

# Harassment in the Workplace: Context as Indicator

Marié McGregor<sup>1</sup>

<sup>1</sup> College of Law, Department of Mercantile Law, University of South Africa, Pretoria, South Africa

Correspondence: Marié McGregor, College of Law, Department of Mercantile Law, University of South Africa, Pretoria, South Africa. E-mail: mcgrem@unisa.ac.za

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## Abstract

Harassment in South African workplaces, and worldwide, is commonly come across. This article will examine the role of *context* in establishing (racial) harassment in a particular case. This has not been done so thoroughly in any previous cases. South African anti-discrimination laws, as in other jurisprudences, prohibit unfair discrimination against employees on various grounds relating to human characteristics or so-called “prohibited grounds” such as race, sex, age, religion, culture and political opinion. In South Africa, harassment is viewed as a form of unfair discrimination. This article emphasises *context* as an important indicator of harassing conduct based on race, and by implication, for harassment and unfair discrimination on other grounds as well. It has importance for South Africa and other countries.

**Keywords:** harassment, unfair discrimination, dignity, grounds, context

## 1. Introduction

This article will examine the role of *context* in establishing racial harassment as interpreted in *SA Transport & Allied Workers Union obo Dlamini and Transnet Freight Rail & another* (2009) 30 *ILJ* 1692 (ARB) (hereafter “*Dlamini*”), the only case so far which has dealt in detail with this notion in South African discrimination jurisprudence.

For purposes of the note, meaning is conferred to the notion “context” as:

“... circumstances, conditions, factors, state of affairs, situation, background, scene, setting” (*Oxford Paperback Thesaurus* (2nd ed.)).

In some instances context is clear and obvious while in other instances it is obscure or disguised. Moreover, conduct which is unfair in one context may not necessarily be unfair in another context. Nonetheless, context is a very important overarching notion to be thoroughly examined when establishing harassment (a form of unfair discrimination (see para 4 below)).

## 2. The Law

The Constitution of the Republic of South Africa, 1996 (hereafter the “Constitution”) guarantees everybody equality before the law and the right to equal protection and benefit of the law (section 9(1)). It prohibits unfair discrimination against anyone (called formal equality (sections 9(3) and 9(4)). It also provides for affirmative action measures to protect and advance people previously disadvantaged by unfair discrimination (section 9(2)). The Employment Equity Act 55 of 1998 (hereafter the “EEA”), in giving content to the Constitution (and as in many other countries’ anti-discrimination laws), prohibits unfair discrimination against employees based on grounds relating to human characteristics (sections 2 and 6(1)) or so-called “prohibited grounds” such as race, sex, religion, disability, culture, sexual orientation and birth. These grounds have been used in the past to categorise, marginalise and oppress persons who possessed these attributes and they have the potential to demean people in their inherent humanity and dignity (*Harksen v Lane NO* 1998 (1) SA 300 (CC) (hereafter “*Harksen*”) at 322D-323E).

Besides the specified prohibited grounds, other “unspecified” prohibited grounds also exist based on attributes or characteristics which have the potential to impair the fundamental dignity of people, or affects them adversely in a comparably serious manner (see *Harksen* at 322B-C and Fredman “Equality: A new generation? (2001) 30 (2) *ILJ* 145 155 [Eng] generally). Importantly, the specified grounds to a great extent determine what would constitute unspecified grounds (McGregor “An Overview of Employment Discrimination Law” (2002) *SA Merc LJ* 157

167-168). The complainant has to show that the alleged discrimination had impacted on her/him as a member of a group of vulnerable people. Thus, when meaning must be given to “unspecified” grounds, they are considered against the specified grounds and a wide-ranging approach is followed.

The EEA regards harassment as a “form” of unfair discrimination and prohibits harassment of an employee on any one or a combination of the prohibited grounds (section 6(3)). It appears from this wording of harassment that fairness is not an issue where harassment is proved; an act of harassment *is* unfair as such. Put differently, unfairness does not have to be shown (Van Niekerk *et al* at 127; Le Roux *et al* at 44-46 and Cooper “Harassment on the basis of sex and gender: A form of unfair discrimination” (2002) 23 *ILJ* 1 30).

