassment Cases of 1998

The 1998 code contains a definition of what sexual harassment entails, as well as an exposition of the elements which should be taken into account when the presence of sexual harassment has to be ascertained. It is not unimaginable that NEDLAC kept the ILO's approach to sexual harassment in mind when drafting it, thereby covering most variations of sexual harassment and maximising protection.

In light of the fact that sexual harassment is prohibited mainly because of the detrimental consequences it holds for the victim (infringing the right to human dignity, privacy and bodily integrity), a key element which may be identified in the definition of the ILO's Committee of Experts stated above is that the conduct should be 'unwelcome'. Thus, the attention paid to the victim should not be accepted by him or her. The complainant alleging that he or she is being sexually harassed can consequently not make this assertion if he or she enjoyed the attention, encouraged it or even participated in the event.²⁰ Such conduct of the

¹⁹ The main aim of the codes is to provide a guideline for the maintenance and promotion of a workplace that is free from sexual harassment and sex discrimination, and in which employers and employees respect each other's right to privacy, integrity, dignity and equality (item 1 of the 1998 code; item 1 of the 2005 code).

²⁰ A Ramsaroop & S Brijball Parumasur 'The Prevalence and Nature of Sexual Harassment in the Workplace: A Model for Early Identification and Effective Management Thereof' (2007) *SA Journal of Industrial Psychology* 25.

recipient stands in direct contrast to the true nature of sexual harassment. The words of Cloete C in *Sadulla v Jules Katz*²¹ reflect this fact:

‘In a case of sexual harassment proper, one would not expect the victim to initiate certain new trends in the conversation, or to introduce fresh material and notions, especially about her/his own sexual life or private bodily parts. There can of course be circumstances that justify a victim in doing this, but they would have to be exceptional, as the primary object of the victim should be discouragement and protestation.’

The ‘unwelcome’ element appears clearly in the definition of sexual harassment in the 1998 code. Here sexual harassment is considered to be ‘unwanted conduct of a sexual nature’. To further highlight the deplorable nature of sexual harassment the following sentence was added: ‘The unwanted nature of sexual harassment distinguishes it from behaviour that is welcome and mutual.’²² Thus, an effective distinction is drawn between cases where sexual harassment arises as a form of sex discrimination, as prohibited by the ILO, and cases where welcome sexual attention or advances are found between consenting adults.

This aspect regarding the distinction between sexual attention and sexual harassment has been underlined even further by expanding the definition to include a description of the situation where sexual attention progresses into sexual harassment. Item 3(2) of the 1998 code stipulates that sexual attention (which on the face of it is regarded as acceptable) will amount to sexual harassment (the unacceptable form of attention) when the attention has been received on a continuous or repetitious basis (although the code recognises that a single incident of sexual attention may be classified as sexual harassment if it is serious enough), and/or if the recipient of the attention has made it clear that the sexual advances are not welcome and/or the party making the advances was aware or should have reasonably been aware that his conduct is unacceptable.

One case where it was found that the applicant was not guilty of sexual harassment because it was merely sexual attention between one adult and another was in *Simmers v Campbell Scientific Africa (CSA)*.²³ While on a business trip the applicant invited a female consultant to CSA to come to his room later that evening if she wanted to engage in sexual relations. This was done after working hours at the end of a social dinner with another colleague. She firmly declined the invitation after which the applicant did not persist. No

²¹ (1997) 18 ILJ 1482 (CCMA) 1487.

²² item 3(1) of the 1998 code.

²³ *Simmers v Campbell Scientific Africa* (2014) 35 ILJ 2866 (LC); (2014) 8 BLLR 815 (LC).

other incidents occurred. When CSA became aware of this incident they subjected the applicant to a disciplinary hearing and found him guilty of sexual harassment. However, after proper consideration Steenkamp J reached a different conclusion:²⁴

‘Simmer’s comment was sexual attention, crude and inappropriate as it may have been. It was a single incident. It was not serious. It could only have become sexual harassment if he had persisted in it or if it was a serious single transgression. Add to this the fact that there was no workplace power differential, the parties were not co-employees, and the incident took place after work. The advance was an inappropriate sexual one, but it did not cross the line to constitute sexual harassment.’

It therefore becomes clear from the example above that all the elements should be considered and not viewed in isolation. Nevertheless, by using the words ‘and/or’, it becomes clear it was never the intention of NEDLAC to require all the factors to be present before a particular incident of sexual attention could be classified as sexual harassment.²⁵ In other words, by inserting ‘and/or’, it seems NEDLAC recognised that the factors may indeed be viewed in isolation. This is an important fact to take note of when an occurrence is tested for sexual harassment — the presence of a single factor from those provided *could be* sufficient to establish sexual harassment. Confusion may however arise as a result. It has been established that sexual harassment amounts to *unwelcome* sexual attention (as clearly stated in the definition provided by the code). However, if the first factor in item 3(2) is viewed and applied in isolation, it may result in a conclusion that there was sexual harassment purely on the basis of the continuous sexual attention, without considering the possibility that the attention may have been welcome. A requirement that at least two of the factors should be present would have avoided any potential uncertainty regarding the conduct’s unwelcome nature, since the combination of the first factor and any of the other two factors (which both included a reference to the unwelcome nature of the attention, by respectively using the words ‘offensive’ and ‘unacceptable’) would have been sufficient indication that the sexual attention was not well received and was therefore unacceptable.

Item 4 of the 1998 code provides a description of the guises of sexual harassment, which reflects the definition of sexual harassment set out by the ILO to some extent. Firstly, it mentions verbal harassment. According to the code this would entail, among other things, unwelcome innuendos, suggestions and hints, the telling of jokes with a sexual undertone, inappropriate comments about a person’s body and even unwelcome whistling at a person. In addition, the 1998 code also refers to non-verbal harassment, describing it as the making of

²⁴ *ibid* 2874.

²⁵ *Gaga v Anglo Platinum Ltd* (2012) 33 ILJ 329 (LAC) 343C-D.

unwelcome gestures, indecent exposure and the display of sexually explicit pictures and objects. A more serious form of sexual harassment is also recognised, being physical conduct of a sexual nature. Under this category physical conduct could range from anything between unwelcome physical contact and touching to assault and even rape.²⁶

It does not seem accurate to consider rape (or sexual assault for that matter) as an example of sexual harassment. Rape is a different, and more serious, situation entirely and comes down to a criminal offence. Moreover, the act of rape is measured against different requirements and criteria and will be adjudicated by the Criminal Court. Fault and prejudice is furthermore required to establish that rape took place, while this is not required in the case of sexual harassment. By comparing rape to sexual harassment consequently does not make sense and it has no place in the code.²⁷

Finally, the 1998 code remarks that *quid pro quo* harassment as well as sexual favouritism can occur. *Quid pro quo* harassment refers to instances where someone in the workplace attempts to influence the process of employment, promotion, dismissal or benefits of an employee or job applicant in exchange for sexual favours.²⁸ Sexual favouritism on the other hand refers to situations where an authority figure in the workplace rewards those who accept and even reciprocate his sexual advances, while others are victimised for declining such attention.²⁹

These aspects from item 3 were the only factors that the 1998 code prescribed for consideration when sexual harassment was to be ascertained. Item 4 of the code provided a list of examples of sexual harassment, but made it clear this should not be viewed as an exhaustive list. The remainder of the 1998 code, from item 5 to item 10, focusses on the employer's administrative obligation to prevent sexual harassment in the workplace, as well as its duty to create policies and follow internal procedures when a complaint of sexual harassment is filed. As the particulars in these items fall outside the ambit of this study, they will not be dealt with.

²⁶ A Basson 'Sexual Harassment in the Workplace: An Overview of Developments' (2007) *Stell LR* 427.

²⁷ C R Snyman *Strafreg* 6 ed (LexisNexis 2012) 367.

²⁸ item 4(1)(d) of the 1998 code; Ramsaroop & Brijball Parumasur n 20 above 25; P A Grobler et al 'A Model for the Management of Sexual Harassment in South African Companies' (2003) 12 *Management Dynamics* 37; Basson n 26 above 428; *Grobler v Naspers* (2004) 25 *ILJ* 439 (C) 447, 449.

²⁹ item 4(2) of the 1998 code.

2.2 *Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace of 2005*

In comparison with the 1998 code of the LRA, the 2005 code drawn up in terms of the EEA to eradicate sexual harassment as a form of unfair discrimination is a much more comprehensive document. As with the 1998 code, it provides a definition of sexual harassment and a list of factors to consider, but the definition is firstly formulated in clearer terms and provides proper guidelines on the meaning of each of the respective factors. Due to its wider approach to sexual harassment, as will be seen below, the 2005 code may be able to provide better guidance in sexual harassment cases across the board, regardless of the relevant circumstances (whether it is a matter of sexual harassment as a form of misconduct for dismissal purposes or a matter of unfair discrimination in terms of the EEA).

Upon drafting the 2005 code, NEDLAC made material amendments to items 3 and 4 of the 1998 code. Item 3 in the 2005 code states: ‘Sexual harassment in the working environment is a form of unfair discrimination and is prohibited on the grounds of sex and/or gender and/or sexual orientation.’ By including this statement (which does not feature anywhere in the 1998 code) item 3 of the 2005 code confirms the intention of the ILO and the EEA that sexual harassment should be classified and prohibited as a form of unfair sex discrimination. The intention of the 2005 code to approach sexual harassment as an equality issue can consequently not be ignored. This is a safe presumption when examining the 2005 code, especially its item 4 which reads as follows.³⁰

‘Sexual harassment is 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:
4.1 whether the harassment is on the prohibited grounds of sex and/or gender and/or sexual orientation;
4.2 whether the sexual conduct was unwelcome;
4.3 the nature and extent of the sexual conduct; and
4.4 the impact of the sexual conduct on the employee.’
(Emphasis added.)

The aspects highlighted in item 4 are meant by the 2005 code to be the key elements to consider when testing a case of alleged sexual harassment. The distinction between sexual attention (being welcome and mutual) and unwelcome sexual harassment as it appears in the 1998 code was omitted from the latest code. The reason for such omission is uncertain, but one may argue NEDLAC was probably of the opinion that a comprehensive description of

³⁰ item 4 of the 2005 code.

and emphasis on the *unwelcome* advances, coupled with the provision of a wide range of factors and examples in the 2005 code, was sufficient to illustrate the unwelcome nature thereof. It should be adequate to use the word ‘unwelcome’ in order to comprehend that the attention was not accepted and mutual. If it is subsequently clear from the descriptions provided by the 2005 code which types of sexual advances are prohibited, it would be redundant to distinguish welcome conduct from it in so many words.

In order to ensure the diverse applicability of the 2005 code, the element of *continuous* or *repeated* sexual advances as a predominant factor for the existence of sexual harassment required by the 1998 code in item 3 does not feature in item 4 of the 2005 code. As can be seen from the quotation above, item 4 of the 2005 code now simply requires in broader terms the thorough consideration of the nature and extent of the conduct, as well as the impact the advances have on the victim. This therefore supposes that the continuous nature of the unwelcome conduct per se is no longer a core issue, but rather the conduct itself and the negative effect it may have on the recipient of the sexually charged attention. It is thus clear that different approaches are to be followed in terms of the 1998 code and 2005 code respectively, as the factors to be considered under each differs to some extent.

In an attempt to avoid ambiguity around item 4 and to contextualise the key elements in that particular item, NEDLAC wrote a supplementary item 5 which thoroughly explains each of the said elements and highlights the factors which ought to be taken into account when ascertaining the presence of sexual harassment. It is accordingly imperative for the accurate application of item 4 to read it with item 5. By not properly considering these aspects and measuring a complaint of sexual harassment against the criteria provided, one could reach an incongruous conclusion.³¹

Apart from the statement made in item 5.1 that sexual harassment is unfair discrimination on the grounds of sex, gender and sexual orientation, it continues by specifically referring in item 5.2 to the various methods a recipient of such conduct could utilise to communicate to the perpetrator that his or her advances are not welcome, whether it is done verbally or implicitly. Since the 1998 code does not indicate what reaction is required from the recipient in order to make her or his displeasure about the advances known to the perpetrator, but merely requires that the recipient should have made it clear to the other party that she or he considers the conduct offensive,³² this could lead to incorrect assumptions. The provision in item 3 is so ambiguously formulated – ‘the recipient *has made it clear* that the

³¹ This has been the case in numerous judgments. This aspect will be covered below.

³² item 3(2)(b) of the 1998 code.

behaviour is considered offensive' (emphasis added) that it could be read that the recipient should have clearly said to the perpetrator that she or he was not receptive to the advance and/or was offended by it. This begged the question whether a person could claim to have been sexually harassed where the advances were unwelcome, if she or he did not fully communicate her or his displeasure or discomfort to the perpetrator, or if the conduct was indeed unwelcome but did not necessarily offend her or him. This would or could have had the result of the complainant having a difficult time proving that the sexual attention was in fact unwelcome.³³

A fact one should not lose sight of is that victims of sexual harassment may react differently to the incidents.³⁴ One could perhaps have chosen to remain quiet and ignore the attentions or words of the perpetrator for whatever reason. Another person may perhaps have decided to take the more active route, whether by confronting the perpetrator head-on and demanding that he or she discontinue the inappropriate actions or by requesting the assistance of a third party. Advances which may offend one person will not necessarily offend another, especially if the personalities of the respective victims are considered, but the advances remain unwelcome. Not only could the personalities of the individual victims dictate which approach they would follow, but in most cases the relationship between the harasser and the harassee may be the dominant influence. In *Taljaard v Securicor*³⁵ the complainant, who was harassed by her manager, decided to follow the passive approach and confessed to a colleague during the course of the harassment that 'at that point she felt helpless and that she could not stand up to him because of his position'. In this arbitration the commissioner stated.³⁶

'Inferiors who are subjected to sexual harassment by their superiors in the employment hierarchy are placed in an invidious position. In this case Mr. Taljaard was her benefactor, the person to whom she owed her employment. Furthermore in a fractured society such as ours, it is pertinent to note that Mr. Taljaard is a middle-aged white male, well-to-do, educated, a senior manager and seemingly powerful. Ms. Paule, on the other hand, is a young coloured woman, of limited means, low education, a menial worker on the lowest rung of the social ladder. It is difficult enough for her to deal

³³ In *Gaga* (CCMA) n 6 above the commissioner found that the complainant could not claim that the advances of the applicant were unwelcome, because from her reaction she was clearly not offended; she did not lodge a complaint; she could not prove on a balance of probabilities that she informed the applicant that his conduct made her uncomfortable; and she even argued that it seemed like she rather enjoyed the advances of the applicant. From the facts of the case and multiple testimonies, it is however clear that the commissioner did not apply his mind and consider the method she chose to use to put distance between herself and the applicant, which was to dismiss the advances and sexual requests flippantly.

³⁴ *Gerber* n 9 above 3005.

³⁵ *Taljaard* n 9 above 1171.

³⁶ *Ibid* 1179. See also *Gregory* n 6 above 2162 regarding the power imbalances between the abuser and the abused and the direct impact this may have on the sanction of the abuser.

with his advances, given this huge imbalance of power . . . [w]hen she has to do so in an atmosphere where her slightest hint of discontent may perceivably result in her employment prospects being under threat, the position is unenviable. It is within this context that her failure to explicitly inform him that his conduct is unwanted is made all the more understandable.’

The commissioner argued in a similar vein in *Gerber v Algorax*,³⁷ adding, ‘Fear of the consequences of complaining to higher authority whether the complaint is made by the victim or a friend, often compels the victim to suffer in silence’. Thus, the conduct of the perpetrator can still amount to sexual harassment, for the advances will under both abovementioned circumstances be unwelcome, regardless of the chosen approach of the victim. Thus it would be inaccurate to find sexual harassment to be absent simply because the victim did not unequivocally communicate to the perpetrator that his or her conduct was uncalled for, unwelcome, offensive or did not officially report the incident(s). It furthermore stands to reason that a presiding officer should not be misled by such facts and as a result fail properly to test whether the sexual advances occurred, were unwelcome and/or had a negative impact on the complainant.

The communication of the unwelcome nature of the perpetrator’s conduct is not formulated in such narrow terms in the 2005 code. Item 5.2 simply points out ‘[t]here 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’.³⁸ A person who alleges sexual harassment will therefore carry the burden of proving the unwelcome nature of the sexual advances and that he or she *behaved in such a manner* as to discourage the conduct and communicate that the advances were not welcome and would not be reciprocated. Care should however be taken to avoid abuse of the wide formulation by a person claiming to have been the recipient of unwelcome advances. It is for this reason that the incident must be analysed as a whole and why it would not be wise to view the allegation in isolation without taking the time to probe the alleged conduct itself.

As stated above, the different approaches of the 1998 code in terms of the LRA and the 2005 code in terms of the EEA to ascertaining whether sexual harassment exists may cause confusion when applied to a particular set of facts. A presiding officer might on the one hand find under the 1998 code that sexual harassment did not occur because the unwelcome nature of the advance was not *clearly* communicated or the victim was not offended. By applying the 2005 code to the same set of facts, it could perhaps be established that sexual harassment

³⁷ *Gerber* n 9 above 3005. See in this regard also *Basson* n 26 above 430.

³⁸ See *Simmers* n 23 above.

did in fact occur because the victim simply ignored the advance in order to communicate its unwelcome nature, thereby meeting the requirements of the 2005 code. Having two codes for the same ultimate purpose but following different approaches might result in legal uncertainty.