### 3. Harassment Generally

Harassment in South African workplaces is commonly come across based on various grounds (Van Niekerk *et al* at 127 ff and Le Roux *et al* at 21). This is also the case in other parts of the world (Le Roux *et al* 7-8). Harassment may be based on sex, religion/cultural belief, race (the latter, the focus of this note) and other grounds. For case law on harassment of a racial nature, see, for example, *Lebowa Platinum Mines Ltd v Hill* [1998] 7 BLLR 666 (LAC). For harassment of a sexual nature, see, for example, *Media 24 Ltd & another v Grobler* (2005) 26 *ILJ* 1007 (SCA); *UASA obo Zulu and Transnet Pipelines* (2008) 29 *ILJ* 1803 and *Gaga v Anglo Platinum Ltd & others* (2012) 33 *ILJ* 329 (LAC). For harassment and/or unfair discrimination related to religion or cultural belief, see, for example, *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* (2009) 30 *ILJ* 868 (EqC); *POPSCRU & others v Department of Correctional Services & another* [2010] 10 BLLR 1067 (LC) and *Correctional Services & another v Police & Prisons Civil Rights Union & others* (2011) 32 *ILJ* 2629 (LAC). For harassment based on pregnancy, see for example, *Swart v Greenmachine Horticultural Services (A Division of Sterikleen (Pty) Ltd)* (2010) 31 *ILJ* 180 (LC)).

### 4. Defining Harassment

“Harassment” is not defined in the EEA but the Act may usefully borrow from the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (hereafter the “PEPUDA”) which covers workers outside the scope of the EEA (section 5(3) of the PEPUDA) and prohibits unfair discrimination on grounds similar to those in the EEA.

The PEPUDA defines harassment to mean (section 1):

“... unwanted conduct which is persistent or serious and demeans, humiliates or creates a hostile or intimidating environment or is calculated to induce submission by actual or threatened adverse consequences and which is related to ... a person’s membership or presumed membership of a group identified by one or more of the prohibited grounds or a characteristic associated with such group.”

Generally then, harassment constitutes treating a person in a humiliating manner.

The Amended Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace (GN 1357, GG 267865, dated 4 August 2005) (hereafter the “Code”) confirms this in item 3. Although the Code deals with *sexual* harassment, it assists in understanding harassment *in general*. Moreover, although the Code is a non-binding instrument, it provides useful guidelines to employers and employees on dealing with harassment.

The Code assists further in that it states that harassment in the workplace amounts to discrimination because it is unwelcome conduct, it violates the rights of an employee, it establishes arbitrary barriers to the full and equal enjoyment of a person’s rights in the workplace, and it violates the dignity of a person so harassed taking into account certain factors (items 4 and 5 of the Code; Van Niekerk *et al* at 127-128; Le Roux *et al* at 45 and Cooper ‘Harassment on the Basis of Sex and Gender: A Form of Unfair Discrimination’ (2002) 23 *ILJ* 1 ff).

Different ways in which an employee may indicate that (sexual) conduct is unwelcome include walking away from the perpetrator and/or seeking the assistance of a co-employee, superior, HR official, friend or family member (item 5 of the Code).

The nature about the test for sexual harassment, whether it is subjective or objective or a combination of the two, is given by the code which takes into account the perspectives of both the complainant and the perpetrator (item 4 of the Code).

### 5. Forms of Harassment

Harassment comes in a wide range of forms including verbal, non-verbal and physical conduct (*ibid* and item 5 of the Code).

Verbal conduct (for sexual harassment) includes insulting, demeaning, intimidating or offensive remarks, comments, jokes, e-mails, innuendoes, hints, sexual advances, statements with sexual overtones, graphic comments about a person's body, whistling and sending e-mail or other messages of sexually explicit content (item 5.3.1 of the Code). Non-verbal conduct comprises of written notes, displaying photos, unwelcome gestures, indecent exposure and the display or sending by e-mail or otherwise of sexually explicit pictures (*ibid*). Physical conduct includes touching, pinching, showing hand signs, staring at a person and sexual assault (*ibid*). The Code further distinguishes between different forms of sexual harassment namely victimisation, *quid pro quo* harassment and sexual favouritism (item 5.3.2 of the Code). These are of less importance to racial harassment and will not be discussed further.