The only reference in the 2005 code which closely relates to welcome sexual advances as recognised in item 3 of the 1998 code can be found in item 5.2.2 where it is indicated that sexual advances which were welcome in the past might not remain so in the future and could change into unwelcome advances. It is safe to say that item 5.2.2 recognises that welcome sexual advances will not indefinitely stay welcome and a perpetrator can hence not argue the absence of sexual harassment because the same conduct was well received by the complainant in the past. From this provision it seems previously acceptable attention may become sexual harassment the moment it starts to be experienced as unwelcome and the complainant in some manner communicates this to the harasser.³⁹ Item 5.2.3 provides for situations where a victim finds it challenging to communicate with the perpetrator regarding his or her unwelcome and disconcerting advances. This item provides that the victim may approach an authority figure in the workplace, a colleague, family member or even a friend to assist in convincing the perpetrator to cease his unacceptable behaviour.

Item 5.3 of the 2005 code focusses on the nature and extent of the unwelcome conduct of the perpetrator. The purpose of this item is to illustrate which types of unwelcome conduct amount to sexual harassment. The forms of sexual harassment as described by item 5.3 are congruent with the types discussed in item 4 of the 1998 code, but dissimilar to the 1998 code in that any of the actions listed will only be viewed as sexual harassment if the unwelcome conduct, considered in isolation, is of a sexual nature.

As part of the exposition of the nature and extent of the unwelcome conduct, the 2005 code also describes quid pro quo harassment and sexual favouritism as forms of unwelcome conduct (item 5.3), but adds another. Victimisation is mentioned, where the recipient of the unwelcome conduct is prejudiced for not accepting and/or reciprocating the advances of the perpetrator. In *Taljaard v Securicor*⁴⁰ the perpetrator threatened to make life at the workplace hell should the complainant not comply with his demands. This example can be seen as the opposite of sexual favouritism, where a recipient would be rewarded if he or she welcomed the perpetrator's sexual advances. Commissioner Witcher had already identified this

³⁹ Due to the welcome nature of the previous sexual advances, it is safe to accept that the previous conduct should not be taken into account when deciding on the appropriate sanction.

⁴⁰ *Taljaard* n 9 above 1171.

distinction in her award in *Gregory v Russels* in 1999. According to her, she would have extended the definition of quid pro quo harassment not only to include situations where promises were made in exchange for sexual favours (which suggest a positive outcome for the recipient) but similarly to include situations where threats of punitive steps against the recipient were made if she or he were to decline to comply.⁴¹

As the 2005 code does not require *continuous* advances before the perpetrator's conduct could be classified as sexual harassment, but rather that the focus should be shifted to the 'unwelcome' nature of the advances and the impact thereof on the victim, it is not peculiar to find a statement in item 5.3.3 confirming that a single incident of unwelcome sexual attention could also amount to sexual harassment.⁴² Although this provision serves an important purpose, it leads to a few questions. No clear criteria exist for these situations, causing uncertainty in its wake. It begs the question concerning which types of sexual attention would qualify as sexual harassment after only one occurrence, especially when it is borne in mind that the next step would entail either a warning from management or the dismissal of the perpetrator.

Logically a single occurrence of sexual attention would probably only be considered as sexual harassment if the conduct is *serious* and has a serious impact on the victim. This might require a subjective approach to the matter to determine the impact of the attention on the particular victim. If this is in fact the case and the seriousness of the conduct should be the predominant factor, it creates even more confusion. Commissioner Jamodien considered serious cases of harassment to include sexual assault, rape, strip searches and quid pro quo harassment, which cases could result in dismissal.⁴³ Similarly Steenkamp J opined in *Simmers v Campbell Scientific Africa*⁴⁴ that when 'serious' cases of sexual harassment are referred to, it should be understood as all conduct which encroaches on the victim's bodily integrity such as touching, groping or any other form of sexual assault and quid pro quo harassment.⁴⁵ Without proper guidelines a floodgate of allegations of sexual harassment after only a single incident could be opened, which allegations would not be able to be measured against a given standard.

⁴¹ *Gregory* n 6 above 2161.

⁴² This provision mirrors that which was stated in the definition of sexual harassment in the 1998 code.

⁴³ *Taljaard* n 9 above 1174.

⁴⁴ *Simmers* n 23 above 2873.

⁴⁵ In the *Grobler* case n 28 above 475B, Dr Swart, a psychologist who treated the complainant, testified that when investigating a case of sexual harassment, a single incident should not be considered in isolation, but that cognisance should be taken of the situation as a whole, as caused by the single incident. The single incident can therefore be a sufficient 'stressor'.

As there are no indications as to what would render conduct serious enough to constitute harassment, it would make sense that a subjective approach should be followed and the circumstances should be analysed from the viewpoint of the victim. This would surely provide an indication of the seriousness of the particular conduct when studying the impact thereof on the person at whom it was aimed, for example when gauging a victim's psychological condition in cases of alleged trauma due to the events.⁴⁶ The argument is supported by item 5.4,⁴⁷ which states:

'The conduct should constitute an impairment of the employee's dignity, taking into account: the circumstances of the employee; and the respective positions of the employee and the perpetrator in the workplace.'

It is hence clear that the 2005 code itself endorses a subjective test for the confirmation of the existence of sexual harassment, which subsequently leads to the question why the courts continuously support a purely objective test.⁴⁸ On the one hand it makes sense to judge the circumstances objectively, in order to avoid the possibility of finding a truly innocent party guilty of sexual harassment based on the allegations of an overly sensitive or mentally unstable 'victim'. Although one person would, subjectively speaking, not consider some act as sexual harassment, this does not make the conduct of a person, objectively considered, less improper. It should therefore be ascertained whether the reasonable person would in the same set of events have felt that her or his dignity was impinged on by the conduct. It would have been a more reasonable approach from the viewpoint of the alleged perpetrator, who may, in reality, not be guilty.⁴⁹

Still, it should not be far from one's mind that sexual harassment is an extremely personal experience: it is the recipients' dignity which is being disrespected; it is their rights which are being infringed; and it should therefore be their prerogative to decide which conduct they consider acceptable or unacceptable. It is thus clear that a subjective element is inevitably present. This fact was noted by Waglay DJP in *Motsamai v Everite Building Products*,⁵⁰ where the learned judge argued as follows:

⁴⁶ As was the case in *Grobler* n 28 above 468-89.

⁴⁷ This item again refers to the nature and extent of the sexual harassment in general, not to single incidents specifically as mentioned in item 5.3.3.

⁴⁸ A Mukheibir & L Ristow 'An Overview of Sexual Harassment: Liability of the Employer' (2006) *Obiter* 256, 257; *Gregory* n 6 above 2168; *Gerber* n 9 above 3005E. The question regarding the subjective and objective test has also been addressed in *Le Roux* n 5 above 31, 32.

⁴⁹ *Basson* n 26 above 432, 433.

⁵⁰ *Motsamai* (LAC) n 7 above 149.

‘Sexual harassment is the most heinous misconduct that plagues a workplace; not only is it demeaning to the victim, it undermines the dignity, integrity and self-worth of the employee harassed. The harshness of the wrong is compounded when the victim suffers it at the hands of his/her supervisor. Sexual harassment goes to the root of one’s being and must therefore be viewed from the point of view of a victim: how does he/she perceive it, and whether or not the perception is reasonable.’

In view of the arguments above it is inconceivable that only an objective test is suitable under these circumstances: One must strike a balance between the objective and subjective tests when determining the presence of sexual harassment by applying them in tandem. A narrow approach should be avoided in order to prevent absurd findings. Cases where this occurred will be discussed below.

Similar to the 1998 code the rest of the 2005 code (items 6-11) covers the administrative duties of the employer regarding sexual harassment in the workplace, as well as procedures that should be complied with when resolving such cases.

The discussion above clearly indicates what constitutes sexual harassment in terms of the 2005 code and which factors should be taken cognisance of when the presence of sexual harassment is to be determined. Logically one will not be able to confirm the existence of sexual harassment with sufficient certainty if the circumstances of an alleged incident are not measured against the provisions of the relevant code. Based on the seriousness of sexual harassment in the workplace and the negative impact it in all likelihood will have on the victim, it will be irresponsible of presiding officers not to use the codes when analysing a case of alleged sexual harassment, even though the facts of the matter may clearly point to the allegations being true. In spite of this duty, some presiding officers neglect to apply the codes (or fail to apply them correctly) where relevant, leading to unnecessary mistakes.

2.3 A perspective on sexual harassment in Canada

Sexual harassment in Canada seems to be viewed as both a human rights issue and labour issue, as prohibitions on sexual harassment can be found in human rights legislation and those strictly regarding employment. Although the South African legislature recognises sexual harassment as an equality issue, being a fundamental right of every South African citizen, the codes issued to eradicate sexual harassment were done so in terms of labour legislation. What is clear however is that, like in South Africa, sexual harassment in Canada is since the early 1980s considered as a form of sex discrimination.⁵¹ Therefore, even in the

⁵¹ D A Campbell “The Evolution of Sexual Harassment Case Law in Canada” 1992 *Queens University Industrial Relations Centre (Current Issues Series) 1*; S Welsh and A Nierobisz “How Prevalent is Sexual

absence of an express prohibition on harassment in any form, sexual harassment could still be considered as tacitly proscribed by any provisions containing a ban on discrimination based on sex. Before sexual harassment was expressly prohibited, such matters were consequently not adjudicated as sexual harassment per se, but rather as discrimination.