A single incident of unwelcome conduct – be it sexual, racial (see Fredman *Discrimination law* at 53) or culture-related – is sufficient to constitute harassment (item 5.3.3 of the Code). All harassing conduct must be based on and linked to one or more of the prohibited or unspecified grounds as set out in the EEA.

The Code further requires employers to develop sexual harassment policies which should stipulate, amongst others, that such harassment is a form of unfair discrimination, harassment in the workplace will not be permitted or condoned, complainants in sexual harassment matters have the right to follow formal and informal procedures to address the complaint and it is a disciplinary offence to victimise or retaliate against an employee who in good faith complains of sexual harassment (item 7 of the Code).

Racial harassment may exist in the form of abusive language, racist jokes, racist name-calling and offensive behaviour (Le Roux *et al* 48-49).

An employer may be held liable for acts of harassment by its employees (item 8.2 of the Code and section 60 of the EEA).

## **6. Dlamini Case**

### *6.1 Background*

In *Dlamini* the parties referred a dispute for advisory arbitration to determine whether an e-mail message constituted unfair and unlawful discrimination. The parties agreed that it was not necessary to show disadvantage in the “usual” sense of the word and that the most appropriate test to adopt was the law relating to harassment (at 1704H).

The case involved Dlamini (a black female), and chief administrator of Transnet (the employer) for a number of years, and her manager, Holdridge (a white male), with whom she did not have a harmonious relationship. Dlamini had differences with Holdridge about, *inter alia*, him not supporting her, accusing her of being talkative, stating that Black people were unionised and that she was lazy, demoralising her, using racial slurs and showing racist tendencies towards her. Moreover, various complaints by Dlamini included not having a clear job description, having a broken chair (while having an existing back problem), her salary not being correct, the work division (she was given contracts to do - in her opinion “demeaning” work - instead of assisting in the fleet section) and her work load being too high (most of these complaints were found to be untrue during the arbitration).

Complaints against Dlamini included that she was viewed as resistant in doing certain work which placed a burden on other employees, she would sometimes be late for work, she was frequently careless in her work and resisted correction. Holdridge compared Dlamini to Lakay (a coloured male co-employee) who was regarded cooperative and who was a quick learner.

Nonetheless, Holdridge took steps to allocate the work evenly and get a job description from head office but this was not very successful.

It appeared that Holdridge did not trust Dlamini as she stated that she had a driver's licence but when prompting her for a copy, she admitted that this she did not have.

### *6.2 The E-mail in Issue*

In October 2006, Lutchka, a Transnet black economic empowerment manager, sent an e-mail about a speech on affirmative action by the (then) Governor of the Reserve Bank to Holdridge and other managers. Holdridge, in turn, and without any remarks by himself, passed this on to employees whom he thought might find it interesting as they worked with affirmative action and black economic empowerment. It contained a press clip from the magazine, *Financial Mail* (hereafter “*FM*”), with comments by the (then) Governor of the Reserve Bank, Mr Tito Mboweni, given during a business breakfast meeting in Johannesburg. Lutchka marked the text “BEE: Eish!!!” (South African slang used often/an abbreviation for black economic empowerment used commonly) and it read as follows

“I have sought to recruit many competent black people, and no sooner have we recruited and trained them than they leave. *I get so upset ... I am stopping this recruitment of black people.* I am okay with my Afrikaners. They stay and do the work and become experts” (own emphasis).

### 6.3 Dlamini’s Reaction

Dlamini complained about the e-mail being in breach of the employer’s e-mail policy and alleged that it was racial and offensive.

She discussed the e-mail with a black male colleague who indicated, however, that he was not offended. Nonetheless, Dlamini claimed that she was offended as “one black person” (at 1701C). She e-mailed Holdridge (and other recipients of the e-mail) stating that she found the e-mail offensive and unacceptable. Holdridge did not reply as he did not want to start an “e-mail war” (at 1696A-C). At the time he also had a great deal of work and he grieved the murder of his mother.

Subsequently Dlamini lodged a grievance against Holdridge. A number of informal meetings were held as well as a formal grievance hearing during which Holdridge apologised to Dlamini. She did not believe the apology to be genuine, neither did she accept a further written apology (at 1699D-E and 1700F-I).