Canada is a federation consisting of ten provinces and three territories, each containing its own government.⁵² The Canadian Human Rights Act of 1985, drawn up by the Federal Government, specifically provides for the prohibition on harassment of an individual on a prohibited ground in, amongst others, matters related to employment in section 14(1).⁵³ In section 14.1 however the Act specifically mentions sexual harassment, recognising it as harassment on a prohibited ground. On the other hand the Canada Labour Code of 1985 also specifically refers to the right of every employee to be free of sexual harassment in the workplace. This code defines sexual harassment in section 247.1 to be:

‘...any conduct, comment, gesture or contact of a sexual nature (a) that is likely to cause offense or humiliation to any employee; or (b) that might, on reasonable grounds, be perceived by that employee as placing a condition of a sexual nature on employment or any opportunity for training or promotion.’

What should be pointed out is that this definition does not highlight the *unwanted* nature of the conduct, but rather focuses on the effect the conduct might have on the victim, requiring that it should have the potential to be offensive or cause humiliation. The second part of the definition is similar to what is considered as *quid pro quo* harassment and sexual favouritism in the South African legal system. The Canada Labour Code goes on to require of every employer to make every reasonable effort to ensure that his or her employees are not subjected to sexual harassment practices, to issue a policy statement regarding sexual harassment in the workplace and to be sure to communicate the content of this policy to all his or her employees.⁵⁴

All thirteen provinces/territories in Canada have enacted human rights legislation, prohibiting discrimination on various grounds, including sex and sexual orientation, but not

Harassment: A Research Note on Measuring Sexual Harassment in Canada” 1997 *The Canadian Journal of Sociology* 506; Janzen v Platy Enterprises Ltd (1989) 1 S.C.R. 1278.

⁵² <http://www.parl.gc.ca/Parlinfo/compilations/ProvinceTerritory.aspx?Menu=ProvinceTerritory> (Accessed 28 May 2015). The thirteen provinces and territories are Alberta, British Columbia, Manitoba, New Brunswick, New Foundland and Labrador, Northwest Territories, Nova Scotia, Nunavut, Ontario, Prince Edward Island, Quebec, Saskatchewan and Yukon.

⁵³ s 3(1) of the Canadian Human Rights Act of 1985 contains a list of prohibited grounds, among which sex and sexual orientation can be found.

⁵⁴ ss 247.3 and 247.4 of the Canada Labour Code of 1985.

all of these human rights instruments include an express prohibition on harassment in general or sexual harassment specifically. The Alberta Human Rights Act of 2000, Human Rights Code of 1996 of British Columbia, Human Rights Act of Prince Edward Island, Charter of Human Rights and Freedoms of Quebec and the Human Rights Code of Saskatchewan only contains prohibitions on sex discrimination under various circumstances, but does not cover sexual harassment per se. The remaining jurisdictions all contain provisions regarding harassment on any prohibited ground (such as sex) or sexual harassment specifically within their human rights legislation. While it is clear from the discussion above that the Federal Government of Canada approaches sexual harassment as both a human rights and labour issue by including prohibitions on it in both spheres of legislation, it seems to be the tendency among the various jurisdictions to mainly focus on it from a human rights perspective.

However, some of the provinces/territories also contain prohibitions on harassment or sexual harassment within their labour legislation. The Employment Act of Saskatchewan does not refer to *sexual harassment*, but contains numerous provisions regarding harassment on any of the prohibited grounds (which include sex) and the employer's, supervisor's and co-employees' obligation to ensure that the employee's right to work in an environment free of harassment is respected.⁵⁵ This Act defines harassment in section 3-1(1)(l) as:

‘...any inappropriate conduct, comment, display, action or gesture by a person: (i) that either: (A) is based on race, creed, religion, colour, **sex, sexual orientation**, marital status, family status, disability, physical size or weight, age, nationality, ancestry or place of origin; or (B) ... adversely affects the worker's psychological or physical well-being and that the person knows or ought reasonably to know would cause a worker to be humiliated or intimidated; and (ii) that constitutes a threat to the health or safety of the worker,...’ (Emphasis added)

Once again it can be noted in this definition that the word ‘unwelcome’ or ‘unwanted’ was not included, as is the case in the definition of the Canada Labour Code of 1985. In this case however the word ‘inappropriate’ was added, describing to some extent that for sexual harassment to be present the behaviour should be considered inappropriate and therefore unacceptable by the victim.

The Prince Edward Island Employment Standards Act contains provisions for sexual harassment specifically,⁵⁶ which provisions are virtually a direct replica of sections 247.1 – 247.4 of the Canada Labour Code of 1985. It can be pointed out that the only two jurisdictions containing provisions in their employment legislation regarding harassment or

⁵⁵ s 3-8 – 3-10 of the Saskatchewan Employment Act.

⁵⁶ s 24-28 of the Prince Edward Island Employment Standards Act.

sexual harassment are among those that did not include these issues within their human rights legislation. From the above it seems that Alberta, British Columbia and Quebec are the only jurisdictions that do not cover sexual harassment in either their human rights or employment legislation.

Upon reading the various sections regarding harassment and sexual harassment in the legislation of the different jurisdictions, it is apparent that all but one merely provides for the prohibition of either harassment or sexual harassment under various circumstances (such as employment, accommodation and services) and states a definition for it. Only the Saskatchewan Employment Act goes so far as to indicate what should be established before it can be concluded that harassment took place. In section 3-1(4) this Act requires that the conduct, comments or displays should either be repeated, or a single occurrence of a serious nature which has a lasting, harmful effect on the victim should be established. Moreover, this Act is the only one that recognises in so many words that harassment may occur as a single event. The legislation in Manitoba,⁵⁷ Northwest Territories,⁵⁸ Nova Scotia,⁵⁹ Nunavut⁶⁰ and Yukon⁶¹ specifically defines harassment or sexual harassment as *a course of vexatious comments or conduct*, apparently not leaving room for the possibility that a single occurrence might also amount to sexual harassment.

With regard to the definitions in particular there is a clear thread that runs through all of the statutory instruments. Although the phrasing might differ somewhat, the definitions all state in some manner that harassment or sexual harassment is unwelcome conduct or vexatious comments based on, among other grounds, a person's sex (this is stated in cases where the definition pertains to harassment in general) or the conduct or comments are of a sexual nature (these definitions specifically refer to sexual harassment). The definitions continue to state that the conduct or comments are committed by a person who is in the position to confer benefits to the victim in case of the acceptance of his or her advances or could retaliate in cases where the advances were rejected. It is inconceivable that the legislatures intended that only parties in power could be guilty of sexual harassment in the workplace. One could therefore assume that this is meant to be a factor to consider, but not a requirement. Finally the definitions all contain the word 'unwelcome' and/or that the perpetrator knew or 'ought reasonably to have known' that the conduct or comments were

⁵⁷ s 19(2) of the Manitoba Human Rights Code of 1987 (as amended in 2013).

⁵⁸ s 14(2) of the Northwest Territories Human Rights Act of 2002.

⁵⁹ s 3(o) of the amended Nova Scotia Human Rights Act of 1989.

⁶⁰ s 1 of the Nunavut Consolidation of Human Rights Act of 2003.

⁶¹ s 14(2) of the Yukon Human Rights Act.

unwelcome.⁶² In this regard the definitions in the various jurisdictions are less restrictive than the Canada Labour Code of 1985, which does not expressly recognise the unwanted nature of the advances, but only that the conduct or comments should have had the potential to cause offense or humiliation. As will be seen below in the application of the South African codes of good practice, requiring offensiveness as a primary factor when determining the existence of sexual harassment may have detrimental consequences.

Clearly it is not the intention of the Canadian legislatures that the various instruments discussed above should serve as guidelines in cases of sexual harassment, but each only attempts to promote a workplace environment free of harassment. However, it ought to be stated in brief that most of the governments or human rights commissions within those governments of the different provinces/territories issued policies or information sheets to the public regarding the meaning of sexual harassment, the shapes it could take, who would be responsible and the employee's options if he or she considered themselves to be a victim of harassing conduct. It can be safely assumed that these policies are meant to provide the necessary guidance on sexual harassment matters where the legislation is lacking. Thus, among others the Alberta Human Rights Commission provided an information sheet on sexual harassment;⁶³ the human rights commissions of Manitoba and New Brunswick and the Department of Human Resources of Nunavut similarly issued workplace harassment policies;⁶⁴ the government in Ontario issued a comprehensive action plan in March 2015 to stop sexual violence and harassment⁶⁵ and the Public Service Commission in Nova Scotia has a Respectful Workplace Policy that strictly prohibits sexual harassment and discrimination in the workplace.⁶⁶

All of these policies prohibit sexual harassment, expressly describe the duty of the employer to prevent sexual harassment from occurring in the workplace and also define sexual harassment in a similar vein to that contained in the legislation. In this regard the policies actually go further by identifying the guises of sexual harassment. In general sexual harassment is divided into verbal, non-verbal and physical conduct. The common types

⁶² Apart from the instruments already referred to above, see also s 10(1) of the New Brunswick Human Rights Act of 2011, s 17 and 18 of the New Foundland and Labrador Human Rights Act of 2010 and s 7(3) of the Ontario Human Rights Code of 1990.