### 6.4 Arbitration

#### 6.4.1 Fairness, Legality and Reasonableness

The arbitrator held that the dispute was to be arbitrated according to the principles of fairness, legality and reasonableness (at 1695I).

#### 6.4.2 Intention not Required to Prove Discrimination

Intention was not a requirement to prove an act of discrimination (at 1710A). However, one must not exclude intention when deciding on a *remedy* for unfair discrimination (Van Niekerk *et al* at 121-122).

#### 6.4.3 Primary Focus of Enquiry

The primary focus of an enquiry must be on the effect or impact of the alleged harassing conduct on the complainant. But, it was cautioned, conduct which was unfair in one context may not necessarily be unfair in a different context (at 1710B-C).

#### 6.4.4 Objective Test for Establishing Discrimination

The parties agreed that the test for establishing discrimination is an *objective* and not a subjective test. It was held that even if the employee *genuinely* felt that her dignity as a black person was impaired, this was not sufficient to justify a finding that the conduct was discriminatory; such approach would admit a subjective test by the back door (at 1710D-E).

Reference was made to *Mahlanyana v Cadbury (Pty) Ltd* (2000) 21 ILJ 2274, where it was cautioned that though the sensitivity of people historically and still subjected to racism were understandable, a “hypersensitive” tendency to classify as racial discrimination otherwise unimpeachable conduct by members of one race towards those of another, where no rational basis for doing so exists, should be avoided (at 1711B).

#### 6.4.5 Reasonable Victim Test

In establishing whether certain conduct constitutes harassment, it was held that the “reasonable victim” test must be applied (at 1705A; 1710F and 1713D). This entailed taking into account the complainant’s viewpoints and reactions (subjective factors) and all surrounding facts which constitute the *context* in which the conduct took place (objective factors). The law will only intervene where a reasonable victim would consider the harassing conduct seriously (at 1706C). Harassing conduct will, moreover, fall outside the parameters of reasonable social interaction (see para 6.6 below).

#### 6.4.6 Context of Communication

##### (i) *All relevant facts to be considered*

The arbitrator went to great lengths to explain the role of *context* in establishing harassing conduct (at 1710E-1711C):

“I need to consider all the relevant facts. I do not consider that this is simply a matter of interpreting the bare language of the press clip but the context of the communication. This includes consideration whether it should have been *reasonably* apparent to the claimant that the conduct of Holdridge in sending the e-mail was offensive to a black person in general (and, possibly, Dlamini in particular) rather than raising, albeit in flippant language, an aspect of AA [affirmative action] ...” (own emphasis).

(ii) *Linguistic and social contexts*

Flowing from this, it could be said that “context” thus confers “meaning” and context was to be viewed from *both linguistic and social* viewpoints (at 1710G-1711C). The arbitrator pointed out that most probably Mboweni’s audience at the breakfast meeting had the advantage of seeing the expression on his face, could hear the intonation of his voice and was aware of the context of the words to assess his intention. Moreover, it did not appear that the remark indicated a person who was worried or angry. It might even have been a playful comment about the important subject of affirmative action. Thus, if a man says to his lover “I really like that red dress on you” she may be delighted but not if the same words had been uttered by a male supervisor with whom she had a poor relationship (at 1711D-E).

Here, it appeared that Dlamini had read the clip in an *isolated context*, free from any context other than it came from Holdridge with whom she did not have a good relationship (at 1711E-F). Dlamini’s reaction demonstrated an understanding of the facts that words acquire meaning not just by the relation of words to concepts but by the *relation of words to other words* (at 1711F).

The arbitrator found the informal language of the clip to have given rise to ambiguity as to its meaning (*ibid*). In contrast, she pointed out, formality can make language less ambiguous because the speaker might then make explicit some background knowledge, his assumptions and the conclusions that he wished to share (at 1711G).

However, in the e-mail complained of, *some* context was given, namely the name of the speaker and it was obvious that the text contained only extracts from the speech given by Mboweni (*ibid*). It was clear that the speaker has personalised the remarks in that he stated that “*I* have sought to recruit ...” (own emphasis) (at 1711G-H). He was not speaking about *all* employers or employers *in general* in South Africa. Furthermore, the speaker was also the country’s first Minister of Labour in the post-apartheid era. In the latter capacity he focussed strongly on a substantial review of South African labour laws. The arbitrator assumed that the likely reader of the *FM* would have been aware of this and would have understood that the opinion of Mboweni was more significant than that of an unknown or anonymous person. The magazine therefore identified not only the words but also the author as being worthy of being put into the public domain (at 1711G-1712B).

Mboweni propagated affirmative action policies to redress the inequalities of apartheid and other discriminatory laws and practices when the Employment Equity Bill was published in 1997 (at 1714C-E). Subsequently the EEA has been implemented with its main purpose to achieve equity in the workplace by eliminating unfair discrimination and implementing affirmative action (Preamble, section 2, and Ch III of the EEA). Now, some years later, Mboweni raised his concerns as an *employer* about some consequences of the suggested reforms. Mboweni had experienced that the Bank which had implemented affirmative action measures, had not been able to retain black people in ample numbers. It appeared that he was pondering the efficacy of affirmative action (at 1714D).

It was thus in the *public interest*, not just of interest to members of the public, the arbitrator found, that the subject of affirmative action (and black economic empowerment), and its successes and failures be discussed and, if need be, be subjected to robust debate (at 1714C-E). There could be no objection to start the ball rolling on such a discussion in a workplace. The freedom to engage in debate and conversation was, however, no licence to distributing racist remarks. Even though the language used was flippant, it did not alter the text’s status as “legitimate opinion” and neither did it offend the dignity of black people (at 1714D-E).

Moreover, the language used at a business breakfast was different than a statement that Mboweni might make in public after, for example, a meeting by the Monetary Policy Committee of the Bank. In such an instance, the Governor most probably would have monitored his language more carefully, knowing that his likely audience would have reflected and acted on his specific chosen words (at 1712E-G).

The arbitrator did not find it relevant that Lutchka, in sending the e-mail to Holdridge, was not an official Transnet communication or that anything turned on the latter sending the e-mail to senior people (but not juniors) (at 1713D-G). Neither was the argument that Holdridge could not hide behind the fact that he was not the source of the words, relevant (at 1709E). It was held that, whereas black people in private may jokingly refer to each other in racially insulting language, a white person overhearing the remarks as an unconnected bystander did not thereby require the right to pass that on to black people in a different social situation (at 1709F). Even if Mboweni was joking or wanting to be controversial, it was held, *that social setting* would have had its own social limits, and that had not been extended to include Holdridge (at 1701A and 1709F).

Moreover, when circulating the e-mail in the workplace, further meaning was given to the context in that Lutchka headed the note with a colloquial term “Eish!!!.” He could, of course, have added a more formal and less

ambiguous, dark introduction had he not wanted to be flippant (at 1712F-G). The heading of the message also made it obvious that the text was something that Lutscka and Holdridge thought worth noting as a provocative statement. The fact that Holdridge sent the e-mail without remarks should have alerted Dlamini to the fact that these were not Holdridge's or Lutchka's words or thoughts and that both of them circulated it as a matter of interest (at 1713F-G).

It was found that the e-mail, though not cautious on Holdridge's side and provocative about the subject of affirmative action - a subject controversial and worthy of debate - was not likely to *harm or demean* black people (at 1713H; 1714A-B). The language, though casual, was not inherently belittling of black people (at 1714B).

It was also important to keep in mind the broader constitutional context namely the primary object of equality before the law (see para 2 above). Employers were required by the law to take affirmative action measures to promote participation in the workplace of people disadvantaged by apartheid. This implied an inevitable tension between formal equality which prohibited unfair discrimination and, substantive equality, which required affirmative action measures to redress disadvantage (at 1714C).

Dlamini, it appears, has noticed *nothing* of the context of the clip and believed that, no matter who the original speaker, and whatever the social context of the communication, the language was inherently discriminatory because it generalised black people by implying that the latter were incompetent and leave as soon as they were trained (at 1713A). The fact that the text of the e-mail did not refer to people like Dlamini, who had been employed for years, was totally disregarded.