⁶³ <http://www.albertahumanrights.ab.ca/SexualHarass.pdf> (Accessed on 28 May 2015).

⁶⁴ <http://www.manitobahumanrights.ca/sexualharassment.html> (Accessed 28 May 2015); http://www2.gnb.ca/content/gnb/en/departments/human_resources/about_us/policies_and_guidelines/harassment_policy.html (Accessed on 28 May 2015); http://www.gov.nu.ca/sites/default/files/files/Finance/Policies/Harassment_Free_workplace_Policy.pdf (Accessed 28 May 2015).

⁶⁵ <http://www.ontario.ca/document/action-plan-stop-sexual-violence-and-harassment> (Accessed on 28 May 2015).

⁶⁶ <https://novascotia.ca/treasuryboard/manuals/PDF/500/50409.pdf> (Accessed 15 May 2015).

recognised by the policies are suggestive remarks and jokes, romantic invitations, questions about another person's sex life, visual displays of objects or sexual images, whistling, patting, rubbing or unwanted physical contact, outright demands for sexual favours and ultimately physical assault.⁶⁷ The policies however do not provide any guidance on how to determine the existence of sexual harassment in a given situation. One could argue that the elements provided in the definitions should be present. However, it is not clear from the legislation whether *all* the elements should be present, or if mere unwelcome sexual conduct which does not necessarily cause offense, is not done by a party in the position to confer benefits or does not have a lasting psychological effect on the victim could also constitute sexual harassment.

In the landmark case of *Janzen v Platy Enterprises Ltd*⁶⁸ the Chief Justice made comments that could clear up some aspects of this uncertainty:

'Sexual harassment is not limited to the demands for sexual favours made under threats of adverse job consequences should the employee refuse to comply with the demands. Victims of harassment need not demonstrate that they were not hired, were denied a promotion or were dismissed from their employment as a result of their refusal to participate in sexual activity... Sexual harassment also encompasses situations in which sexual demands are foisted upon unwilling employees or in which employees must endure sexual groping, propositions, and inappropriate comments, but where no tangible economic rewards are attached to involvement in the behaviour.'

In the case mentioned above Chief Justice Dickson also provided a non-exhaustive definition for sexual harassment, which was henceforth used by many Canadian courts as the test for sexual harassment.⁶⁹ The Chief Justice considered sexual harassment to be 'unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment.'⁷⁰ In the matter of *Canada (HRC) v Canada (Armed Forces) and Franke*,⁷¹ Madame Justice Tremblay-Lamer deconstructed this definition and identified the elements to consider when determining the existence of sexual harassment. She highlighted the fact that the conduct should be 'unwelcome' (considering the reaction of the victim as the alleged conduct occurred); it

⁶⁷ n 63 – 66 above.

⁶⁸ *Janzen v Platy Enterprises Ltd* (1989) 1 S.C.R. 1282 (Manitoba). This comment was used in the case of *Mallioux v N Yanke Transfer Ltd* (1999) CanLII 19559 (CA LA) to determine whether sexual harassment existed in a given situation. By referring to Mallioux using his age, experience and position in the workplace to gain sexual favours from a younger female employee and retaliating against her when she rejected his advances and him telling sexual jokes and making sexual comments to other female co-workers, the court concluded that '[T]here is no question this was sexual harassment'.

⁶⁹ *Canada (Human Rights Commission) v Canada (Armed Forces)* (1999) 3 FCR 653, 1999 CanLII 18902 (FC); *Woiden v Lynn* (2002) CanLII 8171 (CHRT); *Birkett v Canada (Canadian Human Rights Commission)* (2007) FC 428; *Naistus v Chief* (2009) CanLII 4 (CHRT).

⁷⁰ n 68 above at 1253.

⁷¹ n 69 above.

should be of a ‘sexual nature’ (considering by way of the reasonable person test on a case-by-case basis whether the conduct was sexual in nature) and whether the conduct was repeated or a single occurrence of a certain gravity, having the effect of creating a negative or hostile working environment.⁷²

This deconstruction was referred to in *Woiden v Lynn*,⁷³ *Birkett v Canada* (Human Rights Commission)⁷⁴ and *Nastiuk v Couchiching*,⁷⁵ where it was clearly stated that the victim was not required to expressly say ‘no’ to the advances, but the unwelcome nature could also be demonstrated by the behaviour of the victim by which to signal the inappropriateness thereof to the perpetrator. In *Naistus v Chief*⁷⁶ the Canadian Human Rights Tribunal also allowed itself to be guided by the definition in *Janzen* and the application thereof by Madame Justice Tremblay-Lamer in *Franke*, successfully finding that sexual harassment occurred where the perpetrator continuously inquired about the particular female co-worker’s underwear, making comments about her breasts and buttocks, exposing his genitals to her and groping her in spite of her rejections.

It is thus clear that even in the absence of guidelines for the determination of sexual harassment in legislation and multiple policies in Canada, the courts created a test for sexual harassment. This test compiled from the definition in *Janzen* seems to be the primary authority among the courts and tribunals accross Canada, creating uniformity and legal certainty as to the factors to apply when judging whether sexual harassment occurred.

3 APPLICATION OF THE CODES OF GOOD PRACTICE ON THE HANDLING OF SEXUAL HARASSMENT CASES

Section 203(3) of the LRA and s 3 of the EEA provide for a statutory duty to interpret the respective Acts against the background of any relevant codes of good practice issued in terms of them. From the discussion below it will become apparent that, despite the obligation to do so, some presiding officers fail properly to take the relevant codes into consideration when determining the existence of sexual harassment in a particular case. The failure to consider the codes can be divided in three categories, each of which is discussed below.

⁷² n 69 above.

⁷³ n 69 at par 103.

⁷⁴ n 69 at par 41.

⁷⁵ *Nastiuk v Couchiching* (2012) CanLII 12 (CHRT) at para 145-146.

⁷⁶ n 69 at para 78-80, 93-95.

3.1 *Category One*

The first category entails cases to which the applicable code was not applied, although appropriate outcomes were reached. The facts of the cases point clearly to sexual harassment, namely repeated unwelcome sexual advances in one of the forms listed in the codes (which in hindsight can be confirmed with the proper application of the relevant code to each situation). One might say that the commissioners and judges were in a sense ‘lucky’ to cause no ill-effects due to their oversight in failing to apply the relevant code.

One of these cases was *Gerber v Algorax*,⁷⁷ heard in 1999. The commissioner did refer to the code, but did not apply the principles contained in it to the situation. He did however find the applicant guilty of sexual harassment after hearing testimonies from various complainants and other eye witnesses about the applicant demanding kisses from his female colleagues, asking about their underwear and touching them inappropriately. Twice he forced kisses on two staff members and phoned another after hours with sexually suggestive remarks about being naked on his bed. On numerous occasions the women informed him of the unacceptable nature of his conduct and a number of superior staff was also approached about the incidents after they occurred.⁷⁸ The applicant denied the allegations, but simultaneously submitted that he was part of a compassionate family and social group where hugs and kisses were commonplace.⁷⁹ In this regard the commissioner argued: ‘One must . . . not forget that what may be regarded as acceptable behaviour in a normal social setting need not necessarily be regarded as normal in the employment environment.’⁸⁰

The commissioner found on a balance of probabilities that the complainants’ versions of the accounts were true as numerous incidents stood unchallenged.⁸¹ After simply stating a few definitions of sexual harassment, without applying them, and referring to the objective test used in sexual harassment cases, the commissioner held that in light of the definitions and objective test it could be found that the applicant did in fact commit sexual harassment.⁸² Although the commissioner was correct with his ultimate award,⁸³ he took a risk by not applying the code and did not discharge his duty in this regard.

⁷⁷ *Gerber* n 9 above.

⁷⁸ *ibid* 2997C-9H.

⁷⁹ *ibid* 3000B.

⁸⁰ *ibid* 3005A-B.

⁸¹ *ibid* 3002A-4B.

⁸² *ibid* 3004A-5I.

⁸³ Repeated, unwelcome verbal and physical advances were proven on a balance of probabilities. It was considered offensive by the women and they acted in such a manner that it should have been clear to the perpetrator that his conduct was not acceptable.

In another matter, *Mokone v Sahara Computers*,⁸⁴ the commissioner also failed to apply the relevant code and did not even refer to a definition of sexual harassment, unlike the commissioner in *Gerber*. In this instance the applicant approached the complainant numerous times with the request to engage with him in a sexual relationship and touched her inappropriately. She initially ignored his advances but started to dismiss him firmly and even filed a complaint against him after the circumstances became intolerable.⁸⁵ After hearing the testimonies the commissioner found that the incidents in all probability did take place and subsequently found the applicant guilty of sexual harassment. What is apparent from the arbitration is that the commissioner focussed too much attention on a report compiled on the complainant by a clinical psychologist, from which it appeared that the complainant was traumatised by the events.⁸⁶ The conclusion that sexual harassment took place simply because a psychologist found the complainant to be traumatised seems weak in the absence of a finding that the conduct which supposedly caused the trauma was in accordance with the definition of sexual harassment in the code. It is consequently important to bear in mind that the reaction of the complainant should not be analysed as the prime factor, but, just as significantly, the alleged conduct itself as well.

3.2 *Category Two*

The second category entails cases where the codes were not applied and as a result it was incorrectly found that sexual harassment did or did not take place, or where the lack of proper application had some other negative impact on the judgment. The first dispute from this category to be discussed is *Gregory v Russells*⁸⁷ which was one of the first sexual harassment cases to be adjudicated after the 1998 code came into force. The complaint of sexual harassment arose after staff alleged that a male colleague was in the habit of walking around the store carrying a pornographic magazine or of taking it with him to the restroom. On multiple occasions he showed the magazine to female staff members and requested that one particular female colleague look at some of the pictures with him, which request she declined. Her refusal evoked a crass reaction, in which the male colleague blatantly referred to her virginity. On another occasion he entered her office with the magazine and left it on her desk despite her request to him to remove it from her office.⁸⁸

⁸⁴ *Mokone* n 7 above.

⁸⁵ *ibid* 2830-1.

⁸⁶ *ibid* 2832-4.

⁸⁷ *Gregory* n 6 above 2169.

⁸⁸ *ibid* 2148F-9.

Apart from the complaints regarding the magazine there was also mention of incidents in which the applicant told a female colleague he had sores on his penis and that he rubbed ointment on it. With the help of admissions made by the applicant himself and eye witness accounts the commissioner found on a balance of probabilities that the incidents complained of did occur.⁸⁹ At no point did the commissioner refer to the relevant code or apply the guidelines contained in it to the facts. As a result the commissioner found the applicant's conduct did not constitute sexual harassment per se:

'Carrying an adult magazine around the workplace en route to the toilet may be tacky but does not, on its own, constitute harassment of those who know about it. Nor would leaving this magazine on a co-employee's table necessarily be such an act. Asking whether a co-employee is interested in viewing a Hustler magazine you happen to have in your office, although unprofessional behaviour, is not automatically an instance of sexual harassment either.'⁹⁰

Although the commissioner found these incidents in themselves were not sexual harassment, he concluded that the perpetrator made himself guilty of hostile work environment harassment because he blatantly disregarded his colleagues' right to privacy and dignity and discriminated against the women based on their gender.⁹¹

The fact that the commissioner based his finding on this aspect alone can be criticised. The 1998 code and 2005 code alike clearly confirm sexual harassment as being any unwelcome conduct of a sexual nature, which includes unwelcome innuendos, suggestions and hints and the unwelcome display of sexually explicit pictures and objects.⁹² The perpetrator's conduct of walking around with the pornographic magazine, showing it off for all to see and discussing the pictures contained in it falls squarely within these categories of sexual harassment. Even the obtuse reference to the female colleague's virginity and the discussion of his private sores can be labelled sexual harassment, as they entail unwelcome remarks with sexual overtones.⁹³ The unwelcome nature of the conduct is further underlined by the fact that the victim expressly refused to have anything to do with the magazine and an official complaint was submitted against the applicant for displaying it. Moreover, since the applicant was in a senior position he should have known that his behaviour was unacceptable.

If the commissioner had considered the code and applied the definition and the relevant items to the facts he would have been able to find the applicant's conduct did meet the terms

⁸⁹ *ibid* 2155-8.

⁹⁰ *ibid* 2168G-I.

⁹¹ *ibid* 2169.

⁹² item 4(b) and (c) of the 1998 code; item 5.3.1.2 and 5.3.1.3 of the 2005 code.

⁹³ item 4(b) of the 1998 code.

of the code and that the applicant was in fact guilty of sexual harassment. The commissioner found the dismissal on grounds of sexual harassment was unfair and ordered the employer to reinstate the applicant retrospectively. If the commissioner had used the code as was required of him, he would probably have found that sexual harassment had occurred, which would also likely have resulted in a different award.

Another matter falling into the second category is *Motsamai v Everite Building Products*.⁹⁴ In this arbitration the applicant brought a case of unfair dismissal against his former employer to the CCMA, claiming he was incorrectly found guilty of sexual harassment. Two separate complaints were lodged against him. The second victim's complaint only entailed a single incident which could ultimately not be proven.⁹⁵ The first victim referred to various instances fraught with sexual connotations. The applicant displayed pornographic material to her which he had on his computer – this she laughed off. The applicant also made comments to her regarding the size of a colleague's penis. During another incident the applicant showed her female condoms in his office and said to her, 'I have a lust towards you', after which she informed him that she did not like what he was doing. During the last incident, before she officially lodged a complaint against him, the applicant touched her inappropriately.⁹⁶ According to the complainant she had always made it clear to the applicant that his conduct was unwelcome.⁹⁷ Finally, the commissioner reached the conclusion that sexual harassment did in fact arise and he wished to make an example of the applicant to show that 'sexual harassment, however minor, will be dealt with harshly'.⁹⁸

However, in spite of this remark, the commissioner found that dismissal was not the appropriate sanction and ordered the employer to reemploy the applicant, but without back-pay. Once again the appropriate code was not referred to in support of the finding that sexual harassment was present – the commissioner simply assumed as such from the facts alone.

Both parties applied for the award to be reviewed: the applicant because he believed the commissioner was incorrect to find he was guilty of sexual harassment (without making out a valid argument for this claim), and the respondent because it opined that the award was ambiguous and absurd in light of the commissioner's remark, quoted above. According to Nel AJ⁹⁹ in the Labour Court there was nothing wrong with the reasoning of the

⁹⁴ *Motsamai* (CCMA) n 6 above.

⁹⁵ *ibid* para 12.3.

⁹⁶ *Motsamai* (LC) n 7 above paras 4-5; *Motsamai* (LAC) n 7 above paras 6-9.

⁹⁷ *Motsamai* (LC) n 7 above para 5.

⁹⁸ *Motsamai* (CCMA) n 6 above para 15.

⁹⁹ *Motsamai* (LC) n 7 above paras 9.11-12.15; *Motsamai* (LAC) n 7 above para 16.

commissioner and he properly reached the conclusion that the incidents complained of did happen and the facts support the finding that sexual harassment occurred.

Nel AJ also failed to use the relevant code to test the circumstances for sexual harassment and, as had the commissioner, let himself be guided by the facts alone. With regard to the respondent's submissions, Nel AJ found the sanction was in fact irrational, seeing as the commissioner clearly viewed sexual harassment in a serious light, yet he oddly decided on a light sanction, especially since the commissioner did not motivate why he believed dismissal to be inappropriate under the circumstances. Nel AJ subsequently found, as argued by the commissioner, that sexual harassment in all probability did occur, but turned the final award around by finding that the dismissal of the perpetrator was substantively and procedurally fair.¹⁰⁰

Motsamai referred the case to the Labour Appeal Court in 2011, where it became quite clear how precarious the situation can become if the code is not properly taken into account. Waglay DJP, like the commissioner and Nel AJ before him, confirmed that sexual harassment had occurred without testing the circumstances against the code, basing it merely on the fact that the testimony of the victim stood unchallenged and the particular incidents sufficiently supported such conclusion.¹⁰¹ The main criticism however was concentrated on the sanction which was imposed by the commissioner. Waglay DJP confirmed the arguments made by Nel AJ, but took it a bit further. He referred to other remarks made by the commissioner which were problematic. The court's criticism had regard to the fact that the commissioner correctly found sexual harassment was present and that it should be viewed in a serious light, but then he curiously moderated the seriousness of the display of female condoms to a colleague by describing the conduct as merely being 'childish', and also incorrectly found the appellant did not continue with his inappropriate behaviour after the victim informed him it was unacceptable.¹⁰² I submit that these opinions expressed by the commissioner undoubtedly influenced the weight of the sanction to be applied. Waglay DJP¹⁰³ made the following observation:

'The commissioner clearly got it wrong. Showing of the condoms must be seen in the *context of the sexual innuendo* contained in the appellant's statement to her ("by my lips and mouth I will be nice") after showing her the condoms and asking her to bring it [sic] to him. Also, the appellant did not stop

¹⁰⁰ *Motsamai* (LC) n 7 above para 26; *Motsamai* (LAC) n 7 above para 17.

¹⁰¹ *Motsamai* (LAC) n 7 above para 19.

¹⁰² *ibid* para 23. Also see paras 12.3, 13.1 respectively in *Motsamai* (CCMA) n 6 above where the commissioner uttered these words.

¹⁰³ *Motsamai* (LAC) n 7 above para 23.

after Msibi told him to stop with his wrongful conduct; in fact, after being told to stop he continued to sexually harass her and proceeded from sexually harassing her verbally to doing so physically.’ (Emphasis added.)