#### 6.5 Dlamini Assumed Discrimination/Harassment for the Wrong Reasons

The evidence suggested that Dlamini assumed discrimination (remember that harassment is a form of discrimination) because she was not getting on well with her white manager (at 1713B). Moreover, she admitted during the arbitration hearing that (i) her original opinion that the e-mail had stated that blacks were incompetent, was not justified on any reading of the text; (ii) her English was "not good" as it was not her first language; (iii) she did not know the original speaker; (iv) she did not investigate Mboweni since having received the e-mail; and (v) she considered it irrelevant that Lutchka had sent the e-mail to Holdridge (at 17134A). These were not considered the actions of a *reasonable* victim (at 1713A-D).

#### 6.6 Reasonable Social Interaction

Transnet argued that the law on discrimination should not have a "chilling effect" on the free exchange of ideas (at 1705E). One must consider the author and the context to understand the *limits* of reasonable social interaction (at 1707D-E). The arbitrator found that discussing affirmative action in the workplace was in the public interest and that such discussion fell *within* the limits of *reasonable social interaction*. The arbitrator further agreed with Dlamini's representative that there was some generalisation in the text and that it was probably a case of stereotyping of both blacks who left the Bank and whites who stayed, but the opinion was based on the speaker's personal experience, which he could definitely express (at 1712G-H). Even if Mboweni's views had not been thought carefully through or based on a sufficient factual basis, distributing those views, the arbitrator found, was still within the realm of *reasonable*, or put differently, *tolerable* social interaction (at 1714C).

#### 6.7 Differentiation between Employees Based on Business Decisions

Dlamini's representative endeavoured to show that Holdridge was antagonistic towards Dlamini, a black women, in contrast to Lakay (a Coloured man referred to above), who learned quick and was cooperative. In this regard the arbitrator found that managers have a responsibility to make business decisions which were not always favourable to individual employees. An adverse decision about Dlamini's performance which she perceived as being adverse to her interests did not in itself constitute harassment or discrimination (at 1714A). The arbitrator could not find that Holdridge differentiated in his assessment of Dlamini and Lakay based on any improper motive or irrational business motives.

#### 6.8 Finding

The substance of the e-mail was about Mboweni's problem of retaining black people at the Bank. Dlamini disagreed with his opinion, but it was found, this did not make her suffer any detriment (at 1714E). Further, her disagreement with the opinion did not make Holdridge's conduct an act of discrimination (at 1714F).

In fact, her reaction to the e-mail was "excessive and unreasonable" and did not constitute that of a "reasonable victim" (*ibid*). The e-mail was critical of aspects of affirmative action, but there was no basis found on which it could be held that Holdridge, by distributing the note, demonstrated that he improperly associated himself with Mboweni and his words.

The arbitrator concluded that sending the e-mail to Dlamini was not prejudicial to her and did not constitute unfair or unlawful discrimination on the grounds of race (at 1715A).

### 7. Comments and Conclusions

The *Dlamini* case emphasised *context* as a very important indicator of harassing conduct based on race, and by implication, for harassment and unfair discrimination on other grounds as well, in South Africa. It elaborated on the notion and showed how the allegedly harassing wording of the e-mail when considered together with *all* relevant facts, and in *both* its *social and linguistic contexts*, gave meaning, firstly, as to who would constitute a reasonable victim and, secondly, what would constitute the *limits of reasonable/tolerable interaction*. Even though the e-mail was critical of aspects of affirmative action, it could not be found, thirdly, that *Holdridge improperly associated himself with Mboweni* (the original speaker) *and his particular words*. Fourthly, the action of sending the e-mail to Dlamini was *not prejudicial to Dlamini* and did *not constitute unfair/unlawful discrimination* on the grounds of *race*.

Even though harassment, and in particular *racial* harassment in South Africa, is an extremely serious matter due to the country's history of racial discrimination, complainants should be careful to assess their own reaction as not being oversensitive when deciding to institute a claim. In this case, Dlamini showed her views that the conduct was unwelcome by responding with e-mails and conversations with a co-employee (see para 4 above). The nature of the test for harassment was viewed to be based on a combination of subjective and objective factors (see paras 4; 6.4.4 and 6.4.5 above). Dlamini's reaction to the e-mail was found to be excessive and unreasonable.

In conclusion, context will *always* be extremely relevant in determining alleged harassment and other unfair discrimination. The *Dlamini* case may assist in such instances in South Africa and in other countries.

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