Waglay DJP is, with respect, accurate in his assertion regarding sexual innuendo, even though he did not refer to it in the context of the code. If the commissioner had considered the code from the outset, the odds are he would have analysed the circumstances from a different angle and would have been able to recognise the gravity of the appellant’s conduct. First and foremost it is important to remember that, as mentioned above, it is clear from the codes that it is not an absolute requirement for sexual advances to be repeated before they can constitute sexual harassment, as single serious transgressions will also suffice. Therefore, even if the commissioner was correct in finding the inappropriate conduct was not repeated, it still would not have justified the conclusion that sexual harassment was absent. The seriousness of the conduct would then have had to be gauged in order to ascertain whether it was harassment or not. Unfortunately the commissioner did not apply this principle due to his failure to take the code into account.

Secondly the incidents, while falling within different categories of sexual harassment (as described in the codes), should be considered cumulatively when ascertaining whether a person was guilty of sexual harassment — it is hence wrong to be influenced by the fact that harassment in one form ceased, but resumed in another. It is consequently irrelevant in this case that the appellant discontinued his verbal harassment (as the physical harassment, which is more serious in nature, replaced it) and this should in no way be viewed in isolation or lead to a lighter sanction.

The third and final remark that can be made about this matter is that the commissioner incorrectly labelled the display of female condoms as merely being childish. The reason for this will be clear upon reading the forms of sexual harassment as described by the codes,¹⁰⁴ which recognise the ‘display . . . of sexually explicit . . . objects’ as a subcategory of sexual harassment. Therefore the display of the condoms should qualify as sexual harassment without reservation. Once again, if the commissioner had applied the code to the circumstances, as he was obliged to do, he would have realised how seriously inappropriate the appellant’s conduct was. Moreover, the award would then most likely have been different so as to reflect the seriousness of the situation.

¹⁰⁴ item 4 of the 1998 code; item 5.3.1.3 of the 2005 code.

A case of paramount importance in illustrating the consequences if the codes are not applied where relevant entails the arbitration of *Gaga v Anglo Platinum*.¹⁰⁵ The applicant was found guilty (during a disciplinary hearing) of sexually harassing his personal assistant for two years by continuously making unwelcome sexual advances by requesting sexual favours, making suggestions of a sexual nature, and on numerous occasions requesting they meet somewhere to engage in sexual activity.¹⁰⁶ This information came to light during the complainant's exit interview, after she resigned supposedly to move closer to her family.¹⁰⁷ The applicant also on occasion made remarks regarding the complainant's appearance, once asking her to remove her jacket and turn around so he could admire her.¹⁰⁸ According to the complainant the advances took place on a continuous basis, regardless of the fact that she did not display any interest.¹⁰⁹ The complainant was unaware of the employer's sexual harassment policy and was therefore oblivious to the steps she could have taken. As a result she decided to handle the situation in her own way, either by ignoring the perpetrator, answering him sarcastically or making excuses to avoid him. However, upon reading the policy at the exit interview for the first time, she was genuinely offended by the sexually charged conduct and decided to lay an official complaint.¹¹⁰

From the complainant's testimony, it seemed she was in a sense hesitant in her reaction to the applicant's conduct when it occurred and was never overly offended by it. However, during the arbitration she insisted that the conduct of the applicant had at all times made her feel uncomfortable, but that she had opted to keep quiet and act dismissively towards his advances as they had a good working relationship.¹¹¹ She did however concede that she was never abrupt or harsh in her dismissal of the applicant's requests, but only responded flippantly with 'yes, whatever' in an attempt to put distance between them. According to the applicant, she did reply to an inappropriate text message from the applicant requesting him to stop what he was doing because he was making her uncomfortable.¹¹²

The applicant denied that any of the alleged incidents had occurred. However, he negated this denial by arguing that at no stage did the complainant react in an offended manner or signal that his advances were unwelcome, and therefore his conduct did not comply with the

¹⁰⁵ *Gaga* (CCMA) n 6 above.

¹⁰⁶ *ibid* paras 4.1.1-4.1.3.

¹⁰⁷ *ibid* para 5.2.

¹⁰⁸ *Gaga* (LAC) n 25 above 335.

¹⁰⁹ *Gaga* (CCMA) n 6 above paras 4.1.1-4.1.2.

¹¹⁰ *ibid* para 4.1.3.

¹¹¹ *ibid* paras 4.1.1, 4.1.2, 4.1.3, 5.5, 5.6.

¹¹² *ibid* para 4.1.2.

definition of sexual harassment.¹¹³ The logical inference can thus be made that, by admission, the sexual advances did in fact occur; it was simply the unwelcome nature thereof which was in dispute. The commissioner found sexual harassment to have been absent.

It appears that the commissioner accepted in his award that the alleged occurrences happened as described, without testing the veracity of the applicant's version. His conclusion that sexual harassment was not present was solely premised on his belief that the complainant did not experience the applicant's advances as unwelcome or offensive, but by dismissing him with the words 'ok, whatever' and 'do you really find me attractive?' in fact enjoyed it. He furthermore argued that her remarks regarding their good working relationship and the applicant overall being a 'nice guy' was not something a victim of sexual harassment would say about his or her harasser. The commissioner stated that the relationship between the complainant and alleged perpetrator could even be described as 'cordial', and the fact that the complainant did not previously file a complaint against him served as further proof of the absence of any offence taken on her part. Finally, the commissioner concluded that the complainant could not prove she was offended or had suffered discomfort because she was unable to present the text message she supposedly sent to the applicant, informing him about her discomfort. The commissioner reasoned: 'One would have expected the applicant to have saved at least one of the SMS's she sent to the applicant requesting him to stop making advances that made her uncomfortable.'¹¹⁴ Ultimately the commissioner found the dismissal to have been unfair, ordering the employer to reinstate the applicant for five months retrospectively.

As this is a matter regarding dismissal, the 1998 code issued in terms of the LRA would apply. It is evident that the commissioner focused on the aspects of offensiveness of the advances and the requirement to make this fact clear to the perpetrator as prescribed by the 1998 code in item 3, although he did not expressly refer to the code or any of the other aspects contained in the code. Since the victim's testimony indicated that she was not overly offended by the advances, the commissioner concluded that in its absence and by the way the victim reacted to the attention, she could not prove the unwelcome nature of the perpetrator's conduct.

The commissioner firstly erred in finding that the advances were not unwelcome, especially since the victim remained adamant that she felt uncomfortable by it. Moreover, the commissioner failed to consider the circumstances as a whole, and did not take into account

¹¹³ *Gaga* (LAC) n 25 above 336.

¹¹⁴ *Gaga* (CCMA) n 6 above para 5.12.

the relationship between the victim and the perpetrator and that due to that the victim had attempted to communicate to him in her own way that she was not receptive of his advances. What should not stand unchallenged is the commissioner's failure properly to apply his mind to the circumstances and to compare them to the guidelines provided in the code. The applicant's conduct of trying to convince the complainant to enter into a sexual relationship with him was undeniably of a sexual nature and it was furthermore unwelcome because the complainant tried to avoid the advances the only way she knew how. Despite the fact that she repeatedly acted dismissively, the applicant continued with his inappropriate conduct. At no point did the commissioner consider the fact that the applicant *continuously made sexual advances*, but he only focussed on the question whether the complainant was offended.

To find that she even may have enjoyed the attention that the applicant paid to her just because she chose only to act dismissively and not to react too harshly or abruptly is an absurd and irrational conclusion. There is no reason to believe that she enjoyed the advances, especially since she made excuses or kept the perpetrator at a distance when he made his suggestive requests. As argued above, it should be borne in mind that not all victims of sexual harassment will respond in the same way to advances. While one might display an active reaction (either aggressively or politely), another might opt simply to ignore them — the unwelcome nature of the sexual attention would still be present as a common denominator; the lack of a proactive reaction does not make the sexual harassment less so.¹¹⁵

Another important aspect the commissioner lost sight of was the position the applicant filled in the company. As human resources manager the applicant was directly involved in the implementation of the employer's sexual harassment policy. Accordingly, it could reasonably have been expected of the applicant to be intimately aware of what conduct was unacceptable in the workplace environment. In light of this fact his conduct should have been judged in an even more serious light, for it shows a clear and conscious disregard for what is considered appropriate. Yet the commissioner still absolved him of all wrongdoing.

This is a matter where the adverse effects of the narrow approach of the 1998 code in comparison to the wider approach of the 2005 code could be highlighted. Should the 2005 code have been applied, a different outcome might have been reached. It cannot be ignored that the complainant was not necessarily offended by the applicant's conduct, but from her testimony it was fairly clear that she was uncomfortable and experienced the advances as unwelcome. As is evident from item 4 of the 2005 code, it will be sufficient to prove sexual

¹¹⁵ See n 36 - n 39 above.

harassment if the victim considered the sexual attention as unwelcome, regardless of whether he or she was offended by it. Moreover, if the 2005 code had been applied, it would not have been required of her expressly to state to the applicant that his conduct was making her uncomfortable before the unwelcome nature could be confirmed. Item 5.2.1 of the 2005 code allows for different methods by which a recipient of sexual attention could indicate to the other party that the conduct is not welcome, including non-verbal communication by ignoring the perpetrator or simply walking away. Clearly a verbal expression of disapproval is not required; acting dismissively, like the complainant did in this case, should thus have been sufficient to indicate to the perpetrator that his or her advances are not accepted. Due to its wider approach the application of the 2005 code would have provided better protection for the complainant in this case.

The final issue entails the argument of the commissioner that the complainant was not offended because she failed to file a complaint against the applicant as soon as the incidents occurred. This serves as further proof of the commissioner's irrational reasoning and his failure properly to apply his mind to the circumstances. The complainant firstly testified that she was not aware of the employer's sexual harassment policy and therefore was unaware of the nature of the applicant's conduct and her options at the time of the incidents. The commissioner failed to take this aspect into account. Secondly, it is not required of the recipient of sexual advances that she or he file a complaint as a necessary prerequisite for the proving of the unwelcome nature of the conduct. Sexual harassment in its simplest form could be present, but due to the particular circumstances the victim might choose not to file an official complaint. It was hence unacceptable of the commissioner to have concluded that the absence of an official complaint indicated that the complainant was not negatively affected by the sexual attention.

Once again the 2005 code provides better guidance than the 1998 code on above matters, as it stipulates in item 5.4.2 that the analysis of an alleged case of sexual harassment should be conducted against the background of the respective positions of the complainant and the perpetrator in the workplace. For instance, the victim might fear retaliation or victimisation, or the perpetrator might be the victim's superior, for whose authoritative position she or he has an innate respect, causing her or him rather to act as if nothing untoward is occurring.¹¹⁶ The absence of such requirement in the 1998 code has the potential to result in incorrect

¹¹⁶ *Taljaard* n 9 above; *Gaga* (CCMA) n 6 above.

conclusions, as in the matter of *Gaga*. This strengthens the argument that perhaps the 2005 code should be the primary source in sexual harassment cases.

This case was taken on review, predominantly because the commissioner failed, among other things, to consider all the facts of the case (such as the repeated sexually charged conduct of the perpetrator) and because he lost sight of the fact that it was for the victim to decide if the conduct was offensive and how to respond to it. According to the applicant in *Anglo Platinum v CCMA*,¹¹⁷ the commissioner would have come to a different conclusion if he had analysed the circumstances as a whole and not simply focussed on the question whether the complainant was offended or not. Cele J found the commissioner to have failed to apply his mind. Without referring to the relevant code himself, the judge found on a balance of probabilities that sexual harassment was present, basing it primarily on the complainant's testimony, more specifically with reference to the text message the complainant claimed to have sent.

The commissioner found this part of the complainant's testimony to be false because it could not be proven. By the complainant's own admission she deleted the message shortly after she had sent it. The commissioner did not apply his mind properly to the issue and reason that her testimony, although unproven, could be true. Cele J did however thoroughly consider this aspect in the Labour Court judgment. He opined that never throughout the complainant's testimony did she exaggerate or seem 'eager to crucify' the respondent. The fact that she did not save the message she sent to the respondent shows she was not vindictive by keeping proof of the respondent's advances. If she wanted falsely to accuse the respondent she would have had plenty of opportunity to do so in her evidence, but she never attempted to make her case against him stronger: she just gave the facts as she knew them. Therefore, the fact that she did not keep the message should have been considered in her favour and not held against her. Against the background of the other facts that stand undisputed and her testimony as a whole, it could be accepted that the complainant probably did send the message and that the alleged perpetrator did in fact sexually harass her by continuing with his advances even after she expressed her discomfort.¹¹⁸ Based upon this argument Cele J subsequently set aside the initial award.¹¹⁹

During the appeal Murphy AJA of the Labour Appeal Court confirmed the commissioner used much too narrow an approach by erroneously concentrating on the complainant's lack of

¹¹⁷ *Anglo Platinum* (LC) n 7 above 11-12.

¹¹⁸ *ibid* 34-5.

¹¹⁹ *ibid* 35-6.

offence at the conduct. He expressly referred to the code where he highlighted that the code did not require of the complainant first to be offended before sexual harassment could be established – being offended is only one of the possible factors to consider. The unwelcome nature of the persistent sexual attention would be sufficient. Although the complainant might possibly have felt flattered at the beginning, her discomfort later on clearly shows in the message she sent to the perpetrator. The commissioner furthermore failed to take the complainant’s testimony into account, where she clearly stated Gaga’s conduct made her uncomfortable.¹²⁰ In his closing remarks Murphy AJA noted the following:¹²¹

‘[T]he commissioner’s lapse in not performing a full assessment of the complainant’s credibility with reference to her almost guileless candour, forthright demeanour, lack of bias, and the consistency of her evidence in relation to the remarks and propositions having been made and their unwelcome nature, as supported by the inherent probabilities evident particularly in the manner in which the complaint came to light, meant that he ignored relevant considerations and failed to apply his mind properly to material evidence and the definitional requirements of sexual harassment in the policy and the code. There is accordingly no rational basis justifying the commissioner’s conclusion that there was no sexual harassment on the limited ground that the remarks and behaviour caused no offence or discomfort. The evidence established that the remarks and behaviour were unwelcome and inappropriately repeated despite being declined.’

3.3 *Category Three*

The third category of cases concerns those matters where an attempt was made to apply the code, but it was done incorrectly. One such example is the arbitration of *Beasley v SA Metal Group*,¹²² where the commissioner had to determine whether sexual harassment took place and whether the applicant, the divisional director of the company, was subsequently dismissed fairly because of it. In this matter the commissioner read and applied the 1998 code incorrectly, as he concluded that the occurrences of hugging, kissing, flirting and suggestive jokes with the complainant (most of which made the complainant very uncomfortable and depressed, especially the one incident where the applicant tried to push his tongue into her mouth) had no *explicit* sexual connotation.¹²³ The 1998 code however does not require that the sexual connotation be explicit, but provides that mere innuendo or hints would suffice.¹²⁴ The words ‘I cannot wait until summer to see you strut your stuff’, ‘We are going to get into trouble for flirting’, ‘You can come to my house tonight if you get skopped out’, ‘Are you

¹²⁰ *Gaga* (LAC) n 25 above 341-3.

¹²¹ *ibid* 344C-G.

¹²² *Beasley* (CCMA) n 8 above.

¹²³ *ibid* 14.

¹²⁴ item 4(b) of the 1998 code.

offering to come play with me?’ and ‘I had a dream about you and it was hectic’ will qualify as sexual innuendo and will subsequently qualify as sexual harassment if unwelcome.¹²⁵

As is the case in *Gaga*, it could also have led to a more satisfactory conclusion if the 2005 code was applicable to the situation as it takes the situation further. If the 2005 code could be applied, the commissioner might then also have considered the complainant’s various ‘coping methods’, as an active reaction is not required to prove the existence of sexual harassment, as long as the complainant did not welcome or even reciprocate the sexual advances.¹²⁶ Finally, the commissioner seemed to have held it against the complainant that she chose not to report the incidents without appreciating her subordinate relationship to the applicant, an aspect which could also have been covered in terms of the 2005 code.

In the review of this arbitration in the Labour Court, Rabkin-Naicker J found this award of the commissioner to be reviewable due to his failure properly to apply the code to the facts, resulting in a decision that a reasonable decision maker could not reach.¹²⁷

4 CONCLUSION

As illustrated above there is a direct correlation between reviewable awards and incorrect inferences and the failure to take cognisance of the Codes of Good Practice on the Handling of Sexual Harassment Cases. Various elements must be properly taken into account and tested against a given set of facts. By not doing so presiding officers set themselves up for failure and criticism. Not only do they fail to discharge their statutory duty, but the human, and labour, rights of victims of sexual harassment are simultaneously not properly protected.

In order to resolve the issues described above, the very last item in each of the respective codes should be thoroughly adhered to, which prescribes that CCMA commissioners should receive specialised training to deal with sexual harassment cases. Of course every case is different with its own unique set of facts which could pose diverse challenges, but if the commissioners are trained in the application of the codes and what factors to look out for, it will give them the basic skills at least to be able to identify and consider the relevant facts. In this way, fewer reviews and appeals will end up in higher courts, alleviating their respective case loads. Moreover, to create uniformity among

¹²⁵ *SA Metal Group (Pty) Ltd v CCMA & others* (2014) 35 *ILJ* 2848 (LC) 2857.

¹²⁶ item 5.2.1 of the 2005 code.

¹²⁷ *SA Metal Group* n 99 above 2860. Also see *Sidumo & another v Rustenburg Platinum Mines Ltd & others* 2008 (2) SA 24 (CC); (2007) 28 *ILJ* 2405 (CC).

presiding officers, thus preventing confusion and maximising protection, the narrow 1998 code should be withdrawn and the wider 2005 code should be implemented as the primary source of guidance in sexual harassment cases.